CT-2011/003

THE COMPETITION TRIBUNAL

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

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*

AND IN THE MATTER OF certain rules, policies and agreements relating to the residential multiple listing service of the Toronto Real Estate Board.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

AND

THE TORONTO REAL ESTATE BOARD

Respondent

BRIEF OF AUTHORITIES OF THE CANADIAN REAL ESTATE ASSOCIATION
(Re: Request For Leave To Intervene)

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TAB 1

Case Name:

Canada (Commissioner of Competition) v. Visa Canada Corp.

Reasons and Order Regarding Motions for Leave to Intervene by The Toronto-Dominion Bank and The Canadian Bankers Association
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
Between
The Commissioner of Competition (applicant), and
Visa Canada Corporation and MasterCard International Incorporated (respondents), and
The Toronto-Dominion Bank, The Canadian Bankers Association (applicants for leave to intervene)

[2011] C.C.T.D. No. 2

Comp. Trib. 2

File No.: CT-2010-10

Registry Document No.: 50

Canada Competition Tribunal
Ottawa, Ontario

Before: Simpson J. (Chairperson)

Heard: March 7, 2011.
Decision: April 5, 2011.

(54 paras.)

Appearances:

For the applicant: The Commissioner of Competition: Kent Thomson, Adam Fanaki, William Miller, David D. Akman.

For the respondents: MasterCard International Incorporated: Jeffrey B. Simpson, James Musgrove. Visa Canada Corporation: Robert Kwinter, Randall Hofley.

For the applicants for leave to intervene: The Canadian Bankers Association: Mahmud Jamal, Michelle Lally, Jason MacLean. The Toronto-Dominion Bank: Paul Morrison, Christine Lonsdale.

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

Introduction

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

Background

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

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

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

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

(a) do not agree with her definition of "credit card network services" as the product market;
(b) do not agree that section 76 of the Act applies on the facts of this case;
(c) characterize the Merchant Restraints as pro-competitive; and

(d) forecast negative consequences for their credit card networks and for their cardholders if the Merchant Restraints are abolished.

The Proposed Intervenors

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

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

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

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

The Development of the Test

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

> **9(3)**. Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the *Competition Act*, to make representations relevant to those proceedings in respect of any matter that affects that person
>
> * * *
>
> **9(3)**. Toute personne peut, avec l'autorisation du Tribunal, intervenir dans les procédures se déroulant devant celui-ci, sauf celles intentées en vertu de la partie VII.1 de la *Loi sur la concurrence*, afin de présenter toutes observations la concernant à l'égard de ces procédures.

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

12 In *Director of Investigation and Research v. Air Canada et al.* (1992), 46 C.P.R. (3d) 184, the Tribunal held that the term "affects" in subsection 9(3) of the Tribunal Act means "directly affects". Accordingly, leave to intervene would be denied to a person who might have strong views about the

outcome of a case, but would not be affected differently from members of the general public. The Tribunal also concluded that the representations to be made by a proposed intervenor would have to be germane to the mandate of the Tribunal.

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

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

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

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

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

18 Lastly, the Tribunal also has provided guidance about requests for leave to intervene made by associations. In *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.*, [1994] C.C.T.D. No. 19 (QL), McKeown J. held that the Canadian Council of Grocery Distributors was directly affected because it was sufficient that there were matters in issue that would directly affect the persons it represented. In the Tribunal's view, having the association as the sole intervenor would be more efficient than requiring each individual retailer to appear independently. Similarly, in *Canada (Director of Investigation and Research) v. Bank of Montreal* (1996), 66 C.P.R. (3d) 409, the Tribunal granted intervenor status to two associations, the Retail Council of Canada and the Canadian Life and Health Insurance Association Inc., noting (at para. 7) that the "association provides a convenient and efficient means of representing the many affected persons in a coherent way before the Tribunal".

The Test

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

(a) The matter alleged to affect that person seeking leave to intervene must be legitimately within the scope of the Tribunal's consideration or must be a matter sufficiently relevant to the Tribunal's mandate (see *Director of Investigation and Research v. Air Canada* (1992), 46 C.P.R. (3d) 184 at 187, [1992] C.C.T.D. No. 24 (QL)).

(b) The person seeking leave to intervene must be directly affected. The word "affects" has been interpreted in *Air Canada*, *ibid.*, to mean "directly affects".

(c) All representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the Commissioner (see *Tele-Direct*).

(d) Finally, the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it (see *Washington v. Director of Investigation and Research*, [1998] C.C.T.D. No. 4 (QL) (Comp. Trib.)).

The Proposed Intervenors' Evidence

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

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

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

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

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

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

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

The Issues

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

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

Question 1 - Are the Proposed Intervenors Directly Affected?

The TD Bank

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

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

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

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

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

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

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

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

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

Conclusion - TD Bank

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

The Canadian Bankers Association

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

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

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

Conclusion - The Association

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

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

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

43 The TD Bank's proposed topics are:

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

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

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

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

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

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

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

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

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

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

TD Bank

Proposed Topic 1

The interactions between TD Bank acting as an Acquirer and merchants is a relevant topic and, in my view, the bank is in a position to provide a unique firsthand perspective which will assist the Tribunal. Accordingly, its intervention on this topic will be allowed.

Proposed Topic 2

However, as discussed above, a broad intervention dealing with TD Bank's business as an Issuer and its interactions with cardholders is not relevant.

Proposed Topic 3

TD Bank's interactions with Visa and MasterCard in its role as an Acquirer is also relevant and its firsthand evidence on this topic is likely to assist the Tribunal. Accordingly, leave will be given to intervene on this aspect of topic 3. However, as discussed above, a broad intervention dealing with TD Bank's interactions with Visa and MasterCard in its role as an Issuer is not relevant. However, a narrower intervention focussed on the setting of Interchange Fees would assist the Tribunal.

Proposed Topic 4

The impact of the Proposed Order on the payments system is relevant. The Association has not listed this as a topic and it appears that Visa and MasterCard will focus on the impact of the order on their credit card networks. Accordingly, an intervention on this topic will assist the Tribunal.

Proposed Topic 5

Firsthand evidence about the impact of the Proposed Order on TD Bank's business as an Issuer and Acquirer is relevant and, in my view, will assist the Tribunal as long as it does not duplicate the Association's evidence on this topic.

Proposed Topic 6

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

Proposed Topic 7

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

The Association

Proposed Topic 1

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

Proposed Topic 2

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

Proposed Topic 3

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

Proposed Topic 4

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

Proposed Topic 5

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

Proposed Topic 6

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

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

ORDER

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

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

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

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

Question 4 - The Scope of the Interventions

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

53 To achieve these objectives, the Tribunal orders that:

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

54 There is no order as to costs.

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

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Sandra J. Simpson

cp/e/qlaim

TAB 2

Indexed as:

Canada (Competition Act, Director of Investigation and Research) v. The D & B Companies of Canada Ltd.

Reasons and Order Granting Request for Leave to Intervene
IN THE MATTER OF an application by the Director of Investigation and Research under section 79 of the Competition Act, R.S.C. 1985, c. C-34;
AND IN THE MATTER OF certain practices by The D & B Companies of Canada Ltd.
Between
The Director of Investigation and Research, Applicant, and
The D & B Companies of Canada Ltd., Respondent, and
Information Resources, Inc., Intervenor, and
Canadian Council of Grocery Distributors, Applicant for Leave to Intervene

[1994] C.C.T.D. No. 19

Trib. Dec. No. CT9401/112

Canada Competition Tribunal
Ottawa, Ontario

Before: McKeown J., Presiding Judicial Member
F. Roseman, V.L. Clarke, Lay Members

October 17, 1994

(5 pp.)

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Counsel for the Applicant for Leave to Intervene:

Canadian Council of Grocery Distributors

Paul Martin

. . . . . .

Reasons and Order Granting Request for Leave to Intervene

The Canadian Council of Grocery Distributors ("CCGD") requests leave to intervene in these proceedings. CCGD represents wholesalers, retailers and other distributors of grocery products across Canada. CCGD asks only for limited intervention rights; it seeks to present legal submissions to object to the nature, scope and effect of certain of the orders sought by the Director of Investigation and Research ("Director") in his application. CCGD is not supporting either party to the application.

The Director and the existing intervenor, Information Resources, Inc., oppose the request for leave to intervene; the respondent supports the request.

We are of the view that the request for leave to intervene should be granted. As the Tribunal

interpreted subsection 9(3) of the Competition Tribunal Act in a 1992 decision in Director of Investigation and Research v. Air Canada, the potential intervenor must show, among other things, that it is "directly affected" by the proceedings.[1] CCGD has demonstrated to our satisfaction that it is "directly affected" by the matters in issue in this application. Several of its members are currently party to contracts with the respondent for the supply of scanner data. They also claim a proprietary interest in the scanner data. Various features of those contracts have been challenged by the Director as anti-competitive and are the focus of some of the remedies sought in the application. Clearly, the members of CCGD who are party to the contracts would be directly affected by an order on the terms requested by the Director.

Counsel for the Director argues that the CCGD must meet the "directly affected" test in its capacity as an association. In this case, we are of the opinion that it is sufficient that there are matters in issue that would directly affect the persons represented by the CCGD. Having the association as the sole intervenor is obviously more efficient than requiring each individual retailer to appear independently.

We are also satisfied that the representations to be made by CCGD will be of assistance to the Tribunal, should we be required to consider the question of appropriate remedies. Because it represents the retailers, CCGD has a perspective different from the parties that it can bring to bear on the issue.

Both counsel for the Director and counsel for Information Resources, Inc. point out that the request for leave to intervene was submitted on the eve of the hearing of the application and argue that the request should therefore be denied. They point out that the newly amended rules of procedure of the Tribunal impose a 30-day deadline from the date of publication of a notice in the Canada Gazette for receipt of requests for leave to intervene. That particular rule, however, does not apply to this proceeding, which was commenced under the old rules and the notice in the Canada Gazette did not mention the 30-day limit. While we acknowledge that the timing of the request by CCGD is certainly not ideal, we are of the view that, given the limited scope of the intervention requested by CCGD and the application of the old rules, no significant disruption to the proceedings or prejudice to the parties will result.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT the request for leave to intervene of CCGD is granted but CCGD is limited to making legal arguments addressing the nature, scope and effect of the orders sought by the Director.

DATED at Ottawa, this 17th day of October, 1994.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) W.P. McKeown W.P. McKeown

d/lls

1 (1992), 46 C.P.R. (3d) 184 at 187, [1992] C.C.T.D. No. 24 (QL).

TAB 3

Indexed as:

Canada (Competition Act, Director of Investigation and Research) v. Bank of Montreal

Reasons and Order Granting Leave to Intervene
IN THE MATTER OF an application by the Director of Investigation and Research under sections 79 and 105 of the Competition Act, R.S.C. 1985, c. C-34;
AND IN THE MATTER OF an abuse of dominant position in the supply of shared electronic network services for consumer-initiated shared electronic financial services.
Between
The Director of Investigation and Research, Applicant, and Bank of Montreal, The Bank of Nova Scotia, Canada Trustco Mortgage Company, Canadian Imperial Bank of Commerce, La Confédération des caisses populaires et d'économie Desjardins du Québec, Credit Union Central of Canada, National Bank of Canada, Royal Bank of Canada, The Toronto Dominion Bank of Canada, Interac Inc., Respondents, and
TelPay, A Division of CTI-Comtel Inc., Retail Council of Canada, Canadian Life and Health Insurance Association Inc., Midland Walwyn Capital Inc., Richardson Greenshields of Canada Limited, MacKenzie Financial Corporation and Trimark Investment Management Inc., Applicants for Leave to Intervene

[1996] C.C.T.D. No. 1

Trib. Dec. No. CT9502/38

Also reported at:66 C.P.R. (3d) 409

Canada Competition Tribunal
Ottawa, Ontario

Before: McKeown J., Presiding Judicial Member
F. Roseman, Lay Member

Heard: February 2, 1996
Decision: February 6, 1996

(11 pp.)

Counsel for the Applicant:

Director of Investigation and Research

D. Martin Low, Q.C.
Peter A. Vita, Q.C.
John D. Bodrug

Counsel for the Respondents:

Bank of Montreal
The Bank of Nova Scotia
Canada Trustco Mortgage Company
Canadian Imperial Bank of Commerce
La Confédération des caisses populaires et d'économie
Desjardins du Québec
Credit Union Central of Canada
National Bank of Canada
Royal Bank of Canada
The Toronto-Dominion Bank
Interac Inc.

John J. Quinn
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Counsel for Applicants for Leave to Intervene:

TelPay, A Division of CTI-Comtel Inc.

Harold K. Irving, Q.C.

Retail Council of Canada

S. John Page
Frank P. Monteleone

Canadian Life and Health Insurance Association Inc.

James B. Musgrove

Midland Walwyn Capital Inc., Richardson Greenshields of Canada Limited, MacKenzie Financial Corporation and Trimark Investment Management Inc.

Lorie Waisberg, Q.C.
Laura Stuart

. . . . . .

Reasons and Order Granting Leave to Intervene

1 Five requests for leave to intervene were filed in this proceeding. One of the applicants later amalgamated its request with another group with similar interests represented by the same counsel, leaving four requests to be dealt with at the pre-hearing conference on February 2, 1996. All four requests for leave were granted, with varying degrees of participation, as detailed below. As this is a consent order proceeding, in which the role of intervenors before the Tribunal is a particularly sensitive issue, we are providing some brief reasons for our decision.

2 A summary description of the various applicants for leave to intervene follows. TelPay, a division of CTI-Comtel Inc. ("TelPay"), currently provides a telephone bill payment service to the customers of some 40 smaller financial institutions, mainly credit unions. The banks provide a similar service to their own customers. TelPay would like to offer a bill payment service to the general public by way of Interac.

3 The Retail Council of Canada ("RCC") represents approximately 7,000 retailers operating in Canada. The vast majority of individual members are small independents, although mid-sized stores and national chains also participate. Together its members account for over 65% of retail store trade dollars spent in Canada. Nearly all Interac direct payment transactions originate in retail stores. Transactions processed through Interac direct payment more than doubled in number between 1994 and 1995 and the use of direct payment is forecast to continue increasing.

4 The Canadian Life and Health Insurance Association Inc. ("CLHIA") represents life and health insurance companies operating in Canada. More than 90% of the life and health insurance business in Canada is generated by CLHIA members. Insurance companies are significant players in financial services. They administer 70% of the pension plans registered in Canada and offer a range of products including individual and group insurance and annuities.

5 Midland Walwyn Capital Inc., Richardson Greenshields of Canada Limited, MacKenzie Financial Corporation and Trimark Investment Management Inc. ("Midland et al.") are, broadly speaking, independent investment companies. They are investment and mutual fund dealers and managers which provide financial services, products, advice and investments to consumers throughout Canada.

6 The focus of the debate at the hearing of the requests was the scope of the representations that the applicants for leave to intervene would be permitted to address and the nature of their participation rights. All the applicants for leave sought some form of evidentiary participation.

7 We are of the view that the applicants for leave would each be directly affected should the draft consent order be granted. The application puts in issue the increased opportunity for new services to be offered through Interac under the draft consent order; TelPay is a third party purveyor of such a potential service. The application identifies restrictions on membership and control of Interac and seeks to remedy the situation; the retailers, insurers and investment companies are all potential new participants in Interac, each in a different fashion. In the case of the RCC and CLHIA, it is, of course, their members that would be directly affected rather than the association itself. The association provides a convenient and efficient means of representing the many affected persons in a coherent way before the Tribunal. We also consider that each of the intervenors has a unique perspective and that representations from them, when confined to the matters particularly within the scope of their respective interventions will assist the Tribunal in assessing whether to issue the draft consent order or not.

8 We note that the Director of Investigation and Research ("Director") did not oppose the grant of intervenor status to any of the applicants. He directed his submissions to the extent of their participation. The respondents initially argued that neither TelPay nor the RCC were "directly affected" by the proceeding but did not pursue the issue in oral argument. The respondents recognized that the other applicants were directly affected; again, they took issue with the participation rights to be accorded.

9 In a consent order proceeding, the scope of participation granted to intervenors assumes critical importance. Conceivably a consent order can be approved without any evidentiary hearing whatsoever, as allowed for by section 105 of the Competition Act. The Tribunal must consider carefully the requests by intervenors to call evidence, in the interests of preventing the proceeding from turning into a "contested" matter and in recognition of the fact that the consent order mechanism can be a valuable part of the overall enforcement of competition law. At the same time, the Federal Court of Appeal and the Supreme Court of Canada decided in the Air Canada case that the specific role of intervenors must be determined "in accordance with fairness and fundamental justice and subject to the requirements of subsection 9(3) that the intervenors' representations must be relevant to [the] proceeding in respect of any matter affecting those intervenors."[1] This is a delicate balancing act. In the end, the Tribunal must be satisfied that the draft consent order meets the test for approval in the face of the views of the intervenors that it will not achieve its goals.

10 With respect to TelPay, we agree with the parties that the sanctioning of the particular service proposed by TelPay and the consequent amendment of the draft consent order to include explicitly that service is a matter which goes beyond the approval of the draft consent order by the Tribunal. It properly relates to implementation of the order. TelPay's request for leave to intervene, however, also raises questions that go to the adequacy of the very procedure set out in the draft consent order for the approval of new services. To that extent, its proposed representations are relevant. The respondents argued that TelPay's interpretation of the language in the draft consent order is not "reasonable". Clearly, there seems to be an issue here on which argument will be helpful to the Tribunal. Since we were not convinced that evidence was necessary in order for TelPay to make effective representations, we have not allowed it any evidentiary role.

11 With respect to the three remaining intervenors, it became clear in the course of argument that their primary concerns, and those on which they wish to present evidence, centre around the issue of whether the draft consent order will be effective if only "financial institutions", as defined in the draft consent order, can participate in Interac as card issuers.

12 The first and most evident aspect of this is that the draft consent order does not mandate the removal of the current restriction on card issuers. What it does do is require Interac to lift its prohibition on access to Interac through "sweep" or "pass-through" accounts. Although the Director argued that the efficacy of sweep accounts was not relevant, the respondents conceded that the participation of the intervenors on that issue was relevant. We agree that whether or not such accounts are workable is a critical element of each intervenor's argument that the draft consent order will not achieve what the Director says it will achieve.

13 In his reply to the comments filed by each of these intervenors, the Director states that he is "unaware of any evidence that shows that such accounts are not workable or viable." Likewise, the respondents replied that they are "also unaware of any evidence that shows pass-through', sweep' or zero-balance' accounts are not viable or cost effective." In the circumstances, we have decided to allow the intervenors to call evidence on that issue. In our opinion, it would not be fair to restrict the intervenors to argument on this point when the parties take the position that the accounts will work as they say that they will and that there is no evidence to the contrary. The intervenors must be allowed a chance to bring forward the contrary evidence that they maintain exists.

14 We are cognizant of the need to keep the proceeding focused and manageable and, with the co-operation of the intervenors, have confined them to joint experts on matters which are common to all of them. On the factual issues concerning sweep accounts, on which the insurers and the investment companies may have different experience and perspective, we have allowed separate fact witnesses.

15 Closely allied to the first issue is the second matter arising out of the restriction on card issuance. As described by counsel for the respondents, the draft consent order increases participation of members in Interac by "opening up the categories of entities who can be acquirers";

it does not alter the existing class of card issuers/financial institutions. The assumption appears to be that other commercial entities can and will participate in Interac as transaction acquirers only. Of the intervenors, this type of participation would most likely come from the retailers.

16 The RCC challenges the position that "acquirer-only" entry is viable and cites various costs that it maintains will inhibit entry. It seems evident that the failure of the draft consent order to encourage the entry of transaction acquirers would have a significant impact on the overall efficacy of the draft consent order in attracting new participants to Interac. We are of the view that it would be virtually impossible for the RCC to present effective representations on this critical issue, which is directly pertinent to its interests, without some form of evidence. We have therefore granted the RCC leave to call one expert on the issue of the economics of participation in Interac as an acquirer only.

17 FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

1. (1) TelPay is granted leave to intervene in this proceeding to make representations on the process for approval of a new service set out in the draft consent order and why that process does not assist in curing the alleged substantial lessening of competition.

   (2) TelPay may attend and make argument on matters within the scope of its intervention at all pre-hearing conferences, motions and at the hearing of the application. TelPay shall not have the right to participate in the calling of evidence or the cross-examination of witnesses at the hearing.

2. The RCC is granted leave to intervene to make representations on why the draft consent order does not cure the alleged substantial lessening of competition with respect to:

   (a) the ability of entities which do not meet the definition of "financial institution" set out in the draft consent order ("non-financial institutions") to obtain access to Interac services under the terms of the draft consent order, including the efficacy of sweep, pass-through and zero balance accounts in allowing retailers to participate effectively in Interac;
   (b) the economics of participation in Interac as an acquirer only;
   (c) the adequacy of the definition of services in the draft consent order in facilitating the introduction of new, competitive services through Interac;
   (d) the functioning of the provisions of the draft consent order relating to the governance and control of Interac; and
   (e) the effect of the existing rules and standards of the Canadian Payments

Association on the functioning of the draft consent order.

3. The CLHIA is granted leave to intervene to make representations on why the draft consent order does not cure the alleged substantial lessening of competition with respect to:

   (a) the ability of non-financial institutions to obtain access to Interac services under the terms of the draft consent order, including the efficacy of sweep, pass-through and zero balance accounts in allowing insurers to participate effectively in Interac;
   (b) the functioning of the provisions of the draft consent order relating to the governance and control of Interac, including the definition of "financial institution" and "demand account" and the role of intervenors in bringing disputes about the interpretation or application of the order to the Tribunal;
   (c) the possibility of future Interac by-laws which distinguish between financial institutions and other Interac members in a way that impedes the draft consent order from achieving its goals; and
   (d) the effect of the existing rules and standards of the Canadian Payments Association on the functioning of the draft consent order.

4. Midland et al. are granted leave to intervene to make representations on why the draft consent order does not cure the alleged substantial lessening of competition with respect to the ability of non-financial institutions to obtain access to Interac services under the terms of the draft consent order, including the efficacy of sweep, pass-through and zero balance accounts in allowing investment companies to participate effectively in Interac.

5. (1) The RCC, CLHIA and Midland et al. may call the following evidence with respect to the efficacy of sweep, pass-through and zero balance accounts in allowing retailers, insurers and investment companies to participate effectively in Interac:

   (a) one joint expert witness on the technical aspects of such accounts;
   (b) if the expert witness referred to in (a) is not qualified to address them, a second joint expert witness on the economic issues arising from the use of such accounts;
   (c) one fact witness from each of CLHIA and Midland et al. on the use of such accounts as it particularly affects their respective members.

(2) The RCC may call one expert witness on the economics of participation in Interac as an acquirer only.

6. The right of RCC, CLHIA and Midland et al. to cross-examine witnesses at the hearing shall be decided at that time by the panel hearing the application, on the request of the intervenor and upon demonstration that the proposed cross-examination will be within the scope of its intervention and non-repetitive.
7. RCC, CLHIA and Midland et al. may attend and make argument on matters within the scope of their respective interventions at all pre-hearing conferences, motions and at the hearing of the application.

DATED at Ottawa, this 6th day of February, 1996.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) W.P. McKeown W.P. McKeown

qp/d/lls

1 American Airlines, Inc. v. Competition Tribunal (1988), [1989] 2 F.C. 88 at 101 (F.C.A.), aff'd (sub nom. Air Canada v. American Airlines, Inc.) [1989] 1 S.C.R. 236.

TAB 4

2002 CarswellNat 4021, 19 C.P.R. (4th) 157, 2002 Comp. Trib. 20

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2002 CarswellNat 4021, 19 C.P.R. (4th) 157, 2002 Comp. Trib. 20

Canada (Commissioner of Competition) v. United Grain Growers Ltd.

In the Matter of the Competition Act, R.S.C. 1985, c. C-34

In the Matter of an application by the Commissioner of Competition under section 92 of the Competition Act

In the Matter of the acquisition by United Grain Growers Limited of Agricore Cooperative Ltd., a company engaged in the grain handling business

The Commissioner of Competition, applicant and United Grain Growers Limited, respondent and The Canadian Wheat Board, applicant for leave to intervene

Competition Tribunal

McKeown J.

Heard: May 14-15, 2002
Judgment: May 29, 2002
Docket: CT2002001

Counsel: *John Syme, Arsalaan Hyder*, for Applicant

Kent E. Thomson, Sandra A. Forbes, for Respondents

Randall T. Hughes, Susan E. Paul, Jeff Lindsay, for Applicant for leave to intervene, Canadian Wheat Board

Subject: Intellectual Property; Property; Corporate and Commercial

Trade and commerce --- Competition and combines legislation — Investigation and prosecution — Intervenor status.

Cases considered by *McKeown J.*:

Canada (Commissioner of Competition) v. Air Canada (April 20, 2001), Doc. CT2001/002/008 (Competition Trib.) — followed

Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc. (June 26, 2000), Doc.

CT2000002/20 (Competition Trib.) — followed

Canada (Director of Investigation & Research) v. Air Canada (1992), 46 C.P.R. (3d) 184 (Competition Trib.) — referred to

Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc. (1995), 61 C.P.R. (3d) 528 (Competition Trib.) — followed

Washington v. Canada (Director of Investigation & Research) (1998), 78 C.P.R. (3d) 479 (Competition Trib.) — referred to

Statutes considered:

Canadian Wheat Board Act, R.S.C. 1985, c. C-24

Generally — referred to

Competition Act, R.S.C. 1985, c. C-34

s. 92 — referred to

Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), Pt. I

s. 9(3) — considered

Rules considered:

Competition Tribunal Rules, SOR/94-290

Generally — referred to

McKeown J.:

1 On January 2, 2002, following the acquisition by United Grain Growers Limited ("UGG") of Agricore Cooperative Ltd. ("Agricore"), the Commissioner of Competition (the "Commissioner") filed an application pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act") for: (a) an order or orders against the respondent pursuant to section 92 of the Act requiring the respondent to divest, at the respondent's option: (i) all of its interests in the Pacific Elevators Limited ("Pacific") grain terminal at the Port of Vancouver (as more fully described in paragraph 21 of the Statement of Grounds and Material Facts dated December 19, 2001) (the "Statement of Grounds and Material Facts"), Western Pool Terminals Limited ("WPTL") and the Loan Agreement between Pacific, WPTL and Alberta Wheat Pool dated January 11, 1996; or (ii) UGG's grain terminal at the Port of Vancouver (as more fully described in paragraph 21 of the Statement of Grounds and Material Facts); and (b) such further orders as may be appropriate.

2 While the Commissioner's position is that there are two options: either the divestiture of the UGG facility or the divestiture of the respondent's 70 percent interest in the Pacific terminal as a whole, the respondent submits that there should be a third option; namely, the divestiture of the so-called Pacific 1 terminal.

3 The existence of a substantial lessening of competition ("SLC") in the market for port terminal grain handling services in the Port of Vancouver has been agreed to by the parties for the purpose of this proceeding and is not at issue in this application. The sole substantive issue in this proceeding is what divestiture will effectively address this SLC; specifically whether the divestiture of the Pacific 1 terminal would satisfy the four conditions set out in paragraph 77 of the Statement of Grounds and Material Facts. Both parties agree that a divestiture that satisfies these four conditions would be sufficient to remedy the SLC.

4 A request for leave to intervene in the proceedings was filed by the Canadian Wheat Board (the "CWB") on February 19, 2002. This request was decided orally at a hearing on May 15, 2002. The CWB was granted leave to intervene on the substantive issue. The following are the reasons for the order.

5 The CWB is a farmer controlled marketing organization which is incorporated pursuant to the provisions of the *Canadian Wheat Board Act*, R.S.C. 1985 c. C-24. The statutory object of the corporation is to market grain grown in Western Canada in interprovincial and export trade. Its mission is to market quality products and services in order to maximize returns to Western Canadian grain producers. All of the money received by the CWB for the sale of CWB grains is combined into one of four accounts (wheat, durum, barley and designated (i.e. malt) barley) and, after deducting the CWB's operating costs, the sales revenue earned is returned to producers. Any increase in the operating costs of the CWB results in a reduction in the return to producers.

6 The CWB is concerned that enhanced market power not adequately remedied will adversely impact access to facilities, price levels and quality of service both at the Port of Vancouver and primary grain elevator levels, thus, resulting in competitive consequences affecting the CWB and the producers that it represents. More specifically, the CWB submits that the alternative partial divestiture proposed by the respondent in the Commissioner's application will not adequately remedy the substantial lessening or prevention of competition arising from the acquisition. Therefore, the CWB alleges that it is directly affected by the matters at issue in the application, which is to determine whether the divestiture of the Pacific 1 Terminal or other alternate remedies satisfy the four conditions set out in paragraph 77 of the Statement of Grounds and Material Facts.

7 The CWB also alleges that it has a unique perspective on the potential competitive effects of the acquisition and the extent to which the partial divestiture proposed by UGG would provide an adequate remedy because it is the direct representative of Western Canadian producers of wheat and barley and is a major user of terminal facilities at the Port of Vancouver.

8 The Commissioner supports the intervention of the CWB as counsel submits that the request satisfies the test for granting intervenor status set out in subsection 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c.19 (2nd Supp.), and in the jurisprudence of the Tribunal.

9 Counsel for the respondent submits that the test for granting intervenor status has not been satisfied by the CWB and that the request for leave to intervene should be denied. Counsel submits that the CWB has not demonstrated that it has unique knowledge of the matters in issue that would provide the Tribunal with a perspective different from the Commissioner's namely because of the narrowness of the issue between the parties as formulated in the pleadings. Counsel argues that CWB only asserts that because it is a customer it has a "unique perspective to 'bring to bear' on the potential competitive effects of this acquisition". Further, counsel submits that the CWB intends to intervene in this case simply to express its view in favour of the Commissioner's position which is not a proper basis on which leave to intervene should be granted.

10 Counsel for the respondent also submits that the CWB should not be given leave to intervene as this would result in a prejudice to the respondent who may be required to divulge highly confidential information concerning its cost structure, margins, operations and future business plans. Counsel submits that the respondent has gone to great lengths to streamline this proceeding and to limit the scope of the issues by negotiating an arrangement with the

Commissioner and that this result might be defeated by the participation of the CWB.

11 As stated in *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (Reasons and Order Granting Requests for Leave to Intervene) (1995), 61 C.P.R. (3d) 528, [1995] C.C.T.D. No. 4 (Competition Trib.), the test for granting intervenor status is set out in subsection 9(3) of the *Competition Tribunal Act*:

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

12 Further, as previously stated in *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.* (26 June 2000), CT2000002/20, Reasons and Order Granting Request for Leave to Intervene at paragraph 3, [2000] C.C.T.D. No. 10 (Competition Trib.) referred to in *Canada (Commissioner of Competition) v. Air Canada*, [2001] C.C.T.D. No. 5 (Competition Trib.) at paragraph 11, the Tribunal must be satisfied that all of the following elements are met in order to grant the status of intervenor:

> (a) The matter alleged to affect that person seeking leave to intervene must be legitimately within the scope of the Tribunal's consideration or must be a matter sufficiently relevant to the Tribunal's mandate (see *Canada (Director of Investigation & Research) v. Air Canada* (1992), 46 C.P.R. (3d) 184 (Competition Trib.), at 187, [1992], C.C.T.D. No. 24 (Competition Trib.)).
>
> (b) The person seeking leave to intervene must be directly affected. The word "affects" has been interpreted in *Air Canada, ibid.*, to mean "directly affects".
>
> (c) All representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the Commissioner (see *Tele-Direct*, cited above in § [2]).
>
> (d) Finally, the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it (see *Washington v. Canada (Director of Investigation & Research)*, [1998] C.C.T.D. No. 4 (Competition Trib.)).

13 I am of the view that the CWB has demonstrated that its request for leave to intervene satisfies the test stated above. In particular, CWB's extensive involvement in the grain industry with producers clearly places it in a unique position to assist the Tribunal in its consideration of the effectiveness of the remedies that are proposed.

14 Confidentiality concerns raised by counsel for the respondent cannot by themselves constitute grounds for denying intervenor status. However, CWB will have to respect any confidentiality obligations arising by virtue of any confidentiality orders.

15 I am of the view that the CWB shall only be entitled to address the issues which I identify below, that will assist the Tribunal in making a decision on the Commissioner's application. Further, I took note of the fact that the CWB is prepared to agree to the conditions proposed by the Commissioner regarding the calling of witnesses which are stated at paragraph 31 of the Response of the Applicant to the Request for Leave to Intervene by the Canadian Wheat Board. I am of the view that those conditions will provide adequate and proper disclosure to the parties of the evidence intended to be called, if at all, by the CWB, and ensure that it is not repetitive or disruptive to the proceedings.

For these Reasons, The Tribunal Orders that:

16 The Canadian Wheat Board is granted leave to intervene on the sole substantive issue of this proceeding:

(a) whether the divestiture of the Pacific 1 Terminal or other alternate remedies would satisfy the four conditions set out in paragraph 77 of the Statement of Grounds and Material Facts and will effectively remedy the substantial prevention or lessening of competition in the market for port terminal grain handling services in the Port of Vancouver.

17 The Canadian Wheat Board shall be allowed to participate in the proceedings and is permitted:

(a) to review any discovery transcripts and access any discovery documents of the parties to the application but not direct participation in the discovery process, subject to confidentiality orders;

(b) to call *viva voce* evidence on the following conditions and containing the following information: (1) the names of the witnesses sought to be called; (2) the nature of the evidence to be provided and an explanation as to what issue within the scope of the intervention such evidence would be relevant; (3) a demonstration that such evidence is not repetitive, that the to be facts proven have not been adequately dealt with in the evidence so far; and (4) a statement that the Commissioner had been asked to adduce such evidence and had refused;

(c) to cross-examine witnesses at the hearing of the application to the extent that it is not repetitive of the cross-examination of the parties to the application;

(d) to submit legal arguments at the hearing of the application that are non-repetitive in nature and at any pre-hearing motions or pre-hearing conferences; and

(e) to introduce expert evidence which is within the scope of its intervention in accordance with the procedure set out in the *Competition Tribunal Rules*, SOR/94-290, and case management.

18 UGG shall not be permitted to seek documentary and oral discovery of the CWB.

END OF DOCUMENT

File No. CT-2011-003

THE COMPETITION TRIBUNAL

THE COMMISSIONER OF COMPETITION

Applicant

AND

THE TORONTO REAL ESTATE BOARD

Respondent

BRIEF OF AUTHORITIES OF THE CANADIAN REAL ESTATE ASSOCIATION

(Re: Request For Leave To Intervene)

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