

**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  <b>FILED / PRODUIT</b> February 10, 2011 CT-2010-10  Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 15

- and -

**VISA CANADA CORPORATION and  
 MASTERCARD INTERNATIONAL INCORPORATED**

Respondents

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**REQUEST FOR LEAVE TO INTERVENE  
 ON BEHALF OF THE CANADIAN BANKERS ASSOCIATION  
 Re: Application by the Commissioner of Competition  
 under section 76 of the *Competition Act***

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The Canadian Bankers Association (“CBA”) requests leave of the Competition Tribunal under s. 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19, as amended, to intervene in these proceedings. In support of its request, the CBA intends to rely on the Affidavit of Darren Hannah, sworn February 10<sup>th</sup>, 2011.

**1. Name And Address Of The Proposed Intervenor:**

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**2. The Matters In Issue That Affect The CBA And The Unique Or Distinct Perspective That It Will Bring To The Proceeding**

1. ***The Commissioner's Application.*** The CBA seeks to intervene in the Commissioner's Application pursuant to s. 76 of the *Competition Act* for an order prohibiting the respondents from implementing, enforcing or continuing agreements or arrangements, or engaging in any like means, that directly or indirectly influence upward or discourage the reduction of the prices paid by merchants for credit card network services within Canada.

2. ***The CBA.*** The CBA is a national organization representing the Canadian banking industry. Its members consist of 51 domestic chartered banks, foreign bank subsidiaries, and foreign bank branches operating in Canada, and their 263,400 employees.

3. ***The CBA's members will be directly affected by the Commissioner's Application.*** The CBA's member banks are interested in this Application because they will be directly affected by the outcome. Any changes to the credit card system, including the respondents' network rules,

which the Commissioner alleges are anti-competitive, would impact the CBA's member banks and their credit card customers.

4. The CBA's member banks play multiple roles in the Canadian credit card system – as the principal *customers* of the respondents' credit card networks, *issuers* of credit cards, and *providers* of personal and commercial retail banking services to their customers, including cardholders. The CBA's member banks are therefore uniquely positioned to explain the credit card system as a whole and the importance of the challenged network rules from the perspectives of key participants in that system.

5. The CBA's perspectives on these issues will be useful to the Tribunal and different from those of the Commissioner and the respondents. The CBA proposes to explain how the challenged network rules are pro-competitive and help ensure the efficiency, integrity, and reliability of the Canadian credit card system as a whole. This benefits all participants in the credit card system – merchants, issuers, acquirers, network providers, and consumers.

6. In particular, many of the CBA's member banks function as:

(a) ***Card issuers.*** Many of the CBA's member banks are issuers of credit cards to consumers and merchants. This includes large credit card issuers such as Bank of Montreal ("BMO"), The Bank of Nova Scotia ("BNS"), Canadian Imperial Bank of Commerce ("CIBC"), Royal Bank of Canada ("RBC"), The Toronto-Dominion Bank ("TD"), and smaller credit card issuers such as Capital One Bank (Canada Branch), Canadian Tire Bank, Canadian Western Bank, HSBC Bank Canada, JP Morgan Chase Bank N.A., MBNA Bank Canada, and President's Choice Bank; and

(b) ***Customers of the Visa and MasterCard credit card networks.*** Collectively, the CBA's member banks are the principal customers of the Visa and MasterCard credit card networks. Four CBA member banks (RBC, CIBC, Canadian Tire Bank, and JP Morgan Chase Bank N.A.) are customers of both of the respondents and issue both Visa-branded and MasterCard-branded credit cards.

7. The CBA's member banks also have significant commercial relationships with their personal and commercial retail banking customers, including cardholders. The Canadian retail

banking industry in Canada is intensely competitive. The CBA's member banks are extremely responsive to their customers' needs and constantly try to improve their retail banking services, including their credit card services. As such, the CBA's members have deep knowledge of the issues faced by customers and merchants in connection with the credit card networks.

8. In addition, certain banks have an interest in the business of acquiring credit card transactions or operate their own acquiring business. For example, TD is the only chartered bank in Canada that directly carries on its own acquiring business. TD processes in excess of \$60 billion annually in payments as an acquirer. BMO and RBC each own a 50% non-controlling interest in Moneris Solutions Corporation, an acquirer which annually processes 2.5 billion credit and debit card transactions across North America.

9. As a result of these various roles, the CBA's member banks have a direct and significant interest in the competitiveness, efficiency, and reliability of the Canadian credit card system as a whole. Any rule changes to this system would directly affect the CBA's member banks and their customers. The CBA's member banks also have multiple perspectives to bring to the Tribunal regarding the functioning of the respondents' credit card networks. These perspectives will be useful to the Tribunal and different from those of the existing parties to the Application (the Commissioner and the respondent card networks).

10. In a case analogous to the CBA's motion to intervene, *The Director of Investigation and Research v. The D & B Companies of Canada Ltd.*, [1994] C.C.T.D. No. 19, the Tribunal granted intervenor status to the Canadian Council of Grocery Distributors ("CCGD"). The Tribunal concluded that the CCGD was directly affected by the matters in issue in the application because several of its members were parties to contracts with the respondent, which contracts the Director of Investigation and Research had alleged were anti-competitive. The Tribunal also held that because the CCGD represented retailers, its perspective would be different from those of the parties and would also assist the Tribunal determine appropriate remedies. Here, many of the CBA's members have significant contractual relationships with one or both respondents and any changes made to the respondents' networks will directly affect the CBA's member banks and their customers (cardholders, including individual consumers, and merchants).

11. The Competition Tribunal similarly granted leave to intervene to the Council of Canadian Airline Employees in *Canada (Director of Investigation and Research, Competition Act) v. Air Canada*, [1992] C.C.T.D. No. 24. The Tribunal held that many of the members of the Council of Canadian Airlines Employees were directly affected by an issue in that proceeding, namely, the continued existence of the respondent Canadian Airlines. The Tribunal also granted the Council leave to intervene because many of its member employees were parties to negotiations concerning a potential equity investment in Canadian Airlines. Here, again, the CBA's members are the principal customers of the respondents, and several important aspects of the banks' banking businesses are potentially implicated in the Application. Accordingly, the CBA respectfully submits that it should similarly be allowed to intervene in this Application.

**3. The Competitive Consequences Arising From The Matters In Issue On Which The CBA Wishes To Make Representations**

12. If granted leave to intervene, the CBA will argue from its members' multiple perspectives that the credit card networks' rules are pro-competitive and are critical to the efficiency, integrity, and reliability of the respondents' credit card systems. Any changes to this system must be considered with the utmost care and based on all relevant information and perspectives. Improper changes to the system will adversely affect competition in the Canadian payment services market, in which Visa-branded and MasterCard-branded credit cards compete with other network-branded credit cards, private label credit cards, retail gift cards, debit cards, cash, and cheques, as well as unregulated electronic payment services like PayPal. Each payment form has its own costs and benefits.

13. In particular, from the banks' perspective as issuers of credit cards to consumers and businesses, the two challenged network rules common to Visa and MasterCard – “no surcharging” and “honour all cards” – are critical to the efficiency, integrity, and reliability of Canada's credit card network. Importantly, the banks do not establish these network rules; rather, these are established by the card networks themselves. Each of these rules serve important functions:

- (a) For a credit card to be valuable to its customers, cardholders must have confidence that the card brand will be widely accepted domestically and internationally. The “honour all cards” rule provides this certainty. If cardholders

cannot be sure that their card will be accepted by a merchant who advertises acceptance of their card brand, they will find themselves in the embarrassing position of having their card rejected at the point of sale, and they will be less likely to obtain and use credit cards. Moreover, issuers, not merchants, will have to deal with the customer complaints and card cancellations that result. Accordingly, eliminating this rule would harm both issuers (especially smaller issuers) and cardholders, and undermine a fundamental premise of the networks – universal acceptance or “ubiquity.”

- (b) Similarly, eliminating the “no surcharging” rule would impose a financial penalty on cardholders. The Tribunal would be licensing merchants to charge customers *additional fees* when customers use their credit cards to make payment. This would not promote competition or economic welfare in Canada. It would simply cause a wealth transfer from consumers to merchants. In countries where surcharging is permitted, the evidence is clear – surcharging has not had a measurable impact on retail prices and has simply caused a wealth transfer from consumers to merchants.

14. Merchants can and do choose which forms of payment they are willing to accept. Merchants are always free to (and many do) refuse to accept credit cards and steer customers to other forms of payment through their own private label cards, cash discounts, loyalty cards, and other means.

15. In summary, the competitiveness, efficiency, and reliability of the Canadian credit card system are at stake in this Application. The CBA wishes to make representations concerning the pro-competitive nature and effects of the challenged network rules. The CBA proposes to explain how the network rules do not by agreement, threat, promise or any like means influence upward, or discourage the reduction of, the price at which another person supplies or offers to supply or advertise a product within the meaning of s. 76 of the *Competition Act*. Moreover, the network rules do not have an adverse impact on competition in any market. Rather, the network rules are pro-competitive and enhance economic efficiency.

**4. The Party Whose Position The CBA Intends To Support:**

16. If granted leave to intervene, the CBA intends to support the respondents' position, but from their different perspectives as participants in the respondents' credit card networks.

**5. The Official Language To Be Used By The CBA:**

17. English.

**6. The CBA's Proposed Participation In The Proceedings:**

18. If the CBA is granted leave to intervene in the Application, it asks to participate in the proceedings on the following terms:

- (a) to review any discovery transcripts and access any discovery documents of the parties to the Application, but not to participate directly in the discovery process or be subject to documentary or oral discovery by any party;
- (b) to lead relevant, non-repetitive *viva voce* evidence at the hearing of the Application on issues raised by the parties;
- (c) to file expert evidence within the scope of its intervention in accordance with the procedures set out in the *Competition Tribunal Rules*, SOR/2008-141, Rules 77 *et seq.*;
- (d) to cross-examine witnesses at the hearing of the Application to the extent that such cross-examination is not repetitive of the cross-examinations conducted by the parties; and
- (e) to make legal arguments at the hearing of the Application and at any pre-hearing motions or case conferences on issues raised by the parties, but not to introduce any new issues.

**7. The CBA Requests An Oral Hearing Of This Motion Only If Any Party Opposes:**

19. If any of the parties opposes the CBA's motion to intervene, the CBA respectfully requests an oral hearing of this motion.

DATED at Toronto, Ontario this 10<sup>th</sup> day of February, 2011.

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THE COMMISSIONER OF COMPETITION

- and -

VISA CANADA CORPORATION and  
MASTERCARD INTERNATIONAL  
INCORPORATED  
Respondents

CT-2010-010

Applicant

**THE COMPETITION TRIBUNAL**

Proceeding commenced at Ottawa

**REQUEST FOR LEAVE TO INTERVENE ON  
BEHALF OF THE CANADIAN BANKERS  
ASSOCIATION**

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February 10, 2011

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New York

**The Commissioner of Competition v. Visa Canada Corporation  
and MasterCard International Incorporated  
CT-2010-010**

Enclosed for filing is the Canadian Bankers Association's motion to intervene, the Affidavit of Darren Hannah, and the Counsel's Certificates of Service of Jason MacLean.

Yours very truly,



Mahmud Jamal

Enclosures

c: Nathalie Clark (*Canadian Bankers Association*)  
Michelle Lally & Jason MacLean (*Osler, Hoskin & Harcourt LLP*)