

CANADA
 PROVINCE OF QUEBEC
 DISTRICT OF MONTREAL

NO: 500-06-000564-118

(Class Action)
 SUPERIOR COURT

9085-4886 QUEBEC INC.

and

P. BAKOPANOS

Petitioners

-vs.-

AMEX BANK OF CANADA, legal person duly incorporated, having its head office located at 101 McNabb St., City of Markham, Province of Ontario, L3R 4H8

and

AMEX CANADA INC., legal person duly incorporated, having its head office located at 101 McNabb St., City of Markham, Province of Ontario, L3R 4H8

Respondents

**MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION
 &
 TO ASCRIBE THE STATUS OF REPRESENTATIVE
 (Art. 1002 C.C.P. and following)**

TO ONE OF THE HONOURABLE JUSTICES OF THE SUPERIOR COURT,
 SITTING IN AND FOR THE DISTRICT OF MONTREAL, YOUR PETITIONERS
 STATES AS FOLLOWS:

I. GENERAL PRESENTATION

A) THE ACTION

1. Petitioners wish to institute a class action on behalf of the following respective groups, of which each is a member, namely:

Merchant Class

- all residents in Canada who accepted as a method of payment for the sale of a good or service an American Express credit card put onto the marketplace directly or indirectly by the Respondents, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who accepted as a method of payment for the sale of a good or service an American Express credit card put onto the marketplace directly or indirectly by the Respondents, or any other group to be determined by the Court;

Consumer Class

- all residents in Canada who purchased a good or service from a Merchant Class member, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Canada who purchased a good or service from a Merchant Class member, or any other group to be determined by the Court;

2. The Respondents, Amex Bank of Canada and Amex Canada Inc. (hereinafter referred to collectively as “Amex” or “American Express”), have a considerable amount of market power and are thus considered a monopoly. According to 2009 Nilson data in the United States, the credit card market share is divided as follows: Visa at 43%, MasterCard at 27%, American Express at 24%, and Discovery at 6%;
3. The present action challenges America Express’s rules preventing merchants from providing consumers with incentives to use forms of payment that are less expensive to the merchant than Amex-branded credit cards or even advising consumers of the relative costs of various payment products (the “Anti-Steering Rules”);
4. Merchants incur fees (known as “merchant discount fees”) each time they swipe an Amex or other payment card. In the absence of the Anti-Steering Rules, merchants would be free to offer consumers incentives to use payment products that carry lower merchant discount fees than do Amex-branded payment cards. If merchants were free to give consumers incentives to use less costly payment products, then Amex would face the prospect of losing business as consumers respond to these incentives, and would therefore be

under pressure to reduce its merchant discount fees. In other words, Amex would face competition in the markets for providing payment card acceptance services to merchants. The Anti-Steering Rules insulate Amex from such competition;

5. Further, by prohibiting merchants from informing consumers about how expensive their payment product is to the merchant and providing them incentives to switch to an alternative payment product, the Anti-Steering Rules serve to entrench Amex's position of monopoly power and allow Amex to extract grossly supra-competitive discount fees from all merchants;
6. The Anti-Steering Rules also ensure that merchants must seek to pass along the high merchant discount fees that they incur on American Express transactions by raising prices to all consumers, including cash-payers, debit card users, and other less expensive credit cards (i.e. Visa, MasterCard, and Discovery). In the absence of the Anti-Steering Rules, the merchant would be free, for example, to impose the discount fee directly upon the cardholder who chooses to use the expensive American Express payment card. The price of goods and services would fall because those prices would no longer be marked up to reflect merchant discount fees;
7. Petitioners contends that the Respondents' conduct has violated section 76 of the Federal *Competition Act*, which states that:

“(a) a person referred to in subsection (3) directly or indirectly

(i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or

(ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and

(b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.”

8. Petitioners thereby contend that the Respondents' conduct has caused:
 - i) the charging to the Merchant Class of credit card processing fees and associated costs at a supra-competitive rate;

- ii) the charging to the Consumer Class of goods and services at artificially inflated prices to take into account the Merchant Class' credit card processing fees and associated costs, which have been passed on in part to the Consumer Class;

B) THE RESPONDENTS

9. Respondent Amex Bank of Canada is a federally incorporated company, the whole as appears more fully from a copy of the *Registre des entreprises* report, produced herein as **Exhibit R-1**;
10. Respondent Amex Canada Inc. is an Ontario incorporated company, the whole as appears more fully from a copy of the *Registre des entreprises* report, produced herein as **Exhibit R-2**;
11. In the year 2009 in the United States, cardholders used American Express credit cards for purchases totalling \$419.8 billion;
12. Both Respondents are generally responsible for all aspects of the credit card business conducted under the American Express brand, including the operation of the American Express network of distribution to consumers and the processing of payments and charges to merchants;

C) THE SITUATION

13. When a consumer presents an Amex-branded payment card for payment, the merchant swipes the card and transmits a record of the transaction to Amex. Amex then sends to the retailer's bank account an amount of money that is equal to the transaction amount minus the "merchant discount fee" that Amex charges retailers. For a typical retailer in many industries, that discount fee is roughly 3% of the total transaction amount. At 3%, if a cardholder presents an Amex-branded payment card to make a \$100 purchase, the merchant will receive \$97 from Amex, and Amex will bill its cardholder for \$100. The \$3 difference is Amex's "discount revenue";
14. Other payment products are far less costly to the merchant. Cash, debit cards, and other credit cards carry much lower discount fees than Amex. As a result, if merchants were able to steer transactions to payment products other than Amex, they would realize significant savings. In a competitive retail marketplace, those savings will be passed along to all consumers in the form of lower everyday prices;
15. There are many ways that a merchant might steer transactions to a less costly payment product, including:

- offering a discount for using a payment product that is cheaper to the merchant, such as Discover, Visa, and MasterCard branded credit cards, while not offering that discount for Amex cards, or any particular type of Amex cards;
- verbally asking customers if they would mind using a different payment product, as opposed to Amex cards, or any particular type of Amex cards;
- posting signage indicating a preference for a cheaper payment product;
- posting the decals and signs of less expensive payment networks and yet not posting the decal or sign of Amex;
- imposing a small charge (sometimes referred to as a “surcharge”) for using all or any subset of Amex-branded payment cards;
- taking any other actions that merchants may yet devise if they were not constrained by the anticompetitive rules against steering.

16. Amex’s Anti-Steering Rules, however, strictly prohibit merchants from engaging in any of these pro-competitive practices. As set forth in the “Merchant Reference Guide – Canada”, section 3.2 impose the following restrictions on merchants that accept American Express:

“Merchants must not:

- indicate or imply that they prefer, directly or indirectly, any Other Payment Products over our Card,
- try to dissuade Cardmembers from using the Card,
- criticize or mischaracterize the Card or any of our services or programs,
- try to persuade or prompt Cardmembers to use any Other Payment Products or any other method of payment (e.g., payment by cash),
- impose any restrictions, conditions, disadvantages or fees when the Card is accepted that are not imposed equally on all Other Payment Products, except for cash,
...
- promote any Other Payment Products (except the Merchant’s own private label card that they issue for use solely at their Establishments) more actively than the Merchant promotes our Card, or
...

Whenever payment methods are communicated to customers, or when customers ask what payments are accepted, the Merchant must indicate their acceptance of the Card and display our Marks according to our guidelines and as prominently and in the same manner as any Other Payment Products.”

the whole as appears more fully from a copy of the most recent “Merchant Reference Guide – Canada”, produced herein as **Exhibit R-3**¹;

17. In the “Merchant Reference Guide – Canada”, the term “Other Payment Products” is defined as the end of the document as “Any charge, credit, debit, stored value or smart cards, account access devices, or other payment cards, services, or products other than the Card.”;
18. The language in Section 3.2 is inserted in identical or substantially similar form in most of American Express' contracts with merchants. In many agreements, the Guide is expressly incorporated by reference;
19. The intended and actual result of Amex’s Anti-Steering Rules is near-total insulation from price-based competition in the payment card acceptance services markets. A competitor network could offer to provide comparable services to retailers at a price far lower than that charged by Amex, however, such a pro-competitive strategy would still not allow this would be competitor to gain any market share from Amex. The reason that the competitor network cannot gain market share by offering the same services at lower prices is because of the Anti-Steering Rules, which flatly ensure the consumer will have no incentive to use the less expensive and more efficient payment medium. And it is the consumer who decides which payment option to use. The Anti-Steering Rules thus render Amex largely impervious to price-based competition in the provision of payment card acceptance services;
20. American Express has substantial market and monopoly power in the credit card industry in general. Amex has an even greater market and monopoly power in the corporate and small business card acceptance services industry in particular. Amex has demonstrated this by:
 - a) its ability to raise the merchant discount fees without losing business to other sellers of payment card services or other payment methods;

¹ In August 2010, American Express amended paragraph of 3.2 to state: “Merchants may offer discounts from their regular posted prices to prospective buyers for different methods of payments, such as cash or by electronic funds transfer, cheque, or other credit and debit products provided that they clearly and conspicuously disclose the terms of the discount offer (including the regular and discounted prices) to all prospective buyers at the point of sale or checkout.”

- b) its ability to substantially raise prices while its unit costs are decreasing and sales volume is increasing;
 - c) the fact that increasing prices have led to increasing sales, instead of decreasing sales;
 - d) its ability to set the merchant discount fee without regard to the cost of providing payment card services to the merchants and without fear that its increasing prices would cause retail customers to switch to any other payment card or method;
 - e) its abnormally high price/cost margin;
 - f) its ability to force merchants to accept the Anti-Steering rules;
21. There are significant barriers to entering into the business of providing payment card services. No company has successfully entered this line of business since 1985. Entry is estimated to cost over \$1 billion to overcome the impediment to market entry of having enough cardholders to induce merchants to accept the cards before having signed up enough merchants to induce consumers to become cardholders - and vice versa. In addition, as explained above, the existence of the Anti-Steering rules is itself a significant barrier to entry;
22. Theoretically, each individual merchant could, of course, simply refuse to accept Amex cards. As a practical matter, however, such a decision is not economically feasible or realistic for the merchants. Many customers and regularly use an Amex card and if the merchant stopped accepting Amex cards, then it would lose many of those customers to competitive retailers that accept Amex card products. The profits lost as a result would be greater than the anti-competitive overcharge suffered at the hands of Amex;
23. Amex exploits its monopoly power. The Anti-Steering rules are anticompetitive in that they nullify the operation of the price mechanism by:
- a) precluding consumers from learning that Amex is a higher-cost payment product;
 - b) preventing consumers from receiving any price reduction for using a lower-cost form of payment than an Amex payment card;
 - c) eliminating any economic or competitive incentive for Amex to lower its prices in order to avoid losing sales (measured in card transactions and/or card transaction volume);
24. The result of these Anti-Steering rules is that:

- a) the cost to the merchant and to the retail customer of using an Amex card is opaque to the retail customer, who is the decision maker as to what payment method to use;
- b) Amex is able to evade and nullify the operation of the price mechanism that, in the absence of the anticompetitive steering rules, would lead merchants to charge lower prices to customers who used less costly payment methods than Amex cards (or be able to credibly threaten to do so) which, in turn, would cause Amex to reduce to a competitive rate the price it charges merchants;
- c) merchants are forced to raise the prices they charge to all customers -- even those who do not use an Amex card -- in order to cover the high and anticompetitively elevated cost of transactions where the customer used an Amex payment card;
- d) Amex is able to charge merchants supracompetitive prices for its payment card services and is further able to obtain and maintain monopoly power, which is the power to raise price substantially above the competitive level without losing so much sales volume as to render the price increase unprofitable;
- e) consumer welfare is reduced as the supracompetitive prices charged by Amex are necessarily incorporated into the retail prices paid by all consumers;

D) THE FOREIGN PROCEDURES

- 25. Several class action actions have been instituted in the United States based on the Respondents' conduct and have all been consolidated in the Eastern District of New York, the whole as appears more fully from a copy of various of these Class Action Complaints, produced herein *en liasse* as **Exhibit R-4**, as well as, the MDL Panel order No 2221, produced herein as **Exhibit R-5**;
- 26. In addition, the Attorney General's of several USA states have filed a complaint for equitable relief for violations of the Sherman Act against the Respondents, the whole as appears more fully from a copy the Complaint, produced herein as **Exhibit R-6**;

II. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONERS

9085-4886 QUEBEC INC.

27. The company 9085-4886 Quebec Inc. has had no more than fifteen (15) employees over the last twelve (12) month period;
28. It operates as a restaurant and has been accepting as payment Amex cards for the last eleven (11) years;
29. Through its processor, it is charged 7 (seven) cents when customers use their Interac debit cards, 1.61% when customers use their regular Visa cards, and 2.10% when customers use their regular MasterCard cards. However, when customers use their American Express cards, the Petitioner is charged by Amex a rate of 3.63%, the whole as appears more fully from a copy of its May 2010 and March 2011 statements, produced herein as **Exhibits R-7 and R-8**, respectively;
30. Notwithstanding the fact that the Petitioner could save money by encouraging its customers to pay by cash, by Interac debit cards, or by using Visa or MasterCard credit cards, it is prevented by the Respondents from doing so through its Anti-Steering rules;
31. Due to the Respondents' conduct, the Petitioner is deprived of being charged credit card processing fees and costs that would reflect an open competitive market in this area and is instead paying supracompetitive rates for its Amex card processing;
32. Finally, the Petitioner is not able to pass all of these costs and charges on to its customers (although some are being passed on) because the consumer simply won't bear it;
33. Petitioner is aware of the various legal actions that have been instituted in the United States against the Respondents with regard to the same conduct that is being alleged herein;
34. Petitioner's damages are a direct and proximate result of the Respondents' conduct;
35. In consequence of the foregoing, Petitioner is justified in claiming damages;

P. BAKOPANOS

36. Petitioner Bakopanos is an average consumer that purchases numerous goods and services in his daily life;
37. Many, if not all, of such goods and services are from merchants that accept as payment credit cards put onto the marketplace directly or indirectly by the Respondents;

38. Due to the Respondents' conduct, he has paid inflated retail prices for the goods and services that he has purchased;
39. Petitioner is aware of the various legal actions that have been instituted in the United States against the Respondents with regard to the same conduct that is being alleged herein;
40. Petitioner's damages are a direct and proximate result of the Respondents' conduct;
41. In consequence of the foregoing, Petitioner is justified in claiming damages;

III. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP

42. Every member of the Merchant Class processed credit cards that were put onto the marketplace directly or indirectly by the Respondents;
43. Each member of the Merchant Class has paid supracompetitive credit card processing fees and costs due to the Respondents' unlawful and anticompetitive conduct;
44. Every member of the Consumer Class has purchased goods and services from a merchant that processes credit cards that were put onto the marketplace directly or indirectly by the Respondents;
45. Each member of the Consumer Class has paid artificially inflated prices for goods and services due to the Respondents' unlawful and anticompetitive conduct;
46. All of the damages to the class members are a direct and proximate result of the Respondents' conduct;
47. In consequence of the foregoing, members of the class are justified in claiming damages;

IV. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

- A) The composition of the class renders the application of articles 59 or 67 C.C.P. difficult or impractical
48. The use of credit cards by consumers and the processing of these credit cards by merchants is extremely widespread in Quebec and Canada;



49. Petitioners are unaware of the specific number of residents who used credit cards and/or process credit cards, however, given their tremendous popularity, it is safe to estimate that it is in the millions;
50. Class members are numerous and are scattered across the entire province and country;
51. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Respondents. Even if the class members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by the conduct of Respondents would increase delay and expense to all parties and to the court system;
52. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory judgements on questions of fact and law that are similar or related to all members of the class;
53. These facts demonstrate that it would be impractical, if not impossible, to contact each and every member of the class to obtain mandates and to join them in one action;
54. In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice;
- B) The questions of fact and law which are identical, similar, or related with respect to each of the class members with regard to the Respondents and that which the Petitioners wish to have adjudicated upon by this class action
55. Individual questions, if any, pale by comparison to the numerous common questions that predominate;
56. The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, Respondents' misconduct;
57. The recourses of the members raise identical, similar or related questions of fact or law, namely:
- a) Did the Respondents engage in any restrictive conduct to fix, raise, maintain, or stabilize the rates, fees, and/or costs of credit card processing services to merchants of goods and services?



- b) Did the Respondents' conduct cause rates, fees, and/or costs of credit card processing services be charged to merchants at supracompetitive levels?
 - c) Did the Respondents' conduct cause the artificial inflation of the price of goods and services paid by consumers to merchants who use credit card processing services?
 - d) Were members of the class prejudiced by the Respondents' conduct, and, if so, what is the appropriate measure of these damages?
 - e) Are members of the class entitled to, among other remedies, injunctive relief, and, if so, what is the nature and extent of such injunctive relief?
 - f) Are the Respondents liable to pay compensatory, moral, punitive and/or exemplary damages to member of the class, and, if so, in what amount?
58. The interests of justice favour that this motion be granted in accordance with its conclusions;

V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

59. The action that the Petitioners wish to institute on behalf of the members of the class is an action in damages;
60. The conclusions that the Petitioners wish to introduce by way of a motion to institute proceedings are:

GRANT the class action of the Petitioners and each of the members of the class;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioners and each of the members of the class;

ORDER the Defendants to permanently cease from continuing or maintaining to engage in unlawful and anticompetitive conduct as alleged herein;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

A) The Petitioners request that they be attributed the status of representative of the Class

61. Petitioners are members of their respective classes;

62. Petitioners are ready and available to manage and direct the present action in the interest of the members of the class that they wish to represent and are determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the class, as well as, to dedicate the time necessary for the present action before the Courts of Quebec and the *Fonds d'aide aux recours collectifs*, as the case may be, and to collaborate with his attorneys;

63. Petitioners have the capacity and interest to fairly and adequately protect and represent the interest of the members of the class;

64. Petitioners have given the mandate to their attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;

65. Petitioners, with the assistance of their attorneys, are ready and available to dedicate the time necessary for this action and to collaborate with other members of the class and to keep them informed;

66. Petitioners are in good faith and have instituted this action for the sole goal of having their rights, as well as the rights of other class members, recognized and protecting so that they may be compensated for the damages that they have suffered as a consequence of the Respondents' conduct;

67. Petitioners understands the nature of the action;



68. Petitioners' interests are not antagonistic to those of other members of the class;

B) The Petitioners suggests that this class action be exercised before the Superior Court of justice in the district of Montreal

69. A great number of the members of the class reside in the judicial district of Montreal and in the appeal district of Montreal;

70. The Petitioners' attorneys practice their profession in the judicial district of Montreal;

71. The present motion is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages;

ASCRIBE the Petitioners the status of representative of the residents included in the class herein described as:

Merchant Class

- all residents in Canada who accepted as a method of payment for the sale of a good or service an American Express credit card put onto the marketplace directly or indirectly by the Respondents, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who accepted as a method of payment for the sale of a good or service an American Express credit card put onto the marketplace directly or indirectly by the Respondents, or any other group to be determined by the Court;

Consumer Class

- all residents in Canada who purchased a good or service from a Merchant Class member, or any other group to be determined by the Court;

Alternately (or as a subclass)



- all residents in Canada who purchased a good or service from a Merchant Class member, or any other group to be determined by the Court;

IDENTIFY the principle questions of fact and law to be treated collectively as the following:

- a) Did the Respondents engage in any restrictive conduct to fix, raise, maintain, or stabilize the rates, fees, and/or costs of credit card processing services to merchants of goods and services?
- b) Did the Respondents' conduct cause rates, fees, and/or costs of credit card processing services be charged to merchants at supracompetitive levels?
- c) Did the Respondents' conduct cause the artificial inflation of the price of goods and services paid by consumers to merchants who use credit card processing services?
- d) Were members of the class prejudiced by the Respondents' conduct, and, if so, what is the appropriate measure of these damages?
- e) Are members of the class entitled to, among other remedies, injunctive relief, and, if so, what is the nature and extent of such injunctive relief?
- f) Are the Respondents liable to pay compensatory, moral, punitive and/or exemplary damages to member of the class, and, if so, in what amount?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioners and each of the members of the class;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioners and each of the members of the class;

ORDER the Defendants to permanently cease from continuing or maintaining to engage in unlawful and anticompetitive conduct as alleged herein;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;



CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

DECLARE that all members of the class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the class that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;

ORDER the publication of a notice to the members of the class in accordance with article 1006 C.C.P. within sixty (60) days from the judgement to be rendered herein in LA PRESSE and the NATIONAL POST;

ORDER that said notice be available on the various Respondents' websites with a link stating "Notice to American Express users";

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

THE WHOLE with costs including publications fees.

Montreal, April 12, 2011
(S) Jeff Orenstein

CONSUMER LAW GROUP INC.
Per: Me Jeff Orenstein
Attorneys for the Petitioners