CITATION: Mancinelli v. Royal Bank of Canada, 2020 ONSC 1646
COURT FILE NO.: CV-15-536174-00CP
DATE: 2020/04/14

ONTARIO
SUPERIOR COURT OF JUSTICE.

BETWEEN:	
JOSEPH S. MANCINELLI, CARMEN PRINCIPATO, DOUGLAS SERROUL, LUIGI CARROZZI, MANUEL BASTOS and JACK OLIVEIRA in their capacity as THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, and CHRISTOPHER STAINES Plaintiffs	*Reidar Mogerman, Louis Sokolov, Charles Wright,* and *Daniel Bach* for the Plaintiffs
– and –	
ROYAL BANK OF CANADA, RBC CAPITAL MARKETS LLC, BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., BANK OF AMERICA CANADA, BANK OF AMERICA NATIONAL ASSOCIATION, THE BANK OF TOKYO MITSUBISHI UFJ LTD., BANK OF TOKYO-MITSUBISHI UFJ (CANADA), BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BARCLAYS CAPITAL CANADA INC., BNP PARIBAS GROUP, BNP PARIBAS NORTH AMERICA INC., BNP PARIBAS (CANADA), BNP PARIBAS, CITIGROUP, INC., CITIBANK, N.A., CITIBANK CANADA, CITIGROUP GLOBAL MARKETS CANADA INC., CREDIT SUISSE GROUP AG, CREDIT SUISSE SECURITIES (USA) LLC, CREDIT SUISSE AG, CREDIT SUISSE SECURITIES (CANADA), INC., DEUTSCHE BANK AG, THE GOLDMAN SACHS GROUP, INC., GOLDMAN, SACHS & CO., GOLDMAN SACHS	*Wendy Berman, Lara Jackson* and *Christopher Horkins* for the Defendants, Bank of Montreal, BMO Financial Corp., BMO Harris Bank N.A. and BMO Capital Markets Limited *Donald Houston, Shane D'Souza* and *Caroline Humphrey* for the Defendants, Credit Suisse Group AG, Credit Suisse Securities (USA) LLC, Credit Suisse AG and Credit Suisse Securities (Canada), Inc. *Subrata Bhattacharjee, Caitlin Sainsbury*, and *Pierre Gemson* for the Defendant Deutche Bank AG *Allan D. Coleman* and *Robert Carson* and *Michelle Lally* for the Defendants Royal Bank of Canada and RBC Capital Markets LLC *Paul Le Vay, Brendan Van Niejenhuis*, and *Ben Kates* for the Defendants Toronto Dominion Bank, TD Bank, N.A., TD Group

CANADA INC., HSBC HOLDINGS PLC, HSBC BANK PLC, HSBC NORTH AMERICA HOLDINGS INC., HSBC BANK USA, N.A., HSBC BANK CANADA, JPMORGAN CHASE & CO., J.P.MORGAN BANK CANADA, J.P.MORGAN CANADA, JPMORGAN CHASE BANK NATIONAL ASSOCIATION, MORGAN STANLEY, MORGAN STANLEY CANADA LIMITED, ROYAL BANK OF SCOTLAND GROUP PLC, RBS SECURITIES, INC., ROYAL BANK OF SCOTLAND N.V., ROYAL BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE S.A., SOCIÉTÉ GÉNÉRALE (CANADA), SOCIÉTÉ GÉNÉRALE, STANDARD CHARTERED PLC, UBS AG, UBS SECURITIES LLC and UBS BANK (CANADA) Defendants	)	US Holdings, LLC, TD Bank USA, N.A. and TD Securities Limited
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: February 24-26, 2020

PERELL, J.

REASONS FOR DECISION

A. Introduction and Overview

[1] In this action under the *Class Proceedings Act, 1992*,[1] the Plaintiffs, Joseph S. Mancinelli, Carmen Principato, Douglas Serroul, Luigi Carrozzi, Manuel Bastos, and Jack Oliveira, in their capacity as The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, and Christopher Staines, sue eighteen groups of bank financial institutions. To date, fourteen of the groups of Defendant banks have entered into settlements agreements.

[2] The latest of the settling Defendants is the Bank of Montreal ("BMO"). BMO is Bank of Montreal, BMO Financial Corp., BMO Harris Bank N.A. and BMO Capital Markets Limited. The Plaintiffs and BMO settled after this certification motion was argued and while these Reasons for Decision were being written and before a settlement approval hearing. For the purposes of these Reasons for Decision, I am continuing to reserve judgment with respect to BMO pending the settlement approval hearing.

[3] The remaining Defendants, Credit Suisse, Deutsche Bank, RBC, and TD have not settled.

[4] Credit Suisse is Credit Suisse Group AG, Credit Suisse Securities (USA) LLC, Credit Suisse AG and Credit Suisse Securities (Canada) Inc.

[5] Deutsche Bank is Deutsche Bank AG.

[6] RBC is Royal Bank of Canada and RBC Capital Markets LLC.

[7] TD is Toronto Dominion Bank, TD Bank, N.A., TD Group US Holdings, LLC, TD Bank

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

USA, N.A. and TD Securities Limited.

[8] The Plaintiffs allege that all (settling and non-settling) Defendants conspired to fix, raise, maintain, stabilize, control, or unreasonably enhance the prices of currency purchased in the foreign exchange foreign currency market ("FX Market"). The Plaintiffs bring a motion to certify the action as against the remaining groups of four (five in the BMO is included) Defendants.

[9] The four remaining non-settling Defendants submit that none of the five certification criteria are satisfied and they ask that the Plaintiffs' motion for certification be dismissed.

[10] For the reasons that follow and subject to the qualifications and modifications described below, the certification motion is granted.

[11] To foreshadow and summarize the qualifications and modifications for the certification of this class action, for the reasons expressed below, I shall certify five causes of action for:

> All persons in Canada who, between January 1, 2003 and December 31, 2013 (the "Class Period"), entered into an FX Instrument transaction with a named Defendant's salesperson either directly or through an intermediary.

[12] To understand these Reasons for Decision, it should be immediately appreciated that this Class Definition defines a class membership that is enormous, but which is substantially smaller than the ginormous size class membership sought by the Plaintiffs. As I shall explain below, the Plaintiffs' proposed Class Definition was over-inclusive. Therefore:

a. I have removed from class membership persons who purchased FX Instruments using the Defendants' proprietary electronic trading platforms.

b. I have removed from class membership persons who entered into FX Instrument transactions with non-Defendant banks. The non-Defendant banks comprise about 30% of the Foreign Exchange Market, and the Plaintiffs submitted that purchasers from non-Defendant banks were similar to what have been called Umbrella Purchasers. Umbrella Purchasers have been included as Class Members in other price-fixing class actions. However, as I shall explain later, the Umbrella Purchaser analogy is inapt for the immediate case.

c. I have removed from Class membership persons who entered into FX Instrument transactions indirectly, the so-called Indirect Purchaser Class Members. These putative Class Members were also described as Investor Class Members, which is how I shall refer to them. Mr. Staines is the proposed Representative Plaintiff for the Investor Class Members. In the Plaintiffs' proposed Class Definition, these are the persons who "purchased or otherwise participates in an investment or equity fund, mutual fund, hedge fund, pension fund or any other investment vehicle that entered into an FX Instrument." As the discussion below will reveal, the Investor Class Members get over the very low hurdle of the first criterion for certification, but there are other reasons for not including them as Class Members. It follows that Mr. Staines does not qualify as a Representative Plaintiff or as a Class Member.

[13] As the discussion below reveal, this price-fixing conspiracy class action is different from

other price-fixing class actions like *Pro-Sys Consultants Ltd. v. Microsoft Corp.*,[2] *Sun-Rype Ltd. v. Archer Daniels Midland Company*,[3] *Infineon Technologies AG v. Option consommateurs*,[4] and *Pioneer Corp. v. Godfrey*.[5] Some but not all the precedential aspects of those cases can be applied to the circumstances of the immediate case.

B. Evidentiary Background

[14] The Plaintiffs supported their motion for certification with the following evidentiary record:

- the affidavit dated June 23, 2017 (2 exhibits, 100 pages) of **David D'Agostini**, a lawyer of Koskie Minsky, LLP, a member of the consortium of Class Counsel. Mr. D'Agostini was cross-examined.
- the affidavit dated February 14, 2019 (14 exhibits, 1,100 pages) of **Robert Alfieri**, a lawyer of Koskie Minsky, LLP.
- the affidavit dated October 10, 2019 (12 exhibits, 162 pages) of **Nathalie Gondek**, a lawyer of Koskie Minsky LLP.
- the affidavit dated May 30, 2016 (56 exhibits, 1990 pages) of **Rory P. McGovern**, a lawyer with Sotos LLP, a member of the consortium of Class Counsel
- the affidavits dated May 18, 2017 (86 pages), February 20, 2019 (31 pages) and December 3, 2019 (10 pages) of **Carol Osler**. Dr. Osler is a financial economist and a professor at Brandeis International Business School of Brandeis University. She is the Martin and Ahuva Gross Professor of Financial Markets and Institutions. She has a Ph.D. in economics (Princeton University). She is an expert on Foreign Exchange Markets. She was formerly employed at the Federal Reserve Bank of New York, where she was a Research Economist on the foreign exchange desk. In the United States, she has been retained by the Department of Justice ("DOJ") to investigate price-fixing in FX (foreign exchange) markets. She has presented to the Organization for Economic Co-operation and Development (OECD) on foreign exchange trading. Dr. Osler was cross-examined.
- the affidavit dated November 24, 2017 (5 exhibits, 66 pages) of **Ronald Podolny**, a lawyer of Siskinds LLP, a member of the consortium of Class Counsel.
- the affidavit dated May 24, 2016 (56 exhibits, 2,580 pages) of the Plaintiff **Christopher Staines**. Mr. Staines was cross-examined.
- the affidavits dated October 26, 2017 and April 5, 2017 of **Charles M. Wright**, a lawyer of Siskinds LLP.

[15] In a settlement approval motion in this proceeding, the Plaintiffs filed an affidavit dated March 31, 2017 of **Ilias Tsiakas**. The Defendants referred to this affidavit on the Certification Motion. Professor Tsiakas, Professor of Finance at the University of Guelph and an expert in

[2] 2013 SCC 57.
[3] 2013 SCC 58.
[4] 2013 SCC 59.
[5] 2019 SCC 42.

Foreign Exchange Markets. He obtained a PhD in Economics from the University of Toronto in 2001 and subsequently joined Warwick Business School in the U.K., where he was Assistant Professor of Finance and promoted to Associate Professor of Finance, as well as serving as Director of the Warwick PhD in Finance program. He joined the University of Guelph in July 2010 as tenured Associate Professor of Finance and was promoted to Full Professor in July 2016. He has published numerous papers on exchange rates, including in the Journal of Financial Economics and the Review of Financial Studies, and published two chapters in the Handbook of Exchange Rates.

[16] The Defendants resisted the motion for certification with the following evidentiary record:

- the affidavit of **Sonja Pavic** (10 exhibits, 612 pages) dated December 5, 2018. Ms. Pavic is an associate lawyer of Osler Hoskin & Harcourt LLP, counsel for RBC.
- the affidavits and reports of **Margaret F. Sanderson** dated December 10, 2018 (2 exhibits, 83 pages) and October 24, 2019 (30 pages) . Ms. Sanderson is Vice President and Practice Leader of Charles River Associates' Antitrust and Competition Economics Practice. She has over thirty years' experience in examining the competitive effects of price-fixing conspiracies. She was an investigator with the Competition Bureau. She has testified in federal and provincial civil proceedings, including in other class actions, as well as before the Competition Tribunal. Ms. Sanderson was cross-examined.
- the affidavits and reports of **Nicholas J. Weir** dated December 10, 2018 (117 pages) and October 23, 2019 (112 pages). Mr. Weir is the Vice President of the Financial Markets Practice at Charles River Associates. He has been involved in FX trading and commodities trading for over twenty years and advises clients on FX trading and commodities issues. He has been an expert witness in in the United States of America in both civil and regulatory proceedings. Mr. Weir was cross-examined.

C. Procedural Background

[17] The proposed Class Counsel are a consortium of: (a) Camp, Fiorante, Matthews, Mogerman; (b) Koskie Minsky LLP; (c) Siskinds LLP, and (d) Sotos LLP.

[18] On September 11, 2015, the action was commenced. The Plaintiffs sue (1) Royal Bank of Canada, RBC Capital Markets LLC; (2) Bank of America Corporation, Bank of America, N.A., Bank of America Canada, Bank of America National Association; (3) The Bank of Tokyo Mitsubishi UFJ Ltd., Bank of Tokyo-Mitsubishi UFJ (Canada); (4) Barclays Bank PLC, Barclays Capital Inc., Barclays Capital Canada Inc.; (5) BNP Paribas, BNP Paribas (Canada), BNP Paribas Group, BNP Paribas North America Inc.; (6) Citibank, N.A., Citibank Canada, Citigroup Global Markets Canada Inc., Citigroup, Inc.; (7) Credit Suisse Group AG, Credit Suisse Securities (USA) LLC, Credit Suisse AG, Credit Suisse Securities (Canada), Inc.; (8) Deutsche Bank AG; (9) The Goldman Sachs Group, Inc., Goldman, Sachs & Co., Goldman Sachs Canada Inc.; (10) HSBC Holdings PLC, HSBC Bank PLC, HSBC North America Holdings Inc., HSBC Bank USA, N.A., HSBC Bank Canada; (11) J.P. Morgan Canada, JPMorgan Chase Bank National Association, JPMorgan Chase & Co., J.P. Morgan Bank Canada; (12) Morgan Stanley, Morgan Stanley Canada Limited; (13) Royal Bank of Scotland Group PLC, RBS Securities, Inc., Royal Bank of Scotland N.V., Royal Bank of Scotland PLC; (14) Société Générale S.A., Société Générale (Canada),

Société Générale; (15) Standard Chartered PLC; (16) UBS AG, UBS Securities LLC and UBS Bank (Canada); (17) Bank of Montreal, BMO Financial Corp., BMO Harris Bank N.A., BMO Capital Markets Limited; and (18) Toronto Dominion Bank, TD Bank, N.A., TD Group Holdings, LLC, TD Bank USA, N.A. and TD Securities Limited.

[19] The Plaintiffs allege that the Defendants conspired to fix, raise, maintain, stabilize, control, or unreasonably enhance the prices of currency purchased in the foreign exchange foreign currency market.

[20] The Plaintiffs and proposed Representative Plaintiffs are:

- Joseph S. Mancinelli, Carmen Principato, Douglas Serroul, Luigi Carrozzi, Manuel Bastos, and Jack Oliveira in their capacity as the Trustees (the "Trustees") of the Labourers' Pension Fund of Central and Eastern Canada (the "Labourers Fund"); and
- Christopher Staines.

[21] The Plaintiffs assert five causes of action: (a) a statutory cause of action under sections 36 and 45 of the *Competition Act*;[6] (b) unlawful means conspiracy; (c) predominant purpose conspiracy; (d) unjust enrichment; and (e) waiver of tort.

[22] The Plaintiffs' claim for relief is as follows:

> The plaintiffs claims on behalf of himself and other members of the proposed Class […]
>
> (a) A declaration that the defendants conspired, agreed and/or arranged with each other to fix, maintain, increase, control, or unreasonably enhance the price of foreign exchange purchased in the foreign exchange market during the Class Period […]
>
> (b) Damages or compensation in an amount not exceeding $1,000,000,000 for:
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> > (i) loss and damage suffered as a result of conduct contrary to Part VI of the *Competition Act*, RSC 1985, c C-34 ("Competition Act");
> >
> > (ii) civil conspiracy;
> >
> > (iii) unjust enrichment; and
> >
> > (iv) waiver of tort;
>
> (c) Punitive, exemplary and aggravated damages in the amount of $50,000,000;
>
> (d) An equitable rate of interest on all sums found due and owing to the plaintiffs and other class members or, in the alternative, pre- and postjudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
>
> (e) Investigative costs and costs of this proceeding on a full-indemnity basis pursuant to section 36 of the *Competition Act*; and (f) Such further and other relief as this Honourable Court deems just.

[23] The proposed class definition is:

> All persons in Canada who, between January 1, 2003 and December 31, 2013 (the "Class Period"), entered into an FX Instrument[1] either directly or indirectly through an intermediary, and/or purchased or otherwise participates in an investment or equity fund, mutual fund, hedge fund,

[6] R.S.C. 1985, c. 34.

pension fund or any other investment vehicle that entered into an FX Instrument. Excluded from the class are the defendants, their parent companies, subsidiaries, and affiliates.

[1] "FX Instruments" includes FX Spot Transactions, Outright Forwards, FX Swaps, FX Options, FX Futures Contracts, Options on FX Futures Contracts, and other instruments traded in the FX Market in Canada or on a Canadian exchange.

[24] The duration of the Class Period is eleven years, 4018 days.

[25] The Plaintiffs propose the following common issues:

Breach of the Competition Act

(i) Did the defendants, or any of them, engage in conduct which is contrary to ss. 45 and/or 46 of the *Competition Act*, R.S.C. 1985, c. 34 (the "*Competition Act*")?

(ii) What damages, if any, are payable by the defendants to the Class Members pursuant to s. 36 of the *Competition Act*?

(iii) Should the defendants, or any of them, pay the full costs, or any, of the investigation into this matter pursuant to s. 36 of the *Competition Act*?

Conspiracy

(iv) Did the defendants, or any of them, conspire to harm the Class Members?

(v) Did the defendants, or any of them, act in furtherance of the conspiracy?

(vi) Was the predominant purpose of the conspiracy to harm the Class Members?

(vii) Did the conspiracy involve unlawful acts?

(viii) Did the defendants, or any of them, know that the conspiracy would likely cause injury to the Class Members?

(ix) Did the Class Members suffer economic loss?

(x) What damages, if any, are payable by the defendants, or any of them, to the Class Members?

Unjust Enrichment and Waiver of Tort

(xi) Have the defendants, or any of them, been unjustly enriched by the conduct alleged?

(xii) Have the Class Members suffered a corresponding deprivation as a result of the conduct alleged?

(xiii) Is there a juridical reason why the defendants, or any of them, should be entitled to retain the overcharge obtained as a result of the conduct alleged?

(xiv) What restitution, if any, is payable by the defendants, or any of them, to the Class Members based on unjust enrichment?

(xv) What restitution, if any, is payable by the defendants, or any of them, to Class Members based on the doctrine of waiver of tort?

(xvi) Are the defendants, or any of them, liable to account to the Class Members for the wrongful profits that they obtained based on the doctrine of waiver of tort?

Punitive Damages

(xviii) Are the defendants, or any of them, liable to pay punitive or exemplary damages having regard to the nature of their conduct and if so, what amount and to whom?

Interest

(xvi) What is the liability, if any, of the defendants, or any of them, for court ordered interest?

[26] In 2016 and 2017, there were four rounds of settlement approvals after consent certifications for settlement purposes.[7] In the first round of settlements, this court approved settlements with three groups of Defendants: (a) UBS AG, UBS Securities LLC and UBS Bank (Canada) ("UBS"); (b) BNP Paribas Group, BNP Paribas North America Inc., BNP Paribas (Canada), and BNP Paribas ("BNP"); and (c) Bank of America Corporation, Bank of America, N.A., Bank of America Canada and Bank of America National Association ("Bank of America"). In the first round of settlements, the Plaintiffs recovered $16 million for the Class Members: UBS paid $5.0 million; BNP paid $4.5 million; and Bank of America paid $6.5 million.

[27] In the second round of settlements, the Plaintiffs reached settlements with three more groups of Defendants: (a) The Goldman Sachs Group, Inc., Goldman, Sachs & Co., and Goldman Sachs Canada Inc. ("Goldman Sachs"); (b) JPMorgan Chase & Co., J.P. Morgan Bank Canada, J.P. Morgan Canada, and JPMorgan Chase Bank National Association ("JPMorgan"); and (c) Citigroup, Inc., Citibank, N.A., Citibank Canada, and Citigroup Global Markets Canada Inc. ("Citibank"). In the second round of settlements, the Plaintiffs recovered $39.3 million for the Class Members: Goldman Sachs paid $6.8 million; JP Morgan paid $11.5 million; and Citibank paid $21 million.

[28] In the third and fourth rounds of settlements, the Plaintiffs reached settlements with six more groups of Defendants: (a) Barclays Bank PLC, Barclays Capital Inc., and Barclays Capital Canada Inc. ("Barclays"); (c) HSBC Holdings PLC, HSBC Bank PLC, HSBC North America Holdings Inc., HSBC Bank USA, N.A., and HSBC Bank Canada ("HSBC"); (c) Royal Bank of Scotland Group PLC, RBS Securities, Inc., Royal Bank of Scotland N.V., and Royal Bank of Scotland PLC ("RBS"); (c) Standard Chartered plc; (e) The Bank OF Tokyo Mitsubishi UFJ LTD. and Bank of Tokyo-Mitsubishi UFJ (Canada) ("BTMU"); and (f) Société Générale S.A., Société Générale (Canada), Société Générale ("SocGen"). In the third and fourth round of settlements, the Plaintiffs recovered $51.5 million for the Class Members: Barclays paid $19.7 million; HSBC paid $15.5 million; RBS paid $13.2 million; Standard Chartered plc paid $0.9 million; BTMU paid $0.45 million; and SocGen paid $1.8 million.

[29] In my Reasons for Decision for the settlement approval for the first round of settlements, I noted that for future settlement approval motions, the Court would require additional information on the Plaintiffs' calculation of damages. In my Reasons for Decision, *Mancinelli v. Royal Bank of Canada*,[8] I stated at paras. 34 and 35:

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[7] *Mancinelli v. Royal Bank of Canada*, 2016 ONSC 6953 (Settlement Approval No. 1); *Mancinelli v. Royal Bank of Canada* 2017 ONSC 2324 (Settlement Approval No. 2); *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 5503 (Settlement Approval Nos. 3 & 4).

[8] 2016 ONSC 6953 (Settlement Approval No. 1).

> 34. Like the objector, I was concerned that at this early juncture of this class proceeding, there was insufficient information about the amount of the settlements being reasonable having regard to the actual damages allegedly suffered by the Class Members, which has not yet been quantified.
>
> 35. Nevertheless, having regard to the information that was available from the proceedings in the United States and having regard to the Defendants' minority share of the Canadian market and keeping in mind the very significant litigation risks and also the value to be attributed to the Settling Defendants' co-operation in prosecuting the claims against the non-Settling Defendants who command 85% of the marketplace, I am satisfied that the amount of these early settlements is fair and reasonable. I will, however, expect more information about the methodology of the Plaintiffs' calculation of damages if there are more settlements.

[30] For the second round of settlement approvals, the Plaintiffs retained Professor Ilias Tsiakas to provide an estimate on the range of potential damages suffered by members of the putative class. Professor Tsiakas estimated a range of total damages between $155 million and $619.9 million between 2008 and 2013 (i.e., the period that was the subject of regulatory findings) and between $270 million and $1,089 million (approximately $1 billion) for the entire Class Period. Based on Professor Tsiakas's opinion, Class Members lost between $270 million and $1 billion.

[31] On May 1, 2018, RBC delivered its Statement of Defence denying the Plaintiffs' allegations of wrongdoing.

[32] On May 2, 2018, Deutsche Bank delivered its Statement of Defence denying the Plaintiffs' allegations of wrongdoing.

[33] On May 3, 2018, Credit Suisse delivered its Statement of Defence denying the Plaintiffs' allegations of wrongdoing.

[34] In July 2018, the Plaintiffs were granted approval for a Distribution Protocol to govern how the $107 million of net proceeds of court-approved settlements were to be distributed among the Class Members.[9] Under the Distribution Protocol Direct Purchaser Class Members had to provide documentation to allow the Claims Administrator to analyze their claim, and therefore, their payout, on a trade-by-trade basis. For Investor Class Members, the documentation simply had to establish that they held funds in certain investment vehicles during the Class Period.

[35] On December 5, 2018, TD delivered its Statement of Defence denying the Plaintiffs' allegations of wrongdoing.

[36] In late 2018 and early 2019, the Plaintiffs reached a thirteenth settlement, this time with Morgan Stanley. The settlement required Morgan Stanley to pay USD$2.3 million for the benefit of the settlement class and to provide cooperation in the prosecution of the case against the remaining Defendants.[10]

[37] Meanwhile, the Claims Administrator was distributing the settlement proceeds. The Administrator noted, however, that two-thirds of Class Members who had submitted claims had not provided proper documentation, despite good-faith efforts to submit claims. The take-up of the settlement funds was disappointing low.

[38] In August 2019, because of the poor take-up and administrative problems that were

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[9] *Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4192 (distribution protocol).
[10] *Mancinelli v. Royal Bank of Canada*, 2019 ONSC 626 (settlement approval No. 5).

impeding a healthy take-up, the Plaintiffs brought a motion to amend the Distribution Protocol, which I approved. The amendments included: (a) implementing bulk filing, which involves creating a claims portal that would allow institutional Investor Class Members to file claims simultaneously on behalf of multiple entities; (b) removing the documentation requirement for all Claimants in favour of post-submission audits; (c) extending the deadline for filing claims from August 19, 2019 to December 31, 2019; and (d) publishing an additional notice of the distribution plan.

[39] On November 11, 2019, the Plaintiffs delivered their Reply to the Statements of Defence.

[40] There is a pending settlement approval motion with respect to BMO.

[41] On February 24-26, 2020, the motion for certification proceeded against five groups of Defendants, including BMO, for which I am reserving judgment.

D. Facts: The Parties

[42] The **Labourers' Pension Fund of Central and Eastern Canada** is a Canadian multi-employer pension fund providing benefits for employees working in the construction industry. The Labourers' Fund is a union-negotiated, defined benefit pension plan, established on February 23, 1972. The pension plan currently has approximately $5 billion in assets, over 100,000 members and over 19,000 pensioners and beneficiaries. A board of trustees representing members of the pension plan governs the fund. The plan is registered under the *Pension Benefits Act* and the *Income Tax Act*.

[43] As will be explained further below, the Labourers' Fund is the nominee as a Representative Plaintiff to represent what is identified in the class definition as direct purchasers of FX instruments, which group I shall describe as the Direct Purchaser Class Members.

[44] During the Class Period, the Labourers' Fund entered into thousands of transactions of FX Instruments, including Spot Transactions, Forwards, and Options. Deutsche Bank and RBC were counterparties to many of these transactions. The trading was undertaken by portfolio managers, who executed FX trades on behalf of the Labourers' Fund and who used FX brokers to find counterparties who made the FX trades on behalf of the Fund.

[45] **Christopher Staines** is an individual investor. He is a so-called "Indirect Purchaser" of FX Instruments. He is a nominee as a Representative Plaintiff to represent what is identified in the class definition as Indirect Purchasers of FX instruments. As noted above, I shall refer to the group of Indirect Purchaser Class Members as the Investor Class Members.

[46] For what follows, it should be noted that Investor Class Members are not indirect purchasers in the sense that that term has been used in other competition law cases. In those cases, the indirect purchasers were "downstream individual purchasers [who] seek recovery for alleged unlawful overcharges that were passed on to them through the successive links in the [distribution] chain".[11]

[47] Mr. Staines was not a downstream purchaser. During the Class Period, Mr. Staines purchased units in mutual funds that hedged against fluctuations in foreign exchange currencies,

[11] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 1.

including the US dollar. The mutual funds were organized as trusts and the trading decisions were made by the trustees or by others hired by the trustees to trade on behalf of the mutual fund. Mr. Staines held units in eight different mutual funds between 2007 and 2013. The mutual fund units were denominated in Canadian dollars. He alleges that his mutual funds entered into FX Instruments. Prospectuses for a subset of Mr. Staines' investments reveal two types of potential foreign exchange activity: (a) the trading of foreign currency; and (b) hedging against foreign currency risk by using derivatives such as swaps, options, futures, and forward contracts.

[48] The Defendant **Credit Suisse** is: (a) Credit Suisse Group AG, a Swiss company headquartered in Zurich, Switzerland; (b) Credit Suisse Securities (USA) LLC, a Delaware limited liability company headquartered in New York, New York and a wholly-owned subsidiary of Credit Suisse Group AG; (c) Credit Suisse AG, a Schedule III bank under the *Bank Act*; and, (d) Credit Suisse Securities (Canada), Inc. a wholly-owned Ontario corporation subsidiary of Credit Suisse Group AG headquartered in Toronto, Ontario.

[49] The Defendant **Deutsche Bank AG** is a German financial services company headquartered in Frankfurt, Germany and a Schedule III bank under the *Bank Act*.

[50] The Defendant **RBC** is: (a) the Royal Bank of Canada, a bank regulated in Canada under the *Bank Act* as a Schedule I bank, with its head office in Toronto, Ontario; (b) RBC Capital Markets LLC, a Minnesota limited liability company, with its principal place of business and headquarters in New York, New York. RBC Capital Markets LLC is a wholly owned subsidiary of the Royal Bank of Canada.

[51] The Defendant **TD** is: (a) the Toronto Dominion Bank, a Schedule I bank under the *Bank Act* with its head office in Toronto, Ontario; (b) TD Bank, N.A., a Delaware corporation headquartered in Cherry Hill, New Jersey and a wholly-owned subsidiary of Toronto Dominion Bank; (c) TD Group US Holdings LLC, a Delaware corporation headquartered in New York, New York and a wholly-owned subsidiary of Toronto Dominion Bank; and (d) TD Bank USA, N.A. a Delaware corporation headquartered in Wilmington, Delaware and a wholly-owned subsidiary of Toronto Dominion Bank.

E. Facts: The Foreign Exchange (FX) Market

[52] Foreign exchange is the buying and selling of currency, or the exchange of one country's currency for another. It is an essential component of international investing, international finance, and international trade in goods and services.

[53] The Foreign Exchange Market is the largest and most active financial market in the world, with average daily trading in excess of US $5 trillion. The FX Market operates 24 hours a day around the world. In contrast to a stock market, in the FX Market, there is no "closing price." because the FX Market operates 24 hours a day.

[54] Over the eleven years of the Class Period, the aggregate of the trading would have been approximately $20.1 Quadrillion.

[55] There are three types of FX Instruments that account for the majority of FX transactions on the FX Market:

- "Spot" - an agreement to exchange sums of currency at an agreed-on exchange rate on a

value date that is within two bank business days.

- "Outright Forward - an agreement to exchange sums of currency at an agreed-on exchange rate on a value date that will be in more than two bank business days. The exchange rate for a forward transaction is called the Forward Outright.
- "FX Swap - A combination of a Spot Transaction plus an Outright Forward done simultaneously, but in the opposite direction.

[56] The Spot is the most important type of instrument. Outright Forwards and FX Swaps derive from the Spot Price and move with it.

[57] The overwhelming majority of FX trades are direct "over-the-counter" transactions with a purchaser dealing directly with a dealer counterparty, such as one of the Defendants. Dealers are intermediaries through whom parties purchase and sell a variety of FX Instruments in bi-lateral transactions. Approximately 98% of FX trading occurs through bilateral transactions between counterparties.

[58] The trading takes place largely in an unregulated and opaque market unlike a stock market. There is no centralized exchange that collects and posts real-time trade information such as order flows and volume.

[59] The dealers' customers are generally divided into three grounds: (a) government customers; (b) financial customers; and, (c) commercial customers. Commercial customers include multinational firms, large regional firms and small-and-medium sized enterprises. Commercial customers use foreign currencies to pay for imported products or services or as the invoice price for exports.

[60] FX Instruments do not have fixed "prices". A party wishing to trade a currency may seek a quote by placing an order by contacting the dealer's salesperson (a "Voice Transaction") or by using a dealer's proprietary electronic trading platform (an "Electronic Transaction").

[61] In economic terms, the dealers "sell" the service of providing liquidity. This service enables customers to trade quickly and inexpensively.

[62] In economic terms services are different from goods. Goods are physical tangible products and services are the activity of performing work for others. Goods are usually uniform or standardized, while services are usually unique because they involve an interpersonal interaction between the service provider and the customer. Liquidity allows a customer to purchase or sell an asset, in this case the asset is currency. Dealers are not compensated through fees or commissions. They make money by purchasing currency at a low price (the "bid" price) and selling currency at a higher price (the "ask price"). The Defendants in the immediate case on average controlled 65% of trading in Canadian currency during the Class Period.

[63] Typically, the dealer quotes a "bid" (the price it will buy a particular currency in exchange for another currency) and an "ask" (the price it will sell a particular currency in exchange for the other currency). The difference between the dealer's bid and the dealer's ask is called the "bidask spread" or simply the "Spread". The dealer earns revenue by the difference (the Spread) between the bid and ask.

[64] The Spread for a customer is marked up relative to the rates at which dealers trade with

each other. It is typical to look at the customer's cost on a single trade as half the Spread, which is the sum of the interdealer half Spread and the customer's markup. Customer markups vary based on established criteria such as prevailing volatility, the currency pair at issue, and the type of customer. The most sophisticated customers, like hedge funds and brokers, pay the lowest markups while small and medium sized enterprises pay the most.

[65] When a customer accepts a dealer's quote, that dealer accepts the risk for any change in the currency's price that may occur before the trader can trade with other traders in the "intertrader market" and fill the customer's order by selling the currency the customer has agreed to sell in exchange and by purchasing the currency the customer has agreed to buy. The dealer could lose money if the exchange rate changes before the dealer transfers the currency inventory just acquired.

[66] The price of a dealer's liquidity services varies across time, across customers, and across currencies. Customer prices depend upon on the type of customer.

[67] A dealer typically has traders on multiple trading places around the world. To ensure consistent pricing, banks create spread matrices that list markups for trades of different sizes in different currencies and for different types of customers.

[68] Because there is no actual fixed exchange rate for any specific currency pair at any particular point in time, some market participants find it convenient to have a shared metric available. Thus, independent third parties have developed and publish daily "benchmark" exchange rates for various currency pairs (defined as "Fixes" or, individually, as a "Fix"). These benchmark exchange rates are used to estimate the market price for a currency pair at the time of each Fix. For example, there is the European Central Bank Fix, which occurs each trading day at 2:15 PM (CET) and the World Markets/Reuters Fix, which occurs each trading day at 4:00 PM (GMT).

[69] Dealing in the FX Market is dominated by a small number of large banks.

[70] The FX Market displays five characteristics economists identify as enhancing the likely impact of collusion: (a) the product is standardized and commodity-like; (b) there are few economic substitutes for the product; (c) the market is relatively concentrated, meaning a small number of agents account for a large share of transactions; (d) barriers to entry limit the ability of outside agents to quickly enter and erode supra-competitive prices; and (e) sellers often exchange information with each other.

F. Facts: The Plaintiffs' Allegations

[71] In the Second Amended Statement of Claim, the Plaintiffs allege that beginning at least as early as January 1, 2003, and continuing until at least December 31, 2013 (eleven years), the Defendants conspired, combined, agreed, and arranged to:

- fix, maintain, increase, control, and enhance unreasonably prices of FX Instruments on a daily or nearly daily basis;
- limit unduly the supply or dealing of FX Instruments and to fix, maintain, control, and lessen the supply of FX Instruments; and

- prevent or lessen, unduly, competition in the purchase, sale, or supply of FX Instruments, and to otherwise restrain or injure unduly competition in FX Instruments.

[72] The Plaintiffs allege that the Defendants' conspiracy encompassed:

- price fixing of bid/ask Spreads;
- price fixing various Fixes, including, but not limited to, WM/Reuters benchmark rates and the ECB reference rate; and,
- other collusive conduct, such as controlling or manipulating the FX Spot Price to trigger client stop-loss orders and limit orders.

[73] The Plaintiffs allege that the Defendants' conspiracy affected dozens of currency pairs. For reasons that will become apparent later it is worth noting that there are hundreds of currency pairs. The United Nations currently recognizes 180 currencies that are used in 195 countries across the world.

[74] Although I would not hold the Plaintiffs' Counsel to what was just a guestimate, Mr. Wright, one of the Plaintiffs' Counsel stated in evidence filed with this Court that based on Class Counsel's investigation up to 5% of FX Instrument trades may have been impacted by the alleged wrongful conduct.

[75] (I pause to parenthetically note that by my reckoning, 5% of FX Instruments trades over the eleven years of the Class Period would be approximately $1.0 Quadrillion of trades. The Plaintiffs, however, limit their claim to a maximum of $1.0 billion, which is $0.000,001 Quadrillion.)

[76] The Plaintiffs allege that the Defendants used various electronic communication platforms to give effect to the conspiracy and to improperly share confidential information about customer orders. These electronic communication platforms included chatrooms. These chatrooms were sometimes exclusive and invitation-only.

[77] The Plaintiffs allege that to carry out the conspiracy, the Defendants communicated directly with each other through chatrooms with names such as "The Cartel," "The Bandits' Club," and "The Mafia" for the purpose of coordinating the prices offered to customers trading in the FX Market and to manipulate various FX benchmark rates, including the WM/Reuters Fix. The Plaintiffs allege that the Defendants exchanged confidential customer information so that chatroom participants could profit at their customers' expense.

[78] The Plaintiffs allege that the Defendants formed these chatrooms with the specific intent of colluding with each other to manipulate the FX Market. Using the chatrooms, the Defendants: (a) improperly shared confidential client and proprietary trading information; (b) coordinated trading to influence the FX rates; (c) monitored the conduct of co-conspirators to ensure secrecy and compliance with the conspiracy; (d) used code names and intentionally misspelled words to evade detection; and (e) agreed to "stand down" by holding off buying or selling currency to benefit co-conspirators.

[79] The Plaintiffs allege that the fixing of FX Spot Prices, including benchmark rates, directly impacted the prices of exchange-traded FX Futures and Option contracts.

[80] In the immediate case, the conduct of some of the Defendants who have settled and the

conduct of the non-settled Defendants in these chatrooms has been the subject of criminal and regulatory investigations in the United States, United Kingdom, and elsewhere.

[81] The Commodity Futures Trading Commission in the United States (the "CFTC") found that FX traders at some banks disclosed confidential customer order information and trading positions, altered trading positions to accommodate the interests of the collective group, and agreed on trading strategies as part of an effort by the group to attempt to manipulate FX benchmark rates.

[82] The United States Office of the Comptroller of the Currency (the "OCC") found that traders at certain banks held discussions in online chatrooms about coordinating FX trading strategies to manipulate exchange rates to benefit traders or the bank. The traders also: (a) disclosed confidential bank information, including customer orders and Spreads; (b) discussed activity to trigger trading actions potentially detrimental to customers and beneficial to the trader or bank; and, and (c) discussed pending orders and agreed not to trade in particular currencies.

[83] The United States Department of Justice (the "DOJ") conducted a criminal investigation. According to the plea agreements by certain banks with the DOJ, FX traders used an exclusive electronic chatroom and coded language to manipulate benchmark exchange rates set through the Fixes. Dealer banks used their exclusive electronic chatrooms to manipulate the euro-dollar exchange rate by agreeing to withhold bids or offers for euros or dollars to avoid moving the exchange rate in a direction adverse to open positions held by co-conspirators.

[84] The US Federal Reserve (the "Fed") found that, as a result of deficient policies and procedures, banks engaged in unsafe and unsound conduct by failing to detect and address improper actions by their traders. These actions included the disclosure in electronic chatrooms of confidential customer information to traders at other organizations.

[85] In the immediate case the four remaining Defendants have been the subject of regulatory investigations for their conduct in chatrooms. In particular:

[86] On November 13, 2017, Credit Suisse entered into a consent order with the New York State Department of Financial Services ("NYDFS") relating to the manipulation of the FX Market. The NYDSF found Credit Suisse inappropriately shared information with other global banks and this sharing of information may have led to coordinated trading, manipulation of exchange rates, and increased Spreads offered to customers in Credit Suisse's foreign exchange business.

[87] On April 20, 2017, the Fed issued an Order to Cease and Desist against Deutsche Bank. The Fed found that that Deutsche Bank's traders engaged in unsafe and unsound conduct in communications in multibank chatrooms consisting of: (a) disclosures of trading positions and, discussions of coordinated trading strategies with traders of other institutions; (b) discussions about possible FX benchmark fix-related trading with traders of other institutions; (c) attempts to influence contributions to submission-based foreign currency benchmarks in certain emerging market currencies; (d) discussions about bid/ask Spreads offered to FX customers for FX non-deliverable forward contracts in an emerging market currency; and (e) discussions on trading in a manner to trigger or defend certain FX barrier options.

[88] On August 23, 2019, RBC entered into a settlement agreement with the Ontario Securities Commission ("OSC") relating to its FX trading practices. RBC admitted that from 2011 to 2013, its traders regularly provided confidential information to, and received confidential information from, the traders of other financial institutions, including in respect of the existence of customer

stop loss orders. This sharing of confidential information occurred in chatrooms and in bi-lateral chats. RBC made a "voluntary payment" of $13.5 million to the OSC, plus costs in the amount of $800,000.

[89] On August 23, 2019, TD entered into a settlement agreement with the OSC relating to its FX trading practices. TD admitted that from 2011 to 2013, its traders regularly provided confidential information to, and received confidential information from, the traders of other financial institutions, including in respect of the existence of customer stop loss orders. This sharing of confidential information occurred in Multi-Dealer Chatrooms and in bi-lateral chats. TD made a "voluntary payment" of $9.3 million to the OSC, plus costs in the amount of $800,000.

G. The Expert Evidence

1. Introduction

[90] The Plaintiffs proffered three expert reports from Dr. Carol Osler, the first dated May 2017, the second dated February 2019, and the third dated December 2019. Dr. Osler was cross-examined.

[91] The Defendants submitted four expert reports, two dated December 2018 and October 2019 respectively from Ms. Sanderson and two dated December 2018 and October 2019 respectively from Mr. Weir.

[92] I am admitting the Sur-Reply reports of Ms. Sanderson and Mr. Weir notwithstanding that the Defendants did not obtained leave to file the Sur-Replies, as required by Rule 25.01(5). I am also admitting Dr. Osler's Sur-Sur Reply Report of December 2019.

[93] The Defendants' expert's in their reports and the Defendants' lawyers in their cross-examination and in their factum for the certification motion launched what might be described as a land, sea, submarine, air, and outer space attack against Dr. Osler's opinion. By my reckoning approximately 33%, fifty-three of the 49 paragraphs (29 pages) of the 181 paragraphs of the factum and a 4-page schedule of hypothetical scenarios that is an appendix to the 99-page factum are aimed at attacking Dr. Osler. The Defendants attack her qualifications, her practical experience, her expertise, her academic publishing, the availability of data for her methodologies, and the assumptions, feasibility, utility, reliability, and probity of her proposed methodologies and opinions.

[94] And in their attack on Dr. Osler, the Defendants lawyers make a big deal of the fact that Mr. Weir and Ms. Sanderson were not cross-examined on their blistering attack on Dr. Osler. And the Defendants' lawyers boast exuberantly about the experience and expertise of the untested by cross-examination Mr. Weir and Ms. Sanderson.

[95] However, courts including the highest courts in the land have frowned upon motions judges determining at a certification motion the reliability and utility of an expert's methodology as part of a certification motion. On a certification motion, there is to be no full-fledged battle of the experts and a plaintiff need only show a credible or plausible methodology for proving class-wide issues. The threshold is a low one, and conflicting expert evidence is not to be given the level of

scrutiny to which it would be subject at a trial.[12] I agree with Justice Rady's comments in *Crosslink Technology Inc. v. BASF Canada,*[13] at paragraph 110, where she stated:

> 110. Turning then to the proposed methodology. I begin by reiterating that the court is ill equipped at this stage of the proceeding to engage in a finely calibrated assessment of evidentiary weight, to borrow from *Hague v. Liberty Mutual Insurance Co*., [2004] O.J. No. 3057 (S.C.J.). The *Pro-Sys* decision underscores that it is not necessary for the motion judge to resolve conflicts between the experts. Indeed, it would be exceedingly difficult to do so unless the inadequacy of the expert's opinion were patently obvious. This is very complex evidence, which requires a considerable degree of sophistication in order to understand it. Part of an expert's role is to assist the court in understanding the underlying science, engineering, medicine – or as in this case, the statistical and economic foundation for the opinion. At this stage of the proceeding, it bears repeating that the motions judge does not have that assistance and is therefore ill-equipped to resolve conflicts, particularly on the basis of a paper record and without the benefit of the interaction that occurs during viva voce testimony. I think it would be incorrect to reject either expert's opinion, and the case should be permitted to go forward because a plausible methodology is before court. The Concise Oxford English Dictionary defines plausible as "apparently reasonable or probable, without being necessarily so". Put another way, the expert evidence raises a triable issue.

[96] Given that this is the procedural law of the land, it is understandable that the Plaintiffs did not bother to cross-examine Mr. Weir and Ms. Sanderson, and I do not accept Mr. Weir's and Ms. Sanderson's as proven or probative simply because it has not undergone cross-examination. I do accept it as relevant to whether there is some basis in fact for the certification criteria. I foreshadow my conclusions to say that notwithstanding the untested barrage of criticisms made by Mr. Weir and Ms. Sanderson, Dr. Osler's evidence met the standard set by the case law and I conclude that there is some basis in fact for her conclusions and her methodology.

2. Carol Osler

[97] The Plaintiffs obtained an expert opinion from Dr. Osler on the identification of conspiratorial activities by the Defendants and about methodologies to assess the damages, which is to say the harm caused by those conspiratorial collusive activities. Dr. Osler was asked to address the extent to which Class Members have been impacted by the conspiracy. She was asked whether there are methods to estimate the damages that are common to the Class Members.

[98] It was Dr. Osler's opinion that:

- If the Class proves that the Defendants colluded to widen Spreads, Class Members who transacted directly with bank dealers would have paid more for the service of liquidity than they otherwise would have paid.
- If the Class proves that the Fix was manipulated, many Class Members placing orders to trade at Fix prices would have paid excessively high prices, or earned excessively low amounts, on days with Fix manipulation. Class Members making Spot trades around

[12] *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57; *Shah v. LG Chem, Ltd.*, 2015 ONSC 6148; *Crosslink Technology Inc. v. BASF Canada*, 2014 ONSC 4529; *Ontario v. Rothmans Inc*., 2011 ONSC 2504; *Steele v. Toyota Canada Inc*., 2011 BCCA 98, leave to appeal to S.C.C. refused [2011] S.C.C.A. No. 200; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*., 2009 BCCA 503, leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 32 (S.C.C.).

[13] 2014 ONSC 4529

the Fix and executing certain derivative transactions would have also experienced losses.

- If the Class proves that the Fix was manipulated, distorted Fix prices would have been passed through directly to mutual-fund values and thus to those trading into or out of mutual funds.
- Fix manipulation would have brought heightened volatility that would have been injurious to all Class Members.

[99] It was Dr. Osler's opinion that using accepted economic and statistical tools, including regression analysis, the damages caused by the Defendants' collusion to those who traded directly with the bank dealers or who traded mutual funds could be calculated.

[100] Dr. Osler said that the variables for the regression analysis for each trade were six fold; namely: (a) contemporaneous market volatility; (b) trade size; (c) whether a human rather than an electronic algorithm priced the transaction; (d) customer's trading activity; (e) share of customer's trades handled directly; and (f) customer's insights about upcoming price moves. But for prices could be calculated for each trade in the class period and compared with the actual prices on a trade-by-trade basis.

[101] Dr. Osler proposed methodologies to identify collusion with respect to bid-ask Spreads and collusion with respect to FX fix prices. Dr. Osler's methodologies may identify anomalous trading patterns which, in turn, can help identify when collusion may have taken place.

[102] Dr. Osler proposes two methodologies to estimate the overcharges for collusion over Spreads. These methodologies rely on estimating but-for Spreads using data from a non-collusive period before and after the Class Period. The first method would use average Spreads for trades in specific size ranges and involving specific customer types. The second method would construct a model to estimate but-for Spreads and use regression analysis to control for factors that might be relevant beyond trade size and customer type.

[103] Both methodologies involve identifying prices that would not have been affected by manipulation of the Fix itself. One methodology assumes the Spot Price would simply rise directly to the post-Fix level, reaching it exactly at the Fix-calculation time; the other uses regression analysis to identify the average path of Spot exchange rates on non-collusive dates for an interval surrounding the Fix.

[104] But-for Fix prices would be used: (a) to calculate damages on fill-at-Fix orders, certain Spot trades, and forward, futures and option contracts; (b) to calculate the damages from trading institutionally-managed funds at unit values distorted by the alleged Fix manipulation; and (c) to calculate the cost to Class Members from any increase in exchange rate volatility associated with Fix manipulation. But for calculations would be calculated separately for different currencies and different customer types because spreads vary across currencies and customer categories.

[105] For example, in her May 2017 report, Dr. Osler stated:

> 62. I have been asked to assume that the conduct alleged in the claim is true. The but-for half-spreads could, nonetheless, be used to aid in the detection of collusion. The average halfspreads for a given currency/customer-type/size category in the post-2013 period would be compared to the average half-spreads for the same category during the Class period. For hedge funds making medium-sized trades against euros, for example, one would compare a hedge fund's but-for half-spread for a medium-sized euro-dollar trade — $HSprd_{ButFor}(EUR,HF,Medium)$ — with the hedge fund's actual

> half-spread for a medium-sized euro-dollar trade — *HSprd(EUR,HF,Medium)*. Average but-for bid-ask half-spreads and average class-period halfspreads can be rigorously compared using standard statistical procedures. If the pattern is statistically unlikely in the absence of collusion, then collusion would be a reasonable inference.
>
> 63. Given the inherent noisiness of financial data, it could turn out that half-spreads were higher during the class period for some but not all currency/customer-type/size categories. For example, 40 out of 50 comparisons could indicate higher spreads during the class period. It is possible to calculate the likelihood that 40 of 50 comparisons have that outcome if there were no collusion. If that likelihood is low one can reasonably infer collusion.

[106] For what follows later in these Reasons for Decision, it is an important point to note that Dr. Osler's methodology would calculate losses to Class Members who directly transacted with Defendant banks. Her methods do not seek to assess pass-through of such losses to others down the chain of the use of the currency.

[107] Dr. Osler's methodology was based on her research and an unpublished paper that she wrote, known as the BKO paper. Her research relied on extraordinarily detailed data from a single bank. Mr. Weir one of the Defendant's expert witness criticized Dr. Osler's methodology because he said the required data would not be available from the Defendant banks, which do not systematically maintain records of the Spread, whether a trade resulted or not.

3. The Defendants' Expert Evidence

[108] The Defendants obtained expert opinions from Ms. Sanderson and Mr. Weir. The purport of their evidence was that over-the-counter trading in FX instruments was collusion proof, *i.e.*, not susceptible to manipulation.

[109] The Defendants' experts submitted that the number and idiosyncratic nature of the variables that factor into determining Spreads and/or pricing FX transactions, the arbitrage risk, and the sophistication of the market participants makes the Plaintiffs' allegations of collusion unfeasible.

[110] The Defendants' expert evidence was that each Spread quoted to a customer is a "bespoke manifestation" of at least 25 variables that a dealer considers in arriving at the quote, such as quantity, order type, currency pair(s), characteristics of the counterparty, and specific markup or commission arrangements that dynamically contribute to, and change, the value of a currency or currency pair every moment of every day.

[111] Based on their experts' evidence, the Defendants thus submitted that they could not collude to agree to a Spread for any currency pair to be paid by prospective customers because the width of the Spread, and the two-way price would be constantly changing in response to numerous uncontrollable variables. The Defendants submitted that the highly sophisticated customers that trade in foreign currencies continuously evaluate FX Spreads and would either arbitrage mispriced Spreads or move on to more competitive offers.

[112] The Defendants' experts opined that Fix rates are subject to complex validation checks to prevent distortion. The data used to determine a Fix is subject to currency specific systematic tolerance checks which will identify outlying data. Validation is performed on the outlying data by specialists, who will seek corroboration, or rely upon their own judgment to determine the

market level. The Fix is then subject to further currency specific tolerance checks prior to publication.

[113] Based on their experts' evidence, the Defendants submitted that Fixes are not susceptible to manipulation. In this regard, they noted that the dealers play no part in the calculation of the WM/Reuters, ECB, or any other Fix rate. They pointed out that the process used for capturing the information for the Fix and for calculating any particular Fix rate is confidential, protected by patent, and unknown to the public, including the Defendants and other FX Market participants.

[114] The Defendants' experts opined that even if the Plaintiffs' allegations of Fix manipulation were capable of being proven, there would be "winners" and "losers" within the Class and between the named Defendants arising from every manipulated Fix.

[115] Mr. Weir and Ms. Sanderson severely critique Dr. Osler's methodologies as not reflecting the realities of FX trading which is different from other activities that have been found to be subject to price-fixing. They critique her economic analysis of the FX trading and the feasibility and reliability of her methodologies, and when she defensively responded with a reply report, they responded with sur-reply expert reports continuing the attack.

H. Certification: Introduction and General Principles

[116] The court has no discretion and is required to certify an action as a class proceeding when the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (a) the pleadings disclose a cause of action; (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (c) the claims of the class members raise common issues; (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and (e) there is a representative plaintiff who: (i) would fairly and adequately represent the interests of the class; (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[117] For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers.[14]

[118] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding.[15] The test for certification is to be applied in a purposive and generous manner, to give effect to the goals of class actions; namely: (a) providing access to justice for litigants; (b) encouraging behaviour modification; and (c) promoting the efficient use of judicial resources.[16]

[119] The representative plaintiff must come forward with sufficient evidence to support

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[14] *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 at para. 14 (S.C.J.), leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).
[15] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16.
[16] *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 15 and 16; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 26 to 29.

certification, and the opposing party may respond with evidence of its own to challenge certification.[17] Certification will be denied if there is an insufficient evidentiary basis for the facts on which the claims of the class members depend.[18] The certification motion is not a merits-based screening of the action but it is a meaningful screening device. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,[19] the Supreme Court of Canada stated:

> 103. [I]t is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (CPA, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.

[120] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim.[20] However, the plaintiff must show "some basis in fact" for each of the certification criteria other than the requirement that the pleadings disclose a cause of action.[21] In the context of the common issues criterion, the some-basis-in-fact standard involves a two-step requirement that: (a) the proposed common issue actually exists; and (b) the proposed issue can be answered in common across the entire class.[22]

[121] The some-basis-in-fact standard sets a low evidentiary standard for plaintiffs, and a court should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case.[23] In particular, there must be a basis in the evidence to establish the existence of common issues.[24] To establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes to establishing only whether the questions are common to all the class members.[25]

[122] On a certification motion, evidence directed at the merits may be admissible if it also bears on the requirements for certification, but, in such cases, the issues are not decided on the basis of a balance of probabilities, but rather on the much less stringent test of some basis in fact.[26] The

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[17] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 22.
[18] *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, aff'd 2012 ONSC 3992 (Div. Ct.); *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106; *Taub v. Manufacturers Life Insurance Co.*, 40 O.R. (3d) 379 (Gen. Div.), aff'd (1999), 42 O.R. (3d) 576 (Div. Ct.).
[19] 2013 SCC 57 at para. 103. See also *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 6098 at para. 19 (Div. Ct.).
[20] *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 28 and 29.
[21] *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 16-26.
[22] *Batten v. Boehringer Ingelheim (Canada) Ltd*., 2017 ONSC 53, aff'd, 2017 ONSC 6098 (Div. Ct.), leave to appeal refused (28 February 2018) (C.A.); *Dine v. Biomet*, 2015 ONSC 7050, aff'd 2016 ONSC 4039 (Div. Ct.); *Good v. Toronto Police Services Board*, 2014 ONSC 4583 (Div. Ct.); *McCracken v. Canadian National Railway Company*, 2012 ONCA 445; *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443; *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744; *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, aff'd 2012 ONSC 3992 (Div. Ct.).
[23] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57; *McCracken v. CNR Co*., 2012 ONCA 445.
[24] *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42 at para. 140; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 at para. 21 (S.C.J.); *Dumoulin v. Ontario*, [2005] O.J. No. 3961 at para. 25 (S.C.J.).
[25] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 110.
[26] *Cloud v. Canada* (2004), 73 O.R. (3d) 401 at para. 50 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 16-26.

evidence on a motion for certification must meet the usual standards for admissibility.[27] While evidence on a certification motion must meet the usual standards for admissibility, the weighing and testing of the evidence is not meant to be extensive, and if the expert evidence is admissible, the scrutiny of it is modest.[28] In a class proceeding, the close scrutiny of the evidence of experts should be reserved for the trial judge.[29]

I. Cause of Action Criterion

1. General Principles

[123] The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada,*[30] is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*.

[124] To satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect, or it is plain and obvious that it could not succeed.[31]

[125] Matters of law that are not fully settled should not be disposed of on a motion to strike an action for not disclosing a reasonable cause of action,[32] and the court's power to strike a claim is exercised only in the clearest cases.[33] The law must be allowed to evolve, and the novelty of a claim will not militate against a plaintiff.[34] However, a novel claim must have some elements of a cause of action recognized in law and be a reasonably logical and arguable extension of established law.[35]

[126] In *R. v. Imperial Tobacco Canada Ltd.*,[36] the Supreme Court of Canada noted that although the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success.

[127] In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless

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[27] *Martin v. Astrazeneca Pharmaceuticals PLC,* 2012 ONSC 2744; *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, aff'd 2012 ONSC 3992 (Div. Ct.); *Schick v. Boehringer Ingelheim (Canada) Ltd*., 2011 ONSC 63 at para.13; *Ernewein v. General Motors of Canada Ltd.* 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545.
[28] *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 at para. 76 (S.C.J.).
[29] *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057, aff'd 2012 BCCA 260.
[30] [1990] 2 S.C.R. 959.
[31] *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 at para. 19 (S.C.J.), leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.); *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 at p. 679 (C.A.), leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476.
[32] *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).
[33] *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).
[34] *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 (C.A.), leave to appeal to the S.C.C. refused (1982), 35 O.R. (2d) 64n.
[35] *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.) at para. 20; *Silver v. DDJ Canadian High Yield Fund*, [2006] O.J. No. 2503 (S.C.J.).
[36] 2011 SCC 42 at paras. 17-25.

patently ridiculous or incapable of proof. The pleading is read generously, and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed.[37]

[128] Bare allegations and conclusory legal statements based on assumption or speculation are not material facts; they are incapable of proof and, therefore, they are not assumed to be true for the purposes of a motion to determine whether a legally viable cause of action has been pleaded.[38]

[129] The failure to establish a cause of action usually arises in one of two ways: (s) the allegations in the statement of claim do not plead all the elements necessary for a recognized cause of action; or, (b) the allegations in the statement of claim do not come within a recognized cause of action.[39]

2. The Plaintiffs' Causes of Action

[130] The Plaintiffs assert five causes of action; that is: (a) a statutory cause of action under sections 36 and 45 of the *Competition Act*; (b) unlawful means conspiracy; (c) predominant purpose conspiracy; (d) unjust enrichment; and (e) waiver of tort.

[131] As I shall mention again later, I note that whether waiver of tort is a cause of action or a remedy for causes of action is still an uncertainty point, but for present purposes nothing turns on this debate, and I shall ignore it and treat waiver of tort as a cause of action.

[132] Section 36 of the *Competition Act* provides a statutory cause of action for the recovery of damages that result from, among other things, conduct that is contrary to the provisions of Part VI of the Act, which includes section 45 of the Act. Section 36(1) reads:

> *Recovery of damages*
>
> 36 (1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, or
>
> (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

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[37] *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 41 (C.A.), leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50, rev'g, (2003), 65 O.R. (3d) 492 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25; *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 at p. 469 (Div. Ct.).

[38] *Deluca v. Canada (AG)*, 2016 ONSC 3865; *Losier v. Mackay, Mackay & Peters Ltd.*, [2009] O.J. No. 3463 at paras. 39-40 (S.C.J.), aff'd 2010 ONCA 613, leave to appeal ref'd [2010] SCCA 438; *Grenon v. Canada Revenue Agency*, 2016 ABQB 260 at para. 32; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184 at para. 34.

[39] *2106701 Ontario Inc. (c.o.b. Novajet) v. 2288450 Ontario Ltd.*, 2016 ONSC 2673 at para. 42; *Aristocrat Restaurants Ltd. v. Ontario*, [2004] O.J. No. 5164 (S.C.J.); *Dawson v. Rexcraft Storage & Warehouse Inc.*, [1998] O.J. No. 3240 at para. 10 (C.A.).

[133] Section 45(1) of the *Competition Act* currently reads:

> *Conspiracies, agreements or arrangements between competitors*
>
> 45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
>
> (a) to fix, maintain, increase or control the price for the supply of the product;
>
> (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
>
> (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

[134] Prior to March 2010, section 45(1) read:

> 45. (1) Every one who conspires, combines, agrees or arranges with another person
>
> (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
>
> (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
>
> (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
>
> (d) to otherwise restrain or injure competition unduly,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both….

[135] The Second Amended Statement of Claim alleges the Defendants engaged in acts that constitute a conspiracy under both versions of section 45(1). The Plaintiffs allege that the Defendants agreed and arrange to fix, maintain, increase and control the prices of FX Instruments. In particular, the Second Amended Statement of Claim pleads that: (a) the Defendants were competitors; (b) the Defendants conspired, agreed and arranged to fix, maintain and control the price of FX Instruments; and (c) Class Members suffered loss.

[136] In addition to the statutory claim, the Plaintiffs plead that the Defendants engaged in the tort of civil conspiracy. The elements of a claim of civil conspiracy are: (a) two or more defendants make an agreement to injure the plaintiff; (b) the defendants: (i) use some means (lawful or unlawful) for the predominate purpose of injuring the plaintiff, or (ii) use unlawful means with knowledge that their acts were aimed at the plaintiff and knowing or constructively knowing that their acts would result in injury to the plaintiff; (c) the defendants act in furtherance of their agreement to injure; and, (d) the plaintiff suffers damages as a result of the defendants' conduct.[40]

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[40] *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57; *Agribrands Purina Canada Inc. v. Kasamekas* 2011 ONCA 460; *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.); *Knoch Estate v. John Picken Ltd.* (1991), 4 O.R. (3d) 385 (C.A.); *Hunt v. T & N plc*, [1990] 2 S.C.R. 959; *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452.

[137] The second element of a civil conspiracy cause of action has come to identify two distinct types of civil conspiracy, *i.e.*, (a) the illegal means conspiracy; and (b) the predominate purpose of injuring the plaintiff conspiracy.

[138] What is required to meet the unlawful means element of the tort of conspiracy is that each of the defendants engage in conduct that is wrong in law.[41] Conduct that is wrong in law is of two types: (a) conduct that is actionable as a matter of private law such as breach of contract, misrepresentation, intentional interference with economic relations, wrongful interference with contractual rights, nuisance, intimidation, and defamation; and (b) conduct that is illegal such as criminal conduct, quasi-criminal conduct, and breach of a statute that does not grant a private right of action.[42]

[139] To make out a conspiracy to injure, the defendant's predominant purpose must be to inflict harm on the plaintiff. It is not enough if harm is the collateral result of acts pursued predominantly out of self-interest. The focus is on the actual intent of the defendants and not on the consequences that the defendants either realized or should have realized would follow.[43] Unless an unlawful means is used, an ordinary commercial transaction or business competition designed to advance one's economic interests, does not constitute a conspiracy to injury even though the complaining party may suffer an economic loss as a result.[44]

[140] Each individual defendant is entitled to know the case they must meet; this is particularly true for the conspiracy pleading because, although conspiracy is a tort committed by a group, the liability of each defendant arises because they individually participated as a member of the group.[45]

[141] A conspirator is not liable vicariously for what somebody else did; there is a joint and several liability and he or she is liable for having participated and contributed to the conspiracy. All participants in a conspiracy are jointly liable for the damages resulting from the conspiracy, regardless of the degree of their participation or the date on which they joined the conspiracy.[46]

[142] In a conspiracy pleading, it is necessary to set out discretely the particular acts of each co-conspirator so that each defendant can know what he or she is alleged to have done as part of the conspiracy.[47] A recitation of a series of events coupled with an assertion that they were intended to injure the insufficient, and it is not appropriate to lump some or all of the defendants together into a general allegation that they conspired to injure the plaintiff.[48] If the plaintiff does not, at the

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[41] *Agribrands Purina Canada Inc. v. Kasamekas* 2011 ONCA 460 at para. 28; *Bank of Montreal v. Tortora*, [2010] B.C.J. No. 466 (C.A.).
[42] *Agribrands Purina Canada Inc. v. Kasamekas* 2011 ONCA 460.
[43] *Harris v. GlaxoSmithKline Inc*., 2010 ONCA 872 at para. 39.
[44] *Agribrands Purina Canada Inc. v. Kasamekas* 2011 ONCA 460 at para. 38; *Harris v. GlaxoSmithKline Inc*., 2010 ONCA 872 at para. 39; *Belsat Video Marketing Inc. v. Astral Communication Inc.*, [1998] O.J. No. 654 at para. 53 (Gen. Div.); *Positive Seal Dampers Inc. v. M. & I. Heat Transfer Products Ltd.* (1991), 2 O.R. (3d) 225 (Gen. Div.).
[45] *EnerWorks Inc. v. Glenbarra Energy Solutions Inc.*, 2012 ONSC 414 at para. 76.
[46] *Botiuk v. Toronto Free Press Publications Ltd*., [1995] 3 S.C.R. 3 at para. 74; *R. v. J.F*, 2013 SCC 12; *Sisu Enterprises Co. v. Dillon*, 2000 BCSC 1752; *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503.
[47] *D.G. Jewelry Inc. v. Cyberdiam Canada Ltd.*, [2002] O.J. No. 1465 at para. 34 (S.C.J.); *J.G. Young & Sons Ltd. v. TEC Park Ltd.*, [1999] O.J. No. 4066 at paras. 9-10 (S.C.J.).
[48] *Pension Financial Services Canada Inc. v. Connacher*, 2010 ONSC 2843 at para. 15; *J. G. Young & Son Ltd. v. Tec Park Ltd*., [1999] O.J. No. 4066 (S.C.J.); *Normart Management Ltd. v. West Hill Redevelopment Co*. (1998), 37 O.R. (3d) 97 (C.A.).

time of pleading have knowledge of the facts necessary to support the cause of action, then it is inappropriate to make the allegations in the statement of claim.[49]

[143] A pleading of conspiracy should specify: (a) who the parties are and their relationship with one another; (b) the agreement between the defendants to conspire and its purpose or object; (c) (d) the overt acts that are alleged to have been done by each of the conspirators in furtherance of the conspiracy and these are to described with clarity and precision; and (e) the damages occasioned to the plaintiff as a result of the conspiracy.[50]

[144] In the immediate case, the Plaintiffs have pleaded both types of civil conspiracy.

[145] In addition to the statutory claim and the civil conspiracy claims, the Plaintiffs plead that the Defendants have been unjustly enriched. A claim for unjust enrichment requires that the plaintiff show that: (a) the defendant has been enriched; (b) the plaintiff experienced a corresponding deprivation; and (c) there is no juristic reason for the defendant's enrichment at the expense of the defendant. [51]

[146] The Plaintiffs plead that the Defendants' misconduct enriched the Defendants and deprived the Class Members of the difference between the purchase or selling prices obtained by Class Members for FX transactions, and the prices which would have been obtained without the conspiratorial acts. The Plaintiffs plead that there can be no juristic reason for the alleged deprivation of the Class Members as this conduct is prohibited by Canadian statute.

[147] The Plaintiffs also plead waiver of tort for an accounting and restitution for disgorgement of the allegedly ill-gotten gain generated by the Defendants as a result of their unlawful conspiracy.

[148] Waiver of tort is a remedial alternative and when it is available, the plaintiff forgoes his or her tort claim and elects instead to advance a claim in restitution seeking to recover the benefits that the defendant has derived from its tortious conduct. The precise legal status, *i.e.*, whether waiver of trot is a remedy or a cause of action, has been a matter of unresolved juridical debate for over a decade beginning in 2006 with *Serhan Estate v. Johnson & Johnson*.[52]

3. The Defendants' Submissions

[149] The Defendants submit that the Plaintiffs' pleading does not satisfy the first criterion for certification, the cause of action criterion. The Defendants make three main arguments.

a. First, the Defendants submit that it is plain and obvious that the Plaintiffs Second

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[49] *J.G. Young & Sons Ltd. v. TEC Park Ltd.*, [1999] O.J. No. 4066 at para. 9 (S.C.J.); *Balanyk v. University of Toronto*, [1999] O.J. No. 2162 at para. 29 (S.C.J.).

[50] *Kates v. Trapeze Asset Management Inc*., 2019 ONSC 3483 at para. 39; *Tran v. University of Western Ontario,* 2014 ONSC 617 varied on other grounds 2015 ONCA 295; *Pension Financial Services Canada Inc. v. Connacher,* 2010 ONSC 2843; *Robinson v Medtronic Inc*., [2009] O.J. No. 4366 (S.C.J.); *Mosher v. Ontario,* [2004] O.J. No. 5412 (S.C.J.); *Aristocrat Restaurants Ltd. (c.o.b. Tony 's East) v. Ontario,* [2003] O.J . No. 5331 at paras. 40, 44 (S.C.J); *Balanyk v. University of Toronto*, [1999] O.J. No. 2162 at para. 71 (S.C.J.); *Normart Management Ltd. v. West Hill Redevelopment Co*. (1998), 37 O.R. (3d) 97 at p. 104 (C.A.); *H.A. Imports of Canada Ltd. v. General Mills* (1983), 42 O.R. (2d) 645 at pp. 646-47 (H.C.J.).

[51] *Moore v. Sweet*, 2018 SCC 52; *Kerr v. Baranow*, 2011 SCC 10; *Garland v. Consumers' Gas Co*., 2004 SCC 25; *Peel (Regional Municipality) v. Canad*a, [1992] 3 S.C.R. 762; *Pettkus v. Becker*, [1980] 2 S.C.R. 834.

[52] [2006] O.J. No. 2421 (Div. Ct.).

Amended Statement of Claim does not plead any reasonable causes of action because the allegations in the plead do not plead all the constituent elements and particulars necessary for a recognized cause of action. This first argument can be characterized as the want of particulars argument.

b. Second, the Defendants assert that it is plain and obvious that the Investor Class Members have no reasonable cause of action because the Investor Class Members did not suffer the loss of a price-fixed FX Instrument transaction and they do not have standing to sue.

c. Third, the Defendants submit that, in any event, the Investor Class Members do not have an unjust enrichment claim.

[150] With respect to the Defendants' first argument, the Defendants submit that the Plaintiffs' Second Amended Statement of Claim does not plead sufficient material facts to establish a cause of action against the Defendants for participating in a single, global price-fixing conspiracy and does not particularize any improper conduct of any specific Defendant as a result of traders employed by a Defendant participating in these private chat rooms.

[151] In furtherance of this first argument, the Defendants submit that the Plaintiffs' Second Amended Statement of Claim does not plead sufficient material facts to establish a global price-fixing conspiracy because the pleading does not particularize: (a) when during the Class Period particular Defendants entered into particular agreement(s); (b) what specific acts were taken by which Defendant(s) in furtherance of the alleged conspiracy; (c) what communications each trader is alleged to have sent or received, in which chatroom, on what date; and (d) what specific action the trader is alleged to have taken as a result of any communication. The Defendants say that the claim, therefore, does not particularize the episodes of alleged collusion and fails to show a single, conspiratorial scheme to affect the entire FX market every day for eleven years.

[152] Further, the Defendants submit that the Second Amended Statement of Claim does not particularize: (a) when during the Class Period the Defendants entered into an agreement(s); (b) which Defendant(s) entered into what agreement(s); and (c) with which of that Defendant(s)' competitors was the agreement(s) made. The Defendants submit that Claim does not particularize what specific acts were taken by which Defendant(s) in furtherance of the alleged conspiracy. The Defendants argue that although the Claim names some traders, it does not particularize what communications each trader is alleged to have sent or received, in which chat room, on what date, or what specific action the trader is alleged to have taken as a result of any communication.

[153] Thus, the Defendants submit that the Plaintiffs allegation of a global conspiracy is really an allegation of episodes of collusion around the world among different subsets of Defendants at different points in time during the Class Period but the Statement of Claim does not include the material facts relied on for each alleged collusive episode and does not particularize what specific acts were alleged to have been taken, and by which Defendants, in furtherance of each episode. From these submissions, the Defendants conclude that it is therefore plain and obvious that the Second Amended Statement of Claim discloses no reasonable cause of action.

[154] Turning to the Defendants' second argument, they make a forceful argument that the Investor Class Members, who in the main are persons who invested in investments, like mutual funds, do not have a legally viable cause of action.

[155] For the second argument, the Defendants submit that while the mutual fund managers may from time to time have make investments in the FX Market or make investments that may be affected by the FX Market, these are direct purchases by the mutual funds managers and do not make the Investors Class Members indirect purchasers with a cause of action for damages.

[156] The thrust of the Defendants' second argument is that the Investor Class Members, *i.e.,* those persons who held units in funds that entered into FX Instruments, have no cause of action because they lack standing to assert claims for damages by funds in which they have invested and the damages, if any, are not attributable to the Investor Class Members.

[157] The Defendants submit that the Investor Class Members in the immediate case are not like the indirect purchasers in the price-fixing conspiracy class action like *Pro-Sys Consultants Ltd. v. Microsoft Corp.*,[53] *Sun-Rype Ltd. v. Archer Daniels Midland Company*,[54] *Infineon Technologies AG v. Option consommateurs*,[55] and *Pioneer Corp. v. Godfrey*.[56] The Defendants point out that in those cases, the indirect purchasers were a class of downstream individual purchasers seeking recovery for alleged unlawful overcharges that were passed on to them through the successive links in the distribution chain. And the Defendants submit that the Investor Class Members are neither direct purchasers or indirect downstream purchasers in FX instruments and, therefore, the Defendants submit that the Investor Class Members cannot rely on the *Pro-Sys Consultants* line of authorities.

[158] The Defendants submit that the Investor Class Members purchased investment instruments such as mutual funds, which are typically organized as a trust, and, therefore, it is the trust that might have experienced losses arising from the alleged wrongful conduct of the Defendants. The trusts would be members of the Direct Purchaser Class.

[159] The Defendants submit that the Investor Class Members claims are akin to the claims of a shareholder for the losses of his or her corporation, which claims are precluded by the well-known corporate law principle from *Foss v. Harbottle*.[57] The Defendants submit that the principle from *Foss v. Harbottle* has been extended to investment trusts.[58]

[160] The Defendants argue that trust law principles bar the Investor Class Members' claims because under trust law, it is the trustee not the beneficiaries of the trust who are the appropriate party to sue to enforce the rights of the trust to claim damages.[59] The trustee is the legal owner of the trust property, and the trustee and not the beneficiary of the trust has the right to sue anyone who damages the trust property.[60] While limited exceptions to the rule exist, the Defendants submit that the exceptions arise only after the beneficiary exhausts every reasonable avenue of relief to

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[53] 2013 SCC 57.
[54] 2013 SCC 58.
[55] 2013 SCC 59.
[56] 2019 SCC 42.
[57] (1843) 2 Hare 461.
[58] *Hunter West Consulting Group Inc. v. 9748697 B.C. Ltd.*, 2019 BCSC 59; *EY Holdings Ltd. v. Great Pacific Mortgage & Investments Ltd.*, 2017 BCCA 405l; *Everest Canadian Properties Ltd. v. Mallmann*, 2007 BCSC 312.
[59] *Michalik v. Resurrection Credit Union Ltd*., 2012 ONCA 898; *Price Security Holdings Inc. v. Klompas & Rothwell*, 2019 BCCA 36.
[60] *700 King Street (1997) Ltd. (Reciever of) v. Acro Capital Inc*, (2004) 70 O.R. (3d) 191 (S.C.J.); *Oliveira v. Zareh*, 2015 ONSC 4293.

force the trustees to act, which has not occurred in the immediate case.[61]

[161] The Defendants rely on *Oliveria v. Zareh*,[62] where the court dismissed a beneficiary's action in the absence of evidence of a request that the trustee take steps. Moreover, the Defendants argue that even where a beneficiary is permitted to pursue a claim for harm done to the trust, any damages awarded would be payable to the trust, not the beneficiary.

[162] Further still, the Defendants argue that beneficiaries would be bound by the terms of the trust instruments; namely, Declarations of Trust. The declarations of trust in the evidentiary record of CI Investments, RBC, and TD confirm that beneficiaries cannot pursue claims for any losses incurred by the investment vehicle.

[163] Turning to the Defendants' third argument and the unjust enrichment claim, the Defendants agree or they, at least, do not seriously contest that there is an unjust enrichment claim for Direct Purchaser Class Members that satisfies the first criterion for certification.

[164] The Defendants submit, however, that the Investor Class Members did not suffer a corresponding deprivation to the alleged gains achieved by the Defendants from their collusive conduct. The Defendants submit that there is a disconnect between the Investor Class Members purported losses and the Defendants alleged gain and this disconnect is fatal to the unjust enrichment claims of the Indirect Purchaser or Investor Class Members. The disconnect is that there is no transfer of wealth from the Investor Class Members, who simply are financially harmed, but the harm they suffer does not enrich the Defendants.

[165] The Defendants rely on *Catalyst Capital Group Inc. v. West Face Capital Inc.*,[63] where corporate plaintiffs advanced a claim in unjust enrichment for investment losses suffered on account of the defendants allegedly distributing false information and short selling their stock. The Court dismissed the claim for disclosing no reasonable cause of action because the plaintiff's alleged losses in the secondary market did not correspond to the defendants' gains in the secondary market.

4. Analysis and Discussion: Cause of Action Criterion

[166] As the discussion below of the other certification criteria will reveal, the Defendants' first argument about the want of particularly for the Plaintiffs' five causes of action is more pertinent to those criteria, than it is to the cause of action criterion. As will appear from the discussion below, in the immediate case, the precise nature of the of price-fixing conspiracy will be very pertinent to the criteria of class definition, common issues, and preferable procedure, but I do not agree that the alleged price-fixing in the immediate case fails to satisfy the cause of action criterion for certification.

[167] In making their first argument about the particularity of the Second Amended Statement of Claim, the Defendants actually make a very weak argument that the cause of action criterion is not satisfied. The Defendants never suggest that the Plaintiffs have not pleaded the constituent

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[61] *Oliveira v. Zareh*, 2015 ONSC 4293; *Testa v. Testa*, 2015 ONSC 2381; *Stoney Tribal Council v. Imperial Oil Resources Ltd*., 2012 ABQB 557

[62] 2015 ONSC 4293. See also *700 King Street (1997) Ltd. (Receiver of) v. Acro Capital Inc*, (2004) 70 O.R. (3d) 191 (S.C.J.).

[63] 2019 ONSC 128.

elements of the five causes of action and a review of the pleading reveals that reasonable causes of action have been disclosed. Moreover, each of the Defendants has served a detailed Statement of Defence which rather suggests that they encountered no difficulty in understanding the case that they are expected to meet.

[168] In my opinion, while the Defendants are correct in describing the nature of the price fixing conspiracy in the immediate as episodic, the Plaintiffs never suggested otherwise. The Defendants make a straw man argument and impugn a pleading that was never made.

[169] In my opinion, there is no merit to the Defendants' argument that the Plaintiffs Second Amended Statement of Claim wants for particularity. The Plaintiffs' Second Amended Statement of Claim identifies: (a) the relationships between the Defendants; (b) the structure of the FX market; (c) communications and agreements between the Defendants and their agents; (d) acts taken in furtherance of the conspiracy; (e) the harm suffered by the Plaintiffs and the proposed class; and (f) the start and end time in respect to which the claim is brought. In other words, the claim describes: (a) the parties to the alleged conspiracy and their relationship (competitors in the sale of FX Instruments); (b) the agreement to conspire; (c) the purpose or objects of the conspiracy (agreement to fix, maintain, increase, control and enhance unreasonably prices of FX Instruments); (d) the overt acts allegedly undertaken in furtherance of the conspiracy (using electronic communication to coordinate and exchange confidential information concerning customer orders and Spreads); and (e) the injury or damages sustained.

[170] Further, the Plaintiffs plead that: (a) the Defendants' acts were unlawful acts directed towards purchasers of FX Instruments;[64] (b) Defendants knew their unlawful acts would likely cause injury to those purchasers; (c) the Defendants breached Part VI of the *Competition Act* and are liable to pay damages pursuant to section 36 of the *Competition Act*; and (d) the Defendants' misconduct amounted to a predominant purpose conspiracy because the predominant purpose of the Defendants' conduct was to cause injury to the Plaintiffs.

[171] The Plaintiffs have concisely pleaded an episodic conspiracy of price fixing in the Foreign Exchange Market over an eleven-year period. The unique nature of the price-fixing conspiracy pleaded in the immediate case may pose difficulties for the Plaintiffs with respect to the class definition, common issues, and preferable procedure criterion, which I will address later, nevertheless, in my opinion, the Plaintiffs have pleaded the constituent elements of all five of their causes of action with sufficient particularity.

[172] Rule 25.06 (1) of the *Rules of Civil Procedure* stipulate that every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. The Defendants' submissions impugning the Second Amended Statement of Claim are aimed at disrupting the Plaintiffs' action by demanding that the Plaintiffs plead the evidence to prove the material facts. This Defendants' attack on the pleading is unfair and it misses the target. A plaintiff is not required to prove its case in its Statement of Claim and need only provide the material facts that support the constituent elements of its claim. The Plaintiffs have done that.

[173] I appreciate that rule 25.06 stipules that where fraud, like the allegations of conspiracy in

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[64] In *Pioneer Corp. v. Godfrey* 2019 SCC 42, the Supreme Court held that a breach of section 45 of the *Competition Act* satisfies the unlawfulness element of the claim for unlawful means conspiracy.

the immediate case, is alleged, the pleading shall contain full particulars, but in the immediate case the full particulars are essentially that the Defendants' traders covertly met in chat rooms and traded information to manipulate for their own benefit FX transactions. The evidence proving those conversations; for example, transcripts of particular chats, if available, would emerge during the discovery stage of the action. The Defendants cannot set a virtually impossible standard for plaintiffs to meet in a price-fixing conspiracy case which are secretive in nature, with the details of the conspiracy largely in the hands of the conspirators.[65]

[174] The financial markets regulators had no difficult in understanding that this is a wrongdoing and while the Defendants may have defences, in the immediate case, the Defendants have had all the particulars they need to plead a defence, which they have done, and, in any event, their attack on the pleading does not rise to the level that it is plain and obvious that the Plaintiffs do not have each and all of their five causes of action.

[175] I turn then to the Defendants' second argument which is that the Investor Class Members do not have the standing to sue as indirect purchasers.

[176] I have already mentioned that I think that the Defendants' second argument is a strong argument. However, the Plaintiffs' have a decent counter argument.

[177] The Plaintiffs argue that although the Investor Class Members may not have purchased FX Instruments directly, their investments would have been "marked to market", meaning the value of their investments would have been tied to benchmarks rates such as the Fix. If the Defendants "fixed the Fix", this would directly impact the price investors bought or sold at (trading losses) or whether they were entitled to/ the amount of derivative payments. Further, the Plaintiffs submit that the Defendants' price fixing would have increased volatility within the FX Market, which means increased risk and this harm is measured by the cost of insuring against it and this harm would have been suffered by the Investor Class Members. The Plaintiffs rely on *Ewert v. Nippon Yusen Kabushiki Kaisha*,[66] and *Shah v. LG Chem, Ltd*.[67] in support of their argument that the impact on the benchmark prices of the Investor Class Members' purchases discloses a cause of action for the Investor Class Members.

[178] The Plaintiffs concede that while it is true that the Investor Class Members are not downstream purchasers and while it is true that pass through losses are not being claimed in the immediate case, it does not follow that *Pro-Sys Consultants Ltd. v. Microsoft Corp., Sun-Rype Ltd. v. Archer Daniels Midland Company, Infineon Technologies AG v. Option consommateurs,* and *Pioneer Corp. v. Godfrey,* are exhaustive of when those indirectly on non-directly harmed by the anti-competitive conduct have a cause of action.

[179] As for the Defendants' trustee argument, the Plaintiffs submit that there are exemptions when the principle from *Foss v. Harbottle* does not apply. The Plaintiffs submit that in the immediate case, Investor Class Members will have sustained independent losses distinct from the damages sustained by trusts and these loses are outside the principle of *Foss v. Harbottle*.[68] The Plaintiffs submit that courts have never considered the Defendants' argument that *Foss v. Harbottle*

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[65] *Crosslink v. BASF Canada*, 2014 ONSC 4529 at para. 27.
[66] 2019 BCCA 187, leave to appeal to S.C.C. ref'd [2019] S.C.C.A. No. 311.
[67] 2015 ONSC 6148, varied 2017 ONSC 2586 (Div. Ct), varied 2018 ONCA 819.
[68] *Locking v. McCowan*, 2015 ONSC 4435, varied 2016 ONCA 88; *Kwinter v. Metrowest Development Ltd*., 2007 ABQB 713.

bars the Investors' claims in the context of claims under s. 36 (1) of the *Competition Act*, and, therefore, it is not plain and obvious that this cause of action does not exist.[69] In any event, the Plaintiffs submit that the Defendants' arguments about the legal viability of the causes of action require a full factual record and should not be decided at certification.[70]

[180] For present purposes, I need not decide whom has the better argument, because for satisfaction of the cause of action criterion for certification, the Plaintiffs need only climb over the molehill of the plain and obvious standard which in the immediate case they over-asserted themselves in surmounting. I, therefore, conclude that The Investor Class Member' Cause of Action and Claim for Damages satisfies the first criterion for certification. Notwithstanding the Defendants' very strong argument, it is not plain and obvious that the Investor Class Members do not have reasonable causes of action.

[181] Before moving on to the Defendants' third cause of action, I pause, however, to note that the Defendants' submissions about the nature of the Investor Class Members' causes of action will present serious problems for the Plaintiffs when the other certification criteria are considered.

[182] Turning then to the Defendants' third argument, it focuses on the Investor Class Members' unjust enrichment claim.

[183] The Plaintiffs submit that for the purposes of the cause of action criterion, the Defendants' argument about indirect purchaser's unjust enrichment claims has been rejected by the Supreme Court in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,[71] where Microsoft argued any enrichment it received was from direct purchasers, not indirect purchasers, therefore, this lack of a direct connection foreclosed a claim for unjust enrichment on behalf of indirect purchasers. The Supreme Court held, however, that at the certification stage, it was not plain and obvious that the indirect purchasers did not have a claim for unjust enrichment.

[184] In my opinion, while it is arguable that the decision in *Pro-Sys Consultants Ltd. v. Microsoft Corporation* is distinguishable because: (a) the factual circumstances of the immediate case, which for the purposes of the cause of action criterion are assumed to be true, are different from *Pro-Sys Consultants*; (b) in particular, it has been conceded that the Investor Class Members are not downstream purchasers of a product; and (c) the economic analysis is corresponding also different; nevertheless, it is not plain and obvious that the case is distinguishable.

[185] In other words, it is not plain and obvious that the Investor Class Members do not have a claim for unjust enrichment or waiver of tort. Thus, once again, the Defendants' argument about the cause of action criterion fails. At trial, there will be evidence and the test for legal viability is determined on a level juridical playing field.

[186] For the above reasons, the Defendants' challenges to the cause of action criterion all fail. I conclude that Plaintiffs have satisfied the cause of action criterion for all five of the pleaded causes of action.

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[69] *Locking v. McCowan*, 2015 ONSC 4435, varied 2016 ONCA 88
[70] *McDowell v. Fortress Real Capital Inc*., 2019 ONCA 71; *Mayer v. Mayer*, 2012 BCCA 77
[71] 2013 SCC 57.

J. Identifiable Class Criterion

1. General Principles

[187] The second certification criterion is the identifiable class criterion. The definition of an identifiable class serves three purposes: (a) it identifies the persons who have a potential claim against the defendant; (b) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (c) it describes who is entitled to notice.[72]

[188] In *Western Canadian Shopping Centres v. Dutton*,[73] the Supreme Court of Canada explained the importance of and rationale for the requirement that there be an identifiable class:

> First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.

[189] In identifying the persons who have a potential claim against the defendant, the definition cannot be merits-based.[74] In *Frohlinger v. Nortel Networks Corporation*[75] at para. 21, Justice Winkler, as he then was, explained why merits-based definitions are prohibited; he stated:

> 21. The underlying reason for each of these prohibitions is readily apparent. Merits-based class definitions require a determination of each class member's claim as a pre-condition of ascertaining class membership. Carrying that concept to its logical conclusion, it would mean that at the conclusion of a class proceeding only those individuals who were successful in their claims would be members of the class and, therefore, bound by the result. Theoretically, unsuccessful claimants would not be "class members" and would be free to commence further litigation because s. 27(3) of the CPA, which states in part:
>
> > A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding [....]
>
> would not bind them or bar them from commencing further actions.

[190] In defining the persons who have a potential claim against the defendant, there must be a rational relationship between the class, the cause of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive.[76] An over-inclusive class definition binds persons who ought not to be bound by judgment or by settlement, be that judgment or settlement

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[72] *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).
[73] 2001 SCC 46 at para. 38.
[74] *Keatley Surveying Ltd. v. Teranet Inc.*, 2012 ONSC 7120 at paras. 159-167; *Frohlinger v. Nortel Networks Corporation*, [2007] O.J. No. 148 at para. 21 (S.C.J.); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38.
[75] [2007] O.J. No. 148 (S.C.J.).
[76] *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 at para. 57 (C.A.), rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.).

favourable or unfavorable.[77] The rationale for avoiding over-inclusiveness is to ensure that litigation is confined to the parties joined by the claims and the common issues that arise.[78] The class should not be defined wider than necessary, and where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended.[79]

[191] A proposed class definition, however, is not overbroad because it may include persons who ultimately will not have a successful claim against the defendants.[80] In *Pioneer Corp. v. Godfrey*,[81] the Supreme Court observed that the fact that some of the Class Members may not have suffered a loss is not a bar to certification. The Court stated at paragraph 120.

> 120. […] Or, it might be that the trial judge finds that an identifiable subset of class members did not suffer a loss, in which case the trial judge could exclude those members from participating in the award of damages, and then use the aggregate damages provision in respect of the remaining class members' claims. Finally, the trial judge could accept Toshiba's argument that some class members suffered a loss, and some did not, but that it is impossible to determine on the expert's methodology which class members suffered a loss. In such a case, individual issues trials would be required to determine the purchasers to whom Toshiba is liable and who are therefore entitled to share in the award of damages.

2. Analysis and Discussion: Identifiable Class Criterion

[192] The proposed Class Definition includes both "direct" and "indirect" purchasers of FX Instruments; namely: (a) the Direct Purchaser Class Members; and, (b) the Investor Class Members. Direct Purchaser Class Members consist of those parties who directly entered into a transaction to buy or sell FX Instruments. Direct Purchaser transactions includes not only transactions in which the counterparties were named Defendants but also includes transactions where the counterparties were not defendants (such as non-defendant banks or brokers).

[193] The Plaintiffs allege that the Direct Purchaser Class Members were affected by manipulation of Spreads insofar as they entered into FX transactions in which Spreads were illegally widened. The Direct Purchaser Class Members bought too high or sold too low. Direct Purchaser Class Members were also affected by manipulation of Fixes insofar as they entered into FX transactions that were tied to Fix rates that had been improperly raised or lowered. The Plaintiffs seek to recover for Direct Class Members damages resulting from both manipulation of Spreads, as well as manipulation of Fix rates.

[194] The Plaintiffs do not seek to trace the pass-through Spread manipulation damages to Investor Class Members

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[77] *Robinson v. Medtronic Inc*., [2009] O.J. No. 4366 at paras. 121-146 (S.C.J.).
[78] *Frohlinger v. Nortel Networks Corporation*, [2007] O.J. No. 148 at para. 22 (S.C.J.).
[79] *Fehringer v. Sun Media Corp*., [2002] O.J. No. 4110 at paras. 12-13 (S.C.J.), aff'd [2003] O.J. No. 3918 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 21.
[80] *Silver v. Imax Corp*., [2009] O.J. No. 5585 at para. 103-107 (S.C.J.) at para. 103-107, leave to appeal to Div. Ct. refused 2011 ONSC 1035 (Div. Ct.); *Boulanger v. Johnson & Johnson Corp*., [2007] O.J. No. 179 at para. 22 (S.C.J.), leave to appeal ref'd [2007] O.J. No. 1991 (Div. Ct.); *Ragoonanan v. Imperial Tobacco Inc.* (2005), 78 O.R. (3d) 98 (S.C.J.), leave to appeal ref'd [2008] O.J. No. 1644 (Div. Ct.); *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 at para. 10 (Gen. Div.)
[81] 2019 SCC 42.

[195] Investor Class Members consist of parties who owned units in entities, including mutual funds, hedge funds or defined-benefit pension funds, that entered into FX transactions at rates tied to the Fix. This includes those Canadian funds that bought and sold foreign currency for hedging purposes, or bought and sold securities or other financial instruments priced in foreign currency, were required to mark to market their holdings in the fund's denomination (i.e. a Canadian dollar denominated fund was required to mark to market its holdings in Canadian dollars). The Plaintiffs allege that to the extent the marking to market was tied to manipulated Fix rates, the value in the funds, and the value of fund units, were affected. The Plaintiffs seek to recover for Investor Class Members consequential damages that resulted from manipulation of Fix rates.

[196] The Defendants' evidence from Ms. Sanderson is that Investor Class Members would include every Canadian who was invested in a pension fund, mutual fund, or any other investment fund during the Class Period – encompassing the 70% of Canadian households that own private pension assets. The class size is enormous. Millions of Canadians come within the Class Definition.

[197] The Defendants challenge the Class Definition, which, upon analysis, actually comprises three types of Class Member; namely: (a) Direct Purchaser from Defendant Class Members; (b) Direct Purchaser from non-Defendant Class Members; and (c) Investor Class Members. The Defendants submit that the Class definition is overbroad and over-reaching and they submit that the class as defined fails to satisfy the second to fifth criterion for certification.

[198] I agree with the Defendants' argument - in part. In my opinion, the Class Definition requires revision to include only the Direct Purchaser from Defendant Class Members. With that amendment all the certification criterion can be satisfied but just for the Direct Purchaser Class Members who transacted business with the Defendants' salespersons, the alleged conspirators.

[199] To explain my opinion about the Class Definition, a metaphor for the proposed class action is helpful. In this metaphor, the Direct Purchaser Class Members can be analogized to purchasers that go to an airport called the Canadian Foreign Exchange Airport. In this metaphor, the Defendants can be analogized to airlines that provide the service of flights from Canada to various foreign lands. Some Direct Purchaser Class Members purchase air flight tickets from the Defendants. The Other Direct Purchaser Class Members purchase air flight tickets from non-Defendant airlines. In this metaphor, the Investor Class Members are not at the airport. Rather, at the same time as the Direct Purchaser Class Members are on their flights, the Investor Class Members are at stock markets buying mutual funds.

[200] This metaphor reveals that the Plaintiffs' proposed class definition is overbroad in including the Direct Purchaser Class Members that purchased FX Instruments from non-Defendants. The non-Defendant banks, which offered the service of liquidity in the Foreign Exchange Market, perpetrated no illegal price-fixing and their services did not coattail on the illegality allegedly perpetrated by the Defendants in fixing prices.

[201] The case at bar is not like the price-fixing cases involving so-called umbrella purchasers who purchased from non-Defendants the goods whose sale prices were being fixed by the Defendants who controlled the market for those goods. In those cases, the Defendants who dominated the market by their misconduct effectively fixed the prices for the whole market in the goods. In contrast, in the immediate case, the Purchaser Class Members who purchased FX Instruments from non-Defendant banks entered into individually negotiated lawful transactions in

which there is no commonality with the Purchaser Class Members who entered into FX transactions with the Defendant banks.

[202] Further, given the episodic nature of the price-fixing perpetrated by the Defendant banks, it would be an impossible for the Direct Purchaser from non-Defendant Class Members to identify whether at the time they made their purchase of liquidity from a non-Defendant bank their transaction was affected by the unrelated illegal transaction. These customers cannot know whether their individually negotiated transaction with an innocent from collusion bank dealer was affected by the wrongdoing being perpetrated on the Direct Purchaser Class Members by the Defendants.

[203] The Direct Purchaser from non-Defendant banks are akin to - but even more remote to the wrongdoing – than the claimants in *Sun Rype Products Ltd. v. Archer Daniels Midland Co*.,[82] who were the potential victims of price-fixing but could not identify themselves as victims because it was impossible to know whether the sweeter purchased for their beverage was a sweeter whose price had been fixed by the Defendants. In *Sun Rype Products Ltd.*, the Supreme Court of Canada decided that there was no identifiable class capable of being certified.

[204] To repeat, in the immediate case, the Direct Purchasers from non-Defendants negotiated individual TX Instrument transactions, which may not have been affected by what the Defendant banks were doing, if they were doing anything at all at the time. To the extent that the Direct Purchaser from non-Defendants were affected by the misconduct of the Defendant banks, which is theoretically possible at least to the extent that it is not plain and obvious that these purchasers do not have a cause of action, they cannot identify themselves as victims. In all events, the Direct Purchasers from non-Defendant banks Class Members do not share a common experience with the Direct Purchasers from Defendant bank Class Members. There is a serious commonality problem.

[205] For the Direct Purchaser from non-Defendant Class Members, there would be enormous problems about self-identification for individual issues trials or for qualification to participate in any settlement or judgment and also a not nice question about whether and to what extent a settlement or judgment should be distributed to these putative Class Members assuming an aggregate assessment of damages or an unjust enrichment award be granted. There also would be difficulties with respect to the unjust enrichment claim, for the reasons discussed above.

[206] The metaphor also reveals that the Plaintiffs' proposed class definition is overbroad in including the Investor Class Members for similar reasons and for the additional reason that the Investor Class Members' claims are even more remote and conceptually different than the claims of the Direct Purchaser Class Members. The Investor Class Members were not at the Foreign Exchange; they were at a Canadian Stock Exchange. The claims of the Investor Class Members cannot truthfully be called indirect purchaser claims and, once again, they are not so-called umbrella purchasers. The claims of the Investor Class Members would be better described as a meta-claim, which is to say a claim about somebody else's claim.

[207] For the Investor Class Members, once again, there would be enormous problems about self-identification for individual issues trials or for qualification to participate in any settlement or judgment and also a not nice (very difficult) question about whether and to what extent a settlement or judgment should be distributed to these putative Class Members assuming an aggregate

[82] 2013 SCC 58.

assessment of damages or an unjust enrichment award be granted. There is a not nice question about how civil conspiracy applies to a meta-claim. There is also the problem for the Investor Clients that at trial there is a level playing field and there is traction to the Defendants' argument that it is the trustees of the mutual funds that has the standing to sue.

[208] Moreover, not including the Investor Class Members avoids the risk of double counting the Class Members' damages.

[209] I wish to be clear that I am not excluding the Direct Purchaser from non-Defendant bank Class Members and the Investor Class Members because ultimately many of them will not have a successful claim against the Defendants. I am excluding them for other reasons, including an inability to self-identify and for reasons discussed below a failure to satisfy the common issues and preferable procedure criteria.

[210] I, therefore, conclude that the Investor Class Members and the Direct Purchaser from non-Defendant bank Class Members should be excluded from the Class Definition. I certify the following class definition for five causes of action:

> All persons in Canada who, between January 1, 2003 and December 31, 2013 (the "Class Period"), entered into an FX Instrument transaction with a named Defendant's salesperson either directly or through an intermediary.

[211] Finally, it should be noted that I have excluded from the Direct Purchaser Class, persons who dealt with the Defendant banks on electronic platforms. There are no allegations of misconduct in the Second Amended Statement of Claim that refer to trading in FX Instruments on electronic platforms. There is no basis in fact to include the activities of the Defendant bank's traders or staff responsible for setting prices on electronic platforms. There are no allegations in any regulatory settlement that electronic transactions were impacted by any alleged anticompetitive conduct.

K. Common Issues Criterion

1. General Principles

[212] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim.[83] The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice.[84] In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,[85] the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding which is that individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.

[213] All members of the class must benefit from the successful prosecution of the action,

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[83] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 18.
[84] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 39 and 40.
[85] 2013 SCC 57 at para. 106.

although not necessarily to the same extent. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class.[86]

[214] An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member.[87] Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries.[88]

[215] Commonality is a substantive fact that exists on the evidentiary record or it does not, and commonality is not to be semantically manufactured by overgeneralizing; *i.e.*, by framing the issue in general terms that will ultimately break down into issues to be resolved by individual inquiries for each class member.[89] In *Rumley v. British Columbia*,[90] Chief Justice McLachlin stated that an issue would not satisfy the common issues test if it was framed in overly broad terms; she stated:

> [….] It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.

[216] However, the commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent; it is enough that the answer to the question does not give rise to conflicting interests among the members; success for one member must not result in failure for another.[91]

[217] The common issue criterion presents a low bar.[92] An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution.[93] Even a significant level of individuality does not

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[86] *Batten v. Boehringer Ingelheim (Canada) Ltd*., 2017 ONSC 53, aff'd, 2017 ONSC 6098 (Div. Ct.), leave to appeal refused (28 February 2018) (C.A.); *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572 at para. 48; *McCracken v. CNR*, 2012 ONCA 445 at para. 183; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at paras. 145-46 and 160, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 512; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 40.

[87] *Fehringer v. Sun Media Corp*., [2003] O.J. No. 3918 at paras. 3, 6 (Div. Ct.).

[88] *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 at para. 126 (S.C.J.), leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), var'd 2011 ONSC 3882 (Div. Ct.); *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 at paras. 50-52 (S.C.J.); *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 at para. 51 (B.C.S.C.), var'd on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.).

[89] *McCracken v. Canadian National Railway Company*, 2012 ONCA 445 at para. 132; *Microcell Communications Inc. v. Frey*, 2011 SKCA 136 at para. 48-50, leave to appeal refused, [2012] S.C.C.A. No. 42; 197; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43, leave to appeal refused, [2008] S.C.C.A. No. 512; *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 at para. 29.

[90] [2001] 3 S.C.R. 184 at para. 29.

[91] *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at paras. 44–46.

[92] *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp*., [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 348; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Carom v. Bre-X Minerals Ltd*. (2000), 51 O.R. (3d) 236 at para. 42 (C.A.).

[93] *Cloud v. Canada (Attorney General)*, (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).

preclude a finding of commonality.[94]A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation.[95]

[218] In the context of the common issue criterion, the some-basis-in- fact standard involves a two-step requirement that: (a) the proposed common issue actually exists; and (b) the proposed issue can be answered in common across the entire class.

[219] Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate with supporting evidence that there is a workable methodology for determining such issues on a class-wide basis.[96] Here the law about commonality is subtle and complex because common question can exist even if the answer given to the question might vary from one member of the class to another. I described this phenomenon in *Shah v. LG Chem, Ltd*.,[97] (a price-fixing case about lithium batteries) at paragraphs 64 and 65 as follows:

> 64. The consequential common issue from that constituent element is that there must be a methodology to show that the harm inflicted by the overpricing reached the indirect purchasers. Justice Rothstein did not say that it had to be shown that every member of the class suffered an individual loss, but rather he said that it had to be demonstrated that the indirect purchaser class as a whole; i.e., as a group, suffered from the harm inflicted by the wrongdoers. This means that if the indirect purchasers succeeded in showing that the loss reached their level of the distribution channel, then that success for the class did not necessarily lead to success for each and every member of the class. As a corollary, Justice Rothstein meant that if the indirect purchasers failed to show that the overpricing reached their level of the distribution channel, then their cause of action would fail for the whole class.
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> 65. In understanding what Justice Rothstein meant, it is helpful to refer to what Justices LeBel and Wagner later said in *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45 about common success as an ingredient of determining commonality:
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> > 45. Having regard to the clarifications provided in Rumley, it should be noted that the common success requirement identified in Dutton must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.

2. Analysis and Discussion: Common Issues Criterion

[220] As just noted above, in the context of the common issue criterion, the some basis in fact standard involves a two-step requirement that: (a) the proposed common issue actually exists; and (b) the proposed issue can be answered in common across the entire class.

[221] In the immediate case, there was no meaningful dispute that there is some basis in fact for issues about a conspiracy by the Defendant banks to fix prices in the Foreign Exchange Market.

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[94] *Hodge v. Neinstein*, 2017 ONCA 494 at para. 114; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 112; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 54.
[95] *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.
[96] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 114-119; *Chadha v. Bayer Inc*. (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106.
[97] 2015 ONSC 6148.

The proposed common issues actually exist to be answered. The Defendants' essential argument is that there is no basis in fact for concluding that the proposed common issues (which are set out in the Procedural Background part of these Reasons for Decision) can be answered in common across the class. And in a submission that dovetails with the Defendants' argument about the preferable procedure criterion, the Defendants' submit that answering the purported to be common issues would not productively advance the class action to make it preferable to individual proceedings by the relatively few of the ginormous number of Class Members who might have been affected by the episodic wrongdoings of the price-fixing Defendants.

[222] I agree with the Defendants' arguments insofar as the Direct Purchaser from Non-Defendants Class Members and the Investor Class Members are concerned. The metaphor set out in above in these Reasons for Decision and the some basis in fact evidence reveals that these putative Class Members have fundamentally different cases from the Direct Purchaser Class Members both at the common issues trial and at individual issues trials should the proceeding get that far. It is neither possible nor preferable to try all these claims together.

[223] The claims the Direct Purchaser from Non-Defendants Class Members and the Investor Class Members are highly individualistic and want for commonality. Moreover, answering the proposed common issues for these Class Members would require discrete and separate answers to all of the proposed common issues from the answers for the Direct Purchaser from Defendant bank Class Members.

[224] For example, it does not follow that if it were proven that the Defendants knew that the conspiracy would likely cause injury to the Direct Purchaser Class Members that it would be established that they had the intent to cause injury to the putative Class Members who were trading with other banks in the Foreign Exchange Market or who were making investments on the Stock Exchange in a myriad of mutual funds that may or may not have been insulated from manipulations of the Spread or the Fix.

[225] Although the point perhaps goes more to the preferable procedure criterion, the inclusion of the highly individualistic and extremely derivative claims of the Direct Purchaser from non-Defendant bank Class Members and of Investor Class Members would make all the claims including the claims of the Direct Purchaser from Defendant Class Members unmanageable.

[226] This all being the case, I nevertheless conclude that the Direct Purchaser from Defendants Class Members' claims, standing alone, satisfy the common issues criterion and I think that there is some basis in fact for all of the proposed common issues for the Direct Purchaser from Defendants Class Members.

[227] The Defendants' essential argument against the common issues criterion for these Direct Purchaser Class Members, for which argument they laid the foundation in their attack on the cause of action criterion, is that because the alleged conspiracy was episodic involving changing permutations of twined currencies and twined conspirators there was no basis in fact for a common issue.

[228] I disagree with the Defendants' essential argument against commonality. An episodic conspiracy can and does raise common issues including the common issue of whether the Defendants' conspired to agreement to episodically price fix the Spread and the Fix.

[229] It is true that unlike a more run of the mill price-fixing conspiracy where the conspirators

use their market position to control prices in the market, the Defendants in the immediate case are only alleged to have price fixed episodically, which is say that they agreed when opportunities arose to price-fix the Spread or the Fix. Should the Plaintiffs prove that allegations at a common issues trial, there would be a substantial advancement in the class proceedings.

[230] In so far as the Direct Purchaser from Defendant Class Members are concerned, I do not agree with the Defendants' argument that Dr. Osler's methodology does not show some basis in fact for proving that these Direct Purchaser Class Members suffered a common impact from the Defendants' wrongdoing. There is a realistic prospect of establishing that the financial harm caused by all the Defendants by their episodic price-fixing was experienced across the class defined as all persons in Canada who, between January 1, 2003 and December 31, 2013 (the "Class Period") entered into an FX Instrument transaction with a named Defendant's salesperson either directly or through an intermediary.

[231] Here is must be recalled that at the certification motion, the Plaintiffs benefit by the very low hurdle of the some basis in fact standard. At trial, it may turn out that Mr. Weir's and Ms. Sanderson's savage attack on the utility and probity of Dr. Osler's methodology is successful, but a certification motion is not the occasion to make final decisions about the Plaintiffs' expert witnesses credibility, reliability, and scientific acumen in the mysteries and mathematics of economics.

[232] In any event, if it were the case that the Defendants had established that the Plaintiffs had not been able to show a workable methodology for determining causation or the quantification of damages on a class wide basis and if it should turn out at trial, as the Defendants content, that Dr. Osler's methodologies are fatally flawed and unproductive, it would not mean that the questions that did not relate to causation or damages would not be certifiable and produce a productive common issues trial that would be a launch pad for individual issues trials to determine on an individual basis causation and quantification of damages.

[233] A common issue about an aggregate assessment of damages is not a prerequisite to certification. Section 6 of the *Class Proceedings Act, 1992* states that the court shall not refuse certification because damages must be assessed on an individual basis. The prospect of an aggregate assessment of damages is a factor in favour of certification, but it is not a prerequisite to certification.[98]

[234] A workable methodology is not a *sine qua non* for the certification of every class action. The alleged price fixing conspiracy in the immediate case of a service (liquidity) has unique features and problems from a conspiracy to price fix a product like DRAM or corn syrup or lithium batteries. Further, it is no obstacle to a class proceeding that the common issues may not be dispositive of the Class Members' causes of action. In the immediate case, assuming success at the common issues trial, the Direct Purchaser from Defendant Class Members, unlike the Direct Purchaser from non-Defendant Class Members, will know at least that they entered into a FX Instrument transaction that may have been price fixed. Assuming success at the common issues trial and noting that the Defendants' liability for conspiracy is a joint and several liability, the position of the Direct Purchaser from Defendant Class Members would be that they established potential liability for all those Defendants proven to have been co-conspirators and the Direct

[98] *Cassano v. Toronto Dominion Bank*, 2007 ONCA 781.

Purchaser Class Members would have proven general causation of harm. These are not issues that depend upon individual findings of fact with respect to each individual claimant. By continuing to individual issues trials, the Class Members who could prove specific causation of harm and quantify their damages will have the opportunity to perfect their causes of action at the individual issues trial.

[235] This is not to say that the individual issues trials will be easy for the Direct Purchaser Class Members. As individual claimants, they will confront very difficult issues proving specific causation and the quantification of damages, but they may be aided by the methodologies of Dr. Osler as they have been refined for trial purposes after there have been examinations for discovery and the extraction of useful data.

[236] I, therefore, conclude that the Plaintiffs satisfy the common issues criterion for all persons in Canada who, between January 1, 2003 and December 31, 2013 (the "Class Period"), entered into an FX Instrument transaction with a named Defendant's salesperson either directly or through an intermediary.[99]

L. Preferable Procedure Criterion

1. General Principles

[237] Under the *Class Proceedings Act, 1992*, the fourth criterion for certification is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute.[100]

[238] In *AIC Limited v. Fischer*,[101] the Supreme Court of Canada emphasized that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. Justice Cromwell stated that access to justice has both a procedural and substantive dimension. The procedural aspect focuses on whether the claimants have a fair process to resolve their claims. The substantive aspect focuses on the results to be obtained and is concerned with whether the claimants will receive a just and effective remedy for their claims if established.

[239] Thus, for a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims.[102] Arguments that no litigation is preferable to a

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[99] I do not rely on it, but it is interesting to note that recently the New York court certified the case against Credit Suisse and the Court certified common issues as to whether there existed a conspiracy to widen spreads and, if so, whether Credit Suisse was a part of that conspiracy. See *In Re Foreign Exchange Benchmark Rates Antitrust Litigation* (September 3, 2019), 13 Civ. 7789 (LGS) (SDNY), Opinion & Order of Lorna G. Schofield, District Judge at 19-21.

[100] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 69, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, 2001 SCC 68.

[101] 2013 SCC 69 at paras. 24-38.

[102] *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).

class proceeding cannot be given effect.[103] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.[104]

[240] To satisfy the preferable procedure criterion, the proposed representative plaintiff must show some basis in fact that the proposed class action would: (a) be a fair, efficient and manageable method of advancing the claim; (b) be preferable to any other reasonably available means of resolving the class members' claims; and (c) facilitate the three principal goals of class proceedings; namely: judicial economy, behaviour modification, and access to justice.[105]

[241] In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s) and their importance in relation to the claim as a whole; (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the *Act*; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the *Act*; and (g) the rights of the plaintiff(s) and defendant(s).[106]

[242] The court must identify alternatives to the proposed class proceeding.[107] The proposed representative plaintiff bears the onus of showing that there is some basis-in-fact that a class proceeding would be preferable to any other reasonably available means of resolving the class members' claims, but if the defendant relies on a specific non-litigation alternative, the defendant has the evidentiary burden of raising the non-litigation alternative.[108] It is not enough for the plaintiff to establish that there is no other procedure which is preferable to a class proceeding; he or she must also satisfy the court that a class proceeding would be fair, efficient and manageable.[109]

[243] In *AIC Limited v. Fischer*, Justice Cromwell pointed out that when the court is considering alternatives to a class action, the question is whether the alternative has potential to provide effective redress for the substance of the plaintiff's claims and to do so in a manner that accords suitable procedural rights. He said that there are five questions to be answered when considering whether alternatives to a class action will achieve access to justice: (a) Are there economic, psychological, social, or procedural barriers to access to justice in the case? (b) What is the potential of the class proceeding to address those barriers? (c) What are the alternatives to class proceedings? (d) To what extent do the alternatives address the relevant barriers? and (e) How do the two proceedings compare?[110]

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[103] *1176560 Ontario Ltd. v. The Great Atlantic and Pacific Company of Canada Ltd.* (2002), 62 O.R. (3d) 535 at para. 45 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).
[104] *Markson v. MBNA Canada Bank*, 2007 ONCA 334; *Hollick v. Toronto (City)*, 2001 SCC 68.
[105] *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp*., 2014 ONCA 901; *AIC Limited v. Fischer*, 2013 SCC 69; *Hollick v. Toronto (City)*, 2001 SCC 68.
[106] *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106.
[107] *AIC Limited v. Fischer*, 2013 SCC 69 at para. 35; *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 28.
[108] *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 48-49.
[109] *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572 at para. 62; *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 at para. 62-67 (S.C.J.).
[110] *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp*., 2014 ONCA 901 at para. 125; *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 27-38.

2. Analysis and Discussion: Preferable Procedure Criterion

[244] Having regard to what has already been said above, the analysis here can be relatively brief.

[245] The Plaintiffs have satisfied the first three criterion for certification and in my opinion what emerges is a manageable class proceeding that can proceed to common issues trials that would meaningfully advance the litigation and provide access to justice for both the Class Members and the Defendants, who deny conspiring to fix prices in the market for FX Instruments. Individual issues trials might be an alternative for a few of the larger customers, but for most of the Class Members individual issues trials would not provide an alternative route to access to justice.

[246] A class proceeding is preferable to individual issues trials in terms of access to justice, behaviour modification and judicial economy.

[247] The case at bar is not like *Bennett v. Hydro One Inc.*[111] and *RG v. The Hospital for Sick Children*,[112] two cases that I did not certify, among other things, for failing the preferable procedure criterion. The Defendants rely on these cases to establish a want of preferability in the immediate case.

[248] However, the determination of whether there is some basis in fact for the preferable procedure criterion is a case-by-case determination depending upon the exigencies of the particular case not the exigencies of other cases. While the principles of those other cases are precedential, there is very little precedential value in the application of the principles to different facts, and, not surprisingly, in the immediate case, the Plaintiffs provide a list of cases arguably similar to the case at bar that have been certified. No purpose would be served by slicing and dicing this caselaw. It is sufficient to say that I am satisfied that applying the legal principles, the Plaintiffs have satisfied the preferable procedure criterion.

[249] In an ironic and novel argument, the Defendants argue, however, that given that many if not most of the putative Class Members are obviously sophisticated actors, including the world's central banks, largest commercial and investment banks, and other large financial institutions, it would be preferable and the Class Members would be better off to simply get on with individual actions or joinder actions under the *Rules of Civil Procedure*.

[250] I find this an odd and ironic argument because if I were to accede to it, the Defendants who deny their liability will simply have to prove their innocence at some considerable expense over and over and over again in individual issues trials brought by the world's largest commercial and investment banks, central banks, and other large financial institutions. This argument had I acceded to it would be a good example of the curse of getting what you wish for. Ironically, having regard to the blistering and ballistic attack made against Dr. Osler and the Defendants' confidence that collusion in the FX Market is both impossible and also impossible to prove, one would have thought that it would be the Defendants who would prefer a class proceeding to achieve a discharge from liability for millions of transactions involving Quadrillions of dollars. With this level of confidence, they should be thanking not resisting the Labourers' Fund bringing a class action.

[251] I conclude that the preferable procedure criterion is satisfied for all persons in Canada who,

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[111] 2017 ONSC 7065.
[112] 2017 ONSC 6545, aff'd 2018 ONSC 7058 (Div. Ct.).

between January 1, 2003 and December 31, 2013 (the "Class Period"), entered into an FX Instrument transaction with a named Defendant's salesperson either directly or through an intermediary.

M. Representative Plaintiff Criterion

1. General Principles

[252] The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan. The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant.[113]

[253] Whether the representative plaintiff can provide adequate representation depends on such factors as: his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim.[114]

[254] In the context of class proceedings, there are three types of conflict of interest that require examination:[115] (a) conflicts of interest arising from a lawyer's direct financial interest in the class proceedings, which are an inherent conflict allowed by the entrepreneurial model of the class proceedings legislation; (b) conflicts arising from the lawyer's divided loyalties arising outside of the class proceeding; and (c) conflicts arising from a divergence of interest between the representative plaintiff and class members.

[255] While a litigation plan is a work in progress, it must correspond to the complexity of the particular case and provide enough detail to allow the court to assess whether a class action is: (a) the preferable procedure; and (b) manageable including the resolution of the common issues and any individual issues that remain after the common issues trial.[116] The litigation plan will not be workable if it fails to address how the individual issues that remain after the determination of the common issues are to be addressed.[117]

2. Analysis and Discussion: Representative Plaintiff Criterion

[256] Having regard to what has already been said above, the analysis of the last certification

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[113] *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 at paras. 36-45 (S.C.J.); *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 at para. 40 (S.C.J.), aff'd [2003] O.J. No. 4708 (C.A.).
[114] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 41.
[115] P. Perell, "Class Proceedings and Lawyers' Conflict of Interest" (2009), 35 *Advocates' Quarterly* 202.
[116] *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Div. Ct.), rev'd on other grounds (2000), 51 O.R. (3d) 236 (C.A.); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 95 (C.A.); *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 at para. 76 (S.C.J.); *Griffin v. Dell Canada Inc*., [2009] O.J. No. 418 at para. 100 (S.C.J.).
[117] *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 at paras. 62-67 (S.C.J.); *Griffin v. Dell Canada Inc*., [2009] O.J. No. 418 (S.C.J.).

criterion can again be relatively brief.

[257] The Plaintiffs have satisfied the four criteria for certification, and in my opinion the fifth criterion is also satisfied for the Labourers' Fund but not for Mr. Staines.

[258] Mr. Staines is disqualified for the obvious reason that the Investor Class Members for whom he was to be the Representative Plaintiff will not be Class Members.

[259] The Defendants made an argument that the Representative Plaintiffs were disqualified because of conflicts between the Class Members. To the extent that this argument extended to the Investor Class Members and the Direct Purchaser from non-Defendant Class Members, the argument is moot because they are no longer Class Members.

[260] The argument fails with respect to Direct Purchaser Class Members. The Defendants submitted that Dr. Osler had acknowledged that of Class Members who might have been impacted, that impact could have been either positive or negative, depending on the individual Class Member's trading in the currency pair at the relevant time. From this submission, the Defendants said that there was an inherent conflict because success for one Class Member would mean failure for another.

[261] This syllogism however is false. There is no conflict. The Class Member who benefited from the trade would never have had a claim so there is nothing to fail. The Class Member who was injured would simply have a claim for having overpaid for liquidity. There is no conflict of interest because the Plaintiffs are seeking compensation only for the damages caused by the Defendants and this does not affect the Class Members who unknowingly and inadvertently benefited from the Defendants' wrongdoing.

[262] The Defendants argued that the Labourers' Fund did not qualify to be a representative for the Direct Purchaser Class Members because it was not directly involved in FX Instrument trading. This is factually true; the Labourers Fund's trading was undertaken by portfolio managers, who executed FX trades on behalf of the Labourers' Fund and by FX brokers who found counterparties for FX trades on behalf of the Fund. The fact that the Labourers' Fund used portfolio managers or FX brokers to make trades on its behalf, however, does not mean that the Labourers' Fund is not a Direct Purchaser Class Member. It just means that its direct purchases were made by its agents.

[263] With four certification criteria satisfied and with competent and experienced Class Counsel (and, for that matter an experience Representative Plaintiff like the Labourers' Fund, which is a class actions frequent flyer) the Plaintiffs succeed in satisfying the Representative Plaintiff criterion for all persons in Canada who, between January 1, 2003 and December 31, 2013 (the "Class Period"), entered into an FX Instrument transaction with a named Defendant's salesperson either directly or through an intermediary.

[264] I conclude that the proposed Litigation Plan, which can be and should be revised in light to the changed Class Definition, is adequate for the purposes of the certification motion. I conclude that the Representative Plaintiff criterion is satisfied in the immediate case.

N. Conclusion

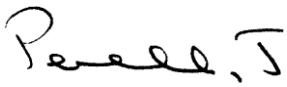
[265] For the above reasons, the certification motion is granted.

[266] If the parties cannot agree about the matter of costs, they may make submissions in writing

beginning with the Plaintiffs' submissions within 20 days of the release of these Reasons for decision followed by the Defendants' submissions within a further 20 days.

[267] In the circumstances of the Covid-19 emergency, these Reasons for Decision are deemed to be an Order of the court that is operative and enforceable without any need for a signed or entered, formal, typed order.

[268] The parties may submit formal orders for signing and entry once the court re-opens; however, these Reasons for Decision are an effective and binding Order from the time of release.



Perell, J.

[269] Released: April 14, 2020

CITATION: Mancinelli v. Royal Bank of Canada, 2020 ONSC 1646
COURT FILE NO.: CV-15-536174-00CP
DATE: 2020/04/14

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JOSEPH S. MANCINELLI, CARMEN PRINCIPATO, DOUGLAS SERROUL, LUIGI CARROZZI, MANUEL BASTOS and JACK OLIVEIRA in their capacity as THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, and CHRISTOPHER STAINES

Plaintiffs

– and –

ROYAL BANK OF CANADA, RBC CAPITAL MARKETS LLC, BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., BANK OF AMERICA CANADA, BANK OF AMERICA NATIONAL ASSOCIATION, THE BANK OF TOKYO MITSUBISHI UFJ LTD., BANK OF TOKYO-MITSUBISHI UFJ (CANADA), BARCLAYS BANK PLC, BARCLAYS CAPITAL INC., BARCLAYS CAPITAL CANADA INC., BNP PARIBAS GROUP, BNP PARIBAS NORTH AMERICA INC., BNP PARIBAS (CANADA), BNP PARIBAS, CITIGROUP, INC., CITIBANK, N.A., CITIBANK CANADA, CITIGROUP GLOBAL MARKETS CANADA INC., CREDIT SUISSE GROUP AG, CREDIT SUISSE SECURITIES (USA) LLC, CREDIT SUISSE AG, CREDIT SUISSE SECURITIES (CANADA), INC., DEUTSCHE BANK AG, THE GOLDMAN SACHS GROUP, INC., GOLDMAN, SACHS & CO., GOLDMAN SACHS CANADA INC., HSBC HOLDINGS PLC, HSBC BANK PLC, HSBC NORTH AMERICA HOLDINGS INC., HSBC BANK USA, N.A., HSBC BANK CANADA, JPMORGAN CHASE & CO., J.P.MORGAN BANK CANADA, J.P.MORGAN CANADA, JPMORGAN CHASE BANK NATIONAL ASSOCIATION, MORGAN STANLEY, MORGAN STANLEY CANADA LIMITED, ROYAL BANK OF SCOTLAND GROUP PLC, RBS SECURITIES, INC., ROYAL BANK OF SCOTLAND N.V., ROYAL BANK OF SCOTLAND PLC, SOCIÉTÉ GÉNÉRALE S.A., SOCIÉTÉ GÉNÉRALE (CANADA), SOCIÉTÉ GÉNÉRALE, STANDARD CHARTERED PLC, UBS AG, UBS SECURITIES LLC and UBS BANK (CANADA)

Defendants

REASONS FOR DECISION

PERELL J.

Rreleased: April 14, 2020.