

FEB 27 2013



Original filed on March 28, 2011.
Amended pursuant to the Order of Chief
Justice Bauman pronounced on December 7,
2012 and entered on February 21, 2013.

NO. VLC-S-S-112003
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MARY WATSON

PLAINTIFF

AND:

BANK OF AMERICA CORPORATION, BMO FINANCIAL GROUP, BANK
OF NOVA SCOTIA, CANADIAN IMPERIAL BANK OF COMMERCE,
CAPITAL ONE FINANCIAL CORPORATION CAPITAL ONE BANK
(CANADA BRANCH), CITIGROUP INC., FÉDÉRATION DES CAISSES
DESJARDINS DU QUÉBEC, MASTERCARD INTERNATIONAL
INCORPORATED, NATIONAL BANK OF CANADA INC., ROYAL BANK
OF CANADA, TORONTO-DOMINION BANK, and VISA CANADA
CORPORATION

DEFENDANTS

Brought pursuant to the *Class Proceedings Act*, RSBC, 1996 c 50

NOTICE OF CIVIL CLAIM

**THIS ACTION HAS BEEN STARTED BY THE PLAINTIFF FOR THE RELIEF SET
OUT IN PART 2 BELOW.**

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (c) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (d) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

TIME FOR RESPONSE TO CIVIL CLAIM

A response to civil claim must be filed and served on the plaintiff,

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFF

PART 1: STATEMENT OF FACTS

THE REPRESENTATIVE PLAINTIFF

1. The plaintiff, Mary Watson, is a merchant and a resident in Vancouver, British Columbia. She has owned and operated a furniture store in Vancouver, BC, since 1990. Ms. Watson accepted payments by Visa credit cards and MasterCard credit cards during the proposed Class Period (as defined in paragraph 15 below).

THE DEFENDANTS

2. The defendant Visa Canada Corporation ("Visa") is a Nova Scotia incorporated company that is extraprovincially registered in British Columbia with a delivery address c/o Paul Richardson, Farris, Vaughan, Wills & Murphy LLP, 25th Floor, 700 West Georgia Street, Vancouver, BC V7Y 1B3 and is a subsidiary of Visa Inc. During the Class Period, Visa operated the Visa credit card network throughout Canada, including British Columbia.

3. The defendant MasterCard International Incorporated ("MasterCard") is incorporated under the laws of the State of Delaware, USA, and is a subsidiary of MasterCard Incorporated, a publicly traded corporation under the laws of the State of Delaware, USA. During the Class Period, MasterCard operated the MasterCard credit card network throughout Canada, including in British Columbia.

4. The defendant Bank of America Corporation "MBNA" is a publicly traded corporation under the laws of the State of Delaware, USA, doing business in Canada as MBNA Bank Canada. During the Class Period, MBNA issued MasterCard-branded credit cards throughout Canada, including British Columbia.

5. The defendant BMO Financial Group ("BMO") is a chartered bank incorporated pursuant to the *Bank Act*, SC 1991 c 46 (the "*Bank Act*"). During the Class Period, BMO issued MasterCard-branded credit cards throughout Canada, including British

Columbia. During the Class Period, BMO was, along with the Royal Bank of Canada, one of the joint investors behind Moneris Solutions Inc. ("Moneris"), one of the leading Acquirers (as defined in paragraph 18 in Canada).

6. The defendant Bank of Nova Scotia ("Scotiabank") is a chartered bank incorporated pursuant to the *Bank Act*. During the Class Period, Scotiabank issued Visa-branded credit cards throughout Canada, including British Columbia.

7. The defendant Canadian Imperial Bank of Commerce ("CIBC") is a chartered bank incorporated pursuant to the *Bank Act*. During the Class Period, CIBC issued both Visa- and MasterCard-branded credit cards throughout Canada, including British Columbia.

8. The defendant ~~Capital One Financial Corporation~~ Capital One Bank (Canada Branch) ("Capital One") is a publicly traded corporation under the laws of the State of Delaware, USA with a Canadian branch. During the Class Period, Capital One issued MasterCard-branded credit cards throughout Canada, including British Columbia.

9. The defendant Citigroup Inc. ("Citi") is a publicly traded corporation under the laws of the State of Delaware, USA. During the Class Period, Citi issued MasterCard-branded credit cards throughout Canada, including British Columbia.

10. The defendant Fédération des caisses Desjardins du Québec ("Desjardins") is an organization overseeing the Desjardin Group, including its caisses populaires and credit unions. During the Class Period, Desjardins issued Visa-branded credit cards throughout Canada, including British Columbia. During the Class Period, Desjardins owned and operated one of the leading Acquirers (as defined in paragraph 18 below) in Canada.

11. The defendant National Bank of Canada Inc. ("National") is a chartered bank incorporated pursuant to the *Bank Act*. During the Class Period, National issued MasterCard-branded credit cards throughout Canada, including British Columbia.

12. The defendant Royal Bank of Canada ("RBC") is a chartered bank incorporated pursuant to the *Bank Act*. During the Class Period, RBC issued both Visa and MasterCard-branded credit cards throughout Canada, including British Columbia. During the Class Period, RBC was, along with BMO, one of the joint investors behind Moneris.

13. The defendant Toronto-Dominion Bank ("TD") is a chartered bank incorporated pursuant to the *Bank Act*. During the Class Period, TD issued Visa-branded credit cards throughout Canada, including British Columbia. During the Class Period, TD owned and operated TD Merchant Services, one of the leading credit card acquirers in Canada.

14. Collectively, BMO, Capital One, Citi, Desjardins, CIBC, MBNA, National, RBC, Scotiabank, and TD are known as the "Defendant Banks".

THE CLASSES AND THE CLASS PERIODS

15. This action is brought on behalf of members of a class (the "Visa Class Members") of merchants consisting of the plaintiff and all Canadian resident persons who, during the period commencing at least as early as March 23, 2001 and continuing through to the present (the "Class Period"), accepted payments for the supply of goods and services by way of Visa credit cards pursuant to the terms of merchant agreements, or such other class definition or class period as the Court may ultimately decide on the motion for certification.

16. This action is brought on behalf of members of a further class (the "MasterCard Class Members") of merchants consisting of the plaintiff and all Canadian resident persons who, during the Class Period, accepted payments for the supply of goods and services by way of MasterCard credit cards pursuant to the terms of merchant agreements or such other class definition or class period as the Court may ultimately decide on the motion for certification.

FACTUAL BACKGROUND TO THE CREDIT CARD INDUSTRY

17. The defendants Visa and MasterCard operate the two largest credit card networks in Canada, including in British Columbia. In 2009, Visa had approximately 31 million credit cards in circulation and MasterCard had approximately 44 million. In 2009, approximately 670,000 merchants across Canada accepted Visa or MasterCard credit cards. In 2009, the Canadian credit card market had \$265 billion in purchase transactions. Visa's share of these transactions was approximately 60% and MasterCard's share approximately 30%.

18. Each credit card network involves contracts with issuing banks that are authorized by the defendants to issue credit cards to consumers bearing the trademarks Visa and/or MasterCard ("Issuing Banks") and acquiring financial institutions that function as payment processors to merchants ("Acquirers"). The Defendant Banks are all Issuing Banks.

19. The credit card industry is characterized by contractual relationships amongst and between Visa, its Issuing Banks, and the Acquirers, and amongst and between MasterCard, its Issuing Banks, and the Acquirers, giving each credit card network market power in the Canadian market for credit card network services.

20. The agreements and contractual relationships that govern the Visa and MasterCard credit card networks constitute two separate, but interrelated conspiracies in operation by way of contracts which are between and among:

- (a) the Visa network and its member banks (which are Issuing Banks and Acquirers); and
- (b) the MasterCard network and its member banks (which are Issuing Banks and Acquirers).

21. In essence, the Visa and MasterCard networks are organizations that facilitate credit and debit card transactions. They do so by setting standards for the exchange of transaction data and funds among merchants, Issuing Banks, and Acquirers. The

networks also provide authorization, clearance and settlement services for all Visa and MasterCard branded payment card transactions.

22. Certain Issuing Banks, such as the defendants CIBC, Desjardins, and RBC, and all Acquirers participate in both credit card networks. Certain Issuing Banks, including the defendants BMO, Desjardins, RBC, and TD, are also Acquirers or own large stakes in Acquirers.

23. In order to accept payments by Visa or MasterCard credit cards, merchants must enter into agreements with Acquirers. These agreements include standard terms and conditions imposed by the Issuing Banks and Visa and MasterCard through their respective agreements with the Acquirers. These agreements include the terms of the Visa International Operating Regulations (the "Visa Rules") and the MasterCard International MasterCard Rules (the "MasterCard Rules").

24. Every time a customer uses a Visa or MasterCard credit card to pay a merchant for a good or service, that merchant must pay a fee, commonly referred to as a "Merchant Discount Fee". The Merchant Discount Fee is calculated as a percentage of the sale price of the good or service supplied. The Merchant Discount Fee is the difference between the price a merchant charges for a good or service and the amount that is paid to the merchant by the Acquirer. In 2009, merchants in Canada paid approximately \$5 billion in Merchant Discount Fees.

25. The Merchant Discount Fee is divided into three parts: the "Interchange Fee" paid to the Issuing Bank associated with the customer's particular Visa or MasterCard credit card, the "Service Fee" retained by the Acquirer and the "Network Fee" paid to either Visa or MasterCard. The Interchange Fee is typically 80% of the Merchant Discount Fee.

26. Through agreements with the Issuing Banks and Acquirers, Visa and MasterCard constitute an unlawfully created and maintained duopoly in the Canadian credit card network services market that leverages their market power to earn supracompetitive profits from Canadian merchants, including the Visa and MasterCard Class Members.

27. During the Class Period, the Visa and MasterCard networks each set and made available default minimum rates for the calculation of Interchange Fees for use by Acquirers and Issuing Banks within their respective credit card networks. These minimum rates set a baseline that applied to the vast majority of purchase transactions within the Visa and MasterCard credit card networks.

28. Interchange Fees vary from card to card depending on the services and incentives bundled with the credit card. Premium credit cards that offer consumers additional incentives such as reward points typically carry a higher Interchange Fee. Merchants are not made aware of the Merchant Discount Fee that will apply to any particular purchase with any particular card until the Acquirer reimburses the merchant.

29. Interchange Fees are also structured to impose different rates on different types of merchants. For instance, Interchange Fees on grocery store and gas station transactions are lower than interchange fees on most other retailers. The defendants' market power gives them the ability to price discriminate in this manner.

- (a) By enforcing adherence to the Visa Rules and the MasterCard Rules, the Visa network and MasterCard network have created agreements or arrangements that impose significant restrictions on the terms upon which Acquirers supply credit card network services to merchants under the merchant agreements (the "Merchant Restraints". Both the Visa Rules and the MasterCard Rules impose substantially the same restraints, including the requirements that merchants must honour all credit cards of the same network (the "Honour All Cards Rule") and may not impose surcharges on purchases made using any credit card of the same network, regardless of the Merchant Discount Fee associated with use of a particular credit card (the "No Surcharge Rule").

30. The Merchant Restraints prevent merchants from effectively encouraging customers to use lower-cost methods of payment, and from declining to accept certain Visa and MasterCard credit cards, including those with higher Merchant Discount Fees such as premium credit cards. The Merchant Restraints prevent merchants from

applying surcharges to payments made by Visa and MasterCard credit cards as compared to other modes of payment such as cash and debit cards. The effect of the Merchant Restraints is to impede or constrain competition for credit card network services, including competition with respect to Merchant Discount Fees.

31. As a consequence of the Merchant Restraints, consumers pay the same prices for goods and services supplied by merchants regardless of mode of payment, despite the higher cost to merchants of Visa and MasterCard credit card transactions.

32. The effect of the Merchant Restraints is that Merchant Discount Fees in Canada are far in excess of similar fees in other jurisdictions where the Merchant Restraints are not applied or are applied differently.

33. In the typical Visa or MasterCard transaction, funds flow from cardholders to Issuing Banks, including the Defendant Banks, which deduct the Interchange Fee, and then to Acquirers who deduct the Service Fee, pay the Network Fee to Visa or MasterCard, and finally pay the residual to merchants (i.e., the purchase price on any transaction less the total applicable Merchant Discount Fee). Information regarding every Visa and MasterCard credit card transaction is distributed to either Visa or MasterCard along with the applicable Issuing Bank and Acquirer associated with that merchant. During the Class Period, the allocation of the Merchant Discount Fee into Interchange Fee, Network Fee, and Service Fee was not disclosed to merchants.

34. Visa, MasterCard, the Issuing Banks, and the Acquirers seek to maximize the aggregate Merchant Discount Fees paid by the Visa and MasterCard Class Members through the two networks.

35. Issuing Banks bundle credit cards with various features such as rewards and points. Visa and MasterCard Class Members pay some or all of the cost of these features, essentially subsidizing the Issuing Banks' promotional schemes.

36. The structure of the Visa and MasterCard credit card network schemes allows Issuing Banks to create powerful incentives for customers to use Visa or MasterCard

credit cards for as many transactions as possible, offering reward points for each dollar spent on premium credit cards.

37. The Merchant Restraints allow Issuing Banks to offload the cost of these promotional schemes onto merchants, who must choose to accept whatever fees are charged or not to accept credit cards at all. The Honour All Cards Rule forces merchants to accept any and all Visa and MasterCard credit cards, no matter how high the fees for using that particular card. The No Surcharge Rule prevents merchants from passing this additional expense along to customers who pay with premium credit cards.

38. The operation of the Visa and MasterCard credit card network schemes by the Defendants are intended to maximize, increase, and maintain the total Merchant Discount Fees paid by merchants, including the Visa Class Members and MasterCard Class Members.

THE VISA CONSPIRACY

39. Various Issuing Banks, including the defendants CIBC, Desjardins, RBC, Scotiabank, and TD, along with others not named as defendants participated as co-conspirators in the alleged unlawful conduct and entered into anti-competitive agreements, including agreements with Visa, each other, and other Issuing Banks regarding the rates of Interchange Fees paid to Issuing Banks by Acquirers within the Visa credit card network. Visa, CIBC, Desjardins, RBC, Scotiabank, and TD are jointly and severally liable for the actions of, and damages allocable to, Visa and the co-conspirator Issuing Banks.

40. Various Acquirers not named as defendants participated as co-conspirators in the alleged unlawful conduct and entered into anti-competitive agreements, including agreements with each other, Visa, and the Issuing Banks. Pursuant to these agreements, the Acquirers entered into merchant agreements with merchants across Canada, including the Visa Class Members, which imposed standard anti-competitive terms and conditions, including the Merchant Restraints. The agreements resulted in the imposition of supracompetitive rates for Merchant Discount Fees paid by the Visa

Class Members. Visa, CIBC, Desjardins, RBC, Scotiabank, and TD are jointly and severally liable for the actions of, and damages allocable to, the co-conspirator Acquirers. These co-conspirator Acquirers include, without limitation, Moneris Solutions, TD Merchant Services, Global Payments, Peoples Trust, First Data, Elavon, Desjardins and Chase Paymentech Solutions.

41. During the Class Period, senior executives and employees of Visa, CIBC, Desjardins, RBC, Scotiabank, and TD and other co-conspirators, acting in their capacities as agents for the defendants and co-conspirators, engaged in communications, conversations and attended meetings with each other. As a result of the communications and meetings, Visa, CIBC, Desjardins, RBC, Scotiabank, and TD and their co-conspirators unlawfully conspired or agreed to:

- (a) impose the Merchant Restraints set out in the Visa Rules on merchants including the Visa Class Members and thereby unreasonably increase the rates of Merchant Discount Fees paid by merchants, including the Visa Class Members, for payments made using Visa credit cards in Canada including British Columbia;
- (b) fix, maintain, increase or control the rates of Merchant Discount Fees in Canada including British Columbia;
- (c) exchange information in order to monitor and enforce adherence to the agreed upon Merchant Restraints in Canada including British Columbia; and
- (d) control the supply of credit card network services in Canada including in British Columbia.

42. In furtherance of the conspiracy, during the Class Period, Visa, CIBC, Desjardins, RBC, Scotiabank, and TD, their co-conspirators, and their servants and agents:

- (a) increased or maintained the default rates for Merchant Discount Fees in Canada, including British Columbia;

- (b) controlled the supply of credit card services by imposing the Visa Rules including the Merchant Restraints on merchants in Canada, including in British Columbia;
- (c) communicated, in person and by telephone, to discuss and fix the default rates for Merchant Discount Fees in Canada, including British Columbia;
- (d) exchanged information regarding the rates for Merchant Discount Fees and the volume of transactions using Visa credit cards for the purposes of monitoring and enforcing adherence to the agreed upon Merchant Restraints;
- (e) took active steps to, and did, conceal the rates of the constituent elements of Merchant Discount Fees from all merchants; and
- (f) disciplined any Acquirer which failed to impose the Merchant Restraints or any merchant which failed to comply with the Merchant Restraints.

43. Visa, CIBC, Desjardins, RBC, Scotiabank, and TD and their co-conspirators were motivated to conspire and their predominant purposes and predominant concerns were to:

- (a) harm the plaintiff and other Visa Class Members by requiring them to pay supracompetitive rates for Merchant Discount Fees; and
- (b) illegally increase their profits.

44. The acts alleged in this claim to have been done by Visa, CIBC, Desjardins, RBC, Scotiabank, and TD were authorized, ordered and done by the respective officers, directors, agents, employees or representatives of each while engaged in the management, direction, control or transaction of its business affairs.

THE MASTERCARD CONSPIRACY

45. Various Issuing Banks, including the defendants BMO, Capital One, CIBC, Citi, MBNA, National, and RBC, along with others not named as defendants, participated as co-conspirators in the alleged unlawful conduct and entered into anti-competitive agreements, including agreements with MasterCard, each other, and other Issuing Banks regarding the rates of Interchange Fees paid to Issuing Banks by Acquirers within the MasterCard credit card network. MasterCard, BMO, Capital One, CIBC, Citi, MBNA, National, and RBC are jointly and severally liable for the actions of, and damages allocable to, the co-conspirator Issuing Banks.

46. Various Acquirers not named as defendants participated as co-conspirators in the alleged unlawful conduct and entered into anti-competitive agreements, including agreements with MasterCard, each other, and the Issuing Banks. Pursuant to these agreements, the Acquirers entered into merchant agreements with merchants across Canada, including the MasterCard Class Members, which imposed standard anti-competitive terms and conditions, including the Merchant Restraints. The agreements resulted in the imposition of supracompetitive rates for Merchant Discount Fees paid by the MasterCard Class Members. MasterCard, BMO, Capital One, CIBC, Citi, MBNA, National, and RBC are jointly and severally liable for the actions of, and damages allocable to, the co-conspirator Acquirers. These co-conspirator Acquirers include, without limitation, Moneris Solutions, TD Merchant Services, Global Payments, Peoples Trust, First Data, Elavon, Desjardins and Chase Paymentech Solutions.

47. During the Class Period, senior executives and employees of MasterCard, BMO, Capital One, CIBC, Citi, MBNA, National, RBC, and their co-conspirators, acting in their capacities as agents for MasterCard and the co-conspirators, engaged in communications, conversations and attended meetings with each other. As a result of the communications and meetings MasterCard and the co-conspirators unlawfully conspired or agreed to:

- (a) impose the Merchant Restraints set out in the MasterCard Rules on merchants, including the MasterCard Class Members, and thereby

unreasonably increase the rates of Merchant Discount Fees paid by merchants, including the MasterCard Class Members, for payments made using MasterCard credit cards in Canada including British Columbia;

- (b) fix, maintain, increase or control the rates of Merchant Discount Fees in Canada including British Columbia;
- (c) exchange information in order to monitor and enforce adherence to the agreed upon Merchant Restraints in Canada including British Columbia; and
- (d) control the supply of credit card network services in Canada including in British Columbia.

48. In furtherance of the conspiracy, during the Class Period, MasterCard, BMO, Capital One, CIBC, Citi, MBNA, National, RBC, and their co-conspirators and their servants and agents:

- (a) increased or maintained the default rates for Merchant Discount Fees in Canada, including British Columbia;
- (b) controlled the supply of credit card services by imposing the MasterCard Rules including the Merchant Restraints on merchants in Canada, including in British Columbia;
- (c) communicated, in person and by telephone, to discuss and fix the default rates for Merchant Discount Fees in Canada, including British Columbia;
- (d) exchanged information regarding the rates for Merchant Discount Fees and the volume of transactions using MasterCard credit cards for the purposes of monitoring and enforcing adherence to the agreed upon Merchant Restraints;
- (e) took active steps to, and did, conceal the rates of the constituent elements of Merchant Discount Fees from all merchants; and

- (f) disciplined any Acquirer which failed to impose the Merchant Restraints or any merchant which failed to comply with the Merchant Restraints.

49. MasterCard, BMO, Capital One, CIBC, Citi, MBNA, National, and RBC, and their co-conspirators were motivated to conspire and their predominant purposes and predominant concerns were to:

- (a) harm the plaintiff and other MasterCard Class Members by requiring them to pay supracompetitive rates for Merchant Discount Fees; and
- (b) illegally increase their profits.

50. The acts alleged in this claim to have been done by MasterCard, BMO, Capital One, CIBC, Citi, MBNA, National, and RBC were authorized, ordered and done by their respective officers, directors, agents, employees or representatives of each while engaged in the management, direction, control or transaction of its business affairs.

CAUSES OF ACTION

Civil Conspiracy

51. The acts particularized in paragraphs 40-51 were unlawful acts directed towards the plaintiff and other Visa and MasterCard Class Members, which unlawful acts the defendants knew in the circumstances would likely cause injury to the Plaintiff and other Visa and MasterCard Class Members and, as such, the defendants are each liable for the tort of civil conspiracy. Further, or alternatively, the predominant purpose of the acts particularized in paragraphs 40-51 was to injure the plaintiff and the other Visa and MasterCard Class Members and the defendants are jointly and severally liable for the tort of civil conspiracy.

Breach of the Competition Act

52. Further, or alternatively, the acts particularized in paragraphs 40-51 are in breach of section 45 of Part VI of the *Competition Act*, RS 1985, c 19 (2nd Suppl.) ("*Competition Act*"), were and are unlawful, and render the defendants jointly and

severally liable to pay damages and costs of investigation pursuant to s 36 of the *Competition Act*.

53. Further, or alternatively, the acts particularized in paragraphs 40-51 were in breach of section 45 of *Competition Act* at the time the acts were committed, and hence were unlawful.

Unlawful Interference with Economic Interests

54. Further, or alternatively, the acts particularized in paragraphs 40-51 were unlawful acts undertaken by the defendants with the intent to injure the plaintiff and the other Visa Class Members and MasterCard Class Members, and the defendants are jointly and severally liable for the tort of unlawful interference with economic interests.

55. The plaintiff and the other Visa and MasterCard Class Members suffered damages as a result of the defendants' unlawful interference with their economic interests.

DAMAGES

56. The plaintiff and the other Class Members suffered the following damages:

- (a) the rates of Merchant Discount Fees have been maintained at and/or increased to a supracompetitive level; and
- (b) competition in the supply of Visa and MasterCard credit card network services has been lessened.

57. During the period covered by this claim, the plaintiff and the other Visa Class Members and MasterCard Class Members entered into standard form merchant agreements with Acquirers containing the Merchant Restraints imposed pursuant to the Visa Rules and MasterCard Rules, respectively, and paid excessive and supracompetitive Merchant Discount Fees. By reason of the alleged violations of the *Competition Act* and the common law, the plaintiff and the other Visa and MasterCard Class Members paid more for Visa and MasterCard credit card network services than

they would have paid in the absence of the illegal agreements and, as a result, they have been injured in their business and property and have suffered damages in an amount presently undetermined (the "Merchant Discount Fee Overcharge").

PUNITIVE DAMAGES

58. The plaintiff pleads that the defendants' conduct as particularized in paragraphs 40-51 was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, wilful, in contumelious disregard of the plaintiff's rights and the rights of each Visa and MasterCard Class Member, indifferent to the consequences and, as such, renders the defendants jointly and severally liable to pay punitive damages.

UNJUST ENRICHMENT, CONSTRUCTIVE TRUST, AND WAIVER OF TORT

59. In the alternative, the plaintiff waives the tort and pleads that she and the other Visa and MasterCard Class Members are entitled to recover under restitutionary principles.

60. The defendants have each been unjustly enriched by the receipt of the Merchant Discount Fee Overcharge. Visa and MasterCard Class Members have suffered a deprivation in the amount of such Merchant Discount Fee Overcharge.

61. Since the Merchant Discount Fee Overcharge that was received by the defendants from the Visa and MasterCard Class Members resulted from the defendants' wrongful or unlawful acts, there is and can be no juridical reason justifying the defendants' retaining any part of such overcharge.

62. The defendants are constituted as constructive trustees in favour of the Visa and MasterCard Class Members for all of the Merchant Discount Fee Overcharge because, among other reasons:

- (a) the defendants were unjustly enriched by receipt of the Merchant Discount Fee Overcharge;

- (b) the Class Members suffered a deprivation by paying the Merchant Discount Fee Overcharge;
- (c) the defendants engaged in inappropriate conduct and committed a wrongful acts by engaging in the conspiracies alleged in this claim;
- (d) the Merchant Discount Fee Overcharge were acquired in such circumstances that the defendants may not in good conscience retain them;
- (e) justice and good conscience require the imposition of a constructive trust;
- (f) the integrity of the marketplace would be undermined if the court did not impose a constructive trust; and
- (g) there are no factors that would, in respect of the artificially induced overcharge, render the imposition of a constructive trust unjust.

63. The plaintiff pleads that equity and good conscience requires the defendants to hold the Merchant Discount Fee Overcharge in trust for the plaintiff and the other Visa and MasterCard Class Members and to disgorge that amount to the plaintiff and the other Class Members.

JURISDICTION

64. There is a real and substantial connection between British Columbia and the facts alleged in this proceeding. The plaintiff and other Visa and MasterCard Class Members plead and rely upon the *Court Jurisdiction and Proceedings Transfer Act* RSBC 2003 Ch 28 (the "*CJPTA*") in respect of these defendants. Without limiting the foregoing, a real and substantial connection between British Columbia and the facts alleged in this proceeding exists pursuant to ss10 (f) – (i) of the *CJPTA* because this proceeding:

- (f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia;

- (g) concerns a tort committed in British Columbia;
- (h) concerns a business carried on in British Columbia; and
- (i) is a claim for an injunction ordering a party to do or refrain from doing anything in British Columbia.

PART 2: RELIEF SOUGHT

65. The plaintiff, on its own behalf, and on behalf of the Visa and MasterCard Class Members, claims against the defendants:

- (a) a declaration that the defendants, and each of them, participated in conspiracies to impose and maintain the Merchant Restraints and/or Merchant Discount Fees in the period beginning at least March 23, 2001 to the present in violation of statutory, common law, and equitable laws as alleged in this claim;
- (b) an order certifying this action as a class proceeding against Visa, CIBC, Desjardins, RBC, Scotiabank, and TD, and appointing the plaintiff as representative plaintiff in respect of the Visa Class Members;
- (c) an order certifying this action as a class proceeding against MasterCard, BMO, Capital One, CIBC, Citi, MBNA, National, and RBC, and appointing the plaintiff as representative plaintiff in respect of the MasterCard Class Members;
- (d) general damages for conspiracy and unlawful interference with economic interests;
- (e) general damages for conduct that is contrary to Part VI of the *Competition Act*;
- (f) an injunction enjoining the defendants from conspiring or agreeing with each other, or others, to impose the Merchant Restraints;

- (g) an injunction enjoining the defendants from conspiring or agreeing with each other, or others, to raise, maintain, fix and/or stabilize the rates of Merchant Discount Fees;
- (h) punitive damages;
- (i) costs of investigation and prosecution of this proceeding pursuant to s 36 of the *Competition Act*;
- (j) pre-judgment and post-judgment interest pursuant to the *Court Order Interest Act*, RSBC 1996, c 78, s 128; and
- (k) such further and other relief as to this Honourable Court may seem just.

PART 3: LEGAL BASIS

66. The plaintiff pleads and relies upon the *Class Proceedings Act*, RSBC, 1996 c 50, the *Competition Act* and the *CJPTA*.

67. Further, the plaintiff claims that the acts particularized in paragraphs 40-51 were unlawful acts directed towards the plaintiff and the other Visa and MasterCard Class Members which unlawful acts the defendants knew in the circumstances would likely cause injury to the plaintiff and the other Visa and MasterCard Class Members, and the defendants are each jointly and severally liable for the tort of civil conspiracy.

68. Further, the predominant purpose of the acts particularized in paragraphs 40-51 was to injure the plaintiff and the other Visa and MasterCard Class Members and the defendants are each jointly and severally liable for the tort of civil conspiracy.

69. Further, the acts particularized in paragraphs 40-51 were unlawful acts intended to cause the plaintiff and the other Visa and MasterCard Class Members economic loss and constituted unlawful interference with the economic interests of the Visa and MasterCard Class Members and render each of the defendants jointly and severally liable to pay the resulting damages.

70. Further, and in the alternative in the circumstances set out above, the plaintiffs are entitled to claim based on equitable and restitutionary principles.

Plaintiff's address for service:

BRANCH MACMASTER LLP
#1410 – 777 Hornby Street
Vancouver, BC V6Z 1S4

Tel: (604) 631-6299
Fax: (604) 631-3429
E-mail: wbranch@branmac.com

Defendants' address for service:

TO:

Visa Canada Corporation
c/o Paul Richardson
Farris, Vaughan, Wills & Murphy LLP
25th Floor, 700 West Georgia Street,
Vancouver, BC V7Y 1B3

AND TO:

MasterCard International Incorporated
200 Purchase Street
Purchase, NY 10577
USA

AND TO:

Bank of America Corporation
101 South Tryon Street
Charlotte, NC 28255
USA

AND TO:

BMO Financial Group
First Canadian Place
100 King Street West
Toronto, ON M5X 1A1

AND TO:

Bank of Nova Scotia
Scotia Plaza
44 King Street West
Toronto, ON M5H 1H1

AND TO:

Canadian Imperial Bank of Commerce
Commerce Court
Toronto, ON M5L 1G2

AND TO:

~~Capital One Financial Corporation~~ Capital One Bank (Canada Branch)
1680 Capital One Drive
McLean, VA 22102
USA
and
P.O. Box 515, Scarborough Stn. D
Scarborough, ON M1R5N4

AND TO:

Citigroup Inc.
399 Park Avenue
New York, NY 10043
USA

AND TO:

Fédération des caisses Desjardins du Québec
2 Complexe Desjardins
PO Box 9000, Desjardins Station
Montreal, PQ H5B 1H5

AND TO:

National Bank of Canada Inc.
600 de la Gauchetière St W
Montreal, PQ H3B 4L2

AND TO:

Royal Bank of Canada
200 Bay Street
Toronto, ON M5J 2J5

AND TO:


Toronto-Dominion Bank
PO Box 1
Toronto Dominion Centre
Toronto, ON M5K 1A2

Place of trial: Vancouver Law Courts


The address of the registry is:

800 Smithe Street, Vancouver, B.C. V6Z 2E1

Date: March 28, 2011



Reidar Mogerman



by permission

Ward K. Branch

Signatures of lawyer for plaintiff

**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION FOR SERVICE
OUTSIDE BRITISH COLUMBIA**

There is a real and substantial connection between British Columbia and the facts alleged in this proceeding and the plaintiff and other Class Members plead and rely upon the *Court Jurisdiction and Proceedings Transfer Act* RSBC 2003 Ch 28 (the "CJPTA") in respect of these defendants. Without limiting the foregoing, a real and substantial connection between British Columbia and the facts alleged in this proceeding exists pursuant to ss10 (f) – (i) of the *CJPTA* because this proceeding:

- (f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia;
- (g) concerns a tort committed in British Columbia;
- (h) concerns a business carried on in British Columbia; and
- (i) is a claim for an injunction ordering a party to do or refrain from doing anything in British Columbia.

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.

APPENDIX

PART 1: CONCISE SUMMARY OF NATURE OF CLAIM:

This proposed class action claim involves allegations of a price fixing conspiracy in the market for credit card network services.

PART 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

PART 3: THIS CLAIM INVOLVES:

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

PART 4:

1. *Class Proceedings Act*, RSBC, 1996 c 50
2. *Competition Act*, RS 1985, c 19, (2nd Supp)