Federal Court  Cour fédérale

Date: 20241115

Docket: T-1871-17

Citation: 2024 FC 1777

Ottawa, Ontario, November 15, 2024

PRESENT: Justice Andrew D. Little

PROPOSED CLASS ACTION

BETWEEN:

JOSEPH S. MANCINELLI, CARMEN PRINCIPATO, DOUGLAS SERROUL, LUIGI CARROZZI, RICCARDO PERSI, BRANDON MACKINNON, AND JACK OLIVEIRA, IN THEIR CAPACITY AS THE TRUSTEES OF THE LIUNA PENSION FUND OF CENTRAL AND EASTERN CANADA

Plaintiff

and

BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., BANK OF AMERICA CANADA, BANK OF AMERICA, NATIONAL ASSOCIATION, BANK OF AMERICA MERRILL LYNCH INTERNATIONAL LIMITED, MERRILL LYNCH INTERNATIONAL, MERRILL LYNCH, PIERCE, FENNER & SMITH INC., MERRILL LYNCH CANADA INC, MERRILL LYNCH INTERNATIONAL SERVICES LIMITED, MERRILL LYNCH FINANCIAL ASSETS INC, MERRILL LYNCH BENEFITS LTD, BNP PARIBAS S.A, BNP PARIBAS GROUP, BNP PARIBAS (CANADA), BNP PARIBAS NORTH AMERICA INC, BNP PARIBAS, CITIGROUP INC, CITIBANK N.A, CITIGROUP GLOBAL MARKETS INC, CITIGROUP GLOBAL MARKETS LIMITED, CITIBANK CANADA, CITIGROUP GLOBAL MARKETS CANADA INC, CRÉDIT AGRICOLE S.A, CRÉDIT AGRICOLE CORPORATE AND INVESTMENT BANK, CRÉDIT AGRICOLE CORPORATE AND INVESTMENT BANK (CANADA BRANCH), CREDIT SUISSE GROUP AG, CREDIT SUISSE AG, CREDIT SUISSE SECURITIES (EUROPE) LTD, CREDIT SUISSE INTERNATIONAL, CREDIT SUISSE SECURITIES (CANADA), INC, CREDIT SUISSE AG, CREDIT SUISSE SECURITIES (USA) LLC, DEUTSCHE BANK AG, DEUTSCHE BANK SECURITIES INC, DEUTSCHE BANK SECURITIES LIMITED, HSBC HOLDINGS PLC, HSBC BANK USA, N.A, HSBC SECURITIES (USA) INC, HSBC BANK PLC, HSBC NORTH AMERICA HOLDINGS INC, HSBC BANK CANADA, HSBC USA, INC, NOMURA SECURITIES INTERNATIONAL, INC, NOMURA INTERNATIONAL PLC, ROYAL BANK OF CANADA, RBC EUROPE LIMITED, RBC CAPITAL MARKETS LLC, TORONTO-DOMINION BANK GROUP, TD BANK, N.A, TD SECURITIES LIMITED, TD GROUP US HOLDINGS, LLC, TD BANK USA, N.A, BARCLAYS CAPITAL CANADA INC.,

BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BARCLAYS EXECUTION SERVICES LIMITED and BARCLAYS CAPITAL SECURITIES LIMITED

Defendants

REASONS FOR ORDERS

[1] In 2016, the United States US Department of Justice ("US DOJ") and the European Commission ("EC") opened investigations into possible antitrust and competition law violations in the market for supranational, sub-sovereign, and agency bonds (known as "SSA Bonds"). A US class action soon followed.

[2] In 2017, the plaintiffs[1] commenced proceedings in this Court under the class proceedings provisions in the *Federal Courts Rules*, SOR/98-106. The plaintiffs claimed that the defendants, which comprise eleven groups of financial institutions, unlawfully conspired to fix the price of SSA Bonds contrary to section 45 of the *Competition Act*, RSC 1985, c C-34 and under common law causes of action. The plaintiffs claimed damages, including under section 36 of the *Competition Act*, in the amount of $1 billion, plus punitive damages.

[3] The plaintiffs' allegations focussed on an alleged conspiracy among the defendants to fix, raise, decrease, maintain, stabilize, control or enhance unreasonably the price of SSA Bonds and to fix, raise, decrease, maintain, stabilize, control or enhance unreasonably supra-competitive bid-ask spreads used by market participants in the SSA Bond market. The plaintiffs alleged that each defendant openly shared with each other defendant their own competitively sensitive pricing information, their customers' trading histories and requests for quotes, their positions and

1 These Reasons refer to the "plaintiffs", recognizing that the listed individuals are acting in their roles as trustees of the Liuna Pension Fund of Central and Eastern Canada.

trading strategies and inside information about the pricing and demand for new issues of SSA Bonds.

[4] The defendants have denied any wrongdoing.

[5] In 2020, this Court approved the plaintiffs' settlements with two groups of defendants. Nine remain. The plaintiffs now seek the Court's approval of proposed settlements with the remaining defendant groups, which will fully resolve the litigation.

[6] These Reasons explain why I am granting the plaintiffs' motion for approval of the proposed settlements with the remaining nine defendant groups and approval of the proposed notices to the Class Members and the administration protocol to distribute the settlement funds. The Court will concurrently issue orders in respect of each of the remaining groups of defendants, substantially in the form agreed by the parties.

[7] In addition, Class Counsel moved for an order approving their legal fees and the disbursements they incurred. This motion will also be granted.

I. **Events leading to these motions**

A. Investigations by Antitrust and Competition Law Enforcement Agencies

[8] The allegations in the Statement of Claim were based on investigations by law enforcement agencies outside Canada.

[9] In December 2015, the US DOJ announced that it was investigating alleged antitrust violations in the SSA bond market. The investigation implicated certain employees at some of the defendants who were traders in the SSA Bond market and residents of the United Kingdom. Bank of America, Credit Suisse, Credit Agricole and Nomura took action to terminate, suspend or put on leave certain employees with responsibilities for their respective SSA bond trading operations.

[10] The US DOJ closed its investigation without issuing relevant public findings. No one was charged in the US.

[11] In the United Kingdom, the Financial Conduct Authority (“FCA”) conducted an investigation into manipulation in the agency bond market. The FCA's investigation was completed in 2017 without any fines or public findings.

[12] An investigation in Europe led to a different result. In December 2018, the EC informed Bank of America Merrill Lynch, Deutsche Bank, Credit Agricole and Credit Suisse that it had taken a preliminary view that they breached European Union competition laws by colluding, in period from 2009 to 2015, in the market for SSA Bonds denominated in US dollars.

[13] In April 2021, the EC fined Bank of America Merrill Lynch (€12,642,000), Credit Agricole (€3,993,000) and Credit Suisse (€11,859,000) for breaching European Union antitrust rules, for a total of €28,494,000. Deutsche Bank was granted immunity due to its cooperation with the EC's investigation.

[14] In Canada, I understand that there is no evidence that the Competition Bureau conducted an investigation into the allegations about a conspiracy in the SSA Bonds market. The plaintiffs confirmed that none of the remaining defendants pleaded guilty in Canada to any unlawful conduct or was subject to any fine or other penalties in connection with any illegal conduct in the SSA Bonds market in Canada.

B. Settlement and Dismissals in the US Class Action

[15] In May 2016, class actions were filed in the United States against the same defendants in this proceeding, alleging violations of the *Sherman Act*. The class actions were consolidated into one proceeding in the US District Court for the Southern District of New York. In October 2019, several non-US dealers successfully challenged the jurisdiction of the US District Court over the asserted antitrust claims.

[16] The plaintiffs in the consolidated US class action reached settlements with the Bank of America, HSBC and Deutsche Bank groups of defendants for a total settlement amount of USD$95.5 million (the “US Settlement”). On April 2, 2021, the US District Court granted final approval of the US Settlement, along with a plan of allocation to distribute the US settlement funds.

[17] Meanwhile, in March 2020, the US District Court dismissed the US plaintiffs' claims against the remaining (non-settling) US defendants for failure to plead a proper cause of action in conspiracy under §1 of the *Sherman Act*. On July 19, 2021, the US Court of Appeals for the Second Circuit affirmed the dismissal and provided its own reasons for dismissing the claims.

C. Canada: Approved Settlement Agreements with Bank of America and HSBC

[18] By order dated February 5, 2020, this Court (*per* Barnes J.) approved two settlement agreements between the plaintiffs and (a) the Bank of America defendants for $750,000 and (b) the HSBC defendants for approximately $1.3 million.

[19] The two settlement agreements included terms requiring the defendants to provide assistance to the plaintiffs in this proceeding. As a result, the plaintiffs obtained online chat room transcripts between certain of the defendants' trader employees who were alleged to have been involved in the conspiracy.

D. Subsequent Events related to this Proceeding

[20] In May 2022, the plaintiffs filed a motion for certification, supported by a record that included an expert report relating to the quantification of aggregated damages allegedly suffered by the plaintiff class.

[21] In July 2022, the plaintiffs executed a settlement agreement with the Deutsche Bank group of defendants. The plaintiffs then engaged in settlement discussions with each of the other remaining defendant groups. By September 2022, they reached agreements in principle for settlement with the TD, Nomura, Credit Suisse, RBC and BNP Paribas groups of defendants. Each executed settlement agreements in October 2022.

[22] On November 3, 2022, at the request of the parties, the Court adjourned a motion concerning proposed certification for settlement purposes. Between November 2022 and October

2023, the plaintiffs executed settlement agreements with the remaining groups of defendants – Barclays, BNP Paribas, Citi and Credit Agricole.

[23] By order issued on March 20, 2024, the Court certified this action as against the remaining defendants for settlement purposes and approved the notice of certification and settlement approval hearing. The Court also approved a plan to distribute the notice to class members.

[24] In the order issued on March 20, 2024, the settlement class (the "Class") was defined as follows:

> All Persons in Canada who, between January 1, 2005 and December 31, 2015, entered either directly or indirectly through an intermediary, and/or purchased or otherwise participated in an investment or equity fund, mutual fund, hedge fund, pension fund or any other investment vehicle that entered into an SSA Bond Transaction. Excluded from the class are the defendants, their parent companies, subsidiaries, and affiliates, and any person who validly opted-out of the Action or who was automatically excluded from the Action pursuant to s. 334.21(2) of the Federal Courts Rules.
>
> "SSA Bond" refers to any and all supranational, sovereign, subsovereign governmental, quasi-governmental, and agency bonds or debt instruments regardless of the structure, currency, or credit quality.
>
> "SSA Bond Transaction" means any purchase, sale, trade, assignment, novation, unwind, termination, or other exercise of rights or options with respect to any SSA Bond.

[25] In these Reasons, I will refer to the period from January 1, 2005, to December 31, 2015, as the "Class Period" and to the persons captured by the definition as the "Class Members".

[26] To support their current motions filed on August 2, 2024, the plaintiffs filed a number of affidavits, principally an affidavit of Charles Wright (a partner at Siskinds LLP, one of the Class Counsel) and affidavits from representatives of the proposed administrator and the firm that sent notices following the consent certification of this proceeding for settlement purposes.

II. **Should the Court approve the Proposed Settlements with the Remaining Defendants?**

A. Legal Principles

[27] The Federal Court of Appeal recently provided "a few reminders about the distinctive nature of class action settlements" in *Waldron v. Canada (Attorney General)*, 2024 FCA 2 (leave to appeal to the Supreme Court dismissed: SCC No. 41141, May 30, 2024). At paragraph 68, Laskin JA summarized:

> • First, class action settlements differ from most other settlements of litigation in requiring the approval of a judge before they can take effect: see rule 334.29(1).
>
> • Second, negotiating a settlement will invariably entail trade-offs and compromise: *Châteauneuf v. Canada*, 2006 FC 286 at para. 7. We do not know what trade-offs and compromises were made here.
>
> • Third, the well-established test for judicial approval is that the settlement be shown to be fair, reasonable, and in the best interests of the class as a whole: *Condon v. Canada*, 2018 FC 522 at para. 17. As the supervising judge recognized, this standard does not require perfection, only reasonableness: 2019 FC 1075 at para. 76.
>
> • Fourth, the judge's assessment of a proposed settlement is "a binary, take-it-or-leave-it proposition. […] The Court is not permitted to change the settlement terms, impose additional terms or promote the interests of certain class members over those of the whole class": *Toronto Standard Condominium Corporation No. 1654 v. Tri-Can Contract Incorporated*, 2022 FC 1796 at para. 17.

> • Fifth, the focus on the interests of the class as a whole may mean that a settlement is approved even if it does not meet the needs or demands of particular class members, or benefits some ahead of others: *Condon* at para 17; *Manuge v. Canada*, 2013 FC 341 at para. 24; *Hébert v. Wenham*, 2020 FCA 186 at para. 9, leave to appeal refused, 2021 CanLII 49683 (SCC).
>
> • And sixth, a judicially approved settlement is nonetheless binding on every class member who has not opted out of the proceeding: see rule 334.29(2). […]

[28] As Laskin JA confirmed in *Waldron*, the central question for approving a class action settlement is whether the proposed settlement is "fair, reasonable and in the best interests of the class as a whole": see also *Hébert v Wenham*, 2020 FCA 186 (Stratas JA), at para 9; *Percival v. Canada*, 2024 FC 824, at paras 33, 89; *Toronto Standard Condominium Corporation No. 1654 v. Tri-Can Contract Incorporated*, 2022 FC 1796, at para 13; *Lin v. Airbnb, Inc.*, 2021 FC 1260, at para 21; *Condon v. Canada*, 2018 FC 522, at para 17.

[29] To assess whether the proposed settlement is fair, reasonable and in the best interests of the class as a whole, the Federal Court – like the provincial superior courts – is guided by a non-exhaustive list of factors:

- The terms and conditions of the settlement;
- The likelihood of recovery or success;
- The expressions of support, and the number and nature of objections;
- The degree and nature of communications between class counsel and class members;

- The amount and nature of pre-trial activities including investigation, assessment of evidence and discovery;
- The future expense and likely duration of litigation;
- The presence of arm's length bargaining between the parties and the absence of collusion during negotiations;
- The recommendation and experience of class counsel; and
- Any other relevant factor or circumstance.

See e.g., *Toronto Standard Condominium Corporation*, at para 14; *Lin*, at para 22.

B. Assessment of the Proposed Settlements

[30] All parties supported the approval of the proposed settlement agreements with the remaining defendants.

(a) *Financial Terms in the Proposed Settlement Agreements*

[31] The plaintiffs submitted that the financial payments in the settlement agreement yield an "excellent" result, given the risks of proceeding to certification and if successful, an eventual trial. I will consider the financial payments, and then the risks and the likelihood of recovery.

[32] In aggregate, the settlement agreements with the remaining defendants provide for a total settlement amount of CAD$4,448,286.75. Combined with previous settlements approved by the Court in 2020, the aggregate settlement funds are $6,521,816.16. This is the amount available to

be paid as compensation to eligible Class Members, Class Counsel's fees and disbursements, and administration costs.

[33] Like the earlier settlements with Bank of America and HSBC, the proposed settlement with Deutsche represents 3.4% of the US settlement with Deutsche (adjusted for currency). The financial terms in the settlement agreements with the other remaining defendants ranged from payments of $150,000 to $500,000. The amount to be paid by each of the remaining nine defendant groups is as follows:

Deutsche Bank:	$2,198,286.75 (US$1,600,500)
TD	$250,000
Nomura	$350,000
Credit Suisse	$500,000
RBC	$250,000
Barclays	$150,000
BNP Paribas	$150,000
Citibank	$200,000
Crédit Agricole	$400,000

[34] The plaintiffs advised that to them, these amounts represented, broadly speaking, the respective involvement of each defendant group in the alleged unlawful conduct. Some defendant groups were implicated in the investigations by law enforcement agencies, while others were not.

[35] Class Counsel assessed the relative involvement of each remaining defendant group with the “limited” information in their possession, assisted by their experts. The plaintiffs were unable to obtain objective data regarding the defendants' respective share of the SSA Bonds market at the pre-certification stage. The plaintiffs did not have access to any of the remaining defendants’ documents. There is no public exchange for SSA Bonds that would enable an expert to determine

either the volume of trading or the percentage of trading handled by each defendant. In the absence of objective data on the remaining defendants' relative market share, Class Counsel advised that their settlement positions were “largely predicated” on their analysis of each of the remaining defendants' degrees of involvement in the alleged conspiracy.

[36] Because the EC fined both Credit Suisse and Credit Agricole and each had one of their respective employees implicated in the US DOJ’s investigation, the plaintiffs took the position that their claims were the strongest against these two remaining defendants. Similarly, Nomura had been named in the US DOJ's investigation and one of its employees had been implicated by the DOJ. By contrast, RBC, TD and Citibank were not implicated in any of the regulatory investigations. The plaintiffs assessed Barclays and BNP as having the lowest degree of involvement. (The evidence does not reveal what material difference(s) existed between RBC, TD and Citibank on one hand, and Barclays and BNP on the other.)

[37] The amounts payable under the proposed settlement agreements are meagre in relation to the plaintiffs’ claim for damages of $1 billion in their Amended Statement of Claim (as amended earlier this year at the consent certification). However, the plaintiffs note that the financial terms in the proposed settlement agreements in this case represent a reasonable proportion of the corresponding settlements of the US class action. In aggregate, the financial terms of the settlement agreements with the eleven defendant groups represent 6.2% of the overall settlement of the US class action. Although the SSA Bond market is an opaque, over-the-counter (“OTC”) market, the plaintiffs contended that the financial settlement terms are in line with the relative size of the SSA Bond market in Canada relative to the SSA Bond market in the US, both as a

proportion of the global market. The plaintiffs referred to case law concerning the financial settlements in Canadian class proceedings relative to the settlement amounts in parallel US class actions arising from the same factual allegations. The plaintiffs also contended that relatively speaking, US class action counsel had more information and were in a better position than Canadian Class Counsel to assess the merits of the case against the defendants using the disclosed facts in the US class action.

[38] While I appreciate how these factors may affect Class Counsel overall or directionally, I do not find the evidence before the Court sufficient to analyze these positions advanced by the plaintiffs in a meaningful or reliable way. (I note in passing that it is a stretch to assert that my reasons in *Toronto Standard Condominium Corp,* at paragraph 25, "endorsed" reference to US settlements to assess the reasonableness of Canadian settlements. See the analysis in that case at paragraphs 33-43, which did not cite the Ontario case law on which the plaintiffs now rely.)

[39] However, it is possible to assess the financial terms in the settlements against the likelihood of recovery and risks of proceeding to certification. I will turn to that assessment shortly.

[40] Before doing so, I must briefly note who will be eligible to make a claim against the pool of money paid under the settlement agreements. In their proposed administration protocol, Class Counsel devised a claims process that sets a minimum size of transaction – a financial threshold, or floor – that must be met to make a claim for a share of the settlement proceeds. Only Class Members that have total eligible SSA Bond transactions of $10 million or more during the Class

Period will be eligible for compensation. The effect is to exclude smaller investors – those with transactions under $10 million – from eligibility to make a claim.

[41] However, an expert engaged by the plaintiffs, Dr Carol Osler, advised in a report prepared for certification that SSA Bonds are generally not purchased or sold in small amounts by retail investors. To the contrary, Dr Osler advised that the following institutions made up over 95% of all investors in SSA Bonds between 2011 and 2016 (which overlaps with the Class Period): central and reserve banks (53%), private banks (25%), asset managers (15%) and pension funds and insurance companies (2%).

[42] To give a sense of scale, in the US settlement claims process, the average claim exceeded US$2.5 billion, and the majority of claims exceeded US$10 million. Thus, according to the evidence, the investors that were “most affected” by the alleged wrongdoing are the Class Members who will be able to make claims in the proposed claims process.

(b) *Likelihood of Recovery and Prospects at the Certification Motion*

[43] The plaintiffs identified two “intervening events” that negatively impacted both the prospects for certification and the likelihood of recovery or success at an eventual trial. The first event was the July 2021 decision by the US Court of Appeals for the Second Circuit, which dismissed the US plaintiffs’ claims against the same defendant groups that remain in this proceeding (except for Deutsche Bank).The plaintiffs’ second “intervening event” was this Court’s decision in *Jensen v. Samsung Electronics Co. Ltd.*, 2021 FC 1185, [2022] 3 FCR 34

(*"Jensen FC"*), aff'd 2023 FCA 89 (*"Jensen FCA"*) (leave to appeal to the Supreme Court dismissed: SCC File No. 40807, January 11, 2024).

[44] Class counsel also identified the following risk factors affecting the likelihood of recovery and risks of proceeding forward towards a trial: none of the remaining defendants pleaded guilty in Canada to any unlawful conduct or were subject to any fines or other penalties in relation to the SSA Bonds market; the defendants' arguments that indirect Class Members would have no claim for alleged losses; and possible defects in their case at trial, including findings that there was no unlawful conspiracy and no impact on the price of transactions entered by Class Members. (I have distilled a longer list of overlapping items into these distinct factors.)

[45] For present purposes of settlement approval, I evaluate these positions as follows.

[46] First, I accept that the US Second Circuit's decision had a significant effect on the plaintiffs' position. The Second Circuit concluded that the alleged conspiracy in the US class action was implausible. The appellate court stated:

> Here, we conclude that plaintiffs have cast a net so wide that the claimed antitrust conspiracy is implausible as alleged.
>
> As plaintiffs themselves note, the secondary market for USD SSA bonds operates through bilateral over-the-counter transactions, with quickly expiring quotes acquired after extended communications with dealers. Because of its decentralized, opaque, and frenetic nature, the secondary market for USD SSA Bonds may indeed be vulnerable to manipulation by individual traders colluding on specific trades.
>
> But the flip side of this same coin is that the conspiracy alleged by plaintiffs -- a "super-desk" involving more than twenty entities in different countries as well as individual traders, conspiring "[e]very day, nearly all day," J. App'x at 169, tainting every one of

> their trades for some seven years -- is simply not plausible. Significantly, in casting this extremely wide net, plaintiffs have explicitly refused to plead, in the alternative, a narrower antitrust conspiracy involving only the Individual Defendants. Accordingly, we evaluate plaintiffs' claims as they are alleged: an antitrust conspiracy involving *all* defendants and affecting *all* trades with the defendants.
>
> In so doing, we conclude that the SAC does not allege sufficient factual detail to establish the plausibility of the claimed conspiracy. The SAC fails to explain how the conspirators were able to wield such control over the secondary market as to impact every trade with every defendant and yield a viable claim for every plaintiff.
>
> The SAC also fails to link each of the defendants individually to specific acts of anticompetitive conduct in furtherance of the conspiracy. Thus, while we agree with the district court that the SAC adequately alleges anticompetitive conduct on the part of the Individual Defendants, *In re SSA Bonds Antitrust Litig.*, 420 F. Supp. 3d 219, 237-38 (S.D.N.Y. 2019), we conclude that the broad conspiracy alleged by plaintiffs is simply not plausible.
>
> [Original italics.]

[47] At the hearing of this motion, the plaintiffs confirmed that the allegations in this proceeding were substantially the same as the allegations in the US class action. Both were based on information from the investigations by the US DOJ and the EC. While US and Canadian law on criminal conspiracy under the *Sherman Act* and *Competition Act* are not identical, I accept the plaintiffs' position that the US Second Circuit's decision materially affected their prospects for certification and a successful result at an eventual trial against the remaining defendants in this proceeding, given that the two proceedings were based on substantially the same factual allegations and eight of the nine groups of remaining defendants in this proceeding had no liability in the US class action.

[48] I turn now to the second intervening event and other risks identified by the plaintiffs. In *Jensen FC,* this Court declined to certify a proposed class proceeding alleging a conspiracy to suppress the global supply and raise the price of Dynamic Random Access Memory ("DRAM") chips. Gascon J. concluded that the statement of claim in *Jensen* did not disclose a reasonable cause of action under sections 36, 45 and 46 of the *Competition Act* for failure to plead material facts. The Court also concluded that the plaintiffs' evidence on the certification motion did not provide "some basis in fact" for the conspiracy they alleged.

[49] In their evidence on this motion, the plaintiffs advised that *Jensen FC*, decided in 2021 and later upheld by the Federal Court of Appeal in 2023, "presented a risk that this Court would find that there was no basis in fact for the alleged conspiracy pleaded by the Plaintiffs at the upcoming certification motion". The plaintiffs relied on the following statement, extracted from paragraph 230 of Justice Gascon's reasons in *Jensen FC*:

> […] Evidence of engaging in "anti-competitive" or "anti-monopoly" behaviour in a foreign country cannot serve to establish some basis in fact for the commonality of a proposed common issue relating to a breach of a specific criminal provision like section 45, when the evidence does not allow to determine which specific anti-competitive behaviour is at stake. […]

[50] Although they did not believe that *Jensen FC* was fatal to their certification motion, the plaintiffs contended that the combination of the reasoning in *Jensen FC,* the conclusions of the Second Circuit in dismissing the class proceeding in the US and the absence of any Canadian law enforcement investigation, materially increased the risk that the Court would determine that there was no basis in fact for the alleged conspiracy.

[51] I agree with the plaintiffs that the Court's conclusions in *Jensen* underlined the need for sufficient material facts in a statement of claim and to file evidence on certification to show some basis in fact for the plaintiffs' allegations about an alleged conspiracy to fix prices (or otherwise affect them) in the SSA Bonds market: see the thorough analysis in *Jensen FC,* esp. at paras 64, 117, 121, 122-161, 172-173 (relating to material facts in the pleading) and paras 196, 210-212, 218, 222-278, 284-289, 292 (related to some basis in fact). See also *Jensen FCA*, at paragraphs 63-69, 70, 78-81, 91-92, 94, affirming the legal tests and their application by the Court in *Jensen FC*. From my review of the plaintiffs' materials on this motion (which included their record filed on the certification motion), I can appreciate why sufficient pleaded material facts and a basis in fact for possible common issues could have been a real concern in this proceeding, both on the face of the Amended Statement of Claim and in the evidence filed for certification. The materials contain scant details that could support the conspiracy alleged in the Amended Statement of Claim (e.g., involving traders who acted as "one team" and the defendants operating a "single trading desk"). The allegations appear to centre on four traders, based in London, using chat rooms to discuss possible pending SSA Bond transactions.

[52] In addition, as in *Jensen FC,* no remaining defendant in the present proceeding has pleaded guilty to an offence in Canada and there is no evidence of an investigation by the Competition Bureau into any defendant's conduct. The absence of a Canadian investigation and no guilty pleas by the remaining defendants in Canada must have had a negative effect on the plaintiffs' assessment of their prospects for success at certification and at trial: see *Jensen FC,* at paras 242, 296, 298. In this case, some defendant groups and their employees were not

implicated in any of the investigations by foreign law enforcement agencies into the SSA Bond market: *Jensen FC,* at para 296.

[53] I pause to observe that it is unclear how the specific statement on which the plaintiffs relied in paragraph 230 of *Jensen FC,* quoted above, materially affected their risks in this proceeding. In that paragraph, Justice Gascon distinguished between "anti-competitive" or "anti-monopoly" behaviour on one hand, and price-fixing or conspiracy on the other hand, under Canadian law. The quoted statement was that evidence of engaging in "anti-competitive" or "anti-monopoly" behaviour in a foreign country cannot establish some basis in fact for the commonality of a proposed common issue for a breach of a specific criminal provision such as section 45, when the evidence does not allow to determine which anti-competitive behaviour is at stake. In *Jensen FC,* some allegations of unlawful activity were based on news reports of an investigation by Chinese authorities into an unspecified kind of "anti-competitive" or "anti-monopoly" behaviour in the DRAM industry that was possibly occurring within China (not a global criminal conspiracy to fix prices as the *Jensen* plaintiffs had alleged was reported): see *Jensen FC,* esp. at paras 222, 225, 230, 237, 240, 243. Here, the circumstances as alleged are different: the US class action and this proceeding are based on the same factual allegations of conspiracy related to fixing (or otherwise affecting) the prices and bid-ask spreads of SSA Bonds, the source of which was an investigation by US DOJ.

[54] In my view, the proposed financial terms of the settlement agreements, both in aggregate and individually, appear to be more than satisfactory in light of the likelihood of recovery and

the risks of proceeding to a certification motion. See *Breckon v. Cermaq Canada Ltd.*, 2024 FC 225, at paras 56-59; *Lin*, at para 39.

(c) *Scope of the Releases in the Proposed Settlement Agreements*

[55] In addition to the financial terms of the settlements, there are two additional issues arising from the terms of the proposed settlement agreements.

[56] First, in addition to settlement funds, Deutsche Bank and Credit Suisse agreed to provide cooperation to the plaintiffs, such as providing an evidentiary proffer and Settlement Disclosure Documents (which in this case meant electronic documents, data and communications provided to plaintiff's counsel in the parallel US class action). In my view, these cooperation provisions are not material to the present approval motion. Deutsche Bank and Credit Suisse did not in fact provide any documents, data or information because the settlements had not yet been approved.

[57] Second, I must examine the terms in the settlement agreements that would release the remaining defendants from certain claims, which would be implemented by this Court's order approving the settlement agreements. Here, I raised a concern at the hearing of the motion as to the temporal scope of the Released Claims in the proposed settlements.

[58] An understanding of this concern requires a digression into the terms of the releases in the settlement agreements. Each of the settlement agreements with the remaining defendants provides, in section 6, that upon the Effective Date, each of the Releasors (i.e., the plaintiffs and all Class Members) shall, by the Court's orders approving the settlement and dismissing the

claims, release all of the Released Claims that the Releasors have against the Released Parties (i.e., for present purposes, the remaining defendants). The settlement agreements contain the following definition:

> ***Released Claims*** means any and all manner of claims, including Unknown Claims, […] which the Releasing Parties ever had, now have, or hereafter can, shall or may have, […] against the Released Parties arising from or relating in any way to any conduct alleged or that could have been alleged in and arising from the factual predicate of the Action or any amended pleading therein, from the beginning of time until the Effective Date […]

[59] The following are deemed to be included in the Released Claims:

> (i) communications related to SSA Bonds, the trading of SSA Bonds between a Released Party and any other broker, dealer or trader in SSA Bonds or any participant in the conspiracy alleged in the Action,
>
> (ii) agreements, arrangements, or understandings related to SSA Bonds, SSA Bond Trading or prices or rates associated with SSA Bonds between released Party and any other broker, dealer or trader in SSA Bonds or any participant in the conspiracy alleged in the Action,
>
> (iii) the sharing or exchange of customer or other confidential information between a Released Party and any other broker, dealer or trader in SSA Bonds or any other participant in the conspiracy alleged in the Action,
>
> (iv) the establishment, calculation, communication, control, manipulation, quotation or use of the price, spread, yield or rate of any SSA Bond in connection with the conspiracy alleged in the Action, or
>
> (v) acts to conceal the conspiracy alleged in the Action.

[60] This definition of Released Claims links a comprehensive description of claims against the Released Parties, with any conduct that was alleged (or that could have been alleged) in or

arising from the "factual predicate" of this proceeding or any amended pleading in it. The language also refers to a time period from "the beginning of time" to the Effective Date. The Effective Date is defined as the date when the "Final Orders" have been received, which is the date when the Court has approved the settlement agreement and has dismissed this proceeding as against the settling defendant (plus the expiry of the time for any appeals or the final dismissal of any appeals). Therefore, the Effective Date is likely in late 2024.

[61] I note that the Released Claims also includes Unknown Claims, which:

> … means any and all Released Claims against the Releasees which Releasors do not know or suspect to exist in his, her, or its favour as of the Effective Date, and any of the Settling Defendant's Claims against Releasors which Releasees do not know or suspect to exist in his, her, or its favour as of the Effective Date, which if known by the Releasors or Releasees might have affected his, her, or its decision(s) with respect to the settlement…

(The definition continues on for ten more lines.)

[62] As may be seen from the definition of the Class, quoted above, the period of time during which the plaintiffs allege a conspiracy to fix (etc.) prices in the SSA Bond market (i.e., the Class Period) is from January 1, 2005, until December 31, 2015. The period from 2005 to December 31, 2015, is also the time period in respect of which Class Members may make a claim for a share of the $6.5 million settlement funds. The evidence on this motion is that the plaintiffs have no information that the defendants' allegedly unlawful conspiratorial conduct in the SSA Bond market continued after 2015. The period of time for which the law enforcement agencies raised issues ended in 2015. In addition, the plaintiffs have only made inquiries about possible unlawful conduct in the SSA Bonds market up to the end of 2015. They made no

inquiries about the period after 2015 and have no evidence about any continuing conspiracy after the end of 2015.

[63] This is also not a case in which the Amended Statement of Claim makes allegations of unlawful or wrongful conduct that is continuing as of the issuance of the claim and up to the time of settlement approval. As counsel acknowledged, to the plaintiffs' understanding, certain defendants, whose traders were identified by the US DOJ, ended the allegedly unlawful conduct by terminating, suspending or otherwise disciplining their respective employees, in 2015 or early 2016.

[64] To bring the concern raised at the hearing into sharper relief: the Class Period ends in 2015, yet under the proposed settlement terms, the remaining defendants will be released from Released Claims, the definition of which refers to a period of time ending on a date in late 2024.

[65] At the hearing, the defendants emphasized a number of points to address this concern. First, the defendants submitted that they specifically bargained for a full release until the Effective Date. They noted that the releases were agreed to be a material term of the settlement agreements, in respect of which they have a right to terminate the settlement agreement if the Court does not approve them: see settlement agreements, section 6.5. Second, the defendants noted that in 2020 in this proceeding, the Court approved two settlement agreements that also involved releases that included comparable language. I agree that these two points are relevant and deserve weight in the assessment of this concern. I do not need to decide whether the language of the release does provide for a full release until the Effective Date.

[66] The remaining defendants' third point was that they have denied any wrongdoing or any conspiracy (continuing or otherwise). Doing so is consistent with the conclusion of the US Second Circuit in dismissing the class action lodged against them. The defendants' position was also that the criminal conspiracy claims of the *Competition Act* are not even engaged by the alleged action. They argued that they should not have to defend against the allegations – that is, to spend money to defend against allegations that have no merit in law. While I am not insensitive to the cost of defending against claims that are considered unmeritorious, these arguments cannot be properly assessed because they go to the merits – or absence of merit – of the conspiracy allegations, and of course also relate to a later time period than the allegations in the Amended Statement of Claim. None of the remaining defendants filed affidavit evidence on this motion.

[67] I find several additional points to be relevant. The first is that a court applying a release to a specific claim is not limited to considering only the express language of the release: see *Corner Brook (City) v. Bailey*, [2021] 2 SCR 540, 2021 SCC 29. Second, while it is not the Court's role on this motion to provide a definitive interpretation, the release language here does not appear to fall within the category of concerns (combined with other elements of a proposed settlement) in the decided class action settlement approval cases that might jeopardize the approval of the present settlement. The scope of the Released Claims is tethered to conduct covered by the "factual predicate" of this proceeding, which is consistent with the five expressly-stated inclusions in Released Claims (set out in paragraph 59, above). Whatever the effect of the inclusion of the references to the "beginning of time" and the Effective Date may be, I do not read the definition of Released Claims to refer to future conduct after the agreed Effective Date.

See the discussions in *Breckon*, esp. at paras 36-37, 43; *Loewenthal v. Sirius XM Holdings, Inc. et al.,* 2021 ONSC 4482, at para 36; *Leonard v The Manufacturers Life Insurance Company*, 2020 BCSC 1840, at para 115; *Coburn and Watson's Metropolitan Home v BMO Financial Group,* 2018 BCSC 1183, at paras 56-59 and *Coburn and Watson's Metropolitan Home,* 2019 BCCA 308, at paras 69, 71, 74-75 (applications for leave dismissed: SCC File Nos. 38872 and 38873 (March 26, 2020)); and *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation,* 2014 ONSC 5812, at paras 44-45 and 54-61.

[68] Third, it is relevant to recall the nature of the SSA Bond market and who enters transactions for SSA Bonds. According to the evidence before the Court, the transacting parties in the SSA Bond market were highly sophisticated – central and reserve banks, private banks, asset managers and pension funds and insurance companies. These institutional investors are members of the Class in Canada and are most affected financially by the proposed settlement. In addition, the evidence on this motion indicated that through correspondence exchanged during settlement negotiations, the remaining defendants advised that the vast majority of their SSA Bond trading during the Class Period occurred in London and/or New York City, with very limited trading occurring with Canadian counterparties.

[69] Thus, while the Class as defined also appears to include "indirect" purchasers of SSA Bonds such as individual investors or perhaps unitholders in mutual funds holding SSA bonds, those Class Members are much less affected (assuming they have potential claims as indirect purchasers as a matter of law). As such, this case is appreciably different from the circumstances in *Breckon,* in which the scope of the released claims was also a concern for the Court in

approving settlement and the class was defined to include all persons in Canada who purchased farmed Atlantic salmon and products containing it: *Breckon*, at paras 6, 14, 36, 45-48.

[70] Fourth, it is also material to note the status of opt-outs and objections to the proposed settlement. Following the Court's order dated March 20, 2024, in this proceeding, Class Members received notice of the proposed settlement terms both directly by mail (to the largest 100 pension funds in Canada in 2022) and also by publication in newspapers and through a press release. The evidence on this motion confirmed that no one has opted out or objected to the proposed settlement.

[71] While the possible temporal scope of the Released Claims has given me pause, the points in paragraphs 65 and 67-70 have tempered the force of my initial concern. Given the applicable legal test for approval, and the earlier analysis at paragraphs 46-54, I find that the concern does not render the proposed settlement unfair to the Class as a whole in the specific circumstances of this proceeding.

(d) *Remaining Factors to Consider for Settlement Approval*

[72] With respect to the other factors listed in *Toronto Standard Condominium Corporation* and *Lin*:

- The communications between Class Counsel and the Class have been satisfactory and have complied with the Court's orders when applicable.
- The parties reached the proposed settlements before the certification motion, so there has been no documentary or oral discovery in this proceeding. The SSA

Bond market is opaque and transactions are done OTC – not on a public exchange. Class Counsel obtained information about the SSA Bonds market and about the investigations by non-Canadian law enforcement agencies, as well as chat room transcripts from Bank of America and HSBC following the approval of their settlements. While the plaintiffs' submissions advised that the settlement agreements were negotiated based on several factors including the "evidence and findings" from the US class action, it is not clear what "evidence" was obtained from that US action, although the decisions from the US District Court referred to some evidence.

- Class Counsel engaged two experts to assist them to understand the SSA Bond market and the information they received, including from Bank of American and HSBC. One expert was a firm called Stonemore Consulting, a UK-based financial markets consultancy with direct experience in trading SSA Bonds. The plaintiffs retained Stonemore to answer questions arising from the technical evidence obtained from HSBC and Bank of America. Stonemore's report was integral to Class Counsel's understanding of the relative participation of each defendant in the alleged unlawful activities. The other expert was the economist mentioned earlier, Dr Osler, who provided expert advice and a report on the methodology for quantifying aggregate damages allegedly suffered by the Class Members.
- The future expense of a certification motion, and an eventual trial, would be very significant.
- Class Counsel negotiated at arm's length with counsel for each of the remaining defendants.
- Class Counsel are very experienced in class proceedings, including proceedings involving claims under the *Competition Act*. They recommend that the Court approve the settlements negotiated with all the remaining defendants.
- As noted, no one has opted out or objected to the proposed settlements.

C. Conclusion on Approval of Settlements

[73] On this motion, the Court must either approve or not approve the proposed settlement agreements. The standard is reasonableness, not perfection. The assessment is a binary, take-it-or-leave it proposition. The Court is not permitted to change the settlement terms, impose additional terms or promote the interests of certain class members over those of the whole class: *Waldron,* at para 68 (fourth bullet).

[74] This settlement is not perfect, nor does it have to be perfect to be approved. There are two components in the broader terms of settlement in this proceeding that have raised concern. One is the temporal scope of the proposed releases, a concern that is tempered by other factors as already assessed. Another concern is the $10 million threshold or floor for making a claim, which suggests that one part of the Class cannot make a claim for a share of the settlement proceeds. That concern is outweighed by the very modest likelihood of a successful claim by indirect purchasers, the small recovery that that group of Class Members would enjoy if included, and the benefits of a streamlined claims process as has been developed by Class Counsel (which, for convenience and to avoid repetition, I will discuss in the next section). In addition, the relevant question for settlement approval concerns interests of the Class as a whole, which, as the case law instructs, may mean that a settlement is approved even if it does not meet the needs or demands of particular class members, or benefits some ahead of others: *Waldron,* at para 68; *Condon,* at para 17; *Mancinelli v. Royal Bank of Canada,* 2021 ONSC 6306, at para 28.

[75] The financial terms of settlement are, as the plaintiffs acknowledge, relatively modest. But in the context of the likelihood of success and the costs and risks of going forward to a certification motion, the financial terms are more than satisfactory.

[76] Weighing all the factors together, I conclude that the proposed settlements with the remaining defendants (in aggregate and individually) are fair, reasonable and in the best interests of the Class as a whole.

III. **Approval of administrator, notice and distribution protocol for the settlement funds**

[77] Class Counsel filed a proposed Plan of Dissemination and a proposed Administration Protocol for the settlement. The plaintiffs propose that Angeion Group be retained as notice and settlement administrator, to implement the proposed Plan of Dissemination and provide claims administration services in accordance with the proposed Administration Protocol.

[78] Angeion's role and the proposed notice and distribution protocols are approved, substantially as proposed.

[79] Angeion has served as administrator in other Canadian class proceedings and in proceedings in the US. Angeion will leverage its experience from successfully administering the $95.5 million class action settlement in the parallel US class action. For that action, Angeion received and processed over 20,000 claim form submissions, evaluating billions of dollars in financial transactions. Certain aspects of the proposed Administration Protocol are based on the Plan of Allocation approved in the US Action, including the proposed Claim Form and the list of

Eligible SSA Bonds. In particular, Angeion has developed a database of Canadian persons who filed claims under the US settlement which will enable the parties to provide direct notice to potential Class Members at minimal cost. In addition, Angeion developed a list of 1,400 eligible SSA Bonds through its administration of the US settlement. It will use this list to expedite the process of verifying the eligibility of instruments claimed by Class Members, which will streamline the claims process in Canada and reduce the time and cost of verifying claims. Mr Wright's affidavit advised that synergies achieved by appointing the same claims administrator here as in the US will result in significant administration costs savings, thereby enhancing the amount of settlement funds left available for distribution to the Class.

[80] Class Counsel prepared the Administration Protocol with advice from Angeion and after consulting with some Class Members including the plaintiffs. It is based on the protocol used in the US class action. The process is simplified and does not require Class Members that submit a claim to prove every SSA Bonds transaction or to submit all transaction records to file a claim form. The claims process uses a points system, with points allocated by tiers based on the value of a claim, rather than on a *pro rata* distribution based on the value of each claim relative to the value of all claims. The administrator will develop, implement and operate secure, web-based systems and procedures for completing, filing, receiving and adjudicating claims. It has the power to ask for more information from claimants as needed.

[81] As already noted, only those Class Members who the Administrator determines have total eligible SSA Bond transactions of $10 million or more during the Class Period will be eligible for compensation under the Administration Protocol. The Wright affidavit explained:

> [116] This eligibility cut-off is intended to save administration costs associated with processing low-value claims where it is expected that the cost of administering the claim would exceed the value of the claim itself. Without any floor, Class Counsel believes the modest compensation available to Class Members would be eroded to a degree that would discourage some Class Members from making claims.
>
> [117] The CAD$10,000,000 "floor" was established by Class Counsel after obtaining information from Angeion regarding the median and average value of SSA Bond transaction totals claimed under the U.S. Settlement, as well as the distribution of U.S. claim values. The floor also reflects the concentrated and top-heavy nature of the SSA Bond market. […]

The Wright affidavit then noted nature of the vast majority of all investors in the SSA Bond market and the scale of transactions, as already described in these Reasons.

[82] One purpose of the eligibility cut-off at $10 million is to ensure that the processing of relatively small claims does not detract from the processing and recovery of Class Members with very large claims who were much more significantly impacted by the alleged wrongful conduct.

[83] Based on the evidence in the record, I find in the circumstances of this case that these processes are fair and reasonable and in the interests of the Class as a whole.

[84] The notice of settlement approval and claims process will be sent directly to the counterparties to SSA Bond transactions for the relevant Class Period, using information to be provided by the remaining defendants under the terms of the proposed settlement agreements; to the 100 largest pension funds for 2022; and to the administrator’s database of Canadian persons who filed claims under the US settlement.

[85] The estimated cost of Angeion's services for notice and settlement administration is approximately $104,000, which is satisfactory in the present context.

[86] Class Counsel will continue to be involved in the claims process and this Court retains its supervisory jurisdiction.

IV. **Should the Court approve Class Counsel's fees and disbursements?**

[87] The second motion addressed in these Reasons is a motion for an order approving counsel fees of $1,112,071.69, plus applicable taxes of $144,569.32, and disbursements of $978,894.51 inclusive of applicable taxes. The fees are for Class Counsel made up of the law firms of Sotos LLP, Siskinds LLP, Koskie Minsky LLP and Camp Fiorante Matthews Mogerman LLP.

[88] In October 2017, Class Counsel entered into a contingency fee retainer agreement. In it, Class Counsel and the plaintiffs agreed that the legal fees will be charged on a percentage basis. It stipulated that Class Counsel shall be paid a legal fee of twenty-five percent (25%) of any "Recovery" (as defined in the retainer agreement), plus disbursements and applicable taxes, if a settlement is reached before certification.

[89] Class Counsel did not obtain any third-party funding for this proceeding.

[90] In February 2020, based on the same retainer agreement and 25% contingency fee arrangement, the Court approved interim fees in the amount of $518,382.35 and interim disbursements in the amount of $544,305.20 (including taxes and future disbursements).

[91] Since the Court's approval of fees in February 2020, Class Counsel lawyers, students and law clerks have devoted 1,732.4 hours to advance this action, totalling approximately $1,068,423.77 in fees at the hourly rates proposed by counsel.

[92] Class Counsel has incurred $978,894.51 in disbursements, which were funded by counsel as part of the retainer agreement with the plaintiffs. This amount includes disbursements for expert reports, international service, travel and accommodation, among other incidental costs. The most significant disbursements were for expert fees, which represent over 80% of Class Counsel's disbursements.

[93] With the proposed Class Counsel fees at this time, the total contingency fee for Class Counsel is $1,630,454.04. Together with the interim disbursements approved from the Previous Settlements, total disbursements have been $1,523,199.71 for Class Counsel.

[94] Rule 334.4 requires that no payments shall be made to counsel from the proceeds recovered in a class proceeding unless the payments are approved by the Court. The class counsel fees have to be "fair and reasonable" in all of the circumstances: *Breckon,* at para 126; *Moushoom v. Canada (Attorney General),* 2023 FC 1739, at para 82; *Lin,* at para 70; *Condon,* at para 81.

[95] The following factors assist the Court to determine whether the proposed class counsel fees are fair and reasonable:

1. The risk undertaken by class counsel;
2. The results achieved;
3. The time and effort expended by class counsel;
4. The complexity and difficulty of the matter;
5. The degree of responsibility assumed by class counsel;
6. The fees in similar cases;
7. The expectations of the class;
8. The experience and expertise of class counsel;
9. The ability of the class to pay; and
10. The importance of the litigation to the plaintiff.

See *Moushoom,* at para 83; *Breckon,* at para 127; *Lin,* at para 71; *Condon,* at para 82.

[96] The two most critical factors in assessing the fairness and reasonableness of a contingency fee request by class counsel are (1) the risk that class counsel undertook in conducting the litigation, measured from the commencement of the action and as the litigation continued but not with the benefit of hindsight when the result looks inevitable; and (2) the degree of success or results achieved for the class members through the proposed settlement: *Breckon,* at para 129; *Moushoom,* at paras 84-85; *Lin,* at para 72; *Condon,* at para 83.

[97] These two key factors have already been partly assessed in relation to the proposed settlement agreements. Counsel emphasized the legal risks as they evolved over the life of this proceeding, the absence of regulatory findings and conclusions to support the claims and that this matter was legally and factually complex. On factual complexity, counsel noted the absence of a transparent exchange for SSA bond transactions despite the size and activity level in the market, the length of the Class Period and the number of SSA bonds at issue, the location of the unlawful activity outside Canada, the absence of good data and the difficulty of the economic and damages analysis in this proceeding. Counsel also noted that they took on the case and funded both fees and disbursements themselves, without the benefit of third-party funding (citing the decision on costs after certification in *Green v Canadian Imperial Bank of Commerce,* 2016 ONSC 3829, at para 14).

[98] I will not repeat the analysis of the legal risks and the terms of settlement to approve the proposed settlements. On the financial terms, counsel characterized the approximately $6.5 million aggregate settlement outcome in this case as “excellent” for the Class, with significant financial benefit for the Class Members most affected.

[99] Counsel also emphasized the following factors in their submissions, which I accept are relevant to the determination of this motion to approve legal fees:

a) The proposed contingency fee is 25%, as agreed at the outset with the representative plaintiffs, a percentage that is not at the top end of the range of outcomes that have been approved on prior fee approval motions.

b) Counsel would get no legal fees or reimbursement of disbursed money if the action were not successful in achieving a settlement or recovery after a trial;
c) The Court's approval of the legal fees and disbursements in 2020 under the same retainer agreement, concurrent with the approval of the two prior settlements;
d) The 1,732 docketed hours spent on this action by Class Counsel;
e) The aggregate fees Class Counsel suggest would be billed at their hourly rates, which approximate the fees proposed to be approved as calculated on a contingency basis as a percentage of the recovery achieved for the Class;
f) With the estimated work remaining to administer the proposed settlements, the proposed legal fees will likely involve no multiplier or premium to Class Counsel.

[100] While I do not agree with all of Class Counsel's submissions, I find the legal fees to be fair and reasonable to the Class in the circumstances of this case. The settlement result achieved is acceptable.

[101] The disbursements incurred by the plaintiffs have exceeded $1.5 million in respect of this proceeding, of which approximately $979,000 are before the Court for approval on this motion.

[102] I find the overall quantum of expert fees to be quite high for a matter that only advanced to the filing of a certification motion. For the expert disbursements since 2020, the evidence filed in the record is adequate but perhaps not complete; some additional information would have been useful. The three pertinent paragraphs in Mr Wright's supporting affidavit for this motion attribute the vast majority of the disbursements over the life of the proceeding (80%) to the two

experts. The affidavit did not include an express breakdown as between the two named experts in aggregate, or year-by-year. The affidavit did include a table in which one law firm incurred expert fees of about $363,000 and another law firm incurred about $388,000, from which I infer that one firm retained Stonemore and the other retained Dr Osler. Neither expert's invoices were attached as exhibits to the affidavit, presumably owing to privilege concerns.

[103] The evidence to support Dr Osler's role is quite satisfactory. The plaintiff's record included Dr Osler's expert report, prepared for and filed on the plaintiff's certification motion. Dr Osler's report, and the affidavit evidence and submissions that referred to it for both of the motions considered in these Reasons, provides both context and support for a significant proportion of the expert fees that must be attributable to its preparation and her interactions with Class Counsel since the Court's approval of the first two settlements in 2020. Given that report and its importance to a certification motion, the evidence of her expertise in the record and her prior involvement with the US class action, I have the evidence needed to approve the share of the overall expert disbursement attributable to Dr Osler – although it was not quantified or provided as a percentage of the overall disbursements.

[104] There is less evidence in the Court record to support the disbursements for expert fees paid to Stonemore. Mr Wright's affidavit advised that Stonemore was retained to answer questions from the highly technical evidence obtained from HSBC and Bank of America under the cooperation terms of the settlements approved by the Court in 2020. The same affidavit refers to a report provided to counsel which was integral to Class Counsel's understanding of the relative participation of each group of defendants in the alleged unlawful conspiracy. I assume

that Class Counsel takes the view that this report is privileged. While the affidavit evidence related to the Stonemore disbursements is not complete and more would have been beneficial – and should be expected in future supporting affidavits for approval motions – I conclude that there is enough in the affidavit evidence, if barely, in this case. Given likely privilege concerns, the absence of Stonemore's report and its invoices is not fatal to approval of the disbursements.

[105] Returning to overall approval issues, I note that while the fees and disbursements together represent more than half of the overall settlement funds achieved for the Class, the disbursements exceeded $1.5 million and Class Counsel had to fund them as agreed in the retainer agreement. The proposed legal fees overall are only slightly higher at approximately $1.6 million for hours spent over a period of more than six years.

[106] In the context of this particular class proceeding and accounting for the factors noted by Class Counsel, I conclude that the sums for legal fees and associated disbursements since 2020 are fair and reasonable and fair to the Class as a whole. An Order will be issued approving those fees and disbursements.

V. **Conclusion**

[107] With the release of these Reasons, the Court will issue orders in respect of each group of remaining defendants, approving and implementing the proposed settlements and approving the notice and administration protocols proposed by the plaintiffs.

[108] An order will also be issued approving Class Counsel's fees and disbursements.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1871-17
STYLE OF CAUSE:	JOSEPH S. MANCINELLI, CARMEN PRINCIPATO, DOUGLAS SERROUL, LUIGI CARROZZI, RICCARDO PERSI, BRANDON MACKINNON, AND JACK OLIVEIRA, IN THEIR CAPACITY AS THE TRUSTEES OF THE LIUNA PENSION FUND OF CENTRAL AND EASTERN CANADA v BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., BANK OF AMERICA CANADA, BANK OF AMERICA, NATIONAL ASSOCIATION, BANK OF AMERICA MERRILL LYNCH INTERNATIONAL LIMITED, MERRILL LYNCH INTERNATIONAL, MERRILL LYNCH, PIERCE, FENNER & SMITH INC., MERRILL LYNCH CANADA INC, MERRILL LYNCH INTERNATIONAL SERVICES LIMITED, MERRILL LYNCH FINANCIAL ASSETS INC, MERRILL LYNCH BENEFITS LTD, BNP PARIBAS S.A, BNP PARIBAS GROUP, BNP PARIBAS (CANADA), BNP PARIBAS NORTH AMERICA INC, BNP PARIBAS, CITIGROUP INC, CITIBANK N.A, CITIGROUP GLOBAL MARKETS INC, CITIGROUP GLOBAL MARKETS LIMITED, CITIBANK CANADA, CITIGROUP GLOBAL MARKETS CANADA INC, CRÉDIT AGRICOLE S.A, CRÉDIT AGRICOLE CORPORATE AND INVESTMENT BANK, CRÉDIT AGRICOLE CORPORATE AND INVESTMENT BANK (CANADA BRANCH), CREDIT SUISSE GROUP AG, CREDIT SUISSE AG, CREDIT SUISSE SECURITIES (EUROPE) LTD, CREDIT SUISSE INTERNATIONAL, CREDIT SUISSE SECURITIES (CANADA), INC, CREDIT SUISSE AG, CREDIT SUISSE SECURITIES (USA) LLC, DEUTSCHE BANK AG, DEUTSCHE BANK SECURITIES INC, DEUTSCHE BANK SECURITIES LIMITED, HSBC HOLDINGS PLC, HSBC BANK USA, N.A, HSBC SECURITIES (USA) INC, HSBC BANK PLC, HSBC NORTH AMERICA HOLDINGS INC, HSBC BANK CANADA, HSBC USA, INC, NOMURA SECURITIES INTERNATIONAL, INC, NOMURA INTERNATIONAL PLC, ROYAL BANK OF CANADA, RBC EUROPE LIMITED, RBC CAPITAL MARKETS LLC, TORONTO-DOMINION BANK GROUP, TD BANK, N.A, TD SECURITIES LIMITED, TD GROUP US HOLDINGS, LLC, TD BANK USA, N.A, BARCLAYS CAPITAL CANADA INC., BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BARCLAYS EXECUTION SERVICES LIMITED and BARCLAYS CAPITAL SECURITIES LIMITED

PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	AUGUST 15, 2024
REASONS:	A.D. LITTLE J.
DATED:	NOVEMBER 15, 2024

APPEARANCES:

Alex Dimson Elile Waitzer Ramna Safeer	FOR THE PLAINTIFFS
Stephen Aylward	FOR DEFENDANT – TD BANK
Christopher Naudie Emilie Dillon	FOR DEFENDANT – BARCLAYS
Lara Jackson	FOR DEFENDANT – RBC
John Fabello Jonathan Silver	FOR DEFENDANT – CREDIT SUISSE
Chantelle Cseh Akiva Stern	FOR DEFENDANTS – NOMURA INT'L PLC & NOMURA SECURITIES INT'L
Zahaib Maladwala	FOR DEFENDANT – BNP PARIBAS
Caitin R. Sainsbury	FOR DEFENDANT – DEUTSCHE BANK
David Kent Brett Harrison	FOR DEFENDANT – CITI
Katherine L. Kay	FOR DEFENDANT – CREDIT AGRICOLE

SOLICITORS OF RECORD:

KOSKIE MINSKY LLP Toronto, Ontario	FOR THE PLAINTIFFS
SOTOS LLP Toronto	

SISKINDS LLP London, Ontario	
CAMP FIORANTE MATTHEWS MOGERMAN Vancouver, British Columbia	
STOCKWODS LLP Toronto, Ontario	FOR DEFENDANT - TD
OSLER, HOSKIN & HARCOURT LLP Toronto, Ontario	FOR DEFENDANT – BARCLAY
CASSELS BROCK Toronto, Ontario	FOR DEFENDANT – RBC
TORYS LLP Toronto, Ontario	FOR DEFENDANT – CREDIT SUISSE
McCARTHY TETRAULT LLP Toronto, Ontario	FOR DEFENDANTS – NOMURA INT'L PLC & NOMURA SECURITIES INT'L
FASKEN MARTINEAU DUMOULIN LLP Toronto, Ontario	FOR DEFENDANT – BNP PARIBAS
BORDEN LADNER GERVAIS LLP Toronto, Ontario	FOR DEFENDANT – DEUTSCHE BANK
McMILLAN LLP Toronto, Ontario	FOR DEFENDANT – CITI
STIKEMAN ELLIOT LLP Toronto, Ontario	FOR DEFENDANT – REDIT AGRICOLE