IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Coburn and Watson's Metropolitan Home v. Bank of Montreal,* 2018 BCSC 897

Date: 20180531
Docket: VLC-S-S-112003
Registry: Vancouver

Between:

Coburn and Watson's Metropolitan Home dba Metropolitan Home

Plaintiff

And:

Bank of Montreal, Bank of Nova Scotia, Canadian Imperial Bank of Commerce, National Bank of Canada Inc., Royal Bank of Canada, and Toronto-Dominion Bank

Defendants

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:	R.M. Mogerman L. Brasil A. Sharon
Counsel for the Defendants:	G. Cowper, Q.C. A.D. Borrell J.S. Yates
Counsel for Walmart Canada Corp. (in attendance for part of the hearing):	E. Babin
Place and Dates of Hearing:	Vancouver, B.C. May 16–18, 2018
Place and Date of Judgment:	Vancouver, B.C. May 31, 2018

I. BACKGROUND

[1] This is a certified class action proceeding. The trial of the 17 common issues is scheduled to commence in September 2019. The issues are complex. If the trial proceeds, it will be lengthy. This proceeding has been described to the court as the largest class action in the history of Canada.

[2] In a nutshell, the plaintiff alleges that the rules under which merchants were permitted to accept credit card payments from customers, which the Notice of Civil Claim describes as the "Honour All Cards Rule", the "No Discrimination Rule" and the "No Surcharge Rule" (collectively the "Merchant Restraints"), had the effect of impeding or constraining competition for credit card network services, including competition with respect to the fees paid by merchants for credit card services ("Interchange Fees"). The plaintiff has also raised the restitutionary remedies of unjust enrichment and waiver of tort.

[3] There are five players in the two credit card networks affected by these proceedings. They are:

a) the networks themselves, i.e., Visa and MasterCard;

b) the financial institutions ("Issuers") that issue credit cards to cardholders;

c) the institutions ("Acquirers") that enter into arrangements with merchants that permit the latter to accept various Visa and/or MasterCard credit cards and, via the network, receive payment for goods and services provided to cardholders - some Issuers are also Acquirers but that is not always the case;

d) the merchants who accept various Visa and MasterCard credit cards; and

e) the cardholders.

[4] The plaintiff alleges that:

a) the Merchant Restraints prevent merchants from effectively encouraging customers to use lower-cost methods of payment;

b) the Merchant Restraints prevent merchants from declining to accept certain Visa and MasterCard cards, including premium cards with higher Interchange Fees;

c) due to the Merchant Restraints, customers pay the same amounts to merchants regardless of the mode of payment, despite the higher costs to merchants of Visa and MasterCard transactions; and

d) the overall effect of the Merchant Restraints is higher Interchange Fees paid by the merchants.

[5] The crux of the plaintiff's case is that interchange rates arose during some or all of the period commencing March 26, 2005 and continuing through to the present (the "Class Period") and that the interchange rates are higher for premium cards, and that there are card-payment alternatives available at a much lower cost to merchants and without interchange rates. The plaintiff says the result is harm to the certified class (the "Class") through Class-wide overcharge.

[6] Although this action was commenced in March 2011, due to the complexity of the issues raised, the number of parties and various appeals that arose from the decisions of this Court regarding the certification, the pleadings have only recently reached the point where they are about to be closed.

[7] The remaining parties (many of the original defendants have settled) are now engaged in the pre-merits trial discovery process.

[8] The Class is comprised of:

a) "BC Visa Class Members": the plaintiff and all British Columbia resident persons who, during 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;

b) "Out-of-Province Visa Class Members": all persons resident elsewhere in Canada who, during some or all of the Class Period, accepted payments in

Canada, outside 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;

c) "BC MasterCard Class Members": 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; and

d) "Out-of-Province MasterCard Class Members": all persons resident elsewhere in Canada who, during some or all of the Class Period, accepted payments in Canada, outside 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.

[9] The Certified Common Issues ("Common Issues") are as follows:

COMPETITION ACT

1. Did the defendants, the co-conspirator Acquirers or any of them, engage in conduct that is contrary to s 45 of the *Competition Act*, R.S.C. 1985, c. C-34 as it existed prior to March 12, 2010 (the "Competition Act")? If so, what was the duration of this conduct?

2. If so, are the Defendants, or any of them, liable to pay damages to the Visa or MasterCard Class Members under s 36 of the *Competition Act*, including the costs of the investigation of the Defendants' misconduct?

CONSPIRACY

3. Did the Defendants, the co-conspirator Acquirers, or any of them, conspire to impose and maintain the Networks' Rules or to increase the Merchant Discount Fees by increasing default Interchange Fees during the Class Period?

4. Did the Defendants, the co-conspirator Acquirers or any of them, enter into agreements regarding Networks' Rules and default Interchange Fees during the Class Period?

5. Did the Defendants, the co-conspirator Acquirers or any of them, conspire to harm the Visa or MasterCard Class Members?

6. Was the predominant purpose of the acts found in the determination of common issues 3, 4 or 5 (individually or collectively, the "Conspiracy Acts") to injure Visa or MasterCard Class Members?

7. Are the Defendants, or any of them, liable to the Visa or MasterCard Class Members for the tort of civil conspiracy?

UNJUST ENRICHMENT AND WAIVER OF TORT

8. Have the Defendants, or any of them, been enriched during the Class Period by receipt of supracompetitive Interchange Fees through the receipt of Merchant Discount Fees or otherwise?

9. Have the Visa or MasterCard Class Members suffered a corresponding deprivation by paying supracompetitive Interchange Fees through the payment of Merchant Discount Fees or otherwise?

10. Is there any juristic reason justifying the enrichment of the defendants and corresponding deprivation of the Visa or MasterCard Class Members, if any?

11. Are the Visa or MasterCard Class Members entitled to an accounting or disgorgement of the Defendants' gains arising from the civil conspiracy?

DAMAGES

12. Were Interchange Fees during the Class Period set at supracompetitive rates? If so, what is the resulting difference between the Merchant Discount

Fees paid by the Visa and MasterCard Class Members and the amount that those Class Members would have paid in a competitive environment?

13. Are the defendants jointly and severally liable for damages for their own conduct and that of the co-conspirator Acquirers?

14. Can an aggregate award of damages be made pursuant to s. 24(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*")?

15. Are the Defendants, or any of them, liable to pay punitive damages having regard to the nature of their conduct? If so, what amount and to whom?

16. Are the Defendants, or any of them, liable to pay court ordered interest?

OTHER REMEDIES

17. Should the Court grant an injunction enjoining the Defendants from conspiring or agreeing with each other, the co-conspirator Acquirers or others, to raise, maintain, fix, and/or stabilize the rates of Interchange Fees, or any component thereof?

18. Should the Court grant an injunction enjoining the Defendants from conspiring or agreeing with each other, the co-conspirator Acquirers or others, to impose the Networks' Rules, or any of them?

[10] The defendants have produced, so far, in excess of 600,000 documents. The sole representative plaintiff has produced 188 (other than settlement documents).

[11] On June 26 and 28, 2017, Ms. Mary Watson was examined for discovery on behalf of the representative plaintiff. There are eight outstanding questions from that discovery which the defendants assert should be answered. As well, there were six objections that were taken by plaintiff's counsel which the defendants assert should be overruled.

[12] In addition, the defendants also assert that, in the circumstances of this case, they are entitled to examine for discovery members of the Class other than the representative plaintiff, including Walmart Canada Corp. ("Walmart") and the Retail Counsel of Canada ("RCC").

II. NOTICES OF APPLICATION

[13] Before me as the pre-trial management and trial judge are the following applications, all of which have been brought by the defendants:

a) Specified Class Members Discovery Motion

   i. that the plaintiff identify within 14 days the Specified Class Members defined in the application for the purpose of examination for discovery by the defendants;

   ii. that the plaintiff be ordered to produce within 60 days the Categories of Documents specified in the application to be obtained from the Specified Class Members; and

   iii. that a representative of each of the Specified Class Members be required to attend for an examination for discovery by the defendants.

b) Walmart/RCC Motion

   i. that the plaintiff be ordered to produce various categories of documents obtained from Walmart and RCC within 30 days;

   ii. that a representative of each of Walmart and RCC be required to attend for an examination for discovery by the defendants on dates to be agreed to by counsel; and

   iii. that the plaintiff be ordered to produce documents collected by plaintiff's counsel from merchants other than the representative plaintiff within seven days.

c) Refusal Motion

i. that the plaintiff be ordered to deliver responses to the outstanding discovery requests within 14 days;

ii. that Ms. Watson be ordered to re-attend within 21 days for a continuation of her examination for discovery to respond to the questions that she objected to answer during her discovery; and

iii. that the plaintiff be required within 28 days to deliver a further list of documents that includes all documents that have been destroyed or requested by the defendants.

[14] The three applications raise the issue of the role of the Class in the discovery process of a certified class action proceeding in the context of a "two-sided market".

[15] The defendants say that they are entitled to a fair and rational opportunity to advance their defences and ought not to be limited and constrained by what the representative member of the Class, in this case Ms. Watson and Coburn's Metropolitan Home ("Metropolitan Home"), may have to offer on discovery.

[16] The defendants complain that Metropolitan Home is anything but representative of the Class. It is a small, one-location, specialty furniture retailer that does not reflect the majority of the tens of thousands of merchants who are members of the Class. The defendants submit that there are many aspects of the Common Issues in respect of which the plaintiff has had either no or at most minimal commercial engagement and that it is manifestly obvious a more expansive discovery is required to allow them to fairly defend the action.

1. Specified Class Members Discovery Motion

[17] Section 17 of the *CPA* expressly provides for members of the Class other than the representative plaintiff to be subjected to discovery by the defendants:

Discovery

> **17** (1) Parties to a class proceeding have the same rights of discovery under the Supreme Court Civil Rules against one another as they would have in any other proceeding.
>
> (2) After discovery of the representative plaintiff or, in a proceeding referred to in section 6, one or more of the representative plaintiffs, a defendant may, with leave of the court, discover other class members.
>
> (3) In deciding whether to grant a defendant leave to discover other class members, the court must consider the following:
>
> (a) the stage of the class proceeding and the issues to be determined at that stage;
>
> (b) the presence of subclasses;
>
> (c) whether the discovery is necessary in view of the defences of the party seeking leave;
>
> (d) the approximate monetary value of individual claims, if any;
>
> (e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered;
>
> (f) any other matter the court considers relevant.
>
> (4) A class member is subject to the same sanctions under the *Supreme Court Civil Rules* as a party for failure to submit to discovery.

[18] Cases where individual discovery is required of all class members are the exception rather than the rule. Examination of class members in addition to the representative plaintiff is available only if the defendants show it is reasonably necessary for the resolution of the common issues: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 59–60; *Ramdath v. George Brown College of Applied Arts and Technology*, 2012 ONSC 2747 at para. 31.

[19] When considering whether to permit discovery of additional class members, the court is to engage in a balancing process in which it must:

> [12] …
>
> [6] … take into account the factors of efficiency and economy which the scheme of the legislation is designed to promote but must balance that in as equitably as possible a manner against the legitimate substantive and procedural rights of the defendants.

Gerber et al v. Johnston et al., 2002 BCCA 663 at para. 12.

[20] The plaintiff submits that the necessary elements required for an order under s. 17(3) of the *CPA* have not been met and that, in any event, notice of the application must first be provided to Class Members against whom discovery is sought as a matter of fairness and natural justice.

[21] The defendants submit that the factors set out in s. 17(3) of the *CPA* weigh heavily in favour of additional Class member discovery. They argue that the evidence relevant to the Common Issues relating to liability, loss and damages may not be evidence that is common to all members of the Class and that evidence from individual merchants, both separately and in the aggregate, will make up the data base upon which the economists, whose methodologies will be central to the issues at trial, will base their respective expert opinions.

[22] Counsel for the defendants also points out that a number of leading merchants in Canada gave evidence before the Federal Competition Tribunal on these very issues, including regarding their experience in dealing with the credit card networks (the "Networks") and the impact it had on their respective businesses. They also gave evidence regarding what their business experience would have been had the conduct impugned in this action not occurred (the "But For World").

[23] I will deal with each of the s. 17(3) *CPA* considerations in turn.

a) The stage of the proceedings and the issues to be determined at trial

[24] Counsel for the plaintiff submits that the action is still at the Common Issue stage and that s. 17(3) of the *CPA* is intended to allow discovery of additional class members on non-common individual or sub-class issues that may arise at the end of the Common Issue stage. He submits further that, in any event, a trial of the Common Issues as framed can take place in a meaningful and efficient way without the need to embark on any individual enquiries. He says that if after the trial of the Common Issues it becomes necessary to determine any individual issues, they can be more efficiently done at that time.

[25] There is no language in s. 17 of the *CPA* limiting the court's discretion to order discovery of additional class members until after the trial of the common issues. If the legislature intended to restrict discovery in class proceedings in such a fashion, it could easily have done so. Instead, the legislature chose to provide that, after proceedings have been certified, each class member is in a position analogous (but not identical) to that of a party in any other civil litigation proceeding and can, at the court's discretion, be required to submit to discovery.

[26] Counsel for the defendants submits that Common Issue 12 is particularly germane to this application: whether the Merchant Discount Fees and Default Interchange Fees (as those terms have been defined in the pleadings) charged to Class members during the Class Period were set at a "supracompetitive rate" (above what can be sustained in a competitive market) and, if so, what the rate would have been in a competitive environment (i.e. the But For World)?

[27] Common Issue 12 necessarily engages an enquiry as to whether there was harm as a component of liability under the *Competition Act*. To conduct such an enquiry, there must be an accounting of any offsetting benefits to merchants in respect of the Interchange Fees that they paid. Counsel for the plaintiff concedes that Common Issue 12 is at play in this application.

[28] Plaintiff's counsel argues that this issue, indeed all Common Issues, engage only the conduct of the defendants which they carried out by way of standard form agreements imposed upon the Class members. They submit that, at the certification stage, the Court found that each of the Common Issues could be determined on a class-wide basis and that the defendants are now attempting to convert the merits trial into a trial of individual issues.

[29] Counsel for the plaintiff points out that the certification court was satisfied that the class action was justified on a "top-down" approach, focusing on the systemic arrangements between the Networks and the Acquirers and whether their conduct was anti-competitive, finding that any overcharging could be assessed in the aggregate, i.e. as a "bulk claim". An aggregate assessment is not the tallying of the

individual class members' claims but rather is a communal assessment of the totality of the claims where the underlying facts permit such an assessment to be done with reasonable accuracy: *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2012 ONSC 6549 at para. 107.

[30] However, the plaintiffs themselves plead, at paragraph 28 of the Notice of Civil Claim that the Interchange Fees to merchants varied and were therefore somewhat individualized:

> 28. 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.

[31] Plainly, this is not a case where all members of the Class paid the same Interchange Fee. Rather, the rates varied depending on the credit card used, the category of credit card, the means of processing of the transaction and many other variables. The Merchant Restraints had different impacts on various merchants. Each experienced different costs and benefits of credit card acceptance for purchases.

[32] Counsel for the plaintiff does not say that an enquiry into offsetting benefits is not relevant. Rather, he submits that the enquiry must be on a class-wide basis and that an enquiry into the circumstances of individual merchants is irrelevant.

[33] Is it clear from the reasons for judgment of Bauman C.J. (as he then was) certifying this proceeding (*Watson v. Bank of America Corporation*, 2014 BCSC 532) ("*Watson*") that the allegations raised in this action involve a "two-sided market" and that the measurement of the net harm to Class members by the setting of the Interchange Fees as well as the extent, if any, to which Interchange Fees were used to promote benefits to merchants will be relevant issues for determination at trial (see *Watson* paras. 238, 241–247, 262, 274, 275, 280, 281, 285).

[34] The concept of "net harm" necessarily requires a comparison between the world as actually experienced by merchants and the But For World.

[35] This analysis was noted by Bauman C.J. in *Watson* where he stated:

> [246] Further, even if a merchant would be better off by paying a lower level of Interchange in the But For world, they could very well be better off by less than the value of any overcharge as the overcharge might also have improved the market as a whole and increased their profits by some partially off-setting amount. …
>
> [247] Thus, from an economic point of view, Dr. Ware [defendants' expert economist] and the defendants are correct to assert that network effects must be taken into account when analyzing the But For world …
>
> …
>
> [262] First and foremost, the question of whether Interchange Fees and the [Merchant Restraints] are ultimately beneficial due to the feedback effects of a two-sided market is a factual finding for trial .
>
> …
>
> [275] In my view, Dr. Brander's [plaintiff's expert economist] methodologies offer a plausible prospect of demonstrating net overcharge or harm on a class-wide basis. I am especially convinced that his benchmark method meets the criteria in [*Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57], but I do not rule out the mark-up method. Any individual characteristics of that harm can be addressed in the merits trial and the proceedings arising out of that trial in the event the plaintiff succeeds.
>
> …
>
> [280] I agree with Dr. Brander and with the plaintiff that Dr. LaCasse's [an expert proffered by the one of the now settled defendants] analysis indicates that the defendants have the data necessary to carry out any acceptable analysis at trial …
>
> [Emphasis added.]

[36] The fact that the plaintiff's expert, Dr. Brander's economic methodology was found to be "plausible" such that it survived the test for certification of the class action does not mean it has been proven. Whether or not it carries the day is a question to be determined at trial. The defendants are entitled to attack that methodology at trial and to attempt to obtain, through the discovery process, a body of evidence that will allow them to do so. I agree with defendants' counsel that that body of evidence includes, at a minimum, whether or not there were any anti-

competitive effects from the Merchant Restraints experienced by the differing categories of merchants forming the Class.

[37] While it is true that Bauman C.J. went on to comment at paras. 294 and 303 that the definition of "Overcharge" in the plaintiff's Notice of Civil Claim included only the defendants' gains from the alleged anti-competitive conduct which were not affected by any set-off of alleged advantages accruing to the Class members, he made it clear that his findings in this regard were in respect of the proposed restitutionary claims (unjust enrichment and waiver of tort), not the "harm-based claims" under the *Competition Act*.

[38] I note as well Bauman C.J.'s comments at paras. 308 and 309 of *Watson* that the plaintiff should not be required to account for network effects (benefits) and that the "pass on" defence has been "definitively rejected", as it would require the Court to "engage in the endless and futile exercise of following every transaction to its ultimate result". He went on to observe that:

> [309] … The trial in this case, or in any case involving two-sided markets, may reveal similar difficulties in proving net harm caused by an overcharge subject to network effects. In that event the law may respond as in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* [1943] A.C. 32 "to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep" (at 61). …
>
> [Emphasis added.]

[39] Bauman C.J. commented further that, at the end of the day, the trial court may be prompted to invoke "the same policy reasons that prompted the denial of the pass on defence" and "deny defendants an offset for alleged benefits to plaintiffs by way of network effects", or "it may prompt the court to shift the burden of proving such offsets to the defendants" [emphasis added.].

[40] To the extent the defendants have such a burden, they are entitled to reasonable, useful and effective discovery to attempt to meet it.

[41] It is the certification order, as informed by the pleadings, which defines relevance for the purpose of the pre-trial discovery process, governed in British

Columbia at least by the principle of proportionality: *Anderson v. St. Jude Medical, Inc.*, 2010 ONSC 4708 at para. 38; *Axiom Plastics Inc. v. E.I. DuPont Canada Co.*, 2011 ONSC 4510 at para. 38; *Stanway v. Wyeth Canada Inc.*, 2013 BCSC 369 at para. 25, leave to appeal ref'd 2013 BCCA 256.

[42] Offsetting benefits is clearly an issue that is raised by Common Issue 12. The fact that the evidence may not be relevant to the plaintiff's theory of the case does not preclude discovery by the defendants of facts that can be used to attack that theory or support the defendants' theory. The defendants are entitled to reasonably explore the extent to which, if at all, merchants, as a class, benefitted from the Interchange Fees.

[43] The defendants should not be foreclosed from pursuing a full enquiry into that issue in order not only to test whether the class-wide methodology the plaintiffs intend to proffer at trial is valid, but also to advance a contrary class-wide methodology.

b) Presence of sub-classes

[44] The Class is comprised of four large sub-classes of merchants, each of those sub-classes consisting of merchants of various sizes and kinds. They are diverse, ranging from small one-location boutiques to the largest retailers in the world.

[45] It is clear from the transcript of the examination for discovery of Ms. Watson that Metropolitan Home is a single location furniture store which sells, rents and appraises mid-century modern furniture. It has no more than one employee other than Ms. Watson and her partner Ms. Coburn. Its relationship and experience with the credit card industry is relatively limited. It processes approximately 100 to 200 credit and debit card transactions per year with a total value of approximately $100,000. Its business is unique to its specific products and clientele. It does not discount prices or offer store credit. It uses the credit facility feature of its credit cards from time to time.

[46] The relative costs and benefits of credit card acceptance to merchants vary based on factors such as the type and size of merchant, the preferences and economic demographics of the merchant's customers, the competitive options available to the merchant's customers, the size and type of the merchant's transactions, the channels of distribution (i.e. online, catalogue/phone or in person) and the costs and benefits to that merchant of accepting other forms of payment: Roxanne Dhanpaul Affidavit#1, Exhibit "R".

[47] The Class comprises tens of thousands of merchants. Metropolitan Home is at the smaller end of the scale. Walmart is at the larger end of the scale. There is undoubtedly a broad spectrum of other sub-classes of merchants within the Class, small, medium and large.

[48] Clearly sub-classes of the Class are present.

c) Is discovery necessary in view of the defences?

[49] The core issues raised by the pleadings, as they now stand, include whether and to what extent Class members, as merchants and cardholders, received benefits as a result of accepting payment by or using Visa or MasterCard credit cards [see Common Response to Third Further Amended Notice of Civil Claim paras. 51–58, 70–71 and 80].

[50] In order for the court to determine whether the Interchange Fees charged to the Class were inflated, an examination of both the costs and benefits of credit card transactions to merchants will be necessary. There will be extensive expert evidence tendered at trial, including that from economists.

[51] Significantly, Dr. Brander does not say in his recent Affidavit #3 (sworn May 3, 2018) that the discovery sought by the defendants is not relevant—rather he deposes that it is not necessary to <u>his</u> methodology. The defendants say that they need the discovery they seek to not only attack Dr. Brander's methodology but also to advance the methodology of their own expert(s). The fact that documents and

discovery may not assist a plaintiff in its case is no reason to deny discovery that may advance a defendant's case.

[52] I accept that the Default Interchange fees are what all merchants start with and that some are able to negotiate lower fees given their unique circumstances. I accept as well that offsetting benefits can be assessed at the class-wide level with the use of experts, who in turn will be relying upon vast amounts of aggregated data relating to the marketplace developed over many years. However, as I have said, it is my view that the defendants are entitled to develop their own factual foundation for the purpose of testing the theories and methodologies put forward by the experts.

[53] I agree with counsel for the defendants that Metropolitan Home is not representative of any but the smallest of merchants in the Class. In my view, given the limited volume and quality of the plaintiff's disclosure and discovery responses to date, discovery of a broader spectrum of merchants is necessary to enable the defendants to properly advance their defences.

[54] However, I am cognizant of the fact that the defendants already have available to them an enormous amount of generalized, individualized and specific data pertaining to the circumstances of the individual Class members obtained by the Acquirers when the individual merchants applied to them for access to the Networks. The defendants have this data, among other means, by virtue of the fact that the Acquirer entities are either a subsidiary, partner or in an alliance relationship with the individual defendants. But what the defendants do not have by way of this information is evidence of the <u>impact</u> of the Merchant Restraints on their respective businesses or what their But For World would have been like.

d) The monetary value of the claims

[55] The monetary value of the plaintiff's claim is vast - in the hundreds of millions of dollars, if not more.

e) Will discovery result in oppression or in undue annoyance, burden or expense?

[56] Counterbalancing any established necessity of additional discovery is whether it will result in undue hardship on the Class members sought to be discovered.

[57] Many of the entities identified by the defendants in their Notice of Application as examples of those who might be "Nominated Merchants" have written to counsel protesting that they either are not members of the Class, have had no involvement in the proceeding and nothing to offer or that production of the categories and volumes of documents specified in the Notice of Application would be significantly onerous and overly burdensome for them.

[58] The defendants acknowledge that additional discovery will be an annoyance, burdensome and expensive for the plaintiff. However, the Class is represented by sophisticated and experienced class action counsel with significant resources in the form of the settlements that have been achieved to date.

[59] Several of the Class members are intimately engaged already in the issues raised by this action through their participation in the Competition Tribunal proceedings which dealt with some of the very issues that are before the court in this proceeding: *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated* (2013), 2013 Comp. Trib. 10. That tribunal dealt with the question of whether Visa and MasterCard had engaged in price maintenance contrary to s. 76 of the *Competition Act* in respect of the Merchant Restraints.

[60] Given the seriousness of the issues raised and the size and resources of the Class, production of documents and attending examination for discovery is unlikely to result in undue oppression or undue annoyance, burden or expense provided that the discovery is limited, contained and properly managed. Any Nominated Merchant who reasonably objects to participating in the discovery process as a result of undue burden or expense can be replaced by another nominee for the category.

[61] On balance, I find that the additional discovery will not be oppressive or result in undue annoyance, burden or expense. I am cognizant that the trial of this action is scheduled to commence in October 2019. I am not concerned that limited, properly managed additional discovery will be disruptive of the trial schedule.

f) Any other relevant matter

[62] I agree with counsel for the defendants that the distinctive characteristics of conspiracy claim alleged by the plaintiff, and in particular the allegation that the contractual architecture by which the Networks operate are anti-competitive and produce harm, necessarily requires that the court be provided with insight into the perspective of the Class members.

g) Order

[63] Having considered the factors of efficiency and economy which class action proceedings are designed to promote as well as the respective interests of the parties and each of the elements set out in s. 17(3) of the *CPA*, I am persuaded that discovery of additional Class members is warranted in this case, but not to the extent sought by the defendants.

[64] Within 30 days of the date of this Order, the plaintiff will provide to the defendants, through counsel, the name of a Class member from each of the following categories of Class member:

a) a national grocery retailing merchant to which an "Industry Program" (as described in the Visa Canada Interchange Reimbursement Fees as referenced in the Notice of Application) applies;

b) a travel services provider for whom chargeback ratios (as described in the Visa Canada Interchange Reimbursement Fees as referenced in the Notice of Application) are likely an important factor;

c) a national gas/petroleum retailing merchant to which an "Industry Program" (as described in the Visa Canada Interchange Reimbursement Fees as referenced in the Notice of Application) likely applies;

d) a merchant that conducts business online only and so has "Standard" as opposed to "Electronic" rates (as described in the Visa Canada Interchange Reimbursement Fees as referenced in the Notice of Application);

e) a private club for which "Recurring Payments" rate criteria (as described in the Visa Canada Interchange Reimbursement Fees as referenced in the Notice of Application) likely applies;

f) an airline to which the "Performance Program" (as described in the Visa Canada Interchange Reimbursement Fees as referenced in the Notice of Application) likely applies;

g) a government entity or university to which the "Emerging Segment" category (as described in the Visa Canada Interchange Reimbursement Fees as referenced in the Notice of Application) likely applies; and

h) a merchant that issues a co-branded Visa or MasterCard credit card and shares Interchange revenue

(Collectively, the "Nominated Merchants".)

[65] The scope of the discovery will be limited to enquiries that are reasonably necessary to legitimately test the economic methodologies and models being advanced and relied upon by the plaintiff's economic expert(s).

[66] The scope of discovery of documents from each of the Nominated Merchants is to be discussed among counsel. If they cannot agree on the scope, they are at liberty to reappear before me.

[67] The defendants will be entitled to a one-day examination for discovery of an appropriate member of each of the Nominated Merchants at a time and place convenient to counsel.

[68] The parties are at liberty to seek further guidance or clarification from the Court as necessary to effect the intent of this Order.

2. Walmart/RCC Motion

a) Walmart

[69] Counsel for the defendants and counsel for Walmart have agreed to adjourn this application in so far as it relates to Walmart to another date. The application proceeded as against RCC alone.

b) RCC

[70] RCC accepted payments in British Columbia (and elsewhere in Canada) for the supply of services, including membership fees, by way of Visa and MasterCard credit cards, during the Class Period. RCC is, therefore, a member of the Class.

[71] It is plain on the evidence before me that RCC has evidence relevant to the Common Issues. Indeed, it tendered affidavit evidence in support of the plaintiff's position at the certification hearing through its then President and CEO, Diane Brisebois.

[72] Ms. Brisebois deposed that RCC represents more than 45,000 retail merchants across Canada, large and small. In 2008, it launched a campaign entitled "Stop Sticking it to Us" which targeted the rising fees charged to merchants for accepting payment by credit cards. It has been actively involved in hearings before the Canadian Senate Banking Committee and provided evidence to the Competitions Tribunal on the very issues raised in this action.

[73] Ms. Brisebois deposed that the RCC "is prepared to provide any information it has that will improve the manageability of [this] proceeding".

[74] Although counsel for the plaintiff concedes that in the case of RCC the considerations set out in s. 17(3)(e) of the *CPA* are not a factor, he nevertheless strongly maintains that discovery of RCC is not necessary.

[75] For the reasons set out above, I am satisfied that the defendants have met the test under s. 17(3) of the *CPA* entitling it to discovery of RCC in addition to the Nominated Merchants.

[76] As was the case in respect of my ruling above, the scope of the RCC discovery will be limited to enquiries that are reasonably necessary to legitimately test the economic methodologies and models being advanced and relied upon by the plaintiff's economic expert(s).

[77] The scope of discovery of documents from RCC is to be discussed among counsel. If they cannot agree on the scope, they are at liberty to reappear before me.

[78] The defendants will be entitled to a one-day examination for discovery of an appropriate member of RCC at a time and place convenient to counsel.

[79] Once again, the parties are at liberty to seek further guidance or clarification from the Court as necessary to effect the intent of this Order.

3. Solicitor's Brief Documents

[80] The defendants also seek, as part of the Walmart/RCC Motion, an order that counsel for the plaintiff produce to them all relevant materials and information obtained from members of the Class other than Metropolitan Home.

[81] The leading case in British Columbia on the subject of litigation privilege is *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 (C.A.) where the Court held that documents collected by a party's solicitor from third parties and made part of his brief were privileged even though the original documents had not been created for the purpose of litigation.

[82] The decision, which remains the law of British Columbia, is contrary to the law in the rest of Canada, as was pointed out by the Supreme Court of Canada in *Blank v. Canada (Department of Justice)*, 2006 SCC 39 at para. 29:

> [29] With the exception of *Hodgkinson* [citation omitted], a decision of the British Columbia Court of Appeal, the decisions of appellate courts in this country have consistently found that litigation privilege is based on a different rationale than solicitor-client privilege. [Citations omitted.]

[83] In the rest of Canada, a pre-existing document obtained by a solicitor for the purpose of litigation is not privileged from production. Despite this dichotomy, our Court of Appeal has recently considered and affirmed the approach taken in *Hodgkinson*: *Cahoon v. Brideaux*, 2010 BCCA 228 at paras. 35–36; *Teck Cominco Metals Ltd. v. Foster Wheeler Pyropower, Inc*., 2010 BCCA 51 at paras. 16, 18–20.

[84] I agree with counsel for the plaintiff that documents obtained by plaintiff's counsel from members of the Class fall within the sanctity of the solicitor's brief as enunciated in *Hodgkinson*. Only the representative plaintiff in a class action is a party. Accordingly, there is no obligation on the part of the other members of the Class (who are non-parties) to produce documents in the class action proceeding. That is unless and until an order is made under s. 17 of the *CPA* requiring the class member to submit to discovery in which case the member is treated as a party for discovery purposes.

[85] If other class members who have provided documents to counsel for the Class were, by simply doing so, to be treated analogous to parties to the litigation, the legislature could have easily done so.

[86] The defendants' application for an order that the plaintiff produce to them all relevant materials and information obtained from members of the Class other than Metropolitan Home is dismissed.

III. REFUSAL MOTION

1. Eight Outstanding Requests

[87] I will deal with each of the eight outstanding requests in turn and in light of the comments set out above.

a) Production of all available tax returns, financial statements and ledgers associated with Metropolitan Home

[88] Metropolitan Home has produced only the statements it received from its Acquirer. It submits that there is no need for any additional financial documents to be produced in order for a fair determination of the Common Issues to take place.

[89] However, the test is not necessity — it is relevance. Rule 7-1(1)(a)(i) of the *Supreme Court Civil Rules* requires that the plaintiff prepare a list of "all documents … that could, if available, be used by any party of record at trial to prove or disprove a material fact". In my view, the requested financial records are relevant to the factual underpinnings of the economic analyses necessary to assess and compare the actual financial position of merchants as compared with the positon they would have been in "but for" the alleged misconduct. In other words, these documents could be relevant in determining the competitive effects of the impugned Merchant Restraints in the marketplace. Production will assist the defendants in their quest to both discredit the class-wide economic methodology proffered by the plaintiff and in the development of their own economic methodology. The defendants are entitled to explore and test those two positions by means of discovery.

[90] Metropolitan Home is required to produce these documents.

b) Production of any documents, including files, relating to the CIBC and RBC bank accounts

[91] For the reasons set out in a) above, Metropolitan Home is required to produce these documents.

c) To the extent they still exist, production of all annual financial statements, tax returns and ledgers relating to Metropolitan Home, as well as any budgets or business plans for the business whether in the possession or control of Metropolitan Home or its accountant. The production to include all documents evidencing Metropolitan Home's revenues and expenses over whatever time periods that may exist

[92] For the reasons set out in a) above, Metropolitan Home is required to produce these documents.

d) Production of records relating to Metropolitan Home's American Express and BMO MasterCard including agreements, notices and statements.

[93] In my view, these documents are not relevant to any of the Common Issues. They relate to Metropolitan Home in its capacity as a consumer, not a merchant.

[94] There will be no order for their production.

e) Production of records relating to Ms. Watson's personal credit cards including agreements, notices and statements

[95] In my view, these documents are not relevant to any of the Common Issues. They relate to Ms. Watson in her capacity as a consumer, not a merchant.

[96] There will be no order for their production.

f) That all documents be preserved for trial

[97] Counsel for the plaintiff has confirmed to the defendants that all remaining documents will be preserved for trial. No order is necessary.

g) Advise whether there is anything that the unnamed co-conspirators have done that is different than the named conspirators

[98] Anything done by unnamed co-conspirators that is different than the named conspirators is not relevant to the issues in this action. This question need not be answered.

h) Provide the names of anyone who has knowledge of any of the matters in question in this action, including the names of those individuals, companies or organizations that may be able to provide copies of the documents that have been destroyed.

[99] In my view, this request is simply too broad to warrant an order that it be answered.

2. The Six Questions Objected to by the Plaintiff

[100] Again, I will deal with each of them in turn.

a) Describe how Metropolitan Home finances its business. In particular, advise whether Metropolitan Home uses the credit facility associated with its two credit cards to finance its business; and if so, Metropolitan Home's analysis in that regard in terms of the costs and benefits of using the credit facility on either or both of its credit cards to finance its business

[101] This question, as framed in the defendants' Notice of Application, is broader than the question as asked during Ms. Watson's examination for discovery, which was:

> 800 Q. And what affects the decisions that you make about whether to carry a balance on the corporate credit card versus using a corporate line of credit in relation to those expenses?

[102] This question seeks to delve into Metropolitan Home's behaviour as a credit card user, not as a merchant who accepts credit cards. In my view it is irrelevant to a determination of the Common Issues. The objection is sustained.

b) Describe how Metropolitan Home prices its products and services, including identifying all factors that influence price and how those are taken into account in setting prices. In particular, advise whether an assessment of the costs associated with accepting credit cards are factored into Metropolitan Home's pricing of its products and services. Also advise whether Metropolitan Home's Merchant Discount Rate, and changes to its Merchant Discount Rate and the overall fees it was paying its acquirer, impacts on the prices Metropolitan Home charges for its products and services, and if so, how. Also describe whether Metropolitan Home reduces its margins when its costs increase and, if so, by what proportion or amount.

[103] In my view, these questions all relate to the "pass on" defence which the courts have repeatedly rejected. The objection is sustained.

c) Advise whether Ms. Watson is of the view that Canadian consumers, i.e. cardholders, are passing on the costs associated with the use of credit cards to merchants.

[104] In my view, these questions all relate to the "pass on" defence which the courts have repeatedly rejected. The objection is sustained.

d) Advise whether, if Metropolitan Home has recouped all its costs from its customers, a damages award for those costs including Merchant Discount Fees would mean it was paid twice for those costs? What is Ms. Watson's view of what her credit card fees should be?

[105] In my view, these questions all relate to the "pass on" defence which the courts have repeatedly rejected. The objection is sustained.

e) Specify the factors that influence Ms. Watson's decisions on whether to use cash, credit or debit for her purchase.

[106] This question seeks to delve into Ms. Watson's personal behaviour as a credit card user, not as a merchant who accepts credit cards. In my view it is irrelevant to a determination of the Common Issues. The objection is sustained.

f) Advise whether the ability to add a surcharge to the price of goods or service to reflect that payment was made with a credit card would be sufficient relief for the members of the Classes. Confirm whether surcharging as described above would mean that merchants of the Classes would not need to lower Merchant Discount Rates or Interchange Rates or abolish the Honour All Cards Rule.

[107] Counsel for the plaintiff submits that these enquiries offend the ultimate issue rule. However, in my view, they are relevant to the issue of what the plaintiff would have done "but for" the alleged misconduct. The objection is overruled and the questions will be answered.

[108] There will be orders accordingly.

"G.C. Weatherill J."