

Dany H. Assaf
dassaf@torys.com
P. (416) 865-7303

September 14, 2017

Ms. Andrée Bernier
Deputy Registrar
The Competition Tribunal
Thomas D'Arcy McGee Building
Suite 600 – 90 Sparks Street
Ottawa, Ontario
L1P 5B4

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

Date: September 14, 2017
CT-2017-014

Andrée Bernier for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

1

Dear Madam:

**Re: *Bank of Montreal et al v. The Commissioner of Competition (CT-1995-002)*
Application Pursuant to s. 106(1)(b) of the *Competition Act***

We are writing to you in connection with the consent agreement dated September 11, 2013 (the "**Consent Agreement**") between the Bank of Montreal et al. and the Commissioner of Competition ("**Commissioner**"). We act for the Respondents.

Please accept this letter pursuant to Rule 81 of the *Competition Tribunal Rules* as an application pursuant to paragraph 106(1)(b), on consent of the parties, to vary and restate the Consent Agreement. A draft order is attached as **Appendix "A"**. The consent of each of the parties is attached as **Appendix "B"**. For general background on the Interac Group, which includes Interac Association, Interac Inc. and Acxsys Corporation, please refer to Part I of the letter that was submitted to the Tribunal on July 12, 2013, attached as **Appendix "C"**.

The Consent Agreement was previously varied in 2013 to permit the combination of the Interac Group into a single incorporated entity, Interac Corp., governed by a single independent board. That restructuring has not occurred. The parties propose that the Consent Agreement be amended as follows:

- Vary the governance provisions of the Restructuring (as defined in the Consent Agreement) to establish a thirteen-person board consisting of eight directors nominated

by the FI Respondents (as defined in the Consent Agreement), four independent directors and the CEO. An Independent Committee consisting of the latter five directors will have sole authority to make decisions before the board respecting the Shared Services (as defined in the Consent Agreement) (para. 8). This provision maintains the independent oversight of the Shared Services that was the essence of the 2013 amendments.

- Require the establishment of an advisory committee of ten persons representing the diversity of Interac participants other than the FI Respondents. The advisory committee will serve as a vehicle to ensure that the views of these other participants are placed directly before the board, thereby maintaining the voice they currently enjoy by virtue of having a minority position on the Association board. This advisory committee shall be struck within 60 days of the Restructuring and shall be chaired by the chair of the Independent Committee (para. 10).
- Amend the termination date such that the Consent Agreement will extend until 915 days following the date upon which Interac Corp. provides the Commissioner with written notice of the closing of the Restructuring (para. 17).
- Require that the FI Respondents will continue to be respondents of the Consent Agreement after the Restructuring (para. 6).
- Require that Interac Corp. will provide each director with a copy of the Consent Agreement and confirm that each director understands the obligations therein, no later than upon his/her appointment as a director (para. 13).
- State that the Consent Agreement does not derogate from the obligation of each of the Respondents to comply with the *Competition Act* or any other law (para. 18).

Consistent with all previous variations of the Consent Agreement, the proposed variation will preserve the existing open and non-discriminatory access and cost recovery operating model relating to the Shared Services. Moreover, as described above, the proposed variation preserves independent governance over the Shared Services and continues to afford non-Respondents, that participate in the Shared Service, with direct input to the Interac Corp. board.

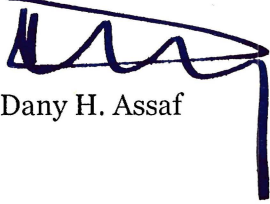
We note that, in previous cases, the Tribunal has granted amendments expeditiously on consent without the need for the parties to appear in person. We respectfully request that the Tribunal order the amendment as soon as possible.

In addition, the Commissioner is satisfied that the implementation of the Variation will continue to address any concerns relating to the Shared Services.

Before formally consenting to the Variation, the Commissioner requested that the Interac Group circulate the draft order to all members of the Association, along with an explanatory note. On September 5th, the Members were sent an email message with further direction to provide any competition concerns regarding the Variation directly to the Commissioner by September 13th. Pursuant to this process, no such competition law concerns or comments have been received.

Thank you for your and the Tribunal's consideration of this matter. We are available to answer any questions or provide any further information at the Tribunal's request.

Yours truly,

A handwritten signature in dark blue ink, consisting of several loops and a long vertical stroke extending downwards.

Dany H. Assaf

Appendix "A"

CT-95-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF an application by the Commissioner of Competition under sections 79 and 105 of the Competition Act, R.S.C. 1985, c. C-34, as amended;

IN THE MATTER OF an abuse of dominant position in the supply of shared electronic network services for consumer-initiated shared electronic financial services;

IN THE MATTER OF a Consent Order granted by the Competition Tribunal dated June 20, 1996, varied on March 25, 1998, further varied on September 8, 2000 and varied and restated as a consent agreement on January 10, 2003, varied on June 16, 2005 and further varied and restated on September 11, 2013;

AND IN THE MATTER OF an application by **Bank of Montreal, et al.**, under sections 105 and 106(1)(b) of the Competition Act, R.S.C. 1985, c. C-34, as amended, to vary on consent the Amended Consent Agreement made by the Competition Tribunal on January 10, 2003, varied on June 16, 2005 and further varied and restated on September 11, 2013.

B E T W E E N:

**Bank of Montreal
The Bank of Nova Scotia
The Canada Trust Company
(formerly Canada Trustco Mortgage Company)
Canadian Imperial Bank of Commerce
Fédération des Caisses Desjardins du Québec
(formerly La Confédération des caisses populaires et
d'économie Desjardins du Québec)
189286 Canada Inc.
(formerly Credit Union Central of Canada)
National Bank of Canada
Royal Bank of Canada
The Toronto-Dominion Bank
Interac Inc.**

Respondents

– and –

The Commissioner of Competition

Applicant

FURTHER REVISED AND RESTATED AMENDED CONSENT AGREEMENT

WHEREAS the Competition Tribunal (the “Tribunal”) issued a Consent Order dated June 20, 1996 under sections 79 and 105 of the *Competition Act* (the “Act”), as varied on consent under sections 105 and 106(1)(b) of the Act on March 25, 1998 and September 9, 2000 (the “Consent Order”) and as restated as an Amended Consent Agreement on January 10, 2003, and then further varied on June 16, 2005 and on September 11, 2013;

AND WHEREAS the parties have agreed to the terms of this Further Revised and Restated Amended Consent Agreement;

NOW THEREFORE, the parties **AGREE** as follows:

Definitions

1. For the purposes of this Further Revised and Restated Amended Consent Agreement the following terms shall have the indicated meaning, except where the context otherwise requires:

“**ABM**” means an automated banking machine that functions as a Terminal in Interac Cash;

“**Account**” means an account held by a Financial Institution from which funds are payable on instruction by a Cardholder;

“**Acquirer**” means a Member that obtains a request Message from a Cardholder for delivery to an Issuer;

“**Acxsys**” means Acxsys Corporation;

“**Advisory Committee**” means the committee of ten (10) Participants other than the FI Respondents, as described in paragraph 10;

“**Affiliate**” means (a) in the case of a Financial Institution other than the Fédération or CUCC, an entity that is controlled by the Financial Institution or an entity that is controlled by the same Person that controls the Financial Institution within the meaning of subsection 3(1) of the *Bank Act*, S.C. 1991, c. 46; (b) in the case of the Fédération, an entity that is controlled by the Fédération within the meaning of section 472 of *An Act respecting financial services cooperatives (Québec)*, R.S.Q., c. C-67.3; (c) in the case of CUCC, an entity that is controlled by it; and (d) in the case of a non-Financial Institution, an affiliated body corporate within the meaning of subsections 2(2) and (3) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44;

“**Annual Fee**” means an annual fee described in paragraph 11(d);

“**Association**” means the Interac Association;

“**Association Board**” means the board of directors of the Association;

“**By-laws**” means the by-laws of the Association;

“**Card**” means any magnetically or otherwise encoded plastic financial service card;

“**Cardholder**” means a customer to whom a Card has been issued by a Financial Institution;

“**Combineco**” means the corporation comprised of Acxsys, Interac Inc. and the Association that, following the Restructuring, directly offers the Shared Services;

“**Commissioner**” means the Commissioner of Competition appointed pursuant to section 7 of the Act;

“**Connection Service Provider**” means a Direct Connector that provides connection to the Inter-Member Network to Indirect Connectors;

“**Cost Recovery**” means recovery of the actual costs incurred in connection with the operation and administration of the Shared Services, as well as the recovery of the R&D and borrowing components that are included as part of the Switch Fee;

“**CUCC**” means 189286 Canada Inc.;

“**DCFI**” means a Member that is a Financial Institution and that is directly connected to the Inter-Member Network for a Shared Service;

“**DCNFI**” means a Member that is not a Financial Institution and that is directly connected to the Inter-Member Network for a Shared Service;

“**Direct Connector**” means a DCFI or a DCNFI;

“**Fédération**” means the Fédération des caisses Desjardins du Québec;

“**Financial Institution**” means a Person that is:

- (a) carrying on, under the regulatory supervision of federal or provincial law, the business of providing financial services in Canada, including the receipt of deposits from the public that are transferable by items that are admissible for clearing by members of Payments Canada; or
- (b) a central cooperative credit society as defined in the *Canadian Payments Act*, R.S.C. 1985, c. C-21 or CUCC; or
- (c) a financial services cooperative as defined in the *Act respecting financial services cooperatives* (Québec), R.S.Q., c. C-67.3;

“**FI Respondents**” mean the Respondents other than Interac Inc.;

“**Fundamental Change**” means decisions of the Association Board relating to security, minimum performance standards, use of the trademarks, Association structure and membership criteria, Association Board composition and voting rules, and fees (other than interchange fees as defined in the By-laws) that require the affirmative vote of two-thirds of the Association Board’s directors for enactment;

“**Incremental Costs**” means the increase in the ongoing costs of the Association (or, following the Restructuring, of Interac Corp.) that would result from providing the basic bundle of services required by an additional Member in a Shared Service, irrespective of the volume of transactions processed by the Member;

“**Independent**” means having no direct or indirect Material Relationship with a Related Entity;

“**Independent Director**” means a director of Interac Corp. who is Independent;

“Independent Committee” means the Independent Committee overseeing the management of the Shared Services as described in paragraph 8(d);

“Indirect Connector” means any commercial entity or Financial Institution which must communicate with other Members in a Shared Service through a Direct Connector;

“INTERAC Cash” means the shared cash dispensing service offered by the Association or, following the Restructuring, Interac Corp.;

“Interac Corp.” means whichever of Combineco or Parentco, that is selected as part of the Restructuring;

“Interac Corp. Board” means the board of directors of Interac Corp.;

“INTERAC Debit” means the shared direct payment service offered by the Association or, following the Restructuring, Interac Corp.;

“Inter-Member Network” means network software used to directly connect to the Shared Services;

“Issuer” means any Financial Institution that issues Cards that facilitate access to its Accounts;

“Material Change” for the purposes of paragraph 11(c), means any change that requires certification, inter-member testing or other non-trivial administrative activity by the Association (or, following the Restructuring, by Interac Corp.) or other Direct Connectors;

“Material Relationship” means any relationship that could be reasonably expected to interfere with the exercise of an Independent Director’s independent judgement and includes the following relationships:

- (a) an individual who is, or has been within the last three years, an employee or executive officer of a Related Entity;
- (b) an individual whose immediate family member is, or has been within the last three years, an executive officer of a Related Entity;
- (c) an individual who, or whose immediate family member, is, or has been within the last three years, an executive officer of an entity if any of the Related Entity’s current executive officers serves or served at that same time on the entity’s compensation committee;
- (d) an individual who received, or whose immediate family member who is employed as an executive officer of a Related Entity received, more than \$75,000 in direct compensation from a Related Entity during any 12 month period within the last three years. Direct compensation does not include the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the Related Entity if the compensation is not contingent in any way on continued service; and
- (e) an individual who accepts, directly or indirectly, any consulting, advisory or other compensatory fee from a Related Entity. Compensatory fees do not include the receipt of fixed amounts of compensation under a retirement plan (including deferred

compensation) for prior service with the Related Entity if the compensation is not contingent in any way on continued service;

“Member” means a member of the Association or, following the Restructuring, a Participant in a Shared Service offered by Interac Corp. or its Affiliates;

“Message” means the electronic messages exchanged between Members of a Shared Service, which are of two types:

- (a) the request message transmitted by an Acquirer; and
- (b) the response message transmitted by an Issuer;

“Operating Regulations” means the operating regulations of the Association;

“Order” means this Further Revised and Restated Amended Consent Agreement;

“Parentco” means the corporation comprised of Acxsys, Interac Inc. and the Association that, following the Restructuring, offers the Shared Services indirectly through an affiliate;

“Participant” means a Person that participates in a Service that is offered by Interac Corp. and, for greater certainty, includes the FI Respondents;

“Payments Canada” means the association established pursuant to subsection 3(1) of the *Canadian Payments Act*, R.S.C. 1985, c. C-21;

“Person” means any individual, sole proprietorship, partnership, firm, entity, unincorporated association, unincorporated syndicate, unincorporated organization, trust, body corporate, and where the context requires, when they are acting as trustee, executor, administrator or other legal representative;

“R&D” means research and development relating to new Services or innovations to existing Services offered by Interac Corp. or a subsidiary of Interac Corp.;

“Rebate” means an amount paid to a Cardholder by an Acquirer in connection with the provision of a Shared Service;

“Related Entity” means Interac Corp., a Participant, an Affiliate of a Participant, a Person that offers any service in Canada that is substantially similar to a Service, or an Affiliate of such Person;

“Restructuring” means the transaction or series of transactions that combines Acxsys, Interac Inc. and the Association to form Interac Corp., with the result that the Association is terminated and the Services are offered either directly by Interac Corp. or indirectly by one or more subsidiaries of Interac Corp.;

“Service” includes a Shared Service and any service offered by Acxsys, as well as any service offered by Interac Corp. or a subsidiary of Interac Corp.;

“Shared Service” means the INTERAC Cash service and the INTERAC Debit service;

“**Surcharge**” means a fee imposed by an Acquirer on a Cardholder for provision of a Shared Service;

“**Switch Fee**” means an Inter-Member Network user fee payable on a per Message basis and calculated to recover the sum of:

- (a) the actual costs incurred to deliver the Shared Services;
- (b) a component to be used by Interac Corp. or a subsidiary of Interac Corp. for R&D, not to exceed \$0.005 per Message; and
- (c) a component to be used to service corporate debt of Interac Corp., not to exceed \$0.002 per Message;

provided that, for clarity, the Switch Fee components described in paragraphs (b) and (c) above only apply in Interac Corp. following the Restructuring;

“**Terminal**” means an ABM, INTERAC Debit terminal, or other device that, in conjunction with a Card, provides a Cardholder with access to a Shared Service; and

“**Trademarks**” means the Interac trademarks.

Application

- 2. Subject to paragraph 6 of this Order, the provisions of this Order shall apply to each of the Respondents and to:
 - (a) each division in Canada, subsidiary in Canada, or other Person in Canada controlled by any of them, and each officer, director, employee, agent or other Person acting for or on behalf of any of them; and
 - (b) each of their successors and assigns.

Operation of the Shared Services

- 3. The operation of the Shared Services shall be carried out in compliance with the following provisions:
 - (a) participation in the Shared Services must be open to all commercial entities except for (i) Visa Inc. and its Affiliates; (ii) MasterCard Incorporated and its Affiliates; and (iii) any other similarly situated commercial entity that the Commissioner has agreed, in writing, should be excluded from such participation;
 - (b) notwithstanding paragraph 3(a):
 - (i) an Issuer in a Shared Service may be required to be a Financial Institution;
 - (ii) reasonable criteria may be established by the Association Board or the Independent Committee, as the case may be, relating to financial eligibility, regulations and operating standards commensurate with the demonstrable risk associated with any Member’s participation in a Shared Service; and

- (iii) reasonable criteria and regulations may be established by the Association Board or the Independent Committee, as the case may be, governing the set-up, establishment, testing and certification for a Member to directly connect to a Shared Service;
- (c) any Member may become a Direct Connector;
- (d) subject to paragraph 3(b)(i), any Member may participate as either an Acquirer or an Issuer, and need not participate as both an Issuer and an Acquirer;
- (e) no Acquirer may impose a Surcharge for the use of the Shared Services that discriminates among Cardholders based on the identity of the Issuer, except where:
 - (i) the Acquirer is also the Issuer; or
 - (ii) the Acquirer's ABM is branded with the Issuer's trademarks, and no other Issuer's trademarks, such that the ABM appears to be an ABM of that Issuer;
- (f) no Issuer may impose fees for use of the Shared Services that discriminate based on the identity of the Acquirer, except where:
 - (i) the Acquirer is also the Issuer; or
 - (ii) the Acquirer's ABM is branded with the Issuer's trademarks, and no other Issuer's trademarks, such that the ABM appears to be an ABM of that Issuer;
- (g) Applicants that demonstrate that they are qualified for Direct Connector status shall be provided with all necessary technical specifications and related information, upon execution of a commercially reasonable confidentiality agreement;
- (h) the Association Board or Interac Corp., as the case may be, shall not impose any restriction or condition on access to the Shared Service based on a Member's Financial Institution's arrangements with its customers regarding the operation of Accounts;
- (i) Interac Inc. or Interac Corp., as the case may be, shall deliver on request received by the Association or Interac Corp. respectively, the information reasonably necessary to allow potential Direct Connectors to determine whether they are ready, willing and able to apply to become a Direct Connector Member;
- (j) Interac Inc. or Interac Corp., as the case may be, shall:
 - (i) grant a commercially reasonable software licence, without any licence fee or royalty charge, authorizing Members to be Direct Connectors and to allow Direct Connectors to connect Indirect Connectors through them for the provision of a Shared Service;
 - (ii) ensure that the Inter-Member Network is fully capable of accommodating Surcharges or Rebates; and
 - (iii) provide a commercially reasonable trademark license without charge upon request to any Member.

Governance of the Association

4. Until the Restructuring closes, the Association shall be governed as follows:
 - (a) there shall be the following three classes of Members in the Association: DCFIs, DCNFIs and Indirect Connectors;
 - (b) the Association shall be governed by the Association Board, which will be solely responsible for making all decisions relating to the administration and operation of the Shared Services;
 - (c) the Association Board shall be comprised of no fewer than 14 Members, of whom no more than 9 shall be appointed by DCFIs. At least 2 Association Board members shall be appointed by DCNFIs and 3 shall be appointed by Indirect Connectors;
 - (d) each class shall appoint its board representatives to the Association Board. The entitlement of a Member of that class to appoint such a representative shall be based on such Member's annual volume of Messages;
 - (e) no more than one Association Board position may be filled by a representative of any one Member or Affiliate of that Member. For the purposes of appointing directors to the Association Board, DCFIs and DCNFIs shall be treated as a single class, except for the appointment of nominees to the two board seats reserved for DCNFIs; and
 - (f) the Association Board shall decide all issues on the basis of one director — one vote. Decisions of the Association Board regarding enhancements to the Shared Services and interchange fees shall be subject to a simple majority vote. The Association Board may delegate all decisions relating to interchange to the CEO of the Association who shall retain advisors that are Independent. All other matters, except for matters involving Fundamental Change, shall be decided as the Association Board determines. No decision of the Association Board shall require more than a two-thirds majority.

Restructuring

5. Notwithstanding any other provision in this Order, the Association may, pursuant to its Memorandum of Association, restructure from an unincorporated association to a corporate form as a component of the Restructuring and may enter into agreement with Acxsys and Interac Inc. to give effect to the Restructuring and create Interac Corp.
6. Upon the closing of the Restructuring as described in paragraph 5, the following variations of this Order will occur:
 - (a) the governance requirements set out in paragraph 4 shall cease to apply;
 - (b) Interac Inc. shall cease to be a Respondent and shall no longer be subject to the provisions of this Order; and
 - (c) the FI Respondents and Interac Corp. shall become the sole Respondents to this Order.
7. On or before the closing of the Restructuring, Interac Corp. shall provide the Commissioner with a copy of the key agreements relating to the Restructuring and an information package describing

the reorganization and the share allocation methodology. Interac Corp. shall also provide the Commissioner with written notice of when the Restructuring has closed.

Structure and Governance of Interac Corp.

8. The governance structure of Interac Corp. shall be as follows:
 - (a) all current Members at the time of the Restructuring must be given a reasonable opportunity to become shareholders of Interac Corp.;
 - (b) Interac Corp. shall be governed by the Interac Corp. Board, which shall be comprised as follows:
 - (i) up to eight (8) members of the board may be appointed by the FI Respondents;
 - (ii) four (4) members of the board shall be Independent; and
 - (iii) the CEO;
 - (c) The initial four (4) board members described in paragraph 8(b)(ii) shall be selected from a slate of eight (8) persons prepared by an independent expert. Such expert shall be appointed by Interac Corp.'s management with the concurrence of the Commissioner or his authorized representative. Interac Corp. shall be responsible for all reasonable fees and expenses properly charged or incurred by the independent expert in the course of carrying out the independent expert's duties under this Agreement. The independent expert shall have no duties of good faith, of a fiduciary nature, or otherwise, to any Respondent. The independent expert shall create a transparent process to identify, interview and select a slate of Independent Directors including but not limited to the creation of a position description after obtaining written input from relevant stakeholders, and ensuring broad dissemination of the call for directors. No shareholder, nor management of Interac Corp., shall have any right to nominate any person for inclusion in the slate. However, shareholders or management may provide written suggestions to the independent expert on director skills and qualifications for the position description and person or persons for the slate. The independent expert will not be obligated to accept any suggestion provided by a shareholder or management. The shareholders of Interac Corp. shall select the four (4) Independent Directors from the slate prepared by the independent expert who shall be appointed for the term of this Agreement. Once the process is complete, the independent expert shall provide a written report to the Commissioner. The shareholders shall not have the right to remove an Independent Director from office during the director's term of office, except (i) with the concurrence of the Commissioner or his representative, for misconduct or (ii) because the director is no longer Independent. In replacing removed directors, Independent Directors shall be appointed by the Independent Committee on the advice of an independent expert;
 - (d) The board members described in paragraphs 8(b)(ii) and 8(b)(iii) shall comprise an Independent Committee of the Interac Corp. Board. All matters before the Interac Corp. Board relating to the Shared Services shall be delegated to the Independent Committee, which shall have sole authority to make decisions respecting such matters;

- (e) Quorum for meetings of the Interac Corp. Board shall be a majority of all the directors and three (3) Independent Directors. Quorum for meetings of the Independent Committee shall be three (3) Independent Directors;
 - (f) All decisions of the Independent Committee shall be approved by a minimum of three (3) Independent Directors; and
 - (g) Interac Corp. shall provide the Commissioner, on request and on a timely basis, with the names of the directors of Interac Corp. as well as such information as he may reasonably require to demonstrate that each Independent Committee member is Independent and to determine whether such director of Interac Corp. has acted in accordance with the duties specified in paragraph 9 of this Agreement.
9. In carrying out their duties, and as they exercise their authority relating to a Shared Service, the directors of the Independent Committee shall consider the effect of their decisions on competition between Participants or groups of Participants, and shall not make a decision that confers a competitive advantage on any Participant or group of Participants.
10. Within 60 days of the Restructuring, an Advisory Committee of ten (10) Persons representing the diversity of Participants other than the FI Respondents shall be struck. The Advisory Committee shall meet at least two (2) times each year and views expressed by Advisory Committee members shall be reported to the Interac Corp. Board. The Advisory Committee shall be chaired by the chair of the Independent Committee.

Fees

11. Any fees imposed in connection with the Shared Services shall comply with the following provisions:
- (a) prior to the closing of the Restructuring, Interac Inc. shall be operated on a not-for-profit basis. Following the closing of the Restructuring, the Shared Services shall be operated on a Cost Recovery basis. As a result, fees or charges imposed by Interac Corp. in connection with the Shared Services shall be set by the Independent Committee at a level that represents Cost Recovery only;
 - (b) subject to any other provision of this Order, the revenue derived from the Shared Services shall be derived entirely from Switch Fees except where non-Switch Fee revenue would have no material negative effect in any market. Interac Inc. or Interac Corp., as the case may be, shall provide the Commissioner with at least 30 days advance notice of any new non-Switch Fee revenue;
 - (c) the Association or Interac Corp., as the case may be, as well as Direct Connectors may recover any direct and identifiable administrative or certification costs incurred during the course of admitting a new Member into the Shared Services or when accommodating an existing Member in the Shared Services following a Material Change in the Member's system;
 - (d) notwithstanding paragraph 11(b), the Association Board or the Independent Committee, as the case may be, may require a Member to pay a reasonable Annual Fee that only recovers the Incremental Costs associated with the class to which the Member belongs. For the purposes of this paragraph and notwithstanding paragraph 4(a), all Direct

Connectors may be treated as a single class and all Indirect Connectors constitute a single class. Any Switch Fees paid by a Member in the year covered by the Annual Fee must be applied against the Annual Fee. A Connection Service Provider shall be permitted to credit Switch Fees from every Indirect Connector that connects behind it towards the Annual Fee, but only for Switch Fees that exceed the value of the Annual Fee for the Indirect Connector. Any change in the Annual Fee is a Fundamental Change. In addition, prior to the closing of the Restructuring, any change in the Annual Fee that exceeds the cumulative change in the Consumer Price Index (measured from the last change in the Annual Fee) must be approved by a majority of the Association Board representatives that are not appointed by the FI Respondents. Written notice shall be provided by Interac Inc. or Interac Corp., as the case may be, to the Commissioner of any increase to the Annual Fee within 30 days of its approval. Interac Inc. or Interac Corp., as the case may be, shall provide to the Commissioner on request on a timely basis the current amount of the Annual Fee, a description of the underlying costs that factor into the Annual Fee, and supporting documentation explaining the estimation of those costs;

- (e) notwithstanding any other term of this paragraph 11, the Association Board or the Independent Committee, as the case may be, may permit the development of policies that impose monetary penalties on Members for non-compliance with the rules governing the Shared Services, provided that such policies:
 - (i) do not discriminate among Members; and
 - (ii) are rationally related to a legitimate business objective of the Association or Interac Corp., as the case may be;
- (f) where Interac Corp. experiences an operating surplus from the Shared Services at the end of its financial year, it may retain the surplus to create a commercially reasonable reserve against contingencies. In addition, the Interac Corp. Board may retain unspent R&D funds to be used for R&D projects for upcoming fiscal years;
- (g) the Association Board and the Independent Committee, as the case may be, must permit Acquirer Members to charge a Surcharge. Surcharging shall require express prior notification to the Cardholder at the Terminal. The Association Board or the Independent Committee, as the case may be, may determine what sort of express prior notification (e.g. signage, etc.) will be deemed acceptable; and
- (h) Interac Corp. shall provide written notice to the Commissioner of the amount of the R&D component and the corporate debt servicing component of the Switch Fee before either component is implemented in a Shared Service, and Interac Corp. shall provide the Commissioner, on request and on a timely basis, such records and information as he may reasonably require to assess the manner in which Interac Corp. has used or intended to use the R&D and debt servicing components collected as part of the Switch Fee.

General

12. The Respondents, individually or acting in concert, shall not engage in any activity which has the purpose or effect of circumventing any provision of this Order either directly or indirectly.

13. No later than upon his or her appointment, Interac Corp. shall provide each director with a copy of this Agreement and confirm that the director has read and understands the obligations set out herein.
14. Interac Inc. or Interac Corp., as the case may be, shall provide the Commissioner on request on a timely basis with copies of material changes or amendments to the By-laws, Operating Regulations and material agreements of the Association and Interac Inc., as well as similar documents relating to the Shared Services in Interac Corp. or any of its Affiliates.
15. In the event of a dispute with respect to the interpretation and application of this Order, any party shall be at liberty to apply to the Competition Tribunal for an order interpreting any of the provisions of this Order.
16. When notice is required to be given pursuant to any of the terms of this Order, it shall be considered given if dispatched by registered letter to the Persons listed in Appendix A appended to this Order.
17. This Order shall terminate 915 days following the date upon which Interac Corp. provides the Commissioner with written notice of closing of the Restructuring under paragraph 7.
18. Nothing in, or done under the authority of, this Agreement affects the operation of the Act or any other law; and for greater certainty, nothing done in, or under the authority of, this Agreement derogates from the obligation of each Respondent to comply with the Act or any other law.

Appendix A

Commissioner of Competition

Competition Bureau

21st Floor
Place du Portage, Phase I
50 Victoria Street
Hull, Québec
K1A 0C9

Attention: Derek Leschinsky

Bank of Montreal

55 Bloor Street West
15th Floor
Toronto, Ontario
M4W 3N5

Attention: Head, North American Retail Payments

The Bank of Nova Scotia

100 Yonge Street
8th Floor
Toronto, Ontario
M5C 2W1

Attention: Mike Henry SVP & Head, Retail Payments, Deposits and Lending

The Bank of Nova Scotia

44 King Street West,
Scotia Plaza, 8th Floor
Toronto, Ontario
M5H 1H1

Attention: Michael Davenport, Associate General Counsel

Canadian Imperial Bank of Commerce

199 Bay Street
Commerce Court West, 4th Floor
Toronto, Ontario
M5L 1A2

Attention: Geoff Weiss, Senior Vice President, Consumer Deposits

Fédération des caisses Desjardins du Québec

425 avenue Viger Ouest
10e étage
Montréal, Québec
H2Z 1W5

Attention: Vice-président, Monétique et Partenariat d'affaires

189286 Canada Inc.

151 Yonge St.
Suite 1000
Toronto, Ontario
MSC 2W7

Attention: President and Chief Executive Officer
c.c.: General Counsel

National Bank of Canada

700 de la Gauchetière West
7th floor
Montréal, Québec
H3B 3B5

Attention: Vice President E-channels and Payments

Royal Bank of Canada

Royal Bank Plaza
200 Bay Street
23rd Floor
Toronto, Ontario
M5J 2J5

Attention: Senior Vice President, Card Services

The Canada Trust Company

77 King Street West
12th Floor
TD North Tower

Toronto Dominion Centre
Toronto, Ontario
M5K 1A2

Attention: Senior Vice President, Everyday Banking, Payments, Personal and Indirect Lending

The Toronto-Dominion Bank

77 King Street West
12th Floor
TD North Tower
Toronto Dominion Centre
Toronto, Ontario
M5K 1A2

Attention: Senior Vice President, Everyday Banking, Payments, Personal and Indirect Lending

Interac Inc.

Royal Bank Plaza, North Tower
200 Bay Street, Suite 2400
Toronto, Ontario
M5J 2J1

Attention: President

COUNSEL:

For the applicants:

Bank of Montreal
The Bank of Nova Scotia
The Canada Trust Company
(formerly Canada Trustco Mortgage Company)
Canadian Imperial Bank of Commerce
Fédération des Caisses Desjardins du Québec
(formerly La Confédération des caisses populaires et
d'économie Desjardins du Québec)
189286 Canada Inc.
(formerly Credit Union Central of Canada)
National Bank of Canada
Royal Bank of Canada
The Toronto-Dominion Bank
Interac Inc.

Mark Nicholson

For the respondent:

The Commissioner of Competition

Derek Leschinsky

September 14, 2017

Ms. Andrée Bernier
Deputy Registrar
The Competition Tribunal
Thomas D'Arcy McGee Building
Suite 600 – 90 Sparks Street
Ottawa, Ontario
L1P 5B4

Dear Madam:

**Re: *Bank of Montreal et al v. The Commissioner of Competition (CT-1995-002)*
*Application Pursuant to s. 106(1)(b) of the Competition Act***

We are writing to you in connection with the consent agreement dated September 11, 2013 (the “**Consent Agreement**”) between the Bank of Montreal et al. and the Commissioner of Competition (“**Commissioner**”). We act for the Respondents.

Please accept this letter pursuant to Rule 81 of the *Competition Tribunal Rules* as an application pursuant to paragraph 106(1)(b), on consent of the parties, to vary and restate the Consent Agreement. A draft order is attached as **Appendix “A”**. The consent of each of the parties is attached as **Appendix “B”**. For general background on the Interac Group, which includes Interac Association, Interac Inc. and Acxsys Corporation, please refer to Part I of the letter that was submitted to the Tribunal on July 12, 2013, attached as **Appendix “C”**.

The Consent Agreement was previously varied in 2013 to permit the combination of the Interac Group into a single incorporated entity, Interac Corp., governed by a single independent board. That restructuring has not occurred. The parties propose that the Consent Agreement be amended as follows:

- Vary the governance provisions of the Restructuring (as defined in the Consent Agreement) to establish a thirteen-person board consisting of eight directors nominated

by the FI Respondents (as defined in the Consent Agreement), four independent directors and the CEO. An Independent Committee consisting of the latter five directors will have sole authority to make decisions before the board respecting the Shared Services (as defined in the Consent Agreement) (para. 8). This provision maintains the independent oversight of the Shared Services that was the essence of the 2013 amendments.

- Require the establishment of an advisory committee of ten persons representing the diversity of Interac participants other than the FI Respondents. The advisory committee will serve as a vehicle to ensure that the views of these other participants are placed directly before the board, thereby maintaining the voice they currently enjoy by virtue of having a minority position on the Association board. This advisory committee shall be struck within 60 days of the Restructuring and shall be chaired by the chair of the Independent Committee (para. 10).
- Amend the termination date such that the Consent Agreement will extend until 915 days following the date upon which Interac Corp. provides the Commissioner with written notice of the closing of the Restructuring (para. 17).
- Require that the FI Respondents will continue to be respondents of the Consent Agreement after the Restructuring (para. 6).
- Require that Interac Corp. will provide each director with a copy of the Consent Agreement and confirm that each director understands the obligations therein, no later than upon his/her appointment as a director (para. 13).
- State that the Consent Agreement does not derogate from the obligation of each of the Respondents to comply with the *Competition Act* or any other law (para. 18).

Consistent with all previous variations of the Consent Agreement, the proposed variation will preserve the existing open and non-discriminatory access and cost recovery operating model relating to the Shared Services. Moreover, as described above, the proposed variation preserves independent governance over the Shared Services and continues to afford non-Respondents, that participate in the Shared Service, with direct input to the Interac Corp. board.

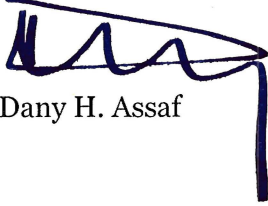
We note that, in previous cases, the Tribunal has granted amendments expeditiously on consent without the need for the parties to appear in person. We respectfully request that the Tribunal order the amendment as soon as possible.

In addition, the Commissioner is satisfied that the implementation of the Variation will continue to address any concerns relating to the Shared Services.

Before formally consenting to the Variation, the Commissioner requested that the Interac Group circulate the draft order to all members of the Association, along with an explanatory note. On September 5th, the Members were sent an email message with further direction to provide any competition concerns regarding the Variation directly to the Commissioner by September 13th. Pursuant to this process, no such competition law concerns or comments have been received.

Thank you for your and the Tribunal's consideration of this matter. We are available to answer any questions or provide any further information at the Tribunal's request.

Yours truly,

A handwritten signature in dark blue ink, consisting of several loops and a long vertical stroke extending downwards.

Dany H. Assaf

Appendix “B”

CONSENT

Bank of Montreal, The Bank of Nova Scotia, The Canada Trust Company, (formerly Canada Trustco Mortgage Company), Canadian Imperial Bank of Commerce, Fédération des Caisses Desjardins du Québec (formerly La Confédération des caisses populaires et d'économie Desjardins du Québec), 189286 Canada Inc. (formerly Credit Union Central of Canada), National Bank of Canada, Royal Bank of Canada, The Toronto-Dominion Bank, and Interac Inc., original respondents to the Consent Agreement in CT-95-002, through their counsel, consent to an order by the Competition Tribunal in the form of the Further Revised and Restated Amended Consent Agreement attached as Appendix A to this letter.

Dated at Toronto, Ontario this 14th, day of September, 2017



Dany H. Assaf
Partner, Torys LLP
79 Wellington St W #3000,
Toronto, ON,
Canada
M5K 1N2
T: 416.865.7303
F: 416.865.7380
E: dassaf@torys.com |

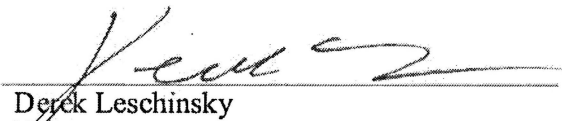
Counsel for the Respondents

Appendix "B"

CONSENT

The Commissioner of Competition, the original Applicant to the Consent Agreement in CT-95-002, through his counsel consents to an order by the Competition Tribunal (the "Tribunal") in the form of the Further Revised and Restated Amended Consent Agreement attached as Appendix "A" to the letter of Dany Assaf addressed to the Deputy Registrar of the Tribunal dated September 14, 2017.

DATED at Gatineau, Quebec this 14th day of September, 2017.



Derek Leschinsky
Department of Justice Canada
Competition Bureau Legal Services
50 Victoria Street
Gatineau, QC K1A 0C9
T: (819) 956-2842
F: (819) 953-9267
E: derek.leschinsky@canada.ca

Counsel for the Commissioner of
Competition

Appendix "C"

Interac Inc.

200 Bay Street, Suite 2400, Box 45, Toronto, Ontario M5J 2J1. Tel: (416) 362-8550



July 12, 2013

Mr. Joseph LaRose
Deputy Registrar
The Competition Tribunal
Thomas D'Arcy McGee Building
Suite 600 – 90 Sparks Street
Ottawa, Ontario
L1P 5B4

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
July 12, 2013 CT-2013-003	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 0001

Dear Sir:

**Re: *Bank of Montreal et al v. The Commissioner of Competition (CT-1995-002)*
*Application Pursuant to s. 106(1)(b) of the Competition Act***

Please accept this letter from the Respondent Interac Inc. as an application, on consent of the parties, to vary and restate the Amended Consent Agreement (the "**Consent Agreement**") between the Bank of Montreal et al. (the "Respondents") and the Commissioner of Competition ("**Commissioner**").¹ A draft order is attached as Appendix "A". The consent of each of the parties other than Interac Inc. is attached as Appendix "B".

The Consent Agreement has been in place since 1996, and has been amended on consent four times (in 1998, 2000, 2003 and 2005). The proposed consent variation (the "**Variation**") represents a fairly substantial restatement of the Consent Agreement. Consequently, we have prepared a fairly comprehensive letter to assist the Tribunal that is set out in six parts, as follows:

- Part I This part sets out background facts about the Interac Group (which is comprised of Interac Association, Acxsys Corporation and Interac Inc.).
- Part II This part summarizes the Consent Agreement focussing on the concerns that the Consent Agreement was intended to address.
- Part III This part describes the commercial needs that motivated the Interac Group to have Interac Inc. approach the Commissioner on behalf of the Respondents to seek his consent to the Variation.
- Part IV This part summarizes the material changes in circumstances that Interac Inc. submits have occurred from the time of the original Consent Order.

¹ The Consent Agreement was originally issued as a consent order in 1996, but was subsequently restated as a consent agreement in 2003 and is herein referred to as such.

- Part V This part describes the process that the Commissioner undertook before consenting to the Variation.
- Part VI This part outlines the Variation. It describes the new provisions added to the Consent Agreement (primarily, but not exclusively related to the proposed restructuring of the Interac Group), the provisions that were removed, and the provisions that were retained. It also provides a high level description of the reasoning underpinning these changes.

PART I: BACKGROUND – THE INTERAC GROUP

Interac Association

Interac Association (the “**Association**”) is an unincorporated association established by a Memorandum of Association, a multi-party contract that was first executed in November 1984 and fundamentally restated in 1996 following the issuance of the Consent Order. The Association is governed by a 14-member board of directors,² appointed annually by members.

The Association manages a payments network that enables members to provide two consumer-initiated shared electronic financial services (“**SEFS**”) to cardholders. These are INTERAC Debit (formerly Interac Direct Payment or “**IDP**”) and INTERAC Cash (formerly Interac Shared Cash Dispensing or “**SCD**”) (the “**Shared Services**”). The Association offers the Shared Services using proprietary software (the Inter-Member Network software, or “**IMN**”). Financial Institutions issue cards (and hence are called “**Issuers**”) to their customers (called “**Cardholders**”). These cards contain encoded-financial information on a magnetic stripe and or a chip that is embedded on the card. The Cardholder uses the card at a terminal that is the responsibility of the member that acquires the transaction (the “**Acquirer**”). For INTERAC Cash, the terminal is an automated banking machine (an “**ABM**”) and the Cardholder receives cash. For INTERAC Debit, the terminal is a debit terminal and the Cardholder purchases goods by paying with funds debited from a deposit account that is linked to the card. In 2012, there were 222 million INTERAC Cash transactions and 3.69 billion INTERAC Debit transactions.

The Association does not use a central switch to process financial messages. Rather, the IMN is used to create a distributed network architecture, which allows directly connected members (“**Direct Connectors**”) each of whom has a copy of the IMN installed on their own host system, to exchange messages directly with each other Direct Connector. There are currently 15 Direct Connectors in the Association. Members that choose not to become Direct Connectors can participate in the Shared Services by connecting through a Direct Connector. These indirectly connected members are known as “**Indirect Connectors**”. Direct Connectors that connect Indirect Connectors are referred to as “**Connection Service Providers**”.

² The Association’s current board is made up of representatives from BMO, BNS, CIBC, CUCC, Fédération, NBC, RBC, TD, Central 1 Credit Union, Global Payments Canada Inc., Chase Paymentech Solutions, Laurentian Bank, Suncor Energy Inc. and Directcash Management Inc.

A Shared Service transaction involves the following steps:

- (a) A Cardholder presents a card to a terminal (*i.e.* a debit terminal in the case of INTERAC Debit or an ABM in the case of INTERAC Cash) and enters a PIN³ - except, as will be discussed below, when using contactless NFC technology (*i.e.* INTERAC Flash);
- (b) For a chip-based debit transaction, the terminal reads basic financial information that is encoded in the card that identifies the Issuer as well as the Cardholder's account and then, where applicable, verifies the PIN. For any transaction initiated by a magnetic stripe, and for INTERAC Cash chip transactions, the PIN is encrypted at the terminal and passed to the Issuer for verification with the transaction message.
- (c) The terminal transmits the financial information from the card, along with the amount to be debited, to the Acquirer who then forwards it to the Issuer via the IMN;
- (d) The Issuer completes the cardholder authentication, verifies that the Cardholder has the requisite funds available and then sends a response back to the Acquirer; and
- (e) upon receipt of an affirmative response, the purchase is finalized (*i.e.* INTERAC Debit) or the transaction is completed and funds are dispensed (*i.e.* INTERAC Cash).

Each time that an INTERAC Debit or INTERAC Cash transaction occurs, a financial obligation is created between the Issuer and Acquirer. These obligations must be settled at the end of each business day. Unlike many other payment networks, including those of Visa and MasterCard, the Association does not maintain a proprietary payment settlement system; rather, it requires its members to settle using the facilities of the Canadian Payments Association (“CPA”). This requirement means that members must either be capable of clearing and settling transactions through the CPA or must contract with an agent (a “Settlement Agent”) to do so.

Pursuant to the Consent Agreement, Interac Inc. levies fees (“**Switch Fees**”) from members in order to recover its and the Association's costs. Switch Fees are IMN user fees recovered by Interac Inc., on a per message basis, to recover the sum of the actual costs the Association incurs to deliver the Shared Services.

Interac Inc.

Interac Inc. was created to function as the legal entity through which the affairs of the Association could be performed; it is the corporate “alter-ego” of the Association that, pursuant to a services and facilities agreement, provides all services and facilities necessary to operate the Association. Interac Inc. holds a master license to the IMN pursuant to which it licences Direct Connectors to use the IMN in connection with the

³ Personal Identification Number, which is a secret code that must be four digits or longer

Shared Services. Interac Inc. also owns the Interac Trademarks which it licenses to the members of the Association on a royalty-fee basis for use in the Shared Services.

Interac Inc. exists in its current form solely as a result of the Consent Agreement, which also requires Interac Inc. to operate on a not-for-profit basis. The Respondents other than Interac Inc. (the “**FI Respondents**”) are the shareholders of Interac Inc. and Acxsys Corporation. Pursuant to unanimous shareholders agreements in each of Interac Inc. and Acxsys Corporation, the FI Respondents control each company and have assumed the powers and authority of the board of directors of each.

Acxsys Corporation

In 1996, when the Consent Order was first implemented, Acxsys did not exist and Interac only offered the Shared Services. The Shared Services were (and remain) card-based. As part of the reorganization to implement the Consent Order, Acxsys was formed in 1996 through a tax-free “butterfly reorganization”, with the same shareholders and shareholdings as Interac Inc. The reason that Acxsys was created was to permit the shareholders of Interac Inc. to have the option to use property owned by Interac Inc. in for-profit contexts, given that the Consent Order forced Interac Inc. to be operated on a not-for-profit basis. Originally, the shareholders expected Acxsys to explore: (i) the use of the IMN software in non-financial markets in Canada; and (ii) the use of the IMN and Association documentation (which Acxsys also owns) outside of Canada. Ultimately, those options were not pursued as acceptable business cases could not be developed.

Almost seven years after the Consent Order was entered into, Acxsys was presented with the opportunity to acquire CertaPay Inc. (“**CertaPay**”) a company that was developing a shared electronic financial service that involved permitting an account holder to send an email money transfer to another person, accessing funds from the account holder’s deposit account. This service did not depend on access to the IMN to be commercially viable. This service ultimately became INTERAC e-Transfer. In October, 2003, Acxsys and CertaPay amalgamated, and CertaPay became a division of Acxsys. Shortly after the amalgamation, Acxsys began to develop a shared payment service that would permit debit payments to be made in connection with internet transactions. This development occurred within the CertaPay division. In October, 2003, with the consent of Association directors, Interac Inc. licensed Acxsys to use the INTERAC trademarks in connection with the email money transfer and online services. Acxsys then branded the services as Interac Email Money Transfer (now INTERAC e-Transfer) and Interac Online Payment (now INTERAC Online), respectively. Neither INTERAC e-Transfer nor INTERAC Online is a card-based product. In addition, Acxsys created a number of new shared services that represent international extensions of the Shared Services (the Association’s mandate is limited to domestic services only). These new services include the following:

(a) Cross Border Debit

Acxsys has entered into an agreement with a major U.S. payment network (NYCE Payments Network, LLC) to permit Cardholders of participating FIs to use their debit cards to purchase goods at participating terminals in the U.S. In practical terms, for Issuers, this service is an international extension of the INTERAC Debit service (which is limited to Canada).

(b) International ABM Service

Acxsys has entered into agreements with two foreign networks (China UnionPay (“CUP”) and PULSE Network LLC (“PULSE”)) to permit CUP Cardholders and Cardholders in the PULSE family of card brands (including Discover and Diners Club) to withdraw cash at participating ABMs in Canada. For Acquirers, this service represents an international extension to the INTERAC Cash service (which is also limited to Canada).

Finally, Acxsys has introduced the following two other services:

(a) International Money Transfer

Acxsys entered into an agreement with Western Union that permits Cardholders of participating financial institutions to use the facilities of INTERAC e-Transfer to send funds electronically from a Canadian deposit account to a cash recipient via Western Union’s global network of access locations.

(b) Private use of the IMN

From time to time, members of the Association wish to use the IMN to exchange messages that are not associated with the Shared Services. Acxsys negotiates individual licenses for the use of the IMN for these particular purposes.

It is clear that Acxsys has developed into an entity that is integrally connected to the Shared Services in a wide variety of ways. The practical result of the Consent Agreement, however, is that Acxsys and the Association must be operated under separate boards with distinct mandates. This fractured structure inhibits the Interac Group from operating as a single unit to develop products and innovations. Interac Inc. believes that to maximize the potential of the Interac Group, each of these services needs to be operated within a single portfolio under a single management and board; the Variation enables this.

PART II: SUMMARY OF THE CONSENT AGREEMENT

In the original application for the Consent Order, the Director of Investigation and Research (now the Commissioner) alleged that the Respondents, jointly had substantial or complete control over the supply of “Shared Electronic Network Services” (“SENS”) in Canada – that is, the services enabling network participants (*i.e.* members) to provide consumer-initiated SEFS. Although the Consent Agreement was primarily focussed on the Association and its services, the Association was not named as a party to the Consent Agreement because of its unincorporated status. Consequently, the entities that were the decision makers at the time, Interac Inc. and the FI Respondents (known as the “**Charter Members**” of the Association) were the Respondents. Through their alleged collective control over the governance of the Association and Interac Inc., the Respondents were alleged to have, through the exercise of their market power, substantially lessened competition in the “intermediate market” for the supply of SENS and in the “retail market” for the supply of SEFS by:

- (a) using narrow eligibility criteria to restrict who was able to connect directly and indirectly to the network;
- (b) imposing service access fees that limited competition among members for the sponsorship of new members (who would purchase SENS) and raised the costs of sponsored members (*i.e.* indirect connectors) relative to those of the Charter Members thus disadvantaging sponsored members as competitors in the retail market (*i.e.* the market for the supply of SEFS to consumers);
- (c) restricting the licensing and use of the IMN software that, as a result, restricted the introduction of new services, the entry of new competitors, and limited competition among members (in the SENS market);
- (d) collectively establishing interchange fees while maintaining a prohibition on surcharges, with the result that competition for ABMs and terminal deployment in the retail market was restrained; and
- (e) using strict eligibility requirements to restrict the types of transactions that could be conducted over the network in order to impede other persons from competing aggressively in the retail market.

As such, the Consent Agreement was premised on four fundamental concerns: (i) granting unfettered access to the IMN and the Shared Services to properly qualified entities; (ii) ensuring that the governance of the Association could not be used to confer a competitive advantage on the FI Respondents as compared to their horizontal competitors; (iii) removing barriers to competition in respect of pricing of SEFS by members (*i.e.*, the surcharge prohibition) and (iv) permitting the development of new SEFS at the member level.

The Consent Agreement requires that the Association remain an unincorporated association and for Interac Inc. to manage itself on a not-for-profit basis. As a result, the Shared Services can only be offered on a not-for-profit basis where all material revenues are derived from cost-based switch fees.

PART III: THE COMMERCIAL BASIS FOR THE VARIATION

The Variation is predicated on Interac Inc.'s desire to restructure the Interac Group to permit it to more effectively compete across its entire portfolio of services. In Interac Inc.'s view, the current organizational structure imposed by the Consent Agreement impedes the Interac Group's ability to innovate and limits its ability to respond in a timely manner to competitive initiatives from large international competitors in the context of a rapidly evolving payments environment. The boards of the Interac Group unanimously concluded that the Interac Group needed to restructure so that it could meet the challenges that have emerged and to remain relevant in an evolving world. It was agreed that the restructuring must achieve the following three imperatives:

- (a) It must bring all of the related services currently offered or under development by the Interac Group under a single corporate umbrella ("**Interac Corp.**") under the supervision of a single board of directors, with a single management;

- (b) It must establish an independent board of directors of Interac Corp. comprised of directors that are independent of both the company itself and of any participant in any service offered by the company; and
- (c) It must afford the restructured company the ability to engage in research and development (R&D) so that it can innovate its existing services, develop new services (such as a mobile payments service), and to otherwise fund its operations so that it can respond to market developments like a normal company would.

The restructuring contemplated by the Interac Group, and permitted by the Variation (the “**Restructuring**”) combines the Interac Group into a single incorporated entity (*i.e.* Interac Corp.) governed by a single independent board, through which all of the Interac Group’s services will be offered either directly or indirectly through subsidiaries. The Shared Services will continue to be offered on a cost recovery basis; however following the Restructuring, Interac Corp. will be permitted to include a capped component in the switch fee for research and development, as well as a capped component to service its corporate debt.

PART IV: THE MATERIAL CHANGES IN CIRCUMSTANCES

Interac Inc. submits that the payments landscape in Canada has evolved dramatically since the Consent Agreement was entered into in 1996. Specifically, the following four major developments have occurred that fundamentally impact the Interac Group in general and the Shared Services in particular:

- (a) New payment services have emerged that are not part of the Association – either because they are not card-based or because they are not domestic services. A number of these new services are offered under the INTERAC mark; a number of others are international extensions of the Shared Services offered by the Association. All of these additional services are offered by Acxsys.
- (b) Developments in networking and payments technologies have opened the door to new shared payments types (*e.g.* contactless payments and mobile payments) and new ways of networking.
- (c) Visa and MasterCard both have fundamentally restructured and have emerged as independent competitors of the Association and Acxsys for all of their shared electronic financial services. Visa and MasterCard are now independent public multinational payments companies. The FI Respondents have no control over the operational competitive decisions of either – they are simply customers of one or both companies.
- (d) The fourth development is that the *Competition Act* (the “**Act**”) has changed. In 2010, the criminal conspiracy provisions of the Act (s. 45) were amended to provide that agreements or arrangements among competitors relating to a number of prescribed areas (including, most notably, price) were illegal *per se*, unless the agreement/arrangement could fit within one of the defences outlined in the section. Because the Association is unincorporated, with a board comprised

primarily of horizontal competitors, it might be alleged that decisions made by the board are agreements among competitors.

Although not strictly necessary for the purposes of an application on consent under s.106(1)(b) of the Act (which is premised solely on the consent of the parties), Interac Inc. has taken the position that each of these changes constitute material changes in circumstances that, collectively, justify the Variation.

PART V: THE COMMISSIONER CONSENTS TO THE VARIATION

In light of the above, the management of the Interac Inc., (who are also the management of the other members of the Interac Group) requested that the Commissioner consider varying the Consent Agreement. After carefully reviewing information obtained from the Interac Group and other market participants, and conducting an extensive analysis of the rapidly evolving payments industry, the Commissioner concluded that there have been material changes in circumstances and consented to the requested Variation.

The concerns addressed by the Consent Agreement are adequately dealt with and remedied through the provisions of the Variation. This conclusion is based on the following reasons:

- (a) the Variation retains all of the provisions of the Consent Agreement relating to the operation of the Shared Services; and
- (b) the Variation continues to address all of the fundamental concerns of the original Consent Order.

In addition, the Commissioner is of the view, and Interac Inc. agrees, that implementation of the Variation is not expected to raise any new competition law concerns in any market.

Before formally consenting to the Variation, the Commissioner requested that the Interac Group circulate the draft order to all members of the Association, along with a brief explanatory note. Members were provided a one week period in which to bring forward any comments or concerns regarding the draft order to the Commissioner's attention. No such comments or concerns were forthcoming.

PART VI: DESCRIPTION OF THE VARIATION

1. The Variation Permits the Restructuring

The primary purpose of the Variation is to permit the Restructuring to occur. The governance of the Shared Services will be assumed by Interac Corp. under the direction of a fully independent board of directors. Rather than replicating the detailed provisions of the current Consent Agreement relating to board structure and governance, the Variation provides for the following:

- (a) While the total number of directors on the Interac Corp. board is left to the discretion of the shareholders, the Variation provides that no more than 60% of the total number of board members may be appointed or elected by the FI

Respondents (under the current Consent Agreement, the FI Respondents represent 8 of 14, or 57% of the total number of the Association board members);

- (b) Non-FI Respondents will have the right to elect at least one board member;
- (c) The CEO will sit on the Interac Corp. board; and
- (d) At least three board members will be appointed by the directors described in (a) (b) and (c) above.

The Restructuring involves a fairly complex set of transactions that must be negotiated among the various entities of the Interac Group and their various shareholders and members. Most importantly, the terms of the Restructuring will have to be agreed upon by all of the shareholders of Acxsys and by a 2/3 majority of both the directors of the Association and the members of the Association (voting by member).

Negotiations for the Restructuring itself have not yet commenced. Consequently, the Variation maintains the status quo for governance of the Association until the Restructuring is completed.

2. The Variation Retains All Material Terms Relating to the Operation of the Shared Services

It is important to note that all of the material terms from the original Consent Agreement dealing with the operation of the Shared Services are retained. In particular:

- (a) All behavioural obligations currently contained in the Consent Agreement relating to the operation of the Shared Services will continue to apply for the term of the Consent Agreement. A concordance of these provisions is set out in the following chart:

Interac board may adopt eligibility criteria, regulations and operating standards	3(b)	3(b)(ii)
Interac board may adopt Criteria and regulations governing set-up, establishment, testing and certification	3(c)	3(b)(iii)
Surcharging of other member's cardholders permitted (generally)	3(o)	10(g)
No discriminating surcharges (Acquirer)	3(p)	3(e)(i) ⁴
No discriminating surcharges (Issuer)	3(q)	3(f)(i) ⁵
IMN must accommodate surcharges or rebates	5(d)	3(j)(ii)

⁴ Draft Further Revised and Restated Amended Consent Agreement provision 3(e)(i) incorporates a new minor change with respect to Trademarked ABMs that is further explained on page 11.

⁵ Draft Further Revised and Restated Amended Consent Agreement provision 3(f)(i) incorporates a new minor change with respect to Trademarked ABMs that is further explained on page 11

- (b) All terms currently relating to access to the Shared Services, access to the INTERAC trademarks and access to the IMN will also continue to apply. A concordance of these provisions is set out in the following chart:

Membership open to all commercial entities	3(a)	3(a) & 3(b)(i)
Any member may become a Direct Connector	3(d)	3(c)
Members need not be both Issuers and Acquirers	3(e)	3(d)
Interac to deliver, on request, necessary information to potential Direct Connector applicants	3(r)	3(i)
Interac shall provide potential members with necessary technical specifications	3(s)	3(g)
No restrictions on access based on members' arrangements with their customers regarding operation of accounts	3(t)	3(h)
Interac to grant commercially reasonable, royalty free, software license	5(b)	3(j)(i)
Interac to grant commercially reasonable trademark licence without charge	5(e)	3(j)(iii)

- (c) The requirement that all material revenues relating to the Shared Services (which are the only services offered by the Association) must be derived from switch fees (paragraph 3(m)) will continue to apply for the term of the Consent Agreement. In addition, the exceptions to the requirement relating to non-discriminatory sanctions policies and to minimum annual fees currently contained in the Consent Agreement (paragraph 3(m.1), (m.2), (m.3), (m.4) and 4) will continue to apply for the term of the Consent Agreement. A concordance of these provisions follows:

Interac's revenue shall be derived from the Switch Fee	3(m)	10(b) & 10(c)
Interac may require a member to pay a reasonable Annual Fee	3(m.1)	10(d)
Switch Fees must be applied against Annual Fee	3(m.2)	10(d)
Any changes to the Annual Fee constitute a Fundamental Change	3(m.3)	10(d)
Written notice of change in Annual Fee shall be provided to Commissioner	3(m.4)	10(d)
Interac may impose non-discriminatory, legitimate monetary penalties	4	10(e)

3. The Variation Provides for Certain Consequences Following Restructuring

Once the Restructuring is completed, the Variation provides for a number of consequences, as follows:

- (a) The FI Respondents cease being Respondents and Interac Corp. will become the sole Respondent. The FI Respondents were named as Respondents to the original Consent Order (along with Interac Inc.) because, as an unincorporated entity, the Association had no legal status. Once the Restructuring is completed, Interac Inc. will cease to exist and the FI Respondents will be shareholders of Interac Corp. (as will the other members of the Association). As the Consent Agreement will be enforceable against Interac Corp. after the Restructuring is complete, it will no longer be necessary to include the FI Respondents as parties to the Agreement.

- (b) Interac Corp. will be permitted to include two additional elements in the switch fee for the two Shared Services. These elements include the following:
 - (i) a component for R&D funding, capped at \$0.005 per message; and
 - (ii) a component for borrowing, capped at \$0.002 per message.
- (c) The parties have agreed that it is appropriate to include a fixed termination date in the Consent Agreement.

In order to provide additional assurance that the board of directors of Interac Corp. will not make decisions relating to the Shared Services that confer a downstream competitive advantage to the FI Respondents, the Variation imposes two new requirements:

- (a) that all directors be “independent” from both Interac Corp. and any Participant in any Service, where the definition of “independent” is drawn from the Canadian Securities Administrators’ National Instrument 52-110 which establishes standards of independence for members of audit committees of publicly traded companies; and
- (b) that the Interac Corp. board must consider the implications on downstream competition of any decision that it makes with respect to the Shared Services and must not make any decision relating to the Shared Services that confers a competitive advantage on one Participant or a group of Participants over another (see paragraph 9 of the Draft Further Revised and Restated Amended Consent Agreement).

4. The Variation Changes Certain Terms Slightly

The Commissioner and Interac Inc. have agreed to change a number of terms of the current Consent Agreement slightly. The following list sets out these changes and a brief explanation:

- (a) Application (section 2). The Variation eliminates the clause “*and all other Persons in active concert or participation with any of them who have received actual notice of this Amended Consent Agreement*” which was deemed unnecessary. The current language is consistent with recent registered Consent Agreements under section 79 and 106 of the Act (see, e.g., *CREA* (s.2); *Canada Pipe* (s.2)).
- (b) Addition of Trademarked ABMs (paragraphs 3(e)(ii) and 3(f)(ii)). Paragraphs 3(e) and 3(f) prohibit discrimination by one member among other members in respect of surcharging and imposing usage fees on Cardholders (respectively). The current Consent Agreement provides an exception to these prohibitions where the Acquirer is also the Issuer (*i.e.* an Issuer does not have to surcharge its own Cardholders and does not have to impose a service fee on its own Cardholders for use of its ABMs). The Association had been approached by members who wished to enter into an agreement that would have a “white label” ABM branded with an Issuer’s trademarks and marketed as if it were the Issuer’s ABM. The

Variation permits these branded ABMs to be treated as if they were owned by the Issuer with respect to the non-discrimination provisions.

- (c) Delegation of Interchange Decisions to CEO (paragraph 4(f)). During the interim period while the terms of the Restructuring are being negotiated, the Association Board will continue to operate under the terms of the current Consent Agreement. This paragraph provides that the Association Board may delegate decision-making authority to the CEO, who must retain independent advisors to assist in the decision-making so that Association Board members do not play any role in interchange decisions.

5. The Variation Makes a Number of Additional Changes

Interac Inc. and the Commissioner have agreed to eliminate all of the provisions in the current Consent Agreement relating to the Bilateral/Multilateral Services. The changes to networking technologies and the evolution of the internet, described in Part IV above, have combined to render the provisions unnecessary. The fact that there have been no applications for Bilateral/Multilateral services made to Interac Inc. at all in the 17 years that the Consent Agreement has been in force strongly supports this conclusion.

In addition to the changes described above, the Commissioner and Interac Inc. have agreed to make a number of changes to the current Consent Agreement to remove definitions and provisions that are no longer used or are no longer necessary given the fact that the Consent Agreement has been in force for 17 years.

Finally, the parties have restated the current Consent Agreement in an effort to make it more cohesive and readable.

* * * * *

We trust that this letter is sufficient for your purposes. We would be happy to answer any questions that the Tribunal might have.

Regards,



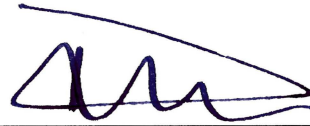
Mark P. O'Connell
President and CEO

Appendix "B"

CONSENT

Bank of Montreal, The Bank of Nova Scotia, The Canada Trust Company, (formerly Canada Trustco Mortgage Company), Canadian Imperial Bank of Commerce, Fédération des Caisses Desjardins du Québec (formerly La Confédération des caisses populaires et d'économie Desjardins du Québec), 189286 Canada Inc. (formerly Credit Union Central of Canada), National Bank of Canada, Royal Bank of Canada, The Toronto-Dominion Bank, and Interac Inc., original respondents to the Consent Agreement in CT-95-002, through their counsel, consent to an order by the Competition Tribunal in the form of the Further Revised and Restated Amended Consent Agreement attached as Appendix A to this letter.

Dated at Toronto, Ontario this 14th, day of September, 2017



Dany H. Assaf
Partner, Torys LLP
79 Wellington St W #3000,
Toronto, ON,
Canada
M5K 1N2
T: 416.865.7303
F: 416.865.7380
E: dassaf@torys.com |

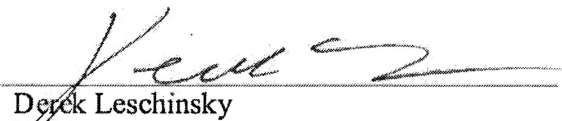
Counsel for the Respondents

Appendix "B"

CONSENT

The Commissioner of Competition, the original Applicant to the Consent Agreement in CT-95-002, through his counsel consents to an order by the Competition Tribunal (the "Tribunal") in the form of the Further Revised and Restated Amended Consent Agreement attached as Appendix "A" to the letter of Dany Assaf addressed to the Deputy Registrar of the Tribunal dated September 14, 2017.

DATED at Gatineau, Quebec this 14th day of September, 2017.



Derek Leschinsky
Department of Justice Canada
Competition Bureau Legal Services
50 Victoria Street
Gatineau, QC K1A 0C9
T: (819) 956-2842
F: (819) 953-9267
E: derek.leschinsky@canada.ca

Counsel for the Commissioner of
Competition