THE TREATMENT OF VERTICAL PRICE RESTRAINTS UNDER THE COMPETITION ACT: A RETROSPECTIVE

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1. Introduction

While it was a surprise to many that Bill C-10, the 2009 *Budget Implementation Act*,[2] contained significant amendments to Canada's *Competition Act* ("CA"),[3] it was no surprise that these amendments repealed price discrimination, promotional allowances and criminal predatory pricing as these provisions had been slated for repeal for many years. The decriminalization of price maintenance (through repeal of the criminal price maintenance provision and introduction of the civil reviewable practice of price maintenance now found in section 76 of the CA) in Bill C-10 was not, however, widely anticipated.

This paper will trace the legislative history of the vertical pricing provisions of the CA and the evolving economic thinking behind these provisions, up to and including the 2009 amendments. It will then consider whether the current law strikes a sufficient balance between various interests intended to be protected by Canada's pricing laws.

2. Criminal Law Origin of the Vertical Pricing Provisions

A vertical restraint is any restriction on competition involving different levels of the supply chain, for example, a restriction contained in an agreement between a supplier and a customer.

Price-based vertical restraints – price maintenance, predatory pricing, price discrimination, geographic price discrimination and promotional allowances – had been treated as criminal matters under the *Combines Investigation Act* ("CIA", the predecessor to the CA) and, indeed, were part of Canada's criminal law (Criminal Code) decades prior to the coming into force of the CIA. The criminal treatment of these practices reflects the historical constitutional underpinnings of federal statutes dealing with anti-competitive practices.

Until the Supreme Court of Canada's 1989 landmark decision in *General Motors of Canada v. City National Leasing*[4] anti-combines legislation was upheld under the federal criminal law power (section 91(27)) of the *Constitution Act*.[5] In *National Leasing*, the Supreme Court of Canada held that the federal trade and commerce power provides the constitutional basis for Parliament's authority to legislate in the realm of competition law.[6] Shortly following the Supreme

Court's decision in *National Leasing*, which had involved a challenge to provisions of the CIA, the Competition Tribunal ("Tribunal")[7] and the Quebec Court of Appeal,[8] respectively, held that while *National Leasing* dealt with the old CIA, the reasoning and conclusions applied equally to the 1986 CA.

With the constitutional basis for competition law settled, Parliament was able to focus on the efficiency of markets, rather than issues of public order and morality, in designing Canada's competition law. This furthered the thinking behind the criminal law underpinnings of the vertical price restraints.

3. Legislative and Enforcement History of the Criminal Pricing Provisions

(a) Origins of the Specific Provisions

The Canadian law respecting price discrimination and predatory pricing traces its roots to the depression of the 1930s. The enactment of criminal prohibitions on price discrimination and predatory pricing followed from a recommendation of the Royal Commission on Price Spreads in 1935.[9] The legislative history of these provisions reveals the concern of that period in Canada's economic history about "unfair competition" and the potential abuse by large firms, such as department stores and chain stores, of their market power to drive independent competitors out of the market and ultimately create monopoly or near monopoly situations. This passage (albeit lengthy) from the Royal Commission's 1935 Report summarizes the origins behind the price discrimination and predatory pricing provisions and the state of thinking about unfair pricing practices:

> Many unfair practices take the form of price discrimination. This inevitably develops when there is considerable unused capacity. If a producer can attract new business at reduced prices while keeping all his former business at the old price, he can gain by the transaction as long as the new business pays anything more than the actual increase in costs which results from it; that is, beyond what the costs would have been if the added business had not been found. Thus occurs the paradox of profit-making sales "below cost," below, that is to say, the total cost which a conservative accounting system would allocate to those goods. Such discrimination is, of course, only possible where the market can be divided into distinct parts. Where discrimination develops, serious problems arise, problems of justice to the individuals subject to discrimination and problems relating to the public interest.
>
> ...

Our evidence demonstrates that, in manufacturing and distribution, price discrimination has become very common. The reason is that the proportion of overhead costs is high and different markets are more or less distinct. Under these conditions, a manufacturer may sell the same commodity at two or more different prices. His branded product will be offered to his regular distributors at a price which covers all costs. But a sizeable proportion of his output, perhaps unbranded, or disguised under a special brand, may be marketed through other channels at a price less than sufficient to cover a fair share of overhead costs, in the belief, often mistaken, that these outlets constitute a market sufficiently separate not to affect the customary price for the product. Similarly, a department or chain store may sell certain goods at prices which do not include overhead, in the expectation that they may recover the loss on other goods.

Where discrimination of this sort exists, the competitive struggle does not necessarily result in the selection of the more efficient. Thus, an injury to the public accompanies the obvious injury to those who are not so lucky as to be the recipient of such favours. Some discrimination is admittedly desirable when sales in quantity involve real economies or when a buyer smooths the "load" by giving his orders to be made "off the peak," but there is also unreasonable discrimination which should be controlled.

Fourth, under imperfect competition, the bargaining advantage of strong organized groups may lead to the exploitation of the weak and unorganized. Faced with losses as the revenue from sales decreases and the expenses of the competitive struggle increase, powerful corporations naturally seek to shift the burden of their losses on to others. This has brought into bold relief the inequality of economic strength when the giants of monopoly and imperfect competition meet in the market the pigmies of unorganized, small-scale, competitive enterprise....

It is not enough to say, as many contend, that these problems are the result of depression and will vanish with the depression. It may be true that when recovery is achieved, competition will become less predatory, discrimination less general, and exploitation less obvious. But it is equally true that, while unfair competition and unequal bargaining are intensified by depression, they will not be

> absent in prosperity, especially in a prosperity characterized by the increasing substitution of imperfect for free competition.[10]

Although the Royal Commission was reluctant to establish precise general principles for classifying practices as unfair, they specified that "[discriminatory discounts, rebates and allowances and territorial price discrimination and predatory price-cutting] should very definitely be considered 'unfair'...They are so widespread and generally condemned that their complete prohibition by the Commission is justified."[11] Moreover, the Royal Commission found that such practices "permit the survival of the powerful, rather than of the efficient."[12] Ultimately the Royal Commission recommended that the Federal Trade and Industry Commission be given the authority and duty to prohibit such unfair trade practices.

In its 1959 Report the Royal Commission on Price Spreads of Food Products reiterated its concerns with the concentration of economic power and "the narrowing opportunities within our economy for individual initiative outside the structure of a large corporation,"[13] and stated that one of its objectives is to provide a "fair opportunity for the relatively small and efficient firm to survive, and for the innovator starting on a small scale to become established."[14] In this report the Royal Commission raised concerns about the level of promotional activity undertaken by "the Canadian retail food trade in general and by the chain supermarket segment in particular,"[15] "the shift towards more use of promotional allowances and away from the traditional volume discounts" and the competitive disadvantage faced by independents in terms of their ability to obtain advertising allowances from suppliers.[16] This was consistent with concerns identified by the Restrictive Trade Practices Commission ("RTPC") in 1958 about promotional allowances being the primary source of differential treatment of grocery distributors.[17] The RTPC suggested that "it would be well for merchandisers...to examine or re-examine their price structures in order to avoid the possibility of discriminatory practices of a kind not warranted on economic grounds and which work unfair hardship on certain types of dealers".[18]

Following the recommendations of the Royal Commission and the RTPC, the prohibition on discriminatory promotional allowances was enacted in 1960 for purposes of ensuring that all competing customers shared in their supplier's promotional budget to a degree proportional to their volume of sales.

Concerns about price maintenance were raised as far back as 1927[19] but, until 1951, price maintenance could only be challenged where it could be considered an anti-combines arrangement under the CIA or the Criminal Code and, to our knowledge, there were no such challenges.[20] The criminal prohibition on price maintenance was introduced in Canada in 1951 by Bill-36,[21] following

the interim recommendations by the MacQuarrie Committee[22] appointed by the government in 1950 to study and recommend "...what amendments, if any, should be made to our Canadian legislation in order to make it a more effective instrument for the encouraging and safeguarding of our free economy."[23] As part of its review, the MacQuarrie Committee considered evidence that control of downstream retail prices by suppliers was widespread in the economy leading to higher prices than would prevail under competitive conditions. The MacQuarrie Committee concluded that the effect of resale price maintenance was the elimination of price competition among retailers of price maintained goods[24] and it also found that resale price maintenance facilitated horizontal collusive agreements.[25] On this basis the MacQuarrie Committee found that resale price maintenance was detrimental to a free economy and not desirable on the grounds of economic efficiency and recommended:

> It should be made an offence for a manufacturer or other supplier:
>
> 1. To recommend or prescribe minimum resale prices for his products.
> 2. To refuse to sell, to withdraw a franchise or to take any other form of action as a means of enforcing minimum resale prices.[26]

The MacQuarrie Committee was clear that suppliers should be free to impose maximum prices and recommend suggested retail prices as long as the manufacturer made it was clear to its customers that the suggested retail price was not intended to operate as a minimum price.[27]

These recommendations were considered by Parliament in December 1951 and the criminal offence of price maintenance was added to the CIA with the passage of Bill C-36. Paragraph 34(2)(b) of the amended CIA stated that: "No dealer shall directly or indirectly by agreement, threat, promise or *any other means whatsoever*, require or induce or attempt to require or induce any other person to *resell* an article or commodity, ...(b) at a price not less than a minimum price specified by the dealer or established by agreement" (emphasis added).[28]

As explained by the Ontario Court of Appeal in *R. v. Campbell*, the rationale for the offence is to prohibit suppliers from controlling downstream prices:

> The evil against which s. 34 is aimed is an attempt on the part of producers to require or induce the purchasers of their products by the means specified in s. 34(2) to maintain a resale price to the consumer which is not less than a minimum price specified by the producer or established by agreement. In short, the section is designed to operate as a ban on resale price maintenance.[29]

(b) Price Maintenance – Legislative History

(i) The Pre-1976 Amendments

In 1960, the price maintenance provision was amended to include the following defences to allegations of price maintenance: loss-leadering (selling the supplier's products below-cost for the purpose of advertising); bait and switch selling (selling products not for profit but for the purposes of attracting customers in the hope of selling them other products); misleading advertising in respect of the product; and failing to provide a reasonable level of service in relation to the products.[30]

In 1970, the provision was renumbered as section 38 of the CIA.[31]

(ii) The 1976 Amendments

When the CIA was amended in 1976, the price maintenance provision read as follows:

> 38. (1) No person who is engaged in the business of producing or supplying a product, or who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trade mark, copyright or registered industrial design shall, directly or indirectly,
>
> > (a) by agreement, threat, promise *or any like means*, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada (emphasis added);[32]

Significantly, the explicit reference to "resell" was removed from the revised price maintenance provision. The removal of the reference to "resell" was interpreted at the time as reflecting Parliament's intent that section 38 should not only apply to instances of vertical conduct. Indeed, the 1976 amendments were considered by the Bureau to clearly indicate Parliament's intent that the price maintenance provision be broadened to include horizontal price maintenance, namely restrictions on prices among competitors:

> Originally known as "resale price maintenance," this provision was introduced into the Competition Act in 1951 to combat vertical pricing restraints imposed by "dealers" against "resellers" (e.g. a wholesaler requiring a retailer to resell the wholesaler's products

> at list price). In 1975, the provision was amended to include both vertical and horizontal pricing restraints.[33]

The New Brunswick Court of Appeal explained the 1976 amendment as follows:

> The section was originally intended to prevent what was then called resale price maintenance, a practice whereby a supplier of goods would attempt to control the price at which the buyer of a product would resell to the consumer. This practice involved the vertical distribution of the product and this element, therefore, became essential to the concept of resale price maintenance. In the 1976 amendment which created the present s. 38, the wording of the section seems to remove the vertical distribution element, thereby adding a whole new sphere of activity within the ambit of the criminal sector.[34]

Both the original provision and the 1976 amendments included the language "directly or indirectly, by agreement, threat, promise;" however, the original provision in 1951 was very broad because it also included the words "any other means whatsoever." In comparison, the 1976 amendments replaced the phrase "any other means whatsoever" with the phrase "any like means," a change which remains in the current civil price maintenance provision. This significantly narrowed the provision. It is not "any means" that influences upward or discourages the reduction of price that constitutes price maintenance; rather, it is only those means specified in the provision (namely, agreements, threats or promises), or those "like" them. The Ontario Court of Appeal explained this distinction in its 1980 decision in *R. v. Philips Electronics Ltd.*: "It is significant that the present section, among other significant changes, has substituted the words "any like means" for "any other means whatsoever." This is a clear indication of the intention of Parliament to substantially restrict the type of attempts which constitute an offence under section 38(1)."[35]

The 1976 amendments also expanded the definition of "product" to include services, including express reference to credit cards and intellectual property.

(iii) The Introduction of the Competition Act and Section 61

The repeal of the CIA and the introduction of the CA in 1986 resulted in the price maintenance offence becoming section 61 of the CA. As with the previous price maintenance provision, section 61 made it a criminal offence to attempt, by means of an "agreement, threat, promise or any like means," to influence another person's prices upward or to discourage the reduction of the prices charged or advertised by that person. As noted above, this prohibition applied

to suppliers of both articles and services, to persons extending credit by way of credit cards, and to intellectual property rights holders. It applied to attempts to influence prices *upward* only, and therefore it was (and remains) permissible for a supplier to require its customers to sell *below* a specified maximum price.

Apart from a supplier's freedom to dictate maximum prices, the prohibition in 61 meant that customers were free to advertise and charge whatever prices they choose. In addition, by virtue of section 61(3) a suggested resale price or minimum resale price was unlawful unless the supplier also made it clear that the customer was not required to abide by or implement the suggestion and would not suffer in its relationship with the supplier as a consequence of failing to do so. This also had to be clear in any advertising placed by the manufacturer (which explains the "individual dealers may sell for less" caveat that commonly accompanies price advertising).

It was also a criminal offence to refuse to supply a product to, or discriminate against, a person because of that person's low pricing policy, unless one of several narrow defences applied, namely loss-leadering, bait and switch selling, misleading advertising, or failing to provide a reasonable level of service. These defences did not apply to the basic offence of price maintenance under paragraph 61(1)(a).

In order to secure a conviction for price maintenance, it was not necessary to prove that the supplier *intended* to maintain a price. In addition, the actual or likely effect of the pricing practice on competition was irrelevant. This made the price maintenance provision far easier to enforce than many other provisions of the CA – for example, the pre-amendment conspiracy provision (which required proof of an undue lessening of competition) or the abuse of dominance provision (which requires proof of a substantial lessening of competition) – because it was not necessary to introduce the kind of complex economic evidence that is required to establish that the price maintenance negatively impacted competition in a market.

(c) Price Maintenance – Enforcement History

Of all of the criminal pricing practices, the most actively enforced provision was the prohibition on price maintenance, with the Commissioner of Competition ("Commissioner") launching numerous cases over the past 60 years. Importantly, all of the reported cases under section 61 and its predecessor provisions which concerned vertical conduct were circumstances where a firm attempted to control the price at which a customer chose to resell the firm's product or to control the price by refusing to supply a customer who engaged in a low-pricing policy. For example, the provisions have been used to

prosecute a manufacturer of jeans who induced retailers to sell the jeans at not less than a minimum price[36] and a gasoline supplier who threatened that low prices by retailer gas stations would cause a price war, and told retail gas stations to increase the price of gas "or else Shell would be ticked off."[37] Refer to the attached Appendix A for a summary of all vertical price maintenance cases.[38]

The Commissioner was very active in enforcing the criminal price maintenance provisions of the CA in the last ten years. Notable cases and settlements included:

- In 2002, The Stroh Brewery Company (Quebec) Ltd. entered a guilty plea and was fined $250,000 because they had advised beer retailers in Quebec that they were required to sell at a price specified by Stroh in order to receive volume discounts.[39]
- In 2003, various Re/Max affiliates agreed to abide by a consent order of the Federal Court requiring a change in Re/Max's policies respecting the advertising of commission rates or fees by their franchisees and sales associates.[40]
- In 2003, Toyota Canada Inc. settled a price maintenance and misleading advertising case when it was found that some of its dealers believed that they would be subject to financial penalties if they sold vehicles or advertised prices below a specified "Access/Drive-Away" price. This price was established for local areas through a system of dealer votes. Toyota Canada Inc. did not pay a fine, but made voluntary donations totalling $2.3 million to charitable organizations as part of the settlement. It also agreed to a court order prohibiting it from engaging in the illegal conduct and requiring it to amend its Access Toyota Program to bring it into compliance with the law.[41]
- In 2004, Toyo Tanso entered a guilty plea and was fined $200,000 after it was found that it met with its independent distributor and attempted to raise the price of isostatic graphite in Canada. Toyo Tanso entered this plea even though it is independent distributor did not raise prices in Canada following the meeting.[42]
- In 2004, John Deere entered into a settlement (without admitting liability or any offence) in which it agreed to pay a rebate of 5% to purchasers of "100 series" tractors in Canada between January and August 2003, after it was found that some Canadian dealers (incorrectly) believed that a "minimum advertised price" clause in John Deere's U.S. contract applied to them, and that they were therefore required to sell or advertise at the list price suggested by John Deere.[43]

- In 2004, Royal Group Technologies entered a guilty plea and was fined $200,000 for attempting to influence another company to maintain the price of PVC window coverings such as vertical blinds and valances.[44]
- In 2005, Labatt Brewing Company pleaded guilty to a charge of price maintenance and was fined $250,000, after the Bureau determined that Labatt had attempted to influence upward discount beer pricing for Labatt-branded and other beers at nine convenience stores in Quebec.[45]

There were also several individual and class action damages suits filed based on alleged violations of the price maintenance provision, the most recent being *Fairview Donut*.[46] In *Fairview Donut*, the plaintiffs were Tim Hortons franchisees who complained that they were required to buy some of the ingredients that they use in their products at unreasonably high prices, thereby eroding their profits. The complaint targeted two aspects of the franchisees' operations: the cost of donuts and the cost of ingredients for soups and sandwiches, referred to as the "Lunch Menu." Justice Strathy of the Ontario Superior Court of Justice granted Tim Hortons' motion for summary judgment, thereby dismissing the franchise and price maintenance class action on the merits of the case.

While Justice Strathy's decision also addressed allegations of breach of contract, breach of duty of good faith and fair dealing, and unjust enrichment, the decision included the following instructive statements about price maintenance under section 61 of the CA:

- *The phrase "any like means" is to be narrowly interpreted*: "The use of the words "like means" indicates that the influencing upward of price *per se* is not a contravention of the section."[47]
- *An ordinary commercial agreement does not necessarily constitute an "agreement, threat, promise or any like means"*: "[T]o be guilty of the criminal offence of price maintenance, a party must do something more than "influence upward" the price of its own product by making a profit on a product that it sells to a second party for sale to a third party. It must be shown that the first party has taken other measures to influence upward or discourage the reduction of the price at which the second party sells the product. If an ordinary commercial agreement between the first party and the second party could be "an agreement, threat, promise or any like means", the section would criminalize routine commercial conduct, which could hardly have been the intent."[48]
- *The price maintenance provision is intended to protect downstream competition and does not prohibit a supplier from increasing its own prices to downstream customers:* "Section 61 does not prohibit a manufacturer or

> supplier from increasing the price at which it sells the product. As I have said earlier, it does not prohibit a supplier from making a large profit on a product it sells to someone downstream. It prohibits a person who produces or supplies a product from attempting, by means of agreement, to influence upward or discourage the reduction of the price at which another person sells the product. The provision is designed to protect the public by prohibiting an upstream supplier from preventing competition among retailers, thereby increasing the price paid by the ultimate consumer. It does not prohibit the upstream supplier from increasing the price at which it supplies the product to a downstream purchaser (emphasis in original)."[49]

- *Confirmation that maximum resale prices are legal:* "It was not an offence under the Competition Act to impose maximum retail prices; nor was it an offence for a manufacturer to suggest retail prices."[50]

The summary judgment decision in *Fairview Donut* provides useful and recent guidance on the interpretation of the price maintenance provision. While in that case the Court was considering the criminal provision, the above statements are nonetheless applicable to the current civil provision.[51]

(d) Criminal Price Discrimination and Promotional Allowance

The price discrimination and promotional allowance provisions were linked as both impacted the basis upon which a supplier made available or offered trade spend (e.g., favourable pricing, discounts, rebates, bonuses, allowances etc.) to customers. Given the highly technical and almost prescriptive nature of these pricing provisions, considerable planning was required to ensure that pricing and trade spend programs both achieved the legitimate commercial objectives of the suppliers and did not running afoul of these provisions.

(i) Price Discrimination – Enforcement History

The general price discrimination provisions of the CA were contained in paragraph 50(1)(a) and subsection 50(2). The relevant provisions were as follows:

> 50 (1) Everyone engaged in a business who...
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> > (a) is a party or privy to, or assists, in any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other

> advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity, ...
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
>
> (2) It is not an offence under paragraph (1)(a) to be a party or privy to, or assist in, any sale mentioned therein unless the discount, rebate, allowance, price concession or other advantage was granted as part of a practice of discriminating as described in that paragraph.

In general terms, the price discrimination provisions prohibited a seller from engaging in a practice of granting a price advantage to one of its customers which was not available to competing customers who purchased like products from the seller in like quantities. There was no requirement to show that the discriminatory pricing had an adverse effect on competition. In economic terms this is often referred to as primary-line discrimination as it focussed on discrimination between competition purchasers (customers) by differential pricing.

Since 1935 there was little enforcement activity and only three convictions (all guilty pleas) under the price discrimination provisions.[52] There have been a number private actions under section 36 of the CA which have contained price discrimination allegations but such allegations have not been upheld by the courts.[53]

In the absence of judicial decisions providing any meaningful guidance to the business and legal community regarding how the provisions should be interpreted, the Bureau received numerous requests for advisory opinions as to whether certain types of pricing practices were consistent with the provisions and there was a concern expressed by some that uncertainty regarding the application of these provisions was having a chilling effect on pro-competitive price strategies and creating unnecessary compliance costs for businesses. In 1993, in order to provide guidance regarding its own interpretation of the provisions, the Competition Bureau ("Bureau") published *Price Discrimination Enforcement Guidelines*,[54] which outlined the theory behind the price discrimination provisions and its enforcement approach.

The theory was that competing purchasers, when they purchase from a supplier articles of similar quality and quantity, should not have their ability to compete with one another negatively affected by unequal pricing treatment at the hands of the supplier. The Bureau's enforcement approach reflected the

highly technical nature of the price discrimination provisions and, accordingly, was relatively permissive.

Of particular note were the following elements of the provision which provided considerable latitude for differential pricing:

- The provision applied only to "sales" (not leases) and to "articles" (not services);
- The provision only applied to "competing purchasers" (i.e., sellers may discriminate between customers who do not compete in the same "market");
- The provision only applied to sales of like quantity – volume discounts were expressly permitted;
- The provision only applied to sale of like quality – a supplier could supply a special line of higher/lower quality products to a particular purchaser at a different price;
- The provision only applied where there was a "practice" of discriminating (a one-time discount to meet a competitive situation or store opening prices were permitted);
- Functional discounts (discounts in favour of a customer who provides some type of service in relation to your product) were permissible provided that they are "available" to all customers who provide the service; and
- Exclusive dealing discounts and loyalty discounts/bonuses were generally permitted as long as they were "available" to all customers.

The obligation to make a product "available" was also important. The Bureau's position was that general pricing terms and any other terms that are unilaterally established by the supplier had to be disclosed to all purchasers. However, if a particular customer approached the supplier, initiated negotiations and obtained some type of price concession in exchange for providing some type of service in relation to the article being purchased, then the supplier's sole obligation was to respond to the initiatives of competing purchasers who ask for similar concessions on similar terms. There was no obligation to actively offer the individually negotiated terms to competing purchasers.

In addition to section 50 (1)(a), geographic price discrimination was prohibited by section 50(1) (b) which provided as follows:

> 50. (1) Every one engaged in a business who
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> (b) engages in a policy of selling products in any area

> of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in such part of Canada, or designed to have such effect,
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> ...
>
> is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years.

Unlike section 50(1)(a), the victim of the alleged regional price discrimination was a competitor of the accused (not a customer as in the case of section 50(1)(a)), the section applied to products (meaning both an article and a service), and most importantly the policy of geographic discrimination had to have the effect or tendency of substantially lessening competition or eliminating a competitor, or be designed to have such effect.

The Bureau did not issue any public guidance on the application of geographic price discrimination and there were few prosecutions[55] and only one conviction in its 50-year history.[56]

(ii) Promotional Allowances – Enforcement History

Under former section 51 of the CA, it was a criminal offence for a person who is party or privy to the granting of an "allowance" (*non-price* advantages given to customers for advertising or display purposes and which are not applied directly to the selling price) to any purchaser that was not *offered* on proportionate terms to other competing purchasers. Section 51 read as follows:

> 51. (1) In this section, "allowance" means any discount, rebate, price concession or other advantage that is or purports to be offered or granted for advertising or display purposes and is collateral to a sale or sales of products but is not applied directly to the selling price.
>
> (2) Every one engaged in a business who is a party or privy to the granting of an allowance to any purchaser that is not offered on proportionate terms to other purchasers in competition with the first-mentioned purchaser, which other purchasers are in this section called "competing purchasers," is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
>
> (3) For the purposes of this section, an allowance is offered on proportionate terms only if

> (*a*) the allowance offered to a purchaser is in approximately the same proportion to the value of sales to him as the allowance offered to each competing purchaser is to the total value of sales to that competing purchaser;
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> (*b*) in any case where advertising or other expenditures or services are exacted in return therefor, the cost thereof required to be incurred by a purchaser is in approximately the same proportion to the value of sales to him as the cost of the advertising or other expenditures or services required to be incurred by each competing purchaser is to the total value of sales to that competing purchaser; and
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> (*c*) in any case where services are exacted in return therefor, the requirements thereof have regard to the kinds of services that competing purchasers at the same or different levels of distribution are ordinarily able to perform or cause to be performed.

Section 51 was rather draconian and certainly more onerous than the prohibition on price discrimination in section 50(1)(a). In order to comply with the price discrimination law a supplier was only required to make a price concession "available" to all competing purchasers. In order to comply with section 51, the supplier had to actively "offer" any promotional allowance offered to one purchaser, to all competing purchasers on proportionate terms. Section 51(3) defined in detail what "proportionate terms" meant in this context – to use a simple example, if a supplier gave an allowance of $10,000 to a customer that purchased $100,000 of the supplier's merchandise, then it would have to give an allowance of $1,000 to a customer that purchased $10,000 of its merchandise.

Since section 51 applied only to allowances that are "collateral to a sale," an allowance given for another purpose – for example, to compensate a retailer for novel sales methods – was not caught. Another relatively easy method to avoid an issue under section 51 was to apply any promotional or trade spend directly to the selling prices (as an invoice/price reduction did not qualify as an allowance within the meaning of section 51).

The Bureau indicated in its *Price Discrimination Enforcement Guidelines* that it would first examine price concessions relating to advertising and display purposes pursuant to section 51, not section 50(1)(a). However, allowances that do not meet the definition provided for advertising and display allowances in section 51 may be reviewed pursuant to section 50(1)(a).

There was little enforcement activity under section 51 and only two contested

cases. In *R. v. William E. Coutts Co.*[57] the meaning of the requirement in section 51(1) of the CA that the promotion be "collateral to sales" was considered. It was held that this section was not breached where an advertising allowance was paid to a retailer as compensation for his experimentation with unique and progressive sales methods. This requirement was also at issue in *R. v. Koss Ltd.*,[58] where it was determined that an allowance need only be related in some way to the sale to be deemed "collateral" to a sale. It was found that the offence did not need to have a particular effect on competition to warrant a conviction under section 51, and a $2,500 fine was imposed.

(e) Predatory Pricing

Predatory pricing was addressed in a specific criminal provision in competition law statutes from 1935 until its repeal in 2009 and, since 1986, it has also been addressed by the broader civil abuse of dominance provisions in section 78 and 79 of the CA. Distinguishing between predatory pricing and aggressive pricing that is "pro-" rather than anti-competitive is fraught with difficulties. As price competition resulting in lower prices is a fundamental component of a competitive marketplace, there had been considerable debate about whether continuing to treat predation as a criminal offence risks chilling legitimate price competition and whether the predatory pricing provisions may be used to protect inefficient competitors rather than the process of competition. As a result of these concerns, the proposals to amend the criminal predatory provisions and the related guidelines which reflect the Bureau's enforcement practice with respect to these provisions were the subject of vigorous and often divisive debate.

(i) The Criminal Provision

Under former section 50(1)(c) of the CA, it was a criminal offence for a person to engage in a policy of selling products at unreasonably low prices. Section 50(1)(c) of the CA read as follows:

> 50 (1) Everyone engaged in a business who...
>
> > (c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect,
> >
> > is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Section 50(1)(b) of the CA created a further offence of geographic price predation, and read as follows:

> 50 (1) Everyone engaged in a business who
>
> (b) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in that part of Canada, or designed to have that effect, or
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

In addition, predatory or below-cost pricing can be an anti-competitive practice which, if engaged in by a dominant firm, may result in civil enforcement action under the abuse of dominance provisions of the CA (sections 78 and 79) if it is or is likely to result in a substantial lessening or prevention of competition.

(ii) Enforcement History and Guidance

Historically, complaints of criminal predatory pricing have frequently been made although very few resulted in criminal enforcement action being pursued by the Commissioner.[59]

The lack of enforcement under the criminal provisions was not only reflective of the significant difficulties in proving the elements of predatory pricing on the criminal standard (i.e., beyond a reasonable doubt) but also the evolution in economic thinking about the appropriate legal framework (i.e., criminal versus civil with a competitive effects test) to assess and, if necessary, sanction pricing behaviour that may be predatory.

Possibly as a result of the lack of criminal enforcement by the Commissioner, complainants have also sought, generally unsuccessfully, to enforce the predatory pricing provisions privately by way of civil actions under section 36 of the CA. In some cases, the resulting judicial decisions contained substantial clarifications of the predatory pricing provisions and their general application, such as, in particular, the *Boehringer* decision dismissing the plaintiff's predatory pricing claims on the basis that a price cannot be predatory, even where it is below-cost, where the price reduction was done to meet a competitor's price.[60]

The Bureau published its original *Predatory Pricing Enforcement Guidelines* in 1992 ("1992 Predatory Pricing Guidelines").[61] Certain aspects of the 1992 Predatory Pricing Guidelines quickly became outdated as they did not reflect the Bureau's enforcement approach. For example, the 1992 Predatory Pricing Guidelines stated that the "average total cost" and "average variable cost"

standards of measurement will be used by the Bureau. However, in 2001 in a preliminary hearing in *Canada (Commissioner of Competition) v. Air Canada*,[62] the Bureau advocated and the Tribunal endorsed the use of the "avoidable cost" standard of measurement to determine whether pricing was below-cost. In 2002, the Bureau released revised *Draft Predatory Pricing Enforcement Guidelines* ("Draft 2002 Predatory Pricing Guidelines") for public comment.[63] The Draft 2002 Predatory Pricing Guidelines were never finalized, likely due to broad criticism about certain aspects of the proposed approach and the subsequent legislative proposal in 2004 (as part of Bill C-19, which died on the Order Paper in November 2005) to repeal the predatory pricing provisions in favour of examining predatory pricing solely under the abuse of dominance provisions of the CA.

In 2007, the Bureau released for public comment further revised draft guidelines ("Draft 2007 Predatory Pricing Guidelines")[64] which were significantly different than the Draft 2002 Predatory Pricing Guidelines and reflected modern economic thinking on the appropriate enforcement approach to predatory pricing practices. Most importantly, the Draft 2007 Predatory Pricing Guidelines clearly indicated that the Bureau would analyze complaints about alleged predation under the civil reviewable abuse of dominance provisions of the CA and that only in very limited circumstances would the Bureau seek to challenge conduct under the criminal predatory pricing provisions.[65] After a period of consultation the Draft 2007 Predatory Pricing Guidelines were finalized (substantially in the same form) in 2008 ("2008 Predatory Pricing Guidelines").[66]

Highlighted below are the principal features of the 1992 Predatory Pricing Guidelines, the Draft 2002 Predatory Pricing Guidelines, and the 2008 Predatory Pricing Guidelines reflecting the Bureau's evolving enforcement approach to predatory pricing.

(A) 1992 Predatory Pricing Guidelines

The 1992 Predatory Pricing Guidelines set out a two-stage analysis of predation complaints:

- *Stage One.* Determine whether the alleged predator has sufficient market power to unilaterally affect industry pricing and whether the predator will be able to recoup losses in the future.
- *Stage Two.* Examine the relationship of the alleged predator's price to its cost of production. The Bureau will use the average variable cost/average total cost measures to assess whether pricing is unreasonably low. Average variable cost includes the costs of labour, materials, energy, promotional allowances, use-related plant depreciation and all other costs

that vary with the levels of output. Average total cost is described as the sum of average variable cost and average fixed costs; that is, costs associated with investment in real plant and machinery and any other fixed assets which do not vary with output produced.

A price set at or above the average total cost of the alleged predator will not be regarded as unreasonably low and a price set below the average variable cost of the alleged predator is likely to be regarded as unreasonably low, unless there is a clear legitimate business justification such as the need to sell off perishable inventory. With regard to prices set somewhere between average total cost and average variable cost, the Bureau's conclusion about their reasonableness will depend on the surrounding circumstances.

(B) Draft 2002 Predatory Pricing Guidelines

The Draft 2002 Predatory Pricing Guidelines (never finalized) proposed significant changes in the Bureau's enforcement approach, most significantly the following:

- *Elimination of Recoupment.* The Bureau proposed that the ability to recoup losses would no longer be considered an essential element of the offence. Rather, it would be considered as one of many factors for determining whether unreasonably low anti-competitive pricing policies have been adopted.
- *Avoidable Cost Test.* The Bureau proposed to update its guidance to reflect the use, in determining whether a price is unreasonably low, of an "avoidable cost" test in accordance with the Tribunal's *Air Canada* Phase I Order rather than the average variable cost and average total cost test used in the 1992 Predatory Pricing Guidelines. Generally, "avoidable costs" are all those costs that can be avoided by not producing the good or service in question.

(C) 2008 Predatory Pricing Guidelines

The 2008 Predatory Pricing Guidelines provided greater clarity on a number of issues including the following:

- *Civil vs. Criminal.* Complaints regarding predatory conduct are examined under the civil abuse of dominance provisions (section 79) and examinations and inquiries under the then-applicable criminal predatory pricing provisions will generally be reserved for egregious or repeat conduct (though the Bureau was not bound by selecting to proceed initially on a civil track).

- *Recoupment.* Recoupment is a central element of a predatory pricing case relevant to both the question of whether the alleged predator has market power and whether the conduct is or is likely to result in a substantial lessening or prevention of competition. This was a welcome clarification, given that it is difficult to see how a below-cost pricing strategy that does not (or would not be likely to) result in higher prices, lower quality or reduced choice is harmful to competition.

  The 2008 Predatory Pricing Guidelines also state that recoupment can be achieved by "charging prices above competitive levels or achieving another anti-competitive objective." Examples of anti-competitive objectives cited in the 2008 Predatory Pricing Guidelines include: preserving the long-term stability of an existing market structure; raising barriers to entry by acquiring a "reputation for predation;" coercing participation in an illegal conspiracy; or establishing an industry standard to exclude others or maintain market control.

  In addition, the 2008 Predatory Pricing Guidelines appear to suggest that recoupment could result from a rival increasing its prices, or becoming less aggressive or otherwise restraining its competitive activities, following a period of discipline by a predatory firm. The 2008 Predatory Pricing Guidelines also indicate that losses incurred in one market may be recouped by exercising market power with respect to another product or geographic market(s).

  The Bureau will consider whether there are factors that reduce the probability of recoupment, such as the existence of large, sophisticated customers. However, the Bureau's approach suggests that, as a practical matter, the ability to recoup losses would be assumed following a finding that a firm: (i) has market power (based on factors such as market share and barriers to entry); and (ii) lacks a pro-competitive business justification for below-cost pricing. The more liberal interpretation of recoupment reduces the likelihood that the Bureau would fail to make out a predatory pricing case due to a difficulty in demonstrating that a firm would be able to recoup its losses following a period of below-cost pricing.

- *Measurement of Cost.* The 2008 Predatory Pricing Guidelines affirm the Bureau and the Tribunal's approach to carrying out the price-cost analysis, using the average avoidable cost test instead of the average variable cost and average total cost tests. Additionally, the 2008 Predatory Pricing Guidelines provide more detailed guidance than that contained in the Draft 2002 Predatory Pricing Guidelines on what avoidable costs entail,

indicating that avoidable costs generally include: (i) labour, materials, energy, use-related plant depreciation, promotional allowances and other variable costs; (ii) the non-sunk portion of product-specific fixed costs, otherwise known as "quasi-fixed costs;" and (iii) incremental fixed and sunk costs associated with sales generated by the firm during the period the low pricing policy is in place.

Where a firm produces multiple products, common costs may be treated as unavoidable and need not be covered in prices charged for individual products. Further, the 2008 Predatory Pricing Guidelines clarify the period over which costs are to be calculated (generally, the Bureau will direct its price/cost analysis to the time period during which the predatory pricing policy is alleged to have occurred).

With respect to the treatment of bundled products, the 2008 Predatory Pricing Guidelines state that a product market may consist of a bundle of products in certain markets or industries characterized by multi-product firms. However, the 2008 Predatory Pricing Guidelines fail to address the question of how the Bureau would apply the predatory pricing provisions to a situation where one firm is selling a competitive product as part of a bundle and a single product firm complains that such activity is effectively prohibiting it from competing or forcing it out of the market, thereby resulting in a substantial lessening of competition.[67]

- *Profitability Impact.* Before looking at costs (i.e., determining whether a firm has engaged in unreasonably low pricing), the Bureau will first determine whether the complainant's business in the relevant market is, or is likely to become, unprofitable as a result of the alleged predatory conduct. Note, however, that the 2008 Predatory Pricing Guidelines indicate that it is not necessary to establish that the pricing policy of a rival is the sole reason why the profitability of the complainant's business in the relevant market has been or could be reduced. The inclusion of this threshold requirement for pursuing a case indicates that the Bureau will continue to investigate predatory pricing in response to complaints, rather than proactively, and that it will pursue complaints only where the profitability of a competitor of the alleged predator has been affected.
- *Price Matching, et al.* The 2008 Predatory Pricing Guidelines confirm the approach taken by the courts on a number of points, and state that matching (as opposed to beating) a competitor's price would be treated as a reasonable business justification for pricing below average avoidable cost and that selling at prices which are above cost cannot constitute predatory pricing. Other potential justifications for below-cost pricing

listed in the 2008 Predatory Pricing Guidelines include selling off excess, obsolete or perishable products and effecting promotional pricing to induce customers to try a new product.

The criminal predatory provisions were repealed shortly after the 2008 Predatory Pricing Guidelines were finalized and published. The Bureau has added a notation to these guidelines that as a result of the repeal, references in the 2008 Predatory Pricing Guidelines to enforcement using the criminal provisions are no longer accurate. For the time being, the 2008 Predatory Pricing Guidelines continue to provide useful guidance on how predatory pricing may be enforced by the Bureau under the civil abuse of dominance provisions.[68]

4. Reform Background to Repeal of the Pricing Provisions

No sooner was the ink dry on the 1975 amendments to the CIA decriminalizing the treatment of mergers and monopolies before concerns were raised that Canada should also decriminalize some or all of the pricing provisions of its competition legislation. As mentioned above, the pricing provisions – price discrimination, promotional allowances, price maintenance and predatory pricing – had been part of Canada's Criminal Code for varying periods of time, and were carried over as criminal offences into the CIA.

Following general observations favouring the decriminalization of competition law made by the Economic Council of Canada in 1969, in 1976 an independent committee appointed by the Minister of Consumer and Corporate Affairs proposed replacing the prohibitions on price discrimination and predatory pricing with civil provisions that would empower a Competition Board to prohibit these practices in prescribed circumstances.[69] However, the sweeping reforms to the CIA contained in the 1976 and 1986 amendments packages did not result in the decriminalization of these pricing provisions.

The 1986 CA gave differential treatment to price-based as compared to non-price-based vertical restraints. Vertical pricing restraints continued to be dealt with as criminal matters potentially subject to significant criminal penalties (fines and imprisonment) and to section 36 claims by private parties (on an individual or class basis) for damages suffered as a result of contravention of these provisions.[70] By contrast, non-price restraints – refusals to deal, tied selling, exclusive dealing and market restriction – were dealt with as non-criminal reviewable practices when they were added to the CIA in 1975.[71] With the exception of refusals to deal, which did not include a competitive effects test until 2002, these non-criminal practices could be prohibited by the Tribunal (and only by the Tribunal) only if they resulted in a substantial lessening or prevention of competition. Also, because the pricing practices were criminal

provisions, companies who engaged in alleged anti-competitive conduct were exposed not only to criminal proceedings under the CA but also private actions for damages under section 36 of the CA.

In June 1995 the Director of Investigation and Research ("Director," the predecessor to the Commissioner) issued a discussion paper ("1995 Discussion Paper")[72] proposing amendments to numerous sections of the CA. The Director proposed the repeal of the price discrimination and promotional allowances provisions on the basis that these provisions: focussed on individual competitors rather than the process of competition; denied flexibility to businesses; created a resource problem for government; and risked creating a chilling effect on behaviours that may be economically efficient and pro-competitive. Immediately following the release of the 1995 Discussion Paper, the Minister of Industry appointed a consultative panel ("Panel") to assess the proposals in the 1995 Discussion Paper and make recommendations to the Director who, in turn, would make reform recommendations to the Minister. The Minister's stated objective was to introduce legislative amendments within one year of the June 1995 Discussion Paper.[73]

The Panel in its 1996 report to the Director[74] recommended the repeal of price discrimination and promotional allowance provisions for the following principal reasons:

- Businesses that feel very constrained by these provisions, as there is a tendency to continue adhering to past practices despite the issuance of the Bureau's guidelines;
- Even with guidelines, compliance with the price discrimination provision represents a significant burden for businesses;
- Criminal prohibition and criminal sanctions were not appropriate tools to deal with these practices;
- There is a continuing threat of private actions which may not be pro-competitive in their effects; and
- These provisions are inconsistent with the general thrust of the CA, which focuses on the competitive impact of conduct.[75]

While the Panel considered including a specific civil provision for price discrimination and promotional allowances it concluded that the reviewable matters provisions, and particularly the abuse of dominant position provision (section 79), were broad and flexible enough to deal with anti-competitive pricing conduct.

It is worth noting that during its consultation process the Panel heard from

small business groups who opposed reform of the criminal pricing provisions. The Panel concluded that "the benefit [of the criminal price discrimination and promotional allowance provisions] to those businesses was overstated more a matter of perceived, than real, benefit..." In particular, the Panel observed that the provisions themselves were not effective at achieving the intent of Parliament when they were enacted:

> [T]he existing provisions do not prevent a supplier from granting a discount or a rebate to a purchaser who buys more, and so have done very little to protect small retailers from the exertion of buying power on the part of large buyers. Rather, they have had the perverse effect of discriminating against dynamic small businesses by permitting suppliers to make price concessions solely on the basis of volume.[76]

It appears that the Panel did not consider reform of the predatory pricing or price maintenance provisions in any detail, and the 1996 Report is silent on these provisions. The legislative amendments to the CA which followed the consultation process (Bill C-20 enacted in 1999) did not incorporate the Panel's recommendations on the criminal pricing provisions.

In the period following the Panel's 1996 Report and one month before the first reading of Bill C-20, M.P. Dan McTeague introduced Bill C-235 (protection of those who purchase products from vertically-integrated suppliers who compete with them at retail),[77] which proposed to amend the CA with the objective of addressing certain forms of anti-competitive pricing activity. This private members bill was prompted by allegations that major integrated oil companies were squeezing the margins available to gasoline retailers. Although Parliament decided not to proceed with Bill C-235, in April 1999, "the Standing Committee on Industry voted: 'that at its earliest convenience the Industry Committee review the anti-competitive pricing practices within the *Competition Act* and any related enforcement guidelines and operations of the Competition Bureau.'"[78]

In response, the Commissioner engaged Professors J. Anthony VanDuzer and Gilles Paquet of the University of Ottawa in June 1999 to conduct an independent study of "some of the provisions of the *Competition Act* dealing with anti-competitive pricing practices by suppliers and powerful competitors and the practices and procedures of the Competition Bureau relating to these provisions. The provisions subject to review are those dealing with predatory pricing, price discrimination and price maintenance and, to the extent that it concerns pricing, abuse of dominance."[79]

In November 1999, the Commissioner released and tabled before the Industry Committee the comprehensive report of the authors ("VanDuzer Report"). The VanDuzer Report examined the economic theory underlying competition policy concerns regarding each of the pricing practices and reviewed the relevant statutory provisions and the Bureau's approach to enforcement of these provisions, as well as the Bureau's enforcement record. Based on this analysis, the authors identified concerns at several levels, in particular: that the pricing provisions do not operate in a manner consistent with what economic theory would prescribe; and that the Bureau's interpretation and enforcement of these provisions are not always consistent with the provisions themselves or economic theory. The VanDuzer Report found that the price discrimination and price maintenance provisions are not accurate tools for addressing anti-competitive behaviour and impose excessive compliance and monitoring costs on businesses. Their chilling effect is further exacerbated by that fact that they are criminal offences. With regard to predation, the authors indicate that:

> [D]esigning rules to deal effectively with predation is the thorniest problem related to anticompetitive pricing practices. The effects can be devastating but are extremely difficult to distinguish from the effects of aggressive competition, even with the expenditure of substantial resources. One thing seems clear, the existing criminal provision, suffers from some serious defects as an instrument to provide relief in circumstances where predation exists.[80]

In a 2001 Ottawa Law Review article,[81] VanDuzer recommended that Canada rely on the existing abuse of dominance provision rather than amend the existing provision to address the concerns identified. He asserted that the provision in its existing state could address these forms of anti-competitive pricing in a manner which is consistent with economic theory:

> The analysis in the *Pricing Report* did not purport to provide a road map to the development of a perfect set of rules to address anticompetitive pricing practices. Its scope did not comprehend horizontal price fixing, nor did it deal with non-pricing practices which may be functionally equivalent to anticompetitive pricing. It does, however, suggest some of the ways in which the current criminal provisions of the Competition Act dealing with price discrimination, predatory pricing and vertical price maintenance are lacking, and concludes that dealing with such practices under the abuse provision has several advantages. Consistent with the economic analysis set out in Part II, for enforcement action to be taken under section 79 the perpetrator must have market power and the

> effect of the alleged anticompetitive acts on competition must be assessed. More than the current *per se* regime, the abuse provision allows for a case-by-case analysis of behaviour which is sensitive to the specific factors at play in a particular industry. It also permits the Tribunal to look in a holistic way at the aggregate of anticompetitive acts, which may include more than pricing behaviour, in a way that the narrow criminal provisions do not. This ability will become increasingly important as the structure of industries change in different ways in response to the challenges of the new economy, including increased non-price competition.[82]

The VanDuzer Report specifically recognized that relying on section 79 is not without challenges and dealing with these pricing matters (to the extent possible) under section 79 is much less certain and predictable than the criminal provisions. While it recognized the limitations of guidelines, the VanDuzer Report indicated that guidelines are very effective tools for both businesses and the Bureau, as they disclose a clear approach to enforcement. Furthermore, unlike litigation, guidelines "can deal with issues comprehensively and within an analytical framework, while decisions in individual cases contribute only incrementally to the understanding of the law and the analysis may be tied to the facts of each case."[83]

Armed with the VanDuzer Report, it was in April 2002 that the House of Commons Standing Committee on Industry, Science and Technology recommended decriminalization of the pricing provisions of the CA. In its report entitled *A Plan to Modernize Canada's Competition Regime*,[84] the Committee recommended the repeal of the criminal price discrimination, promotional allowance, predatory pricing and price maintenance provisions, and the corresponding inclusion of such practices as potential anti-competitive acts for purposes of the civil abuse of dominance provisions of the CA. With regard to price maintenance, the Committee also recommended price maintenance practices among competitors (i.e., horizontal price maintenance), whether manufacturers or distributors, be added to the conspiracy provisions (section 45) of the CA.

The Commissioner and her staff at the Bureau objected to the decriminalization of price maintenance in hearings before the Industry Committee in 2002 stating:

> Well, when it comes to price discrimination and predatory pricing, these are already reviewable under section 79. And as I said earlier today, the price maintenance provision's been a very effective provision for us. We don't really take many cases under any

> of those sections. We have been very careful in the last seven or eight years to apply those provisions judiciously. We use a lot of alternative case resolutions rather than prosecutions to get resolutions to these matters quickly, without cost to us or to the private parties. As long as those resolutions are effective and we don't have repeat offenders, we find that is an effective way of dealing with it. I'd challenge anybody to identify a price maintenance case that we've taken in the last ten years that would not have pro-competitive effects. This really shouldn't be a problem.... In terms of those situations where we apply price maintenance, I think it's appropriate to have criminal sanctions. Where we think the situation is not particularly egregious, we have used these alternative case resolutions, which are effective. I don't see that a civil provision would improve the situation.[85]

In response to the Standing Committee's Report, the government agreed to consider the decriminalization of the price discrimination, promotional allowance and predatory provisions in its next round of consultations on amendments to the CA, but it specifically deferred consideration of the decriminalization of price maintenance until the consultation on revisions to conspiracy provisions was completed.[86]

In June 2003, consistent with its response to the Standing Committee's Report, the government launched a consultation process on proposed legislative amendments with the release of *Options for Amending the Competition Act: Fostering a Competitive Marketplace* (the "Options Paper") and the Bureau mandated the Public Policy Forum to conduct consultations on the Options Paper. In releasing the Options Paper, the government stated that it "is committed to modernizing the *Competition Act* in the face of a rapidly changing global economy and public consultations play a vital role in this process."[87] The Public Policy Forum released its final report on these consultations on April 8, 2004.[88]

The Options Paper proposed repealing the criminal price discrimination, promotional allowances and predatory pricing provisions and dealing with these pricing behaviours under the existing provision for abuse of dominance. It also envisaged that the proposed reforms on administrative monetary penalties ("AMPs") and civil cause of action would apply to the decriminalized pricing provisions. The general purpose of these proposals was described by the Public Policy Forum as "increas[ing] the effectiveness of enforcement activities against anti-competitive pricing behaviour, while also encouraging aggressive price competition." The Public Policy Forum found that:

> The majority of the intervenors supported the proposal to decriminalize these provisions based on diverse, and often diverging reasons. A large majority of the intervenors supported these proposals to reform the pricing provisions and agreed that the current provisions can discourage pro-competitive interactions. Some intervenors supported these proposals to increase the effectiveness of the Bureau's enforcement. Considerable disagreement persists on the need to implement AMPs and to expand the civil cause of action for the practices covered by existing pricing provisions.[89]

On April 27, 2004, after the release of the Public Policy Forum's Final Report, the Bureau held an additional roundtable to discuss in greater detail the proposals to strengthen the civil provisions (AMPs and civil cause of action) and the reform of the pricing provisions. A few months later, on November 4, 2004, *Bill C-19: An Act to Amend the Competition Act and To Make Consequential Amendments to Other Acts* was introduced into Parliament, proposing amendments to the criminal pricing provisions as recommended by the government in its Options Paper. Bill C-19 was referred to the Industry Committee before second reading and the Committee held hearings with a number of stakeholders starting in November 2004 and continuing into November 2005, when it died on the Order Paper. During the hearings, small and medium enterprises and consumer groups supported the decriminalization of the pricing provisions on the condition that AMPs were made available under the abuse of dominance provision.

In July 2007, the Conservative government announced the establishment of the Competition Policy Review Panel ("CPRP") and mandated it to review Canada's competition and foreign investment policies, and to develop recommendations on how to make Canada more globally competitive. In June 2008, the CPRP issued its recommendations.

While acknowledging that the CA is recognized internationally as being both "modern and flexible," and is not an impediment to Canada's overall competitiveness, the CPRP concluded that updating certain provisions of Canada's competition laws could facilitate long-term improvements to Canada's productivity. Among the sweeping reforms to Canada's competition and foreign investment laws, the CPRP recommended that the federal government repeal the outdated criminal price discrimination, promotional allowance and predatory pricing provisions. The CPRP was of the view that criminal law should be reserved for conduct that is unambiguously harmful to competition and where clear standards can be applied, and that this was not the case for these pricing provisions. Moreover, to treat such activities as civil matters (e.g., under the

abuse of dominance provisions) would align Canadian competition law with that in the United States.[90]

The CPRP also recommended that the government repeal the existing *per se* criminal price maintenance provision and replace it with a new civil, effects-based test (together with allowing a private right of enforcement of this new provision). As noted by the CPRP, the criminal provision was broader than comparable law in the United States, and other similar provisions of the CA, such as refusal to deal and exclusive dealing, address competition issues between suppliers and resellers as civil matters. The CPRP concluded that resale price maintenance should similarly be treated as a civil matter.[91]

5. Post-2009 – The Current Pricing Provisions and Their Implications

In March 2009, as part of the *Budget Implementation Act* rushed through Parliament by Canada's Conservative government, Canada's criminal laws respecting price discrimination, geographic price discrimination, promotional allowances and predatory pricing were repealed. Additionally, the criminal offence of price maintenance was repealed and replaced with a new civil reviewable practice of price maintenance.

Below is an overview of the 2009 amendments and their implications for each of the pricing practices in question.

As a general observation, it is without question that these amendments were widely welcomed by the business and legal communities. One of the principal and intended effects of these amendments is the elevated importance of the abuse of dominance provisions of the CA to an assessment of pricing practices. In this regard, it is important to note that in March 2012, the Bureau issued for public consultation *Draft Enforcement Guidelines: The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)* ("2012 Revised Draft Abuse Guidelines"). The 2012 Revised Draft Abuse Guidelines differ significantly in both tone and substance from the prior draft issued in January 2009 (just a few months before the amendments were enacted) and proposed to withdraw[92] detailed and practical guidance that has been the subject of considerable consultation in the past, creating a serious void in the guidance available to businesses on the Bureau's approach to application of the abuse of dominance provisions.[93] In comparison, the 2009 Draft Guidelines[94] contained detailed appendices dealing with practices in respect of which firms commonly seek advice, namely exclusive dealing, product bundling, bundled or loyalty rebates and denying a competitor access to a facility or service. While various comments on the 2009 Draft Guidelines were provided to the Bureau, the move towards detailed guidance was widely regarded as a positive and welcome

development and it was anticipated that updated draft guidelines would include a further developed version of the 2009 Draft Guidelines.

If the 2012 Revised Draft Abuse Guidelines are finalized in their current form, Canadian businesses will be left with three short paragraphs to guide them on the Bureau's approach to exclusionary practices and just two paragraphs to guide them on the Bureau's approach to predatory conduct. In addition the 2012 Revised Draft Abuse Guidelines depart from previous guidance in a number of respects and deviate from appellate case law on the application of section 79 of the CA. The broad and, in some cases, vague approach to the legal and economic framework taken in the 2012 Revised Draft Abuse Guidelines together with the absence of detailed guidance on specific practices creates the impression that the Bureau is primarily concerned with preserving flexibility in enforcement rather than encouraging and facilitating compliance. While maintaining flexibility in enforcement is not an illegitimate objective, there is a significant risk that what is gained in preserving flexibility will be at the expense of legitimate aggressive competition in the market.

The Bureau's proposed withdrawal of meaningful guidance on its enforcement approach is troubling and in some respects undermines the impact of the repeal of the criminal pricing provisions. As the Canadian Bar Association stated in its submission on the 2012 Revised Draft Abuse Guidelines:

> Guidelines play an important role in the business world. The crucial role of guidelines is to communicate to the business community and the practicing bar two things: What the Bureau believes the law to be (i.e., how it interprets the law); and how the Bureau applies the law in its day to day activities. This communication is essential if the Bureau is to be transparent and predictable in carrying out its statutory mandate. It permits businesses to factor the Bureau's positions into their business decisions.
>
> We have an overarching concern that the current slimmed-down Draft Guidelines have become less specific, less precise and more qualified in many important respects. As drafted, we do not believe that the Draft Guidelines accomplish either of the key functions of guidelines.[95]

We hope that by the time this paper is published the Bureau will have considered the comments it has received as part of its consultation and recalled VanDuzer's comments that "[r]egardless of what happens in terms of legislative reform, effective guidelines represent an important next step toward developing effective rules to deal with anticompetitive pricing practices in Canada."[96]

(a) Repeal of Criminal Price Discrimination and Promotional Allowance Provisions

The repeal of the criminal price discrimination and promotional allowance provisions was widely welcomed and uncontroversial. As a result of these amendments, businesses not holding a "dominant" market position are now free to offer preferential pricing, trade spending programs or promotional allowances to certain customers but not others, regardless of the relative volumes purchased or the reasons for differential treatment. This is a significant change for companies doing business in Canada as it provides them with considerably more flexibility in customizing trade spend programs for each customer and allows them to discriminate between their customers. However, dominant firms still need to be mindful of the potential application of the abuse of dominance provisions of the CA to their pricing and trade spend practices.

Businesses holding a dominant market position need only be concerned where discriminatory pricing and promotional spending practices have an anti-competitive (i.e., disciplinary, exclusionary or predatory) purpose directed at the firm's actual or potential competitors (e.g., aggressively targeting the customers of competitors out of proportion to what may be found to be reasonably warranted in a particular circumstance)[97] and are likely to result in a substantial lessening or prevention of competition in the particular market. For example, in *Canada Pipe*,[98] the Commissioner alleged that Canada Pipe's "stocking distributor program," pursuant to which it gave loyalty rebates to its distributor customers for stocking Canada Pipe's products exclusively, was an abuse of its dominant position. In the first instance, the Tribunal found that the exclusivity program was not coercive in that distributors could exit the program at certain times without penalty and were not impeded from purchasing from Canada Pipe at undiscounted list prices, nor did the program impede entry. The Federal Court of Appeal disagreed, finding that the program did in fact result in a substantial lessening or prevention of competition and remanding the case back to the Tribunal.[99]

(b) Repeal of the Criminal Predatory Pricing Provisions

In contrast, the repeal of the criminal predatory pricing provisions of the CA – leaving below-cost pricing to be examined only under the civil abuse of dominance provisions – is likely to have only a minor practical impact on business conduct for three principal reasons:

- As reflected in the 2008 Predatory Pricing Guidelines, the Bureau's enforcement practice had been to examine all but the most egregious allegations of predation (e.g., predation to enforce a conspiracy) under

the civil abuse of dominance provisions so, in this respect, the repeal simply codified existing enforcement practice;

- Anti-competitive below average avoidable cost pricing occurs only rarely; and
- Any loss of deterrent effect that may result from the repeal of the criminal provision is likely to be offset by the introduction of substantial AMPs for conduct that has been found to be anti-competitive under the abuse of dominance provisions.

As indicated above the Bureau is considering the repeal of its very important guidance set out in its 2008 Predatory Pricing Guidelines. The 2012 Draft Revised Abuse Guidelines reduce guidance on the application of section 79 to predatory pricing allegations to two short paragraphs which contain certain statements which depart from the 2008 Predatory Pricing Guidelines and others that are ambiguous as their meaning.[100]

(c) Section 76 and the Decriminalization of Price Maintenance

Historically, price maintenance was a *per se* criminal matter, subject to unlimited fines, potential imprisonment and was actively enforced by the Bureau. The March 2009 amendments to the CA replaced the criminal regime with new civil rule of reason price maintenance provisions with private access to remedies at the Tribunal, but to very limited remedies – no fines, no monetary penalties, no ability to seek damages for the conduct. While certainly a welcomed change, this was and continues to be a material shift in the law for both the business and legal communities and the Bureau.

(i) The Elements

The new price maintenance provisions continue to have the elements of the former criminal provision with some refinements[101] and materially increase the applicant's burden by adding a requirement that the price maintenance activity is likely to have an "adverse effect on competition in a market."

Under section 76 the Tribunal may make an order if it finds that:

> (a) a person referred to in subsection (3) directly or indirectly
>
> (i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or
>
> (ii) has refused to supply a product to or otherwise discriminated

> against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and
>
> (b) the conduct has had, is having or is likely to have an adverse effect on competition in the market.

The new civil provisions retain the standard defences to a refusal to supply due to a customer's low pricing policy, namely loss-leader selling, bait and switch selling, misleading advertising, and unreasonable service levels, and continue to allow suggested retail pricing and maximum retail prices.[102]

Importantly, the prior criminal provision was applicable to attempts of a supplier to influence price at which "any other person engaged in business in Canada" supplies or offers to supply a product in Canada. This phrase has been narrowed to apply only to the price at which "a supplier's customer or any other person to whom the product comes for resale" supplies or offers to supply a product in Canada. "Attempts" to influence prices upward are therefore no longer prohibited. In addition, Parliament chose to reintroduce the word "resale" to the new civil provision. The decision to specifically reference "resale" in section 76 reflects Parliament's intent to return to the previous approach, and thereby limit the Tribunal's jurisdiction to review and prohibit alleged price maintenance conduct only where such conduct occurs within the context of a vertical, reseller relationship.[103] Indeed, the predecessor price maintenance provision had been criticized for being too broad and capturing horizontal behaviour which could be adequately addressed under the criminal conspiracy provision in section 45.

The most significant change to the substantive provision is the requirement to demonstrate that the conduct has had, is having or likely to have an adverse effect on competition in a market. The requirement to demonstrate an adverse effect on competition reflects recommendations of the VanDuzer Report as well as recommendations of the CPRP. Both were of the view that prior to a determination that price maintenance conduct violates the CA, it must be demonstrated by the applicant that the price maintenance has an anti-competitive effect.[104]

The only other provision of the CA with the requirement to prove an adverse effect on competition is section 75, the refusal to supply provision. In the context of section 75 applications, in *Nadeau*[105] and *B-Filer*[106] the Tribunal provided insight into the meaning of this requirement. The Tribunal held that the provision requires a comparative "assessment of the competitiveness or likely competitiveness of a market with, and without, the refusal to deal."[107]

Competitiveness is evaluated in relation to the degree of market power that prevails in the market. The question then is whether, as a consequence of the refusal to deal, the remaining market participants are placed in a position of created, enhanced or preserved market power.[108] The main difference between paragraph 75(1)(e) and other similar civil sections in the CA, such as section 79 (abuse of dominance) and section 92 (mergers), is that the practice of refusal to deal does not require that the adverse impact be substantial. The Tribunal's only comment in this regard in the *B-Filer* case was that an adverse impact is less than a substantial one.[109]

(ii) Remedies

Even if each of the elements of the new section 76 is satisfied and the Tribunal decides to exercise its discretion and order a remedy, limited remedies are available. The Tribunal is permitted, upon application of the Commissioner or a private person with leave, to make an order prohibiting the price maintenance activity or requiring the supplier to supply on usual trade terms. The Tribunal is not empowered to order financial penalties. In addition, no provision is made to allow a private party to sue for damages based on a breach of these provisions.

(iii) The Implications

The decriminalization of price maintenance and its new civil framework provide manufacturers and wholesalers substantially more flexibility with respect to pricing programs than under the old regime. For example, minimum advertised price programs, once strictly forbidden in Canada, are now permissible in Canada unless they are likely to have an adverse effect on competition in the relevant market. It is now more onerous to obtain a remedy for price maintenance and the remedies under the section are very limited.

With the inclusion of a competitive effects requirement, the new civil price maintenance law conforms the Canadian treatment of resale price maintenance, to some extent, with the "rule of reason" approach taken by the United States Supreme Court in *Leegin*.[110] More importantly, it has focussed the dialogue in Canada on the central question of when is engaging in price maintenance anti-competitive?

As has been recognized by three Government-initiated studies (the Van-Duzer Report,[111] the 2002 Report of the Parliamentary Standing Committee[112] and the CPRP[113]) as well as the Bureau,[114] price maintenance activity – even if engaged in by a monopolist – is not inherently anti-competitive. As the United Sates Supreme Court stated in *Leegin*, the "economics literature is replete with

pro-competitive justifications for a manufacturer's use of resale price maintenance."[115] In particular, the United States Supreme Court agreed that minimum resale price maintenance can stimulate inter-brand competition by reducing intra-brand competition. Price maintenance generally reflects the decision of a supplier, acting unilaterally, to adjust the mix of price and non-price dimensions of competition among its retailers. It is an efficient tool to address the free rider problem by rewarding those who invest in promotional and support services for the product and to facilitate entry of new firms or brands by assuring retailers a reasonable margin.

The economics literature has identified four circumstances in which resale price maintenance might be anti-competitive:

- *Facilitating an Upstream Cartel* – Manufacturers may find it easier to coordinate on retail prices than on wholesale prices, which are harder to observe and monitor because they are not posted and may be part of more complicated contracts and may vary across regions. By implementing retail price floors the cartel members have a mechanism which both stabilizes retail prices and allows for easy monitoring of each supplier's activity and easy detection of cheating on the price-fixing agreement.
- *Facilitating a Downstream Cartel* – Retailers may collectively coerce suppliers to implement price maintenance where they are concerned about price discounting or the threat of potential entry by discounters.
- *Downstream Exclusion* – When used by a dominant retailer to protect it from retailers with better distribution systems and lower cost structures, price maintenance activity may inhibit or delay innovation in distribution or exclude discount retailers.
- *Upstream Exclusion* – Price maintenance may be an exclusionary practice when used by a dominant manufacturer to give retailers an incentive not to sell the products of its rivals.

When considering these theories of potential anti-competitive harm, one of the principal practical questions raised is why would the Commissioner resort to using section 76 to address these types of harms? The Commissioner has much more effective tools in section 45, the criminal cartel provision, to address situations where price maintenance is used to facilitate upstream and downstream cartel activity, and in section 79, abuse of dominance, to address situations where price maintenance is used to facilitate upstream and downstream exclusion. Furthermore, subsection 76(11) would prevent the Commissioner from bringing concurrent sections 45/76 or sections 79/76 proceedings. Where the principal concern about a person's conduct is that it is

abusive or that its purpose is to facilitate a conspiracy, the Commissioner can be expected to be reluctant to bring an application under section 76 knowing the best remedy available is a prohibition order.

On the other hand, there may be circumstances where neither the abuse of dominance provisions nor the criminal conspiracy provisions would most effectively address the conduct by the supplier engaged in the price maintenance activity. For example, where a resale price maintenance policy is imposed on retailers at the insistence of a dominant retailer seeking to prevent discounting, it is the dominant retailer rather than the supplier imposing the policy that may be engaged in an abuse of dominance. In these circumstances, it may well be useful for the Bureau to have a legal avenue to prevent the supplier from continuing the price maintenance policy as an alternative or in addition to taking steps against the retailer under the abuse of dominance provisions. Moreover, in these circumstances, since the abuse of dominance provisions are exclusively enforced by the Commissioner, a separate price maintenance provision which includes a private right of access provides retailers denied the opportunity to compete on price with a means to challenge a price maintenance policy.

Similarly, even where there is suspicion that a supplier has instituted a price maintenance policy to facilitate a conspiracy among retailers, it may be difficult to establish a criminal standard of proof that the supplier "aided and abetted" retailers in criminal conduct. In these circumstances, it may well be useful for the Bureau to have an alternative provision to rely on to bring such a price maintenance policy to an end.

As the Bureau has not provided guidance on how the civil price maintenance provisions will be applied in practice and there is not yet jurisprudence on the scope of section 76, it is less clear whether the Bureau (or the Tribunal) would seek to apply the price maintenance provisions to address vertical conduct that results in higher retail prices where such conduct is not motivated by one of the four anti-competitive explanations for price maintenance outlined above. Accordingly, the limits of pro-competitive justifications for price maintenance engaged in suppliers with market power, such as brand positioning and a desire to prevent free riding, are uncertain, particularly in circumstances where such policies bring about a decline in inter-brand competition.

(iv) *Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated* – The First Challenge Under Section 76

The new civil price maintenance provision is currently being put to the test in a case that is now pending before the Tribunal.[116] In December 2010, less than

two years after section 76 came into force, the Commissioner filed an application challenging certain practices of Visa Canada Corporation ("Visa") and MasterCard International Incorporated ("MasterCard") under section 76 of the CA.[117] In short, the Commissioner alleges that the no surcharge rule[118] and honour all cards rule[119] ("Rules") of Visa and MasterCard ("Respondents") have an adverse effect on competition by limiting the ability of merchants, through either the implementation of surcharges or the denial of certain types of credit cards, to steer customers to other forms of payment. The Commissioner further claims that the ability to steer customers to other forms of payment would, in turn, give merchants additional leverage in obtaining lower merchant discount rates ("MDRs," the fees paid by merchants to acquirers) in their negotiations with acquirers. The Commissioner also claims that reduced MDRs would result in lower prices for consumers.[120]

The Respondents and the Intervenors[121] argue that there is no resale of any Visa or MasterCard product by acquirers to merchants, nor is any Visa or MasterCard product sold by merchants to consumers. Further, even if there is such a resale (which is denied), the Rules do not have an adverse effect on competition. Instead, the Rules are pro-competitive and reflect efficiency-enhancing business practices intended to protect the value of the credit card brands by ensuring that cardholders have a uniform experience that is positive, convenient, safe, and reliable when they choose to pay using their Visa or MasterCard credit card. Moreover, the Visa and MasterCard credit card networks are complex, competitive ecosystems involving cardholders, merchants, acquirers, issuers, and the networks themselves, and the elimination of the Rules is likely to have unintended, adverse consequences. For example, assuming surcharging becomes widespread and has the effects contended by the Commissioner, eliminating the no surcharge rule would harm issuers and consumers by reducing credit card benefits, rewards, and overall credit card usage, but at the same time, would create a new profit centre for merchants; and eliminating the honour all cards rule would harm issuers and consumers by undermining the core value proposition of credit cards – namely, their ubiquity and certainty of acceptance.

The Commissioner's legal theory of the case is novel in two key respects. First, it differs from Canadian jurisprudence in the vertical price maintenance context as the relationship between Visa or MasterCard, acquirers and merchants is not a vertical distribution relationship whereby a wholesaler or distributor sells a product to its customer, who in turn resells that product to an end-user. The Respondents and Intervenors argue that Visa and MasterCard do not sell any product or service to acquirers which is then resold to

merchants; rather, acquirers sell a wholly different set of services to merchants than those provided to acquirers by Visa and MasterCard.

Second, the Commissioner's case does not follow the chain of causality set out in section 76 of the CA. Section 76 requires that the applicant first show that the subject conduct (in the case of Visa and MasterCard, the imposition of the Rules) is resale price maintenance. Only after proving on the balance of probabilities that the subject conduct is resale price maintenance, the applicant ust show that that same conduct, the resale price maintenance, has an adverse effect on competition. If the applicant is unable to demonstrate that the conduct is resale price maintenance, the Tribunal has no jurisdiction to grant an order under section 76. Similarly, if the applicant is successful in establishing that the conduct is resale price maintenance but is unable to show that the resale price maintenance has had, is having or is likely to have an adverse effect on competition, the Tribunal has no jurisdiction to grant an order under section 76. This is similar to other vertical restraint provisions in the CA. Refusal to deal in section 75 and exclusive dealing, market restriction and tied selling in section 77, each require that the applicant first demonstrate that the subject conduct fulfills the statutory requirement, and only then does the applicant move on to demonstrate the competitive impact on a market.

Instead, the Commissioner alleges that the Rules adversely affect competition, and therefore influence upward the default interchange rates set by Visa and MasterCard and charged by issuers to acquirers, which are then passed on by acquirers to merchants as part of the MDRs. In our view, the Commissioner's application appears to conflate the two distinct elements of section 76.[122] The Commissioner's proposed interpretation of section 76 suggests that any conduct by a supplier that increases the costs incurred by a downstream party could be challenged as price maintenance, even if that downstream party makes a legitimate business decision to increase its prices so as to cover its own increased costs.

Until the Tribunal renders its decision in this case, there will continue to be uncertainty as to the scope of the civil price maintenance provision and the type of conduct which may be found to be offside of section 76.

6. Concluding Comment

Following more than 30 years of debate and study about how best to address vertical pricing conduct under Canadian competition law, Parliament took steps in 2009 to reflect the consensus that such conduct should be decriminalized and, moreover, subject to remedial action only when engaged in by a firm with a market position sufficient to affect market dynamics. While other changes

to the CA implemented at the same time, including the strengthening of the abuse of dominance provisions through the inclusion of administrative monetary penalties, overshadowed the repeal of the criminal price discrimination, promotional allowance, and predatory pricing provisions and the decriminalization of the price maintenance provisions, the importance of these changes to the modernization of Canada's competition law and the competitiveness and efficiency of the Canadian economy should not be underestimated. However, the Bureau has a critical role to play to ensuring the objectives of these reforms are realized. Now that Canadian businesses are no longer constrained by strict provisions of the CA dictating the limits of acceptable vertical pricing conduct, meaningful guidance from the Bureau is needed on how it intends to apply the abuse of dominance provisions to pricing practices in order not to undermine Parliament's objective in decriminalizing vertical price restraints and eliminating the chill on pro-competitive pricing practices.

CASE	PRODUCT SOLD FROM PRODUCER TO RETAILER	PRODUCT SOLD FROM RETAILER TO CONSUMER	NATURE OF ALLEGED CONDUCT
R. v. Labatt (2005 Court of Quebec)	Discount beer	Discount beer	Sales reps influenced convenience stores to raise price of discount beer, including through bribery.
R. v. Toyo Tanso USA, Inc. (2003 FCTD T-298-03) (Ottawa)	Graphite products	Graphite products	Defendant meets with distributer to attempt to raise price of product.
R. v. La Compagnie Brasserie Stroh (Québec) Ltée (2002 FCTD Ottawa T-1504-02)	Beer	Beer	Defendant requires retailers to maintain minimum resale price in order to be eligible for a volume-based discount.
R. v. Toyota Canada (2002 FCTD Ottawa T-1065-02)	Automobiles	Automobiles	Defendant's marketing program implies that dealers who sold below "Access/Drive-Away Prices" would be penalized.
R. v. Mr. Gas (1995 Ont. Prov. Ct.)	Gasoline	Gasoline	Defendant introduces deliberately low prices in competitors' home markets in order to send a message that they should raise prices in the defendant's home market ("retaliatory price cutting"). In one case, defendant implies threat of a price war if competitor does not raise prices. In other cases where there was no threat, defendant is acquitted.
R. v. Shell Canada Products Ltd. (1990 MB CA)	Gasoline	Gasoline	Threats that low price would cause a price war; stations told to increase price of gas "or else Shell would be ticked off."
R. v. Epson (1987 Ont. Dist. Ct.)	Printers	Printers	Dealers persuaded to sign agreement whereby they would not sell product below a list price.
R. v. North Sailing Products Ltd. (1987 Ont. Dist. Ct.)	Marina hardware (e.g., shackles, compasses, blocks, winches etc.)	Marina hardware	Defendant (wholesaler) reduces the discount given to customer (retailer) because customer was discounting its retail prices.
R. v. George Lanthier & fils ltée (1986 Ont. Dist. Ct.)	Bread	Bread	Wholesaler bakery's sales representative threatened retailer that bakery would reduce quantity of bread available if retailer sold below suggested price.
R. v. Sunoco (1986 Ont. Dist. Ct.)	Gasoline	Gasoline	Defendant offers dealer price support so long as he matches prices of competitors. Dealer not permitted to discount below competitors.

CASE	PRODUCT SOLD FROM PRODUCER TO RETAILER	PRODUCT SOLD FROM RETAILER TO CONSUMER	NATURE OF ALLEGED CONDUCT
R. v. Rainbow Jeans Co. (1985 PEI Prov. Ct.)	Blue jeans	Blue jeans	Defendant refused to supply wholesale blue jeans to stores that sold at a discounted price.
R. v. Andico Manufacturing Ltd. (1983 MB QB)	Waterbeds	Waterbeds	Waterbed manufacturer cuts off supply to dealer that sells for too low a price.
R. v. Cluett Peabody Canada Inc. (1982 Ont. Co. Ct.)	Men's shirts	Men's shirts	Defendant and retailer (The Bay) agree not to place "off-price" advertisements for shirts mentioning the "Arrow" brand name. Defendant also convicted on a separate refusal to supply count and acquitted on other RPM counts.
R. v. A&M Records of Canada Ltd. (1980 Ont. Co. Ct.)	Records	Records	Defendant allows dealers an advertising allowance of 2.5% of net purchases, provided dealers do not sell below fixed "dealer cost" price list.
R. v. Church & Co. (1980 Ont. Prov. Ct.)	Shoes	Shoes	Defendant shoe manufacturer engages in cooperative advertising programme with retailers to ensure prices do not fall below a listed amount.
R. v. H.D. Lee of Canada Ltd. (1980), 57 C.P.R. (2d) 186 (QC Ct. Sess. Peace)	Blue jeans	Blue jeans	Defendant refuses to supply jeans to a retailer that sells below minimum price.
R. v. Superior Electoronics Inc. (1979), 45 C.P.R. (2d) 234, [1979] B.C.J. No. 206	Stereo equipment	Stereo equipment	Defendant requires dealership agreements to include clause wherein dealer agrees to refrain from "heavy price-cutting" and, on one occasion, refuses to supply a price cutting dealer.
R. v. Levi Strauss of Canada Ltd. (1979), 45 C.P.R. (2d) 215, [1979] O.J. No. 1732 (Ont. Co. Ct.)	Blue jeans	Blue jeans	Defendant penalized retailers who sold below its price line by deliberately filling orders with wrong and unordered goods or cutting off supply entirely.
R. v. Rolex Watch Co. of Canada (1978 Ont. Co. Ct.)	Watches	Watches	Defendant representatives pressured retailers into stopping sale prices on watches.
R. v. Kito (1975 MBQB)	Carpet sweepers	Carpet sweepers	Manufacturer requires retailer to sell carpet sweepers above a given price.

CASE	PRODUCT SOLD FROM PRODUCER TO RETAILER	PRODUCT SOLD FROM RETAILER TO CONSUMER	NATURE OF ALLEGED CONDUCT
R. v. Browning Arms Co. of Canada (1974), 18 C.C.C. (2d) 298, 15 C.P.R. (2d) 79 (Ont. C.A.)	Firearms	Firearms	Defendant representative would report on dealers' price cutting and need to bring retailers "in line."
R. v. Petrofina Canada Ltd. (1974 Ont. Dist. Ct.)	Gasoline	Gasoline	Lessee of defendant facing heaving independent competition. Defendant says lessee can reduce retail price by 4 cents/gallon and will receive subsidy to help compete. Lessee reduces by 5 cents/gallon and defendant terminates lease.
R. v. William E. Coutts Co. Ltd. (1968), 1 O.R. 549 (C.A.)	Greeting cards	Greeting cards	Defendant supplier successfully invokes loss leader defence after retailer sells them for 1 cent as part of a promotion, but is convicted on another count wherein it only supplies to retailer after retailer agrees not to sell below a certain price.
R. v. Sunbeam (1967 Ont. H. Ct. J.)	Electric Razors	Electric Razors	Defendant sells product to distributors who in turn sell to retailers. Defendant sets "minimum profitable resale price" and tells retailers they will be investigated for loss-leadering if they sell below MPRP. Defendant follows up MPRP letters with numerous phone calls to try to convince retailer to comply with MPRP.
R. v. Campbell (1964 OCA)	Surgical blades	Surgical blades	Defendant manufacturer creates scheme whereby wholesale dealers can sign large volume purchase contracts with hospitals at list price and receive a 20% discount off of list price, provided defendant approves the contract.
R. v. Kralinator Filters Ltd., (1962) 41 C.P.R. 201, [1962] M.J. No. 1 (M.B.Q.B.)	Oil filters	Oil filters	Defendant stops supplying retailer due to its low pricing policy.
R. v. Moffats Ltd. (1956 Ont. CA)	Refrigerators	Refrigerators	Defendant agrees to pay 50% of cost of dealers' advertisements provided the dealers do not retail the refrigerators below specified price.

CASE	PRODUCT SOLD FROM PRODUCER TO RETAILER	PRODUCT SOLD FROM RETAILER TO CONSUMER	NATURE OF ALLEGED CONDUCT
Acquittals			
R. v. Must de Cartier Inc. (1989 Ont. Dist. Ct.)	Watches	Watches	Defendant refuses to supply retailer with watches after it advertises a 50% discount.
R. v. Sony Canada (1987 Ont. Dist. Ct.)	Audiovisual equipment	Audiovisual equipment	Defendant accused of refusing to supply discount dealers of audiovisual equipment that did not adhere to list prices.
R. v. Griffith Saddlery & Leather Ltd. (1986), 14 C.P.R. (3d) 389, [1986] O.J. No. 2765 (Ont. Prov. Ct.)	Equestrian products	Equestrian products	Defendant accused of refusing to supply because of complainant's low pricing policy. Court rules refusal to supply was not necessarily because of a low pricing policy but a policy to only sell to retailers that carry a large inventory.
R. v. Salomon Canada Sports Ltd., [1986] J.Q. No. 617 (C.A.)	Ski bindings	Ski bindings	Defendant refuses to supply retailer with ski bindings after retailer offers bindings free with purchase of another supplier's skis; defendant successfully invokes loss-leadering defence.
R. v. Schelew (1982 NB QB)	Apartment rentals	Apartment rentals	Defendant ran interest group of local landlords and convinced them to agree to raise rents.
R. v. Philips (1980 OCA)	Television remote controls	Television remote controls	Defendant manufacturer publishes newspaper advertisements containing a suggested retail price; does not make any threats or agreements.
R. v. Warner Brothers (1978 Ont. Prov. Ct.)	Movie tickets	Movie tickets	WB enters into agreement with theatre owner not to accept Golden Age Cards to for movie admission.

ENDNOTES

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[2] *Budget Implementation Act, 2009* (S.C. 2009, c. 2).

[3] R.S.C. 1985, c. C-34.

[4] (1989), 58 D.L.R. (4th) 255 (S.C.C.) ("*National Leasing*").

[5] In *Proprietary Articles Trade Association v. Canada (Attorney General)*, [1931] A.C. 310, the Privy Council upheld the *Combines Investigation Act, 1923* as a valid expression of the federal criminal law power under section 91(27): "If Parliament genuinely determines that commercial activities which can be described [as contrary to the public interest] are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes." (at 323-324). For example, in *R. v. Campbell* (1965) 58 D.L.R. (2d) 673, a 1951 law prohibiting resale price maintenance was upheld by the Supreme Court as a criminal law. As amendments were made giving the CIA a more regulatory character, some lower courts upheld the legislation under the Federal Government's trade and commerce power (section 91(2)) as well as under the criminal law power. See for example *R. v. Hoffmann-La Roche Ltd. (Nos. 1 and 2)* (1981) 33 O.R. (2d) 694 which involved the tied selling provisions of the CIA and *BBM Bureau of Measurement v. Director of Investigation and Research* [1985] 1 F.C. 173 which involved predatory pricing provisions of the CIA.

[6] In *Quebec Ready Mix Inc. v. Rocois Construction Inc.* [1989] 1 S.C.R. 695, the companion case to *National Leasing*, the Supreme Court dismissed a similar constitutional challenge to the CIA for the same reasons.

[7] *Director of Investigation and Research v. Xerox Canada Inc.* (1990) 33 C.P.R. (3d) 83.

[8] *Alex Couture Inc. et al. v. Attorney General of Canada* (1991) 83 D.L.R. (4th) 577.

[9] Canada, Royal Commission on Price Spreads, *Report of the Royal Commission on Price Spreads* (Ottawa : J. O. Patenaude, Printer to the King, 1935).

[10] *Ibid.* at 7-9.

[11] *Ibid.* at 270.

[12] *Ibid.* at 270.

[13] Canada, Royal Commission on Price Spreads of Food Products, *Report of the Royal Commission on Price Spreads of Food Products*, vol. 1 (Ottawa : Queen's Printer, 1959) at 59.

[14] *Ibid.* at 51.

[15] *Ibid.* at 50-60; also at 136-138.

[16] *Ibid.* at 59.

[17] Restrictive Trade Practices Commission, *Report Transmitting a Study of Certain Discriminatory Pricing Practices in the Grocery Trade made by the Director of Investigation and Research,* vol. 9 (Ottawa : Queen's Printer and Controller of Stationery, 1958) at 193.

[18] *Ibid.* at 186.

[19] See, for example, *Investigation into the Proprietary Articles Trade Association*, Report of Commissioner – Combines Investigation Act (Ottawa: October 24, 1927).

[20] See the discussion in R.S. Khemain and W.T. Stanbury *Historical Perspectives on Canadian Competition Policy* (Institute for Research on Public Policy, 1991) at 178.
[21] R.S.C. 1927, c. 26 by *An Act to Amend the Combines Investigation Act* S.C. 1951 [2nd sess.] c. 30, s. 1.
[22] Canada, Committee to Study Combines Legislation, *Report to the Minister of Justice and Interim Report on Resale Price Maintenance* (Chair: J.H. MacQuarrie) (Ottawa: Queen's Printer, 1952) ("*MacQuarrie Report*").
[23] See Statement of the Minister of Justice, House of Commons, June 27, 1950, cited in *Report to the Minister of Justice*, Committee to Study Combines Legislation (Ottawa: Queen's Printer) March 8, 1952, p. 55.
[24] The MacQuarrie Committee was not persuaded that resale price maintenance was necessary to protect against loss-leadering or protect the reputation of manufactured branded goods or the margins of small business.
[25] This finding appears to be related to a principal factor which lead to the establishment to the MacQuarrie Committee itself. Following the Second World War (during which anti-combines legislation was suspended), the government was subjected to public criticism because of its failure to deal with a long-standing price-fixing agreement in the flour milling industry disclosed by the Combines Commissioner F.A. McGregor in his 1948 report which was not tabled in the House of Commons until the Commissioner resigned in 1949.
[26] *MacQuarrie Report* at 57 and 71.
[27] The MacQuarrie Committee also recommended the establishment of the RTPC and the office of Director of Investigation and Research and the repeal of the *Criminal Code* provisions dealing with conspiracies, mergers and monopolies such that prosecutions of such matters would be brought only under the CIA). These recommendations were all ultimately implemented.
[28] *Combines Investigation Act*, R.S.C. 1952, c. 314, s. 34(2)(b).
[29] *R. v. Campbell*, [1964] 2 O.R. 487 at para. 87.
[30] *An Act to Amend the Combines Investigation Act and the Criminal Code*, S.C. 1960, c. 45, s. 14.
[31] *Combines Investigation Act*, R.S.C. 1970, c. C-23.
[32] *Combines Investigation Act*, S.C. 1974-1975-1976, c. 76, s. 38.
[33] Harry Chandler, "Beyond Merriment and Diversion: The Treatment of Conspiracies under Canada's Competition Act", address to the Roundtable on Competition Act Amendments Insight Conferences (Toronto, May 25, 2000).
[34] *R. v. Schelew* (1984), 52 N.B.R. (2d) 142 at para. 25.
[35] *R. v. Philips Electronics Ltd.*, 116 D.L.R. (3d) 298 (Ont. C.A.) at page 305.
[36] *R. v. H.D. Lee of Canada* (1980), 57 C.P.R. (2d) 186.
[37] *R. v. Shell Canada Products Ltd.* (1990), 63 Man. R. (2d) 1.
[38] The summary at Appendix A is from Visa Canada Corporation's Closing Arguments in *Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated et al*, CT-2010-010.
[39] *R. v. La Compagnie Brasserie Stroh (Québec) Ltée* (2002 FCTD Ottawa T-1504-02).
[40] Competition Bureau, "Competition Bureau Settles Real Estate Case Involving Canadian Re/Max Franchisees" (February 17, 2003), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00297.html.

[41] *R. v. Toyota Canada* (2002 FCTD Ottawa T-1065-02).
[42] *R. v. Toyo Tanso USA, Inc.* (2003 FCTD Ottawa T-298-03).
[43] Competition Bureau, "Consumers to be reimbursed by John Deere Limited" (October 19, 2004), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00248.html.
[44] Competition Bureau, "Window coverings company pleads guilty to attempting to influence competitor's prices" (November 15, 2004), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00240.html.
[45] *R. v. Labatt* (2005 Court of Quebec).
[46] *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252 ("*Fairview Donut*").
[47] *Ibid.* at para. 599.
[48] *Ibid.* at para. 600.
[49] *Ibid.* at para. 585.
[50] *Ibid.* at para. 583.
[51] Note that while the *Fairview Donut* decision was issued in February 2012 and therefore after the repeal of section 61, the challenge was brought under the prior criminal price maintenance provision. There is no right for a private party to sue for damages based on a breach of the new civil price maintenance provision.
[52] The three convictions are: *R.* v. *Simmons* (unreported, 15 October 1984) (Ont. Prov. Ct. (Crim. Div.)) ($15,000 fine on each of two counts and prohibition order); *R.* v. *Neptune Motors*, [1986] C.C.L. 7046 (Ont. Dist. Ct.) ($50,000 fine); and *R.* v. *Perreault*, [1996] R.J.Q. 2565, [1996] A.Q. No. 2660 (C.S.), online: QL (QJ) (one year prison term).
[53] See, for example, *Conversions by Vantasy Ltd. v. General Motors of Canada Ltd.*, [2002] M.J. No. 343 (Man. Ct. Q.B.) (plaintiff's claim did not succeed because, among other things, the Court found that it had failed to prove that there was a purchaser in competition with Vantasy that received an advantage) and *Atlantic Wholesalers Ltd. v. Positive Ventures Ltd.*, [2005] N.B.J. No. 8 (N.B. Ct. Q.B.) (plaintiff's claim did not succeed because, among other things, the Court found that a two week price concession for Pepsi that was granted to a supermarket was not part of a "practice" of discriminating).
[54] Competition Bureau, *Price Discrimination Enforcement Guidelines* (1993), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01810.html.
[55] *R.* v. *Perreault*, [1996] R.J.Q. 2565 (Q.S.C.) ("*R.* v. *Perreault*"); *R.* v. *Carnation Co.* (1969) 58 C.P.R. 112 (Alta. C.A.); [1996] A.J. No. 11 Riley J. ("Alta S.C.).
[56] *R.* v. *Perreault*.
[57] [1968] 1 O.R. at 550, 52 C.P.R. 21, [1968] 2 C.C.C. at 222, 67 D.L.R. (2d) at 88; affirmed [1968] 1 O.R. at 564, 54 C.P.R. 60, [1968] 2 C.C.C. 221, 67 D.L.R. (2d) 87 (C.A.).
[58] (1982), 65 C.P.R. (2d) 95 (B.C. Prov. Ct.).
[59] See *Canada (Commissioner of Competition) v. Air Canada,* (2003), 26 C.P.R. (4th) 476 (Comp. Trib.) ("*Air Canada*") (Air Canada found to have operated at fares that did not cover avoidable costs on certain routes; the Commissioner subsequently withdrew the remainder of its application following Air Canada's agreement not to appeal the decision with respect to avoidable costs); *R. v. Perreault* (convicted and sentenced to one year imprisonment under the conspiracy, price maintenance and predatory pricing provisions for deliberately maintaining low pricing policy over a two period with the intention of eliminating competitors); *R. v. Consumers Glass Co.*, (1981), 33

O.R. (2d) 228 (prices set to minimize losses which were above average variable cost were not unreasonably low); *R. v. Hoffman-LaRoche Limited* (1980), 28 O.R. (2d) 164 (H.C.J.) affirmed 33 O.R. (2d) 694 (C.A.) ($50,000 fine ordered for predatory pricing by giving away products for fee during a six-month period); and *R. v. Producers Dairy Ltd.* (1996), 50 C.P.R. (2d) 265 (Ont. C.A.) and *R. v Carnation Co.* (1969), 58 C.P.R. 112 (Alta C.A.) (acquittals on the basis that temporary price reduction to meet aggressive competition is not a "policy" within the meaning of section 50(1)).

[60] See *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1983), 83 C.P.R. (3d) 51 (Ont. Ct. (Gen. Div.); *A.P.I. Alarm Inc. v. D'Arterio* (2009), 176 A.C.W.S (3d) 606 (Ont. S.C.J.) (offering to sell at unreasonably low prices is not a "policy of selling at unreasonably low prices", and no actual loss or damage suffered); *Skybridge Investments Ltd. v. Metro Motors Ltd.* (2006), 385 W.A.C. 140 (predatory pricing claim struck as refusal as restriction on selling vehicles for export not captured by section 50); and *Culhane v. ATP Aero Training Products Inc.* (2004), 31 C.P.R. (4th) 113 (F.C.); affirmed (2005) C.P.R. (4th) 20; leave to appear to S.C.C. refused 256 D.L.R. (4th) vi (giving away products as for free as a marketing tool was not predatory pricing as no intent to harm or loss or damage to the plaintiff was shown).

[61] Competition Bureau, *Predatory Pricing Enforcement Guidelines* (March 1992), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01746.html.

[62] *Canada (Commissioner of Competition) v. Air Canada,* Order Regarding Issues to be Determined at the Hearing, 2001 Comp. Trib. 011 ("*Air Canada* Phase I Order").

[63] Competition Bureau, *Draft Enforcement Guidelines on Illegal Trade Practices: Unreasonably Low Pricing Policies Under Paragraphs 50(1)(b) and 50(1)(c) of the Competition Act* (November 12, 2002), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00366.html.

[64] Competition Bureau, *Draft Predatory Pricing Enforcement Guidelines* (October 9, 2007), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02469.html.

[65] In the intervening period, the Bureau published *Enforcement Guidelines on the Abuse of Dominance Provisions*, *the Information Bulletin on the Abuse of Dominance Provisions as Applied to the Retail Grocery Industry* and *the Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry* which also addressed the application of section 79 to predatory conduct.

[66] Competition Bureau, *Predatory Pricing Enforcement Guidelines* (July 2008), available at http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/02713.html ("2008 Predatory Pricing Guidelines").

[67] For example, Firm A sells product *y* and Firm B, having a "dominant" position in product *x*, sells products *x* & *y* separately and as a bundle for a substantial discount such that the price of the bundle is only marginally greater than the price at which Firm A is selling product y. Firm A claims (likely under the abuse of dominance or tied selling provision) that Firm B is engaging in anti-competitive activity including predatory pricing with respect to product *y* (the product both Firm A and Firm B sell). A key issue in determining whether pricing of the competitive product (product y) is below-cost is whether the discount given by Firm B on the entire bundle of products should be wholly allocated to product y. The U.S. jurisprudence suggests that the discount on the bundle should be allocated entirely to the

competitive product. See for example, *Cascade Health Solutions* v. *PeaceHealth*, 502 F.3d 895, 905 (9th Circuit 2007).

[68] As discussed below, the Bureau recently issued revised draft abuse of dominance guidelines which are proposed to supersede all previous guidelines and statements of the Commissioner and the Bureau regarding the administration and enforcement of section 79, including the 2008 Predatory Pricing Guidelines.

[69] Lawrence A. Skeoch & Bruce C. McDonald, *Dynamic Change and Accountability in a Canadian Market Economy: Proposals for the Further Revision of Canadian Competition Policy by an Independent Committee Appointed by the Minister of Consumer and Corporate Affairs* (Ottawa: Dept. of Consumer and Corporate Affairs, 1976).

[70] Section 36 of the CA provides that a plaintiff may bring a private action before the courts for damages and other relief arising from conduct that contravenes the criminal provisions of the CA.

[71] *An Act to amend the Combines Investigation Act and the Bank Act and to repeal an act to amend the combines investigation act and the criminal code*, S.C. 1974-1975-1976, c. 76.

[72] Canada, Director of Investigation and Research, Bureau of Competition Policy, *Discussion Paper on Competition Law* (1995) (unpublished).

[73] Canada, Consultative Panel on Amendments to the Competition Act, *Report of the Consultative Panel on Amendments to the Competition Act to the Director of Investigation and Research, Competition Act* by George N. Addy, (Hull, Quebec : Industry Canada, Competition Bureau, 1996) at 1 ("1996 Report").

[74] *Ibid.* "Price Discrimination and Promotional Allowances".

[75] *Ibid.*

[76] *Ibid.* at Part 3, "The Consultative Panel".

[77] Bill C-235 passed first reading on October 6, 1997 and was referred to the Standing Committee on Industry. On April 15, 1999, the Committee decided to report the Bill to the House of Commons without the clauses or the title. The Bill is numbered C-201 in the second session of the 36th Parliament. Bill C-201 died on the order paper on October 22, 2000, when the 36th Parliament, 2nd Session was dissolved by Royal Proclamation.

[78] Competition Bureau, Announcement, "Public Release of the VanDuzer Report" (25 November 1999), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00760.html.

[79] J. Anthony VanDuzer & Gilles Paquet, *Anticompetitive Pricing Practices and the Competition Act Theory, Law and Practice* (University of Ottawa, 1999) at Appendix 1 - Terms of Reference for Review ("*VanDuzer Report*").

[80] *Ibid.* at Part 4 - Elements of a Competition Regime - Summary and Conclusions – Predatory Pricing.

[81] J. Anthony VanDuzer, "*Assessing the Canadian Law and Practice on Predatory Pricing, Price Discrimination and Price Maintenance*" (2000-2001) 32 Ottawa L. Rev. 179-234 ("VanDuzer Article").

[82] *Ibid.* at 232.

[83] *VanDuzer Report*, Part 4 - Elements of a Competition Regime - Summary and Conclusions - Conclusions Regarding Specific Types of Anticompetitive Pricing Practices General Comments - The Limitations of Guidelines.

[84] Canada, Standing Committee on Industry, Science and Technology, *A Plan to*

Modernize Canada's Competition Regime (Ottawa: The Committee, 2002) (Chair: Walt Lastewka), available at http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/eng/00391.html ("*A Plan to Modernize Canada's Competition Regime*").

[85] Canada, Parliament, *Evidence of Assistant Deputy Commissioner of Competition to Standing Committee on Industry, Science and Technology, Competition and Policy Study*, 37th Leg. 1st sess., No. 064 (January 31, 2002).

[86] *Ibid.*

[87] Competition Bureau, *Discussion Paper - Options for Amending the Competition Act: Fostering a Competitive Marketplace* (Ottawa: The Competition Bureau, 2003) at 3.

[88] Canada, Public Policy Forum, *National Consultation on the Competition Act Final Report* (April 8, 2004).

[89] *Ibid.* at 21.

[90] Canada, Competition Policy Review Panel, *Compete to Win: Final Report – June 2008* (Ottawa: Public Works and Government Services Canada, 2008) at 58, 126 ("*Compete to Win*").

[91] *Ibid.* at 58, 127.

[92] Competition Bureau, *Draft Abuse of Dominance Enforcement Guidelines* (March 22, 2012) at 1 purport to "supersede all previous guidelines and statements by the Commissioner of Competition or other Bureau officials regarding the administration and enforcement of section 79". Available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03445.html.

[93] See for example, Canadian Bar Association, *Enforcement Guidelines: Abuse of Dominance (Competition Act Section 78 and 79)* (May 2012), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CBA-Comments-Abuse-Dominance-2012-05-23.pdf/$file/CBA-Comments-Abuse-Dominance-2012-05-23.pdf ("*CBA Submission on 2012 Draft Abuse Guidelines*"); Osler, Hoskin & Harcourt LLP, *Comments on the Competition Bureau's 2012 Draft Updated Abuse of Dominance Guidelines* (May 22, 2012), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Olser-Comments-Abuse-Dominance-2012-05-23.pdf/$file/Olser-Comments-Abuse-Dominance-2012-05-23.pdf ("*Osler Submission on 2012 Draft Abuse Guidelines*").

[94] Competition Bureau, *Draft Updated Enforcement Guidelines on the Abuse of Dominance Provisions* (January 2009), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02942.html.

[95] *CBA Submission on 2012 Draft Abuse Guidelines* at 3.

[96] VanDuzer Article at 234.

[97] *Commissioner of Competition v. Canada Pipe Co.* [2006] F.C.A. 233 at 72 ("*Canada Pipe*").

[98] *Canada Pipe.*

[99] On December 20, 2007, the Bureau and Canada Pipe announced that they had settled their dispute pursuant to a consent agreement, which provides that Canada Pipe will implement a new rebate program, as an alternative to the existing program, that does not require participants to purchase products exclusively from the company in order to qualify for discounts and rebates. See Competition Bureau, "Competition Bureau reaches agreement with Canada Pipe Company Ltd." (December 20, 2007), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02548.html.

[100] For more detail refer to *CBA Submission on 2012 Draft Abuse Guidelines* and *Osler Submission on 2012 Draft Abuse Guidelines.*

[101] The following minor refinements are of note:

- The prior criminal law was applicable to an "attempt" to influence price. The reference to "attempt" has been removed; and
- Part (ii) of subsection 76(a), the refusal to deal as a result of the person's low pricing policy, has been expanded to apply not just to a person but to "a class of persons."

[102] The price maintenance provisions continue to imply that a customer is free to charge and advertise whatever price it chooses for a supplier's product, subject to any maximum price that the supplier may establish. To reinforce this notion, section 76 continues to provide that a suggestion of a resale price or minimum resale price for a product is proof that the person to whom the suggestion is made is influenced in accordance with the suggestion, unless the supplier also makes it clear that the customer is not required to abide by the suggestion and that the relationship with the supplier will not suffer should the customer choose not to do so. This must also be clear in any advertising a manufacturer produces.

[103] Principles of statutory interpretation suggest this is the correct approach. See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) at 579: "It is presumed that amendments to the wording of a legislative provision are made for some intelligible purpose: to clarify the meaning, to collect a mistake, to change the law. A legislature would not go to the trouble and expense of amending a provision without any reason." See also Ruth Sullivan, *Statutory Interpretation*, 2d ed. (Toronto: Irwin Law, 2007) at 293: Relevant inferences may be drawn "from the pattern of formal and substantive change....If the changes have been substantive, the interpreter must try to discover the reasons for the change. It is sometimes possible to detect trends or patterns in successive amendments....Once documented, such patterns and correlations can be strong evidence of legislative intent."

[104] *VanDuzer Report* at 84: "In order to target anticompetitive conduct accurately, competition rules dealing with vertical price maintenance should take into account (a) the market power of the supplier, including the availability of alternative sources of supply, and (b) the competitive effects of the price maintenance, including any efficiency based explanations." *Compete to Win* at 61: "repeal the existing resale price maintenance provisions and replace them with a new civil provision to address this practice when it has an anti-competitive+ effect. This new provision should be subject to the private access rights before the Competition Tribunal."

[105] *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et. al.* (2009 Comp. Trib. 6) at paras. 365-366, aff'd 2011 FCA 188.

[106] *B-Filer Inc. v. Bank of Nova Scotia* (2005) 44 C.P.R. (4th) 214 (Comp. Trib.).

[107] *Ibid.* at para. 200.

[108] *Ibid.* at para. 208.

[109] *Ibid.* at para. 211.

[110] *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 127 S. Ct. 2705 (2007) ("*Leegin*").

[111] *VanDuzer Report.*

[112] *A Plan to Modernize Canada's Competition Regime.*

[113] *Compete to Win.*

[114] In the Bureau's 1997 submission to the OECD Policy Roundtable on Resale Price Maintenance, the Bureau commented that economic theory regarding resale price maintenance generally falls into two categories: those situations where the practice can be welfare-enhancing, and those where the practice has the potential to be anti-competitive. The Bureau explained that welfare-enhancing practices, by increasing the dealer's margin on sales, increases the dealer's desire for additional sales of that brand, which in turn induces the dealer to invest in the services. As a result, resale price maintenance aligns supplier and dealer incentives so that the resulting combination of price and service maximizes the value of the product. In contrast, a practice is likely to be welfare-reducing if its purpose is to facilitate either an upstream or downstream cartel. See OECD, *Policy Roundtable on Resale Price Maintenance* (1997) at 35-36, available at http://www.oecd.org/dataoecd/35/7/1920261.pdf.

[115] *Leegin* at 9.

[116] The six week hearing ended on June 21, 2012.

[117] *Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated et al*, CT-2010-010. The authors of this paper act as counsel to an intervening party, Canadian Bankers Association. The public versions of the filings of the Commissioner, the Respondents and the Intervenors can be accessed through the Competition Tribunal's website.

[118] This rule prohibits merchants that choose to accept Visa or MasterCard credit cards from charging cardholders a fee when using a Visa or MasterCard as their method of payment.

[119] This rule prohibits merchants who choose to accept Visa or MasterCard credit cards from refusing to accept a valid Visa or MasterCard credit card.

[120] Significantly, the Commissioner's application and requested order assumes the following causal chain of events: (1) a significant number of merchants will surcharge or decline certain MasterCard or Visa credit cards, or Visa and/or MasterCard will fear such surcharging or card declines; (2) there is an actual or expected significant loss of transaction volume on the Visa and/or MasterCard credit card networks; (3) Visa and/or MasterCard lower their default interchange rates in response to the volume loss; (4) acquirers charge lower MDRs to their merchant customers; and (5) merchants pass on these cost savings to their customers in the form of lower retail prices.

[121] The Canadian Bankers Association and The Toronto-Dominion Bank intervened in this proceeding.

[122] In *Canada Pipe* at paras. 26, 28., the Federal Court of Appeal found that: "Each statutory element must give rise to a distinct legal test, for otherwise the interpretation risks rendering a portion of the statute meaningless or redundant.... [I]t is important that the correct approach to the overlapping use of supporting evidence in the competition context be properly understood, so as to avoid the interpretive danger of impermissible erosion or conflation of the discrete underlying statutory tests. Although a particular piece of supporting evidence may be employed as an indirect indicator in respect of more than one element, the elements themselves must remain conceptually distinct."