See paras. 14, 150, 161

Case Name:

ERSS Equity Retirement Savings Systems Corp. v. Canadian Imperial Bank of Commerce

Between
ERSS Equity Retirement Savings Systems Corp. and
Equity Retirement Rewards Limited Partnership,
plaintiffs, and
Canadian Imperial Bank of Commerce, defendant

[2002] B.C.J. No. 2395

2002 BCSC 1462

8 B.C.L.R. (4th) 340

29 B.L.R. (3d) 99

117 A.C.W.S. (3d) 730

Vancouver Registry No. C986255

British Columbia Supreme Court
Vancouver, British Columbia

Wedge J.

Heard: June 3 - 7, 10 - 14 and
August 19 - 21, 2002.
Judgment: October 22, 2002.

(194 paras.)

Equity -- Fiduciary or confidential relationships -- Breach of confidence -- What constitutes -- Confidentiality agreements.

Action by ERSS for damages for misuse of confidential information in breach of a confidentiality agreement. In 1992, ERSS developed a business plan for an equity retirement rewards program. The

concept was that each time a member made a purchase from a participating retailer, a percentage of the purchase price would be deposited automatically into a retirement savings account and grow tax-free. He approached CIBC in 1992 and in 1995 hoping to secure either investment funding or sponsorship. On each occasion, CIBC declined to participate. Before the 1992 meeting, CIBC signed a confidentiality agreement in which it agreed not to use any ERSS program materials unless that information was or became available to the public. In 1998, a few months after its final meeting with ERSS, CIBC launched the Dividend Visa, a credit card that gave customers a cash rebate that could, at the customer's option, be directed to a retirement savings account. ERSS argued that the Dividend Visa embodied the confidential elements of the ERSS program, and that CIBC used confidential information to develop or market the Dividend Visa. CIBC presented evidence that as early as 1992, it had been aware of a similar program in the United States, and that independent of any discussions with ERSS, it had begun to develop new card products in 1995. It retained its own product development consultant and did its own research. The employees involved in development of the new card products had not been involved in meetings with ERSS.

HELD: Action dismissed. Information that was in the public domain at the time of the first meeting between ERSS and CIBC, and information that subsequently entered the public domain, was not confidential. The idea of a loyalty program with a reward of an automatic deposit into a retirement savings vehicle was clearly in the public domain by the time CIBC launched the Dividend Card. There was no duty not to compete referred to in the confidentiality agreement. The fact that ERSS brought CIBC's attention to the similar product in the United States did not make that information subject to the confidentiality agreement, as it was in the public domain. The Dividend Card was not substantially the same as the ERSS program. There was no evidence that CIBC used the ERSS concept or the ERSS research in developing its Dividend Card. Development of a card product linked to CIBC's retirement products was the inevitable result of its marketing strategy. The idea did not originate with anyone at CIBC who had been exposed to the ERSS information.

Counsel:

A. Lenczner, Q.C., G. Elliott and E. Maroudas, for the plaintiffs.
G. Cowper, Q.C., and M. Ghikas, for the defendant.

WEDGE J.:--

INTRODUCTION

1 In late 1990, Dennis Paul, founder of ERSS Equity Retirement Savings Systems Corp. ("ERSS"), came upon the idea of helping consumers save for retirement while spending on day-to-day needs. He called it the Equity Retirement Rewards Program (Equity): each time a

member made a purchase from a participating retailer, a percentage of the purchase price would be deposited automatically in a retirement savings account created by Equity and grow tax-free.

2 By 1992, Mr. Paul had developed a business plan that he took to various financial institutions and retailers, hoping to secure investment funding and sponsors for Equity. The Canadian Imperial Bank of Commerce was among those he approached. CIBC signed a confidentiality agreement that prohibited use of the Equity program materials unless the information was already available to the public.

3 In 1992, and again in 1995, CIBC reviewed Mr. Paul's materials but on each occasion declined to participate in Equity. Because of difficulties obtaining funding, ERSS did not launch Equity. In January, 1998, Mr. Paul again approached CIBC. By then, ERSS was in the final stages of securing investment funding and hoped to launch Equity in the fall of 1998. Once again, however, CIBC decided not to participate.

4 In April, 1998, a few months after the meeting with Mr. Paul, CIBC launched a credit card called the Dividend Visa which gave customers a cash rebate that could, at the customer's option, be directed to a retirement savings account or any other account the customer had with the bank.

5 ERSS brought this action alleging that the CIBC had misused confidential information by launching a credit card with characteristics substantially the same as the Equity program. CIBC denied using any confidential information disclosed to it by ERSS.

ISSUES

6 Two issues arise in this case:

1. Does the CIBC Dividend Visa embody the confidential elements of the Equity program?
2. Did the representatives of CIBC use any confidential information concerning Equity to develop or market the Dividend Visa?

7 I have concluded that the answer to both questions is "no".

LEGAL PRINCIPLES

(a) Breach of Confidentiality

8 The Supreme Court of Canada has confirmed that to succeed in establishing a breach of confidence, a plaintiff must satisfy three conditions:

(1) the information must have the necessary quality of confidence about it;
(2) the information must be imparted in circumstances in which an obligation of confidence arises; and

> (3) there must be a misuse of that confidential information to the detriment of the confider.
>
> (Cadbury-Schweppes Ltd. v. FBI Foods Ltd., [1999] 1 S.C.R. 142 (S.C.C.), citing LAC Minerals Ltd. v. International Corona Resources Ltd. (1989), 61 D.L.R. (4th) 14 (S.C.C.))

9 In the event that the information disclosed by one party to another is found to be confidential, the law may impose on the recipient a "unique disability" with respect to the information that is not shared by other members of the public. The recipient is uniquely disabled from using the information in order to ensure that s/he does not gain an unfair advantage over others. This concept, otherwise known as the "springboard" doctrine, was articulated in Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd., [1967] R.P.C. 375 (Ch.D.) at p. 391:

> ... the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a spring-board for activities detrimental to the person who made the confidential communication, and spring-board it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public....[T]he possessor of such information must be placed under a special disability in the field of competition in order to ensure that he does not get an unfair start....

10 The concept of unique disability was applied in the well-known case of LAC Minerals v. Corona (supra). The plaintiff, Corona, was a mining company that had staked some property in Northern Ontario and was in the process of drilling holes to determine whether there was sufficient gold to develop the property. Corona published its drill results in a newsletter published and widely-read in the mining world. LAC Minerals was interested in providing funding to Corona to fully explore the property as a joint venture. With such a venture in mind, Corona's geologist met with LAC Minerals and disclosed his theory about the gold deposits on the property based in part on the drill results.

11 Corona's plan was to acquire the property and, with funding from LAC Minerals, continue exploring it. However, shortly after the meeting with Corona's geologist, LAC Minerals proceeded on its own to purchase the property. The Supreme Court of Canada ruled that while it was open to any other member of the public to attempt to acquire the property, LAC Minerals was precluded as a matter of law from doing so because Corona had provided it with information that was not yet in the public domain. The Court observed at page 25:

> Such a holding may mean that LAC is uniquely disabled from pursuing property in the area for a period of time, but such a result is not unacceptable. LAC had the option of either pursuing a relationship with Corona in which Corona would

> disclose confidential information to LAC so that LAC and Corona could negotiate a joint venture for the exploration and development of the area, or LAC could, on the basis of publicly available information, have pursued property in the area on its own behalf. LAC, however, is not entitled to the best of both worlds.

12 Where a party discloses information that is partly public and partly private, it must prove that the recipient used the specific elements of the information that remained confidential because they were the product of the party's ingenuity. The recipient is free, however, to use the elements of the disclosed information that are already in the public domain. In Seager v. Copydex Ltd., [1967] 1 W.L.R. 923, the House of Lords described the nature of the obligation (at paras. 931 to 932) this way:

> When the information is mixed, being partly public and partly private, then the recipient must take special care to use only the material which is in the public domain. He should go to the public source and get it: or, at any rate, not be in a better position than if he had gone to the public source. He should not get a start over others by using the information which he received in confidence. At any rate, he should not get a start without paying for it.

Meaning of "Public Domain"

13 The case law establishes that the duty of confidentiality is an equitable doctrine designed to address the circumstances where a recipient of confidential information has misused the information to obtain for itself a commercial opportunity developed through the effort and ingenuity of another party and not otherwise available from public sources. However, the public at large need not be aware of the information. Whether information is, or has become, part of the public domain must be determined with reference to the particular community to whom the information would be of interest.

14 In Ridgewood Resources Ltd. v. Henuset (1982), 18 Alta. L.R. (2d) 68, the Alberta Court of Appeal held that information known only to a small percentage of people involved in a specialized field is nevertheless information in the public domain. Further, the court concluded that the use of information that is in the public domain, even where the recipient is not independently aware of the information, does not make the recipient liable for its use. A similar conclusion was reached in Edac v. Tullo, 1999, 47 C.C.E.L. (2d) 264 (Ont. S.C.) (at paras. 44-47).

(b) The 1992 Confidentiality Agreement

15 The scope of the duty of confidentiality may be modified by contract. Parties may, for example, enter into a confidentiality agreement that includes a non-competition clause. However, the duty of confidentiality by itself does not impose an obligation on the recipient of confidential information not to compete with the party who discloses that information. The duty not to compete

arises only if the agreement has a specific provision to that effect. In Visagie v. TVX Gold Inc. (2000), 187 D.L.R. (4th) 193 (Ont. C.A.), the Ontario Court of Appeal stated (at para. 40) as follows:

> The parties in this case have reduced their agreement to writing. It was open to them to include a non-competition clause that would prevent TVX from competing with Alpha for Kassandra. They have not done so. As stated above, the court "should be extremely circumspect in adding to the bargain they have set down."

16 Parties to a confidentiality agreement are also free to agree to limit or circumscribe the equitable duty of confidentiality that would otherwise arise. In Cadbury-Schweppes (supra), Binnie J., for the Court, noted (at para. 36) that "private ordering" is permissible in law:

> Just as a contractual term can limit or negative a more general duty implied by the law of tort, so too can a contractual term that deals expressly or by necessary implication with confidentiality negate the general obligation otherwise imposed by equity: 337965 B.C. Ltd. v. Tackama Forest Products Ltd. (1992), 91 D.L.R. (4th) 129 (B.C.C.A.), per Southin J.A., at p. 176, leave to appeal to this Court refused, [1992] S.C.C.A. No. 368. The ability of parties to contract out of, or limit, general duties otherwise imposed by law has been labelled "private ordering", and the general principles applicable here would be analogous to the principles considered by this Court in the context of concurrent remedies in tort and contract in BG Checo International Ltd. v. British Columbia Hydro & Power Authority, [1993] 1 S.C.R. 12 (S.C.C.) at p. 27:
>
> > ...the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon.

17 In the present case, Mr. Paul retained legal counsel to draft the Confidentiality Agreement and required that it be signed by CIBC before he first met with the bank on April 6, 1992, and provided it with written materials concerning Equity. The Confidentiality Agreement contains provisions that create certain exceptions to information that would otherwise be caught by its terms. The provisions relevant to this case are the following:

> This Agreement applies to all data, records, reports, calculations, opinions, charts, documents, and other information whatsoever (the "Information") whether or not marked confidential, contained in the Plan and disclosed or provided to the Viewer...except:

> (a) Information which at the date of this Agreement is in the public domain;
> (b) Information which after the date of this Agreement is published or otherwise becomes part of the public domain through no fault or action of the Viewer or any of its directors, officers, employees or agents...

18 These provisions of the Confidentiality Agreement circumscribe the general duty of confidentiality imposed by equity.

BACKGROUND

19 Dennis Paul is the president and CEO of ERSS Equity Retirement Savings Systems Corp. He is a Vancouver business-man and entrepreneur who for many years successfully applied his creativity and marketing skills to a variety of business ventures.

20 In 1990, Mr. Paul was living in Vancouver but working from an office he had opened in Seattle, Washington, to market a fermenting process he had designed for use in the home brewing industry. While commuting from Seattle to Vancouver one weekend, he began contemplating the fact that he was forty years of age, the second of his two children had just been born, and yet he did not have a retirement savings plan. He thought there must be many "baby boomers" thinking about - perhaps worrying about - the ageing population, the lack of savings for retirement, and the strain that persons of his vintage might eventually place on the national pension system.

21 With his background as an entrepreneur, Mr. Paul went on to link the concepts of spending money on the necessities of everyday living and accumulating savings for retirement. He considered the marketing feasibility of a program that had participating retailers offering consumers a rebate on some portion of their purchases, with the rebate automatically deposited in an annuity created by the program and compounding tax-free over time.

22 Mr. Paul knew of other "loyalty reward" programs in the Canadian market at the time, but they were in the nature of frequent flyer reward programs offered by the two major national airlines and retail reward programs offered by companies such as Zellers. Those programs offered consumers the opportunity to accumulate points that could be redeemed only by purchasing more products or services sold by the particular retailer. If the points did not accumulate to a particular level, they could not be redeemed. Once accumulated, the points did not increase in value.

23 Mr. Paul felt the real attraction of a reward program offering a rebate deposited automatically into an annuity was that the money would increase in value over time and do so tax-free. A key element of the program was the concept of an annuity created and administered by the program; consumers would not be required to take steps to open their own retirement savings vehicle. It would make saving for retirement so simple.

Development of the Equity Program

24 Mr. Paul was excited about the concept and felt that other Canadians his age would feel the same way. The concept would also be appealing to retailers if they were given exclusive rights to participate in the program. Consumers would be motivated to switch to retailers prepared to offer a retirement savings reward. Mr. Paul immediately began drafting a business plan. Within a week, he had a plan he could take to an accountant for review and advice. He asked John Robinson of Price Waterhouse to evaluate the plan and the financial forecasts. He also created a company known as AERP Annuity Equity Retirement Plan Corp ("AERP").

25 While Mr. Paul had his own instincts as to the viability of the program, he had to determine what the consumer would think. He retained McIntyre & Mustel, a Vancouver-based market research house, and Decima, an Ontario-based research house, to work in association researching consumer response. Consumers were asked whether they preferred a cash rebate or the same amount invested in a retirement fund that accumulated interest. The research, conducted in 1991 and early 1992, indicated a very strong consumer preference for the retirement account option.

26 With the research in hand, Price Waterhouse evaluated the AERP business plan, the essence of which it described in Mr. Robinson's March, 1991, report as follows:

> The features of the AERP concept from the viewpoint of prospective members includes addressing growing concerns about financial security at retirement, generating significant funds in annuity accounts due to compounding effects and offering a single integrated discount program across a combination of prominent vendors.

27 The purpose of the involvement of Price Waterhouse was not only to assess the viability of the business plan but assist in developing the program and attracting potential financial investors and sponsors. Mr. Robinson gave Mr. Paul advice concerning the tax implications of the program, and sought an advance ruling from Revenue Canada as to whether a rebate deposited automatically into a retirement savings vehicle would attract income tax.

28 Mr. Paul testified that the idea of using an RRSP to receive the rebate money was his. However, I conclude on the basis of the documents generated at the time by both Mr. Paul and Price Waterhouse that the use of an RRSP came from Price Waterhouse. Mr. Paul, who was working in the United States at the time, originally thought he could use annuities to shelter retirement savings without immediate tax consequences as was the case in the United States. He was also under the mistaken impression that Canadian chartered banks could issue annuities, as is the case with American chartered banks. He discovered only later, after receiving advice from Mr. Robinson, that in Canada (with the exception of Quebec) insurance companies issue annuities. He also learned from Mr. Robinson that savings accumulated in an annuity have immediate tax consequences unless the annuity is sheltered in an RRSP.

29 Mr. Paul eventually amended the program such that its central feature was the creation of an RRSP to receive rebate funds rather than an annuity. In early 1992, he renamed his company ERSS Equity Retirement Savings Systems Corp.

30 With the marketing research and Price Waterhouse evaluation in hand, Mr. Paul was ready to approach potential investors and program sponsors. He prepared a brochure describing his program to take with him to meetings. The brochure described the mechanics of the concept this way:

> Each time the cardholder makes a purchase from an Equity Partner a percentage of the purchase total is paid by the participating partner to the cardholder's personal Equity account.

31 The brochure also described other features of the Equity program. Consumers could join the program by paying a $25 membership fee. Once the amount of the rebate funds reached $200, the money was transferred from the consumer's Equity account into an annuity purchased by Equity to mature when the cardholder reached the age of sixty-five. The threshold amount of $200 was later changed to $100. Until the consumer's account reached the $100 threshold, the money was to be kept in a pooled trust fund and the interest accruing on the money went to ERSS.

32 An additional feature of the Equity program was the involvement of a Visa sponsor. Consumers who became members of Equity also had the option of obtaining a Visa card, issued by a participating bank. If the Equity member used the Visa card to purchase a product, he or she also received a rebate from the Visa sponsor that was directed to the member's Equity account. In essence, if the Equity member obtained a Visa card he or she could obtain a rebate both from the Equity program and the Visa sponsor in the same transaction.

The Confidentiality Agreement

33 Mr. Paul began approaching potential investors and sponsors sometime in 1991. Before doing so, he retained a Vancouver law firm to draft an agreement (the Confidentiality Agreement) that ensured the protection of his program from use by others once they had viewed the Equity program materials. On each occasion that Mr. Paul met with a potential investor or sponsor, he first required that the confidentiality agreement be signed.

34 The Confidentiality Agreement is annexed to these reasons as Appendix A. Essentially, it prohibited CIBC from using the Equity program and all information concerning the program (research data, financial projections etc.) except for the purpose of determining whether to participate as an investor or retail sponsor.

35 However, there were a number of stated exceptions to the prohibition. For example, information already in the public domain and information published or otherwise entering the public domain after the date of the agreement was not confidential.

36 In the summer of 1991, Mr. Paul presented his plan to a number of insurance companies in the hopes of attracting a strategic business partner to provide financing to launch the program and, in addition, to issue the RRSP. Among those insurance companies was Great West Life in Winnipeg. Although Great West Life decided not to participate, one of its board members, Abe Simpkins, liked the presentation and asked Mr. Paul to meet with him to discuss the program further. Mr. Simpkins was one of Winnipeg's more successful entrepreneurs. Mr. Paul met with Mr. Simpkins in August, 1991.

37 Mr. Simpkins was very interested in the Equity program. He asked many questions. At the end of the presentation, he told Mr. Paul that he had also been asked to fund a program in the United States that had certain similarities to the Equity program. It was called "START" - Spend Today and Retire Tomorrow - in which consumers could earn rebates on purchases and direct the rebate money to an annuity in order to accumulate savings for their retirement. However, the program was not as "user-friendly" as the Equity program. Instead of simply presenting a card to the merchant, the consumer was required to fill out a form requesting that the rebate be directed to an annuity. The START program did not have a $25 membership fee or a $100 threshold before the money was transferred to a retirement savings vehicle. There was no tax rebate at the end of the year.

38 Shortly after the meeting with Mr. Paul, Mr. Simpkins offered ERSS full funding for the program in exchange for a 90% stake in the overall program. ERSS was not interested in that proposition. There were further negotiations but ultimately no agreement was reached.

ERSS Meetings with CIBC

39 In early 1992, Mr. Paul contacted Barbara Rae, a respected and successful businesswoman from Vancouver, hoping to recruit her to the ERSS board of directors. Ms. Rae had a high profile in the business community and many business contacts. She sat as a director on several boards, including the CIBC board of directors. Mr. Paul hoped she could attract investors to his program. Ms. Rae agreed to meet Mr. Paul on April 3, 1992, in Toronto where they were both attending other meetings.

40 In that meeting, Mr. Paul gave Ms. Rae an overview of the Equity program, including the Price Waterhouse evaluation of the business plan and the research ERSS had conducted. He also advised Ms. Rae that ERSS had already obtained a letter of intent from the Laurentian Bank to issue the Equity Visa card. Ms. Rae told Mr. Paul that in her view CIBC would make a much better Visa sponsor than the Laurentian Bank, as CIBC had more retail branches than any other Canadian bank and a national presence. Mr. Paul agreed that CIBC would be a better Visa sponsor but ERSS had a commitment from Laurentian; to begin negotiations with a different bank would take a great deal of time.

41 Ms. Rae asked whether Mr. Paul would be interested in meeting with the president of CIBC, Holger Kluge, to discuss the bank's potential involvement in Equity. Mr. Paul said he would be interested. Ms. Rae immediately phoned Mr. Kluge and arranged a lunch meeting for that day.

42 Mr. Paul met with Mr. Kluge over lunch. He explained that he had devised a concept for a loyalty program that offered a retirement savings contribution with a tax rebate attached to it, and that they were putting the program together as a multi-sponsor program involving a spectrum of retailers. Mr. Paul told Mr. Kluge that ERSS was currently in discussions with Laurentian Bank to provide funding as an investment partner and issue the RRSP's through its insurance arm, but that he would view CIBC as a much better Visa sponsor. Mr. Paul referred during the meeting to the brochure describing Equity, the Price Waterhouse evaluation and the three research reports that had been completed.

43 Mr. Kluge expressed considerable interest in Equity. He asked Mr. Paul if he could leave him copies of the materials he had with him. Mr. Paul said he would be delighted to do so, but that CIBC would first be required to sign a copy of the Confidentiality Agreement that ERSS had prepared. Mr. Kluge said he did not think that would be a problem as CIBC signed such agreements routinely, but that he would have to consult with in-house counsel. The meeting ended on that note.

44 Later in the day Mr. Kluge telephoned Mr. Paul to advise that he had been unable to speak with legal counsel and that it would likely be Monday before he could sign the Confidentiality Agreement. He also asked Mr. Paul whether CIBC would be given the same opportunity as Laurentian Bank to not only become a Visa sponsor but also a financial partner in the program responsible for issuing the RRSP reward. Mr. Paul replied that while discussions between ERSS and Laurentian "had moved fairly far down the road", he would nevertheless be very interested in discussions with CIBC so long as they could move quickly and make a decision within a week or two. Mr. Kluge agreed to assemble a team from the bank to meet with Mr. Paul and a Price Waterhouse representative the following Monday in Toronto.

45 On Monday, April 6, 1992, Mr. Paul began a four-day meeting with representatives of CIBC. The Confidentiality Agreement was signed at the beginning of the meeting. Mr. Paul used a presentation deck during the meeting to describe the Equity program and present the business plan and research reports. The CIBC representatives were from various departments within the bank. Mr. Robinson from Price Waterhouse attended the last two days of the meeting.

46 Mr. Paul explained to the group that when an Equity member used the Equity card at a participating sponsor and paid for the purchase with the Equity Visa card, he or she would get an average rebate of 3% deposited into a trust account. When the threshold of $100 was achieved, Equity would purchase an RRSP vehicle that would compound in value tax-free. The member would also obtain a tax deduction for the rebate. Sources of profit for Equity included interest accruing on the funds in trust and a percentage of each transaction.

The START Program

47 During the meeting, Mr. Paul told the group that his concept was new and different from anything currently in the marketplace. However, he advised them that he had recently read an article in USA Today, an American newspaper, announcing the development of the START program in the

United States that was similar to his concept in some respects but significantly different in others. He said START was a multi-sponsor program that offered a Metropolitan Life annuity as the loyalty reward, whereas his program offered an RRSP reward that was tax deductible and accrued value tax-free.

48 Mr. Paul did not view the announcement of the START program in the American newspaper as information in the public domain. The article simply described the features of the program currently being developed outside Canada. It had not yet been launched. There were no charts or graphs, and no financial data about the program in the article. However, Mr. Paul acknowledged that he mentioned the START program in the course of the meeting in order to disclose all potential competition and because he understood that the information about START would fall within the parameters of the Confidentiality Agreement so long as he had introduced it to CIBC.

49 The USA Today article to which Mr. Paul referred in the meeting with CIBC was a full-page advertisement published March 25, 1992. The advertisement contained a number of details about START. They included a description of the loyalty program and reward currency as well as the positioning or marketing approach of the program, which was to help consumers "spend today and retire tomorrow." The advertisement disclosed that START was a multi-sponsor loyalty program with a reward currency into a long-term savings vehicle for retirement. It stated in part as follows:

> When it comes to money, you've always had two options: save it, or spend it. Wouldn't life be sweet if you could do both at the same time?
>
> START offers you the opportunity to do just that. Whenever you buy a product or service from Speigel, MCI, USTravel, Club Med, Herz, and an ever-growing list of companies, up to 6% of the money you spend can be deposited into a tax-deferred annuity in your name.
>
> The annuity is offered and guaranteed by Metropolitan Life. And given time and the power of compound interest, the amounts you can accumulate are astonishing.

50 On the same day, March 25, 1992, an article concerning START appeared in the Toronto Star. It, too, described the essential aspects of the program:

> Under a patented savings plan called Start Inc., millions of Americans can lease cars, take a vacation or buy a toaster while, at the same time, putting money aside for their retirement.
>
> When Start members do business with 11 participating companies, up to 6% of

> their total annual purchases will be contributed to their registered pension account held by Manufacturers Hanover Trust Co., of New York....

51 Coincidentally, on April 6, 1992, the day Mr. Paul began meeting with CIBC and executed the Confidentiality Agreement, a Canadian marketing report called "Strategy" published a front page article on START. The author suggested that START would launch in Canada within six months, and described the program's reward currency as "essentially, a rebate/retirement savings program for consumers who buy from participating companies". Other particulars concerning the program were also described:

> With an enrolment fee in the US of $25, START offers members a patented saving program that allows them to accumulate funds for their retirement through purchases made from participating companies.
>
> When the escrow account reaches $100, the member can open a START Plus Annuity into which funds from future purchases can be transferred automatically, or the member can receive the $100 in escrow in cash.

52 Mr. Paul acknowledged that he first became aware of the START program in August, 1991. In about March, 1992, he became aware that START offered annuities as its loyalty reward. Mr. Paul read Strategy from time to time as he was involved in marketing, and had seen the Strategy magazine article on START shortly after it was published in the spring of 1992.

53 The similarities between START and Equity were dramatic enough that Mr. Paul suspected Abe Simpkins had misappropriated, for use by START, some of the confidential information disclosed by Mr. Paul at the meetings between the two men in Winnipeg and Vancouver in August, 1991. The $25 membership fee, the $100 threshold, the pooling of funds in a trust account, and the creation of a retirement savings vehicle as the loyalty reward, were all features both programs shared. As a result, Mr. Paul sought legal advice in 1992 to determine whether he could take action against Mr. Simpkins and/or START. On the advice he received, he decided he did not have the necessary resources at the time to launch legal proceedings.

54 START had been patented in the United States in 1986. It was available for viewing by Canadians. It was in fact viewed by at least some Canadians in the loyalty marketing industry. Mr. Paul testified that he and a representative of Laurentian Bank obtained a copy of the START patent in late 1991 or early 1992.

55 Michael Auriemma currently holds the patent for START. He testified in the proceedings that the patent covers any payment mechanism offering a rebate if the rebate is directed into a savings vehicle.

CIBC Response to the April 1992 Meetings

56 The meetings between Mr. Paul and CIBC concluded Thursday, April 9, 1992. On Friday, April 10, Mr. Paul met with John Kearns, a senior vice-president in CIBC's marketing division. Mr. Kearns told Mr. Paul that CIBC had decided not to participate in Equity as an investor because the timelines proposed by Mr. Paul were too tight to permit CIBC to perform its own due diligence concerning the proposal. According to Mr. Paul, Mr. Kearns indicated that CIBC had not closed the door on the possibility of participating as the Visa card sponsor. Mr. Paul wrote to Mr. Kearns confirming his understanding that CIBC was giving serious consideration to participating in this manner.

57 Mr. Kearns evidence was that he did not leave open the possibility of CIBC participating to any extent in Equity and was unhappy with Mr. Paul's letter which, in Mr. Kearns view, misrepresented the contents of their April 10, 1992, discussions. He drafted a letter to that effect, but, unbeknownst to Mr. Kearns at the time, the letter was never sent. CIBC had no further contact with Mr. Paul in the spring of 1992.

58 I conclude that Mr. Paul was more optimistic than he ought to have been as a result of his discussion with Mr. Kearns. Although Mr. Kearns' letter was never sent, Mr. Paul must have understood that CIBC had decided against participating to any extent in Equity. Mr. Paul heard nothing from CIBC during the spring and summer of 1992, yet he did not contact anyone from the bank to inquire further about its participation.

The August 1992 Meeting with CIBC

59 In May or June, 1992, Ms. Rae joined the board of directors of ERSS. She remained a director of CIBC. There was some controversy in the evidence as to whether CIBC or ERSS initiated the next contact concerning the possible participation of CIBC in Equity. I accept the evidence of Mr. Kluge, who testified at trial, that in August, 1992, Ms. Rae lobbied on behalf of ERSS and persuaded Mr. Kluge to send a representative of CIBC to meet with Mr. Paul in Vancouver. Ms. Rae told Mr. Kluge that ERSS had received a favourable tax ruling from Revenue Canada concerning the Equity program, and a number of retail sponsors had expressed interest. Mr. Kluge instructed Mr. Kearns to contact Mr. Paul and set up a meeting.

60 Mr. Kearns spoke to Mr. Paul in August, 1992, and agreed to send the general manager of his marketing division, Ken Lalonde, to Vancouver to meet with Mr. Paul. The two men met on August 26 and 27, 1992. Mr. Paul once again went through the marketing research ERSS had done and reviewed the elements of the Equity program. At the end of the two days, Mr. Lalonde told Mr. Paul he would put together a report for Mr. Kluge. Mr. Lalonde's recommendation to Mr. Kluge was that CIBC ought not to participate in Equity.

The December 1992 Meeting with CIBC

61 In November, 1992, Barbara Rae sent a memo on behalf of ERSS to Mr. Kluge advising that ERSS now had financing from the Laurentian group firmly in place, and that Laurentian wished to

have CIBC as the Visa sponsor for the program. Once again, Mr. Kluge agreed to have a representative from CIBC's marketing division meet with Mr. Paul. Pattie Robb, marketing manager of CIBC's Card Products Division, contacted Mr. Paul in late November, 1992. They agreed to meet in Toronto in December. On December 15, 1992, Mr. Paul met with Ms. Robb and Ed Gettings, also of the Card Products Division. As neither of these individuals had been involved in earlier meetings with Mr. Paul, he provided them with extensive materials concerning Equity and the marketing research that had been done.

62 In February, 1993, Ms. Robb wrote to Mr. Paul, advising that CIBC would not participate in Equity. Her letter stated in part as follows:

> While it appears to be an interesting concept that does speak to a "growing concern" among Canadians about their future financial well-being and independence at retirement, at this time we are not interested in pursuing any further involvement.

Other Efforts by ERSS to Fund Equity

63 As a result of the decision by CIBC not to participate in Equity, Mr. Paul approached a number of other banks to determine their interest in participating as the Visa sponsor. In each case, Mr. Paul required endorsement of the Confidentiality Agreement. And in each case, he described not only the Equity program, but also the START program that was being developed in the United States at the time.

64 By 1993, START had made its American launch in Virginia through NationsBank. That launch was unsuccessful, and a second launch was made with backing from Metropolitan Life Insurance. The program was ultimately discontinued due to lack of success in about 1995.

65 In April, 1993, the funding arrangement between ERSS and Laurentian Bank collapsed; Laurentian was the subject of a takeover bid by another bank that was not willing to remain involved in the Equity program. ERSS continued its search for investors and sponsors, and, in November, 1994, obtained a commitment from Midland Walwyn to finance Equity. ERSS, together with a few potential sponsors, retained another research house, Innovative Marketing Inc., to conduct additional research. The 1992 research was now almost three years old and required updating in order to attract more sponsors. Unfortunately, ERSS once again lost its funding when Midland Walwyn underwent management changes.

The 1995 Meeting with CIBC

66 At some point in 1995, ERSS began discussions with another potential investor, Laurasia, an investment capital company with offices in Toronto. An accountant with the company knew individuals within CIBC and obtained Mr. Paul's permission to make another approach to the bank with a view to persuading it to participate in Equity as its Visa sponsor. As a result of that approach,

a meeting was arranged between representatives of the accounting firm KPMG, accountants for Laurasia, and Cheryl Longo, who was at the time general manager of credit card marketing for CIBC. Ms. Longo was directed by her superior in the Card Products Division to attend the meeting. Ms. Longo's superior had been asked to arrange the meeting by the corporate side of the bank.

67 Ms. Longo and one of her associates, Steve Webster, met with the KPMG representatives in the spring of 1995. Mr. Paul was not present at the meeting. Ms. Longo understood CIBC was being approached to consider participating in Equity in a variety of ways - as an investor, as a trustee for the funds management of the program, or as the Visa card sponsor. In Ms. Longo's view, the only role CIBC was prepared to consider was as the Visa card sponsor. At the meeting, she was provided with some materials describing the Equity program and financial projections concerning the program. She did not receive any of the marketing research that had been completed by ERSS.

68 Neither Ms. Longo nor Mr. Webster had any prior knowledge of the Equity program. Neither had been involved in the meetings with Mr. Paul that occurred in 1992 and 1993 or seen any of the ERSS materials that had been left with the bank. After reviewing the materials provided to them at the meeting, both were of the view that CIBC should not participate in the program to any extent. It struck Ms. Longo that the Equity program was very much like the unsuccessful American START program that she had read about in marketing publications. Ms. Longo and Mr. Webster jointly authored a memo reporting on the meeting. The memo dated March 19, 1995, states in part:

> ...I am sceptical about the enrolment numbers provided by Equity. It is unclear to me how they will succeed in signing up 12% of Canadian families when they are charging a $25 sign up fee. Moreover, 12% of Canadian families is very high when you consider that only 22% of taxfilers contribute to an RSP. This means that over half the people who currently contribute to an RSP will join this programme in the first year. No other similar programme has had this level of success.
>
> Furthermore, an almost identical programme has been in existence in the U.S. for the past two years (called START). Nationsbank is the credit card partner. A report on this programme from SMR Research Corporation states that the programme has not been overly successful to date. SMR attributes this to consumers finding the programme complicated and the lack of high profile merchants.
>
> The success of Equity depends on the company gaining participation of high profile partners. To date there is not hard commitment from any high profile partner. According to Peat Marwick, contracts have been signed with King Optical, Sunquest Tours, Laurentian VISA, Budget Rent-a-Car and Speedy

> Muffler - these cannot be considered high profile. Peat Marwick states that they have not seen these contracts suggesting that they may not exist. This tends to be supported by the fact that CIBC has been asked to participate despite the fact that a contract supposedly exists with Laurentian...

69 SMR Research Corporation, referred to in the memo, is a syndicated credit card research publication published annually in the United States. Ms. Longo testified that CIBC purchased it to track and understand trends in the larger American credit card market.

70 Ms. Longo also testified, as reflected in the March, 1995, memo, that she was concerned that since Equity was essentially a merchant coalition loyalty program it could only succeed with top quality, high profile merchants. It appeared that Equity had secured no commitments from such merchants yet ERSS was professing to have a launch date only months away.

71 As a result of Ms. Longo's recommendation, CIBC decided not to participate in Equity. After March, 1995, ERSS had no further meetings with CIBC until January, 1998.

Development of New Card Products by CIBC

72 In 1995, CIBC became concerned about the prospect of American "monolines" (that is, companies that only issue credit cards) coming to Canada and gaining market share in the credit card industry at the expense of banks such as CIBC. The monolines were very aggressive in the United States and, as a result, were successfully encroaching on the credit card market share of American banks. Members of the Card Products Division of CIBC were of the view that the CIBC Visa was not sufficiently distinguishable from Visa cards issued by other institutions to prevent CIBC cardholders from switching to other cards.

73 CIBC decided it must develop a brand or "branding strategy" that would make the CIBC Visa different from other Visa cards and at the same time emphasize the banking products it offered to consumers. Mary Giles has worked in the Card Products Division of CIBC since 1993, and since that time has developed and launched twelve CIBC credit cards - almost half of the cards offered by CIBC. Her responsibilities have included identifying new opportunities for card products and implementing them. She was the CIBC employee directly responsible for the development of the CIBC Dividend Visa.

74 Ms. Giles testified that once CIBC identified the need for a new branding strategy, the Card Products Division retained a branding, marketing and product development consultant from Kansas City called New Product Insights ("NPI"). NPI worked with clients to assist in developing brand strategies and new product ideas tied to the brand strategies. The principal of NPI, Lewis Berey, worked with representatives of the Card Products Division to develop the new card ideas.

75 Phase 1 of the project was dedicated to the development of a brand strategy. That objective was described in the NPI presentation of November 8, 1995, as follows:

> Assist CIBC Visa Marketing Management in developing a strategic branding foundation to optimize future card growth, focused on the question of how to differentiate CIBC Visa cards from other Visa and non-Visa credit cards.

76 The first step taken by Mr. Berey was to obtain information from CIBC about the financial industry and credit card products on the market. NPI also reviewed the credit card business in the United States in order to understand American trends, and brand strategies of major American institutions issuing credit cards including the ways they were positioning themselves in the marketplace. NPI also conducted research on consumer attitudes toward the Visa and CIBC brands.

77 The theory of NPI was that there are six major benefits attractive to consumers that become platforms for businesses hoping to attract consumer interest: "makes me feel better"; "offers me variety"; "makes my life easier"; "saves me time"; "saves me money"; and "better quality". In the marketing business, these six benefits are known as marketing "platforms". NPI encourages clients to find the right benefit, and then build all products and services on the basis of that benefit. NPI referred to this theory as the "Hierarchy of Consumer Needs". Essentially, NPI's role was to help find the appropriate "platform" and ways to built on it such that consumers would be attracted to it.

78 NPI's initial research on consumer attitudes disclosed that consumers identified CIBC credit cards with Visa, not with CIBC. As a result, the objective of NPI was to develop a means to emphasize the identity of CIBC as the issuer of the Visa. As a part of the initial phase, NPI interviewed employees from various product areas of CIBC to become familiar with the needs of the various areas from a corporate standpoint and their attitudes toward the CIBC brand. NPI discovered that the strategy being pursued by the Card Products Division was to spend marketing money on attracting new customers to the bank, whereas the focus of the other product areas was to persuade current bank customers to invest in more of the products offered by the bank - or, in marketing vernacular, "cross-selling" from one bank product to another.

79 This divergence in focus between the Card Products Division and the other product areas of the bank eventually led to the recommendation by NPI of a branding strategy that involved the Card Products Division cross-selling to other bank products and services. In other words, NPI ultimately recommended a strategy that involved the designing of CIBC Visa cards that were linked in some fashion with other products routinely offered by the bank. In a document dated February 7, 1996, this strategy was one of five potential brand strategies presented to CIBC by NPI, and was the strategy accepted by CIBC. The document provided, in part, as follows:

> CIBC Credit Card Services offers a wide array of credit card products which physically link the credit cards to CIBC bank services by making bank services more visible and accessible. Credit cards are positioned as one of many important line extensions (e.g. checking accounts, savings accounts, home mortgage, credit cards), rather than as an isolated product line...

> The cross-selling of CIBC services becomes the major priority, not the marketing of borrowed interest from co-brand partners. This will be achieved by using credit cards as relationship products for bank customers and "beachhead" products for non-bank customers...

80 This branding strategy came to be known as "credit cards from CIBC" or simply "from CIBC", and involved linking the CIBC Visa cards back to the various bank services that were offered to the consumer. After conducting marketing research on the "from CIBC" strategy as well as the other alternatives, NPI identified "from CIBC" as having particularly favourable results in terms of retaining current CIBC customers and potentially good results in acquiring new customers. In a document dated March 22, 1996, NPI described its recommendation in these terms:

> For CIBC bank customers who have more complex financial needs, we will offer credit cards "from CIBC" that provide added convenience by linking their credit card to other CIBC bank services.
>
> There will also be a financial incentive to customers having multiple bank services...

81 NPI was also of the view that CIBC ought to pursue a second brand strategy known as "Primera", which involved CIBC creating an entirely new brand, not connected to CIBC and its products, in order to attract new customers. However, the Card Products Division felt that it was not capable of pursuing both strategies simultaneously, and decided to first pursue the "from CIBC" strategy.

82 Following the conclusion of the first phase, and the decision to proceed to develop credit cards utilizing the "from CIBC" strategy, CIBC retained NPI to complete Phase II, which involved developing the strategy to the point at which it could be implemented. That involved two steps: first, by meeting with the various departments within the bank, determining the products they had to offer, and, second, researching the need in the marketplace for a credit card tied to the services offered by the bank.

83 NPI began the second phase process by interviewing representatives of the various product groups within CIBC to identify opportunities to tie bank products and services to a new group of Visa cards "from CIBC". NPI set up interviews with employees in the various product groups. The interviews began in early November, 1996. Of those interviewed, the only employee who had any familiarity with the Equity program was Patti Robb, who had been involved in meetings with ERSS in 1992. Ms. Robb was no longer a member of the Card Products Division, nor had she been involved in that department for some years. She was interviewed as a representative of Telephone Banking Products.

84 One of the CIBC product groups interviewed by NPI was Retirement Products. The idea for a

card concept that rewarded customers by adding money to a CIBC mutual fund, GIC or RSP originated from this group. Notes taken by the NPI employee responsible for that interview disclose the following discussion:

> ...In terms of opportunities for the penetration strategy...they are somewhat restricted because they can only give incentives which have a direct influence on the Retirement Account...they can't give bonus points etc., that benefit you in other ways...
>
> The main idea we developed was a "RSP card"...the more you spend on your Visa card that either contributions are made to your RSP account or this influences the rate that you'll get on your next GIC purchase. This notion of spending for saving later is unique as opposed to spending for getting immediate rewards such as travel or miles...

85 None of the employees in Retirement Products interviewed by NPI had been involved in the earlier meetings between CIBC and Mr. Paul.

86 NPI considered the RSP card concept in the context of the six consumer benefits or platforms, and eventually decided that it fell within the "saves me money" platform. Initially, however it was linked with the "save for the future" platform. An NPI document dated November 14, 1996, attached notes from interviews recording discussions about the idea of linking Visa cards to retirement products. The notes disclose, in part, the following:

> This...rewards the customer by contributing money to CIBC mutual funds, a GIC, a RSP or savings account. It is intended to appeal to a wide segment of customers more concerned with saving for the future than immediate gratification. In addition to paying cash into saving type accounts, a reward structure than (sic) allows points to be redeemed for a higher interest rate might also have appeal.

87 The concept of linking a card to an RSP became associated with the "saves me money" platform in an NPI document dated November 20, 1996. That platform was described as follows:

> It provides customers the opportunity to save money each time they link a CIBC bank product with CIBC Visa. The greater the number of product linkages the greater the savings. The benefit rewards the customer for the depths of CIBC relationship and allows customers to grow and optimize.

88 Following interviews with the various product divisions within the bank, NPI put together materials for a brainstorming session with the CIBC Card Products Division. One of the ideas presented at the session was a credit card linked to retirement savings (mutual fund, RRSP, GIC) as

a concept within the "from CIBC" brand. Materials prepared by NPI entitled "NPI Brainstorming Document" described the concept as the "CIBC VISA RSP Card" which would reward customers "by adding money to a CIBC mutual fund, savings account, GIC or RSP". The document was prepared to facilitate a brainstorming session scheduled for December 3, 1996.

89 NPI regarded a card product tied to retirement products offered by CIBC as one of the most obvious ways of creating the links envisaged by the "from CIBC" brand strategy. According to Mr. Berey, one of the three most pressing issues for consumers was financial security at retirement. He felt that if CIBC could link the Visa card to retirement savings, it could create a good business opportunity.

90 The brainstorming session took place in early December, 1996, and involved several members of the Card Products Division. However, none of the work done by NPI on new card product ideas, including the RSP Card, involved any CIBC representatives from the Card Products Division before that brainstorming session. The card ideas involving links to bank products (mortgages, RSP's etc) were received favourably at the session.

91 Following the brainstorming session, NPI performed additional work on the new card ideas, refining the concepts so they could be submitted for marketing research. By mid-December, 1996, the RSP card had been given the name "matched spending", and was described as follows:

> With the CIBC matched Spending Program, for every $1000 you spend with your VISA Card from CIBC, CIBC will reward you - by making a 1% contribution to your CIBC Retirement Savings Program, or by giving you cash back to your CIBC transaction account.

92 NPI continued revising the new card concepts throughout January, 1997. The "matched spending concept" was given a new name - the Annual Rebate Card. The concept behind this card was a 1% contribution by CIBC to any one of the cardholder's existing CIBC accounts, or cash back, as the reward for the consumer spending $1,000 using the credit card. The choice belonged to the cardholder, but the rebate could only go into an existing account; no accounts would be automatically set up for the cardholder. The idea was to offer a top-up to an account already opened by the cardholder.

93 In February, 1997, CIBC retained a research house called ABM to conduct qualitative marketing research testing the strength of platforms (that is, "saves me money" etc.) and the various card concepts. The research disclosed that the "saves me money" platform was the most appealing to consumers, and was particularly strong when supported by three new card products known as the Preferred Merchant Card, the Mortgage Card, and the Annual Rebate Card.

94 NPI recommended that CIBC conduct broader, quantitative research on those concepts. NPI worked with CIBC to refine the card concepts based on the results of the earlier qualitative research. The Annual Rebate Card underwent some minor revisions, primarily to emphasize the consumer's

freedom to choose where to direct the 1% rebate. A concept revision dated May 8, 1997, described the Annual Rebate Card as follows:

> With an Annual Rebate Card from CIBC, CIBC will reward you by making a cash rebate of 1% of your total card spending. Your end of year rebate may be deposited to your choice of CIBC accounts - to you Savings Account, to your Retirement Savings Program or to any other CIBC account. At the beginning of each year you are free to change how you wish to deposit the coming year's contribution.

95 The quantitative research was conducted by ABM in the summer of 1997. It tested whether customers would increase their banking relationship with CIBC as a result of obtaining one of the new cards. It also tested how well each of the card concepts fit within the "saves me money" platform. The quantitative research validated the results of the earlier research and NPI's recommendations. All three of the new card concepts that had scored well previously - Preferred Merchants, Mortgage and Annual Rebate - scored exceptionally well, as did a Valued Customer Rewards card.

96 NPI recommended those four new card concepts as a group of products that CIBC could offer under the "saves me money" platform. It also recommended that the Annual Rebate Card be modified slightly so that it would be tied directly to investments such as the GIC and RRSP, and that such modification be reflected in a new name - the Investment Card. In terms of timing for the release of the products, NPI recommended the release of the Mortgage Card, then the Preferred Merchants Card and finally the Annual Rebate Card. Those recommendations were based on NPI's focus, which was to recommend the products that best captured the "from CIBC" brand strategy.

97 The business case analyses and feasibility assessments concerning the recommended products were left to the CIBC Card Products Division. CIBC immediately discarded the Preferred Merchants Card because it involved multiple sponsors, and CIBC decided there were too many obstacles associated with launching such a card. That left the Mortgage Card and the Investment Card.

98 In the late summer of 1997, CIBC began the product development process for these two cards, which included formulating the marketing approach and business case for the cards. NPI briefed the advertising agency, Padulo, that had been retained by CIBC to translate the "from CIBC" strategy and "saves me money" platform into visual advertising form. Padulo developed an advertisement or "creative" for both the Mortgage Card and the Investment Card, because it was the plan of CIBC to launch the two cards in succession.

99 Padulo developed a variety of advertising or creative concepts for these cards and submitted them to ABM for marketing research in October, 1997. Consumer reaction led to further refinements by Padulo of the creative concepts, and, once modified, they were again taken to research by ABM in late November or early December, 1997.

100 For the Investment Card, the message conveyed by the creative to the consumer was saving for the future while spending money on present needs. For example, one creative stated "Buy her a new crib and we'll help you save for her college education...." Another creative concept, known as the "If you're wondering" concept, posed questions such as "If you're wondering...how to put her through college...." The answer, according to the creative, was to use the CIBC Investment Card because it allowed cardholders to spend money and at the same time accumulate savings for the college education of their children. Another creative invited cardholders to spend and thereby save for their retirement.

101 One of the features of the Investment Card highlighted in the creative was the automatic deposit of the 1% cash rebate into the cardholder's RRSP account or other savings account. The ad described the card as follows:

> If you're wondering how to put her through college, here's a smart suggestion. With the new CIBC investment card, you get all the traditional advantages of a credit card, plus you earn savings that help build your investment value. There are no special rules, no complicated conditions. Every time you use your card you earn 1% on the amount of your purchase and interest. These savings are then added to your RRSP, GIC or CIBC savings account automatically. It's that simple.

102 ABM reported on the results of the creative concepts tested in the fall and early winter of 1997 in a document entitled "Visa Branding Creative Qualitative Concept Testing - Phase II" dated December 18, 1997. The report was used in a debriefing session with CIBC. It disclosed that the "If you're wondering" creative concept tested in the second phase represented a "major breakthrough" compared with the concepts researched in October, 1997, during the first phase of testing.

103 The advertising concepts tested at this time became the advertising used to launch the CIBC Dividend Card in the spring of 1998. Further research was done following the second phase results with respect to the television creative that was to be used to launch the "from CIBC" cards. CIBC received the key findings from that research in early February, 1998.

104 Preparation of the business case for the Mortgage Card and the Investment Card proceeded at the same time the creative concepts were being developed. Initially, CIBC intended to launch the Mortgage Card in the spring of 1998 and the Investment Card in the fall of the same year. In late December, 1997, or the first week of January, 1998, CIBC decided to launch the Investment Card first. According to CIBC, the central factor underlying this decision was the discovery by the Card Products Division that further systems development was required before it could issue a credit card tied to mortgage rebates.

105 CIBC was determined to launch one of the new card products because it became aware in late 1997 that the sponsor of one of its most popular cards, the CIBC Ford Visa, would no longer participate as a card sponsor. Ford Canada gave notice to CIBC in November, 1997, that it was

discontinuing its sponsorship of the card. On December 18, 1998, the Card Products Division was advised that Ford's withdrawal would occur in the spring of 1998. CIBC would have to persuade the hundreds of thousands of Ford Classic and Ford Gold cardholders to move to another CIBC Visa card.

January 1998 meeting between ERSS and CIBC

106 In late 1997, CIBC was advised that ERSS was close to finalizing funding arrangements with a major investor. Although the evidence was somewhat unclear on this point, I conclude that Ms. Rae, who was still a member of the CIBC board of directors, contacted Mr. Kluge to ask CIBC to consider conducting joint research with ERSS with a view to participating in Equity as a Visa sponsor. Mr. Kluge forwarded the request to Mr. Pehleman in the Card Products Division. Mr. Pehleman, in turn, asked Ms. Giles to contact Dennis Paul to discuss the possibility of joint research and assisting ERSS in the design of a questionnaire. Mr. Pehleman gave Ms. Giles a letter with Mr. Paul's telephone number, and a document describing the Equity program that he had received from Mr. Paul.

107 Mr. Pehleman's discussion with Ms. Giles occurred in about the third week of December, 1997. Until then, Ms. Giles had not heard of ERSS or the Equity program. She was not involved in any of the earlier meetings with Mr. Paul, and was not part of any of the bank's discussions in 1992 or 1995 concerning the possibility of participating in Equity. Ms. Giles was not familiar with the features of the program before being provided with the Equity materials by Mr. Pehleman.

108 Ms. Giles contacted Mr. Paul in late December to schedule a meeting. The meeting occurred on January 8, 1998. Mr. Paul attended with two representatives from Bedford Capital, the investment capital company that had committed to fund Equity. Mr. Paul explained that Bedford Capital had agreed to provide $14.5 million in funding to Equity subject to the completion of market research disclosing results as favourable as the 1995 research.

109 In the course of the meeting, Mr. Paul used a presentation deck to describe the Equity program. The materials described Equity in the following way:

> The Equity program provides a way for Canadians to accumulate a personal retirement account by purchasing specific goods and services that participate in the program. Each time our member shops at a participating store, or buys a participating product or a service, a percentage of the purchase price is contributed by the sponsor to our member's retirement account. How it works is that each time a member goes to a participating store or uses a service...they present their card while making the purchase, their card is swiped and that records their transaction. Then once a week, once a month depending on the sponsor...all of those transactions are downloaded to our computer's central system and at the same time simultaneously there's a transfer of funds that go into the pooled trust account. We have a record at Equity as to who those funds

> belong to and the trustee has a record of who those funds belong to. The funds sit in a pooled trust account until the member accumulates $100, at which time they are contacted and given a menu of rewards that they can choose from and the RRSP is, of course, the reward that we promote the most.

110 Mr. Paul's presentation included a description of the loyalty reward attached to the program:

> ...We know from our research that the majority of Canadians between the ages of 18 and 49 are very concerned about their financial security. Those that are older and don't have a long time to go for compounding growth are not necessarily motivated by a retirement contribution. So what we did is we developed a program whereby mom and dad or grandpa and grandma can help their children or their grandchildren by using the Equity card and having the funds go into a registered educational savings plan for their children, and by doing that what we do is we lend ourselves to a broad range of customers...

111 Mr. Paul's presentation emphasized the tax-free nature of the reward. The member would be able to use the rebate as a tax deduction at the end of each year, and the money would compound in value tax-free within the retirement savings vehicle. In the case of a registered education savings plan (RESP), the money would compound in value tax free and, in addition, the government provided a 20% top-up annually.

112 In the course of the presentation, Mr. Paul provided a summary of the research ERSS had conducted between 1992 and 1995. He also showed Ms. Giles samples of "concept advertisements" that illustrated Equity's creative approach, and the manner in which Equity sponsors would be expected to advertise the program. One such concept ad showed a picture of two young children with the following message:

> Give your kids all they have got coming to them. If you spend just $550 each year on your child's clothes and toys and school supplies at Eatons from age 5 to 18, it will be worth $27,141 in their Equity account at retirement. Add in everything else you buy and give your kids even more to look forward to.

113 At the end of the presentation, Mr. Paul asked Ms. Giles if CIBC would participate in the ERSS research and help design the market research questionnaire as a potential Visa sponsor. He then placed a proviso on that request: if CIBC did participate in the research, ERSS needed an undertaking to the effect that if the research results were as good as, or better than, the results of the 1995 research, CIBC would provide the Visa sponsorship and be prepared to join the launch of the Equity card in the fall of 1998.

114 Ms. Giles was not aware before the meeting that the request to participate in research was contingent upon an undertaking by CIBC to participate in Equity of the results were favourable. She refused to make the commitment Mr. Paul sought. She had only just been introduced to the Equity

program and felt it was too early to make such a commitment. She told Mr. Paul CIBC would require more than just positive research on which to base a decision to participate.

115 Mr. Paul recalled Ms. Giles saying that she had reviewed the Equity materials and research, that CIBC had done its own research, and that she knew a retirement savings program was a motivational reward - so why did CIBC need him? Mr. Paul testified that his response was as follows:

> ...you need us for several reasons, Ms. Giles. Number one, the bank has signed a confidentiality, non-compete agreement. We bring a multi-sponsor network to the program. And we have a professional management team in place ready to launch this program in the fall of 1998.

116 The meeting ended with Ms. Giles refusing to make any commitment on behalf of the bank. Mr. Paul recalled Ms. Giles saying the bank had systems issues, a great deal going on in the Visa department, and that she would have to discuss the matter with Mr. Pehleman and others in her department. After the meeting, according to Mr. Paul, there were a number of telephone discussions with Ms. Giles. Throughout those discussions Ms. Giles refused to commit to participate in the research. However, in the last of the telephone discussions Mr. Paul asked Ms. Giles whether she would "find a way" to participate in Equity if the research results demonstrated that CIBC could issue several hundred thousand new cards as a result of being a Visa sponsor. Mr. Paul recalled Ms. Giles saying she believed she could find a way to participate in that case. ERSS embarked on its field research, but did not identify CIBC as the Visa sponsor.

117 Ms. Giles denied making a commitment even to the extent described by Mr. Paul. Her evidence is supported by the fact that when ERSS commissioned field research in early 1998, it did not do so on the basis that the Visa sponsor was CIBC. The research was conducted on the basis that there would be a Visa sponsor, but no sponsor was specifically identified. The value of the field research, and the reason that ERSS wanted CIBC to participate in it as the Visa sponsor, was to determine consumer response to a program that offered specific, named sponsors. The research was of little value to CIBC unless it was identified as the Visa sponsor. Ms. Giles would have no reason to commit to participate in Equity on the basis of research that did not canvass consumer response to a CIBC Visa. I accept Ms. Giles' evidence that CIBC made no commitment to participate in the research or in the Equity program.

118 Ms. Giles' reaction to Equity was not very positive, and certainly not positive enough to consider replacing the cards CIBC was in the process of developing. ERSS was apparently planning a fall launch date for Equity but as yet had no signed sponsors. Despite the plan to move quickly and aggressively, ERSS had not yet designed its questionnaires for its field research. The cost of joining Equity was high for a loyalty program. There were enough "red flags" in Ms. Giles' opinion to convince her that no commitment should be made. She reported her views to Mr. Pehleman and CIBC took no further steps with respect to the Equity program.

119 The ERSS research was completed in late March, 1998. Mr. Paul made attempts to contact people within CIBC and was eventually successful in speaking to Mr. Pehleman. However, Mr. Pehleman was noncommittal and his team was not available to meet with Mr. Paul. The research was never provided to CIBC.

The Launch of the CIBC Dividend Visa

120 As indicated earlier, the Card Products Division decided in late December or early January to launch the Investment Card before the Mortgage Card because it had become apparent that the mortgages department required a systems upgrade before adding another product linked directly to it. From their experience with mortgages, the Card Products personnel discovered that linking a card directly to bank products such as mortgages and investments required more systems modifications than they had first thought. CIBC had originally planned to link the Investment Card directly to the investment products, and had tested that concept in the research. The mocked-up advertisements implied an automatic link in the form of a deposit into the cardholder's existing RRSP or RESP.

121 However, Card Products decided not to postpone the launch of the Investment Card until the appropriate systems could be developed. They had for many months planned to launch the first new card product in the spring of 1998, and, with the loss of the Ford Gold and Ford Classic cards imminent, did not wish to postpone the launch. Instead, CIBC decided to simplify the Investment Card by making it a "cash-back" card while at the same time maintaining the "from CICB" brand strategy and "saves me money" platform by positioning the card in the media advertising as a card linked to bank products such as the RRSP, RESP and GIC.

122 The difference was that the 1% cash back or rebate earned by the cardholder would be automatically applied by the bank to the cardholder's December Visa statement unless the cardholder specifically requested that it be redeemed in the form of a money order and applied to an existing investment product the cardholder had opened with CIBC. The choice was the cardholder's, but the cardholder was required to specify if he or she wished to have the money directed to an investment product rather than the December Visa statement. The cardholder could then obtain a money order and deposit the funds into an existing account.

123 Ms. Longo described in evidence CIBC's decision to create a cash-back card. She explained that Paul Vessey, Mr. Pehleman's superior in Card Products, had expressed in an earlier meeting in November, 1997, that he liked the rebate card idea. He felt that although it was a good idea to link the card to the bank's investment products, it would also work as a simplified cash-back card. Mr. Vessey was aware that a similar card had recently been launched by American Express. Ms. Longo made the decision to present the idea of a cash-back card to her boss, Mr. Pehleman, confident that he would approve since his own boss had liked the idea. They went ahead and began to finalize the business case, a task that went quickly because the quantitative research and business case had already been completed for the more complex, linked, card. Ms. Longo described the process

leading to the creation of the cash-back card as follows:

> ...I knew already from the advisory board that I had, that Paul Vessey, who was my boss's boss, Scott Pehleman's boss, really liked the rebate card idea and he had actually mentioned in the November meeting that he thought it was a really great idea on the linkages but that to simplify it as a cash back card that would work too, because American Express had previously launched within the last nine months a 1% cash back card...
>
> ...And so we make the decision to switch it - or I make the decision to switch it and present that to Scott Pehleman, my boss, as -- as a decision that kind of effectively ties up all of our objectives. And he knows that his boss is going to like it because he already liked the rebate card and the cash-back card idea, so we go with it. We go straight into business - finalizing the business case...
>
> ...We had it pretty much done on the mortgage card, and - because we had come out of quantitative research, and the rebate card in a pure cash-back form was even simpler and was a better business case because we didn't have to do the system builds expense of it that was in the mortgage business case...

124 The decision to launch a cash-back card positioned as one linked to the bank's investment products was made after Ms. Longo returned from vacation in late December, 1997. On January 5, 1998, the manager of Gold Card products, Brenda Clark, held a meeting with a small group of employees in the Card Products Division to discuss winding down the Ford Classic and Gold cards and preventing the loss of the several hundred thousand cardholders by persuading them to switch to another CIBC card product. Ms. Clark was aware that CIBC's plan was to "cross-sell" the Mortgage Card to the Ford Visa cardholders. However, on January 7, 1998, Ms. Longo advised Ms. Clark that the Mortgage Card would not be ready and that instead the bank would be launching a cash-back card that would be ready to replace the Ford Visa. Unless CIBC accelerated the launch of the Investment Card, it did not have an appropriate alternative card product - one that offered a cash loyalty reward - to offer Ford Visa cardholders.

125 A document dated January 7, 1998, prepared by Ms. Clark for a meeting of CIBC personnel, contains Ms. Longo's handwritten changes reflecting the decision to replace the Mortgage Card with the cash-back card.

126 Ms. Giles was primarily responsible for launching the new card. She prepared a document entitled "Proposed Product Development Strategy" on January 8, 1998, which described a proposed timeline for the launch of several new card products. The first was the Rebate (Investment) Card with a proposed launch date of late March, 1998.

127 The Card Products Division decided to rename the card the Dividend Card to emphasize the link between the cash reward and CIBC investment products. A memo dated January 11, 1998, drafted by a CIBC employee, Michael Testa, described the features of the new card to the agency responsible for the design of the card. The memo states in part as follows:

> CIBC is planning to launch a new classic Visa card called the "CIBC Dividend VISA card". This card rewards cardholders with a yearly dividend (up to 1%) paid by cheque. The Annual dividend is based upon the accumulated net purchase amounts as posted thru [sic] the January to December statements...
>
> ...Through consumer research we know this concept is perceived very well. The appealing aspect is the cash dividend. All other loyalty programs require the cardholder to purchase an item or restrict their behaviour to redeem their reward; since this is cash the customer can spend it where ever [sic] they wish...

128 The business case for the Dividend Visa was signed off in late January, 1998. The card was launched during the last week of April, 1998. In one of the first news releases dated April 29, 1998, entitled "CIBC Launches First Credit Card", the following quote is attributed to Ms. Longo:

> This is the first card in the marketplace to offer customers dividends that can be invested into financial services such as RRSPs or GICs...
>
> The card allows customers to invest money for the future or apply the cash against expenses they have now...

129 Ms. Longo explained in evidence the reason CIBC's press release described the Dividend Card in those terms:

> ...the press release is a form of mass marketing, and we were trying to convey the positioning of linking back to other bank products and "saves you money" in - into the marketplace. And though it was a cash-back card, it was a - one of the first cash-back cards that was positioned at topping up investment...products.

130 However, the direct mail campaign targeting both current and potential CIBC customers emphasized the cash-back feature of the Dividend Card rather than the link to the bank's investment products.

131 In late May, 1998, a CIBC employee, Maureen Chorney, prepared a "post-implementation review" of the Dividend Card launch for internal distribution within CIBC. The memo, dated May 29, 1998, is entitled "Colours Project"; "colours" was the internal code name for the Dividend Card. The purpose of the memo was described as follows:

> ...This document will outline the learnings, the things that went well, the feedback from the team members, and areas of improvement for the UAT. It is intended to improve the effectiveness of future projects as well as contribute to the learnings regarding future product launches.

132 The memo then describes the schedule followed by CIBC with respect to the launch of the Dividend Card. It supports the evidence of Ms. Giles and Ms. Longo concerning the decision to replace the Mortgage Card with the Dividend Card, and the timing of that decision:

> The JAD for the first new product, Castle (a partnership with CIBC Mortgages Inc (CMI)), was held in October 1997. The launch was to be Spring 1998. The team focussed on developing the Business requirements and understanding what the new Bankcard system provided. It was soon apparent that there were items that needed to be resolved between the partners, VISA and CMI, that would likely delay a Spring launch. On January 7, 1998 the Business Requirements and "learnings" were re-cycled as Colours, the Dividend card...

133 On April 29, 1997, Mr. Paul read in the Globe and Mail the CIBC press release describing the launch of its new card product, the CIBC Dividend Card. At trial, he described his reaction to the press release:

> I was shocked, because I had been talking to CIBC for some period of time and this was our program. This was my program. This is the idea I brought to them, to attach retirement savings to a credit card.

134 Mr. Paul was of the view that the CIBC Dividend Card, as advertised in the media, was identical to the Equity program. He sought legal advice. In early May, 1998, solicitors retained by ERSS wrote to CIBC to advise that in their view CIBC had breached the Confidentiality Agreement by launching the Dividend Card. Counsel for CIBC provided a reply shortly thereafter, denying that it had engaged in misconduct of any sort.

135 In June, 1998, CIBC launched the Platinum Dividend Visa, marketed as an upscale counterpart to the Dividend Visa. The Platinum Dividend had an enrolment fee and a 2% cash rebate. It was positioned to compete with the new platinum card market segment.

136 A few months after CIBC launched the Dividend Visa, ERSS lost its investment funding. Bedford Capital representatives were of the view that the introduction of the Dividend Visa in the marketplace had essentially pre-empted the Equity program. ERSS was ultimately successful in obtaining funding from a different investor, and launched the Equity program in October, 2000.

137 ERSS brought this action seeking damages against CIBC for breach of fiduciary duty and misuse of confidential information. At the outset of the trial, counsel for ERSS advised the court that it was not proceeding with the action for breach of fiduciary duty. It was common ground

between the parties that ERSS and CIBC were arm's-length commercial parties and not business partners, and that nothing in the relationship between them gave rise to fiduciary obligations on the part of CIBC.

Positions of the Parties

138 The position of ERSS was essentially twofold: first, CIBC used the confidential elements of the Equity program to develop the Dividend Visa. Second, CIBC used the research and marketing approach developed by ERSS and thereby obtained a head start when it launched the Dividend Visa in the marketplace.

139 CIBC's response was, first, that the Confidentiality Agreement prohibited only the use of information not already available to the public. The idea of a loyalty program with a reward of a deposit into a retirement savings vehicle had been in the public domain for many years. Second, CIBC said the Dividend Card was developed and marketed independently of any confidential information disclosed to it about the Equity program.

DISCUSSION

1. Does the CIBC Dividend Visa embody the confidential elements of the Equity program?

140 ERSS bears the onus of proving that the information it alleges CIBC used was confidential information within the terms of the Confidentiality Agreement.

141 The central allegation of ERSS is that CIBC developed a Visa card "embodying" the characteristics of Equity. That allegation is contained in the Statement of Claim (para. 19) as follows:

> ... an announcement in the Globe and Mail indicated that the Defendant CIBC was issuing its own VISA card with a program and reward substantially identical to that contained and embodied in the Equity Program ...

142 That allegation is repeated later in the Statement of Claim (para. 28):

> From, at least late 1997, the Defendant CIBC formed the intention to proceed with a VISA card of its own embodying many of the features of the Equity Program....The Defendant's actions in the Spring and Summer of 1998 in proceeding with a VISA card embodying the Equity Program concept to the exclusion of the Plaintiff ERSS Corp. is a clear demonstration of the misuse of confidential information ... by the Defendant.

143 The unique and confidential feature of the Equity program was described by ERSS in its pleadings (Reply and Joinder of Issue) as:

> ... the creation of an RRSP account for each customer, the deposit of a percentage of the cardholder's purchase to such RRSP account, the tax free feature of such a deposit and the ability of a customer to provide for an RRSP by means of purchases from retailers.

144 In evidence at trial, Mr. Paul acknowledged that in 1992 when the parties signed the Confidentiality Agreement, the unique feature of Equity was the loyalty program with a retirement savings vehicle attached to it. The confidential aspect was the combination of the two - a loyalty program with an automatic deposit into a retirement savings vehicle that grows in value tax-free.

145 The terms of the Confidentiality Agreement, and in particular the enumerated exeptions, limit the duty of confidentiality otherwise imposed on CIBC by equity. The parties have, by contract, created a private regime with respect to CIBC's obligation to treat the information concerning Equity in confidence.

146 As a result of that contract, information that was in the public domain as of April 6, 1992, or subsequently entered the public domain, was not confidential. For the reasons that follow, I have concluded that the feature of the Equity program alleged to be confidential - a loyalty program with a reward of an automatic deposit into a retirement savings vehicle - was in the public domain at least by the time CIBC launched the Dividend Card in 1998.

147 Mr. Paul testified that he understood the terms of the Confidentiality Agreement to preclude CIBC from using any information he disclosed during the course of his meetings with the bank, including information that was in the public domain before April 6, 1992, or subsequently became part of the public domain. Mr. Paul made reference to the START program in his first meeting with CIBC for the express purpose of bringing that information within the parameters of the Confidentiality Agreement. He also understood the Confidentiality Agreement to impose on CIBC a duty not to compete with ERSS by entering the market with a product resembling the Equity program.

148 In my view, Mr. Paul's understanding as to the effect of the Confidentiality Agreement was not consistent with its terms. There is no specific reference in the agreement to a duty not to compete, nor could such a restriction be inferred from the document. Further, the exceptions to nondisclosure are unambiguous: the parties expressly agreed that CIBC was under no duty of confidentiality with respect to information disclosed by ERSS which, as of April 6, 1992, was in the public domain or which, after the date of the Agreement, entered the public domain through no fault of CIBC.

149 I accept the submission of CIBC that the effect of the Confidentiality Agreement was to preserve the status quo. The exclusion of information in the public domain was designed to permit ERSS to explain the Equity program without viewers of the program being able to use the information, while at the same time accommodate the ability of viewers such as CIBC to pursue its own card product research and development.

150 The term "public domain" is not defined in the Confidentiality Agreement. From the case law concerning the duty of confidentiality, and in particular the Ridgewood Resources and Edac cases (supra), I conclude the term should be given its plain and ordinary meaning: information is in the public domain if it is available or accessible to the public. The question is accessibility; whether the viewer is actually aware of the information at the time of viewing is irrelevant. The information need not be available or accessible to the public generally to bring it into the public domain, so long as it is available to those members of the public who have a particular interest in the marketing or development of products such as credit cards and loyalty programs.

151 Under the terms of the Confidentiality Agreement, information that is "published or otherwise becomes part of the public domain" is not confidential. The parties thus recognized that the publication of information after concluding the Agreement (through no fault of CIBC) was one means of bringing it into the public domain. Once published, the information has lost its confidential nature.

152 A significant modification of the general law resulting from the Confidentiality Agreement concerns the concept of unique disability. While the first position of ERSS was that the concept underlying Equity was not in the public domain before April, 1998, it appeared to argue in the alternative that CIBC remained uniquely disabled from using the idea of a retirement savings contribution as a loyalty reward even if that idea was in the public domain before or after the meetings with ERSS in 1992. I cannot accept that argument because the exceptions contained in the Confidentiality Agreement effectively displace the concept of unique disability.

153 Under the terms of the Confidentiality Agreement, CIBC was entitled to develop a competing product using information disclosed by ERSS provided the information was accessible as of April 6, 1992, or was published or otherwise became accessible after that time.

154 CIBC acknowledged that many of the materials ERSS provided to the bank in the 1992 meetings remained confidential under the Confidentiality Agreement, and, in particular, the research data obtained by ERSS including charts and graphs describing the research results as well as financial information and projections concerning the Equity program. However, CIBC argued that the feature of Equity alleged to be confidential was a loyalty program with a retirement savings contribution as the reward. That idea, said CIBC, was brought into the public domain by START, and no duty of confidence arose with respect to it.

155 I accept the submission of CIBC. The concept of linking a retirement savings vehicle to a loyalty program and promoting it as a means of saving for retirement was the essence of the START program. By the time CIBC launched its Dividend Visa Cards, START had been in the public domain for about six years.

156 The concept underlying START was so similar to the Equity concept that Mr. Paul suspected his idea had been misappropriated by Abe Simpkins, the Winnipeg businessman with whom he met in 1991. Mr. Simpkins was involved in discussions with individuals who were attempting to launch

START in the United States. Mr. Paul acknowledged that at the time he became aware of START, he understood it appealed to the same concern as Equity, which was the gap between government social programs and retirement savings of individual consumers. Mr. Paul also acknowledged that the marketing approach taken by START could equally be attributed to Equity ("spend today and retire tomorrow").

157 As early as March, 1992, Mr. Paul read about START in USA Today. He was able to ascertain from that newspaper article that START was a multi-sponsor loyalty program with a reward currency into long term savings vehicles for retirement. The USA Today article described START as being a multi-sponsored program offering the ability to earn up to a 6% rebate on purchases that could be used as a tax-deferred benefit. The article also described the program's use of an annuity as an investment vehicle, the ability to earn compounded interest, the use of a trust account to pool the funds, the $25 fee, the $100 threshold, and the promotion of the program as a means of spending today and retiring tomorrow.

158 The essential features of START were published not only in the American press but in the Canadian press as well. On the very day that Mr. Paul and CIBC entered into the Confidentiality Agreement, April 6, 1992, the Canadian marketing report Strategy published its front page article on START. The loyalty reward was described in the article as "essentially, a rebate/retirement savings program for consumers who buy from participating companies". The article also described the process by which the annuity was opened after the $100 threshold was met and the automatic transfer of the rebate to the annuity from all subsequent purchases.

159 A second group of articles in American publications accompanied the commencement of NationsBank's participation in START as the credit card sponsor in 1993. Mr. Paul acknowledged that some institutions he approached between 1992 and 1995 were already familiar with START. For example, the Bank of Nova Scotia was aware of START when Mr. Paul met with the bank in 1993.

160 Most significantly, the CIBC employee who "quarterbacked" (to use the terminology of counsel for CIBC) the development of the Dividend Card, Ms. Longo, became aware of the START program independently of any information provided to CIBC by Mr. Paul. Ms. Longo learned of START in early 1995 from her review of the American research publication SMR Research Corporation. When Ms. Longo met with representatives of an accounting firm who approached CIBC for funding in March, 1995, she was immediately struck by the similarities between Equity and START. In her memo dated March 29, 1995, she cited the lack of success of START as a reason to decline the opportunity offered by ERSS to participate in Equity.

161 The representatives of CIBC with whom Mr. Paul first met in 1992 were unaware of the START program. ERSS argued that because Mr. Paul was the one who brought START to the attention of CIBC, the information about START fell within the parameters of the Confidentiality Agreement. I cannot accept that argument as it runs contrary to the plain wording of the exemptions

described in the Confidentiality Agreement. Those provisions refer to information "in the public domain"; they do not refer to information known to individuals within CIBC. As the case law demonstrates, information in the public domain means information capable of being accessed, not information in fact accessed. The issue is accessibility.

162 Further, ERSS did not dispute that Ms. Longo, the person ultimately responsible for the launch of the Dividend Visa, learned of the START program not as a result of information provided by Mr. Paul but by entirely independent means. The fact that Ms. Longo learned of START by reviewing marketing publications also underscores the fact that the information was accessible to Canadians and was in fact accessed by the bank from the public domain.

163 Both ERSS and CIBC tendered expert evidence on the issue of what elements of Equity, if any, were known to persons familiar with loyalty programs as of April, 1998, when CIBC launched the Dividend Card. I have concluded that expert evidence was not necessary to determine this, or any other, issue.

164 Although CIBC does not bear the onus of establishing that the distinguishing features of Equity are shared by START, the evidence does establish startling similarities between the two programs. By contrast, the CIBC Dividend Card is dissimilar to both Equity and START in many respects. The Dividend Card, while positioned to promote bank products such as the RRSP and GIC, is in fact a cash-back card. It was also positioned to appeal to consumer choice. The Dividend Card does not offer as its loyalty reward the creation of an RRSP, an automatic RRSP contribution, or any kind of tax relief. It is a credit card sponsored only by CIBC, as distinct from the multi-sponsor loyalty program offered by both Equity and START.

165 Equity was not positioned to appeal to consumer choice. All of Equity's promotional materials published before the Dividend Card was launched emphasized that the cardholder's reward was the creation of an RRSP once the $100 threshold was reached, and automatic RRSP deposits thereafter.

166 Equity, like START, is not a credit card. It consists of the combination of a multi-sponsor network with a loyalty card, together with a credit card issued by a named Visa sponsor. While Equity does have features that are not identical to START, none of the features of Equity that ERSS said distinguished it from START are alleged to have been incorporated into the Dividend Card. Equity was not positioned to appeal to choice; all of Equity's promotional materials created before the Dividend Card was launched emphasize that the cardholder's reward was the creation of an RRSP once the $100 threshold was reached, and automatic deposits into the RRSP thereafter.

167 In summary, the loyalty reward offered by Equity was in the public domain at least by the time CIBC launched the Dividend Card in 1998. In addition, the loyalty reward of Equity was not substantially the same as that of the Dividend Visa.

2. Did CIBC Use Any Confidential Information Disclosed By ERSS in the

Development of the Dividend Card?

168 ERSS argued that while the Dividend Card ultimately launched in 1998 was a cash-back card that did not offer an automatic deposit into a retirement savings vehicle, CIBC used confidential marketing research and advertising concepts of ERSS to develop and launch the Dividend Card. Further, according to ERSS, once CIBC became aware in January, 1998, that ERSS was planning to launch Equity in the fall of 1998, it accelerated its launch of the Dividend Card in order to ensure its product was in the marketplace first.

169 ERSS asked the court to infer use by CIBC of the marketing approach developed by ERSS on the basis of the similarities in the advertising concepts used by CIBC to introduce the Dividend Card to the market. CIBC said that just as its product was developed independently, the advertising for its product was developed independently by CIBC and its agents.

170 According to CIBC, the similarity in marketing approach resulted from the fact that the bank independently researched and tested a product that more closely resembled Equity, that is, a card linked to customer accounts with CIBC. In any event, said CIBC, the marketing developed by ERSS for the launch of Equity was substantially the same as that used by the START program - "spend today and retire tomorrow". Thus there was nothing confidential about the marketing approach because it, too, had been in the public domain for many years.

171 Despite the uncanny resemblance of Equity to START, Mr. Paul did not obtain the concept for the Equity program from START or the START patent. Similarly, the individuals primarily responsible for the development of the Dividend Visa testified that they did not use any information relating to Equity (or START) in the process that resulted in the card. Their evidence was supported by the thousands of pages of documents generated by CIBC and its agents during the lengthy period of time it took to develop the Dividend Visa. There was nothing in the substantial volume of documentation to support the allegation that CIBC used the Equity concept or the research done by ERSS.

172 The evidence established that the Dividend Visa, and the marketing or promotion associated with it, were the result of a systematic process that began more than three years after ERSS first approached CIBC, and took two and one-half years to complete. The branding strategy and product development were carried out by NPI, an external agency that had no prior relationship with CIBC. NPI also directed the research and testing that was carried out by the research house ABM. Mr. Berey, NPI's principal, testified that he was not aware of Equity or the concept underlying Equity, and that no one within CIBC had ever mentioned Equity to him.

173 The only market research provided to CIBC by ERSS before January 8, 1998, was the 1992 research. When representatives of KPMG met with Ms. Longo in the spring of 1995, they did not provide her with any of the updated research conducted by ERSS around that time. Ms. Longo had not heard of Equity before that meeting. She was not aware that Mr. Paul had met with representatives of CIBC in 1992 and had never seen the materials Mr. Paul provided to the bank at

that time. Ms. Longo's recommendation against participating in Equity rested in part on her knowledge of the START program and its lack of success in the United States.

174 Later in 1995, CIBC hired NPI to embark on a systematic review of card products and their relationship to the rest of the products and services offered by CIBC. Ms. Longo directed the overall project, but Ms. Giles was the employee directly responsible for the branding and product development of the new card products, including the Dividend Visa. She was not involved in the 1992 meetings with Dennis Paul. Ms. Giles testified that no one from CIBC mentioned Equity to her during the two and one-half years of the card development process. She only became aware of Equity in late December, 1997, when Mr. Pehleman asked her to meet with Mr. Paul. It was not until January 8, 1998, that Mr. Paul first explained the Equity program to her.

175 I accept Ms. Giles' evidence with respect to the development of the Dividend Visa. It was supported by the documentary evidence. I also accept that she met with Mr. Paul at Mr. Pehleman's request, and had no subversive agenda in doing so. Her reaction to Equity was not positive for a number of reasons, among them the fact that it was a multi-sponsor program without any signed sponsors or field research. The cost of joining the program was high. By the time of the meeting, CIBC had already developed, researched and tested the card that became the Dividend Visa, and had decided to launch the card within a few months. Ms. Giles was under no obligation to disclose that information to Mr. Paul.

176 In 1995, CIBC hired NPI to assist CIBC in evaluating their business needs and develop card products that would prevent erosion in their cardholder base by the "monolines" - the American credit card companies that had no brand identity. The goal was to develop a brand identity for CIBC's Visa cards recognisable to consumers and thereby defend against attrition and assist in acquiring new customers. NPI initially recommended pursuing two brand strategies. The first was Primera, a low-cost product line that did not carry the CIBC name. The second was "Visa from CIBC".

177 In practical terms, the "from CIBC" strategy recommended by NPI involved linking all of CIBC's Visa cards back to the other products and services offered by the bank to ensure that customers were aware they were receiving benefits from CIBC as distinct from Visa or a credit card partner such as Air Canada (which was the case with the CIBC Aerogold Card) or Ford (the CIBC Ford Visa cards). By pursuing this strategy, CIBC could also market or cross-sell its other products and services to cardholders.

178 ERSS did not dispute that NPI and its principal, Mr. Berey, were unaware of the Equity program. NPI first obtained the concept of a Visa card linked to an RSP from its interviews with individuals in CIBC's Retirement Products Division. ERSS invited me to infer that persons within Retirement Products obtained the concept from representatives of CIBC who met with Mr. Paul in 1992. Although none of the documentary or oral evidence at trial supported that inference, ERSS argued the inference could be drawn from the similarity between Equity and a Visa card linked to

an RSP.

179 I am unable to draw such an inference. I accept the submission of CIBC that once the decision was made to pursue the "from CIBC" strategy and link its Visa cards to products offered by the bank, it was inevitable that one of the card concepts to surface would be a Visa card tied to CIBC's retirement products. In the second phase of the card development process, which began in the fall of 1996, representatives of NPI interviewed each of the product divisions within CIBC for ideas. Minutes of the meetings with each group reflect the discussions that took place. When NPI interviewed the Retirement Products Division, the group came up with the idea of a Visa card that rewarded customers by adding money to a CIBC mutual fund, GIC or RSP. The minutes of that meeting reflect the discussion that took place. There was no mention of Equity or any program external to the bank. The idea was the result of the branding strategy.

180 I am satisfied that the idea for a card product linked to retirement savings did not originate with anyone in the Card Products Division, or anyone within CIBC who had been exposed to Equity. The concept was the logical consequence of the NPI strategy to develop the "from CIBC" brand of Visa cards.

181 A card tied to investment products was only one of many ideas that surfaced in the NPI interviews. The Dividend Visa did not suddenly appear, or appear in isolation. Nor was it immediately launched. A whole series of card ideas was generated as a result of the interviews with the various product divisions within the bank. The card ideas were then organized by "platforms" - with names such as "saves me money", "makes me money", "makes me feel better" and others. One of the cards grouped under the "saves me money" platform was the Annual Rebate Card.

182 In mid-1997, the card concepts and platforms were sent to qualitative testing by focus groups. On the basis of the research, NPI recommended that CIBC adopt the "saves me money" platform. The card concepts under that platform were sent for quantitative testing. As a result of that testing, NPI recommended launching the Mortgage Card in early 1998 and the Annual Rebate Card, renamed the Investment Card, later that year.

183 Ms. Longo, Ms. Giles and Ms. Clark all testified that the decision to launch the Investment Card first was a business decision based on systems difficulties encountered with the mortgages division. That card was ultimately never launched because of systems problems. In addition, it became apparent to CIBC in late November, 1997, that the Ford Visa cards would be discontinued by the spring and it was therefore necessary to have a new card product ready to launch at that time. The Card Products Division had, in November, 1997, considered issuing the Dividend Card as a simple cash-back card promoted as a means of saving for retirement but without the actual systems link to investment products. In late December, 1997, or early January, 1998, CIBC decided it could achieve the "from CIBC" positioning with the Investment card through marketing rather than a direct systems link that might delay the launch. By January 7, 1998, CIBC had made the decision to launch the Investment Card rather than the Mortgage Card, and to launch it as a cash-back card

rather than a card linked directly to retirement products.

184 Card Products renamed its new card the Dividend Visa in early January, 1998. The documentary record reflects that the card was renamed by January 11, 1998. The business case for the Dividend Visa was finalized by late January and the card was launched at the end of April, 1998. The Platinum Dividend Visa, the "upscale" version of the card that offered a 2% annual rebate on consumer purchases, was launched in the summer of 1998. That card was designed to attract the Ford Gold Visa cardholders.

185 ERSS urged the court to conclude that CIBC misappropriated the advertising ideas developed by Equity and shown to Ms. Giles by Mr. Paul in the January 8, 1998, meeting. According to ERSS, there were notable gaps in CIBC's research. For example, said ERSS, CIBC never researched or tested the concept of spending in order to build an RESP for a child's college education, and must have used the marketing approach developed by ERSS for Equity as a "springboard" to get the Dividend Card to the marketplace first.

186 The evidence, however, did not support that assertion. The documentary record disclosed that in the fall of 1997, NPI briefed the advertising agency, Padulo, with respect to advertising concepts for the Investment/Dividend Card. The "If you're wondering" creative concept, an advertisement appealing to the notion of spending while at the same time saving for retirement or for a child's college education, was developed by Padulo and tested by ABM in October and November, 1997, well in advance of Ms. Giles' meeting with Mr. Paul.

187 The overall message, spend and at the same time save for your retirement and/or the future of your children, was certainly the message Equity wanted to send to the public. But it was also the message delivered by START in its marketing approach ("spend today and retire tomorrow"). That advertising concept had been in the public domain for many years.

188 There was nothing sinister about the timing of CIBC's launch of the Dividend Card. Counsel for ERSS argued that CIBC obtained an unfair advantage, a head start, from the information disclosed by Mr. Paul in the January 8, 1998, meeting. In argument, he asked rhetorically: "What was the rush?" It was a question he also quite properly put to each of the CIBC witnesses involved in the launch of the card.

189 Each of those witnesses testified to the business reasons behind the decision to proceed with the Dividend Card instead of the Mortgage Card, the decision to launch the card in the spring of 1998, and the decision to launch a cash-back card that was marketed to promote the link to retirement savings. The evidence of each witness was consistent with that of the others, and was supported by the extensive documentary record. The evidence of Ms. Giles, Ms. Longo and Ms. Clark withstood the exacting and skilful cross-examination of counsel for ERSS and was credible in all respects.

190 It may be that CIBC in its advertising oversold its product. The marketing of the Dividend

Card may have been such that the appeal was broader that the product actually delivered. When the card was launched, the news releases and the advertising campaign in the media emphasized the link to the bank's retirement savings accounts. But CIBC also emphasized in its advertising the element of choice: the cardholder could choose to apply the rebate to an investment account rather than having it applied automatically to his or her Visa statement at the end of the year. In the direct mailings to prospective customers, CIBC emphasized the cash-back feature of the card.

191 The message delivered through the advertising was really a question of emphasis, not accuracy. In any event, the issue before the Court was not whether CIBC's advertising was faithful to its product. The issue was whether CIBC used confidential information as a springboard when it developed and marketed the Dividend Card.

192 I am satisfied that the concept for the Dividend Card was the result of the independent process - a lengthy, painstaking and costly one - undertaken by CIBC with the assistance of NPI, ABM and Padulo. I am also satisfied that CIBC used its own marketing research and marketing approach to launch the card.

SUMMARY OF CONCLUSIONS

193 The claim of ERSS is dismissed for the following reasons:

1. The CIBC Dividend Visa does not embody the confidential elements of the Equity program because:

   (a) The feature of Equity alleged to be confidential was the loyalty reward of an automatic deposit into an RRSP. That concept was in the public domain several years before CIBC launched the Dividend Visa;

   (b) The loyalty reward offered by the Dividend Visa is not substantially the same as that offered by Equity. Equity is a multi-sponsor loyalty program with a reward of an automatic deposit into an RRSP. The Dividend Visa is a credit card supported only by CIBC, and rewards cardholders with a cash rebate credited to their December Visa statement.

2. CIBC did not use any confidential information concerning Equity to develop or market the Dividend Visa. The Dividend Visa, and the marketing approach developed to promote it, was the culmination of a systematic, lengthy and independent process undertaken by CIBC approximately three years after ERSS first approached CIBC with the idea of the Equity program.

194 Unless either party wishes to make submissions on the issue of costs, CIBC is entitled to its costs at Scale 3.

WEDGE J.

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