CT-2010-010

THE COMPETITION TRIBUNAL

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

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

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

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE
FILED / PRODUIT
March 3, 2010
CT-2010-010
Jos LaRose for / pour
REGISTRAR / REGISTRAIRE
OTTAWA, ONT
43

- and -

VISA CANADA CORPORATION and MASTERCARD INTERNATIONAL INCORPORATED

Respondents

REPLY OF THE CANADIAN BANKERS ASSOCIATION TO THE RESPONSE OF THE COMMISSIONER OF COMPETITION Re: Application by the Commissioner of Competition under section 76 of the *Competition Act*

I. Overview

1. This is the Reply of the Canadian Bankers Association ("CBA") to the Commissioner of Competition's Response to the CBA's request for leave to intervene in this Application.

2. The Commissioner's Application proposes to scrutinize two multi-party systems – the Canadian credit card systems operated by Visa and MasterCard – and asks the Tribunal to make fundamental changes to the rules governing those systems. The CBA's member banks are part of these multi-party systems: they have contractual relationships with the ***card networks*** themselves (as the principal customers of Visa and MasterCard); with ***consumers*** (as the issuers of credit cards), for whom a bank-issued credit card is often part of a broader banking relationship; and in

some instances certain members of the CBA have contracts with ***merchants*** (by having an interest in the business of acquiring credit card transactions or by operating their own acquiring business). The CBA has deep knowledge of the issues faced by customers and merchants in connection with these credit card networks, and seeks to present a balanced perspective on these issues that would inform the Tribunal of how all these interests are implicated by this Application. The uncontradicted evidence shows that the CBA's member banks collectively issue some ***69 million*** Visa and MasterCard credit cards, accounting for ***$265 billion*** in annual net retail sales, or ***29% of all consumer spending in Canada***.[1] Yet the Commissioner of Competition claims that the CBA's 51 member banks are not, in any way, "directly affected" by this proceeding. The Commissioner asserts that the Tribunal should decide the important issues before it without considering the broader and distinct perspective of Canada's banks or their submissions on the ramifications of any rule changes to them and their customers. With respect, the Commissioner's position should be rejected.

3. The Commissioner also takes an overly restrictive position regarding the intervention test and the purpose of intervenors. The Commissioner ignores settled Tribunal case law holding that the existence of a contractual relationship between an intervenor and a party to an application satisfies the "directly affected" requirement of the test. The Commissioner also conflates the requirement that an intervenor bring a different or unique ***perspective*** with the non-requirement of adopting a different ***legal position*** than the parties. Finally, the Commissioner does not address the purposes – and importance – of allowing intervenors, which are to protect the interests of non-parties, to ensure the Tribunal is well-informed of the issues in the proceeding and the ramifications of any decision it makes, and to support and legitimize the Tribunal's ultimate ruling. The CBA's proposed intervention furthers all these purposes.

II. The CBA's Member Banks Are Directly Affected By The Application In A Manner That Relates To Competition

(i) The uncontradicted, concrete, and specific evidence is that the CBA's member banks will be directly affected by this Application

4. Contrary to the Commissioner's assertions (Commissioner's Response, ¶¶21-32), the CBA has tendered uncontradicted, concrete, and specific evidence of how the CBA's member

[1] Affidavit of Darren Hannah sworn February 10, 2011 ("Hannah Affidavit"), ¶¶3, 7-10, 16.

banks will be directly affected by this Application in a manner relating to competition. The CBA's evidence is that its member banks will be directly affected because: (1) the CBA's member banks are the principal customers of, and have contractual relationships with, the Respondents' credit card networks that are alleged to be anticompetitive; (2) the CBA's member banks issue credit cards to individuals and businesses, and carry on personal and commercial banking relationships with Canadian cardholders; and (3) several CBA member banks have an interest, or directly participate, in the business of acquiring credit card transactions from the Respondents' allegedly anticompetitive credit card networks.[2]

5. More particularly, the CBA's uncontradicted evidence is that the Commissioner's proposed changes to the Respondents' allegedly anticompetitive network rules would "***harm*** both issuers (especially smaller issuers) and cardholders,"[3] and "impose a ***financial penalty*** on cardholders"[4] (who are, of course, the banks' customers), with the result that cardholders "***will be*** less likely to obtain and use credit cards" issued by the CBA's member banks.[5] The Commissioner's 37-page submission is silent regarding this uncontradicted, concrete, and non-speculative evidence of harm to the CBA's member banks and their customers, and asserts, incorrectly, that "[t]he Bankers Association [*sic*] offers no evidence" with respect to how it is "***directly*** affected by the Application in a manner different from the vast majority of Canadians" (Commissioner's Response, ¶29).

(ii) The CBA member banks' millions of contractual relationships with participants in the Respondents' credit cards networks establish that they are "directly affected"

6. While the impact of the Commissioner's Application on the CBA's member banks is self-evident on the facts of this case, it is also amply supported by this Tribunal's intervention jurisprudence. While (as Simpson J. noted in *Burns Lake*) the "context" of a particular case will always play a "key role" in determining whether a prospective intervenor is "directly affected" by a proceeding to justify intervention,[6] several of the Tribunal's past intervention rulings are

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[2] Hannah Affidavit, ¶¶3, 7-10.

[3] Hannah Affidavit, ¶20(a) (emphasis added).

[4] Hannah Affidavit, ¶20(b) (emphasis added).

[5] Hannah Affidavit, ¶20(a) (emphasis added).

[6] *Burns Lake Native Development Corp. v. Canada (Commissioner of Competition*, [2006] C.C.T.D. No. 16 (Comp. Trib.), ¶52 [*Burns Lake*].

instructive. The Tribunal has consistently held that a prospective intervenor is "directly affected" by a proceeding if the intervenor has a contractual or other relationship with a party before the Tribunal that could be affected by the proceeding. The Commissioner cites several of these cases to oppose the CBA's motion, yet they support the opposite conclusion. For example:

(a) In *Director of Investigation and Research v. The D & B Companies of Canada Ltd.*,[7] the Tribunal granted leave to intervene to the Canadian Council of Grocery Distributors ("CCGD") in an application relating to whether contracts for the supply of scanner data were anticompetitive. Several CCGD members were parties to contracts with the respondent that were alleged to be anticompetitive. The Tribunal ruled that allowing the CCGD to intervene was more efficient than requiring each individual retailer to intervene independently. The Tribunal's remarks apply equally to the CBA's present motion:

> ***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 on the application. Clearly, the members of CCGD who are party to 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.***[8]

(b) In *Canada (Competition Act, Director of Investigation and Research) v. Canadian Pacific Ltd.*,[9] Noël J. stated that "I accept that a customer, supplier or other industry participant ***can***, in the appropriate circumstances, be directly affected by matters in issue

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7 *Director of Investigation and Research v. The D & B Companies of Canada Ltd.*, [1994] C.C.T.D. No. 19 (Comp. Trib.), cited in the Commissioner's Response, ¶¶45, 55.

8 *Id.*, p. 2 (emphasis added).

9 *Canada (Competition Act, Director of Investigation and Research) v. Canadian Pacific Ltd.* (1997), 74 C.P.R. (3d) 37 (Comp. Trib.), cited in the Commissioner's Response, ¶¶20, 25, 70, 77 [*Canadian Pacific*].

before the Tribunal, and on that ground, be granted intervenor status."[10] This is precisely the basis for the CBA's motion: it has shown how its member banks are the principal customers of the Respondents and necessary industry participants in Visa and MasterCard's Canadian credit card systems that are alleged to be anticompetitive.[11] Noël J. added in *Canadian Pacific* that "once it is established that a proposed intervenor acts in one (or more) of those capacities, it remains incumbent upon it to state how it is affected *qua* customer, supplier, or other industry participant, as this is essential to the delineation of the scope of the intervention."[12] Again, the CBA has done this: it has shown how its member banks' would be directly affected *qua* issuers of Visa and MasterCard credit cards (as part of a broader banking relationship for many cardholders), customers of Visa and MasterCard, and acquirers of Visa and MasterCard credit card transactions.[13]

(c) In *Canada (Director of Investigations and Research, Competition Act) v. Air Canada,*[14] an application to the Tribunal to vary a consent order approving the merger of the computer reservation systems of Air Canada and Canadian Airlines International Limited, the Tribunal granted leave to intervene to the Council of Canadian Airlines Employees, whose members were employees of the respondent Canadian Airlines who faced "unemployment if the airline does not survive" and who were negotiating a potential equity investment in Canadian Airlines.[15] The Tribunal also granted leave to intervene to IBM Canada Ltd., VIA Rail Canada Inc., and Unisys Canada Inc., because they were either suppliers to, or customers of, a party to the application.[16] The CBA's member banks are far more directly implicated in, and affected by, the present Application than any of the intervenors granted standing in *Air Canada.*

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10 *Id.*, p. 43 (emphasis in original).

11 Hannah Affidavit, ¶¶3, 7-10.

12 *Canadian Pacific*, above, note 9, p. 43.

13 Hannah Affidavit, ¶¶11-24.

14 *Canada (Director of Investigation and Research, Competition Act) v. Air Canada* (1992), 46 C.P.R. (3d) 184 (Comp. Trib.), cited in Commissioner's Response, ¶¶17, 27-28, 40, 43, 59, 64, 65, 70, 72, 73 [*Air Canada*].

15 *Id.*, p. 189.

16 *Id.*, pp. 188-189.

(d) In *Burns Lake Native Development Corp. v. Canada (Commissioner of Competition)*,[17] Simpson J. explained that the Tribunal had granted intervenor status to the Saskatchewan Wheat Pool ("SWP") in an earlier case because of "***the potential harm to SWP under contracts***" involving the respondent. Simpson J.'s observations equally support the CBA's present motion.

III. The CBA Brings A Useful And Distinct Perspective To This Application

(i) The CBA's useful and distinct perspective

7. Contrary to the Commissioner's assertions (Commissioner's Response, ¶¶40-53), the CBA will bring distinct perspective to this Application that will be useful to the Tribunal as it considers this Application. Because the CBA's member banks play various essential roles in the multi-party Visa and MasterCard credit card systems, the CBA's perspective is much broader than and different from those of the parties. The CBA member banks' broad experience and expertise as the principal customers of Respondents' credit card networks and as issuers, as providers of personal and commercial banking services to cardholders, and some with interests in or as acquirers, will significantly help the Tribunal understand the system-wide competitive effects of the Commissioner's proposed rule changes.[18]

8. Like the Canadian Wheat Board's perspective in *United Grain Growers Ltd. v. Canada (Commissioner of Competition)*, the CBA's "in-depth knowledge of the industry" and the "large number" of banks it represents will place it in "a unique position to make original representations."[19] And, like the intervenors White Directory of Canada, Inc. and NDAP/DAC in *Tele-Direct*, who had "special knowledge and expertise [that] ... may assist the Tribunal,"[20] even though "they support[ed] the Director's position generally,"[21] the CBA member banks'

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17 *Burns Lake*, above, note 6, ¶¶40-41 (emphasis added), citing *Commissioner of Competition v. United Grain Growers Limited*, 2002 Comp. Trib. 21. *Burns Lake* is cited in the Commissioner's Response, ¶¶20-21, 25.

18 Hannah Affidavit, ¶¶11-13; CBA's Request for Leave to Intervene, ¶¶5-9.

19 *United Grain Growers Ltd. v. Canada (Commissioner of Competition)*, [2005] C.C.T.D. No. 33 (Comp. Trib.), ¶19 [*UGG*].

20 *Director of Investigation and Research v. Tele-Direct (Publications) Inc.* (1995), 61 C.P.R. (3d) 528 (Comp. Trib.), p. 530 [*Tele-Direct*].

21 *Id.*

specialized expertise derived from multiple roles in Visa and MasterCard's credit card system will assist the Tribunal in this Application. As the Tribunal stated in the *Washington* case cited by the Commissioner: "If a potential intervenor were to come forward and satisfy the Tribunal that it had some unique knowledge of the matters at issue which would provide the Tribunal with a perspective different from the Director's, the Tribunal would be most interested."[22]

9. In asserting that the CBA does not provide a distinct or useful perspective from Visa or MasterCard, the Commissioner ignores the purpose of allowing intervenors to participate in judicial or administrative proceedings. Sopinka and Gelowitz note that "[i]intervention supplies the court with an ***enhanced perspective*** on the questions at issue in the proceedings, thus ***promoting better, more informed, decision-making and increased public acceptance of court decisions***."[23] As Sopinka and Gelowitz explain:

> The purpose of intervention is threefold: (1) to protect the interests of non-parties; (2) to ensure that the court is well informed of the arguments in regard to the issues raised in the proceeding and the ramifications of the decision to be made by the court; and (3) to support and help legitimize the court's decision.[24]

10. These comments apply equally to this intervention before this Honourable Tribunal. The CBA will provide the Tribunal with an enhanced perspective on whether the Respondents' network rules are indeed anticompetitive, or whether instead (as the CBA claims) they promote the competitiveness, efficiency, and reliability of the Respondents' credit card networks. The CBA's members are directly affected by these issues and seek to protect their interests as non-parties, including their relationships with both cardholders and merchants. The CBA's participation will tend to promote better and more informed decision-making by the Tribunal and increase public acceptance of any decision or order it may make. By contrast, shutting out the national voice of Canada's 51 banks and the issuers of 69 million Visa and MasterCard credit cards will only serve to undermine public acceptance of the Commissioner's position should she succeed in this Application.

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22 *Washington v. Canada (Director of Investigation and Research)*, (1998), 78 C.P.R. (3d) 479 (Comp. Trib.), p. 486 [*Washington*].

23 John Sopinka and Mark Gelowitz, *The Conduct of an Appeal* (2nd ed., 2000), p. 253 (emphasis added).

24 *Id.*, p. 254.

11. The Commissioner diminishes the importance of an intervenor's distinct perspective by suggesting that the CBA will merely "parrot" the submissions of Visa and MasterCard (Commissioner's Response, ¶¶40-45). An intervenor must provide a useful and distinct ***perspective***, not necessarily a different legal ***position***, than the parties. Supporting a particular side and generally agreeing with the legal position of a particular party does not disqualify a prospective intervenor, provided that the intervenor brings a useful and distinct perspective to the issues. As Simpson J. recently noted in *Canada (Commissioner of Competition) v. Canadian Real Estate Assn.*, "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."[25]

12. The Tribunal's approach to the distinct perspective requirement is similar to the approach of the Supreme Court of Canada when it considers intervention motions. The Supreme Court accepts that the criterion of useful submissions is "easily satisfied by an applicant who has a history of involvement in the issue giving the applicant an expertise which can shed fresh light or provide new information on the matter".[26] The Court has also noted that "[t]he submissions of responsible organizations" with "a past history of helpful intervention" are appropriate for intervention.[27] In view of the CBA's expertise and its long history of responsible interventions in important cases affecting the banking industry, and the useful and distinct perspective that the CBA will offer in this case, the CBA respectfully submits that it should be granted intervenor status in this case.

13. In short, while the CBA ***generally*** intends to support the Respondents' legal position of the Respondents because their legal position is legally correct – it is too early to tell whether it will support the Respondents' legal positions on ***all*** issues affecting the CBA's member banks – it will do so from its different, broader perspective, derived from its members' multiple roles in the Visa and MasterCard credit card systems.

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[25] *Canada (Commissioner of Competition) v. Canadian Real Estate Assn.*, [2010] C.C.T.D. No. 11 (Comp. Trib.), ¶12 [*CREA*] (emphasis added); see also *Southam Inc. v. The Director of Investigation and Research* (1997), 78 C.P.R. (3d) 315 (Comp. Trib.), p. 319 ("[i]ntervenors are intended to supplement the cases of a party by bringing to the Tribunal their ***own and distinct perspective of the subject matter in dispute***")(emphasis added); and *Washington*, above, note 22, p. 482 ("an intervenor must bring to the Tribunal ***a unique or distinct perspective of the subject matter in dispute***")(emphasis added).

[26] *Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335, p. 340.

[27] *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1990] S.C.B. No. 2140, cited in Sopinka and Gelowitz, *The Conduct of an Appeal*, above, note 23, p. 266.

14. By contrast, under the Commissioner's restrictive approach, intervenors who propose to support the legal position of a particular party would automatically be disqualified from intervening. But the Commissioner's restrictive approach is not supported by the authorities: in the cases cited by the Commissioner, the Tribunal granted leave to intervene in 21 of 27 applications for to intervene (77%) (see **Appendix A**). In addition to confusing a distinct perspective with a distinct legal position, the Commissioner's approach contradicts Rule 43(2)(3) of *Competition Tribunal Rules*, which states that a prospective intervenor "shall set out the name of the party, if any, ***whose position that person intends to support***" (emphasis added). Clearly, then, supporting a party's legal position is not a bar to intervention.

15. The Commissioner's approach is also undermined by the cases she cites, in which successful applicants for leave to intervene supported the legal position of a particular party,[28] including several who supported the Commissioner's legal position (whose motions the Commissioner supported).[29]

16. In sum, neither the Tribunal's *Rules* nor its jurisprudence stipulate that a different legal position is a necessary condition for intervention. Rather, what is required is a distinct perspective that will assist the Tribunal.

17. Nor, as claimed by the Commissioner, should the CBA be required to rely on Visa and MasterCard to present its members' perspectives and protect their interests (Commissioner's Response, ¶¶47, 50-52). A prospective intervenor who will be directly affected by a proceeding and has a distinct perspective to contribute should be entitled to protect its interests and present its perspective. It should not be left to the mercy of the case that the parties may choose to present to protect their interests. This is a matter of basic fairness. As Iacobucci C.J. (as he then was) stated in *American Airlines, Inc. v. Canada (Competition Tribunal)*, "one can question why

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[28] See e.g. *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool*, [2006] C.C.T.D. No. 7 (Comp. Trib.), ¶6; *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool*, [2006] C.C.T.D. No. 8 (Comp. Trib.), ¶6; *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool*, [2006] C.C.T.D. No. 12, ¶7 (Comp. Trib.); *Canadian Pacific*, above, note 9, pp. 46-47; *Air Canada*, above, note 14, p. 191.

[29] See e.g. *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool*, [2006] C.C.T.D. No. 6 (Comp. Trib.), ¶6; *UGG*, above, note 19, ¶23; *Tele-Direct*, above, note 20, p. 535; *Air Canada*, above, note 14, p. 191. The Commissioner also did not oppose the intervention of Lawrence Dale (who supported the Commissioner's position on the merits) in *CREA*, above, note 25, although Simpson J. denied Mr. Dale's intervention because he tendered only a "bald statement" of his different interest and perspective, was generally supportive of the Commissioner's case, and in any event the Commissioner would have had the benefit of Mr. Dale's evidence because she confirmed that she would be calling him as a witness.

the intervenors cannot ensure that ***their argument or reasons*** are supported by facts that ***they*** have had the chance to prove in evidence."[30]

(ii) The CBA's position on this Application is entirely consistent with its earlier submissions before Parliamentary committees

18. Contrary to the Commissioner's assertion (Commissioner Response, ¶¶38-39), the CBA did not "admit" in an unrelated submission before a Parliamentary Committee in 2009 that it has no relevant or useful submissions on the issues before this Tribunal. Far from being "fatal," the CBA's submissions to the Joint Meeting of the Standing Committee on Finance and the Standing Committee on Industry, Science and Technology are entirely consistent with the position before this Tribunal. In 2009, the CBA stated candidly that it could not provide substantive comments on the "***setting*** of interchange fees, the terms of merchant-acquirer contracts and the 'honour all cards rule' … which the banking industry ***does not control***."[31] Similarly, in its request to intervene the CBA emphasized that "[i]mportantly, the ***banks do not establish these network rules; rather, these are established by the card networks themselves***."[32] Here, as before the Parliamentary committees, the CBA does not propose to make submissions about the ***setting*** of rules that are outside its member banks' control, but rather about how those rules, set by Visa and MasterCard, are pro-competitive and critical to the efficiency, integrity, and reliability of Canada's Visa and MasterCard credit card networks.[33]

19. For these reasons, the CBA easily surpasses the threshold for intervention: the CBA's member banks are directly affected by the issues raised in this Application, and they have useful and different perspectives to present that will assist the Tribunal as it hears and decides the important issues before it.

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30 *American Airlines, Inc. v. Canada (Competition Tribunal)* (1988), 54 D.L.R. (4th) 741 (Fed. C.A.), p. 748 (emphasis in original) [*American Airlines*].

31 "Canada's Credit and Debit Card Marketplace: Submission to the Joint Meeting of the Standing Committee on Finance and the Standing Committee on Industry, Science, and Technology", The Canadian Bankers Association, May 28, 2009, p. 1 (emphasis added), Hannah Affidavit, Exhibit B.

32 CBA's Request for Leave to Intervene, ¶13 (emphasis added); Hannah Affidavit, ¶20 (emphasis added).

33 CBA's Request for Leave to Intervene, ¶13; Hannah Affidavit, ¶20.

IV. The Scope Of The CBA's Intervention Should Not Be Stifled As Proposed By The Commissioner

(i) The CBA's position

20. The Tribunal has the discretion to, and should, grant the CBA effective and meaningful intervention participation rights. As Iacobucci C.J. explained in *American Airlines*, intervenors should be allowed an "effective and meaningful intervention" in order "to ensure they are able to show how they could be affected by an order, all subject to the discretion and supervision of the Tribunal."[34] The CBA should therefore be permitted to make representations and present evidence on all issues before the Tribunal that directly affect its member banks.

21. While the scope of intervention must be decided on a case-by-case basis having regard to the particular rights and interests implicated, the CBA's request to review discovery transcripts (without participating in the discovery, and by abiding by any confidentiality orders made by the Tribunal), to call non-repetitive *viva voce* and expert evidence, to make non-repetitive cross-examination of witnesses, and to make legal arguments, are fair, reasonable, and entirely consistent with the intervention rights granted by the Tribunal in past cases.[35] As a matter of basic fairness, the CBA should be given these rights to participate given the nature and scope of its members' affected interests in the particular circumstances of this case. The CBA adopts Iacobucci C.J.'s observation in *American Airlines* that, "if a wider role for interveners does lead to longer or more complex proceedings before the Tribunal, surely that is a necessary price to pay in the interests of fairness, which is expressly required under subsection 9(2) [of the *Competition Tribunal Act*]."[36]

(ii) The CBA should not be limited to making submissions on remedy

22. Contrary to the Commissioner's assertions (Commissioner's Response, ¶¶58-60), the CBA should not be limited to making submissions on remedy. The CBA seeks to make representations from its different and useful perspective concerning all those matters before the

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34 *American Airlines,* above, note 30, p. 748.

35 *Tele-Direct*, above, note 20, pp. 535-6; *Canada (Commissioner of Competition) v. Air Canada,* [2001] C.C.T.D. No. 5, ¶15 [*Air Canada II*].

36 *American Airlines,* above, note 30, p. 749. Section 9(2) of the *Competition Tribunal Act* states: "All proceedings before the Tribunal shall be dealt with as informally and expeditiously ***as the circumstances and considerations of fairness permit***" (emphasis added).

Tribunal that directly affect its member banks. The Commissioner confuses an example of how the CBA's member banks will be directly affected (by incurring financial losses) with the range of issues that the CBA seeks to address. The fact that the Commissioner's changes to the network rules would adversely affect the viability of the Visa and MasterCard credit card systems and thereby harm the CBA's member banks simply shows that the CBA's members are directly affected. But this should not define or limit the scope of the CBA's participation, given that it has a useful and distinct perspective on various aspects of the functioning of the multi-party Visa and MasterCard transaction systems.

(iii) The substantive and procedural scope of the CBA's intervention

23. The Commissioner offers a series of cascading alternative options for the CBA's appropriate substantive and procedural scope of intervention (Commissioner's Response, ¶¶61-77). The CBA's position is set out briefly below.

24. ***The CBA should not be limited to making legal argument at case conferences and hearings*** (Commissioner's Response, ¶¶61-62). Given how the CBA's member banks would be affected, and the variety of different perspectives that it brings to this Application, the CBA should not be limited to making legal argument. To do so would not be fair to the CBA's interests and would largely rob the Tribunal of the distinct perspectives that the CBA seeks to offer. As the Federal Court of Appeal held in *American Airlines*:

> It the interveners 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 intervener was affected by the proceeding, Similarly, one can question why the interveners cannot ensure that ***their argument or reasons*** are supported by facts that ***they*** have had the chance to prove in evidence.[37] [...]
>
> [Interveners] ***arguably could more effectively and efficiently prove these facts if they have the ability to lead evidence or cross-examine witnesses depending on the issue involved and the circumstances of the particular case.***

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[37] *American Airlines*, above, note 30, p. 748 (emphasis in original).

> ***It seems to me that permitting interveners to play a role wider than simply presenting argument is also a fairer way of treating them.***[38]

25. Indeed, this Tribunal routinely allows intervenors to tender evidence within the scope of their intervention.[39]

26. The CBA further submits that, in the particular circumstances of this case, it should not be subject to a requirement of further leave of the Tribunal before tendering *viva voce* evidence. Given the CBA's members' interests, and their multiple distinct perspectives, such a requirement would complicate and delay the proceeding and lead to protracted leave motions (especially given the Commissioner's position on this motion). Instead, the Tribunal should adopt the approach taken by McKeown J. in *Air Canada* (2001), which was to allow WestJet to intervene and file *viva voce* evidence, subject to Air Canada's right to object. As McKeown J. stated:

> After careful consideration, the Tribunal came to the view that, in the present case, requiring WestJet to seek leave before calling viva voce evidence could have the potential of unduly delaying the proceedings. ***Requiring WestJet to seek leave before introducing evidence may not be the most efficient way to proceed. Therefore, WestJet should, in my view, be entitled to adduce relevant and non-repetitive evidence subject to Air Canada's right to make objections.***[40]

27. ***The CBA should be permitted to cross-examine witnesses.*** The Tribunal routinely permits intervenors to cross-examine witnesses within the scope of their intervention.[41] As noted

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[38] *Id.*, p. 749 (emphasis added).

[39] See, *e.g.*, *Air Canada,* above, note 14, pp. 191-92; *Tele-Direct*, above, note 20, pp. 535-36; *Canadian Pacific,* above, note 9, pp. 48-49; *UGG*, above, note 19, ¶23; *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.,* [2006] C.C.T.D. No. 6, ¶6; *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.,* [2006] C.C.T.D. No. 7, ¶6; *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.,* [2006] C.C.T.D. No. 8, ¶6; *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.,* [2006] C.C.T.D. No. 12, ¶7.

[40] *Air Canada II*, above, note 35, ¶15 (emphasis added).

[41] See, *e.g.*, *Air Canada,* above, note 14, pp 191-92; *Tele-Direct*, above, note 20, pp. 535-36; *Canadian Pacific,* above, note 9, pp. 48-49; *UGG*, above, note 19, ¶23; *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.,* [2006] C.C.T.D. No. 6, ¶6; *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.,* [2006] C.C.T.D. No. 7, ¶6; *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.,* [2006] C.C.T.D. No. 8, ¶6; *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.,* [2006] C.C.T.D. No. 12, ¶7.

above, in the particular circumstances of this case, the CBA should be granted leave to do so without further leave of the Tribunal, subject to the Commissioner's right to object.

28. ***The CBA should be permitted to file non-repetitive expert evidence that reflects its perspective.*** The Commissioner's cites the *Tele-Direct* (1995) case as authority for the proposition that intervenors should not be permitted to file expert evidence because in some past cases such evidence has been duplicative of the parties' expert evidence. However, in *Tele-Direct*, the Tribunal ***rejected*** an attempt to delay (not prohibit) the filing of expert evidence from intervenors until after the parties had filed their evidence, and to the contrary allowed expert evidence from the intervenors without restrictions. The Tribunal ruled:

> We recognize the validity of this position; expert evidence filed by intervenors is not subject to the same stringent requirements as factual evidence and does risk being largely duplicative of the parties' expert evidence. ***We cannot, however, think that the suggested solution is practical. It seems to us that allowing the intervenors to file later than the parties gives them the advantage of having read the parties' expert reports before being required to file their own. 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.***[42]

29. Indeed, as in *Tele-Direct* itself, this Tribunal routinely permits intervenors to file expert evidence within the scope of their intervention.[43]

30. In the alternative, however, if this is the Tribunal's preferred option, the CBA is prepared to apply for leave of the Tribunal before adducing evidence, expert or otherwise, and/or cross-examining witnesses.

31. ***The CBA has no objection to providing discovery.*** Finally, while the CBA is not seeking to conduct documentary or oral discovery of the parties (and agrees to abide by any

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[42] *Tele-Direct*, above, note 20, p. 534 (emphasis added).

[43] See, e.g., *Air Canada,* above, note 14, pp 191-92; *Tele-Direct*, above, note 20, pp. 535-36; *Canadian Pacific,* above, note 9, pp. 48-49; *UGG*, above, note 19, ¶23; *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.,* [2006] C.C.T.D. No. 6, ¶6; *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.,* [2006] C.C.T.D. No. 7, ¶6; *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.,* [2006] C.C.T.D. No. 8, ¶6; *Canada (Commissioner of Competition) v. Saskatchewan Wheat Pool Inc.,* [2006] C.C.T.D. No. 12, ¶7.

confidentiality order of the Tribunal regarding access to the parties' discovery transcripts and productions), the CBA has no objection to providing discovery from the CBA, in accordance with Rule 60(2) of the *Competition Tribunal Rules*, of a list of documents within the scope of its intervention that are relevant to any matter in issue and that are or were in its possession, power or control (rather than a list of documents that are or were in the possession, power, or control of the CBA's member banks, because such documents are not within the possession, power, or control of the CBA). In this regard, the CBA notes that the Commissioner has already issued many detailed Requests for Information to several of the CBA's member banks in the context of this Application. Apart from confirming the CBA's members' interests in this Application, these Requests for Information show that the Commissioner is already obtaining information from, and the perspectives of, several Canadian banks. The CBA respectfully submits that it, too, should be permitted to present its members' perspectives to the Tribunal.

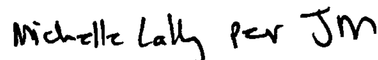
V. Order Sought

32. The CBA respectfully requests leave to intervene on the terms in ¶18 of its Request for Leave to Intervene dated February 10, 2011, or alternatively, on such other terms as this Honourable Tribunal deems appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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

Mahmud Jamal



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THE COMMISSIONER OF COMPETITION	- and -	VISA CANADA CORPORATION and MASTERCARD INTERNATIONAL INCORPORATED	CT-2010-010
Applicant		Respondents	

THE COMPETITION TRIBUNAL

Proceeding commenced at Toronto

REPLY OF THE CANADIAN BANKERS ASSOCIATION TO THE RESPONSE OF THE COMMISSIONER OF COMPETITION

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