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COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
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Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 29

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Our Matter Number: 1168274

SENT BY E-MAIL

Mr. Jos LaRose
Competition Tribunal
90 Sparks Street, Suite 600
Ottawa, ON K1P 5B4

Dear Mr. LaRose:

Stargrove Entertainment Inc. v. Universal et al. (CT-2015-014)

This letter is the response of Sony/ATV Music Publishing Canada Co. and Sony Music Entertainment Canada Inc. to the motion for leave to intervene in this matter filed by the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (“CIPPIC”).

It is respectfully submitted that the Competition Tribunal should dismiss CIPPIC’s motion for leave to intervene with costs because CIPPIC does not qualify as an intervener under s. 9(3) of the *Competition Tribunal Act*. Section 9(3) provides that the Competition Tribunal may grant leave to a person “only in respect of any matter that affects that person”. The Competition Tribunal has explained that “affects” in s. 9(3) means “directly affects”, and that, accordingly, “leave to intervene would be denied to a person who might have strong view about the outcome of a case, but would not be affected differently from members of the general public”: see *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Corporation*, 2011 Comp. Trib. 2, ¶12, *per* Simpson J.

Here, CIPPIC claims to be “interested” in this application, but it does not claim to be “affected” by it at all, directly or otherwise. CIPPIC appears to have strong views about the outcome of this case, and claims an expertise that it says would assist the Tribunal, but these factors have consistently been held to be insufficient for intervener status. As such, CIPPIC’s motion for leave to intervene should be dismissed.

This is a sufficient basis for the Tribunal to dismiss CIPPIC’s motion for leave to intervene.

Sony/ATV Music Publishing Canada Co. and Sony Music Entertainment Canada Inc. also adopts the submissions of ABKCO Music & Records and Casablanca Media Publishing.

Yours very truly,



Mahmud Jamal

c: David Fewer (*University of Ottawa Faculty of Law*)
Nikiforos Iatrou (*WeirFoulds*)
W. Michael G. Osborne and Wendy Sun (*Affleck Greene McMurtry*)
Chris Hersh and Casey Chisick (*Cassels Brock & Blackwell*)
Peter Franklyn, Gerrard Kennedy (*Osler*)

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2011 Comp. Trib. 2

File No.: CT-2010-10

Registry Document No.: 50

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

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

B E T W E E N:

The Commissioner of Competition
(applicant)

and

**Visa Canada Corporation and
MasterCard International Incorporated**
(respondents)

and

**The Toronto-Dominion Bank
The Canadian Bankers Association**
(applicants for leave to intervene)



Date of hearing: 20110307

Before Judicial Member: Simpson J. (Chairperson)

Date of Reasons for Order and Order : April 5, 2011

Reasons for Order and Order signed by: Madam Justice Sandra J. Simpson

**REASONS AND ORDER REGARDING MOTIONS FOR LEAVE TO INTERVENE BY
THE TORONTO-DOMINION BANK AND THE CANADIAN BANKERS
ASSOCIATION**

Introduction

[1] The Toronto-Dominion Bank and the Canadian Bankers Association (the “Proposed Intervenor”) are moving for leave to intervene in proceedings commenced by the Commissioner of Competition (the “Commissioner”) against Visa Canada Corporation (“Visa”) and MasterCard International Incorporated (“MasterCard”) pursuant to section 76 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”). This provision deals with price maintenance.

Background

[2] Visa and MasterCard do not issue credit cards. Rather, they operate the credit card networks which are used to process credit card transactions. Visa and MasterCard credit cards are issued to shoppers by financial institutions such as banks. They are described as “Issuers” when they perform this function. Some banks also operate as “Acquirers”. In this role, they provide services to merchants which allow them to process payments made with Visa and MasterCard credit cards. Acquirers are required by Visa and MasterCard to include certain terms in the agreements they make with merchants. Those terms include provisions which require merchants to accept all Visa and MasterCard credit cards and which prohibit merchants from imposing a surcharge on a shopper who uses a premium credit card. Terms of this kind have been described by the Commissioner as the “Merchant Restraints”.

[3] In broad terms, the Commissioner’s application concerns the fees paid by merchants (the “Card Acceptance Fees”) for the ability to accept Visa and MasterCard credit cards when shoppers make retail purchases.

[4] The application also deals with the portion of Card Acceptance Fees known as “Interchange Fees”. Interchange Fees are retained by Issuers and represent a significant portion of Card Acceptance Fees. The Commissioner asks the Tribunal to order the abolition of the Merchant Restraints (the “Proposed Order”) saying that such an order will promote competition in the setting of Card Acceptance Fees. The suggestion is that, if competition is introduced, Card Acceptance Fees will decline.

[5] The Commissioner’s application raises a number of issues and, based on the pleadings, Visa and MasterCard dispute all the fundamentals of her case. In particular they:

- (a) do not agree with her definition of “credit card network services” as the product market;
- (b) do not agree that section 76 of the Act applies on the facts of this case;
- (c) characterize the Merchant Restraints as pro-competitive; and
- (d) forecast negative consequences for their credit card networks and for their cardholders if the Merchant Restraints are abolished.

The Proposed Intervenors

[6] Against this background, the Toronto-Dominion Bank (“TD Bank”) and the Canadian Bankers Association (the “Association”) seek leave to intervene under subsection 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd supp.) (the “Tribunal Act”).

[7] TD Bank is a Schedule I bank incorporated under the *Bank Act*, S.C. 1991, c. 46. It is one of the largest banks in Canada and it is the only Canadian chartered bank which carries on business as both an Issuer and an Acquirer. If granted leave, TD Bank will support the positions taken by Visa and MasterCard.

[8] The Association is a national organization which represents the Canadian banking industry. Its members include 51 domestic chartered banks, subsidiaries of foreign banks, and foreign bank branches operating in Canada. The Association deals with matters of concern to the banking industry as a whole and its main activities are in the fields of legislation, education, publication, public relations, and information. The Association, if granted leave, will also support Visa and MasterCard.

[9] Visa and MasterCard are in favour of the interventions but did not make oral submissions on the motions for leave. The Commissioner, on the other hand, argued that both Proposed Intervenors should be denied leave to intervene.

The Development of the Test

[10] Subsection 9(3) of the Tribunal Act reads as follows:

9(3). Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the *Competition Act*, to make representations relevant to those proceedings in respect of any matter that affects that person

9(3). Toute personne peut, avec l'autorisation du Tribunal, intervenir dans les procédures se déroulant devant celui-ci, sauf celles intentées en vertu de la partie VII.1 de la *Loi sur la concurrence*, afin de présenter toutes observations la concernant à l'égard de ces procédures.

[11] The first guidance provided by the courts regarding the test for leave to intervene is found in the Federal Court of Appeal decision in *American Airlines, Inc. v. Canada (Competition Tribunal)* (1988), 54 D.L.R. (4th) 741, aff'd [1989] 1 S.C.R. 236. The Tribunal had concluded that the word “representations” in subsection 9(3) of the Tribunal Act meant that intervenors were only entitled to make submissions. Mr. Justice Iacobucci, as he then was, disagreed. He concluded that, in appropriate cases, the Tribunal could allow intervenors broader rights of participation including a right of discovery, the right to call evidence and the right to cross-examine witnesses.

[12] In *Director of Investigation and Research v. Air Canada et al.* (1992), 46 C.P.R. (3d) 184, the Tribunal held that the term “affects” in subsection 9(3) of the Tribunal Act means

“directly affects”. Accordingly, leave to intervene would be denied to a person who might have strong views about the outcome of a case, but would not be affected differently from members of the general public. The Tribunal also concluded that the representations to be made by a proposed intervenor would have to be germane to the mandate of the Tribunal.

[13] In *AC Nielsen Company of Canada Ltd. v. Canada (Director of Investigation and Research)*, [1994] C.C.T.D. No. 9 (QL), the Tribunal refused to grant leave to lawyers who had a particular interest in competition law but who had failed to allege or demonstrate how the proceeding affected them. The Tribunal found that a particular interest in the area of competition law, without more, did not justify leave to intervene.

[14] In *Director of Investigation and Research v. Tele-Direct (Publications) Inc. et al.* (1995), 61 C.P.R. (3d) 528, the Tribunal granted leave to intervene to a publisher of a classified telephone directory and two advertising agencies, but refused to grant leave on all their proposed issues because the Director of Investigation and Research had not raised them in his application.

[15] In *Canada (Director of Investigation and Research) v. Canadian Pacific Ltd. et al.* (1997), 74 C.P.R. (3d) 37, the Tribunal held that a proposed intervenor must identify the capacity in which it is directly affected. The Tribunal further held that the representations to be made by a proposed intervenor must be relevant and of assistance to the Tribunal.

[16] In *Southam Inc. et al. v. Director of Investigation and Research* (1997), 78 C.P.R. (3d) 315, the Tribunal referred to the requirement that an applicant for intervenor status must bring to the Tribunal a distinct perspective. In that instance, Noël J., as he then was, held that intervenors are intended to “supplement the case of a party by bringing to the Tribunal their own and distinct perspective of the subject matter in dispute” (at p. 319).

[17] In *Washington v. Canada (Director of Investigation and Research)* (1998), 78 C.P.R. (3d) 479, the merging parties sought a variation of a consent order to remove the requirement for a divestiture of certain assets. The variation was on consent and was sought because a new entrant had appeared in the relevant market. The proposed intervenor advised the Tribunal that it would undertake an investigation about the effect of the entry and would put before the Tribunal evidence which might differ from that presented by the parties. The Tribunal denied leave to intervene and held that a proposed intervenor should have a unique and distinct perspective and should be able to satisfy the Tribunal that it had facts to present without conducting a “fishing expedition”.

[18] Lastly, the Tribunal also has provided guidance about requests for leave to intervene made by associations. In *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.*, [1994] C.C.T.D. No. 19 (QL), McKeown J. held that the Canadian Council of Grocery Distributors was directly affected because it was sufficient that there were matters in issue that would directly affect the persons it represented. In the Tribunal’s view, having the association as the sole intervenor would be more efficient than requiring each individual retailer to appear independently. Similarly, in *Canada (Director of Investigation and Research) v. Bank of Montreal* (1996), 66 C.P.R. (3d) 409, the Tribunal granted intervenor status to two associations, the Retail Council of Canada and the Canadian Life and Health Insurance

Association Inc., noting (at para. 7) that the “association provides a convenient and efficient means of representing the many affected persons in a coherent way before the Tribunal”.

The Test

[19] In *The Commissioner of Competition v. Canadian Waste Services Holdings*, 2000 Comp. Trib. 9, Mr. Justice McKeown reviewed the above case law and listed the requirements to be met by a proposed intervenor. They are:

- (a) The matter alleged to affect that person seeking leave to intervene must be legitimately within the scope of the Tribunal’s consideration or must be a matter sufficiently relevant to the Tribunal’s mandate (see *Director of Investigation and Research v. Air Canada* (1992), 46 C.P.R. (3d) 184 at 187, [1992] C.C.T.D. No. 24 (QL)).
- (b) The person seeking leave to intervene must be directly affected. The word “affects” has been interpreted in *Air Canada, ibid.*, to mean “directly affects”.
- (c) All representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the Commissioner (see *Tele-Direct*).
- (d) Finally, the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it (see *Washington v. Director of Investigation and Research*, [1998] C.C.T.D. No. 4 (QL) (Comp. Trib.)).

The Proposed Intervenors’ Evidence

[20] TD Bank’s motion for leave to intervene is supported by a joint affidavit sworn on February 9, 2011, by Jim Sallas, Senior Vice-President, Personal Lending and Credit Cards, and by Jeff van Duynhoven, President of Merchant Services (the “Bank’s Affidavit”). None of the parties challenged the joint format or cross-examined the deponents.

[21] The deponents say that TD Bank is directly affected by the proceedings in its dual roles as Issuer and Acquirer and also in its overall banking business. They say that if the Merchant Restraints are removed, there will be significant migration away from credit cards to other forms of payment. This change would directly impact TD Bank as an Issuer and as an Acquirer and, if its customers’ credit cards were refused, those refusals might negatively affect its overall banking business.

[22] The deponents also say that TD Bank brings a distinct and unique perspective to the proceedings because of its dual roles. They note that Visa and MasterCard generally do not have any direct interaction with cardholders and say that they can neither explain the costs associated with the creation of features and benefits associated with TD Bank’s credit cards nor detail the role played by Card Acceptance Fees in the viability of TD Bank’s issuing business.

[23] Mr. Sallas and Mr. van Duynhoven also believe that the Commissioner’s application will affect Canada’s entire payments system and that the credit card networks cannot and should not be examined by the Tribunal in isolation from their place in Canada’s overall payments system.

[24] The Association has filed the affidavit of Darren Hannah, Director of Banking Operations for the Association, sworn on February 10, 2011. Mr. Hannah was not cross-examined.

[25] He says that the Association's 51 member banks are key participants in the Canadian credit card system as the principal customers of the Respondents' credit card networks and as credit card issuers both large and small. He adds that the Association's member banks also have significant commercial relationships with their personal and commercial retail banking customers, including cardholders. He notes that some member banks have an interest in the business of acquiring credit card transactions and some operate their own acquiring businesses.

[26] He also says that the member banks issue approximately 90% of the credit cards in use in Canada and that from the banks' perspective as issuers of credit cards to consumers and businesses, the Merchant Restraints are critical to the efficiency, integrity, and reliability of Canada's credit card networks.

The Issues

[27] On the facts presented on these motions, the questions for determination are:

1. Are the TD Bank and the Association's members directly affected by the Commissioner's application? And, if so,
2. Are the topics they wish to address relevant to issues raised in the Commissioner's application? And, if so,
3. Are the TD Bank and the Association in a unique or distinct position to address those topics and will their participation assist the Tribunal?
4. Finally, if leave is granted what should be the extent of the intervenors' participation before and during the hearing?

Question 1 – Are the Proposed Intervenors Directly Affected?

The TD Bank

[28] TD Bank says that the Merchant Restraints are found in all its contracts with merchants and that it is directly affected because the abolition of the Merchant Restraints will effectively rewrite the contracts it holds as an Acquirer. TD Bank also functions as an Issuer and says that, if the Merchant Restraints are eliminated and its customers' credit cards are refused by merchants, it will be directly affected because customers will make less use of their cards, fewer Card Acceptance Fees will be paid by merchants and customers may blame the bank for their inability to use their credit cards.

[29] The Commissioner submits that the impacts foreseen by TD Bank are merely speculative predictions and, as such, do not meet the requirement to show a definite impact. She says that

that requirement is found in *Burns Lake Native Development Corporation et al. v. The Commissioner of Competition and West Fraser Timber Co. Ltd. et al.*, 2006 Comp. Trib. 16, (“Burns Lake”). Burns Lake dealt with whether a party had standing to challenge a registered consent agreement under section 106 of the Act. In my view, the reasoning in Burns Lake does not apply to requests for intervenor status under subsection 9(3) of the Tribunal Act because the context for the applications is entirely different. In section 106 challenges, the registered consent agreement has ended a dispute and has imposed remedies for alleged anti-competitive conduct. It is therefore reasonable to require a party challenging the agreement to be certain about its impact.

[30] The situation for those seeking leave to intervene under subsection 9(3) of the Tribunal Act is very different. Proposed intervenors are required to apply for leave to intervene ten days after a response is filed to a Commissioner’s application. At that point, since the Commissioner has a right of reply, the pleadings are not closed and the hearing of the application is at a future date. In these circumstances, it is not reasonable to require a proposed intervenor to be completely certain about the ways in which it might be affected by the relief sought by the Commissioner. Some speculation is acceptable.

[31] The Commissioner also says that the Proposed Order will have an impact on the 670,000 merchants who accept credit cards and on the 20 million Canadians who hold such cards. For this reason she says that the fact that TD Bank is a party to contracts with merchants and cardholders should not justify an intervention because it is not affected in a manner which is different from a vast number of Canadians and Canadian businesses.

[32] However, the fact that many Canadians hold credit cards from Issuers and numerous merchants deal with Acquirers does not mean that the banks which offer contracts to those cardholders and merchants are not directly affected in their businesses of issuing and acquiring if those contracts are to change as a result of the Proposed Order.

[33] TD Bank also says it is directly affected by what it describes as the allegations of anti-competitive behaviour found in paragraph 12 of the Commissioner’s application. There she states that Acquirers are required by Visa and MasterCard to include the Merchant Restraints in their contracts with merchants. Then, in paragraphs 14, 47, 48 and 58, the Commissioner asserts that the Merchant Restraints are anti-competitive. TD Bank says that, because it is an Acquirer, these paragraphs, taken together, allege anti-competitive behaviour on its part.

[34] In my view, this submission is not sound. No remedy is sought against TD Bank or any other Acquirer. TD Bank is not named as a party and no impropriety is suggested. Rather, the pleadings, as a whole, make it clear that, in the Commissioner’s view, Acquirers and merchants, who make agreements which include the Merchants Restraints, have no alternative but to agree to their inclusion because they have no bargaining power. Further, the Commissioner’s counsel confirmed in the hearing that no allegations were made against TD Bank. Accordingly, there are no allegations of anti-competitive conduct to underpin this submission that TD Bank is directly affected.

[35] TD Bank has a third reason for alleging that it is directly affected. It says that it provides full banking services to many of the cardholders it deals with as an Issuer. It submits that if the Merchant Restraints are removed, TD Bank's customers who hold credit cards issued by the bank might re-evaluate their overall banking relationship with the bank when merchants refuse those cards.

[36] I have not accepted this submission as evidence of a direct effect which justifies an intervention. In my view, if cardholders are apprehensive about the Proposed Order and its impact on their overall banking relationships, that information must come from them.

Conclusion – TD Bank

[37] Although I have rejected two of TD Bank's reasons for saying that it is directly affected, I am persuaded by its initial submission that it is directly affected by reason of its businesses as Issuer and Acquirer.

The Canadian Bankers Association

[38] The Commissioner again says that the Association only speculates about the impact of the Proposed Order on the Association's members and that speculation cannot support an application for leave to intervene.

[39] For the reasons given above some speculation is permissible. However, in my view, the Association's evidence is not speculative. Mr. Hannah's affidavit shows that the Association is certain that cardholders will complain to Issuers and cancel their credit cards if these cards are refused by merchants.

[40] As well, two of the Association's members have a 50% interest in Acquirer businesses and, as discussed earlier, their contracts with merchants will change if the Proposed Order is made.

Conclusion – The Association

[41] I accept the Association's evidence and am satisfied that many of its members are directly affected.

Question 2 – Are the Proposed Intervenors' Proposed Topics Relevant?

[42] During the hearing, counsel for each of the Proposed Intervenors was asked to list the topics their clients wished to address if given leave to intervene.

[43] The TD Bank's proposed topics are:

1. Interactions the bank has with merchants in its role as an Acquirer;
2. Interactions the bank has with cardholders in its role as an Issuer;

3. The bank's interactions with Visa and MasterCard in its dual roles as Issuer and Acquirer;
4. The impact of the Proposed Order on the payments system;
5. The impact of the Proposed Order on TD Bank's business as an Issuer and as an Acquirer;
6. TD Bank's perceptions of the impact of the Proposed Order on its merchant and cardholder customers;
7. TD Bank's view of the reasons for the Merchant Restraints.

[44] The Association wishes to address the following topics from the multiple perspectives of its members:

1. The competitiveness of the payments system and the benefits it provides to all its participants;
2. How the Merchant Restraints are pro-competitive and critical to the efficiency, integrity and reliability of the Visa and MasterCard credit card networks;
3. The role of Card Acceptance Fees from the perspective of the Issuer;
4. The impact of the Proposed Order on benefits and services Issuers provide to cardholders;
5. The reasons why section 76 of the Act does not apply on the facts of this case.
6. The impact of the Proposed Order on Issuers, Acquirers, merchants and cardholders.

General Observations – The Relevance of the Business of Issuers and of the Canadian Payments System

[45] The Commissioner's case does not center on the business of issuing credit cards. However, the Bank's Affidavit shows that it seeks to expand the hearing to have the Tribunal consider all aspects of the business including its costs and the services it provides to cardholders. As well, the Association says that the Tribunal must consider the competitiveness of the payments system because the Proposed Order will affect the system as a whole.

[46] I have concluded that it is not appropriate to permit the Proposed Intervenors to expand the hearing to deal extensively with matters which are not the subject of allegations by the Commissioner. Accordingly, the Proposed Intervenors will not be given leave to adduce general broad-based evidence about the business of issuing credit cards or about the operation of the Canadian payments system. However, there is room for limited evidence on these topics for the reasons given below.

[47] The Commissioner deals with the impact of the Proposed Order on Issuers in her Application at paragraphs 48, 58, 71 and 73 and in her Reply at paragraphs 57-59, 61 and 83. She alleges that, with the Proposed Order, there will be an incentive for Issuers to compete with one another by issuing credit cards with reduced Interchange Fees so that merchants will accept their cards without surcharges. In view of this allegation, it would be relevant for the Proposed Intervenors to adduce evidence about the likely impact of the Proposed Order on Interchange Fees.

[48] Turning to the payments system, the Commissioner asks for a discretionary order and both Visa and MasterCard have said that, even if price maintenance is established, the Tribunal should not exercise its discretion in favour of the order. For this reason, the impact of the Proposed Order on the payments system is relevant.

Question 2 (cont'd) and 3 – Relevance, Uniqueness and Assistance

[49] I now turn to the specific topics suggested by the Proposed Intervenors.

TD Bank

- Proposed Topic 1** The interactions between TD Bank acting as an Acquirer and merchants is a relevant topic and, in my view, the bank is in a position to provide a unique firsthand perspective which will assist the Tribunal. Accordingly, its intervention on this topic will be allowed.
- Proposed Topic 2** However, as discussed above, a broad intervention dealing with TD Bank's business as an Issuer and its interactions with cardholders is not relevant.
- Proposed Topic 3** TD Bank's interactions with Visa and MasterCard in its role as an Acquirer is also relevant and its firsthand evidence on this topic is likely to assist the Tribunal. Accordingly, leave will be given to intervene on this aspect of topic 3. However, as discussed above, a broad intervention dealing with TD Bank's interactions with Visa and MasterCard in its role as an Issuer is not relevant. However, a narrower intervention focussed on the setting of Interchange Fees would assist the Tribunal.
- Proposed Topic 4** The impact of the Proposed Order on the payments system is relevant. The Association has not listed this as a topic and it appears that Visa and MasterCard will focus on the impact of the order on their credit card networks. Accordingly, an intervention on this topic will assist the Tribunal.
- Proposed Topic 5** Firsthand evidence about the impact of the Proposed Order on TD Bank's business as an Issuer and Acquirer is relevant and, in my view, will assist the Tribunal as long as it does not duplicate the Association's evidence on this topic.

Proposed Topic 6 The impact of the Proposed Order on merchants and cardholders is relevant. However, TD Bank has no direct evidence to offer on this issue. It only proposes to give the Tribunal the benefit of its “perceptions”. In my view, evidence of this nature will not assist the Tribunal and this intervention will not be permitted.

Proposed Topic 7 TD Bank is not the author of the Merchant Restraints and is not responsible for their imposition. Accordingly, it is not uniquely placed to address the reasons for their use. Evidence on this topic will presumably come from Visa and MasterCard. Further, to the extent that TD Bank raised this topic to respond to perceived allegations of anti-competitive conduct, such a response, as noted above, is not required since no such allegations were made.

The Association

Proposed Topic 1 For the reasons given above, I have concluded that general evidence about the competitiveness and benefits of the Canadian payment services market is not relevant.

Proposed Topic 2 Whether or not the Merchant Restraints are pro-competitive and what role they play in the provision of credit card networks are relevant topics. However, Visa and MasterCard will address these issues and are in the best position to do so since they impose the restraints and operate the networks. The Association does not offer a unique perspective on these topics. Accordingly, an intervention on this topic will not be permitted.

Proposed Topic 3 The Issuers’ perspective on the role of Card Acceptance Fees and, in particular, Interchange Fees is relevant. It cannot be addressed by Visa and MasterCard and it is not on TD Bank’s list of topics. Accordingly, intervention on this issue is appropriate.

Proposed Topic 4 As mentioned earlier, the impact of the Proposed Order on Interchange Fees is relevant. As well, the impact of the Proposed Order on benefits and services available to cardholders is also relevant. These topics are included in Topic 6 below.

Proposed Topic 5 The application of section 76 of the Act to the facts of this case is, of course, relevant. However, it will be addressed by Visa and MasterCard. Accordingly, an intervention on this issue is not warranted.

Proposed Topic 6 The impact of the Proposed Order on Issuers, Acquirers, merchants and cardholders is relevant. However, the Association does not have merchants and cardholders among its members so any evidence about their views of the impact would be entirely speculative and will therefore not assist the Tribunal.

However, views of the Association's members about the impact of the Proposed Order on Issuers and Acquirers may well assist the Tribunal. An intervention will be permitted on this topic but only to the extent that the evidence and the submissions do not duplicate those made by the TD Bank.

ORDER

[50] For the reasons given above, TD Bank is given leave to intervene to address the following topics:

- A. Its interactions with merchants as an Acquirer.
- B. Its interactions with Visa and MasterCard as an Acquirer.
- C. Its interactions with Visa and MasterCard as an Issuer as those interactions relate to Interchange Fees.
- D. The impact of the Proposed Order on the payments system.
- E. The impact of the Proposed Order on its business as an Issuer and an Acquirer to the extent that there is no duplication with the Association's evidence and submissions.

[51] For the reasons given above, the Association is given leave to intervene on the following topics:

- A. The Issuer's perspective on the role of Card Acceptance Fees.
- B. The impact of the Proposed Order on Issuers and Acquirers to the extent that there is no duplication with the TD Bank's evidence and submissions.

Question 4 – The Scope of the Interventions

[52] Having determined that the Proposed Intervenor have relevant evidence to offer, the question is how to structure their interventions so that they effectively assist the Tribunal without unduly lengthening the proceeding or unduly interfering with the *lis* between the Commissioner and Visa and MasterCard.

[53] To achieve these objectives, the Tribunal orders that:

- (i) The intervenors must proceed according to the schedule for the case agreed to by the parties in a letter to the Tribunal from Blakes dated March 29, 2011 as it relates to the Respondents.
- (ii) Subject to any orders dealing with confidentiality, the intervenors are to be served with the parties' productions and affidavits of documents as they become available.
- (iii) The intervenors are to produce the documents relevant to the topics of their respective interventions and deliver affidavits of documents on or before August 15, 2011.
- (iv) The intervenors have not asked for oral discovery of a representative of the Commissioner. They may not attend such discoveries but may, as requested, review those transcripts.
- (v) If the Commissioner wishes to discover a representative of each of the intervenors, she may do so. However, her right to discovery is limited to the topics on which each has been given leave to intervene and is also limited in time to three (3) hours for the representative of the TD Bank and two (2) hours for the Association's representative.
- (vi) TD Bank may call a maximum of three witnesses and the Association may call a maximum of two witnesses at the hearing. Those limits include any experts the intervenors may wish to call.
- (vii) At the hearing, the intervenors' counsel may cross-examine the Commissioner's witnesses only on the topics of their respective interventions. When cross-examining, counsel may not repeat questions already asked by any other counsel.
- (viii) Intervenor may make written and oral argument which is not repetitive.
- (ix) When the Chess Clock timing is established, the intervenors will be given distinct time allotments. In other words, the Commissioner's suggestion that their time be deducted from the time allotted to Visa and MasterCard is not accepted.

[54] There is no order as to costs.

DATED at Ottawa, this 5th day of April, 2011.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Sandra J. Simpson

COUNSEL:

For the applicant:

The Commissioner of Competition

Kent Thomson
Adam Fanaki
William Miller
David D. Akman

For the respondents:

MasterCard International Incorporated

Jeffrey B. Simpson
James Musgrove

Visa Canada Corporation

Robert Kwinter
Randall Hofley

For the applicants for leave to intervene:

The Canadian Bankers Association

Mahmud Jamal
Michelle Lally
Jason MacLean

The Toronto-Dominion Bank

Paul Morrison
Christine Lonsdale