

JUN 01 2017



The Original Notice of Civil Claim was filed on March 28, 2011 and the Amended Notice of Civil Claim was filed on February 27, 2013 and the Further Amended Notice of Civil Claim was filed on June 30, 2016.

NO. VLC-S-S-112003  
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

COBURN AND WATSON'S METROPOLITAN HOME dba  
METROPOLITAN HOME

PLAINTIFF

AND:

~~BANK OF AMERICA CORPORATION~~, BANK OF MONTREAL,  
BANK OF NOVA SCOTIA, CANADIAN IMPERIAL BANK OF  
COMMERCE, ~~CAPITAL ONE BANK (CANADA BRANCH)~~,  
~~CITIGROUP INC.~~, ~~FEDERATION DES CAISSES~~  
~~DES JARDINS DU QUEBEC~~, ~~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

**SECOND FURTHER AMENDED NOTICE OF CIVIL CLAIM**

(AMENDED PURSUANT TO ORDER ISSUED NOVEMBER 2, 2016)

**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. ~~4.~~ The plaintiff, Coburn and Watson's Metropolitan Home, dba Metropolitan Home ("Metropolitan Home"), is a business partnership in Vancouver, British Columbia. Metropolitan Home has owned and operated a furniture store in Vancouver, BC, since 1990. Metropolitan Home 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 and is a subsidiary of Visa Inc., a publicly traded corporation under the laws of the State of Delaware, USA. 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 British Columbia.

~~4. The defendant Bank of America Corporation ("BofA") is a publicly traded corporation under the laws of the State of Delaware, USA, which, until December 2011, did business in Canada as MBNA Canada Bank. In December 2011, MBNA Canada Bank was renamed BofA Canada Bank. During the Class Period, MBNA Canada Bank issued MasterCard-branded credit cards throughout Canada, including in British Columbia. BofA sold the majority of its MBNA Canada Bank assets, including the majority of its credit card accounts to the defendant The Toronto-Dominion Bank ("TD") in or about December 2011.~~

4. ~~5.~~ The defendant Bank of Montreal ("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 ("RBC"), one of the founding partners behind Moneris Solutions Inc. ("Moneris"), one of the leading Acquirers (as defined in paragraph 19~~17~~ below) in Canada. Moneris was created in 2000 as a joint venture between BMO and RBC, which continue to be in partnership in Moneris.

5. ~~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.

6. ~~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. During the Class Period, CIBC had a marketing alliance with Global Payments Inc. ("Global").

~~8. The defendant 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 Federation des caisses Desjardins du Quebec ("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 Desjardins Payment Services, one of the leading Acquirers in Canada.~~

7. ~~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. During the Class Period, National had a marketing alliance with Global.

8. ~~12.~~ The defendant 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, involved in founding Moneris, as described above.

9. ~~13.~~ TD ~~The defendant The Toronto-Dominion Bank ("TD")~~ is a chartered bank incorporated pursuant to the *Bank Act*. During the Class Period, TD issued Visa- and MasterCard-branded credit cards throughout Canada, including British Columbia. During the Class Period, TD owned and operated TD Merchant Services, one of the leading Acquirers in Canada. In or about December 2011, TD ~~made the MBNA purchase described above~~ purchased the majority of Bank of America Corporation's MasterCard credit card portfolio in Canada ("MBNA").

10. ~~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

11. ~~15.~~ This action is brought on behalf of members of a class (the "BC Visa Class Members") consisting of the plaintiff and all British Columbia resident persons who, during some or all of the period commencing March 28, 2005 and continuing through to the present (the "Class Period"), accepted payments in British Columbia for the supply of goods or 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 application for certification.~~

12. ~~16.~~ This action is also brought on behalf of members of a class (the "Out-of-Province Visa Class Members") consisting of all persons resident elsewhere in Canada who, during some or all of the Class Period, accepted payments in Canada, outside of British Columbia, for the supply of goods or services by way of



Visa credit cards pursuant to the terms of merchant agreements, and who opt in to this proceeding;

13. ~~17.~~ This action is also brought on behalf of members of a further class (the "BC MasterCard Class Members") consisting of the plaintiff and all British Columbia resident persons who, during some or all of the Class Period, accepted payments in British Columbia for the supply of goods or 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 application for certification.~~

14. ~~18.~~ This action is also brought on behalf of members of a further class (the "Out-of-Province MasterCard Class Members") consisting of ~~All~~ persons resident elsewhere in Canada who, during some or all of the Class Period, accepted payments in Canada, outside of British Columbia, for the supply of goods or services by way of MasterCard credit cards pursuant to the terms of merchant agreements, and who opt in to this proceeding.

## **FACTUAL BACKGROUND TO THE CREDIT CARD INDUSTRY**

15. ~~19.~~ The defendants Visa and MasterCard operate the two largest credit card networks in Canada, including 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%.

16. ~~20.~~ There are significant barriers to entry in the credit card network services market. There have been no significant new entrants in the market for credit card network services over the past 20 years.

17. ~~21.~~ 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 or MasterCard ("Issuing Banks") and acquiring financial institutions

that function as payment processors to merchants ("Acquirers"). The Defendant Banks are all Issuing Banks. Some of the Defendant Banks are also Acquirers, or have an ownership interest in Acquirers.

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

19. ~~23.~~—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).

20. ~~24.~~—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.

21. ~~25.~~—Certain Issuing Banks, such as the defendants CIBC, ~~Desjardins~~, RBC, and TD, 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, and in some cases control the operations of those Acquirers. TD ~~and Desjardins are~~ is both an Issuing ~~Banks~~Bank and ~~Acquirers~~an Acquirer. BMO and RBC own and control Moneris as partners in a joint venture. CIBC and National have marketing alliances with Global.



22. ~~26.~~—In order to accept payments by Visa or MasterCard credit cards, ~~merchants~~a merchant must enter into ~~agreements with Acquirers. These~~an agreement with an Acquirer. Pursuant to the Visa and MasterCard rules, these agreements include standard terms and conditions ~~imposed by the Issuing Banks and Visa or MasterCard through their respective agreements with the Acquirers. These agreements include~~that are required to be in each contract between a merchant and an Acquirer. These agreements are required to incorporate the terms of the Visa International Operating Regulations (the "Visa Rules") ~~and/or~~the MasterCard Worldwide MasterCard Rules (the "MasterCard Rules") (collectively, the "Network Rules").

23. ~~27.~~—For every transaction where a cardholder 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 the difference between the price a merchant charges for a good or service and the amount that the merchant ultimately receives for that transaction. In 2009, merchants in Canada paid approximately \$5 billion in Merchant Discount Fees.

24. ~~28.~~—The Merchant Discount Fee is made up of three parts: the "Interchange Fee" paid to the Issuing Bank associated with the customer's particular Visa or MasterCard credit card, the "Service Fee" paid to the Acquirer and the "Network Fee" paid to either Visa or MasterCard. The Interchange Fee is typically 80% of the Merchant Discount Fee.

25. ~~29.~~—Through agreements, Visa, MasterCard, and their Issuing Banks and Acquirers leverage their market power to earn supracompetitive profits from Canadian merchants, including the BC Visa Class Members and Out-of-Province Visa Class Members (collectively, the "Visa Class Members") and BC MasterCard Class Members and Out-of-Province MasterCard Class Members (collectively, the "MasterCard Class Members").

26. ~~30.~~—During the Class Period, Visa and MasterCard, along with their respective Issuing Banks and Acquirers, each set and made available default rates for the calculation of Interchange Fees for use by Acquirers and Issuing Banks within their



respective credit card networks (the "Default Interchange Fees"). Typically, the Default Interchange Fees are set as a percentage of the price of the good or service supplied. The Visa Rules and MasterCard Rules require that the Default Interchange Fees be paid absent a specific agreement as between the Issuers and Acquirers establishing different Interchange Fees (the "Default Interchange Rule"). As a result, the Default Interchange Fees applied to virtually all purchase transactions within the Visa and MasterCard credit card networks.

27. ~~31.~~ 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 Interchange Fee that will apply to any particular purchase with any particular card until the Acquirer reimburses or invoices the merchant.

28. ~~32.~~ Visa and MasterCard set their Interchange Fees as prices to merchants, not Acquirers. Interchange Fees are 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.

29. ~~33.~~ Despite increases to the cost to merchants of accepting Visa and MasterCard credit cards, the defendants' market power is such that the number of merchants who accept Visa and MasterCard credit cards has not decreased.

30. ~~34.~~ By enforcing adherence to the Visa Rules and the MasterCard Rules, ~~respectively, the defendants, through~~ the Visa network and MasterCard network have created agreements or arrangements that impose significant restrictions on the terms upon which credit card network services are provided to merchants. Both the Visa Rules and the MasterCard Rules impose substantially the same restraints ~~(the~~ "Networks' Rules"), including:

- (a) the Default Interchange Rule;
- (b) the requirement that merchants must honour all credit cards of the same network (the "Honour All Cards Rule") ;
- (c) the requirement that merchants must not impose surcharges on purchases made using any credit card of the same network, regardless of the Merchant Discount Fee, and in particular the Interchange Fee, associated with use of a particular credit card (the "No Surcharge Rule").
- (d) the requirement that merchants must not make it more difficult to pay by MasterCard credit cards, or offer preferential treatment for paying by any particular method (the "No Discrimination Rule").

31. ~~35.~~ The Honour All Cards Rule, the No Surcharge Rule and the No Discrimination Rule are collectively referred to as the "Merchant Restraints".

32. ~~36.~~ Acquirers are contractually obliged to enforce the Networks' Rules, including the Default Interchange Rule and the Merchant Restraints.

33. ~~37.~~ 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 Interchange Fees, such as premium credit cards. The Merchant Restraints prevent merchants from applying surcharges to payments made by Visa and MasterCard credit cards, including Visa and MasterCard credit cards with higher Interchange Fees, or 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 Interchange Fees.

34. ~~38.~~ As a consequence of the Merchant Restraints, consumers pay the same price to merchants 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.

35. ~~39.~~ While the Merchant Restraints eliminate or neutralize advantages offered by lower-cost methods of payment, the structure of the Visa and MasterCard credit card network schemes allows Issuing Banks to create powerful incentives for cardholders to use Visa or MasterCard credit cards for as many transactions as possible. Issuing Banks bundle credit cards with various consumer features such as rewards and points for each dollar spent on premium credit cards.

36. ~~40.~~ The effect of the Merchant Restraints is that in Canada, Interchange Fees are far in excess of similar fees in other jurisdictions where the Default Interchange Rule and Merchant Restraints are not applied or are applied differently.

37. ~~41.~~ — In the typical Visa or MasterCard transaction, funds flow from the Issuing Bank through the Acquirer or transaction processing company to the merchant. As part of this process, the Merchant Discount Fee is calculated by the Acquirer or transaction processing company the merchant has contracted with for the provision of credit card network services. The calculation of the Merchant Discount Fee incorporates the Interchange Fee and Network Fee, which are established by Visa or MasterCard. Although there are several models for the flow of funds between the parties, the invariable end result is that the merchant pays the Merchant Discount Fee and in particular the Interchange Fee, whether by way of a separate payment or a deduction from the amount paid through the Acquirer with whom the merchant has contracted. During the Class Period, the allocation of the Merchant Discount Fee into Interchange Fee, Network Fee, and Service Fee was not set out in the statements provided to merchants.

38. ~~42.~~ Visa, MasterCard, the Issuing Banks, and the Acquirers seek to maximize and increase the aggregate Interchange Fees which constitute the vast majority of the Merchant Discount Fees paid by the Visa and MasterCard Class Members through the two networks.

39. ~~43.~~ Under the Visa and MasterCard Rules, Acquirers agree not to sue Visa, MasterCard, or Issuing Banks over the level of Interchange Fees or any other matter.

40. ~~44.~~ The result of the Default Interchange Rule and Merchant Restraints is to allow Interchange Fees to be maintained at supracompetitive levels by restricting the pressures that, in a competitive market, would drive lower Interchange Fees. The operation of the Visa and MasterCard credit card network schemes by the Defendants are intended to maximize, increase, and maintain the aggregate Interchange Fees which constitute the vast majority of the Merchant Discount Fees, paid by merchants, including the Visa and MasterCard Class Members.

### THE VISA CONSPIRACY

41. ~~45.~~ Various Issuing Banks, including the defendants CIBC, ~~Desjardins~~, RBC, Scotiabank, and TD, along with other Issuing Banks 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. These agreements include, but are not limited to, the Visa Rules. 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.

42. ~~46.~~ Acquirers, including Acquirers not named as defendants or owned or controlled by 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. These agreements include, but are not limited to, the Visa Rules. 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 Networks' Rules and the Merchant Restraints. The agreements resulted in the imposition of supracompetitive Interchange Fees which constitute the vast majority of the 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 coconspirator Acquirers. These co-conspirator Acquirers include, without limitation, Moneris, TD Merchant Services, Global, Peoples Trust, First Data, Elavon, Desjardins and Chase Paymentech Solutions. Defendants who are Issuing Banks and also own, operate, or control Acquirers, being Desjardins, RBC, and TD, participated in the conspiracy in both capacities.

43. ~~47.~~ 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 communications, conversations and meetings, and through the imposition of the Visa Rules, Visa, CIBC, ~~Desjardins~~, RBC, Scotiabank, and TD and their co-conspirators did and unlawfully conspired or agreed to:

- (a) impose the Default Interchange Rule, Merchant Restraints, and other restraints set out in the Visa Rules on merchants, including the Visa Class Members and thereby unreasonably increase Interchange Fees, which constitute the vast majority of the 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 Interchange Fees in Canada including British Columbia; and
- (c) exchange information in order to monitor and enforce adherence to the agreed upon Default Interchange Rule, Merchant Restraints and other restraints set out in the Visa Rules, in Canada including British Columbia.

44. ~~48.~~ 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 Interchange Fees, which constitute the vast majority of the Merchant Discount Fees paid by merchants, including the Visa Class Members, for payments made using Visa credit cards ~~for Merchant Discount Fees by increasing or maintaining Interchange Fees,~~ in Canada, including British Columbia;
- (b) imposed the Visa Rules including the Default Interchange Rule and the Merchant Restraints on merchants in Canada, including British Columbia;
- (c) communicated, in person, in writing, and by telephone, to discuss and fix the Default Interchange Fees in Canada, including British Columbia;
- (d) exchanged information regarding the rates for Interchange 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 Default Interchange Rule or enforce the Merchant Restraints or any merchant which failed to comply with the Merchant Restraints.

45. ~~49.~~ — Visa, CIBC, ~~Desjardins,~~ RBC, Scotiabank, TD, and their co-conspirators were motivated to conspire and their predominant purposes and predominant concerns were to: harm the plaintiff and other Visa Class Members by requiring them to pay supracompetitive rates for Interchange Fees, which formed a part of Merchant Discount Fees.

- ~~(a) — harm the plaintiff and other Visa Class Members by requiring them to pay supracompetitive rates for Merchant Discount Fees as a result of the establishment of supracompetitive Interchange Fees; and~~



(b) — ~~illegally increase their profits.~~  
46. ~~50.~~ — The collusive 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

47. ~~51.~~ — Various Issuing Banks, including the defendants BMO, ~~Capital One~~, CIBC, ~~Citi~~, ~~Desjardins~~, MBNA, National, RBC, and TD, along with other Issuing Banks 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. These agreements include, but are not limited to, the MasterCard Rules. MasterCard, BMO, ~~Capital One~~, CIBC, ~~Citi~~, ~~Desjardins~~, MBNA, National, RBC, and TD are jointly and severally liable for the actions of, and damages allocable to, the co-conspirator Issuing Banks.

48. ~~52.~~ — Acquirers, including Acquirers not named as defendants or owned or controlled by defendants, participated as co-conspirators in the alleged unlawful conduct and entered into anti-competitive agreements, including agreements with each other, MasterCard, and the Issuing Banks. These agreements include, but are not limited to, the MasterCard Rules. 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 Networks' Rules and the Merchant Restraints. The agreements resulted in the imposition of supracompetitive rates for Interchange Fees, which constitute the vast majority of the Merchant Discount Fees paid by the MasterCard Class Members. MasterCard, BMO, ~~Capital One~~, CIBC, ~~Citi~~, ~~Desjardins~~, MBNA, National, RBC, and TD are jointly and severally liable for the actions of, and damages allocable to, the coconspirator Acquirers. These co-conspirator Acquirers include, without limitation, Moneris, TD Merchant Services, Global, Peoples Trust,

First Data, Elavon, Desjardins and Chase Paymentech Solutions. Defendants who are Issuing Banks and also own, operate, or control Acquirers, being BMO, Desjardins, RBC, and TD, participated in the conspiracy in both those capacities.

49. ~~53.~~—During the Class Period, senior executives and employees of MasterCard, BMO, ~~Capital One~~, CIBC, ~~Citi~~, ~~Desjardins~~, MBNA, National, RBC, TD, and their ~~coconspirators~~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, conversations and meetings, and through the imposition of the MasterCard Rules, MasterCard, BMO, ~~Capital One~~, CIBC, ~~Citi~~, ~~Desjardins~~, MBNA, National, RBC, TD and their co-conspirators did and unlawfully conspired or agreed to:

- (a) impose the Default Interchange Rule, Merchant Restraints, and other restraints set out in the MasterCard Rules on merchants including the MasterCard Class Members and thereby unreasonably increase the rates of for Interchange Fees, which constitute the vast majority of the 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 Interchange Fees in Canada including British Columbia; and
- (c) exchange information in order to monitor and enforce adherence to the agreed upon Default Interchange Rule, Merchant Restraints, and other restraints set out in the MasterCard Rules in Canada including British Columbia.

50. ~~54.~~—In furtherance of the conspiracy, during the Class Period, MasterCard, BMO, ~~Capital One~~, CIBC, ~~Citi~~, ~~Desjardins~~, MBNA, National, RBC, TD, and their ~~coconspirators~~co-conspirators and their servants and agents:



- (a) increased or maintained the default rates for Interchange Fees, which constitute the vast majority of the Merchant Discount Fees paid by the MasterCard Class Members in Canada, including British Columbia;
- (b) imposed the ~~MasterCard Rules including the~~ Default Interchange Rule, Merchant Restraints, and other restraints set out in the MasterCard Rules on merchants in Canada, including British Columbia;
- (c) communicated, in person, in writing, and by telephone, to discuss and fix the Default Interchange Fees in Canada, including British Columbia;
- (d) exchanged information regarding the rates for Interchange 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 Default Interchange Rule or enforce the Merchant Restraints or any merchant which failed to comply with the Merchant Restraints.

51. ~~55.~~ — MasterCard, BMO, ~~Capital One~~, CIBC, ~~Citi~~, ~~Desjardins~~, MBNA, National, RBC, TD, 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, as a result of the establishment of supracompetitive Interchange Fees; and~~
- ~~(b)~~ — ~~illegally increase their profits.~~ Interchange Fees, which formed a part of the Merchant Discount Fees.

52. ~~56.~~ The collusive acts alleged in this claim to have been done by MasterCard, BMO, ~~Capital One~~, CIBC, ~~Citi~~, ~~Desjardins~~, MBNA, National, RBC, and TD 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

### *Breach of the Competition Act*

53. ~~57.~~ Until March 12, 2010, the acts particularized in paragraphs ~~43-54~~ are 41-52 were in breach of section 45 of Part VI of the *Competition Act*, RSC 1985, c C-34, as amended from time to time (the "~~Competition Act~~"), and, accordingly, render the defendants jointly and severally liable to pay damages and costs of investigation pursuant to section 36 of the *Competition Act*.

54. ~~58.~~ Specifically, and contrary to s.45 of the *Competition Act* prior to March 12, 2010, in committing the acts particularized in paragraphs 43-54, the defendants conspired to fix, maintain, increase or control the ~~rates for Interchange Fees, which constitute the vast majority of price of the~~ price for the supply of credit card network services, and in particular Interchange Fees, to the Class, and hence their conduct was unlawful.

55. Further, or alternatively until March 12, 2009, in committing the acts particularized in paragraphs 41-52, the defendants agreed to attempt to influence upward and discourage the reduction of the price at which credit card network services to the Class, and in particular Interchange Fees were supplied to the Class, contrary to s. 61 of the *Competition Act*, and hence were unlawful.

### Civil Conspiracy

### Unlawful Means Conspiracy

56. The acts particularized in paragraphs 41-52 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 jointly and severally liable for the tort of unlawful means conspiracy.

### ***Civil Conspiracy to Injure***

57. ~~59.~~ The acts particularized in paragraphs 43-54 were directed towards the plaintiff and other Visa and MasterCard Class Members. The predominant purpose of those acts 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 to injure.

### **DAMAGES**

58. ~~60.~~ The plaintiff and the other Visa and MasterCard Class Members suffered the following damages:

- (a) the rates of for Interchange Fees, which constitute the vast majority of the Merchant Discount Fees paid by the Visa and MasterCard Class Members have been maintained at or increased to a supracompetitive level; and
- (b) competition in the supply of credit card network services has been lessened.

59. ~~61.~~ During the Class Period, the plaintiff and the other Visa 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 Interchange Fees, which constitute the vast majority of the Merchant Discount Fees paid by the Visa and MasterCard Class Members. 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 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 "Visa Overcharge" and the "MasterCard Overcharge", respectively).

## **PUNITIVE DAMAGES**

60. ~~62.~~—The plaintiff pleads that the defendants' conduct as particularized in paragraphs 43-54 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 AND WAIVER OF TORT**

61. ~~63.~~In the alternative, the plaintiff waives any tort plead above, and pleads that it and the other Visa and MasterCard Class Members are entitled to recover for the defendants' gains resulting from the civil conspiracy ~~to injure~~ claims under restitutionary principles.

62. ~~64.~~Further, or in the alternative, the defendants have each been unjustly enriched by the receipt of the Visa Overcharge or MasterCard Overcharge. Visa and MasterCard Class Members have suffered a deprivation in the amount of such Visa Overcharge or MasterCard Overcharge.

63. ~~65.~~—Since the Visa Overcharge or MasterCard Overcharge that was received by the defendants from the Visa and MasterCard Class Members resulted from the defendants' civil conspiracy ~~to injure~~, there is and can be no juridical reason justifying the defendants' retaining any part of such overcharge. The contracts by which the defendants purport to have received the overcharge are illegal and void because they resulted from the defendants' tortious conspiracy ~~to injure~~.



## JURISDICTION

64. ~~66.~~ 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, c 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 sections 10 (f) — (i) of the CJPTA because this proceeding:

- (a) ~~(f)~~ concerns restitutionary obligations that, to a substantial extent, arose in British Columbia;
- (b) ~~(g)~~ concerns a tort committed in British Columbia;
- (c) ~~(h)~~ concerns a business carried on in British Columbia; and
- (d) ~~(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. ~~67.~~ 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 Networks' Rules and in particular the Default Interchange Rule and the Merchant Restraints during the Class Period, and to raise, maintain, fix or stabilize the rates of Merchant Discount Fees by raising, maintaining, fixing or stabilizing Interchange Fees, 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 Metropolitan Home 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~~, ~~Desjardins~~, MBNA, National, RBC, and TD, and appointing Metropolitan Home as representative plaintiff in respect of the MasterCard Class Members;
- (d) general damages for civil conspiracy ~~to injure~~;
- (e) general damages for conduct that is contrary to section 45 of Part VI of the *Competition Act* as it existed prior to March 12, 2010;
- (f) an accounting and disgorgement of any benefits acquired by the defendants through any civil conspiracy ~~to injure~~;
- (g) an injunction enjoining the defendants from conspiring or agreeing with each other, or others, to impose the Networks' Rules;
- (h) an injunction enjoining the defendants from conspiring or agreeing with each other, or others, to raise, maintain, fix or stabilize the rates of Interchange Fees;
- (i) punitive damages;
- (j) costs of investigation and prosecution of this proceeding pursuant to section 36 of the *Competition Act*;
- (k) pre-judgment and post-judgment interest pursuant to the *Court Order Interest Act*, RSBC 1996, c 78, s 128; and
- (l) such further and other relief as to this Honourable Court may seem just.

### PART 3: LEGAL BASIS



66. ~~68.~~ 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 41-52 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 jointly and severally liable for the tort of unlawful means conspiracy.

68. ~~69.~~ Further, the plaintiff claims that the acts particularized in paragraphs 43-54 were directed towards the plaintiff and the other Visa and MasterCard Class Members and the predominant purpose of those acts 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 to injure.

69. ~~70.~~ Further, and in the alternative, the plaintiff and other Visa and MasterCard Class Members are entitled to claim for the wrongful or unlawful acts giving rise to the civil conspiracy ~~to injure claim~~ claims based on equitable and restitutionary principles.

Plaintiff's address for service:

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Defendants' address for service:

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USA

AND TO:

~~Bank of America Corporation~~  
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~~USA~~

~~AND TO:~~

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AND TO:

Bank of Nova Scotia  
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Toronto, ON M5H 1H1

~~-23-~~

AND TO:

Canadian Imperial Bank of Commerce  
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AND TO:

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~~McLean, VA 22102~~  
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~~AND TO:~~



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~~AND TO:~~

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AND TO:

Toronto-Dominion Bank  
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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

  
Ward K. Branch, Q.C.

Date:

Signatures of lawyers 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, c 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 section 10 (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.



~~-25-~~ 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)~~ (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.