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After the *Visa/Mastercard*
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I. INTRODUCTION

The Canadian *Competition Act* (the "Act") was amended in 2009 to repeal the former criminal prohibition against price maintenance and introduce a new civil "reviewable practice" which prohibits suppliers from adversely affecting competition by "influencing upward or discouraging the reduction" of resale prices.

The Competition Bureau (the "Bureau") brought its first case under the new price maintenance provision in 2010 alleging that certain of Visa and MasterCard's "merchant acceptance rules" had the effect of "influencing upward or discouraging the reduction" of credit card acceptance fees charged to merchants, to the detriment of competition in the relevant market.

The Bureau's price maintenance case against Visa and MasterCard attracted a great deal of interest and attention in Canada. Ultimately, the Competition Tribunal (which adjudicates such matters) ruled against the Bureau because it concluded that the Bureau's case did not fit within the intended scope of the new price maintenance provision.

In many respects, the Bureau proceedings against Visa and MasterCard can be regarded as a "one off" case with only minor implications for the future enforcement of the price maintenance provision in Canada. The case certainly did not involve a typical resale price maintenance scenario. However, it is also possible that the *Visa/MasterCard* case may one day be regarded as the high water mark for price maintenance enforcement in Canada. That is because the Bureau is currently signaling that it does not consider resale price maintenance to be a top enforcement priority. If that truly turns out to be the case, the result would be consistent with the recent trend in Canadian competition law to downplay enforcement of pricing conduct outside of horizontal price-fixing.

II. PRICE MAINTENANCE IN CANADIAN COMPETITION LAW

Section 76 of the Act provides that the Competition Tribunal (the "Tribunal") may make an order if it finds that, among other things (i) a person who is engaged in the business of producing or supplying a product, (ii) has, by agreement, threat, promise or any like means, (iii) influenced upward or discouraged the reduction of the price at which the person's customer, or any other person to whom the product comes for resale, supplies or offers to supply or advertises a product within Canada, and (iv) that this conduct has had, is having or is likely to have an "adverse effect on competition in a market."

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A supplier is also prohibited under section 76 from "discriminating" against any person because of the "low pricing policy" of that person. Again, this prohibition only applies if the conduct "has had, is having or is likely to have an adverse effect on competition in a market."

It has been held that in order for there to be an "adverse effect on competition in a market," the conduct must create, enhance, or preserve a position of market power. Broadly speaking, the Bureau takes the view that a market share below 35 percent will normally not give rise to concerns of market power.

Where the Tribunal determines that the elements of section 76 are established, it may make an order prohibiting the person from continuing to engage in the impugned conduct. Damages and/or fines are not available as remedies.

Section 76 was enacted as part of a series of amendments to the Act passed in 2009. Prior to 2009, price maintenance was a *per se* criminal offense. The 2009 amendments repealed the criminal prohibition against price maintenance and, with the enactment of section 76, made this practice a civil matter subject to review by the Tribunal. Importantly, the amendments also introduced a market impact element (adverse effect in a market) in place of the former *per se* standard.

Repeal of the criminal price maintenance offense was first recommended by a report commissioned by the Bureau in 1999. The report argued that a *per se* prohibition against resale price maintenance was inconsistent with economic theory and suggested that price maintenance should be subject instead to civil review. Subsequent reports in 2002 and 2008 also recommended the decriminalization of price maintenance in Canada. These recommendations were ultimately put into effect in 2009 with the repeal of the criminal resale price maintenance offense and the enactment of the new civil provision in section 76. The Act's other pricing offenses were repealed at the same time, including the criminal offenses of price discrimination and geographic price discrimination. Again, the rationale was that these offenses criminalized types of vertical conduct that are often neutral or even pro-competitive and thus not deserving of criminal sanction.

III. VISA/MASTERCARD—FIRST DECISION UNDER THE NEW PRICE MAINTENANCE PROVISION

Since 2009, a growing number of manufacturers has taken advantage of the greater flexibility offered by section 76 to introduce various types of pricing programs in Canada. These can take the form of programs setting a minimum advertised price (MAP programs) and/or setting a minimum resale price.

Although we are now seeing more resale pricing programs in Canada, all of the most recent attention surrounding the price maintenance provision has focused on the Bureau's application under section 76 to prohibit certain practices adopted by Visa and MasterCard to control the conduct of merchants who accept their cards. To date, this is the only case to have been brought by the Bureau under section 76.

A. Background to the Visa/MasterCard Case

As elsewhere in the world, credit and debit card transactions are an important part of retail purchasing in Canada. According to recent data (for 2007), almost 50 percent of all retail transactions in Canada are paid for with credit or debit cards.

Interchange fees and merchant application rules became contentious issues in Canada after both Visa and MasterCard changed their fee structures for credit cards in 2008.

Many merchants in Canada objected to these changes. They complained that the new interchange fee formulas, combined with the introduction of premium cards, made it more difficult for them to control and predict the level of merchant fees that they would face at the end of each month. Even more disturbing, the net result was to introduce significantly higher fees. Some merchants said that their fees had gone up by 30 percent.

Complaints were also raised about certain of the operating networks' "merchant acceptance rules," such as the "no surcharge" rule, the "honor all card" rule, and the "no discrimination" rule. The "no surcharge" rule prohibits merchants from applying a surcharge to credit card purchases in order to steer consumers to other payment forms; the "honor all cards" rule requires that merchants accept all credit cards offered by a network; and the "no discrimination" rule prohibits merchants from distinguishing in their treatment of cards from different networks. Merchants in Canada alleged that these rules limited their ability to direct consumers to lower-cost payment methods and thus to control their payment costs.

In response to the chorus of complaints from merchant and consumer groups, the Canadian Senate voted in March 2009 to "examine and report on the credit and debit card systems in Canada and their relative rates and fees, in particular for businesses and consumers." The hearings were convened by the Senate's Standing Committee on Banking, Trade and Commerce (the "Senate Committee"). The Senate Committee issued its report in June 2009 (the "Senate Report").

On the issue of interchange fees for credit cards, the Committee found that the Canadian credit card market is characterized by unequal bargaining power as between merchants and the credit card companies. The Committee was struck by how many merchants claimed that they had to continue accepting credit cards to avoid losing customers and sales, which left them with no leverage to resist rising fees and negotiate more favorable payment arrangements.

The Committee recommended that the federal government appoint an oversight board with the mandate of determining ways that merchants could be empowered by improving the quality and range of information available to them. The Senate Committee also recommended that the board develop a "code of conduct" to govern practices for setting fees and rates. The Senate Committee further recommended that merchants be permitted to bargain collectively when negotiating payment card conditions and fees, and that this form of cooperation should be exempt from the provisions of the Act.

On the issue of merchant application rules, the Senate Committee recommended that merchants be permitted to impose surcharges or offer discounts for different payment methods (although it expressed a preference for surcharges). Merchants would be able to inform customers about lower-cost payment methods and would be obliged to display, at the point-of-purchase, the amount of any applicable surcharge or discount.

The Senate Committee also expressed its strong belief that networks should not be able to impose "honor all card" rules, whether to require acceptance of all credit cards, including premium cards with higher interchange fees, or to require acceptance of both credit cards and debit cards.

The Bureau was investigating these issues as well. During the Senate Committee hearings on credit and debit cards, for example, a representative of the Bureau testified that it was investigating the interchange fee issue to determine if the credit card companies were in violation of section 79 of the *Competition Act*, which prohibits "dominant" parties from engaging in "anti-competitive acts" that result in a "substantial lessening or prevention of competition." The Bureau confirmed that this investigation remained ongoing at a separate hearing into credit and debit card issues conducted by the House of Commons Standing Committee on Industry, Science and Technology in November 2009.

Ultimately, the Bureau decided to bring its application under section 76 of the Act, the civil price maintenance provision.

The Bureau's case focused on the impact of three types of merchant application rules: the "no surcharge" rule, the "honor all cards" rule, and the "no discrimination" rule (the latter only imposed by MasterCard). The Bureau alleged that these rules (collectively, the "Merchant Rules") constrain merchants from encouraging customers to use lower-cost methods of payment, thereby limiting the ability of merchants to negotiate lower interchange and other fees that they must pay for the use of credit cards.

These fees (referred to collectively as "Card Acceptance Fees") are paid by merchants to entities known as Acquirers, which provide the services required by merchants to accept credit cards as a form of payment. Since the Merchant Rules are established by Visa and MasterCard in their own respective agreements with Acquirers, the Bureau alleged that Visa and MasterCard's conduct had the effect of "influencing upward or discouraging the reduction of" the Card Acceptance Fees contrary to section 76. The Bureau further alleged that this conduct reduced competition by preventing merchants from playing one credit card network against the other in order to negotiate reduced Card Acceptance Fees, and by otherwise reducing the incentive of the two networks to compete against each other by lowering their fees.

B. The Competition Tribunal's Decision

The Tribunal heard the case in May and June of 2012. It released the full text of its decision in September 2013. In the end, the Tribunal dismissed the Bureau's application on the grounds that section 76 did not apply.

The Bureau had argued that section 76 was broad enough to extend beyond the classic resale price maintenance scenario, provided that the person whose prices are being affected qualifies as a "customer." The Tribunal disagreed, holding that the "resale" of a product is an essential element of section 76, and that there was no such "resale" in this case. Specifically, the Tribunal found that while Visa and MasterCard provide one set of services to entities functioning as Acquirers in the credit card system ("Credit Card Network" services), these Acquirers provide a different set of services to merchants to enable them to accept credit card payments ("Credit Card Acceptance" services). As such, there is no "resale" to fit within section 76 since Acquirers do not "resell" to merchants any services they receive from Visa/MasterCard.

Interestingly, the Tribunal commented that the Bureau's concerns appeared to "be more directed to abuse of dominance by the two credit card companies." However, the Tribunal also recognized that, pursuant to existing Canadian jurisprudence, the Act's abuse of dominance

provision is limited to conduct the purpose of which is to exercise a predatory, exclusionary, or disciplinary negative effect on a *competitor*, which would not have fit the fact situation here.

Although the Tribunal dismissed the Bureau's application, it then went on to consider, in *obiter*, the substantive merits of the case in the event that it was wrong in its conclusions. In this *obiter* portion of its decision, the Tribunal concluded that the Visa and MasterCard "no surcharge" rules (but not the other rules) "influenced upward" the Card Acceptance Fees paid by merchants. The Tribunal reasoned that, in the absence of these rules, either surcharging or the threat of it would steer or threaten to steer credit card transaction volume to other means of payment and that this, in turn, would either constrain the fees charged to merchants or bring about the reduction of fees charged to Acquirers that are then passed on to merchants, such as interchange fees.

For similar reasons, the Tribunal also concluded that the "no surcharge" rules adversely affect competition in the market. Again, this was based on the Tribunal's finding that the "no surcharge" rule eliminates the prospect of an actual or threatened loss of transaction volume that otherwise could serve to incentivize competition between Visa and MasterCard.

Having concluded its substantive analysis, the Tribunal then turned to the issue of exercise of discretion. As noted above, section 76 of the Act only provides that the Tribunal *may* issue an order where all of the elements of the provision are satisfied, not that it is obliged to do so. In that respect, section 76 is similar to the other reviewable practices provisions in the Act (such as abuse of dominance).

The Tribunal members were unanimously of the view that, even if they had found a violation of section 76 in this case, they would not have granted relief against Visa and MasterCard. The Tribunal acknowledged that this type of result is exceptional, but it was satisfied on the evidence that "the proper solution to the legitimate concerns raised by the [Competition Bureau] is going to require a regulatory framework." Based on evidence of the experiences in other jurisdictions, the Tribunal believed that there would be a need for "ongoing adjustment and stakeholder consultation" which is more readily accomplished under a regulatory scheme and for which the "blunt instrument" of a Tribunal order is not suitable.

IV. CONCLUSION

The Bureau announced on September 30, 2013 that it would not appeal the Tribunal's decision dismissing its application. Commissioner of Competition John Pecman stated that the Bureau intends to focus its efforts instead on alternate means of addressing competition issues in the supply of credit card services in Canada, including working with the federal government and stakeholders to advocate for appropriate changes.

To some degree, the Bureau's decision not to appeal the Tribunal's *Visa/MasterCard* decision may be a function of the unique set of circumstances involved in the case and the novel approach the Bureau took to the price maintenance provision in this instance. The *Visa/MasterCard* case obviously did not involve the typical price maintenance scenario, and thus a further appeal might have been of only limited value in clarifying the law in this regard.

The Bureau's decision not to appeal may also reflect a more general lack of enthusiasm for taking on price maintenance cases under section 76, at least if the conduct does not have an

egregious effect on competition. As noted above, this sentiment strongly influenced the decision to repeal the criminal price maintenance offense in the first place, as well as to repeal other pricing offenses, such as price discrimination.

Finally, the Bureau's decision dovetails with Commissioner Pecman's commitment to make greater use of the Bureau's advocacy powers to address competition issues in the Canadian economy, particularly in regulated sectors. Mr. Pecman first raised this prospect in speeches delivered earlier this year, when he was still Interim Commissioner. More recently, the Bureau issued a call on September 10, 2013 for public input into which areas of the economy could benefit from the Bureau's targeted advocacy for increased competition.

However, if price maintenance issues are no longer attracting headlines in Canada, another form of pricing conduct is moving to the top of the public agenda.

There has been a great deal of concern in recent years about multinational manufacturers pricing their products higher in Canada than in the United States. Some studies have shown that Canadian prices for many consumer goods are, on average, 15 percent higher than in the United States.

These price differentials are usually explained away on the basis of factors such as differences in transportation costs, higher costs of doing business in Canada, and a market that is roughly 1/10 the size of the United States. However, the Canadian government is now investigating whether there are proactive ways to address and ameliorate the perceived inequities of this type of "country pricing."

According to reports, it appears that one of the avenues being explored is whether the Act should be amended (or perhaps, more accurately, re-amended) to bring back some form of prohibition against geographic price discrimination. It is still far from clear what form this prohibition would take or even if the proposal will ever get off the ground. However, it could mark an interesting reversal in the recent trend in Canada to reduce restrictions on pricing conduct, with the important exception—of course—of horizontal price-fixing.