CT-2010-010

THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

VISA CANADA CORPORATION AND MASTERCARD INTERNATIONAL INCORPORATED

Respondents

THE TORONTO-DOMINION BANK AND THE CANADIAN BANKERS ASSOCIATION

Intervenors

WRITTEN CLOSING SUBMISSIONS OF THE INTERVENOR, THE TORONTO-DOMINION BANK

McCarthy Tétrault LLP
Suite 5300, P.O. Box 48
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

F. Paul Morrison
Tel: 416 601-7887

Christine Lonsdale
Tel: 416 601-8019

Adam Ship
Tel: 416 601-7731
Fax: 416 686-0673

Counsel for The Toronto-Dominion Bank

TABLE OF CONTENTS

INTRODUCTION AND OVERVIEW

1. The Toronto-Dominion Bank ("TD") provides these Written Submissions to assist the Tribunal in relation to the issues on which TD adduced relevant evidence. As the owner and operator of both an acquiring and issuing business in the credit card system, TD has put forward evidence that is relevant to several of the central issues on which the Commissioner's Application depends. In addition, TD has put forward the only expert in this proceeding who has specifically opined on the effect of the proposed order on the wider payments system in Canada.

2. TD submits that the Commissioner's Application is misconceived and ought to be dismissed in its entirety for the following reasons:

(a) Under s. 76 of the *Competition Act*, the Commissioner is required to prove that Acquirers in Canada resell credit card network services that they purchase from Visa and MasterCard. The evidentiary record makes clear that Acquirers do *not* resell anything that they purchase from Visa and MasterCard. Instead, Acquirers provide the key foundation in the financial and electronic infrastructure that supports the credit card transaction process. Visa and MasterCard play a separate, complementary role including, by facilitating Acquirers' access to Card Issuers around the globe, as it is the Card Issuers who ultimately provide authorization for transactions.

(b) Under s. 76 of the *Act*, the Commissioner is also required to prove that Visa and MasterCard maintain the price at which Acquirers provide acquiring services to merchants, either by imposing a minimum price or by influencing upwards or preventing the reduction of the ultimate price charged to merchants. The evidence is uncontroverted that Acquirers in Canada have absolute freedom to make pricing decisions with merchants; Visa and MasterCard play no role in Acquirers' pricing. Interchange fees are simply an operating cost of doing business for Acquirers, which puts them in the same position as any other for-profit business that has operating costs to factor into their pricing.

Visa and MasterCard do not maintain Acquirers' pricing anymore than jet fuel suppliers maintain the price at which airlines provide flights to passengers.

(c) As a matter of this Tribunal's discretion under s. 76, it should refuse to make an order given the significant uncertainties in the evidentiary record regarding the effect of the order sought by the Commissioner. The Canadian payments system is complex and integrated. The Minister of Finance has recently intervened in the payment system with a powerful *Voluntary Code of Conduct for the Credit and Debit Industry in Canada in 2010* ("Code of Conduct") that remains in its infancy and which addresses the same merchant concerns that underlie the present Application. In recognition of the complex and integrated nature of the payment system, the Minister of Finance announced just this month that his department will be reviewing the Code of Conduct to make sure it is keeping up with technological advancements in the payment system, something this Tribunal would also be called upon to do in the future if it issues an order in this proceeding. This evidence demonstrates that it is likely this Tribunal will be called upon to supervise and refine any order that is issued.

(d) This Tribunal should consider the wider effects of surcharging in the exercise of its discretion under s. 76. The merchants most likely to employ surcharging are those who already possess market power and who already enjoy the lowest card acceptance fees in Canada. And, as the Australia experience reveals, it is likely that some merchants will engage in predatory surcharging that will far exceed their reasonable costs of accepting credit cards. The technological obstacles to employing differential or selective surcharging will also mean that merchants will be required to employ blended rates for surcharging, which will undermine the very benefits the Commissioner alleges will accrue from surcharging. Since merchants already have the right to engage in other steering practices, such as providing discounted prices to consumers who use other forms of payment, there is no reason to mandate that Visa and MasterCard also provide the right to surcharge as both discounting and surcharging are equivalent.

(e) In exercising its discretion, this Tribunal should also consider the unintended consequences of issuing the requested order. Significant market stakeholders

are not parties to this Application, and will receive unfair competitive advantages from the proposed order. American Express, by way of example, will likely secure additional market share by reason of being exempt from the proposed order, as was the case after the regulatory interventions in Australia. In addition, the Commissioner's theory that reduced credit card transaction volumes is good for competition should be viewed with scepticism alongside the clear evidence that credit cards provide significant benefits to the Canadian retail economy. For example, credit cards facilitate retail transactions by providing a critical source of short term, revolving credit for consumers. In reality, most merchants will likely never employ surcharging and are simply asking this Tribunal to provide them with a tool they can use as additional leverage to negotiate with Visa and MasterCard in the future. This is not a proper reason to have the Tribunal to issue an order.

3. It is respectfully submitted that the Commissioner simply cannot avail herself of s. 76. The Application fails fundamentally to fit the legal framework relied upon.

INTERVENTION TOPIC 1: TD'S INTERACTIONS WITH MERCHANTS AS AN ACQUIRER

ACQUIRERS DO NOT RESELL CREDIT CARD NETWORK SERVICES

4. The Tribunal has heard detailed evidence relating to the question of whether Acquirers in Canada "resell" to merchants certain services that they purchased from Visa and MasterCard. TD invites this Tribunal to make the following findings in respect of this issue:

(a) The proper interpretation of s. 76 of the *Competition Act* requires the Commissioner to demonstrate that Acquirers do resell credit card network services that they purchase from Visa and MasterCard. It is not sufficient, as the Commissioner asserts, that the Tribunal find that Acquirers are simply customers of Visa and MasterCard.

(b) On the basis of the evidentiary record, there is no resale by Acquirers of anything that Visa or MasterCard sells to them. Rather, Acquirers provide the key foundation in the electronic and financial infrastructure for credit card transactions in Canada. Throughout the life cycle of a credit card transaction, the Visa and MasterCard networks are traversed for mere milliseconds and only to provide access by Acquirers to the Card Issuers who ultimately provide authorization for a given transaction.

5. The Tribunal ought to have regard to the following evidence in making its findings of fact regarding whether there is a resale:

(a) Jeff van Duynhoven's evidence regarding the services that Acquirers provide to merchants, including his evidence about the role that Acquirers play in the authorization, clearance and settlement processes.

(b) Visa, MasterCard and other Acquirers' evidence regarding the payment services offered by Visa and their interaction with the services provided by Acquirers.

(c) Key concessions made by the Commissioner's expert, Brian McCormack, on cross examination.

(d) Evidence from the Commissioner's experts, Professor Carlton and Dr. Frankel, which is inconsistent with the Commissioner's allegation of "resale".

A. Resale a Requisite Element of Section 76

(i) Section 76 Must Be Interpreted in Light of the Economic Mischief It Addresses

6. The prohibition on price maintenance in Canada dates back to 1951. The provision has undergone several amendments, but retained its core policy goal of requiring resellers to be able to set their prices independently. Today, the prohibition is contained in section 76, a recently amended provision, which has not yet been interpreted by the Tribunal or the Courts. In interpreting the text of the provision, the Tribunal must look to the goal of the section and the competitive harm it aims to address. This is consistent with the "modern" approach to statutory interpretation enunciated by the Supreme Court of Canada:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[1]

7. The price maintenance provision, like other sections of the *Competition Act*, should be interpreted with regards to the economic mischief Parliament intended to address. In the words of the Supreme Court in *Southam Inc. v. Canada (Director of Investigation and Research)*:

> The aims of the [*Competition Act*] are more "economic" than they are strictly "legal."[2]

8. The economic objectives of the *Competition Act* may be discerned, *inter alia*, from House of Commons debates, including those held in parliamentary committees,[3] academic

---

[1] *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42 559 at p. 580, para. 26, **Commissioner's BOA, Tab 17**; *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45 at p. 122, para. 154, **TD's BOA, Tab 4**; *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867 at p. 883, paras. 28-29, **Visa's BOA, Tab 34**; *Montréal (City) v. 2952-1366 Québec Inc.,* [2005] 3 S.C.R. 141 at pp. 151-152, para. 9, **TD's BOA, Tab 8**.

[2] *Southam v. Canada (Director of Investigation and Research, Competition Act)*, [1997] 1 S.C.R. 748 at para. 48, **TD's BOA, Tab 14.**

[3] *Nadeau Poultry Farm Limited v. Groupe Westco Inc et al,* 2009 Comp Trib 6 at para. 130, aff'd 2011 FCA 188, **Commissioner's BOA, Tab 22**.

commentary, studies and legislative committee reports.[4] Among other factors, the legislative history of a provision is relevant to determining its objective.[5]

9. In interpreting the *Competition Act*, the economic objectives of its provisions must take precedence over the minutiae of its wording. As the Supreme Court noted in *Irvine v. Canada (Restrictive Trade Practices Commission)*, Canadian competition legislation, while "no doubt clear and consistent when the statute was first enacted, …has over the years had new provisions patched on, older sections deleted, phrases wedged in or subsections carved out until the meaning of some of the provisions is obscure."[6] The Supreme Court further observed in *Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research)*, that as a result of the many amendments the *Competition Act* has undergone, it "may to some extent have lost its initial coherence."[7] The resulting patchwork of statutory provisions "seriously lack[s] any symmetry"[8] and must be interpreted purposefully, with regard to the economic mischief it aims to address, rather than in an overly technical manner.

10. The object of the *Competition Act* includes maintaining and encouraging competition in Canada in order to promote the efficiency and adaptability of the Canadian economy.[9] Thus, the *Competition Act* only permits intervention in independent actors' business practices in narrow circumstances, when such practices hamper competition or efficiency. It does not require, or, indeed, authorize the Tribunal to alter contractual arrangements among independent economic actors to facilitate negotiation of alternative business arrangements or enhance the

---

[4] *Imperial Brush v. Canada (Commissioner of Competition)*, [2008] CCTD No 2 at paras. 60-75, **TD's BOA, Tab 5**.
[5] *Sears Canada Inc v. Canada (Commissioner of Competition)* [2005] CCTD No 1 at paras. 87-93, **TD's BOA, Tab 12**.
[6] [1987] 1 S.C.R. 181 at para. 15, **TD's BOA, Tab 6**.
[7] [1990] 1 S.C.R. 425 at para. 22, **TD's BOA, Tab 16**.
[8] *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181 at para. 15, **TD's BOA, Tab 6**.
[9] *Competition Act*, section 1.1, **TD's BOA, Tab 1**.

bargaining power of one or more parties. As the Federal Court of Appeal stated in *Barcode Systems Inc. v. Symbol Technologies Canada ULC*:

> The purpose of the *Competition Act* is to maintain and encourage competition in Canada. It is not to provide a statutory cause of action for the resolution of a dispute between a supplier and a customer that has no bearing on the maintenance or encouragement of competition.[10]

(ii) The Economic Rationale for the Prohibition on Price Maintenance

11. Price maintenance is generally understood by economists as a business practice whereby "an upstream firm constrains its customers' downstream prices."[11] Accordingly, price maintenance law in Canada has always had, as its chief concern, the need to enable resellers to set prices independently, without pressure from suppliers. In particular, it has always been the goal of the provision to safeguard the right of a downstream reseller to discount the goods it acquires from an upstream supplier. Resale has always been a requisite element of the prohibition on vertical price maintenance. Without resale, there cannot be price maintenance.

12. As very recently expressed by Strathy J. of the Ontario Superior Court in *Fairview Donut Inc. v. The TDL Group Corp.*,

> The typical price maintenance offence occurs where a supplier uses threats, promises or agreements to prevent a customer from selling a product below a minimum price or refuses to supply a product to a customer or otherwise discriminates against the customer due to its low pricing policy.[12]

13. Referring to the predecessor section, the Manitoba Court of Appeal has stated in *R. v. Kito Canada Ltd.*:

> [T]he mischief aimed at by section 38 of the *Combines Investigation Act* was the practice of large corporations, with monopolistic or near monopolistic powers, artificially keeping retail prices high by coercing

---

[10] 2004 FCA 339 at para. 23**, TD's BOA, Tab 2**.

[11] Witness Statement of Kenneth Elzinga, Exhibit R-480, para. 76.

[12] *Fairview Donut Inc. v TDL Group Corp,* 2012 ONSC 1252, 2012 CarswellOnt 2223 (WL Can) at para. 587, **Mastercard's BOA, Tab 5**. In this case, the Court was interpreting the predecessor provision to the current section 76. The predecessor provision was adopted in 1976.

> independent retailers into fixing prices and by refusing to supply such independent retailers if they did not maintain the suggested list price of products. … Parliament wanted to protect the small retailer from undue pressure from large wholesalers, distributors and manufacturers.[13]

14. Academic literature, similarly, views the goal of price maintenance provisions as the protection of the public from suppliers' restrictions upon resellers' ability to price suppliers' products independently. Thus, Professor Trebilcock, in *The Common Law of Restraint of Trade*, states:

> Resale price maintenance in its most typical form refers to the practice of manufacturers stipulating as a condition of supply of their goods that retailers must adhere to a minimum schedule of prices when reselling the goods to consumers.[14]

15. As Professor Elzinga stated in an academic paper, and confirmed in his evidence, the traditional description of resale price maintenance can be formulated thus:

> A resale price maintenance agreement is a contract in which a manufacturer and a downstream distributor or retailer agree to a minimum or maximum price.[15]

16. As Professor Winter explained in his testimony before the Committee on Industry of the House of Commons,

> Resale price maintenance … is the practice of manufacturers setting a minimum price at which retailers can sell their product. A supplier of jeans, for example, might tell its retailers that they can carry its product only if they agree not to sell it below $30.[16]

---

[13] *R. v. Kito Canada Ltd.* (1976), 30 C.C.C. (2d) 531 (C.A.) at para. 22, **TD's BOA, Tab 23**. The Manitoba Court of Appeal was interpreting the original version of the provision, adopted in 1951.

[14] Michael Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* (Toronto: Carswell, 1986) at 356, **Visa's BOA, Tab 43**. See also: Michael Trebilcock et. al., *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press Incorporated, 2002) at 373, **Visa's BOA, Tab 44**. J. Anthony VanDuzer, "Assessing the Canadian Law and Practice on Predatory Pricing, Price Discrimination and Price Maintenance" (2000-01) 32 Ottawa L. Rev. 179 at 191, **Visa's BOA, Tab 42**. Ittai Paldor, "The Vertical Restraints Paradox: Justifying the Different Legal Treatment of Price and Non-Price Vertical Restraints" (2008) 58 U. Toronto L. J. 317 at 317, **Visa's BOA, Tab 41**.

[15] Elzinga Transcript (June 4, Public), p. 2779 (line 13) to p. 2780 (line 9), Exhibit A-489, p. 1841.

[16] House of Commons, Standing Committee on Industry (May 9, 2000) at 915, **TD's BOA, Tab 18**.

17. Accordingly, it has always been understood in Canada that the goal of the price maintenance provision is the protection of downstream resellers' autonomy to independently price the products they resell.

(iii) Legislative History of Section 76

18. Section 76 of the *Competition Act* is a recently amended provision, enacted in 2009. There is no jurisprudence interpreting this amended provision. Accordingly, resort must be had to the legislative history and case law interpreting its predecessors.

(iv) The 1951 Version

19. The prohibition upon price maintenance in Canadian law originated in 1951, when the Committee to Study Combines Legislation (the "MacQuarrie Committee") recommended the inclusion of a provision to prohibit price maintenance in the *Combines Investigation Act*. The MacQuarrie Committee defined price maintenance as "the practice designed to ensure that a particular article shall not be *resold* by the retailers, wholesalers or other distributers at less than the price prescribed by the supplier, that is in most cases the manufacturer."[17] The Committee found the practice to be "extensively applied and of growing importance in Canada."[18] In assessing its effects upon the economy, the Committee found that "the direct and immediate effect of resale price maintenance is the elimination of price competition among retailers in price-maintained goods" and its continuation, "on the growing scale [then] practiced," was not justified.[19]

---

[17] Canada, *Report of the Committee to Study Combines Legislation and Interim Report on Resale Price Maintenance* (Ottawa: Queen's Printer, 1952), at 57 ["MacQuarrie Report"], emphasis added, **Visa's BOA, Tab 48**.

[18] MacQuarrie Report at 67, **Visa's BOA, Tab 48**.

[19] MacQuarrie Report at 71, **Visa's BOA, Tab 48**.

20. The MacQuarrie Committee concluded:

> It should be made an offense for a manufacturer or other supplier:
>
> 1. to recommend or prescribe minimum resale prices for his products;
>
> 2. to refuse to sell, to withdraw a franchise or to take any other form of action as a means of *enforcing minimum resale prices*.[20]

21. The resulting provision read, in part, as follows:

> 34(2) No dealer shall directly or indirectly by agreement, threat, promise or any other means whatsoever, *require or induce or attempt to require or induce any other person to resell an article or commodity*, …
>
> (b) at a price not less than a minimum price specified by the dealer or established by agreement.[21]

22. Thus, the element of resale was central to the original offence of price maintenance. Without resale, the offence could not be made out. Indeed, the very mischief the provision aimed to address was attempts by suppliers to influence the price at which "a particular article shall … be resold."[22]

(v) The 1976 Amendments

23. In 1976, as part of a substantial overhaul of the *Combines Investigation Act*, the price maintenance provision was amended. The word "resale" was removed, in order that the section capture not only vertical, but also horizontal restraints, i.e. conduct in which retailer competitors, rather than suppliers, attempt to influence upward the price of a product. The definition of "product" was also expanded to include services, including credit card services.

---

[20] MacQuarrie Report at 71, emphasis added, **Visa's BOA, Tab 48**.

[21] *Combines Investigation Act*, RSC 1927, c26, as amended by SC 1952, c39, s.34(2)(b), emphasis added, **Mastercard's BOA, Tab 15**.

[22] MacQuarrie Report at 57, **Visa's BOA, Tab 48**.

24. The rationale for the amendments was presented by the Bureau in its *Background Papers* as follows:

> The amendments to the resale price maintenance provisions have attempted to remove certain deficiencies in the former provisions in relation to resale at a specified price. … It has been shown that it was possible to circumvent the provision if a supplier required that resale take place at a higher price than the price at which an article was currently being sold but did not specify the required higher resale price. … The provisions no longer refer to requiring or inducing a person to sell at a specified price.[23]

25. As of 1976, the relevant provision read, in part, as follows:[24]

> 61. (1) No one who is engaged in the business of producing or supplying a product, or who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trademark, copyright or registered industrial design shall, directly or indirectly,
>
> (a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada.

26. Under the post-1976 amendment provision, cases involving vertical restraints continued to involve the *resale* of a product from supplier to retailer.[25] In each of these cases, the conduct that led to the criminal conviction involved the resale of a product, the price of which the convicted supplier attempted to influence. In the words of the Ontario District Court, an offence

---

[23] Canada, Bureau of Competition Policy. *Trade Practices Reviewable by the Restrictive Trade Practices Commission* (Ottawa: Consumer and Corporate Affairs, 1976) at 38 and 54, **Visa's BOA, Tab 47**.

[24] *Combines Investigation Act*, R.S.C. 1970, C. 34, s. 61, **Commissioner's BOA, Tab 37**.

[25] See, e.g., *R v. Church and Co. (Canada) Ltd*. (1980), 52 C.P.R. (2d) 21, 1980 CarswellOnt 1463 (Ct. J. Prov. Div.) [sentencing decision regarding a shoe manufacturer's attempt to establish a retail price below which retailers could not sell its shoes], **Visa's BOA, Tab 11**; *R. v. Cluett Peabody Canada Inc.* (1982), 64 C.P.R. (2d) 30, [1982] O.J No. 3643 (Co. Ct. J. Crim. Ct.) [a manufacturer's attempt to influence the retail prices at which its dress shoes would be resold by dealers to merchants], **Visa's BOA, Tab 12**; *R. v. Epson (Canada) Ltd.* (1987), 19 C.P.R. (3d) 195, [1987] O.J. No. 2708 (Dist. Ct.) [sentencing decision regarding a computer products manufacturer's agreement with its dealers concerning the price at which its products could be resold], **Visa's BOA, Tab 14**; *R. v. George Lanthier & Fils Ltee* (1986), 12 C.P.R. (3d) 282, [1986] O.J. No. 3046 (Dist. Ct.) [a supplier's efforts to influence the prices at which its baked goods would be sold to the public], **Visa's BOA, Tab 15**; *R. v. North Sailing Products Ltd.* (1987), 18 C.P.R. (3d) 497, [1987] O.J. No. 2706 (Dist. Ct.) [a yacht broker's attempt to prevent its dealer from discounting its products], **Visa's BOA, Tab 22**; *R. v. Rainbow Jean Co. Ltd.* (1985), 6 C.P.R. (3d) 75, [1985] P.E.I.J. No. 98 (Prov. Ct.) [a jeans manufacturer's attempt to prevent the discounting of its jeans by a retailer], **Visa's BOA, Tab 27**; *R. v. Rolex Watch Co. of Canada*, [1978] O.J. No. 2012 (Co. Ct.) [a luxury watch manufacturer's effort to prevent the discounting of its watches by several jewellers], **Visa's BOA, Tab 28**; *R. v. Shell Canada Products Ltd*. (1990), 63 Man. R. (2d) 1, [1990] M.J. No. 73 (C.A.), **Visa's BOA, Tab 30**; *R. v. Sunoco Inc.* [1986] O.J. No. 2319 (H.C.J.) at para. 45, **Commissioner's BOA, Tab 20** [a gasoline supplier's effort to prevent a dealer from discounting is gasoline].

under this section is committed "if the manufacturer intends to enter into an agreement which attempts to influence upward or discourage downward pricing by the dealer."[26]

27. The 1976 amendments made two other important changes. First it broadened who the section applied to so that rather than merely applying to dealers it now applied "irrespective of whether that person is the supplier of the product" and at the same time the amendments to the section added the words "who extend credit by way of credit cards or is otherwise engaged in a business that relates to credit cards". The latter change was undertaken to ensure that retailers would be permitted to discount for cash in response to a proposed amendment which sought to prohibit payment by credit cards.[27] The background papers explain the effect of the amendments:

> It is also anticipated that this amendment will effectively curtail the practices engaged in by a firm providing credit card services for retailers of preventing a retailer from giving a discount for cash. This provision will, therefore, be of benefit not only to retailers but to consumers.[28]

28. Post-1976 cases which involve price maintenance or attempted price maintenance include *R. v. George Lanthier & Fils Ltee*,[29] in which the accused baker was charged with price maintenance in respect of the bread it supplied to a Cornwall retailer. When the retailer stated its intention to advertise below the baker's suggested retail price in a local newspaper, the baker's representative told the retailer that the baker could "limit the amount of bread going into [the retailer's] store."[30] The baker's representative's words were found to be a "threat", the

---

[26] *R. v. Sunoco Inc.* [1986] O.J. No. 2319 (H.C.J.) at para. 45, **Commissioner's BOA, Tab 20.**

[27] House of Commons, Standing Committee on Finance, Trade and Economic Affairs, Minutes and Proceedings of Evidence, 30th Parl., Sess., No. 55 (3 June 1975) at 1752-1753, **Visa's BOA, Tab 50.**

[28] Canada, Bureau of Competition Policy. *Trade Practices Reviewable by the Restrictive Trade Practices Commission* (Ottawa: Consumer and Corporate Affairs, 1976) at 1556, **Visa's BOA, Tab 47**.

[29] *R. v. George Lanthier & Fils Ltee* (1986), 12 C.P.R. (3d) 282, [1986] O.J. No. 3046 (Dist. Ct.), **Visa's BOA, Tab 15**.

[30] *R. v. George Lanthier & Fils Ltee* (1986), 12 C.P.R. (3d) 282, [1986] O.J. No. 3046 (Dist. Ct.) at para. 11, **Visa's BOA, Tab 15**.

intent of which was to discourage the reduction of the price at which the retailer desired to advertise the product in question. The baker was convicted of price maintenance.[31]

29. Similarly, in *R. v. Rainbow Jean Co. Ltd.*,[32] a supplier of jeans threatened to cease supplying jeans to a particular retailer who was reselling those jeans below the prices set by local competitors. When the retailer's representative met the supplier's representative, to examine the samples and place orders, the supplier's representative stated that he was getting complaints from other retailers in the area, in respect of the retailer's low prices. The supplier then stated that should the retailer continue undercutting his competitors' prices, the supplier would "have to cut [him] off" from the supply of jeans.[33] On the basis of this conduct, the supplier was convicted of price maintenance.[34]

30. In *R. v. North Sailing Products Ltd.*,[35] a yacht hardware dealer ordered a number of pieces of hardware from a supplier. The dealer was denied a discount originally promised by the supplier. The supplier's representative stated that the denial of the discount was caused by the reseller's discounting of the yacht hardware which was hurting the sales of others.[36] The Court found that the language used by the company's representative was an attempt by a threat, promise, or like means to influence the dealer's prices. North Sailing Products Ltd was convicted of price maintenance.[37]

---

[31] *R. v. George Lanthier & Fils Ltee* (1986), 12 C.P.R. (3d) 282, [1986] O.J. No. 3046 (Dist. Ct.) at paras. 12-13, **Visa's BOA, Tab 15**.

[32] *R. v. Rainbow Jean Co. Ltd.* (1985), 6 C.P.R. (3d) 75 (Prov. Ct.), (1985), 6 C.P.R. (3d) 75, [1985] P.E.I.J. No. 98 (Prov. Ct.), **Visa's BOA, Tab 27**.

[33] *R. v. Rainbow Jean Co. Ltd.* (1985), 6 C.P.R. (3d) 75, [1985] P.E.I.J. No. 98 (Prov. Ct.) at para. 7, **Visa's BOA, Tab 27**.

[34] *R. v. Rainbow Jean Co. Ltd.* (1985), 6 C.P.R. (3d) 75 (Prov. Ct.) (1985), 6 C.P.R. (3d) 75, [1985] P.E.I.J. No. 98 (Prov. Ct.) at para. 18, **Visa's BOA, Tab 27.**

[35] (1987), 18 C.P.R. (3d) 497, **Visa's BOA, Tab 22.**

[36] *R. v. North Sailing Products Ltd.*, (1987), 18 C.P.R. (3d) 497, [1987] O.J. No. 2706 (Dist. Ct.) at para. 16, **Visa's BOA, Tab 22.**

[37] *R. v. North Sailing Products Ltd.*, (1987), 18 C.P.R. (3d) 497, [1987] O.J. No. 2706 (Dist. Ct.) at paras. 97-98, **Visa's BOA, Tab 22.**

31. The fact that, despite the removal of the word "resale" from the section, resale continued to be a required element following the 1976 Amendments, is also illustrated by Justice Strathy's very recent decision in *Fairview Donut Inc. v. TDL Group Corp.*[38] In that case, a group of Tim Hortons franchisees alleged that the franchisor engaged in price maintenance by mandating that they purchase supplies from Tim Hortons or its designated suppliers. In dismissing the Plaintiffs' individual claims, the Court observed that the *Competition Act* did not prohibit a supplier from *suggesting* a retail price, so long as the person to whom the suggestion was made was free not to accept it.[39] The franchisees' agreements with the franchisor contained express provisions in order to comply with this principle. Further:

> To be guilty of the criminal offence of price maintenance, *a party must do something more than 'influence upward' the price of its own product by making a profit on a product that it sells to a second party for sale to a third party. It must be shown that the first party has taken other measures to influence upward or discourage the reduction of the price at which the second party sells the product. If an ordinary commercial agreement between the first party and the second party could be an 'agreement, threat, promise or any like means', the section would criminalize routine commercial conduct, which could hardly have been the intent*.
>
> …
>
> In this case, the plaintiffs complain that the price maintenance is effectuated because they are 'captive' and have no ability to negotiate with suppliers or to buy from other suppliers. … That may be true. Franchisees may be stuck with one price which is, for practical purposes, non-negotiable. *That is not, however, the result of conduct of Tim Hortons that is directed towards the reduction of competition. It is the result of a bargain made between Tim Hortons and its franchisees* whereby franchisees give up the autonomy they would have as independent business people and agree to buy their products from suppliers and at prices specified by Tim Hortons.
>
> …
>
> This lack of autonomy is the result of legitimate agreements entered into by the plaintiffs and Tim Hortons for legitimate purposes. Moreover, *there is nothing in the distribution agreements that prohibits the distributors from charging lesser amounts to the franchisees*. They cannot charge more than the stated prices, but they can charge less.

---

[38] *Fairview Donut Inc. v TDL Group Corp,* 2012 ONSC 1252, 2012 CarswellOnt 2223 (WL Can), **Mastercard's BOA, Tab 5**.

[39] *Fairview Donut Inc. v TDL Group Corp,* 2012 ONSC 1252, 2012 CarswellOnt 2223 (WL Can) at para. 583, **Mastercard's BOA, Tab 5**.

> The same applies to the franchisees. Tim Hortons specifies maximum prices, but the franchisees are free to reduce those prices. In a nutshell, *there is no evidence whatsoever of any agreement or conduct by Tim Hortons that would interfere with the ability of distributors to sell the par baked products at prices of their choice*, as long as they do not exceed the prices stipulated by Tim Hortons.[40]

32. As the decision demonstrates, following the 1976 Amendments, despite the removal of the term "resale" from the provision, price maintenance involving vertical restraints continued to require the resale of a product from a supplier to a downstream distributor.[41] The decision further demonstrates that so long as the downstream distributors can set the price of the products they resell, no price maintenance can occur.

(vi) <u>The 2009 Amendments</u>

33. The latest amendments to the price maintenance provision, although passed in 2009, originated in a prolonged evolution of economic theory on the subject of resale price maintenance. Over the past decade, academic experts increasingly came to the conclusion that resale price maintenance can have pro-competitive effects and, accordingly, must be converted from a *per se* offence to a civilly reviewable practice subject to the so-called "rule of reason" (i.e. one that only engages conduct that is anti-competitive). The evolving economic thinking also resulted in the express reintroduction of "resale" into the text of the section, limiting the provision to regulation of vertical restraints.

34. Writing as early as 1986, Professor Trebilcock noted that the "sinister explanations" of the harm occasioned by resale price maintenance were "[no] longer regarded by economic analysts as possessing wide explanatory power." In particular, he noted that the resale price

---

[40] *Fairview Donut Inc. v TDL Group Corp,* 2012 ONSC 1252, 2012 CarswellOnt 2223 (WL Can) at paras. 600, 602 and 603, emphasis added, **Mastercard's BOA, Tab 5**.

[41] See also: Canada, Competition Policy Review Panel. *Compete to Win* (Ottawa: Public Works and Government Services Canada, 2008) at 58, **Visa's BOA, Tab 45**: "The resale price maintenance provisions of the *Competition Act* [i.e. the former s. 61], broadly speaking, address pricing issues that can arise *between suppliers and resellers of a product*." (Emphasis added).

maintenance is not, *ipso facto*, a manifestation of monopoly or market power of the upstream manufacturer.[42]

35. Professor Anthony J. VanDuzer, writing in the *Ottawa Law Review*, similarly observed of the previous version of the provision:

> The present provision dealing with price maintenance is not designed to address anticompetitive price maintenance … Consequently, in its present form, it is not an accurate tool for taking enforcement action and likely imposes excessive compliance and monitoring costs on business. This chilling effect is exacerbated by the criminal nature of the price maintenance provision.
>
> …
>
> With respect to all forms of vertical price maintenance, the economic analysis … indicates that suppliers should be able to take advantage of efficiency-based defences, such as encouraging customers to devote more resources to the provision of product service.[43]

36. Professor Winter, testifying before Standing Committee on Industry of the House of Commons stated:

> Leaving pricing practices in the criminal section means a reliance on courts to make the distinction between the anti-competitive and pro-competitive use of practices. We simply need a specialized tribunal to make that difficult assessment. In addition, there's no reason for a practice like resale price maintenance to be per se illegal under a criminal section.[44]

37. Professor Thomas W. Ross of the University of British Columbia, testifying before the same Committee, stated:

> On resale price maintenance, it's a sort of anomaly, given that we recognize the possible efficiency benefits of things like exclusive dealing and tied selling. We don't make them criminal and we don't make them per se illegal. It's sort of odd that we do that to resale price maintenance.

---

[42] Michael J. Trebilcock, *The Common Law of Restraint of Trade* (Carswell: Toronto, 1986) at 356, **Visa's BOA, Tab 43**.

[43] J. Anthony VanDuzer, "Assessing the Canadian Law and Practice on Predatory Pricing, Price Discrimination and Price Maintenance" (2001) 32 Ottawa L. Rev. 179 at 226, **Visa's BOA, Tab 42**.

[44] House of Commons, Standing Committee on Industry (May 9, 2000) at p. 0910, **TD's BOA, Tab 18**.

> There are lots of good reasons to use resale price maintenance that have nothing to do with hurting competition.[45]

38. Finally, Mr. Paul Crampton (as he then was) testifying before the same Committee several years later, explained:

> [T]he pro-competitive aspect of it, of resale price maintenance, is that it provides dealers with a margin to invest in providing services to expand the demand for the product. An economist would typically tell you that when you expand the demand for the product, you increase aggregate wealth in the economy, so it's pro-competitive in that sense. … Resale price maintenance would allow you to engage in that competition. By making it a criminal offence it chills that type of pro-competitive behaviour.[46]

39. The evolving academic conception of price maintenance exemplified above found expression in a number of policy recommendations. In his 1999 report commissioned by the Bureau, Professor VanDuzer (the "VanDuzer Report") recommended, *inter alia*, that:

(a) competition rules dealing with vertical price maintenance be converted from a *per se* offence to one that takes into account the competitive effects of the price maintenance, including any efficiency based explanations and the market power of the supplier.

(b) vertical price maintenance be subject to civil review under the abuse of dominance provision, section 79.

(c) the criminal price maintenance provision, section 61, be amended to limit it to horizontal conduct.[47]

---

[45] House of Commons, Standing Committee on Industry (May 4, 2000), at p. 0920, **TD's BOA, Tab 19**.

[46] House of Commons, Standing Committee on Industry, Science and Technology (February 5, 2002), at p. 1230, **TD's BOA, Tab 20**.

[47] Canada, Competition Bureau, *Anticompetitive Pricing Practices and the Competition Act Theory, Law, and Practice* by J Anthony VanDuzer & Gilles Paquet (Ottawa: Competition Bureau, 1999) at page 84, **Visa's BOA, Tab 45**. See also testimony of Professor Anthony VanDuzer, House of Commons, Standing Committee on Industry (December 7, 1999) at 1545, p. 4, **TD's BOA, Tab 21**, calling for the conversion of price maintenance section from a per se offence to a "rule of reason" practice: "to the extent that there are efficiency justifications for price maintenance, the per se criminal prohibition we have in the act is probably over-inclusive."

40. In 2002, the House of Commons Standing Committee on Industry, Science and Technology released a report entitled "A Plan to Modernize Canada's Competition Regime" ("IST Report"), which observed:

> All witnesses, except Bureau officials, who commented on price maintenance had a recurring theme: vertical price maintenance should be decriminalized and horizontal price maintenance should be moved to the conspiracy provision. The Bureau, the lone dissenter, could only offer a higher success rate when prosecuting under a per se offence as its reason for departing from expert opinion. … [T]he Committee sees no social benefit in risking convictions of, and a 'chilling effect' on pro-competitive vertical price maintenance under the criminal section of the Act, when the civil section offers a more reasonable approach and a better result.[48]

41. The IST Report made a number of recommendations regarding the *Competition Act*, including that: (1) price maintenance involving horizontal restraints be added to the conspiracy provision (section 45); and (2) price maintenance involving vertical restraints be reviewed under the abuse of dominance provision (section 79).[49]

42. Finally, in 2008, Industry Canada's Competition Policy Review Panel released its final report entitled "Compete to Win" ("the CPRP Report"), which again recommended that price maintenance be decriminalized:

> The resale price maintenance provisions of the Competition Act, broadly speaking, *address pricing issues that can arise between suppliers and resellers of a product*, but do so as a criminal offence under the legislation. This is an area of Canadian competition law that is more restrictive than comparable US law. Other provisions of the Competition Act, such as those relating to refusal to deal and exclusive dealing, address competition issues between suppliers and resellers as civil matters. The Panel believes that resale price maintenance should also be treated as a civil matter.[50]

---

[48] House of Commons, "A Plan to Modernize Canada's Competition Regime, Report on the Standing Committee on Industry, Science, and Technology dated April 2002 (Walt Lastewka, M.P., Chair) at 75, **Mastercard's BOA, Tab 9**.

[49] House of Commons, "A Plan to Modernize Canada's Competition Regime, Report on the Standing Committee on Industry, Science, and Technology dated April 2002 (Walt Lastewka, M.P., Chair) at 76, **Mastercard's BOA, Tab 9**.

[50] Canada. Competition Policy Review Panel. *Compete to Win* (Ottawa: Public Works and Government Services Canada, 2008) at 58 (emphasis added), **Visa's BOA, Tab 46**.

43. The CPRP Report's principal proposal with respect to the price maintenance provision was that the provision be confined to vertical restraints only, and that the practice be decriminalized. Parliament accepted both recommendations.

44. The 2009 amendments narrowed the price maintenance provision considerably and amended it in the following ways:

(a) The provision was converted from a criminal offence into a civil reviewable practice;

(b) The word "resale" was reintroduced into the definition of the offence, thus limiting it to conduct involving vertical restraints only;

(c) The provision was converted from a *per se* offence to a "rule of reason" one, where liability will be found only if the conduct has an adverse effect on competition in the relevant market;

(d) The making of an order under the section is discretionary ("the Tribunal *may* make an order"); and

(e) The provision became subject to a limited private right of access to the Tribunal.

45. The provision, in relevant part, now reads:

> 76. (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that
>
> (a) a person referred to in subsection (3) directly or indirectly
>
> (i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada,
>
> …
>
> and
>
> (b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.

> Order
>
> (2) The Tribunal may make an order prohibiting the person referred to in subsection (3) from continuing to engage in the conduct referred to in paragraph (1)(a) or requiring them to accept another person as a customer within a specified time on usual trade terms.
>
> Persons subject to order
>
> (3) An order may be made under subsection (2) against a person who
>
> (a) is engaged in the business of producing or supplying a product;
>
> (b) extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards …

46. The 2009 amendments did not create a new offence. They merely amended the long-existing provision to make a more efficient enforcement tool and eliminate excessive compliance costs for businesses. Because horizontal restraints no longer form a part of the price maintenance prohibition, only conduct involving vertical restraints remains subject to section 76. Resale formed an element of price maintenance involving vertical restraints following the 1976 amendments, although the very word "resale" was removed. It continues to be a required element of the current version. The Commissioner's proposed reading of the section cannot stand.

47. The Bureau's own *Guide to Amendments to the Competition Act*, which aims to elucidate the most recent version of the provision, supports the position that resale is a requisite element of the prohibition on price maintenance in section 76. The *Guide* states:

> The price maintenance provisions are designed to provide *resellers of products* with the freedom to set their own prices…[51]

(vii) Distinction between Section 76 and Section 79

48. The Commissioner wrongly seeks to apply the broad interpretation appropriate for abuse of dominance (section 79) in this case. It deliberately chose to bring its application under the

[51] Competition Bureau of Canada. *A Guide to Amendments to the Competition Act,* April 22, 2009 at 2, **MasterCard's BOA, Tab 10**.

narrowly focused resale price maintenance provisions of the *Competition Act*. TD in no way suggests that the abuse of dominance provision has any proper application to the facts before this Tribunal, but observes that the broader language of the abuse of dominance provision is balanced by requiring the Commissioner to demonstrate a greater negative impact on competition. It is simply wrong and inconsistent with Parliament's intention for the Commissioner to advocate for an expansive reading of the price maintenance provision and thus seek to turn s. 76 into an abuse of dominance 'light' provision.

49. As discussed above, in legislating the 2009 Amendments to the *Competition Act*, Parliament expressly rejected both the VanDuzer Report's and the IST Report's recommendation that vertical price maintenance be addressed as an "anticompetitive act" within the more general abuse of dominance provision (section 79). This legislative choice reinforced the distinction between the two provisions. In contrast to the broadly worded section 79, which targets abuse of dominant position generally, the narrow focus of section 76 is a prohibition against suppliers' attempts to constrain the pricing independence of downstream resellers.

50. While section 79, due to its broad scope, requires the Commissioner to prove that the conduct complained of is "preventing or lessening competition *substantially* in a market", the narrowly focused section 76 requires merely that the conduct have "an adverse effect on competition in a market."

51. The Commissioner erroneously attempts to shoehorn the facts of the instant case into section 76, despite the absence of resale, a requisite element under the section, in order to try to benefit from the lower burden of proof in respect of the competitive effect of the conduct complained of.

52. The Commissioner's Application must be dismissed. It fails to prove the requisite elements of price maintenance. In particular, the Commissioner's complete failure to establish that acquirers "resell" credit card network services to merchants is fatal to her Application.

B. No Evidence of Resale

53. The evidentiary record overwhelmingly establishes that Acquirers in Canada provide distinct services to merchants to enable them to accept credit cards. Contrary to the Commissioner's allegation, Acquirers do not "resell credit card network services" to merchants. Instead, Acquirers and build and operate proprietary networks of their own and deploy point-of-sale technology to merchants in order to enable payment card transactions. Acquirers use the Visa and MasterCard networks for mere milliseconds in order to access Card Issuers who ultimately provide authorization for transactions.

(i) Evidence of Jeff van Duynhoven

54. Jeff van Duynhoven, President of TD Merchant Services, TD's acquiring business, has explained the nature of the credit card acceptance and processing services that Acquirers such as TD provide to Merchants. [redacted][52]

55. Mr. van Duynhoven's evidence makes clear that Acquirers provide credit card acceptance and processing services that are wholly distinct from the services they purchase from Visa and MasterCard. The distinctions between the services provided by Acquirers and those provided by Visa and MasterCard can best be understood from the perspective of the "life

[52] [redacted]

cycle of [a credit card] transaction".[53] The life cycle of a credit card transaction has the following phases:

(a) The pre-transactional phase, which is critically important and takes place *exclusively between merchants and Acquirers*;

(b) The authorization, which requires the relevant Acquirer to seek, and the relevant Card Issuer to provide, authorization for a transaction by briefly traversing the electronic networks of Visa or MasterCard;

(c) The clearance and settlement as between merchants and Acquirers, which takes place exclusively between those parties *without the involvement of Visa or MasterCard*;

(d) The clearance and settlement between Acquirers and Card Issuers, during which Visa and MasterCard play a role by relaying the information and funds that originate with Acquirers and Card Issuers; and

(e) The post-transactional phase, in which Acquirers in Canada face residual financial risk for chargebacks and merchant default.

Throughout all of these phases, Acquirers are exclusively responsible for providing all service, support and assistance to Merchants. Each of these phases and the relevant evidence is further summarized below.

56. ***The Pre-Transactional Phase***. As Mr. van Duynhoven testified, "before a single [credit card] transaction can actually occur … [the] merchant needs to be set up on [an Acquirer's] system".[54] Typically, this will involve TD providing point-of-sale devices to merchants.[55] In this regard, TD designs point-of-sale technology, such as key-pad terminals,[56] which will ultimately

[53] van Duynhoven Transcript (May 31 Public), p. 2501 (lines 6-19).
[54] van Duynhoven Transcript (May 31 Public), p. 2501 (lines 20-23).
[55] van Duynhoven Transcript (May 31 Public), p. 2502 (lines 1-7).
[56] van Duynhoven Statement, Exhibit I-456, para. 49(a).

connect the merchant to TD's proprietary electronic network.[57] As Mr. van Duynhoven testified, once a merchant has a point-of-sale device, the next step is for TD to "program [the] point-of-sale device to accept a variety of cards that that merchant wishes to accept", a process that in some instances takes the form of a "complex technology project" costing "hundreds of thousands of dollars".[58] TD has a team of ■ professionals dedicated to delivering point-of-sale technology solutions.[59] While the Commissioner would, without foundation, like to characterize the point-of-sale technology process as an "ancillary service," in fact it is a fundamental step in the life cycle of a credit card transaction.

57. ***The Authorization***. In order for a merchant to process a credit card transaction, it must use the point-of-sale device to obtain authorization. Authorization requests first flow from a merchant's point-of-sale device to an Acquirer's proprietary network. All Acquirers in Canada, including TD, have proprietary computer networks that facilitate connections between merchants, payment card networks, including but not limited to, Visa and MasterCard, and the thousands of Card Issuers around the globe who ultimately provide authorization for individual transactions.[60] Once an authorization request traverses the point-of-sale terminal to TD's network, TD employs "cryptographic keys to identify that terminal as one of [TD's] terminals to make sure there [are no] fraudulent transactions being introduced into the system."[61] TD will then identify the applicable payment network for the transaction and route the authorization request over to that payment network, which in turn "routes the transaction to the [I]ssuer [who

[57] van Duynhoven Statement, Exhibit I-456, paras. 49(a), 50-51.
[58] van Duynhoven Transcript (May 31 Public), p. 2502 (lines 1-7).
[59] van Duynhoven Statement, Exhibit I-457, paras. 49(a), 50-51.
[60] van Duynhoven Statement, Exhibit I-456, paras. 16, 44-46.
[61] van Duynhoven Transcript (May 31 Public), p. 2502 (lines 18-22).

then] makes the determination if [it is] going to authorize … or decline that transaction …"[62] As Mr. van Duynhoven testified:

> [T]he only part [of the process] that actually touches the Visa [or MasterCard] network[s] is those few milliseconds during the authorization process that I am actually traversing over the Visa [or MasterCard] network[s] to get to the ultimate [card] issuer to provide that authorization.[63]

58. ***Clearance and Settlement Between Merchants and Acquirers.*** For merchants, the purpose of the clearance and settlement process is to have their Acquirers deposit into their bank accounts the monetary value of their authorized transactions for the applicable period. This clearance and settlement process takes place "exclusively" between TD and its merchants in the sense that *"at no time is Visa or MasterCard involved"*.[64] The process typically takes place at the end of each business day and begins with the merchant "identif[ying] all of [the] transactions that they processed throughout that day" and sending that information to TD through the point-of-sale device. Once TD receives this "clearance" data from the merchant over its electronic network,[65] TD will enter into the settlement process with that merchant. TD will "aggregate [the clearance] information," process that information and then forward payment to the merchant on the "same business day".[66] Importantly, TD's merchants enjoy daily cash flow equal to 100% of the value of the credit card transactions they complete, with TD only collecting its fees from Merchants at the end of the month.[67] Among other things that they compete on, Acquirers in Canada compete with one another in relation to the time taken to settle with merchants.[68]

---

[62] van Duynhoven Transcript (May 31 Public), p. 2495 (lines 15-20).
[63] van Duynhoven Transcript (May 31 Public), p. 2505 (lines 10-16).
[64] van Duynhoven Transcript (May 31 Public), p. 2498 (line 22) to p. 2499 (line 13).
[65] van Duynhoven Transcript (May 31 Public), p. 2497 (line 21) to p. 2498 (line 5).
[66] van Duynhoven Transcript (May 31 Public), p. 2498 (lines 6-13).
[67] van Duynhoven Transcript (May 31 Public), p. 2504 (lines 4-14); van Duynhoven Statement, para. 67(b).
[68] Stanton Statement, Exhibit R-443, para. 47.

59. ***Clearance and Settlement Between Acquirers and Card Issuers***. The day after TD settles with its Merchants, it will enter into the clearance and settlement process with Visa and MasterCard. This involves TD aggregating all of its Visa and MasterCard transactions and transmitting to each of Visa and MasterCard a "clearing file" of all of the transactions for which authorization was previously obtained, and for which settlement is now sought, from the applicable Card Issuers. Visa and MasterCard in turn aggregate all the clearing data they receive from Acquirers and transmit that data to the Card Issuers who had previously provided the authorization for those transactions. The Card Issuers in turn transmit to Visa and MasterCard the total value of the transactions they authorized, minus "the interchange revenue" for those transactions, which the Issuer retains.[69] Visa/MasterCard then transmit to Acquirers the value of their transactions, minus the interchange revenue retained by the Card Issuers. Final settlement with Acquirers typically occurs "one to two business days" after TD settles with its Merchants.[70]

60. The Card Issuers' retention of interchange revenue requires TD to "float" this capital over the course of the month, since it has already paid the full transaction value to its merchants. By way of illustration, over the course of the month of December, 2011, TD's acquiring business was required to float over [redacted] in Visa interchange fees and approximately [redacted] in MasterCard interchange fees.[71] This reflects a float of the same order of magnitude as any other month.[72] The evidence is clear that this is the practice employed by most Acquirers in Canada,[73] including Global Payments.[74]

---

[69] van Duynhoven Transcript (May 31 Public), p. 2499 (line 17) to p. 2500 (line 20).

[70] van Duynhoven Transcript (May 31 Public), p. 2499 (line 17) to p. 2500 (line 20).

[71] Van Duynhoven Statement, Exhibit I-457, para. 64(d).

[72] Van Duynhoven Transcript (May 31 Public), p. 2506 (lines 13-19).

[73] van Duynhoven Transcript (May 31, Public), p. 2507 (line 9) to p. 2508 (line 3); McCormack acknowledged in chief that the "general market practice in Canada … is to pay the merchant the gross settlement amount .. .and then charge the merchant the merchant service fee down the road" (at May 14, Public, p. 579, lines 10-14).

[74] Cohen Transcript (June 6, Public), p. 3285 (line 22) to p. 3286 (line 9).

61. ***The Post-Transaction Phase: Residual Risk on TD***. As an Acquirer, TD remains financially responsible for the transactions it acquires.[75] This creates two areas of residual risk for TD after the authorization, clearance and settlement processes are complete. First, TD remains responsible for any transaction that results in a "charge-back" from the Card Issuer such as, for example, where a Cardholder has paid for but never received the merchant's goods or services.[76] Second, through the clearance and settlement processes described above, TD undertakes "accounts receivable risk" in that it has "floated" for its merchants all the interchange fees for the month but will not collect any of its fees until after its billing process is complete at the end of the month.[77]

62. ***Front-Line Service, Support and Assistance to Merchants*.** Throughout the entire lifecycle of a credit card transaction, the Acquirer remains at the "front line" of the process for merchants, providing all service, support and technical assistance to merchants who accept Visa and MasterCard credit cards. TD maintains a call centre with [redacted] professionals who are dedicated to the provision of service and support to merchants across Canada, which is open 24 hours a day, 7 days a week.[78] In addition, TD has a team of over [redacted] service technicians across Canada who are mobilized daily to attend at Merchant locations to provide on-site service and assistance.[79] All stakeholders rely on Acquirers to provide this service infrastructure for the credit card system in Canada.[80]

---

[75] Van Duynhoven Statement, I-456, paras. 41-43, 64(c).
[76] van Duynhoven Transcript (May 31, Public), p. 2503 (line 2) to p. 2504 (line 3).
[77] van Duynhoven Transcript (May 31, Public), p. 2504 (lines 4-14).
[78] Van Duynhoven Statement, Exhibit I-457, paras. 49(c), 74-77.
[79] van Duynhoven Statement, Exhibit I-457, paras. 49(c), 74-77.
[80] van Duynhoven Transcript (May 31, Public), p. 2504 (lines 15-25).

(ii) Visa, MasterCard and Other Acquirer Evidence

63. The role of Visa and MasterCard within the lifecycle of a credit card transaction was explained in the evidence of Bill Sheedy of Visa and can be usefully contrasted with TD's evidence regarding the role of acquirers. As Mr. Sheedy explained, Visa plays three roles:

(a) Visa and MasterCard sign up and develop "relationships with financial institutions … that sign up merchants to accept the card [*i.e.*, Acquirers] and those that issue cards to consumers [*i.e.*, Issuers]."

(b) Payment Networks operate a "telecommunications infrastructure" to facilitate transactions and the movement of money. This essentially mirrors Mr. van Duynhoven's evidence that the Visa/MasterCard networks are simply one step in the process whereby Acquirers communicate with Card Issuers around the world who provide authorization and settlement money for transactions.

(c) Payment Networks "publish … rules, or operating regulations, to ensure that there is harmony and alignment in the system and make it all work."[81]

64. Brian Weiner of Visa gave similar evidence, testifying that Merchants access their Acquirers' proprietary system, but it is Acquirers who exclusively place data onto the Visa network. In terms of authorization, clearing and settlement, Visa and MasterCard provide "plumbing for that system" by linking Acquirers to Card Issuers.[82]

65. MasterCard's witnesses confirmed that Acquirers provide a "different suite of services" to merchants, including deployment of point of sale technology, guaranteed and prompt payment services, customer service support, as well as assumption of risk.[83] In addition, Mr. Stanton confirmed that "Merchants have no ability to connect to the MasterCard network … [and must] connect electronically via point-of-sale solutions to the proprietary system operated by their

[81] Sheedy Transcript (May 28 Public) at p. 2162 (line 1) to p. 2163 (line 2).
[82] Weiner Statement, Exhibit R-426, para. 39; Weiner Transcript (May 29, Public) at p. 2314 (line 16) to p. 2315 (line 12).
[83] Stanton Statement, Exhibit R-443, paras. 34-35. See also Leggett Transcript (June 1, Public), p. 2595 (lines 3-18).

Acquirers".[84] Mr. Cohen from Global Payments, another Acquirer, confirmed that none of the services that Global Payments provides to merchants are purchased from Visa or MasterCard.[85] Karen Leggett, former Chair of the Board of Directors of Moneris Solutions, another Acquirer, also confirmed that Acquirers provide their own "diverse suite of value-added services" including "processing, clearing, settlement".[86]

66. Visa and MasterCard earn revenue for the services they provide to Acquirers and Card Issuers by charging a network fee that is assessed on the volume of transactions authorized and settled through Acquirers and Card Issuers. This network fee is paid by both Acquirers and Card Issuers.[87]

(iii) Commissioner's Industry Expert, Michael McCormack

67. Michael McCormack, of Florida, was the Commissioner's expert with respect to the payment card industry in Canada. He purported to opine that Acquirers in Canada resell "credit card network services" to merchants. TD submits that this Tribunal ought to accord no weight to this evidence for the following reasons:

(a) Mr. McCormack's opinion on resale was fatally undermined on cross examination as well as when the witness responded to questions from the Tribunal.

(b) Mr. McCormack has no relevant experience in Canada and made a number of critical errors and omissions about the Canadian payments system in his evidence.

---

[84] Stanton Statement, Exhibit R-443, para. 40.
[85] Cohen Transcript (June 6, Public), p. 3283 (line 4) to p. 3284 (line 2).
[86] Leggett Transcript (June 1, Public), p. 2595 (lines 3-18).
[87] van Duynhoven Statement, Exhibit I-457, para. 22; Sheedy Statement, Exhibit R-471, para. 14.

68. Mr. McCormack defined "credit card network services" as services for authorization, clearing and settlement of credit card transactions.[88] Mr. McCormack acknowledged that Acquirers are necessary to this process. He conceded that the roles of Acquirers and Visa/MasterCard in the transaction are "integrated" and need to be "combined" in order to be effective:

> Q: … I take it from your report and from your evidence this morning that … the purpose of the … processing exercise, is to obtain authorization, clearance and settlement of the credit card transaction. That's right, isn't it?
>
> A: Well, yes. It is the general objective of the service, yes.
>
> …
>
> Q: So the authorization, the clearing and the settlement are the core services?
>
> A: With regards to credit card network services that acquirers are offering and the networks are also providing the acquirers, yes.
>
> Q: You do agree with me, I take it, from your knowledge of what the acquirer provides for the merchant, that without what the acquirer provides for the merchant, the transaction can't be completed? The credit card payment transaction cannot be completed without what the acquirer provides to the merchant. You agree with that, I take it?
>
> A: Are you speaking of Canada or are you speaking more generally?
>
> Q: I am just speaking about Canada … That is all we're concerned about at the moment, sir.
>
> … I am asking you to take the system as you understand it, and I am putting to you to you that without the services provided by acquirers, the credit card transaction using a Visa card or the credit card transaction using a MasterCard could not be completed.
>
> It is kind of self-evident, but I take it you agree with that?
>
> A: Well, I am having problems with you bifurcating the service between the acquirers and networks, because the acquirers and the network services in my mind are hand in hand.
>
> Q: They're integrated? Do you agree with that?
>
> A: They are integrated, yes.

[88] McCormack Report, Exhibit A-032, at para. 16(f); McCormack Transcript (May 14, Public), p. 608 (line 24) to p. 609 (line 7).

> Q: They combine to allow the credit card transaction to be effected; right?
>
> A: Yes.[89]
>
> …
>
> Q: [At paragraph 16(f) of your report you] give your definition of credit card network services … ?
>
> A: Yes.
>
> Q: And it is that which you say is resold. Do I understand your evidence correctly?
>
> A: Credit card network services, yes.
>
> Q: … And … the service is integrated as between the acquirers and the networks …?
>
> A: Yes.
>
> Q: In your words, they go "hand in hand"? …
>
> A: Yes.
>
> Q: And, indeed, part of the overall service is … provided by the acquirer to the merchant without the involvement of the Visa network at all; right? The settlement as between the merchant and the acquirer is done without any involvement of the Visa network at all?
>
> A: Yes.
>
> Q: Right. And the authorization comes from the issuer and is communicated, as we discussed this morning, partly by the Visa network and partly by TD's network. That is true, too; right?
>
> Q: Yes. Usually, yes.[90]

69. Mr. McCormack also acknowledged that the step-by-step process set out by Mr. van Duynhoven in his witness statement is essentially correct,[91] that Acquirers' point-of-sale devices are necessary for the completion of transactions,[92] and that most merchants in Canada desire a

[89] McCormack Transcript (May 14, Public), p. 608 (line 24) to p. 611 (line 24).
[90] McCormack Transcript (May 14, Public), p. 651 (line 3) to p. 652 (line 18).
[91] McCormack Transcript (May 14, Public), p. 611 (line 25) to p. 613 (line 10).
[92] McCormack Transcript (May 14, Public), p. 616 (lines 1-9).

point-of-sale system that can process many different kinds of payments.[93] Mr. McCormack also conceded that Acquirers provide training, technological support, and ongoing service to Merchants, services that Visa and MasterCard do not provide.[94]

70. In response to the Panel's question, Mr. McCormack confirmed essentially that there is no resale of credit card network services:

> Fundamentally, acquirers are *selling access* to typically the Visa and MasterCard networks in Canada, and the access is comprised of various steps of the transaction, and also the fund settlement process. So that is *authorization, which is the event of a transaction being approved; clearing, which means the merchant sending the cardholder data through the various stages so it may be posted to the cardholder's account; and* the third piece is *the settlement, which is the funds amount, ultimately starting with the issuer and really the cardholder agreeing to pay an amount.* Those funds are being remitted back through to the merchant so they receive them.[95]

71. This Tribunal ought also to have regard to Mr. McCormack's lack of Canadian experience when determining what weight to accord to his assertions. The witness has never been employed by a Canadian Acquirer, lists no Canadian work experience on his CV,[96] and has never provided expert evidence in a Canadian case.[97] Mr. McCormack:

(a) Made a significant error in his report, not realizing that most Acquirers in Canada pay their merchants 100 percent of their transaction values on a daily basis, "floating" over the course of the month the interchange fees already paid by the Acquirers to the Issuers.[98] To the very end of his cross-examination, Mr. McCormack was not forthright regarding his error in that regard.[99] By contrast,

---

[93] McCormack Transcript (May 14, Public), p. 616 (lines 10-24); pp. 622 (line 19) to 623 (line 8).

[94] McCormack Transcript (May 14, Public), pp. 648 (line 25) to 650 (line 4).

[95] McCormack Transcript (May 15, Public), p. 792 (line 21) to p. 793 (line 14) [emphasis added].

[96] McCormack Report, Exhibit A-032, Schedule "A" (Curriculum Vitae).

[97] McCormack Report, Exhibit A-032, Schedule "B" (Previous Experience as Testifying and Consulting Expert).

[98] See McCormack Report, Exhibit A-032, paras. 91(g) and 92, which suggest that Acquirers in Canada deduct Card Acceptance Fees at the time they settle with Merchants.

[99] For example, while McCormack acknowledged in chief that the "general market practice in Canada … is to pay the merchant the gross settlement amount .. .and then charge the merchant the merchant service fee down the road" (at May 14, Public, p. 579, lines 10-14) in cross examination, he refused to acknowledge that this was common enough in Canada to warrant mention in his reports (p. 638, line 16, to p. 641, line 5).

Mr. van Duynhoven testified that this was one of three major differences between acquiring businesses in Canada and the United States.[100]

(b) Acknowledged that he "did not spend a lot of time analyzing debit cards"[101] in Canada for his report, despite the fact that the debit card sphere in Canada is fundamentally different than in the U.S.[102]

(c) Acknowledged that he did not "specifically look into American Express in Canada",[103] despite the fact that it is discussed by Visa, MasterCard, and TD in their evidence in this proceeding.

(d) Acknowledged that he had not been aware that PayPal was accepted in Canada by merchants in a brick and mortar environment,[104] and in fact gave contrary evidence in his report which he didn't correct in his reply report.[105]

(iv) Response to Commissioner's Closing Submissions on Resale

72. In her written Closing Submissions, the Commissioner puts forward two arguments in support of her position that Acquirers "resell" credit card network services to merchants to which TD responds.

73. At paragraphs 395-396 of her Closing Submissions, the Commissioner points to Acquirers' small share of card acceptance fees as evidence that Acquirers provide only a "small proportion of value-add" with "Visa and MasterCard … [providing] the main, primary and critical input supplied to Acquirers". TD submits that Acquirers' profit margins are not an appropriate lens through which to determine whether there is, in fact, a "resale" of credit card network services. However, to the extent that profit margins are relevant, it is significant to note that

[100] van Duynhoven Transcript (May 31, Public), p. 2507 (line 9) to p. 2508 (line 3).
[101] McCormack Transcript (May 14, Public), p. 660 (lines 5-11).
[102] van Duynhoven Transcript (May 31, Public), p. 2508 (line 12) to p. 2509 (line 1).
[103] McCormack Transcript (May 14, Public), p. 701 (line 24) to p. 702 (line 1) ("I haven't specifically looked into American Express in Canada and the types of products that they have issued in what proportions").
[104] McCormack Transcript (May 14, Public), pp. 677 (line 18) to 681 (line 22).
[105] McCormack Report, Exhibit A-032, pp. 21-22.

fees paid to Visa and MasterCard account for the smallest proportion of card acceptance fees, with Card Issuers earning the largest proportion through interchange fees and Acquirers earning the second largest proportion through their own margins. As the evidence of Mr. van Duynhoven demonstrates, the average margin retained by TD Merchant Services is "22 basis points" per transaction.[106] By contrast, Visa's network fee paid by Acquirers is only 6 basis points per transaction.[107]

74. At paragraphs 59-60 and 67 of her Written Closing Submissions, the Commissioner cites evidence from Mr. van Duynhoven to the effect that Acquirers "sell access" to the "Visa and MasterCard networks". In so doing, the Commissioner ignores Mr. van Duynhoven's detailed and extensive evidence as to the services provided by Acquirers to their merchant customers, and how those services are provided, as discussed herein. In addition, Mr. van Duynhoven's evidence was that the word "network" must be understood in the wider context of the thousands of Card Issuers and millions of cardholders around the world who actually make up the Visa and MasterCard networks:

[redacted][108]

75. On re-examination, Mr. van Duynhoven confirmed that merchants do not have the ability to put data onto, nor retrieve data from, the Visa or MasterCard electronic networks:

[redacted]

106 [redacted]
107 [redacted]
108 [redacted]

[redacted][109]

C. The Commissioner's Economist Experts

76. The Commissioner's expert economist, Dr. Carlton, makes no assertion of a resale and conceded on cross examination that the notion of a resale played no role in his economic analysis.[110] Indeed, Dr. Carleton agreed that "Visa and MasterCard are providing to acquirers … *a certain input, and then the acquirers take that input and produce services to merchants*."[111]

77. Dr. Frankel acknowledged the centrality of Acquirers in the provision of what the Commissioner has termed "credit card network services." Dr. Frankel defined those services as being "supplied by acquirers to merchants to permit them to accept general purpose credit card transactions."[112] Dr. Frankel did not use the word "resale" at all in his analysis.[113]

78. Dr. Winter baldly asserts that Acquirers are "intermediaries". He says that: "Acquirers obtain credit card services and access to the credit card network from the credit card companies, and they provide that access to merchants. That makes them intermediaries." However, he provided no factual basis for this assertion nor did he ground his views in the evidence from industry participants. As the question of resale is not a question of economic theory, Dr. Winter's bare assertion ought to be accorded no weight.

---

[109] [redacted]

[110] Carlton Transcript (May 16, Public), at p. 1192 (line 17) to p. 1193 (line 1).

[111] Carlton Transcript (May 17, Public), at p. 1300 (lines 17-20) [emphasis added].

[112] Summary of Expert Report of Alan S. Frankel, Exhibit A-054, at p. 20.

[113] Frankel Transcript (May 16, public), at p. 1192 (line 23) to p. 1193 (line 12).

INTERVENTION TOPICS 2 & 3: TD'S INTERACTIONS WITH VISA AND MASTERCARD

TD SETS ITS OWN PRICES

79. TD submits that the Tribunal ought to make the following findings regarding the setting of prices by Acquirers in Canada:

(a) Acquirers are completely free to set their own prices and do so within a highly competitive market for acquiring services in Canada.

(b) Interchange fees are a cost input to Acquirers just like any other cost input. Acquirers wishing to turn a profit will naturally set the prices for their services above their operating costs.

(c) As a matter of law, price maintenance requires something more than simply one business setting its prices above the price it pays its own suppliers for other services. Section 76 is not engaged merely because Acquirers in Canada often set their own prices to merchants above the Interchange Fees they pay to Card Issuers.

80. In resolving these factual issues, the Tribunal ought to have regard to the following evidence:

(a) Jeff van Duynhoven's evidence as to how TD sets its prices to merchants for acquiring services;

(b) Jordan Cohen's evidence regarding how Global Payments sets it prices; and

(c) Visa, MasterCard and the merchants' evidence regarding their direct pricing relationships with each other.

A. Legal Principles

81. As discussed above, the objective of the prohibition against price maintenance has always been the preservation of the freedom of downstream resellers to discount the goods they acquire from upstream suppliers.

82. As formulated by the MacQuarrie Committee, which first put forth the recommendation to introduce the prohibition, price maintenance is "the prescription and the enforcement of minimum resale prices."[114]

83. Similarly, in the words of the VanDuzer Report,

> Price maintenance occurs *where a firm tries to set a minimum price at which another firm can sell its product*. …
>
> The economic rationale for prohibiting vertical resale price maintenance under competition law is that it lessens competition by restricting the ability of the retailer to compete on price.[115]

84. Further, in the words of the IST Report,

> Price maintenance is the practice *whereby a firm attempts to either set or influence upward the minimum price* at which another firm further down the manufacturer-wholesaler-retailer distribution chain can sell its product.[116]

85. It follows that no price maintenance occurs when the re-seller has complete freedom to set their own prices. As Strathy J. explained in *Fairview Donut Inc.*, an increase imposed by the supplier upon the price of its product, in the absence of restraints upon the downstream reseller's ability to discount, does not constitute price maintenance:

> [The section] prohibits a person who produces or supplies a product from attempting, by means of agreement, to influence upward or discourage the reduction of the price at which another person sells the product. *The provision is designed to protect the public by prohibiting an upstream supplier from preventing competition among retailers,* thereby increasing the price paid by the ultimate consumer*. It does not prohibit the upstream supplier from increasing the price at which it supplies the product to a downstream purchaser*.[117]

---

[114] MacQuarrie Committee Report, at p. 71, **Visa's BOA, Tab 48**..

[115] Canada, Competition Bureau, *Anticompetitive Pricing Practices and the Competition Act Theory, Law and Practice* by J Anthony VanDuzer & Gilles Paquet at p. 13, emphasis added, **Visa's BOA, Tab 45**.

[116] House of Commons, "A Plan to Modernize Canada's Competition Regime, Report on the Standing Committee on Industry, Science, and Technology dated April 2002 (Walt Lastewka, M.P., Chair) at 73, emphasis added, **Mastercard's BOA, Tab 9**.

[117] *Fairview Donut Inc. v TDL Group Corp,* 2012 ONSC 1252, 2012 CarswellOnt 2223 (WL Can) at para. 585, emphasis added, **Mastercard's BOA, Tab 5**.

86. Strathy J. observed that the price maintenance case law reflected the court's concern to protect "the public from conduct that interfered with the ability of retailers to engage in price competition".[118] Setting an input cost, or even an input price was not sufficient to establish price maintenance because the downstream price was not limited. In dismissing the price maintenance claim Strathy J. held:

> In my view, a trial is not required for the determination of the plaintiff's claims under s. 61, because Tim Hortons is not a person engaged in the business of producing or supplying a product. Moreover, in this case, the setting of a wholesale price through a Joint Venture Agreement that is specifically designed to supply ingredients to franchisees is not criminal price maintenance, because it does not impair or limit the ability of downstream purchasers to sell at whatever price they choose.[119]

87. Accordingly, where the upstream supplier imposes no restraints upon the ability of the downstream reseller to price its product, no price maintenance occurs. Since Acquirers are free to compete on price amongst themselves, and are not bound by contractual or other restraints from reducing the price of their services, the prohibition upon price maintenance is not engaged in the present case.

88. If a mark-up imposed by a downstream reseller, in the absence of prohibited conduct by the upstream supplier, were itself sufficient to engage the resale price maintenance provision, everyone placing an item into the stream of commerce would be liable under this provision. In such a scenario, every wholesale supplier would face allegations of resale price maintenance. For example, a shoe manufacturer would engage in resale price maintenance simply by virtue of a retailer reselling the shoes at a higher price than it had acquired them from the manufacturer. Indeed, any time a business resells an item at a profit (which is the entire business model of the retail sector), section 76 would be engaged. This would obviously be an absurd result and such an interpretation should be avoided.

---

[118] *Fairview Donut Inc. v TDL Group Corp,* 2012 ONSC 1252, 2012 CarswellOnt 2223 (WL Can) at para. 590, **Mastercard's BOA, Tab 5**.

[119] *Fairview Donut Inc. v TDL Group Corp,* 2012 ONSC 1252, 2012 CarswellOnt 2223 (WL Can) at para. 593, **Mastercard's BOA, Tab 5**.

B. No Evidence of Price Maintenance

89. The evidentiary record makes clear that Acquirers have absolute freedom to make pricing decisions like all other for-profit businesses. They take account of their operating costs, including interchange and network fees, and attempt to earn a profit in a fiercely competitive acquiring market. Visa and MasterCard play no role in this process.

(i) Evidence of Jeff van Duynhoven

90. TD's acquiring business has complete freedom to establish its fee arrangements with its merchants.[120] It has no contractual obligation to Visa or MasterCard concerning those fee arrangements.[121] The evidence from Visa and MasterCard is consistent in this regard.[122] Mr. van Duynhoven affirmed this evidence in direct examination:

> Q: … Having regard to your … contractual arrangements with Visa and MasterCard, are you under any obligation to pass on interchange fees and/or network fees, which I understand you refer to as assessment fees? Are you under any obligation to pass on those fees to your merchant customers?
>
> A: No. We have no obligation to Visa or MasterCard to pass on any of those fees …
>
> Q: And is your pricing in any way -- to your merchant customers, is your pricing in any way dictated or mandated by Visa or MasterCard?
>
> A: No, not at all.[123]

91. Acquirers are financially responsible for paying interchange fees for credit card transactions to Card Issuers.[124] In this respect, interchange fees are cost inputs to Acquirers. While interchange fees are the largest cost item to TD's acquiring business, the same can be

---

[120] van Duynhoven Statement, Exhibit I-456, paras. 30(a), 35.

[121] van Duynhoven Statement, Exhibit I-456, paras. 30(a), 35.

[122] See Sheedy Statement, Exhibit R-471, para. 19; Weiner Statement, Exhibit R-426, para. 5; Weiner Transcript (May 29, Public), at p. 2314 (lines 8-12); Stanton Transcript (May 30 Public), p. 2448 (lines 10-11); Cohen Statement, Exhibit R-511, para. 45.

[123] van Duynhoven Transcript (May 31 Public), p. 2513 (lines 3-17).

[124] van Duynhoven Statement, Exhibit I-456, paras 18, 26, 37(i).

said of jet fuel in the airline business.[125] A cost incurred by a business is not a "minimum price" paid by customers of that business. To the extent that interchange fees are asserted by the Commissioner to be a "minimum price" paid by merchants, the same would apply to jet fuel costs being a "minimum price" paid by airline passengers.

92. Mr. van Duynhoven confirmed this point on cross examination:

[redacted][126]

93. In fact, TD's acquiring business sometimes enters into a pricing arrangement with a merchant that does not even cover TD's costs for interchange fees:

> Q: And in the context of your business, are there or have there been some merchants for whom your pricing is or has been below the level of the applicable interchange fees?
>
> A: Yes. So we've had several occurrences of that …[127]
>
> … [W]here we have chosen to lose money in aggregate on the merchant, or we have chosen to lose money on a particular product that they're offering -- that we offer to them, so whether that be credit card or debit acceptance. And that is in response to the fact that they have a broader relationship with TD.
>
> So they may have other loans and deposits, or other services with TD. So we've taken the more macro view, from a TD standpoint, and said we're okay losing money here, because this is important to this client and, in aggregate, TD is comfortable with the profitability of that entire relationship.[128]

94. TD's pricing models also demonstrate that Visa and MasterCard do not maintain the prices charged to merchants. [redacted]

---

[125] Houle Transcript (May 10 Public), p. 500 (lines 9-15).

[126] [redacted]

[127] van Duynhoven Transcript (May 31, Public), p. 2513 (lines 18-23).

[128] van Duynhoven Transcript (May 31 Public), p. 2514 (lines 10-23).

[redacted][131]

[redacted] "on occasion" such assumptions have proven wrong and TD has "ended up having less than full recovery."[132] [redacted][133]

95. Under TD's secondary pricing model – Interchange Plus – merchants pay the actual interchange rates that apply to their transactions plus a per transaction fee. This is an internal pricing decision that TD makes independently, in the exercise of its own business judgment, without any influence from Visa or MasterCard. This pricing model is only offered to a very small number of large, sophisticated merchants with huge transaction volumes, and low credit risk, and only where those merchants have specifically demanded such an arrangement. As Mr. van Duynhoven stated:

> Q: … [A]re there criteria or factors that you apply in considering whether you are prepared to agree to an interchange-plus contract with any particular merchant?
>
> A: Yes. Typically, they are the largest merchants, the most sophisticated merchants. Typically, over $100 million in processing

---

[129] van Duynhoven Statement, Exhibit I-457, para. 94.

[130] [redacted]

[131] van Duynhoven Statement, Exhibit I-457, para. 95.

[132] van Duynhoven Transcript (May 31, Public), p. 2514 (lines 5-9).

[133] [redacted]

> volume is one criteria that we would employ. So really it is only our largest customers that we would entertain that.
>
> And, again, it is typically when the merchant has asked for that in … a request for proposal, as part of a competing bid that they're looking for to acquire merchant services from us or any of my competitors.
>
> Q: What is it about the merchants that, from the point of view of your business, causes you to be prepared to consider interchange-plus contract as opposed to the other form of pricing that you referred to earlier in your evidence?
>
> A: Certainly. There are several factors.
>
> So one is just the significant volume they will represent in terms of transactions. So there's the sheer size that they deliver to us.
>
> Another is the fact that they typically engage in longer-term contracts. So typically a five-year contract is common, and there is an exclusivity provision, that they will only process with us, and that contrasts to our standard agreement where a merchant can exit with a small fee.
>
> Also, because of the nature of who these merchants are, there's typically less risk for us. So I described earlier to the Tribunal the risk that we incur for charge-backs or if a merchant becomes insolvent, those sorts of things. Because these are typically publicly-traded companies, there is more readily available information for us to ascertain that risk and get comfortable with that.[134]

(ii) Evidence Regarding Other Acquirers in Canada

96. Jordan Cohen of Global Payments confirmed that Visa and MasterCard play no role whatsoever in the pricing decisions made by Global Payments.[135] As Mr. Cohen testified:

> Q: Could you tell me this, sir? What influence, if any, do either MasterCard or Visa have on your prices to merchants?
>
> A: Directly, they have no influence on our prices.
>
> There may be an indirect influence by way of cost of goods. To the extent that interchange is a cost component of the overall cost base that we have, there is that effect. But on a direct basis, they have no influence on how we price.
>
> Q: All right. Sir, what policy or rule, if any, is there of MasterCard or Visa which dictates what your prices should be to merchants?

---

[134] van Duynhoven Transcript (May 31, Public), p. 2511 (line 6) to p. 2513 (line 2); see also van Duynhoven Statement, Exhibit I-456, para. 103.

[135] Cohen Statement, Exhibit R-511, paras. 44-45.

A: There is none.[136]

97. Ms. Leggett, formerly Chair of Moneris Solutions, similarly testified that interchange fees are simply a cost input for Acquires. Acquirers price their services on the basis of a "merchant discount rate …. assessed on a number of different factors … [including but not limited to a merchant's] transaction volume … as well as the average transaction price … and … the individual merchant risk profile."[137]

98. One of the Commissioner's merchant witnesses, Mario DeArmas of Wal-Mart Canada, provided this Tribunal with instructive evidence regarding the role of Acquirers in setting prices autonomously from Visa and MasterCard. TD provides acquiring services to Wal-Mart with respect to Visa credit card and Interac transactions. Wal-Mart has obtained "competitive" pricing from its two Acquirers. In Wal-Mart's view, there is "significant competition between Acquirers" in Canada, with rival Acquirers able to provide competitive prices to merchants for the portion of card acceptance fees they retain as their margin.[138]

C. Evidence Regarding Finances of TD's Issuing Business

99. At paragraphs 52 and 56 of her Closing Written Submissions, the Commissioner cites from financial statements of TD's issuing business regarding her position that [redacted] The Commissioner has cited TD's evidence out of context.

100. At paragraph 55 of her Closing Written Submissions, [redacted] However,

[136] Cohen Transcript (June 6, Public), p. 3287 (line 15) to p. 3288 (line 4); see also p. 3298 (lines 7-14).
[137] Leggett Transcript (June 1, Public), p. 2596 (lines 5-23).
[138] De Armas Statement, Exhibit A-001, para. 35.

this evidence is incomplete without the following:

(a) While the Commissioner cites 2010 revenue [redacted][139]

(b) In re-examination, Mr. Hewitt put the 2010 data into clearer context by explaining [redacted]

[redacted][140]

…

[redacted][141]

101. At paragraph 56 of her Written Closing Submissions, the Commissioner cites from TD's financial statements to allege that [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[139] Hewitt Statement, Exhibit I-475, Exhibit "C", p. 46 (row 18, last column).

[140] [redacted]

[141] [redacted]

[redacted][142]

142 [redacted]

INTERVENTION TOPICS 4 & 5: EFFECT OF PROPOSED ORDER ON TD AND ON THE PAYMENTS SYSTEM

THE TRIBUNAL'S JURISDICTION AND DISCRETION

102. The elimination of the No Surcharge Rule and the Honour All Cards Rule (the "Proposed Order") would have an adverse effect on the payment system in Canada. In light of its likely negative impact, it is submitted that the Tribunal ought not to issue the discretionary order sought in light of the impact of the Proposed Order. TD invites the Tribunal to make the following findings:

(a) If this Tribunal were to issue the Proposed Order, it is likely that it will be called upon to engage in ongoing supervision and enforcement of that Order. The potential effects of the Proposed Order are at best uncertain, with various witnesses offering different predictions based on international precedent and economic theory. In other jurisdictions, such as Sweden[143] and Australia, regulators who have intervened in the credit card system have been required to maintain ongoing oversight to supervise and indeed refine their regulatory interventions to meet the requirements of the payment system. This Tribunal has held that such ongoing supervision is not desirable.

(b) The evidence also strongly suggests that the merchants most likely to engage in surcharging are the largest merchants who hold market power in their respective retail markets. These merchants will likely levy surcharges in excess of their costs of acceptance, with the true intention of earning additional profit rather than steering cardholders to alternative forms of payment.

(c) If the Order is granted, payment networks that compete with Visa and MasterCard – such as American Express – will obtain an unfair competitive advantage and will increase their market share. American Express will be given the unfettered ability to target the premium high-spend segment of the credit card issuing market.

---

[143] Frankel Report, Exhibit A-050, PDF page 121.

(d) If surcharging is allowed, the technological obstacles to differential (or selective) surcharging result in blended rates being employed. This will send inaccurate pricing signals to consumers and thus undermine a core benefit that the Commissioner alleges will flow from surcharging.

(e) Many merchants who testified before this Tribunal made clear that they do not wish to surcharge at point-of-sale. Rather, they hope that the Proposed Order would lead to a reduction in their prices without the need to surcharge. The law should not provide a remedy where the proposed beneficiaries have no need for or intention of deploying that remedy.

(f) Merchants currently have the right to steer customers to forms of payment other than credit cards, including the right to provide discounts to customers using less expensive forms of payment. It is Mr. van Duynhoven's evidence that discounting is preferable to surcharging.

(g) The concerns raised in this proceeding have been the subject of recent regulatory intervention through the Code of Conduct, a living document that remains under the regulatory supervision of the Financial Consumer Agency of Canada and the control of the Minister of Finance. This regulatory intervention – still in its infancy – should be allowed to take effect before further intervention is contemplated.

(h) Credit Cards provide and have provided numerous benefits to the wider Canadian payments system and indeed to the Canadian economy. The order sought has the potential to reduce credit card transaction volumes. In the exercise of its discretion, the Tribunal cannot ignore the tangible economic detriment likely to be the result for the Canadian economy.

A. Tribunal's Jurisdiction Limited to "Prohibiting" the Network Rules

103. Contrary to paragraphs 639 and 646 of the Commissioner's Written Closing Submissions, if this Tribunal finds that the elements of s. 76 are established, TD respectfully submits that its jurisdiction is limited to eliminating the No Surcharge Rule and the Honour All Cards Rule. The jurisdiction accorded by s. 76 is limited to "prohibiting the person [Visa and

MasterCard] … from continuing to engage in [the impugned] conduct …", that being the enforcement of the Rules. Section 76 does *not* grant the Tribunal the jurisdiction to issue broader remedies, nor does it authorize the Tribunal to allow certain conduct to continue but subject to conditions defined by the Tribunal.

104. Where Parliament intended to grant this Tribunal broader remedial jurisdiction, it has used express language to that effect. For instance, s. 79(1) of the Act, which similarly grants the jurisdiction to "make an order prohibiting [conduct]," is supplemented by a separate power in s. 79(2) to essentially make any order that the Tribunal deems just.[144] Similarly, s. 77 of the Act, which also contains a jurisdiction to prohibit, also enables the Tribunal to order "any other requirement … to… restore or stimulate competition …."[145] If Parliament intended s. 76 of the Act to have similar remedial flexibility, it could and would have employed language such as that employed in s. 79(2) or s. 77.

105. The case law supports the proposition that the remedial jurisdiction under s. 76 is limited. In *Superior Propane Inc. v. Canada (Director of Research and Investigation, Competition Act)*, Justice Rothstein held that s.100.(1) of the Act, which enables the Tribunal to issue an interim order preventing the completion of a merger, does *not* allow for a broader order.[146] There, the respondent argued that the Tribunal had the discretion to allow a proposed merger to proceed subject to certain conditions. Justice Rothstein disagreed:

> I do not think it is open to the Tribunal to make such an order on this application. To do so would be to make an order that allows an act or thing that is directed toward completion or implementation of the proposed merger, but subject to conditions.
>
> …
>
> …. The order must still be an order forbidding an act or thing that is directed toward the completion or implementation of a proposed merger.

---

[144] *Competition Act* s.79.(2), **TD's BOA, Tab 1**.

[145] *Competition Act* s.77.(2), **TD's BOA, Tab 1**.

[146] *Superior Propane v. Canada (Director of Investigation and Research, Competition Act)*, [1998] CCTD No 20 at paras 15-18, **TD's BOA, Tab 15**.

> Paragraph 100(4)(a) is not an open invitation to the Tribunal to make whatever order it considers appropriate in the circumstances… If that would have been Parliament's intention in section 100, it could have easily used these words. It did not do so ….[147]

B. Governing Principles in the Exercise of Tribunal's Discretion

106. This Tribunal has the statutory discretion to decide not to issue an order even where the definitional elements of resale price maintenance are satisfied. Section 76 provides that the Tribunal "may" make an order if the elements of resale price maintenance are met. This Tribunal has held that the word "may" accords a discretion to the decision maker, even where the elements of the statutory provision are satisfied. As affirmed in *RONA Inc. v. Canada (Commissioner of Competition)*, the word "may … must be construed as permissive unless the context indicates a contrary intention."[148] In *Southam v. Canada*, this Tribunal noted that the word "'may' … gives the Tribunal the discretion to choose … as it judges appropriate."[149]

107. Considering the factors which animate this discretion, this Tribunal has looked broadly beyond the strict elements of the provision to the wider context in which the impugned conduct operates.[150] More recently, this Tribunal held clear that "in exercising its discretion, the Tribunal must be guided by the purposes of the *Competition Act*."[151]

108. The purpose of the Act is defined in s. 1.1 as follows:

> The purpose of this Act is to maintain and encourage competition in Canada in order to promote the **efficiency and adaptability of the Canadian economy**, in order to expand opportunities for Canadian **participation in world markets** while at the same time recognizing the role of foreign competition in Canada, in order **to ensure that small and**

---

[147] *Superior Propane Inc. v. Canada (Director of Research and Investigation, Competition Act)*, [1998] CCTD No 20 at paras 16, 18, **TD's BOA, Tab 15**. The Tribunal recently cited this reasoning with approval in *Labatt Brewing v. Canada (Commissioner of Competition)* [2007] CCTD No 5 at para. 14, **TD's BOA, Tab 7**.

[148] *RONA Inc. v. Canada (Commissioner of Competition)*, [2005] CCTD No 17 at para. 91, **TD's BOA, Tab 11**.

[149] *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, 1992 CarswellNat 1655 47 C.P.R. (3d) 240, [1992] C.C.T.D. No. 14 at para 19, **TD's BOA, Tab 13,** aff'd 1997 1 S.C.R. 748, **TD's BOA, Tab 14**.

[150] *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* 1989 CarswellNat 720, 27 C.P.R. (3d) 1 (WL) at paras. 67-68, **TD's BOA, Tab 3**.

[151] *RONA Inc. v. Canada (Commissioner of Competition)*, [2005] CCTD No 17 at para. 91, **TD's BOA, Tab 11**.

> **medium-sized** enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide **consumers with competitive prices and product choices**. [Emphasis added.]

109. Having regard to this provision the Tribunal may consider, *inter alia,* the following factors in exercising its jurisdiction under s. 76:

(a) the extent to which the Proposed Order would effect the wider "efficiency and adaptability of the Canadian economy";

(b) the extent to which Proposed Order would promote or undermine integration between the Canadian and "world markets";

(c) the extent to which the Proposed Order would effect "small and medium-sized enterprises" in terms of their market participation; and

(d) the extent to which the Proposed Order would "provide consumer with competitive prices and product choices".

C. The Proposed Order Would Require Ongoing Supervision by this Tribunal

110. This Tribunal has consistently held that ongoing supervision is not desirable in the context of competition litigation. In *Tele-Direct (Publications) Inc. v. Canada (Director of Competition and Research, Competition Act)*, Justice Rothstein held that ongoing regulatory oversight "is the antithesis of the objectives of competition policy" and "simply not part of the mandate of the Tribunal."[152] In *Palm Dairies Ltd. v. Canada (Director of Investigation and Research, Competition Act)*, this Tribunal rejected a proposed consent order in part because it would require the Tribunal to "direct on a perpetual basis" one of the parties.[153]

111. This reasoning flows from fundamental principles of competition policy. It is widely accepted that, in competition policy, "the regulator is the competitive process itself," not the

---

[152] *Tele-Direct (Publications) Inc. v. Canada (Director of Competition and Research, Competition Act)*, [1997] CCTD No 8 at para 533, **Commissioner's BOA, Tab 14**.

[153] *Palm Dairies Ltd. v. Canada (Director of Competition and Research, Competition Act)*, 1986 CarswellNat 1263 12 C.P.R. (3d) 540 (WL) at para. 15, **TD's BOA, Tab 9**.

Tribunal.[154] Competition policy does not generally rely on ongoing regulatory oversight to promote competition.[155]

112. The Supreme Court of Canada has recently reaffirmed that courts not issue orders that will require their further supervision.

> … The terms of the order must be clear and specific. The party needs to know exactly what has to be done to comply with the order. Also, the courts do not usually watch over or supervise performance. While the specificity requirement is linked to the claimant's ability to follow up non-performance with contempt of court proceedings, supervision by the courts often means relitigation and the expenditure of judicial resources.[156]

113. TD submits that the Proposed Order sought in the current case raises serious issues regarding the requirement for ongoing supervision by this Tribunal:

(a) The expert evidence reflects tangible concerns regarding the effects that the Proposed Order will have, including potential adverse effects on stakeholders. The payment system is a complex, interdependent "eco-system". As Mr. Jairam explained:

> In its entirety, the Canadian payment system is a complex web of interrelated and/or overlapping products that serve a variety of consumer, business, or public sector needs, and are organized in a constellation of payment schemes each with their own set of rules. To add to this complexity, the payment scheme rules are set by governing bodies that have different mandates, different stakeholder structures and different regulatory oversight. The Finance Minister has overall interest in overseeing this diverse environment for the benefit of all Canadians.[157]

(b) The evidence from Australia strongly suggests that intervention into the payments system must necessarily be followed by close monitoring and refinement by the regulating body. Reports from the Reserve Bank of Australia

---

[154] John S. Tyhurst, "Monopoly Lost? The Legal and Regulatory Path to Canadian Telecommunications Competition, 1979-2002," (2001-2002) 33 Ottawa L.R. 385-428 at para 111, **TD's BOA, Tab 17**.

[155] John S. Tyhurst, "Monopoly Lost? The Legal and Regulatory Path to Canadian Telecommunications Competition, 1979-2002," (2001-2002) 33 Ottawa L.R. 385-428 at para 113, **TD's BOA, Tab 17**.

[156] *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R 612, at paras. 23-24, **TD's BOA, Tab 10**.

[157] Jairam Report, Exhibit I-515, para. 27.

reflect that it took several years after its regulatory intervention into the credit card system before the effects could be truly measured. And once those effects were able to be measured – eight years after the 2003 reforms – the Reserve Bank is now required to refine its original intervention to provide additional safeguards.

(c) As discussed below, unintended consequences have been seen in other jurisdictions that have struck down the No Surcharge Rule, including excessive surcharging practices and lack of proper disclosure to cardholders.

114. It is also worth noting that in Canada, the Minister of Finance has overall jurisdiction for the supervision and regulation of the payments system, and has recently exercised that jurisdiction to announce a review of "this highly dynamic and rapidly evolving sector" to ensure its continued "safety and soundness". As stated by the Minister of Finance in a recent speech at a conference hosted by the Canadian Payments Association:

> As Minister of Finance … I am responsible for the overall policy framework for the payments system at the federal level, including its safety, soundness, levels of innovation and competition and ensuring that consumers and businesses are well serve[d].[158]
>
> …
>
> We [at Finance] are taking a fresh look at how the Canadian payments system and its participants are governed to ensure the continued safety and soundness of the payments system, to spur innovation and promote consideration of user interest. Important questions we need to ask include, are new players and technologies posing challenges to our current governance arrangements? What is the appropriate scope and nature of public sector oversight in this highly dynamic and rapidly evolving sector?[159]

115. This Tribunal can neither regulate nor make an order that requires ongoing supervision and very likely further intervention. The Commissioner asserts that this case cries out for a remedy but it is the Minister of Finance who is charged with the responsibility to oversee the

---

[158] Speech of The Honourable Jim Flaherty, June 8, 2012, Transcription, p. 7, **TD's BOA, Tab 22**.

[159] Speech of The Honourable Jim Flaherty, June 8, 2012, Transcription, p. 8, **TD's BOA, Tab 22**.

payments system and he has his hand on the tiller. The Minister of Finance has and continues to exercise his regulatory authority in this area. There is no gap to be filled by the Tribunal.

D. Large Merchants With Market Power Will Surcharge Excessively

116. If the Proposed Order were granted, merchants with market power will be the ones most likely to surcharge.[160] As Mr. Jairam noted, "dominant merchants are more likely to embrace surcharges as they have market power and customers may have no option but to absorb the surcharge".[161] These are also the merchants that pay the lowest levels of card acceptance fees, because they can negotiate lower Acquirer Fees from their Acquirer,[162] and/or because they are eligible for the lower, volume-based interchange rates set by Visa and MasterCard.[163] Indeed, Mr. De Armas acknowledged that Wal-Mart – the world's largest retailer – already enjoys the lowest interchange rate available, mostly due to its volume.[164] Online transactions are particularly likely to be subject to surcharges, as consumers have little choice to go elsewhere, and will likely not want to abandon a transaction after taking the initial set up time.[165]

117. By providing larger retailers with additional benefits not really exercisable by small and medium sized businesses, the proposed order would increase the cost disadvantages of smaller business. As stated by Mr. Jairam, citing from the Australian experience:

> … [S]ince the repeal of [no surcharge rule], small and medium sized businesses in Australia have faced an increasing cost disadvantage against larger retailers in the form of relatively higher card acceptance fees.[166]

---

[160] Jairam Report, Exhibit I-515, paras. 47-48, 63-68; Buse Statement, Exhibit R-409, para. 18; Leggett Transcript (June 1, Public), p. 2600 (lines 16-23); and p. 2649 (lines 9-18); Church Transcript (June 5, Public), at p. 2877 (lines 4-15); p. 2884 (lines 3-10).

[161] Jairam Report, Exhibit I-515, para. 47.

[162] van Duynhoven's Statement, Exhibit I-456, paras. 103.

[163] Weiner Statement, Exhibit R-426, para. 26.

[164] De Armas Transcript (May 9, Public), p. 288 (line 22) to p. 289 (line 6).

[165] Jairam Report, Exhibit I-515, para. 48 (fifth bullet) ("When surcharges are presented well into a lengthy transaction, consumers are more likely to absorb the surcharge rather than re-start the transaction process - such as online transactions").

[166] Jairam Report, Exhibit I-515, para. 101 (fifth bullet).

118. It is worth noting that, in contrast to the likely beneficiaries of the Proposed Order, [redacted][167]

119. The evidence from Australia shows that if surcharging becomes widespread, predatory surcharging will occur with merchants taking advantage of the Proposed Order as a means of extracting additional profit from consumers.[168] This is akin to a tax. The Reserve Bank of Australia has recently concluded "that surcharging is now sufficiently common, and surcharging above the cost of acceptance sufficiently widespread, that an unconstrained capacity for surcharging may no longer be appropriate."[169] Average surcharging rates in Australia are approximately 100 basis points above the average card acceptance cost of merchants. Online, where consumers have few payment options, the average merchant surcharge is 400 basis points.[170] Mr. Swansson of Coles Supermarket in Australia agreed that predatory surcharging has now been recognized as a problem in that jurisdiction.[171] As in Australia, surcharging in Canada will operate as a new "profit centre" for large, powerful Merchants with market power.[172]

120. This would be contrary to the purpose of the Act, which, among under things, is to "provide consumers with competitive prices and product choices".[173]

---

[167] [redacted].

[168] Jairam Report, Exhibit I-515, paras. 19, 63, 101-102; Buse Statement, Exhibit R-409, para. 20; van Duynhoven Statement, Exhibit R-456, para. 148(c).

[169] van Duynhoven Statement, Exhibit I-456, December 2011 RBA Report, at p. 361 (p. 10 of internal document).

[170] Leggett Transcript (June 1, Public), p. 2601 (line 18) to p. 2602 (line 12); Jairam Report, Exhibit I-515, para. 101 (third bullet).

[171] Swansson Transcript (May 22, Public), p. 1501 (lines 10-14).

[172] Jairam Report, Exhibit I-515, paras. 63, 98-106; Buse Statement, Exhibit R-409, paras. 18-20; van Duynhoven Statement, Exhibit I-456, paras. 144(c), 149-154; Leggett Statement, Exhibit I-471, para. 46-58.

[173] Section 1.1 of the Act, **TD's BOA, Tab 1**.

121. Predatory surcharging by merchants with market power could damage the credibility of credit cards as a payment solution in Canada. It will cause a "chill effect".[174] While the Commissioner has suggested that the Proposed Order will advance competition, the expert evidence is that predatory surcharging will diminish competition by leading to a consolidation in the acquiring and issuing industries in Canada.[175] Smaller Acquirers and smaller Card Issuers – who compete fiercely with their larger counterparts for market share – will be harmed by the decrease in credit card transaction volume resulting from predatory surcharging.[176] According to Mr. Jairam:

> … [S]maller issuers and smaller acquirers would be impacted disproportionately because the credit card business is a scale business. With a material reduction in volumes or values, smaller issuers such as credit unions and niche acquirers would be priced out of the market, resulting in consolidation and further concentration in the issuer and acquirer market space.
>
> As surcharging practices take hold in Canada, the result would be a reduction in the number of issuers and acquirers, weakening competition. Such a reduced competitive environment is less conducive to product innovation[177]

122. Even TD – an important player in both the issuing and acquiring markets – would [redacted] respond to the Proposed Order.[178]

E. The Proposed Order Would Provide Unfair Competitive Advantages to Non-Parties

123. American Express is not subject to these proceedings. If the requested order is made, it will have the unintended consequence of giving American Express a competitive advantage.[179]

---

[174] van Duynhoven Statement, Exhibit I-456, paras. 154.

[175] Jairam Report, Exhibit I-515, paras. 80-85; Leggett Statement, Exhibit I-471, para. 65.

[176] Jairam Report, Exhibit I-515, paras. 80-85.

[177] Jairam Report, Exhibit I-515, paras. 80 and 85.

[178] [redacted]

[179] Jairam Report, Exhibit I-515, at para. 118.

124. The evidence from the Reserve Bank of Australia demonstrates that an unintended consequence of the regulatory interventions in that jurisdiction has been to increase the relative market shares of the unregulated Payment Networks, including American Express. As stated by Mr. Jairam:

> [Reserve Bank of Australia] data presents directional evidence that the relative market share of unregulated card schemes (e.g., American Express and Diners Club) improved since the introduction of regulation. Between 2002 and 2011, the number of cards issued by Visa, MasterCard and Bankcard registered a decline of approximately 6%. During the same time, the number and value of American Express and Diners Club cards increased 51% and 44%, respectively - which could be attributed to the largest Australian Banks beginning to issue American Express cards.[180]

[redacted][181] [redacted][182] Visa's evidence from Australia is also consistent in this regard, with American Express's market share growing substantially since the regulatory reforms.[183]

125. In Canada, the Visa Infinite Card was developed as a strategy to compete with American Express for high-spend Cardholders who expect satisfying levels of rewards and benefits.[184] The MasterCard World and World Elite Card categories were a competitive response to attract high-spend "transactor" Cardholders to compete with the Visa Infinite Card.[185] If the No

---

[180] Jairam Report, Exhibit I-515, at para. 101 (Seventh Bullet).

[redacted]

[183] Buse Statement, Exhibit R-409, para. 30.

[184] Sheedy Statement, Exhibit R-471, para. 103; Weiner Statement, Exhibit R-426, para. 36; [redacted]

[185] DeVita Statement, Exhibit R-451, para. 33.

Surcharge Rule were abolished and merchants began to implement surcharging policies, the effect will be that many current premium cardholders will shift to American Express.[186]

126. In addition, if the Proposed Order were granted, it is likely that certain larger merchants will employ surcharging practices as a competitive tactic to gain leverage against their competitors, especially those with co-branded cards. As Mr. Jairam noted:

> [T]he merchants who surcharge cards of certain issuers would likely be merchants with dominant market power and with credit card issuing interests of their own. In these cases, the primary motivation would be to steer more volume toward their own branded card or towards an issuer they prefer.
>
> … Given the composition of the Canadian issuer market, a retailer-issuer who adopts a selective surcharging approach will probably target smaller retailer-issuers, as well as smaller non-retailer issuers …[187]

F. Technological Obstacles to Selective Surcharging

127. Mr. van Duynhoven has provided clear and uncontradicted evidence regarding the technological challenges posed by the practice of selective or differential discounting. The challenges can be broken down into four categories:

(a) Increasing the length of transaction times at point-of-sale;

(b) Doubling of data volumes on Acquirers' electronic networks;

(c) Re-writing of all point-of-sale device software; and

(d) Incompatibility with contactless and mobile payments.

128. Mr. van Duynhoven stated:

> …[W]hen the card is presented for payment at the point of sale … I [as the acquirer] do not know, at that point in time, what product type that card is.

---

[186] DeVita Statement, Exhibit R-451, para. 64.

[187] Jairam Report, Exhibit I-515, paras. 65-66.

> So the terminal can read the number, but both Visa and MasterCard have mandated in Canada that all acquirers have to support account level processing.
>
> So in order for me to determine what the appropriate interchange rate is for that particular transaction, to enable differential or selective surcharging, I will first have to go to, if it is a Visa card, the Visa host.
>
> So [the request for information must] come from the TD terminal -- from the TD terminal to the TD network, go to the VisaNet to verify what is that product code, potentially to the issuer as well, and then all the way back.[188]

129. This will cause delay at the check out-counter, as the Merchant will need to run the inquiry for the interchange rate through the point-of-sale terminal, which TD will need to route to the Payment Network: "[I]n the meantime, that consumer is standing there waiting for a response from that particular terminal, and so there is a slowdown in that checkout process …"[189]

130. In addition, by sending an electronic inquiry over the TD network to obtain the applicable interchange rate in advance of an authorization request, Merchants engaging in differential surcharging will double the amount of volume that is required to traverse Acquirers' networks:

> … I have now doubled [the] volume that goes through my [electronic] network [because of the inquiries that will precede the authorization requests]. So now I have to add capabilities, expand the size of my network to have through-put capabilities. There are additional costs for that.[190]

131. Point-of-sale devices in Canada are not currently programmed so as to display information received from the Payment Network back to the Cardholder. Therefore, in order to allow the Merchant to obtain the Cardholder's approval for the quantum of the differential

---

[188] van Duynhoven Transcript (May 31 Public), p. 2519 (lines 3-21).

[189] van Duynhoven Transcript (May 31 Public), p. 2519 (lines 22-25).

[190] van Duynhoven Transcript (May 31 Public), p. 2520 (lines 10-14).

surcharge as determined by the information received from the Payment Network, all point-of-sale device software will need to be re-written:

> …[T]he way chip and PIN has been implemented here in Canada is that [the] card number is not displayed back to the point-of-sale device until the authorization message comes back … So effectively it would be a rewrite of all of that capability that exists today, that merchants spent multiple years rolling out chip and PIN in Canada, to enable that identification of the card number prior.
> …
> That would involve a rewrite of, as I said, what is a global standard for EMV or chip capabilities. So technically, while it might be feasible, it is a huge effort, a huge technical effort, and one that would involve cooperation globally.[191]

132. While this may be technically feasible for "contact" transactions such as those employing the standard CHIP and PIN technology in Canada, it would not be available for contactless or mobile transactions, where the authorization process takes place instantaneously at point-of-sale, based on a globally established and adapted standard:

> … So Visa and MasterCard have [contactless transactions through] payWave and PayPass, and in those circumstances there is actually -- from a technical standpoint, there is a global standard that identifies contactless transactions. And when that card is tapped on a contactless terminal, that transaction immediately is gone for authorization. So there is no ability to get in the middle of that transaction to verify that product code.[192]

As the evidence of Visa and MasterCard reveals, the volume of contactless transactions will continue to grow with time.[193]

133. The financial cost of building the technological capacity to process differential and selective surcharging would be very high. By way of example, Acquirers collectively spent in excess of $100,000,000 over the last decade to procure the enhanced technology to

---

[191] van Duynhoven Transcript (May 31 Public), at p. 2520 (line 15) to p. 2521 (line 18).

[192] van Duynhoven Transcript (May 31 Public), at p. 2521 (lines 4-12).

[193] Sheedy Transcript (May 28 Public) at p. 2165 (line 22) ("increasingly, contactless payments"); DeVita Transcript (May 30, Public), p. 2475 (line 19) to p.2475 (line 11)

accommodate the card-integrated-chips (known as CHIP + PIN technology) that are now found in most credit cards in Canada.[194] Mr. van Duynhoven cites this example when estimating the costs of building the capability for selective surcharging:

> Q: … [Y]ou have touched upon, in the course of that answer, the costs that may be associated with providing, if possible, technological capability to respond to selective surcharging … [D]o you have a sense of the magnitude of those costs?
>
> A: …[K]nowing what it did cost us to implement chip and PIN, I would reliably say that our cost alone would be in the millions of dollars.
>
> And … merchants would have to make … significant changes to their point-of-sale systems, and, as I testified earlier, the costs for some large merchants might be in the hundreds of thousands of dollars. So every single merchant who wanted to implement that would have to make those changes.[195]

134. Mr. Jairam provided similar evidence:

> The technical challenge of delivering a real time pricing engine - one that takes into account the multi-dimensional considerations [that bear on a transaction's interchanger rate] - is challenging enough. The reality is any such initiative will require large investments - costs that will eventually be borne by merchants as higher service fees.[196]

Mr. Jairam also explained that merchants wishing to surcharge will likely employ blended surcharges in order to get around the technological challenges, which will obscure the pricing signals that the Commissioner alleges surcharging will provide:

> The primary impact of [blended surcharging] … is that, since the same surcharge is levied on all credit card types, it does not provide a clear signal to consumers about switching to alternative, lower-cost credit cards. On the contrary, a blended rate may have the effect of discouraging, as a whole, the use of credit cards as a payment instrument.
>
> Given the relative ease of adopting the blended rate method and the complexity of the pass through method, it is highly likely that merchants will use a blended rate surcharge method.[197]

---

[194] van Duynhoven Statement, Exhibit I-456, para. 48(a).

[195] van Duynhoven Transcript (May 31 Public), p. 2521 (line 19) to p. 2522 (line 12).

[196] Jairam Report, Exhibit I-515, para. 59.

[197] Jairam Report, Exhibit I-515, paras. 61-62.

135. Evidence from the Commissioner's witnesses confirms that there are significant technical obstacles to implementing differential or selective surcharging:

(a) Mr. McCormack conceded that the technology to determine the interchange rate applicable to a credit card does not currently exist in Canada and that, if that technology was developed, it would require signal connectivity outside the merchant location that might well delay the transaction process.[198]

(b) [redacted][200]

(c) [redacted][201]

(d) Mr. Symons of the merchant, IKEA, testified that IKEA discontinued its surcharging practice in the United Kingdom primarily due to frustrations experienced by front line staff with the technical implementation of the practice with the point-of-sale terminals.[202] In cross examination, and in Mr. Jairam's evidence,[203] it emerged that [redacted].[204] IKEA told a consumer rights group in the

[198] McCormack Transcript (May 15, Public), p. 794 (line 4) to p. 795 (line 4); p. 796 (line 12) to p. 797 (line 3) ("there is an additional step, on top of the authorization, to obtain some information from a remote source").

[redacted]

[202] Symons Statement, Exhibit A-087, para. 60.

[203] Jairam Transcript (June 7, Public), p. 3430 (line 24) to p.3431 (line10).

[204] [redacted]

United Kingdom that: "even after six years, many of our customers are angry with this approach and we cannot afford to alienate customers."[205]

(e) Tim Broughton, the owner of the merchant, C'est What, noted that customers in the restaurant business are highly sensitive to delay at the end of their meal in terms of processing their payments. [206] Hence, C'est What does not accept payment by Interac because they perceive the transaction time to be too long.[207] This strongly suggests that restaurant merchants would be particularly sensitive to the technological obstacles to surcharging.

136. The evidence regarding the technological obstacles to surcharging is even sharper when viewed in the context of the evidence [redacted]:

(a) As Ms. Li from WestJet made clear, WestJet is currently [redacted][208]

[redacted][209]

(b) As Mr. Shirley from Best Buy testified:

[redacted][210]

…

[redacted]

[205] VISA super-complaint: credit and debit surcharges, Exhibit I-519, p. 34 (internal p. 28).
[206] Broughton Transcript (May 9, Public), p. 348 (line 10) to p. 349 (line 20).
[207] Broughton Transcript (May 9, Public), p. 342 (line 26) to p. 343 (line 1).
[208] [redacted]
[209] [redacted]
[210] [redacted]

[redacted][211]

137. As discussed in detail below at paragraphs 138-147, in reality, surcharging is simply not an attractive option for merchants, who actually want to obtain additional leverage from this Tribunal in future negotiations with Visa and MasterCard.

G. Merchants Are Really Asking the Tribunal to Provide Negotiating Leverage

138. The weight of the evidence from the merchant witnesses strongly suggests that the vast majority of them do not intend to surcharge at point-of-sale. Instead, they want this Tribunal to issue the Proposed Order in order to enhance their bargaining position in future potential negotiations with Visa and MasterCard in which these merchants hope to secure decreased interchange rates. TD submits that this is not the proper basis on which to seek the Tribunal's assistance. Where the beneficiaries of the discretionary order do not even intend to exercise the powers that would be granted to them under that order, this should militate against the issuance of that order.

139. The Commissioner's expert, Mr. McCormack, acknowledged that merchants may be reluctant to surcharge unless their competitors were doing, given the potential risk of upsetting customers.[212] This is consistent with the evidence of the merchants who testified in this case.

140. [redacted]

---

[211] [redacted].

[212] McCormack Transcript (May 14, Public), p. 727 (lines 5-17).

[redacted] Indeed, Mr. Broughton also testified that, in his view, surcharging is best when the cardholder is told that the payment networks are imposing the surcharge, rather than the merchant, which suggests that C'est What would not want to impose a surcharge as contemplated under the Proposed Order.[214]

141. [redacted][215] This strongly suggests that [redacted] has no intention of adding an additional "surcharge" step to the check-out process and is merely seeking a better negotiating position with Visa and MasterCard.

142. [redacted] had not yet decided whether it would implement surcharging in Canada, despite the fact that it had put forward a witness statement in support of the Commissioner's Application.[216] Moreover, as discussed above at paragraph 135(d), IKEA's negative experience with surcharging in the United Kingdom strongly suggests it would not implement surcharging in Canada.

143. Moreover, the evidence of Mr. Daigle also suggests that Shoppers Drug Mart would not actually exercise the right to surcharge if the Proposed Order was granted. Mr. Daigle insisted – when confronted with the decision of Shoppers not to implement discounting for loyalty-card customers – Shoppers wishes to treat all of its customers equally rather than alienating cardholders.[217] Moreover, Shoppers does not want to implement a policy that will make the point of sale experience any more complex given that this could lead to delay and confusion for

---

[213] [redacted]

[214] Broughton Transcript (May 9, Public), p. 342 (line 13) to p. 343 (line 10).

[215] [redacted].

[216] [redacted].

[217] Daigle Transcript (May 10, Public), p. 425 (lines 9-19).

the customer.[218] Indeed, for American Express transactions – which are the most complex for Shoppers – no surcharging is currently taking place.[219]

144. For its part, Coles Supermarket abandoned surcharging after a short pilot project in Australia. [redacted][220] It is telling that in 2001, the submission of the Australian Retailers Association's ("ARA") submission to the RBA said that surcharging was not a realistic option. Coles is a member of the ARA.[221]

145. It is noteworthy that none of the merchant witnesses addressed in a meaningful way the technological obstacles to selective surcharging, discussed at paragraphs 127-157 above, or how the considerable costs of addressing those obstacles would impact whether they would surcharge. Many did acknowledge that some form of real-time access to interchange rates would be required to allow them to surcharge.

146. The Commissioner's Application is supported by, and seeks to benefit most, those who need it least. Of the ten merchant witnesses called by the Commissioner, only one (C'est What) is a "small" merchant. All the others are very large merchant conglomerates, with multiple locations across Canada, sales in the hundreds of millions if not billions of dollars, and considerable market power.

147. The market power of these very large merchants is demonstrated by the fact that, as the evidence unequivocally reveals, they are able to negotiate the lowest available interchange rates and card acceptance fees and, in this respect, have a competitive advantage over their smaller, less powerful rivals. Further, as the evidence confirms, several of them been able to

---

[218] Daigle Transcript (May 10, Public), p. 425 (line 14) to p.426 (line 2).

[219] Daigle Transcript (May 10, Public), p. 439 (lines 8-13); p. 440 (lines 5-10).

[220] [redacted]

[221] Australian Retailers Assocation – Submission to the RBA & Australian Competition and Consumers Commission, Exhibit R-078.

have direct negotiations with Visa or MasterCard or both, and a number of them [redacted] have entered into favourable agreements with Visa or MasterCard that impact their effective interchange rates.

H. Discounting Is Equivalent to Surcharging

148. As discussed in detail above, the Code of Conduct enshrines the right of Merchants to engage in discounting practices at point-of-sale in order to steer cardholders to alternative forms of payment.[222] After consulting with stakeholders, the Minister of Finance in 2010 chose discounting as the best steering mechanism and rejected surcharging. In his speech of June 8, 2012, the Minister reaffirmed his conclusion that discounting provides merchants with "competitive advantage [to] … change the way consumers choose payment options":

> With this Code of Conduct merchants have the power to offer consumers discounts for paying with a low cost payment method. I suggest to you isn't that the best of all reward programs? Before calling for [further regulation] … merchants should realize that they hold significant competitive advantage and can change the way consumers choose payment options.[223]

149. Mr. van Duynhoven testified to the numerous advantages that discounting holds over surcharging as an effective steering mechanism.[224] Even before the introduction of the Code of Conduct, 12 percent of merchants in Canada engaged in discounting practices. This is expected to rise, as discounting was not widely appreciated as an option prior to the Code of Conduct.[225] As Mr. van Duynhoven testified:

> Our view is that discounting provides similar cost management capabilities for a merchant. And, in fact, the beauty of discounting is that it is what I would term "self-regulating".
>
> So the advantage of discounting is that a merchant needs only to provide enough of a discount that is necessary to effect the behaviour that they want to induce in that consumer.

---

[222] Van Duynhoven Statement, Exhibit I-456, para. 139.

[223] Speech of The Honourable Jim Flaherty, June 8, 2012, Transcription, p. 9, **TD's BOA, Tab 22**.

[224] Van Duynhoven Statement, Exhibit I-456, paras. 140-144.

[225] Van Duynhoven Statement, Exhibit I-456, para. 143.

> So if they want to have them not use a credit card and use a debit card, they know what their costs are now with the code of conduct. They know what the cost of accepting those cards are. And they can offer enough discount where it makes an advantage for them.
>
> And they only need to offer that to those customers that they're looking to switch that behaviour.
>
> And that contrasts with surcharging, that we have seen in jurisdictions like Australia, where … it has become a for-profit capability. That risk, in my opinion, doesn't exist with discounting.[226]

150. The evidence from the merchant witnesses called by the Commissioner makes clear that there is nothing inherently disadvantageous about discounting. Merchants who say otherwise are simply expressing their own business decision that has nothing to do with resale price maintenance. The merchant witnesses testified consistently that they build all their costs into the prices they charge consumers, including their costs of accepting credit cards.[227] With those costs built in, merchants are free to offer a discounted price to consumers who choose a payment instrument other than a credit card. The following evidence from the merchant witnesses is instructive:

(a) Mr. De Armas confirmed that, despite its "everyday low prices" policy, Wal-Mart does in fact employ discounting practices in its business. For example, Wal-Mart offers discounts through the marketing strategy of "rolling back" its existing prices from time to time or offering temporary rebates on prices through its e-commerce site.[228] It is apparent that Wal-Mart could engage in discounting to steer customers to lower forms of payment if it wished to.

(b) Ms. Li of WestJet acknowledged that WestJet had not undertaken any study or analysis to determine whether surcharging is more effective than discounting.[229]

---

[226] van Duynhoven Transcript (May 31 Public), p. 2524 (line 18) to p. 2525 (line 19).

[227] De Armas Transcript (May 9, Public), p. 270 (lines 22-25); Broughton Transcript (May 9, Public), p. 346 (lines 2-5); Daigle Transcript (May 9, Public), p. 397 (lines 11-22); Symons Transcript (May 22, Public), p. 1597 (line 23) to p. 1598 (line 3); Houle Transcript (May 10, Public), p. 521 (lines 19-24); p. 522 (lines 10-13).

[228] De Armas Transcript (May 9, Public), p. 320 (line 18) to p. 321 (line 1).

[229] Li Transcript (May 22, Public), p. 1576 (line 23) to p. 1577 (line 2).

WestJet has no concrete basis to reject discounting except its own internal pricing policy of not wanting to offer discounts.

(c) Marion van Impe of the University of Saskatchewan conceded that the University did not engage in discounting due to logistical issues such as communication with students.[230] Therefore, the University of Saskatchewan's decision not to discount had nothing to do with the relative effectiveness of surcharging over discounting and was instead related to specific University-specific examples which have no broad application.

151. Professor Mulvey, an expert in consumer behaviour, testified that merchants in Canada engage in a variety of different pricing strategies, with many using discounting to gain a competitive advantage.

> [H]istorically through the history of retailing we have seen merchants use high/low pricing. Let's keep it artificially high, and then we'll discount it so it seems like a deal. We'll bring in the people, and then we'll start charging high and low.
>
> … [P]ricing is a very creative area, and having the lowest price, yes, it is a strategy employed by some merchants, but it is not the only way.
>
> They use different pricing mechanisms as a basis to have competitive advantage.[231]

152. Pricing policies are the choice of the merchant. Merchants – who have already built the cost of card acceptance into their pricing – are free to engage in discounting practices to steer consumers to alternative forms of payment.

I. Regulatory Intervention in the Payments System Needs Time to Work

153. TD submits that, in the exercise of its discretion under s. 76, this Tribunal ought to take into account the current landscape of the Canadian payments system. This landscape recently experienced a fundamental change with the introduction by the Federal Government of the

---

[230] Van Impe Transcript (May 23, Public), p. 1715 (lines 4-9).
[231] Mulvey Transcript (June 6, Public), p. 3276 (lines 1-15).

Code of Conduct in 2010.[232] The Code of Conduct binds Visa, MasterCard, and all major Card Issuers and Acquirers in Canada and enshrines important principles to govern the credit card system.[233] The purpose of the Code of Conduct was to address concerns that had been expressed by merchants, concerns repeated by the Commissioner in the current proceeding.[234] The Financial Consumer Agency of Canada has supervisory jurisdiction over the Code of Conduct and has been providing ongoing interpretation and enforcement that will further deepen the impact of this important regulatory intervention into the credit card system.[235]

154. In 2008, merchant associations such as the Retail Council of Canada began to voice concerns expressed by their members regarding the emergence of premium credit cards and what merchants perceived to be rising card acceptance fees.[236] This led to a campaign among retailers in Canada over the issue of "rising" card acceptance fees. The Senate Committee on Banking, Trade and Commerce, heard from stakeholders in the industry, including merchant groups. A Committee of the House of Commons also reviewed the matter before it was ultimately taken up by the Ministry of Finance.[237]

155. The Ministry of Finance implemented an extensive consultation process in the lead up to the Code of Conduct. Submissions were received from merchant associations, Visa, MasterCard, a number of Acquirers (including TD), Card Issuers, and consumers associations.[238] As part of this process, the Ministry of Finance looked carefully at both the

---

[232] Hewitt Statement, Exhibit I-476, paras. 47-50; Van Duynhoven Statement, Exhibit I-456, paras. 123(a), 125(b), 127-139.

[233] Jairam Report, Exhibit I-515, paras. 39-40.

[234] Jairam Report, Exhibit I-515, paras. 39-40; Hewitt Statement, Exhibit I-476, paras. 47-50; Van Duynhoven Statement, Exhibit I-456, paras. 123(a), 125(b), 127-139.

[235] van Duynhoven Statement, Exhibit I-456, at para. 134-135; Jairam Report, Exhibit I-515, para. 40.

[236] van Duynhoven Statement, Exhibit I-456, at para. 128.

[237] Weiner Transcript (May 29, Public), at p. 2317 (lines 9-25).

[238] van Duynhoven Statement, Exhibit I-456, at para. 130; Weiner Transcript (May 29, Public), at p. 2318 (lines 7-15); Weiner Statement, Exhibit R-426, para. 51.

Honour All Cards and No Surcharging Rules,[239] partly in response to a specific request by the Canadian Federation of Independent Business, an influential merchant association, for the abolition of these rules.[240] [redacted][241]

156. In May, 2010, the Minister of Finance published the Code of Conduct. The public reaction voiced on behalf of the main beneficiaries – merchants - of the Code of Conduct is telling. The Retail Council of Canada called the Code of Conduct "a huge victory for us [merchants]". The Canadian Federation of Independent Business declared that "[merchants] got almost 95 per cent of what we wanted," with enhanced "power in dealing with Visa, MasterCard and their bank and processor partners."[242] The Code of Conduct constitutes a significant intervention into the credit and debit card industry in Canada.[243] To wit:

(a) Merchants have the express right to steer consumers to forms of payment other than credit cards, through discounting and related mechanisms. The No Surcharge Rule was deliberately left untouched by the Minister of Finance and the Honour All Cards Rule (although bifurcated for debit and credit) was left untouched for credit cards. In terms of the merchants' ability to steer, Mr. Weiner explained in his testimony that:

> Merchants can use any form of steering that they really like, except for surcharging … They can offer discounts. They [can] … offer coupons. They can use loyalty programs. They can

---

[239] Weiner Transcript (May 29, Public), at p. 2320 (lines 12-24).

[240] [redacted]; Leggett Transcript (June 1, Public), p. 2605 (lines 8-18).

[241] van Duynhoven Statement, Exhibit I-457, at para. 145.

[242] Weiner Statement, Exhibit R-426, at para. 56.

[243] van Duynhoven Statement, Exhibit I-456, at para. 132-134; van Duynhoven Transcript (May 31, Public), at p. 2523 (line 12) to 2524 (line 10); Hewitt Statement, Exhibit I-476, at paras. 50-51; Weiner Statement, Exhibit R-426, paras. 58-60.

> simply ask a consumer whether or not they would be willing to use a different form of payment.[244]

In his June 8, 2012 speech, the Minister of Finance reaffirmed his conclusion that discounting provides merchants with "competitive advantage [to] … change the way consumers choose payment options":

> With this Code of Conduct merchants have the power to offer consumers discounts for paying with a low cost payment method. I suggest to you isn't that the best of all reward programs? Before calling for [further regulation] … merchants should realize that they hold significant competitive advantage and can change the way consumers choose payment options.[245]

(b) Networks are obligated to publish their default interchange rates on their public websites so that all members of the public can understand merchants' cost of acceptance.

(c) Acquirers are required to provide transparent bills to merchants so that they can easily compare the prices with those offered by other Acquirers. [redacted][246]

(d) Merchants are given the express right to terminate their agreements with Acquirers within 90 days after any price increase.

(e) Issuers are required to limit the issuance of premium cards to those consumers who specifically request such cards and to those meeting minimum earning or spending thresholds.

157. As discussed above, the Financial Consumer Agency of Canada has oversight authority for the Code of Conduct and receives complaints from merchants and merchant associations with regard to its enforcement. By way of example, a complaint by the Canadian Federation of

---

[244] Weiner Transcript (May 29, Public), p. 2321 (line 23) to p. 2322 (line 6).

[245] Speech of The Honourable Jim Flaherty, June 8, 2012, Transcription, p.9, **TD's BOA, Tab 26**.

[246] [redacted].

Independent Businesses in 2011 regarding how a large Acquirer had interpreted the Code of Conduct led that Acquirer to back down and provide merchants with additional time to terminate their agreements upon notice of a price increase.[247]

158. The effect of the Code of Conduct cannot yet be fully assessed, given its recent vintage (indeed, some of its provisions did not become binding until February, 2011).[248] As the experience in Australia illustrates, it takes several years for the effects of a major regulatory intervention into the credit card system to be fully assessed. The Reserve Bank of Australia's regulatory intervention, which had been preceded by a public antitrust proceeding that was never completed,[249] occurred in 2003, yet only now is the Reserve Bank beginning to come to terms with the effects of its interventions.[250]

159. Mr. Jairam confirmed that "[m]uch of the Voluntary Code is only beginning to take effect and the Finance Minister has indicated that, though voluntary, he expects compliance and would not hesitate to intervene in order to enforce it."[251]

160. As Mr. van Duynhoven testified, the Code of Conduct should be given time to work before another significant intervention is made into the payments system:

> I don't think all of the effects [of the Code of Conduct] have been seen at present. We have to remember that the code has been in effect for less than two years.
>
> The typical merchant agreement is three years for most acquirers, and for some it is five years. So unless there has been a pricing change, there is no ability for the merchant to exercise their ability to exit that particular agreement from that contract. So I think time will allow more -- more change.

---

[247] van Duynhoven Statement, Exhibit I-456, paras. 134-136.

[248] van Duynhoven Statement, Exhibit I-456, paras. 127, 131-132.

[249] Swansson Transcript (May 22, Public), p. 1506 (line 3) to p. 1508 (line 3).

[250] See, for example, van Duynhoven Statement, Exhibit I-456, Exhibit "DD", Reserve Bank of Australia's December 2011 Report.

[251] Jairam Report, Exhibit I-515, para. 40.

> And the other point is I think the … FCAC [Financial Consumer Agency of Canada] Commissioner, has come out with several rulings already on interpretations of the code of conduct to provide more guidance on the principles that Finance had set out.
>
> So I think, and I know, there has been ongoing conversations on other issues regarding transparency in the industry. So I think over time we will continue to see the benefit of the code of conduct and the advantage that that does provide to merchants in Canada.[252]

161. [redacted][254]

162. That the Code of Conduct is a living document is confirmed by the recent announcement of the Minister of Finance that his department is "currently reviewing" the Code of Conduct with an eye to emerging trends and issues in the Canadian payments system, such as "mobile payments products".[255]

163. Even with the Code of Conduct in place, the Ministry of Finance continues to meet regularly with payment networks, such as MasterCard, to address issues of reform beyond the mandates specifically set out in the Code of Conduct. Ms. DeVita of MasterCard testified that she :

[redacted]

[252] van Duynhoven Transcript (May 31 Public), p. 2526 (lines 2-23).

[253] [redacted]

[254] [redacted]

[255] Speech of The Honourable Jim Flaherty, June 8, 2012, Transcription, p. 8, **TD's BOA, Tab 22**.

[redacted][256]

J. Impacts of Credit Cards to the Canadian Payments System

164. Credit card transactions take place within a larger payments system the elements of which are all interconnected. As Mr. Jairam explained, "[c]hanges to one part of the [payment] ecosystem … will have a ripple effect across the entire landscape as different parties adjust to the new competitive environment."[257] This Tribunal ought to have regard to the wider payments system, including the benefits that credit cards currently provide in that system and the potential impacts that the Commissioner's Proposed Order would have on that system.

165. It is clear that credit cards provide multiple benefits within the payments system:[258]

(a) Credit cards provide a "credit facility that supports retail activity", especially by promoting transactions by those without immediate "funds in their [banking] accounts, which is a prerequisite to processing debit card payments". Any drop in credit card volumes and any decrease in the availability of this credit facility could harm retail output in Canada. Mr. Jairam stated:

> Consumer spending, the largest component of Canadian gross domestic product, has been shown to increase with credit card use. Indeed, the Bank of Canada recently found that tightening consumer credit conditions over the financial crisis was

---

[256] [redacted]

[257] Jairam Report, Exhibit I-515, at para. 18.

[258] Jairam Report, Exhibit I-515, at para. 38; Leggett Transcript (June 1, Public), at p. 2586 (line 17) to p. 2589 (line 24); Stanton Statement, Exhibit R-443, paras. 13 and 15-19.

> associated with a "sharp drop-off' in consumer spending in the US, leading to the conclusion that central banks will loosen credit conditions to stimulate domestic demand.[259]

(b) Credit cards, even more so with the emerging popularity of contactless transactions, provide fast and convenient point-of-sale experiences for consumers and merchants alike. Surcharging at point-of-sale would not only undermine this benefit but actually *increase* wait times at point-of-sale. Mr. Jairam testified:

> Consumers who shop at merchants that surcharge will likely endure longer wait times at checkout caused by the increased handling time associated with customers deliberating on which card to use, and deciding on which alternative payment instrument to use – whether debit, cash, or cheques.[260]

(c) Credit cards also promote retail transactions by providing cardholders with benefits, including “such as insurance, theft protection, fraud protection, and support when contesting inappropriate or erroneous merchant charges.” Card Issuers’ structure their entire business models on the premise that increased rewards will cause cardholders to spend more money at point-of-sale.[261] Mr. Hewitt, who led TD’s development and launch of a premium Visa card from 2007-2010,[262] [redacted]

> [redacted]

> [redacted]

---

[259] Jairam Report, Exhibit I-515, at para. 95 (first bullet).

[260] Jairam Report, Exhibit I-515, at para. 94.

[261] Hewitt Statement, Exhibit I-476, para. 46; [redacted]

[262] Hewitt Transcript (June 1, Public), p. 2670 (lines 14-17).

[263] [redacted]

[redacted][264]

(d) Mr. Hewitt's evidence regarding the benefits of premium cards is entirely consistent with Shoppers Drug Mart's experience that rewards offered to their Optimum cardholders drove increased purchases.[265]

(e) Credit cards provide retailers and merchants with "the guarantee of payment" from their Acquirer, even if the cardholder ultimately fails to pay his/her Card Issuer at the end of the month. Merchants also enjoy "reduced handling costs of cash and cheque payments."

(f) The wider payments system benefits as Canada is a "global leader in chip & PIN technology that has improved security and minimized fraud risks for card holders, merchants and issuers." As Mr. Jairam noted, any trend toward increased use of outdated payment instruments, such as cheques or cash, could have unintended consequences in terms of undermining the innovations of electronic payments and promoting the underground economy.[266]

---

[264] [redacted]

[265] Daigle Statement, Exhibit "A", 2010 Annual Report, PDF Page 20 (internal p. 3).

[266] Jairam Report, Exhibit I-515, para. 20(x).

(g) Credit cards have allowed for a "proliferation of online payments .. that allows a merchant to either create solely a virtual presence online … or enables a merchant to actually extend their sales power, either domestically or internationally, by creating a presence online". In Canada, Interac debit has not become a serious payment option online.[267] In the online space, consumers will have little choice but to pay surcharges. The experience from Australia suggests that the surcharges imposed by online merchants will be particularly excessive.[268]

166. In contradistinction to the widespread benefits to merchants' businesses and to the Canadian economy resulting from credit cards as readily available and easily used payment instruments, Mr. Jairam gave uncontradicted evidence of the negative impacts to the Canadian payments system that would flow were the Proposed Order to be granted.

167. Those impacts would impose themselves with adverse effect upon several essential features of the robust Canadian payment system. The features that would be most impacted include the following:

(a) the development, accessibility and healthy competitiveness of the system (i.e., its "ubiquity") would be reduced;

(b) the availability of an array of suitable payment instruments to suit diverse conditions (i.e., its "convenience") would be diminished;

(c) its ability to respond to and address evolving needs (i.e., its "responsiveness") would be retarded;

---

[267] Jairam Report, Exhibit I-515, p. 27 ("… while Interac Online was introduced in 2004, the product has not yet entrenched itself to widely facilitate use of debit cards to support online commerce").
[268] Leggett Transcript (June 1, Public), p. 2602 (lines 10-12).

(d) its ability to facilitate travel, tourism and trade (i.e., its "globally integrated" nature) would be adversely affected.[269]

168. Mr. Jairam was specific as to how the above features of the Canadian payments system would be adversely impacted. His evidence in this regard was virtually unchallenged. Those conclusions include:

(a) Retail consumer traffic would be diminished, as the convenience and benefits from easy credit card usage would be interfered with;

(b) Less affluent consumers who rely on credit to manage their cash flows would be more heavily impacted;

(c) Larger merchants would benefit disproportionately to the detriment of smaller merchants;

(d) Competition in the financial services market would be reduced, as smaller issuers and acquirers would find it more difficult to compete with their larger counterparts;

(e) Travel, tourism and trade, especially within Canada, would be negatively affected by the diminished utility of credit cards as payment instruments;

(f) Innovation in the payments sector, which is primarily dependent upon the credit card sector, would take a backwards step;

(g) The increase in cash or cheque usage will slow the pace of Canada's move toward a digital economy, and place Canada at a competitive disadvantage to other developed and developing economies.[270]

169. The above-listed negative effects, and others, would retard the development in Canada

[269] Summary of Evidence of Balaji Jairam, Exhibit I-517, pp. 5 and 9.

[270] Jairam Report, Exhibit I-515, at paras. 20 and 129; Summary of Evidence of Balaji Jairam, Exhibit I-517, p. 9.

of a more advanced payment system. This would fly in the face of the fundamental message delivered by the recently-concluded Canadian Payments Task Force:

> … [U]less Canada develops a modern digital payments system, Canadians will be unable to fully engage in the digital economy of the 21st century, leading to a lower standard of living across the country and a loss in international competitiveness. [271]

170. None of the merchant witnesses reflected in their evidence on the undoubted benefits brought to their businesses by credit card usage, nor upon the detrimental impact to their sales that would result from implementation of the Proposed Order, if granted. Their evidence lacks critical balance in this, and other respects. Accordingly, their complaints, and their evidence generally, should be regarded with skepticism by the Tribunal.

[271] Summary of Evidence of Balaji Jairam, Exhibit I-517, p. 5; Jairam Transcript (June 7, Public) at p. 3341 (line 9) to p.3342 (line 14).

RELIEF SOUGHT

171. TD supports the request by Visa and MasterCard that this Tribunal dismiss the Commissioner's Application, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

FOR

F. Paul Morrison / Christine Lonsdale / Adam Ship

Counsel for The Toronto-Dominion Bank

CT-2010-010

THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

VISA CANADA CORPORATION AND MASTERCARD INTERNATIONAL INCORPORATED

Respondents

THE TORONTO-DOMINION BANK

Intervenor

WRITTEN CLOSING SUBMISSIONS OF THE INTERVENOR, THE TORONTO-DOMINION BANK

McCarthy Tétrault LLP
Suite 5300, P.O. Box 48
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

F. Paul Morrison
Tel: 416 601-7887

Christine Lonsdale
Tel: 416 601-8019

Adam Ship
Tel: 416 601-7731

Of Counsel for The Toronto-Dominion Bank

#11553105