

CT-2010-010

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

**AND IN THE MATTER OF** an application by the Commissioner of Competition pursuant to section 76 of the *Competition Act*;

**AND IN THE MATTER OF** certain agreements or arrangements implemented or enforced by Visa Canada Corporation and MasterCard International Incorporated.

**BETWEEN:**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE  <b>RECEIVED / REÇU</b> April 27, 2012  REGISTRAR / REGISTRAIRE	
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**THE COMMISSIONER OF COMPETITION**

Applicant

- and -

**VISA CANADA CORPORATION and  
MASTERCARD INTERNATIONAL INCORPORATED**

Respondents

- and -

**CANADIAN BANKERS ASSOCIATIONS and  
THE TORONTO-DOMINION BANK**

Intervenors

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**WITNESS STATEMENT OF TIM BROUGHTON**

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1. I am a co-owner of C'est What?, Inc. ("C'est What"), a restaurant and pub located in the St. Lawrence Market area of Toronto. Prior to opening C'est What, I was employed as a management consultant with Canada Consulting Cresap (now part of the Boston Consulting Group).

2. My business partner, George Milbrandt, and I opened C'est What in 1988 and have operated the restaurant for the past 24 years. As such, I have knowledge of the matters discussed below. Where I rely on information provided to me by others, I verily believe the information to be true.

### C'est What

3. C'est What is a restaurant and pub offering customers quality, value, and comfort with an "ethno-clectic" menu and all-natural craft-brewed beers, wines, and hand-picked premium spirits. At 6,200 square feet, the restaurant has a maximum capacity of 340 people. Entrees are priced between \$7.95 and \$14.95. We are open seven days a week from 11:30am to 2:00am. The restaurant also has an adjoining performance room that provides a venue for artists, musical shows, and similar attractions.

4. In addition to cash, C'est What accepts Visa, MasterCard and American Express credit cards as payment. Credit card transactions represent between [REDACTED] and [REDACTED] of C'est What's payment volume depending on the season.<sup>1</sup> In 2011, [REDACTED] credit card transactions were concluded at C'est What [REDACTED] [REDACTED]. Approximately 92% of these credit card payments were made using either a Visa or MasterCard credit card.

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<sup>1</sup> A higher number of group bookings are paid for by credit cards during the winter months.

**The Increasing Cost of Credit Card Acceptance**

5. C'est What purchases credit card services from Global Payments Direct, Inc. ("Global Payments"), a financial institution referred to as an "Acquirer", or payment processor. Global Payments provides C'est What with the infrastructure and services necessary to accept credit cards as a form of payment, including access to the Visa and MasterCard credit card networks, facilitation of authorization requests for credit card transactions and settlement of payment. A copy of the agreement entered into between C'est What and Global Payments (the "Merchant Agreement") is attached as Exhibit "A" to this witness statement.

6. The market for Acquirer services in Canada is competitive and C'est What has switched between Acquirers in the past. Between 2004 and 2009, C'est What used Moneris Solutions Corporation ("Moneris") as an Acquirer. Prior to 2004, C'est What used Global Payments.

7. Between 2004 and May 2009, C'est What was charged a uniform basic rate of [REDACTED] on each Visa and MasterCard credit card transaction. This rate was negotiated by the Canadian Restaurant and Foodservices Association on behalf of its members, including C'est What.

8. However, beginning in 2008, the real effective rate on each Visa and MasterCard credit card transaction began to increase because of the introduction of "non-qualifying transaction" fees. "Non-qualifying" transactions were transactions made with a corporate credit card, a credit card issued by a foreign bank, or a high spend reward credit card. "Non-qualifying" transactions also included those transactions that were manually entered because the card was not present at the time of the transaction as, for example, when large group bookings were taken over the phone and a deposit was requested. In the 8 months from September 2008 to May 2009 (a period of very low

inflation), the impact of increased credit card fees resulted in a 9.6% increase in C'est What's credit card acceptance costs.

9. By May 2009, C'est What's basic rate on each Visa and MasterCard credit card transaction had increased to [REDACTED] and an additional [REDACTED] basis points ("bps") over the basic rate was charged for every "non-qualifying" transaction.

10. In November 2009, the basic rate paid by C'est What for each Visa and MasterCard credit card transaction increased again to [REDACTED] of the value of each transaction, an increase of 9% over a six-month period. At the same time, the additional charge for each "non-qualifying" transaction increased to [REDACTED] an increase of 40% over a six-month period. By October 2010, the additional charge for each of C'est What's "non-qualifying" transactions had increased again to [REDACTED] and additional fees were introduced, such as the Visa and MasterCard brand fee (10bps) and foreign brand fee (50bps).

11. In November 2010, C'est What purchased Digital Dining, an integrated point-of-sale system from Menusoft Systems Corporation ("Menusoft") that allows integration with Mercury Payment Systems ("MPS") for credit card processing. As a result of adopting this point-of-sale system, all of C'est What's credit card transactions since November 2010 have been acquired by MPS' acquiring partner, Global Payments.

12. Under the agreement with MPS/Global Payments, C'est What is charged a basic rate of [REDACTED] for each Visa credit card transaction and [REDACTED] for each MasterCard credit card transaction. In addition to the basic rate, a large and growing number of additional fees are charged, such as fees for transactions with Visa premium or MasterCard high spend credit cards and fees for electronic non-EMV standard transactions. On average, a transaction attracts between two and three separate fees.

The information provided on the monthly statement I receive from Global Payments does not allow me to easily or clearly understand which transactions incur which fees.

13. Factoring in all of the fees paid to Global Payments, C'est What's effective cost of credit card acceptance has steadily increased from [REDACTED] for each credit card transaction in December 2008 to [REDACTED] in December 2011. That is an increase of 25.5% over three years.

14. Card acceptance costs represent a significant expense to C'est What, far exceeding the reasonable value of credit cards to C'est What. In 2011, I spent close to \$[REDACTED] on credit card acceptance fees for the restaurant, which is almost the same as the \$[REDACTED] I spent on all utilities combined (electricity, gas, water and sewage).

15. The higher card acceptance costs associated with premium credit cards impose even more significant costs on C'est What, with very little advantage or benefit, if any, to C'est What. The average rate for each premium credit card transaction is [REDACTED] (the range is from [REDACTED] to [REDACTED]). Compared to the original [REDACTED] basic rate charged between 2004 and September 2008, this represents an increase of 62%, while yielding no additional value to C'est What. By December 2011, [REDACTED] of all transactions [REDACTED] of dollar volume) at C'est What occurred with a premium credit card. These costs are particularly significant in comparison to the average profit margin for restaurants of 3.2%.

### **The Merchant Rules**

16. I am unable to manage or control the increasing cost of credit card acceptances because of certain rules implemented and enforced by Visa and MasterCard (the "Merchant Rules"). [REDACTED]  
[REDACTED] C'est What is bound by the Merchant Rules that have been implemented by Visa and MasterCard.

17. The Merchant Rules prevent me from encouraging customers to use credit cards with lower card acceptance fees or lower-cost methods of payment, such as cash. In particular, the Merchant Rules prohibit me from surcharging or refusing to accept certain types of credit cards.

18. C'est What is also impacted by additional costs related to credit card acceptance. For example, to meet the requirements for "chip-and-pin" credit card authorization mandated by Visa and MasterCard (deadline October 2012), C'est What will have to purchase six new hand-held point-of-sale terminals, at a minimum cost of \$1,000 each, as well as incur the additional hardware and software costs of integrating the terminals into the existing point-of-sale system. While I do have the option of not converting, I would then have no fraud protection if a chip card is presented and swiped at my point-of-sale terminal. Moreover, if my point-of-sale terminals are not chip-enabled by 2014, I will be subject to an additional fee for each transaction.

19. Moving to chip-enabled credit cards also introduces additional costs to C'est What, beyond the cost of point-of-sale terminal upgrades. For example, with signature cards, servers can leave customers to settle the bill on their own. With chip cards, however, the servers will need additional time to assist customers with processing their transactions. If there is a delay in accepting payment, it can have a highly detrimental effect on their impression of the entire visit. There are also additional considerations, such as opportunities for error, the absence of a fully integrated wireless solution, and the consumer inconvenience of a wired solution.

20. Despite high card acceptance fees and other ancillary costs, I cannot realistically refuse to accept credit cards at C'est What. The credit card networks, namely Visa and MasterCard, have succeeded in making their credit cards ubiquitous, meaning that customers have come to expect that their credit cards will be accepted everywhere.

If I were to refuse to accept Visa or MasterCard credit cards at C'est What, many of my customers would take their business elsewhere.

21. In the absence of a regulated solution, the only way I foresee being able to mitigate the increasing costs of accepting credit cards is to pass on some of my costs of credit card acceptance. This requires a change to the Merchant Rules.

22. [REDACTED]  
[REDACTED]  
[REDACTED] To do so, would also require the networks to facilitate easy and obvious differentiation between types of credit cards.

23. Today, all consumers end up paying higher prices as a result of the costs associated with premium credit cards, regardless of whether or not they receive any of the benefits associated with such cards. Rather than raising prices for everyone, selectively surcharging only those customers who choose to pay with a higher-cost payment method is a transparent and fairer result.

24. [REDACTED]  
[REDACTED]  
[REDACTED] Effective competition between Visa and MasterCard should, in turn, reduce the fees charged to merchants.

25. If customers are aware of the real cost of using their credit cards they can make an informed decision as to whether the additional cost of the transaction is worth the benefits they receive for using their credit card.

26. Chip technology makes it relatively easy to implement surcharging functionality on a point-of-sale terminal. Customers could be prompted to agree to a surcharge as they enter their credit card PIN number at the point of sale terminal.

27. Discounting for the use of lower-cost payment methods is not a viable option. It would not be practical or effective to offer a discount to all customers paying with cash or a lower-cost credit card to attempt to steer the remaining customers to lower-cost payment methods. It is more efficient and effective to surcharge only those customers choosing to pay with higher-cost payment methods.

28. In addition, to remain competitive I must be able to advertise the lowest prices I can on my menu, rather than prices that may be further discounted depending upon the payment method selected by the customer. It is implicit in the Merchant Rules that I must list the price applicable to purchases made using a credit card, as opposed to advertising a lower price and then applying a surcharge to those customers who use higher-cost payment methods.

Signed: March 7, 2012



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TIM BROUGHTON



**EXHIBIT "A"**

**[Redacted]**

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*(March 7, 2012)*

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