

Federal Court



Cour fédérale

Date: 20250423

Docket: T-1049-20

Citation: 2025 FC 721

Ottawa, Ontario, April 23, 2025

PRESENT: Justice Andrew D. Little

BETWEEN:

DAVID REGAN

Plaintiff

and

**MASONITE INTERNATIONAL CORPORATION,
MASONITE CORPORATION, JELD-WEN, INC., JELD-
WEN HOLDING, INC., AND JELD-WEN OF CANADA,
LTD.**

Defendants

REASONS FOR ORDERS

[1] The plaintiff filed motions under Rule 334 of the *Federal Courts Rules*, SOR/98-106, for approval of two settlement agreements that will resolve this proceeding, a distribution protocol related to the settlement funds, and the fees and disbursements of class counsel.

[2] For the reasons that follow, the motions will be allowed.

I. **Events Leading to these Motions**

A. *The Amended Statement of Claim*

[3] This proceeding was started by Statement of Claim issued on September 9, 2020. The pleading was amended on February 12, 2021, to substitute the current plaintiff for a previous proposed representative plaintiff (the “Amended Statement of Claim”).

[4] The Amended Statement of Claim alleged an ongoing illegal conspiracy among the defendants, from March 2014 to the present, to raise, maintain, fix and/or stabilize the price (which I will call “price-fixing”) of Interior Molded Doors in North America. The Amended Statement of Claim alleged that the defendants jointly controlled a substantial portion of the “Interior Molded Door market”. According to the pleading, the defendants agreed to fix prices at supra-competitive levels, increased the prices of Interior Molded Doors at least eight times, reduced the supply of that product and engaged in other associated illegal acts, all contrary to subsection 45(1) of the *Competition Act*, RSC 1985, c. C-34. That provision provides:

Conspiracies, agreements or arrangements between competitors Discriminatory Practices

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;

Complot, accord ou arrangement entre concurrents Actes discriminatoires

45 (1) Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complotte ou conclut un accord ou un arrangement :

a) soit pour fixer, maintenir, augmenter ou contrôler le

(b) to allocate sales, territories, customers or markets for the production or supply of the product; or	prix de la fourniture du produit;
(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.	b) soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit; c) soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.

[5] The Amended Statement of Claim alleged that the defendants and unnamed co-conspirators carried out the conspiracy by:

- a) participating in meetings, conversations and communications in North America to discuss coordinating prices of Interior Molded Doors;
- b) agreeing, during those meetings, conversations, and communications, on the prices of Interior Molded Doors;
- c) agreeing, during those meetings, conversations, and communications, to refrain from competing on prices for Interior Molded Doors;
- d) agreeing, during those meetings, conversations, and communications, to coordinate price adjustments in North America;
- e) selling Interior Molded Doors in Canada and elsewhere for the agreed upon prices, controlling discounts, and otherwise fixing, increasing, maintaining or stabilizing prices for Interior Molded Doors in Canada and elsewhere;
- f) allocating markets, customers, and/or setting specific sales volumes of Interior Molded Doors that each Defendant and unnamed co-conspirator would supply in Canada and elsewhere;
- g) agreeing to reduce the supply of Interior Molded Doors and/or reduce the supply of doorskins in Canada and elsewhere;
- h) accepting payment for Interior Molded Doors sold in Canada and elsewhere at collusive and supra-competitive prices;

- i) communicating secretly, in person and by telephone, to discuss and fix prices and volumes of sales of Interior Molded Doors;
- j) exchanging information regarding the prices and volumes of sales of Interior Molded Doors for the purposes of monitoring and enforcing adherence to the agreed-upon prices, volumes of sales and markets;
- k) engaging in meetings, conversations, and communication for the purpose of monitoring and enforcing adherence to the agreed-upon price-fixing scheme;
- l) actively and deliberately taking active steps to conceal the unlawful conspiracy from their customers; and
- m) disciplining any corporation that failed to comply with the conspiracy.

[6] The plaintiff claimed damages under section 36 of the *Competition Act*.

[7] The Amended Statement of Claim did not contain specific factual allegations relating to an illegal conspiracy in Canada. The pleading was filed based on allegations made in class actions in the United States.

B. *Class Actions in the United States*

[8] In 2018, two class actions were filed in the United States District Court for the Eastern District of Virginia. Each action concerned direct purchasers and indirect purchasers as plaintiffs. The defendants were JELD-WEN, Inc., and Masonite Corporation, two of the defendants in this proceeding.

[9] In the United States class actions, there were several early and unsuccessful motions to dismiss. The parties also engaged in discovery, including both document production and depositions of approximately 50 witnesses.

[10] In February 2020, the plaintiffs in the two US actions moved for class certification. Both actions settled before the certification motions. In the US direct purchaser action, the defendants initially agreed to settle by paying US\$56 million (US\$28 million each). In the US indirect purchaser action, the defendants settled for US\$19.5 million (US\$9.75 million each). The District Court had concerns with the terms of settlement. The parties went to mediation and increased the amount of the direct purchaser settlement to US\$61,600,000. On June 3, 2021, the District Court approved revised direct purchaser settlement. On July 27, 2021, the District Court approved the original indirect purchaser settlement.

[11] The US direct purchaser settlement class consisted of all persons or entities that purchased Interior Molded Doors in the US directly from any defendant in the action at any time from October 19, 2014, to December 31, 2018. The indirect purchaser settlement class consisted of all persons and entities that, during the period March 1, 2014, to September 4, 2020, indirectly purchased one or more standalone Interior Molded Doors in 21 states, that were manufactured or sold by either defendant, not for resale.

C. *Motion for Certification in this Court*

[12] On April 1, 2021, the plaintiff filed a motion record for certification of this action as a class proceeding. Subsequently, the parties agreed to pause the certification schedule to explore the potential for settlement. In May 2022, they participated in mediation, which did not immediately lead to a settlement. The parties continued on litigation and negotiation tracks, with the plaintiff negotiating separately with each of the two groups of defendants (Masonite and JELD-WEN).

[13] On June 5, 2023, the defendants served their responding motion record on certification.

[14] On July 25, 2023, the plaintiff filed a reply motion record.

[15] The certification motion was scheduled for October 2023.

D. *The parties enter settlement agreements*

[16] In July and August 2023, the plaintiff entered into agreements in principle to settle with the two groups of defendants.

[17] On November 3, 2023, the plaintiff executed a settlement agreement with the Masonite defendants. It was amended on April 29, 2024.

[18] On March 27, 2024, the plaintiff executed a settlement agreement with the JELD-WEN defendants.

E. *Certification for proposed settlement*

[19] On July 15, 2024, in accordance with the terms of the settlement agreements, the plaintiff brought a motion seeking certification of the proceeding for settlement purposes and approval of a notice of certification and settlement approval hearing.

[20] On July 30, 2024, this Court certified this proceeding as a class proceeding for settlement purposes in respect of both proposed settlements, and approved a notice of certification and settlement approval hearing and a plan for dissemination of the notice of hearing.

[21] The Court's order dated July 30, 2024, defined the "Settlement Class" as: "All persons in Canada who purchased Interior Molded Doors in Canada during the "Class Period", except the Excluded Persons." In both proposed settlement agreements, the Class Period was defined as March 1, 2014, to the date of the order issued on July 30, 2024.

F. *The present motions*

[22] The present motions to approve the proposed settlements, a notice of settlement approval and a distribution protocol, and to approve class counsel's fees and disbursements, were heard on October 30, 2024.

[23] As a result of an issue raised at the hearing, the parties were entitled to submit additional argument, if so advised, after the release of my reasons in *Mancinelli v. Bank of America Corporation et al.*, 2024 FC 1777. I have not received any additional submissions and therefore assume the parties did not consider that any were necessary.

II. **Approval of the Proposed Settlements and the Distribution Protocol**

A. *Legal Principles*

[24] A class proceeding may be settled only with the approval of a judge: Rule 334.29(1).

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

- First, class action settlements differ from most other settlements of litigation in requiring the approval of a judge before they can take effect: see rule 334.29(1).
- Second, negotiating a settlement will invariably entail trade-offs and compromise: *Châteauneuf v. Canada*, 2006 FC 286 at para. 7. We do not know what trade-offs and compromises were made here.
- Third, the well-established test for judicial approval is that the settlement be shown to be fair, reasonable, and in the best interests of the class as a whole: *Condon v. Canada*, 2018 FC 522 at para. 17. As the supervising judge recognized, this standard does not require perfection, only reasonableness: 2019 FC 1075 at para. 76.
- Fourth, the judge’s assessment of a proposed settlement is “a binary, take-it-or-leave-it proposition. [...] The Court is not permitted to change the settlement terms, impose additional terms or promote the interests of certain class members over those of the whole class”: *Toronto Standard Condominium Corporation No. 1654 v. Tri-Can Contract Incorporated*, 2022 FC 1796 at para. 17.
- Fifth, the focus on the interests of the class as a whole may mean that a settlement is approved even if it does not meet the needs or demands of particular class members, or benefits some ahead of others: *Condon* at para 17; *Manuge v. Canada*, 2013 FC 341 at para. 24; *Hébert v. Wenham*, 2020 FCA 186 at para. 9, leave to appeal refused, 2021 CanLII 49683 (SCC).
- And sixth, a judicially approved settlement is nonetheless binding on every class member who has not opted out of the proceeding: see rule 334.29(2). [...]

[26] As the third bullet point in *Waldon* confirms, the central question for approving a class action settlement is whether the proposed settlement is “fair, reasonable and in the best interests

of the class as a whole”: *Hébert v Wenham*, 2020 FCA 186, at para 9; *Mancinelli*, at para 28; *Breckon v. Cermaq Canada Ltd.*, 2024 FC 225, at para 27; *Percival v. Canada*, 2024 FC 824, at paras 33, 89; *Toronto Standard Condominium Corporation No. 1654 v. Tri-Can Contract Incorporated*, 2022 FC 1796, at para 13; *Lin v. Airbnb, Inc.*, 2021 FC 1260, at para 21.

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

- a) The terms and conditions of the settlement;
- b) The likelihood of recovery or success;
- c) The expressions of support, and the number and nature of objections;
- d) The degree and nature of communications between class counsel and class members;
- e) The amount and nature of pre-trial activities including investigation, assessment of evidence and discovery;
- f) The future expense and likely duration of litigation;
- g) The presence of arm’s length bargaining between the parties and the absence of collusion during negotiations;
- h) The recommendation and experience of class counsel; and
- i) Any other relevant factor or circumstance.

See *Mancinelli*, at para 29; *Breckon*, at para 28; *Toronto Standard Condominium Corporation*, at para 14; *Lin*, at para 22.

[28] A settlement may be approved even if it does not meet the needs or demands of particular class members, or benefits some ahead of others: *Waldron*, at para 68 (fifth bullet); *Mancinelli*,

at para 74 (citing *Condon v. Canada*, 2018 FC 522, at para 17 and *Mancinelli v. Royal Bank of Canada*, 2021 ONSC 6306, at para 28).

B. *Should the Court approve the proposed settlements?*

(1) Terms of the Settlements

[29] The two settlement agreements entered into by the Masonite defendants and the JELD-WEN defendants contained substantially the same terms.

[30] The defendants agreed to pay all-inclusive settlement amounts as follows:

- a) Masonite agreed to pay \$1,151,920; and
- b) JELD-WEN agreed to pay \$1,060,000.

[31] These settlement amounts were agreed to include payment in respect of compensation to eligible Class Members; any amounts to be distributed as a *cy-près* payment; class counsel fees and disbursements; and administration expenses.

[32] These settlement amounts are modest. Although class counsel sought to “benchmark” the quantum against the US settlements with a discount owing to the merits of the Canadian case, I did not find the benchmark or explanation of the comparison to be persuasive on this motion.

[33] The settlement terms included a release, a dismissal of this proceeding and an agreement to discontinue proposed class proceedings commenced in Quebec. In addition, the defendants

agreed to provide information about customer purchases of Interior Molded Doors to assist with the administration of claims against the settlement funds.

[34] Class counsel also prepared a Distribution Protocol: a protocol for the distribution of the “net” settlement funds, after deducting administration expenses, class counsel fees and disbursements. The Distribution Protocol provides that a person who purchased Interior Molded Doors in Canada during a claims period (from March 1, 2014, to July 30, 2024) is a member of the Settlement Class. To qualify for a payment from the net settlement proceeds, the Settlement Class Member must be disclosed in the defendants’ sales data as having purchased Interior Molded Doors directly from the defendants in the claims period. Such purchases must total at least \$400,000. On filing a valid claims form, the person will be paid a proportion of the net settlement funds based on the value of their purchases as against the total value of all eligible settlement class members’ purchases. In effect, there is a \$400,000 floor or threshold in the claims process.

[35] JELD-WEN and Masonite were required to provide names and addresses of their direct purchaser customers of Interior Molded Doors during the Class Period. Masonite’s customer list consisted of only four purchasers. It is expected that at least two of these purchasers will be eligible to make a claim. JELD-WEN provided its sales information with its customer list. JELD-WEN’s customer list disclosed 70 customers with qualifying purchases. The approximate purchase value for these customers ranges from \$431,000 to \$19 million, with an average of \$2.9 million.

[36] The Distribution Protocol provides for a *cy-près* distribution of \$100,000 to Habitat for Humanity Canada. It is intended to “account for consumer and other claims” that will not qualify for the \$400,000 claim threshold. According to the plaintiff, those Settlement Class members (i.e., all indirect consumer purchasers and some purchasers that purchased directly from the defendants) will benefit indirectly from the donation. The evidence indicates that Habitat for Humanity Canada is a national charitable organization dedicated to helping Canadians living with housing insecurity by helping to build and rehabilitate affordable housing. Its work focuses on a model of affordable homeownership, bridging a gap for low-income, working families, by providing them an opportunity to purchase their own home. Habitat for Humanity provided class counsel with a proposal for the use of the *cy-près* distribution funds.

[37] Under the Distribution Protocol, class counsel will administer the claims process.

[38] While the terms of the settlement agreements contemplate a Distribution Protocol that will be approved by the Court, the terms of the Distribution Protocol were not part of the settlement agreements. There is a separate request to approve the Distribution Protocol.

[39] I now turn to the factors to assess whether to approve the proposed settlement agreements.

(2) Pre-Trial Activities, including the Extent of Discovery

[40] The defendants did not file Statements of Defence and no party has had the benefit of documentary discovery or oral examinations for discovery under the *Federal Courts Rules* in this proceeding.

[41] As noted, the plaintiff filed a certification motion, the defendants responded and the plaintiff replied, all with expert reports to support their positions. The defendants' record included an affidavit from a representative of JELD-WEN in Canada. Thus, the plaintiff has had the benefit of a complete certification record to assess the likelihood of success and the risks of proceeding forward.

[42] The plaintiffs also had access to many of the materials filed in the direct purchaser action in the US District Court, because most of the documents were unsealed.

[43] An affidavit from Charles M. Wright, a partner in the firm acting as class counsel, advised that the evidence in that US action was largely circumstantial. There was evidence of "high-level employees engaged in intra-company communications". From negotiations with the defendants, the plaintiffs learned that the testimony of the defendants' representatives was that the communications were not related to the pricing of Interior Molded Doors or any agreement not to compete in the Interior Molded Doors market.

[44] Based on the scope of the US discovery, which Mr Wright described as "extensive" documentary discovery and more than 50 depositions, Mr Wright testified that "we do not expect discovery in the Canadian action to yield additional evidence supporting a conspiracy".

[45] The defendant JELD-WEN of Canada, Ltd. filed an affidavit of its president and general manager as evidence in the certification motion. The same affidavit was also filed on the present motion to approve the settlement. The president and general manager testified that JELD-WEN Canada's pricing for Interior Molded Doors was first and foremost driven by costs, particularly Canadian input costs including manufacturing and transportation costs (see paras 42, 49-56, 71-72). He described contracts and negotiations with customers. He also advised that the pricing decision process was Canadian, and he did not seek or require approval from JELD-WEN in the United States for any pricing decision for JELD-WEN Canada. JELD-WEN Canada was aware of price increase announcements for customers in the US, but they were not a factor in Canadian price increases or Canadian pricing in general.

[46] The JELD-WEN Canada affidavit confirmed that the president and general manager had never spoken to anyone at Masonite (to his knowledge). During his time at the company, he had never had (and was not aware of anyone at JELD-WEN Canada having) any communications with any employee of any of its competitors about any aspect of competition regarding Interior Molded Doors (or any other products), including discussions of price, price increases, supply or any other aspect of competition between them. The JELD-WEN Canada affidavit confirmed that it made its own business decisions concerning product offerings and pricing, independent of its competitors including Masonite. It did not enter into any agreement or have any understanding with any of its competitors about any aspect of competition regarding Interior Molded Doors in Canada.

[47] JELD-WEN Canada's president and general manager was not cross-examined on this affidavit. However, it is not every day that a senior officer of a defendant provides an affidavit to defend a certification motion in a class action alleging a criminal conspiracy, let alone an affidavit containing the exculpatory evidence just described.

[48] The steps taken to obtain fact discovery, and the information obtained related to the likely merits of the claims pleaded in the Amended Statement of Claim, support the approval of the proposed settlement agreements.

(3) Negotiation of the Settlement Agreements

[49] I accept Mr Wright's evidence that the negotiations that ultimately culminated in the settlement agreement consisted of "hard-fought, arm's length negotiations spanning over two years" from May 2021 to summer 2023, including at a mediation.

(4) Future Steps and Likelihood of Recovery or Success

[50] The plaintiff reasonably anticipates that the defendants will strongly oppose the motion for certification and that if the proceeding is certified as a class proceeding, it will several years before the Court will render a judgment on the merits.

[51] The plaintiff argued that after the Amended Statement of Claim was filed, there were developments in the case law pertaining to the certification of price-fixing cases in this Court that affected the likelihood of certification and ultimately, recovery or success of the proposed class action. According to the plaintiff, the legal landscape was significantly altered by *Jensen v.*

Samsung Electronics Co. Ltd., 2021 FC 1185, [2022] 3 FCR 34 (“Jensen FC”), aff’d 2023 FCA 89 (“Jensen FCA”) (leave to appeal to the Supreme Court dismissed: SCC File No. 40807, January 11, 2024).

[52] The plaintiff referred to the defendants’ position that there was no factual basis for the alleged conspiracy in Canada such that the plaintiff could not satisfy either the cause of action or common issue requirements, as confirmed in *Jensen FC* and *Jensen FCA*. The plaintiff also referred to the defendants’ position that the plaintiff’s claim contained a bald allegation that the defendants entered into a conspiracy and failed to plead material facts sufficient to support a viable claim; that the plaintiff provided no evidence with respect to the existence of an agreement between the defendants to engage in the alleged anti-competitive conduct in or affecting Canada; and that the Canadian market was distinct from the US market and that any conspiracy in the US (which they denied) did not apply in Canada, a position supported by the affidavit filed by JELD-WEN Canada.

[53] The plaintiff’s submissions on this motion acknowledged a “real risk” that the plaintiff would be unable to prove a price-fixing conspiracy under subsection 45(1) of the *Competition Act*, because (a) there were no guilty pleas or findings in Canada or the US related to the alleged conspiracy, and (b) the US evidence was largely circumstantial and based on telephone calls and in-person meetings (and not on the contents of documents) that individuals testified were unrelated to prices or competition.

[54] As noted above, based on the scope of discovery in the US, already described, the plaintiff acknowledged that it was unlikely that discovery in this proceeding would yield additional evidence to support a conspiracy.

[55] I find the plaintiff's assessment of a low likelihood of recovery to be realistic in the circumstances. Regardless of whether the legal landscape was significantly altered by *Jensen FC* or *Jensen FCA*, there were risks to the plaintiff's position on certification arising from insufficient pleaded material facts and from the absence of a basis in fact for possible common issues: *Mancinelli*, at paras 51-52. The proposed financial terms of the two settlement agreements are satisfactory considering the likelihood of recovery and the risks of proceeding forward to a certification motion and possibly a trial on the merits. Put another way, the financial terms of the two settlements are an attractive and viable alternative to continued litigation. See *Mancinelli*, at paras 48-54; *Breckon*, at paras 56-59; *Lin*, at para 39.

[56] The delays, costs and risks of continued litigation, given the modest likelihood of success at certification and at a trial, are factors that favour approval of the proposed settlement agreements.

(5) The *Cy-près* Payment of \$100,000 in the Distribution Protocol

[57] The \$100,000 *cy-près* distribution is in lieu of payments to class members who will not receive any settlement funds, including all indirect consumer purchasers and some direct purchasers (i.e., retailers) that purchased from a defendant but do not qualify for settlement funds

[58] The plaintiff referred to *Sorenson v. easyhome Ltd.*, 2013 ONSC 4017, in which Justice Perell held that if “in all the circumstances an aggregate settlement recovery cannot be economically distributed to individual class members, the court will approve a *cy près* distribution to credible organizations or institutions that will benefit class members”: at para 26. The plaintiffs also referred to *Emond v. Google LLC*, 2021 ONSC 302, at para 37; *Harper v. American Medical Systems Canada Inc.*, 2019 ONSC 5723, at para 47; and *Ford v. F. Hoffman - La Roche Ltd.* (2005), 74 OR (3d) 758, 2005 CanLII 8751 (SC), at paras 78-80.

[59] A *cy-près* payment is not an ideal mode of distribution. It implies that a settlement payment is made not to class members but to an appropriate substitute for them: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 SCR 545, at para 26. In some cases, a *cy-près* payment may advance some of the objectives of class proceedings, including access to justice and behaviour modification or deterrence: *Sorenson.*, at paras 28-29; *Emond*, at paras 28-33; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 SCR 534, at paras 28-29. A *cy-près* should attempt to serve the objectives of the case and the interests of class members. It should be an indirect benefit to them that approximates their remedial compensation: *Sorenson*, at para 30; *Emond*, at para 24.

[60] The first question to consider is whether, in all the circumstances, a *cy-près* payment is an appropriate mechanism to distribute settlement funds: *Chartrand v Google LLC*, 2021 BCSC 7, at paras 45-50. Typically, when a *cy-près* payment is used, there is a practical concern that funds cannot be economically distributed to individual class members: *Breckon*, at paras 53-54; *Sorenson*, at para 26. There may be a large class and a modest settlement amount, so that

identification of class members and distribution of funds to them is too expensive in relation to the settlement funds available for distribution. Or there may be tiny settlement amounts on a *per capita* basis: see e.g., *Cronk v LinkedIn Corporation*, 2023 BCSC 2165, at paras 24-25, 39; *Chartrand*, at para 48.

[61] In this case, there is evidence about the number of direct purchaser class members who likely qualify to claim some of the settlement proceeds under the Distribution Protocol. While the plaintiff contended that the net settlement funds cannot be economically distributed to individual class members, the direct evidence does not support this argument. For example, the direct evidence does not contain an estimated number of indirect purchasers, or of direct purchasers who will not qualify to make a claim or, for that matter, an estimate of the overall size of the Settlement Class. However, the settlement proceeds are modest (about 40% of the aggregate settlement amount in *Breckon*) and it does not take much imagination to work out that there must be quite a sizeable number of indirect purchaser class members, from new-home construction companies to home renovation firms, to individual consumers buying a single product. In addition, proof of a quantum of claim for all indirect purchasers of Interior Molded Doors in Canada would be challenging, expensive and unwieldy. I find that payments from the net settlement funds to each non-qualifying Settlement Class member would be impractical.

[62] Second, I am also satisfied that the *cy-près* payment to Habitat for Humanity Canada is appropriate as a proxy for indirect consumer purchasers. There is a sufficient connection between the nature of the claim, Habitat for Humanity's mission and its proposed use of the donated funds, and the goals of indirectly benefitting the class and promoting behaviour modification:

Chartrand, at paras 54-56; *Eidoo v. Infineon Technologies AG*, 2020 ONSC 7208, at paras 6-7; *Walmsley v. 2016169 Ontario Inc.*, 2020 ONSC 1416, at para 45.

[63] Overall, I find that the proposed *cy-près* distribution is satisfactory as a term in the Distribution Protocol. It is not a negative factor in the approval of the proposed settlement.

(6) The Release in the Settlement Agreements

[64] At the hearing, I raised concerns about the scope of the release terms agreed by the plaintiff in favour of the defendants.

[65] The plaintiff, and all members of the Settlement Class, release the settling defendants and a long list of other releasees associated with them, from the “Released Claims that any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall, or may have”. Released Claims is defined, in material part, as any and all manner of claims:

... that any of the Releasors ever had, now has or hereafter can, shall or may have, relating in any way to the purchase, sale, pricing, discounting, manufacturing, marketing, offering or distributing of Interior Molded Doors, whether purchased directly or indirectly, including [...] and any claims for consequential, subsequent or follow-on harm that arises after the Date of Execution in respect of any agreement, combination, conspiracy or conduct that occurred during the applicable Class Period.

The Class Period is March 1, 2014, to the date of the order certifying the proceeding for settlement purposes (i.e., July 30, 2024). In the Masonite settlement, this term was amended; it previously had an end date of December 30, 2020.

[66] The definition of Released Claims goes on to provide that Released Claims do not include:

- i. claims based on negligence, personal injury, breach of contract, bailment, failure to deliver lost goods, damaged or delayed goods, product defects, breach of product warranty, securities, or similar claims between the Parties that relate to Interior Molded Doors (unless such claims allege, arise or are related to, directly or indirectly, alleged anticompetitive conduct, anticompetitive communications or conduct contrary to the *Competition Act*);
- ii. claims brought, whether before or after the Effective Date, outside of Canada relating to purchases of Interior Molded Doors outside of Canada; or claims brought, whether before or after the Effective Date, under laws other than those of Canada relating to purchases of Interior Molded Doors outside of Canada.

The Effective Date is essentially the date this Court approves the settlement agreement and the Quebec proceeding is discontinued.

[67] To assess the impact of the release on the approval of the proposed settlement, I am guided by *Breckon* (especially at paras 36-37, 43) and *Mancinelli* (especially at paragraphs 65, 67-70); and by *Loewenthal v. Sirius XM Holdings, Inc. et al.*, 2021 ONSC 4482; *Leonard v The Manufacturers Life Insurance Company*, 2020 BCSC 1840, at para 115; *Coburn and Watson's Metropolitan Home v BMO Financial Group*, 2018 BCSC 1183 ("Coburn and Watson's BCSC"), aff'd *Coburn and Watson's Metropolitan Home*, 2019 BCCA 308 ("Coburn and Watson's BCCA") (applications for leave dismissed: SCC File Nos. 38872 and 38873 (March 26, 2020)); and *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation*, 2014 ONSC 5812, at paras 44-45 and 54-61.

[68] The Ontario court in *Quizno's* did not approve the terms of settlement in a class proceeding based on the scope of the release: *Quizno's*, at paras 38, 45, 55. The concern was that it was unfair to categorically bar all future claims of the types identified in the statement of claim, which was a possible interpretation of the proposed release. It was not fair or reasonable to bar all future claims based on presently unknown new wrongs perpetrated by the defendants in the future: *Quizno's*, at paras 55-56, 58, 60-61. I note that the parties to the release did not agree on its scope (at paras 49-52).

[69] Both *Breckon* and *Mancinelli* concluded that the language of the respective releases did not preclude the approval of the settlements. As noted above, the parties did not have the reasons in *Mancinelli* at the hearing and have not made additional submissions in response to it. Although the possibility of amendments to the release language was mentioned at the hearing (as was done after the hearing in *Coburn and Watson's BCSC*, and after the decision in *Quizno's*), the parties in this proceeding have not done so.

[70] Both the release provision in the settlement agreements and the definition of Released Claims include language about the future. The latter includes claims the Releasors “ever had, now has or hereafter can, shall or may have, relating in any way to” a list of claims categories [emphasis added]. These terms may then be considered with the defined terms (particularly Released Claims), the temporal scope of the Class Period and the rest of the terms of the Settlement Agreements, and the terms of the Distribution Protocol. Of course, the Court’s role is to assess whether the overall settlement terms meet the legal test of being fair, reasonable and in the best interests of the class as a whole. The scope of the release terms, including their potential

application to “future” conduct and harm, is one aspect of the approval analysis for the proposed settlement of a class proceeding.

[71] For the reasons that follow, I conclude that the release terms do not prevent the approval of the proposed settlement.

[72] First, the nature and scope of the pleaded allegations affect the breadth of a release that that the Court may approve as part of a proposed settlement in a class proceeding. The Amended Statement of Claim pleaded a criminal conspiracy contrary to the *Competition Act*, which was alleged to continue to the “present time”. In the proposed settlement, the parties have agreed to “finally resolve on a national basis” the existing lawsuit: see Recital J of the settlement agreements.

[73] Relatedly, the defendants submitted that they bargained for the releases. This position is consistent with section 6.7 of the settlement agreements, which confirms the materiality of the releases and confers a right of termination if the Court does not approve the releases.

[74] In my view, the allegation in the Amended Statement of Claim of a continuing criminal conspiracy of price-fixing, made in a proposed class proceeding in which the class was proposed to include all purchasers (direct and indirect) of the product in question, is an important consideration in the assessment of the scope of the release in this case.

[75] Second, the plaintiff's written submissions argued that the form of release was limited to the allegations raised in the Amended Statement of Claim and excluded many kinds of claims that are unrelated to anticompetitive conduct. The plaintiff also advised at the hearing that the parties intended to limit the release to the Class Period, not to future claims. The defendants did not support the Court considering the latter point.

[76] Consistent with contract interpretation principles, it is the language of the settlement agreements should guide the Court's assessment on this motion, rather than one or more parties' intention as argued by counsel (see *Mancinelli*, at para 67; *Corner Brook (City) v. Bailey*, [2021] 2 SCR 540, 2021 SCC 29, at paras 20-21, 25, 43, 56-57).

[77] It is not disputed that the Court may consider the language of the release: see e.g., *Coburn and Watson's BCSC*, at paras 24-29, 56-61, aff'd *Coburn and Watson's BCCA*, at para 76. However, I note that the defendants filed no written submissions and the parties' oral submissions on this motion were not comprehensive on the interpretation of the release provisions. There is no evidence as to any surrounding circumstances.

[78] While the plaintiff argued that the release was limited to the allegations in the Amended Statement of Claim, the definition of Released Claims does not expressly tether the released claims to the pleading (as occurs in some cases, e.g., *Loewenthal*, at paras 34-35). The plaintiff's submissions also did not address the future-oriented language, noted above.

[79] However, release language that settles a lawsuit is often extremely broad, and it must be considered in the context of the parties' dispute – a context that may serve as a limiting factor when interpreting the wording in a release: *Corner Brook*, at paras 36, 43. As the parties noted, Recital E of the Settlement Agreements provides:

E. WHEREAS the Settling Defendants are entering into this Settlement Agreement in order to achieve a final and nation-wide resolution of all claims asserted or which could have been asserted against the Releasees by the Plaintiffs and the Settlement Class in the Proceedings and any Other Actions, and to avoid further expense, inconvenience and the distraction of burdensome and protracted litigation;

[Emphasis added.]

[80] In addition, the term Released Claims includes the language “in respect of any agreement, combination, conspiracy or conduct that occurred during the applicable Class Period”, which appears to modify the expansive language describing claims and harm that precedes it. Further, “Released Claims” does not include express language to cover claims “arising” or accruing up to, or after, the Effective Date. While the release provision provides that “[u]pon the Effective Date”, the Releasors release and discharge the Releasees from the Released Claims, the quoted phrase appears to concern the timing of when the release comes into force (i.e., when it is effective) rather than the time period it covers.

[81] With all of these considerations in mind, and placing the release terms in the context of the overall resolution of this proceeding, I find that the scope of the release agreed in the Settlement Agreements does not raise the same clear concerns that arose in *Quizno's*. This conclusion is supported by *Breckon*, in which Gascon J. concluded that the release terms in that case did not fit among the release clauses that the Court should be reluctant to approve. Having

carefully considered *Quizno 's*, Gascon J. was satisfied that the defendants had not unfairly obtained an overbroad release in the circumstances: *Breckon*, at paras 37-43. The release language in the present case appears to be similar to the language in *Breckon*: see *Breckon*, at paragraphs 36, 43.

[82] I also find it preferable to defer any other comments on interpretation to a future court that is required to apply the release terms, with full submissions and possibly supporting evidence. Given the terms in the release and the matrix of possible claims, the circumstances in which this release could apply in a future proceeding are complex. Different aspects of the release provisions could apply to bar or to not bar a potential future claim, depending on the nature and specific circumstances of that claim. As *Corner Brook* confirms, in a case that interprets and applies a release, there may be claims based on facts known to the parties at the time the release is executed, and other claims based on facts unknown to them at that time. In addition, there may be material differences amongst proceedings commenced after a release is executed: one proceeding may be based on conduct and harm arising before execution, another on conduct before the release was executed but harm that arose after execution, and a third on conduct and harm that both occurred after the release was executed. The drafters of the present release terms appear to have been alive to these scenarios, which can raise difficult questions for contractual interpretation and admissible evidence as to surrounding circumstances – questions that may be even more challenging because the release was agreed as part of a settlement of a class proceeding.

[83] As in *Mancinelli* and *Breckon*, I conclude that the release terms in this case, taken in the broader context of the test in *Waldron* and the likelihood of recovery in this case, are not fatal to the approval of the terms of the proposed settlement agreements as fair, reasonable and in the best interests of the class as a whole: *Mancinelli*, at para 71.

(7) Expressions of Support or Objections to the Proposed Settlements, and the Views of Class Counsel

[84] The following factors support the approval of the proposed settlements.

[85] As a result of the notice given to class members, class counsel received only two opt-outs, one of which advised that the party did not believe the settlement was in the best interests of the class. The evidence on this motion does not explain the reasons for that statement.

[86] No one appeared at the hearing to oppose the proposed settlements.

[87] Experienced class counsel recommends that the Court approve the proposed settlements.

(8) Conclusion

[88] On this motion, the Court must either approve or not approve the proposed settlements. The Court may not make changes to the terms of the proposed settlement agreements. It need not be a perfect settlement to be approved.

[89] Considering the factors assessed above, cumulatively, I conclude that the proposed settlement is fair, reasonable and in the best interests of the class as a whole. Similarly, I

conclude that the Distribution Protocol should also be approved. The Court will issue orders, substantially in the form proposed by counsel.

III. **Motion to Approve Class Counsel Fees and Disbursements**

A. *Legal Principles*

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

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

- a) The risk undertaken by class counsel;
- b) The results achieved;
- c) The time and effort expended by class counsel;
- d) The complexity and difficulty of the matter;
- e) The degree of responsibility assumed by class counsel;
- f) The fees in similar cases;
- g) The expectations of the class;
- h) The experience and expertise of class counsel;
- i) The ability of the class to pay; and
- j) The importance of the litigation to the plaintiff.

See *Mancinelli*, at para 95; *Breckon*, at para 127; *Moushoom*, at para 83; *Lin*, at para 71.

[92] These factors are non-exhaustive and their weight will vary based on the particular circumstances of each class action: *Breckon*, at para 129; *Lin*, at para 72. However, the two critical factors in assessing the fairness and reasonableness of a contingency fee request by class counsel are (1) the risk that class counsel undertook in conducting the litigation, measured from the commencement of the action and as the litigation continued but not with the benefit of hindsight when the result looks inevitable; and (2) the degree of success or results achieved for the class members through the proposed settlement: *Mancinelli*, at para 96; *Breckon*, at para 129; *Moushoom*, at paras 84-85; *Lin*, at para 72.

[93] I agree with Justice Gascon in *Breckon* that part of the Court's role on a motion to approve class counsel's fees is to scrutinize the proposed fees and disbursements and analyze the supporting evidence, to protect the members of the class: *Breckon*, at paras 131-132, 160-161.

B. *Analysis*

[94] The plaintiff and class counsel entered into a contingency fee retainer agreement dated December 15, 2020. Class counsel took on certain risks, including the possibility that they would spend time and incur significant disbursements (e.g., for expert's fees) but never be paid or reimbursed if they were unable to obtain a favourable judgment or settlement. In addition, class counsel could be liable for adverse costs awards.

[95] Class counsel's fee request is for 25% of the result obtained, which was the percentage agreed upon in the retainer agreement. The affidavit of the representative plaintiff supports the proposed payment and reimbursement of disbursements incurred by class counsel for the proceeding.

[96] As noted already, the results achieved for the plaintiff class were modest. However, as already analyzed in these Reasons, they are reasonable in light of the likely low merit of the claim as disclosed on the present motions.

[97] I agree with class counsel that the risks increased as this matter moved towards a certification motion. When the proceeding started, there was no investigation in Canada or the US into a possible criminal price-fixing conspiracy. There is no evidence that the Competition Bureau commenced an investigation, or laid charges under section 45 of the *Competition Act*. The plaintiff did not have the benefit of guilty pleas to criminal conduct in Canada to support the claim for damages under section 36 arising from illegal conduct under section 45.

[98] I also accept that the risks increased because the US class proceedings did not yield significant evidence to support the position on a criminal price-fixing conspiracy connected to Canada.

[99] In sum, I agree that in this case, the price-fixing allegations in the Amended Statement of Claim presented difficulties of evidentiary proof from the outset (as often occurs in criminal conspiracy proceedings, in which the communications or conduct giving rise to the alleged conspiracy is often known only to the defendants). Those challenges increased over time.

[100] The time and effort by class counsel, stated in terms of docketed hours spent on the matter, support the approval of the proposed fees. I accept that class counsel had to do considerable legwork to determine whether the evidence obtained from the US class actions supported a criminal conspiracy in Canada, and had to work with the expert witness retained for the certification motion.

[101] The percentage of the overall settlement fund represented by the fees and disbursements of class counsel is about 48%. This is high. It is also approximately the same as the percentage approved in *Breckon*, after adjustments by the Court: *Breckon*, at para 164.

[102] Class counsel have sensibly proposed to administer the claims process under the Distribution Protocol, which will reduce costs to the class.

[103] I am satisfied that class counsel's responsibly incurred disbursements for expert fees and that the quantum is not unreasonable or disproportionate in the context of this proceeding.

[104] For these reasons, I conclude that class counsel's proposed fees and disbursements is approved.

IV. **Conclusion**

[105] For these reasons, the motions are allowed. The Court will issue orders separately to implement these conclusions.

[106] There will be no costs order.

"Andrew D. Little"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1049-20

STYLE OF CAUSE: DAVID REGAN v MASONITE INTERNATIONAL CORPORATION, MASONITE CORPORATION, JELD-WEN, INC., JELD-WEN HOLDING, INC., AND JELD-WEN OF CANADA, LTD.

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: OCTOBER 30, 2024

REASONS FOR ORDER: A.D. LITTLE J.

DATED: APRIL 23, 2025

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