Articles

THE GAP IN CANADIAN COMPETITION LAW FOLLOWING CANADA PIPE

March 30, 2014 (This version: May 25, 2014)
By: Ralph A. Winter[1]
Sauder School of Business, UBC

Among other things, well-designed competition policy prohibits anti-competitive, single-firm practices. The vast majority of corporate practices are of course efficient as means of either enhancing demand or keeping costs low. In some cases, however, firms adopt practices that suppress competition within a market or inhibit the entry of rivals into the market. In a complete set of competition laws, any practice that is potentially anti-competitive could be challenged under the law and its impact assessed in a court or specialized body.

Canadian competition law is not complete. An important class of potentially anti-competitive business cannot be challenged under the Competition Act after the Federal Court of Appeal decision in Canada Pipe because no section of the Act captures these practices. No section is available under which an application can be made for a remedy where the practices are shown to lessen competition. This gap in the law can be traced to a flawed definition in Nutrasweet and Canada Pipe of one of the most basic terms in competition policy: anti-competitive.

This Article discusses a set of practices that can suppress competition in a market without meeting either of two conditions attributed to 79(1)(b) by Nutrasweet and Canada Pipe (that it must have the intent of a negative impact on a competitor; and this effect must be predatory, exclusionary or disciplinary). These practices are those that raise prices in the market by suppressing the competitive mechanism, softening competition to the benefit of all firms in the market not just the firm adopting the practice. The practices benefit, rather than harm, rivals and cannot be described as predatory, exclusionary or disciplinary. The practices are missed by section 79 under the current law yet potentially lessen competition.

Une politique sur la concurrence bien conçue interdit, entre autres, les pratiques anti-concurrentielles et le comportement individuel des entreprises. La vaste majorité des pratiques des entreprises sont naturellement efficaces en tant que moyens d'accroître la demande ou de limiter les coûts. Pourtant, dans certains cas, les sociétés adoptent des pratiques qui éliminent la concurrence au sein d'un marché ou empêchent des rivaux d'y pénétrer. Dans un régime de droit de la concurrence complet, toute pratique pouvant être anti-concurrentielle devrait être remise en question en vertu du droit et ses incidences devraient être évaluées par un tribunal ou un organe spécialisé.

Le droit canadien de la concurrence n'est pas complet. Depuis l'arrêt rendu par la Cour d'appel fédérale dans l'affaire Tuyauteries Canada Ltée*, une catégorie importante d'entreprises pouvant empêcher la concurrence ne peut être examinée en vertu de la Loi sur la concurrence car aucun article de la Loi ne traite de ces pratiques. La Loi ne prévoit aucune possibilité de recours lorsqu'il est démontré que les pratiques freinent la concurrence. Cette lacune juridique trouve sa source dans une définition mal adaptée, donnée dans les affaires* Nutrasweet *et* Tuyauteries Canada Ltée*, du terme « anti-concurrentiel," l'un des plus essentiels de la politique en matière de concurrence.*

Cet article porte sur un ensemble de pratiques qui peuvent éliminer la concurrence dans un marché sans satisfaire à deux conditions attribuées à l'alinéa 79(1)b) par les juges des affaires Nutrasweet *et* Tuyauteries Canada Ltée *(qu'il faut qu'il existe un effet négatif intentionnel sur un concurrent et que cet effet soit abusif, ou qu'il vise une exclusion ou une mise au pas). Ces pratiques sont celles qui accroissent les prix sur un marché en éliminant le mécanisme de la concurrence, minimisant ainsi la concurrence au profit de toutes les entreprises parties audit marché, pas seulement au profit de celle ayant adopté la pratique. Les pratiques profitent aux rivaux au lieu de leur nuire et ne peuvent être décrites comme étant abusives ou visant une exclusion ou une mise au pas. L'article 79 actuel ne prévoit pas ces pratiques qui, pourtant, réduisent la concurrence.*

I. INTRODUCTION

Among other things, well-designed competition policy prohibits anti-competitive, single-firm practices. The vast majority of corporate practices are of course efficient as a means of either enhancing demand or keeping costs low. In some cases, however, firms adopt practices that suppress competition within a market or inhibit the entry of rivals into the market. In a complete set of competition laws, any practice that is potentially anti-competitive could be challenged under the law and its impact assessed in a court or specialized body.

Canadian competition law is not complete. An important class of potentially anti-competitive business cannot be challenged under the *Competition Act* (the "*Act*")[1] after the Federal Court of Appeal decision in *Canada Pipe*[2] because no section of the *Act* captures these practices. No section is available under which an application can be made for a remedy where the practices are shown to lessen competition. This gap in the law can be traced to a flawed definition in *NutraSweet*[3] and *Canada Pipe* of one of the most basic terms in competition policy: *anti-competitive*.

Paragraph 79(1)(b) of the *Competition Act*, in the section of the *Act* dealing with abuse of dominance, requires for a successful application that the practice being impugned involve anti-competitive acts.[4] The legal meaning of an anti-competitive act in Canada, adopted by the Competition Tribunal in *NutraSweet* and confirmed by the Federal Court of Appeal in *Canada Pipe* is an act that involves an "intended negative effect on a competitor that is predatory, exclusionary or disciplinary."[5] *Canada Pipe* also confirmed that paragraph 79(1)(b) must stand on its own, apart from paragraph 79(1)(c) in particular, as one requirement for a successful application. In short, to be successfully challenged on the basis of section 79, a business practice must among other requirements meet the two conditions attributed to 79(1)(b) by *NutraSweet* and *Canada Pipe*: it must have the intent of a negative impact on a competitor; and this effect must be predatory, exclusionary or disciplinary. (For brevity, I shall refer to these two conditions as the *NutraSweet* Conditions.)

I discuss in this paper a set of practices that can suppress competition in a market without meeting either of the *NutraSweet* Conditions. These practices are those that raise prices in the market by suppressing the competitive mechanism, softening competition to the benefit of all firms in the market not just the firm adopting the practice. The practices benefit, rather than harm, rivals and cannot be described as predatory, exclusionary or disciplinary. The practices are missed by section 79 under the current law yet potentially lessen competition.

For concreteness let me offer two examples at the outset. Suppose that each of the two firms in a duopoly adopts *meeting competition* clauses in contracts with buyers. That is, each firm commits to matching any price offered to buyers by its rival. Contracts contain no commitment to prices, which are negotiated over time between the seller and the buyer and also contain little or no commitment, such as liquidated damages, for the buyer to remain in the contract. The firms' contractual commitments to meeting-competition clauses are publicly observable.

Meeting competition clauses might appear to be pro-competitive. After all, matching or beating price cuts by rivals is at the heart of the competitive process. The strategy of committing to price matching may, to the contrary, elicit collusive pricing in the market. The commitment by each firm to meet price cuts by its rival means that if the firms are currently setting prices at the collusive, joint profit-maximizing level neither firm has the incentive to undercut the price. The firm considering a price cut in order to increase its market share would know that its rival would automatically match the price cut. The firm would know that an attempt to capture a larger market share by dropping price would fail. The incentive to cut price below the collusive level thus disappears once the contractual clauses have been adopted. Prices remain high. Ironically, committing ahead of time to be an automatic, aggressive competitor can completely stifle the competitive process.

This theory of meeting competition clauses as anti-competitive, first offered by Steven Salop (1986), is not a particularly realistic explanation of most uses of the contractual guarantee. But it is conceivable that there are some markets for which the anti-competitive theory is plausible, with the result of a substantial lessening of competition.

The second example of a practice missed by the *Competition Act* after *Canada Pipe* is a retail most-favoured nation ("MFN") restraint. This restraint limits retailers from charging more for a manufacturer's product than for competing brands. The effect of the restraint can be similar to the potential competition-suppressing effect of meeting-competition clauses. Suppose that two firms producing identical products, sold through the same retailers, have adopted retail MFN restraints. Neither firm has the incentive to reduce its price below the monopoly price in an attempt to capture market share because it knows that any decrease in its retail price will be matched by a drop in its rival's retail price. The theory of this restraint as anti-competitive is plausible. I discuss the restraint below in the context of *Canada (Commissioner of Competition) v Visa Canada Corporation and MasterCard International Incorporated* ("*VISA*").[6]

For well-functioning competition policy we need the competitive impact of strategies like meeting-competition clauses or retail MFNs to be assessed against evidence in a judicial or quasi-judicial setting. Yet under Canadian competition law these type of strategy cannot be challenged when they soften competition: in this case, the practices meet neither of the necessary *NutraSweet* Conditions of section 79(1)(b). In particular, rival firms benefit from the impact of the practice in suppressing competition.

Section 79(1)(c) contains another necessary requirement for a successful challenge of a business practice under the abuse of dominance section: that the practice has or is likely to have the effect of preventing or lessening competition substantially in a market (which I will summarize in the usual way as a "substantial lessening of competition" or simply "SLC"). This condition is met in Canadian competition law if the level of competitiveness in the market is substantially lower as a result of the practiced being challenged:

> In order to achieve the inquiry dictated by the statutory language of paragraph 79(1)(c), the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is "substantial."[7]

A difference in the level of competitiveness of a market is generally measured by a difference in prices, although a substantial decrease in non-price competition would qualify as meeting the condition as well.

The practices escaping the Canada Pipe conditions of paragraph 79(1)(b) discussed in this paper may nonetheless meet the substantial lessening of competition of the subsequent paragraph, 79(1)(c) in the *Act*. For example, a retail MFN restraint may substantially lessen competition even where the clauses fail to satisfy the *NutraSweet* Conditions. In other words, the *Canada Pipe* interpretation of section 79 leaves us with the proposition that a *practice that lessens competition substantially is not necessarily anti-competitive.*

This proposition is nonsensical in standard language. The proposition is entirely consistent with Canadian competition law following *Canada Pipe*, however, because that decision confirms the *NutraSweet* approach of interpreting "anti-competitive" in 79(1)(b) as "anti-competitor." Under *Canada Pipe*, anti-competitive refers to harm to a competitor, not harm to competition. Indeed, the Court found the Tribunal to be in error in drawing a logical link between an anti-competitive act and an act that lessened competition in a market. As discussed by Michael Trebilcock and in an article that I co-authored with Edward Iacobucci, the interpretation is at odds with sensible competition policy.[8] I elaborate on the weak legal foundation and the economic consequences of *Canada Pipe* in this Article.

The narrowing of section 79 by *Canada Pipe* raises the issue of whether other sections of the *Competition Act* could substitute in challenging the set of practices described. In *VISA*, the application under section 76 was unsuccessful. I suggest below that a coherent section 79 may well have been applicable in this case. Section 77 is available for specific potentially anti-competitive practices – tied selling, exclusive dealing and market restriction – but not for other practices in the potentially anti-competitive set of practices that I describe.

It might be thought that an application for a remedy to these practices could be successful under section 45, which deals with agreements, arrangements or conspiracies among competitors. A court is allowed to infer the existence of an agreement from all circumstances of a case (section 45(3)). But coordinated behaviour that falls short of an actual agreement does not satisfy the requirements of section 45 – and the simultaneous use of competition-dampening strategies is an even *weaker* basis for inferring an agreement that coordinated behaviour. A competition-suppressing practice may be in the interest of each firm individually whether or not its competitors' decide to adopt the same activity. In the language of game theory, the practice may be a dominant strategy. Where a strategy is dominant, no agreement can therefore be inferred from strategies alone. No level of coordination at all, even that falling short of actual agreement, is needed for the suppression of competition by a group of firms through the adoption of these practices. Section 45 would therefore be generally unavailable for competition-suppressing practices. Cartels are illegal. But a set of firms adopting these practices in a market would not constitute a cartel, even if the outcome of price competition under the practices were collusive prices.

Section 90.1 deals with agreements or arrangements that substantially lessen or prevent competition. This section, unlike section 45, contains no allowance for inference of an agreement from market circumstances and is therefore even less likely to provide a channel for successful application to remedy competition-dampening practices.

I elaborate in the next section of this Article on the evolution of Canadian competition law that has brought us to the gap in the law whereby a set of competition-suppressing practices escapes scrutiny. In section 3, I discuss the economics of competition-suppressing practices. In section 4 I outline the basic economics of *VISA*. *VISA*, I suggest, demonstrates that the gap in Canadian competition law is not just a matter of theory but has already had consequences for Canadian consumers.

II. THE LAW

Abuse of dominance is treated as a reviewable practice under civil procedure in section 79 of the *Competition Act*. The *Competition Act* replaced the *Combines Investigation Act* ("*CIA*") in 1986, and section 79 of the *Competition Act* replaced the criminal offense of monopolization in the previous statute. The passage of the *Competition Act* was preceded by a series of reports, starting with a report by the Economic Council of Canada in 1969, which proposed a two-track procedure with some offenses treated as criminal and others dealt with under civil procedures. Following several failed attempts at reforming the *CIA* in the 1970s, a 1981 discussion paper issued by the Bureau of Competition Policy, as the Competition Bureau was then known, addressed the issue of monopolization (roughly the same as abuse of dominance).[9] The discussion paper proposed that competition law address monopolization under civil procedures.[10]

The Bureau of Competition Policy discussion paper defined "anti-competitive conduct" as "conduct of a restrictive, exclusionary or predatory nature." The discussion paper set out a list of proposed examples of such conduct.

The first abuse of dominance case brought under the 1986 *Act*, *NutraSweet*, set out the definition of an anti-competitive act. Specifically, the tribunal in *NutraSweet* listed section 78 of the *Act*, which contains a non-exhaustive list of acts to which section 79 applies, then stated:

> This list of anti-competitive acts is clearly not meant to be exhaustive and the respondent admits that other conduct not specifically mentioned in section 78 can constitute an anti-competitive act. A number of the acts share common features but, as recognized by the Director and the respondent, only one feature is common to all: an anti-competitive act must be performed for a purpose, and evidence of this purpose is a necessary ingredient. The purpose common to all acts, save that found in paragraph 78(f), is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary.[11]

The example found in paragraph 78(f) is "buying up of products to prevent the erosion of existing price levels."[12] This language clearly reflects the definition of anti-competitive conduct in the 1969 Bureau discussion paper cited above.

In *NutraSweet*, the Commissioner challenged eight practices of NutraSweet, including the contracts that NutraSweet entered into with a set of customers in Canada. These contracts, which included meet-or-release clauses, were challenged as exclusionary. The list of impugned practices also included an alleged agreement between NutraSweet and a competitor, Ajinomoto, under which Ajinomoto agreed not to sell in Canada (or the United States).

NutraSweet, as mentioned, establishes two conditions as necessary and together sufficient for section 79(1)(b): that there be a practice of acts that has an intended negative effect on a competitor; and that these acts be predatory, exclusionary or disciplinary. Yet as a matter of economics, negative impact on a competitor is neither necessary nor sufficient for a practice to be anti-competitive. It is not sufficient because any practice that a firm undertakes to make it a more efficient firm invariably has a negative impact on a competitor yet is not anti-competitive. And a negative impact on a competitor is not necessary for an act to be anti-competitive, as the discussion in the introduction of one particular practice, meeting competition, demonstrates; these practices benefit rivals and yet are anti-competitive.

It is in the necessity of the NutraSweet Conditions (rather than the sufficiency) where the problem lies. The legal necessity of conditions in a statute is interpreted by a court or Tribunal in specifying conditions under which statute does *not* apply. In *NutraSweet*, the necessity of the NutraSweet Conditions are set out in the Tribunal's reasons for rejecting as anti-competitive the agreement between Ajinomoto and NutraSweet under which Ajinomoto would not compete in Canada. The Tribunal stated:

> "The critical question is whether the agreement is an anti-competitive act under section 78. In the Director's view, the fact that NSC, given its market position, has an arrangement with Ajinomoto that excludes Ajinomoto from selling in Canada qualifies the arrangement as such. In the Tribunal's view, this by itself is not sufficient. A consistent pattern in the anti-competitive acts cited in section 78 (save for that in paragraph (f)) is that the competitor of the dominant firm is a target not a fellow actor…[W]e do not believe that we have been provided with adequate justification for including the NSC/Ajinomoto arrangement (insofar as it affects Canada) as an anti-competitive act under section 78."[13]

In assessing the *NutraSweet* Conditions for an act to be anti-competitive under the law, it is important to consider the logical implication of the example 78(f), one of the eight examples of anti-competitive acts ser out in section 78. The *NutraSweet* tribunal seemed to find some comfort from the fact that seven of the eight examples in section 78 were characterized by the two conditions. This would be fine in a decision concerned with *sufficiency* of a practice to meet the section. It is fair to label a practice that shared the essential properties of all but one of the statutory examples of anti-competitive acts in 78 as anti-competitive.

But when it comes to adopting the conditions as *necessary* for an act to be anti-competitive, in order to meet the necessary conditions of section 79(1)(b), the existence of the example 78(1)(f) in the statute is a logical problem. *The example 78(f) is a counterexample to the necessity of the NutraSweet conditions for an act to be characterized as anti-competitive*. An adoption of the conditions as necessary for an act to be anti-competitive for the purposes of meeting section 79 contradicts the statute itself, since the statute provides a counterexample to the logical necessity of the conditions. NutraSweet is not only problematic in terms of creating a gap in Canadian competition law, the decision is logically inconsistent with the *Competition Act*.

In *Canada Pipe*, how did the Federal Court of Appeal respond to this logical inconsistency? The court confirmed the *NutraSweet* definition of "anti-competitive" in section 79(1)(b):

> In *NutraSweet*, the Tribunal … suggested (at page 34) the following working definition of "anti-competitive act":
>
> > A number of the acts [mentioned in section 78] share common features but [...] only one feature is common to all: an anti-competitive act must be performed for a purpose, and evidence of this purpose is a necessary ingredient. <u>The purpose common to all acts, save that found in paragraph 78(f), is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary.</u> [Emphasis added in original].
>
> I adopt the above definition, which is very close in substance to the core characteristic of the enumerated list of section 78, save at paragraph 78(1)(*f*). This exception was noted by the Tribunal in *NutraSweet*.[14]

In other words, the Court noted the example at 78(1)(f), which is logically inconsistent with the definition that it was providing, but then flatly ignored the logical inconsistency.

I conclude, in short, that the Federal Court of Appeal in *Canada Pipe* confirmed a definition of "anti-competitive" for the purposes of applying condition 79(1)(b) that contradicted the statute itself.

The question arises as to why the Court was so adamant on supporting a meaning of "anti-competitive" in 79(1)(b) that was so different from the definition of "substantial lessening of competition" in 79(1)(c). The answer is in the Court's reference to principles of statutory interpretation:

> The multi-element structures of sections 77 and 79 suggest that the applicable legal tests consist of several discrete subtests, each corresponding to a different requisite element. Indeed, this interpretation appears necessary to give effect to the "well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage" (*R v Proulx*, [2000] 1 SCR 61, at para 28; see also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at para 27). 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.[15]

The Court believed that a lesson of the cited principle of statutory interpretation meant that the meaning of an act that is "anti-competitive" in section 79(1)(b) must be distinct from the meaning of an act that results in a "lessening of competition" in section 79(1)(c).

The Court's justification can be challenged on four grounds. First, suppose (hypothetically) that "anti-competitive" were the only substantive element of 79(1)(b). Then it would be correct that if an "anti-competitive" act were taken to be synonymous with an act that "lessened competition" – then 79(1)(b) would be redundant as a matter of logic. Any act that substantially lessened competition, meeting 79(1)(c), would necessarily be anti-competitive, meeting 79(1)(b). But, less formally, the structure of these two conditions is simply that the first provides a condition on the *qualitative* nature of the act, "anti-competitive" and the second on the *quantitative* significance of the first condition, "*substantial* lessening of competition." The principles of statutory interpretation cannot possibly be interpreted so narrowly as to disallow a pair of sections that provide for, in turn, a qualitative condition on an effect and a condition as to the quantitative significance of the effect. This structure is useful in terms of both readability and guidance, notwithstanding the redundancy as a matter of formal logic.

Second, "anti-competitive" is not the only substantive element of 79(1)(b). The section requires "a *practice* of anti-competitive acts" (emphasis added). There is substantial discussion in Canadian competition law of the meaning of "practice," including in *NutraSweet* itself.[16] Citing previous cases, the Tribunal stated:

> "the Tribunal is of the view that a practice may exist where there is more than an "isolated act or acts." For the same reasons, the Tribunal is also of the view that different individual anti-competitive acts taken together may constitute a practice."[17]

In establishing that the conditions of section 79(1)(b) are met, the Commissioner must establish that anti-competitive acts constitute a *practice*, and to demonstrate that the conditions of section 79(1)(c) are met, the Commissioner must establish that the practice has the effect of a *substantial* lessening of competition. Section 79(1)(b) is not rendered redundant ("mere surplusage") by section 79(1)(c) when "anti-competitive" is interpreted, as it should be, as a lessening of competition. Section 79(1)(b) is a substantive additional requirement.[18]

Third, given the tenuousness (at best) of the argument that the *R v Proulx*[19] principle of statutory interpretation compels a distinction between an "anti-competitive" act and an act that "lessens competition," the Tribunal should have resorted to a more fundamental principle of statutory interpretation: that the interpretation of a statute be read in the context of the entire statute, including the object of the statute. The Canadian Supreme Court citing *Rizzo & Rizzo* as did the Court of Appeals, quotes a well-known legal text:

> It is well-established that, "Today there is only one principle or approach [to statutory interpretation], namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[21]

The purpose clause of the Canadian *Competition Act* reads:

> 1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities

> for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.[22]

The key phrase in this section is "the purpose of this Act is to maintain and encourage competition in Canada..." The Canada Pipe interpretation of section 79(1)(b) of the *Act*, by creating a gap for practices that harm competition, is inconsistent with this purpose clause.

The contraction between *Canada Pipe* and the purpose of competition law is widely recognized. As Michael Trebilcock stated in 2007, in a critical commentary on the *Canada Pipe* decision,

> the single greatest advance in thinking in the competition policy field over the past 30 years in Canada and most other developed countries with mature competition law regimes is that the purpose of competition law is not the protection of competitors (including less efficient competitors) or maximizing the number of competitors in a market, but rather protecting the competitive process so that the ultimate goal of competition policy – the efficient utilization of resources in a market economy – is maximized.[23]

A prominent US case on point is *Brunswick v Pueblo Bowl-O-Mat*.[24]

The fourth and final point is about an inconsistency of the *Canada Pipe* decision with another fundamental principle of statutory interpretation. As discussed above the *Canada Pipe* interpretation of "anti-competitive," in requiring harm to a competitor, attributes to the *Act* a logical inconsistency. Section 79(1)(b) of the *Act* would require harm to a competitor, yet an example of the practices covered by Section 79, as provided by section 78, includes in 78(1)(f) a practice, "buying up of products to prevent the erosion of existing price levels" that would directly contradict the necessary condition 79(1)(b) under the court's interpretation. But an obvious and established principle of statutory interpretation is that any paragraph in a statute should not be interpreted so as to be logically inconsistent within another part of the statute. The Court of Appeals for British Columbia recently cited a well-known text on this requirement:

> There is a presumption of consistent expression in legislative drafting. It is to be understood that the legislature chooses its words carefully and consistently when drafting legislation.[25]

The Federal Court of Appeals in *Canada Pipe* appears to have followed *NutraSweet* in assuming that section 78(1)(f) can simply be ignored in interpreting 79(1)(b). The Court must have considered the example in 78(1)(f) to be unintended by Parliament; otherwise their interpretation of 79(1)(b) is logically inconsistent with the intent of Parliament in including in the previous section of the *Act* an example of an anti-competitive act that does not harm a rival. But this violates the principle of statutory interpretation cited by the Court of Appeals for British Columbia that "the legislature chooses its words carefully and consistently when drafting legislation."

A natural reaction to this argument for the inconsistency of *Canada Pipe* with a fundamental principle of statutory interpretation may be to note that both the Tribunal and the Federal Court of Appeals, in establishing a test for non-enumerated acts, *recognized* the example in section 78(1)(f) as an exception to what was otherwise a common thread running through the enumerated items in section 78. How can the example then be relied upon to criticize the reasoning in *NutraSweet*? (This has been the reaction of some commentators.)

I know of no basis by which a court can overcome a logical inconsistency between its interpretation of a statutory clause (here 79(1)(b)) and another clause in the statute (78(1)(f)) simply by explicitly recognizing the logical inconsistency. Nor can the example in 78(1)(f) be dismissed as a single exception to a common thread running through the other examples. A proposition (in this case, the Court's interpretation that legislators intended harm to a competitor as a condition in section 79) can be defeated by a single counter-example. In interpreting section 79(1)(b), the court should have assumed that the legislature chose its words "carefully and consistently" in drafting 78(1)(f) – and a careful and consistent drafting of this example communicates clearly that harm to a rival is not necessary for a practice to meet the conditions of section 79. [26]

The Federal Court of Appeal's interpretation of section 79(1)(b) would appear to be faulty as a matter of law on at least four grounds. I discuss below the policy consequences of this misinterpretation.

III. THE ECONOMICS

The class of practices missed by the Canadian competition law after *Canada Pipe* are those that potentially suppress competition in a market to the benefit of all firms. The following is a non-exhaustive list of such practices. I include in this list practices that have been characterized by at least some economic scholars as important in suppressing competition, setting aside my own views as to the importance of the anti-competitive theories. If we have faith in the courts to discern competitive acts from anti-competitive acts, then the option should be open in law for any potentially anti-competitive practice to be challenged.

- Meeting-competition clauses
- Price-matching
- Most-favoured-nation (MFN) clauses
- Vertical territorial restraints
- Retail MFN clauses

I described in the introduction the potential role of **meeting-competition clauses** in suppressing competition. Entering into meeting competition clauses is, in the theory, a commitment that a supplier will match any price decreases by its rival. The incentive for cutting prices is eliminated and cartel prices sustained simply by the agreements themselves.

Price matching is similar to meeting competition, but rather than being a contractual clause is a practice at the retail level. Retailers such as Best Buy, Future Shop, and Home Depot announce to consumers that they will match the prices of any seller on an identical item. Having adopted price matching as a long run strategy, firms compete on prices. The anti-competitive theory of price matching is that the announcement of price matching is not so much an announcement to shoppers as it is an announcement to a firm's rivals. Any attempt by rivals to drop price so as to capture a larger market share would be automatically neutralized, eliminating the incentive to undercut a monopoly price. As with meeting competition clauses, the long run strategy by firms in a market supports collusive pricing. Edlin (1997)[27] discusses the possible legal strategies to restrict the practice of price matching on the basis of its anti-competitive effects. Moorthy and Winter (2006)[28] suggest another theory of price matching, that it signals to busy consumers that a firm is genuinely low-priced (High-priced firms are disciplined against mimicking the price-matching signal by the cost that would be imposed upon them by active shoppers, who would invoke price-matching guarantees). Moorthy and Winter distinguish the two theories, as well as a third theory based on price discrimination, on the basis of testable implications and argue that the evidence supports the signaling theory. For our purposes here, however, what matters is the potential for this practice to raise prices, as minor as this may be. Competition law should be available as a means of challenging business strategies as anti-competitive. We have to trust that non-meritorious cases would either not be brought or would be defeated in the hearing as found not to have led to a substantial lessening of competition.

Most favoured nation (MFN) clauses adopted by sellers act as commitment, or partial commitment, against price-cutting by members of a cartel. In this theory, cartel members have established collusive prices but the stability of the cartel is at risk because of cheating on the cartel. Adoption of MFN clauses by cartel members means that if any cartel member dropped its price in an attempt to cheat on the cartel, it would be forced to offer the same price to all customers, or (under some variations of the clause) to refund the excessive prices collected from previous customers. MFNs reduce the benefit of cheating on a cartel, enhancing the cartel's stability. In this sense, MFNs can be a facilitating practice, to the benefit of all cartel members; they do not harm the rivals of any firm adopting the clause. A substantial economic literature, e.g. Cooper (1986), Scott-Morton (1997) and Scott-Morton (2013), investigates the competitive impact of MFNs, and explains the popularity of this practice in the economy.[29]

MFNs in some cases may harm a competitor, as Scott-Morton (2013) explains with reference to *United States v Delta Dental of R.I.*[30] This case involved MFNs imposed in contracts selling dental services to insurers. An incumbent insurer and a new entrant purchased services from dentists on behalf of their clients. The incumbent, with a large share of the insurance demand from the typical dentist, had an MFN clause in its contract with dentists, which required that the low price paid by the dentists to the entrant also be available to the incumbent. The reaction to the enforcement of the MFN clause by the incumbent was withdrawal by the dentists from the entrant's plan. Like meeting competition clauses, MFNs have a potentially exclusionary effect under some circumstances and a collusive effect under others.

It is the potential exclusionary effect that was the basis for the recognition in *NutraSweet* that MFNs can be anti-competitive.[31] The use of MFNs in serving an anti-competitive role by dampening competition among firms in a market, rather than excluding firms, cannot be challenged under section 79, however, because the *NutraSweet* condition of harming a rival would not be met.

Vertical Territorial Exclusivity clauses in wholesale contracts provide each retailer with an exclusive territory within which no other retailer can sell a manufacturer's product. The potential efficiencies from territorial restrictions are well known, and inspired the change in U.S. antitrust law with *Silvania*[32] in 1976 towards a much more liberal approach to the practice. Patrick Rey and Joseph Stiglitz (1985)[33] offer an alternative perspective, one that is more consistent with the European Commission's more aggressive approach to this restraint. Vertical territorial restraints introduce a second level of market power in the supply chain of a manufacturer. While the potential inefficiencies of two stages of market power are well known (the "double markup theory" of Spengler 1950),[34] Rey and Stiglitz point out that the creation of the second stage of market power commits a manufacturer to a more passive response to any price change by rivals. That is, the supply chain consisting of the manufacturer and each retailer response to any price change with a smaller change in its own price, as compared to the situation without territorial restraints. Manufacturers engaged in price competition in a concentrated market have incentive to adopt any strategy that commits them to a passive response (or passive "reaction curve") because the commitment induces higher prices on the part of its rivals. Territorial restrictions, in the Rey-Stiglitz theory, raise prices to the advantage of all firms in the market.

Retail MFNs (also referred to as price parity restraints) is the most important potentially competition-suppressing practice in terms of recent cases. This restraint appears in two main variations. The simplest form of the restraint is the following: a pair of suppliers, providing products to consumer through a common set of retailers, each impose a restraint on the retailer requiring that the supplier's product not be sold at a price higher than the price that the retailer charges for the products sold by the other supplier. Retail MFNs of this form have been the subject of a number of competition policy investigations in the UK and Europe, as Fletcher and Hviid (2014)[35] discuss. These include the UK Monopolies and Mergers Commission (MMC) investigation into foreign package holidays (1997). The practice was alleged in the decision of the UK Office of Fair Trade on tobacco (2010). Fletcher and Hviid indicate that the practice also appears to be part of an ongoing European Commission investigation into Apple's distribution contracts for the iPhone. As I discuss below, the Commissioner's theory in VISA is a variation on this theory.

A second form of retail MFNs flips the roles of the retailers and suppliers. The suppliers set prices for products that are sold through retailers; each retailer imposes a restraint on its suppliers that the supplier not price its (the supplier's) product at a higher level at the retailer than at other retailers. By a standard argument in the economics of vertical contracting, this form of retail MFN is analytically identical to the first form. Restrict attention to a single supplied product, to keep things simple. The retailers can be modeled as providing an input (a retail platform) to the product and distribution of the common producer, which has control of the prices. The retailers compete in providing this input and charge an amount equal to the retail markup for their input. The impact of the restraint on the common supplier is a restraint effectively to set prices identically for all differentiated versions of the product. ("Differentiated" here means across retail platforms.) The competitive impact of the practice is assessed in terms of retailers' incentives to set competitive versus high markups in return for providing the retail platform service.[36]

Examples of the second form of retail MFNs include the sale of ebooks through Apple's iBook application on the iPad. Apple required that publishers price their ebooks no higher on Apple's iBook platform that on other online platforms. As discussed in Fletcher and Hviid (2014), Apple has agreed in commitments with the European Commission to remove these items from its contracts in the EU. The same ruling has been imposed in the US, in the Southern New York District Court.[37] The Office of Fair Trading (OFT) in the UK investigated Amazon for a similar restraint. Amazon required that a trader on its online platform, Amazon Marketplace, not sell a product for a lower price, including delivery charges, than on its own website or another retail platform such as eBay.

To understand the economic impact of this practice, let us focus on the first form of retail MFNs. Suppose that two suppliers sell their products through a common set of retailers, which set the prices for the products. Assume that the retailers are competitive, so that economic profits are zero at the retail level. That is, competition among retailers drives price levels down to the point where revenue just covers costs. The two products are substitutes, but not extremely close substitutes; retailers must carry both products to sustain demand. An example, offered in my expert report for the Commissioner in VISA, is the market for tea and coffee sold through coffee shops. Coffee shops are competitive, but must offer both tea and coffee because customers often arrive in pairs, each preferring a different drink. The two upstream suppliers provide coffee beans and tealeaves, respectively. Assume, for simplicity, that the demands for coffee and tea are symmetric and of equal size.

Suppose that each supplier adopts a retail MFN restraint that requires that the retailer not charge more for its brewed product than for its rival's product. What is the impact of this long run strategy on price competition between the suppliers? Suppliers compete in setting upstream wholesale prices, once the restraints are imposed.

The normal competitive process, in the absence of the restraints, would have upstream suppliers competing on prices for tealeaves and coffee beans. High prices, say at the collusive level that maximized the combined profits of both suppliers, could not be sustained because either supplier would have an incentive to undercut its rival's price so as to increase market share. Prices would be bid down, under our assumption that the products are substitutes, well below the collusive level.

When retailers face a pair of MFN restraints, however, the competitive mechanism is suppressed. Retailers operating under the restraints will set equal prices for a cup of tea and a cup of coffee, at a level that covers the average cost of the inputs. Once the restraints are established in the market, neither supplier has the incentive to undercut a price set by its rival at the collusive level. Undercutting the price would not capture additional market share because retailers would not pass along the lower price in the form of differential retail prices. No price below the collusive level is an equilibrium price. This is the *competition-suppression* effect of the restraints.

A second effect of the MFN restraints is at work, raising prices even higher than the collusive level. To focus on the second effect, let us set the competition-suppression effect aside by assuming that tea and coffee are not substitutes, i.e. that the two products have a zero cross-elasticity of demand (This sets the competition suppression effect aside because there is no competition; the prices that maximize individual profit are identical to the prices that maximize collective profit). The coffee bean producer, for example, has an incentive to raise prices above the level that would emerge in the absence of the restraints because for each dollar that he raises the price of beans (per one cup's worth of beans), its customers face only a 50-cent rise in the price of coffee (assuming that retail prices reflect a full pass-through of increases in retail costs). Demand drops at only half the rate with price increases as in the absence of the restraints. In my expert report for the Commissioner in VISA, I label this second effect the *cost-externalization* effect.

The combined impact of the competition-suppression effect and the cost externalization effect is to raise prices even higher than the collusive level.[38] In terms of raising prices, this vertical restraint is particularly pernicious.

Boik and Corts (2013),[39] in a contemporaneous paper, offer an elegant formal development of the impact of retail MFNs. These authors confirm that the impact of retail MFNs is to raise price above the collusive level. They also demonstrate that there are ranges of industry parameters for which retail MFNs are both profitable and anti-competitive.

All of the practices discussed have the potential to suppress competition. These are all examples of what Scott-Morton (2013) describes as *contracts that reference rivals* ("CRRs"). A CRR is any contract between a buyer and a seller that references the terms of a transaction involving a different buyer or different seller. As Scott-Morton explains, CRRs in general have the potential to suppress competition through *exclusion* of a competitor from a market; or *collusion*, via the softening of price competition and consequent increase in market prices. Contracts of the potentially collusive type generally fail to meet the *Canada Pipe* condition of harming a competitor and are therefore missed by section 79.

IV. VISA

This section offers a discussion of the Commissioner's economic theory in *VISA* as a case that could have potentially been brought under a coherent section 79, but which would not fit in section 79 as the law now stands. The main practice challenged in VISA was a requirement on the part of VISA and MasterCard that merchants not surcharge consumers for transactions undertaken with a particular credit card: the no-surcharge restraint.

My aim is not to defend in detail the Commissioner's theory as demonstrating that the practices challenged in that case are anti-competitive. My purpose here is simply to demonstrate that a set of practices that were unsuccessfully challenged under 76 of the *Act*, because of a decision by the Tribunal that the practices did not meet the definition of resale price maintenance, might well have been brought under a coherent section 79. This set of practices, under the Commissioner's theory, resulted in a substantial lessening of competition, meeting the conditions of a revised section 79, but did not meet the Tribunal's interpretation of the conditions of section 76.[40]

The no-surcharge rule is imposed within the context of complicated four party credit card networks. The simple point that I want to outline here is that the economic impact of the no-surcharge rules is identical to the economics of retail MFNs as outlined above. I then review the applicability of a revised section 79.

A transaction in a so-called "four-party credit card network involves five parties:

(a) the credit card company (such as Visa or MasterCard);

(b) the consumer using the credit card (the "cardholder");

(c) the financial institution issuing the credit card to the cardholder (the "Issuer");

(d) the financial institution that supplies Credit Card Network Services to the merchant (the "Acquirer"); and

(e) the merchant.

It is useful to illustrate, in a simplified way, the basic cash flows involved in a credit card transaction, taking realistic values for transactions fees. Consider the case in which surcharging is not allowed. Consider the following transaction as a hypothetical example: a product is purchased with a credit card for an amount of 100 dollars; the Interchange Fee is 1.50 percent or $1.50; the Network Fees paid by each of the Issuer and Acquirer are 0.06 percent or $0.06, for a total of $0.12; and the Merchant Service Fee charged to the merchant on that transaction is 1.60 percent or $1.60. In this example, the Merchant Service Fee is the sum of the following three components:

(a) the Interchange Fee that is retained by the Issuer, equal to 1.50 percent (or e transaction value;

(b) the Acquirer Network Fee, equal to 0.06 percent (or $0.06) of the transaction value; and

(c) the margin retained by the Acquirer, equal to 0.04 percent (or $0.04) of the transaction value.

Issuers spend the interchange fee in promoting the credit card (at the banks) and providing issuing services. Issuers issue credit cards to cardholders; maintain cardholder accounts; establish terms of credit card programs, such as the fees paid by the cardholder and the credit card interest rates; fund rewards (*e.g.* air miles) for cardholders; and settle transactions with Acquirers.

In this market, it is the transactions fees (not the payment of the underlying principal of 100 dollars) that are at issue. The *effective* payment flows of these fees are illustrated in Figure 1:

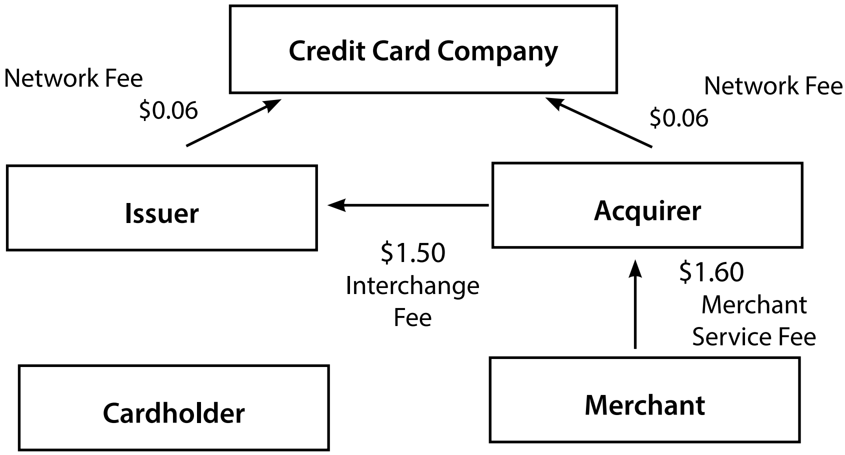

Figure 1: Flow of Transaction Cost Payments in a Credit Card Transaction

The credit card company sets the network fees and interchange fee. The acquirer sets the merchant service fee. The market for acquirer services is competitive, so that the merchant service fee reflects the sum of the interchange fee, the network fee and transactions costs on the part of the acquirer (The network fee is by far the largest of these components).

The flow of funds diagram in Figure 1 represents the transactions cost under the no-surcharge restrictions. Cardholders pay no fee per transaction because merchants are not allowed to charge consumers for credit card transactions.

The credit card market, as Figure 1 illustrates, is a two-sided market in the sense that to compete successfully in the market, a firm must attract both consumers and merchants. Consumers would not use a credit card if merchants did not accept the card, and merchants would not adopt the card if no consumers used the card.

It is helpful, however, to alter this figure in a way that will allow the analysis of the no-surcharge rule to collapse to the simpler case of a restraint in a conventional, one-sided market. Assume that the interchange fee, instead of being transferred directly from the Acquirer to the Issuer, spends 1 millisecond in the accounts of the credit card company. This hypothetical change cannot make a difference to anything substantive in the market, since the credit card company controls the value of the interchange fee whether it flows directly to the issuers or through the credit card company accounts.

To understand the impact of the restraints, we make a second change to the diagram to represent the transactions fees that would be observed if merchants were allowed to charge consumers for credit card transactions. Retaining the simplifying assumption that interchange fees travel through the accounts of the credit card company, the resulting flow of (transactions) funds would be as in Figure 2.

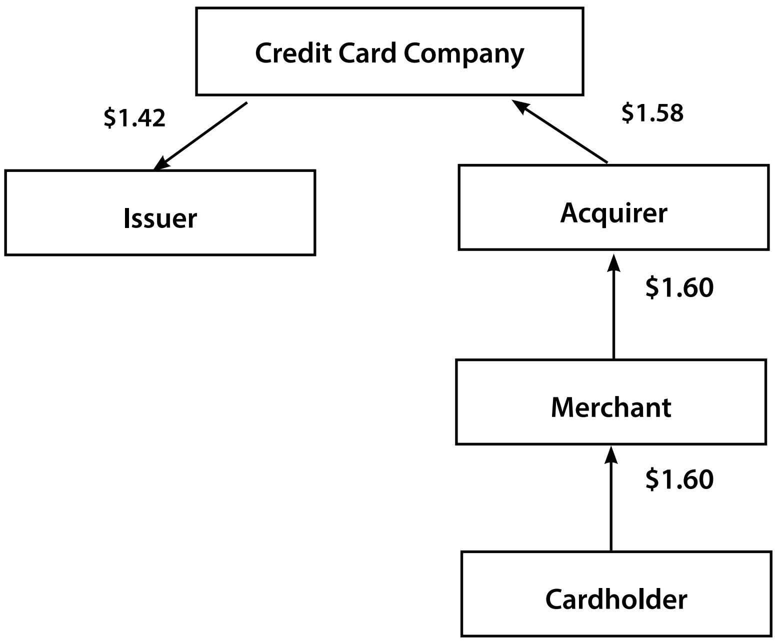

Figure 2: Effective Flow of Funds for a Credit Card Transaction with Surcharge Fee and Issuers paid from Credit Card Company Accounts

As Figure 2 illustrates, the market for credit card services can be described in a simple way, parallel to the flow of funds in the sale of any product. A credit card company sells the right to use a credit card, including access to the credit card company's network, to merchants and consumers. The services are offered through intermediaries called acquirers. The credit card company, like other firms, spends some fraction of its revenue on promotion activities – in this market through payments to issuers.[41]

The no-surcharge rule, requiring that merchants charge the same price for all credit card transactions or for cash transactions, is precisely the retail MFN restraint discussed earlier. The no-surcharge restraints have two impacts, as per the earlier discussion. First, the restraints suppress price competition between credit card companies by eliminating the incentive to undercut a high price. The second effect is the cost-externalization effect. When a credit card company raises its total fee to acquirers (including the interchange fee), its own customers bear only part of the resulting fee increase. The merchant is forced by the no-surcharge restraint to spread the increase in fee (passed on by acquirers) to all customers, including both customers of the competing credit card company and cash customers. The sum of the competition-suppression effect and the cost-externalization effect is, in theory, to raise the cost charged by the credit card company above the price that the two credit card companies would set if they coordinated perfectly on all fees. Economic theory predicts that the no-surcharge rule has a strongly anti-competitive impact on the rates for credit card transactions.

Credit card companies spend an extraordinary portion of their revenues from Acquirers, on promotion. (This portion is represented by the interchange fees.) Nowhere in antitrust policy, however, does the allocation of a high proportion of supra-competitive prices to promotion justify practices that support the high prices through the suppression of competition. The no-surcharge rules are anti-competitive.

The Tribunal accepted the essential economic theory of the case offered by the Commissioner. But the Commissioner brought the case under section 76, the price maintenance section. The Tribunal rejected the application on the basis that the application of section 76 required *resale* price maintenance; and the provision to merchants by an acquirer of the right to use a credit card company's network did not constitute the *resale* of a product sold to acquirers.

Suppose that section 79(1)(b) had legally been interpreted as simply requiring that the anti-competitive acts constitute a *practice* rather than a one-off act, instead of requiring in addition that there be harm to a competitor from predatory, exclusionary or disciplinary practices. It is reasonable to conjecture that under the conditions of the (revised) section 79, the Tribunal would have decided that the requirements of the section had been met. Whether the Tribunal would have used its discretion of impose a remedy is another matter.[42] But the competitive impact of the restraints imposed by VISA and MasterCard of no surcharging would have been fully assessed under an applicable section of the *Competition Act*, rather than being pushed aside by legal arguments as to whether the language of resale price maintenance applied.

V. CONCLUSION

Canada Pipe is frustrating to a competition policy scholar. The critical difference between harm to a competitor and harm to competition had long been recognized in competition law generally. Harm to a competitor is neither necessary nor sufficient for the harm to competition, and in an Act designed to further competition, harm to a competitor deserves no place as a necessary condition in the law to remedy a potentially anti-competitive practice.

The potential harm of *Canada Pipe* goes well beyond frustrating scholars to creating a genuine gap in Canadian competition law. The decision is to the detriment of consumers. There is no compelling reason in the legal principles of statutory interpretation that "harm to a competitor" had to be introduced by the court as a necessary condition or a practice meet the conditions of Section 79 for a successful application by the Commissioner. *Canada Pipe* directly contradicts provisions in the *Competition Act*, and potential economic harm arises from the set of anti-competitive practices that cannot now be challenged under the *Competition Act*.

Endnotes

[1] *I am grateful to Ed Iacobucci, Tom Ross, Larry Schwartz and Michael Osborne for very insightful comments.*

[2] RSC 1985, c C-34 [*Competition Act*].

[3] *Canada (Commissioner of Competition) v Canada Pipe Co*., 2006 FCA 233 [*Canada Pipe*].

[4] *Canada (Director of Investigation and Research) v NutraSweet Co.*(1990), 32 CPR (3d) 1 (Comp Trib) [*NutraSweet*].

[5] The relevant section is as follows:

79. (1) Where, on application by the Commissioner, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

[6] *Canada Pipe, supra* note 2 at paras 64-65.

[7] 2013 Comp Trib 10 [*VISA*].
The set of practices that I discuss lead to the outcome of cooperative prices (or at least supra-competitive prices) when firms adopt the practices that then compete in setting prices. Economists label these practices as collusion-facilitating practices, because they can lead to the same *outcome* as if firms cooperated on prices, even where there is no agreement among firms. Salop (1986) is the classic reference on this theme. The legal or competition-policy literature facilitating practices focuses less on outcomes and more on *conduct*. This literature uses the term "facilitating practices" to refer to practices that facilitate either reaching agreements on prices or enforcing the agreement. (See OECD, "Facilitating Practices in Oligopolies," online: <http://www.oecd.org/daf/competition/41472165.pdf>).

[8] *Canada Pipe, supra* note 2 at para 37.

[9] See Michael J Trebilcock, "Abuse of Dominance: A Critique of Canada Pipe" (2007) Can Comp Rec 1; Edward Iacobucci & Ralph A Winter, "Abuse of Dominance in Canadian Competition Policy" (2010) 60 UTLJ 219.

[10] Canada, Department of Consumer and Corporate Affairs, *Proposals for Amending the Combines Investigation Act: A Framework for Discussion* (Ottawa: Bureau of Competition Policy, 1981).

[11] For an excellent review of the history of the abuse of dominance leading up to section 79 of the *Competition Act*, see George Addy, John Bodrug & Charles Tingley, "Abuse of Dominance in Canada: Reflections on 25 Years of Section 79 Enforcement" (2012) 25:2 Can Comp L Rev 276.

[12] *Supra* note 3 at 57.

[13] The other examples in section 78's non-exhaustive list of acts considered to be anti-competitive, include the following: a vertically integrated supplier squeezing the profit margins of an nonintegrated customer-competitor so as to prevent the latter from entering into or expanding in a market; acquisition of a supplier by a customer, or vice versa, to impede or prevent a competitor from entering the market or to eliminate the competitor from the market; freight equalization for the purpose of impeding or preventing entry into or eliminating a competitor from a market; temporary use of fighting brands to discipline or eliminate a competitor; adoption of incompatible product specifications in order to prevent a person from entering into, or to eliminate that person from, a market; pre-emption of scarce facilities; requiring or inducing a supplier to sell only or primarily to certain customers or to

refrain from selling to a competitor; and, selling below cost to discipline or eliminate a competitor.

[14] *Supra* note 3 at 63.

[15] *Canada Pipe, supra* note 2 at paras 64-65.

[16] *Ibid* at para 26.

[17] See *supra* note 3 at para 56: "There are two elements that must be determined in paragraph 79(1)(b), namely whether there is a 'practice' and whether there are 'anti- competitive acts'." The decision then treats the two conditions in turn.

[18] *NutraSweet, supra* note 3 at para 59.

[19] One might argue that the second *element* of 79(1)(b), "anti-competitive" would be redundant given 79(1)(c) if "anti-competitive" were interpreted as reducing competition. But this would still leave the provision 79(1)(b) as a whole non-redundant, as required by the *R v Proulx* principle of statutory interpretation.

[20] 2000 SCC 5 [*Proulx*].

[21] I recognize that in the interpretation of *contracts* there is a debate between the textual school of interpretation and the contextual school of interpretation. See Ronald J Gilson, Charles F Sabel & Robert E Scott, "Text and Context: Contract Interpretation as Contract Design" (1 February 2014) Stanford Law and Economics Olin Working Paper No 457: "In a textualist regime, generalist courts cannot consider context; in a contextualist regime, they must." In statutory interpretation, there is no such debate. Context must matter in interpretation, as discussed below.

[22] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at 21, citing Elmer A Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983) at 87.

[23] *Supra* note 1, s 1.1.

[24] Trebilcock, *supra* note 8 at 7.

[25] 429 US 477 (1977). In this case, the plaintiffs attempted to show that the defendant, a large bowling equipment manufacturer, lessened competition by entering the market for bowling alley entertainment in violation of section 7 of the US *Clayton Act*. The plaintiffs relied on evidence that their profits were lower as the result of entry by the defendant, Brunswick Corporation, into the market. The US Supreme Court held: "For plaintiffs in an antitrust action to recover treble damages on account of § 7 violations, they must prove more than that they suffered injury which was causally linked to an illegal presence in the market; they must prove injury of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury must reflect the anti-competitive effect of either the violation or of anti-competitive acts made possible by the violation."

[26] *First Majestic Silver Corp. v Santos*, 2014 BCCA 115 at 26, citing Ruth Sullivan, S*ullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis, 2008) at 214.

[27] In addition, section 79(1)(b) applies to all acts, both those similar to the

examples enumerated in section 78 and those not enumerated. The logical inconsistency cannot be excused by assuming that section 79(1)(b) applies only to non-enumerated acts.

[28] Aaron S Edlin, "Do Guaranteed-Low-Price Policies Guarantee High Prices, and Can Antitrust Rise to the Challenge?" (1997) 111 Harv L Rev 528.

[29] S Moorthy & RA Winter, "Price-matching guarantees" (2006) 37:2 RAND J Econ 449.

[30] Thomas E Cooper, "Most-Favored-Customer Pricing and Tacit Collusion" (1976) 17:3 RAND J Econ 377; Fiona Scott-Morton, "The Strategic Response by Pharmaceutical Firms to the Medicaid Most-Favored-Customer Rules" (1997) 28:2 RAND J Econ 269; Fiona Scott-Morton, "Contracts that Reference Rivals" (2013) 27:3 Antitrust 72. See also the comments by panelists at the FTC conference on MFNs in September 2012, "Most-Favored-Nation Clauses and Antitrust Enforcement and Policy" (Public Workshop, US Department of Justice and the Federal Trade Commission, 10 September 2012), online: <http://www.justice.gov/atr/public/workshops/mfn/>.

[31] 943 F Supp 172 (1996).

[32] *Supra* note 3 at 73.

[33] *Continental TV, Inc. v GTE Sylvania Inc.*, 537 F 2d 980 (1976).

[34] Patrick Rey & Joseph Stiglitz, "The Role of Exclusive Territories in Producers' Competition" (1995) 26:3 RAND J Econ 431.

[35] JJ Spengler, "Vertical Integration and Antitrust Policy" (1950) 58:4 Journal of Political Economy (The University of Chicago Press) 347.

[36] Amelia Fletcher & Morten Hviid, "Retail Price MFNs: Are they RPM 'at its worst'?" forthcoming, *Antitrust* 2014.

[37] *Ibid.*

[38] *US v Apple Inc., et al.*, 12 Civ 2826 (DLC).

[39] The previous paragraph shows that when the competition-suppression effect is set aside, the cost-externalization effect raises prices. More generally, even when the competition-suppression effect is operative because of a positive cross-elasticity of demand, the combination of the two effects is to raise prices even higher than the collusive level. Note that I have discussed the impact on prices for the case of a zero cross-elasticity in order to illustrate the extra upwards force from the cost-externalization effect, but in fact the suppliers would lose profits from adopting the MFN restraint in this case. When the products are close substitutes (but not so close that retailers can forgo one or other of the products) then the gain in profits from raising prices above the competitive level exceeds the loss in profits from raising prices too much; the restraints are profitable.

[40] Andre Boik & Kenneth S Corts, "The Effects of Platform MFNs on Competition and Entry," Working Paper, (2013) University of Toronto online: <http://economics.yale.edu/sites/default/files/corts_17-oct-2013.pdf>.

[41] I was an expert for the Commissioner in VISA. The speculation that the case would have been brought under section 79 without the *NutraSweet/*

Canada Pipe requirement that a competitor be harmed should not be attributed to any party other than me.

[42] The optimal proportion of revenue to spend on issuing activities is determined by the Dorfman-Steiner theorem (Robert Dorfman & Peter O Steiner, "Optimal Advertising and Optimal Quality" (1954) 44 American Economic Review 826). This is mathematically equivalent to the formula for the optimal interchange fee provided in Eric Emch & T Scott Thompson, "Market Definition and Market Power in Payment Card Networks" (2006) 5:1 Review of Network Economics. The credit card literature develops the theme that the interchange fee is chosen to maximize output (the total size of transactions) of a credit card company by balancing the two sides (merchants and cardholders) of the two-sided credit card market. This is no different conceptually or mathematically than the Dorfman-Steiner balancing of the effects of lower prices versus greater promotional expenditure in attracting demand.

[43] VISA, *supra* note 6 at 394. The Tribunal did state that even if the conditions of section 76 had been met, it would not have proposed a remedy:

> "We are unanimously of the view that even if the requirements under section 76 had been met, this is not a proper case to grant discretionary relief. Given the evidence adduced, it is clear that the proper solution to the legitimate concerns raised by the Commissioner of Competition is going to require a regulatory framework [...] A section 76 Order would be a blunt instrument and there will be technical hitches, unforeseen consequences, a need for ongoing adjustment and stakeholder consultation. The experience in other jurisdictions such as Australia and the United Kingdom shows that concerns will be raised by consumers regarding surcharging and possible gouging, and rather sooner than later, intervention will have to take place by way of regulation."