RECENT DEVELOPMENTS IN THE COMPETITION POLICY TREATMENT OF RESALE PRICE MAINTENANCE

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I. Introduction

The recent report of the Royal Commission on the Economic Union and Development Prospects for Canada (the Macdonald Commission) recommends "a review of the provision (of the Combines Act) making it illegal in any circumstances to require compliance with minimum resale prices."[1] The purpose of the review would be to determine whether resale price maintenance (RPM) should be made illegal only in cases of proven anti-competitive impact. The Commission suggests further that RPM might be made reviewable by an administrative tribunal, similar to the treatment of tied selling and exclusive dealing under the existing provisions of the Act. The Commission's recommendation is based on an extensive background study of the nature and economic effects of vertical restraints. The background study goes further than the Commission in recommending that resale price maintenance should be made legal except where it facilitates the establishment of a manufacturers' or retailers' cartel.[2]

In the U.S., the Department of Justice has actively supported the overturning of the existing per se prohibition of RPM. Although privately initiated cases have been brought before the courts, neither the Department nor the Federal Trade Commission has prosecuted a single RPM case since 1982. The stand taken by the U.S. antitrust agencies against the per se prohibition of RPM has provoked serious opposition in the Congress.[3]

The debate over the treatment of resale price maintenance concerns the appropriate scope for restrictions placed by manufacturers (or dealers) on the manner in which goods and services are distributed. The effects of RPM have much in common with those of non-price restraints dealing with the territories dealers may serve, the package of goods and services they offer or the customers with whom they may deal. All of these practices involve the suppression of intrabrand competition but can also facilitate increased interbrand competition by encouraging the establishment of more efficient distribution systems.[4] Attempts to prevent grey marketing - the parallel importation of goods outside the manufacturers' approved distribution channels - entail similar concerns.[5]

This article surveys the current developments in the economics and law of resale price maintenance. Section II reviews the economic arguments put forward in recent studies of RPM. Section III compares the treatment of RPM under the competition laws of the U.S. and Canada. Section IV compares the enforcement of the RPM prohibitions in Canada and the U.S. Section V provides conclusions and suggestions for further analysis.

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II. The Economic Effects of RPM

The controversy over the treatment of RPM rests on competing views of the economic effects of the practice. Four main reasons have been advanced in favour of retaining the prohibition. First, it has been suggested that even within a single manufacturer's brand, the suppression of price competition at the retail level of the market is detrimental to consumers.[6] Second, it has been widely suggested that RPM may facilitate the enforcement of collusive arrangements among manufacturers of competing brands.[7] Third, some commentators have suggested that RPM may be used to foreclose distribution channels to potential rivals.[8] Fourth, retailers may induce manufacturers to engage in RPM as a means of achieving super-competitive retail profit margins.[9] Each of these rationales will now be considered in turn.

The basic argument that the suppression of retail price competition within a single brand is by itself detrimental to consumers is difficult to sustain. In general, manufacturers will prefer the lowest possible retail profit margins for their products in order to maximize sales.[10] It would normally be against the interests of individual manufacturers to raise the resale prices of their products unless the accompanying changes in the distribution system stimulate increased demand for the products.[11] In the absence of other anti-competitive purposes, a manufacturer's decision to enforce resale prices for his own brand is simply a part of a marketing strategy.

The concern that RPM can facilitate collusive arrangements among manufacturers of competing brands has been noted by Telser.[12] In this view, the fixed resale prices reduce the incentive of individual members of a cartel to shade their wholesale prices, since such price cuts cannot generate additional sales at the retail level. The use of RPM by manufacturers of large electric lamps in Canada and electric light bulb manufacterers in the U.S. may have been examples of such use of the practice to facilitate horizontal collusion.[13] It is important, however to note that the use of RPM in such cases is incidental to the horizontal agreement among competing firms. The latter may be dealt with directly under the relevant competition law provisions.

It has also been suggested that RPM may be used by individual manufacturers to deny distribution channels to potential rivals. In this view, the anti-competitive effects of RPM involve the erection of entry barriers and are similar to those of non-price vertical restraints. The use of RPM by the U.S. sugar and tobacco trusts was probably intended for this purpose, although the evidence suggests that such use was of limited effectiveness.[14] In both the U.S. and Canada, non-price vertical restraints are generally dealt with under a rule of reason, pursuant to which they are permitted except in cases of proven anti-competitive impact.[15] To the extent that the effects of RPM are similar to those of non-price vertical restraints, it may be argued that they should be subjected to a similar standard.

Another important source of opposition to RPM is the concern that retailers may induce manufacturers to engage in the practice as a means of obtaining super-competitive retail profit margins. In effect, manufacturers are paid (with a higher wholesale price) to police quasi-cartel arrangements among dealers and to protect them from discount retailers.[16] The prominent role of certain U.S. retail industry associations, especially druggists and liquor distributors, in lobbying for "fair trade" legislation is often cited in support of this view.

In many retail trades, however, entry is too easy to permit super-competitive profit margins. The drug and liquor trades in which dealer collusion was observed were characterized by state entry restrictions. Furthermore, the evidence suggests somewhat broader support for RPM among manufacturers than dealers.[17] In sum, while the dealer cartel hypothesis accounts for some specific instances of RPM, it does not provide a general explanation for the practice.

The positive case for resale price maintenance (i.e., against a general prohibition) is based on the view that it facilitates more efficient distribution of goods and services - thereby resulting in increased interbrand competition. This may occur in several ways. For example, RPM can facilitate more rapid introduction of new products in the market by increasing the number of outlets stocking the product.[18] The demand for consumer goods is positively related to the number of outlets stocking the product. RPM can provide the margins necessary to make a new product attractive to retailers. Even such opponents of RPM as Pitofsky agree that an exception should be made to accommodate this use of the practice.[19]

The use of RPM to create incentives for the provision of point-of-sale information and special services by dealers has received considerable attention in recent years. The demand for many products depends on the wide availability of accurate information on their uses and features. In the absence of RPM, the provision of such information is subject to free riding by discount retailers. This undermines the viability of full service dealers, resulting in an overall reduction in the availability of information in the market. This theory appears to explain the use of RPM in industries such as audio and video equipment and computers.[20] Opponents of RPM agree that there should be an exception for this use of the practice.[21]

In an important extension of the dealer service argument, Marvell and McCafferty have argued that RPM enables manufacturers to obtain certification of the quality of their products from reputable dealers. The stocking of the product by such retailers signals that the product is consistent with their high quality reputations. Like the provision of pre-sale information, this signal is subject to free riding by discount retailers. RPM can prevent such free riding and make high quality products attractive to reputable retailers. The relatively common use of RPM in higher-quality lines of products such as fine china and hardware tends to support this view of the practice.[22]

A related rationale for RPM that has received considerable attention in Canada is the prevention of loss leader selling. Manufacturers have long argued that loss leader selling damages the reputation and erodes the normal sales value of their products.[23] This results in reduced availability and diminished sales. An extensive inquiry by the Restrictive Trade Practices Commission in the 1950's concluded, however, that the detrimental consequences of loss leader selling had been exaggerated, and that many alleged instances of the practice are in fact merely aggressive price competition.[24]

Some recent studies have attempted to provide a more systematic assessment of the impact of RPM as a basis for policy revision. A Staff Report to the Federal Trade Commission reviewed the 68 RPM cases processed by the Commission from 1965 to 1982. The study found that RPM was often useful to relatively small firms selling in structurally competitive markets. Such use was unlikely to be harmful to consumers. It also determined that RPM occurred within all types of market structures. It was unlikely that RPM facilitated collusion among manufacturers in the majority of these markets. The Staff Report concluded that the per se prohibition of RPM in the U.S. is "extremely difficult" to defend on the basis of economic logic.[25]

In their background study for the Macdonald Commission, Mathewson and Winter analyse the economic welfare effects of the various possible uses of RPM. They acknowledge that the practice is harmful to consumers where it is used to support a manufacturers' or retailers' cartel. However, the existence of a cartel can be rejected in most cases. Where RPM is used by a single manufacturer acting independently, it is likely to be welfare-enhancing.

Mathewson and Winter also undertake a selective analysis of 6 Canadian cases involving RPM. In one of the cases, RPM facilitated the operation of a manufacturers' cartel.[26] In their view, however, the majority of the cases involved the use of RPM to: (i) provide incentives for special dealer services; and/or (ii) signal superior quality to consumers. Such use enabled the firms involved to enter the market more quickly and to establish more efficient distribution systems. They conclude that prohibition of the use of RPM by new entrants into a consumer goods market will be harmful to price and product competition in the long run.

Most recently, a study of U.S. RPM cases that were brought by the Department of Justice and Federal Trade Commission from 1890 to 1983 has attempted to gauge the empirical significance of specific anti-competitive uses of RPM.[27] It finds that approximately one third of U.S. RPM cases may have facilitated collusion by manufacturers of competing brands. However, the use of RPM to bolster a cartel is subject to serious practical difficulties. The study concludes that most instances of RPM involve the pro-competitive uses noted above.

III. The Treatment of RPM Under U.S. and Canadian Law

In the U.S., RPM is not dealt with specifically in the antitrust statutes but is governed by the judicial interpretation of section 1 of the Sherman Act. In the 1911 case of Dr. Miles Medical Co. v. John D. Park and Sons Co. the U.S. Supreme Court held that vertical price fixing agreements were inherently anti-competitive and therefore illegal per se under the Act.[28] The Court reasoned that "The manufacturer having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

The U.S. per se rule was effectively suspended by the Miller-Tydings Act of 1937, which exempted RPM agreements from the antitrust laws when authorized by state "fair trade" statutes. The McGuire-Keough Act of 1952 went beyond the Miller-Tydings Act to authorize enforcement of resale price agreements against non-signing distributors -- i.e., all dealers within a state could be bound to minimum prices as long as one of them had signed a contract to this effect. The Supreme Court's holding in Dr. Miles was re-instated in 1975, when Congress repealed the Miller-Tydings and McGuire-Keough Acts.[29] The U.S. Department of Justice actively supported the repeal on the basis that the two Acts provided sweeping authority for price fixing.

Since 1975, two inconsistencies in the U.S. law of vertical restraints have forced a partial re-consideration of the prohibition of RPM. First, the per se prohibition of RPM is in contrast to the more permissive treatment of non-price vertical restraints in the U.S. In the landmark case of Continental T.V. Inc. v. G.T.E. Sylvania (1977), the Supreme Court ruled that restrictions on the territories within which a distributor may sell, or the customers with whom he may deal, were to be judged under a rule of reason.[30] The Court reasoned specifically that non-price vertical restraints may be beneficial to consumers, in that they permit manufacturers to establish service-oriented distribution systems that would otherwise be undermined by free riders. Since 1977, the rationale for the Supreme Court's treatment of non-price vertical restraints is increasingly seen as applicable to RPM as well. Indeed, as Mr. Justice White suggested in his concurring opinion in Sylvania, "the effect, if not the intention, of the Supreme Court's opinion is necessarily to call into question the firmly established per se rule against price restraints."

Second, the prohibition of vertical price fixing in the U.S. is at odds with the treatment of unilateral price maintenance in that country. The per se rule in Dr. Miles is aimed at price fixing agreements -- i.e., conspiracies between a manufacturer and his distributors to establish minimum prices. This is consistent with its foundation in section 1 of the Sherman Act, dealing with contracts, conspiracies and combinations in restraint of trade. In its 1919 decision in U.S. v. Colgate, the Supreme Court held that unilateral price maintenance by manufacturers is permissible.[31] That is, a manufacturer can merely announce its resale prices in advance and refuse to deal with those who fail to comply.[32] In practice, the fact situations covered by Colgate and Dr.

Miles are difficult to distinguish. For many years Colgate was regarded largely as a judicial anomaly. In its important 1984 decision in Monsanto Co. v. Spray-Rite Service Corp., however, the Supreme Court has seemingly strengthened the doctrine in Colgate.

In Monsanto, the Supreme Court received a brief from the U.S. Department of Justice urging it to overturn the per se rule in Dr. Miles.[33] The Court chose not to overturn Dr. Miles but to clarify the application of the rule in that case. It stated that an unlawful agreement may not be inferred merely from the termination of a distributor in response to complaints of price cutting from competing dealers. Rather, there must be evidence that "tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently" and that demonstrates "a conscious commitment to a common scheme to achieve an unlawful objective." The Court indicated specifically that it wished to fortify the doctrine in Colgate.[34]

The U.S. Supreme Court's reasoning in Monsanto suggests that even in its limited form, the per se rule against vertical price fixing may not last long. The Court did not reject the urging of the Department of Justice to overturn Dr. Miles on the merits, but side-stepped the issue on the basis that the validity of the trial judge's per se instructions to the jury was not raised in the initial appeal. The Supreme Court noted explicitly that "the economic effect of ... unilateral and concerted vertical price setting, and agreements on price and non-price restrictions is in many, but not all, cases similar or identical." This statement, coupled with the Court's more general observations regarding the efficiency benefits of vertical restraints, foreshadows a more thorough-going re-examination of Dr. Miles. As Professor (now Judge) Frank Easterbrook suggests, "the decision to endorse Colgate in strong terms must reflect substantial dissatisfaction with Dr. Miles .... The days of Dr. Miles may be numbered."[35]

In contrast to the treatment of RPM in the U.S., in Canada the practice is dealt with under specific provisions of the Combines Investigation Act. In 1952, Canada became the first country to adopt a specific legislative ban on resale price maintenance and related activities. This ban was in response to the recommendations of the MacQuarrie Committee Report and the apparent growth of price maintenance in several merchandising industries as a result of their experience under regulation by the Wartime Prices and Trade Boards.[36] The existing provisions of the Combines Act were considered inadequate to deal with such activities.

In the 1950s considerable attention was focused on the perceived impact of loss leader selling on small businesses. In 1960 the Act was amended to provide a defence to aspects of the ban on RPM in certain circumstances, including where a manufacturer believed that his product was being used as a loss leader.[37] As discussed below, to some extent these defences may accommodate the pro-competitive rationales for resale price maintenance.

In 1976, the resale price maintenance provisions of the Combines Act underwent a number of further revisions, as part of the Stage I amendments to the Act.[38] First, the provisions were extended to cover services as well as articles. Second, the wording of the section was broadened to cover not merely the specification of minimum resale prices but, more generally, attempts to influence upward or discourage the reduction of the prices at which goods are sold. The revised wording applies to horizontal as well as vertical price maintenance.[39] In addition, the amendments clarified that price maintenance is also prohibited where it is achieved through the exercise of a patent, trademark, copyright or registered industrial design. Parliament also added to the Act a specific sub-section dealing with attempts to induce refusal to supply for reasons of price shading.

The current section 38(1)(a) of the Act makes it an offence for any person engaged in the business of making or selling a product

> (a) by agreement, threat, promise or any like means, (to) attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in a business in Canada supplies or offers to supply or advertises a product within Canada...

It should be noted that section 38(1)(a) prohibits price maintenance whether by agreement or (unilateral) threat. In this respect the prohibition of price maintenance in Canada is broader than the corresponding prohibition of vertical price fixing in the U.S.

Section 38(1)(b) of the Act makes it an offence to

> (b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.

In effect, it is an offence to refuse to supply for reasons of price shading, irrespective of the existence of an agreement. Persons engaged in RPM are frequently charged under both sections 38(1)(a) and 38(1)(b).

Section 38 does not prohibit the mere use of manufacturers' suggested retail prices. However, sub-section (3) places an onus on manufacturers employing such prices to indicate to the dealers or, in the case of publication or advertisement, the public, that the product may be sold for a lower price.[40]

Finally, section 38(6) of the Combines Act provides that

> (6) no person shall, by threat, promise or any like means, attempt to induce a supplier, as a condition of his doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons.

This provision is directed at the perceived role of dealers in initiating refusal to supply for the purpose of price maintenance.

In assessing the scope of the Combines Act provisions respecting price maintenance, it is important to note the limitations incorporated in section 38(9) of the Act. In effect, this section provides a defence to a manufacturer charged under section 38(1)(b) with refusing to supply a dealer for reasons of price discounting, where the manufacturer believes that: (i) his product is being used as a loss leader; (ii) the dealer is using his product to "bait and switch"; (iii) the dealer is engaging in misleading advertising; or (iv) the dealer has failed to provide the level of service that might reasonably be expected.[41] To some extent these exceptions accommodate the positive rationales for RPM noted above. However, the exceptions do not apply to the offence of price maintenance under section 38(1)(a), nor do they apply to the offence of inducement to engage in refusal to supply under section 38(6).

The definition of loss leader selling for the purposes of section 38(9) has been considered by the courts. In general, loss leader selling is considered as sale at a price below invoice cost. In R. v. Lee, the court rejected a test of loss leading based on whether the retailer sells a product for the purpose of making a profit on it or for the purpose of advertising.[42]

In terms of the positive rationales for resale price maintenance, the application of the level of servicing defence is also of interest. The courts have emphasized that the test of section 38(9)(d) is the level of servicing expected by customers and not the level desired by the manufacturer.[43] The courts have also held that the defence applies only to post-sale servicing, although this holding was corrected in the 1976 amendments.[44] Most important, the cases confirm that the defences in section 38(9) are available only in respect of refusal to supply for reasons of low prices.[45]

In sum, unlike the U.S. antitrust statutes, the Combines Investigation Act deals specifically with the various aspects of price maintenance. The Act creates three separate offences dealing with price maintenance, refusal to supply discounters and inducement to engage in refusal to supply. The basic offence of price maintenance is broader than the corresponding U.S. law, in that it prohibits price maintenance both by agreement and unilateral action. To some extent the defences provided in section 38(9) accommodate the pro-competitive rationales for RPM noted in Part II of this article. However, these defences do not apply to the offence of price maintenance under section 38(1)(a).

IV. Enforcement of RPM Policy in the U.S. and Canada

Since the advent of the Reagan Administration, the U.S. antitrust agencies have adopted the view that RPM can be beneficial and have virtually ceased to enforce the prohibition of the practice. Since 1980, the Department of Justice has not prosecuted a single RPM case.[46] This is in contrast to an average of 10 RPM prosecutions per year during the 1970s.[47] In addition, the Federal Trade Commission has not prosecuted an RPM case since 1982. The rule against RPM has continued to be enforced in private litigation, primarily by terminated distributors, as in the Monsanto case.

In contrast to the U.S., public enforcement of the prohibition of price maintenance in Canada has continued. During the year ending March 31, 1984, seventeen price maintenance cases were concluded by the courts.[48] These represented the majority of the 22 cases under the Combines Act concluded during the year.

Since 1983, the position taken by the U.S. antitrust agencies on RPM has drawn increasing opposition from the Congress. As noted, the Department of Justice's amicus brief in the Monsanto case urged the Supreme Court to overturn the per se rule set down in Dr. Miles. In response, the Congress attached a rider to the Department of Justice Appropriations Act for fiscal 1984 forbidding the use of any of the funds appropriated by the Act for the purpose of overturning or modifying the per se rule. Since the Bill was enacted just prior to the scheduled argument in Monsanto, the then Assistant Attorney General for Antitrust, William F. Baxter, was prevented from orally urging the Court to adopt the position suggested in the Department's brief.[49]

In January 1985, the Department of Justice released its Vertical Restraints Guidelines,[50] similar to the Department's Merger Guidelines which have been used extensively in antitrust litigation. The Guidelines set forth a structured rule of reason identifying circumstances in which vertical arrangements will not be challenged by the Department. These include: (i) a low market share on the part of the firms; (ii) low overall market concentration; and (iii) ease of entry into the supplier and distributor markets. While ostensibly limited to non-price restraints, the Guidelines were taken by the House of Representatives' Committee on the Judiciary as a thinly-veiled attempt to undermine the traditional treatment of RPM as well as non-price restraints. On November 19, 1985, the Committee approved and reported to the House a resolution stating that the Vertical Restraints Guidelines do not have the force of law, do not accurately express federal antitrust law or Congressional intent, should not be considered by the courts as binding or persuasive, and should be recalled by the Attorney General.[51]

The Report accompanying the Judiciary Committee's resolution indicates that it is not satisfied with the "largely theoretical" case that has been put forward against the per se prohibition of RPM. The Committee sides with experts who "take strong issue with the Chicago School approach to vertical restraints, which they regard as a departure from the most fundamental antitrust principles." The Guidelines "attempt to dilute or trivialize the generality of the per se rule against price fixing, both horizontal and vertical." The Committee sees a need for more empirical evidence to support proposals for change.

V. Conclusions

The Macdonald Commission's recommendation for a review of the prohibition of resale price maintenance is timely in light of recent findings respecting the economic effects of the practice. The weight of economic opinion has shifted substantially since the enactment of the current provisions of the Combines Act governing price maintenance. A growing body of theoretical and empirical literature supports the view that RPM can be pro-competitive. Nevertheless, the concern remains that RPM can facilitate quasi-cartel activity among dealers and manufacturers. These aspects of the practice should be balanced against its potential pro-competitive effects.

The Congressional response to the U.S. Department of Justice Vertical Restraints Guidelines demonstrates the continuing depth of resistance to liberalization of the treatment of RPM in the U.S. The Congress is specifically concerned that a full rule of reason approach would be inadequate to deal with the genuinely anti-competitive aspects of RPM. In the area of non-price vertical restraints, relatively few cases have been successfully prosecuted under the rule of reason. It seems likely that moves to adopt a liberalized approach to RPM in Canada would elicit similar concerns.

In these circumstances, there is a need to flesh out a workable rule of reason for RPM cases. Some possibilities include: (i) a broadening of the application of the existing defences in section 38(9) of the Combines Act; (ii) a reverse onus for firms to show that their use of RPM is not anti-competitive; or (iii) a structural approach that would prohibit RPM only in cases where the firms involved possess market power. Alternatively, the law might allow the use of resale price maintenance in select industries where it is shown to be pro-competitive. This would be similar to the approach in the U.K.[52] The extensive body of RPM cases in Canada provides a rich source for evaluation of the probable impact of possible rules. Such evaluation would go a long way to help refine the competition policy treatment of RPM in Canada.

These suggestions apply only to the treatment of resale price maintenance under the Combines Act. The rule against horizontal price maintenance, which is also covered by section 38 of the Act, has not been discussed here. The rule of reason would apply to arrangements respecting the resale of products along an individual manufacturer's distribution chain.

NOTES

1. Royal Commission on the Economic Union and Development Prospects for Canada, Report (Ottawa: Supply and Services Canada, 1985), p. 224. Section 38 of the Combines Investigation Act prohibits price maintenance and related activities, subject to certain exceptions noted below. The prohibition extends to horizontal as well as resale price maintenance. Like the Macdonald Commission's recommendation, this article is concerned solely with the treatment of RPM under the Act.

2. F. Mathewson and R. Winter, Competition Policy and the Nature of Vertical Exchange (Toronto: University of Toronto Press, forthcoming), p. 152.

3. U.S., House of Representatives, Vertical Restraints Guidelines Resolution (Report to Accompany H. Res. 303, No. 99-399, November 21, 1985).

4. Frank H. Easterbrook, "Vertical Arrangements and the Rule of Reason," Antitrust Law Journal, vol. 5.3, Issue 1, 1984, pp. 135-173.

5. R.D. Anderson and S.D. Khosla, "Recent Developments in the Competition Policy Treatment of Tied Selling," Canadian Competition Policy Record, vol. 6, no. 1, March 1985, pp. 1-14.

6. Robert Pitofsky, "In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing," Georgia Law Review, vol. 71, 1983, p. 1487.

7. Lester G. Telser, "Why Should Manufacturers Want Fair Trade?" Journal of Law and Economics, vol. 3, 1960, p. 86.

8. Richard Zerbe, "The American Sugar Refinery Company, 1887-1914: The Story of a Monopoly", Journal of Law and Economics, vol. 12, 1969, p. 339.

9. U.S., Federal Trade Commission, Report on Resale Price Maintenance (Washington, D.C.: 1945); F.M. Scherer, Industrial Market Structure and Economic Performance (Boston: Houghton Mifflin, 2nd ed., 1980), pp. 590-594.

10. "The manufacturer's interest is in high demand and therefore a low retail price, ceteris paribus, once the wholesale price has been set." Mathewson and Winter, supra note 2, p. 20.

11. "If a manufacturer adopts RPM willingly, even when there are lower margin distribution alternatives available, the manufacturer must believe that the adoption of the higher margins is a path to greater net-of-margin demand for its product." Howard P. Marvell and Stephen McCafferty, "The Welfare Effects of Resale Price Maintenance," Journal of Law and Economics, vol. XXVIII (2), 1985, pp. 363-379.

12. Telser, supra note 7.

13. R. v. Canadian General Electric Co. Ltd. (1976) 34 C.C.C. (2d) 489 (electric lamps); and U.S. v. General Electric, 272 U.S. 476 (1926) (light bulbs). Skeoch notes a number of additional examples of the use of RPM to facilitate horizontal collusion in industries such as sugar, drugs, radio tubes, tobacco, dental supplies, optical goods and bread. L.A. Skeoch, "Canada" in Basil S. Yamey, Resale Price Maintenance (Chicago: Aldine, 1966), pp. 25-29.

14. Zerbe, supra note 8; Marvell and McCafferty, supra note 11, pp. 367-68.

15. See Combines Investigation Act, Part IV.1 (Canada); Contintental T.V. Inc. v. G.T.E. Sylvania, Inc., 443 U.S. 36 (1977).

16. Marvell and McCafferty, supra note 11, pp. 373-74.

17. Thomas R. Overstreet, Resale Price Maintenance: Economic Theories and Evidence (Washington, D.C.: Federal Trade Commission, Bureau of Economics, Staff Report, 1983), pp. 132-34; Marvell and McCafferty, supra note 11, pp. 373-74.

18. J.R. Gould and L.E. Preston, "Resale Price Maintenance and Retail Outlets," Economica, vol. 32, 1965, p. 302.

19. Robert Pitofsky, "Why Dr. Miles was Right", Regulation, January-February 1984, pp. 27-30.

20. Frank Easterbook, "Restricted Dealing is a Way to Compete," Regulation, January-February 1984, pp. 23-27.

21. Pitofsky, supra note 19. Some economists have argued that the welfare implications of RPM are ambiguous, even where the practice is adopted to encourage enhanced pre-sale services, since the additional costs to customers who do not need the special services may exceed the gains to new-customers. Marvell and McCafferty dispute this possibility. Supra note 11, pp. 370-71.

22. Howard P. Marvell and Stephen McCafferty, "Resale Price Maintenance and Quality Certification," Rand Journal of Economics, vol. 15, 1984, p. 346; Marvel and McCafferty, supra note 11.

23. Marvell and McCafferty, supra, note 11, pp. 374-75.

24. Restrictive Trade Practices Commission, Report on an Inquiry into Loss-Leader Selling (Ottawa: Queen's Printer, 1955).

25. Overstreet, supra note 17, pp. 81-82; p.176.

26. R. v. Canadian General Electric Co. (Electric Large Lamps) (1976) 34 C.C.C. (2d) 489. See also Restrictive Trade Practices Commission, Report in the Matter of an Inquiry Relating to the Production, Manufacturer, Sale and Supply of Electric Lamps and Related Products (1971). The other cases considered by Mathewson and Winter are: Matsushita Electric (1981); R. v. H.D. Lee of Canada (1981), 57 C.P.R. (2d) 186; R.v. Levi-Strauss of Canada Ltd. (1979), 45 C.P.R. 25; R. v. Rolex Watch Co. of Canada Ltd. (1981), 50 C.P.R. (3d) 222; and R. v. Sunbeam Corp. (Canada) Ltd. (1969(1 D.L.R. (3d) 161.

27. Stanley I. Ornstein, "Resale Price Maintenance and Cartels", Antitrust Bulletin, Summer 1985, pp. 401-432.

28. 220 U.S. 373 (1911)

29. Easterbrook, supra note 4, p. 136.

30. 43 U.S. 36 (1977). For a more detailed account of the evolution of the U.S. law on price and non-price vertical restraints, see S.D. Khosla and R.D. Anderson, "The Monsanto Case and the Evolution of RPM Policy in the U.S.," Canadian Competition Policy Record, vol. 5, no. 3, September 1984, pp. 9-16.

31. 250 U.S. 300 (1919).

32. Phillip Areeda, "The State of the Law," Regulation, January-February 1984, pp. 19-22, at 21.

33. Brief of the U.S. Department of Justice, Monsanto Co. v. Spray-Rite Service Corp., No. 82-914, 1983.

34. "It is of considerable importance that independent action by the manufacturer, and concerted action on non-price restrictions, be distinguished from price fixing agreements...If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in Sylvania and Colgate will be seriously eroded." U.S., Supreme Court, 465 U.S. 752 (1984). This statement underscores the limitation of the U.S. prohibition of RPM to vertical price fixing agreements.

35. Easterbrook, supra note 4, at p. 171.

36. Report of the Committee to Study Combines Legislation and Interim Report on Resale Price Maintenance, October 1, 1951 and March 8, 1952; L.A. Skeoch, "Canada", in B.S. Yamey, Resale Price Maintenance, supra note 13.

37. See the discussion of section 38(9), infra.

38. The Stage I amendments to the Act were in response to the recommendations in the Economic Council of Canada's Interim Report on Competition Policy. The Report supported retention and strengthening of the prohibition of R.P.M. Economic Council of Canada, Interim Report on Competition Policy (1969)' PP. 104-106.

39. For discussion, see R.J. Roberts, Anticombines and Antitrust (Toronto: Butterworths, 1980), pp. 231-34.

40. Section 38(3) does not, however, create a separate offence relating to suggested retail prices. R. v. Philips Electronics Ltd., (1981) S.C.R. 264.

41. R. v. William Coutts, (1968) 54 C.P.R. 60.

42. R. v. H.D. Lee, (1981), 57 C.P.R. (2d) 186.

43. R. v. H.D. Lee, id.

44. R. v. H.D. Lee, id.

45. R. v. Sunbeam Corp. (Canada) Ltd., (1967) 1 O.R. 23; (1967), 62 D.L.R. (2d) 45; (1969) 1 D.L.R. (3d) 161.

46. U.S., House of Representatives, supra note 3.

47. Pitofsky, supra note 19.

48. Director of Investigation and Research, Annual Report for the Year Ended March 31, 1984 (Ottawa: Supply and Services Canada, 1984), p. 14.

49. U.S., House of Representatives, supra note 3.

50. United States, Department of Justice, Vertical Restraints Guidelines, 1985.

51. U.S., House of Representatives, supra note 3.

52. "Any firm in the U.K. wanting to maintain resale price floors has the burden of proving that doing so would be in the public interest. In practice, this...has meant that RPM is effectively illegal except in the markets of two products: pharmaceuticals and books. Suppliers in these industries argued successfully that unrestrained competition would harm the distribution of the products." Mathewson and Winter, supra note 2, p. 4.