

THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

**VISA CANADA CORPORATION AND
MASTERCARD INTERNATIONAL INCORPORATED**

Respondents

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
March 3, 2011 CT-2010-010	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 40

THE TORONTO-DOMINION BANK

Applicant for Leave to Intervene

**REPLY OF THE TORONTO-DOMINION BANK ("TD")
TO THE RESPONSE OF THE COMMISSIONER OF
COMPETITION TO TD's MOTION FOR LEAVE TO INTERVENE**

1. The Response (the "Response") of the Commissioner of Competition (the "Commissioner") is based essentially on three submissions:

- (a) that TD's Motion fails to establish that it is "directly affected" by the Application;
- (b) that TD's Motion fails to establish that TD has a unique or distinct perspective that will be of assistance to the Tribunal; and

- (c) that, if leave to intervene is granted, the scope and terms thereof should be significantly restricted.
2. TD will address each of these positions in turn in this Reply.
3. The Commissioner's Response relies upon the test for the granting of intervenor status set out in the *CREA* case, but does not challenge TD's Motion with respect to two of the four elements of the test. That is, the Response appears to concede:
- (a) that the matters affecting TD are legitimately within the scope of the Tribunal's consideration or are sufficiently relevant to the Tribunal's mandate; and
- (b) that TD's representations are relevant to issues specifically raised in the pleadings of the parties.¹

As set out in its Motion and further discussed hereinafter, TD is directly affected by these proceedings and brings a unique perspective to assist the Tribunal with relevant representations to be addressed to the issues raised in the pleadings and within the scope of the Tribunal's mandate in this matter.

A. TD is Directly Affected

4. The Commissioner repeatedly asserts that any direct effect upon TD is "speculative", "hypothetical", and/or "unsupported"². Nothing could be further from the fact.
5. TD has filed the sworn Affidavit evidence of Messrs. Sallas and van Duynhoven. They are, respectively, the heads of TD's business as an Issuer and an Acquirer. Their evidence is

¹ *Canada (Commissioner of Competition) v. Canadian Real Estate Assn.* [2010] C.C.T.D. No. 11, at para. 12 ("*CREA*"), as cited in the Commissioner's Response, at para. 15.

² See, for example, the Commissioner's Response, at paras. 4, 20, 22 and 24.

unchallenged and uncontradicted. The Commissioner has chosen to file no evidence at all in response to TD's motion.

6. The unchallenged and uncontradicted evidence of Messrs. Sallas and van Duynhoven is that, among other things, the relief sought by the Commissioner:

- (a) would alter the terms upon which TD provides products and services to its cardholders and merchant customers;
- (b) would impact upon the utility and attractiveness of credit cards for consumers and, therefore, upon TD's credit card business;
- (c) would lead to dissatisfaction among TD's merchant customers and, consequently, would upset TD's overall relationship with its banking customers;
- (d) would impact directly upon the services that TD as an Acquirer is able to provide to its merchant customers;
- (e) would erode TD's ability to continue to offer attractive packages of benefits and reward programs to its cardholders and could tighten access to credit cards for certain customers; and
- (f) would lead to a decline in credit card usage, which would reduce competition between different payment systems and alter the competitive landscape of the overall payments system.³

7. These are a few demonstrative examples from the uncontradicted evidence filed by TD. TD relies upon the entirety of the evidence of Messrs. Sallas and van Duynhoven as to the direct effect of the Application upon TD.

³ Affidavit of Jim Sallas and Jeff van Duynhoven dated February 9, 2011, at paras. 6, 30-34, 42, 44, 46, 62(c), and 62(b)-(e), TD Motion Record, at pp. 23-42.

8. Contrary to the assertion in the Commissioner's Response, TD's motivation is not simply to preserve the *status quo*.⁴ Its positive contribution to improvements in the payment cards systems is demonstrated, for example, by its active participation in the creation of the Voluntary Code of Conduct for the Credit and Debit Card Industry, which brought positive change to the credit and debit card industry, to the benefit of the industry as a whole and merchants in particular, including allowing merchants to provide discounts for different methods of payment (e.g. cash, debit card, credit card) and differential discounts among different payment card networks.⁵

9. The Commissioner's reliance on the *Burns Lake* case is misplaced. In *Burns Lake*, the Commissioner brought a reference to pose questions to the Tribunal as to the proper interpretation of s. 106(2) of the *Competition Act*, due to amendments enacted in 2002 to the consent order/agreement approval process, which had not to that point been addressed by the Tribunal. Section 106(2) establishes its own regime with respect to whether an application to vary or rescind a consent agreement should be granted. It is distinct from the test expressed in s. 9(3) of the *Competition Tribunal Act*. In setting the test to be applied to an application to vary or rescind a consent agreement under s. 106(2), the Tribunal held *inter alia*:

- that "to respect Parliament's intention to give greater expedition and certainty to parties to a settlement, a fairly restrictive approach should be taken to the definition of "directly affected";
- that an applicant "must be able to show that the consequences for that party are definite";
- that "the scope for relief in a 106(2) application suggest that only effects related to competition should be considered"; and
- that an applicant must "experience[s] first hand a significant impact on a right which relates to competition or on a serious interest which relates to competition".⁶

⁴ As alleged at para. 6 of the Commissioner's Response.

⁵ See Affidavit of Jim Sallas and Jim van Duynhoven, at paras. 51-56 and Exhibit D, TD Motion Record, at pp. 39-40 and 51.

⁶ *Burns Lake Native Development Corporation et al v. Commissioner Competition and West Fraser Timber Co. Ltd. et al* [2006] C.C.T.D. No. 16, at paras. 49, 50 and 55, as cited at para. 21 of the Commissioner's Response.

10. The Tribunal's decision in *Burns Lake* was specifically designed to respond to the reference brought by the Commissioner and to define the standards applicable to s. 106(2). The *Burns Lake* standards have not been applied nor, indeed, cited in any subsequent decisions of the Tribunal on motions for leave to intervene under s. 9(3) of the *Competition Tribunal Act*.

11. Throughout her Response, the Commissioner cites from extracts of certain other cases in which motions for intervention were considered by the Tribunal. For the most part, those extracts are not helpful. All such cases turn on their particular facts, and the cited passages, taken without context, do not assist in the Tribunal's consideration of TD's Motion. As stated by the Tribunal in *Burns Lake*, such motions "will depend on the facts of a particular case".⁷

12. The *D&B Companies* case is a precedent for the Tribunal granting intervenor status where, as here, the proposed intervenors were parties to contracts with the respondent, features of which contracts were challenged by the Director as anti-competitive. The Tribunal held:

"Several of its [CCGD's] members are currently party to contracts with the respondent for the supply of 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."⁸

13. The Commissioner asserts that it has not made allegations of anti-competitive conduct against Acquirers.⁹ TD remains of the view that she has, and that, having made such allegations, the Commissioner now seeks to minimize them for purposes of her Response so as to oppose TD's Motion.

⁷ *Burns Lake*, *supra*, at para. 51.

⁸ See *Canada Competition Act (Director of Investigation and Research) v. The D&B Companies of Canada Ltd.*, [1994] C.C.T.D. No. 19, at p. 2.

⁹ See Commissioner's Response, at para. 33.

14. In sum, the Commissioner:

- (a) makes allegations and seeks remedies that directly impact the manner in which and the terms on which credit card transactions in Canada are conducted and, therefore, that directly impact TD in its businesses, both as Issuer and as Acquirer as well as upon its overall business and banking relationships with its customers; and
- (b) asserts that the so-called “Merchant Restraints” are anti-competitive and that Acquirers (including TD) agree with the Respondents to enforce and impose these allegedly anti-competitive terms and conditions upon their merchant customers.

Yet despite making serious allegations and seeking far-reaching remedies that impact TD in its business operations, the Commissioner asks this Tribunal to deny TD status to respond to such allegations, to protect its business and reputational interests, and to provide distinct insights, perspectives and evidence to the Tribunal.

B. TD Has a Unique/Distinct Perspective

15. As held by Noël J. in the *Southam* case cited by the Commissioner:

“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.”¹⁰

In the *Canadian Pacific* case cited by the Commissioner, Noël J. stated:

“Intervenors are usually admitted because they are at the time of their admission in a position to offer additional insight to the Tribunal”¹¹

¹⁰ *Southam Inc. v. The Director of Investigation and Research* (1997), 78 C.P.R. (3d) 315, at p. 319 (“*Southam*”), cited in the Commissioner’s Response, at para. 41.

¹¹ *Director of Investigation and Research v. Canadian Pacific Ltd. et al* (1997), 74 C.P.R. 37, at p. 46 (“*Canadian Pacific*”), cited in the Commissioner’s Response, at para. 20.

16. TD fulfils these tests. It brings a number of perspectives and insights to this important proceeding that neither the Commissioner nor the Respondents can provide, including:

- as an Issuer;
- as an Acquirer;
- as both an Issuer and an Acquirer;
- as a leading member of Canada's banking industry;
- as an operator of a multi-faceted banking business; and
- as a leading member of and participant in most, if not all, of the elements of Canada's payments systems.

17. In addition, in its day-to-day business as both an Issuer and an Acquirer, TD has daily and ongoing contact with the members of the public affected by these proceedings, i.e., consumers/users of credit cards and the merchants from whom consumers purchase goods and products. Neither the Applicant nor the Respondents is or, indeed, purports to be in this position.

18. As stated in its Motion, TD carries on business in the capacities of two of the three "Players" in the matters which are the subject of this Application, as identified by the Commissioner on her website (the third "Player" being the Respondents). Further, TD is directly involved in seven of the eight steps in the transaction whereby a cardholder pays for a purchase using a credit card as demonstrated in the Figure contained in the Commissioner's Application¹². In addition, in her Application¹³ the Commissioner states that there are typically four participants in a credit card transaction; TD as Issuer and Acquirer occupies two of those roles, and has direct daily contact with the other two participants, i.e., the cardholders and merchants. None of the parties to this proceeding can make this statement. The Commissioner does not address any of these points in her Response.

¹² See Commissioner's Notice of Application, at para. 39.

¹³ See Commissioner's Notice of Application, at para. 31.

19. Where (as in paragraph 46 of her Response) the Commissioner cannot deny the distinctiveness of TD's perspective, she asserts that it is not relevant. The relevance and impact of TD's perspective is clearly established in TD's Motion. It is confirmed by the Commissioner's own website and by the diagrammatic representation in the Notice of Application (as discussed above).

20. That Visa and MasterCard discuss (although they cannot embody) certain aspects of TD's perspective¹⁴ simply confirms the relevance of TD's perspective and the effect of these proceedings upon it. That certain arguments may be similar to those of the Respondents and/or that TD witnesses may be called¹⁵ does not affect TD's Motion. Similar statements likely could be made with respect to motions for leave to intervene in most cases. If such points were determinative, motions for leave to intervene could never be granted.

21. Ultimately, the Tribunal will have to consider the breadth of the issues raised by the Application. This does not amount to "expand(ing) the scope of the matters at issue"¹⁶. How broadly the Tribunal will direct its inquiry remains to be determined. But clearly, the potential effect of the remedies requested upon other elements of Canada's payments system is relevant to the Tribunal's deliberations. Inter alia, it is relevant to:

- the proper definition of "a market" under s. 76(1) of the *Competition Act*;
- whether the conduct complained of "has had, is having or is likely to have an adverse effect on competition ..." in that market under s. 76(1)(b);
- whether the Tribunal should make an order, and if so, the terms of that order, under s. 76(2).

The Commissioner and the Respondents cannot offer the broad perspective of participation in all aspects of Canada's payment systems. TD can and will.

¹⁴ See Commissioner's Response, at para. 47.

¹⁵ See Commissioner's Response, at para. 51.

¹⁶ See Commissioner's Response, at para. 46.

22. In adjudicating upon the Application, the Tribunal will have to weigh and balance the sometimes competing interests of several affected participants in the payments systems, including the interests of cardholders and merchants, as well as those of Issuers, Acquirers, the networks themselves, and participants in other modes of payment in Canada. TD is well positioned to assist the Tribunal in determining this balance, as TD seeks to achieve such balance every day in its business operations. As stated by Messrs. Sallas and van Duynhoven:

“In order to retain our merchant services customers, we must constantly balance revenue concerns with maintaining the goodwill of our business customers.”¹⁷

23. Although it is a member, TD is also separate and distinct from the Canadian Bankers' Association (the “CBA”). The submission referred to in paragraph 38 of the Commissioner's Response is that of the CBA, not that of TD, and, in any event, does not bear the interpretation ascribed to it in the Commissioner's Response. It should be noted, as is a matter of public record, that Mr. Sallas and/or Mr. van Duynhoven have appeared on behalf of TD, and separately from the CBA, at hearings where the CBA has also appeared, including before:

- the Senate Committee on Banking, Trade and Commerce – Mr. van Duynhoven appeared on April 2, 2009;
- the Joint Meeting of the Standing Committee on Finance and the Standing Committee on Industry, Science and Technology – Mr. van Duynhoven appeared on May 26, 2009 and Mr. Sallas appeared on May 28, 2009.

24. Through its intervention, if granted, the CBA will bring perspectives as to banking practice and policy. TD brings a different perspective, that of an operator of banking businesses and, in particular, of the businesses of issuing credit cards and acquiring credit card transactions. Mr. Sallas and Mr. van Duynhoven are, respectively, the heads of the TD business units that carry on these very operations. The Commissioner's Application seeks to closely examine and, ultimately, change how these businesses function. The Tribunal must understand how the businesses operate, including issues as to costs, services, products and

¹⁷ Affidavit of Jim Sallas and Jeff van Duynhoven at para. 42, TD Motion Record, at p. 34-35.

their features, customer preferences and merchant needs and problems. TD can provide all of these perspectives from a direct, operational viewpoint. The Commissioner and the Respondents cannot. Nor will the CBA, whose focus is to speak for the banking industry as a whole, and not for or from the perspective of any particular member.

C. Scope and Terms of Intervention

25. In suggesting that TD's proposed intervention relates solely to the question of the appropriate remedy, the Commissioner incorrectly characterizes TD's Motion. As discussed above and in its Motion, TD brings a distinct and unique perspective to the range of issues raised by the Application. It is directly affected by the allegations made and the positions taken by the Commissioner, not merely by the remedies sought.

26. It is premature to restrict the terms of the proposed intervention as suggested by the Commissioner, especially in that (as stated in TD's Motion) the Commissioner's allegations of anticompetitive conduct and the remedies sought are not fully defined in the Application. Rather, they remain open-ended.

27. Further, the fact that TD (generally) supports the submissions of the Respondents does not at all mean that its "positions are wholly aligned with those of the Respondents"¹⁸. As stated above and in its Motion, TD's perspectives and positions are distinct from those of the Commissioner and of the Respondents.

28. TD has already undertaken that if leave to intervene is granted, it will conduct and coordinate its intervention so as not to be repetitive or duplicative of the representations of the parties or other intervenors. Further, TD has undertaken to comply with the *Competition*

¹⁸ See Commissioner's Response, at para. 62.

Tribunal Rules (the “*Rules*”) and with any directions of the Tribunal with respect to the conduct of the proceeding.

29. Beyond that, TD submits that at this early stage its participation should not be restrictively defined. The nature, content and extent of the evidence to be adduced by the Commissioner are not yet known. There is ample precedent in prior decisions of the Tribunal for the granting of leave to intervene on terms similar to those requested by TD in its Motion.¹⁹

30. The submissions of the Commissioner seeking to restrict the terms of TD’s proposed intervention are at odds with the direction given by Iacobucci C. J. (as he then was) in the *American Airlines* case, where he stated:

“... If the intervenors can make a statement of facts, reasons or argument on matters that affect them, the question arises whether they should be allowed, at the discretion of the court in accordance with the general principle discussed above, to call evidence to support the facts which would show the manner in which the intervenor was affected by the proceeding. Similarly, one can question why the intervenors cannot ensure that their argument or reasons are supported by facts that they have had the chance to prove in evidence.

It seems to me that it is not a satisfactory answer to say that the Director must be relied on to establish the facts (or reasons) for the intervenors because only the Director is a party, or only the Director and the persons against whom an order is sought are the parties or have a *lis* between them, or that the Director must have carriage of the proceedings under the *Competition Act*.

... I am confident that the presiding members of the Competition Tribunal can deal with the matters to give respect to those concerns if or as needed.”

¹⁹ See, e.g., *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.*, [2006] C.C.T.D. No. 6; *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.*, [2006] C.C.T.D. No. 7; *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.*, [2006] C.C.T.D. No. 8; *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.*, [2006] C.C.T.D. No. 12; *Director of Investigation and Research v. Tele-Direct (Publications) Inc.* (1995), 61 C.P.R. (3d), 528, at pp. 535-536; *United Grain Growers Limited v. Commissioner of Competition*, [2005] C.C.T.D. No. 33; *United Grain Growers Limited v. Commissioner of Competition*, [2005] C.C.T.D. No. 34; *Commissioner of Competition v. United Grain Growers Limited*, [2002] C.C.T.D. No. 19; *Commissioner of Competition v. United Grain Growers Limited*, [2002] C.C.T.D. No. 10; *Commissioner of Competition v. Air Canada*, [2001] C.C.T.D. No. 5.

... Parliament has also provided a means to ensure that those who may be affected can participate in the proceedings in order to inform the Tribunal of the ways in which matters complained of impact on them. I would ascribe to Parliament the intention to permit those intervenors not only to participate but also to do so effectively. A restrictive interpretation of sub-section 9(3) could in some cases run counter to the effective handling of disputes coming before the Tribunal."²⁰

31. In particular, the proposal that TD ought to be required to obtain specific leave with respect to each and every aspect of its participation, including even to the extent of questions to be asked of witnesses²¹, should be rejected. It is unworkable and would inevitably burden and lengthen the hearing to the detriment of all participants.

32. Similarly, if granted intervention status, TD's request to lead expert evidence should not be restricted at this early stage. In the *Tele-Direct* case cited by the Commissioner (para. 72, Response), the Tribunal rejected the suggested restrictions on the intervenors' entitlement to call expert evidence, and stated:

"We cannot, however, think that the suggested solution is practical. ... No alternative solution having been suggested, we have not included any additional restrictions on expert evidence in the order, but leave it to the panel hearing the application to control the more obvious instances of duplication in the evidence submitted."²²

33. With respect to the Commissioner's request for documentary and oral discovery of TD:

(a) if granted leave to intervene, TD agrees to appropriately defined documentary and oral discovery, in keeping with its status as an Intervenor, and subject to the right to seek a confidentiality order if so advised; and

²⁰ *American Airlines Inc. v. Competition Tribunal*, [1989] 2 F.C. 88, at pp. 97-98 (F.C.A.); Affd. (sub-nom *Air Canada v. American Airlines Inc.*), [1989] 1 S.C.R. 236.

²¹ See Commissioner's Response, at para. 70.

²² *Director of Investigation and Research v. Tele-Direct (Publications) Inc. et al* (1995), 61 C.P.R. (3d) 528, at pp. 533-534 (Comp. Trib.).

(b) TD notes the irony of the Commissioner's request for oral and documentary discovery of TD, in light of her assertion that TD is not affected by this proceeding and has nothing distinctive to contribute.

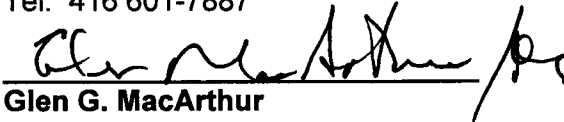
34. TD respectfully requests that its Motion for Leave to Intervene be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

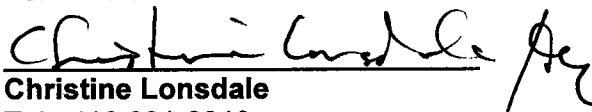
Dated at Toronto, Ontario, this 3rd day of March, 2011.



F. Paul Morrison
Tel: 416 601-7887



Glen G. MacArthur
Tel: 416 601-7888



Christine Lonsdale
Tel: 416 601-8019
Fax: 416 868-0673

McCarthy Tétrault LLP
Barristers and Solicitors
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Of Counsel for The Toronto-Dominion Bank

TO: Kent E. Thompson / Adam Fanaki
Davies Ward Phillips & Vineberg LLP
1 First Canadian Place, 44th Floor
Toronto ON M5X 1B1

Tel: 416 863-0900
Fax: 416 863-0871

Of Counsel for the Applicant the
Commissioner of Competition

AND TO: Jeffrey B. Simpson / David W. Kent /
James B. Musgrove
McMillan LLP
Brookfield Place, Suite 4400
181 Bay Street
Toronto ON M5J 2T3

Tel: 416 865-7000
Fax: 416 865-7048

Of Counsel for the Respondent
MasterCard International Incorporated

AND TO: Robert Kwinter / Randall Hofley /
Navin Joneja
Blake, Cassels & Graydon LLP
Box 25, Commerce Court West
199 Bay Street
Toronto ON M5L 1A9

Tel: 416 863-3283
Fax: 416 863-2653

Of Counsel for the Respondent Visa
Canada Corporation

AND TO: Mahmud Jamal / Jason MacLean /
Michelle A. Lally
Osler
1 First Canadian Place
P.O. Box 50, Stn. 1st Canadian Place
Toronto ON M5X 1B8

Tel: 416 862-6764
Fax: 416 862-6666

Of Counsel for the Proposed Intervenor,
the Canadian Bankers' Association

AND TO: The Registrar
The Competition Tribunal
Thomas D'Arcy McGee Building
600 – 90 Sparks Street
Ottawa ON K1P 5B4

Tel: 613 957-7851
Fax: 613 952-1123

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

F. Paul Morrison
Tel: 416 601-7887

Glen G. MacArthur
Tel: 416 601-7888

Christine Lonsdale
Tel: 416 601-8019

Of Counsel for The Toronto-Dominion Bank
#10134336