

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

**VISA CANADA CORPORATION AND
MASTERCARD INTERNATIONAL INCORPORATED**

Respondents

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

February 10, 2011
CT-2010-010Jos LaRose for / pour
REGISTRAR / REGISTRAIRE**THE TORONTO-DOMINION BANK**

Applicant for Leave to Intervene

OTTAWA, ONT

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AFFIDAVIT OF JIM SALLAS AND JEFF VAN DUYNHOVEN

We, JIM SALLAS of the City of Hamilton in the Province of Ontario, and JEFF VAN DUYNHOVEN, of the Township of King, in the Province of Ontario, Businessmen, MAKE OATH AND SAY AS FOLLOWS:

INTRODUCTION

1. I, Jim Sallas, am employed by The Toronto-Dominion Bank ("TD") as Senior Vice President, Personal Lending and Credit Cards. As such I am responsible for TD's Credit Card Group that issues credit cards under the Visa brand. The Personal Lending and Credit Card Group is responsible for the general management of all unsecured lending products including credit cards in Canada. Specifically with respect to credit cards, the responsibilities include: the offering and issuing of credit cards to consumers and small businesses along with providing or facilitating the provision of the supporting credit cards services and card benefits as required. Attached hereto as Exhibit "A" is a copy of my brief biographical profile.
2. I, Jeff van Duynhoven, am employed by TD as President, TD Merchant Services. TD Merchant Services is responsible for the merchant acquiring business of TD. TD Merchant Services provides a complete line of credit and debit card processing services and payment transaction solutions for various transactions including telephone, internet and for direct face-to-face interactions. Attached hereto as Exhibit "B" is a copy of my brief biographical profile.
3. We have read and closely considered the Notice of Application of the Commissioner (the "Application"), as well as the Response of Visa Canada Corporation ("Visa") and the Response of MasterCard International Incorporated ("MasterCard"). TD is directly concerned with, involved in and impacted by the issues raised by the Application against Visa and MasterCard.

OVERVIEW

4. We believe that TD satisfies the criteria to be granted leave to intervene in this proceeding.

Directly Affected / Competitive Consequences

5. TD is directly affected by the Application and will suffer competitive consequences if the relief sought is granted. TD carries on business both as an Issuer of credit cards and as an Acquirer of credit card transactions. In the conduct of these businesses, it deals directly as an Issuer with its cardholder customers and as an Acquirer with its merchant customers.
6. The "Merchant Restraints" discussed in the Commissioner's Application include the "no surcharge rule" and the "honour all cards rule". If either of these rules were removed or revised, as sought by the Commissioner, TD would be directly impacted in the carriage of its businesses both as an Issuer and an Acquirer. As well, the credit card features and benefits which TD provides to its customers would be affected in range and type and certain types of credit cards might be removed from the market altogether.
7. These impacts would be felt not only by TD, but also by its cardholder customers and its merchant customers, i.e., the Canadian public.
8. The removal of the "no surcharge rule" and/or "the honour all cards rule" would lead to a loss of confidence by consumers in the reliability and utility of credit cards. We believe that the relief sought by the Commissioner will lead to a significant migration to alternative methods of payment by consumers in Canada. In that TD carries on business in many of Canada's payments systems, this would have significant consequences for TD in the operation of its overall business.

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9. TD's relationships with its cardholder customers and with its merchant customers are not confined to interaction around credit cards. Rather, TD seeks to and does provide many other banking services and fulfils many other banking needs for the vast majority of those customers. For TD, therefore, the relief sought by the Commissioner will impact not only the cardholder relationship or the merchant customer relationship, but the much broader, overall banking relationship that TD has with both sets of customers. For example, we believe that if merchants were specifically permitted to refuse certain TD credit cards, the cardholder customer might re-evaluate its/his/her banking relationship with TD due to the association of TD's brand with the denial of service in the mind of the cardholder.

Unique Perspective

10. We believe that TD brings a unique perspective to this proceeding, which is not brought either by the Applicant or by the Respondents:
- (a) as both an Issuer and an Acquirer, in the operation of its business, TD deals directly and on a daily basis both with cardholder customers and with merchant customers. As they both admit in their Responses, Visa and MasterCard do neither;
 - (b) TD is the only chartered bank in Canada which directly operates both as an Issuer and an Acquirer. No other member of Canada's banking community can bring this perspective to this proceeding. Other members of Canada's banking community have chosen not to operate directly in the acquiring business arena;
 - (c) TD carries on business in most of the other categories of Canada's payments system (eg: cheque, cash and debit). As such, TD brings a broader perspective to the proceeding than the Respondents;

- (d) no other provider of acquiring services in Canada (eg: Moneris, Global Payments, Chase Paymentech) is also an issuer of credit cards (except Caisse Desjardins). Rather, they are "monoline" businesses. Their aims and objectives are very different from TD's. Hence, no other provider of acquiring services can provide TD's perspective to the Tribunal.
11. In our view this Application will affect not only the operation of the credit card network, but Canada's entire payments system. The credit card networks cannot and should not be viewed in isolation.

TD's BUSINESS

12. TD is a Schedule I bank incorporated under the *Bank Act*, S.C. 1991, c. 46, with its head office in Toronto, Ontario. TD is one of the largest banks in Canada and as of October 31, 2010 it has total assets of \$620 billion and total deposits of \$430 billion. We have more than 19 million customers and clients whom we serve through our various businesses: Canadian Personal and Commercial Banking, Wealth Management, U.S. Personal and Commercial Banking, and Wholesale Banking.
13. TD operates a network of more than 2,600 ABMs and approximately 1,100 branches across Canada. TD has more than 11.5 million personal and small business customers and is a leading provider of debit point of sale payments.
14. As one of Canada's largest chartered banks, TD has witnessed and participated in the evolution of payments over the last 150 years including, in particular, the movement from cash and cheques to debit and credit cards and the development of the many other payments mechanisms that are available today. Today, TD has a significant presence in almost all aspects of the payments systems in Canada. As a result, it is in a position to

present a more informed and historical perspective on the many aspects of the Canadian payments systems which stand to be affected by the Application. In contrast, Visa and MasterCard conduct business in Canada almost exclusively as credit card networks, i.e., in only one of the many payment methods in use by Canadians today.

15. To provide a brief illustration of payment methods in Canada, we set out below some key statistics drawn from the "Canadian Payments Forecast: 2010", prepared by Technology Strategies International:

- (a) there were 7.3 billion cash-based point-of-sale transactions in 2009;
- (b) the average cash retail payment was \$15;
- (c) \$143.8 billion in personal cheques were cleared in 2009;
- (d) there were 3.8 billion debit card transactions in 2009;
- (e) the value of these debit transactions amounted to \$171.4 billion;
- (f) 2.5 billion credit card transactions were processed in 2009;
- (g) the value of those credit card transactions was approximately \$264.5 billion.

16. Three facts emerge from these statistics which are important for the Tribunal when considering the Application:

- (a) Credit cards, which are the sole focus of this Application, are merely one way in which Canadians exchange money;
- (b) On a transaction basis, credit cards are used far less than debit cards; and

- (c) Credit cards are typically used for larger transactions.

TD'S PRESENCE IN THE CREDIT CARD NETWORK

17. The Application focuses on only two of the participants in the credit card network, Visa and MasterCard. However, TD is directly affected by the Application because it is a significant provider of credit card services to both consumers and merchants in Canada. TD is a customer of both the Visa and MasterCard networks. In the Visa card network, TD is both an Issuer of Visa credit cards and an Acquirer of credit card transactions. In the MasterCard card network, TD is an Acquirer of credit card transactions.
18. In her Application (at para. 31), the Commissioner refers to a "four party" system for operating credit card networks. TD occupies two of the four party roles which the Commissioner has referenced, i.e. as both an Issuer and an Acquirer, and deals directly with the other two parties in the "four party" system.
19. We have visited the internet website of the Competition Bureau, i.e., the Commissioner's website. There, in connection with this matter, the Commissioner identifies three categories of "Players" involved in and affecting the issues in this proceeding. Two of the three categories of "Players" are identified as "Credit Card Issuers" and "Acquirers". The Bureau identifies the other "Player" as "Credit Card Networks" and goes on to identify the Respondents, i.e., Visa and MasterCard, as the operators of the two largest credit card networks in Canada.
20. Hence, on the Commissioner's own website, TD, (being both an Issuer and an Acquirer) is effectively identified as a "Player" in two of the three essential categories affecting the issues in this proceeding. Attached hereto as Exhibit "C" is a print-out of the referenced portion of the Commissioner's website.

21. Having read the Response of Visa and the Response of MasterCard, we believe that Visa and MasterCard cannot convey to the Tribunal the position, perspective, interests or overall concerns of TD as both an Issuer and an Acquirer. As a result, we feel strongly that TD should have its own voice before the Tribunal with respect to the matters which so directly and substantially affect its businesses.

TD AS ISSUER

22. In its capacity as an Issuer of credit cards, TD is directly affected by the Application.
23. There are approximately 5 million TD Visa credit cards in circulation. Of those, approximately 4 million such cards are used by their holders in any given month. On an annual basis, approximately \$33 billion is charged by TD cardholders to their TD credit cards. TD has a significant percentage of the market for Issuers of credit cards in Canada. On a sales volume basis, TD's share of the Visa card market is approximately 12%.
24. TD has two paramount goals in the operation of its business as an Issuer of credit cards. The first is to attract as many people as possible to become TD cardholders and use their cards. The second is to persuade those cardholders to use TD with respect to all or many of their other banking needs.
25. TD offers a range of different Visa credit cards in order to appeal to different kinds of consumers and to accommodate different needs, preferences and priorities. For example, some TD Visa credit cards offer travel rewards, while others offer rebates or other rewards. There is also a credit card which offers cardholders the ability to make purchases in U.S. dollars with the intention of attracting customers who travel or shop frequently in the United States. As well, some of the credit cards offered by TD have a low or no annual fee. Accommodation is also made for those customers who regularly

carry balances on their credit cards, by offering TD credit cards with low interest rates.

The simplest card is a TD Green Visa Card. It has no annual fee.

26. Similarly, TD offers a range of Visa credit cards to businesses in order to appeal to different kinds of small business customers. For example, TD's Business Visa Travel Card offers travel rewards which can be redeemed and applied towards business travel which is charged to the card. TD's Business Visa Card is a card which carries a low annual fee and which provides insurance protection and emergency services for business owners.
27. At present, TD offers a total of 15 different credit cards. The TD Visa credit cards which TD offers to consumers are:
- (a) TD First Class Travel *Visa Infinite* Card
 - (b) TD Platinum Travel *Visa* Card
 - (c) TD Classic Travel *Visa* Card
 - (d) TD Green *Visa* Card
 - (e) TD Gold Elite *Visa* Card
 - (f) TD Rebate Rewards *Visa* Card
 - (g) TD Emerald *Visa* Card
 - (h) TD Gold Select *Visa* Card
 - (i) TD/AAvantage Platinum *Visa* Card
 - (j) TD U.S. Dollar *Visa* Card

- (k) TD GM *Visa* Card (which is in the process of being phased out and which the public can no longer apply for as of January 1, 2011)
- (l) TD Drivers Reward *Visa* Card.

The TD *Visa* credit cards which TD offers to small businesses are:

- (a) TD Venture Line of Credit *Visa* Card
- (b) TD Business Travel *Visa* Card
- (c) TD Business *Visa* Card.

28. TD seeks to gain market share by assembling a suite of attractive features and benefits for its credit card products to appeal to as many different types of consumers and small businesses as possible. The costs associated with the creation of these features and benefits are part of the significant overall expense of operating TD's credit card business as an Issuer. Below is a brief description of some of these costs:

- (a) the costs associated with physically creating and issuing the credit card (e.g. cutting and embossing the plastic to create the card, and processing, packaging and mailing the created plastic);
- (b) the costs associated with bad debts and write-offs when customers default upon (i.e.: do not pay off) their credit card balances, including the costs of pursuing collection;
- (c) the costs involved in providing to cardholders such services as handling all manner of credit card inquiries whether by phone, by the web or at a branch;
- (d) the costs involved with adjudicating the credit card applications;

- (e) the costs involved in assisting a customer with the chargeback process where the customer disputes the charge on his/her credit card;
- (f) paying service fees to Visa for processing, including routing through the credit card network, the transactions associated with each credit card use;
- (g) the float cost (or "cost of money") involved with providing an interest-free grace period on purchases and the extension of credit generally;
- (h) the costs resulting from fraud perpetrated on the system and the costs involved with card loss and thefts, including the re-issuance of replacement cards for such stolen/lost cards;
- (i) the costs of the various features and benefits, including reward programs, created for each credit card, such as the TD Travel Rewards Program, the TD Drivers Rewards Program, the rebate program, and the provision of auto rental collision/loss damage insurance, medical and travel insurance, purchase security and extended warranty insurance.

29. The ability to cover such costs is essential to the viability of TD's credit card business. The Respondents, who do not incur, manage or cover these costs, are unable to address this issue. Nor are they able to assist the Tribunal in detailing the role of Card Acceptance Fees in the viability of TD's issuing business. With rare exceptions, the Respondents generally do not have any direct interaction with cardholders. Therefore, they are not able to provide this perspective, which is vital to the Tribunal's understanding of the issues in this proceeding.

30. We observe that the Commissioner's Application seeks, among other things, to prohibit "Merchant Restraints", including the "no surcharge" rule and the "honour all cards" rule.

In our view, either remedy would have undesirable effects upon the utility of credit cards to consumers and the use of credit cards by consumers in Canada.

31. If the "honour all cards rule" were prohibited, the following are a few brief examples of "on the ground" consequences for cardholders:
 - (a) cardholders could be "stranded" if they only carry one card, and it is not accepted by the merchant;
 - (b) cardholders could be unable to access short-term credit or other funds by the use of their credit card, and so be without funds at all;
 - (c) in an emergency situation, cardholders could find themselves unable to book, including online, a car, hotel or flight.
32. Removing the "no-surcharge" rule could result in an overall increase in prices if surcharging becomes a new profit centre for merchants. That is, removing the rule would enable merchants to charge cardholders an additional amount for using a credit card. This amount could be higher than the applicable Card Acceptance Fee.
33. Removal of either rule would substantially reduce the overall volume of payment transactions through the credit card network. If consumers are surcharged for their credit card transaction or if their card is no longer accepted ubiquitously by merchants displaying the VISA and/or MasterCard network logos, they will lose confidence in pulling out the card from their wallet to make a purchase. Consequently, it is likely that Issuers will be less eager to issue cards that consumers are wary of using.
34. If credit card volumes migrate to another payment mechanism not covered by the order sought by the Commissioner, it is unclear what precise changes will happen to merchant and cardholder costs. It is our view that the effect will be a dramatic re-ordering of

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payment methods used by consumers in Canada. This would impact TD adversely as the volume of payment transactions through the use of credit card networks would decrease.

35. The Commissioner advances the view that there is insufficient competition in the supply of credit cards in Canada. We strongly disagree. TD knows from its own experience that competition with respect to customers' credit card usage is fierce.
36. We view all other methods of payment as competitive alternatives to payment by a TD credit card. This includes cheques, cash, debit, PayPal, money orders, gift cards, prepaid cards and all other payment cards including private label store cards.
37. Further, according to a 2009 Card Sense survey of 5,000 Canadians, 36% Canadians hold a Visa card or a MasterCard card. The challenge for TD's business as an Issuer is to have consumers prefer to use a TD credit card for as many of their purchase transactions as possible.
38. The Respondents are not Issuers. They have no direct experience with the business of issuing cards. TD has this experience. We can inform the Tribunal about the competition that does exist for issuers, including between credit cards and all other forms of payment. Nor do the Respondents have any experience in the competitive business of attracting consumers to use a particular Issuer's credit card rather than the credit card of another Issuer, or another form of payment altogether. The Tribunal must understand how Issuers compete for market share in the credit card business in order to adjudicate the issues raised by this case.

TD AS ACQUIRER

39. TD Merchant Services, a business unit of TD, has been established – and trusted – in the payment solutions industry for over 30 years. In the most basic sense, TD sells a service directly to Canadian merchants. TD provides its customers with point of sale payment devices – the hardware that sits on the counter in a store – and processes payments on behalf of the retailer. TD is the only Canadian bank that directly operates a merchant acquiring business. The reason is simple: we believe that financial services is a relationship business and that it is advantageous to have a comprehensive relationship with our merchant customers.
40. There are over 670,000 merchant locations in Canada which accept either Visa cards or MasterCard cards or both. TD has in excess of 100,000 merchant locations as merchant customers. TD processes in excess of \$60 billion annually in payments as an Acquirer. TD's share of the Acquirer services market in Canada is estimated to be approximately 17% of merchant locations accepting Visa cards and 15% of merchant locations accepting MasterCard cards.
41. TD has two distinct goals in operating its Acquiring business. First, to attract as many merchant customers for its acquiring services as possible. Second, to develop a broad banking relationship with all of its merchant customers. Hence, most of TD's merchant customers have a multi-faceted business relationship with TD. Approximately 9 out of 10 of TD merchant customers engage in other banking business with TD.
42. In keeping with TD's business goals as set out above, we must be, and constantly are, sensitive to any dissatisfaction TD's merchant customers may have with TD's acquiring services, because any such dissatisfaction could lead the merchant customer to dissolve its entire banking relationship with TD. In order to retain our merchant services

customers, we must constantly balance revenue concerns with maintaining the good will of our business customers. As an example, TD implemented provisions in its merchant services contracts, such as allowing its merchant customers to leave their contract with TD, without penalty, when faced with a price increase. We implemented this provision even before its inclusion in the recent introduction of the Voluntary Code of Conduct discussed below.

43. TD competes with other providers of acquiring services in Canada which essentially are "monoline" businesses. Their only points of business contact with their merchants are through the payment card transactions they process for their merchant customers. The other major players are:

- (a) Moneris Solutions,
- (b) Global Payments,
- (c) Chase Paymentech,
- (d) First Data, and
- (e) Elavon.

44. By contrast, as a chartered bank, TD is concerned with establishing a full banking relationship with its merchant customers. Therefore, we are concerned with more than just providing payment card transaction processing, which is the main focus of the entities listed above. None of the companies offering acquiring services are also Issuers, like TD. (We note the exception of Caisse Desjardins, which is a caisse populaire and whose business focus and market is primarily in Quebec). No other provider of acquiring services carries on its business with the perspective and overall sensitivity to the customer's broad banking and financial needs and requirements as TD.

45. The following is a summary of the payment processing services that TD provides to its merchant customers:
- (a) enabling merchants to transact with any customer they choose by providing merchants with a single point of sale system which can accept all payment cards including Visa, MasterCard and American Express cards, as well as Interac debit cards and prepaid cards (including gift cards);
 - (b) guaranteeing merchants generally same day or next day payment of their funds; the merchant's money receipts are generally deposited to their accounts the same day, if they are a TD business banking customer, and generally the next transaction day, if they maintain their deposit account at a financial institution other than TD;
 - (c) enabling merchants to forego having to run their own credit assessment and collection services;
 - (d) enabling merchants to reduce the number of transactions which occur in cash; cash receipts are troublesome for merchants because they are particularly vulnerable to employee fraud and are susceptible to enabling tax avoidance;
 - (e) helping to increase the size and number of sales transactions at a merchant's location; studies have shown that consumers spend more at a merchant location when using a credit card rather than cash;
 - (f) offering a range of flexible banking and deposit arrangements to its merchant customers;
 - (g) issuing clear and transparent monthly statements to its merchants;

- (h) providing training to merchants and their staff on various issues related to the payment card acceptance and the use of TD's acquiring services;
 - (i) providing guidance to merchants regarding the operating rules and regulations of the Visa and MasterCard networks and helping merchants remain compliant with each network's operating rules and regulations ;
 - (j) acting as an advocate for the merchant with respect to chargeback issues and any other cardholder issues with various credit card issuers;
 - (k) working to minimize the financial consequences to merchants of "non-compliance" with the network rules;
 - (l) leading the industry by acting in a transparent manner in our dealings with our merchant customers, industry representatives and government stakeholders.
46. A number of consequences on the acquiring side would flow if the Commissioner's application is successful and the "no surcharge" and "honour all cards" rule were altered. The volume of credit card transactions would drop substantially as credit cards became less attractive to cardholders. At the same time, a network which allowed surcharging would mean that providers of acquiring services would have to implement the changes required to allow merchants to surcharge at the point of sale. For example, a question would need to be asked of the cardholder at the point of purchase to determine if they are willing to proceed with the transaction and pay the surcharge. These services changes represent an additional cost which would be incurred by the provider of acquiring services when transaction levels were falling. As a result the per unit transaction cost of providing acquiring services would necessarily increase.

47. The Commissioner alleges that there is insufficient competition in the provision of credit card services in Canada. We strongly disagree. There is vigorous competition in the market place to offer acquiring services to merchants. TD competes daily with other acquirers on many attributes including price, service, system capabilities/reliability, and transparency.

OUR BALANCED PERSPECTIVE

48. TD as Issuer seeks to maximize the value delivered to its cardholders and TD as Acquirer seeks to maximize the interests of its merchant customers. This is a unique perspective on the issues raised in this Application.
49. In addition to maximizing the value of the Issuer and Acquirer businesses, each of our businesses recognizes that the other has valuable TD customers whose overall satisfaction and loyalty must be considered in the operation of our respective businesses. That is, on the Issuer side, approximately 90% of TD's customers have a broader banking relationship with TD, and not simply a relationship as a Visa credit card holder. Similarly, on the Acquirer side, the vast majority of TD's merchant customers have a much broader banking relationship with TD than simply as a merchant customer of the Acquirer business.
50. Hence, while we look to maximize the value of these individual businesses, we must be concerned, as part of the proper operation of these businesses, with the overall satisfaction of both cardholder and merchant customers. This unique perspective on the issues raised in this Application is one not shared by any other major bank or major provider of acquiring services in Canada.

VOLUNTARY CODE OF CONDUCT

51. Merchant industry groups and legislators have cited lack of transparency as an issue around certain billing and marketing practices by providers of acquiring services. TD is an advocate, supporter and leader of the need for change. TD believes that this has been a significant issue which is now being addressed by the Voluntary Code of Conduct.
52. In or about 2009, coincident with the arrival of "premium cards" as a noticeable presence in the credit card market in Canada, merchants became sensitive to increased fees associated with the use of premium cards. Concurrent with the introduction of these new premium cards and a more complex fee structure, acquirers also adjusted fees paid by merchants.
53. In order to address the concerns of merchants and respond to their needs, the Minister of Finance undertook a consultative process within the credit and debit card industry in Canada. TD participated in both the Senate and House of Commons hearings and advocated for greater transparency to the benefit of merchants. As a result of that process, the Minister of Finance published a voluntary Code of Conduct for the Credit and Debit Card Industry in Canada ("Voluntary Code of Conduct").
54. The Voluntary Code of Conduct came into effect on May 17, 2010. While most provisions came into effect immediately, Issuers have until May 17, 2011 and providers of acquiring services have until February 17, 2011 to become compliant with certain of its provisions.
55. Although it is voluntary, all of the major issuers and providers of acquiring services in Canada, including TD, have signed on to the Voluntary Code of Conduct. Further, Visa

and MasterCard have incorporated compliance with the Voluntary Code of Conduct into their rules.

56. The publication and adoption by the industry of the Voluntary Code of Conduct is a significant development for merchants, as it addresses the issues of non-transparent billing and marketing practices. It is too early to judge the success of the Voluntary Code of Conduct. In our opinion the Commissioner's Application is premature because we believe the Voluntary Code of Conduct will address many of the merchants' issues and concerns and restore the proper balance between all parties in the credit card payment system. Its effect can only be gauged over time. Attached hereto as Exhibit "D" is a copy of the Voluntary Code of Conduct.

TASK FORCE ON THE CANADIAN PAYMENTS SYSTEMS

57. The Task Force for the Canadian Payment System Review (the "Task Force") was appointed on June 18, 2010 by Federal Minister of Finance, Jim Flaherty. Its mandate includes the following competitive aspects:
- (a) to assess the competitive landscape by identifying any potential barriers for new entrants and mechanisms to improve the competitive landscape of the domestic payments systems;
 - (b) to assess and report on whether consumers and merchants are well served by the domestic payments systems.
58. Attached hereto as Exhibit "E" is a copy of the mandate of the Task Force.
59. In September 2010, the Task Force published a study prepared for it entitled "The Canadian Payments Landscape". It is intended that the Task Force will issue its final

report and recommendations at the end of 2011. Attached as Exhibit "F" is a copy of pertinent extracts from "The Canadian Payments Landscape".

60. The study provides a detailed perspective on the current state of Canada's payments systems and their complexity. This was accompanied by a call for views and commentary on the state of the Canadian payments systems. This period has ended and the submissions have been made available to the public. The Task Force has also engaged in a Workshop process that invited current large and small participants in the system, merchants, potential new entrants, technology experts and persons with international experience in payments systems to discuss the future direction of the Canadian payments systems. The Task Force will use its broad mandate to examine the entire legislative and regulatory framework for the Canadian payments systems, and will make proposals that will significantly affect the competitive forces within this system.
61. We believe that the matters raised in this proceeding are a subset of the issues under consideration by the Task Force. Therefore, these issues are better left to be considered in the first instance by the Task Force, within its mandate of an integrated review of Canada's payments systems as a whole.

TD IS DIRECTLY AFFECTED – COMPETITIVE CONSEQUENCES

62. TD is directly affected by these proceedings for the following reasons:
- (a) It is an Acquirer. Therefore, it is the subject of the allegation that the "Merchant Restraints" are imposed upon merchants by Acquirers and that Acquirers enforce the Merchant Restraints as against the merchants.
 - (b) It is an Issuer. Therefore, TD is directly affected by the proposal to eliminate the "no surcharge" rule and the "honour all cards" rule. As set out earlier in this

Affidavit, the orders sought by the Commissioner will have the consequence of making the use of credit cards less reliable to consumers as a method of payment, and therefore less attractive to them. This, in turn, will reduce the incentive to Issuers to issue credit cards and so will decrease competition.

- (c) A migration from credit cards to other payment forms, referred to above, 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 those with new or weak credit profiles.
- (d) Any shift away from credit cards could stunt or reduce the growth of the electronic portion of the payments systems.
- (e) A decline in credit card usage will reduce the competition between different payments systems and, so, will alter the competitive landscape of the overall payments system.
- (f) TD believes that the network rules embodied by the "Merchant Restraints" allow Issuers to compete with each other on a level playing field. These rules also ensure that the integrity and reliability of the card networks are maintained.

TD'S DISTINCT, UNIQUE PERSPECTIVE

63. We believe TD brings a distinct, indeed, unique perspective to these proceedings:

- (a) TD is the only chartered bank in Canada which directly carries on business both as an Issuer and an Acquirer. As such, in the overall conduct of its business, it is sensitive to the needs and concerns of both cardholder customers and merchant

customers. Hence, TD brings a broader perspective to the issues in this proceeding.

- (b) TD's relationships with its cardholder customers and with its merchant customers are not confined to those relationships. TD seeks to, and commonly does, provide those customers with their other banking and lending needs. Its relationships are not "monoline" as are those of other acquiring service providers. As compared to Canada's other chartered banks, TD's position in this respect is unique as no other bank directly operates as an Acquirer. In the result, TD is able to provide the Tribunal with evidence that takes into account all of the financial/banking needs of affected cardholders and merchants.
- (c) Further, as we have explained above, TD operates its Issuer and Acquirer businesses in a coordinated manner. As such, we are able to assist the Tribunal with this integrated, balanced perspective, arising from the manner in which we conduct these businesses and informed by our day-to-day contact with cardholder customers and merchant customers in the ordinary course of the operation of these lines of business.
- (d) No other bank in Canada and no other provider of acquiring services in Canada can provide TD's distinctive evidence, information and perspective on the issues raised in this proceeding. Nor can Visa or MasterCard, which do not have direct relationships with cardholders or merchants as TD does. Nor, of course, can the Commissioner.
- (e) Finally, as one of Canada's leading chartered banks, TD forms an integral part of Canada's banking and payments system. Credit cards are but one aspect of the

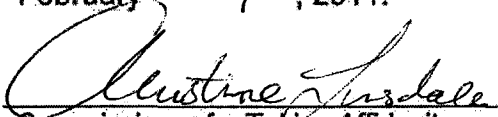
payments system, which also includes cash, debit cards, gift cards and many other modes of payment, most of which are encompassed within TD's banking operations. As we have discussed in this Affidavit, we are strongly of the view that the issues raised by the Commissioner can only properly be considered by the Tribunal in the context of the payments system in Canada as a whole, of which credit cards are only one part. The implications of the remedies sought in this proceeding for the broader Canadian payments system framework can be addressed by TD. Neither the Commissioner nor the Respondents can offer this perspective to the Tribunal.

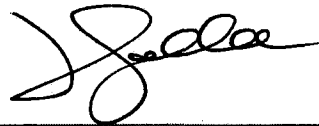
64. We also believe that the credit card network should not be examined by the Tribunal in isolation from its place in Canada's overall payments system. To the extent that the Application seeks to change the terms upon which credit card transactions are conducted, it will affect the operation of Canada's payments systems. We believe that TD can assist the Tribunal to consider the Commissioner's requested remedies in their proper, overall context.
65. Neither TD nor any other person can accurately predict the exact economic consequences if the remedies sought are granted. The credit card network is complicated with many interdependent parts. We are firmly of the view that the consequences, although difficult to predict with precision at this time, will be damaging to the credit card as a payment mechanism and will have repercussions for most if not all other payment mechanisms. Our views regarding the interconnected nature of the Canadian payment system are echoed in the study prepared for the Task Force, "The Canadian Payments Landscape" which states:

"Changes to one part of the ecosystem (eg. new entrants, new regulations, new fees) will have a ripple effect across the entire

landscape as different parties adjust to the new competitive environment."

SWORN BEFORE ME in the City of Toronto, Ontario, Canada, on February 9, 2011.


Commissioner for Taking Affidavits



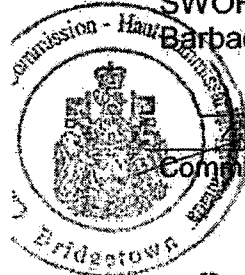
Jim Sallas

SWORN BEFORE ME in Barbados, on February 9, 2011.


Commissioner for Taking Affidavits



Jeff van Duynhoven


Dale Smyl
Second Secretary (Consular)
Canadian High Commission
Bridgetown's Court Hill, St. Michael
Bridgetown, Barbados
BB: 1110

The document that is being electronically submitted to the Tribunal is an electronic version of a paper document that has been signed by the affiant. The signed document in paper copy is available and will be produced if requested by the Tribunal.

Exhibit "A"

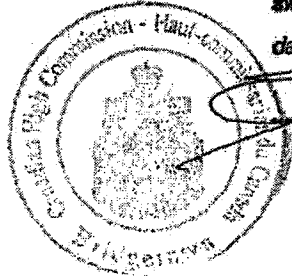
Jim Sallas

Brief Biographical Profile

I am the Senior Vice-President, Personal Lending and Credit Cards at TD.

Specifically, with respect to credit cards my responsibilities include: the offering and issuing of credit cards to consumers and small businesses along with providing and facilitating the provision of supporting credit cards services and card benefits required.

This is Exhibit "A" referred to in the affidavit of JIM SALLAS AND JEFF VAN DUYNHOVEN sworn before me, this day of FEBRUARY 9, 2011



[Signature]
A COMMISSIONER FOR TAKING AFFIDAVITS

This is Exhibit "A" referred to in the affidavit of JIM SALLAS AND JEFF VAN DUYNHOVEN sworn before me, this day of 9th FEBRUARY, 2011

[Signature: Christine Ludale]
A COMMISSIONER FOR TAKING AFFIDAVITS

Exhibit "B"

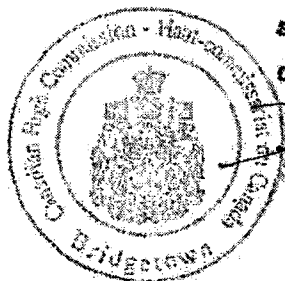
Jeff van Duynhoven

Brief Biographical Profile

A brief description of my pertinent background and experience is as follows.

Since 1992, I have been actively involved in the payments business. Before joining TD Merchant Services, I was responsible for TD Canada Trust's electronic banking channels including, Internet Banking; the electronic Bill Payment business and TDCT's Interactive Voice Response telephone banking service. I am a current member of VISA Canada's Advisory Committee and a former board member of the *Interac* Association, CertaPay Inc. and Dexit Inc. I hold a Bachelor of Commerce degree from Carleton University and I am recognized as a Certified Cash Manager (CCM) by the US based Association of Financial Professionals.

This is Exhibit 4 B^v referred to in the affidavit of JIM SALLAS AND JEFF VAN DUYNHOVEN sworn before me, this 9th day of FEBRUARY 2011



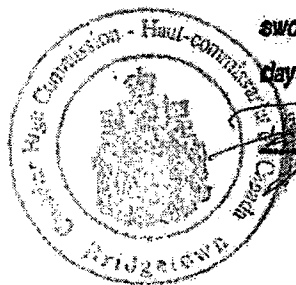
[Signature]
A COMMISSIONER FOR TAKING AFFIDAVITS

This is Exhibit "B" referred to in the affidavit of JIM SALLAS AND JEFF VAN DUYNHOVEN sworn before me, this 9th day of FEBRUARY 2011

Christine Guibelle
A COMMISSIONER FOR TAKING AFFIDAVITS

Exhibit "C"

This is Exhibit "C" referred to in the affidavit of JIM SALLAS AND JEFF VAN DUYNHOVEN sworn before me, this day of FEBRUARY 20 11



[Signature]
A COMMISSIONER FOR TAKING AFFIDAVITS

This is Exhibit "C" referred to in the affidavit of JIM SALLAS AND JEFF VAN DUYNHOVEN sworn before me, this day of 9th FEBRUARY 20 11

Christine Tinsdale
A COMMISSIONER FOR TAKING AFFIDAVITS



Competition Bureau
Canada

Bureau de la concurrence
Canada



Home > Media Centre > Fact Sheets

Visa and MasterCard's Anti-competitive Rules

Fact Sheet

December 2010

The Players

Credit Card Networks

- Visa and MasterCard operate the two largest credit card networks in Canada.
- Through their networks, Visa and MasterCard provide infrastructure and services such as authorization and settlement of transactions for customers who pay using their respective network's brand of credit cards.

Credit Card Issuers

- Financial institutions, such as banks, credit unions and caisses populaires, issue credit cards in Canada.
- The issuers set annual credit card fees and interest rates charged to card holders and determine reward levels for programs like air miles and cash back.

Acquirers

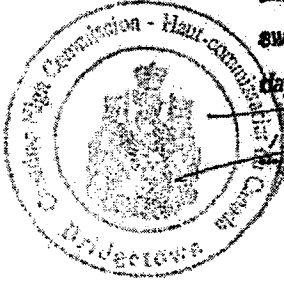
- Acquirers are the companies that supply credit card network services to merchants.
- This includes authorization and processing of credit card transactions, as well as point-of-sale services, such as credit card terminals.

The Fees and How They are Collected and Shared

Card Acceptance Fee

- Card acceptance fees are paid by merchants each time a customer pays for a good or service with a credit card.
- The fees are a percentage of the purchase price paid to the merchant by the customer.
- Fees range from 1.5 percent to 3 percent or more, and are higher on premium credit cards.
- Fees are distributed in different proportions to the credit card network, the issuer and the acquirer.

Exhibit "D"



This is Exhibit 4D referred to in the
affidavit of JIM SALLAS AND JEFF
sworn before me, this 27th VAN DUYNHOVEN
day of FEBRUARY 2011

[Handwritten signature]

A COMMISSIONER FOR TAKING AFFIDAVITS

This is Exhibit 'D' referred to in the
affidavit of JIM SALLAS AND JEFF
sworn before me, this 9th VAN DUYNHOVEN
day of FEBRUARY 2011

Christine Tuschke

A COMMISSIONER FOR TAKING AFFIDAVITS

Department of Finance
CanadaMinistère des Finances
Canada

Canada

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[Home](#) > [Publications and reports](#) > [Code of Conduct for the Credit and Debit Card Industry in Canada](#)

CODE OF CONDUCT FOR THE CREDIT AND DEBIT CARD INDUSTRY IN CANADA

PURPOSE

The purpose of the Code is to demonstrate the industry's commitment to:

1. Ensuring that merchants are fully aware of the costs associated with accepting credit and debit card payments thereby allowing merchants to reasonably forecast their monthly costs related to accepting such payments.
2. Providing merchants with increased pricing flexibility to encourage consumers to choose the lowest-cost payment option.
3. Allowing merchants to freely choose which payment options they will accept.

SCOPE

The Code applies to credit and debit card networks, (referred to herein as payment card networks), and their participants (e.g. card issuers and acquirers¹).

The payment card networks that choose to adopt the Code will abide by the policies outlined below and ensure compliance by their participants. The Code of Conduct will be incorporated, in its entirety, into the payment card networks' contracts, governing rules and regulations.

The Code will apply within 90 days of being adopted by the card networks and their participants. Networks and acquirers will have up to nine months to implement Element 1. Issuers will have up to one year to re-issue cards already in circulation that contravene Element 6 or 7.

REQUIREMENTS FOR PAYMENT CARD NETWORKS

By adopting the Code, payment card networks agree to provide any requested information regarding actions taken by themselves or participants to the Financial Consumer Agency of Canada, for the purpose of monitoring compliance with the Code. In addition, payment card networks agree to pay for the fees associated with monitoring compliance with the Code, as determined by the Financial Consumer Agency of Canada.

POLICY ELEMENTS

1. Increased Transparency and Disclosure by Payment Card Networks and Acquirers to Merchants

The payment card networks and their participants will work with merchants, either directly or through merchant associations, to ensure that merchant - acquirer agreements and monthly statements include a sufficient level of detail and are easy to understand. Payment card networks will make all applicable interchange rates easily available on their websites. In addition, payment card networks will post any upcoming changes to these fees once they have been provided to acquirers.

Payment card network rules will ensure that merchant statements include the following information:

- Effective merchant discount rate² for each type of payment card from a payment card network;
- Interchange rates and, if applicable, all other rates charged to the merchants by the acquirer;
- The number and volume of transactions for each type of payment transaction;
- The total amount of fees applicable to each rate; and,
- Details of each fee and to which payment card network they relate.

This information must be presented in a manner that is clear, simple and not misleading.

2. Payment card network rules will ensure that merchants will receive a minimum of 90 days notice of any fee increases or the introduction of a new fee related to any credit or debit card transactions. Payment card networks will provide at least 90 days notice to acquirers for rate and / or fee changes and at least 180 days notice for structural changes².

Notification is not required for fee changes made in accordance with pre-determined fee schedules, such as those based on merchant sales volume, provided that the schedules are included in the merchant's contract.

3. Payment card network rules will ensure that following notification of a fee increase or the introduction of a new fee, merchants will be allowed to cancel their contracts without penalty.

By signing a contract with an acquirer, a merchant will have the right to cost certainty over the course of their contract. As a result, in the event of a fee increase or the introduction of a new fee, merchants will be allowed to opt out of their contracts, without facing any form of penalty, within 90 days of receiving notice of the fee increase or the introduction of a new fee.

Merchants may not cancel their contracts in relation to fee increases made in accordance with pre-determined fee schedules, such as those based on merchant sales volume, provided that the schedules are included in the merchant's contract.

4. Payment card network rules will ensure that merchants who accept credit card payments from a particular network will not be obligated to accept debit card payments from that same payment card network, and vice versa.

Payment card networks will not require merchants to accept both credit and debit payments from their payment card network. A merchant can choose to accept only credit or debit payments from a network without having to accept both.

5. Payment card network rules will ensure that merchants will be allowed to provide discounts for different methods of payment (e.g. cash, debit card, credit card). Merchants will also be allowed to provide differential discounts among different payment card networks.

Discounts will be allowed for any payment method. As well, differential discounting will be permitted between payment card networks.

Any discounts must be clearly marked at the point-of-sale.

6. Competing domestic applications from different networks shall not be offered on the same debit card. However, non-competing complementary domestic applications from different networks may exist on the same debit card.

A debit card may contain multiple applications, such as PIN-based and contactless. A card may not have applications from more than one network to process each type of domestic transaction, such as point-of-sale, Internet, telephone, etc. This limitation does not apply to ABM or international transactions.

7. Payment card networks will ensure that co-badged debit cards are equally branded.

Payment card network rules shall ensure that the payment networks available on payment cards will be clearly indicated. Payment card networks will not include rules that require that issuers give preferential branding to their brand over others. To ensure equal branding, brand logos must be the same size, located on the same side of the card and both brand logos must be either in colour or black and white.

8. Payment card network rules will ensure that debit and credit card functions shall not co-reside on the same payment card.

Debit and credit cards have very distinct characteristics, such as providing access to a deposit account or a credit card account. These accounts have specific provisions and fees attached to them. Given the specific features associated with debit and credit cards, and their corresponding accounts, such cards shall be issued as separate payment cards. Consumer confusion would be minimized by not allowing debit and credit card functions to co-reside on the same payment card.

9. Payment card network rules will require that premium credit and debit cards may only be given to consumers who apply for or consent to such cards. In addition, premium payment cards shall only be given to a well-defined class of cardholders based on individual spending and/or income thresholds and not on the average of an issuer's portfolio.

Premium payment cards have a higher than average interchange rate. They must be targeted at individuals who meet specific spending and/or income levels.

10. Payment card network rules will ensure that negative option acceptance is not allowed.

If payment card networks introduce new products or services, merchants shall not be obligated to accept those new products or services. Merchants must provide their express consent to accept the new products or services.

¹ "Acquirers" are entities that enable merchants to accept payments by credit or debit card, by providing merchants with access to a payment card network for the transmission or processing of payments.

² The effective merchant discount rate is calculated as the total fees paid by the merchant to an acquirer, related to the processing of a specific type of payment card from a payment card network, divided by the total sales volume for that type of payment card.

³ Structural changes are significant changes to the fee structure for a payment card network. This includes the introduction of new types of interchange or other fees, a change to the interchange rate structure or the introduction of a new type of credit or debit card.



Date Modified: 2010-05-18

Exhibit "E"

Home	About	Learn	Participate	Contact
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ABOUT

HOME > ABOUT > MANDATE

Mandate

Mandate of the Task Force

The payments system refers to arrangements that allow consumers, businesses and other organizations to transfer value from one party to another. It includes the institutions, instruments and services that facilitate the transfer of value between parties in a transaction.

Given the importance of a safe and efficient payments system and the need to ensure that the framework supporting the payments system remains effective in light of new participants and innovations, the government is appointing this task force to conduct a review of the payments system. Specifically, the task force will:

- Identify public policy objectives to be pursued in the operation and regulation of the payments system;
- Identify and assess the regulatory and institutional structures best suited to achieving these public policy objectives;
- Assess and report on the safety and soundness of the Canadian payments system;
- Assess the competitive landscape by identifying any potential barriers for new entrants and mechanisms to improve the competitive landscape of the domestic payments system;
- Assess the degree of innovation in the domestic payments system and report on the challenges and opportunities to bring new and innovative products to market in Canada; and
- Assess and report on whether consumers and merchants are well served by the domestic payments system.

Through the above assessment, it is expected that the task force will provide concrete, actionable advice and recommendations to the Minister of Finance to help guide the evolution of the payments system in Canada.

TOP OF PAGE	IMPORTANT NOTICES
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This is Exhibit "E" referred to in the affidavit of JIM SALLAS AND JEFF VAN DUYNHOVEN sworn before me, this 9th day of FEBRUARY 20 11

[Signature]
A COMMISSIONER FOR TAKING AFFIDAVITS

This is Exhibit "E" referred to in the affidavit of JIM SALLAS AND JEFF VAN DUYNHOVEN sworn before me, this 9th day of FEBRUARY 20 11

[Signature]
A COMMISSIONER FOR TAKING AFFIDAVITS

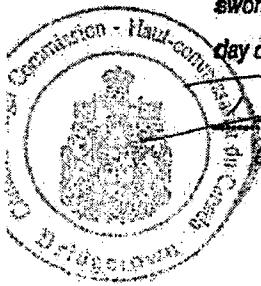


Exhibit "F"

This is Exhibit "F" referred to in the
 affidavit of TIM SALLAS AND JEFF VAN DUYNHOVEN
 sworn before me, this 9th
 day of FEBRUARY 2011
Christine Lonsdale
 A COMMISSIONER FOR TAKING AFFIDAVITS



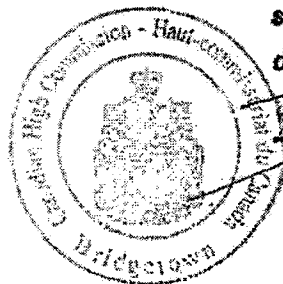
Task Force for the Payments System Review
Groupe de travail sur l'examen du système de paiement

Canadian Payments Landscape

Prepared for the

Task Force for the Payments System Review

September, 2010



This is Exhibit "F" referred to in the
 affidavit of TIM SALLAS AND JEFF VAN DUYNHOVEN
 sworn before me, this 9th
 day of FEBRUARY 2011
[Signature]
 A COMMISSIONER FOR TAKING AFFIDAVITS

Executive Summary: Overview of the Canadian Payments System

Overview of the Canadian Payments System

- Extremely complex system involving a wide range of stakeholders
- There is a wide, and growing, range of payment methods available to consumers, merchants, businesses, corporations and governments
- Incumbents (such as Canadian banks), new entrants (such as e-commerce specialists) and global payments providers (such as the credit card networks) are rapidly expanding the range and breadth of payments options available to Canadians
- Likewise, a range of payment enablers are also actively contributing to this expansion
- There is active competition across all parts of the complex payments landscape. There are no participants that dominate the system
- The current regulatory environment is complex, involving multiple industry stakeholders and levels of government
- In general, consumer oriented payment mechanisms (cash, debit and credit) account for the bulk of payments transactions
- In general, business oriented payment mechanisms (LVTS) account for the bulk of payment dollar values
- Electronic payment mechanisms (e.g. debit) generally are growing while conventional paper based methods (e.g. cheque)

Executive Summary: Overview of Key Payments Trends

Overview of Key Payments Trends

- The Canadian payments landscape has evolved in quite distinct phases over preceding decades
- Over the past decade, the marketplace changes have resulted in much greater choice for consumers and higher levels of innovation
- Most of the innovation has been centred on the consumer oriented payments and not corporate oriented methods (e.g. LVTS, SWIFT)
- A wide range of factors are driving this accelerating rate of change:
 - Expansion and convergence of payment form factors
 - Accelerating pace of innovation
 - Increasing global collaboration
 - Maturing of consumer preferences
 - Historic regulation losing relevance
 - Increasing security and privacy challenges
 - Leadership of global, scale-efficient players

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1. Introduction

2. Payments Overview

- a. What is a Payment?
- b. The Canadian Payments Ecosystem
- c. Canadian Payments System Regulatory Framework

3. Review of Payment Methods

4. Review of Participants in the Payments Ecosystem

5. Appendices

- a. Participant Profiles
- b. Review of Payment-Related Activities
- c. Glossary of Terms
- d. Further Reading

1. Introduction

This current-state summary of the Canadian Payments Landscape has been prepared for the Task Force for the Payments System Review

Report Background

- The Task Force for the Payments System Review was formed in June 2010 by the Department of Finance Canada with the objective of reviewing the Canadian Payments System and providing recommendations to the Department of Finance
- As a key input to the process, the Task Force requires a holistic mapping of the current Canadian payments landscape, including all payment types and identifying all scheme and system operators as well as their users
- In addition, the Task Force requires an analysis of the competitive landscape, interaction between participants of the Canadian payments system and a review of relevant federal and provincial regulatory frameworks

Objectives and Scope

- The objectives of this report are to:
 - Provide a graphic map of the Canadian payments system
 - Detail the roles of all players
 - Discuss trends and significant changes over recent years
 - Identify the various regulatory regimes that govern participants
- New and emerging payment types have not been covered in detail
- This report is not a qualitative review of the payments landscape and does not provide recommendations for change

Approach

- Publicly-available data was used to gather transaction growth information and extrapolate market trends, as well as to compile profiles of participant types and companies, and identify trends, recent developments and the regulatory framework for the payments industry
- Internal Deloitte expertise and available public information was used to build a comprehensive map of the Canadian payments system, including the interdependencies between key players

Observations

- The rapid evolution and integration of new technologies in recent years have changed the way that payments are made, while new business models and new market entrants have reinvigorated what was previously a relatively stable industry
- While businesses and consumers can choose from an ever-widening array of payment options, the magnitude of this evolution of the payments marketplace has created considerable uncertainty regarding the near- and medium-term direction of the industry
- Recent trends have indicated a continued decline of cheques, with credit cards as the fastest-growing payment type
- New form factors (e.g., contactless, mobile) have considerable long-term potential to change the way Canadians make payments

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1. Introduction

2. Payments Overview

a. What is a Payment?

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5. Appendices

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c. Glossary of Terms

d. Further Reading





2. Payments Overview: A. What is a Payment?

Payments facilitate the flow of funds and information between two parties

<p>What is a Payment?</p>	<ul style="list-style-type: none"> ▪ A payment is the transfer of value between two parties ▪ Payments may be used for a variety of purposes, including to purchase goods and services, to settle a legal obligation or to transfer funds between parties/locations ▪ Payments encompass a wide range of activities, Examples include (but are not limited to): <ul style="list-style-type: none"> - Paying with cash - Writing a cheque - Wiring money overseas - Paying for inventory via EDI
<p>What are the defining characteristics of different Payment types?</p>	<ul style="list-style-type: none"> ▪ Sender/Recipient: e.g., Person-to-Person (P2P), Consumer-to-business (C2B) or Business-to-Government (B2G). Who are the parties to the transaction? ▪ Form Factor: e.g., Is the payment made with cash, paper cheque, plastic card or electronically? ▪ Funding Source: e.g., Do the funds come from cash in your wallet, a demand deposit account (chequing account), or from a line of credit? ▪ Timing of Funds: e.g., Is it a Pay Now transaction (debit), Pay Later (credit) or Pay Before (gift card)? ▪ Regulation: Which regulatory bodies oversee the transaction – is it a CPA-regulated transaction (ACSS/LVTS), a Consumer Protection Act-regulated transaction (cash) or largely unregulated (eWallets)?
<p>What is a payments ecosystem?</p>	<ul style="list-style-type: none"> ▪ "Payments ecosystem", "payments landscape" and "payments industry" all refer to the collection of consumers, businesses, merchants, financial institutions, payments networks, regulators, processors, new entrants and service providers that play a role in initiating, processing and regulating payments transactions and redefining boundaries ▪ Payments ecosystems are inherently complex with multiple payment options, multiple players (with sometimes divergent goals), overlapping or non-existent regulatory regimes and evolving consumer choice ▪ In addition to the Sender and Recipient there can be many parties involved in the transaction such as an issuer to provide access to funds; an acquirer to help the merchant process the transaction and clearing and settlement agencies ▪ Changes to one part of the ecosystem (e.g., new entrants, new regulations, new fees) will have a ripple effect across the entire landscape as different parties adjust to the new competitive environment ▪ A well-managed payments ecosystem provides secure, reliable and cost-effective payment options for consumers and merchants, and is a vital component of a stable economy

2. Payments Overview: A. What is a Payment?

A variety of payment methods can be employed to enable the transfer of funds between parties

Payment Type	Examples	Description	Typical Consumer/Merchant Usage Fees
Cash		Paper notes and coins as issued by the Bank of Canada; foreign currency where accepted	<ul style="list-style-type: none"> No per-transaction costs Merchants may offer cash discounts to consumers Significant cost to cash handling for merchants including bank fees, theft and opportunity costs
Cheques		Paper instrument instructing a financial institution to pay a specific amount of a specific currency to a specific Recipient	<ul style="list-style-type: none"> Sender: \$0-\$1.25 per cheque, or bundled into a monthly account fee typically ranging from \$0 - \$14 (max \$25) Recipient: \$0-\$3.00 per cheque depending on account plan Significant processing and handling costs to all including approval administration, cheque processing costs and fraud
Debit Card (Point of Sale)	Interac Association; Maestro	Card issued by a financial institution that provides instant access to funds online or at a merchant's checkout for purchase of goods & services. Funds are instantaneously withdrawn from the user's account	<ul style="list-style-type: none"> Consumers: \$0-1.25 per transaction or bundled into monthly service fee. International transactions more expensive Merchants: Fixed fee of \$0.08-\$0.15 per transaction or 0.15% + \$0.05 plus acquirer fees plus monthly account fees
Debit Card (Cash Dispensing)	Cirrus Network; Plus Network	Card issued by a financial institution that permits the withdrawal of cash at Automated Banking Machines (ABMs). Withdrawals made at the same bank as the card issuer are considered "on-us", while withdrawals made at another institution's ABM are considered "not on-us"	<ul style="list-style-type: none"> On-Us Transaction: \$0-\$0.50, or bundled into a monthly account fee Not On-Us Transaction: \$1.50 - \$3.00 each to issuer and acquirer (or more if international). May be free under reciprocal bank arrangements
Credit Card	Visa Inc.; MasterCard Worldwide	Card issued by a financial institution that allows online and point-of-sale purchases to be charged to a credit account, line of credit or other loan facility	<ul style="list-style-type: none"> Consumers: No per-transaction fees for credit cards. Annual fees from \$0 - \$200 or more. \$0-\$5 for cash advances. 10%-30% annual interest on revolving balances Merchants: Merchant discount rate is composed of interchange ranging from 1.2%-2% per transaction plus acquirer processing and periodic account fees
AFT Debit	Canadian Payments Association	Automated Funds Transfer (AFT) Debits are Pre-Authorized Debits (PAD). Permits direct periodic (usually monthly) billing from a bank account to a merchant or other Recipient. Typically used for recurring bill payments. Processed over the Canadian Payment Association's (CPA) Automated Clearing and Settlement Service (ACSS)	<ul style="list-style-type: none"> Consumer: \$0.65-1.25 per debit or bundled into monthly service fee Merchants: Varies according to merchant banking agreement
AFT Credit	Canadian Payments Association	Identical to AFT Debit, except funds flow from merchant to consumer. Most common use is for payroll and government disbursements (such as EI, CPP and tax returns)	<ul style="list-style-type: none"> Consumer: No per transaction fee to user Merchants: Varies according to merchant banking agreement

Note: Detailed descriptions are provided in Section 3

2. Payments Overview: A. What is a Payment?

A variety of payment methods can be employed to enable the transfer of funds between parties, cont...

Payment Type	Examples	Description	Typical Consumer/Merchant Usage Fees
EDI and Electronic Remittances	Canadian Payments Association	Electronic Data Interchange (EDI) payments are corporate-to-corporate transfers routed through the CPA's ACSS. Electronic (EDI) Remittances are similar to AFT Debits, except that they are one-time instead of recurring	Consumer: \$0.65-1.25 per debit or bundled into monthly service fee Businesses: Varies according to merchant banking agreement
Proprietary/ Prepaid Closed Loop Card	Starbucks Corporation	Similar to a credit card, except that it is only accepted at certain retail merchants. Transactions are processed using proprietary networks rather than open-loop networks such as Visa or American Express	Consumer: No transaction fees. Usage fees of \$0.50-\$2.50 for activities such as activation, card replacement or customer service
LVTS Wires	Canadian Payments Association	The Large Value Transfer System (LVTS), an electronic wire transfer system for instant transfers between financial institutions of \$50,000 or more. Often used for settlement of stock/bond market trades or corporate procurement. Processed by the CPA	Businesses: \$10 for incoming wire transfers, \$16 - \$80 for outgoing wire transfers plus foreign bank fees (exact amount based on amount and if funds are being sent to home banks' branch)
SWIFT Transfer	Society for Worldwide Interbank Financial Telecommunication	The Society for Worldwide Interbank Financial Telecommunication (SWIFT). Enables payments between member financial institutions. Used for sending funds domestically (via LVTS) and internationally	Businesses: Varies according to amount sent and Sender/Recipient location, typically \$30 (send and receive)
International Remittances	Western Union Company	Person-to-person overseas funds transfer where the Recipient does not require a bank account to receive the funds. Funds generally flow over a proprietary payment network (e.g., Western Union)	Sender: 1.2%-20% of the remitted value depending on the location money is sent from and where it is sent to Recipient: \$0 or more depending type of service used
Digital Wallets/ eWallets	PayPal, Inc.	Funds stored outside of financial institution for conducting transactions online or via mobile phone. Also manages billing and shipping information to enable online purchases. Allow users to make electronic commerce transactions quickly and securely, and provides an easy way for individuals and business to collect online payments	Personal Transfer Sender: 2.9% + \$0.30 CAD per funds transfer that comes from a Credit Card (Sender decides who pays this fee), free when money comes from PayPal balance or a bank account Recipient: No fees, except where funds are transferred from a Credit Card wherein the Sender may decide that the Recipient is to pay the fee which is 2.9% + \$0.30 CAD per funds transfer



2. Payments Overview: A. What is a Payment?

A variety of payment methods can be employed to enable the transfer of funds between parties, cont...

Payment Type	Examples	Description	Typical Consumer/Merchant Usage Fees
Digital Wallets/ eWallets	PayPal, Inc.	Funds stored outside of financial institution for conducting transactions online or via mobile phone. Also manages billing and shipping information to enable online purchases. Allow users to make electronic commerce transactions quickly and securely, and provides an easy way for individuals and business to collect online payments	<p>Purchases Sender: No fees Recipient: Standard rate of 2.9% + \$0.30 CAD. Lower fee rates are based on monthly sales volume for the previous calendar month (PayPal)</p> <ul style="list-style-type: none"> •Sales volume between \$0-\$3,000 CAD incurs a 2.9% fee per transaction + \$0.30 CAD •Sales volume between \$3,000.01-\$12,000 CAD incurs a 2.5% fee per transaction + \$0.30 CAD •Sales volume between \$12,000.01-\$125,000 CAD incurs a 2.2% fee per transaction + \$0.30 CAD •Sales volume greater than \$125,000 CAD incurs a 1.9% fee per transaction + \$0.30 CAD <p>A Recipient must meet PayPal's Merchant Rate criteria and complete a onetime application</p> <p>Cross-Border Purchases Sender: No fees Recipient: Standard rate 3.9% + \$0.30 CAD. Transaction fees for cross-border purchases are applicable to Recipients who have sold goods or services to Senders outside of Canada or the US. Lower rates are based on monthly sales volume from the previous calendar month (PayPal)</p> <ul style="list-style-type: none"> •Sales volume between \$0-\$3,000 CAD incurs a 3.9% fee per transaction + \$0.30 CAD •Sales volume between \$3,000.01-\$12,000 CAD incurs a 3.5% fee per transaction + \$0.30 CAD •Sales volume between \$12,000.01-\$125,000 CAD incurs a 3.2% fee per transaction + \$0.30 CAD •Sales volume greater than \$125,000 CAD incurs a 2.9% fee per transaction + \$0.30 CAD <p>A Recipient must meet PayPal's Merchant Rate criteria and complete a onetime application</p>



2. Payments Overview: A. What is a Payment?

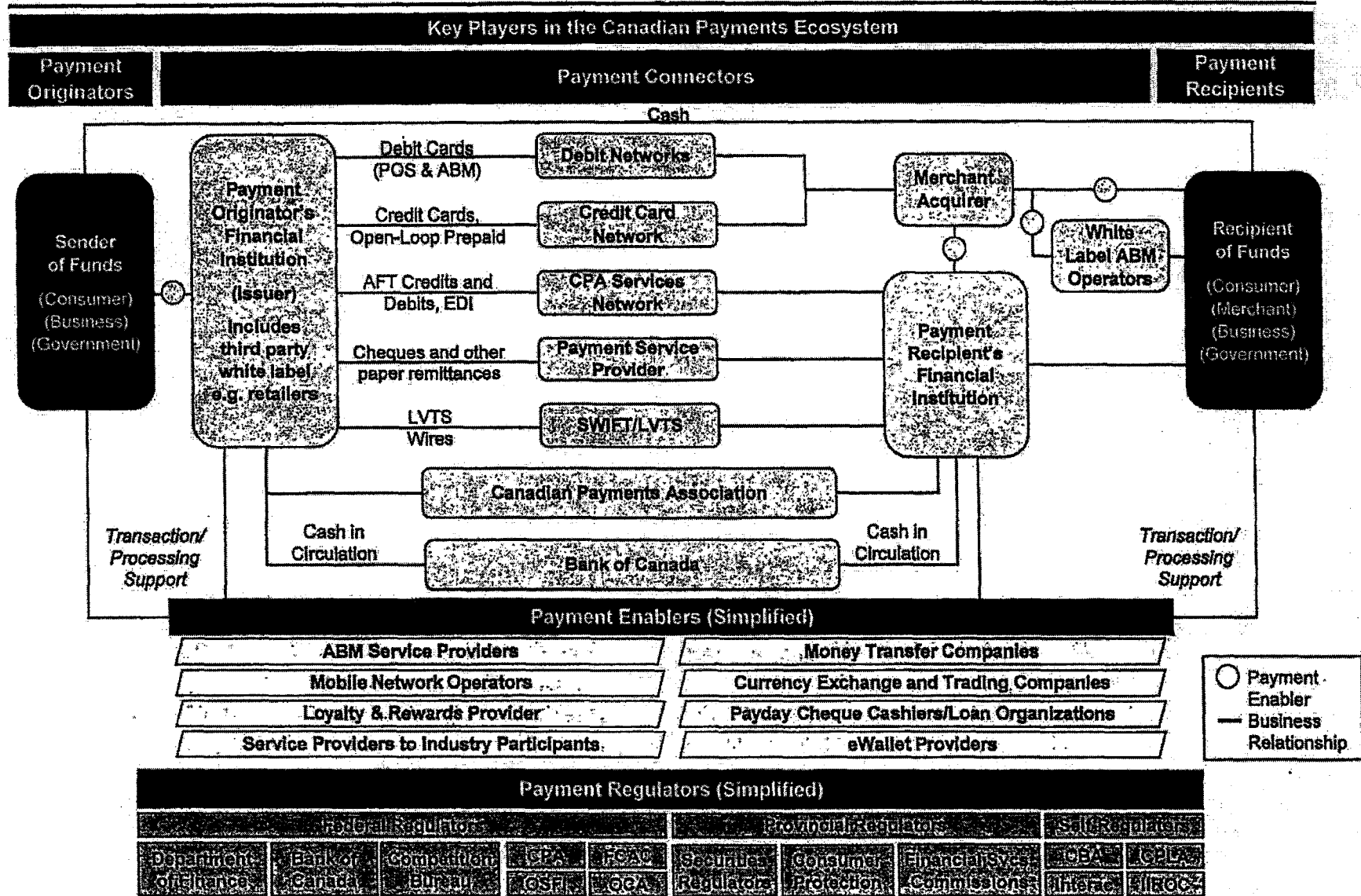
A variety of payment methods can be employed to enable the transfer of funds between parties, cont...

Payment Type	Examples	Description	Typical Consumer/Merchant Usage Fees
Mobile Payment	Zoompass	Person-to-person or consumer-to-business payment made using a mobile phone. Can draw/deposit funds from/to a consumer's bank/credit card account or maintain balances like an eWallet	<p>Sender: 3.5% per transaction on credit card transactions (Zoompass), but free from a Zoompass account</p> <p>Recipient: No fee (Zoompass)</p> <p>Usage Fees: \$0.50 per withdrawal to bank account, no fee to add funds to Zoompass account from bank account, \$10 penalty for insufficient funds (Zoompass)</p>



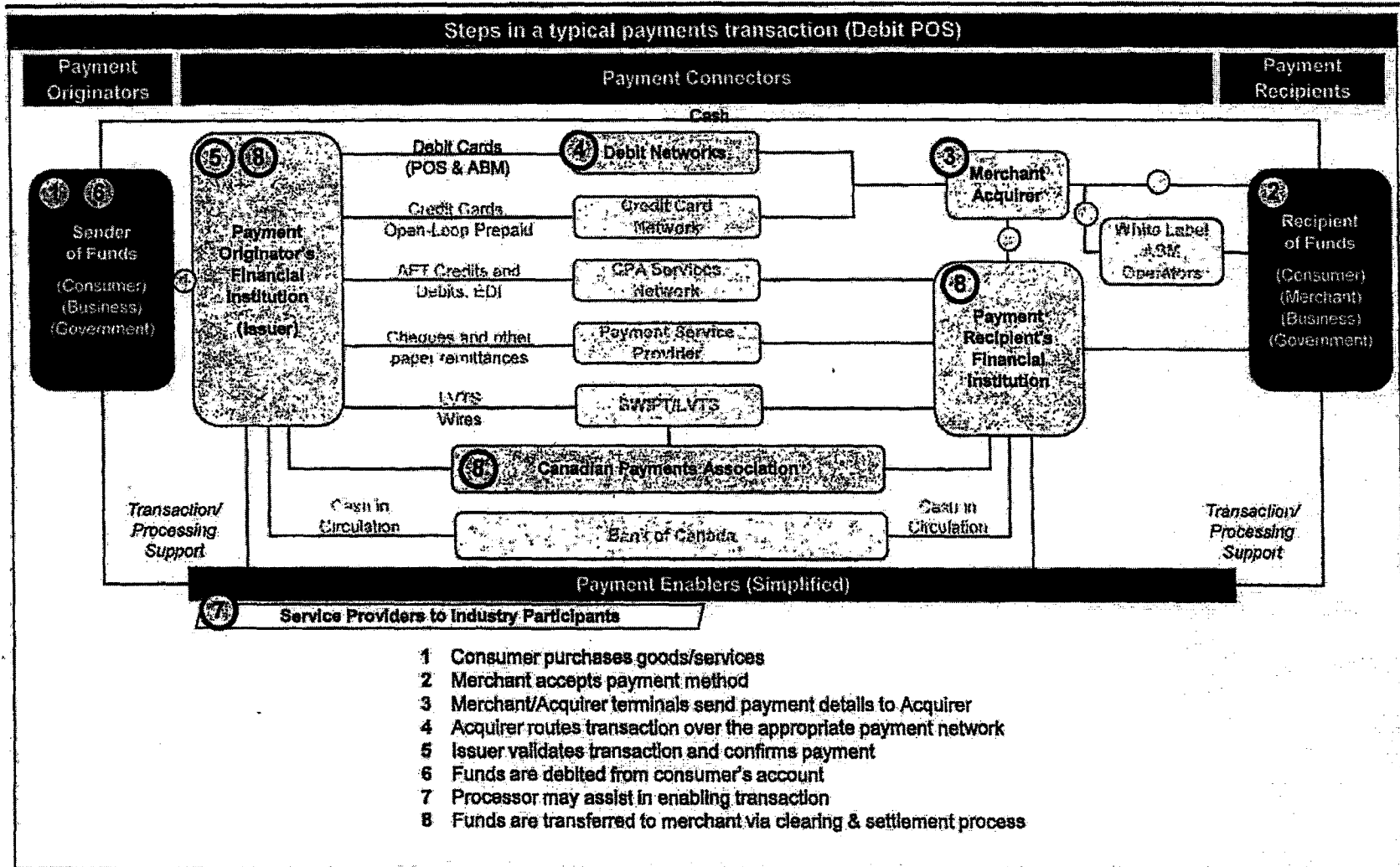
2. Payments Overview: B. The Canadian Payments Ecosystem

The Canadian Payments Ecosystem is a dynamic network of interconnected participants working together to enable a variety of payment types



2. Payments Overview: B. The Canadian Payments Ecosystem

Participants in a payments transaction vary according to type, but typically include senders, recipients, issuing and receiving financial institutions, acquirers and a network

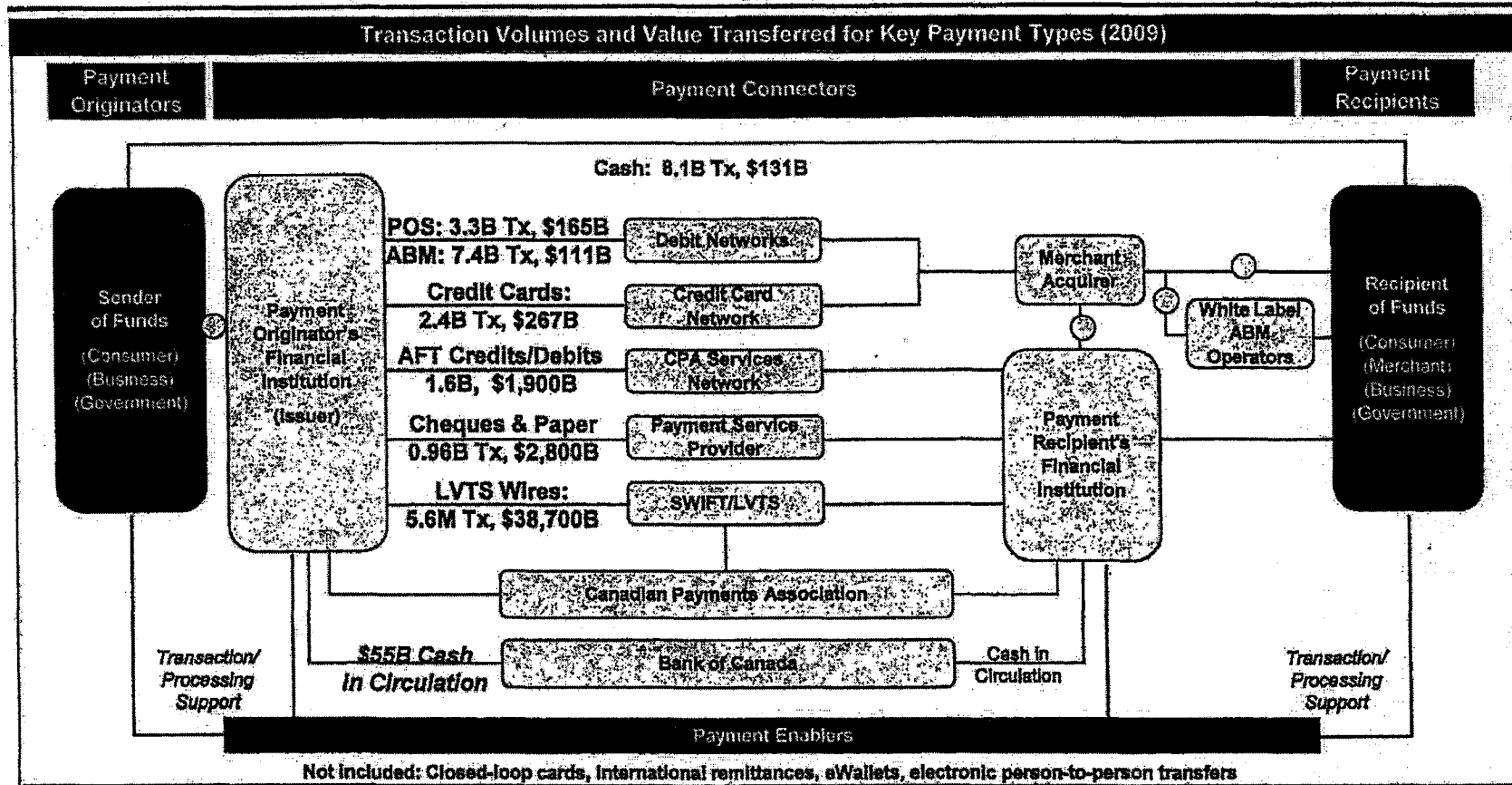


Note:

This is a simplified representation of one type of transaction (POS debit). Specific participation varies according to the type of payment, e.g., cheques do not require a payments network and cash does not require an issuer or acquirer. Type-specific payment interaction models are provided in the following section.

2. Payments Overview: B. The Canadian Payments Ecosystem

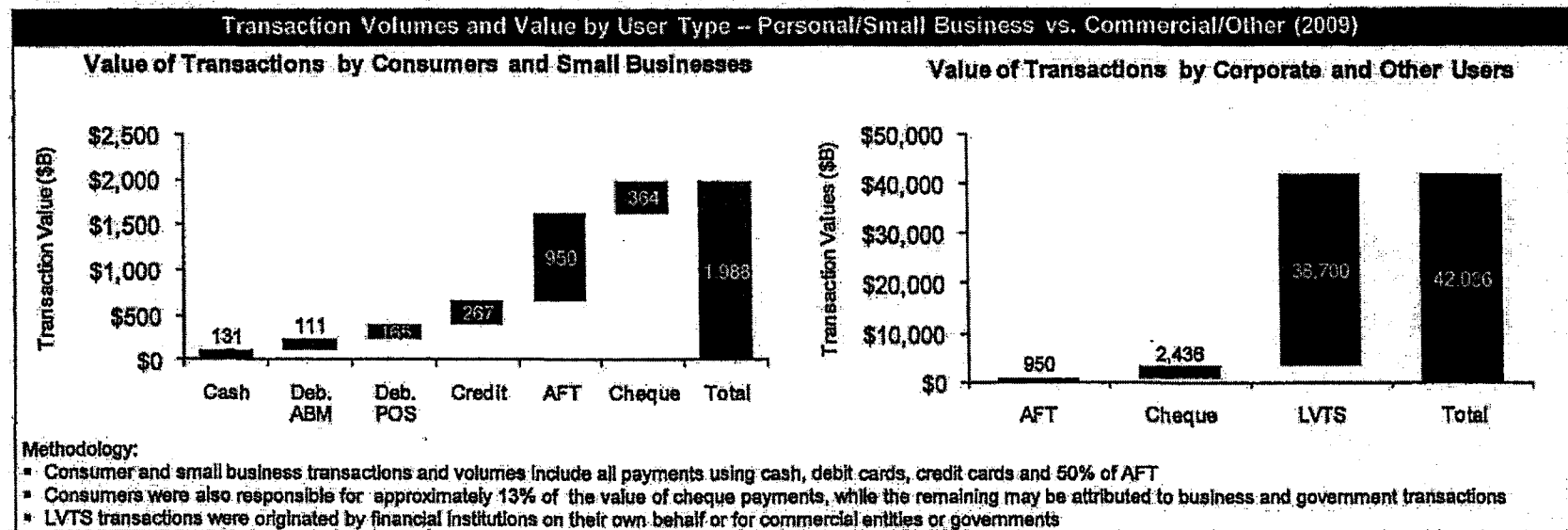
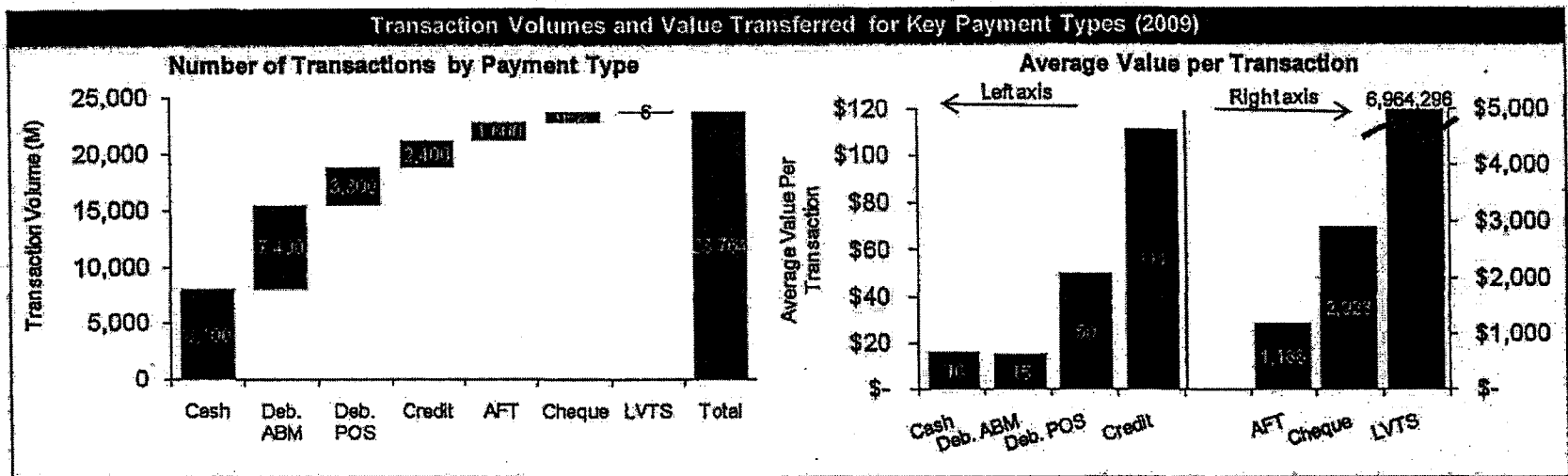
Collectively, the Canadian payments system processes an annual volume of almost 24 billion domestic transactions and transfers more than \$44 trillion in funds



- Observations**
- The total volume of payments is almost 30 times Canada's GDP of \$1.6 trillion. This is due largely to the \$39 trillion processed over LVTS, much of which is for non-economic activity such as settling securities trades. However, LVTS also processes the smallest number of transactions
 - Cheque payments represent the second-highest value due to their continued use in business-to-business transactions
 - Cash volumes and values are extremely challenging to quantify due to the absence of an electronic audit trail. This estimate is based on cash withdrawals and estimated spending patterns

2. Payments Overview: B. The Canadian Payments Ecosystem

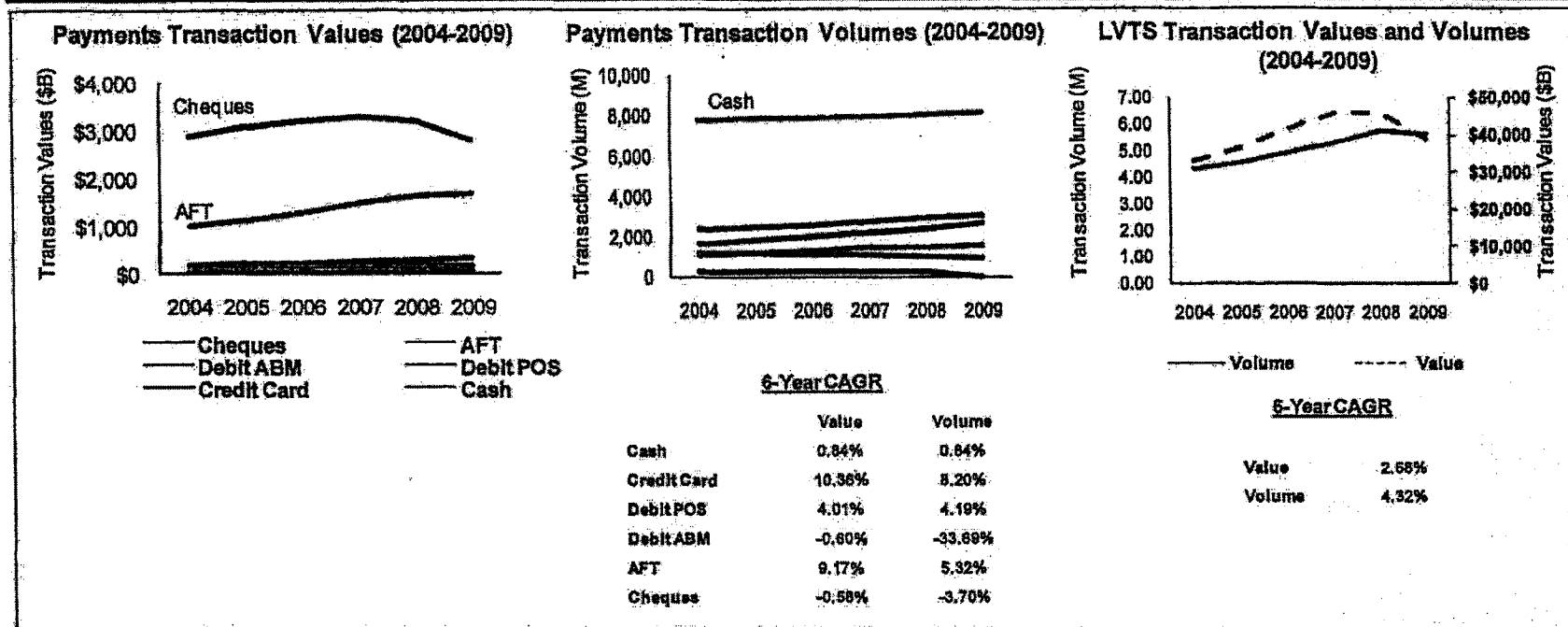
Debit, cash and credit cards dominate the landscape by transaction count, while the vast majority of value is transferred via LVTS



2. Payments Overview: B. The Canadian Payments Ecosystem

As the Canadian payments market matures, paper-based transactions are increasingly giving way to electronic forms of payment

Preliminary Payments Value and Volume Trends (2004-2009)



Observations

- As electronic payment alternatives continue to grow in popularity, cheque usage is expected to continue its declining trend in both value and volume. Over the past 5 years the value of cheques remained the highest in transactions value compared to other payment types but the number of cheques written continued to decline
- Credit cards continue to be the fastest-growing payment method (both in terms of the number of transactions and volume), fueled by widespread acceptance, credit availability, high brand awareness and rewards programs
- Growth in debit card transactions might accelerate with the introduction of contactless and branded debit
- While the value of credit and debit transactions remains relatively low, the number of transactions carried out using these payment methods continues to increase

Source: CPA, Bank for International Settlements Report prepared by Committee on Payment and Settlement Systems of the Group of Ten Countries, 2009. All figures are estimates and include on-us transactions.

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.

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

**VISA CANADA CORPORATION AND
MASTERCARD INTERNATIONAL INCORPORATED**

Respondents

THE TORONTO-DOMINION BANK

Applicant for Leave to Intervene

**AFFIDAVIT OF JIM SALLAS
AND JEFF van DUYNHOVEN**

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Suite 5300, P.O. Box 48
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Of Counsel for The Toronto-Dominion Bank
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A-851-88

A-851-88

American Airlines, Inc. (*Appellant*)

v.

Competition Tribunal, Air Canada, Air Canada Services Inc., PWA Corporation, Canadian Airlines International Ltd., Pacific Western Airlines Ltd., Canadian Pacific Air Lines, Limited, 154793 Canada Ltd., 153333 Canada Limited Partnership, The Gemini Group Automated Distribution System Inc., Director of Investigation and Research, Wardair Canada Inc., Consumers' Association of Canada, Attorney General of the Province of Manitoba (*Respondents*)

INDEXED AS: AMERICAN AIRLINES, INC. v. CANADA (COMPETITION TRIBUNAL)

Court of Appeal, Iacobucci C.J., Heald and Stone JJ.—Ottawa, October 25 and November 10, 1988.

Combines — Practice — Scope of interventions before Competition Tribunal under Competition Tribunal Act s. 9(3) — Tribunal not prevented by Act s. 9(3) from allowing interveners to fully participate in proceedings, including right to discovery, calling of evidence and cross-examination of witnesses — Specific role of interveners in particular case matter for Tribunal's discretion.

Construction of statutes — Meaning of "making representations" in Competition Tribunal Act, s. 9(3) — Scope of intervention allowed thereby — In pari materia rule of interpretation can be rebutted by more persuasive arguments.

When Air Canada or its subsidiary and Canadian Airlines International Limited and its associated companies were believed to have formed a merger of their computer reservation systems, the Director of Investigation and Research (the Director) applied to the Competition Tribunal for an order dissolving the merger, alleging that it would prevent or lessen competition in the provision of computer reservation systems services.

American Airlines, Inc. (American) and others applied to the Competition Tribunal for leave to intervene in these proceedings pursuant to subsection 9(3) of the *Competition Tribunal Act* which allows interveners, with leave of the Tribunal, to make representations in respect of any matter affecting them. The Tribunal granted leave to intervene but interpreted subsection 9(3) as preventing interveners from participating in examination for discovery, calling evidence and cross-examining witnesses. This is an appeal and a cross-appeal from that decision.

American Airlines, Inc. (*Appelante*)

c.

^a Tribunal de la concurrence, Air Canada, Services Air Canada Inc., PWA Corporation, Lignes aériennes Canadien International, Pacific Western Airlines Ltd., Lignes aériennes Canadien Pacifique, Limitée, 154793 Canada Ltd., 153333 Canada Limited Partnership, The Gemini Group Automated Distribution Systems Inc., Directeur des enquêtes et recherches, Wardair Canada Inc., Association des consommateurs du Canada, Procureur général de la province du Manitoba (*intimés*)

RÉPERTORITÉ: AMERICAN AIRLINES, INC. c. CANADA (TRIBUNAL DE LA CONCURRENCE)

^d Cour d'appel, juge en chef Iacobucci, juges Heald et Stone—Ottawa, 25 octobre et 10 novembre 1988.

Coalitions — Pratique — Étendue des interventions devant le Tribunal de la concurrence sous le régime de l'art. 9(3) de la Loi sur le Tribunal de la concurrence — L'art. 9(3) de cette loi n'empêche pas le Tribunal d'autoriser les intervenants à participer pleinement aux procédures, notamment en leur permettant de participer à la communication, de présenter des éléments de preuve et de contre-interroger les témoins — Pouvoir discrétionnaire du Tribunal de déterminer le rôle spécifique que sont appelés à jouer les intervenants dans une espèce particulière.

Interprétation des lois — Sens de l'expression «présenter des observations» utilisée à l'art. 9(3) de la Loi sur le Tribunal de la concurrence — Étendue de l'intervention qui y est prévue — La règle d'interprétation in pari materia peut être réfutée par des arguments qui emportent la conviction.

^h Soupçonnant les sociétés Air Canada ou ses filiales, d'une part, et les Lignes aériennes Canadien International et ses associées, d'autre part, d'avoir fusionné leurs systèmes de réservation informatisés, le directeur des enquêtes et recherches (le directeur) a présenté devant le Tribunal de la concurrence une demande en vue d'obtenir une ordonnance de dissolution de ce fusionnement, alléguant que ce dernier empêcherait ou diminuerait la compétition dans la prestation de services de réservation informatisés.

ⁱ La société American Airlines, Inc. (American), entre autres, a déposé devant le Tribunal de la concurrence une requête en intervention en vertu du paragraphe 9(3) de la *Loi sur le Tribunal de la concurrence*. Ce paragraphe autorise les intervenants, avec la permission du Tribunal, à présenter des observations concernant des questions qui les touchent. Le Tribunal a accordé l'autorisation d'intervenir, mais il a interprété le paragraphe 9(3) de façon à empêcher les intervenants de participer aux interrogatoires préalables, à la présentation d'éléments de preuve et au contre-interrogatoire des témoins. D'où les présents appel et contre-appel.

Held, the appeal and cross-appeal should be allowed.

The principle that a court has authority and discretion over its procedure—and the Tribunal was clearly given court-like powers in that respect—was so fundamental that it could be abrogated only by clearly expressed statutory language.

“Representations”, according to the dictionary definition, extend not only to arguments, but also to facts and reasons. That being so, interveners should be allowed to provide the facts on which they rely. This interpretation is strengthened by the broad purpose of the *Competition Act* as stated in section 1.1 thereof. It is logical that Parliament has also, for the achievement of that purpose, provided a means to ensure that those who may be affected can participate effectively in the proceedings in order to inform the Tribunal of the ways in which matters complained of impact on them. A wider input makes for a better-informed and more appropriate decision.

Allowing interveners to play a wider role may prolong and complicate proceedings, but that was a price that had to be paid in the interests of fairness, which was expressly required by subsection 9(2).

The fact that sections 97 and 98 of the *Competition Act*, a statute *in pari materia* with the *Competition Tribunal Act*, authorize the Director “to make representations and call evidence” does not necessarily mean that Parliament intended the phrase “to make representations” in subsection 9(3) of the *Competition Tribunal Act* to exclude the calling of evidence. The applicable rule of interpretation is one that can be rebutted, as it has been in this case, by more persuasive arguments.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Canadian Bill of Rights, R.S.C. 1970, Appendix III.
Competition Act, R.S.C. 1970, c. C-23 (as am. by S.C. 1986, c. 26, s. 19), ss. 1.1 (as enacted *idem*), 22 (as enacted *idem*, s. 24), 60 (ss. 50-100, enacted *idem*, s. 47), 64, 73, 76, 77, 97, 98.
Competition Tribunal Act, S.C. 1986, c. 26, ss. 8, 9(1),(2),(3), 13(1), 16, 17.
Federal Court Rules, C.R.C., c. 663, R.R. 344(3) (as am. by SOR/87-221), 1203 (as am. by SOR/79-57, s. 20), 1312.

CASES JUDICIALLY CONSIDERED

APPLIED:

Fishing Vessel Owners' Association of British Columbia et al. v. Canada (1985), 57 N.R. 376 (F.C.A.).

COUNSEL:

Colin L. Campbell, Q.C. for appellant.
Nick J. Shultz and Janet Yale for Consumers' Association of Canada.

Arrêt: l'appel et le contre-appel devraient être accueillis.

Le principe selon lequel la cour jouit de la compétence et du pouvoir discrétionnaire sur sa procédure, et à cet égard le Tribunal est clairement investi de pouvoirs de nature judiciaire, est à ce point essentiel qu'il ne peut être abrogé que par une disposition législative clairement exprimée.

Selon la définition dans le dictionnaire, le terme anglais «representations» s'étend non seulement aux exposés d'arguments, mais aussi aux faits et aux motifs. Aussi les intervenants devraient-ils être autorisés à exposer les faits sur lesquels ils s'appuient? Cette interprétation est renforcée par le vaste objet de la *Loi sur la concurrence*, tel qu'il ressort de son article 1.1. En vue de la réalisation de cet objectif, il est logique que le législateur ait fourni à ceux qui peuvent être touchés la possibilité de participer efficacement aux procédures aux fins d'informer le Tribunal de l'impact que risquent d'entraîner sur eux les agissements faisant l'objet de la plainte. Leur apport élargi ne peut ainsi que contribuer à la prise d'une décision plus éclairée et judicieuse.

Il est possible qu'une participation accrue des intervenants prolonge et complique les procédures, mais c'est le prix à payer pour satisfaire à l'exigence expresse d'équité du paragraphe 9(2).

Le fait que les articles 97 et 98 de la *Loi sur la concurrence*, législation *in pari materia* avec la *Loi sur le Tribunal de la concurrence*, autorisent le directeur à «présenter des observations et des preuves» ne signifie pas nécessairement que le législateur a voulu exclure de l'expression «présenter des observations», utilisée au paragraphe 9(3) de la *Loi sur le Tribunal de la concurrence*, la présentation d'éléments de preuve. La règle d'interprétation applicable peut être réfutée, comme elle l'a été en l'espèce, par des arguments qui emportent la conviction.

LOIS ET RÈGLEMENTS

Déclaration canadienne des droits, S.R.C. 1970, Appendice III.
Loi sur la concurrence, S.R.C. 1970, chap. C-23 (mod. par S.C. 1986, chap. 26, art. 19), art. 1.1 (édicte, *idem*), 22 (édicte, *idem*, art. 24), 60 (art. 50 à 100, édicte, *idem*, art. 47), 64, 73, 76, 77, 97, 98.
Loi sur le Tribunal de la concurrence, S.C. 1986, chap. 26, art. 8, 9(1),(2),(3), 13(1), 16, 17.
Règles de la Cour fédérale, C.R.C., chap. 663, Règles 344(3) (mod. par DORS/87-221), 1203 (mod. par DORS/79-57, art. 20), 1312.

JURISPRUDENCE

DÉCISION APPLIQUÉE:

Fishing Vessel Owners' Association of British Columbia et autres c. Canada (1985), 57 N.R. 376 (C.A.F.).

AVOCATS:

Colin L. Campbell, c.r. pour l'appelante.
Nick J. Shultz et Janet Yale pour l'Association des consommateurs du Canada.

Marshall E. Rothstein, Q.C. for Air Canada Ltd., 153333 Canada Limited Partnership, Air Canada Services Inc.

Jo'Anne Streckaf for PWA Corporation, Canadian Airlines International Ltd., Pacific Western Airlines Ltd., Canadian Pacific Air Lines, Limited, 154793 Canada Ltd., 153333 Canada Limited Partnership, Air Canada Services Inc.

John F. Rook, Q.C. and *Trevor S. Whiffen* for Director of Investigation and Research.

No one appearing for Attorney General of the Province of Manitoba.

No one appearing for Wardair Canada Inc.

Marshall E. Rothstein, c.r. pour Air Canada, 153333 Canada Limited Partnership, Services Air Canada Inc.

Jo'Anne Streckaf pour PWA Corporation, Lignes aériennes Canadien International, Pacific Western Airlines Ltd., Lignes aériennes Canadien Pacifique, Limitée, 154793 Canada Ltd., 153333 Canada Limited Partnership, Services Air Canada Inc.

John F. Rook, c.r. et *Trevor S. Whiffen* pour le directeur des enquêtes et recherches.

Personne n'a comparu pour le procureur général de la province du Manitoba.

Personne n'a comparu pour Wardair Canada Inc.

SOLICITORS:

McCarthy & McCarthy, Toronto, for appellant.

Consumers' Association of Canada, Ottawa, on its own behalf.

Aikins, MacAulay & Thorvaldson, Winnipeg, for Air Canada Ltd., 153333 Canada Limited Partnership, Air Canada Services Inc.

Bennett Jones, Calgary, for PWA Corporation, Canadian Airlines International Ltd., Pacific Western Airlines Ltd., Canadian Pacific Air Lines, Limited, 154793 Canada Ltd., 153333 Canada Limited Partnership, Air Canada Services Inc.

Holden, Murdoch & Finlay Toronto, for Director of Investigation and Research.

Attorney General of the Province of Manitoba, Winnipeg, on its own behalf.

Blake, Cassels & Graydon Toronto, for Wardair Canada Inc.

The following are the reasons for judgment rendered in English by

IACOBUCCI C.J.: This is an appeal by American Airlines, Inc. (American or appellant), pursuant to subsection 13(1) of the *Competition Tribunal Act*, S.C. 1986, c. 26, from the order of Strayer J. of the Competition Tribunal [order dated 18/7/88, CT-88/1, not yet reported] with respect to an application by American to intervene, pursuant to

PROCUREURS:

McCarthy & McCarthy, Toronto, pour l'appelante.

L'association des consommateurs du Canada, Ottawa, pour son propre compte.

Aikins, MacAulay & Thorvaldson, Winnipeg, pour Air Canada, 153333 Canada Limited Partnership, Services Air Canada Inc.

Bennett Jones, Calgary, pour PWA Corporation, Lignes aériennes Canadien International, Pacific Western Airlines Ltd., Lignes aériennes Canadien Pacifique, Limitée, 154793 Canada Ltd., 153333 Canada Limited Partnership, Services Air Canada Inc.

Holden, Murdoch & Finlay, Toronto, pour le directeur des enquêtes et recherches.

Procureur général de la province du Manitoba, Winnipeg, pour son propre compte.

Blake, Cassels & Graydon, Toronto, pour Wardair Canada Inc.

Ce qui suit est la version française des motifs du jugement rendu par

LE JUGE EN CHEF IACOBUCCI: La société American Airlines, Inc. (ci-après American ou l'appelante) a interjeté appel, conformément au paragraphe 13(1) de la *Loi sur le Tribunal de la concurrence*, S.C. 1986, chap. 26, de l'ordonnance qu'a rendue le juge Strayer de ce Tribunal [ordonnance en date du 18-7-88, CT-88/1, encore inédite] relativement à la demande de la société d'intervenir, en application du paragraphe 9(3) de

subsection 9(3) of the *Competition Tribunal Act*, in a proceeding before the Competition Tribunal.

The proceeding in question was instituted by the application of the Director of Investigation and Research (Director) for, amongst other things, an order under section 64 of the *Competition Act*, R.S.C. 1970 c. C-23, as amended [by S.C. 1986, c. 26, ss. 19, 47],* and for an interim order under section 76 of the *Competition Act*.¹ In effect, the Director has alleged that Air Canada and Canadian Airlines International Limited and other named parties have formed a merger of the computer reservations systems of Air Canada and Canadian Airlines International Limited which prevents or lessens, or is likely to prevent or lessen, competition substantially within the meaning of section 64 of the *Competition Act*, in the provision of computer reservation system services to airlines, travel agents and consumers in Canada.

Requests to intervene in the proceeding were also filed by Wardair Canada Inc. (Wardair), and the Consumers' Association of Canada (CAC). The order of Strayer J. gave leave to intervene in the proceeding to American, Wardair and CAC and, in particular, allowed them to attend and present argument on all motions and at all pre-hearing conferences and hearings, on any matter affecting them, respectively.

American, supported by CAC, appeals because of the limited scope of the intervention afforded by the order of Strayer J. CAC has appealed to this Court by way of cross-appeal pursuant to Rule 1203 of the *Federal Court Rules* [C.R.C., c. 663 (as am. by SOR/79-57, s. 20)]. It is noteworthy that the Director supports the arguments of the appellant and other interveners for an increased role in their intervention.

The appellant argues in short that Strayer J. erred in law in his interpretation of subsection 9(3) of the *Competition Tribunal Act* which had the

* Editor's Note: Sections 50 to 100 of the *Competition Act* were added by S.C. 1986, c. 26, s. 47.

¹ The Director's application was subsequently amended by order of the Competition Tribunal to include a prayer for relief under subparagraph 64(1)(e)(iii), section 77 and paragraph 77(1)(b) of the *Competition Act*.

cette même Loi, dans une procédure se déroulant devant le Tribunal.

Il s'agit en l'occurrence de la demande qu'a présentée le directeur des enquêtes et recherches (ci-après le directeur) en vue notamment d'obtenir une ordonnance en vertu de l'article 64 de la *Loi sur la concurrence*, S.R.C. 1970, chap. C-23, telle que modifiée [par S.C. 1986, chap. 26, art. 19, 47]*, ainsi qu'une ordonnance provisoire en vertu de l'article 76 de cette Loi¹. Le directeur allègue que Air Canada et les Lignes aériennes Canadien International ont, avec d'autres parties nommées, fusionné leurs systèmes de réservation informatisés et que ce fusionnement empêche ou diminue sensiblement la concurrence ou aura vraisemblablement cet effet, au sens de l'article 64 de la *Loi sur la concurrence*, dans la prestation au Canada de services de réservation informatisés aux lignes aériennes, aux agents de voyage et aux consommateurs.

La société Wardair Canada Inc. (ci-après Wardair) et l'Association des consommateurs du Canada (ci-après l'ACC) ont également déposé des requêtes en intervention. Dans son ordonnance, le juge Strayer autorise les sociétés American et Wardair, de même que l'ACC, à intervenir dans la procédure, et en particulier à assister et à présenter des arguments à toutes audiences relatives à des requêtes et à toutes conférences préparatoires et audiences concernant toutes questions qui touchent chacune d'entre elles.

Appuyée par l'ACC qui s'est portée contre-appelante conformément à la Règle 1203 des *Règles de la Cour fédérale* [C.R.C., chap. 663 (mod. par DORS/79-57, art. 20)], la société American en appelle de la portée limitée de l'intervention permise par le juge Strayer. Soulignons que le directeur appuie les arguments de l'appelante et des autres intervenants en faveur de l'accroissement de leur intervention.

L'appelante soutient, en bref, que le juge Strayer a erré en droit lorsqu'il a interprété le paragraphe 9(3) de la *Loi sur le Tribunal de la*

* Note de l'arrétiste: Les articles 50 à 100 de la *Loi sur la concurrence* ont été ajoutés par S.C. 1986, chap. 26, art. 47.

¹ La demande du directeur a ultérieurement été modifiée par ordonnance du Tribunal de la concurrence de façon à inclure une demande de redressement en vertu du sous-alinéa 64(1)(e)(iii), de l'article 77 et de l'alinéa 77(1)(b) de la *Loi sur la concurrence*.

effect of preventing the interveners from participating in examination for discovery, calling evidence, and cross-examining witnesses.²

I am of the view that the appeal and cross-appeal should be allowed, but before setting out my reasons, I would like to refer to parts of the judgment appealed from because of the importance of the issue to proceedings under the *Competition Act* and because of the admirably comprehensive approach taken by Strayer J. in his reasoning.

At the outset I think it appropriate to refer to section 9 of the *Competition Tribunal Act*, which provides as follows:

9. (1) The Tribunal is a court of record and shall have an official seal which shall be judicially noticed.

(2) All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

(3) Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal to make representations relevant to those proceedings in respect of any matter that affects that person. [Emphasis added.]

JUDGMENT APPEALED FROM

Strayer J. interpreted "representations" in subsection 9(3) to mean "arguments" and held that the subsection could not be taken to include the rights claimed by the interveners, *viz.*, participating in discovery, calling evidence and cross-examining witnesses. In this connection, he stated [at pages 13-14 of order]:

Subsection 9(3) of the *Competition Tribunal Act* authorizes any person, with leave of the Tribunal, to "intervene . . . to make representations . . ." . . . The first point to note is that the authority is given to intervene for a particular purpose only, and one therefore cannot derive any broader authority by reference to other meanings which the term "intervene" may have in other contexts. The term "to make representations" in normal English usage would suggest the presentation of argument; that is, persuasion rather than proof. If there is any lingering ambiguity of this term in the English version, it appears to be clarified in the French version which states the purpose of a permitted intervention as "afin de présenter des observations". The term "observations" is most commonly

² Before Strayer J., Wardair apparently did not ask to participate in discovery but wished to call evidence and cross-examine witnesses in addition to presenting argument.

concurrency de façon à empêcher les intervenants de participer aux interrogatoires préalables, à la présentation d'éléments de preuve et au contre-interrogatoire des témoins².

^a J'estime que l'appel et le contre-appel devraient être accueillis, mais avant d'exposer mes motifs, j'aimerais souligner certains passages du jugement dont appel, tant en raison de l'importance de la question en litige eu égard aux procédures engagées sous le régime de la *Loi sur la concurrence*, qu'à cause du caractère remarquablement complet de l'analyse qu'y fait le juge Strayer.

^c Il convient, dès le départ, de citer l'article 9 de la *Loi sur le Tribunal de la concurrence*:

9. (1) Le Tribunal est une cour d'archives et il a un sceau officiel dont l'authenticité est admise d'office.

^d (2) Dans la mesure où les circonstances et l'équité le permettent, il appartient au Tribunal d'agir sans formalisme, en procédure expéditive.

^e (3) Toute personne peut, avec la permission du Tribunal, intervenir dans les procédures se déroulant devant le Tribunal afin de présenter des observations qui se rapportent à ces procédures et qui concernent des questions touchant cette personne. [Non souligné dans le texte original.]

JUGEMENT DONT APPEL

^f ^g Donnant au terme «observations» utilisé au paragraphe 9(3) le sens d'«arguments», le juge Strayer soutient que ne sauraient être compris dans ce paragraphe les droits dont se réclament les intervenants, savoir le droit de participer à la communication, de présenter des éléments de preuve et de contre-interroger les témoins. Il affirme à cet égard [aux pages 13 et 14 de l'ordonnance]:

^h ⁱ Le paragraphe 9(3) de la *Loi sur le Tribunal de la concurrence* autorise toute personne, y ayant été autorisée par le Tribunal, à «intervenir . . . afin de présenter des observations . . .» . . . Le premier point à remarquer est que l'autorité est donnée pour intervenir à une fin particulière seulement, et l'on ne peut donc pas en faire dériver une autorité plus étendue en faisant référence à d'autres sens que le terme «intervenir» peut avoir dans d'autres contextes. L'expression «présenter des observations» selon l'usage anglais («to make representations») évoque la présentation d'arguments, autrement dit, la persuasion plutôt que la preuve. Si le terme employé dans la version anglaise laisse subsister une ambiguïté sous-jacente, celle-ci semble clarifiée dans la version française, qui précise la fin

² Lors de l'audience présidée par le juge Strayer, la société Wardair n'a apparemment pas demandé à participer à la communication mais a exprimé le désir de présenter des éléments de preuve et de contre-interroger les témoins, en plus de soumettre des arguments.

applied to the presentation of comments or argument before a court or tribunal. [Appeal Book, pages 14-15.]

Strayer J. said that this interpretation of subsection 9(3) was strengthened by reference to sections 97 and 98 of the *Competition Act* which authorizes the Director to participate before federal and provincial, respectively, boards and agencies. In each of those sections the Director is authorized to “make representations to and call evidence” before the board. A distinction is thus made between representations and the calling of evidence, which is supported in the French version of the two sections: “*présenter des observations et des preuves*” in section 97, and “*présenter des observations et soumettre des éléments de preuve*” in section 98. Because Strayer J. found the *Competition Tribunal Act* and the *Competition Act in pari materia*, he stated that similar language in the two statutes should be given similar meanings. Accordingly, since in sections 97 and 98 of the *Competition Act* “representations” do not include the presentation of evidence, so it should be in subsection 9(3) of the *Competition Tribunal Act*, namely, that “making representations” should not include the calling of evidence.

In reaching this conclusion, Strayer J. also noted that to grant the interveners the role they wished would be tantamount to treating them as parties, and under the *Competition Act* only the Director can apply for orders against specified persons. Thus the only parties in proceedings under the *Competition Act* are to be the Director and the persons against whom orders are sought. He concluded that the *Competition Act* does not provide any private right of action against the parties to an anti-competitive merger since the only action contemplated is one taken by the Director.

Strayer J. also found that the general implied authority of a court to permit interventions on terms it thinks fit was restricted by the limiting language of subsection 9(3) of the *Competition*

d'une intervention permise: «afin de présenter des observations». Le terme «observations» est plus communément appliqué à la présentation de commentaires ou d'arguments devant un tribunal judiciaire ou administratif. [Dossier d'appel, p. 14-15.]

a Le juge Strayer déclare que cette interprétation du paragraphe 9(3) est renforcée par la référence aux articles 97 et 98 de la *Loi sur la concurrence*, lesquels autorisent le directeur à intervenir devant les offices et organismes tant fédéraux que provinciaux. Dans chacun de ces articles, dans la version anglaise, le directeur est autorisé à «*make representations to and call evidence before the board*». Ainsi, une distinction est faite entre «*representations*» et «*the calling of evidence*», ce que confirme la version française des deux articles où il est question de «présenter des observations et des preuves» à l'article 97, et de «présenter des observations et soumettre des éléments de preuve» à l'article 98. Estimant que la *Loi sur le Tribunal de la concurrence* et la *Loi sur la concurrence* sont *in pari materia*, le juge soutient que le même terme utilisé dans les deux lois doit avoir le même sens. Il en conclut que, comme dans les articles 97 et 98 de la *Loi sur la concurrence* le terme «observations» n'inclut pas la présentation d'éléments de preuve, il doit en être de même au paragraphe 9(3) de la *Loi sur le Tribunal de la concurrence*, à savoir que l'expression «présenter des observations» ne devrait pas comprendre la présentation d'éléments de preuve.

À l'appui de sa conclusion, le juge Strayer souligne qu'accorder aux intervenants le rôle qu'ils souhaitent équivaudrait à leur donner le statut de parties et que seul le directeur peut, en vertu de la *Loi sur la concurrence*, demander à ce qu'une ordonnance soit rendue contre des personnes désignées. Ainsi, sont seules parties aux procédures se déroulant sous l'empire de la *Loi sur la concurrence* le directeur et les personnes à l'égard desquelles est demandée une ordonnance. Par conséquent, affirme le juge Strayer, il n'existe, en vertu de cette Loi, aucun droit privé d'action contre les parties à un fusionnement anti-concurrentiel puisque la seule action prévue est celle que prend le directeur.

Le juge Strayer conclut également que le pouvoir général implicite dont une cour est investie de permettre l'intervention aux conditions qu'elle estime appropriées est limité par le libellé restrictif

Tribunal Act. In addition, in looking at the context of the *Competition Act*, Strayer J. was of the view that proceedings before the Competition Tribunal were justiciable in nature which in his view reinforced a narrow interpretation of subsection 9(3). In this respect, he said [at pages 20-21]:

It is quite consistent with the view that Parliament has in effect created a *lis* between the Director of Investigation and Research and the parties to the merger; a *lis* which is to be determined on the basis of the facts and the law for which the proper parties to the proceedings have the prime responsibility of presentation. In such a context it is not inappropriate that the potential role of intervenors be quite limited, nor can an interpretation of subsection 9(3) to this effect be considered absurd or inconsistent with the general purposes of the Act. It was open to Parliament to allow anyone potentially aggrieved by a merger to commence a proceeding before the Tribunal against the merging parties, but Parliament elected not to do so. Instead it obviously saw the commencement of such a proceeding and its direction as a matter involving an important public interest which was to be defined and pursued by the Director, a public officer, as he thinks best in the public interest. In such circumstances it is irrelevant that other persons might take a different view of when or how such proceeding should be conducted. Their assistance will no doubt be welcomed by the Director in the development of evidence supportive of the allegations he has made but it is he who has the carriage of the proceeding. It is he who, together with the respondents, has the ultimate responsibility of shaping the issues and, indeed, of settling the matter (subject to the approval of the Tribunal should a consent order be required). [Appeal Book, pages 22-23.]

Strayer J. also pointed to subsection 9(2) which directs the Competition Tribunal to deal with all proceedings "as informally and expeditiously as the circumstances and considerations of fairness permit." In his view allowing intervenors to prolong proceedings through the multiplication of witnesses and cross-examination of witnesses could only lead to delaying the decisions of the Tribunal and discourage use of it. Thus a narrow interpretation of "representations" in subsection 9(3) was justified. By way of final comment, Strayer J. referred to the intervention role of provincial and federal attorneys general in constitutional cases at the appellate level and the fact that they had not been handicapped unduly in their interventions by not having been involved at the trial level in the

du paragraphe 9(3) de la *Loi sur le Tribunal de la concurrence*. De plus, il estime que, dans le contexte de la *Loi sur la concurrence*, les procédures qui se déroulent devant le Tribunal de la concurrence ont un caractère justiciable, ce qui, à son avis, vient renforcer l'interprétation étroite de ce paragraphe. Voici ce qu'il déclare à ce propos [aux pages 20 et 21]:

Cela est conforme avec l'opinion selon laquelle le Parlement a créé un *lis* entre le directeur des enquêtes et recherches et les parties à un fusionnement; ce *lis* doit être réglé en fonction des faits et du droit que les parties directement en cause dans les procédures ont la responsabilité première de présenter. Dans ce contexte, il est logique que le rôle éventuel des intervenants soit assez limité, et l'interprétation en ce sens du paragraphe 9(3) ne peut être jugée absurde ni incompatible avec l'objet général de la Loi. Le Parlement avait la possibilité de permettre à tous ceux qui pourraient être touchés par un fusionnement d'engager une procédure devant le Tribunal contre les parties au fusionnement, mais il n'a pas choisi de le faire. À la place, il a de toute évidence compris que le déclenchement d'une telle procédure et sa conduite mettent en jeu des intérêts publics importants que le directeur, en sa qualité de fonctionnaire, devait définir et poursuivre de la façon qu'il juge la plus appropriée dans l'intérêt public. Dans de telles circonstances, il importe peu que d'autres personnes puissent avoir une opinion différente sur le moment ou la façon de mener une telle procédure. Le directeur sera sans doute reconnaissant à ces personnes de leur aide dans l'établissement des preuves à l'appui des allégations qu'il a formulées, mais c'est au directeur que revient la conduite de la procédure. C'est lui qui, en dernière analyse, a la responsabilité de cerner les questions, avec la collaboration des défenderesses, et de fait d'en arriver à un règlement (sous réserve de l'approbation du Tribunal en cas d'ordonnance par consentement). [Dossier d'appel, p. 22-23.]

Le juge Strayer fait en outre remarquer qu'en vertu des dispositions du paragraphe 9(2), le Tribunal de la concurrence se doit «Dans la mesure où les circonstances et l'équité le permettent ... d'agir sans formalisme, en procédure expéditive.» À son avis, tout délai dont les intervenants pourraient être responsables dans la procédure, en raison du grand nombre de témoins et de contre-interrogatoires, ne pourrait que retarder les décisions du Tribunal et dissuader les parties d'y recourir: d'où la justification de l'interprétation restrictive du terme «observations» utilisé au paragraphe 9(3). En dernière analyse, le juge Strayer évoque le rôle d'intervenants que jouent les procureurs généraux provinciaux et fédéraux dans les affaires constitutionnelles portées devant les juridictions d'appel; il souligne que ces derniers n'ont pas été indûment empêchés d'exercer leur fonction en n'agissant pas en première instance en ce qui concerne la présentation des éléments de preuve et

presentation of evidence and cross-examination of witnesses. He said [at page 25]:

The role of the Competition Tribunal in merger proceedings is more akin to that of a court than to that of a public inquiry and it is not absurd, illogical, or demeaning that non-parties to such proceedings have only a limited part to play. If they have evidence to provide which would be helpful to one of the authorized parties to these proceedings it is difficult to believe such party will not welcome their assistance. But if they want to raise new issues which neither party is prepared to embrace, they cannot do so because that would be inconsistent with the adversarial system which Parliament has prescribed. [Appeal Book, page 28.]

ISSUE BEFORE THE COURT

With this background and review of the reasons of Strayer J., the issue before us focusses on the meaning of subsection 9(3) of the *Competition Tribunal Act*. Indeed, every party appearing before this Court agrees with the observation made by Strayer J. that, were it not for subsection 9(3), the Tribunal would have implied authority to permit interveners to call evidence and cross-examine witnesses. The issue then is whether subsection 9(3) restricts interveners in the manner held by Strayer J. or whether, as contended by the appellants, subsection 9(3) does not prevent the Competition Tribunal from using its discretion to decide the role that interveners will play.

REASONS FOR ALLOWING THE APPEAL

A useful starting point to answer the issue before us is the principle, which is widely recognized and accepted, that courts and tribunals are the masters of their own procedures. As a part of this principle, courts have also been recognized as having an inherent authority or power to permit interventions basically on terms and conditions that they believe are appropriate in the circumstances. This principle was clearly articulated by this Court in the *Fishing Vessel Owners' Association* case:

Every tribunal has the fundamental power to control its own procedure in order to ensure that justice is done. This, however, is subject to any limitations or provisions imposed on it by the law generally, by statute or by the rules of Court.³ [Emphasis added.]

³ *Fishing Vessel Owners' Association of British Columbia et al. v. Canada* (1985), 57 N.R. 376 (F.C.A.), at p. 381.

le contre-interrogatoire des témoins. Il affirme [à la page 25]:

Le rôle du Tribunal de la concurrence dans les procédures de fusionnement ressemble plus à celui d'un tribunal judiciaire qu'à celui d'un organisme d'enquête publique, et il n'est ni absurde, ni illogique, ni dégradant, pour des parties non engagées dans de telles procédures, d'être limitées à jouer un rôle restreint. Si des preuves propres à aider l'une des parties autorisées pouvaient être fournies, il est difficile de croire que cette partie n'accepterait pas qu'on l'aide. Toutefois, si ces parties non engagées veulent soulever de nouvelles questions qu'aucune des parties n'est prête à appuyer, elles ne peuvent le faire, puisque cela irait à l'encontre de la procédure contradictoire qu'a prévue le Parlement. [Dossier d'appel, p. 28.]

QUESTION EN LITIGE

Les motifs de l'ordonnance du juge Strayer ainsi exposés, la question en litige devant cette Cour se résume à l'interprétation du paragraphe 9(3) de la *Loi sur le Tribunal de la concurrence*. Toutes les parties ayant comparu devant la Cour sont en effet d'accord avec le juge Strayer pour affirmer que, n'eût été du paragraphe 9(3), le Tribunal aurait l'autorité implicite de permettre aux intervenants de présenter des éléments de preuve et de contre-interroger des témoins. Il convient donc de décider si ce paragraphe limite le rôle des intervenants comme l'estime le juge Strayer ou si, comme le soutiennent les appelants, ce même paragraphe n'empêche pas le Tribunal de la concurrence de déterminer, à sa discrétion, le rôle que les intervenants seront appelés à jouer.

MOTIFS D'ACCUEIL DE L'APPEL

Pour trancher cette question, il est intéressant de partir du principe largement accepté suivant lequel les tribunaux judiciaires et administratifs sont maîtres de leur propre procédure. C'est en vertu de ce principe que les tribunaux se sont également vu reconnaître l'autorité ou le pouvoir inhérent de permettre les interventions aux conditions qu'ils estiment adaptées aux circonstances. La présente Cour a clairement exposé ce principe dans l'affaire *Fishing Vessel Owners' Association*:

Chaque tribunal est investi du pouvoir fondamental de contrôler sa propre procédure afin d'assurer que la justice est rendue. Ce pouvoir est toutefois assujéti à toute limitation ou disposition prévue soit par le droit en général, soit par une loi, soit par les règles de la Cour.³ [Non souligné dans le texte original.]

³ *Fishing Vessel Owners' Association of British Columbia et autres c. Canada* (1985), 57 N.R. 376 (C.A.F.), à la p. 381.

With respect to the Competition Tribunal, it is clearly stated in its statute that the Tribunal is given court-like powers and a concomitant procedural discretion to deal with matters before it: see section 8, subsection 9(1) and section 16 of the *Competition Tribunal Act*.⁴ Of particular relevance is subsection 8(2):

8. ...

(2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

The principle of a court's authority and discretion over its procedure is so fundamental to the proper functioning of a court and the interests of justice that, in my view, only clearly expressed language in a court's constating statute or other applicable law should be employed to take away that authority and discretion. When one looks at the dictionary meaning of the operative words used in section 9 as well as the context of the section and of the proceedings under the *Competition Act*, I do not think that the wording of subsection 9(3) is clearly expressed to eliminate the Tribunal's inherent authority or discretion in the manner found by Strayer J.

Subsection 9(3) allows persons to intervene, with leave of the Competition Tribunal, "to make representations relevant to [the] proceedings in respect of any matter that affects that person." To ascertain the meaning of the words in the section one should look not only at the dictionary definition and the context but also at the nature of the matters being dealt with in the action as well as the overall objectives of the underlying legislation.

In *The Shorter Oxford English Dictionary*, "representation" is stated to mean, among other

⁴ Subsection 8(1) gives the Tribunal jurisdiction to hear applications under Part VII of the *Competition Act* and related matters and subsection 8(3) deals with contempt orders of the Tribunal. Subsection 9(1) stipulates that the Tribunal is a court of record and shall have an official seal which shall be judicially noticed. Section 16 gives rule making power to the Tribunal.

Dans le cas du Tribunal de la concurrence, sa loi constitutive lui confère clairement des pouvoirs de nature judiciaire de même qu'une compétence discrétionnaire concomitante en matière de procédure: voir l'article 8, le paragraphe 9(1) et l'article 16 de la *Loi sur le Tribunal de la concurrence*⁴, et particulièrement le paragraphe 8(2) suivant:

8. ...

(2) Le Tribunal a, en ce qui concerne la présence, la prestation de serment et l'interrogatoire des témoins, la production et l'examen de documents, l'exécution de ses ordonnances et les questions nécessaires ou utiles à l'exercice de sa compétence, tous les pouvoirs droits et privilèges d'une cour supérieure d'archives.

Ce principe de la compétence et du pouvoir discrétionnaire de la cour sur sa procédure est à ce point essentiel à son bon fonctionnement et à celui de la justice qu'il ne peut, à mon avis, être écarté que par une disposition clairement exprimée de sa loi constitutive ou d'une autre loi applicable. Or, si l'on prend en compte la définition que donne le dictionnaire des termes importants de l'article 9, dans le contexte des procédures engagées sous le régime de la *Loi sur la concurrence*, il est, à mon avis, impossible de conclure, comme l'a fait le juge Strayer, que le paragraphe 9(3) est libellé de façon à faire expressément échec au pouvoir ou à la discrétion inhérente du Tribunal.

En vertu du paragraphe 9(3), toute personne peut, avec la permission du Tribunal de la concurrence, intervenir «afin de présenter des observations qui se rapportent [aux] procédures et qui concernent des questions touchant cette personne». Pour connaître la signification des mots utilisés dans cette disposition, il y a lieu non seulement d'en vérifier la définition dans le dictionnaire et d'en examiner le contexte, mais également de tenir compte de la nature des questions soulevées dans l'action, ainsi que des objectifs globaux de la loi.

Entre autres définitions du terme «*representation*», *The Shorter Oxford English Dictionary*

⁴ En vertu du paragraphe 8(1), le Tribunal entend les demandes présentées en application de la Partie VII de la *Loi sur la concurrence* de même que les questions s'y rattachant; le paragraphe 8(3) vise quant à lui la question de l'outrage au tribunal. Le paragraphe 9(1) porte que le Tribunal est une cour d'archives et qu'il a un sceau officiel dont l'authenticité est admise d'office. L'article 16 lui confère le pouvoir d'établir des règles d'application.

things, the following, which I find applicable to subsection 9(3):

A formal and serious statement of facts, reasons or arguments, made with a view to effecting some change, preventing some action, etc. . . . [Emphasis added.]

Strayer J. chose to restrict "representations" to mean only "argument" in the sense of persuasion and not proof. Under Strayer J.'s reasoning, the facts or reasons relied on by interveners to support their arguments would be provided by the Director (or possibly by the party against whom the Director was seeking an order).

But it is important to note that subsection 9(3) allows persons to intervene to make representations relevant to those proceedings in respect of any matter that affects that person. It is expressly recognized that orders of the Tribunal could be made that would affect the interveners, such as in the case at bar. If 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.

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 interveners 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 fail to see how allowing interveners to have an effective and meaningful intervention 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, cannot be reconciled with the adversarial or justiciable nature of proceedings before the Tribunal. Moreover such a role for interveners will not necessarily displace the

donne la suivante que j'estime applicable au paragraphe 9(3):

[TRADUCTION] Un exposé formel et sérieux de faits, de motifs ou d'arguments visant à apporter des changements, à prévenir certaines actions, etc. . . . [Non souligné dans le texte original.]

Dans son ordonnance, le juge Strayer a choisi de restreindre l'acception de ce terme à l'aspect «arguments», dans le sens de la persuasion et non de la preuve. D'après son raisonnement, les faits et les motifs sur lesquels les intervenants appuient leurs arguments proviennent du directeur (ou peut-être de la partie à l'égard de laquelle ce dernier demande une ordonnance).

Toutefois, il importe de souligner que le paragraphe 9(3) permet à une personne d'intervenir afin de présenter des observations qui se rapportent aux procédures et qui concernent des questions touchant cette personne. Il est ainsi expressément reconnu que le Tribunal peut rendre des ordonnances susceptibles de toucher les intervenants comme dans le cas sous étude. Or, si les intervenants peuvent présenter un exposé de faits, de motifs ou d'arguments sur les questions qui les touchent, on peut se demander s'ils ne devraient pas, à la discrétion de la cour suivant le principe général évoqué plus haut, être autorisés à présenter des éléments de preuve à l'appui des faits montrant en quoi ils sont concernés. De même, on peut se demander pourquoi les intervenants ne pourraient pas fonder leurs arguments ou leurs motifs sur des faits qu'ils auraient eux-mêmes eu l'occasion de produire en preuve.

Il me semble qu'il n'est pas satisfaisant de dire que les intervenants doivent se fier au directeur pour établir les faits (ou les motifs) sous prétexte qu'il est le seul à être partie, ou que seuls possèdent ce statut le directeur et les personnes à l'égard desquelles une ordonnance est demandée ou qu'ils ont entre eux un litige, ou encore que c'est au directeur que revient, en vertu de la *Loi sur la concurrence*, la conduite de la procédure.

Je vois mal en quoi le fait de donner aux intervenants l'occasion de montrer, de façon significative et efficace, l'effet qu'une ordonnance risque d'avoir sur eux—le tout sous la surveillance et à la discrétion du Tribunal—serait inconciliable avec le caractère contradictoire ou justiciable de l'instance. De plus, en jouant un tel rôle, les intervenants ne modifieraient pas nécessairement le statut

status of the parties before the Tribunal, the carriage of the matter by the Director, or the *lis* nature of the proceedings. 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.

My conclusion on this meaning of "representations" for the purpose of subsection 9(3) of the *Competition Tribunal Act* is strengthened when one looks to the wider context and nature of the proceedings under the *Competition Act*.

The purpose of the *Competition Act* as shown in section 1.1 [as enacted by S.C. 1986, c. 26, s. 19] thereof is extremely broad:

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

It is evident from the purpose clause that the effects of anti-competitive behaviour, such as a merger that has the result of substantially lessening competition, can be widespread and of great interest to many persons. In these matters, Parliament has provided for the Director to serve as the guardian of the competition ethic and the initiator of Tribunal proceedings under Part VII of the *Competition Act*; but 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 interveners not only to participate but also to do so effectively. A restrictive interpretation of subsection 9(3) could in some cases run counter to the effective handling of disputes coming before the Tribunal.

At issue in the case before us is, among other things, an order for dissolution, pursuant to section 64 of the *Competition Act*, of the merger of computer reservation systems in the airline business. Section 65 lists various factors that the Tribunal

des parties devant le Tribunal, ni la façon dont le directeur conduit la procédure ni le caractère litigieux de cette dernière. Je suis certain que les juges du Tribunal de la concurrence peuvent, au besoin, tenir compte de ces diverses considérations.

Ma conclusion en ce qui concerne le sens du terme «observations» aux fins du paragraphe 9(3) de la *Loi sur le Tribunal de la concurrence* est renforcée par l'examen du contexte et de la nature des procédures engagées sous le régime de la *Loi sur la concurrence*.

L'objet de cette loi, tel qu'il ressort de son article 1.1 [édicte par S.C. 1986, chap. 26, art. 19], est très vaste:

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficacité de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

Il est manifeste à la lecture de cette disposition que les agissements anti-concurrentiels, tel un fusionnement donnant lieu à une diminution sensible de la concurrence, peuvent avoir de grandes répercussions et susciter un intérêt des plus vifs chez de nombreuses personnes. Le Parlement a fait du directeur le gardien de l'éthique dans ce domaine, lui confiant le soin d'engager devant le Tribunal les procédures découlant de l'application de la Partie VII de cette Loi; mais parallèlement, le législateur a fourni à ceux qui peuvent être touchés la possibilité de participer aux procédures aux fins d'informer le Tribunal de l'impact que risquent d'entraîner sur eux les agissements faisant l'objet de la plainte. Il faut à mon avis présumer que le Parlement a voulu, non seulement autoriser les intervenants à participer aux procédures, mais également à le faire efficacement. En certains cas, une interprétation restrictive du paragraphe 9(3) pourrait compromettre le règlement satisfaisant des litiges portés devant le Tribunal.

Dans la présente espèce, la Cour est notamment saisie, conformément à l'article 64 de la *Loi sur la concurrence*, d'une demande d'ordonnance de dissolution du fusionnement des systèmes de réservation informatisés dans le secteur des lignes aériennes.

may consider in deciding whether to issue such an order. These factors are fairly broad and it would seem reasonable to assume that persons attaining intervener status under subsection 9(3) could be well-positioned to provide insights concerning them through argument and reasons based on facts. Moreover they 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.

It seems to me that permitting interveners to play a role wider than simply presenting argument is also a fairer way of treating them. Although the Director is supporting the wider interpretation before us, it is not difficult to envision future situations where the Director and an intervener might disagree on some matter of fact or evidence of which the Tribunal should be apprised. It is therefore not only logical to give the Tribunal the jurisdiction to decide the issue rather than simply leaving it to the Director to decide in each case, but it is also fair.

Fairness is a relevant consideration because subsection 9(2) of the *Competition Tribunal Act* expressly requires that proceedings before the Tribunal be dealt with as informally and as expeditiously as the circumstances and fairness allow. This point of fairness also answers the concern raised by Strayer J. that a wider role for interveners will prolong and complicate proceedings before and thereby delay decisions of the Tribunal. But, 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).

Finally, I refer to the view of Strayer J. that his conclusion for a narrow interpretation was strengthened when one looked to the wording of sections 97 and 98 of the *Competition Act*. Those sections, which were found by Strayer J. to be in a statute *in pari materia* with the *Competition Tribunal Act*, distinguished between making

nes. À l'article 65 sont énumérés les différents éléments dont le Tribunal peut tenir compte lorsqu'il détermine s'il y a lieu d'émettre une telle ordonnance. Ces facteurs couvrant un champ assez vaste, il paraît raisonnable de présumer que les personnes se qualifiant comme intervenantes aux termes du paragraphe 9(3) seraient bien placées pour éclairer le Tribunal à cet égard par des arguments et des motifs fondés sur des faits. Il peut en outre être allégué que, suivant la nature des questions soulevées et les circonstances de l'espèce, les intervenants pourraient démontrer plus efficacement l'existence de ces faits s'ils avaient aussi la possibilité de soumettre des éléments de preuve ou de contre-interroger les témoins.

Il me semble qu'en étant autorisés à jouer un rôle plus actif que de simplement présenter des arguments, les intervenants recevraient également un traitement plus équitable. Bien qu'en l'espèce le directeur appuie la thèse de l'interprétation large, il est facile d'envisager des situations où le directeur et un intervenant ne seraient pas d'accord sur une question de fait ou de preuve devant être soumise au Tribunal. Il est donc non seulement logique mais équitable de donner au Tribunal la compétence de trancher le débat au lieu d'en laisser chaque fois la responsabilité au directeur.

L'équité est un facteur important à considérer puisqu'aux termes mêmes du paragraphe 9(2) de la *Loi sur le Tribunal de la concurrence*, le Tribunal se doit d'agir sans formalisme, en procédure expéditive, dans la mesure où les circonstances et l'équité le permettent. Cet aspect rejoint la préoccupation exprimée par le juge Strayer, à savoir qu'une participation accrue des intervenants risquerait de prolonger et de compliquer les procédures se déroulant devant le Tribunal et d'en retarder par le fait même les décisions. Cependant, si tel était le cas, ce serait, à n'en pas douter, le prix à payer pour satisfaire à l'exigence expresse du paragraphe 9(2).

Considérons enfin l'opinion du juge Strayer selon laquelle la thèse de l'interprétation étroite est renforcée par le texte des articles 97 et 98 de la *Loi sur la concurrence*. Dans ces dispositions qui, de l'avis du juge Strayer, sont contenues dans une loi *in pari materia* avec la *Loi sur le Tribunal de la concurrence*, est établie une distinction entre le

representations and calling evidence; he concluded the same distinction should be made in interpreting subsection 9(3) of the *Competition Tribunal Act*.

I do not dispute his finding the statutes *in pari materia*; however, I do not accept that the choice of words in sections 97 and 98 of the *Competition Act* dictates their meaning in subsection 9(3) of the *Competition Tribunal Act*. There are several other sections in both statutes which use the words "representations" or "make representations". Sections 60 and 73 of the *Competition Act* allow interventions by the attorneys general of provinces "for the purpose of making representations" on behalf of provinces; subsections 22 [as enacted by S.C. 1986, c. 26, s. 24] (2) and (3) of the *Competition Act* allow interested persons "to make representations" with respect to proposed regulations relating to certain applications, orders and proceedings; and section 17 of the *Competition Tribunal Act* which invites interested persons "to make representations . . . in writing" with respect to any rules that the Competition Tribunal may make. I do not think that in each section of the two statutes the use of "representation" must necessarily be given the same meaning, especially where the context and purpose of a particular section may dictate otherwise. Sections 97 and 98 of the *Competition Act* deal with endowing the Director with the authority to appear before federal and provincial agencies or boards which raises different considerations from those raised by subsection 9(3) of the *Competition Tribunal Act*. It may be, although I refrain from any formal holding on the matter, that Parliament, out of an abundance of caution, has added the "calling of evidence" in sections 97 and 98 to ensure that making representations is not interpreted narrowly by the federal or provincial boards and agencies before which the Director is appearing. In any event, I believe the main task of a court is in each case to ascertain the meaning of a specific section by looking to its wording and context. The fact that Parliament has chosen a formulation of words in another section of a related statute which appears to convey a particular meaning should not of itself displace convincing reasons why the same interpretation should not apply to the section in issue before the court. The point made about sections 97 and 98 is, after all, a rule of interpretation that can be

fait de présenter des observations et celui de soumettre des preuves. Il en conclut que la même distinction doit s'appliquer au paragraphe 9(3) de la *Loi sur le Tribunal de la concurrence*.

^a Que ces lois soient *in pari materia*, je ne le conteste pas; ce que je ne peux accepter cependant, c'est que le choix des termes utilisés aux articles 97 et 98 de la *Loi sur la concurrence* en dicte la signification au paragraphe 9(3) de la *Loi sur le Tribunal de la concurrence*. En effet, les termes «observations» et «faire des observations» figurent dans plusieurs autres dispositions de ces deux lois. Par exemple, les articles 60 et 73 de la *Loi sur la concurrence* autorisent le procureur général d'une province à intervenir «pour présenter des observations» au nom de la province; aux paragraphes 22 [édicte par S.C. 1986, chap. 26, art. 24] (2) et (3) de cette même Loi, les personnes intéressées sont autorisées à «présenter des observations» à l'égard de projets de règlements relatifs à certaines demandes, ordonnances et procédures; en vertu enfin de l'article 17 de la *Loi sur le Tribunal de la concurrence*, le Tribunal invite les intéressés «à lui présenter par écrit leurs observations» à l'égard de toute règle d'application qu'il peut établir. Or, je ne crois pas que dans chacune de ces dispositions, le terme «observations» doive nécessairement revêtir la même signification, particulièrement lorsque le contexte et l'objet de la disposition s'y opposent. Les articles 97 et 98 de la *Loi sur la concurrence* confèrent au directeur le pouvoir de comparaître devant des organismes ou offices fédéraux et provinciaux où sont soulevés des éléments différents de ceux dont il est question au paragraphe 9(3) de la *Loi sur le Tribunal de la concurrence*. Il se peut, bien que je m'abstienne de toute conclusion formelle à ce sujet, que le Parlement ait, pour plus de précaution, ajouté la «soumission d'éléments de preuve» aux articles 97 et 98 afin que lesdits offices et organismes n'interprètent pas restrictivement le droit du directeur de présenter des observations. Quoi qu'il en soit, j'estime qu'il appartient à la cour, dans chaque cas, de déterminer le sens d'une disposition donnée en examinant le texte de cette disposition de même que le contexte dans lequel elle s'insère. Ainsi, le fait que le Parlement ait choisi d'utiliser, dans une autre disposition d'une loi connexe, une formulation qui paraît avoir une signification particulière, ne doit pas suffire à écarter les raisons par ailleurs convaincantes de

rebutted, and in this case has been, by more persuasive arguments.

In light of my reasons for allowing the appeal, I do not find it necessary to deal with other arguments of the appellant relating to the judgment of Strayer J. amounting to a denial of natural justice or as being contrary to the *Canadian Bill of Rights* [R.S.C. 1970, Appendix III].

CONCLUSION

Mindful of the ordinary dictionary meaning of "representations" as discussed above, and of the recognition in subsection 9(3) itself of interveners as persons who are affected by competition proceedings, and of the overall purpose and context of the *Competition Act* and proceedings thereunder, I conclude that the meaning of "representations" in subsection 9(3) of the *Competition Tribunal Act* is not as restrictive as decided by Strayer J. I would therefore allow the appeal and the cross-appeal, set aside the decision of Strayer J., and refer the matter back to the Tribunal on the following bases:

- (a) that the Tribunal is not precluded, in exercising its inherent discretion from allowing interveners to fully participate in the proceedings before it, including, if it so determines, the right to discovery, the calling of evidence and the cross-examination of witnesses; and
- (b) that the specific role of the interveners in this proceeding should be left to the Tribunal to decide, in the circumstances of this case, but in accordance with fairness and fundamental justice and subject to the requirements of subsection 9(3) that the interveners' representations must be relevant to this proceeding in respect of any matter affecting those interveners.

croire que la disposition en litige en l'espèce devrait recevoir la même interprétation. Le moyen tiré des articles 97 et 98 n'est après tout qu'une règle d'interprétation dont l'application peut être réfutée—et elle l'a été dans la présente affaire—par des arguments qui emportent la conviction.

Vu ces motifs, il n'y a pas lieu que je me prononce sur les autres arguments de l'appelante à l'encontre du jugement du juge Strayer, savoir le déni de justice naturelle ou la contravention à la *Déclaration canadienne des droits* [S.R.C. 1970, Appendice III].

CONCLUSION

Étant donné la signification ordinaire du terme «observations» selon le dictionnaire ainsi qu'il appert de l'examen ci-haut, et vu la reconnaissance expresse au paragraphe 9(3) des intervenants comme personnes touchées par les procédures en matière de concurrence, vu enfin l'objet et le contexte global de la *Loi sur la concurrence* et des procédures y relatives, j'en viens à la conclusion que le terme «observations» figurant au paragraphe 9(3) de la *Loi sur le Tribunal de la concurrence* n'est pas utilisé dans un sens aussi restrictif que l'a affirmé le juge Strayer. En conséquence, je suis d'avis d'accueillir l'appel et le contre-appel, d'infirmer la décision du juge Strayer et de renvoyer l'affaire au Tribunal, eu égard aux principes suivants:

- a) rien n'empêche le Tribunal, dans l'exercice de sa discrétion inhérente, d'autoriser les intervenants à participer pleinement aux procédures dont il est saisi en leur permettant notamment, s'il en décide ainsi, de participer à la communication, de présenter des éléments de preuve et de contre-interroger les témoins;
- b) il appartient au Tribunal de déterminer le rôle spécifique que seront appelés à jouer les intervenants dans la présente procédure, compte tenu des circonstances de l'espèce, mais dans le respect des principes d'équité et de justice fondamentale et sous réserve des exigences du paragraphe 9(3) portant que les observations des intervenants doivent se rapporter à cette procédure et concerner des questions qui les touchent.

The only matter remaining to be considered is the question of costs. Neither the appellant nor any of those supporting it asked for costs either in their memoranda or orally at the hearing of the appeal. On the other hand, counsel for the respondents appearing on the appeal asked, in their memorandum, that the appeal be dismissed with costs. They did not, however, make any oral argument with respect to costs. The position then of the Court is that no argument, written or oral, has been addressed to it in this regard. However, I am of the view that the question of costs should be dealt with.

Subsection 13(1) of the *Competition Tribunal Act* provides that any decision or order of the Tribunal may be appealed to this Court "as if it were a judgment of the Federal Court—Trial Division." Accordingly, it would seem that costs should be disposed of in an appeal from the Tribunal on a basis similar to that employed in appeals from the Trial Division. Under new Rule 344 [as am. by SOR/87-221], which came into effect on April 1, 1987, it seems clear that an award of costs is in the complete discretion of the Court. Subsection (3) of Rule 344 sets out a number of matters that the Court is entitled to consider when awarding costs. One of the matters enumerated is the result of the proceeding. Since the appellant and those supporting it have been successful in this appeal, I consider this to be a cogent reason, in the circumstances of this case, for awarding costs. A perusal of the various other matters enumerated in subsection (3), when they are related to the circumstances of this appeal, do not persuade me otherwise.

I should add that, were it not for the provisions of subsection 13(1) of the *Competition Tribunal Act*, the Court's discretion under Rule 344(1) would have been displaced by the provisions of Rule 1312, which is the general rule applicable to appeals from tribunals other than the Trial Division. That Rule provides:

Rule 1312. No costs shall be payable by any party to an appeal under this Division to another unless the Court, in its discretion, for special reasons, so orders.

Il reste à trancher la question des dépens. Ni l'appelante, ni les parties qui l'ont appuyée n'ont demandé qu'ils leur soient adjugés, que ce soit dans leurs exposés ou oralement lors de l'audition de l'appel. Les avocats des intimés ont par contre demandé dans leur exposé que l'appel soit rejeté avec dépens. Ils n'ont toutefois pas présenté d'arguments oraux à cet effet. La Cour estime donc qu'aucun argument, oral ou écrit, n'a été porté à son attention à ce sujet. Je suis néanmoins d'avis qu'il convient de statuer sur les dépens.

Le paragraphe 13(1) de la *Loi sur le Tribunal de la concurrence* dispose que les décisions ou ordonnances du Tribunal sont susceptibles d'appel devant la présente Cour «tout comme s'il s'agissait de jugements de la Division de première instance de cette Cour». Par conséquent, il semble que la question des dépens doive être réglée, dans le cas d'une décision du Tribunal frappée d'appel, de la même façon que dans le cas d'un appel en provenance de la Division de première instance. Or, en vertu de la nouvelle Règle 344 [mod. par DORS/87-221] en vigueur depuis le 1^{er} avril 1987, il semble manifeste que la Cour a entière discrétion pour adjuger les dépens. Le paragraphe (3) de cette Règle énumère une série de facteurs dont la Cour a le droit de tenir compte à cet égard, l'un d'eux étant le résultat de l'instance. L'appelante et les parties qui l'ont appuyée ayant eu gain de cause en l'espèce, j'estime qu'il s'agit, dans les circonstances, d'une raison suffisante pour adjuger des dépens. L'examen des autres facteurs énumérés, dans la mesure où ils se rapportent aux circonstances du présent appel, n'ébranle pas ma conviction.

Je dois cependant ajouter que, n'eussent été les dispositions du paragraphe 13(1) de la *Loi sur le Tribunal de la concurrence*, la discrétion dont jouit la Cour en vertu de la Règle 344(1) aurait dû s'exercer en conformité avec les dispositions de la Règle 1312, laquelle constitue la règle générale applicable aux appels émanant de tribunaux autres que la Division de première instance. Cette Règle est ainsi libellée:

Règle 1312. Il n'y aura pas de dépens entre parties à un appel interjeté sous le régime du présent chapitre, à moins que la Cour, à sa discrétion, ne l'ordonne pour une raison spéciale.

If that Rule were otherwise to apply here, I would have had no hesitation in concluding that costs should not be awarded unless special reasons to the contrary had been established on the record. However, in view of the words used in section 13 *supra*, I think Rule 344(1) and not Rule 1312 applies to this appeal and because, if this were an appeal from the Trial Division, I would award costs for the reasons expressed earlier herein, I would allow this appeal and the cross-appeal with costs, if asked for.

HEALD J.: I concur.

STONE J.: I agree.

Si je devais appliquer cette Règle à l'espèce, je n'aurais aucune hésitation à conclure qu'il ne doit pas y avoir d'adjudication de dépens à moins qu'une raison spéciale n'apparaisse au dossier. ^a Cependant, vu le texte de l'article 13 précité, j'estime que c'est la Règle 344(1), et non la Règle 1312, qui s'applique dans le présent cas: comme, pour les motifs déjà exprimés, j'adjugerais des dépens s'il s'agissait d'un appel provenant de la ^b Division de première instance, je suis d'avis d'accueillir l'appel et le contre-appel avec dépens, si demande en est faite.

LE JUGE HEALD: Je souscris à ces motifs.

^c LE JUGE STONE: Je suis d'accord avec ces motifs.

Air Canada, Air Canada Services Inc., PWA Corporation, Canadian Airlines International Ltd., Pacific Western Airlines Ltd., Canadian Pacific Airlines Ltd., 154793 Canada Ltd., 153333 Canada Limited Partnership and The Gemini Group Automated Distribution Systems Inc. Appellants

v.

American Airlines Inc., Wardair Canada Inc. and Consumers' Association of Canada Respondents

and

The Director of Investigation and Research Respondent

and

The Attorney General of the province of Manitoba and the Competition Tribunal Respondents

INDEXED AS: AMERICAN AIRLINES INC. v. CANADA (COMPETITION TRIBUNAL)

File No.: 21275.

1989: March 1.

Present: Dickson C.J. and Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka and Cory JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Courts — Competition Tribunal — Jurisdiction — Leave to intervene — Role of the interveners — Whether interveners may participate fully in the proceedings — Competition Tribunal Act, S.C. 1986, c. 26, s. 9(3).

APPEAL from a judgment of the Federal Court of Appeal (1988), 89 N.R. 241, setting aside an order of the Competition Tribunal. Appeal dismissed, Lamer J. dissenting.

J. C. Major, Q.C., Jo'anne Strekaf, M. E. Rothstein, Q.C., and Marc Monnin, for the appellants.

Colin L. Campbell, Q.C., for the respondent American Airlines Inc.

Air Canada, Services Air Canada Inc., PWA Corporation, Lignes Canadien International Ltée, Pacific Western Airlines Ltd., Lignes Aériennes Canadien Pacifique Ltée, 154793 Canada Ltd., 153333 Canada Limited Partnership et The Gemini Group Automated Distribution Systems Inc. Appelantes

c.

American Airlines Inc., Wardair Canada Inc. et l'Association des consommateurs du Canada Intimées

c et

Le directeur des enquêtes et recherches Intimé

et

Le procureur général de la province du Manitoba et le Tribunal de la concurrence Intimés

e RÉPERTORIÉ: AMERICAN AIRLINES INC. c: CANADA (TRIBUNAL DE LA CONCURRENCE)

N° du greffe: 21275.

1989: 1^{er} mars.

Présents: Le juge en chef Dickson et les juges Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka et Cory.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

g

Tribunaux — Tribunal de la concurrence — Compétence — Autorisation d'intervention — Rôle des intervenants — Les intervenants peuvent-ils participer pleinement aux procédures? — Loi sur le Tribunal de la concurrence, S.C. 1986, chap. 26, art. 9(3).

POURVOI contre un arrêt de la Cour d'appel fédérale (1988), 89 N.R. 241, qui a infirmé une ordonnance du tribunal de la concurrence. Pourvoi rejeté, le juge Lamer est dissident.

J. C. Major, c.r., Jo'anne Strekaf, M. E. Rothstein, c.r., et Marc Monnin, pour les appelantes.

Colin L. Campbell, c.r., pour l'intimée American Airlines Inc.

Sandra J. Simpson and Trevor Whiffen, for the respondent the Director of Investigation and Research.

N. J. Schultz, for the respondent the Consumers' Association of Canada.

Neville Shende, Q.C., for the respondent the Attorney General of Manitoba.

The judgment was delivered orally by

THE CHIEF JUSTICE—The judgment of the Court will be delivered by Mr. Justice Lamer.

LAMER J.—A majority is of the view that this appeal fails substantially for the reasons given by Chief Justice Iacobucci for the Federal Court of Appeal. In dissent, Mr. Justice Lamer, adopting substantially the reasons of Mr. Justice Strayer, would allow the appeal, set aside the judgment of the Federal Court of Appeal, and restore the order granted by Strayer J.

The appeal is accordingly dismissed with costs, Lamer J. dissenting.

Judgment accordingly.

Solicitors for the appellants: Bennett, Jones, Calgary; Aikins, MacAulay & Thorvaldson, Winnipeg.

Solicitors for the respondent American Airlines Inc.: McCarthy & McCarthy, Toronto.

Solicitors for the respondent the Director of Investigation and Research: Sandra J. Simpson and Trevor Whiffen, Toronto.

Solicitors for the respondent the Consumers' Association of Canada: Lang, Michener, Lash, Johnston, Ottawa.

Solicitor for the respondent the Attorney General of Manitoba: Neville Shende, Winnipeg.

Sandra J. Simpson et Trevor Whiffen, pour l'intimé le directeur des enquêtes et recherches.

N. J. Schultz, pour l'intimée l'Association des consommateurs du Canada.

Neville Shende, c.r., pour l'intimé le procureur général du Manitoba.

Version française du jugement rendu oralement par

LE JUGE EN CHEF—Le jugement de la Cour sera prononcé par le juge Lamer.

LE JUGE LAMER—La Cour, à la majorité, estime que ce pourvoi échoue essentiellement pour les motifs énoncés par le juge en chef Iacobucci en Cour d'appel fédérale. En dissidence, le juge Lamer, qui adopte essentiellement les motifs du juge Strayer, aurait accueilli le pourvoi, infirmé l'arrêt de la Cour d'appel fédérale et rétabli l'ordonnance accordée par le juge Strayer.

Le pourvoi est donc rejeté avec dépens, le juge Lamer est dissident.

Jugement en conséquence.

Procureurs des appelantes: Bennett, Jones, Calgary; Aikins, MacAulay & Thorvaldson, Winnipeg.

Procureurs de l'intimée American Airlines Inc.: McCarthy & McCarthy, Toronto.

Procureurs de l'intimé le directeur des enquêtes et recherches: Sandra J. Simpson et Trevor Whiffen, Toronto.

Procureurs de l'intimée l'Association des consommateurs du Canada: Lang, Michener, Lash, Johnston, Ottawa.

Procureur de l'intimé le procureur général du Manitoba: Neville Shende, Winnipeg.