



Reference: *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2011 Comp. Trib. 17

File No.: CT-2010-10

Registry Document No.: 100

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 Order: October 5, 2011

Order signed by: Madam Justice Sandra J. Simpson

CONFIDENTIALITY (PROTECTIVE) ORDER

[1] FURTHER TO the motion, on consent, by The Commissioner of Competition (the "Commissioner") for a confidentiality (protective) order;

[2] AND FURTHER TO the draft confidentiality (protective) order filed on consent by the Commissioner, Visa Canada Corporation ("Visa"), MasterCard International Incorporated ("MasterCard"), The Toronto-Dominion Bank ("TD") and the Canadian Bankers Association (the "CBA");

[3] AND WHEREAS the parties to this Order acknowledge and agree that the public disclosure of certain documents in this proceeding could cause specific and direct harm as such documents contain competitively sensitive and/or proprietary information including, but not limited to, contractual arrangements, operational information, budgets and financial reports, strategic plans and internal market studies;

THE TRIBUNAL ORDERS THAT:

[4] For the purposes of this Order:

- (a) "Respondents" shall mean Visa and MasterCard and "Respondent" shall mean either of them;
- (b) "Intervenors" shall mean TD and the CBA and "Intervenor" shall mean either of them;
- (c) "Commissioner's Documents" shall mean (i) those documents originating with or from the Commissioner that are listed in the Commissioner's Affidavit of Documents, and (ii) those documents that have been or may otherwise be filed or produced in this application or on any related motions by the Commissioner, other than any of the Respondents' Documents or the Intervenors' Documents;
- (d) "Commissioner's Confidential Documents" shall mean the Commissioner's Documents designated by the Commissioner as "Sensitive Document", "Confidential-Level A" or "Confidential-Level B", to denote the persons who are permitted access to those documents. For greater certainty, subject to paragraph [4](m) below, only the Commissioner may assert a confidentiality claim over the Commissioner's Documents;
- (e) "Respondents' Documents" shall mean (i) those documents originating with or from the Respondents, (ii) those documents that are listed in the Respondents' Affidavits of Documents, and (iii) those documents that have been or may otherwise be filed or produced in this application or on any related motions by the Respondents, other than any of the Commissioner's Documents or the Intervenors' Documents;
- (f) "Respondents' Confidential Documents" shall mean the Respondents' Documents designated by the Respondents as "Sensitive Document", "Confidential-Level

A" or "Confidential-Level B" to denote the persons who are permitted access to those documents. For greater certainty, subject to paragraph [4](m) below, only the Respondents may assert a confidentiality claim over their respective Respondents' Documents;

- (g) "Intervenors' Documents" shall mean (i) those documents originating with or from the Intervenors, (ii) those documents that are listed in the Intervenors' Affidavits of Documents, and (iii) those documents that have been or may otherwise be filed or produced in this application or on any related motions by the Intervenors, other than any of the Commissioner's Documents or the Respondents' Documents;
- (h) "Intervenors' Confidential Documents" shall mean the Intervenors' Documents designated by the Intervenors as "Sensitive Document", "Confidential-Level A" or "Confidential-Level B" to denote the persons who are permitted access to those documents. For greater certainty, subject to paragraph [4](m) below, only the Intervenors may assert a confidentiality claim over their respective Intervenors' Documents;
- (i) The Commissioner's Confidential Documents, the Respondents' Confidential Documents, and the Intervenors' Confidential Documents are collectively referred to as the "Protected Documents". For greater certainty, "Protected Documents" includes the information contained in those documents;
- (j) "Sensitive Document" shall mean an agreement (and any document relating to the creation of such an agreement) that each of Visa and MasterCard has with their respective credit card issuers and/or customers, which any of the Respondents or Intervenors may so designate. Visa, MasterCard, TD and the CBA will each produce a list setting out which documents contained within their productions are Sensitive Documents within 20 days of the entering of this Confidentiality (Protective) Order and will provide that list to all Parties and Intervenors;
- (k) "Relied On" in reference to the Sensitive Documents shall mean any situation whereby one or more of the Sensitive Documents is referred to:
 - (i) in an examination for discovery in respect of this application;
 - (ii) in a Witness Statement filed with the Competition Tribunal in this application;
 - (iii) in an Expert Report filed with the Competition Tribunal in this application;
 - (iv) in a document relied upon or to be relied upon during the hearing of this application;
 - (v) in a written legal submission filed with the Competition Tribunal in this

application; or

(vi) during the hearing of this application;

(l) "Relevant Sensitive Document" shall mean a Sensitive Document that is Relied On in this proceeding by the Commissioner, Visa, MasterCard, TD or the CBA;

(m) If a document originates with or from more than one Party or Intervenor, the Parties and/or Intervenors in question shall use their best efforts to determine the appropriate confidentiality level of that document, failing which the Parties and/or Intervenors in question may, as set out in paragraph [10] below, apply to the Tribunal for determination of the confidentiality or appropriate level of confidentiality of that document. Pending resolution of any such disagreement, paragraph [10] below shall govern the confidentiality designation of the document in question;

(n) "Party" shall mean the Commissioner or any of the Respondents and "Parties" shall mean both the Commissioner and the Respondents;

(o) "Designated Representatives" shall mean those persons designated by any of the Respondents and the Intervenors in accordance with paragraph [16] below; and,

(p) "Expert" shall mean an expert retained by a Party or an Intervenor who:

- (i) is not a current employee of either of the Respondents or of an Intervenor or of any of their affiliates;
- (ii) has not been an employee of either of the Respondents or of an Intervenor or of any of their affiliates within two years prior to the date of this Order; and
- (iii) is not a current employee of a competitor of either of the Respondents or of an Intervenor or of any of their affiliates.

[5] This Order shall apply to all persons, to the extent that they acquire access to Protected Documents through the proceedings in this application, provided that information which is acquired independently of the proceedings in this application and information which is or becomes available in the public domain (other than inadvertently or through any breach of this Order) shall not be considered a Protected Document under this Order.

[6] No Protected Document shall be disclosed, except with the prior written consent of the Party or Intervenor that claimed confidentiality over the Protected Document or in accordance with this Order or any further order of the Tribunal.

[7] This Order and its schedules apply to all documents which have already been produced in these proceedings pursuant to the disclosure procedure in this application. For greater certainty, this Order shall not apply to any copies, whether in paper or electronic format, of any

Protected Documents which came into the possession of a Party or an Intervenor (or their outside counsel) independent of and prior to the disclosure procedure in this application.

[8] Protected Documents designated as Sensitive Documents may be disclosed only in accordance with paragraph [12] below. Relevant Sensitive Documents may be disclosed only in accordance with paragraph [13] below. Protected Documents designated as Confidential-Level A may be disclosed only in accordance with paragraph [14] below. Protected Documents designated as Confidential-Level B may be disclosed only in accordance with paragraphs [15] and [16] below.

[9] Protected Documents designated as Sensitive Documents shall be contained in a list prepared by the Party claiming the designation pursuant to paragraph [4](j) of this Order. Protected Documents designated as Confidential-Level A shall be clearly marked "Confidential-Level A", "Highly Confidential" or "Exempt from Disclosure" on the face of the document and on each page which is claimed as confidential. Protected Documents designated as Confidential-Level B shall be clearly marked "Confidential-Level B" on the face of the document and on each page which is claimed as confidential.

[10] The Parties and the Intervenors shall use their best efforts to resolve any issues that may arise between them concerning a claim of confidentiality or appropriate level of confidentiality for the Protected Documents. In the event of a disagreement regarding the confidentiality or appropriate confidentiality designation for any document, the document in issue shall be deemed to be either a Sensitive Document or a Confidential-Level A as applicable, pending the resolution of that disagreement. If agreement cannot be reached, then any of the Parties and Intervenors may apply to the Tribunal to determine the confidentiality or appropriate level of confidentiality of any document.

[11] A Party or an Intervenor may, at any time and with prior reasonable notice to the other Party(ies) and Intervenor(s), change the confidentiality designations of any of its Protected Documents or re-designate any of its Protected Documents as non-confidential. Documents re-designated as non-confidential shall cease to be confidential and shall form part of the public record if introduced into evidence at the hearing of this application, unless the Parties and Intervenors agree otherwise or the Tribunal orders otherwise.

[12] Subject to paragraph [17] below, Protected Documents designated as Sensitive Documents may be disclosed only to the Commissioner, counsel for the Commissioner, counsel's staff and Commissioner's staff directly involved in the application, third party document review vendors ("Document Review Vendors") retained by the Commissioner and, where disclosure is required to carry out their mandate, the Experts retained by the Commissioner and the staff of the Experts directly involved in the application as well as Visa's and MasterCard's respective outside counsel and the Respondents' respective Experts.

[13] Subject to paragraph [17] below, Relevant Sensitive Documents may be disclosed only to the Commissioner, the Commissioner's counsel, the Commissioner's Experts and her Document Review Vendors, Visa's outside counsel, Visa's Experts and its Document Review Vendors, MasterCard's outside counsel, MasterCard's Experts and its Document Review Vendors, TD's outside counsel, TD's Experts and its Document Review Vendors, and the CBA's

outside counsel, the CBA's Experts and its Document Review Vendors.

[14] Subject to paragraph [17] below, Protected Documents designated as Confidential-Level A may be disclosed only to the Commissioner, counsel for the Commissioner, counsel's staff and Commissioner's staff directly involved in the application, outside counsel for the Respondents directly involved in the application, outside counsel for the Intervenors directly involved in the application, counsel's staff directly involved in the application, Document Review Vendors retained by any of the Parties or Intervenors and, where disclosure is required to carry out their mandate, the Experts retained by the Parties or the Intervenors and the staff of the Experts directly involved in the application.

[15] Subject to paragraph [17] below, Protected Documents designated as Confidential-Level B may be disclosed only to the persons identified in paragraph [16] below.

[16] The Respondents and the Intervenors may each designate up to three of their corporate employees and up to six of their in-house counsel as their representatives (the "Designated Representatives") who:

- (a) in the case of MasterCard, will be permitted to access Protected Documents designated by the Commissioner, Visa and the Intervenors as Confidential-Level B;
- (b) in the case of Visa, will be permitted to access Protected Documents designated by the Commissioner, MasterCard and the Intervenors as Confidential-Level B;
- (c) in the case of TD, will be permitted to access Protected Documents designated by the Commissioner, the Respondents and the CBA as Confidential-Level B; and
- (d) in the case of the CBA will be permitted to access Protected Documents designated by the Commissioner, the Respondents and TD as Confidential Level-B.

The designation of the Designated Representatives shall be made by written notice to the Tribunal, with a copy sent simultaneously to all Parties and the Intervenors.

[17] Notwithstanding any provision of this Order, the Commissioner may disclose the Commissioner's Confidential Documents to any person for the purpose of preparing for the hearing of this application, subject to the limits prescribed in section 29 of the *Competition Act*.

[18] Experts, Document Review Vendors and Designated Representatives shall not disclose Protected Documents directly or indirectly to any other person except for persons permitted to receive such Protected Documents in accordance with this Order or any other order of the Tribunal.

[19] Prior to gaining access to Protected Documents, each Expert, Document Review Vendor and Designated Representative shall execute a confidentiality agreement in the form attached as Schedule A to this Order ("Confidentiality Agreement").

[20] A Party, an Intervenor, a Designated Representative, a Document Review Vendor or an Expert who is required by law to disclose any Protected Document, or any portion thereof, shall, prior to disclosing any Protected Document, give prompt written notice, including a description of the Protected Document(s) to be disclosed, to the Party or Intervenor that claimed confidentiality in respect of the Protected Document(s) in issue so that the latter Party or Intervenor, as the case may be, has a reasonable opportunity to seek a protective order or other appropriate remedy.

[21] For greater certainty, all persons, including the Commissioner and her staff, who obtain access to documents, including Protected Documents, through the discovery process in this application are subject to an implied undertaking to use the documents and information contained therein solely for the purpose of this application and any related proceedings.

[22] Documents over which no privilege or confidentiality claim has been asserted shall form part of the public record in this proceeding if introduced into evidence at the hearing of this application or otherwise placed on the record.

[23] The confidentiality of Protected Documents (including Sensitive Documents and Relevant Sensitive Documents) shall be maintained up to and throughout the hearing of the application and thereafter. Protected Documents (including Sensitive Documents and Relevant Sensitive Documents) shall not form part of the public record in the application or other proceeding, unless the Parties, or in the case of Protected Documents (including Sensitive Documents and Relevant Sensitive Documents) supplied by an Intervenor, the Parties and that Intervenor, agree otherwise or the Tribunal orders otherwise after hearing the submissions of the Parties and, if applicable, the Intervenor. If information from a Protected Document (including from any Sensitive Document or Relevant Sensitive Document) is incorporated into any other document and that document is introduced into evidence at the hearing of this application or other proceeding, the document shall be a Protected Document having the same level of confidentiality as the level applicable to the Protected Document from which the information came.

[24] This Order does not determine the admissibility of any documents as evidence at the hearing of the application. For greater certainty, this Order is without prejudice to any rights the Parties or the Intervenors may have to object to the filing or production of documents.

[25] The termination of proceedings in this application shall not relieve any person to whom Protected Documents were disclosed pursuant to this Order from the obligation of maintaining the confidentiality of such documents in accordance with the provisions of this Order, subject to any further order of the Tribunal.

This Order shall be subject to further direction or order of the Tribunal, including in relation to the use of Protected Documents at the hearing of the application.

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

SIGNED on behalf of the Tribunal by the Chairperson.
(s) Sandra J. Simpson

SCHEDULE "A"

Confidentiality Agreement

IN CONSIDERATION of being provided with information or documentation in connection with this application over which claims for confidentiality have been advanced (the "Confidential Information"), I _____, of the City of _____, in the Province/State of _____, hereby agree to maintain the confidentiality of the Confidential Information so obtained.

I will not copy or disclose the Confidential Information so obtained to any other person, except, as applicable, (a) my staff who are directly involved in this matter; (b) counsel for the Party or Intervenor on whose behalf I have been retained, members of his or her firm who are directly involved in this application and, in the case of the Commissioner, the Commissioner's staff directly involved in the application; (c) other experts retained by or on behalf of the Party or Intervenor on whose behalf I have been retained and who have signed a similar confidentiality agreement with the Parties or the Intervenors to this application; and (d) persons permitted by order of the Competition Tribunal. Nor will I use the Confidential Information so obtained for any purpose other than in connection with this application and any related proceedings.

Upon completion of this application and any related proceedings, I agree that the Confidential Information, and any copies of same, shall be dealt with in accordance with instructions from counsel for the Party or Intervenor I am retained by or as prescribed by order of the Competition Tribunal. I acknowledge and agree that the completion of this application and any related proceedings shall not relieve me of the obligation of maintaining the confidentiality of the Confidential Information in accordance with the provisions of this Agreement, subject to any further order of the Tribunal.

I acknowledge that I am aware of the order granted by the Competition Tribunal on _____, in this regard, a copy of which is attached to this agreement and agree to be bound by same. I acknowledge that any breach of this agreement by me will be considered to be a breach of the said order of the Competition Tribunal. I further acknowledge and agree that any Party or Intervenor shall be entitled to injunctive relief to prevent breaches of this agreement and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled in law or in equity.

In the event that I am required by law to disclose any of the Confidential Information, I will provide **[insert name of retaining or employing Party or Intervenor]** with prompt written notice so that the Party or Intervenor that claimed confidentiality over such Confidential Information may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the Confidential Information that is legally required and I will exercise my best efforts to obtain reliable assurances that confidential treatment will be accorded to the Confidential Information.

I will promptly, upon the request of the person providing the Confidential Information, advise where such material is kept. At the conclusion of my involvement, I will, upon the request and direction of the person providing the Confidential Information, destroy, return or otherwise

dispose of all Confidential Information received or made by me having been duly authorized and directed to do so.

I hereby attorn to the jurisdiction of the Federal Court of Canada and/or the Competition Tribunal to resolve any disputes arising under this agreement.

DATED this ___ day of _____, 2011.

SIGNED, SEALED & DELIVERED
in the presence of:

_____ (seal)
Witness

COUNSEL:

For the applicant:

The Commissioner of Competition

Kent E. Thomson
Adam Fanaki
William J. Miller
Davit D. Akman

For the respondents:

MasterCard International Incorporated

Jeffrey B. Simpson
David W. Kent
James B. Musgrove

Visa Canada Corporation

Robert Kwinter
Randall Hofley
Navin Joneja

Canadian Bankers Association

Mahmud Jamal
Michelle Lally
Jason MacLean

Toronto-Dominion Bank

F. Paul Morrison
Glen G. MacArthur
Christine Lonsdale