Competition Tribunal Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2011 Comp. Trib. 19
File No.: CT-2010-10
Registry Document No.: 108

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)

and

Visa Canada Corporation
MasterCard International Incorporated
(respondents)

and

The Toronto-Dominion Bank
The Canadian Bankers Association
(intervenors)

Date of hearing: 20111004
Before Judicial Member: Simpson J. (Chairperson)
Date of Reasons and Order: October 12, 2011
Reasons and Order signed by: Madam Justice Sandra J. Simpson

REASONS AND ORDER REGARDING THE COMMISSIONER'S MOTION DEALING WITH THE REDACTION OF INFORMATION FROM TD BANK'S PRODUCTIONS AND ITS REFUSAL TO PRODUCE CERTAIN DOCUMENTS

[1] The Commissioner of Competition (the Commissioner) alleges that Toronto-Dominion Bank's ("TD Bank") Further and Better Affidavit of Documents dated September 9, 2011 (the "TD Affidavit") is deficient for the following reasons:

(i) Redactions have been made in the following documents:

(a) Approximately 50% or 750 of the documents listed in the TD Affidavit have been redacted to remove references to the identity of TD Bank's merchant customers. These references may include the merchants' names, addresses and telephone numbers. Samples of these documents are found as exhibits 60, 61 and 62 to the affidavit of Richard Bilodeau of the Commissioner's office dated September 19, 2011 (the "Bilodeau Affidavit").

(b) The Profit and Loss Statement for TD Bank's Merchant Services Business which is found as Exhibit 63 to the Bilodeau Affidavit has been redacted to remove detailed information about the revenues associated with three debit businesses and line information about aggregated expenses.

(c) Six TD Bank Government Relations documents have been redacted to remove information about topics other than credit cards. These documents are found as Exhibit C to the affidavit of Dera Nevin of McCarthy Tétrault dated September 26, 2011 (the "Nevin Affidavit"). Five of the documents are short. However, one is approximately sixty pages in length.

(ii) TD Bank refused to produce documents showing the content of pre-contractual negotiations between TD Bank and Visa Canada Corporation (Visa) and MasterCard International Incorporated (MasterCard).

THE CONTEXT

[2] In broad terms, the Commissioner's main application against Visa and MasterCard (the "Application") concerns certain restraints placed on merchants who have entered into agreements to accept Visa and MasterCard credit cards. The Commissioner alleges that abolishing these restraints will encourage card holders to use lower cost forms of payment and will promote competition in setting the fees paid by merchants for credit card network services.

[3] When financial institutions such as banks issue credit cards to shoppers they are described as "Issuers". Some banks also operate as "Acquirers". In this role, they provide services to merchants which allow them to process payments made with credit cards. TD Bank operates as both an Issuer and an Acquirer with respect to Visa and MasterCard credit cards.

[4] TD Bank is an intervenor in the Application. It has a unique perspective because, unlike Visa and MasterCard, TD Bank deals directly with merchants who use the Visa and MasterCard credit card networks.

[5] By order of the Tribunal dated April 5, 2011, TD Bank was given leave to intervene on five issues. The following four are relevant for present purposes:

(i) TD Bank's interactions with merchants as an Acquirer.

(ii) TD Bank's interactions with Visa and MasterCard as an Acquirer.

(iii) TD Bank's interactions with Visa and MasterCard as an Issuer as those interactions relate to Interchange Fees.

(iv) The impact of the Proposed Order [in the Application] on TD Bank's business as an Issuer and an Acquirer to the extent that there is no duplication with the other intervenor's evidence and submissions.

[6] The Tribunal's Order of April 5, 2011 also required the TD Bank to produce the documents relevant to, *inter alia*, the above topics.

[7] TD Bank is a party to the Tribunal's Confidentiality (Protective) order dated October 5, 2011 (the "Confidentially Order"). On consent, all the documents at issue have been produced with the designation Confidential – Level A. Documents so designated may be disclosed only to the Commissioner, to outside counsel for the parties and for the intervenors who are directly involved in the application, to outside counsel's staff, to document review vendors retained by any of the parties or intervenors and, where disclosure is required to carry out their mandate, to the experts retained by the parties or the intervenors and to the staff of the experts directly involved in the Application.

THE LAW

[8] TD Bank says that the law is that although productions are generally unredacted, redactions are permitted if the redacted information is irrelevant and confidential or if a lengthy document includes segmented irrelevant material.

[9] For the reasons that follow I have not been persuaded that this is an accurate statement of the applicable law. Instead, I have concluded that the general rule proposed by the Commissioner and described below is the law with respect to the propriety of redacting information from non-privileged productions.

[10] The parties referred to the following cases in their submissions: (i) *Glaxo Group Ltd. v. Novopharm Ltd.* (1996), 122 F.T.R. 192, 1996 CarswellNat 1907 (Fed. T.D.); (ii) *Horn v. Canada*, 2006 FC 280, upheld on appeal in *Horn v. Canada; Williams v. Canada*, [2006] F.C.J. No. 1029 (C.A.), (*sub. nom. Obonsawin et al. v. The Queen et al.*) 2006 FCA 234, 2006 DTC 6497; (iii) *Eli Lily Canada Inc. v. Sandoz Canada Inc.*, 2009 FC 345; and (iv) *Eli Lilly Canada*

Inc. v. Hospira Healthcare Corp., 2009 CarswellNat 5477. I will describe the salient points of each decision:

(i) *Glaxo Group Ltd. v. Novopharm Ltd.*

[11] This is a decision of Mr. Justice Lutfy of the Federal Court dated November 1, 1996. He stated at para. 17 the rule that "If a portion of a document is relevant, the document must be disclosed and its unexpurgated version must be made available for inspection." (the "General Rule"). The plaintiff had filed an affidavit of documents which listed several documents with redacted portions. The defendant moved for production of all documents in unredacted form. Mr. Justice Lutfy worried that the courts would be overburdened by requests for more complete disclosure if parties were permitted to produce redacted versions of their documents. He ordered production of unredacted copies. While the Court acknowledged that a party might deviate from the General Rule in "exceptional situations", no such circumstances were found to exist.

(ii) *Horn v. Canada*

(a) Federal Court

[12] Chief Justice Lutfy's decision in *Horn v. Canada* on March 2, 2006 reaffirmed the General Rule. The plaintiffs in *Horn* were directed by the case management judge to request that a non-party to the proceedings produce certain documents. They were eventually produced but the names of specific client organizations were redacted. As in *Glaxo*, Chief Justice Lutfy found that the plaintiffs had failed to bring the redacted documents within any exception to the General Rule. He ordered that unredacted copies of the documents be produced. The Chief Justice also separately considered claims that the non-party owed a duty of confidentiality to its clients to redact the information from the produced documents, but found that no such implied or explicit duty was shown to exist.

(b) Federal Court of Appeal

[13] On appeal, the appellants argued that Chief Justice Lutfy had erred in failing to consider relevance of the redacted information. Mr. Justice Nöel writing for a unanimous Court of Appeal on June 28, 2006 upheld the decision of Chief Justice Lutfy requiring production of the unredacted documents. The Court of Appeal reached this decision even though the Chief Justice had not considered whether the redacted information was irrelevant. The Court then, apparently in *obiter dicta*, looked at relevance and found no basis for the appellant's claim that the redacted information was irrelevant.

[14] At para. 22, Mr. Justice Nöel repeated the General Rule that relevant documents are to be produced in their entirety even if they include irrelevant information and declined to interfere with the lower court's factual finding that confidentiality concerns did not arise. However, the Court also stated, based on a decision of Master Keighley of the British Columbia Supreme Court in *Lewis and Petryk*, 2005 BCSC 77, [2005] B.C.J. No. 129 at para. 15 that there are exceptions to the General Rule and that "clearly irrelevant" portions of relevant documents can be redacted.

[15] The difficulty is that Master Keighley's decision does not use the words "clearly irrelevant". Rather, at para. 15, he quoted from the decision of Lowry J., as he then was, in *North American Trust Co. v. Mercer International Inc.*, [1999] 71 B.C.L.R. (3d) 72 (S.C.) where he stated the General Rule when he said that a litigant cannot avoid producing a document in its entirety simply because some parts of that document may be irrelevant. Mr. Justice Lowry then added:

> The whole of the document is producible if a part of it relates to a matter in question. But where what is clearly not relevant is by its nature such that there is good reason why it should not be disclosed, a litigant may be excused from having to make a disclosure that will in no way serve to resolve the issues. In controlling its process, the court will not permit one party to take unfair advantage or to create undue embarrassment by requiring another to disclose part of a document that could cause considerable harm but serve no legitimate purpose in resolving the issues.

[16] In my view, Mr. Justice Lowry was acknowledging that an exception to the General Rule might be made if clearly irrelevant material would cause embarrassment or harm. There was no suggestion that production could be avoided only because information was clearly irrelevant. Further evidence would be needed to show the existence of exceptional circumstances.

[17] The case before Master Keighley dealt with a plaintiff's claim for damages arising out of injuries, both physical and psychological, caused by a motor vehicle accident. The plaintiff produced her doctor's records but redacted pre-accident notes dealing with earlier obstetrical and gynaecological issues, saying that the information was irrelevant and confidential. The defendants said they should be included because prior issues of that kind might have a bearing on her psychological state at the time of the accident. Master Keighley decided that he could not deal with the matter without an affidavit and adjourned for that purpose.

(iii) *Eli Lilly Canada Inc. v. Sandoz Canada Inc.*

[18] In this case Sandoz produced a number of non-privileged redacted documents. On a motion for production of the complete documents, Prothonotary Tabib observed, in *obiter*, that very large documents with identifiable and relatively independent sections of irrelevant material might lend themselves to partial production of only the relevant sections. The Prothonotary also observed that redactions of portions of text within a disclosed section of a document may be permitted where (1) the redacted portions are clearly irrelevant and would clearly not assist in properly understanding the relevant parts of the document and (2) important confidentiality concerns exist. She said at para. 14:

> When it comes to redacting portions of text within a disclosed part or section of a document, redactions may also be permissible but the following considerations should apply: The redacted portion should be clearly irrelevant to the issues in dispute and would clearly not assist in properly understanding those parts of the

> documents which are relevant. Redactions should also only be resorted to where important confidentiality concerns exist.

[19] In my view, this passage is describing a special circumstance and I agree that if a compelling confidentiality issue exists, irrelevance must be considered and found before a redaction will be permitted. I take nothing from the Prothonotary's use of the phrase "clearly irrelevant" in the above passage as I have found that there is no authority for its use in this context.

[20] If a court is persuaded that exceptional circumstances exist (for example, if there is an enormous volume of redacted material or if the redacted material is embarrassing or confidential), then and only then must relevance be considered before the redaction is allowed to stand.

[21] The Prothonotary also observed in *Sandoz* that even if special circumstances exist, the case for redactions would be weaker if enhanced confidentiality protections are in place.

(iv) *Eli Lilly Canada Inc. v. Hospira Healthcare Corp.*

[22] Hospira produced a batch of records with redactions. Hospira argued that the redactions were not strictly covered by the claims of the patent and were therefore irrelevant. Hospira also made arguments relating to confidentiality, but produced no evidence on this issue. Prothonotary Tabib found at para. 17 that "the practice of parties redacting portions of documents on no justification whatsoever other than lack of relevance…is one to be avoided. Partial productions and redactions should not be permitted unless on grounds of proportionality, onerousness, or convenience or when genuine issues of confidentiality arise." She therefore ordered production of unredacted versions of the documents.

[23] Again, in my view, the Prothonotary is describing special circumstances when she refers to proportionality, onerousness, convenience and to genuine issues of confidentiality. The General Rule remains that, absent exceptional circumstances, non-privileged relevant documents are to be produced in their entirety. In other words, redactions of irrelevant material are not permitted.

[24] By virtue of the General Rule, it is not necessary to consider whether or not the information redacted by TD Bank in its productions is relevant. The law is clear that even irrelevant information is to be disclosed unless exceptional circumstances are found. However, if exceptional circumstances exist, relevance will be considered and only redactions of irrelevant material will be permitted.

THE DEFICIENCIES

[25] Against this background, I now turn to a consideration of the alleged deficiencies in the TD Affidavit:

(i) The Redactions

(a) Merchants' names and other identifying information.

[26] In my view, there is no justification for the redaction of this material. It is not privileged and it is part of a document which has been produced so the General Rule applies to prohibit the deletion of irrelevant material.

[27] However, TD Bank suggests that the redactions are made in part because it has contractual obligations of confidentiality to its merchant customers. But, as noted below, the confidentiality agreements provide that information will be made public in the context of litigation.

[28] Three of the four agreements produced by TD Bank include the following passage:

> 16.4 In addition the obligations of confidentiality and restrictions on use do not prevent the disclosure of Confidential Information in the following circumstances:
>
> (a) It is required in a judicial or administrative proceeding after giving the disclosing party as much advance notice of the possibility of such disclosure as practical so that the disclosing party may attempt to stop such disclosure or obtain a protective order concerning such disclosure.

[29] The fourth agreement produced by TD Bank provides:

> 19.2 Confidential Information does not include information that:
>
> (c) is required to be disclosed by applicable law, but prior to such disclosure and to the extent feasible, the [REDACTED] shall be consulted as to the proposed form and nature of the disclosure.

[30] In light of these passages I find that no special circumstances related to confidentiality exist in this case. I therefore see no reason to deviate from the General Rule that unredacted versions of these documents must be produced in their entirety.

[31] TD Bank also says that the redaction of the merchants' identities has raised the question of the interplay between the issues TD Bank has been permitted to pursue in its role as an intervenor and the issues raised in the Application. TD Bank submits that information in its productions which is not relevant to the issues on which it has been given leave to intervene can be deleted from its documents even though that information is relevant to the issues in the Application.

[32] In my view, this submission misses the point. Since there are no special circumstances, the General Rule applies and it does not give TD Bank a right to redact any information in a produced document. Accordingly, the relevance or irrelevance of the merchants' identities in context of either TD Bank's intervention or the Application does not arise..

(b) Profit and loss statement

[33] In my view, the General Rule also applies to this document. There is no justification for deleting the material TD Bank alleges is irrelevant from a document it acknowledges is a relevant production. I should note that although TD Bank claimed confidentiality for the redacted information in its submissions, this claim was not supported by evidence in the Nevin Affidavit.

(c) Government relations documents

[34] TD Bank suggests that exceptional circumstances justify its redaction of the irrelevant portions of these documents. They say they are confidential and highly sensitive. Further, in the case of the single sixty page document, the submission is that practical considerations suggest that the irrelevant material should not unduly burden the process.

[35] In my view, the documents are so severely redacted that it is impossible to determine that they are organized in independent and identifiable segments by topic. There are no tables of contents and no headings for the redacted information. In these circumstances and given that none of the documents indicate that they are confidential and given that the Nevin Affidavit does not refer to them as confidential or sensitive, TD Bank's submission that the irrelevant material can be redacted due to special circumstances cannot succeed.

[36] Finally, I should observe that even if TD Bank's claims to confidentiality had had an evidentiary foundation, it is unlikely that I would have allowed redactions because of the confidentiality afforded these productions by the Confidentiality Order.

(ii) Pre-contract documents

[37] The issue here is relevance. TD Bank says that it has produced its contracts with Visa and MasterCard in its roles as Issuer and Acquirer (the "Contracts") and that the positions the parties took during the negotiations of the Contracts are not relevant. However, as noted above, TD Bank asked for leave to intervene to deal with its "interactions" with Visa and MasterCard and has produced the Contracts as evidence of interaction.

[38] The Commissioner's request does not cover all interactions. It only relates to documents dealing with the negotiations which led to the Contracts and is limited to documents used at the Senior Management and Board levels.

[39] In my view, such documents are clearly relevant to a topic on which TD Bank has been given leave to intervene and as such they are to be produced.

COSTS

[40] The Commissioner is entitled to costs. If an amount cannot be agreed, a bill of costs should be prepared, exchanged and filed and I will fix an amount in a hearing by teleconference.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[41] TD Bank shall forthwith produce to the Commissioner unredacted versions of all documents listed in the TD Affidavit which had previously been produced in redacted form and which are not subject to privileged claim. If applicable, these documents are to be produced in their native (i.e. original) format.

[42] TD Bank shall forthwith produce to the Commissioner all documents, dated from the year 2007 forward, sent or received at the Senior Management and Board levels which describe, *inter* alia, the issues and the positions taken by TD Bank and Visa and MasterCard and the progress of TD Bank's negotiations with Visa and MasterCard relating to TD Bank's contracts in its capacity as an Issuer and Acquirer.

[43] For the reasons given above, the issue of cost remains under reserve.

DATED at Ottawa, this 12th day of October, 2011.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Sandra J. Simpson

APPEARANCES:

For the applicant:

The Commissioner of Competition

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For the respondents:

MasterCard International Incorporated

Brett Harrisson (McMillan LLP)

Visa Canada Corporation

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For the intervenors:

Canadian Bankers Association

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