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Canadian SSA bond-fixing litigation expected to be certified then settle, lawyers say

25 April 2019 | 14:53 EDT

- Conspiracy cases certified 'more often than not' under prevailing standard
- No Canadian Competition Act price-fixing class action 'has ever gone to trial'
- Pending Toshiba v. Neil Godfrey Supreme Court decision could shape outcome

A CAD 1.25bn lawsuit in which several leading banks stand accused of conspiring to fix bond prices is likely to be certified as a class action by Canada's federal court, according to three Canadian antitrust lawyers.

Beyond that, the future of the case is uncertain, they noted.

The plaintiffs in the Mancinelli v. Bank of America case are the trustees of a Canadian labour union pension fund. The defendants allegedly bought bonds for the plaintiffs from 2005 to 2015. The defendants consist of Bank of America [NYSE:BAC], BNP [OTCMKTS:BNPQY], Citigroup [NYSE:C], Credit Agricole [OTCMKTS:CRARY], Credit Suisse [SIX:CSGN] [NYSE:CS], Deutsche Bank [FWB:DBK] [NYSE:DB], HSBC [LSE:HSBA] [NYSE:HSBC], Nomura [TYO:8604] [NYSE:NMR], RBC [TSX:RY] [NYSE:RY] and Toronto-Dominion Bank [NYSE:TD] [TSX:TD] and several of their subsidiaries.

"We allege that these financial institutions conspired to fix the price of a certain kind of bond; we call them SSA, which stands for supernational, subnational and agency bonds," said plaintiff counsel Garth Myers of Koskie Minsky. "They conspired to fix the prices to their own benefit and to the detriment of people who are buying bonds in the market," Myers told this news service.

Myers' clients allege that the defendants shared their customers' pricing information, trading history, requests for quotes and other non-public information in order to impact the price of bonds.

"Typically in these kinds of cases, information is shared through chatrooms and we expect that to be the case here," Myers said. "We've seen the use of Bloomberg chatrooms before in other cases and we would expect to see that here again."

Regarding the CAD 1.25bn claimed as damages, Myers said, "Typically, we put a number on the statement of claim without knowing a whole lot about the precise amount of damages sustained by the class, so we tend to not put a lot of stock in that number. It's sort of a symbolic figure."

PROPRIETARY

Sector: Financial Services
Topics: Cartels & Horizontal Agreements, Private Litigation

Grade: Confirmed

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Myers' law firm is also, in cooperation with two other class-action specialty firms, handling three similar proposed class actions, alleging manipulation of gold, silver and foreign exchange prices by the same group of banks.

Before a class action can proceed, and before the defendants are required to file a statement of defence, a judge must certify it. Certification "can be challenging, especially in cases like this where all the information is in the hands of the defendants," Myers said. But, he added, "it's more likely than not that these cases get certified ... The ball is in our court to move the case forward."

Paul Morrison, litigation lawyer at Miller Thomson, does not believe that certification will be a high hurdle. "Conspiracy cases are more often than not granted certification," he said. "Based on the statement of claim, I think they have a good chance of getting the case certified," he added.

Kevin Wright, litigation lawyer at DLA Piper, agrees. "Virtually all of these cases end up being certified," he said. "A lot of the courts have taken a very generous view of the standard ... [which] is 'some basis in fact,' lower than 'balance of probabilities'."

Class action lawsuits based on alleged violations of Canada's Competition Act are relatively common, according to Wright and Morrison, but Mancinelli v. Bank of America is different in some important respects.

"What's interesting about this case is the market," Morrison said. "These SSA bonds are pretty specialized creatures and the defendants are some of the largest banks carrying on business in Canada," he added, "the defendants are very big, very well financed financial institutions."

Morrison argued that this case was likely inspired by legal actions outside of Canada, such as recent investigations into the defendants by antitrust agencies in the US, UK and EU for similar alleged conduct. "Plaintiffs' class action counsel in effect piggyback on these regulatory investigations," he said, "and it looks like they are doing so in this case."

Wright pointed out that the CAD 1.25bn in claimed damages is "on the higher end of the scale" and predicted that, if certified, the case would likely settle. No price-fixing class action under the Competition Act has ever gone to trial, he explained. "The plaintiffs' firms are very sophisticated. They will go to trial if they need to go to trial, but most of their models are settlement models." Wright estimated that 25-30% of any settlement or judgment would likely to go to the plaintiffs' lawyers as a contingency fee.

Notably, the plaintiffs' law firm has also filed a near-identical claim, with the same plaintiffs and same defendants, in Ontario Superior Court. Myers declined to comment on why.

"It may be that they are concerned about whether or not federal court really has jurisdiction in this case, so they have brought it in

a provincial court as well," Morrison said. He explained that it is likely that a defendant will bring a motion to stay Mancinelli v. Bank of America on the grounds that federal court lacks jurisdiction or that the defendants should not have to litigate the same case twice. A stay usually ends a case in that court forever.

There is another wild card involved -- the Supreme Court of Canada is now deliberating on the case of Toshiba v. Neil Godfrey, which deals with several issues important to the SSA bonds class action, including the test for certification. The Godfrey decision could be delivered soon, according to Wright, and may change the legal landscape for Mancinelli v. Bank of America.

"While Godfrey is being deliberated, many [Competition Act class actions] have been paused, either formally or informally," Wright said. "Many if not most cases are paused."

Myers did not respond to an emailed question about whether Mancinelli v. Bank of America was paused until the release of the Supreme Court's decision.

All of the parent company defendants declined to comment or did not respond.

To read the statement of claim, click here.

by Mark Coakley in Toronto

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