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**THE REDEMPTION OF S. 76: FINDING MEANING FOR RESALE  
PRICE MAINTENANCE IN THE SERVICE CONTEXT AFTER VISA-  
MASTERCARD**

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*This Article argues that the result in *The Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated* revealed a gap in the Competition Act's price maintenance provision with respect to the meaning of a service and that of the resale of a service. It summarizes the history of price maintenance in Canada, reviews the economic logic that motivates Canadian competition policy towards resale price maintenance in the goods context, develops a working interpretation for services and the resale of services, and demonstrates that that interpretation is compatible with the policy concerns behind section 76.*

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*J'affirme d'abord que le résultat de la décision dans l'affaire *La commissaire de la concurrence c. Visa Canada Corporation et MasterCard International Incorporated* a révélé une lacune dans la disposition sur le maintien des prix de la Loi sur la concurrence en ce qui concerne la définition d'un service et celle de la revente d'un service. Je passe ensuite en revue l'historique de la notion de maintien des prix au Canada, analyse la logique économique qui sous-tend les politiques canadiennes en matière de concurrence à l'égard de la maintenance des prix pour ce qui est des marchandises, mets au point une interprétation opérationnelle des services et de la revente des services et démontre que cette interprétation est compatible avec les préoccupations de politique sous-jacentes à l'article 76.*

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**O**n June 3, 1975, in a meeting of the Standing Committee on Banking, Trade and Commerce, Norman Cafik, the Parliamentary Secretary to the Minister of Consumer and Corporate Affairs, proposed an amendment to the *Combines Investigation Act*'s price maintenance provision so that the provision would explicitly include the conduct of "one who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards."<sup>2</sup> The

Minister, André Ouellet, supporting the amendment, explained that it was intended to ensure that credit card companies would not be able to prohibit merchants from offering discounts on transactions settled in cash.<sup>3</sup> The amendment succeeded and remains in force, with identical wording, in the price maintenance provision found in the current *Competition Act*.<sup>4</sup>

In a limited sense, Mr. Cafik's amendment appears to have been successful. Retailers are permitted to offer discounts for cash and their right to do so was endorsed by the quasi-regulatory Code of Conduct for the Credit and Debit Card Industry in Canada promulgated by the Minister of Finance in August 2010.<sup>5</sup> For more than thirty years, however, Visa's International Operating Regulations have included a "No-Surcharge Rule" that prevents merchants accepting Visa-branded cards from levying additional charges on any transactions made with such cards, including premium cards, which impose higher transaction fees on merchants. The Rule also requires Issuers (the financial institutions that issue Visa-branded cards) and Acquirers (companies that provide point-of-sale authorization services allowing merchants to access the Visa network and verify payments) to ensure that merchants comply. MasterCard imposes a similar rule.<sup>6</sup>

Though the No-Surcharge Rule is, of course, slightly different from the hypothetical rule prohibiting cash discounting at which Mr. Cafik's amendment was aimed, it is clear that they effect similar constraints on merchants' behaviour by making it more difficult to give customers an incentive to use cash or non-premium cards, which cost less to accept. It is surprising, then, that when the No-Surcharge Rule came before the Competition Tribunal in *The Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated*—the first price maintenance case involving credit cards since the amendment—the Tribunal held, in spite of explicit statutory instructions regarding the credit card business, that section 76, the price maintenance provision currently in force, could not apply.<sup>7</sup>

The essential element of price maintenance has always been the exertion of influence by one party on the price at which another party sells a product. The Tribunal accepted in *Visa-MasterCard* that the No-Surcharge Rule had influenced upward the fees paid by Acquirers to Visa and MasterCard ("Interchange Fees") and by merchants

to Acquirers (“Card Acceptance Fees”). However, it refused to grant an order prohibiting the imposition of such rules on the grounds that the services provided by Visa and MasterCard to Acquirers were different from those provided to merchants by Acquirers and therefore fell outside the scope of section 76, which, the Tribunal found, requires the product whose price is affected to have been purchased from the person engaging in price maintenance and resold. Finding no evidence of resale, in other words, the Tribunal was unable to find that Visa and MasterCard had engaged in resale price maintenance.<sup>8</sup>

Counsel for the Commissioner argued that this interpretation would lead to the absurd result that section 76(3)(b)—the successor to the Cafik amendment—could never be applied, because the facts of the case proved that credit card services could never be resold in an identical form.<sup>9</sup> The Tribunal responded by allowing that “the resale of a product does not require that the product be identical,” but added that, “in many instances,” it would be.<sup>10</sup>

The result in the *Visa-MasterCard* case points to a serious conceptual gap in the law of price maintenance in Canada. This gap affects much more than credit cards and has not been the subject of adequate scrutiny. At present, section 76 extends to “products,” which means it applies to the sale of services as well as articles and commodities, but the provision is limited to conduct that influences upward or discourages a reduction in the price at which the product is resold.<sup>11</sup> The problem is that the *Visa-MasterCard* decision gives no guidance whatsoever on either the definition of a service or the question of what will constitute the resale of a service—if such a thing is even possible. The draft Enforcement Guidelines for section 76 that were recently released by the Competition Bureau reiterate the comment from *Visa-MasterCard* quoted above but do not make any specific mention of resale in the service context.<sup>12</sup>

As things stand, the Canadian law of resale price maintenance in the service context is badly muddled. Advances in technology have allowed product markets dependent on the re-provision of services by electronic or other means to proliferate, but businesses and their advisors can only guess at the scope of section 76 where services are concerned. This state of affairs is both unjust and, to the extent that manufacturers and upstream distributors may avoid desirable strategies for fear

of review, potentially inefficient as well. This paper's goal is to explore the origins of the problem and develop an interpretive approach to this gap in the law of resale price maintenance in Canada for the benefit of businesspeople, legal scholars and practitioners, jurists, legislators and anyone else who may be called to grapple with the meaning of section 76 in the service context.

The paper proceeds in six parts as follows:

- Part I reviews the history of section 76 and its predecessor provisions and demonstrates that the peculiar result in *Visa-MasterCard* was the direct consequence of an amendment made to the *Act* in 2009, perhaps without adequate forethought;
- Part II summarizes the economic theories of resale price maintenance and the arguments for and against regulation or prohibition in the canonical case involving the resale of manufactured goods;
- Part III reviews and evaluates a number of possible understandings of the concepts of a “service” and the resale of a service, drawing from statute, jurisprudence and commentary from Canada, the UK, and Australia, and identifies an approach for use in Canada;
- Part IV applies the economic theory surveyed in Part II to the definition suggested in Part III and argues that that definition is consistent with the economic logic that motivates section 76; and,
- Finally, Part V summarizes the findings of Parts III and IV and discusses the way forward.

### **Part I: The History of Price Maintenance Legislation in Canada**

Even before the advent of antitrust legislation of any kind in Canada, the practice of price maintenance was recognized at English common law as an agreement in restraint of trade and therefore unenforceable when “unreasonable.”<sup>13</sup> In 1889, the Canadian Parliament made it a criminal offence to “unduly prevent, limit, or lessen the manufacture or production of any [...] article or commodity, or to unreasonably enhance the price thereof.” The *Combines Investigation Act*, which first

came into force in 1923, maintained this criminal prohibition, including on its list of proscribed practices any agreement or arrangement “to enhance price” where doing so operated to the detriment of the public.<sup>14</sup> However, the provision was not enforced as a standalone offence. As late as 1951, no Canadian court had ever found an individual or corporation liable for engaging in price maintenance alone and not as part of a combine.<sup>15</sup>

The practice of resale price maintenance outside the context of a demonstrated combine first came under serious scrutiny in 1950 with the work of the MacQuarrie Committee.<sup>16</sup> For reasons that are discussed in Part II, the Committee determined that the practice of resale price maintenance was basically anti-competitive even in the absence of an explicit agreement to collude and recommended the complete prohibition of the practice. In 1951, Parliament amended the *Combines Investigation Act* to include an offence of resale price maintenance as section 37A.<sup>17</sup>

Two features of the 1951 version of the offence, which remained in force with only minor changes until 1976, are relevant for the present purposes. First, the provision was directed at a “dealer”—defined as “a person engaged in the business of manufacturing or supplying or selling any article or commodity”—and thereby excluded price maintenance in markets for the provision of services.<sup>18</sup> Second, the proscribed conduct was described entirely in terms of resale: “no dealer shall directly or indirectly by agreement, threat, promise or any means whatsoever, require or induce or attempt to require or induce any other person to resell an article or commodity” at a specified price or above the dealer’s specified minimum price; and “no dealer shall refuse to sell or to offer for resale the article or commodity to any other person for the reason that such other person” either “refused to resell or to offer for resale” at a price at or above the dealer’s specified minimum price or “resold or offered to resell” at a price below the dealer’s specified minimum price.<sup>19</sup>

Over time, recognition of the increasingly important role played by services in the post-war economy began to make the omission of services from the scope of the *Combines Investigation Act* seem anachronistic. The authors of a report published by the Economic Council of Canada in July 1969 observed what it called “enough evidence pointing

to the existence in the service sector of anti-competitive practices detrimental to the public interest to lead to the conclusion that the continued exemption of parts of this sector from competition policy cannot be justified.”<sup>20</sup> After a few false starts in Parliament, a major amendment to the *Combines Investigation Act* was passed in 1975 and came into force on January 1, 1976.<sup>21</sup>

The 1976 amendments effected a significant expansion of the scope of the price maintenance provision. In accordance with the recommendations made by the Economic Council of Canada, the reference to a “dealer” was replaced by “person engaged in the business of producing or supplying” and the words “article or commodity” were replaced by the word “product,” which “includes an article and a service.”<sup>22</sup> At the same time, the requirement of resale was removed from the provision entirely, so that horizontal as well as vertical price maintenance was also covered. These changes created a significantly broader offence: where the 1951 provision included only price maintenance agreements affecting the price at which the original article or commodity was sold, the 1976 provision applied to attempts to influence “the price at which *any other person engaged in business in Canada* supplies or offers to supply or advertises *a product* within Canada,” whether or not that product had originally been sold by the person trying to influence its sale price (emphasis added).<sup>23</sup> To be explicit, the 1976 provision applied to services and did not have a resale requirement. The Cafik amendment, which simply confirmed that credit card services constituted a product for the sake of that provision, was thus perfectly consistent with this broad regime.

The provision remained substantially unchanged again until 2009, when price maintenance was changed from a *per se* illegal criminal offence to a civil matter subject to review by the Competition Tribunal as a result of developments in economic theory and in response to calls for harmonization with international competition law regimes. Crucially, the resale requirement was reintroduced to the provision at this time, excluding horizontal price maintenance from the ambit of the new section 76. The 2009 provision, which was in force for *Visa-MasterCard* and remains unchanged, captures price maintenance agreements affecting “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”(emphasis added).<sup>24</sup> The

Competition Tribunal confirmed in *Visa-MasterCard* that the resale requirement applies to the words “any other person” as well as to “the person’s customer” and that resale is a necessary element of the entire provision.<sup>25</sup>

The resale element of the price maintenance provision was restored to the *Competition Act* in 2009 as part of Bill C-10 (the “Bill”), which was developed and passed in a relatively short time and without substantial debate.<sup>26</sup> In the words of the Hon. Gordon O’Connor, the Member for Carleton—Mississippi Mills, who made the sponsor’s speech for the 524-page Bill’s second reading in the House: “we could literally spend hours, or months, engaged in abstract academic discussions about this bill, but we do not have the luxury of time, nor do the Canadians who have lost their jobs.”<sup>27</sup> In the Senate, the Hon. Lowell Murray pointed out that the Bill included amendments representing “the most significant changes to the Competition Act in decades” and that by including them in the urgently required budget implementation bill, “the government [had] effectively ensured that these changes [would] become law with limited, if any, meaningful debate.”<sup>28</sup>

The *Visa-MasterCard* decision and the dilemma it represents were the inevitable legal consequence of the 2009 amendments, which were rushed through Parliament and leave no record of legislative intent with respect to services. By restoring the resale element but preserving the extension of the provision to services, the 2009 provision created a statutory gap with respect to the meaning of resale that must be resolved if the provision is to have any principled application in the service context.

## **Part II: Economic Theories of Resale Price Maintenance**

The first step in finding meaning for section 76 in the service context is to understand the economic reasoning that motivates the Canadian policy attitude toward resale price maintenance. One of the reasons for the ambivalent legal treatment of resale price maintenance over time may be that the economic motivations for the practice are often obscure and can differ from case to case. In the simplest, perfectly competitive model, a manufacturer who uses price maintenance to discourage retailers from offering reductions in price decreases the quantity demanded of retailers, who face a downward-sloping demand

curve.<sup>29</sup> This in turn reduces the manufacturer's own sales and thus its profits.<sup>30</sup> Any theoretical model of resale price maintenance, therefore, must explain why the phenomenon occurs at all.

Economists have developed both pro- and anti-competitive explanations for the practice of resale price maintenance. In some instances, resale price maintenance may be a response to downstream market failures by the firms in the best position to solve them efficiently; in others, it may be undertaken for anti-competitive or abusive reasons. Overall, there are good reasons to think that resale price maintenance is efficient and pro-competitive often enough to make per se illegality the wrong approach. Recognizing this, Canadian competition law regulates resale price maintenance under a rule of reason, prohibiting the practice only where it "has had, is having, or is likely to have an adverse effect on competition in a market."<sup>31</sup>

In general, pro-competitive explanations for resale price maintenance focus on the non-price elements of retail sales, such as the persuasive and promotional efforts of dealers, including the information and after-market service they provide to consumers and the location and number of resale outlets. This "service hypothesis" posits that a market failure will lead retailers to under-provide these non-price demand factors in equilibrium, and resale price maintenance helps to ensure that they provide an optimal amount, with the effect of increasing total social welfare. For example, a promotional campaign may be able to convince a consumer to purchase a product without being able to ensure that he or she purchases the product from the retailer who paid for the campaign. Such a campaign is a classic public good: the retailer who provides the campaign cannot exclude its competitors from benefitting from it by lowering their prices and poaching its customers. Since all retailers understand this, they will provide less promotional campaigning in aggregate, leading to lower sales and lower total social welfare. Through the use of resale price maintenance agreements, however, the manufacturer can correct this free-rider problem by ensuring that retailers cannot compete on price and must instead compete by offering optimal levels of service.<sup>32</sup>

Economists also recognize that resale price maintenance carries the possibility of abuse. A second class of theories describes situations in which resale price maintenance contracts are used to facilitate



or sustain other anti-competitive tactics that harm the interests of consumers or reduce total social welfare. For example, one common objection to the practice concerns collusion: resale price maintenance may serve as an enforcement mechanism for cartelization at either the manufacturer level (the “manufacturer cartel” case) or the retailer level (the “retailer cartel” case). Similarly, resale price maintenance may be used by manufacturers to discourage retailers from stocking competing products by guaranteeing them higher profit margins that they will be reluctant to jeopardize—in other words, manufacturers use resale price maintenance to bribe retailers into accepting exclusive dealing arrangements (the “product exclusion” case).

In the manufacturer cartel case, resale price maintenance agreements are initiated by manufacturers as a tool to facilitate tacit or explicit cartelization by making cheating behaviour easier to observe when it takes place.<sup>33</sup> This was a major concern of the MacQuarrie Committee.<sup>34</sup> The argument proceeds as follows: manufacturers would like to engage in supra-competitive cartel pricing, but such arrangements are unstable, because each manufacturer faces a strong incentive to undercut the cartel price slightly and seize the whole market for itself. Where wholesale prices are transparent, it is easy to observe cheating behaviour. This helps to stabilize the cartel, because it makes it difficult to cheat without prompting the collapse of the cartel arrangement. In many cases, however, wholesale prices are difficult to observe. Retail prices are transparent, but they are susceptible to fluctuations caused by factors other than changes in the wholesale price, such as changes in distribution costs, rental expenses, and so on. These fluctuations make the cartel unstable, because members will tend to interpret fluctuations in retail price caused by exogenous factors as evidence of cheating by other manufacturers. By using resale price maintenance to impose a price on retailers, manufacturers can help to prolong the life of the cartel.

In the retailer cartel case, price maintenance agreements are actually imposed on manufacturers by retailers, who would like to increase their profits through cartel pricing and thus use their market power over manufacturers to force the manufacturer to act as coordinator for the cartel, even though it loses profits in the process.<sup>35</sup> In such a case, a group of retailers acting in concert exert monopsony power over a manufacturer by threatening to boycott its products unless it agrees to

enforce their cartel through the use of resale price maintenance agreements. As long as the manufacturer enforces the agreements, retailers cannot compete on price without losing access to the product, so their cartel will remain stable. This arrangement also protects incumbent retailers by making it difficult for more efficient discount retailers to enter the market with a lower price.

A final reason to regard resale price maintenance agreements with suspicion is the product exclusion case, in which a dominant manufacturer implicitly guarantees retailers a supra-competitive profit margin by establishing a supra-competitive price floor, which the retailer can enjoy as long as it refuses to stock competing products. If the retailer does stock competing products, the manufacturer will stop supplying the product and the retailer will lose access to the monopoly rents. In such a case, resale price maintenance acts as a bribe that helps support the exclusive dealing arrangement. Where alternative distribution channels are limited, competing manufacturers would face higher distribution costs and new entrants would be discouraged, with negative consequences for consumers and total social welfare.<sup>36</sup>

To summarize, then, Canadian competition policy views resale price maintenance as a potentially pro-competitive practice that can help to correct for under-provision of services at the retail level that also has the potential to be abused as a tool to facilitate manufacturer or retailer collusion or to exclude new retailers or products from entering the marketplace. To preserve the intent of the provision, an interpretation of resale price maintenance for the service context that is consistent with the economic basis for that policy is required. Finding such an interpretation is the task of Parts III and IV.

### **Part III: What is a “Service”? When is a Service Resold?**

The Tribunal’s decision in *Visa-MasterCard* confirmed as a matter of statutory interpretation that resale was a fundamental element of the reviewable conduct set out in section 76, but it did not engage with the conceptual problems posed by that interpretation in the service context. The Tribunal provided no guidance about what constitutes a “service” for the purposes of section 76 and did not explain the reasoning that led it to characterize what Visa and MasterCard sold to Acquirers (what it called “Network Services”) and what Acquirers

sold to merchants (“Acceptance Services”) as services. Furthermore, the Tribunal did not explain why, in its view, the finding that Network Services (which includes “authorization, clearance and settlement of transactions services”) were different from Acceptance Services (which includes “leasing and selling point-of-sale equipment [and] providing guaranteed payment and credit services”) precluded a further finding that the latter constituted or involved the resale of the former.<sup>37</sup> The Tribunal was of course entitled and obligated to make decisions on these points of law, but because it failed to provide reasons for its findings, the meaning of a service, as well as that of the resale of a service, for the purposes of section 76 remains unclear. Even if “service” is merely a residual category that captures any product that is not an article—which may indeed be the most plausible explanation—it is still necessary to decide what it means for such a thing to be resold.

Like its predecessor the *Combines Investigation Act*, the Competition Act defines a service with frustrating circularity: by section 2(1), “service” means “a service of any description whether industrial, trade, professional or otherwise.”<sup>38</sup> These words must be interpreted in light of section 12 of the *Interpretation Act*: “every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.”<sup>39</sup> The broadest possible interpretation of the 1976 amendment that replaced “article” with “product” is that Parliament was less concerned with the scope of a service than with ensuring that the price maintenance provision would have sufficient breadth to allow the regulation of all products traded in Canada. On this view, “service” is a kind of residual category that contains all products that are not articles.

Although this interpretation is not entirely satisfactory, because the *Competition Act* does not define a product except to say that that it “includes an article and a service,” the meaning of a product under the *Act* has been much more deeply considered than that of a service, which makes the residual interpretation an appealing one. Crucially, too, the rule of reason approach to regulation is consistent with the broadest possible interpretation, because the Competition Bureau and the Tribunal are in a much better position to determine the appropriate limits of enforcement than is Parliament.

The definition of a service in the competition law context has never

received any conclusive judicial interpretation in Canada, but what little case law is available supports, or is at least compatible with, this broad interpretation. The first judicial comment on the scope of a service in the field of competition law was made in *R v Schelew*, a case decided by the New Brunswick Court of Queen's Bench in 1982 in which a letter was sent by the secretary of the Moncton and District Landlords' Association to the members of that group advising the members to raise their rents to take advantage of prevailing market conditions.<sup>40</sup> In that case, Barry J. made this ambivalent comment: "The Crown maintains that renting an apartment is a "service" within the *Act*. It may be such but surely Parliament could have said so clearly had it so intended." He went on to find that in any case there was no agreement for the purposes of the price maintenance provision, however, making his comment about services *obiter dicta*. At the New Brunswick Court of Appeal, Angers J.A., concurring in the dismissal of the *Schelew* appeal, said the following, also in *obiter*: "Although the trial judge expressed doubts as to whether providing rental accommodations constituted 'supplying a product' I would assume by virtue of the definitions that it does."<sup>41</sup> In 1994, Lomas J. of the Alberta Court of Queen's Bench accepted in *R v Royal LePage Real Estate Services Ltd.* that "real estate brokerage services" were services for the purpose of the *Combines Investigation Act*.<sup>42</sup>

Furthermore, the sale of an article in a certain manner can constitute a service in itself, so that both the article and the service are components of the product rendered. In the 1984 case of *R v Metropolitan Toronto Pharmacists' Association* (which concerned a charge of conspiracy, not price maintenance), Van Camp J. of the Ontario High Court of Justice held that "the product here is not just the article, namely the prescription drugs, but is also the service of supplying prescription drugs to subscribers under a Green Shield pre-payment plan."<sup>43</sup> The recognition that services of this kind are often bundled with sales to final consumers may create additional complexities for resale in the retail context—particularly where certain elements of retail service are provided by a third party—because the sale of goods in a retail setting implies certain bundled services. This issue is considered below.

In addition to the cases above, there have been a handful of settlements involving price maintenance in the service context. In 2003, the Competition Bureau settled with Re/Max Ontario Atlantic Canada

Inc., *Re/Max of Western Canada*, and *Re/Max International Inc.* over a new policy allegedly prohibiting brokers from advertising independent commission rates.<sup>44</sup> In 2007, the Bureau reached a settlement with six Fort McMurray auto body repair shops who allegedly engaged in price maintenance and price fixing with respect to labour rates for repair services.<sup>45</sup>

Together with *Visa-MasterCard*, the cases cited above—all of which, it is worth noting, occurred between 1976 and 2009, during the period in which the price maintenance provision did not include a resale requirement—appear to represent all the guidance Canadian jurisprudence has to offer on the meaning of “service” in the competition law context. Any understanding of the term, then, must include real estate services and may also include rental services and labour and repair services. This is compatible with the broad interpretation of “service” as a residual category for products other than articles.

Another fact that tends to support the broad interpretation is the lack of statutory exclusions in the *Competition Act*. A different, narrower model can be found in the *Fair Trading Act 1973*, which briefly expanded the reach of UK competition law to services through Part X before it was repealed in 1976. While in force, Part X relied on the following definition:

“services” does not include the application to goods of any process of manufacture or any services rendered to an employer under a contract of employment, but, with those exceptions, includes engagements (whether professional or other) which for gain or reward are undertaken and performed for any matter other than the production or supply of goods, and any reference to the supply of services or to supplying, obtaining or offering services or to making services available shall be construed accordingly.<sup>46</sup>

Under the *Fair Trading Act 1973*, all “engagements” undertaken for gain are potentially services, with the exception of those related to the manufacture, production, or supply of goods and those rendered under a contract of employment. But no such exclusions are found in the *Competition Act*. Nothing in the *Competition Act* or the scant Canadian jurisprudence prevents a process of manufacture or an engagement related to the supply of goods from being treated as a service, and

indeed *Metropolitan Toronto Pharmacists' Association* is proof that the supply of goods will indeed constitute a distinct service in at least some cases.<sup>47</sup>

Similarly, the UK Restrictive Practices Court found in *Re Ravenscroft Properties Ltd.* that, during the short time it was in force, Part X of the *Fair Trading Act 1973* excluded “a landlord [who] merely lets his property without more,” since a bare lease is merely a transfer of some right in property, but included “services such as portage, a lift, and central heating for which [tenants] pay a ‘service charge’.”<sup>48</sup> This implies the peculiar result that a landlord supplies a service when he provides tenants with access to his lift in exchange for a service charge, but he does not supply a service when he provides tenants with access to other parts of the premises under a lease in exchange for rent. However, in the absence of any other judicial comment, Angers J.A.’s comment in *obiter* in *R v Schelew*<sup>49</sup> that leasing an apartment constituted a product suggests that this distinction may not be supportable in the Canadian context. This also weighs in favour of the broad interpretation.

A final clue that may support a broad interpretation for “service” is the provision in section 2(1) of the *Competition Act* specifying that “supply” means, “in relation to a service, sell, rent or otherwise provide a service or offer so to provide a service.”<sup>50</sup> The question of what it might mean to rent a service is best discussed elsewhere, but it is worthwhile to observe that the *Competition Act* seems to be employing an understanding of a service as something that is capable of being supplied in a wide and perhaps intentionally unlimited variety of ways. Like the case law, this is at least consistent with the interpretation that Parliament intended the word “service” to work complementarily with “article” so that together they would capture any conceivable product.

There is even less judicial comment about the meaning of resale in the service context. Van Camp J.’s decision in *Metropolitan Toronto Pharmacists' Association*, which distinguished between prescription drugs as an article and the provision of such drugs under a Green Shield plan as a service, appears to be the only relevant comment, and only deepens the problem.<sup>51</sup> As noted above, the sale of goods in the retail context will often—perhaps invariably—include bundled services related to sourcing and stocking inventory, arranging for delivery, and so on. If the provision of goods under an insurance plan is a service

distinct from the goods themselves, it seems likely that a bundled retail service like inventory management or final delivery is also a distinct service whose resale could be the subject of a reviewable price maintenance agreement. For example, if a shipping company were to impose a minimum price at which retailers could charge their customers for delivery of retail goods carried out by the shipping company, that agreement could be reviewable under section 76 of the *Act*. In other cases, however, whether or not a bundled service has been resold may not be as obvious. If a manufacturer charges a fee to the retailer to deliver a product directly to the consumer instead of delivering it to the retailer, but the retailer charges a delivery fee to the customer to recoup its payment to the manufacturer, has the retailer resold the delivery? The legislative record does not clarify these issues: as indicated in Part I, the 2009 amendment was passed quickly and with little recorded debate.

However, some useful guidance can be found in the Australian *Competition and Consumer Act 2010*.<sup>52</sup> It carries a special provision, section 96A, which applies directly to price maintenance in the “re-supply” of services. For the purposes of the provision, section 95A(1) defines a service broadly, as follows:

“services” includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and includes, but is not limited to, the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under [various types of contract] but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.<sup>53</sup>

It should be noted at the outset that, in contrast to the UK *Fair Trading Act 1973*, the Australian *Competition and Consumer Act 2010* defines a service more expansively than does the *Competition Act*. Whereas the Australian statute includes tickets and rights to property under the heading of services, the *Competition Act* considers such entitlements “articles.” According to section 2(1) of the *Competition Act*, an “article” includes “real and personal property of every description including ... tickets or like evidence of right to be in attendance at a particular place at a particular time or times.”<sup>54</sup> “Article” also includes

deeds and instruments evidencing the title or right to property, including a corporation or its assets, or to receive or recover property. To avoid redundancy, then, the word “service” should not be understood to include tickets and rights to property in Canada. Since a product includes an article, of course, this does not alter the scope of section 76.

More to the point, the *Competition and Consumer Act 2010* also offers a fairly sophisticated model to follow with respect to the resale of services. “Re-supply of services” is defined in section 4C(f) of the *Competition and Consumer Act 2010* as follows:

a reference to the re-supply of services (the original services) acquired from a person (the original supplier) includes a reference to:

(i) a supply of the original services to another person in an altered form or condition; and

(ii) a supply to another person of other services that are substantially similar to the original services, and could not have been supplied if the original services had not been acquired by the person who acquired them from the original supplier.<sup>55</sup>

In 1995, the Australian Parliament circulated an explanatory memorandum to accompany the bill that went on to create these provisions.<sup>56</sup> The memorandum acknowledges that some services, like haircuts, are personal in nature and can never be re-supplied; once performed, they expire forever. This is the type of service one may have in mind if one finds that the very concept of reselling a service seems incoherent. However, not all services are personal. The memorandum goes on to explain that, for the purposes of Australian competition law, there are three ways in which a service can be re-supplied.

The first is what the memorandum calls “the natural meaning of re-supply of services.”<sup>57</sup> To fall into this category, the service must be resold in identical form. In explaining this first category, the memorandum provides the following example: “A re-supply of services might occur where, for example, an entertainment centre sells to a ticketing agent a bundle of tickets each entitling the bearer to sit in a particular seat at a particular time, and the ticketing agent on-sells those tickets.”<sup>58</sup> As noted above, because the Australian statute defines



“services” as including rights conferred in trade or commerce, the tickets qualify and their resale constitutes a re-supply. Under the Canadian *Competition Act*, this would be a resale of an article. However, the memorandum goes on to suggest that another example of re-supply of the first category might occur “where person A supplies financial information by electronic means to person B and B then supplies that information, also by electronic means, to C.”<sup>56</sup> The supply of electronic information is clearly not an article under the *Competition Act*, so there is no obvious reason it should not constitute a service as a matter of statutory interpretation. A newspaper that “resells” live stock ticker data by reproducing it on its own website might come under this definition, and so might an electronics manufacturer that outsourced its phone support to a call centre it did not own. The Tribunal’s comment in the *Visa-MasterCard* case that resold services will, “in many instances,” remain unchanged from the form in which they were originally sold, compels the inference that this first type of resale forms at least part of the meaning of resale in relation to services in Canadian competition law.<sup>60</sup>

The second and third types of resale recognized by the Australian *Act* are those described in sections 4C(f)(i) and (ii): “a supply of the original services to another person in an altered form or condition;” and “a supply to another person of other services that are substantially similar to the original services, and could not have been supplied if the original services had not been acquired by the person who acquired them from the original supplier.”<sup>61</sup> Under the second type of resale, which includes re-supply “in an altered form or condition,” the memorandum gives the example of information provided electronically by A to B, who then “amplifies” the signal and transmits it to C.<sup>62</sup> The second type is very similar to the first and does not provide much help. The third type of resale, however, contains two extremely useful ideas: first, the “substantial similarity” criterion, which asks whether the second service is too different from the first to be considered a resale; and, second, the “necessary input criterion,” which asks if the second service could have been provided if the first had not been provided. Together, these two criteria form a useful framework for the definition of resale in the service context that can be adopted for use in Canada.

The first criterion, the substantial similarity criterion, reflects the insight that if the second article or service is so different from the first

that it represents an entirely new product, then nothing that would normally be called a “resale” has taken place. This language may be familiar from part of the *Visa-MasterCard* decision already excerpted above: “The resale of a product does not require that the product be identical. However, [...] in many instances, the product will be identical or *substantially similar* on the important characteristics of the product”(emphasis added).<sup>63</sup> Limiting the application of resale price maintenance rules in this way for both articles and services accords with the plain language meaning of the word “resale”: one would not ordinarily say that a baker resells flour in the form of bread. Of course, how much manipulation can take place before the second service constitutes a new original service is unclear. Australian courts have not yet considered either section 96A or section 4C(f), and they will eventually have to make decisions about the limits of the words “substantially similar.” The memorandum explains the third type of resale with the following example: “B manipulates the information to transform it into a more easily understood form and then supplies the transformed information to C.”<sup>64</sup> Suppose, though, that B does not merely manipulate the information but translates it into a different language or uses it in a calculation to draw new conclusions. Would such conduct represent a re-supply or resale of the original information, or is B really selling a separate service as a translator or analyst? Intuition points to the latter, but there is no principled basis for the distinction; in Australia, as in Canada, either the courts or the legislature will have to step in to draw this line. Still, although the concept of substantial similarity may not provide a great deal of additional content to the analysis, it can at least clarify the structure of the inquiry, and to that extent it is a valuable contribution to the service resale problem. Further, as noted above, the Bureau’s draft Enforcement Guidelines for section 76 draw special attention to the use of the words “substantially similar” in the *Visa-MasterCard* decision and signal the Bureau’s intent to use it as a conceptual tool in resale price maintenance cases going forward.<sup>65</sup>

The second criterion, the necessary input criterion, stipulates that B has not re-supplied to C a service he obtained from A if the service obtained from A was not a necessary input to the service he supplies to C. In other words, if the service B supplies could have been performed without the service A supplied, then what B supplies is an entirely new service. This is the significance of the words “could not have been supplied if the original services had not been acquired by the person who

acquired them from the original supplier” in section 4C(f)(ii) of the Australian *Act*. The necessary input criterion, whose use does not appear to have been suggested in Canada elsewhere, has several attractive features. First, it helps to limit the application of resale price maintenance in service situations that are not analogous to the simple goods case. If A sells some good to B and B sells some good to C, it is clear as a limiting case that if B’s sale to C would have been possible without A’s sale to B, then B did not resell to C what he bought from A. In the absence of any statutory language to the contrary, consistency requires that this limit apply in the service case as well. Second, it recognizes that services may be inputs to other services, and that the providers of services that are primarily inputs may have significant market power over downstream service providers. It is difficult to imagine that A could have sufficient market power to impose an abusive price maintenance agreement if B could sell to C without dealing with A. For example, a news wire service knows that the newspapers and clipping services that resell its stories cannot do business without the wire service’s product, and it may attempt to use its position to manipulate the price at which the downstream services are sold. If the necessary input criterion is not met, the wire service’s power over the newspapers and clipping services is significantly reduced.

These two criteria are also compatible with the factual findings of the Tribunal in *Visa-MasterCard*, and thus with Canadian law. As noted above, the Tribunal based its decision in *Visa-MasterCard* on the finding that the “authorization, clearance and settlement of transactions services” provided by Visa and MasterCard to Acquirers over their respective networks were different from “leasing and selling point-of-sale equipment [and] providing guaranteed payment and credit services,” which is what Acquirers provide to merchants.<sup>66</sup> Though the Tribunal never said so explicitly, it seems clear that the necessary input criterion was met: the Acquirers could not have provided retailers with point-of-sale and credit services if Visa and MasterCard had not first supplied them with authorization, clearance and settlement of transactions services. However, the Tribunal found that the services were not resold because they were not sufficiently similar. Although the Tribunal phrased its decision in terms of the non-identity of the services (“These services are different and Acquirers do not resell either Visa or MasterCard Credit Card Network Services”), it also noted that “the resale of a product does not require that the product be identical,”

which implies that a service could potentially be resold in different form if degree of difference were not excessive.<sup>67</sup> Adopting the language of the Australian *Act*, it could be said that Tribunal determined that the latter group of services was not sufficiently similar to the former, and therefore the service was not resold.

Pending further judicial comment or legislative reform, it will fall to scholars, litigants, and the Competition Tribunal and the courts to grapple with the task of defining resale price maintenance in the service context. In light of the above analysis, it is the author's opinion that the resale requirement of section 76 should be understood to be satisfied in the service context if, and only if, the substantial similarity criterion and the necessary input criterion have both been met. Although the substantial similarity criterion and the necessary input criterion are not by any means a complete answer, they can help to provide much-needed structure to the problem.

#### **Part IV: Is the Proposed Approach to the Resale of Services Compatible with the Economic Rationale for section 76?**

Part III proposed an approach based on Australian competition law, under which resale of a service occurs if, and only if, two criteria have been met. Under this approach, a service provided by A to B is resold by B to C when: a) the service provided by B to C is substantially similar to the service initially provided by A to B; and b) the service provided by B to C could not have been provided if A had not provided the initial service to B. In this Part, the economic reasoning that motivates Canadian policy on resale price maintenance in the goods context is shown to be compatible with this approach.

A supportable interpretation of resale price maintenance in the service context will reflect the policy goals of section 76 and of the *Competition Act* as a whole. This serves as a litmus test: to preserve the intent of the provision, any understanding of the resale of services in section 76 must be consistent with the theoretical basis on which resale price maintenance is subject to scrutiny under Canadian competition law in general.

As Part II explained, Canadian competition policy treats resale price maintenance under the rule of reason, which reflects the

understanding that the behaviour can have positive or negative effects in each case. In other words, the cost of administering a case-by-case civil review is believed to be lower than the cost of the inefficiencies inherent in either a *per se* legality or illegality approach. The purpose of this Part is to demonstrate that the pro- and anti-competitive applications that motivate the rule of reason approach in the goods case are also present in the services case as defined above. Importantly, it also shows that price maintenance agreements in cases without a “true” resale satisfying both the substantial similarity criterion and, in particular, the necessary input criterion are not well-described by the economic models underpinning the rule of reason approach: such agreements are not compatible with either the pro-competitive service hypothesis or the anti-competitive cartelization and exclusive dealing theories. This reinforces the value of the two-pronged interpretation of resale proposed in Part III, which limits the scope of the provision to the explanatory power of the theories on which the provision depends.

In general, the pro-competitive potential of resale price maintenance applies in the service context as well as the goods context. It will be recalled that the principal model for the pro-competitive role of resale price maintenance is the service hypothesis, in which the manufacturer imposes a price floor to ensure that retailers provide optimal levels of advertising, information, and other services that increase demand rather than free-ride on the services provided by others and compete by undercutting one another’s pricing. Although the service hypothesis model appears to have been developed with the goods context in mind, it also applies to the type of promotional secondary services commonly found in service industries, such as advertising and customer education. Indeed, the model may even have particular application where services are being resold, because of the responsiveness of demand to retailers’ efforts to vouchsafe the credibility of the initial service provider.

The service hypothesis predicts that if resale price maintenance is not allowed, retailer services that increase demand will be under-provided because of public goods problems. Because downstream firms are unable to advertise for the service they resell without also increasing demand for competitors reselling the same service, advertising acts as a public good subject to under-provision. An example might be a generic tax accounting service resold to the public by a number of

smaller retail firms on the ground who, in the absence of an imposed price floor, would tend to compete on price instead of spending time and money persuading their customers to use the service, because they know that the customers, once persuaded, would simply obtain the service from a lower-priced competitor. By using resale price maintenance to prevent retailers from free-riding in this way, the upstream service provider ensures that an optimal level of persuasion will be provided by retailers. If a retailer cannot prevent its competitors from benefitting from its efforts to vouchsafe and promote the service to customers, they will simply free-ride and compete on price, which discourages such efforts in the first place. As a result, consumers are under-informed about the quality of the service and less likely to buy at all. Resale price maintenance helps to ensure that these value-creating transactions actually take place.

If either of the two criteria discussed in Part III are not met and no “true” resale has taken place, however, this rationale begins to break down. If the service provided to customers by retailers is not substantially similar to that provided by the original service provider, the final service is likely to be different across retailers, which would reduce or eliminate the ability of a retailer to free-ride on other retailers’ efforts to promote their own version or versions of the service. If retailers are not free-riding, there is no market failure for resale price maintenance agreements to correct. Similarly, if the original service is not a necessary input to the final service, so that retailers can easily substitute away from the original service provider attempting to impose resale price maintenance, the original service provider is less likely to try to support the retail market by bargaining for price maintenance agreements that may support the sales of its competitors. This is not to say that price maintenance agreements in the service context where the substantial similarity criterion is not met cannot be pro-competitive in other ways or that they should be *per se* illegal. However, it does suggest that the economic motivations of such agreements may be quite different from those contemplated by section 76 and that such cases are properly excluded from the scope of the provision.

The potential for abusive applications of resale price maintenance crosses over into the service context as well. The manufacturer cartel scenario described in Part II is no less plausible in the service context than in the goods context. For example, suppose that two real estate

agencies jointly control the market in a region. These agencies operate by providing independent agents with access to their respective listings databases in exchange for a commission on properties listed or sold, and those agents provide clients with access to the same listings for a larger commission. This arrangement, which could arise where the agencies have the expertise to build and maintain the network but the franchisees have local presence, salesmanship skills, and so on, might easily satisfy both the substantial similarity criterion and the necessary input criterion, and thus constitute the resale of the provision of access to listings database. The agencies would like to collude to fix their commissions at a supra-competitive level in order to increase their profits, but they cannot observe each other's commission. They can only observe the rates agents charge to the public. Without price maintenance, there is no way to distinguish between cheating and exogenous fluctuations in agents' rates, and thus the cartel is unstable. With price maintenance, it is easy to observe cheating and the cartel can persist, to the detriment of consumers and with a corresponding deadweight loss.

As in the pro-competitive case, however, the explanatory force of this theory is diminished if the substantial similarity criterion and the necessary input criterion are not satisfied. If the agents' service is not substantially similar to the agencies', there will, by definition, be inputs to the former other than the latter. The imposition of price maintenance at the retail level in such a case necessarily forces the agent to bear the cost of any increases in the price of other, non-cartelized inputs. Retailers will want to avoid this cost if they can. At the same time, the manufacturer cartel reduces the size of the total market and allows the agencies to capture economic surplus that would otherwise be enjoyed by consumers and agents. It is unlikely that agents would tolerate the imposition of price maintenance agreements that forced them to bear these costs if the agents' service was not a necessary input to their own and they could substitute to a non-cartelized alternate input. If price maintenance agreements were to appear in situations in which the substantial similarity criterion and the necessary input criterion were not satisfied, manufacturer cartelization would be unlikely to be the cause.

The retailer cartel theories are compatible with the proposed definition of service resale as well. An example might be found in a market in

which a single wire news service provides reporting content to a large number of newspapers. The newspapers do not generate content of their own and the wire services cannot sell their content elsewhere. The newspapers operate on a subscription basis. The newspapers would like to increase their subscription fees in tandem to a supracompetitive level, but each fears that its rival would defect on the arrangement and seize the market by undercutting the cartel price. Under such conditions, the newspapers can coerce the wire services into acting as cartel co-ordinators by threatening to boycott any service that does not enforce price maintenance. Any newspaper that tries to undercut the others will lose access to the wire content and be unable to operate. Because of the collective market power enjoyed by the newspapers, the wire services will comply, even though doing so shrinks the market and reduces their revenues.

Again, the retailer cartel theories are much less persuasive where the substantial similarity criterion and the necessary input criterion are not met. If the newspapers do not simply reproduce the wire content but edit the content so that the final articles are not substantially similar, then the final content is almost certain to differ across newspapers. The lack of a homogenous product would tend to encourage the newspapers to compete on quality as well as price, making the market a poor candidate for cartelization. Further, if the newspapers' editorial changes are so profound that the wire content was not in fact necessary to the final product at all, then there is no way for the wire service to act as a credible cartel enforcer, because each newspaper is free to undercut the cartel price and carry on producing news in spite of the wire service's boycott.

Finally, resale price maintenance in the service context also carries the potential for abuse as a tool to bar the entry of new firms at the initial service provider level when it is used to bribe retailers into exclusive dealing. Although retailers do not, of course, "stock" competing services for resale, resale price maintenance can still be used to encourage product exclusion in the service context. For example, if small retail financial services firms process their clients' stock market transactions through a platform provided by a dominant brokerage firm, the dominant firm can guarantee the retail firms' supra-competitive profit margins by using resale price maintenance to impose a price floor on all the retail firms. If the dominant firm implicitly or



explicitly threatens to stop supplying brokerage services to any retail firm that offers its clients the option of brokering elsewhere, the high profit margins created by the use of resale price maintenance acts as an incentive to refuse to deal with other brokerages.

As above, the applicability of this model is largely limited to cases of “true” resale. Where the retail service is not substantially similar to the original brokerage service, consumers are likely to be less concerned with the identity of the broker and more concerned with the retail firm, which whom they deal more closely and which provides the personal services they came to consume in the first place. If the identity of the broker is not important to consumers, retailers will have an incentive to switch to a different broker, forgoing the supra-competitive price in order to capture the market. The exclusive dealing arrangement will be similarly unstable if the original brokerage service is not a necessary input to the retail service at all. Each retail firm will have an incentive to stop offering the brokerage service altogether, giving up the benefit of the high prices guaranteed by the price maintenance in exchange for the opportunity to undercut the price floor and capture the market.

In sum, the economic analysis that underlies the rule of reason approach to resale price maintenance enshrined in section 76 is compatible with the service context where the criteria proposed in Part III are met, but it breaks down in other cases. This is a strong sign that the approach to service resale developed in this paper is compatible with Canadian competition policy and will be useful to anyone who engages with s. 76 in the service context after *Visa-MasterCard*.

## **Part V: Looking Forward**

Part III identified a viable framework for the concept of resale in the context of services by repurposing a definition from Australian competition law. That framework relies on two criteria to establish that a service has been resold: first, the substantial similarity criterion, which asks whether or not the first and second services are sufficiently unlike that a finding of continuity between the two is unsupportable; and second, the necessary input criterion, which asks whether or not the second service could have been supplied without the supply of the first. If, and only if, both criteria are met, the second service is a resale of the first. The framework is compatible with Canadian law and policy.

Part IV demonstrated the possibility that, under this framework, resale price maintenance in relation to services might serve the same pro- and anti-competitive purposes as resale price maintenance in relation to goods, which supports the application of the rule of reason. It also showed that where these two criteria are not met, the economic rationales behind s. 76 begin to break down. In other words, the framework proposed in this paper limits the Competition Tribunal's authority to review resale price maintenance activity in the service context to cases in which economic theories on which that authority depends can be coherently applied.

The *Visa-MasterCard* case brought the issues created by the 2009 amendments to s. 76 to light. These issues may be avoided in practice by selective enforcement by the Competition Bureau, or legislative relief may ultimately be necessary to repair the provision. But until such relief arrives, it will fall to scholars, litigants, and the Tribunal and the courts to determine the boundaries of retail price maintenance in the service context. This article represents a small step in that direction; it is hoped that others will follow.

### Endnotes

<sup>1</sup> J.D. candidate, University of Toronto and articling student, Davies Ward Phillips & Vineberg LLP. The author is grateful to Professor Edward Iacobucci for comments and suggestions. The *Visa-MasterCard* case of the title is: *The Commissioner of Competition v Visa Canada Corporation and MasterCard International Incorporated*, 2013 Comp Trib 10 [*Visa-MasterCard*].

<sup>2</sup> Standing Committee on Finance, Trade and Economic Affairs, *Minutes of Proceedings and Evidence*, 30th Parl, 1st Sess, No 55 (3 June 1975).

<sup>3</sup> Standing Committee on Banking, Trade and Commerce, *Minutes of Proceedings and Evidence*, 30th Parl, 1st Sess, Final Report (5 June 1975).

<sup>4</sup> RSC 1985, c C-34 [the *Act*].

<sup>5</sup> Canada, Financial Consumer Agency of Canada, *Code of Conduct for the Credit and Debit Card Industry in Canada*, online: Financial Consumer Agency of Canada <<http://www.fcac-acfc.gc.ca/Eng/forIndustry/publications/lawsReg/Pages/CodeofCo-Codedeco.aspx>>.

<sup>6</sup> *Visa-MasterCard*, *supra* note 1 at paras 35-37.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid* at paras 134, 160.

<sup>9</sup> *Ibid* at para 114.

<sup>10</sup> *Ibid* at paras 115, 134.

<sup>11</sup> *Competition Act*, *supra* note 4, s 2(1).

<sup>12</sup> Competition Bureau of Canada, *Price Maintenance (Section 76 of the Competition Act)—Enforcement Guidelines*, online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03687.html>> [“*Enforcement Guidelines*”].

<sup>13</sup> Tamara Hunter, “History of Price Maintenance Legislation in Canada” in RS Khemani & WT Stanbury, eds, *Historical Perspectives on Competition Policy* (Halifax: The Institute for Research on Public Policy, 1991) 177 at 178.

<sup>14</sup> SC 1923, c 9, ss 2, 26.

<sup>15</sup> Hunter, *supra* note 13 at 178.

<sup>16</sup> *Ibid* at 179; *Report of the Committee to Study Combines Legislation and Interim Report on Resale Price Maintenance*, (Ottawa: Queen’s Printer, 1951) [MacQuarrie Report]

<sup>17</sup> *Combines Investigation Act*, RSC 1927, c 26, s 37A, as amended by *An Act to Amend the Combines Investigations Act*, SC 1951, c 30 s 1.

<sup>18</sup> *Ibid*, s 37A(1).

<sup>19</sup> *Ibid*, ss 37A(3)(a)-(b).

<sup>20</sup> Economic Council of Canada, *Interim Report on Competition Policy*, (Ottawa: Information Canada, July 1969) at 147.

<sup>21</sup> *Combines Investigations Act*, RSC 1970, c C-23, as amended by *An Act to Amend the Combines Investigations Act*, SC 1974-75-76, c 76, s 18(1).

<sup>22</sup> *Ibid*, ss 2(1), 38(1).

<sup>23</sup> *Ibid*, s 38(1)(a).

<sup>24</sup> *Competition Act*, *supra* note 4, s 76.

<sup>25</sup> *Visa-MasterCard*, *supra* note 1 at paras 115-17.

<sup>26</sup> Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, 2nd Sess, 40th Parl, 2009, cl 426 (assented to 12 March 2009), SC 2009, c 2.

<sup>27</sup> *House of Commons Debates*, 40th Parl, 2nd Sess, No 11 (9 February 2009) at 1110 (Gordon O’Connor).

<sup>28</sup> *Debates of the Senate*, 40th Parl, 2nd Sess, vol 146 No 16 (5 March 2009) at 1540-50 (Lowell Murray).

<sup>29</sup> Note that the terms “manufacturer” and “retailer” are used for convenience to refer to any upstream-downstream supply chain relationship.

<sup>30</sup> Michael Trebilcock et al, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002) at 377.

<sup>31</sup> *Competition Act*, *supra* note 4, s 76(1)(b).

<sup>32</sup> Trebilcock et al, *supra* note 30 at 380, 386-87.

<sup>33</sup> *Ibid* at 377-78.

<sup>34</sup> *MacQuarrie Report*, *supra* note 16 at 67.

<sup>35</sup> Trebilcock et al, *supra* note 30 at 378.

<sup>36</sup> Kenneth G Elzinga & David E Mills, “The Economics of Resale Price Maintenance” (31 December 2009) in Kenneth G Elzinga & David E Mills, eds, *Issues in Competition Law and Policy* (ABA Section of Antitrust Law, 2008) 1841 at 1847.

<sup>37</sup> *Visa-MasterCard*, *supra* note 1 at paras 147-49.

<sup>38</sup> *Competition Act*, *supra* note 4, s 2(1).

<sup>39</sup> *An Act Respecting the Interpretation of Statutes and Regulations*, RSC 1985, c I-21, s 12 [*Interpretation Act*].

<sup>40</sup> (1982), 38 NBR (2d) 340 (NBQB) [*Schelew QB*].

<sup>41</sup> (1984), 52 NBR (2d) 142 (NBCA) [*Schelew*].

<sup>42</sup> *R v Royal LePage Real Estate Services Ltd.*, [1994] AJ No 823, (Alta QB) (decided by Lomas J.).

<sup>43</sup> (1984), 3 CPR (3d) 233 (Ont HC) [*Metropolitan Toronto Pharmacists' Association*].

<sup>44</sup> James Musgrove, "Developments in the Canadian Law of Price Maintenance and Predatory Pricing" (Paper delivered at 56th Annual Spring Meeting of the Antitrust Section of the American Bar Association, 27 March 2008) at 6.

<sup>45</sup> *Ibid* at 8.

<sup>46</sup> *Fair Trading Act 1973* (UK), c 41, s 117(1).

<sup>47</sup> *Metropolitan Toronto Pharmacists' Association*, *supra* note 43.

<sup>48</sup> *Re Ravenseft Properties Ltd.'s Application*, [1978] 1 QB at 57 [*Re Ravenseft Properties Ltd.*].

<sup>49</sup> *Schelew*, *supra* note 41.

<sup>50</sup> *Competition Act*, *supra* note 4, s 2(1).

<sup>51</sup> *Metropolitan Toronto Pharmacists' Association*, *supra* note 43.

<sup>52</sup> *Competition and Consumer Act 2010* (Cth).

<sup>53</sup> *Ibid*, s 95A(1).

<sup>54</sup> *Competition Act*, *supra* note 4, s 2(1).

<sup>55</sup> *Competition and Consumer Act 2010*, *supra* note 52, s 4C(f).

<sup>56</sup> The Parliament of the Commonwealth of Australia, House of Representatives, *Competition Policy Reform Bill 1995-Explanatory Memorandum* ["*Explanatory memorandum*"] at 6.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Ibid*.

<sup>59</sup> *Ibid*.

<sup>60</sup> *Visa-MasterCard*, *supra* note 1 at paras 115, 134.

<sup>61</sup> *Competition and Consumer Act 2010*, *supra* note 52, s 4C(f).

<sup>62</sup> *Explanatory memorandum*, *supra* note 56 at 6.

<sup>63</sup> *Visa-MasterCard*, *supra* note 1 at paras 115, 134.

<sup>64</sup> *Ibid*.

<sup>65</sup> *Enforcement Guidelines*, *supra* note 12.

<sup>66</sup> *Visa-MasterCard*, *supra* note 1 at paras 147-49.

<sup>67</sup> *Ibid*.