



No. VLC-S-S-112003
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

MARY WATSON

PLAINTIFF

AND:

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

DEFENDANTS

NOTICE OF APPLICATION

Name of applicant: Mary Watson

To: Bank of America Corporation, BMO Financial Group, Bank of Nova Scotia, Canadian Imperial Bank of Commerce, Capital One Financial Corporation, Citigroup Inc., Federation des Caisses Desjardins du Quebec, MasterCard International Incorporated, National Bank of Canada Inc., Royal Bank of Canada, Toronto-Dominion Bank, and Visa Canada Corporation.

And To: Their respective solicitors

TAKE NOTICE that an application will be made by the applicant to the Honourable Chief Justice Bauman at the courthouse at 800 Smithe Street, Vancouver, B.C. on a date and time to be set for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order certifying this action as a class proceeding pursuant to the *Class Proceedings Act*, RSBC 1996, c 50 (the "CPA").
2. An order appointing Mary Watson ("Watson") as the representative plaintiff of the Visa Class and the MasterCard Class, as defined below.

3. An order defining the classes as:

a. the "Visa Class":

All British Columbia resident persons who, during some or all of the period commencing March 28, 2001 and continuing through to the present (the "Class Period"), accepted payments 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 motion for certification; and

b. the "MasterCard Class":

All British Columbia resident persons who, during the Class Period, accepted payments 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 motion for certification.

4. An order staying any other British Columbia proceeding relating to this proposed class proceeding.

5. An order stating the nature of the claims asserted on behalf of the Visa Class and of the MasterCard Class to be:

- a. civil conspiracy;
- b. breach of the *Competition Act*, RS 1985, c 19 (2nd Suppl);
- c. unlawful interference with economic interests; and
- d. unjust enrichment.

6. An order stating the relief sought by the Visa and MasterCard Classes to be as set out in paragraph 66 of the Notice of Civil Claim.

7. An order stating the common issues to be those set out in **Schedule "A"** to this Notice of Application.

8. An order setting the form and content of the notice program for the certification of this action.

9. An order that the defendants and plaintiff share the costs of the notice program.

10. An order stating that:

- a. members of the Visa Class and MasterCard Class may opt out of this class proceeding by sending a written election by regular mail to Class Counsel within 90 days from the date in which this action is certified (the "Opt Out Date");
 - b. no person may opt out of this class proceeding after the Opt Out Date; and
 - c. within one month from the Opt Out Date, Class Counsel will report to the Court the names of the persons who have opted out of this class proceeding.
11. An order or orders providing such further and other relief and directions as Class Counsel may request and as this Honourable Court may deem just.

Part 2: FACTUAL BASIS

Background

1. A background of the credit card industry which forms the basis for the claims of the plaintiff and of the proposed Class is set out at paragraphs 17 through 39 of the Notice of Civil Claim, and is hereby repeated. Unless otherwise stated, all defined terms used in this Notice of Application shall have the same meaning as given to them in the Notice of Civil Claim.
2. Throughout the Class Period, Watson accepted payment for goods by way of Visa or MasterCard credit cards pursuant to an agreement with an Acquirer.
3. Whenever Watson accepted payment for goods by way of Visa or MasterCard credit cards, she was forced to pay Merchant Discount Fees.
4. In order to be allowed to accept payment by way of Visa credit cards, Watson had to agree to a number of restrictions, including:
 - a. Watson must accept all valid Visa credit cards presented by its customers; and
 - b. Watson cannot charge a customer more if they pay with a Visa credit card which carries higher Merchant Discount Fees.
5. In order to be allowed to accept payment by way of MasterCard credit cards, Watson had to agree to a number of restrictions, including:
 - a. Watson must accept all valid MasterCard credit cards presented by its customers; and

- b. Watson cannot charge a customer more if they pay with a Visa or MasterCard credit card which carries higher Merchant Discount Fees.

Cause of action

6. The plaintiff claims against the defendants on her own behalf, on behalf of the Visa Class, and on behalf of the MasterCard Class.
7. The plaintiff relies upon the following well-established causes of action:
 - a. the tort of civil conspiracy;
 - b. breach of the *Competition Act*, RS 1985, c 19 (2nd Suppl);
 - c. unlawful interference with economic interests; and
 - d. unjust enrichment.
8. Further particulars of the plaintiff's causes of action against the defendants are provided at paragraphs 52 through 56 of the Notice of Civil Claim, and are hereby repeated.
9. The plaintiff says that the conduct of the defendants has resulted in the cost of accepting payment by Visa or MasterCard credit cards being fixed, maintained, increased, or controlled by the defendants such that the prices paid during the Class Period were at a supracompetitive level.

Two or more class members

10. In addition to the plaintiff, there are hundreds of thousands of merchants in Canada that accept payment for goods or services by Visa or MasterCard credit cards pursuant to merchant agreements. In 2009, over 670,000 merchants in Canada accepted payment by Visa or MasterCard credit card.

One or more common issues

11. The plaintiff proposes Common Issues listed on Schedule "A" to this Notice of Application.

Preferable procedure

12. The plaintiff is aware of the substantial costs that pursuing this action as an individual action would entail.
13. The plaintiff would not be able to afford to prosecute this action as an individual action.

14. The plaintiff has proposed a workable methodology for the determination of the claims advanced in this action.
15. There are no other preferable means to resolve the claims of the members of the Visa Class and of the MasterCard Class.

Representative plaintiff

16. The plaintiff is prepared to represent the interests of the members of the Visa Class and the MasterCard Class.
17. The plaintiff has put forward a Litigation Plan providing a workable method for advancing the litigation.
18. The plaintiff has put forward a Notice Program providing a reasonable method for notifying the members of the Visa Class and the MasterCard Class of the certification of this action.
19. The plaintiff is not aware of any conflicts with the other members of the Visa Class and the MasterCard Class with respect to the proposed common issues.

Part 3: LEGAL BASIS

1. The action should be certified as a class proceeding and the plaintiff should be appointed representative plaintiff because the requirements of s 4(1) the *Class Proceedings Act*, RSBC 1996, c 50 are met. Specifically:
 - a. the pleadings disclose a cause of action;
 - b. there is an identifiable class of two or more persons;
 - c. the claims of the class raise common issues;
 - d. a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues; and
 - e. there is a representative plaintiff who:
 - i. will fairly and adequately represent the interests of the class;
 - ii. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on the behalf of the class and notifying class members of the proceeding; and
 - iii. does not have a conflict of interest with the other class members with respect to the common issues.

2. The proposed Notice Program is a reasonable method of notifying putative members of the Visa and MasterCard Classes of the certification of this action.
3. It is fair, just, and reasonable that the defendants pay the costs of certain aspects of the Notice Program.

Part 4: MATERIAL TO BE RELIED ON

1. The pleadings and proceedings filed herein;
2. Affidavit #1 of Mary Watson, affirmed December 20, 2011.
3. Affidavit #1 of Dr. James Brander, affirmed January 6, 2012.
4. *Class Proceedings Act*, RSBC 1996, c 50.
5. Such further and other materials as the plaintiff's lawyers may advise and this Honourable Court permit.

The applicant estimates that the application will take three (3) days.

This matter is within the jurisdiction of a master.

This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: January 9, 2012



Signature of

applicant

lawyer for applicant

Ward K. Branch



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To be completed by the court only:

Order made

in the terms requested in paragraphs *[specify]* of Part 1 of this notice of application

with the following variations and additional terms:

Dated: _____ *[month, day, year].*

Signature of

Judge Master

Appendix

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts

SCHEDULE "A"

PROPOSED COMMON ISSUES

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*, RSC 1985, c C-34 (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, Merchant Discount Fees and in particular default Interchange Fees, or any component thereof during the Class Period?
4. Did the Defendants, the co-conspirator Acquirers or any of them, enter into unlawful agreements regarding Networks' Rules, Merchant Discount Fees and in particular default Interchange Fees, or any component thereof 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. Did the Defendants know, or should they have known, that the acts found in the determination of common issues 3, 4, or 5 (individually or collectively, the "Conspiracy Acts") were, in the circumstances, likely to cause injury to the Visa or MasterCard Class Members?
7. Was the predominant purpose of the Conspiracy Acts to injure Visa or MasterCard Class Members?
8. Are the Defendants, or any of them, liable to the Visa or MasterCard Class Members for the tort of civil conspiracy?

UNLAWFUL INTERFERENCE WITH ECONOMIC INTERESTS

9. Are the Defendants, or any of them, liable to the Visa or MasterCard Class Members for the tort of unlawful interference with economic interests as a result of the Conspiracy Acts?

UNJUST ENRICHMENT, CONSTRUCTIVE TRUST, WAIVER OF TORT

10. Have the Defendants, or any of them, been unjustly enriched during the Class Period by receipt of supracompetitive Merchant Discount Fees and in particular default Interchange Fees, or any component thereof?

11. Have the Visa or MasterCard Class Members suffered a corresponding deprivation by paying supracompetitive Merchant Discount Fees and in particular default Interchange Fees, or any component thereof, during the Class Period?
12. Is there any juristic reason justifying retention by the Defendants, or any of them, of some or all of the supracompetitive portion of Merchant Discount Fees and in particular default Interchange Fees or any component thereof (the "Overcharge") paid by the Visa or MasterCard Class Members?
13. Can the defendants be constituted as constructive trustees in favour of the Visa or MasterCard Class Members for the Overcharge?
14. Do equity and good conscience require that the Defendants, or any of them, hold the Overcharge in trust for the plaintiff and the other Visa or MasterCard Class Members and to disgorge that amount to the plaintiff or other Visa and MasterCard Class Members?

DAMAGES

15. Were the Merchant Discount Fees and in particular default Interchange Fees, or any component thereof, charged to Visa or MasterCard Class Members during the Class Period set at a supracompetitive rate? If so, what would the rate have been in a competitive environment?
16. Does the Defendants' conduct entitle the Visa or MasterCard Class Members to punitive damages?
17. Are the defendants jointly and severally liable for damages for their own conduct and that of the co-conspirator Acquirers?
18. Can an aggregate award of damages be made pursuant to s 24(1) of the *Class Proceedings Act*?
19. Are the Defendants, or any of them, liable to pay punitive or exemplary damages having regard to the nature of their conduct? If so, what amount and to whom?
20. Are the Defendants, or any of them, liable to pay court ordered interest?

OTHER REMEDIES

21. 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 Merchant Discount Fees and in particular default Interchange Fees, or any component thereof?
22. 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?