Credit card surcharges in Canada: what you need to know

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Between 2010 and 2018, five class actions involving merchant fees were launched in Alberta, British Columbia, Ontario, Québec and Saskatchewan (collectively, the Class Actions).[1] One of the outcomes to the Class Actions is that the leading credit card networks whose rules prohibited surcharging to allow Canadian businesses and merchants to apply a surcharge to those credit cardholders from Oct. 6, 2022.

Previous surcharge rules

A **surcharge** is a fee that a merchant or business may add to a transaction where a customer chooses to pay by credit or debit card.

Québec's *Consumer Protection Act* requires disclosing all-inclusive prices except in limited cases, such as sales taxes (see Section 224 c.). The courts have concluded that this obligation makes it illegal to apply a surcharge.

Aside from Québec, no other province or territory in Canada has laws that prohibit surcharging.[2] It should be noted that merchants should consider recent changes to the *Competition Act* with respect to drip pricing when deciding whether to impose a surcharge. Drip pricing means offering a product or service at an unattainable price because consumers must also pay additional charges or fees to buy the product or service. This is considered a deceptive marketing practice and is prohibited under the civil and criminal provisions of the *Competition Act*.

Nevertheless, before Oct. 6, 2022, businesses were prohibited from surcharging when accepting payments by commonly used credit cards due to standard terms and conditions imposed by those credit card networks.

As part of their settlement in the Class Actions leading credit card networks agreed to amend their "No Surcharge Rule", permitting merchants to surcharge. Beginning Oct. 6, 2022, these credit card network rules permit merchants to surcharge in Canada.

Surcharges

Every time a business or merchant accepts payment from a consumer by credit card, that business must pay a fee (the Merchant Discount Fee). The Merchant Discount Fee is a fee the merchant pays to the business, which processes the payment (the Acquirers). The Merchant Discount Fee is determined by Acquirers based on their business models and is charged to merchants for accepting credit cards. The Merchant Discount Fee is generally a percentage of the price paid by the consumer for a merchant's good or service.

In order to accept payments by certain major credit cards, businesses or merchants must agree to the network's respective rules, as part of their agreement with their Acquirers. These rules included a prohibition to impose a surcharge on purchases made using any credit card (the No Surcharge Rule).

In 2013, the Competition Bureau unsuccessfully challenged the No Surcharge Rule for price maintenance within the meaning of the *Competition Act*. The Competition Bureau's complaint alleged that the "No Surcharge Rule" was price maintenance within the meaning of Section 76 of the *Competition Act*. The Competition Tribunal held that price maintenance requires a resale, or that the Commissioner of Competition had not established that certain credit card network's customers, resell their products. Subsequently, the No Surcharge Rule was challenged as part of the Class Actions.

The Class Actions

In the Class Actions, approximately 670,000 merchants and businesses in Canada (collectively, the Plaintiffs), claimed damages against certain card networks and financial institutions (collectively, the Defendants).

Over the years, various settlements between the Defendants and the Plaintiffs were reached in the Class Actions. In 2021, the final settlement was reached. The total net settlement of $188,530,000.00 (less fees and disbursements will be distributed to members of the class).[3]

The Plaintiffs' complaint centered around the standard terms and conditions imposed by leading card networks, which serve as prerequisites for merchants and businesses to accept payments by credit card, imposed unlawful constraints on merchants and businesses. Namely, the Plaintiffs alleged that the requirement that merchants must honour all credit cards of the same network (the Honour All Cards Rule) and the No Surcharge Rule had the effect of constraining competition for credit card networks. The Honour All Cards Rule required merchants to accept all credit cards types while the No Surcharge Rule prohibited merchants from passing additional expense to consumers.

As part of their settlement in the Class Actions, the leading card networks agreed to amend their No Surcharge Rule to permit merchants to surcharge, subject to certain terms and conditions. In 2022, such merchant rules were amended to permit surcharging under prescribed conditions.

Conclusion

Businesses or merchants seeking to impose a surcharge for payments made by credit cards in Canada should carefully consider the terms and conditions set out by their card

network in this respect and the provisions regarding drip pricing in the *Competition Act*. Advance notice of a business's intention to impose a surcharge may be required and surcharging not be possible under certain circumstances. In addition, businesses must clearly disclose surcharges and fees to consumers before a transaction is completed.

Our team at BLG can help navigate these changes. For any questions, please reach out to any of the authors or key contacts listed below.

[1] The following proceedings made up the Class Actions: *Bancroft-Snell v. Visa Canada Corporation* (Ontario), *Coburn and Watson's Metropolitan Home, dba "Metropolitan Home" (previously, Watson) v. Bank of America Corporation* (British Columbia), *Macaronies Hair Club and Laser Center Inc., Operating as Fuze Salon v. BofA Canada Bank* (Alberta), Hello Baby Equipment Inc. v BofA Canada Bank (Saskatchewan) and 9085-4886 Québec Inc. v Visa Canada Corporation (Québec).

[2] Québec's *Consumer Protection Act*, CQLR, c. P-40.1, prohibits surcharging with respect to natural persons (consumers).

[3] *Coburn and Watson's Metropolitan Home v Bank of Montreal,* 2021 BCSC 2398 at para 5.

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