**CT-2010-010**

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended;**

**IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 76 of the *Competition Act*;**

**IN THE MATTER OF certain agreements or arrangements implemented or enforced by Visa Canada Corporation and MasterCard International Incorporated.**

B E T W E E N :

**THE COMMISSIONER OF COMPETITION**

Applicant

- and -

**VISA CANADA CORPORATION and MASTERCARD INTERNATIONAL INCORPORATED**

Respondents

**THE TORONTO-DOMINION BANK**
**THE CANADIAN BANKERS ASSOCIATION**

Intervenors

# CLOSING ARGUMENT OF VISA CANADA CORPORATION

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BETWEEN:

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## CLOSING ARGUMENT OF VISA CANADA CORPORATION

## I. INTRODUCTION

1. On December 15, 2010, the Commissioner of Competition (the "Commissioner") commenced an application (the "Application") before the Competition Tribunal (the "Tribunal") seeking remedial orders against Visa Canada Corporation ("Visa") and MasterCard International Incorporated ("MasterCard") under section 76 of the Competition Act (the "Act"), which is the price maintenance provision.

The Commissioner of Competition's Notice of Application, dated December 15, 2010 ("Notice of Application")

2. The Application challenges two of Visa's long standing operating principles, the No Surcharge Rule and the Honour All Cards Rule (collectively, the "Visa Rules"). Although the Commissioner seeks an order generally prohibiting Visa from impeding or limiting the ability of merchants to engage in any practice that discriminates against or discourages the use of a particular credit card or any other the method of payment, Visa has no such rule in Canada.

Notice of Application, para. 95

3. Significantly, although a considerable focus of the Commissioner's evidence and argument in this proceeding has been on interchange, and specifically, the default interchange rates which Visa sets, it is imperative to recognize that the Commissioner has not advanced any legal challenge under section 76 or otherwise with respect to the fact of interchange, the fact of default interchange, the fact that Visa establishes the default interchange rates, or the manner by which it does so. The sole legal challenge advanced by the Commissioner in this case is in respect of the Visa Rules.

Reply of The Commissioner of Competition, para. 23

4. The Commissioner alleges that the Visa Rules influence upward or discourage the reduction of the "prices" (interchange and network fees) that Acquirers pay and/or, in the alternative, influence upward or discourage the reduction of the prices that merchants charge their customers for the goods and services they sell.

5. The Commissioner's case is built on a legal and factual house of cards that cannot stand. There is no reasonable legal basis (and unsurprisingly, no legal precedent in Canada) to support the application of section 76 to the matters alleged by the Commissioner. Moreover, the evidence

does not support the convoluted factual chain of causation that the Commissioner relies upon to support its unprecedented legal theory.

6. Visa's fundamental position, which has been fully supported by the evidence presented before the Tribunal, is that the Commissioner's allegations do not and cannot constitute price maintenance for the purposes of section 76 as a matter of law or fact, having regard to the following:

(a) the Visa Rules impose no restrictions whatsoever on the prices that Acquirers charge merchants or that merchants charge their customers; Acquirers and merchants are free to set their selling prices at whatever levels they choose;

(b) Visa does not sell any product to either Acquirers or merchants that is "resold", which is a requirement of subsection 76(1)(a) of the Act;

(c) the Commissioner further misconstrues and misapplies section 76 of the Act having regard to the following:

(i) the Commissioner's allegation is that the Visa Rules have the effect of influencing upward or discouraging the reduction of a price or prices that Visa *itself* sets; it is clear that section 76 only applies where *someone else's* price is influenced upward or discouraged downward;

(ii) the Commissioner's allegation is that the Visa Rules constitute price maintenance because they set a "price floor" for interchange and network fees that Acquirers have to price above in order to make a profit; interchange and network fees are input costs to Acquirers – it is not and

cannot be price maintenance because a party sets its own selling price above its costs, where it is otherwise free to set its selling price without direction or interference from its direct or indirect upstream supplier;

(iii) the Commissioner incorrectly reverses the clear order of causality mandated under section 76 (i.e., that the Tribunal must first find that there is proscribed conduct that constitutes price maintenance under subsection 76(1)(a), and can only then consider whether such price maintenance has had, is having or is likely to have an adverse effect on competition in a market) by asserting that the Visa Rules "adversely affect competition" and thereby influence upward or discourage the reduction of the "prices" that Visa charges Acquirers;

(iv) in so interpreting section 76, the Commissioner further improperly conflates the two distinct elements of the price maintenance provision set out in subsections and 76(1)(a)(i) and 76(1)(b), thereby making subsection 76(1)(a)(i) unnecessary, converting section 76 into a generalized vertical restraint provision and rendering the provision an absurdity.

(d) Apart from the unsustainability of the Commissioner's theory of price maintenance as a matter of law, the convoluted and complex causal chain needed to establish price maintenance as characterized by the Commissioner is wholly unsupported by the evidence which fails to establish that

(i) in the absence of the Visa Rules, surcharging or refusal to accept certain Visa cards would be widespread by Canadian merchants, or feared by Visa to be so;

(ii) there would be an actual or anticipated significant loss of transaction volume on the Visa network, resulting from (i);

(iii) Visa would lower its default interchange rates and/or network fees in response to (ii); and,

(iv) Acquirers would lower card acceptance fees charged to merchants in response to (iii).

(e) Further, the evidence fails to establish that if interchange rates and/or network fees were reduced, the prices charged by merchants to their customers would be reduced, thereby defeating any allegation that the conduct alleged has influenced upward or discouraged the reduction of the prices that merchants charge their customers; and,

(f) in any event, as a matter of law, fact and economics, the Visa Rules do not adversely affect competition in any market. To the contrary, the Visa Rules are long-standing, pro-competitive elements of the Visa operating structure which have the purpose and effect of promoting the issuance of Visa credit cards by Canadian issuers, the use of Visa credit cards by Canadian cardholders and the acceptance of Visa credit cards by Canadian merchants. The Visa Rules promote the competitiveness of Visa credit cards against the broad array of competing

payment methods available to Canadian cardholders and expand output on the Visa network.

7. Visa therefore respectfully submits that there is no basis in fact or law for the relief sought by the Commissioner in the Notice of Application and therefore asks that the Commissioner's Application be dismissed with costs.

## II. ROADMAP TO VISA'S CLOSING ARGUMENT

8. This argument is organized as follows:

(a) Section III outlines key background facts with respect to Visa, its operation of the Visa network and the nature, purpose and effect of the Visa Rules that are challenged in this proceeding. The principal points in this section are:

(i) Visa operates a complex and sophisticated electronic payments network that facilitates the issuance of Visa credit cards to cardholders and the acceptance of Visa credit cards by merchants;

(ii) as a payment network, Visa competes vigorously against all forms of payment;

(iii) both cardholders and merchants enjoy significant benefits associated with payment by Visa credit cards;

(iv) as the network operator, Visa establishes rules (the VIOR) to ensure the orderly, efficient and secure operation of the network to the benefit of all participants;

(v) both of the Visa Rules in issue are fundamental to the operation of the Visa Network: they promote and facilitate competition between Visa and other forms of payment; they provide benefits to cardholders that use credit cards, to banks that issue credit cards and to merchants that accept credit cards, and they expand the output on the Visa network;

(vi) the No Surcharge Rule ensures that Visa cardholders are not penalized when they use their card; the Rule promotes issuance by making Visa credit cards more attractive to cardholders and benefits merchants by promoting the use of Visa credit cards;

(vii) the Honour All Cards Rule similarly promotes cardholder and merchant interests by ensuring broad acceptance of Visa credit cards regardless of card type or issuer and promotes competition among issuers by establishing a ready market for new card products issued by even the smallest issuers. Many merchants are direct beneficiaries of the Honour All Cards Rule;

(viii) the introduction of the Visa Infinite product, the Commissioner's allegations notwithstanding, has not materially increased merchant card acceptance costs; Visa's premium products were introduced as a competitive response to American Express and represent the lowest cost credit card product in Canada targeted at high spend consumers who, the evidence establishes, spend more than standard card users;

(b) Section IV describes the statutory and judicial history of the price maintenance provision in Canada and explains why the Commissioner's allegations do not and cannot constitute a contravention of section 76 as a matter of law. The principal points in this section are:

(i) the legislative and judicial history of the price maintenance provision in Canada makes clear that the sole focus of vertical price maintenance has always been and remains prohibiting an upstream supplier from directly or indirectly constraining by specific conduct the ability of a downstream seller to freely reduce the prices at which it sells its products should it wish to do so;

(ii) that a supplier can engage in price maintenance "indirectly" does not entail that any conduct that impacts a downstream seller's price, or has that "effect", is price maintenance where the downstream seller remains free to set its prices;

(iii) the Tribunal must find that the conduct "has influenced upward, or has discouraged the reduction of" the relevant price – mere speculation is insufficient;

(iv) the Visa Rules do not and cannot constitute price maintenance having regard to the following:

- the provision requires that the conduct have influenced upward or discouraged the reduction of the price that someone else charges; it cannot

be price maintenance to influence upward one's own price – precisely the allegation here;

- it cannot be price maintenance because a downstream seller sets its price to cover the input costs of the goods or services it acquires from an upstream supplier – again, precisely the allegation being made here;
- section 76 requires that the products applied be "resold" by the person whose price is allegedly being influenced upward or discouraged downward – Visa does not supply any product to acquirers or merchants that is "resold";
- section 76 has a clear direction of causality; the conduct in subsection 76(1)(a) must be found by the Tribunal to result in adverse effect on competition; the "influencing upward or discouraging downward" of price cannot be caused by an adverse effect on competition – precisely the allegation being advanced by the Commissioner; and,
- the Commissioner's approach improperly conflates the two distinct elements of section 76 (the "influencing upward or discouraging the reduction of' requirement and the "adverse effect on competition requirement") thereby rendering the first requirement irrelevant and turning section 76 into a general, open-ended vertical (or potentially even horizontal) restraint provision;

(c) Section V sets out why the Commissioner's untenable theory of price maintenance is, in any event, unsupported by the facts as proven. The principal points in this section are:

(i) the merchants' ability to elect not to accept Visa credit cards at all is a complete answer to the allegations of price maintenance, because such non-acceptance would have a more direct and obvious impact on Visa system volumes than surcharging or selective card acceptance, and alleged volume impact is the core of the Commissioner's allegation;

(ii) the obvious ability of merchants to steer cardholders to other forms of payment in compliance with the Visa Rules is another complete answer to the price maintenance allegations; the Commissioner has failed to demonstrate that other means of steering are not available to merchants or that such would be ineffective as steering mechanisms;

(iii) None of the elements of the multi-part causal chain upon which the Commissioner's theory of price maintenance turns, have been established by the evidence:

- The evidence does not establish that surcharging and/or refusal to accept certain Visa credit cards would be widespread;
- The evidence does not establish that there would be an actual or anticipated significant loss of transaction volume on the Visa network;

- The evidence does not establish that Visa would lower its default interchange rates and/or network fees in the face of merchant surcharging or refusal to accept certain Visa credit cards; and,

- The evidence does not establish that Acquirers will lower card acceptance fees to their merchant customers in the absence of the Visa Rules or that any reduction in interchange rates or network fees would result in lower prices to consumers;

(iv) Merchant intent to employ surcharging for so-called "cost recovery" contradicts the Commissioner's theory of price maintenance and therefore provides yet another ground for dismissing the price maintenance allegations in this case.

(d) Section VI addresses two matters that, while not strictly relevant to the Commissioner's price maintenance theory, were the subject of some considerable focus in the Commissioner's case and therefore warrant a response: convenience fees and foreign jurisdictions. The principal points in this section are as follows:

(i) Convenience Fees

- While Visa does not allow convenience fees in Canada, it had considered doing so and permits them in some other jurisdictions, including United States, subject to limitations set out in the relevant rules; and,

- Convenience fees, where permitted, are an exception to the No Surcharge Rule because, in Visa's business judgment, convenience fees can benefit

cardholders and contribute to growth of the network, because they promote the acceptance of Visa cards in payment channels where they might not otherwise be accepted, because they are non-discriminatory in that they must be for a fixed amount and because they can be avoided by the cardholder who must have the right to use their Visa card in another payment channel the merchant offers. As such, convenience fees can be contrasted with discriminatory surcharges which Visa considers to be harmful to cardholders and the network generally.

(ii) Foreign Jurisdictions

- The Commissioner's particular reliance on the experience in Australia as prescriptive in this case is misplaced. Because Australia simultaneously reduced interchange rates by regulation at the same time as it abrogated the No Surcharge Rule, no judgment regarding the impact of surcharging alone on interchange rates, which is the core of the Commissioner's case, can be made. Similarly, the Reserve Bank of Australia ("RBA") did not abrogate the Honour All Cards Rule as it relates to credit cards alone, so the Australian experience has no bearing on that issue;

- What the Australian experience does show is that when given the opportunity, merchants with market power will surcharge excessively, well above the cost of acceptance and there is no evidence whatsoever that consumers have benefited from lower retail prices despite massive reductions in interchange and ever increasing rates of surcharging;

- Of far greater relevance to this Tribunal than the experience in Australia, are the positions recently taken by authorities in the United States and Canada. Both jurisdictions have considered and assessed merchant concerns of the type advanced by the Commissioner in this case and neither jurisdiction has abrogated either the No Surcharge Rule or the Honour All Cards Rule as it relates to credit cards alone;

- Canada has implemented a Code of Conduct to which Visa and MasterCard are signatories and which, among other things, ensures that merchants are free to offer their customers discounts for forms of payment other than credit card. Visa's rules incorporate the requirements of Code of Conduct, but actually go further in the breadth and scope of steering mechanisms they permit merchants to employ.

(e) Section VII explains that there is no need to consider section 76(1)(b) given that the Commissioner has not demonstrated that the conduct at issue in this case is properly considered price maintenance. In addition, this section explains that the Commissioner has in any event misconstrued the application of section 76(1)(b) in this case by not alleging that price maintenance (assuming it is found to exist) results in an adverse effect on competition in a market, and instead alleging that the Visa Rules adversely affect competition, which is an incorrect application of section 76. This section also describes the meaning of "adverse effect on competition in a market," noting that pursuant to the jurisprudence:

(i) The Commissioner must demonstrate that the Visa Rules create, enhance or preserve market power, including consideration of not just price-related aspects of competition but also other aspects of competition such as service, quality, consumer choice and innovation;

(ii) Even if prices paid by merchants were demonstrably high (which they are not), "high prices" in and of themselves do not equate to the creation, enhancement or preservation of market power;

(iii) A proper consideration of competitive effects under section 76(1)(b) requires consideration of the pro-competitive and efficiency enhancing aspects of the Visa Rules;

(iv) Under section 76(1)(b), effects on competition must be analyzed in relation to a specified relevant antitrust market; and,

(v) The alleged anti-competitive effects cannot be based on speculative outcomes. Rather, the term "is likely to have" suggests a relatively high standard of proof.

(f) Section VIII focuses on the evidence in this proceeding which establishes that the Visa Rules are pro-competitive and efficiency enhancing business practices. As such, the Visa Rules cannot have an adverse effect on competition. In particular, the section explains that:

(i) The Visa Rules protect the value of the Visa brand by ensuring that cardholders have a uniform experience that is positive, convenient, safe and reliable when they choose to pay using their Visa card;

(ii) Both cardholders and merchants benefit from the Visa Rules. The Visa Rules are designed to prevent merchants from holding up cardholders at the point of sale (to the detriment of cardholders) and free riding on the Visa system (to the detriment of other merchants);

(iii) The evidence from this proceeding confirms that Visa's rationale for employing the Visa Rules is legitimate. For instance, there are logical and justified concerns about: a) negative cardholder reaction from surcharging; b) transparency over who is imposing the surcharge (the merchant or Visa); and c) excessive surcharging by merchants, as already expressed by regulators in Australia and the United Kingdom;

(iv) The Commissioner has not provided any evidence of an anti-competitive motivation on the part of Visa in employing the Visa Rules, let alone one based on a strategy of price maintenance; and,

(v) Claims to abolish the Visa Rules in the manner sought by the Commissioner were recently rejected by the Canadian Department of Finance, as well as the U.S. Department of Justice (in respect of the No Surcharge Rule), both of which had been presented with concerns similar to this case regarding the ability of merchants to steer to lower cost payment methods;

(g) Section IX summarizes and discusses, in general terms, the Commissioner's two principal theories of anti-competitive harm – the competition "suppression" theory and the "cross-subsidization" theory – in an attempt to provide the Tribunal with the appropriate context, and despite the numerous internal inconsistencies and contradictions contained therein. It is explained that even if the facts relied upon by the Commissioner are proven, at a fundamental level, both theories fail because they are based on a partial analysis. That is, the Commissioner's theories consider the effect of the Visa Rules on the incentives of Visa and MasterCard to set prices for Acquirers, but they do not incorporate an analysis of the incentives of Visa and MasterCard to compete for transaction volume by focusing on Issuers. A complete analysis would look at the ability of Visa and MasterCard to "undercut" by competing on both sides. The same types of volume based incentives that the Commissioner claims would emerge on the acquiring side by prohibiting the Visa Rules already exist on the issuer side with the Visa Rules in place. The Visa Rules cannot be said to create, enhance or maintain market power.

(h) Section X addresses in detail the Commissioner's competition suppression theory by explaining that this theory is dependent on the likelihood of arriving at one specific end result from a multitude of possible outcomes. As a matter of logic, since the Commissioner's theory is dependent on a multi-step chain of events occurring, and each step in the chain presents multiple possible outcomes, the likelihood of arriving at the one end result that happens to match the

Commissioner's theory is highly remote. In actuality, each of the steps that are required to satisfy the Commissioner's case are fraught with analytical and evidentiary deficiencies. There are simply too many "ifs", "ands", or "buts" for the Commissioner's theory to be sustainable. In particular:

(i) The Commissioner alleges that removing the Visa Rules will lead to merchants sending "price signals" to customers via surcharging or selective acceptance; but the evidence establishes that merchants already have today numerous ways of sending "price signals" to their customers by offering discounts or other incentives for using lower cost payment methods, disclosing cost of acceptance, choosing not to accept Visa, or other methods of steering, all of which are permitted by the Visa Rules;

(ii) The Commissioner alleges that if such price signalling is utilized by merchants, it will be widespread; but the evidence establishes that merchants are not likely to surcharge because of, among other things, a "first mover" problem and a general preference not to surcharge. In addition, it was demonstrated that the mere "threat" of surcharging (in the absence of the Visa Rules) was not significant as far as Visa is concerned;

(iii) The Commissioner alleges that if such price signalling occurs and if it is widespread, or there is a credible threat of same, then it will be precise enough for customers to distinguish between costs associated with Visa and MasterCard (and other credit card networks, cash and debit), as well as between costs associated with standard and premium cards; but there is

no evidence (including from jurisdictions where surcharging is permitted) to suggest that market conditions are likely to produce differential surcharging with such accuracy (for example, as between Visa and MasterCard transactions as opposed to as between credit card and non-credit card transactions, or as between credit card types);

(iv) The Commissioner alleges that if such price signalling occurs and if it is widespread and if it is precise enough to distinguish between Visa and MasterCard, or between standard and premium cards, then such surcharging or discrimination will lead to a significant reduction in cardholder usage or membership of the surcharged brand; but the evidence demonstrated that there are numerous possible outcomes other than decreased volume on the relevant network that could arise from merchant surcharging. For instance, surcharging by merchants could lead to the customer going to a store that does not surcharge, not returning to the store for another visit, or simply opting to pay the surcharge and carry on;

(v) The Commissioner alleges that if such price signalling occurs and if it is widespread and if it is precise enough to distinguish between Visa and MasterCard and standard and premium and if it would lead to lower transaction volume to the relevant network, then that network would compete by lowering interchange rates and/or network fees to Acquirers in order to stem the tide from volume losses on the network; but the evidence at this proceeding (including testimony from Visa and its customers,

supported by statements from the Commissioner's experts) suggests that Visa is not likely to lower interchange or network fees in response to surcharging or discrimination. Moreover, the experience in Australia does not demonstrate that interchange fees, or card acceptance fees, will be reduced as a result of surcharging;

(vi) The Commissioner alleges that if such price signalling occurs and if it is widespread and if it is precise enough to distinguish between Visa and MasterCard and standard and premium and if it would lead to lower transaction volume to the relevant network and if it would lead the relevant network to compete by lowering interchange or network fees, then the lower fees would be passed on to merchants by Acquirers in the form of lower card acceptance fees; but there is no evidence to substantiate this position as no Acquirers (other than TD which has intervened on behalf of the Respondents) have been called as witnesses by the Commissioner;

(vii) The Commissioner alleges that if such price signalling occurs and if it is widespread and if it is precise enough to distinguish between Visa and MasterCard and standard and premium and if it would lead to lower transaction volume to the relevant network and if it would lead the relevant network to compete by lowering interchange or network fees and if the lower fees would be passed on to merchants by Acquirers in the form of lower card acceptance fees, then the lower card acceptance fees

would be passed on to consumers in the form of lower prices at retail rather than being retained by merchants, but the evidence establishes that merchants would not reduce prices at retail; and,

(viii) At the end of the day, all of the witnesses that testified to the issue (on behalf of both the Respondents and the Commissioner) acknowledged there is no credible evidence that the ability of merchants to surcharge Visa and MasterCard transactions has led to lower prices for consumers. While the Commissioner's experts argued that such an outcome is too difficult for economists to demonstrate (but that it flows naturally from their competition suppression theory), this is not nearly sufficient to prove an adverse effect on competition under subsection 76(1)(b) (or price maintenance under subsection 76(1)(a)) on a balance of probabilities;

(i) Section XI addresses the Commissioner's "cross-subsidization" theory in detail, explaining that this theory does not demonstrate an adverse effect on competition in a market. As explained in this section:

(i) The Commissioner's theory has nothing to do with whether there is an adverse effect on "competition in a market" that the Commissioner has identified, as required by section 76(1)(b). "Merchants", "consumers" or the "retail industry" do not constitute relevant antitrust markets. Rather, the "cross-subsidy" argument focuses on a broader public policy issue of whether certain types of consumers bear a higher proportion of costs than

they should. This is not a question for competition policy, let alone one that is relevant to price maintenance;

(ii) In any event, the evidence demonstrates that attempts to quantify or to otherwise determine the competitive impact of the alleged cross-subsidy (as between cash or debit customers and credit card customers) is futile because, among other reasons:

- Nominal costs to merchants of cash or debit customers cannot properly be compared in a rigid and wooden fashion along side the costs of using credit cards. One must also account for the differences in benefits enjoyed by merchants from the use of each payment method;
- Cash, debit, cheques and other payment methods are themselves not costless to merchants. Any reasonable analysis of a "cross-subsidy" would need to account for these costs to merchants as well, not just the costs to merchants of using credit cards;
- There are very few "cash or debit customers" and "credit card customers" because the overwhelming majority of Canadians have a credit card, and use a variety of payment methods any given day or week;
- Cross-subsidies of the nature alleged by the Commissioner occur all the time. There are an endless number of examples of such cost differences based on individual customer preferences, that are not broken out by retailers based on individual customer usage; and,

- Even if a cross-subsidy were found to exist, merchants have a choice as to whether or not to "undo" the cross-subsidy (or in fact require cardholders to subsidize cash customers) by offering a discount for using payment methods other than credit cards. However, merchants have made no efforts to rectify this alleged cross-subsidization through discounting or other means;

(iii) Finally, this section explains that the cross-subsidy argument offered by the Commissioner is inherently at odds with the Commissioner's theory of price maintenance. The price maintenance theory is predicated on merchants negotiating away the ability to surcharge in exchange for lower interchange rates. There is no evidence that any such reduction in interchange would be calibrated to a level that eliminates the cross-subsidization concern. In fact, under the Commissioner's theory the cross-subsidization persists until credit card acceptance is given away to the merchants for free;

(j) Section XII explains why the Commissioner's definition of the relevant product market is flawed in a number of respects (Visa does not take issue with the geographic market as defined by the Commissioner). In this section, it is demonstrated that:

(i) The Commissioner and her experts seek to define the relevant product market too narrowly as Credit Card Network Services. In fact, Visa competes for transaction volume with payment methods that include cash,

debit, cheque, other credit card companies and new entrants such as PayPal. Such competition is driven by consumer choice at the point of sale, which is the focus of the Visa Rules that are the subject of this proceeding;

(ii) The Commissioner and her experts ignore the significant implications of the fact that Visa provides network services to two sets of customers simultaneously, whose demand is inter-related. There is a virtual consensus among economists that in network industries characterized by two-sided platforms the standard methodologies for defining markets and assessing market power are much less informative, but this is ignored by the Commissioner;

(iii) The Commissioner and her experts confuse and conflate the services that Visa and MasterCard provide to Acquirers and Issuers with the services that Acquirers provide to merchants. The two sets of services are not the same. Visa does not compete with Acquirers (nor does it compete with Issuers);

(iv) The Commissioner's experts misapply the hypothetical monopolist test by wrongly imputing the inherent narrowness and one-sidedness of the "acquiring" market onto the broader and two-sided market in which Visa and MasterCard actually participate. These errors manifest themselves when one properly considers the role of interchange as a balancing tool (and not a revenue generating price to Visa and MasterCard);

(v) The Commissioner relies on a narrow definition of the market (Credit Card Network Services), focusing on the perspective of merchants (who do not purchase services from Visa). Yet, the Commissioner's theory of anti-competitive harm is predicated on consumer choice in a broader payments market that includes the ability for consumers to switch among credit cards, debit and cash in the face of a small addition to the price (surcharge). The Commissioner is trying to have it both ways: on one hand defining the market narrowly to exclude debit and cash in order to arrive at a finding of market power, and on the other hand seeking a remedy that seeks to drive increased output of cash and debit to provide competitive discipline on card acceptance fees; and,

(vi) Prior judicial findings involving the credit card industry cited by the Commissioner are not germane to this case because none of those cases involved a theory of price maintenance and none of the cases were commenced after Visa and MasterCard were transformed from not-for-profit associations owned by issuing and acquiring financial institutions into independent for-profit publicly traded companies;

(k) Finally, section XIII demonstrates the significant deficiencies in the Commissioner's analysis of market power. In particular, this section explains that:

(i) The Commissioner's repeated references to supposed increases in merchant's costs of acceptance – including fluctuations in interchange

rates – are not properly considered evidence of market power, and once the role of interchange is properly understood there is no objective evidence of market power;

(ii) References by the Commissioner to Visa's and MasterCard's market shares are not evidence of market power, as they mask the vigorous competition between the two companies. The Commissioner's reliance on market shares and card acceptance fees is further called into question when one considers that the credit card network with the highest market share in fact generally has the lowest interchange rate while the credit card network with the smallest market share generally entails the highest card acceptance costs;

(iii) Claims that merchants are "required" to accept Visa are more rhetorical than analytical. When properly considered, it is clear that merchants have choices with respect to which payment methods they decide to accept. Merchant choices may be influenced by what merchants' competitors do, but that is not a function of market power on the part of Visa or MasterCard – rather, that is a function of competition among merchants; and,

(iv) Visa faces significant competitive constraints from a variety of sources including:

- Its competitors such as MasterCard, American Express, Interac, cash, cheques and other forms of payment, with whom Visa competes for transaction volume;
- Its customers (issuing and acquiring financial institutions) which are some of the largest and most sophisticated companies in Canada; and,
- Competitive pressures to create new products, improve existing products and infrastructure and innovate, for the benefit of consumers.

## III. KEY BACKGROUND FACTS

### (a) Section overview

9. This section outlines key background facts with respect to Visa, its operation of the Visa network and the nature, purpose and effect of the Visa Rules that are challenged in this proceeding. It explains the role of interchange in the two-sided market in which Visa operates and explains why the Visa Rules in issue are pro-consumer, pro-competitive and how they contribute to the expansion of output on the Visa network. It also discusses premium cards and why Visa introduced these products to compete more effectively in the Canadian payments market.

### (b) Visa operates the Visa Network

10. Visa Canada, with its head office in Toronto, Ontario, is a wholly-owned subsidiary of Visa Inc., a Delaware corporation with its principal place of business in San Francisco, California.

Witness Statement of William Sheedy, dated April 10, 2012 ("Sheedy Statement"), para. 3

Witness Statement of Brian Weiner, dated April 10, 2012 ("Weiner Statement"), para. 3

11. Visa became a publicly traded corporation on March 19, 2008. Prior to this date, Visa functioned as a joint venture between thousands of independent financial institutions across the world. The financial institutions that were formerly joint venturers are now among Visa's clients.

Sheedy Statement, para. 4

12. Visa operates the electronic payment system network by which transactions involving payment with a Visa payment card (including credit, debit or prepaid cards) are authorized and paid as between cardholders' and merchants' financial institutions. Visa also engages in significant marketing and promotions efforts to support the Visa brand and invests in product, platform and processing enhancements to improve the quality and security of the network. Visa additionally provides risk monitoring and management services to minimize the risks faced by Issuers and Acquirers and ultimately the amount of fraud and other losses that may occur.

Sheedy Statement, para. 6

13. Worldwide, there are 1.6 billion Visa payment cards accepted by 29 million merchants (as reported by Visa's financial institution clients), with 16,600 financial institutions connected to the Visa network. Within Canada, there are 32.4 million Visa credit cards accepted by 493,300 merchants (as reported by Visa's financial institution clients), with 21 financial institutions connected to the Visa network.

Sheedy Statement, para. 7

14. Visa is not itself a financial institution. It does not issue payment cards or extend credit to consumers, nor does it sign up merchants to accept Visa credit cards. Rather, Visa provides an

efficient, secure network for processing transactions among the financial institutions that do fulfill these roles within and across more than 170 countries and territories.

Sheedy Statement, para. 8

15. In addition to Visa itself, the Visa credit card payment system involves the following stakeholders: (1) cardholders who use credit cards to purchase goods and services; (2) merchants that display a Visa-owned mark denoting acceptance of Visa credit cards in exchange for goods and services; (3) financial institutions that issue credit cards to, and contract with, cardholders ("Issuers") (Issuers collect funds from cardholders on purchases and transfer funds to Acquirers); and (4) financial institutions that contract with merchants to enable merchants to accept Visa credit card transactions, with the financial institution paying the merchant for the goods or services provided to the cardholder ("Acquirers").

Sheedy Statement, para. 9

16. To be able to participate in the Visa payment system, a merchant must have an agreement with an Acquirer under which the merchant agrees to accept Visa cards, and the Acquirer agrees to provide payment to the merchant for sales transactions made on those cards. Merchants connect to their Acquirer's proprietary network, and Acquirers connect to the Visa network. Merchants do not purchase "access" to the Visa network from their Acquirers; merchants can neither place data on the Visa network nor obtain data from the Visa network.

Sheedy Statement, para. 11

Weiner Statement, para. 39

Weiner Evidence, Hearing Transcript, p. 2314, lines 16-20

Van Duynhoven Statement, paras. 44 and 49

[redacted]

[redacted]

Jewer Evidence, Hearing Transcript, p. 1742 lines 14-25

17. Acquirers compete vigorously with each other for merchant business. When a customer purchases goods or services from the merchant using a Visa credit card, the merchant provides the relevant card data electronically to the Acquirer, or to a third party processing firm acting for the Acquirer, for verification and processing. The Acquirer presents the data to Visa through the Visa network, and Visa in turn contacts the Issuer that issued the credit card to the customer to approve the transaction (which would include, for example, evaluating the amount of funds available in the customer's credit line). This step is known as "authorization." The Issuer then advises Visa whether it is approving or declining the transaction. Visa relays that message to the Acquirer. This transmittal of transaction information from the Acquirer to the Issuer and back over the Visa network, for purposes of determining whether the purchase is approved, is known as "authorization" and typically takes less than one second. Visa charges a fee, typically to both the Issuer and the Acquirer for this processing of information to authorize a transaction.

Sheedy Statement, para. 11

Van Duynhoven Statement, paras. 36-37 and 116-122

Witness Statement of Jordan E. Cohen, dated April 9, 2012 ("Cohen Statement", para. 24

18. Once the Acquirer knows whether the Issuer approves the transaction, the Acquirer notifies the merchant through a message to the card terminal at the merchant's point of sale. If the transaction is authorized, the merchant provides the goods or services to the cardholder, and indicates to its Acquirer that the transaction has been completed. Visa's rules require the Acquirer to promptly credit the merchant's account. The Acquirer charges the merchant a fee for the Acquirer's services, either by deducting a percentage of the transaction value before crediting

the merchant's account or by future periodic billing. For example, if the cardholder purchased $100 in goods and services, the Acquirer may charge a "merchant discount fee" of 2%, and thus deposit $98 in the merchant's account after deducting the $2 fee. The merchant discount fee is negotiated between the merchant and the Acquirer. Visa is not involved in any such negotiations and is not party or privy to the agreements between merchants and their Acquirers.

Sheedy Statement, para. 12

Van Duynhoven Statement, para. 64

Weiner Statement, para. 5

Weiner Evidence, Hearing Transcript, p. 2314, lines 8-12

19. In a typical transaction, the Issuer pays the Acquirer (over the Visa network) the amount of the purchase price of the goods or services provided by the merchant (usually within 24 to 48 hours), less a fee known as the "interchange fee" (single transactions are not settled individually, however but rather, net settlement typically occurs at the end of the day for each Issuer's and Acquirer's transactions that took place that day over the network). If the interchange fee is 1.5%, the Issuer will pay the Acquirer $98.50. Visa sets a default interchange fee that can be superseded if the Issuer and Acquirer agree to a different fee. The processing by Visa of information regarding amounts owed by Issuers and Acquirers to each other, and processing by Visa of payments from Issuers to Acquirers is known as "clearing and settlement." Authorization, clearance and settlement are not services "resold" or otherwise provided by Acquirers to merchants; Acquirers provide merchants the ability to accept Visa and all other types of payment cards. Authorization, clearance and settlement are network functions that are necessary to commence and complete the transfer of funds attendant on a Visa credit card transaction, but are not services "resold" or otherwise provided by Acquirers to merchants.

Sheedy Statement, para. 13

Weiner Evidence, Hearing Transcript, p. 2314, line 21 to p. 2315, line 12

20. Visa does not receive any revenue from the Issuer's interchange fees. Visa receives network fees from both Issuers and Acquirers for its authorization, clearing and settlement activities. Accordingly, Visa's revenues are tied directly to the number and value of transactions on its system. Therefore, Visa seeks to maximize transaction volume on its payments network in order to maximize returns to its shareholders.

Sheedy Statement, para. 14

Weiner Statement, para. 5

**(c) Visa's customers are Issuers and Acquirers, not merchants or cardholders**

21. Cardholders do not contract with Visa for cardholder services and merchants do not contract with Visa for acquiring services. Rather, as discussed above, cardholders contract with Issuers to obtain Visa credit cards, and merchants contract with Acquirers to obtain merchant services.

Sheedy Statement, para. 17

22. Visa facilitates its network services by providing Issuers and Acquirers, among other things, with: (1) the right to use the Visa brand and logo; (2) advertising and promotional programs aimed at consumers and merchants; (3) the Visa operating regulations, including provisions with respect to interchange and dispute resolution; (4) centralized authorization, clearing, and settlement functions; and, (5) fraud protections and controls. Through participation in the Visa system, Issuers provide their customers with access to a vast collection of merchants. Similarly, Acquirers provide their customers with access to a vast collection of cardholders with the ability to pay for goods safely, conveniently, and on credit, with limited risk to merchants.

Sheedy Statement, para. 18

23. Visa does not have any role in setting the prices that Issuers charge cardholders or that Acquirers charge merchants. Both Issuers and Acquirers remain free to set prices at their sole discretion and Visa does not retain information on the merchant discount fees that Acquirers charge. For example, nothing in Visa's rules prevents an Acquirer from charging lower merchant discount fees to a particular merchant based upon volume or other considerations, even if the Acquirer is paying the same interchange fee to the Issuer for transaction receipts from all merchants in that category. The interchange fee paid to Issuers and the processing fees charged by Visa to the Acquirer are costs to the Acquirer, but neither Visa nor the Issuer makes these fees a fixed percentage or any part of the merchant discount fee. Interchange fees and Acquirer fees are set based on the amount of the transaction or as a flat fee per transaction (or some combination of these two components), not based on the merchant discount fee charged. The merchant discount fee is set by the Acquirer in its own discretion, based on its own business strategies. The same interchange fee and Acquirer fees would apply regardless of the amount of the merchant discount fee.

Sheedy Statement, para. 19

Weiner Statement, para. 5

**(d) Visa faces competition from different payment methods**

24. In Canada, as in all markets around the world, Visa competes with a large number of alternative payment options, including not only competing credit card brands such as MasterCard and American Express, but also other payment networks that offer charge cards, debit cards, and prepaid cards, as well as cash, cheques, and mobile and electronic payments being introduced

through rapid innovation. Specific to Canada, Interac is a very well established competitor and processes more transactions annually than Visa does in Canada across all of its products.

Sheedy Statement, para. 29

Sheedy Evidence, Hearing Transcript, p. 2163, line 5 to p. 2164, line 4

Weiner Statement, paras. 7 and 8

Weiner Evidence, Hearing Transcript, p. 2308, line 25 to p. 2309, line 8

**(e) Issuer/cardholder benefits**

25. Visa credit cards provide customers with a convenient, safe and secure method to pay for goods and services received from merchants on a deferred basis. A credit card provides the customer with revolving credit and an interest-free grace period as well as accurate record keeping. It may also provide the customer with rewards (such as cash back, air miles, car rental insurance, and extended warranties) that add value for the cardholder, so he or she receives "more for their money" when making a purchase. Indeed, Issuers compete vigorously with each other and with other networks such as American Express to attract new customers through reward offerings and promotions. However, as discussed above, Visa faces strong competition from other payment brands and methods.

Sheedy Statement, para. 34

Expert Report of Mike McCormack, dated March 14, 2012 ("McCormack Expert Report"), para. 22

Expert Report of Alan S. Frankel, dated March 9, 2012 ("Frankel Expert Report"), para. 64

**(f) Acquirer/merchant benefits and demands**

26. The benefits that a merchant gains by choosing to accept Visa credit cards include the following:

(a) a customer whose purchasing power has been enhanced by convenient and immediate credit underwritten by the Issuer, giving the merchant increased sales without the increased risks associated with extending the credit itself, for example, through a proprietary credit card;

(b) a guarantee of quick payment to the merchant's account by the Acquirer, regardless of whether the cardholder pays its bill to the issuer;

(c) increased customer satisfaction, as customers can use a Visa credit card if that is their preferred form of payment;

(d) the value of credit card rewards, which make the merchants' goods and services a better bargain than if the customer were paying the same sticker price with cash, resulting in increased sales for the merchant;

(e) improved access to international customers, including through on-line e-commerce sales;

(f) protection from fraud and theft associated with other forms of payment;

(g) a reduction in the costs associated with other forms of payment, such as personnel costs, counting and accounting for cash and cheques, and security costs relating to handling, storing and transporting cash (including armoured cars, cameras, counterfeiting losses, etc.);

(h) the ability to complete transactions quicker and more efficiently than with other methods of payment, allowing fast throughput at the point of sale for merchants;

(i) easy, accurate, and efficient record-keeping tools; and,

(j) the benefit of Visa's investment in security, reliability, and brand infrastructure.

Weiner Statement, para. 19

Sheedy Statement, para. 35

McCormack Evidence, Hearing Transcript, p. 674, line 19 to p. 676, line 15

Li Evidence, Hearing Transcript, p. 1580, line 23 to p. 1581, line 18

Shirley Evidence, Hearing Transcript, p. 1656, line 12 to 1658, line 19

Van Impe Evidence, Hearing Transcript, p. 1679 lines 13-17; p. 1687 line 13 to p. 1688, line 1; p. 1689 lines 10-13

27. Many of these features allow for more robust competition between merchants, including allowing smaller merchants to compete with larger merchants that offer their own private label or co-branded payment cards.

28. [redacted] merchant witnesses testified that they had no choice but to accept Visa credit cards, stating that failing to do so would put them at a "competitive disadvantage." Obviously, taking any action because it is to the competitive benefit of a business to do so is very different from having no alternative to taking that action. Clearly, every merchant has a choice regarding whether to accept Visa credit cards; if they choose to accept them, they do so because the benefits of doing so outweigh the costs. The Commissioner's expert, Professor Winter, agreed entirely with this. When asked on cross-examination whether he agreed that merchants can choose to accept a brand of credit card, the Commissioner's Professor Winter stated:

> Yes. This is a free-enterprise economy. Merchants are not compelled to purchase a service. They are free to purchase it, and he will purchase it if the benefits of doing so are greater than the cost.

Winter Evidence, Hearing Transcript, p. 2046, line 21 to p. 2047, line 4

Jewer Statement, para. 26

[redacted]

Shirley Statement, para. 18

Swansson Statement, para. 11

[redacted]

Broughton Statement, para. 20

[redacted]

29. The Commissioner's expert, Mr. McCormack, also agreed that merchants have the option not to accept credit cards if the costs exceed the benefits; the following exchange is from his cross examination:

> MR. HOFLEY: If it was costing merchants more to accept credit cards than they were gaining from the acceptance of credit cards, would they accept credit cards, Mr. McCormack?
>
> MR. McCORMACK: Not -- no, not if they perceived it in that fashion.
>
> MR. HOFLEY: Would you agree with me that if they did perceive that they weren't getting value, if you will, for credit cards, they would use all mechanisms available to them to steer volume away from payment by credit cards?
>
> MR. McCORMACK: That's one possible direction. The other would be, if they didn't feel they were getting value, they would cease acceptance.

McCormack Evidence, Hearing Transcript, p. 696, line 22 to p. 697, line 10

30. The University of Saskatchewan decided to stop accepting Visa credit cards in 2010 due to concerns about the cost of acceptance. This example demonstrates that merchants are able to and indeed cease acceptance of Visa credit cards if it is in their financial interests to do so.

Van Impe Statement, para. 30

31. The evidence clearly establishes that the benefits of accepting Visa credit cards overwhelmingly exceed the costs of doing so for all of the other merchants who testified in this

proceeding. [redacted]

[redacted]

**(g) The role of interchange**

32. Interchange fees are a vital tool used by Visa to balance competing demands on both sides of the two-sided market. As stated previously, Visa does not receive any revenue from interchange fees. Rather, Visa strives to set default interchange rates at the long-term network volume-maximizing level. This means setting interchange rates at a level that allows both Issuers and Acquirers to profitably participate in the Visa network. If interchange rates are set too high, Acquirers will not participate because they will be unable to profitably set their merchant discount rate at a level low enough to attract merchants and if interchange rates are set too low, Issuers will not participate because they will be unable to profitably offer their current and potential new cardholders sufficient value to induce them to use their cards or to purchase new cards. Thus, interchange rates are a key part of competition among Visa and its competitors to attract Acquirers and Issuers and, in turn, merchants and cardholders.

Sheedy Statement, para. 38

Weiner Statement, para. 21

33. At the same time, setting interchange is not an exact science. Visa monitors its relationships with Issuers and Acquirers on a regular basis and adjusts the interchange rates and where deemed necessary to respond to competitive factors and maximize network volume over the long term. In setting interchange rates to maximize network volume, Visa takes the following factors into account: (1) promoting overall system growth and growth in particular merchant segments in competition with other payment methods; (2) reflecting the value delivered to Issuers and Acquirers, and in turn their merchant and cardholder customers; and (3) delivering value sufficient for merchants to accept credit cards and financial institutions to invest in the system and to assume risks of card issuance.

Sheedy Statement, para. 39

Sheedy Evidence, Hearing Transcript, p. 2166, line 16 to p. 2168, line 10

Weiner Statement, para. 25

Weiner Evidence, Hearing Transcript, p. 2310 line 19 to p. 2311 line 5

34. Visa considers an interchange rate program to be in balance if it is connected to a business strategy that gives Visa the best opportunity to expand volume over the long term. However, this balance changes given that Visa is in a competitive and dynamic marketplace. In some cases, Visa has grown its payment system through reductions in interchange rates, in others through increases. For example, Visa makes a lower credit card interchange rate available to Acquirers in respect of emerging segments where consumers have not traditionally paid with credit cards. On the other hand, Visa sets a higher interchange rate on premium card transactions where Issuers need to be compensated for the cost of increased cardholder benefits.

Sheedy Statement, para. 40

Weiner Statement, para. 28

Weiner Evidence, Hearing Transcript, p. 2311, line 12 to p. 2312, line 24

35. The management of interchange rates has allowed Visa to compete for merchant acceptance and cardholder usage more effectively against other credit card networks such as MasterCard and American Express (both of which generally have higher interchange rates than Visa), as well as other forms of payment such as cash, cheque and debit.

Sheedy Statement, para. 41

36. Issuers and Acquirers are free to enter into bilateral agreements providing such guarantees and other terms, and setting out the interchange fee that the Issuer will charge; such arrangements are rare in Canada. With the exception of "on-us" transactions (where the Issuer and Acquirer are the same financial institution, accounting for approximately 15 percent of network volume in Canada), there are presently no such agreements in Canada, though Visa is equipped to support them in Canada should Issuers and Acquirers wish to do so. Mr. Sheedy's testimony was that there would "just be chaos" in the absence of a default interchange system:

> ... all of the participants in the payment system would have to negotiate bilaterally with every other payment participant in the network. Every acquiring bank with every issuing bank, every merchant with every issuing bank, would have to come together and negotiate terms.

Sheedy Evidence, Hearing Transcript, p. 2169, lines 6-11 and 20-23

Sheedy Statement, para. 44 and 45

Weiner Statement, para. 21

**(h) The Visa International Operating Regulations**

37. Issuers, Acquirers and payment processors who act as agents for Acquirers may participate in the Visa system by meeting the conditions outlined in the Visa International

Operating Regulations ("VIOR"). The VIOR form a contract between Visa, on the one hand, and each Issuer and Acquirer that participates in the Visa system, on the other.

Sheedy Statement, para. 46 and Exhibit "D"

Weiner Statement, para. 20

38. The VIOR are intended to ensure that the Visa network operates effectively and efficiently. Among other things, the VIOR provide for prompt funding for the settlement of transactions, allocation of risk of non-payment by cardholders, and procedures for the resolution of transaction disputes and fraudulent transactions. The VIOR are also designed to protect the value of the Visa brand by ensuring that cardholders and merchants experience a common, convenient, safe and reliable payment experience throughout the global Visa network.

Sheedy Statement, para. 47

39. The VIOR include a rule that prohibits merchants that choose to accept Visa credit cards from placing a surcharge on cardholders for using a Visa credit card as their chosen method of payment (the "No Surcharge Rule") and a rule prohibiting such merchants from refusing to accept a valid Visa credit card (the "Honour All Cards Rule").

Sheedy Statement, para. 48

40. The VIOR require that, as a term of their own contracts with merchants, Acquirers must require merchants to abide by the VIOR provisions regarding use of Visa-owned marks, including a requirement to display the mark that indicates that the merchant accepts Visa credit cards for payment. Acquirers must also require that merchants comply with the VIOR provisions regarding payment acceptance, including the No Surcharge Rule and the Honour All Cards Rule.

Sheedy Statement, para. 49

41. Visa's rules allow merchants to steer customers to alternative forms of payment by a number of methods, including by discounting. Only surcharging and refusing to accept Visa credit cards after the merchant has agreed to accept this method of payment are prohibited.

Sheedy Statement, para. 50 and Exhibit "D"

42. Several of the Commissioner's witnesses assert that Visa is unwilling to meet or negotiate with them to discuss their concerns with respect to the cost of acceptance of Visa credit cards for payment, or other matters. This is inaccurate. Visa can and does meet with Canadian merchants to discuss and address their business concerns and has negotiated agreements with Canadian merchants pursuant to which reduced interchange rates are made available to the merchant's Acquirer. Such agreements are negotiated on the basis of Visa's assessment and recognition of the value that merchants seeking such agreements bring to the Visa network.

Sheedy Statement, para. 51

Weiner Statement, paras. 40, 41, 44, 45, 46 and 47

Weiner Evidence, Hearing Transcript, p. 2315, line 25 to p. 2317, line 3

Witness Statement of Candice Li, dated March 7, 2012 ("Li Statement"), para. 24

Witness Statement of Craig Daigle, dated March 6, 2012 ("Daigle Statement"), para. 24

Witness Statement of Mario de Armas, dated March 6, 2012 ("de Armas Statement"), para. 27

Witness Statement of Charles Symons, dated March 13, 2012 ("Symons Statement"), para. 24

De Armas Evidence, Hearing Transcript, [redacted] p. 300, line 4 to p. 301, line 25; pp. 316, line 1 to p. 317, line 10; [redacted]

[redacted]

Li Evidence, Hearing Transcript, p. 1537, line 22 to p. 1538, line 5; [redacted]

[redacted]

Houle Evidence, Hearing Transcript, pp. 532, line 20 to p. 533, line 4

[redacted]

**(i) The No Surcharge Rule**

43. The No Surcharge Rule has existed for over 30 years. This rule, which is Core Principle 6.3 of the VIOR, states as follows:

> No Surcharging Unless Required by Law
>
> Visa merchants agree to accept Visa cards for payment of goods or services without charging any amount over the advertised price as a condition of Visa card acceptance, unless local law requires that merchants be permitted to engage in such practice.

Sheedy Statement, para. 53 and Exhibit "D"

(ii) *The No Surcharge Rule is a pro-consumer rule*

44. The No Surcharge Rule protects consumers by requiring that the price a consumer pays at checkout be no greater than the advertised price of the product. Merchants remain free to steer customers away from using Visa credit cards, through discounting or other means. Visa's No Surcharge Rule is also intended to protect goodwill in the Visa brand from being damaged by negative consumer reaction to additional charges imposed by merchants for use of their Visa credit cards. The No Surcharge Rule also protects the balance of incentives in the Visa system in an effort to maximize the value of the network for stakeholders in the aggregate. Each of these objectives of the No Surcharge Rule is discussed below.

Sheedy Statement, para. 54

Sheedy Evidence, Hearing Transcript, p. 2170, line 1 to p. 2171, line 10

45. Visa has spent more than forty years and invested many millions of dollars to build the Visa brand into one that is universally known and trusted. Visa cardholders rely on the Visa brand for safe and convenient transactions – as Visa's former ad slogan said, cardholders expect Visa to be "everywhere [they] want to be." Visa has promoted to cardholders that their cards will be broadly accepted.

Sheedy Statement, para. 59

46. As discussed above, Visa's rules do not prevent merchants from attempting to influence customers' choice of payment method. However, once a customer makes clear that she wishes to pay with a Visa credit card, she should not be punished for that choice. Regardless of whether the cardholder has notice of a merchant's intention to surcharge, being required to pay more to use a Visa credit card deprives the cardholder of the promise Visa has made.

Sheedy Statement, para. 55

Sheedy Evidence, Hearing Transcript, p. 2170, line 1 to 2171, line 10.

[redacted]

47. The hostile consumer reaction to surcharging undermines the Visa brand. Indeed, Visa's own research shows that consumers oppose surcharging. A report commissioned by Visa in Australia, showed that 86 percent of Australians oppose surcharging. Similarly, a recent survey by the Consumers Association of Canada, found that 75 percent of Canadians "strongly oppose" merchant surcharging. This hostile reaction to surcharging and its impact on Visa's brand is different from the brand effect of discounting. This is why Visa opposes merchant surcharging

but allows discounting. It is not because surcharging steers customers to alternative payment methods more effectively than discounting.

[redacted]

Frankel Evidence, Hearing Transcript, p. 930 line 8 to p. 931 line 3

Expert Report of Benoît Gauthier, dated April 9, 2012 ("Gauthier Expert Report"), Exhibit 3.7, p. 20

Expert Report of Michael Mulvey, dated April 4, 2012 ("Mulvey Expert Report"), para. 16

48. Merchants recognize that the Visa brand can be a significant draw to consumers – it is undoubtedly one of the primary reasons why millions of merchants accept Visa credit cards today. When a merchant disadvantages Visa credit cards by surcharging, however, it engages in free-riding on the value of the Visa brand in a way that serves only the interests of the merchant by misappropriating the value that the Visa brand has delivered. Regardless of whether notice is given, merchants that attract customers into their stores (or to their websites) by promising that a cardholder can pay with a Visa credit card, but then penalize them by imposing a surcharge, are leveraging Visa's brand equity to increase their sales while simultaneously damaging Visa's brand and consumer perceptions of the benefits and value of using their Visa credit cards.

Sheedy Statement, para. 63

Expert Report of Kenneth G. Elzinga, dated April 10, 2012 ("Elzinga Expert Report"), paras. 227-233

Expert Report of Jeffrey Church, dated April 10, 2012 ("Church Expert Report"), paras. 52-54

49. As a result, the No Surcharge Rule protects both Visa's brand image and Visa's value proposition. Surcharging by even a small number of merchants could significantly harm the Visa

brand and consumer expectations of what it means for a merchant to accept Visa credit cards. Those sorts of harms would make Visa a less competitive payment system.

Sheedy Statement, para. 64

(iii) *Merchants Remain Free to Steer Customers by Other Methods*

50. While merchants cannot surcharge for use of a Visa credit card, Visa's rules do not prohibit a merchant from steering customers to other credit card brands or types, or other payment forms. There are many methods by which merchants steer or can steer customers to other forms of payment, for example:

(a) Deciding not to accept Visa credit cards at all;

(b) Offering the customer a discount or rebate, including an immediate discount or rebate at the point of sale, if the customer uses a particular brand of credit card (either a different general purpose card or a card that is co-branded with the merchant's name), a particular type of credit card, or another method of payment. The Visa Rules permit two-tiered (or multi-tiered) pricing by merchants, based on brand or method of payment; merchants are free to charge less than their advertised price for a product – Visa's rules only preclude them from charging more;

(c) Offering a free or discounted product, or upgraded product, if the customer uses a particular brand or type of general purpose card or a particular form of payment;

(d) Offering a free, discounted or enhanced service if the customer uses a particular brand or type of general purpose card, or a particular form of payment;

(e) Offering the customer an incentive, encouragement, or benefit for using a particular brand or type of general purpose card or a particular form of payment;

(f) Offering a discount or other inducement if a consumer signs up for a card product and puts the transaction on that card;

(g) Asking consumers whether they would like to put their transactions on a particular credit card brand or type, or pay by a method other than credit card;

(h) Expressing a preference for the use of a particular brand or type of general purpose card or a particular form of payment. Indeed, Visa has explicitly stated to the Canadian Federation of Independent Business ("CFIB"), a merchant group, that nothing in the VIOR prohibits a promotional campaign encouraging merchants to use signage to steer consumers towards alternative forms of payment, promoting a particular brand or type of general purpose card or a particular form or forms of payment through posted information or sequencing of payment choices (such as placing preferred methods first in a pull-down menu in an online environment), or through other communications to a customer; or,

(i) Communicating to a customer the reasonably estimated or actual costs incurred by the merchant when a customer uses a particular brand or type of general purpose card or a particular form of payment or the relative costs of using different brands or types of general purpose cards or different forms of payment.

51. No evidence was presented to the Tribunal that any merchant in Canada has adopted any of the steering mechanisms listed in subparagraphs (b) to (i) above, although such mechanisms

are available to merchants without restriction under the Visa Rules. Moreover, there was no evidence presented that any merchant has taken up the recommendations of the CFIB and posted signs recommending the use of payment methods other than credit cards. Indeed, not one of the Canadian merchants who testified in this proceeding provided any evidence that they have taken any steps whatsoever to inform their customers of the relative costs of accepting credit cards or any other form of payment and all of the merchants who were questioned about this on cross-examination agreed that they had taken no such steps. Indeed, Mr. Daigle of Sobeys acknowledged that the only form of payment that Sobeys promotes on its website and in-store, is payment by credit card.

Sheedy Statement, para. 68 and Exhibits "D" and "H"

Weiner Statement, para. 48

Symons Evidence, Hearing Transcript, [redacted] p. 1621, lines 17-23

Shirley Evidence, Hearing Transcript, [redacted] p. 1650, line 10 to p. 1651, line 19; p. 1652, line 19 to p. 1653, line 3

Winter Evidence, Hearing Transcript, p. 2036, lines 10-20; p. 2052, lines 9-20; p. 2046, line 3 to p. 2047, line 4

Jewer Evidence, Hearing Transcript, [redacted] p. 1740, line 25 to p. 1741, line 4; p. 1759, lines 5-12; p. 1723, lines 10-18; p. 1751, line 8 to p. 1752, line 21

Van Impe Evidence, Hearing Transcript, [redacted] p. 1708, line 20 to p. 1709, line 21; p. 1707, lines 14-18

De Armas Evidence, Hearing Transcript, p. 308, lines 3-8; p. 266, line 9 to p. 275, line 14; p. 273, line 4 to p. 275, line 23

McCormack Evidence, Hearing Transcript, p. 697, lines 3-17; p. 693, lines 19-23

Daigle Evidence, Hearing Transcript, p. 405, line 16 to p. 414, line 8; [redacted]

52. The Commissioner's witnesses suggest that if discounting is as effective as surcharging at steering customers to alternative payment methods, Visa would have no reason to oppose surcharging. However, while Visa accepts that merchants may wish to steer customers to alternative payment methods, it prefers that merchants make the experience for customers as positive as possible. Discounting accomplishes this goal, but surcharging does not. Moreover, the evidence overwhelmingly indicates that Canadian merchants have no interest in steering their customers to other forms of payment, otherwise one would expect that they would employ the means available to them to do so, but none do. It is apparent that while the merchants are at least prepared to consider surcharging, because it represents a revenue opportunity; they are not prepared to provide discounts or take other measures to steer their customers to other forms of payment, either because such measures might cost them money or might upset their customers. Fundamentally, the evidence shows that merchants want their customers to be able to pay by the method they choose.

Sheedy Statement, paras. 69 and 70

Sheedy Evidence, Hearing Transcript, p. 2170, lines 14-21

Weiner Evidence, Hearing Transcript, p. 2321, line 20 to p. 2322, line 6

Elzinga Expert Report, paras. 190-193

Church Expert Report, paras. 80-88

Li Statement, para. 39

Daigle Statement, para. 40

de Armas Statement, para. 61

Witness Statement of Paul Jewer, dated March 7, 2012, ("Jewer Statement") paras. 55 and 56

Witness Statement of Pierre Houle, dated March 7, 2012, ("Houle Statement") paras. 46 and 63

Witness Statement of Michael Shirley, dated March 8, 2012 ("Shirley Statement"), para. 40

Symons Statement, para. 66

Broughton Evidence, Hearing Transcript, p. 344, lines 3-13

[redacted]

Li Evidence, Hearing Transcript, p. 1572, line 3 to p. 1573, line 23

Shirley Evidence, Hearing Transcript, p. 1650, lines 3-9; p. 1652, lines 10-18; [redacted]

Jewer Evidence, Hearing Transcript, p. 1732, lines 18-23

53. While discounting provides consumers with an incentive to switch to a different form of payment, it does so positively rather than negatively from the consumer's perspective. The consumer is presented with a *benefit* for switching rather than a *penalty* for using a Visa credit card. Consumers are unlikely to react with hostility toward Visa if they are offered a discount for an alternative payment method, which means less harm to the Visa brand than surcharging. From Visa's perspective, these alternatives to surcharging are both pro-consumer and less harmful to the Visa brand; as such, the No Surcharge Rule is a particularly appropriate condition for participation in the Visa payment system. Professor Elzinga described the ability of merchants to discount as "like Pareto improvement" – something that makes some people better off and nobody worse off. Conversely, surcharging is not Pareto improvement – instead, it harms consumers and does not help others.

Sheedy Statement, para. 75

Elzinga Evidence, Hearing Transcript, p. 2709, line 21 to p. 2710, line 7

**(j) The Honour All Cards Rule**

54. Visa cardholders reasonably expect that their cards will be accepted at all merchants that display the Visa system's acceptance logo. Without an assurance of acceptance, the convenience of using the credit card is diminished. Core Principle 6.1 of the VIOR provides:

> Visa merchants displaying Visa acceptance marks at payment locations agree to accept corresponding Visa-branded products for payment. If the customer indicates that he or she wants to pay with a Visa product, a merchant must complete and process the Visa transaction as defined in the Visa Operating Regulations.
>
> Sheedy Statement, para. 91 and Exhibit "D"

55. The Honour All Cards Rule, which is Core Principle 6.2 of the VIOR, currently states as follows:

> Honour All Cards Properly Presented
>
> Honouring All Visa Cards
>
> Visa merchants may not refuse to accept a Visa product that is properly presented for payment, for example, on the basis that the card is foreign-issued, or co-branded with a competitor's mark. Merchants may steer customers to an alternative method of payment, such as providing discounts for cash, but may not do so in a confusing manner that denies consumer choice. Merchants may decline to accept a Visa product that is not covered by their acceptance contract, and may also consider whether present circumstances create undue risk.
>
> Sheedy Statement, para. 92 and Exhibit "D"

56. The Honour All Cards Rule has existed since the creation of Visa in 1976.

> Sheedy Statement, para. 93

(i) *The Honour All Cards Rule is a pro-consumer rule*

57. By providing for universal acceptance, the Honour All Cards Rule benefits consumers by assuring them that their Visa credit cards will be accepted at merchants that display the Visa

logo, regardless of which financial institution issued the card or what type of card it is or what features it offers. Consumers thus avoid investing the time and effort necessary to determine whether each merchant at which the consumer shops will accept the consumer's card for payment at the checkout counter.

Sheedy Statement, para. 94

58. Absent the Honour All Cards Rule, cardholders would suffer in at least three ways. First, they would face the prospect that their Visa credit card would be declined due to the type of card they hold. Like the No Surcharge Rule, the Honour All Cards Rule prevents merchants from engaging in a bait and switch exercise, by advertising the Visa logo but then refusing to accept a valid Visa credit card. Second, consumers would face the risk of the possible loss of benefits associated with many Visa credit cards. Specifically, a consumer holding a Visa rewards card today has likely paid for that card with the expectation that he or she will receive an enhanced benefit and that the card will be accepted wherever the Visa mark is displayed. If that consumer's Visa credit card is not accepted, its value is diminished as the consumer is unable to enjoy the benefits for which he or she paid. Third, like surcharging, regardless of whether notice is given, allowing merchants to selectively refuse Visa credit cards would stymie cardholders' ability to determine the value of a card product when deciding whether to enter a contract with the Issuer. In particular, a cardholder cannot determine the value of a Visa Infinite card if he or she cannot predict how often it will be accepted by merchants.

Sheedy Statement, para. 95

(ii) *Merchants remain free to steer customers by other methods*

59. As is the case with the No Surcharge Rule, nothing in the Honour All Cards Rule prevents merchants from steering customers to other payment methods through discounting, signage, or other methods outlined above.

Sheedy Statement, para. 97

(iii) *The Honour All Cards Rule protects goodwill in the Visa brand*

60. Part of the goodwill in the Visa brand is tied to acceptance of Visa credit cards by any merchant displaying the Visa logo. The Honour All Cards Rule, like the No Surcharge Rule, prevents merchants from free-riding on the value of the Visa logo, while damaging the brand by denying the acceptance that the logo represents.

Sheedy Statement, para. 98

(iv) *The Honour All Cards Rule enhances the efficiency of Visa's product*

61. By allowing a wide variety of banks to issue cards under the Visa brand, the Honour All Cards Rule creates a competing card product that the thousands of card-issuing banks could not offer individually. The rule likewise enhances the efficiency of that product by avoiding the need for thousands of card-issuing banks to arrange individually for acceptance at millions of merchants. This also permits smaller acquirers like Home Trust to offer their merchant customers access to all Visa cardholders despite their relatively modest share of the acquisition market.

Sheedy Statement, para. 100

Witness Statement of Robert Livingston dated April 10, 2012, ("Livingston Statement") paras. 24-29

(v) *The Honour All Cards Rule promotes competition*

62. The Honour All Cards Rule promotes competition by preventing merchants from limiting card acceptance to the major Canadian banks. It prevents Acquirers from entering into

agreements to accept only Visa credit cards from certain Issuers. It ensures that a consumer holding a card issued by smaller Issuers such as Vancouver Savings Credit Union or Laurentian Bank receive the same experience and obtain the same benefit as consumers holding cards issued by Canada's largest financial institutions. The rule therefore facilitates competition by smaller financial institutions, and expands the Visa network to a broader range of Issuers and their cardholders.

Sheedy Statement, para. 101

Witness Statement of Karen Leggett, dated April 5, 2012 ("Leggett Statement"), para. 75

Livingston Statement, paras. 22-23

63. Moreover, the experience in other jurisdictions provides no assistance to the Commissioner in respect of the Honour All Cards Rule, as no jurisdiction in the world has abrogated the Honour All Cards Rule as it relates to credit cards alone.

Sheedy Statement, para. 102

Witness Statement of Elizabeth Buse, dated April 9, 2012 ("Buse Statement"), para. 39

64. Although the merchants who testified in this proceeding all (apparently) support the Commissioner's request to abrogate the Honour All Cards Rule, the majority of them are direct beneficiaries of the rule. This is because most of the merchants (Wal-Mart, WestJet, Shoppers, [redacted] IKEA, Best Buy and Air Canada) either have co-branded credit cards or are the beneficiaries of other arrangements (i.e., Air Canada's association with Aeroplan) which provides direct benefits to them when cards are used broadly by cardholders at other merchants. The Honour All Cards Rule, ensures, for example, that WestJet could not reject acceptance of

Aeroplan cards even though they benefit its direct competitor, Air Canada, and [redacted]

[redacted]

[redacted]

Li Evidence, Hearing Transcript, p. 1552, lines 8-24

65. [redacted]

[redacted]

[redacted]

**(k) The Visa Rules are not "merchant restraints"**

66. The Commissioner unfairly and pejoratively defines the Visa Rules as "merchant restraints." In fact, the Visa Rules ought more fairly and aptly to be regarded as akin to the rules that a franchisor implements to govern the relationship with its franchisees. Like franchise rules, the Visa Rules ensure that Visa cardholders enjoy a consistent experience when they use their Visa credit card – they can have an assurance that their card will be accepted without penalty at any merchant who displays the Visa logo. Like franchise rules, the Visa Rules thereby enhance and protect the Visa brand and goodwill.

67. The evidence in this case disclosed that Shoppers Drug Mart is the licensor of approximately 1200 independently owned and operated stores whose operators are subject to the terms of a franchise agreement. Among other things, the franchise agreement prohibits the licensees from selling products above a maximum price and also requires the licensees to purchase products designated by Shoppers.

Daigle Statement, para. 5

Shoppers Associate Agreement, Exhibit R-025, Articles 6.01(b) and (j)

68. Mr. Daigle of Shoppers agreed on cross-examination that the terms of the license agreement, including the requirement to purchase products designated by Shoppers imposed higher costs on the licensees (than, for example, they would incur if they purchased non-compliant cut-rate products) and that such requirements necessarily would be reflected in the licensees' selling prices, as they would be expected to set such prices above their costs. Mr. Daigle agreed that all of these requirements were reasonable to ensure that Shoppers customers enjoyed a consistent experience when they shop at different Shoppers stores. On re-examination, Mr. Daigle and Commissioner's counsel had the following exchange in respect of the terms of the franchise agreement:

> MR. THOMSON: From the perspective of Shoppers, why would that kind of provision be in the agreement?
>
> MR. DAIGLE: Well, it goes back to things we talked about earlier, how Shoppers Drug Mart wants their customers to have a good experience when they enter our stores. And this paragraph is really, let me use the term, anti-gouging provision.
>
> So if I use, for example, the Olympics in Vancouver a couple of years ago, obviously, in a situation like that, an associate could be motivated to increase his prices because there is so much demand for his price.

> The last thing we would want, though, as a company is somebody walking into a Shoppers Drug Mart and buying something they forgot before going to the Olympics, a simple thing like toothpaste, instead of paying a dollar, because there are so many people and there's so much demand, our associate charges five dollars.
>
> So that is why we have that there, to prevent our associates from charging what we deem to be over and above an acceptable price.
>
> Daigle Evidence, Hearing Transcript, p. 476, line 18 to p. 477, line 15

69. It is difficult to imagine a more succinct and accurate summary of the business rationale underlying the Visa Rules. Like Shoppers, Visa wants to ensure that its cardholders have a good experience every time they use their Visa credit card and that they are not subject to "price gouging". Like Shoppers' franchise rules, the Visa Rules are not unfair or unreasonable "merchant restraints"; they are entirely justifiable commercially common business terms, legitimately designed to protect and promote Visa's goodwill and further the interests of Visa cardholders, Issuers and merchants.

### (l) Premium cards

70. In 2008, Visa introduced its Infinite credit card, Visa's first premium product in Canada, to compete with American Express, which had been the leader in the high-spend segment in Canada. The Commissioner's witnesses maintain that the introduction of Visa's Infinite cards resulted in a significant increase in interchange fees. The evidence is to the contrary. The interchange rates associated with Visa's Infinite cards is just 20 basis points higher than the rates associated with Visa's standard credit cards. Because Visa's Infinite volume represents only about [redacted] of Visa's overall volume, the impact of Infinite cards on Visa's average effective interchange rates is substantially less than 20 basis points. Moreover, at around the same time as it introduced its Infinite cards, Visa also lowered the interchange rates in respect of a number of

its rate categories (for example, gas, grocery, emerging segments). Mr. Weiner's uncontradicted evidence is that over the last 5 years, that is, from the period before the introduction of Infinite cards to the present, Visa's effective average interchange rates have gone up just 5 basis points (approximately from 1.60 to 1.65), or 5 cents on a $100 transaction.

Weiner Statement, paras. 27-28, 31 and 36

Read-in Brief of the Commissioner of Competition (Visa), p. 52 (q. 1761 from the Examination for Discovery of Michael Bradley on December 7, 2011)

71. Mr. Weiner's uncontradicted evidence is also that Canadian merchants benefit from the acceptance of Visa Infinite cards. Visa Infinite cards are generally the lowest cost premium cards in Canada – less costly to merchants than MasterCard and American Express premium products. As such, Visa Infinite cards deliver the highest spending customers to merchants at the lowest cost (as compared with other premium card products in Canada). If merchants were to choose not to accept Visa Infinite cards, they would risk losing the business of the highest spending customers to competing merchants who accept them; if customers elect to use American Express premium cards (which would be unaffected by any order issued by this Tribunal), the cost to the merchant is likely to be higher (and potentially significantly so) than if the merchant accepted Visa Infinite cards.

Weiner Statement, paras. 35-37

[redacted]

Shirley Evidence, Hearing Transcript, p. 1637, lines 2-6

Broughton Evidence, Hearing Transcript, p. 363, line 20 to p. 364, line 4

[redacted]

Daigle Evidence, Hearing Transcript, p. 439, lines 8-13

72. That Visa Infinite cardholders, in fact, spend more than non-Infinite cardholders is confirmed by the uncontradicted evidence appended to Mr. Weiner's witness statement and by the expert testimony of Peter Dunn. Evidence from several of the merchants who testified in this case also confirms that premium cardholders spend more than non-premium cardholders.

> Weiner Statement, para. 37 and Exhibits "H", "I" and "J"
>
> Expert Report of Peter T. Dunn, dated April 10, 2012 ("Dunn Report"), paras. 3(c), 26-30 and 65(c) and Exhibit "E"
>
> [redacted]
>
> McCormack Evidence, Hearing Transcript, p. 676, lines 10-15
>
> Shirley Evidence, Hearing Transcript, p. 1661, line 9 to p. 1162, line 23

73. There was also independent confirmation from Shoppers Drug Mart that premium cardholders spend more. Shoppers offers its customers the Optimum loyalty card program that gives customers who present the card reward points that can be converted to discounts on "front store" merchandise at Shoppers' locations. Mr. Daigle agreed that the Optimum card operates on the same principle as a premium credit card: the availability of rewards gives cardholders an incentive to use the card more. In its 2010 Annual Report, Shoppers' stated:

> This is very encouraging for continued sales growth, as Shoppers Optimum® cardholders frequent our stores more often and have an average basket size or spend which is 63% greater than non-cardholders.
>
> Daigle Statement, para. 29 and Exhibit "A" at p. 3 (PDF p. 20)

74. Although Mr. Daigle disagreed that premium credit cards, like the Optimum card, would lead cardholders to spend more, his explanation cast no doubt on the principle demonstrated by Shoppers' own experience with the Optimum card and the application of that principle to premium credit cards. Mr. Daigle's purported explanation of the difference between premium

cards and Shoppers' Optimum card in terms of the propensity of cardholders to spend more, focused solely on the costs to Shoppers of accepting premium credit cards, but said nothing about why premium credit cards would not provide the same incentive to cardholders to spend more that has been Shoppers' obvious experience in respect of its Optimum card.

Daigle Evidence, Hearing Transcript, p. 422, lines 3-8

75. At least one merchant, Tim Broughton of C'Est What?, Inc., suggested that issuing banks "target" the customers "who are continually spending lots of money" to receive premium cards, suggesting that this somehow runs counter to the point that premium cardholders are higher spenders than non-premium cardholders. To the contrary: that is the point. Premium cards are a market reality; it is not a market reality that Visa created, but rather one to which it responded, not only by introducing a competitive product, but by introducing the lowest cost product in the premium segment in Canada.

Broughton Evidence, Hearing Transcript, p. 71, lines 8-11

76. Several of the merchants who testified in this proceeding said that if the No Surcharge Rule was abrogated that they would consider selectively surcharging premium cards. The fact is that there is no evidence whatsoever that in any jurisdiction anywhere in the world, including Australia, merchants who have the right to surcharge actually selectively surcharge premium cards. In fact, in Australia, one of the concerns that Visa faces is that merchants surcharge on a blended basis – surcharging both American Express cards and Visa cards even though the effective interchange rate on American Express cards is more than 3.5 times (1.86% for Amex versus 0.50% for Visa) that of Visa in Australia. Elizabeth Buse, the Visa Executive with

responsibility for Australia, explained why merchants do not selectively surcharge premium cards:

> So merchants sometimes will surcharge American Express versus Visa, but among Visa cards, I don't know of an instance where the merchant would surcharge only premium or super premium cards.
>
> I mean, you have to think about it from the merchants' perspective. That is a really hard thing to do. So I'm buying something at the merchant. I pull out my card. It happens to be a Visa Infinite card, and the clerk says, Oh, you know what? If you're going to use that, that's going to cost you 1.5 percent.
>
> Then the clerk and the [customer] get into a discussion about, you know, Do you have another form of payment, or the person is asking, Why am I paying that fee? The person standing behind me in line is saying, What's going to happen when I get to the point of sale?
>
> I mean, the end of the day, merchants are not in the business of accepting payments. They're in the business of selling things, and they're not going to do something that is going to disrupt the process of getting consumers to purchase goods.
>
> Buse Evidence, Hearing Transcript, p. 2114, line 19 to p. 2115, line 22
>
> See also:
>
> [redacted]
>
> Li Evidence, Hearing Transcript, p. 1526, line 6 to p. 1527, line 7
>
> [redacted]

77. Based on the evidence provided by the merchants in this case, it is entirely speculative whether merchants would actually selectively surcharge only premium cards. Moreover, the merchant witnesses who addressed this topic said that in order to selectively surcharge premium cards, Visa would have to implement product identification technology that would enable merchants to determine the interchange rate in respect of each particular transaction, at the point-

of-sale. Apart from the fact that this Tribunal has no jurisdiction to impose any such requirement, the evidence failed to establish whether such technology is even possible, or if it were, whether, as a practical matter, merchants would actually use it.

[redacted]

Jewer Evidence, Hearing Transcript, p. 1760, line 24 to p. 1761, line 16; [redacted]

[redacted]

Li Statement, paras. 40 and 41

Daigle Statement, paras. 44-47

De Armas Statement, paras. 66-68

Jewer Statement, paras. 61-64

Houle Statement, paras. 65-68

Shirley Statement, paras. 45-48

Symons Statement, paras. 74-76

Broughton Statement, para. 22

78. With respect to the jurisdiction of the Tribunal to make such an order, subsection 76(2) is clear. The only remedial orders available to the Tribunal are orders prohibiting continuation of the conduct that constitutes price maintenance or requiring that another person be accepted as a customer within a specified time on usual trade terms. The remedial powers available to the Tribunal under section 76 are in contrast to the broader remedial powers available to the Tribunal under other provisions within Part VIII. For example, under section 77, dealing with exclusive dealing, market restriction and tied selling, the Tribunal may issue an order prohibiting the conduct, "and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market." Similarly

broad powers are provided in section 79(2) (Abuse of Dominance). The Tribunal has no such authority to make such orders under section 76.

*Competition Act*, R.S.C. 1985, c. C-34, sections 76, 77 and 79

79. On the question of whether such technology is even possible, Brian Wiener testified that while such technology could be implemented that would identify whether or not a Visa card is a premium or standard card, because the interchange rate is only determined after the transaction is completed, it is not technologically possible to have the interchange rate determined at the point-of-sale.

Weiner Evidence, Hearing Transcript, p. 2403, line 4 to p. 2407, line 16; p. 2426, line 18 to p. 2428, line 19

80. Finally, for the reasons outlined by Ms. Buse, and having regard to the actual merchant practices in jurisdictions such as Australia, there is no reason to believe that even if such technology were possible, that merchants would avail themselves of it. [redacted] Merchants do not want their customers to be delayed or inconvenienced at the end of a transaction, which would be the inevitable result of the implementation of product notification technology, even if such technology existed.

Buse Statement, paras. 8 and 27 and Exhibit "L"

[redacted]

Broughton Evidence, Hearing Transcript, p. 342, line 16 to p. 343, line 10

**(m) Account level processing**

81. The Commissioner focuses heavily on account level processing ("ALP"), but fundamentally mischaracterizes ALP technology as having as its sole purpose the conversion of standard Visa credit cardholders to premium cards without notice. ALP, in fact, is a technological advancement that connects the cardholder with their unique card number, allowing for changes to be made to a cardholder's account without the need to issue a new card with a new number. For example, today, if a cardholder applied to its issuer and was given an Infinite card, the new card would have a new account number or in the cardholder would have to notify any vendors who had a cardholder's previous account number on record of the new number. With account level processing, this would be unnecessary because the same number follows the cardholder regardless of the type of card the cardholder is issued.

Sheedy Evidence, Hearing Transcript, p. 710, line 2 to p. 711, line 14

82. It is true, that as a technological matter, ALP could be used to upgrade standard cardholder to a premium card. However, the concern the Commissioner has expressed that ALP can be used to unknowingly convert Visa standard cardholders to premium cards is misplaced. First, the ALP system is not operational for Visa cards anywhere in Canada and never has been; not a single issuer in Canada has adopted ALP and the technology cannot be implemented unless issuers adopt it. [redacted] Second, there is not a single Visa cardholder in Canada who has had their Visa card status upgraded from standard to premium via ALP, without notice or otherwise. The technology has never been used in Canada. Third, the Code of Conduct expressly prohibits issuers from converting standard cardholders to premium cards without notice. Even if ALP was operational

in Canada, which it is not, issuers could not use that technology to upgrade standard Visa cardholders to premium cards without the cardholder having applied for the upgraded card or consenting to its issuance. Paragraph 9 of the Code of Conduct expressly provides:

> 9. Payment card network rules will require that premium credit and debit cards may only be given to consumers who apply for or consent to such cards. In addition, premium payment cards shall only be given to a well-defined class of cardholders...
>
> Code of Conduct For the Credit and Debit Card Industry in Canada, Weiner Statement, Exhibit "R"

[redacted]

83. ALP, and its possible implications for Visa premium cards, are irrelevant to any matter before this Tribunal. ALP technology is not operational in Canada and there are no current plans to make it operational in Canada. Moreover, the concern the Commissioner has expressed is fully addressed by the Code of Conduct; should any issues arise in the event that ALP was introduced in Canada, the Department of Finance would presumably deal with them. ALP does not raise a competition law concern and certainly not a price maintenance concern.

## IV. SECTION 76 OF THE COMPETITION ACT

### (a) Section overview

84. This section describes the statutory and judicial history of the price maintenance provision in Canada and explains why the Commissioner's allegations do not and cannot constitute a contravention of section 76 as a matter of law. It explains how, fundamentally, vertical price maintenance is and always has been concerned with actions taken by upstream suppliers to dictate or constrain price reductions by direct or indirect downstream purchasers, typically combined with retaliatory or punitive measures to enforce compliance, none of the elements of which are present in this case. The section also explains the "resale" requirement,

which, again, is not met on the facts of this case. Finally, the section addresses the lengths to which the Commissioner has gone to contort the language of section 76 to fit the facts alleged here, and why as a matter of law and policy, those efforts should be soundly rejected.

**(b) The text of section 76**

85. Subsection 76(1) of the Act, introduced by amendments in 2009, sets out the reviewable practice of price maintenance. Subsection 76(1) reads as follows:

| Price maintenance | Maintien des prix |
|---|---|
| **76.** (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that | **76.** (1) Sur demande du commissaire ou de toute personne à qui il a accordé la permission de présenter une demande en vertu de l'article 103.1, le Tribunal peut rendre l'ordonnance visée au paragraphe (2) s'il conclut, à la fois : |
| (a) a person referred to in subsection (3) directly or indirectly | a) que la personne visée au paragraphe (3), directement ou indirectement : |
| (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 | (i) soit, par entente, menace, promesse ou quelque autre moyen semblable, a fait monter ou empêché qu'on ne réduise le prix auquel son client ou toute personne qui le reçoit pour le revendre fournit ou offre de fournir un produit ou fait de la publicité au sujet d'un produit au Canada, |
| (ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the | (ii) soit a refusé de fournir un produit à une personne ou catégorie de personnes exploitant une entreprise au Canada, ou a pris quelque autre mesure |

low pricing policy of that other person or class of persons; and

discriminatoire à son endroit, en raison de son régime de bas prix;

(b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.

b) que le comportement a eu, a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché.

[emphasis added].

*Competition Act*, R.S.C. 1985, c. C-34, section 76

86. Section 76 has two distinct elements, both of which must be satisfied for the provision to be engaged, directly or indirectly: the first (in paragraph 76(1)(*a*)) sets out actionable conduct that constitutes price maintenance and the second (in paragraph 76(1)(*b*)) sets out the requisite competitive effect threshold that must also be satisfied before the conduct can be prohibited by order of the Tribunal.

*Competition Act*, R.S.C. 1985, c. C-34, section 76

87. Subparagraph 76(1)(*a*)(i) requires that the Commissioner establish that a person has, directly or indirectly, engaged in conduct that constitutes price maintenance, i.e., that a person, by agreement, threat, promise or other like means, has influenced upward or discouraged the reduction of the price at which the person's customer or another person to whom the product comes for resale supplies, offers to supply or advertises a product within Canada. Paragraph 76(1)(*b*) requires that the Commissioner further establish that the demonstrated price maintenance, i.e., the conduct described in subparagraph 76(1)(*a*)(i), has had, is having or is likely to have an adverse effect on competition in a market.

*Competition Act*, R.S.C. 1985, c. C-34, section 76

88. The Commissioner contends that the 2009 amendments, which introduced section 76, somehow broadened the scope of the price maintenance provision. There is no basis whatsoever for any such conclusion based on the changes that were made to the previous provision (section 61) and the legislative and policy background that culminated in the amendments. Similarly, the Commissioner does not reference any basis for her position (apart from the expert report of Professor Winter, whose principal opinions in this regard are contradicted by his own writings). The true purpose and effect of the 2009 amendments, as further explained herein, significantly narrowed the scope of the price maintenance provision. The true purpose and effect of those amendments can be best understood in the context of the statutory history of price maintenance law in Canada and the policy considerations which began more than a decade ago that ultimately led to the introduction of section 76 in its current form.

> See also: Elmer Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974). at 67, which states: "There is only one approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

**(c) Legislative history of price maintenance in Canada**

89. It is clear that the Canadian legislative history in respect of price maintenance is relevant and helpful in understanding the purpose and scope of the price maintenance provision in its current form. The Supreme Court of Canada has explicitly recognized the importance of legislative history to statutory construction, noting that "[l]egislative history may be used to interpret a statute because prior enactments may throw some light on the intention of the legislature in repealing, amending, replacing or adding to it."

> *Gravel v. City of St-Léonard,* [1978] 1 S.C.R. 660 at 667

See also *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919 at paragraph 45, and *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867 at paragraph 33.

(i) *The 1951 amendments*

90. The offence of price maintenance was introduced in Canada in 1951 by Bill 36, which amended the *Combines Investigation Act* ("CIA"), the predecessor to the *Competition Act*. Paragraph 34(2)(*b*) of the amended CIA stated:

> (2) 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)
>
> *Combines Investigation Act*, R.S.C. 1952, c. 314, para. 34(2)(b)

91. This section was included in Bill 36 pursuant to the findings of the Committee to Study Combines Legislation (the "MacQuarrie Committee"). The MacQuarrie Committee defined resale price maintenance as "the practice designed to ensure that a particular article shall not be resold by the retailers, wholesalers or other distributers at less than the price prescribed by the supplier ..." The MacQuarrie Committee concluded that "it should be made an offense for a manufacturer or other supplier to recommend or prescribe minimum resale prices for his products; and to refuse to sell, to withdraw a franchise or to take any other form of action as a means of enforcing minimum resale prices." The Explanatory Note published beside the resale price maintenance provision in the official text of Bill 36 stated: "[t]his is a new section, the purpose of which is to forbid persons engaged in manufacturing, supplying or selling articles or commodities from fixing specific or minimum resale prices for such articles or commodities."

> Canada, Committee to Study Combines Legislation, *Report to the Minister of Justice and Interim Report on Resale Price Maintenance* (Ottawa: Queen's Printer, 1952) at 57 and 71 (Chair: J.H. MacQuarrie).
>
> Combines Investigation Act, SC 1951, c 30, section 1
>
> Bill C-36, *An Act to Amend the Combines Investigation Act*, 5th Sess, 21st Parl, 1951, explanatory note (1) (assented to 29 December 1951) S.C. 1951, c. 30, s. 1

(ii) *The 1976 amendments*

92. As indicated above, the original provision included the language still used today, "directly or indirectly, by agreement, threat, promise", but the original provision was very broad because it then added the words, "any other means whatsoever". On January 1, 1976, the language was revised and the formulation that still exists, or "any like means," was added. This significantly narrowed the provision, making it clear that it is not "any means" that influences upward or discourages its reduction of price that constitutes price maintenance, only those means specified in the provision, or those like them. This is the formulation that exists today. This issue was specifically recently addressed by Strathy J. in the *Fairview Donut* case:

> The use of the words "like means", indicates that the influencing upward of prices per se is not a contravention of the section: *R. v. Philips Electronics Ltd.*, 116 D.L.R. (3d) 298 (Ont. C.A.) at page 305:
>
> "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)."
>
> *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252 (*"Fairview Donut"*) at para. 599

93. The Commissioner suggests that there is no question that an element of section 76 is satisfied because the Visa Rules are unquestionably implemented "by agreement". But that misses the point. The requirement is not that there exist "an agreement" or that an agreement be

implemented. Rather, the phrase "by agreement, threat, promise or any like means" informs what is meant by "influence upward" because it focuses on the *manner* by which such influencing takes place. This was made clear in *Fairview Donut*: 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. The question is whether the influencing upward of the price charged by the downstream seller occurs by means of an agreement, threat, promise or like measure. In this case, there is no agreement that, directly or indirectly, constrains the pricing decision of the downstream seller (such as an agreement between company X and distributor Y to sell at a particular price); there is no threat that does so (such as company X threatening to curtail next year's supplies unless company Y sells at a particular price); there is no promise that does so (such as company X promising to provide bonus payments to company Y for selling at particular price); and there are no like means that do so. Hence, the Commissioner's suggestion that there is no question that the "by agreement" requirement of section 76 is satisfied here is incorrect.

*Fairview Donut, supra* at para. 600

94. In 1976, Parliament passed Bill C-2, which made substantial amendments to the *Combines Investigation Act*, including the price maintenance provision. Pursuant to the amendments, the word "resale" was removed from the principal definition of the offense and the definition of "product" was expanded to include services, including express reference to credit cards and intellectual property. Price maintenance continued to constitute a *per se* criminal offence. As of 1976, the relevant 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, trademark, 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,...
>
> *Combines Investigation Act*, SC 1974-1975-1976, c. 76, s 18.

95. The Commissioner places particular reliance in this case on the inclusion of the reference to credit cards in the price maintenance provision, which was part of the 1976 amendments, but continues in the current provision. The first point to note is that the reference to credit cards was added at the same time as the resale requirement was removed, so the issues with respect to "resale" which, it is submitted, are important in this case, would have had no bearing on the inclusion of the reference to credit cards in the amended provision in 1976. Second, Parliament's addition of a reference to credit cards in the price maintenance provision in 1976 is entirely consistent with the legislative history referenced above, which confirms the focus of Canada's price maintenance provision as a prohibition against restraints on the ability of downstream sellers to engage in discounting.

96. In a 1975 meeting of the Standing Committee on Finance, Trade and Economic Affairs, the Minister of Consumer and Corporate Affairs stated that the inclusion of the credit card clause was intended to "forbid this practice that a company, in the credit card business, will not be allowed to force by contracts – the retailers to refuse to give discounts to those who are paying cash. I think that is the main concern about the credit card operation." The Minister further explained the amendment as follows:

> What we are doing is that we are adding the questions of credit cards in these series of activities where there should be no price maintenance ... Therefore, by putting the credit card apparatus [in the price maintenance provision], we allow the retailers who honour credit cards the possibility of giving a cash discount to a customer if he so desires to do this.
>
> House of Commons, Standing Committee on Finance, Trade and Economic Affairs, Minutes and Proceedings of Evidence, 13th Parl., 1st Sess., No. 55 (3 June 1975) at 43 and 56 (Hon. André Ouellet)

97. Additionally, background papers released by the Competition Bureau in connection with the 1976 amendments confirm that the Minister's remarks are consistent with the Bureau's expectation that the inclusion of credit card service providers in the price maintenance provision would "effectively curtail the practices engaged in by a firm providing credit card services for retailers of preventing a retailer from giving a discount for cash." As noted, the Visa Rules do not restrict merchants from offering their customers discounts for paying with different types of Visa cards, other brands of credit cards, or other forms of payment.

> Background Papers, Stage 1 Competition Policy, Bureau of Competition Policy, Consumer and Corporate Affairs Canada, April 1976 ("Background Papers") at 55

98. In short, Parliament's intention (as confirmed by the Competition Bureau's understanding at the time) in including credit cards in the price maintenance provision was crystal clear. It was intended to ensure that merchants who accept credit cards would have the ability to discount for cash. The legislative history shows that the Visa Rules fully address the legislative concern that underlay the inclusion of the reference to credit cards in Canada's price maintenance provision, and for this reason as well, the Visa Rules should be regarded as legally compliant.

(iii) *The 2009 amendments*

99. The process leading up to the most recent amendments to the price maintenance provision began more than a decade prior to the entry into force of section 76 on March 12,

2009. In the Spring of 1999, the House of Commons Standing Committee on Industry reviewed Bill C-235 (which later became Bill C-201) and passed a resolution "that at its earliest convenience the Industry Committee review the anti-competitive pricing practices [including price maintenance] within the Competition Act and any related enforcement guidelines and operations of the Competition Bureau." In response, the Bureau commissioned Professor J. Anthony VanDuzer to examine and report on the pricing provisions of the Act. On November 25, 1999, the Bureau tabled Professor VanDuzer's report, entitled "Anticompetitive Pricing Practices and the Competition Act" before the Committee. With respect to what was then section 61, the VanDuzer Report recommended *inter alia* that:

(a) 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.

(b) vertical price maintenance should not be a criminal offence but should be subject to civil review under the abuse of dominance provision, section 79, and guidelines regarding the application of section 79 to price maintenance cases, including an analytical framework for the assessment of market power and competitive effect under section 79, should be developed.

(c) the criminal price maintenance provision, section 61, should be amended (in the next round) to limit it to horizontal conduct, and guidelines to address the relationship between the current criminal provision, section 61, as it applies to

horizontal price maintenance, and section 45, dealing with conspiracies and agreements to lessen competition, should be developed.

*Combines Investigation Act*, R.S.C. 1985, c. C-34, s. 61.

House of Commons, Minutes of the Standing Committee on Industry, 36th Parl., 1st Sess., No. 112 (20 April 1999).

J. Anthony VanDuzer and Gilles Paquet, *Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice* (Ottawa: Competition Bureau, 25 November 1999) ["VanDuzer Report"] at 83-84.

100. In 2002, the House of Commons Standing Committee on Industry, Science and Technology released a report entitled "A Plan to Modernize Canada's Competition Regime" (the "IST Report"). The IST Report made 29 recommendations regarding the Act and the CTA, including the following:

> That the Government of Canada repeal the price maintenance provision (section 61) of the Competition Act. In order to distinguish between those practices that are anticompetitive and those that are competitively benign or pro-competitive, that the Government of Canada amend the Competition Act so that: (1) price maintenance practices among competitors (i.e., horizontal price maintenance), whether manufacturers or distributors, be added to the conspiracy provision (section 45); and (2) price maintenance agreements between a manufacturer and its distributors (i.e., vertical price maintenance) be reviewed under the abuse of dominance position provision (section 79).
>
> House of Commons, Standing Committee on Industry, Science and Technology, A Plan to Modernize Canada's Competition Regime (April 2002) at 76 (Chair: Walt Lastewka).

101. In 2008, Industry Canada's Competition Policy Review Panel ("CPRP") released its final report entitled, "Compete to Win", which again recommended that price maintenance be decriminalized. The CPRP report stated:

> The resale price maintenance provisions of the *Competition Act*, broadly speaking, address pricing issues that can arise between suppliers and resellers of a product, but do so as a criminal offence under the legislation.

> This is an area of Canadian competition law that is more restrictive than comparable US law. Other provisions of the *Competition Act*, such as those relating to refusal to deal and exclusive dealing, address competition issues between suppliers and resellers as civil matters. The Panel believes that resale price maintenance should also be treated as a civil matter.
>
> Competition Policy Review Panel, Compete to Win: Final Report–June 2008 (Ottawa: Public Works and Government Services Canada, 2008) ("CPRP Report") at 58

102. As indicated above, the principal thrust of the CPRP's proposals with respect to the price maintenance provision was that price maintenance should be confined to vertical conduct only and the practice should be decriminalized. The CPRP's approach is also significant insofar as it confirms the point already made that, in its vertical form, price maintenance in Canada, from a legislative, judicial and competition policy perspective has consistently and continually been focused on "resale price maintenance."

103. The CPRP recommended *inter alia* that Parliament "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" (emphasis added). The CPRP's recommendation is also of critical significance insofar as it demonstrates beyond any question that the addition of a competitive effects test to the resale price maintenance provision was clearly intended as a screen to *limit* the scope of the provision, not to broaden it. The CPRP's intent was clear: there was to be a new civil provision that would only prohibit resale price maintenance where such could be shown to have an anticompetitive effect, but not otherwise. This is precisely the form of provision that Parliament introduced less than a year later.

> CPRP Report, *supra* at p. 61

104. In 2009, Parliament amended the Act's price maintenance provision in four ways, considerably narrowing the provision in the process:

(a) Parliament repealed section 61 and replaced it with section 76, thereby moving price maintenance from the criminal to the civil provisions of the Act;

(b) In keeping with the creation of a horizontal agreement regime established by the same amendments (sections 45 and 90.1), Parliament expressly stated that a "resale" is required under section 76 thereby limiting section 76 to vertical conduct only;

(c) Parliament added a distinct competitive effects element in paragraph 76(1)(*b*); and,

(d) Parliament provided for limited private right of access to the Tribunal for perceived contraventions of section 76.

105. As indicated, the Commissioner argues that the 2009 amendments reflected Parliament's intention to broaden the scope of section 79, but provides no support for that proposition. This is because there is no support. The legislative and policy record is clear as described herein. The existing price maintenance provision was regarded as overbroad in at least two important respects: it assigned *per se* criminal liability to conduct that was clearly not unambiguously harmful to competition (and indeed could be pro-competitive) and it applied to both vertical and horizontal conduct. The 2009 amendment squarely and exclusively addressed these two concerns by de-criminalizing price maintenance, limiting the conduct to vertical conduct by re-

introducing the resale requirement and adding a competitive effects threshold to ensure that price maintenance could only be prohibited where the conduct adversely affects competition.

> Church Expert Report, at para. 20 and Appendix "D"
>
> Winter Evidence, Hearing Transcript, p. 1971, line 3 to p. 1972, line 17
>
> Ralph A. Winter, "Presidential Address: Antitrust restrictions on single-firm strategies", Canadian Journal of Economics, Vol. 42, No. 4, November 2009, Exhibit R-113 ("Winter Presidential Address Article"), p. 1218-1219
>
> Elzinga Expert Report, para. 88

106. There is nothing in the record and nothing the Commissioner can point to that even remotely suggests a legislative intention to turn section 76 into an open-ended generalized vertical restraint provision. Yet that is precisely what Professor Winter now asserts is the effect of section 76 and is the inevitable result of the interpretation of section 76 that the Commissioner urges this Tribunal to adopt. Strikingly, in the 2009 article already referenced, Professor Winter expressed concern regarding the very position the Commissioner espouses in this matter, stating that there is "reason to be optimistic" that the 2009 amendments to the resale price maintenance provision will relax the strict application of resale price maintenance in Canada making it less, not more, likely that conduct will come within its reach:

> One might suspect that the condition of 'adverse effect on competition' would be satisfied in the law simply if RPM is shown to raise prices or inhibit intrabrand competition, in which case the law against RPM would have been relaxed very little. But there is reason to be optimistic that this is not the case. The condition that the practice influences price upwards and the condition of an adverse effect on competition are stated as separate necessary conditions in the new sections 76 (1) (a) (i) and 76 (1) (b), respectively. The principles of statutory interpretation require that the distinct conditions have separate meanings. An 'adverse effect on competition' must therefore go beyond influencing upwards the price of a single product.
>
> Winter Presidential Address Article, *supra*, footnote 19, p. 1218-1219

Winter Evidence, Hearing Transcript, p. 1939, line 21 to p. 1940, line 10; p. 1971, lines 13-21; p. 1980, line 18 to p. 1981, line 7; p. 1995, line 16 to p. 1997, line 2

Competition Bureau of Canada, A Guide to Amendments to the *Competition Act*, April 22, 2009, p. 2

### (d) Judicial history of price maintenance in Canada

107. Price maintenance law in Canada has always had, and maintains as its core focus, a concern about suppliers restricting a reseller's ability to price independently, notably to discount. Stated most simply, vertical price maintenance is and always has been concerned with upstream suppliers mandating a vertically imposed price floor on downstream sellers. The Commissioner maintains that Section 76 does not require as a constituent element the imposition of a vertical price floor, but that is precisely how the Commissioner's expert in this matter, Professor Winter, defines vertical price maintenance (which, incidentally, Professor Winter had no reservations about describing exclusively as "resale price maintenance", or RPM).

Winter Presidential Address Article, *supra*, p. 1211 (Table 1)

See also:

Michael Trebilcock et al, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press Incorporated, 2002) at 373.

J. Anthony VanDuzer, "Assessing the Canadian Law and Practice on Predatory Pricing, Price Discrimination and Price Maintenance" (2000-01) 32 Ottawa L. Rev. 179 at 191.

Church Expert Report, para. 19

108. The jurisprudence in Canada is consistent with the scholarly treatment of price maintenance. While there are no reported cases interpreting section 76, there are many cases interpreting its prior incarnations. All of the reported cases under the former sections 61 and 38 concerning vertical price maintenance have considered resale price maintenance on the basis of an upstream firm controlling or attempting to control the price at which a downstream firm

chooses to resell its product or controlling the downstream price by refusing to supply a customer who engages in a low-pricing policy.

109. Examples of vertical price maintenance cases in Canada in the 60s, 70s and 80s, 90s and as recently as February of 2012 (in other words, both before and after the 1976 amendments) confirm that throughout its history in Canada, vertical price maintenance has always been approached by Canadian courts on the same basis: i.e., as a prohibition against an upstream supplier pressuring a downstream reseller to increase or maintain its prices. Excerpts from selected cases are set out below; attached as Appendix "A" is a detailed list of cases dating back to the 1950s , all of which follow the same pattern.

110. In *R. v. Campbell*, a 1964 decision, a manufacturer of surgical blades supplied a form of contract for use by suppliers, including a specified consumer list price which, if followed, would entitle the reseller to a rebate. The court in that case held:

> It is utterly incredible that suppliers having in their possession a contract obligating the hospital to pay specified current list prices, would supply its wants for less. Simple logic and common experience militate against any such supposition so strongly as to preclude discussion of the point. It is beyond question that the arrangement proven by the Crown has the effect of inducing the suppliers to resell Bard-Parker's surgical blades at a price not less than the minimum price specified by that company or established by agreement and to consumers whose purchases accounted for 60% of the volume of sales of that particular product.
>
> *R. v. Campbell* (1964), 1 O.R. 487, (Ont. C.A.) at p. 36

111. In *R. v. Kito Canada Ltd.*, a 1976 decision, a carpet sweeper manufacturer required that retailers resell its carpet sweepers at a price not less than a minimum price which it specified. The court held that:

> In my opinion, the mischief aimed at by section 38 of the Combines Investigation Act was the practice of large corporations, with monopolistic or near monopolistic powers, artificially keeping retail prices high by coercing independent retailers into fixing prices and by refusing to supply such independent retailers if they did not maintain the suggested list price of products. Before 1951, for instance, a retail gasoline station which undercut the suggested list price of gasoline was in danger of having its supply cut off as a punishment. I believe that Parliament wanted to protect the small retailer from undue pressure from large wholesalers, distributors and manufacturers. Parliament wanted to protect the weak against the strong, though it enacted words which catch the weak as well as the strong.
>
> *R. v. Kito Canada Ltd.*, (1976), 30 C.C.C. (2d) 531, (M.B.C.A.) at para. 22

112. In *R. v. Andico Manufacturing Ltd.*, a 1983 decision, a waterbed manufacturer cut off supply to a reseller that priced its product too low. The court there held:

> What is prohibited by the Act in the interests of the eventual consuming public, is improper and unlawful pressure and concern by the supplier with the price at which the dealer in a free enterprise society retails a product to the public.
>
> *R. v. Andico Manufacturing Ltd.* (1983), 4 C.P.R. (3d) 476, (M.B.Q.B.) at para. 13

113. In *R. v. Georges Lanthier et fils, Ltee.*, a 1986 decision, a wholesale bakery threatened to reduce the quantity of bread available to a retailer if the retailer resold the bread below the suggested price. The court held:

> The purpose of s. 38 is to proscribe a manufacturer from dictating the retail price of a consumer item so that the public loses the benefit of competition.
>
> *R. v. Georges Lanthier et fils, Ltee* (1986), 12 C.P.R. (3d) 282 (Ont. Dist. Ct.) at para. 4

114. In *R. v. Shell Canada Products Ltd.*, a 1990 decision, a producer of gasoline threatened a retail outlet to raise the price at which its gasoline was being resold. The court held:

> Although there was some disagreement as to the details, [a representative from the producer] agreed that he had made the telephone calls alleged and that in substance he had been counselling [the reseller] to restore its prices to that being charged by other retailers.
>
> *R. v. Shell Canada Products Ltd.* (1990), 29 C.P.R. (3d) 32 (Man. C.A.) at p. 6

115. Finally, and most recently (February 2012), in *Fairview Donut Inc. v. The TDL Group Corp.*, the Court concluded, on a summary judgment motion, that there was no basis for a price maintenance claim in the context of Tim Hortons' franchise agreements imposing certain restrictions on franchisees. Strathy J. held:

> 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.
>
> *Fairview Donut, supra* at para. 585

116. The clear intention of the law is reinforced by the companion provision (now included in subparagraph 76(1)(*a*)(ii), but included in earlier versions of the price maintenance provision as well), that specifically prohibits a supplier from refusing to deal with, or otherwise discriminating against, a discounter of the supplier's products.

117. Section 76 is not a generalized prohibition against conduct that results in prices being higher than they might otherwise be. Rather, it is a specific prohibition against an upstream supplier endeavouring to constrain, directly or indirectly, the ability of its downstream seller to engage in discounting by agreement, threat, promise or like means. There is no allegation in this case that Visa Canada has endeavoured in any way to constrain any party from selling any product at lower prices. Indeed, the No Surcharge Rule that is the subject of the Commissioner's

challenge expressly permits discounting. The Honour All Cards Rule imposes no restriction whatsoever on the prices that any party is permitted to charge for any product.

**(e) The "resale requirement"**

118. Although, as indicated, one of the principal changes introduced by the 2009 amendments to the price maintenance provision was the reinsertion of the word "resale," the Commissioner incongruously contends that the amended provision should somehow be read as not requiring a "resale." The Commissioner, however, is unable to point to any legislative or policy statement connected with the 2009 amendments that supports this position. Indeed, even the Commissioner's interpretation of the status of the "resale" requirement under the prior provision (section 61) does not withstand close scrutiny.

119. It has been suggested, for example, that as a result of the 1976 amendments, "... the word 'resale' disappeared from the Canadian competition law vocabulary..." This is an inaccurate interpretation of the effects of the 1976 amendments. It is the case that the removal of the word "resale" from the principal definition of the offense in 61(1)(a) appeared to extend the provision to include both vertical and horizontal conduct. Indeed, following the 1976 amendments the Competition Bureau took the position that horizontal price fixing could be pursued under section 61 (thereby avoiding the need to establish an undue lessening of competition as was then required under section 45).

> C. J. Michael Flavell, *Canadian Competition Law: A Business Guide* (Toronto: McGraw Hill Ryerson Limited, 1979) ("Flavell") at 288-289

120. However, the concept of "resale" did not disappear, and in fact was expressly retained by section 61. Notably, subsections (3) and (4) of section 61, which addressed suggested prices by an upstream supplier to a downstream seller, expressly included reference to "resale." In other

words, in addressing the vertical aspects of price maintenance, section 61 clearly retained the concept of "resale." While it is unclear whether as a strict matter of law a "resale" would have been required to establish vertical price maintenance under section 61, as indicated, the provision clearly retained the resale concept in relation to vertical conduct and, as indicated below, this has been reflected in the case law interpreting section 61.

> Flavell, *supra*
>
> 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).
>
> Background Papers, at 55.
>
> *R. v. Bayda and Associates Surveys Inc.* (1997), 207 A.R. 28, 5 Alta. L.R. (3d) 95 (Q.B.).
>
> *R. v. Labatt Brewing Company* (23 November 2005), Montreal 500-73-002495-055 (C.Q.).
>
> *R. v. Shell Canada Products Ltd.* (1990), 63 Man.R. (2d) 1, 45 B.L.R. 231 (C.A.).

121. The 1976 amendments ought more properly to be understood as recognizing two forms of price maintenance: vertical, or resale price maintenance, and horizontal price maintenance. In fact, this distinction was expressly recognized by Strathy J. in the *Fairview Donut* case, already referenced:

> Section 61(1) of the Competition Act was in effect between May 1, 1993 and March 11, 2009, until it was repealed by S.C. 2009, c. 2, s. 417. It prohibited both vertical price maintenance (between a manufacturer and a retailer, for example, referred to as "resale price maintenance") and horizontal price maintenance (where a party attempts to influence upward the price at which a competitor offers its product). (Emphasis added)
>
> *Fairview Donut, supra* at para. 581

122. The 2009 amendments removed the horizontal aspect of price maintenance that had been introduced in 1976 and restored the price maintenance provision to its historical state of a purely

vertical restraint, i.e., resale price maintenance. Hence the CPRP's characterization of the provision already referenced:

> The resale price maintenance provisions of the *Competition Act*, broadly speaking, address pricing issues that can arise between suppliers and resellers of a product, but do so as a criminal offence under the legislation.
>
> CPRP Report, *supra* at page 58

123. The Commissioner's contention that section 76(1)(a)(i) has "two halves" (the only purpose of which is to limit the application of the "resale" requirement to "one half" of the provision) is ludicrous. Section 76 includes various subsections as designated by Parliament. Had Parliament intended further bifurcation or division of section 76 to provide further guidance as to its interpretation or application, Parliament would have done so. Similarly, section 76(1)(a)(i) includes commas where Parliament chose to delineate specific clauses within the subsection; for example, the subsection provides, "... upward, or has discouraged the reduction of..." Presumably, had Parliament intended the interpretation pressed upon the Tribunal by the Commissioner, the subsection would have read, "... the price at which the person's customer, or any other person to whom the product comes for resale, ...". There are no such commas. More importantly still, the interpretation advanced by the Commissioner ignores – effectively reads out – the word "other" in the phrase "or any other person". "Other" is a clear reference to a person, other than the customer, to whom the product also comes for "resale." Who else does "other" refer to if not that customer? As such, the only appropriate interpretation of the subsection is that the word "resale" applies to both "customer or any other person."

124. The Commissioner correctly identifies the "ordinary reading" doctrine as the appropriate principle to be applied in interpreting section 76(1)(a)(i). In short, if an "ordinary" reading

would support the interpretation of the provision advanced by the Commissioner, the bifurcation that the Commissioner proposes would be unnecessary; stated differently, the need to break the provision into two halves to support the interpretation advanced by the Commissioner proves beyond doubt that the interpretation proposed does not result from an "ordinary" reading of the subsection.

> Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) ("*Sullivan on the Construction of Statutes*") at 23-26
>
> *Canadian Pacific Airlines Ltd. v. Canadian Air Line Pilots Ass.*, [1993] 3 S.C.R. 724, [1993] S.C.J. No. 114 ("*Canadian Pacific Airlines*") at para. 7

125. In addition, there is no principled basis for bifurcating the provision in this way, and the Commissioner has not pointed to one; it is entirely a result-oriented interpretation specific to the theory the Commissioner is advancing in this case. It is also absurd. If the supplier's customers are not resellers, how does "the product" get into the hands of "other persons"? The other persons would have to acquire "the product" either from "the customer," in which case the customer is a "reseller", or they would have to acquire the product directly from the supplier, in which case they are a "customer" and there are no "other persons." Longstanding principles of statutory interpretation establish that an interpretation of section 76(1)(a) that leads to an absurd result (as advanced by the Commissioner) is to be avoided.

> *Manrell v. Canada*, 2003 F.C.A. 128 ("*Manrell*") at paras. 59-60
>
> *Great Lakes United v. Canada (Minister of Environment)*, 2009 FC 408 ("*Great Lakes*") at para. 185.
>
> *Morgentaler v. The Queen*, [1975] S.C.J. No. 49, [1976] 1 S.C.R. 616 at 676
>
> *Re Rizzo and Rizzo Shoes Ltd.* [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27 at 27
>
> Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at 27

**(f) "Directly or indirectly"**

126. The Commissioner asserts that the inclusion of the words "directly or indirectly" in subparagraph 76(1)(*a*) creates an "effects-based" provision such that conduct that "has the effect" of influencing upward or discouraging the reduction of price can constitute price maintenance:

> [S]ection 76 of the Act is not confined to agreements that specify a particular price or set minimum prices. Rather, in pertinent part, section 76 applies to conduct that "directly or indirectly" by agreement or other prescribed means has "influenced upward, or has discouraged the reduction of" the price at which a supplier's customer supplies or offers to supply a product within Canada. As described in paragraphs 69 to 75 of the Commissioner's Application, the Merchant Restraints have the effect of influencing upward or discouraging the reduction of the significant Card Acceptance Fees charged by Acquirers for supplying Credit Card Network Services to merchants. [Emphasis added]
>
> Reply of the Commissioner of Competition, at paragraph 41.

127. The Commissioner's interpretation of paragraph 76(1)(a) is wrong. Where a supplier does not (by way of agreement, threat, promise or like means) directly or indirectly influence upward or discourage the reduction of the price at which a person offers to supply or advertises a product, there is no price maintenance for the purposes of section 76, even if the supplier's conduct would have the *effect* of raising prices. As more fully explained below, the "effect" that the Commissioner relies upon depends on a wholesale misapplication of section 76, predicated on the twin concepts that the provision mandates no order of causality and that the conduct specified in subparagraph 76(1)(a)(i) can be established by demonstrating an adverse effect on competition under paragraph 76(1)(b).

> *Competition Act*, R.S.C. 1985, c. C-34, section 76

128. The key point is the one already referenced, namely, that the focus of section 76 and its predecessors (and it should be noted that the language "directly or indirectly" is not new, but was

included in the original 1951 offense provision) is conduct engaged in by an upstream supplier to constrain, direct, or dictate the prices charged by a downstream customer. That the conduct can be engaged in "indirectly" does not alter the nature of the conduct that is (and has always been), the target of the vertical price maintenance provision. For price maintenance to occur "indirectly", it must still be shown that a party has, albeit indirectly, constrained, directed or dictated the prices charged by a downstream seller by agreement, threat, promise or like means.

*Combines Investigation Act*, R.S.C. 1952, C. 314, subsection 34(2)

129. The "indirect" language does not mean that any conduct that has the "effect", in the broadest sense, of influencing the downstream seller's price comes within the provision. The clearest example of "indirect" price maintenance would arise in a vertical supply chain involving a manufacturer, a wholesaler and a retailer. The inclusion of the "indirectly" language ensures, for example, that a manufacturer who required as a term of dealing with a wholesaler that the latter restrict the discounting behaviour of its downstream retailers, could not escape liability by arguing that it had no direct contractual relationship with the ultimate seller.

130. The Commissioner cites two authorities (*Sunoco* and *Moffats*), presumably in support of the proposition that the "indirect" language entails that conduct that has any "effect" on price falls within the price maintenance provision. Neither of these cases assists the Commissioner in this regard. The conduct at issue in the *Sunoco* case is best summarized in the sentencing decision as follows:

> The offense which I found the company to have committed was the agreement which Sunoco imposed on the Singh station that they would compete with what Sunoco said was there similar and like competition and the dealer was forbidden to initiate downward pricing and was not to

> compete with prices charged by the station across the road or with any other station other than those specified.
>
> The dealer was given a price allowance and this price allowance was frozen to discipline the dealer when the oral agreement was broken by Mr. Singh ordering prices to drop below that of the similar and like competition.
>
> To put it succinctly, the agreement, though oral, was that the dealer would receive an allowance so long as he priced as he as directed, but when he did not, the company disciplined him by freezing his allowance.

*R. v. Sunoco* (1986), 12 C.P.R. (3d) 79 (Ont. Dist. Ct.) ("*Sunoco*") at para. 1-3

*R. v. Moffats Limited*, [1957] O.R. 93, 118 C.C.C. 4 (Ont. C.A.)

131. In short, *Sunoco* incorporates all of the elements of vertical resale price maintenance already referenced: the supplier specifically directed the reseller not to drop its prices and disciplined the reseller when he disobeyed; the only arguably "indirect" aspect of the matter, related to the fact that the supplier did not specify a resale price but rather controlled the reseller's pricing by threatening to withhold an allowance unless the reseller priced in the manner specifically directed by the supplier. Not one of these elements is present in this case before the Tribunal, nor is there even any allegation that they are. Visa does not direct Acquirers how to price their products in any manner and certainly does not discipline them for failing to comply with mandated pricing policies. As such, notwithstanding the reference in the *Sunoco* trial decision to the words "effects" and "indirectly", that decision is of no assistance whatsoever to the Commissioner in this case. To the contrary, the decision squarely supports Visa's position that the conduct alleged here is not and cannot constitute price maintenance.

*R. v. Sunoco (1986)*, 11 C.P.R. (3d) 557, [1986] O.J. No. 3043 (QL) (Ont. Dist. Ct.)

132. The unique issue in *Moffats*, which is of little relevance in this case, was that the accused manufacturer had dictated to the reseller the minimum prices at which the latter could advertise the products in issue, at a time when the price maintenance provision did not expressly cover such conduct (which it has since the 1976 amendments). In the final analysis, both the trial and appellate courts concluded that the cooperative advertising arrangement in issue had the effect of inducing the reseller to sell at a price not less than the minimum price specified by the manufacturer. Although *Moffats* is bound by its unique facts, the case falls squarely within the principles already enunciated; the courts were satisfied that the manufacturer had specifically induced the reseller to adhere to minimum prices mandated by the manufacturer, and *Moffats* is therefore clearly distinguishable from the facts in this case, where Visa says nothing whatsoever to Acquirers regarding the prices at which they sell their services. Again, there is nothing in *Moffats* to suggest that conduct which in some generalized way has the "effect" of influencing the pricing decisions of a downstream party constitutes price maintenance and, as such, the case is of no assistance to the theory advanced by the Commissioner.

*Moffats*, *supra* at paras. 23, 32-33

**(g) The Tribunal must find that the requisite conduct "has" influenced upward or discouraged the reduction of price**

133. That section 76 is not an "effects-based" provision, in the sense that it captures conduct that has the "effect" of influencing upward or discouraging the reduction of a price, is clear from the language of the section itself. Particular note is to be made of the provisions of section 76 that permit an upstream supplier to suggest a resale price to a downstream seller, provided that it is clear that the downstream reseller is free to sell for less. Obviously, a suggested resale price may very well have the "effect" of influencing upward or discouraging the reduction of the price

at which the reseller sells the product – indeed, that almost certainly is the point. The concern of section 76 is that downstream sellers ultimately have the freedom to set their own prices, notwithstanding the ability of upstream suppliers to suggest resale prices to their direct or indirect customers. This is entirely consistent with the case law referenced above and further supports a conclusion that the conduct alleged in this case cannot be price maintenance: simply stated, under the Visa Rules, Acquirers are free to set the prices at which they sell their services to their customers at whatever level they choose.

> *Fairview Donut, supra* at para. 583
>
> *R. v. Must de Cartier Canada, Inc.* [1989] O.J. No. 1168 (Ont. Dist. Ct.), p. 4 and 12

134. Moreover, had Parliament intended subparagraph 76(1)(a)(i) to reach agreements, threats, promises or any like means that *had the effect of* influencing upward or discouraging the reduction of a price, it would have said so. Parliament said no such thing. Significantly, what Parliament did say is that the Tribunal must find that the specified conduct *has* influenced upward or *has* discouraged the reduction of price. The word "has" is a new addition to section 76; that term was not included in section 61. Significantly, section 61 included "attempts" to influence upward or discourage the production of price as a means of committing the offense; the word "attempt" was removed from section 76. It is not sufficient under section 76 for a supplier to "attempt" to influence upward or discourage the reduction of the price at which a downstream purchaser sells a product, the Tribunal must find that the conduct *has* influenced upward or discouraged the reduction of the price charged. In other words, Parliament turned its mind to this issue and determined, presumably as a another means of *narrowing* the reach of section 76, that the Tribunal must be satisfied that the conduct has actually occurred before considering whether

the conduct has had, is having or is likely to have an adverse effect on competition and may therefore warrant a remedial order. Speculative effects are insufficient – the Tribunal must be satisfied on the evidence that the conduct alleged *has* influenced upward or *has* discouraged the reduction of the requisite price. As discussed further herein, the evidence adduced by the Commissioner in this case comes nowhere close to meeting this standard.

> Although ordinary speakers or writers require much cooperative guesswork from their audience, a legislature is an idealized speaker. Unlike the rest of us, legislatures say what they mean and mean what the say. They do not make mistakes. In *Dillon v Catelli Food Products Ltd.*, Ridell J.A. wrote:
>
> > The modern principle is to credit the legislators with knowing what they intend to enact into law and with a knowledge of the English language which enabled them to express their meaning.
>
> In *Spillers Ltd. v Cardiff (Borough) Assessment Committee*, Lord Hewart said:
>
> > It ought to be the rule, and we are glad to think that it is the rule that words are used in an Act of Parliament correctly and exactly, and not loosely and inexactly. Upon those who assert that at rule has been broken the burden of establishing their proposition lies heavily.
>
> *Sullivan on the Construction of Statutes, supra*, p. 206-207

**(h) Maximum resale price maintenance raises no issue in Canada**

135. Canadian law is clear that "maximum resale price maintenance" i.e., influencing downward or discouraging the increase of a price is not an issue under the price maintenance provision. This is because the conduct described in section 76 and its predecessors is the "influencing upward or discouraging the reduction" of a price. That maximum resale price maintenance raises no issue in Canada has been confirmed by numerous authorities. It is Visa's

position that the Visa Rules, do not constitute "maximum resale price maintenance," but even if they did, this raises no issue under section 76.

*Fairview Donut, supra* at paras. 583, 603 and 606

Flavell, *supra* at 295

136. This point is significant because the Commissioner's expert, Dr. Frankel, set out in his report a hypothetical scenario (the "Coke and Pepsi" example), which he described as representing competitive economic effects that are "essentially the same as the MasterCard and Visa No-Surcharge Rules and Honour-All-Cards Rules". On cross-examination, Dr. Frankel acknowledged that in an earlier article he had used essentially the same hypothetical as "Coke and Pepsi" and had characterized the conduct as potentially resulting in *maximum*, not minimum, resale price maintenance. It is further clear that what led to the characterization of the example as potentially constituting maximum resale price maintenance, was that the hypothetical did not permit discounting; just as in Dr. Frankel's report submitted in this proceeding, the hypothetical contemplated a "same price" rule – not a rule like the Visa No Surcharge Rule that expressly permits discounting.

Frankel Expert Report, paras. 120-122

Frankel Evidence, Hearing Transcript, p. 1038, line 24 to p. 1058, line 22 and Exhibit RV-59

Frankel Reply Report, para. 93

137. Dr. Frankel was less than candid in describing the reference in his earlier paper stating that there, he had explained that "no-surcharge rules are a form of price maintenance" without clarifying that the "form of price maintenance" that he had referenced was maximum resale price maintenance, conduct that raises no issue under section 76. Indeed, Dr. Frankel stated twice

(once in his original report and again in his reply report) that he had earlier opined that the No Surcharge Rules were a "form of price maintenance," without saying that the form of price maintenance that he was referencing was maximum resale price maintenance.

> Frankel Expert Report, paras. 120-122 and 138
>
> Frankel Evidence, Hearing Transcript, p. 1038, line 24 to p. 1058, line 22 and Exhibit RV-59
>
> Frankel Reply Report, para. 93

### (i) The Visa Rules do not and cannot constitute price maintenance for the purposes of section 76 of the Competition Act

138. After 32 witnesses over 20 hearing days, this much is clear: there is no evidence whatsoever that Visa directs Acquirers what to charge Canadian merchants for card acceptance services in respect of Visa credit cards or imposes any pressure on Acquirers of any kind, or by any means, to increase their prices or not to reduce them. Indeed, the Commissioner does not and never has alleged otherwise.

> Notice of Application, para. 77 - "The Merchant Restraints restrict the terms upon which Acquirers supply Credit Card Network Services to merchants, thereby influencing upward or discouraging the reduction of the price at which Acquirers supply Credit Card Network Services to merchants."
>
> Examination for discovery of Richard Bilodeau, Read-In Brief of the Respondents ("Respondents' Read-Ins"), Tab 14, questions 894 and 897
>
> Frankel Evidence, Hearing Transcript, p. 995, lines 6-20
>
> Sheedy Statement, paras. 19, 76 and 81
>
> Weiner Statement, para. 5

139. As far as Visa is concerned, under its Rules or otherwise, Acquirers are free to set the merchant discount rates they charge merchants at whatever level they are able to negotiate. Acquirers are free to set their rates below cost if they choose; whether they do so or not is not the point [redacted]. From a

price maintenance perspective, the relevant point is that Visa does not endeavour in any way to influence upward or discourage the reduction of the prices that Acquirers charge their customers for the services they provide. Mr. Weiner's uncontradicted evidence is that to the extent that lower card acceptance fees would encourage a greater number and volume of transactions on the Visa network through increased merchant acceptance of Visa credit cards for payment, or increased Visa credit card transactions, it is in Visa's interests that the card acceptance fees Acquirers charge merchants be lower, not higher.

Van Duynhoven Evidence, Hearing Transcript, p. 2513, line 18 to p. 2514, line 23

Weiner Statement, para. 5

140. There is also no evidence, and none of the nine Canadian merchants who testified in this case even suggested in their witness statements or oral testimony, that Visa has anything whatsoever to say about the prices merchants charge their customers for the goods and services they sell. It is apparent that most of the merchants who testified in this case engage in discounting of one form or another, in some cases extensively. There is no evidence and no suggestion that Visa has ever endeavoured in any way to interfere with such discounting behaviour by merchants. To the contrary, the Visa Rules expressly permit merchants to provide their customers with discounts for preferred forms of payment.

[redacted]

Sheedy Statement, para. 50 and Exhibit "D"

[redacted]

Shirley Evidence, Hearing Transcript, [redacted] p. 1647, line 24 to p. 1651, line 24

[redacted]

De Armas Evidence, Hearing Transcript, p. 326, line 17 to p. 327, line 17

Daigle Evidence, Hearing Transcript, p. 422, line 13 to 426, line 4; p. 430, line 9 to p. 434, line 18

Li Evidence, Hearing Transcript, p. 1543, line 22 to p. 1545, line 20 and Exhibit RM-83

Winter Evidence, Hearing Transcript, p. 2036, lines 10-20

141. In short, there is no evidence that Visa has engaged in the type of conduct that has been characterized as vertical price maintenance in Canadian jurisprudence for more than 60 years. The Commissioner's experts say that this case is not a "typical" price maintenance case. But the Commissioner has not pointed to one single Canadian authority that comes anywhere close to recognizing the conduct alleged in this case as price maintenance. Simply stated, the conduct alleged here is not an "atypical" example of price maintenance; it is not price maintenance at all.

Reply Expert Report of Ralph A. Winter, dated April 23, 2012 ("Winter Reply Report"), para. 10

Winter Evidence, Hearing Transcript, p. 1974, lines 6-16

Van Duynhoven Statement, para. 112

142. From an economics and competition policy perspective, concerns about the anticompetitive nature of vertical price maintenance stem from issues relating to its potential to facilitate collusion at the upstream or downstream level (the cartel hypothesis), relax competition between retailers, and/or foreclose market entry. Examples of these anticompetitive effects include artificially high prices from suppliers to retailers due to coordination between suppliers, artificially high retail prices to consumers since retailers are unable to pass through cost reductions/freely set their own prices and threats by manufacturers to cut off supply to retailers who undercut the collusive price. None of these concerns are applicable in this case or even alleged by the Commissioner and her experts.

Church Expert Report, Appendix "D"

143. It is critically important to understand the allegation of price maintenance being advanced by the Commissioner in this case, which can be summarized as follows:

(a) The Visa Rules adversely affect competition between Visa and MasterCard (because if merchants could surcharge, for example, they would do so in sufficient volume to steer customers away from credit cards, which would result in reduced volumes on the Visa and MasterCard networks, which would incent Visa and MasterCard to reduce and/or compete with respect to interchange and network fees);

(b) This adverse effect on competition influences upward and discourages the reduction of the prices which Visa charges its Acquirers for the services Visa provides; and

(c) Acquirers "pass on" the increased prices they pay to Visa in the form of higher card acceptance fees charged to their merchant customers.

144. That this is clearly the allegation being made by the Commissioner is best illustrated by the expert testimony of Professor Winter. In defining the relevant "price" for the purposes of the application of section 76, Professor Winter says at paragraph 40 of his expert report:

> Acquirers are, undeniably, customers of Visa and MasterCard. The total payment by an Acquirer is therefore an appropriate concept of price: the payment by customers for the product is, in any market, the definition of price. (Emphasis added)

Winter Expert Report, para. 40

Professor Winter further states at paragraph 22 of his report:

> The Merchant Rules are structured so as to eliminate or substantially reduce important sources of competitive discipline on and between Visa and MasterCard. This substantial reduction or elimination of competition between Visa and MasterCard has the effect of influencing upward and discouraging the reduction of the prices at which Acquirers supply Credit Card Network Services to merchants. (Emphasis added).
>
> Winter Expert Report, para. 22

In examination-in-chief, Professor Winter testified:

> ... The merchant rules are a vertical restraint on pricing that lead Visa and MasterCard each to set higher prices for credit card network services.
>
> Winter Evidence, Hearing Transcript, page 1936, line 3-6

On cross-examination, Professor Winter, testified as follows:

> Mr. Hofley: Professor Winter, so this suppression of competition between Visa and MasterCard, you conclude, I believe, that this leads to higher Visa and MasterCard acquirer fees, right?
>
> Dr. Winter: that's correct, leads to higher acquirer fees, that is, fees paid by acquirers.
>
> Mr. Hofley: And this is an increase in the prices which Visa and MasterCard charge acquirers, correct?
>
> Dr. Winter: Yes.
>
> Winter Evidence, Hearing Transcript, p. 1954, line 18 to p. 1955, line 2

With respect to the prices paid by merchants, Professor Winter states at paragraph 20 of his Report that:

> These higher fees are passed on by Acquirers to merchants in the form of higher Merchant Service Fees.
>
> Winter Expert Report, para. 20

145. Nowhere is it alleged that Visa directs or otherwise applies any pressure on Acquirers regarding the fees they charge merchants. The only connection alleged by the Commissioner

between fees paid by Acquirers and the card acceptance fees charged to merchants is reflected in paragraph 46 of the Notice of Application:

> ...no Acquirer could profitably set Card Acceptance Fees below the combined level of Interchange Fees and Network Fees.

146. In other words, interchange and network fees are costs to Acquirers, and like any for-profit business, Acquirers can reasonably be expected to set their fees above their costs.

Sheedy Statement, paras. 13, 14 and 19

Sheedy Evidence, Hearing Transcript, p. 2245 lines 1-10

Weiner Statement, para. 21

[redacted]

Frankel Evidence, Hearing Transcript, p. 994, line 22 to p. 995, line 20.

Carlton Evidence, Hearing Transcript, p. 1300, lines 11-20

Winter Evidence, Hearing Transcript, p. 1944, lines 9-24

Van Duynhoven Statement, paras. 88-89

Bilodeau Discovery Transcript, qq. 894 and 897, Respondent's Read-Ins, Tab 14

147. In short, the Commissioner's allegation is that the two Visa Rules in issue adversely affect competition and thereby influence upward the "prices" (interchange and network fees) that Acquirers pay. Leaving aside the fundamental factual error in the Commissioner's approach (i.e., interchange is not a "price" that Visa charges Acquirers for anything), the Commissioner's allegations do not and cannot constitute price maintenance as a matter of Canadian law for the following reasons (all of which are dealt with in further detail herein):

(a) it is not and cannot be price maintenance to influence upward or discourage the reduction of a person's own price; price maintenance only occurs where the price that is influenced upward (in the manner prescribed in section 76(1)(a)(i)) is the price that *another person* charges;

(b) it is not and cannot be price maintenance because a downstream seller sets its price to cover the input costs of the goods or services it acquires from an upstream supplier;

(c) section 76 requires as a constituent element that the product supplied be "resold" by the person whose price is allegedly being influenced upward or discouraged downward. Here, Visa does not, directly or indirectly, sell any product to either Acquirers or merchants that is resold. Visa sells one set of services to Acquirers, and Acquirers sell a different set of services to their merchant customers. Visa does not sell anything to merchants either directly or indirectly, nor does there appear to be any allegation that merchants "resell" any product that they acquire directly or indirectly from Visa to their customers;

(d) in apparent recognition of the fact that there is no evidence whatsoever that Visa endeavours to exercise any influence or control over the prices that either Acquirers or merchants charge their customers (which is the hallmark of resale price maintenance), the Commissioner and her experts have endeavoured to establish that the Visa Rules adversely affect competition and thereby influence prices upward. The Commissioner's approach to the application of section 76 ignores the obvious order of causation mandated by the section; and,

(e) further, the Commissioner's interpretation improperly conflates the two distinct requirements of section 76: the price maintenance conduct in subsection 76(1)(a) and the adverse effect on competition in subsection 76(1)(b). The Commissioner maintains that the "influencing upward" element (i.e., the conduct specified in subsection 76(1)(a)(i)) can be satisfied by establishing an adverse effect on competition under subsection 76(1)(b), thereby rendering subsection 76(1)(a)(i) unnecessary. This interpretation also turns section 76 from a provision focused on specific conduct into a broad-based vertical (or potentially horizontal) restraint provision of virtually limitless bounds.

148. Significantly, although much of the evidence in this proceeding has focused on interchange, there is no allegation in this case that the fact of interchange, the fact that Visa sets default interchange, or the manner in which it does so, constitute price maintenance.

Reply of The Commissioner of Competition, para. 23

**(j) Price maintenance only occurs where the price that is influenced upward is the price that a*nother person* charges – conduct that influences upward or discourages a party's own price, is not price maintenance**

149. Subparagraph 76(1)(a)(i) could not be clearer: it must be shown that a person has by agreement, threat promise or like means, "influenced upward, or … 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." In short, the conduct must influence upward or discourage the reduction of the price *another person charges*. It cannot be price maintenance where the conduct alleged influences upward or discourages the reduction of a person's *own price*. As noted above, this point was confirmed by the Ontario

Supreme Court as recently as February of this year in the *Fairview Donut Inc.* case wherein Strathy J. stated in respect of section 61 (which had been advanced as part of a civil claim in a class action):

> 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. (Emphasis in original)
>
> *Fairview Donut, supra* at para. 585

150. Price maintenance is not concerned with the price that suppliers *charge their own* customers (which, as outlined above, is precisely the allegation being advanced by the Commissioner here), it is solely concerned with specific conduct directed at impairing the ability of a downstream customer to freely set its selling price to its customers. Further summarizing the Canadian law of price maintenance, Strathy J. held in *Fairview Donut*, "In all these cases, the court was concerned with the protection of the public from conduct that interfered with the ability of retailers to engage in price competition." Applying these principles here, it is incontrovertible that Visa's Rules do not interfere with the ability of Acquirers to engage in price competition – virtually every witness who testified on behalf of the Commissioner in this matter testified that there is intense competition between and among Acquirers who are free to set their prices to merchants without any interference by Visa.

> Frankel Evidence, Hearing Transcript, p. 1220, lines 21-25
>
> Sheedy Evidence, Hearing Transcript, p. 2232, line 14 to p. 2233, line 10
>
> Weiner Evidence, Hearing Transcript, p. 2314, lines 8 to 12

Van Duynhoven Evidence, Hearing Transcript, p. 2513, line 3 to p. 2514, line 23

Cohen Statement, paras. 43-46

Van Duynhoven Statement, paras. 30 and 116-122

*Fairview Donut, supra* at para. 590

**(k) It is not and cannot be price maintenance because a downstream seller sets its price to cover the input costs of the goods or services it Acquires from an upstream supplier**

151. Strathy J. further held that "[section 61] does not prohibit the upstream supplier from increasing the price at which it supplies the product to a downstream purchaser". (Emphasis added). The evidence in *Fairview Donut* was that Tim Horton's, as franchisor, imposed various rules on its franchisees, including requiring the franchisees to purchase key inputs from parties designated by TDL and capping the franchisees maximum resale prices. As in this case, the plaintiffs claimed that Tim Horton's requirements constituted price maintenance because they had the effect of driving up the prices the franchisees paid their suppliers for baked goods. Having consider these allegations, Strathy J. held:

> The setting of a wholesale price through a joint venture agreement that is specifically designed to supply ingredients to franchisees is not criminal price maintenance because it does not impair or limit the ability of downstream purchasers to sell at whatever price they choose.
>
> ...
>
> In my view, to 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.

*Fairview Donut, supra* at paras. 585, 593 and 600

152. The principle that no antitrust issue arises where a downstream seller sets its prices to cover the costs of inputs from its upstream supplier, was specifically addressed by the US Ninth Circuit in *Kendall v. Visa U.S.A.*, a merchant class action against Visa and MasterCard. Although *Kendall* was not a price maintenance case, the plaintiffs in that case had made precisely the same factual allegation that the Commissioner advances here, i.e., that "because the interchange fee is one of the cost factors an acquiring bank considers when determining the merchant discount fee, the interchange fee effectively sets a floor for each bank's merchant discount fee". The Ninth Circuit rejected the plaintiff's assertion on the following basis:

> In this sense, the Consortiums indirectly establish the merchant discount fee, much as the cost of eggs sets a floor for the price of an omelette on a menu. Just like the restauranteur, the banks charge [**16] the merchant a higher price than their cost of business to make a profit. This behavior suggests a rational business decision, not a conspiracy.
>
> See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 102 (2d Cir. 2005) ("Economics demands that the [merchant] discount fee [for credit card transactions] be greater than the interchange fee the acquiring institution must pay to the card-issuing institution."). Allegations of facts that could just as easily suggest rational, legal business behaviour by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws.

*Kendall v. VISA U.S.A.*, 518 F.3d 1042 (9th Cir. 2008) ("*Kendall*") at 1049

153. Like Strathy J. in *Fairview Donut*, the Ninth Circuit refused to characterize a routine commercial reality as an antitrust violation. The input costs that a commercial entity incurs will inevitably establish a practical "price floor" if the entity hopes to make a profit and stay in business – that the costs a business incurs will "influence" its selling price is not price maintenance, it is a basic economic reality. If it can constitute price maintenance because interchange and network fees represent a "price floor," which Acquirers are "influenced" to price

above, then unless interchange and network fees are zero, Visa can always be alleged to be engaged in price maintenance, as merchants will always be able to assert that Acquirers raised their prices to cover interchange and network fees.

*Kendall, supra*

**(l) Section 76 requires as a constituent element that the product supplied be "resold" by the person whose price is allegedly being influenced upward or discouraged downward**

154. In short, subparagraph 76(1)(a)(i) clearly requires that the product in issue be "resold" by the "customer or other person" whose price is allegedly being influenced upward or discouraged from being reduced. Applying this principle here, the Commissioner bears the burden of establishing that Acquirers on the one hand, and merchants on the other, "resell" a product supplied to them by Visa. That burden has not been met.

*Sullivan on the Construction of Statutes*, 23-26

*Canadian Pacific Airlines, supra* at para. 7

155. With respect to Acquirers, the evidence is that Visa sells a range of services (including network services that facilitate the authorization, clearance and settlement of transactions over the network) to Acquirers and that Acquirers sell a distinct array of services to their merchant customers. Acquirers do not "resell" (or otherwise provide) authorization, clearance, and settlement services to merchants – at bottom, Acquirers sell merchants the ability to accept Visa and other payment cards for payment. Authorization, clearance, and settlement are matters between Acquirers and Visa which occur over the network; as Brian Weiner aptly described it, these functions are part of the "plumbing" of the network. Similarly, Acquirers do not resell "access to the Visa network" to merchants. The evidence is clear: merchants connect to the proprietary networks operated by their Acquirers; Acquirers, in turn, connect to the Visa

network. Merchants have no ability to either put data on the Visa network or retrieve data from it, i.e., they have no access to the Visa network. While the evidence has pointed to various references to Acquirers providing merchants "access to the network," it is plain and obvious that such references are colloquial and do not establish that Acquirers "resell" merchants access to the Visa network. It is incontrovertible that transactions initiated at a merchant's place of business through the Acquirer's terminal are routed over the Visa network; if, to that extent, merchants, or their customers, have "access to the Visa network" such is entirely consistent with the position that Acquirers do not "resell" access to the network to merchants. The distinctions between the services offered by Visa and those offered by Acquirers are particularized in greater detail in the Closing Written Arguments of Toronto-Dominion Bank; Visa agrees and relies upon those submissions and the evidence underlying them.

Weiner Statement, para. 39

Weiner Evidence, Hearing Transcript, p. 2314, lines 16-20.

Van Duynhoven Statement, paras. 9-10, 17, 36-37, 39-40, 44, 49, Exhibit "A" and Exhibit "I"

[redacted]

Jewer Evidence, Hearing Transcript, p. 1742, line 14 to p. 1743, line 5

156. The Commissioner and her witnesses have misrepresented Visa's position in this matter, suggesting that Visa's contention is that there is no "resale" unless "there is a resale of precisely the same product, physically unchanged, from a supplier to a reseller." That is not Visa's position – rather, Visa's point is that there is no resale by Acquirers of any product acquired from Visa at all; it is not now nor has it ever been Visa's contention that there is no "resale" because the products sold by Acquirers to merchants are changed in some way. Rather, the point is that

the products supplied by Visa to its Acquirers are different than the products supplied by Acquirers to merchants.

Commissioner's Opening, Hearing Transcript, p. 92, lines 10-13

Commissioner's Reply, para. 38.

157. Professor Church testified that in formulating a principled approach to the question of "resale" from an economic perspective, it would be sensible to conclude that there could be no resale if the product supplied by the upstream supplier was not in the same relevant product market as the product sold by the downstream purchaser. Visa agrees with Professor Church's stated approach, and notes that the evidence of both Mr. McCormack and Dr. Frankel supports the conclusion that the products sold by Visa to Acquirers are not in the same product market as the products sold by Acquirers to merchants.

Church Evidence, Hearing Transcript, p. 2859, line 15 to p. 2860, line 17

158. For example, Mr. McCormack stated in his report that the services provided by Acquirers are "centered on providing merchants with the ability to accept Visa and MasterCard branded credit cards for payment." While in fact, the services Acquirers provide are centered on providing merchants with the ability to accept payment cards generally (not just Visa and MasterCard), Visa clearly does not provide Acquirers with "the ability to accept Visa cards" and, accordingly, Visa Acquirers obviously sell a different product to their customers.

McCormack Expert Report, para. 159

159. Dr. Frankel acknowledged on cross examination that Visa does not compete with its Acquirers; in other words, the products that Visa provides Acquirers do not compete with (i.e., are not in the same market as) the products Acquirers provide to merchants. For all these reasons,

Visa submits that, as a factual matter, there is no resale by Acquirers to merchants of any products that Acquirers purchase from Visa.

Frankel Evidence, Hearing Transcript, p. 991, lines 5-17

160. It is also clear, and indeed, there is no evidence to the contrary, that merchants do not resell any products that they obtain from Visa to their customers. As such, the Commissioner's alternative allegation that Visa has engaged in price maintenance in respect of merchants (which, in any event, does not appear to have been seriously advanced by the Commissioner in this proceeding) must be rejected.

Notice of Application, para. 78

161. Visa maintains that if this Tribunal should conclude that "resale" is a required element of section 76, and is further satisfied as a question of fact that there is no "resale" by Acquirers of any product acquired from Visa, or any "resale" by merchants of any product acquired from Visa, then such findings would be dispositive of the Commissioner's Application. It is to be emphasized, however, that while it is Visa's position that these are precisely the findings that this Tribunal ought to make, Visa's position does not turn on such a finding. If this Tribunal should conclude, either that a "resale" is not required, or if required, that a "resale" occurs as a matter of fact and law, Visa respectfully submits that the Application ought still to be dismissed on any one or more of the other bases outlined herein.

**(m) Section 76 has a clear direction of causality: the conduct in 76(1)(a) must be found to result in an adverse effect on competition; the "influence[ing] upward or discourage[ing] the reduction of price" requirement cannot be caused by an adverse effect on competition under 76(1)(b)**

162. As stated, the Commissioner's unprecedented allegation of price maintenance in this case is that the Visa Rules adversely affect competition and thereby influence upward or discourage

the reduction of the prices that Visa charges Acquirers for the services it provides. In other words, the Commissioner purports to rely on the adverse effect on competition requirement set out in Section 76(1)(b) to establish the core requirement of the conduct in section 76(1)(a)(ii). The Commissioner is forced to adopt this untenable approach because there is no evidence whatsoever that Visa endeavours by agreement, threat, promise or like means to influence upward or discourage the reduction of the price that Acquirers charge their customers. Indeed, there has never been any allegation that Visa interferes in any way with the freedom of Acquirers to set the prices they charge merchants (an essential hallmark of vertical price maintenance under Canadian law since 1951).

163. That this is the Commissioner's position is clear from the Notice of Application (most notably, paragraphs 70 and 71) and from the expert reports filed on behalf of the Commissioner in this proceeding, particularly the expert report of Professor Winter. In paragraph 22 of his expert report, for example, Professor Winter says:

> The Merchant Rules are structured so as to eliminate or substantially reduce important sources of competitive discipline on and between Visa and MasterCard. This substantial reduction or elimination of competition between Visa and MasterCard has the effect of influencing upward and discouraging the reduction of the prices at which Acquirers supply Credit Card Network Services to merchants. From the perspective of economics, the upward influence condition and adverse-competitive-impact condition of section 76 are met.
>
> Winter Expert Report, para. 22
>
> Winter Reply Report, paras. 28-32

164. Professor Winter took issue with Professor Church's critique of his reverse causality theory, maintaining that, "section 76 specifies no particular 'order of causality' between these two conditions that must be established before the Tribunal may grant a

remedy." Professor Winter further states that, "one implication of Dr. Church's interpretation of section 76 is that the Tribunal can consider only those adverse effects on competition that are caused by an upward influence in prices," a position which Professor Winter characterizes as "absurd." The interpretation of section 76 as specifically mandating that the Tribunal must first be satisfied that the requirements of Section 76(1)(a) are met before considering whether such conduct has had, is having, or is likely to have an adverse effect on competition, is not "absurd," it is specifically what the law requires.

Winter Reply Report, paras. 28 and 32

165. Ironically, Professor Winter also criticized Professor Church for failing to "provide a single citation to the 'economics and competition policy literature'" that he alleges support his arguments regarding the direction of causality. What Professor Church could have referenced was Professor Winter's own writings on this issue. In his 2009 article, "Presidential Address: Antitrust restrictions on single-firm strategies," Professor Winter set out his views on the 2009 introduction of section 76 of the Competition Act, stating:

> Canada's new law on RPM went into effect with the amendments to the competition act on 12 March. RPM is no longer a criminal, per se illegal activity. RPM is now a reviewable practice which the Tribunal can prohibit in a case if it leads to an adverse effect on competition in a market. (Emphasis added)

Winter Presidential Address Article, *supra*, p. 1218

Winter Reply Report, para. 28

166. On cross-examination, Professor Winter endeavoured to resile from this obvious contradiction of the entirely unsupported position that he has advanced in this case by suggesting that, in the article, he was somehow referencing "traditional resale price maintenance," stating

that the remarks were qualified by a reference to "that type of case." No such qualification appears in the paragraph referenced above and it is painfully obvious that Professor Winter was expressing his views on the order of causality clearly set out in section 76, views that flatly contradict those he presented to this Tribunal. The Commissioner has not presented a single commentary by either Professor Winter or anyone else that supports the contention that section 76 does not mandate the order of causality that is plain and obvious on the face of the provision.

Winter Evidence, Hearing Transcript, p. 1987, line 20 to p. 1988, line 15

167. Professor Winter's inconsistent views notwithstanding, a plain reading of section 76, aided by a consideration of the statutory context in which the provision is found, demonstrates beyond question that this Tribunal must first determine whether the conduct set out in Section 76(1)(a) has been made out and, then and only then, is consideration to be given to whether or not such conduct has had, is having or is likely to have an adverse effect on competition.

168. As already indicated, subsection 76 (1)(a)(i) sets out one of the two forms of price maintenance captured by section 76 (subsection 76(1)(a)(ii) references refusals to supply or discrimination against a person because of that person's low pricing policy, a form of price maintenance that is not raised on the facts here). Before the Tribunal can consider exercising its discretion to issue an order under subsection 76(2), the Tribunal must find that conduct under 76(1)(a) has occurred and further, that such conduct has had, is having, or is likely to have an adverse effect on competition in a market under subsection 76(1)(b).

169. The conduct in subsection 76(1)(b) is the conduct set out in subsection 76(1)(a), not conduct generally. This is clear having regard to the reference to "the conduct" and not "conduct" in subsection 76(1)(b) and having regard to subsection 76(2), which provides:

> (2) The Tribunal may make an order prohibiting the person referred to in subsection (3) from continuing to engage in the conduct referred to in paragraph 1(a) or requiring them to accept another person as a customer within a specified time on usual terms.

170. That there is a causal order in section 76 is clear from the provision, and the interpretation proposed by the Commissioner thus defies logic. If the Tribunal can or must first determine whether conduct adversely effects competition to satisfy the requirements of 76(1)(a), there would be no "conduct" to apply the competitive effects screen in 76(1)(b) to until the Tribunal had first applied the competitive effects screen and the analysis becomes completely and hopelessly circular.

171. The interpretation of section 76 being urged upon this Tribunal by the Commissioner is also entirely inconsistent with the related vertical pricing provisions in Part VIII of the Act (of which section 76 forms part) and is in stark disregard of the presumption that statutory provisions are, when read together, to form a coherent whole. Section 76 is one of five non-criminal vertical reviewable practices set out in Part VIII of the Competition Act: refusal to deal (section 75); price maintenance (section 76); exclusive dealing, tied selling and market restriction (section 77). In each case, the provision sets out specific proscribed conduct which has to be established, but can only be subject to an order of the Tribunal if it is further found that the conduct has a prescribed anticompetitive effect:

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework;... The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies...
>
> *Sullivan on the Construction of Statutes, supra* at 223.

*2747-3174 Quebec Inc. v. Quebec (Regie des permis d'alcool),* [1996] S.C.J. No. 112, [1996] 3 S.C.R. 919 at para. 207.

172. The refusal to deal provision (section 75) is an illustrative example which also provides a valuable interpretive aid in respect of section 76. Prior to 2002, the refusal to deal provision (like the price maintenance provision prior to 2009) contained no competitive effects element; that element was added at the same time as private access to the Tribunal was introduced in respect of the refusal to deal provision. The competitive effects element did not alter in any way the conduct that constituted refusal to deal; the test was added as a screen to ensure that only refusals to deal that would have an anticompetitive effect could be prohibited. It should also be noted that section 75 is the only other provision in the Act that employs the same competitive effects screen ("an adverse effect on competition") as section 76. The other provisions in Part VIII employ the more stringent "substantial lessening of competition" test.

173. The structure of section 75 is essentially identical to that of section 76. Section 75 sets out the constituent elements of the conduct that constitutes refusal to deal and then provides:

> and, (e) the refusal to deal is having or is likely to have an adverse effect on competition in a market.

174. In the *B-Filer* case, which was the first case that considered the amended refusal to deal provision, the Tribunal confirmed the order of causation, namely that the Tribunal had to determine whether refusals to deal *result in* an adverse effect on competition and also confirmed that the addition of the competitive effects threshold did not alter the nature, scope or purpose of the refusal to deal provision, holding:

> In our view, while the addition of the competitive effects provision paragraph 75(1)(e) changes the context and purpose of section 75 to the extent that there is now a focus on determining whether refusals to deal

> result in adverse effects on competition, this amendment does not change the ultimate concern of 75(1)(a).
>
> *B-Filer Inc., et al. v. The Bank of Nova Scotia*, 2006 Comp. Trib. 42 at para. 78 ["*B-Filer*"]

To determine whether there is a refusal to deal, the conduct has to fall within the description set out in Section 75 (1)(a) through (e) – to determine whether the conduct so found can be prohibited, the Tribunal has to be satisfied that the conduct is having or is likely to have and an adverse effect on competition.

175. Subsection 76(1)(a) sets out the conduct that constitutes price maintenance and then, in language almost identical to subsection 75(1)(e), subsection 76(1)(b) sets out the same competitive effects threshold. Section 76(1)(b) refers to "the conduct" rather than "price maintenance," because there are two forms of conduct set out in subsections 76(1)(a)(i) and (ii).

176. The latter point is important. In addition to subsection 76(1)(a)(i), which is the focus of this case, subsection (ii) is an additional form of price maintenance dealing with refusal to supply or discrimination because of a person's low pricing policy. For both subsections, "the conduct" must be shown to have an adverse effect on competition under subsection 76(1)(b). It cannot possibly be the case that an "adverse effect on competition" could be used to establish that a party "has refused to supply a product to or has 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."

177. The order of causality in respect of subsection (ii) is absolutely clear; the refusal to supply or discrimination because of the purchaser's low pricing policy would first have to be established and it would then have to be shown that such conduct adversely affected competition

– this could not be established in the opposite direction. This is a complete answer to the Commissioner's contention that there is no order of causality in section 76(1)(a), otherwise, there would be one order of causality for subsection (i) and one order of causality for subsection (ii) (both of which are governed by subsection 76(1)(b)), which defies every accepted rule of statutory interpretation and common sense.

> *Manrell, supra* at paras. 59-60
>
> *Great Lakes, supra* at para. 185

**(n) The Commissioner's interpretation of section 76 improperly conflates the two distinct elements of the provision, subsections 76(1)(a), 76(1)(b), renders subsection 76(1)(a) irrelevant, and turns section 76 into a general, open-ended vertical (or potentially horizontal) restraint provision**

178. The Commissioner's proposed interpretation conflates the two separate and distinct requirements of section 76 and would allow the "influencing upward of price" requirement to be established on the basis of an adverse effect on competition, thereby rendering subsection 76(1)(a)(i) unnecessary. Remarkably, it is Professor Winter, again, who in his prior writings flatly contradicted the position he now espouses in this case. In his 2009 article already cited, Professor Winter wrote:

> One might suspect that the condition of 'adverse effect on competition' would be satisfied in the law simply if RPM is shown to raise prices or inhibit intrabrand competition, in which case the law against RPM would have been relaxed very little. But there is reason to be optimistic that this is not the case. The condition that the practice influences price upwards and the condition of an adverse effect on competition are stated as separate necessary conditions in the new sections 76 (1) (a) (i) and 76 (1) (b), respectively. The principles of statutory interpretation require that the distinct conditions have separate meanings. An 'adverse effect on competition' must therefore go beyond influencing upwards the price of a single product.
>
> Winter Presidential Address Article, *supra*, footnote 19, p. 1218-1219

179. Similarly, the Commissioner's proposed interpretation of section 76 runs counter to the ruling in *Canada Pipe*, where the Federal Court of Appeal stated (in the context of section 79 of the Act) that "[e]ach statutory element must give rise to a distinct legal test, for otherwise the interpretation risks rendering a portion of the statute meaningless or redundant."

> *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, ("*Canada Pipe*") at para 26

180. The interpretation of section 76 urged upon this Tribunal by the Commissioner not only reverses the obvious order of causation mandated by the section, it renders redundant subsection 76(1)(a), and thus, the provision an absurdity. If accepted, this interpretation would turn section 76 into a generalized, vertical (or potentially horizontal) restraint provision of virtually limitless bounds. The latter is not an idle concern; it is the inevitable outcome of the interpretation being advanced by the Commissioner and one which is confirmed by Professor Winter. On cross-examination, Professor Winter agreed with the proposition that, "if conduct suppresses competition at the manufacturing or, in this case, the Visa/MasterCard level, *it will always influence upward or discourage the reduction of the price charged by those manufacturers*, in this case Visa and MasterCard." (Emphasis added)

> Winter Evidence, Hearing Transcript, p. 1996, lines 12-19

181. As such, *any* vertical conduct (and potentially any horizontal conduct) that adversely affected competition could form the basis of a resale price maintenance complaint because, by definition such conduct would "influence prices upward". Accordingly, the Commissioner, or a private complainant with a tied selling complaint could elect to proceed under the price maintenance provision to take advantage of the lower competitive effects threshold. Ironically, it was precisely these kinds of concerns which, in part, underlay the 2009 amendment of the price

maintenance provision. This was the point made by the Commissioner's counsel, Mr. Thomson in his opening statement. The competition bar had long been concerned that the Commissioner was using or threatening to use the price maintenance provision to challenge horizontal price fixing on a per se basis, thereby avoiding the burden of establishing the undue lessening of competition required under the Act's horizontal price-fixing provision, section 45. The interpretation of section 76 now being advanced by the Commissioner leads to similar concerns of over-breadth. This could not possibly have been Parliament's intention in amending section 76, a legislative exercise undertaken expressly to narrow the scope of the price maintenance provision, not broaden it.

182. It is undisputed that the Tribunal should interpret section 76 having regard to the plain and ordinary meaning of the words of the provision and further, having regard to the statutory context in which it resides. Visa submits that the interpretation it advances entirely accords with these principles. What the Tribunal cannot do, as the Commissioner asks be done, is stretch the statutory language of the provision in order to achieve what the Commissioner contends is a desired result in this case; legislation in the guise of statutory interpretation must be avoided: "[c]learly the courts are not allowed, under the guise of interpretation, to substitute their own notions of good policy for those of the legislature." As Pierre-André Côté describes in his text, *The Interpretation of Legislation in Canada*:

> The judge, who is the ultimate interpreter of laws, is not cloaked in the legitimacy of democratic election. Consequently, he or she must confine himself or herself to being, in the words of Montesquieu, "the mouthpiece for the words of the law". It is the legislature, or whomever has been delegated legislative power by the legislature, which bears the responsibility for the political choices of legislative activity.
>
> *Sullivan on the Construction of Statutes, supra* at 309

Pierre-André Côté, *The Interpretation of Legislation in Canada,* (4th ed) (Toronto: Carswell, Thomson Reuters Canada Ltd., 2011) at 9

183. The Commissioner's contention that the Visa Rules adversely affect competition, and thereby influence prices upward, is the only theory of price maintenance advanced by the Commissioner in this case. For the reasons set out herein, that theory is unsustainable. Simply stated, the Commissioner has no legal basis for the claim advanced in this case; there is no other conclusion that can reasonably be reached. Visa therefore submits that the Commissioner's Application must be dismissed on that basis alone. Even if the Commissioner's theory were legally sustainable, the Commissioner bears the burden of proving her case on the balance of probabilities, a burden which the Commissioner has not come close to discharging based on the facts presented before this Tribunal. The factual shortcomings of the Commissioner's case are set out below.

## V. THE COMMISSIONER'S THEORY OF PRICE MAINTENANCE IS UNSUSTAINABLE ON THE FACTS

### (a) Section overview

184. Section V sets out why the Commissioner's untenable theory of price maintenance is, in any event, unsupported by the facts as proven. A proper analysis of the evidence shows that merchants have available to them effective measures to steer their consumers to other forms of payment that are fully compliant with the Visa Rules and that, as such, the latter cannot possibly constitute price maintenance. This section further demonstrates that none of the elements of the Commissioner's convoluted theory of causation are established by the evidence.

**(b) The merchants' ability to elect not to accept Visa cards for payment is a complete answer to the allegation of price maintenance**

185. As already stated, Canadian merchants clearly have a choice of whether or not to accept Visa credit cards for payment. The Commissioner' s experts agree that if the costs of accepting Visa credit cards exceeded the benefits, merchants could and would not accept them. The merchants who testified in this proceeding all characterize credit card acceptance as if it is an all or nothing proposition, frequently stating that they have no option but to "accept credit cards." What they consistently ignore is the obvious ability of merchants to play one credit card network against the other. For example, Visa and MasterCard combined only represent approximately [redacted] of Sobeys annual sales, with MasterCard only representing [redacted] Does Sobeys really have no choice but to accept MasterCard; is it not obvious that Sobeys has the option to drop MasterCard acceptance, or at the very least to threaten to do so (an option all the more realistic when one considers that surcharging and or refusing to accept certain MasterCards would put a percentage of Sobeys [redacted] MasterCard volume at risk)? If the object is to put credit card network volume at risk, on the theory that doing so would incent the networks to reduce interchange and/or network fees, surely dropping their cards altogether or threatening to do so would be far more effective than surcharging or selective card acceptance.

Jewer Statement, paras. 24 and 26

See also, for example: Daigle Statement, para. 17; De Armas Statement, para. 32

186. As discussed further herein, the evidence clearly shows that surcharging or selective card acceptance can lead to various outcomes, most of which have no impact on network volumes. Non-acceptance of Visa cards altogether would, by definition, impact Visa's network volumes, and the obvious ability of merchants to take such action, or to threaten to do so, is a complete

answer to the allegation that the Visa Rules constitute price maintenance: if merchants consider the cost of accepting Visa cards too high, they need not accept them.

**(c) The ability of merchants to steer cardholders to other forms of payment by other means is a complete answer to the allegations of price maintenance**

187. Every merchant who accepts Visa cards in Canada does so knowing that it is contractually obligated to accept all Visa cards properly tendered for payment and to do so without surcharge. Visa's Rules expressly permit merchants to steer or attempt to steer customers to the merchant's preferred form of payment by means other than surcharging or selective acceptance of Visa credit cards. In the absence of proof on the balance of probabilities that the other means of steering available to merchants are ineffective, the Commissioner's theory of price maintenance (even if it were legally sustainable, which Visa submits it is not) must be rejected. This is because the Commissioner's theory is that surcharging or selective card acceptance (or the threat of doing so) are the most effective or perhaps only effective means of steering cardholders to other forms of payment in sufficient volume to impact the "prices" set by Visa for the services it provides Acquirers. This is why, so the Commissioner argues, the Visa Rules constitute price maintenance. If the means available to steer cardholders to other forms of payment that are permitted under the Visa Rules are effective, or more properly stated, if there is insufficient evidence to establish that they are not, then the Visa Rules cannot constitute price maintenance.

188. Importantly, it is not necessary that Visa establish, or that this Tribunal find, that the steering mechanisms available under the Visa Rules are *more effective* at steering than surcharging or selective card acceptance; the Commissioner bears the burden of proof in this case, not Visa (clearly, the Commissioner does bear the burden of proving, at a minimum, that

surcharging and/or selective card acceptance are *more effective* than all the steering mechanisms available under the Visa Rules, combined). If the Tribunal concludes that the steering mechanisms available under the Visa Rules are "effective," or, in any event, that the Commissioner has not established on the requisite standard that they are "ineffective," the Tribunal must find that the Commissioner's theory of price maintenance fails. Again, for the sake of completeness, it must be emphasized that a finding that the steering mechanisms available under the Visa Rules are on a combined basis ineffective is a *necessary* but not a *sufficient* condition to a finding of price maintenance under the Commissioner's untenable theory; but, as already outlined above, even if the Tribunal were to conclude that the other steering mechanisms available under the Visa Rules are ineffective, the Commissioner's theory of price maintenance still fails as a matter of law.

**(d) The Commissioner has not established that informing customers of the relative costs of payments and asking them to use the merchants preferred method, is ineffective**

189. In any event, the Commissioner has not come close to establishing on the evidence that the steering mechanisms available to merchants under the Visa Rules are ineffective at steering cardholders to other forms of payment (nor, in fact, has it been established that all of the available steering mechanisms are, on a combined basis, less effective than surcharging and/or selective card acceptance).

190. Virtually *all* of the merchant witnesses have testified that consumers are unaware that credit cards generally cost merchants more than other forms of payment (as with so much in this case, even this evidence is ultimately equivocal, because, in several instances, credit cards – the merchant's co-brand card – represented the least costly form of payment accepted by the

merchant, even as compared to debit). But *not one* of the merchants has taken the step clearly available to them of advising their customers that credit cards cost them more to accept and requesting that their customers use forms of payment that cost the merchant less. How can this Tribunal possibly conclude, or the merchants assert, that so informing their customers would not be an effective means of steering consumers to other forms of payment when not one of them has tried it?

[redacted]

Broughton Evidence, Hearing Transcript, p. 352, line 8 to p. 353, line 5

Houle Evidence, Hearing Transcript, p. 516, line 15 to p. 517, line 3

191. Significantly, the CFIB, the industry association for small businesses in Canada, recently ran a campaign encouraging its members to post notices informing consumers that credit cards cost merchants more to accept and encouraging their customers to use other forms of payment. While there is little evidence before the Tribunal regarding the extent to which merchants have responded to this campaign (the Commissioner, of course, never mentioned it), a Globe and Mail article that appeared on June 5, 2012 indicated that the CFIB and others consider this to be an effective strategy for reducing merchant payment acceptance costs.

"Brewery sideswiped by high transaction fees", The Globe and Mail, June 5, 2012, Exhibit R-524

192. Strikingly, several merchants who testified claimed that if they were permitted to surcharge, they would dutifully provide detailed information to their customers concerning the reasons therefore (including the fact that credit card acceptance is more costly than other means of payment) and they believed that such notice would modify consumer behaviour, including

making consumers more amenable to surcharging. This evidence raises at least two questions. First, given that not a single merchant witness who testified currently informs its customers about the relative costs of payment methods, why should this Tribunal accept that merchants would be any more likely to provide such notice to customers if surcharging were allowed (again, this Tribunal would have no jurisdiction to make any such order, and, given that merchants are not parties to this proceeding, even if it could make such an order, the Tribunal would have no ability to enforce it)? Second, if merchants believe that providing notice to consumers in a surcharging environment would affect their behaviour (which they have certainly claimed in this proceeding), how can they reasonably claim (again, as they have in this proceeding) that notifying consumers in a non-surcharge environment that credit cards cost merchants more and asking them to use other forms of payment, would be ineffective?

[redacted]

De Armas Statement, para. 63

[redacted]

[redacted]

Houle Evidence, Hearing Transcript, p. 516, line 8 to p. 519, line 23

Houle Statement, para. 45

Li Evidence, Hearing Transcript, p. 1528, lines 11-24

Shirley Evidence, Hearing Transcript, p. 1653, line 8 to p. 1654, line 23;

[redacted]

**(e) The Commissioner has not established that the provision of discounts or other benefits to cardholders is either unavailable to merchants, or would be ineffective**

193. The principal position advanced by the merchant witnesses is that while they would be able to surcharge, they say that discounting is not a feasible option, remarkably, because, among other things, in order to discount they would have to raise their prices. To even state the proposition is to see how ridiculous it is on its face. Even if this statement were accurate on some theoretical level, the evidence demonstrated that merchants provide discounts of one form or another all the time and that they did not "raise their prices" in order to do so. There is absolutely no reason that merchants could not provide a 1% or 2% discount to their customers who use other forms of payment, if they wished to do so, without the need to raise their prices. Moreover, most of the merchant witnesses acknowledged that they already build in the cost of accepting credit cards into the prices that they charge their customers. As such, it borders on the absurd to suggest that the merchants would have to further raise their prices in order to provide their customers with a discount for using a preferred form of payment. In any event, the evidence is that merchants adjust their prices all the time and there is nothing to stop merchants from making whatever minor adjustments would be necessary to provide for discounting for other forms of payment if merchants wish to do so.

[redacted]

Winter Evidence, Hearing Transcript, p. 2036, lines 10-20; p. 2052, lines 9-20; p. 2046 line 3 to p. 2047 line 4

De Armas Evidence, Hearing Transcript, p.317 line 13 to p. 318 line 25; p. 266 line 9 to p. 267 line 5

[redacted]

Daigle Evidence, Hearing Transcript, p. 430 line 9 to p. 433 line 25; p. 458, lines 12-18

Li Evidence, Hearing Transcript, pp. 1543 line 22 to p. 1544 line 4

Broughton Evidence, Hearing Transcript; p. 344, lines 3-13

[redacted]

Li Evidence, Hearing Transcript, p. 1572, line 3 to p. 1573, line 23

[redacted]

Jewer Evidence, Hearing Transcript, p. 1732, lines 18-23

194. Although many of the merchants went to almost comic lengths to deny that the various forms of price reductions that they regularly provide to their customers constitute "discounts" (although Shoppers maintained that its Optimum loyalty card program provided its consumers with "true discounts"), whether or not merchants can "discount" for other forms of payment is beside the point. The relevant question is not whether merchants *can discount*; the question is whether they can steer their customers to other forms of payment, by means other than surcharging or selective credit card acceptance. The evidence is clear: merchants do have such means available to them and they evidently believe they are effective.

De Armas Evidence, Hearing Transcript, p. 266 line 9 to p. 275 line 23; p. 317 line 13 to p. 318 line 25; p. 326 line 13 to p. 327, line 17

Daigle Evidence, Hearing Transcript, pp. 405 line 16 to p. 414 line 8

[redacted]

[redacted]

195. The clearest evidence in this regard is the various loyalty programs operated by several of the Canadian merchants who testified. Shoppers is a case in point. As already stated, Shoppers operates its enormously successful Optimum loyalty program. Under that program, Optimum cardholders receive reward points that translate into discounts on Shoppers products. As currently operated, however, Optimum customers receive reward points regardless of how they pay. Customers receive the same number of points when they pay by cash, cheque, regular debit or Visa, MasterCard or American Express credit card, including premium cards. But Shoppers clearly recognizes that the Optimum program can be used to influence payment choice. Optimum cardholders receive additional points if they use the Shoppers branded debit card and even more points if they use the Shoppers co-brand MasterCard credit card. There is nothing to stop Shoppers, and indeed it would *cost Shoppers less, not more*, to cease awarding Optimum points to customers paying with Visa or MasterCard credit cards generally, or premium cards specifically. Alternatively, Shoppers could award more points to their customers who pay with cash or debit (just as it awards more points to users of its branded debit and credit cards), but Shoppers takes no such steps.

Daigle Evidence, Hearing Transcript, p. 405 line 16 to p. 414 line 8

Houle Evidence, Hearing Transcript, p. 543, lines 5-13 and Exhibit RM-31

De Armas Evidence, Hearing Transcript, p. 317 line 13 to p. 319 line 4

[redacted]

Li Evidence, Hearing Transcript, p. 1544, lines 5-21

Shirley Evidence, Hearing Transcript, p. 1647 line 24 to p. 1651 line 19

196. On cross examination, Mr. Daigle endeavoured to explain why Shoppers "would never implement discounting" on its Optimum program (which, in itself, is an odd statement, because Mr. Daigle readily agreed that the Optimum program is a discount program). Mr. Daigle's evidence on this point was as follows:

> MR. KWINTER: Fair enough. There is nothing to stop you from doing any of the following. You could organize your Optimum program so that those discounts are available on cash and debit only and not on Visa, credit or Visa Infinite cards; isn't that true?
>
> MR. DAIGLE: It is true, but we would definitely not do it for the simple fact that, as you stated earlier, we have over 10.5 million cards out in Canada. It's been an extremely successful program in Canada, and one of the reasons for that is it is a very simple program. As you said, you spend money. You get benefits, and you can use those future benefits on future purchases.
>
> It is easier than programs such as The Bay, where you get a catalogue, you earn points; you get a catalogue, you order stuff from that catalogue. It is more simple than the Canadian Tire program that does differentiate on benefits you get by -- depending on the payment method.
>
> So part of the uniqueness of this program is its simplicity. People get it. They understand it. We would never start implementing discounting on that program, because it's not a program tied to payment methodology.
>
> It is a program that treats everyone equally, and if we were to start discounting for those Optimum cardholders who started bringing cash or debit versus Visa, now we're making a two-tiered program. It's going to alienate our -- a good percentage of our 10 million Optimum program members. It's going to be more complex at the cash checkout point when people are trying to determine, Well, do I pay Visa and take these points, or do I pay cash and get the extra Optimum points?
>
> It would be confusing for the customer. It would be confusing for the person working at the cash trying to explain it, and it would become a two-tiered system. We would never do it, because that program is successful. It has nothing to do with payments, so we wouldn't even entertain that idea.

> MR. KWINTER: You have a two-tiered system now, sir. Right now, as we sit here today, if I pay with an Optimum debit card, I get more points than if I pay with cash, credit or debit; right?
>
> MR. DAIGLE: Those are separate programs. Like you said, everyone is equal. If they give us that card, whether they're a high income earner or not, if they have that card, the basic Optimum card, they earn the exact same points.
>
> Those other two programs you referred to are separate programs. People have to apply to it and they have to qualify for it, and they've chosen to bolt on another benefit, but the base program is the base program for everyone in Canada.
>
> All 10.5 million subscribers to that Optimum program are treated exactly the same way. If they choose to get an Optimum card from MasterCard or if they choose an RBC card, that is something different.
>
> Daigle Evidence, Hearing Transcript, p. 424 line 14 to p. 426 line 23

197. Mr. Daigle's evidence is telling and highly relevant in numerous respects. First, he maintained that, "It [the Optimum program] is a program that treats everyone equally;" it does not. He also said that, "It has nothing to do with payments;" it does. Shoppers customers get more points, that is they are not "treated equally," if they use either the Shoppers branded debit card or the Shoppers branded MasterCard credit card (so the program is already connected, in part, to payment methods). Second, Mr. Daigle testified that:

> ...if we were to start discounting for those Optimum cardholders who started bringing cash or debit versus Visa, now we're making a two-tiered program. It's going to alienate our -- a good percentage of our 10 million Optimum program members. It's going to be more complex at the cash checkout point when people are trying to determine, Well, do I pay Visa and take these points, or do I pay cash and get the extra Optimum points?
>
> It would be confusing for the customer. It would be confusing for the person working at the cash trying to explain it, and it would become a two-tiered system.
>
> Daigle Evidence, Hearing Transcript, p. 425 line 15 to p. 426 line 2

198. The Tribunal should ask itself, how is this evidence distinguishable in any way from the circumstances that would apply to surcharging? Surcharging would create a "two-tiered system" – customers paying by credit card (or premium card) would pay more than those who do not; surcharging would alienate a good percentage of Shoppers customers – customers who collectively spent [redacted] on Visa and MasterCard credit cards at Shoppers in 2011; surcharging would be more complex at checkout, as cardholders decide, "do I pay by Visa and incur the surcharge or use another form of payment that isn't surcharged?"; surcharging would be confusing for the customer and confusing for the person at the cash who has to explain the process. Strikingly, all of the points that Mr. Daigle raises as obstacles to using the Optimum program to differentiate credit card customers from non-credit card customers are identical to points raised by Visa in opposition to surcharging. Indeed, throughout the evidence, every objection that the merchants raised to the difficulties of implementing discounting as a steering mechanism applied equally to surcharging. The difference is discounting necessarily costs the merchants revenue, while surcharging presents a revenue generating opportunity.

[redacted]

Broughton Evidence, Hearing Transcript, p. 361, line 3 to p. 363, line 4

Shirley Evidence, Hearing Transcript, p. 423, line 15 to p. 427, line 22

199. [redacted]

[redacted]

200. The evidence amply shows that merchants have a broad array of discounting and other strategies available to them to steer customers to other forms of payment; they just do not use them. As in other aspects of this matter, the merchants seem to regard "discounting" as an all or nothing proposition, as if the only option available to them is to discount across the board for other forms of payment. While it is obvious that many merchants could do just that, this is clearly not the only option available to them. IKEA, for example, employed a program in the UK where it discounted a single product. That discounted product was tied to surcharge revenue, but there is no reason that it had to be. Indeed, it would have made much more sense to discount a single product and make the product available to customers who used IKEA's preferred form of payment. In the UK program, the discounted product was available to all customers, regardless of how they paid. Clearly, if merchants can differentially surcharge (which many merchants claimed they would consider doing), certainly they can differentially discount.

Li Evidence, Hearing Transcript, p. 1576, line 2 to p. 1577, line 10

[redacted]

De Armas, Hearing Transcript, pp. 279, line 19 to p. 281, line 3

Symons Evidence, Hearing Transcript, p. 372, line 16 to p. 373, line 25

201. Visa submits that the Commissioner's expert evidence on the issue of surcharging versus discounting should be afforded no weight by the Tribunal. None of the Commissioner's experts are or were qualified as experts in retailing or behavioural economics. Essentially, the Commissioner's experts provided a lay perspective on the issue of the ability of merchants to

discount and without any consideration of the variety of methods available to merchants to steer consumers to other forms of payment (including the use of loyalty programs) that was disclosed by the evidence. Far more probative on the issue of discounting versus surcharging is the survey evidence and supporting commentary of Dr. Gauthier and Professor Mulvey. This represents the only empirical evidence before the Tribunal regarding consumer reaction to surcharging, discounting and "inform and ask" steering strategies. Not only does this evidence confirm the common sense assumption that consumers react most negatively to surcharging, it shows that discounting is likely to be an effective steering mechanism. This evidence also shows that the reaction of a significant proportion of consumers faced with a surcharge would be to leave the store and not complete their purchase, casting further doubt on the probability that merchants would ultimately regard surcharging as a workable strategy.

Gauthier Report, Exhibit 3.6

Mulvey Report, paras. 34 and 46

202. Merchants who accept Visa credit cards are under a legally binding contractual obligation not to surcharge and to accept all Visa cards validly tendered for payment. Apart from any other consideration, even if there was a legal basis for the Commissioner's price maintenance claim in this case, before this Tribunal could issue an order abrogating legal obligations that merchants freely agreed to accept, there should be some evidence showing that merchants have actually tried the steering methods that are permitted under the Visa Rules. Stated simply, this Tribunal cannot possibly determine that the steering mechanisms available under the Visa Rules are not effective when not one of the merchants who testified in this proceeding has ever tried any of them. Moreover, as a matter of principle and the rule of law, how can Visa's liability for price maintenance turn on the choices that merchants make? Mr. Daigle, for example, freely admitted

that Shoppers could use the Optimum program to steer customers from credit cards to other forms of payment – he just does not want to; how can that decision possibly expose Visa to liability for price maintenance?

Daigle Evidence, Hearing Transcript, p. 424, line 6 to p. 427, line 8

**(f) None of the elements of the causal chain upon which the Commissioner's theory of price maintenance turns, have been established by the evidence**

203. The Commissioner's theory that the Visa Rules "influence upward" the "prices" that Visa charges Acquirers depends on a causal chain, the establishment of each element of which is essential to the Commissioner's theory, and none of which has been demonstrated by the evidence. For purposes of section 76(1)(a), the causal chain can be summarized in four elements:

(a) surcharging and/or refusal to accept certain Visa credit cards must be widespread or feared by Visa to be widespread;

(b) there must be an actual or anticipated significant loss of transaction volume on the Visa network as a result of (a);

(c) Visa must lower its default interchange rates and/or network fees as a result of (b); and,

(d) Acquirers must lower card acceptance fees to their merchant customers as a result of (c).

The specific elements of the causal chain are discussed below in more detail because the Commissioner relies on essentially the same facts in making the "upward influence" argument as she does in making her "adverse effects" argument. In the analysis below regarding section

76(1)(b), the causal chain is addressed specifically in the context of how it relates to the Commissioner's theory of anticompetitive harm.

(i) *The evidence does not establish that surcharging and/or refusal to accept certain Visa credit cards would be widespread*

204. The Commissioner's theory depends on surcharging or the refusal to accept certain Visa credit cards to be widespread or to be feared by Visa to be widespread, otherwise, Visa would have no reason to be concerned about a material loss of volume on the network, and even assuming there was any merit to the Commissioner's theory, no reason to lower interchange or network fees. Strikingly, [redacted] merchants who testified in this proceeding stated in their witness statements that they would actually surcharge if given the ability to do so; the most they said was that they would "consider it". Similarly, [redacted] merchants said that they would refuse to accept Visa premium cards; some said that they would consider doing so, others indicated that they would not even consider it.

[redacted]

Li Statement, para. 35

[redacted]

Symons Statement, para. 52

[redacted]

Houle Statement, para. 50

[redacted]

Daigle evidence, Hearing Transcript, p. 436, lines 5-21

205. The uncertainty about whether and the extent to which merchants would actually surcharge was confirmed and indeed accentuated by the oral testimony. As his Lordship

confirmed [redacted] A number of the merchants acknowledged that they would not be the first among their competitors to surcharge and that they would not surcharge unless their competitors did. A number of the merchants characterized as "speculative" whether they would surcharge and the basis upon which they might do so. [redacted]

206. Taking the evidence as a whole, whether any merchants would actually surcharge if permitted to do so, let alone that surcharging would be widespread is entirely speculative. Clearly, this necessary element of the Commissioner's causal theory has not been established on the balance of probabilities. As such, the Commissioner's theory does not even get out of the starting gate.

(ii) *The evidence does not establish that there would be an actual or anticipated significant loss of transaction volume on the Visa network*

207. The Commissioner's theory is that faced with an actual or anticipated significant loss of transaction volume on the Visa network, Visa would reduce the default interchange rates and/or network fees it sets, as a result of surcharging or selective card acceptance (see Notice of Application, paragraph 73). As indicated above, it is entirely speculative whether merchants would surcharge or refuse to accept certain Visa credit cards at all if permitted to do so; by definition, it must be equally speculative whether there would be any impact on Visa's network volume at all, let alone a sufficiently significant impact to provide any incentive to Visa to reduce interchange and network fees (even assuming that would be Visa's reaction). Even if one assumes that merchants would surcharge or refuse to accept certain Visa credit cards, it is still speculative whether or to what extent Visa's network volumes would be impacted. This is because potential cardholder reaction to surcharging or card refusal are variable; some might impact network volume; some might not.

Frankel Evidence, Hearing Transcript, p. 1082, line 22 to p. 1085, line 9

Daigle Evidence, Hearing Transcript, p. 437, line 23 to p. 439, line 7

208. [redacted] But like so much in this case, arguments that the Commissioner advances for one proposition undermine its core position in other areas. [redacted]

[redacted]

209. Considering that an unknown percentage of cardholders faced with a surcharge would pay the surcharge and that a further unknown percentage would leave the store and use their Visa credit card somewhere else where a surcharge is not imposed, it is entirely speculative whether, or to what extent, surcharging would impact Visa's network volume. As indicated, there is very limited evidence indicating that merchants would actually refuse to accept Visa premium cards if given the ability to do so, but even in that event, any potential impact on Visa network volume would similarly be tempered by the probability that an indeterminate number of cardholders would elect to shop at a competing merchant who accepted Visa infinite cards. As such, again, this necessary element of the Commissioner's causal theory of price maintenance has not been established on the evidence.

Frankel Evidence, Hearing Transcript, p. 1082, line 22 to p. 1085, line 9

Daigle Evidence, Hearing Transcript, p. 437, line 23 to p. 439, line 7

(iii) *The evidence does not establish that Visa would lower its default interchange rates and/or network fees in the face of merchant surcharging or refusal to accept certain Visa credit cards*

210. It is obviously fundamental to the theory of price maintenance advanced by the Commissioner in this matter, that, in response to the purported surcharging or refusal to accept certain Visa cards by merchants and the purported negative impact on Visa network volumes, Visa would reduce its default interchange rate and/or network fees. It has not, however, been demonstrated by the evidence that Visa would do any such thing. Mr. Sheedy's evidence is clear and can be summarized as follows.

211. First, Mr. Sheedy's evidence is that surcharging and refusal to accept certain Visa cards negatively impact the cardholder's experience, making Visa credit cards a less attractive payment option. Reducing interchange may only exacerbate the problem by diminishing the revenue available to Visa credit card issuers to fund cardholder programs and rewards, similarly diminishing the value and attractiveness of Visa credit cards. Faced with surcharging, or selective card acceptance, Visa may consider *raising* interchange, not lowering it, in order to better fund issuer incentives to cardholders that would encourage them to continue to use their Visa credit cards notwithstanding negative merchant conduct.

Sheedy Statement, paras 63, 77-80

Sheedy Evidence, Hearing Transcript, p. 2175, line 12 to p. 2178, line 8

212. Second, Visa's effective average interchange rate in Canada is 1.65%. Experience shows that merchants who surcharge will typically do so at a level that is at least, if not higher (sometimes substantially so) than, the merchant's total cost of acceptance, typically at least 2%. Mr. Sheedy's evidence was that given that the probable surcharge is likely to be higher than the interchange rate, a merchant who is intent on surcharging will do so irrespective of any reduction in interchange that Visa would be able to offer; even if interchange were reduced to zero, it would not offset the revenue that the merchant could generate by surcharging. As Mr. Sheedy testified in-chief:

> ... Sitting down with a merchant who is contemplating adding a 2% surcharge onto a transaction, and looking at it interchange fee that is materially less than the surcharge amount, there is nothing that we could do with interchange fees would influence that merchants appetite to assess a 2% fee.

Sheedy Evidence, Hearing Transcript, p. 2176, line 12-18

Sheedy Statement, para. 80

213. Third, Mr. Sheedy testified that, assuming that merchants specifically targeted Visa's premium cards through either surcharging or selective acceptance, Visa's strategy may well be not to *lower* the interchange rates on its premium products, but to *raise* the interchange rates on its standard products, thereby creating a single blended rate and thus removing the incentive for merchants to specifically target Visa's s premium products. This strategy is particularly plausible given that the gap between Visa's premium and standard products in Canada is only 20 basis points and that its premium rates are the lowest in the segment in Canada. Mr. Sheedy's evidence in this regard was not challenged on cross-examination.

Sheedy Statement, paras. 78-79

Sheedy Evidence, Hearing Transcript, p. 2176, line 24 to p. 2178, line 8

214. [redacted]

[redacted]

Buse Statement, para. 31

[redacted]

215. [redacted]

[redacted]

[redacted]

[redacted]

216. Mr. Thomson put to Mr. Sheedy that there are no documents attached to his witness statement to support the position Mr. Sheedy advanced regarding Visa's potential response in the event of merchant surcharging. Visa did, however, advised the Commissioner in response to a discovery undertaking that Visa's head of interchange, Tolan Steele, had testified in the US MDL proceeding that it was not the case that Visa would lower interchange in response to surcharging, but rather, that Visa would have to assess the situation with the result that interchange might go up, it might go down, or it might stay the same. Given that the Commissioner bears the burden of proof, the far more telling point is that although Visa produced approximately 90,000 documents in this proceeding, there is not a single document that shows that Visa would reduce its default interchange rate or network fees in Canada in response to merchant surcharging or selective card acceptance. Not one. Moreover, Mr. Sheedy's

uncontradicted evidence is that he is not aware of a single instance anywhere in the world where Visa has reduced default interchange rates in response to actual or threatened surcharging.

Sheedy Evidence, p. 736, lines 5 to 10

Sheedy Statement, paras. 77, 78 and 80

Exhibit RV-65 (Questions in writing for Visa regarding foreign proceedings and jurisdictions), answer to question 26

(iv) *The evidence does not establish that Acquirers will lower card acceptance fees to their merchant customers in the absence of the Visa Rules*

217. Clearly, the Commissioner's theory of price maintenance depends on Acquirers reducing the level of card acceptance fees to merchants, in the unlikely event that all of the other steps in the Commissioner's causal chain take place and the removal of the Visa Rules were to reduce the amounts that Acquirers pay in respect of interchange and network fees. First, Acquirers are under no obligation under the Visa Rules to pass on cost savings to merchants in the form of lower card acceptance fees. Just as merchants are free to set the fees they charge merchants as low as they want, if Acquirers face lower input costs, they can pass such costs savings on to their merchant customers, or not, as they choose.

Weiner Evidence, Hearing Transcript, p. 2314, lines 8-12

Van Duynhoven Evidence, Hearing Transcript, p. 2513, line 3 to p. 2514, line 23

218. Secondly, there was no evidence whatsoever submitted to the Tribunal regarding the amount by which interchange or network fees would be or might be expected to be reduced in the event that the Visa Rules were eliminated. Not one single merchant witness was asked about the level of reduction in interchange or network fees that they would seek in the absence of the Visa Rules, nor did a single expert who testified on behalf of the Commissioner address this

point. As such, the amount of the putative reduction, if any, is entirely speculative. By way of comparison, the evidence from Australia shows no discernible evidence of lower retail prices 10 years after interchange fees were dramatically reduced by regulation. The point is made that the reductions in costs are so small that they do not show up in the prices that merchants charge their customers. Given that there is not one shred of evidence before this Tribunal of how much (if any) interchange or network fees would be reduced in the absence of the Visa Rules and given that we are dealing with fractions of an amount that averages 165 basis points (plus a nominal amount for network fees), how can this Tribunal possibly conclude that even if there were some indeterminate reduction in interchange and/or network fees, any such reduction would necessarily be translated into a discernible reduction in the prices that Acquirers charge merchants, any more than reduction in interchange rates in Australia resulted in lower prices to consumers.

Buse Statement, paras. 23-24

Buse Evidence, Hearing Transcript, p. 2117, lines 2-5

219. The Commissioner relies heavily on "interchange plus" contracts to establish that reductions in default interchange rates would necessarily result in lower card acceptance fees to merchants who are subject to those contracts. Again, however, whether the abrogation of the Visa Rules would result in lower card acceptance fees, even where the relationship between the Acquirer and the merchant is governed by an "interchange plus" contract is speculative and contingent. First, even if one accepts (notwithstanding the points already referenced) that Visa would reduce interchange, it may reduce some rates and increase others, with no net change in the overall effective default interchange rate; in which case, the default interchange rate even under interchange plus arrangements might not change. The evidence in Australia shows that

even where individual rates may have been adjusted, the overall average effective rate has been managed by Visa to the regulated maximum cap of 50 basis points.

220. [redacted] Given that one of the professed merchant objectives of surcharging and selective credit card acceptance is to steer customers to forms of payment other than credit card, thereby potentially lowering volume on the Visa network, there can be no assurance that if such strategies were effective, merchants would not face higher card acceptance fees imposed by their Acquirers for failing to meet their volume objectives. Finally, even if interchange reductions resulted in some short-term reduction in card acceptance fees as a result of existing interchange plus agreements, there can be no assurance that in a surcharge world Acquirers would be willing to enter into the same kinds of arrangements going forward; when current interchange plus agreements come up for renewal, merchants may well not be prepared to offer the same terms and could find themselves paying the same or higher card acceptance fees, notwithstanding any impact on interchange rates arising from abrogation of the Visa Rules. Again, all of this is entirely speculative.

Buse Statement, para. 15

[redacted]

Van Duynhoven Evidence, Hearing Transcript, p. 2511, line 6 to p. 2513, line 2

[redacted]

221. Finally, the Commissioner makes frequent reference to the fact that interchange rates represent 80% or more [redacted] and [redacted] of the merchant discount rate ("MDR"), as if this is somehow relevant to the matters under

consideration by the Tribunal. It is not. As the evidence clearly establishes, interchange is a cost to Acquirers. The percentage that interchange represents relative to the final price that Acquirers charge merely reflects the margin that Acquirers are able to earn over and above their costs. The fact that interchange can represent almost 100% of the MDR, merely reflects the extent of competition that Acquirers face and evidences countervailing market power that particularly large merchants wield in negotiating down card acceptance fees with their Acquirers. Far from demonstrating price maintenance, the fact that interchange can represent such a high percentage of the MDR coupled with the fact that the percentage is variable points to the *absence* of price maintenance, it is obvious that Acquirers are free to reduce their prices in response to competitive pressures or customer demand and frequently do so. The fact that Acquirer costs represent such a high percentage of the card acceptance fees charged to merchants is hardly cause for concern; it is the opposite. It simply confirms that Acquirers operate in a highly competitive market in which their margins are very small [redacted]

222. [redacted] The Commissioner's entire theory of price maintenance turns on this Tribunal being satisfied that if permitted to do so, merchants *would* surcharge or selectively accept Visa

credit cards in sufficient quantity to *actually* negatively impact Visa network volumes, with the result that Visa *would* lower interchange and network fees. The Commissioner bears the burden of proof in this matter; it cannot possibly aid the Commissioner that what Visa would or might do in the event that merchants were permitted to surcharge or selectively accept Visa credit cards is entirely speculative, even from Visa's perspective. As indicated, the merchant evidence on these critical points is entirely speculative at best. In light of the obvious insufficiency of the merchant evidence in this regard and the Commissioner's clear failure to establish through Visa's documents and witnesses the factual steps supporting the theory of price maintenance upon which the Commissioner relies is fatal to that theory, which this Tribunal must therefore reject.

[redacted]

223. As indicated, even if the foregoing elements could be established on the evidence, which they were not (and even though none of this would constitute price maintenance under Canadian law), it would still have to be shown that the resulting reductions in interchange and/or network fees *would* result in Acquirers passing on the savings to merchants in the form of lower card acceptance fees; again, this too is ultimately speculative. As noted above, section 76 specifically requires that the Tribunal be satisfied that the conduct in issue *has* influenced upward or *has* discouraged the reduction of the relevant price. Taken at its highest, the evidence tendered in this case establishes at the very most that the Visa Rules *might* have the effect that the Commissioner contends and, contrary to the evidentiary burden which the Commissioner must satisfy, the evidence actually shows that it is *unlikely* that any of the effects argued for by the Commissioner would occur and certainly not more likely than not.

(v) *The evidence does not establish that any reduction in interchange or network fees would result in lower prices to consumers*

224. The preceding paragraphs addressed the various factors that the Commissioner would have to demonstrate on the evidence to show, even on the basis of the Commissioner's legally untenable theory, that the Visa Rules influence upward or discourage the "prices" that Visa charges Acquirers. To establish the alternative claim that the Visa Rules influence upward or discourage the reduction of the prices that merchants charge their customers, the Commissioner would have to show that in the absence of the Visa Rules, merchants would, in fact, charge their customers less. The evidence could not be clearer that, even if default interchange rates and/or network fees were reduced, it is entirely up to the merchants whether or not and to what extent they would pass on any savings to their customers in the form of lower prices. For example, Mr. Houle of Air Canada refused to "speculate" on whether or not Air Canada would reduce its prices if it were permitted to surcharge. In addition, Ms. Li of WestJet explained that surcharging would be a "new form of revenue" that would be looked at as a "cost recovery" and that it may not affect pricing, as WestJet sets its price based on "what we believe the market will bear".

Houle Evidence, Hearing Transcript, p. 532, lines 10-15

Li Evidence, Hearing Transcript, p. 1572, line 3 to p. 1575, line 1

225. This is simply a corollary to the obvious fact that Visa has nothing whatsoever to do with the prices that merchants charge their customers – merchants are free to set their prices however they want. As already indicated, the evidence from Australia shows that even in the face of very substantial (regulatorily mandated) reductions in interchange, there has been no discernible reduction in the prices consumers pay. Apart from the legal considerations already cited, which

make clear that the Visa Rules cannot possibly constitute price maintenance with respect to the prices that merchants charge their customers, the fact is that the prices merchants charge their customers has everything to do with the free exercise of their pricing discretion and nothing whatsoever to do with Visa or the Visa Rules and as such, there can be no price maintenance in respect of those prices.

### (g) Merchant intent to employ surcharging for so-called "cost recovery" contradicts the Commissioner's theory of price maintenance

226. Much of the merchant evidence related to the desire or intention of merchants to use surcharging as a means of "cost recovery". However, firstly, almost all of the Canadian merchant witnesses testified that they already recovered the cost of accepting credit cards in the prices they charge consumers. As such, surcharging would not be a form of "cost recovery", but rather a source of additional revenue; and to the extent that merchants do not reduce their prices, surcharge revenue flows to the bottom line as additional profit. The second point (and one which critically undermines the Commissioner's theory of price maintenance) is that surcharging as "cost recovery" is antithetical to the Commissioner's theory of price maintenance. This is because to the extent that cardholders actually pay the surcharge, there is no impact on Visa's network volume and the mechanism for price maintenance upon which the Commissioner relies cannot apply. The same is true if the cardholder elects to leave the store and shop at a competing merchant that does not apply a surcharge. The evidence of Mr. Gauthier and Mr. Mulvey shows that a significant proportion of consumers are likely to do precisely that if faced with a surcharge.

Frankel Evidence, Hearing Transcript, p. 1082, line 22 to p. 1085, line 9

Daigle Evidence, Hearing Transcript, p. 437, line 23 to p. 439, line 7

Gauthier Expert Report, Exhibit 3.6

Mulvey Expert Report, paras. 34 and 46

[redacted]

De Armas Evidence, Hearing Transcript, p. 285, line 1 to p. 286, line 12

Li Evidence, Hearing Transcript, p. 1571, line 24 to p. 1572, line 8

[redacted]

Daigle Statement, para. 28

Jewer Statement, para. 44

227. Although the merchants pay lip service to the idea that they would consider using surcharging to put pressure on Visa to lower interchange and network fees, many of the merchants actually view surcharging largely, if not entirely, as a means of "cost recovery". [redacted]

[redacted]

Li Evidence, Hearing Transcript, p. 1574, line 13 to p. 1575, line 1

[redacted]

Van Impe Evidence, Hearing Transcript p. 1699, lines 6-10

[redacted]

[redacted]

## VI. OTHER MATTERS

### (a) Section overview

228. Section VI addresses two matters that, while not strictly relevant to the Commissioner's price maintenance theory, were the subject of some considerable focus in the Commissioner's

case and therefore warrant a response: convenience fees and foreign jurisdictions. This section explains why convenience fees (although not permitted in Canada) are, in fact, wholly consistent with the No Surcharge Rule, because where properly applied in accordance with the limits established for them, such fees can have a positive impact on the Visa network, unlike discriminatory surcharges which are harmful to both cardholders and the network. With respect to foreign jurisdictions, this section explains why Australia ought not be regarded as a model to be exemplified in Canada and shows how the unintended negative consequences of the RBA's 2003 reforms should, if anything, militate against the abrogation of the Visa Rules. The section further explains that Canadian and US authorities have already rejected calls to abrogate the Visa Rules and, with specific reference to Canada, points out that the Federal Department of Finance has already determined that the Code of Conduct strikes the appropriate balance among stakeholders in Canada's complex payments industry.

**(b) Convenience fees are consistent with the rationale for the No Surcharge Rule**

229. The Commissioner also relies heavily on the fact that in certain jurisdictions, the VIOR provide for "Convenience Fees," defined as a "fee charged by a Merchant for an added convenience to the Cardholder," and that Visa considered permitting such fees in Canada (Visa does not allow convenience fees in Canada). Simply stated, Visa opposes surcharging because it considers that surcharging can only harm Visa's brand and cannot grow volume on the Visa network. By contrast, Visa allows convenience fees in the limited circumstances where they are permitted, because it believes convenience fees will grow volume on the Visa network and enhance the Visa brand by actually enabling cardholders to use their Visa cards in circumstances where they otherwise could not. As such, there is no inconsistency between the prohibition

against surcharging generally and the limited allowance of convenience fees as exception to the No Surcharge Rule; both are consistent with Visa's overall objective of promoting measures that benefit the network and prohibiting those that do not.

Sheedy Statement, para. 88

230. Convenience fees are permitted by Visa on alternate payment channels where merchants have not traditionally accepted payment cards. For example, in the United States, utilities have traditionally accepted payment only by mail. Under Visa's convenience fee rules, however, utilities are permitted to impose a flat convenience fee if the customer pays online, as long as the same flat fee is charged for all payments in the alternative channel, and the fee is thus truly for the convenience of paying outside the merchant's normal payment channel.

Sheedy Statement, para. 89

231. The concerns associated with surcharging are not present – convenience fees are permitted where, but for the fee, the merchant would not permit payment by credit card and the rules around convenience fees require both proper notice to cardholders and the availability of an option for cardholders to pay by credit card without incurring the convenience fee. For example, in the United States, with the exception of tax payment transactions, Acquirers may permit merchants to levy a convenience fee only when the fee is:

(a) Charged for a bona fide convenience in the form of an alternative payment channel outside the Merchant's customary payment channels;

(b) Disclosed to the Cardholder as a charge for the alternative payment channel convenience;

(c) Added only to a non-face-to-face Transaction. The requirement for an alternate payment channel means that Mail/Telephone Order and Electronic Commerce Merchants whose payment channels are exclusively non-face-to-face may not impose a Convenience Fee;

(d) A flat or fixed amount, regardless of the value of the payment due;

(e) Applicable to all forms of payment accepted in the alternative payment channel;

(f) Disclosed before the completion of the Transaction and the Cardholder is given the opportunity to cancel; and,

(g) Included as a part of the total amount of the Transaction.

Sheedy Statement, para. 89

232. Although Visa has considered permitting convenience fees in Canada, it has not done so. As Mr. Sheedy explained in his testimony, implementation of a convenience fee rule in Canada was delayed for two reasons. Although following the reorganization of Visa in 2008, Canada had expressed interest in adopting a convenience fee exception to the No Surcharge Rule similar to that which is in place in the United States, Visa decided to assess such matters on a global, rather than a country by country basis, which slowed the process for Canada. Second, based on the regulatory interest in Visa's No Surcharge Rule, including the interest evidenced by this proceeding, Visa considered it prudent to put any further consideration of convenience fees in Canada on hold. Nevertheless, Visa continues to be of the view that convenience fees, properly implemented and subject to the limitations prescribed for them are, unlike prohibited surcharges, non-discriminatory provisions which are of net benefit to Visa cardholders and are likely to the benefit rather than harm the Visa network.

Sheedy Statement, paras. 88-90

Sheedy Evidence, Hearing Transcript, p. 2172, line 13 to p. 2175, line 11

**(c) Foreign jurisdictions**

233. The Commissioner places considerable reliance on developments in foreign jurisdictions, particularly the measures adopted by the RBA in 2003. Taken as a whole, the developments in the various jurisdictions (including Canada and the US) that have considered the payments industry are of little assistance to the Commissioner and actually weigh against, not for, the relief the Commissioner seeks from this Tribunal.

234. In his opening statement, Mr. Thomson said that there were "something like 20 other countries in the world where surcharging is allowed", a statement which overstates both the nature and import of that evidence. Of the 20 countries referenced, a dozen are European countries (Belgium, the Czech Republic, Denmark, Estonia, Finland, Germany, Ireland, Malta, Poland, Portugal, Slovenia and Spain) that only recently (2009/2010) adopted rules permitting surcharging. No evidence, however, was provided to this Tribunal indicating whether those rules are operative in any of those countries, if they are, the extent to which merchants in any of those countries are actually surcharging, and, if so, what impact they have had, if any, on interchange and/or network fees, or what, if any, the consumer reaction has been. Mr. Thomson did not mention (nor did Dr. Frankel in his evidence) that there are a dozen countries that have actually passed laws prohibiting surcharging, nor do Mr. Thomson's figures take into account the approximately 150 countries where Visa's No Surcharge Rule remains in force.

Commissioner's Opening, Hearing Transcript, p. 27, lines 9-11

Sheedy Statement, para. 8

Frankel Expert Report, Exhibit 4

235. The reality is that there are only five countries in the world where surcharging has been abrogated for any appreciable period of time: Australia, the Netherlands, Sweden, Switzerland, and the United Kingdom. There was virtually no evidence before the Tribunal with respect to the Netherlands, except that credit cards are not commonly used in that jurisdiction, which suggests that the utility of that country as any kind of comparison to Canada would be limited, even assuming that additional information was tendered, which it was not. Similarly, there was no evidence presented before the Tribunal regarding surcharging in Switzerland, and certainly no information on the impact, if any, of surcharging on default interchange rates and/or network fees in that country. Although Sweden permitted surcharging in 1995, it has since prohibited it. Surcharging has also been permitted in New Zealand since 2009 based on a settlement reached between Visa and MasterCard and the competition authority in that country, but the evidence is that there has been limited surcharging in New Zealand. There is no evidence whatsoever that interchange rates or network fees have declined in New Zealand as a result of surcharging, and indeed Ms. Buse's uncontradicted evidence is that, "there has been no downward pressure on New Zealand [interchange rates]" as a result of surcharging.

Frankel Evidence, Hearing Transcript, p. 943, lines 11-15; p. 948, lines 3-8

Buse Statement, paras. 39 and 41

236. That leaves the United Kingdom and Australia. In the UK, surcharging has been permitted since 1989. More recently, consumer complaints with respect to excessive surcharging and price gouging by merchants in the UK were accepted by the Treasury Department, leading to pending legislation to ban excessive surcharging, a topic upon which Dr. Frankel, in particular, was less than candid. There was virtually no evidence presented to the Tribunal regarding the impact of surcharging on interchange and/or network fees in the UK [redacted]

[redacted]

Frankel Evidence, Hearing Transcript, p. 920, line 18 to p. 931, line 17

Exhibit RV-55, The Telegraph, "Credit Card Fees to be Banned in Crackdown on Surcharges"

Sheedy Statement, paras. 56-58

[redacted]

237. The Tribunal has heard considerable evidence with respect to Australia, much of it conflicting. Because Australia simultaneously capped interchange (now at an average effective rate of 50 bps) and eliminated Visa and MasterCard's No Surcharge Rules, there are little if any meaningful conclusions that can be drawn from the Australian experience regarding the probable impact that permitting surcharging would have on default (or specific) interchange rates in Canada.

238. Further, although the Commissioner cited limited, largely anecdotal (and in some instances equivocal) examples of merchants who are said to have negotiated interchange reductions in exchange for their agreement to either stop surcharging or refrain from doing so, the fact is that for 10 years Visa has managed its effective interchange rate to the regulatorily mandated maximum – so even if rates went down for some merchants they obviously had to go up for others. To the extent that American Express has reduced its rates (which still remain more than 3.5 times higher than Visa's), it would be impossible, absent evidence from American

Express (which has not been present in this proceeding), to determine whether such reductions were because of competition with Visa and MasterCard for merchant acceptance, to avoid surcharging of Amex Cards, or fear that the RBA would reduce American Express's interchange rates by regulation.

239. Although the RBA steadfastly maintains that the 2003 reforms have achieved every one of their intended welfare objectives, the RBA admits that Australian consumers have been the victims of excessive surcharging (a problem that the RBA is now endeavouring to address through modification of its regulation), and there is no measurable evidence that retail prices have fallen despite massive reductions in interchange and the imposition of surcharges that are often multiples of the card acceptance fees that merchants are paying.

Buse Statement, paras. 22 and 24 and Exhibit "H"

Leggett Statement, para. 6

240. Ms. Buse's uncontradicted evidence was that Australian consumers are worse off as a result of the RBA's reforms. Visa cardholders are paying higher annual fees to issuers for cards that yield fewer benefits and they are being surcharged, all with no measurable reduction in retail prices. To add insult to injury, because of blended surcharging by merchants, Visa cardholders are paying the same surcharge as American Express cardholders, who enjoy greater benefits on their premium cards because American Express is unregulated.

Buse Statement, paras. 18-28 and 33-36

Buse Evidence, Hearing Transcript, p. 2112, line 18 to p. 2114, line 3

241. Ms. Buse also testified (as confirmed by the RBA) that the largest merchants, who pay the lowest interchange rate, are the most likely to surcharge and the smallest merchants, who pay the highest interchange rate, are least likely to surcharge.

Buse Evidence, Hearing Transcript, p. 2114, lines 4-18

242. It is also significant that although the merchants who testified in this case suggest that if permitted to do so they would selectively surcharge premium cards, there is no evidence whatsoever that merchants in Australia or anywhere else in the world ever selectively surcharge premium cards – the evidence is that when given the opportunity to surcharge, merchants typically surcharge all credit cards equally.

Buse Evidence, Hearing Transcript, p. 2114, line 19 to p. 2115, line 22

243. Significantly, the Australian reforms were implemented by Australia's financial regulator not by its competition authority, the ACCC. Evidently, and even though the ACCC has a broader mandate than the Tribunal, the ACCC evaluated the merchant complaints regarding the Australian payments industry but elected not to act.

244. Far more telling than what Australia has done, is what Canada and the United States have not; neither has abrogated the No Surcharge Rule or Honour All Cards Rules, despite having been strenuously urged to do so by the merchant lobby in each country and with full knowledge of the Australian reforms introduced by the RBA. In 2010, the US Department of Justice looked at many of the same concerns that have been raised by the Commissioner in this proceeding, and although elimination of the No Surcharge Rule was clearly under consideration, like Canada, the US opted instead for a regime that promoted steering to other forms of payment through discounting and other means, all of which are permitted under Visa's Rules.

Sheedy Statement, paras. 86-87

Weiner Statement, para. 57

245. The Commissioner makes much of the fact that the US Department of Justice reserved its rights to look again at Visa's Rules in the future. The fact remains that notwithstanding having looked closely at the No Surcharge Rule (and against the background of the Australian reforms that had been in place for years), the US Department of Justice resolved its concerns without abrogating the No Surcharge Rules and maintained that position despite strenuous opposition through the Tunney Act review process that saw the Consent Order approved.

Sheedy Statement, para. 87

246. Of even greater relevance to this Tribunal, is the way in which the Government of Canada has dealt with these issues. Although the Canadian government has the same authority as the RBA to designate a payment system for regulation, and despite having had these issues vetted by Senate and House of Commons committees, the Federal Department of Finance rejected calls to abrogate the No Surcharge and Honour All Cards Rules. Instead, less than two years ago, on August 16, 2010, the Department of Finance adopted a comprehensive Code of Conduct to which both Visa and MasterCard are signatories. The Payments Task Force established by the Minister of Finance has also continued to review the Canadian payments industry and recently released its final report. Directly responsive to a question His Lordship asked at the hearing, the Code of Conduct remains a living document; among the recommendations of the Payments Task Force, is that the Code of Conduct be reviewed every two years.

Weiner Statement, paras. 50-55

Weiner Evidence, Hearing Transcript, p. 2317, line 4 to p. 2322, line 6

Credit and Debit Card Markets, Task Force for the Payments System Review, Witness Statement of Betty K. Devita, dated April 10, 2012, para. 72 and Exhibit "T", p. 9

247. Moreover, the day following the completion of evidence in this hearing, here is what Minister of Finance Flaherty had to say about the Canadian government's approach to regulation of the payments industry and key aspects of the Code of Conduct:

> Some jurisdictions around the world have chosen highly prescriptive and constraining rules governing credit and debit payments, even dictating prices. As practices evolve these rules are bound to become obsolete and to have significant unintended consequences. I understand that some players in the payments system would like me to cap interchange rates. Similarly many people would like the price of gas to be capped, their cell phone bills to be capped and their groceries to be capped.
>
> We all know that controlling prices does not work and that what we need is healthy competitive innovative markets. That is why rate regulation has never been the name of the game in the Canadian financial sector. Canada benefits from a good low cost debit option that almost all consumers have access to. With the Code of Conduct, I have taken steps to preserve Canada's low cost debit system by prohibiting competing domestic payment applications and empowering merchants to steer consumers toward low cost options through steering and discounting.
>
> With this Code of Conduct merchants have the power to offer consumers discounts for paying with a low cost payment method. I suggest to you isn't that the best of all reward programs. Before calling for rate regulation and asking the government to limit reward programs for consumers, merchants should realize that they hold a significant competitive advantage and can change the way consumers choose payment options. (Emphasis added)

The Honourable Jim Flaherty, Minister of Finance, Speech delivered at the 2012 Payments Panorama Conference hosted by the Canadian Payments Association, June 8, 2012, Quebec, PQ ("Flaherty Speech")

248. It is apparent that the Commissioner considers the conclusions reached by government regulators on many of the issues presented in this proceeding as relevant to the Tribunal's assessment of the application before it. The Commissioner, however, has not presented a single witness to provide a principled basis for the Tribunal's preference for the conclusions reached by

the RBA over the conflicting conclusions reached by the Government of Canada and the US Department of Justice. The mere fact that the Commissioner prefers the conclusions reached by the RBA to those reached by Canada and the US is hardly sufficient reason for this Tribunal to do so.

## VII. SECTION 76(1)(B): "ADVERSE EFFECT ON COMPETITION IN A MARKET'

249. Section 76(1)(b) requires that: "the conduct has had, is having or is likely to have an adverse effect on competition in a market". Prior to the enactment of section 76, no such anti-competitive effects standard applied to price maintenance. It is explained, above, that the conduct at issue in this case is not properly considered price maintenance under section 76(1)(a). Accordingly, there is no need for this Tribunal to consider whether section 76(1)(b) is satisfied.

250. In addition, the Commissioner has not alleged, nor tendered any evidence, that *price maintenance* has adversely affected competition, which she must. The Commissioner's application fails on that basis alone. The Commissioner has, instead, argued that the Visa Rules adversely affect competition in the market for Credit Card Network Services and that this has influenced upward card acceptance fees. Assuming *arguendo* that this allegation is relevant under section 76, Visa submits that the Commissioner has manifestly failed to establish on a balance of probabilities that the Visa Rules adversely affect competition in any market, let alone the market for Credit Card Network Services. Moreover, as further explained herein, Visa respectfully submits that Credit Card Network Services is not the properly defined relevant market, based on the theory of competitive harm advanced by the Commissioner. Visa's basis for this submission is set out in detail below.

251. There are no reported cases interpreting section 76(1)(b). The term "is having or is likely to have an adverse effect on competition in a market" has, however, been interpreted in two cases, *Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.* and *B-Filer Inc. et al. v. The Bank of Nova Scotia*, both decided under section 75(1)(e) of the *Act* (the refusal to deal provision), which has included the same competitive effects test since that provision was amended in 2002.

> *Nadeau Poultry Farm Ltd. v. Groupe Westco Inc., et al.*, 2009 Comp. Trib 6 ("*Nadeau* (Tribunal)") at paras. 362-369
>
> *B-Filer, supra* at paras. 201-211

252. The key aspects of the Tribunal's decision regarding the meaning of "adverse effect on competition in a market" are summarized in *Nadeau*, at paras. 362-369 (adopting the Tribunal's reasons on this point in *B-Filer*). The Tribunal's decision in *Nadeau* was recently upheld by the Federal Court of Appeal.

> *Nadeau Poultry Farm Ltd. v. Groupe Westco Inc., et al.*, 2011 FCA 188, 419 N.R. 333 ("*Nadeau* (FCA)")

253. From these two cases, it is clear that in determining the meaning of "adverse effect on competition in a market" the Tribunal was principally guided by prior decisions that dealt with the interpretation of paragraph 79(1)(c) of the *Competition Act* (abuse of dominance). A number of key points that are relevant to this case emerge from this jurisprudence.

**(a) The Commissioner must demonstrate that the No Surcharge Rule and Honour All Cards Rule create, enhance or preserve market power**

254. In both *Nadeau* and *B-Filer*, this Tribunal held that the meaning of the term "competition" in the phrase "adverse effect on competition" is no different in nature than how it is used in the "substantial lessening of competition" standard under the abuse of dominance provisions in section 79. While the Tribunal held that an "adverse effect" standard mandates a

somewhat lower threshold than a "substantial lessening" standard, in both cases, the Commissioner must demonstrate that the impugned action "creates, enhances or preserves the market power" of the respondent.

255. In *Canada (Commissioner of Competition) v. Canada Pipe Co.*, the Federal Court of Appeal outlined the test to be applied in determining whether there has been a substantial lessening of competition. The Tribunal must determine "but for the impugned practice, would markets be characterized by greater price competition, choice, service or innovation than exists in the presence of this practice?"

*Canada Pipe, supra* at para. 30

256. This Tribunal's application of paragraph 76(1)(b) must therefore consider the impact of the alleged conduct on all facets of competition, e.g., price, quality, service, consumer choice and innovation. This point is particularly relevant to this proceeding.

257. The Commissioner's theory and evidence focus almost exclusively on a single aspect of competition involving payment networks; namely, what the Commissioner refers to as the price paid by merchants for card acceptance fees. (See, below, for an explanation of why the Commissioner's theory is flawed.) There is little, if any, discussion in the Commissioner's materials (including Professor Carlton's, Dr. Frankel's and Professor Winter's expert reports) on the impact (positive or negative) of the No Surcharge Rule and Honour All Cards Rule on the quality of the products and services provided to merchants and consumers, on the level of service associated with such products, on consumer choice or on the level of innovation. As set out below, in *Canada Pipe* the Federal Court of Appeal explained that a proper analysis of the competitive effects of the relevant conduct entails a consideration of all of these factors together,

not just the absolute fees paid by one category of participant in a five-party payment system. In this matter, a focus on the price of one side of a two-sided platform is also inappropriate because the price on one side cannot change without creating incentives to change price on the other side. In any case, such a singular focus on fees runs counter to the Competition Bureau's own guidelines. For example, the Bureau's Merger Enforcement Guidelines provide:

> In general, when evaluating the competitive effects of a merger, the Bureau's primary concerns are price and output. The Bureau also assesses the effects of the merger on other dimensions of competition, such as quality, product choice, service, innovation and advertising – especially in markets in which there is significant non-price competition. To simplify the discussion, unless otherwise indicated, the term "price" in these guidelines refers to all aspects of firms' actions that affect the interests of buyers. References to an increase in price encompass an increase in the nominal price, but may also refer to a reduction in quality, product choice, service, innovation or other dimensions of competition that buyers value.
>
> Competition Bureau, Merger Enforcement Guidelines, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html#s2_2 ("Merger Enforcement Guidelines")

258. Visa does not concede that any price it charges is unreasonably high or reflects any exercise of market power. However, given the Commissioner's sole focus on the "prices" paid by merchants for Credit Card Network Services as a theory of anti-competitive harm, it should be noted that "high prices" in and of themselves are not considered as the creation, enhancement or preservation of market power. Indeed, when the Competition Bureau began to investigate the payment card industry in 2009, Richard Taylor, then Deputy Commissioner of Competition, noted in his remarks to the Standing Senate Committee on Banking Trade and Commerce the following:

> Allow me to explain briefly exactly what the Bureau can investigate. It is important to note that, under the act, *businesses are generally free to set their own prices at whatever level the market will bear*. For the

> Competition Bureau, high prices or fees are a concern only when they are the result of a contravention of the Act, such as price fixing or the abuse of a dominant position. Let me be very clear on this point: *The Competition Bureau, as an independent law enforcement agency, does not have the ability to mandate, regulate or decide prices in any industry, including with respect to interchange fees*.
>
> I am constrained by the confidentiality provisions of the Act from discussing specifics of our investigations. I can confirm to the committee that with respect to how interchange fees are set, we are looking at whether there may have been a contravention of section 79 or other sections of the act. Section 79, Abuse of Dominant Position, prohibits dominant firms from engaging in practices that have had, are having or are likely to have the effect of preventing or lessening competition in a market. If during this investigation we find evidence of a breach of the provisions of the Competition Act, we will act. [Emphasis added]
>
> Senate, Proceedings of the Standing Senate Committee on Banking Trade and Commerce, 40th Parl., 2nd Sess., No. 3 (March 25, 2009) at 3:20 (Richard Taylor)

259. It follows that an entity's relative negotiating position with particular parties is not considered anti-competitive in and of itself. This, however, is a principal focus of the Commissioner's allegation in this case, and the evidence of each Canadian merchant who testified in this proceeding. Re-balancing the negotiating positions of two commercial entities is not the aim of section 76; indeed, it is not the proper purview of competition law or policy. As then Deputy Commissioner Taylor further noted:

> As a statute of general application, the Competition Act does not attempt to regulate individual transactions between buyers and sellers.
>
> Senate, Proceedings of the Standing Senate Committee on Banking Trade and Commerce, 40th Parl., 2nd Sess., No. 3 (March 25, 2009) at 3:19 (Richard Taylor)

260. Likewise, seeking to re-allocate (alleged) cross-subsidies among market participants is not, in and of itself, an aim of competition policy. If that were the case, then almost every business engaged in discussions with suppliers and customers would find themselves before the

Tribunal. It also means that the Competition Bureau (presumably after incessant lobbying) and the Competition Tribunal would be engaged in an exercise of redistributing or transferring wealth among commercial entities; this is not a role for which the Bureau or Tribunal is suited or designed.

261. Accordingly, section 76(1)(b) does not direct the Tribunal to consider the absolute level of fees paid by any single actor in the payment card system, but rather the effect of the Visa Rules on competition. This requires consideration of not only fees but also competition in terms of consumer choice, service, quality and innovation.

**(b) The Tribunal must also have regard to the pro-competitive and efficiency enhancing aspects of the Visa Rules**

262. The Federal Court of Appeal also held in *Canada Pipe* that in determining whether there has been a substantial lessening of competition, the Tribunal "must be sufficiently flexible to allow a full assessment of all factors relevant in the particular fact situation at issue" and must have regard to the purpose clause in section 1.1 of the *Act*, which includes among its objectives: "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy" and "to provide consumers with competitive prices and product choices."

> *Competition Act*, section 1.1
>
> *Canada Pipe*, *supra* at paras. 47-48

263. These factors are certainly relevant to a consideration of the competitive effects of the Visa Rules, and need to be taken into account for a proper consideration of competitive effects in a market under section 76(1)(b). The pro-competitive and efficiency enhancing aspects of the Visa Rules are described more fully above. It is clear from the evidence described in those

sections that the No Surcharge Rule and the Honour All Cards Rule preserve consumer choice (of method of payment) at the point of sale by providing consumers with the assurance that they will not be penalized for using a particular type of credit card through merchant surcharging or by having their card declined for acceptance. Moreover, the evidence is clear that the No Surcharge Rule and the Honour All Cards Rule are pro-competitive in the sense that their removal would allow merchants to exploit whatever market power they have by excessively surcharging or selectively declining certain cards.

Church Expert Report, paras. 51-59

Summary of the Expert Report of Jeffrey Church, Exhibit R-491 ("Church Summary"), slides 12-13

Church Evidence, Hearing Transcript, p. 2876, line 23 to p. 2879, line 7

Elzinga Expert Report, paras. 212, 222, 225-238

Elzinga Evidence, Hearing Transcript, p. 2703, line 8 to p. 2705, line 25

Kenneth G. Elzinga, "Top 10 Responses to Dr. Frankel and Professor Carlton", Exhibit R-482 ("Elzinga Summary"), slide 6

264. It is clear upon a reading of the evidence that the Commissioner and her experts did not consider these factors as relevant. Rather, their sole focus is the alleged impact of the Visa Rules on merchants and, to a lesser extent, non-card carrying consumers (a very small portion of consumers). Indeed, the Commissioner's experts, Professor Winter and Dr. Frankel, agreed on cross-examination that they had not assessed the total consumer welfare associated with the Visa Rules as part of their respective analyses.

Winter Evidence, Hearing Transcript, p. 2019, lines 10-15

Frankel Evidence, Hearing Transcript, p. 1155, line 11 to p. 1157, line 3

265. By ignoring the (positive) impact of the Visa Rules on cardholders, which represent the vast majority of Canadian consumers, and on competition, the analysis of competitive effects conducted by the Commissioner and her experts stands in stark contrast to the Federal Court of Appeal's statement in *Nadeau* that: "[t]he object of competition legislation is to protect consumers, and to protect market participants only to the extent that doing so can be shown to protect consumers."

*Nadeau*, *supra*, at para. 99

266. A consideration of total consumer welfare under section 76(1)(b) is also consistent with competition policy in the United States with respect to price maintenance. It was recently held by the U.S. Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, that minimum resale price maintenance in the United States would be considered under a "rule of reason" analysis, pursuant to which pro-competitive aspects of the conduct are considered along with the anti-competitive aspects of the conduct.

*Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 55 U.S. 877, 127 S.Ct. 2705 (SCOTUS)

**(c) The adverse effect on competition must be "in a market"**

267. Section 76(1)(b) makes clear that the effect on competition must be analyzed in relation to a specified relevant antitrust market. Effects on competition cannot be analyzed in a vacuum or as a general proposition. In both *Nadeau* and *B-Filer*, for example, definition of the relevant market and the assessment of the competitive effects of the alleged refusal to deal in the relevant markets so defined was a key area of focus (and an issue in the appeal to the Federal Court of Appeal in *Nadeau*). Similarly, case law dealing with other provisions in the *Competition Act* require that the anti-competitive effects be analyzed with respect to competition "in a market"

(e.g., section 77 dealing with exclusive dealing, tied selling, market restriction; sections 78/79 dealing with abuse of dominance; etc.).

> *Canada Pipe, supra* at paras. 8-16
>
> *Canada (Director of Investigation and Research, Competition Act) v. NutraSweet Co.* (1990), 32 C. P. R. (3d) 1 (Comp. Trib.) ("*NutraSweet*")

268. This is important because the Commissioner's experts (and Dr. Frankel in particular) apparently considered that the adverse effects alleged in this proceeding were not (and need not be) analyzed with respect to any particular relevant market, but rather could be considered general in nature. Such an analysis is contrary to the standard under section 76(1)(b), which requires that adverse effects on competition be analyzed "in a market."

**(d) The alleged anti-competitive effects cannot be based on speculative or even "possible" outcomes**

269. Section 76(1)(b) uses the term "has had, is having or is likely to have" in describing the adverse effects standard. Hence, the statute requires a demonstration of actually observed or probable effects.

270. In *B-Filer*, the Tribunal cited *Air Canada v. Canada (Commissioner of Competition)*, wherein the Tribunal found that a "relatively high standard of proof" is required to establish the "'likely' occurrence of a future event" and that in this respect the terms "likely" and "probable" were synonymous. On this basis, the Tribunal in *B-Filer* found that the requirement to establish the likelihood of an adverse effect requires proof that such an event is "probable," and not merely "possible."

> *Air Canada v. Canada (Commissioner of Competition)*, [2000] CCTD No. 24; aff'd [2002] F.C.J. No. 424 (FCA) ("*Air Canada*"), at paras. 37-38
>
> *B-Filer, supra*, at para. 211

271. It follows that an adverse effect on competition in a market cannot be based on theories that are speculative or based on what "might" or "could" occur. This point is even more pertinent in this case because of the manner in which the Commissioner seeks to make out her claim of price maintenance. In particular, as described above, the Commissioner has reversed the required order of causation between section 76(1)(a) and section 76(1)(b). The Commissioner and her experts claim, in effect, that the "influence upward" condition (section 76(1)(a)) is satisfied because the Visa Rules have an adverse effect on competition (section 76(1)(b)) that leads to higher prices. However, section 76(1)(a) requires a demonstration that the conduct in question "*has* influenced upward" or "*has* discouraged the reduction" of the price that another person charges for a product, not merely that such occurrence is "likely." There is no ability to satisfy section 76(1)(a) on the basis of a "likely" or "probable" outcome, as there is in section 76(1)(b). Moreover, as described in detail below, the Commissioner's principal theory of anti-competitive harm is based on a convoluted causal chain that involves demonstration of several individual steps, each leading to the next. Most, if not all, of these steps are (at best) speculative based on the evidence in this proceeding and, as such, each has several possible outcomes – it follows that the chance that all of the steps in the sequence will occur is highly remote. Accordingly, the Commissioner's application of section 76 is even more confounding.

## VIII. THE NO SURCHARGE RULE AND THE HONOUR ALL CARDS RULE ARE PRO-COMPETITIVE AND EFFICIENCY ENHANCING BUSINESS PRACTICES

272. The evidence in this proceeding demonstrates that the Visa Rules are pro-competitive and efficiency enhancing business practices based on sound economic logic (the evidence also

establishes the Visa Rules are pro-consumer). As such, they do not and cannot have adverse effects on competition in a market.

273. As a preliminary matter, the Commissioner and her experts routinely refer to the No Surcharge Rule and the Honour All Cards Rule as the "Merchant Restraints." This term obfuscates the nature and purpose of these two Visa operating rules; instead, (as Professor Elzinga described) it would be more appropriate to describe these rules as "Cardholder Assurances."

Elzinga Evidence, Hearing Transcript, p. 2703, line 16 to p. 2704, line 7

**(a) Business rationale underlying the No Surcharge Rule and the Honour All Cards Rule**

274. As described in more detail above, the No Surcharge Rule and the Honour All Cards Rule are important aspects of the VIOR which are intended to ensure that the Visa network operates effectively and efficiently. These Rules protect the value of the Visa brand by ensuring that cardholders have a uniform experience that is positive, convenient, safe, and reliable when they choose to pay using their Visa card.

275. The No Surcharge Rule is intended to protect the goodwill of the Visa brand from being damaged by negative consumer reaction to additional charges imposed by merchants for use of a Visa branded credit card. The No Surcharge Rule also protects the balancing of incentives in the Visa system, in order to maximize the value of the network for stakeholders in the aggregate.

Sheedy Statement, paras. 59-65

276. Similarly, the Honour All Cards Rule provides cardholders with assurance that their particular type of Visa credit card will be accepted at a merchant that displays the Visa logo

indicating that it has chosen to accept Visa as a method of payment. In other words, the cardholder may use his or her Visa card where the Visa logo is displayed regardless of whether that particular Visa card is issued by, for example, CIBC, RBC, TD or another Issuer and regardless of the reward features associated with that particular Visa card. Cardholders thus avoid the time and hassle of determining whether each merchant at which the cardholder shops will accept the Visa card for payment at the checkout counter. When a consumer sees that a merchant displays the Visa logo, that consumer knows that when he or she approaches the till, his or her Visa card will be honoured at the advertised price. In this manner, the Visa Rules serve to protect consumers' choices, which, as noted above, is one of the enumerated purposes in section 1.1 of the *Competition Act*.

Sheedy Statement, paras. 94-95

Elzinga Expert Report, paras. 235-238

Church Expert Report, paras. 9-10

Summary of the Expert Report of Michael S. Mulvey, Exhibit R-503 ("Mulvey Summary"), slides 6 and 10

277. Merchants also benefit directly from the Visa Rules. For example, a number of merchants, including Wal-Mart, have affiliate bank Issuers. Others, including Shoppers Drug Mart, Sobeys, WestJet, Best Buy and Air Canada, have co-branding agreements with an existing issuer. The evidence in this case makes clear that these merchants benefit from having their co-branded Visa credit cards accepted by all merchants that accept Visa credit cards, rather than only at their own retail outlets.

[redacted]

Li Statement, para. 17

Daigle Statement, para. 29

Shirley Statement, para. 14

278. Professors Church and Elzinga explained that the Commissioner and her experts do not account for potential behaviour by merchants to reduce the attractiveness to consumers of using a credit card. Economists describe these particular concerns as the potential for hold up of cardholders and free riding. Merchants (especially those that do not expect repeat business) have an incentive to engage in hold up, i.e., add a surcharge, *after* the consumer has taken steps to acquire the product or service in question. This type of conduct creates an inherent incentive to free ride on the investments made by the card network and other merchants that abide by the Visa Rules and do not surcharge: the free riding occurs because the merchants who engage in hold up benefit from the increase in system demand that emanates from the expectation that all forms of payment will be accepted and that cardholders will not be surcharged. The free riding merchant is able to increase its profits by switching the customer to a less costly form of payment or by adding a surcharge. The damage that may be done to the card network – the reduction in cardholders' willingness to use that brand of card or a reduction in the number of cardholders – affects the network overall and all merchants that participate in the system, as well as negatively affecting all cardholders. The Visa Rules are designed to prevent this.

Church Expert Report, para. 53

Elzinga Expert Report, paras. 226-230

279. Both Professors Elzinga and Church described the similarity in the rationale for the Visa Rules with the operating rules that franchisors routinely impose on franchisees, whereby franchisors (such as McDonalds) typically establish a very strict set of rules for their franchisees

to ensure a consistent consumer experience at each location. In the absence of such rules, some franchisees would have an incentive to provide lower quality or higher priced service resulting in a different (negative) customer experience, while free-riding on the brand value associated with the franchise.

Church Expert Report, para. 54

Elzinga Expert Report, paras. 79-80

280. [redacted]

**(b) Evidence from this proceeding confirms that Visa's rationale for employing the No Surcharge Rule and Honour All Cards Rule is legitimate**

(i) *Concerns about negative cardholder reaction*

281. As explained above, the No Surcharge Rule protects the goodwill in the Visa brand from being damaged by negative consumer reaction to additional charges imposed by merchants for use of a Visa credit card. Professor Mulvey's evidence is that consumers consider surcharges "akin to a tax" and that surcharges yielded the most negative consumer reaction of all the steering mechanisms analyzed. "Simply put" Professor Mulvey concluded, "Canadian consumers hate the idea." Similarly, in a 2011 Australian study conducted for Visa by UMR research, [redacted] of respondents viewed surcharging as "unfair" (including [redacted] of respondents without a debit or credit card). Importantly for Visa's reputation, [redacted] of these respondents held the card networks responsible for the surcharge, despite the fact that it was imposed by the merchant.

Mulvey Expert Report, para. 32

Sheedy Statement, paras. 54-64 and Exhibit "F", *UMR Research Ltd.*, "A Snapshot of Surcharging in Australia" (8 June 2011)

Sheedy Statement, para. 60

(ii) *Concerns about transparency*

282. Given that customers would often hold the card networks responsible for a surcharge imposed by a merchant, there are legitimate concerns about the manner in which the surcharge is disclosed by the merchant to the cardholders. These transparency concerns are borne out by evidence from the Commissioner's witnesses. For example, Tim Broughton of C'est What testified that if allowed to surcharge, he would inform customers that it was levied by Visa, not by C'est What?: "[t]he way I would like to see this happen is it would say on the bottom a Visa surcharge, because it is Visa's surcharge. It is not mine. I don't want to do it. The cost of processing is not one that I set, okay?"

Broughton Evidence, Hearing Transcript, p. 361, line 14 to p. 362, line 1

283. [redacted]

284. In its 2011 response to the *Which?* Super-Complaint, the United Kingdom Office of Fair Trading (OFT) voiced similar concerns:

> The OFT considers that consumer detriment arises because payment surcharges lack transparency and/or because the headline price is not achievable for the majority of consumers as the payment mechanism which does not incur a surcharge is not readily available. The lack of transparency of effectively compulsory surcharges may allow retailers to increase the level of surcharges, as by the time the charges are revealed consumers have invested time in the purchase and are therefore deterred

from shopping around and comparing offers, weakening competition between retailers.

OFT, "Payment Surcharges: Response to *Which?* Super-Complaint" (2011) (Exhibit E to Sheedy Statement) ["*Which?* Response"] at section 7.2 (emphasis added); see also section 6

(iii) *Concerns about excessive surcharging*

285. The evidence from jurisdictions where surcharging is allowed confirms that merchants often surcharge well in excess of the cost of acceptance. This practice allows certain merchants to use credit card surcharges as a profit centre, especially in sectors such as transportation and tourism, or for online payments.

286. The practice of excessive surcharging has recently attracted considerable scrutiny in the U.K. and Australia. As noted above, in the U.K., the OFT acknowledged concerns over excessive surcharging in its response to the *Which?* Super-Complaint and advocated for greater merchant transparency. In Australia, the RBA has voiced significant concerns in this regard on numerous occasions. In December 2011, the RBA concluded that "surcharging is now sufficiently common, and surcharging above the cost of acceptance sufficiently widespread, that an unconstrained capacity for surcharging may no longer be appropriate." The RBA consequently concluded that card networks should be allowed to limit surcharges to the "reasonable cost of card acceptance." The RBA's decision confirms similar earlier findings by Choice, a consumer watchdog, as well as other industry experts.

*Which?* Response at section 7

Reserve Bank of Australia, *A Variation to the Surcharging Standards: A Consultation Document* (December 2011), Buse Statement, Exhibit "H", p. 7-14

Reserve Bank of Australia, *Review of Card Surcharging: A Consultation Document* (June 2011), Buse Statement, Exhibit "F", p. 5-6

Buse Statement, paras. 20-22

See also:

Choice, *Choice Report: Credit Card Surcharging in Australia* (2010), Buse Statement, Exhibit "G", p. 8, 11-15, 20-21

Robert Stillman, William Bishop, Kyla Malcolm, and Nicole Hildebrandt, "Regulatory Intervention in the Payment Card Industry by the Reserve Bank of Australia: Analysis of the Evidence" (London, 2008), Buse Statement, Exhibit "J", ("Stillman Report") p. 12, 27-30

Expert Report of Gregory John Houston (December 14, 2009), Buse Statement, Exhibit "L", p. 6-11

287. The Commissioner's expert witnesses have effectively conceded this point. Mr. McCormack said he is aware of "some issues" with respect to excessive surcharging. Professor Carlton admitted that "there is nothing to guarantee that a merchant might not charge ... a surcharge in excess of the merchant fee" and that he is "aware that those concerns have arisen internationally." Professor Winter acknowledged the problem as well, and advocated "a policy that would allow merchants to surcharge, but also allow credit card companies to restrict the level of surcharging to levels that are reasonably justified by cost." Such a standard, even if plausible, begs the question of what levels are considered "reasonably justified" which is something the Commissioner has not sought to address.

McCormack Evidence, Hearing Transcript, p. 763, lines 7-18

Carlton Evidence, Hearing Transcript, p. 1339, lines 5-25

Winter Evidence, Hearing Transcript, p. 2058, lines 5-22

**(c) No anti-competitive motivation underlying the Visa Rules, let alone one based on a strategy of price maintenance**

288. The Commissioner has adduced no evidence of an anti-competitive motive underlying either of the Visa Rules, including no evidence related to any strategy on the part of Visa to engage in price maintenance, nor of any joint conduct by Visa and MasterCard.

289. It is telling that the Commissioner has not directed this Tribunal to any evidence demonstrating that Visa seeks to utilize the Visa Rules to fulfill an objective of suppressing competition as between Visa and MasterCard, suppressing merchant leverage, reducing elasticity of demand at the merchant or consumer level, maintaining card acceptance fees charged by Acquirers, or maintaining retail prices charged by merchants. Indeed, such strategies would run counter to Visa's business model, which is premised on maximizing transaction volume over its network.

290. Moreover, there has been no allegation in these proceedings that Visa and MasterCard have colluded or otherwise jointly agreed to employ or maintain the No Surcharge Rule and Honour All Cards Rule; each has done so independently based on the business judgment each considers would maximize transaction volume on its particular network. Nor is there any allegation of "joint price maintenance." Accordingly, the fact that Visa and MasterCard each independently operate their systems (which by all accounts compete against one another) using a No Surcharge Rule and Honour All Cards Rule is evidence of the pro-competitive (legitimate) nature of the Visa Rules.

Winter Evidence, Hearing Transcript, p. 1978, line 15 to p. 1979, line 10

Frankel Evidence, Hearing Transcript, p. 1051, line 25 to p. 1052, line 3

291. In addition, as noted above, the Visa Rules are longstanding aspects of the VIOR. They were designed and introduced into the Visa system over 30 years ago to help Visa grow transaction volume, well before there were any allegations of market power or dominance. As further evidence of the legitimate business objectives underlying the Visa Rules, payment systems *not* alleged to have any significant degree of market power by the Commissioner employ

similar rules. For example, American Express requires merchants to treat American Express cards the same way they treat other payment methods; therefore, if a merchant accepts Visa and American Express, that merchant may not surcharge American Express transactions.

> Financial Consumer Agency of Canada "Frequently Asked Questions" (18 May 2011), online: FCAC <http://www.fcac-acfc.gc.ca/eng/resources/faq/qaview-eng.asp?id=347>, Exhibit "V" to Weiner Statement

292. The pro-consumer aspects of the Visa (and MasterCard) rules at issue mean that the Visa and MasterCard networks are more competitive against each other as well as against other forms of payment. Without these rules, consumers would be more reluctant to use Visa or MasterCard branded credit cards. Simply put, they increase interbrand competition.

> Church Expert Report, paras. 55-56

293. It would be unusual, to say the least, for the law to condemn the Visa Rules as anti-competitive simply because Visa is a more successful entity today than it was when these rules were introduced, i.e., because the Visa Rules had accomplished the legitimate and intended purpose of expanding output on the system. Such an outcome would be particularly unprincipled as a matter of competition policy when one considers that smaller players in the payments industry with which Visa competes employ the very same practices, presumably also in an effort to expand volume on their networks and not for any anti-competitive purpose. For purposes of section 76, pro-competitive conduct cannot suddenly be re-characterized as "anti-competitive" just because an entity has crossed a particular size threshold. Competition policy generally does not seek to punish companies for adopting policies that contribute to growth and success because of their appeal to consumers.

**(d) Canadian regulatory and US antitrust authorities have both recently rejected claims to abolish the Visa Rules**

294. The Visa Rules have recently come under regulatory and judicial scrutiny in Canada and the United States. In both countries, authorities examined these Rules and their effects, and concluded that they should not be abrogated. The Commissioner is now trying to use the Tribunal to collaterally attack certain rules that have already been sanctioned on both sides of the border.

295. As detailed above, in Canada, the Ministry of Finance released the Code of Conduct for the Credit and Debit Card Industry in Canada ("Code of Conduct") in April 2010 after careful consultation with multiple stakeholders including merchant groups, some of whom (such as the Retail Council of Canada) lobbied for the abrogation of the Visa Rules. Visa's No Surcharge Rule was left intact. In the United States, the Department of Justice recently resolved with Visa and MasterCard a lawsuit it had brought against Visa, MasterCard and American express challenging their non-discrimination rules. The No Surcharge Rule was part of that investigation, and no allegations of price maintenance were made by the United States Department of Justice. The Department of Justice considered the effects of the No Surcharge Rule but chose not to seek its abrogation, instead limiting the relief sought to rules that in some cases limited discounting – rules that do not exist in Canada.

Code of Conduct, Exhibit RM-8

Final Judgment as to Defendants MasterCard International Incorporated and Visa Inc., *U.S. et al. v. American Express Co. et al.*, Civil Action No. CV-10-4496 (E.D.N.Y.), Sheedy Statement, Exhibit "J"

Sheedy Statement, paras. 86-87

Weiner Statement, paras. 50-52

Jewer Evidence, Hearing Transcript, p .1749, line 17 to p. 1750, line 24; p. 1760, lines 14-23

**(e) The Commissioner did not consider the pro-competitive and efficiency enhancing aspects of the Visa Rules**

296. The Commissioner has effectively ignored the evidence of the pro-competitive and efficiency enhancing nature of the Visa Rules adduced by Visa and MasterCard, seemingly as irrelevant (consistent with the views of her economic experts). Visa and MasterCard's evidence in this regard remains unchallenged.

297. Professors Winter and Carlton ignore this issue entirely. For example, Professor Winter's mandate was not concerned with the pro-competitive aspects of the Visa Rules and instead considered only whether one of the consequences is that there is some adverse effect on competition in some market. In his report, he stated: "I have been asked to examine whether the Merchant Rules ... have had, are having, or are likely to have an adverse effect on competition in a market." On cross-examination, Professor Winter testified:

> MR. HOFLEY: So your mandate was to look at whether or not the reduction of the price occurred for customers of Visa and MasterCard supplying a product within Canada, correct?
>
> DR. WINTER: That was the first part of my mandate, yes.
>
> MR. HOFLEY: Right. And the second part of your mandate was to examine whether the merchant rules adversely affect competition in a market, correct?
>
> DR. WINTER: That's correct.
>
> MR. HOFLEY: And that was the totality of your mandate, correct?
>
> DR. WINTER: Yes.

Winter Evidence, Hearing Transcript, p. 1939, lines 4-17

> MR. HOFLEY: Let me see if I can make this simple. Is it fair to say, from your perspective in giving evidence in respect of this case, that you have not assessed the total consumer welfare associated with this practice?
>
> DR. WINTER: That's correct.
>
> Winter Expert Report, para. 3 (b)
>
> Winter Evidence, Hearing Transcript, p. 2019, lines 10-15

298. As explained above, the Visa Rules are pro-competitive because they preserve consumer choice (of payment method) at the point of sale by providing consumers with the assurance that they will not be penalized for using a particular type of credit card by merchant surcharging or by having their card declined for acceptance. They also prevent merchants from exploiting whatever market power they have by excessively surcharging or selectively declining certain cards.

> Church Expert Report, paras. 51-59
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> Church slides, 12-13
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> Church Evidence, Hearing Transcript, p. 2876, line 23 to p. 2879, line 7
>
> Elzinga Expert Report, paras. 212, 222, 225-238
>
> Elzinga Evidence, Hearing Transcript, p. 2703, line 8 to p. 2705, line 25
>
> Elzinga Summary, slide 6

299. In the end, Visa and MasterCard's evidence of the pro-competitive and efficiency enhancing effects of the No Surcharge Rule and Honour All Cards Rule remains uncontradicted. The Commissioner's theory ignores these effects.

## IX. THE COMMISSIONER'S ANALYSIS OF ADVERSE EFFECTS ON COMPETITION IN A MARKET

300. Earlier in these submissions, Visa demonstrates that the Commissioner's "price maintenance" analysis is incorrect in that, among other things, the Commissioner seeks to

demonstrate that an "influence upward" of prices (ostensibly paragraph 76(1)(a)) was caused by an adverse effect on competition (paragraph 76(1)(b)), essentially reversing the order of causality required by section 76. Notwithstanding these serious analytical issues, it is equally clear that the allegation that the Visa Rules "have had, are having or are likely to have an adverse effect on competition in a market" is itself fundamentally flawed in several material respects. For the sake of clarity, these flaws in the Commissioner's analysis (which are explained in more detail in this section) are not contingent on any particular outcome or analysis of market definition or market power, which are discussed below.

301. Based on the Commissioner's pleadings, opening argument, witness and expert testimony, there are numerous internal inconsistencies and contradictions with the Commissioner's theories of adverse effects on competition. In addition, as explained above, the Commissioner struggles to contort section 76 in almost every possible manner so that it can be applied to this case.

302. In any event, in order to guide the Tribunal (and without admitting to any of the required elements), the Commissioner's theories of anticompetitive harm in this matter can be briefly summarized as follows:

(a) The Commissioner asserts that the relevant market is the supply of "Credit Card Network Services (CCNS)" in Canada. (In Part XII, it is explained why the Commissioner's market definition analysis is flawed from both an analytical and evidentiary perspective).

Notice of Application at paras. 6 and 80

(b) Having defined the relevant market to include only the supply of CCNS, the Commissioner concludes that Visa and MasterCard have market power. (In Part XIII, it is explained why the Commissioner's market power analysis is flawed from both an analytical and evidentiary perspective.)

Notice of Application at paras. 88-92

(c) The Commissioner then argues that, given the alleged market power of Visa and MasterCard in the market for the supply of CCNS, the Visa Rules have an adverse effect on competition principally in two ways.

(i) The Commissioner claims that the No Surcharge Rule and Honour All Cards Rule suppress the ability of merchants to send appropriate price signals to consumers, and that because the ability to send such price signals (i.e., surcharge) would materially impact demand for volume on each credit card network, Visa and MasterCard would each have greater incentives (because of increased merchant leverage) to compete for merchant business by lowering interchange rates and/or network fees. Acquirers would then pass on savings from these reduced costs to merchants in the form of lower card acceptance fees. (In Part X, it is explained why the Commissioner's suppression of competition theory is flawed from both an analytical and evidentiary perspective.)

Notice of Application at para. 93

Winter Report, paras. 81-86

Winter Evidence, Hearing Transcript, p. 1952, line 6 to p. 1953, line 12

Frankel Expert Report, paras. 141, 151, 157

Frankel Reply, para. 68

(ii) The Commissioner argues that credit card users are "cross-subsidized" by cash and debit users. Specifically, the Commissioner claims that since merchants may not surcharge customers who pay with a credit card (although the Commissioner concedes merchants can discount), merchants must spread the cost of credit card acceptance across all sales including to those customers that do not pay with credit cards. Therefore, the merchant's cost of credit card acceptance is borne not just by credit card users but by all customers regardless of payment method and elasticity of demand by cardholders seeking to pay with their card is lessened. Moreover, according to the Commissioner, as a result, retail prices are elevated. (In part XI, it is explained why the Commissioner's cross-subsidization, or "cost externalization" theory is flawed from both an analytical and evidentiary perspective.)

Notice of Application at para. 93

Winter Expert Report, paras. 87-93

Winter Evidence, Hearing Transcript, p. 1955, line 3 to p. 1956, line 24

Frankel Expert Report, paras. 119-122

Frankel Reply Report, paras. 90-92

303. In respect of both theories, the Commissioner and her experts acknowledge that the Visa Rules allow for discounting (and other steering mechanisms) by merchants, but they claim that –

for a variety of reasons – discounting is less effective (relative to surcharging) at steering and thus enhancing merchants' ability to negotiate lower interchange and/or network fees.

304. The following sections explain in detail the reasons why the Commissioner's theories of anti-competitive harm are unsustainable from an analytical and evidentiary point of view. However, at a more basic level, leaving aside the analytical and factual deficiencies, both of the Commissioner's two theories of anticompetitive harm fail because they are based on a partial analysis: they consider the effect of the rules on the incentives for Visa and MasterCard to set prices for Acquirers, but do not incorporate the incentives for Visa and MasterCard to compete for volume on the issuing side. A complete analysis would look at the effect of the rules on the incentives for Visa and MasterCard to compete on both sides of their network.

305. The Commissioner's theories of anticompetitive harm provide that the rules create or enhance market power because they reduce the incentive of Visa and MasterCard to "undercut" each other's higher prices. The reason identified by the Commissioner is the alleged suppression of the volume response to lower prices for Acquirers because of the rules. The key point missed by the Commissioner and her experts, however, is that (accepting the Commissioner's theory) while the rules may mean that the increase in volume resulting from reduced acquirer fees is not as large, they do not stop Visa and MasterCard from increasing their volumes profitably by reducing their fees to Issuers or otherwise providing Issuers with other incentives. Visa and MasterCard can still increase the volume of their transactions by "undercutting" on the Issuer side.

306. A restraint or rule that suppresses the volume response on one side of the network is insufficient by itself to reduce the demand response, as assumed by the Commissioner, unless

there is a similar type of restraint on the other side. Since there is no such restraint (on the issuing side) even under the Commissioner's own theory, any positive margin gained from competition suppression or cost externalization could be readily dissipated — competed away — on the Issuer side of the networks. Visa and MasterCard can do so by providing incentives to Issuers to get cardholders to use and hold their cards, thereby increasing their volumes. That is, Visa and MasterCard will still have incentives to undercut and compete away positive margins with the rules in place — as Professor Winter assumes would happen in the absence of the rules.

Winter Expert Report, para. 72

Church Evidence, Hearing Transcript, p. 2874, line 10 to p. 2876, line 18; see also p. 2961, line 15 to p. 2970, line 9

Church Expert Report, paras. 43-50

307. In other words, the avenues for increased volumes from reducing the fees that the Commissioner assumes are foreclosed by the Visa Rules still exist, but on the Issuer side of the platform. Hence, it is not possible to conclude that the rules have an effect on the market power of Visa and MasterCard without assessing the incentive and effectiveness of undercutting on the Issuer side of the platform (which the Commissioner in fact argues is robust). In other words, the same incentives that the Commissioner argues would exist in the absence of the rules on the acquiring side already exist on the Issuer side *with the rules*. If competition on the Issuer side is a reasonable substitute for competition on the Acquirer side in inducing consumers to switch among cards or acquire a card (the Commissioner has provided no evidence to suggest that this is not the case), then it is difficult to fathom how the rules can create, enhance, or maintain market power.

## X. THE COMMISSIONER'S COMPETITION "SUPPRESSION" THEORY IS FUNDAMENTALLY FLAWED

308. The Commissioner's suppression of competition theory is summarized above and explained in her Notice of Application, paragraph 93(b), as: "distorting or harming the competitive process and proper functioning of the price-setting mechanism for Card Acceptance Fees." On paper and in pleadings, the Commissioner's theory can be reduced to a few concise statements or phrases such as "fosteri[ng] competition" or providing a source of "competitive discipline." As explained above, these vague and indeterminate concepts are not to be equated with the meaning of "adverse effect on competition in a market" as that phrase is used in paragraph 76(1)(b).

309. Further, because the Commissioner effectively attempts to conflate the two distinct elements of section 76 – the "influence upward" element in section 76(1)(a) and the "adverse effects" element in section 76(1)(b) – into one, the factual and causal assertions underlying the Commissioner's competition suppression theory overlap considerably (if not entirely) with the factual and causal assertions underlying the Commissioner's "influence upward" arguments, discussed above. Although the factual and causal assertions are essentially identical, below, Visa Canada explains why the Commissioner's competition suppression theory fails (relying on much the same evidence in respect of the "influence upward" condition) for two reasons. First, to address the suppression of competition theories advanced by the Commissioner and her experts under their discussions of anti-competitive effects and, second, because there are different burdens of proof applicable to the two sub-subsections: under section 76(1)(a), the Commissioner is required to show that the conduct at issue (the Visa Rules) "has" influenced upward another person's price, whereas under section 76(1)(b), the Commissioner is required to

show that the conduct at issue, if found to exist, "has had, is having or is likely to have" an adverse effect on competition in a market.

310. As explained above, and confirmed, for example, by Professor Winter, the Commissioner's competition suppression theory is dependent on proof, on a balance of probabilities, that several speculative steps (in a convoluted chain of events) will result in lower card acceptance fees and retail prices. In particular, the Commissioner contends that:

(a) Removing the Visa Rules will lead to merchants sending "price (payment cost) signals" to customers via surcharges and/or card discrimination;

(b) This surcharging and/or card discrimination would be widespread, or threat of it being widespread would be sufficient to accomplish the same objective;

(c) This widespread surcharging will be precise enough for customers to distinguish between card acceptance fees associated with Visa and MasterCard (along with other credit networks, cash and debit) as well as between card acceptance fees associated with standard and premium credit cards;

(d) This accurate and widespread surcharging or discrimination (or the threat thereof) will lead to a significant reduction in cardholder usage of the relevant brand of card and will lead to fewer Canadians enrolling for membership of the relevant brand of card, i.e., lower transaction volume;

(e) In the face of this reduced cardholder usage and enrolment Visa and MasterCard would lower default (or specific) interchange rates and/or network fees in order to

stem the tide of the volume losses on their network or out of fear of significant volume losses on their network;

(f) This lowering of default interchange rates or network fees would be passed on to merchants by Acquirers in the form of lower card acceptance fees rather than being retained by Acquirers; and,

(g) These lower card acceptance fees would be passed on to consumers in the form of lower prices at retail rather than being retained by merchants.

Winter Expert Report, paras. 70-86

For example, see Winter Evidence, Hearing Transcript, p. 2055, line 5 to p. 2063, line 14

311. If the Tribunal is not persuaded that even one of these steps in the chain is likely to occur, the Commissioner's competition suppression theory fails since each step in the chain causes the next. In fact, as discussed herein, each and every factual step in the Commissioner's lengthy chain is fraught with significant analytical and evidentiary holes. Accordingly, the burden of satisfying each aspect on a balance of probabilities becomes greater as one moves further down the causal chain (e.g., if step (a) and step (b) each have a 50% probability, the chance of both step (a) and step (b) occurring is only 25%). The cumulative effect of this burden is that the prospect that all of the factual elements in the causal chain will occur is highly remote. As such the alleged "competition suppression" theory is sustainable.

**(a) Merchants have numerous ways of sending "price signals" to their customers if they want to do so**

312. The Commissioner claims that removing the No Surcharge Rule will provide merchants with the ability to send appropriate "price signals" to customers by surcharging transactions that are processed using higher cost payment methods.

Frankel Summary, slide 5

Carlton Expert Report, para. 44

Winter Expert Report, paras. 72-73

313. However, as discussed above, the Visa Rules do not prevent merchants from sending equivalent "price signals" to effect or otherwise threaten volume reductions by a number of methods other than surcharging or card discrimination. These methods include, among others:

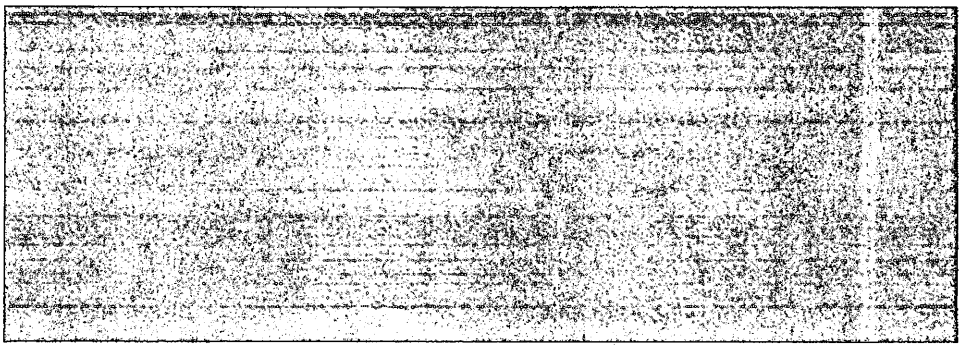
(a) Providing discounts based on credit card brand (i.e., Visa or MasterCard), credit card type (i.e., standard or premium), other payment method (i.e., cash, debit, cheque).

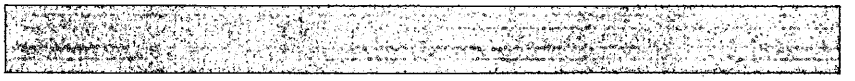
(b) Disclosing relevant card acceptance cost information (such as displaying interchange fees – which are required to be publicly available by the Code of Conduct – at the cash register) so that consumers can decide for themselves whether they are comfortable absorbing those costs. The unwillingness (as opposed to inability) of merchant to provide relevant cost or similar information to customers was evident in the testimony of a number of the merchant witnesses. For example:

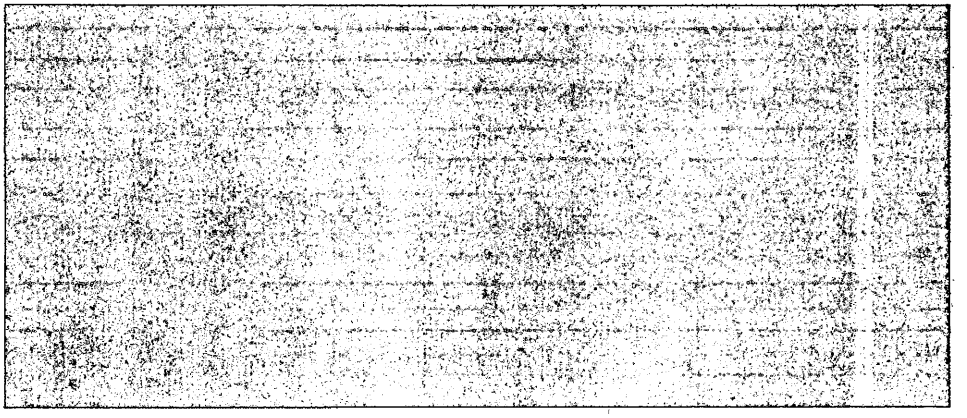
(i) Mr. Houle claimed that Air Canada is unable to send correct pricing signals to customers, but he admitted that the company does not indicate

to customers that it has a preference as to payment method even though this is permitted by the Code of Conduct;

Houle Evidence, Hearing Transcript, p. 516, line 25 to p. 520, line 22

(ii) 



(iii) 

(iv) Mr. Broughton admitted that C'est What? does not communicate concerns about the cost of payment to consumers.

Broughton Evidence, Hearing Transcript, p.352, lines 8-21

(c) Refusing to accept one of Visa or MasterCard credit cards but continuing to accept the other, or as some retailers have done, refusing to accept either Visa or MasterCard. As Professor Winter explained: "This is a free-enterprise economy.

Merchants are not compelled to purchase a service. They're free to purchase it, and they will purchase it if the benefits of doing so are greater than the cost."

Winter Evidence, Hearing Transcript, p. 2046, line 25 to p. 2047, line 4

(d) Providing a loyalty rewards program that is based on payment method. For example, several of the retailers that testified in this proceeding have loyalty programs that are designed to encourage certain conduct by their customers: Shoppers Drug Mart (Optimum Card), Sobeys (Club Sobeys), Air Canada (Aeroplan), Best Buy (Rewards Zone). Canadian Tire also has a loyalty rewards program, which provides different benefits depending on payment method;

Daigle Evidence, Hearing Transcript, p. 405, lines 12-22

[redacted]

Houle Evidence, Hearing Transcript, p. 486, line 19 to p. 487, line 1

Shirley Evidence, Hearing Transcript, p. 1647, line 24 to p. 1648, line 9

Houle Evidence, Hearing Transcript, p. 425, lines 6-8

(e) Provide a separate (and faster) check-out line for customers based on the customer's payment method; and

(f) Provide free gifts (or the opportunity to win a free gift) for customers based on the customer's payment method.

Winter Evidence, Hearing Transcript, p. 2046, lines 3-20

314. These other steering methods – all of which are permitted by the Visa and MasterCard rules – provide merchants with adequate tools to direct volume away from certain payment methods in the same manner as surcharging or card discrimination would under the Commissioner's suppression theory, if merchants chose to do so.

315. In this respect, even accepting the Commissioner and her experts' version of how competition in the industry ought to function (i.e., credit card companies lowering default interchange rates to stem volume losses), the ability to stem volume losses (or drive volume) by such "undercutting" on interchange exists under the current rules. For example, MasterCard could approach a merchant today with the following propositions: "We will offer you a lower interchange rate if you provide discounts to those customers who use a MasterCard" or "We will offer a lower interchange to you if you actively promote the use of MasterCard in your store" or "We will offer a lower interchange to you if you set up a loyalty rewards program for use of MasterCard." By the same token, a merchant today could "threaten" (a phrase the Commissioner and her experts are fond of using) to levy a discount on a competing brand's payment method, for example: "If you (MasterCard) do not lower your interchange, I will provide a 1% discount to all customers that use a Visa card". Professor Winter acknowledged that these methods of driving volume are available to merchants under Visa's (and MasterCard's) rules.

> Winter Evidence, Hearing Transcript, p. 2050, line 21 to p. 2051, line 2; p. 2051, line 11 to p. 2051, line 17

316. The importance of the availability of discounting and other steering methods under the terms of the Visa Rules (as opposed to the relative effectiveness of discounting as compared to surcharging) should not be understated. The ability to discount, which is also enshrined in the Code of Conduct, provides merchants with a very real choice: merchants are not precluded by the Visa Rules from providing a differing price based on payment methods.

317. This ability to discount also renders irrelevant the Commissioner's experts' examples of soft drinks (e.g., Dr. Frankel's Coke and Pepsi) and hot drinks (e.g., Professor Winter's coffee and tea). Under those examples, each expert specifically provided that the rule in question

mandated that the "same price" or equal treatment be applied across all products. That is simply not what the Visa Rules require. On cross-examination, Professor Winter admitted that in his coffee/tea example, he "assumed away" discounting and focused on surcharging and that "[i]n the credit card industry, discounting is available." On cross-examination, Dr. Frankel also agreed that merchants have the ability to discount and that his Coke/Pepsi example did not address the ability to discount.

> Winter Evidence, Hearing Transcript, p. 2034, lines 3-4
>
> Frankel Evidence, Hearing Transcript, p. 1001, lines 6-11; p. 1041, line 2, p. 1043, line 14

318. For the reasons explained above, the claims expressed by the merchant witnesses and the Commissioner's experts about discounting being less effective or less practical than surcharging are not credible. In any case, the alleged ineffectiveness is not attributable to the Visa Rules (which permit such activity), but is a function of merchants' unwillingness to invest the time, effort and expense to implement discounting methods or to accept the financial risk they perceive accompanies discounting (as opposed to surcharging). On cross-examination, Professor Winter conceded that the apparent lack of effectiveness of discounting is not a function of Visa's Rules:

> MR. HOFLEY: And you would agree with me that, to the extent discounting may not be as effective, as you say, as steering, that is not a function of the Visa or MasterCard rules, correct?
>
> DR. WINTER: Excuse me. That's correct. That is just a condition of the market.
>
> MR. HOFLEY: And that it is conceivably a function of merchants' investment in discounting techniques or creative discounting techniques? Is that a fair statement?
>
> DR. WINTER: Merchants' effectiveness in using the discounting strategy will depend upon their investment.

Winter Evidence, Hearing Transcript, p. 2036, line 15 to p. 2037, line 2

**(b) The evidence does not demonstrate that surcharging will be widespread or that the threat of surcharging will be credible**

319. The Commissioner contends that not only will surcharging occur but that it will be widespread (or the threat of such widespread surcharging will be sufficient to have an impact). However, the evidence at the hearing did not establish that surcharging is likely to be widespread at all, nor did it establish that a threat of surcharging is credible. In fact, as is described above, several of the merchant witnesses testified that they would suffer from a "first mover" problem in that if they were to be the first merchant in their respective industry to engage in surcharging, then they would risk losing significant customer sales to a competitor. The Commissioner's industry expert, Mr. McCormack acknowledged that there is a first mover "consideration" which companies would have to factor into their business planning.

[redacted]

McCormack Evidence, Hearing Transcript, p. 727, line 5 to p. 729, line 16

320. Some of the witnesses at the hearing even went so far as to suggest that some sort of regulatory solution may be appropriate to address the apparent "problem" of competition among merchants jeopardizing their collective ability to engage in surcharging of consumers. [redacted]

[redacted]

Similarly, Mr. Broughton (C'est What?) expressed a preference for regulatory intervention in

both his witness statement and testimony, and in the absence of this, the ability to surcharge with the surcharge fee charged directly by the card company.

[redacted]

Broughton Statement, para. 21

Broughton Evidence, Hearing Transcript, p. 362, line 22 to p. 369, line 4

321. With respect to the supposed "threat" to surcharge, in his reply report, Professor Winter stated: "... the mere threat of a surcharge or the possibility of surcharging can be an effective means of creating an incentive for Visa and MasterCard to decrease Acquirer Fees." (Professor Winter initially asserted that actual surcharging would have to occur but later, in his reply report, indicated that the threat of surcharging would be sufficient.)

Winter Reply Report, para. 64

Winter Evidence, Hearing Transcript, p. 2060, line 24 to p. 2063, line 18

322. In contrast, Mr. Sheedy testified that there is no serious threat of widespread surcharging by merchants for a number of reasons. When asked whether he accepted "the premise that, if merchants either surcharge or threaten to do so, that Visa would lower interchange in response," Mr. Sheedy responded as follows:

> I don't accept that premise. First off, I think it is important to clarify that – and I have had lots of exposure to merchants. Most merchants do not want to surcharge. Most merchants want to service their customers in a convenient and a quick way. They don't want to introduce confusion and something that is less positive, like a surcharge. So even if the ability to surcharge were present, it's my view and my experience that most merchants wouldn't surcharge. I think for the small percentage of merchants that would surcharge, they would surcharge irrespective of what we did with interchange fees.

Sheedy Evidence, Hearing Transcript, p. 2175, line 12 to p. 2176, line 5

Sheedy Statement, paras. 77-81

Buse Statement, para. 36

Devita Statement, para. 62

323. The testimony of the merchant witnesses also strongly suggests that the general preference of most merchants is not to surcharge. For example [redacted] In addition, Mr. Broughton testified that if surcharging is allowed, C'est What? is "clearly not going to be the first people to do it". Both the Shoppers and Coles witnesses stated that it was their respective companies' preference not to surcharge.

[redacted]

Broughton Evidence, Hearing Transcript, p. 354, lines 22-25

Daigle Evidence, Hearing Transcript, p. 436, line 7 to p. 437, line 9

Swansson Evidence, Hearing Transcript, p. 1505, lines 1-25

**(c) The evidence does not demonstrate that merchants will send accurate price signals by surcharging**

324. The Commissioner and her experts rely on the proposition that, not only will surcharging occur on a widespread scale, such surcharging will be precise enough for customers to distinguish between card acceptance fees associated with Visa and MasterCard (and other credit networks, cash and debit) as well as between card acceptance fees associated with standard and premium credit cards. During cross-examination, Professor Winter stated:

> MR. HOFLEY: And you say at paragraph 73, which I believe is page 22 of the PDF, that -- and I am quoting: "... the ability to differentially surcharge between Visa and MasterCard credit [sic] be a significant source

> of competitive discipline that would keep Merchant Service Fees at competitive levels." Do you see that?
>
> ...
>
> DR. WINTER: Yes.
>
> MR. HOFLEY: So your theory is predicated on merchants choosing to send fairly precise price signals based on credit card brand or credit card type?
>
> DR. WINTER: Yes. My theory is based on surcharges reflecting the costs.
>
> ....
>
> MR. HOFLEY: No. I understand that. But that wasn't my question. My question was, your theory -- and I think you agreed with me -- is that your theory is predicated on merchants choosing to send fairly precise price signals based on card brand or card type, to differentially price.
>
> DR. WINTER: To differentially price. How precise that would be, which is part of your question, would depend upon market conditions.
>
> Winter Evidence, Hearing Transcript, p. 2057, line 15 to p. 2059, line 6
>
> Winter Expert Report, para. 72

325. However, there is no evidence to suggest that "market conditions" would produce differential surcharging as between Visa and MasterCard transactions, nor as between premium and standard credit cards within the Visa or MasterCard brands, rather than as between credit card and non-credit card transactions. As such, it is a highly dubious suggestion that surcharging, if permitted, would be engaged in by merchants in the manner required for the suppression of competition theory. In fact, to provide the real world experience, in jurisdictions where surcharging is permitted (e.g., Australia), there is no evidence that merchants surcharge differentially as between Visa and MasterCard card acceptance fees or as between standard and premium credit cards. Rather, the evidence is that, where surcharging is permitted, merchants

are much more likely to engage in blended surcharging (i.e., surcharge all credit card transactions at one blended rate) and/or excessive surcharging.

Winter Evidence, Hearing Transcript, p. 2059, lines 8-15

326. In her Witness Statement, Elizabeth Buse advised that many merchants in Australia now engage in "blended surcharging" whereby they levy the same surcharge regardless of what brand a cardholder uses. Since Visa is prohibited by Australian law from setting interchange as high as the fees presently charged by Amex, the result of "blended surcharging" is that the surcharge rate is often above the cost of Visa acceptance, and in some cases even above the cost of Amex acceptance. As such, merchants have earned additional revenue from every Visa transaction at the expense of Visa cardholders. Furthermore, in her testimony before the Tribunal, Ms. Buse said that "among Visa cards, I don't know of an instance where the merchant would surcharge only premium or super premium cards."

Buse Statement, para. 35

Buse Evidence, Hearing Transcript, p. 2116, lines 16-24; p. 2115, lines 1-4

327. For these reasons, it is incorrect to argue (as the Commissioner and her experts have) that the "market" will lead to the appropriate level of surcharging because retailing is competitive. The evidence demonstrates that most merchants have some measure of market power that is capable of being exercised – if not in an economic sense then in the sense that the merchant has power over the customer that has already walked in the door or waited in line or decided to purchase the product. (For example, as noted above, the UK OFT was concerned that "by the time the charges are revealed consumers have invested time in the purchase and are therefore deterred from shopping around and comparing offers, weakening competition between

retailers.") Moreover, as Justice Phelan noted, the retail sector is not homogeneous; common sense dictates that there are several sectors of the retail industry that rely more heavily on credit card users and retailers in many (if not all) of these sectors have greater market power than others. Evidence with respect to excessive surcharging by merchants is discussed above.

Winter Evidence, Hearing Transcript, p. 2094, line 18 to p. 2097, line 19

*Which?* Response at section 7.2; see also section 6

**(d) The evidence does not demonstrate that surcharging will lead to lower transaction volume on a network**

328. For the next step in the suppression of competition theory, the Commissioner contends that such accurate and widespread surcharging (or the threat thereof), if it occurs, will lead to lower transaction volume as a result of: (1) cardholders' reduced usage of the relevant card; and/or (2) fewer Canadians enrolling for membership in the relevant card. However, the evidence at the hearing demonstrated that there are several alternative potential outcomes that are associated with merchant surcharging or card discrimination other than steering the customer to a lower cost payment method. For instance, according to a number of the merchant witnesses and experts, surcharging could lead to: customers leaving the establishment to shop elsewhere using their preferred payment method; customers not returning for a future visit (because of the negative reaction to a surcharge), but using their preferred payment method elsewhere; or customers paying the surcharge.

329. On cross-examination, Dr. Frankel agreed that if a merchant imposes a surcharge, the customer may leave the store and go make the purchase on his or her card at another store, or make the purchase, but go to another retailer who accepts his or her preferred card in the future. Dr. Frankel also admitted that, if a merchant imposes a surcharge and the customer pays, then

there would be no impact on Visa's volume because the transaction was processed. Furthermore, if the customer instead goes to another location where the customer uses his or her Visa card (or in the future goes to another location), then there is still no impact on Visa's volume as the transaction is processed at another retailer.

Frankel Evidence, Hearing Transcript, p. 1083, line 2 to p. 1084, line 2

330. The evidence from Australia does not suggest that surcharging is likely to lead to lower volume on a network that is surcharged; in fact, quite the opposite. The evidence also demonstrated tha [redacted] Ms. Buse stated in her Witness Statement that:

> I have seen no evidence to indicate that the 2003 reforms led to increased debit use. If the reforms were intended, in part, to help merchants steer consumers to alternative forms of payment. this goal has not been accomplished.

And upon cross-examination:

> MR. FANAKI: Nevertheless, my point is credit card volumes have continued to increase from the period 2005 to 2010, fair?
>
> MS. BUSE: Yes.
>
> [redacted]

Buse Statement, para. 32

[redacted]

331. Even the Commissioner's expert appeared to acknowledge this potential outcome. In his report, Professor Carlton cited the RBA's 2010 Consumer Payments Use Study which suggests that "around half of consumers that hold a credit card will seek to avoid paying a surcharge by either using a different payment method that does not attract a surcharge (debit card or cash) or

going to another store." (Emphasis added) This RBA report notes that "almost 30 per cent of merchants surcharged at least one of the credit cards they accepted" in 2010; however, "the proportion of credit card transactions where a surcharge was actually paid by the consumer was virtually unchanged between 2007 and 2010, at around 5 per cent", which suggests that rather than pay a surcharge, the consumer went to another store that did not surcharge.

> Carlton Expert Report, para. 72 (Emphasis added)
>
> John Bagnall, Sophia Chong, and Kylie Smith, Reserve Bank of Australia, *Strategic Review of Innovation in the Payments System: Results of the Reserve Bank of Australia's 2010 Consumer Payments Use Study* (June 2011), Exhibit A-374, at p. 16 (confidential)

332. In this regard, Ms. Buse also stated:

> [I]t may also be the case that consumers facing a surcharge are not steered to cash or debit, but rather choose not to shop at a merchant who surcharges and instead to shop at a merchant who accepts Visa or MasterCard credit cards without a surcharge.
>
> Buse Statement, para. 28

333. Another potential outcome of merchant surcharging is that the consumer simply opts to complete the sale and pays the surcharge. This scenario similarly does not translate into lost volume on the network from surcharging.

334. The merchant evidence called by the Commissioner similarly supports these conclusions. For example, Mr. Daigle of Shoppers Drug Mart testified as follows:

> MR. KWINTER: Let's be in a world where we're surcharging. You would agree that a number of things can happen. First, the customer could pay the surcharge; right?
>
> MR. DAIGLE: Right.

MR. KWINTER: They pay the surcharge. You take in the additional revenue. We have been through that. But you will also agree the credit card network doesn't suffer because the transaction goes through; correct?

MR. DAIGLE: They don't suffer on that particular transaction, but there might be less usage of those credit cards in total, because some people might move to cash or debit.

MR. KWINTER: Let's look at it in a transaction-by-transaction basis, because I am going to cover your point in a moment. In my example where the surcharge is paid, there is no impact on system volume, because the transaction goes through; correct?

MR. DAIGLE: Right.

MR. KWINTER: The customer could also not want to pay the surcharge and leave the store and go to one of your competitors who doesn't surcharge. That's correct?

MR. DAIGLE: They could.

MR. KWINTER: Right. And in that situation, again, the network doesn't suffer an impact, because the person who has made the purchase. They just made it somewhere else; right?

MR. DAIGLE: Right.

Daigle Evidence, Hearing Transcript, p. 437, line 24 to p. 439, line 7

335. Finally, Dr. Mulvey noted the following based on the Gauthier Survey results:

> Steering rate "success" – the rate at which surcharging moves transaction volume away from credit cards to other forms of payment – is undermined by two types of failure. First, cardholders faced with a surcharge may opt to pay the surcharge and use their credit card. Second, cardholders faced with a surcharge may opt to leave the store and take their business elsewhere (or pay and not patronize the store again). From the perspective of transaction volume, the purchase may be delayed (the cycle will repeat itself at another store), the purchase may be abandoned altogether, or the purchase (or future purchases) may be made at another store that accepts the form of payment (credit cards) the customer prefers.
>
> As illustrated in Charts 3 and 5 (below), merchants who impose surcharges are most likely to incur lost sales in both the present and the future as dissatisfied customers walk-out and complete their immediate

> and future purchases elsewhere. This brings profound economic consequences. A merchant's decision to surcharge will evaluate the downside risk wrought by consumers who respond negatively to surcharges but refuse to be steered, i.e. leading them into (walk-out) actions that do not serve the merchant's long-term interests.
>
> Mulvey Expert Report, paras. 33-34
>
> Gauthier Expert Report, section 3.3

336. The results of the survey conducted by Mr. Gauthier demonstrate that surcharging (particularly in relation to discounting) is much more likely to lead to customers not wanting to shop at that store in the future.

> Gauthier Expert Report, page 18

**(e) The evidence does not demonstrate that Visa would lower interchange or network fees in response to surcharging (or the threat of surcharging)**

337. The evidence at the hearing does not support the Commissioner's contention that, facing the threat of lower transaction volume as a result of surcharged or discriminated transactions (or the threat thereof), Visa and MasterCard would lower their default (or specific) interchange rates and/or network fees or, as Professor Winter stated, "undercut" each other from the merchant's perspective.

> Winter Expert Report, paras. 71-74

(i) *Visa is not likely to lower interchange or network fees in response to surcharging*

338. The evidence at the hearing suggests that in response to surcharging it is just as, if not more, likely that Visa and MasterCard would (to use Professor Winter's words) "undercut" each other, not by lowering default (or specific) interchange rates or network fees as the Commissioner argues, but rather by increasing the value proposition to Issuers and cardholders

in order to compensate for the negative cardholder experience associated with possible surcharges. This might include higher interchange fees to fund greater rewards.

339. Indeed, support for this proposition is found in the evidence led by the Commissioner, including:

(a) Mr. McCormack's expert report, where Mr. McCormack stated:

[redacted]

and later,

> From a cardholder's standpoint, increases in rewards may incent the cardholder to use a credit card more frequently in place of other methods of payment, including debit cards, cash, cheques or other credit cards with less lucrative rewards.

McCormack Expert Report, paras. [redacted] 143

(b) While this likely outcome was essentially ignored in Professor Winter's initial analysis, Professor Church discussed it in his report and direct testimony, and then later Professor Winter admitted it during cross-examination.

Church Expert Report, paras. 41(ii), 48

Winter Evidence, Hearing Transcript, p. 2047, line 18 to p. 2054, line 23

(c) [redacted]

340. The evidence of the Respondents and Intervener witnesses also supports this conclusion. For example, Mr. Sheedy stated:

> I understand the Commissioner's allegation to be that if merchants were permitted to surcharge or threaten to do so, Visa would reduce default interchange rates. I do not accept this to be the case. As indicated above, one of Visa's principal concerns with the abrogation of the No Surcharge Rule is the negative impact this would have on Visa cardholders and the potential negative effect this would have on Visa network volume (indeed, the Commissioner's point is that surcharging would steer consumers away from payment with a Visa credit card). Faced with disgruntled cardholders who have seen the value of their Visa credit cards diminished by surcharging, Visa would be even less likely to reduce interchange rates, which would only exacerbate the problem.
>
> ...
>
> While it is suggested that Visa Canada would reduce its interchange rates if, for example, it became apparent that merchants were specifically surcharging Visa's premium card products, in fact, Visa Canada's response could actually be to raise the interchange rates on its non-premium credit card products (or moved to a blended rate), to remove the incentive for surcharging Visa's premium card products.
>
> ...
>
> I am not aware of any instance anywhere in the world where Visa has reduced default interchange in response to actual or threatened surcharging, and I have no reason to believe that Visa would do so in Canada. For example, because of regulatory intervention, Australia has some of the lowest interchange rates in the world. Despite low interchange rates, however, the number of merchants surcharging is increasing, as is the average surcharge amount.
>
> Sheedy Statement, paras. 77, 79-80

341. Similarly, in his oral evidence, Mr. Sheedy testified as follows:

> MR. SHEEDY: I think what we've seen in markets like Australia is that you have merchants -- let's say you have an airline that has a particularly strong market position with -- at an airport, at a hub, and because of their market position they're able to assess a 5 percent surcharge on top of the transaction.

> Well, in that instance, if I want to grow my business or at least maintain business with cardholders while transacting at that airline, and I think about what I would do with interchange fees, I want cardholders to continue to use their Visa card, even in face of that surcharge.
>
> So having an interchange fee go down, where the issuer would be in a weaker position to invest in marketing programs and rewards and other features/functions for that card, would actually diminish cardholder demand to want to transact with that airline.
>
> I think the converse would be true, where if we increased interchange fees and we collaborated with financial institutions to market to those cardholders all of the reasons why they ought to use their Visa card, then we actually improve our odds of being able to have the cardholder power through and still have demand to want to use their Visa card in light of that surcharge.
>
> So in that instance, higher interchange would actually be a better business strategy for us and allow us to maintain more transactions from that surcharging merchant.
>
> Sheedy Evidence, Hearing Transcript, p. 2177, line 3 to p. 2178, line 8

342. In addition, Karen Leggett of the Canadian Bankers Association testified as follows:

> The Australian experience suggests that allowing surcharging in Canada would likely reduce competition among issuers, resulting in reduced choice for consumers. When the No Surcharge Rule was eliminated in Australia, issuers responded by reducing both cardholder benefits and the range of credit cards products offered to consumers. Australian issuers now offer less valuable rewards to their cardholders. Since 2003, Australian issuers have also increased fees to cardholders to compensate for lower interchange fees. Accordingly, cardholders in Australia now experience some or all of surcharging when using their credit cards, fewer credit card benefits and options, and higher card fees.
>
> I have no basis to believe that allowing surcharging would lower the default interchange rates of Visa or MasterCard or lower MDRs. Indeed, allowing surcharging might well have the opposite effect - increasing default interchange rates for standard credit cards to compensate issuers for the reduced transaction volume and revenue from premium cards.
>
> Leggett Statement, paras. 66-67

(ii) *The Australian experience does not demonstrate that interchange rates, or card acceptance fees, will reduce as a result of surcharging*

343. The Commissioner cannot use the Australian experience as evidence that interchange rates will likely be reduced if merchants are permitted to surcharge. As stated above, an obvious and key distinction between Australia and Canada is that interchange rates were regulated downward in Australia. In Australia, Visa and MasterCard's average effective interchange rates remain at the highest level permissible by the regulation in spite of the ability of merchants to surcharge credit card transactions. Ms. Buse testified that: "reduction in default IRF rates witnessed in Australia has occurred solely as a result of their regulated reduction and is not in any respect attributable to the removal of the No Surcharge Rule." Ms. Buse also stated that:

> [t]he repeal of the No Surcharge Rule has had no effect on Visa's default IRF rates in Australia. Visa's maximum credit interchange rates in Australia are controlled by the RBA and not by Visa or any other private actor. The presence of surcharging has hurt Visa, its Issuers and Acquirers, and Visa cardholders, but has not affected IRF rates.
>
> Buse Statement, paras. 17 and 29

344. Contrary to assertions made by the Commissioner and her experts, Visa has never agreed in Australia to reduce the interchange rate available to a given merchant's Acquirer in response to any threat or action by a merchant to surcharge Visa credit cards, or to refuse to honour all Visa credit cards. As indicated above, while interchange rates applicable to particular merchants or merchant classes may vary, the weighted average interchange rate must not exceed 0.5% plus GST, as required by the RBA.

[redacted]

Buse Statement, para. 30

345. [redacted]

[redacted]

[redacted]

346. [redacted]

[redacted]

[redacted]

347. The Commissioner and her experts rely on the example of American Express in Australia in an effort to demonstrate that surcharging has led and will lead to lower card acceptance fees; however, there is no evidence that American Express's lower card acceptance fees in Australia were the result of merchant surcharging (American Express did not testify in this proceeding despite being the only major credit card company not subject to the Commissioner's desired remedy). Rather, it is just as, if not more, likely that American Express's card acceptance fees in Australia were reduced because Visa's and MasterCard's interchange rates were regulated to much lower levels. Accordingly, American Express was not required to provide as much in the way of cardholder rewards to compete effectively with Visa and MasterCard Issuers and could not justify, to merchants, a greater delta between American Express's fees and those of Visa and MasterCard. In addition, American Express may have lowered its card acceptance fee out of concerns over regulation by the RBA.

*Regulatory Intervention in the Payment Cards Industry*, Reserve Bank of Australia, Buse Statement, Exhibit J, p. 231

*Choice Report*, Buse Statement, Exhibit G, p. 58

348. In any event, if the Commissioner's view is correct, i.e., that surcharging led to lower interchange for American Express card acceptance fees in Australia, then the Commissioner's requested remedy herein would lead to an absurd result. Since American Express (which has higher card acceptance fees than either Visa or MasterCard) is not subject to these proceedings, according to the Commissioner's reasoning, American Express would not reduce its fees in Canada even if Visa's and MasterCard's interchange rates were negotiated lower by merchants because of the ability to surcharge; this is because American Express could prohibit surcharging. The end result would be the shifting of volume to American Express – already the highest cost credit card network in Canada for merchants – as cardholders would be able to both avoid being surcharged and obtain the benefits by using American Express.

**(f) Lower interchange or network fees would not be passed on by Acquirers to merchants, or from merchants to consumers**

349. The Commissioner contends that lower interchange or network fees would be passed on by Acquirers to merchants in the form of lower card acceptance fees, as opposed to being retained at least in part by Acquirers, and from merchants to consumers in the form of lower retail prices rather than being retained at least in part by merchants. Again, there is no evidence to substantiate the Commissioner's assertion. Merchants contract with Acquirers with respect to their card acceptance fees, not with Visa or MasterCard. The Visa and MasterCard Rules do not require Acquirers to pass on interchange or network fee reductions to merchants and no Acquirer has testified in this proceeding that all savings in Acquirers' costs would be passed on to merchants.

Weiner Evidence, Hearing Transcript, p. 2314, lines 8-12

Van Duynhoven Evidence, Hearing Transcript, p. 2513, line 3 to p. 2514, line 22

350. With respect to the possibility of lower retail prices, as noted below, there is no credible evidence that lower card acceptance fees have led or are likely to lead to lower retail prices. This includes attempts to identify such an effect in Australia, where surcharging is permitted and interchange fees have been regulated downward. In this respect, Ms. Buse testified:

> I am not aware of any evidence that merchants in Australia have reduced the prices they charge to consumers for the sale of goods or services at retail as a result of either the IRF benchmarks or the removal of the NSR. Consistent with Visa's experience in this regard, studies have also concluded that there is no evidence of any pass-though effect of savings by merchants to consumers. Direct government intervention into setting default interchange rates has simply had no discernable effect on the retail prices that consumers pay, while pervasive merchant surcharging has increased the prices to consumers choosing to pay with Visa credit cards.
>
> The RBA noted in the preliminary conclusions of a 2007-2008 review of the Australian payments system that it had received "[n]o concrete evidence ... regarding the pass-through of [merchant] savings [to consumers]." A 2008 report by Robert Stillman and others of CRA International (the "Stillman Report") found that "while the RBA's regulations have clearly harmed consumers by causing higher cardholder fees and less valuable reward programmes, there is no evidence that these undeniable losses to consumers have been offset by reductions in retail prices or improvements in the quality of retailer services. The RBA's intervention has redistributed wealth in favour of merchants."

Buse Statement, paras. 23-24

Reserve Bank of Australia, *Reform of Australia's Payments System: Preliminary Conclusions of the 2007/08 Renew* (April 2008), Exhibit "I" to Buse Statement, p. 214

Stillman Report, p. 214

Sheedy Statement, para. 83

351. Moreover, a number of the merchant witnesses indicated that surcharging would not necessarily lead to a "one to one" reduction in price at retail. For example, when asked by

Justice Phelan if C'est What? would lower prices if it were able to surcharge, Mr. Broughton stated that the price change may not be one-for-one. Similarly, on cross-examination, Mr. Houle (Air Canada) admitted that cost savings may not be passed along to customers in the form of lower retail prices, saying that it "would not be a one-for-one exercise."

Broughton Evidence, Hearing Transcript, p. 374, line 13 to p. 376, line 3

Houle Evidence, Hearing Transcript, p. 531, lines 1-25

352. [redacted] As Ms. Li testified, "we price ... based on what we believe the market will bear." This is further evidence that merchant surcharging would not lead to corresponding lower retail prices, either at the individual merchant level or in the aggregate. Accordingly, any claim that surcharging would lead to lower retail prices is at best highly speculative.

Li Evidence, Hearing Transcript, p. 1571, line 24 to p. 1572, line 21

[redacted]

Shirley Evidence, Hearing Transcript, p. 1644, line 14 to p. 1645, line 10

**(g) Merchants already can and do negotiate for lower interchange**

353. Finally, it should be noted the Commissioner's theory is premised upon merchants' inability to negotiate lower interchange with Visa and MasterCard with the rules in place. However, several of the merchant witnesses that testified on behalf of the Commissioner, for example Wal-Mart [redacted] are currently the beneficiaries of lower than average interchange rates through sector-specific and/or volume-specific interchange rates, and

the University of Saskatchewan similarly benefited (before it stopped accepting Visa credit cards).

Weiner Statement, para. 24

[redacted]

Van Impe Evidence, Hearing Transcript, p. 1704, lines 8-25

De Armas Evidence, Hearing Transcript, p. 288, line 22 to p. 289, line 8

[redacted]

354. For example, [redacted]

[redacted]

355. [redacted]

[redacted]

356. In addition, Dr. Askanas correctly asked Mr. Jewer of Sobeys (who appeared on behalf of the Retail Council of Canada) about the possibility of retailer buyer groups negotiating for lower interchange (as buyer groups routinely do in other contexts). The evidence is that the CFIB has

negotiated lower interchange rates for its members. Accordingly, the Commissioner's starting point for her analysis, i.e., that merchants are unable to negotiate with Visa and/or that Visa and MasterCard do not compete for merchant acceptance with respect to interchange (in the presence of the rules) is itself erroneous. For example, Mr. Weiner testified that the CFIB and Retail Council of Canada have both negotiated preferential card acceptance arrangements with Canadian Acquirers.

Weiner Statement, para. 47

Jewer Evidence, p. 1758, line 13 to p. 1759, line 21

357. This presents another analytical problem with the Commissioner's theory. If the objective is to increase merchants' leverage so they are able to secure lower interchange rates, then in theory the issue is never-ending. Negotiating leverage between parties is relative, and parties that pay fees will always want to pay less. Even if the Commissioner's remedy is granted, merchants may find other reasons to suggest that interchange rates are too high, perhaps by arguing that certain other rules or practices of the credit card companies that, like the No Surcharge Rule and Honour All Cards Rule, have objectives wholly unrelated to merchants' ability to negotiate for lower interchange. For example, if Visa had a rule that required merchants to ensure that Visa cardholders would not be sent to the back of the checkout line simply because they were paying with Visa (to ensure a positive and consistent customer experience), merchants could argue that a prohibition on sending Visa cardholders to the back of the checkout line eliminates a source of "competitive discipline" because, absent such a rule, merchants could seek to "threaten" the card companies to lower interchange or else face the prospect of their cardholders' being penalized for using a Visa card. In essence, merchants may not be satisfied unless and until card acceptance fees were reduced to zero (or less). Similarly,

the ability of merchants to surcharge significantly above cost (for example, a 5% or 10% surcharge) would provide merchants with a measure of "competitive discipline" and leverage. However, even the Commissioner's experts acknowledge that prohibiting surcharging significantly above cost would be appropriate.

Jewer Evidence, Hearing Transcript, p. 1749, line 17 to p. 1750, line 24

Winter Evidence, Hearing Transcript, p. 2058, lines 9-22

Carlton Evidence, Hearing Transcript, p. 1341, line 18 to p. 1342, line 9

358. Finally, some merchants, including several who testified at this proceeding, are able to engage in co-branding. Merchants such as [redacted] offer their own credit card through an affiliated issuing bank; in these cases, interchange is received by the merchant. In other cases, merchants engage in co-branding by entering into relationships with third-party issuers (as, for instance, in the case of West Jet). These are additional examples of the options that merchants have with respect to payment card acceptance.

[redacted]

Li Evidence, Hearing Transcript, p. 1552, lines 8-24

359. As explained above, the Commissioner is required to demonstrate that all of the steps in the multi-step causal chain underlying the competition suppression theory is, at least, "likely" or "probable." If there is any uncertainty with the likely outcome of any one step, it is that much less likely that the following step will occur. The preceding discussion explains why there are significant deficiencies with each step in the causal chain let alone the entire chain of events itself. As such, the Commissioner's suppression of competition analysis is unsustainable.

## XI. THE COMMISSIONER'S CROSS-SUBSIDIZATION THEORY DOES NOT DEMONSTRATE AN ADVERSE EFFECT ON COMPETITION IN A MARKET

360. The Commissioner's experts posit that, because of the Visa Rules, "the price paid by credit card users is, in effect, subsidized by taxing purchasers who do not use credit cards to pay for their purchase." Professor Winter refers to this as "Adverse Competitive Effect II", his "cost-externalization" hypothesis. The Commissioner and her experts further assert that this cross-subsidization also leads to higher prices at retail for all consumers.

> Carlton Expert Report, para. 39
>
> Winter Expert Report, paras. 87-106
>
> See also Frankel Reply Report, para. 90

361. As explained in more detail below, the evidence demonstrates that the Commissioner's cross-subsidy theory has nothing to do with whether there is an "adverse effect on competition in a market." In any event, the notion of attempting to calculate with any degree of certainty whether there is any unique cross-subsidy and if so, determining whether the magnitude or effect of any such cross-subsidy adversely affects competition, is an exercise in futility, and regardless not one susceptible to proof on a balance of probabilities. Furthermore, there was no credible evidence introduced at the hearing to show that retail prices are any higher as a result of the Visa Rules; and in any event, the retail industry is not a relevant market for purposes of paragraph 76(1)(b). Finally, the Commissioner's cross-subsidy theory is fundamentally at odds with her own theory of how price is allegedly influenced upwards as a result of the Visa Rules.

### (a) Cross-subsidization is not relevant to whether there is an adverse effect on competition in a market

362. Paragraph 76(1)(b) asks whether the conduct, if found to exist, "has had, is having or is likely to have an adverse effect on competition in a market." As explained above, the words "in

a market" make it clear that a paragraph 76(1)(b) analysis must be conducted in relation to a relevant antitrust market.

363. The analyses of the Commissioner, and more specifically her experts, with respect to cross-subsidization do not meet this requirement. For example, on cross-examination, Dr. Frankel insisted that, when assessing competitive effects, a "holistic view" should be adopted:

> MR. KWINTER: Sir, yesterday you addressed with my friend the question of output as a measure of whether a practice is harmful or beneficial to the public. Do you remember that? It was part of your opening.
>
> DR. FRANKEL: Yes.
>
> MR. KWINTER: And you said that the problem could be that if you focus just on a party's output, that could be a problem, because sales could be reduced in the overall marketplace. Do you remember saying that?
>
> DR. FRANKEL: Yes.
>
> MR. KWINTER: I take it, sir, when you used the term "marketplace", did you mean market or is it some different thing?
>
> DR. FRANKEL: I explained this yesterday. I am happy to go through it again.
>
> A relevant market is just a tool to figure out whether a party has market power. Well, that could be market power over a narrow market, in this case, credit card acceptance or network services that merchants buy. I explained why I find that that is a relevant market.
>
> When it is time to evaluate the competitive effects, it is sensible to take a more holistic view...
>
> Frankel Evidence, Hearing Transcript, p. 1089, line 16 to p. 1090, line 23
>
> See also Frankel Evidence, Hearing Transcript, p. 1098, lines 5-17

364. Thus, rather than assessing competitive effects on the relevant antitrust market, Dr. Frankel held that it is appropriate to go beyond a market and adopt a broader view of competitive

impact. Of course, given the express language of paragraph 76(1)(b), Dr. Frankel's approach does not comply with the analysis that the Act requires.

365. Professor Winter's approach is also non-compliant with the requirement of paragraph 76(1)(b) to the extent that he focuses on the competitive effects of Visa Rules "on" Visa and MasterCard, as opposed to "between" them. Professor Winter explained:

> DR. WINTER: No. If we look at that sentence again, I say: "The Merchant Rules are structured so as to eliminate or substantially reduce important sources of competitive discipline ..."
>
> Not just between Visa and MasterCard, but on Visa and MasterCard. So it is true that the first mechanism [suppression of competition] is about competition between Visa and MasterCard. The second mechanism ["cost externalization"] is about the ability to impose part of the costs of credit cards on cash and debit customers.
>
> Winter Evidence, Hearing Transcript, p. 1959, line 17 to p. 1960, line 4

366. Like Dr. Frankel, Professor Winter did not restrict his analysis of competitive effects to the (allegedly) relevant antitrust market. Cross-subsidization cannot be relevant to whether there is an adverse effect on competition (presumably between competitors) in a market. The Commissioner's theory of cross-subsidization does not focus on the relevant antitrust market that the Commissioner has defined, CCNS. Rather, it turns on the way consumers who use other payment methods supposedly shoulder the costs of these respective methods unequally. Thus, the Commissioner's assertions regarding cross-subsidization are not only inaccurate, but entirely irrelevant to whether there is an adverse effect on competition in the market identified by the Commissioner, as required by paragraph 76(1)(b).

367. As Professor Church summarized in his report:

> According to Professor Winter non credit card users "subsidize" credit card users. In this context what is important to remember, as with the issues of the distributional effects of RPM, that the distributional effects of conduct-without something more does not make conduct an issue for competition policy (even if the Rules were price maintenance, which they are not). The something more is an enhancement, preservation, or maintenance of market power. The impossibility of have the evidence to assess the effect on aggregate consumer welfare of the Rules is an additional consideration that militates strongly against the use of competition policy to regulate the Rules. It is not enough to simply identity the possibility of a cross subsidy, Professor Winter must prove it reduces aggregate consumer welfare and prove that it results in an adverse effect on competition within a relevant market. Professor Winter has not, in my opinion, done so, for the reasons stated above.
>
> Church Expert Report, para. 59
>
> Church Evidence, Hearing Transcript, p. 2881, line 22 to p. 2883, line 5
>
> Elzinga Expert Report, para. 183

**(b) Attempting to determine the amount or competitive effect of such a cross-subsidy is futile**

368. Leaving aside for the moment the significant analytical and economic problems with the Commissioner's cross-subsidy theory as it relates to an analysis of likely adverse effects on competition in a market, there are a number of fundamental factual issues that were not addressed by the evidence in this proceeding and are required for the Commissioner's cross-subsidization theory of adverse effect on competition to be plausible. As a result, the Commissioner's assertions that rest on the cross-subsidy theory (such as the assertion of higher retail prices for all consumers) are not sustainable.

369. Factual issues and questions not addressed by the Commissioner's cross-subsidy theory include the following.

(i) *Nominal costs to merchants of using cash or debit cannot be compared along side costs of using credit cards*

370. The costs to merchants of using cash or debit cannot be compared along side costs of using credit cards. As Professor Elzinga explained:

> [T]he nominal costs of using cheques, cash and debit cards cannot be woodenly compared to a nominal cost of credit cards. One must also account for differences in the benefits merchants enjoy from the use of cards and compare the benefits with the true costs of all payment mechanisms.
>
> Elzinga Expert Report, para. 188
>
> Elzinga Summary, slide 12

371. These differences in benefits enjoyed by merchants are numerous and significant, as was confirmed by several witnesses:

(a) Mr. McCormack referred to:

> [an] interest-free period between the time a purchase is made and the date on which payment is due (i.e., deferred payment), revolving credit (i.e., a cardholder may, instead of paying any charges incurred by the prescribed deadline without interest, carry a balance on his or her credit card and pay interest on the outstanding amount), protection against fraudulent transactions, the ability to make purchases remotely over the telephone and on the Internet and, with certain cards, rewards, points or other benefits (such as airline travel, concierge services, and access to lounges in airports) associated with the use of those cards.
>
> McCormack Statement, para. 22; see also McCormack Evidence, Hearing Transcript, p. 671, line 20 to p. 675, line 18

(b) Dr. Frankel pointed to the "distinct attributes" such as:

> ...deferred payment (including an interest-free period between the time a purchase is made and the date at which payment is due), revolving credit (purchases made on a credit card may be paid by the cardholder over a period of time), protection against fraudulent transactions, and the ability to make purchases remotely.

Frankel Statement, para. 64

(c) [redacted]

(d) Mr. Houle testified that the Air Canada website only accepts major credit cards and debit cards. He also testified that, for various reasons such as "convenience", Air Canada does not accept cash onboard its flights.

Houle Evidence, Hearing Transcript, p. 484, line 12-25; p. 520, line 6 to p. 521, line 1; p. 484, line 12 to p. 486, line 14; p. 507, line 23 to p. 508, line 23

(e) Similarly, Ms. Li testified that WestJet also only accepts credit cards onboard its flights.

Li Evidence, Hearing Transcript, p. 1553, line 20 to p. 1555, line1

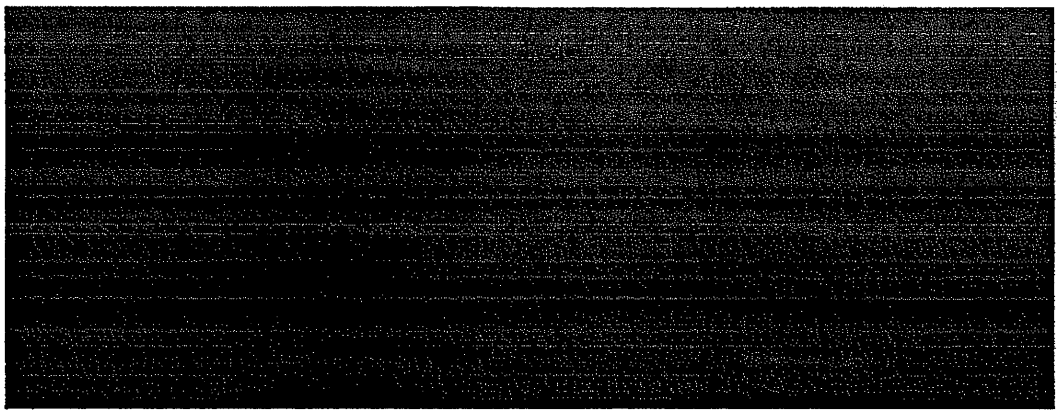
(f) Ms. Van Impe testified that credit cards provided benefits to both the University of Saskatchewan and its students.

Van Impe Evidence, Hearing Transcript, p. 1686, lines 13-24

(g) Mr. Shirley testified that Best Buy is susceptible to "price deflation" whereby "at the time we introduce a product into the store, that is usually the highest you will ever see that retail price, and then over time the price decreases, and, consequently, usually our margins as well." Mr. Shirley then noted that one benefit to Best Buy of credit cards is to "bring a purchase forward."

Shirley Evidence, Hearing Transcript, p. 1629, line 21 to p. 1630, line 2; p. 1657, line 24 to p. 1658, line 2

(h)

(i) 

(j) Mr. Sheedy testified to an extensive list of benefits to merchants where credit cards are concerned, which include, in addition to the benefits mentioned above, fast and efficient completion of transactions.

Sheedy Statement, para. 35(a)-(j)

(k) Mr. Weiner also testified that, by accepting credit cards, merchants are able to avoid or minimize ancillary costs associated with other forms of payment (for example, extending credit to consumers and fraud protection).

Weiner Statement, para. 9

(l) In addition to many of the benefits stated above, Ms. Leggett testified to the fact that credit card transactions are settled in the merchant's currency, thereby reducing the impact of currency fluctuations on the merchant's net income.

Leggett Statement, paras. 20-21

372. In many instances, the benefits to merchants associated with credit cards carry over to non-credit card users as well. For example, at gas stations the line up to pay by cash (or other sundry items) is frequently shorter because many consumers pay at the pump using their credit cards. Similarly, many retailers such as grocery stores are choosing to implement self-checkout

lines which reduce check-out times and require fewer staff. These initiatives may not have been pursued without the benefits to merchants associated with credit cards.

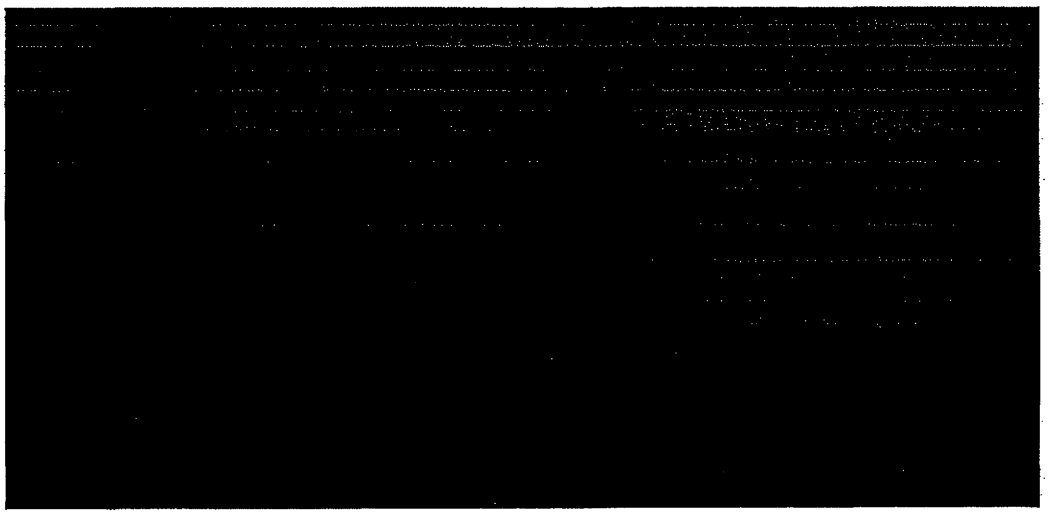
Elzinga Evidence, Hearing Transcript, p. 2723, line 8 to p. 2724, line 15

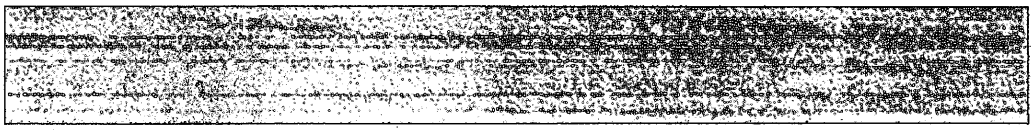
Leggett Statement, para. 21

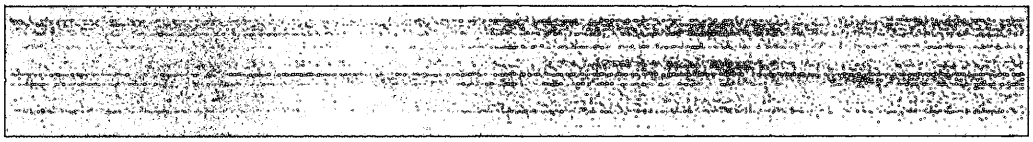
373. Given the differences in the benefits that merchants obtain from different payment methods, it makes little sense to compare directly the nominal cost to merchants of cash or debit on the one hand and the cost of credit cards on the other hand, for purposes of any credible analysis of cross-subsidization.

(ii) *Cash, cheques, debit (and other payment methods) are not costless to merchants: they each have their own costs*

374. The Commissioner's experts said little, if anything, in their reports about the costs to merchants of other payment methods such as cash, cheques or debit. These payment methods have their own costs to merchants (such as costs of armoured trucks, employee fraud). Several of the merchant witnesses provided evidence on this issue. For example:

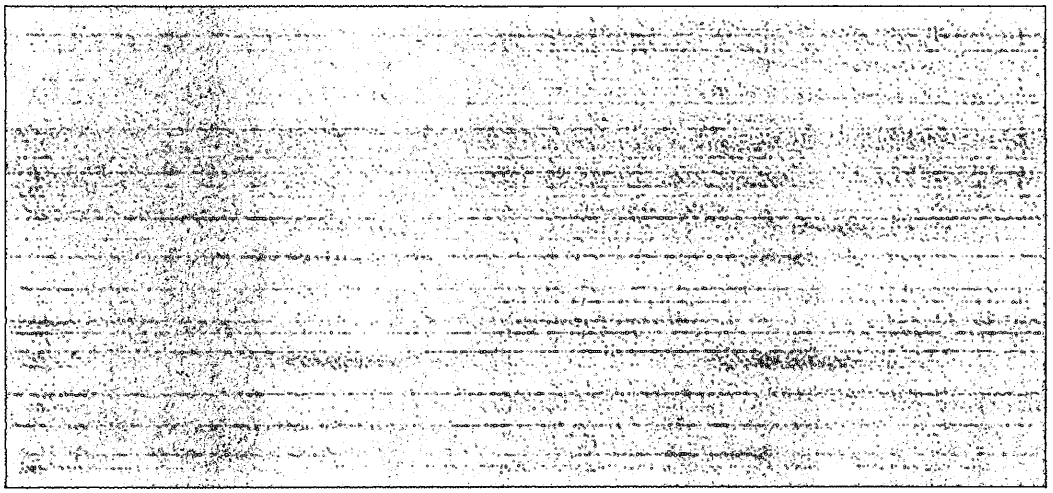
(a) 





(b)

(c)



(d) Mr. De Armas (Wal-Mart) stated that cash is more expensive than debit because of the processing and armoured car pick-up fees.

De Armas Evidence, Hearing Transcript, p 333, line 22 to p. 334, line 13

375. Professor Elzinga explained in his report, using information published by the Bank of Canada and the Canadian Bankers' Association, that if one takes into account just the lending costs associated with the cost of credit cards, the resulting cost of a credit card transaction ($0.27) is comparable to the cost of cash ($0.25) or debit ($0.19). Professor Elzinga also noted that, if one is considering the relative subsidization of different payment methods, cash in fact enjoys significant subsidization from the government (through the printing of money, availability of banking systems, laws requiring acceptance of cash as legal tender, etc.). However, even the government recognizes the costs associated with cash, and recently announced that it will

eliminate the penny. A credible analysis of any cross-subsidy would need to take such costs into account.

> Elzinga Statement, paras. 112-114 and 188
>
> House of Commons Debates, 102 (29 March 2012) at 1620-25 (Hon. Jim Flaherty)

376. In relation to the Commissioner's case, to address the cross-subsidy concern a surcharging merchant would either need to deduct these costs from the amount of any surcharge it levies on credit card transactions, or net out the costs of cash and debit from any surcharge on credit card transactions, in order to accurately send the appropriate "price signals" to consumers via a surcharge. One of the Commissioner's experts, Professor Winter, admitted that such an approach would be appropriate:

> MR. HOFLEY: So would you agree with me that in a world where surcharging is permitted, in order to remove this cross-subsidization problem by cash or debit customers or credit card customers, one of two things would have to happen?
>
> Either, first, these differential costs for cash or debit from credit card would have to be netted out in the surcharge to the credit card?
>
> DR. WINTER: Yes.
>
> MR. HOFLEY: Or they could be separately surcharged to each payment method, so cash could pay -- if debit is the cheapest, then debit would pay some amount, maybe nothing. Cash would be an amount plus a surcharge for cash, and credit would be an amount plus a surcharge for credit?
>
> DR. WINTER: That's possible it could work that way, yes.
>
> MR. HOFLEY: So you could have --
>
> DR. WINTER: In order for the prices to fully reflect the difference in costs of transactions, which I think is what you're getting at --
>
> MR. HOFLEY: Yes, the price signal.

DR. WINTER: -- I agree with you.

Winter Evidence, Hearing Transcript, p. 2068, line 18 to p. 2069, line 15

(iii) *There are very few (if any) exclusively "cash and debit customers" or exclusively "credit card customers"*

377. Dr. Frankel noted in his reply report that "there is a regressive element to this cross-subsidy" because cash and debit customers tend to be less wealthy. Similarly, Professor Winter suggested that "the cost of impact falls on cash and debit customers." Of course, there are very few (if any) exclusively cash and debit customers or exclusive cash customers.

Frankel Reply Report, para. 90

Winter Expert Report, para. 106

378. Virtually all Canadians are cash, debit and credit card customers, since the overwhelming majority of Canadians (perhaps with the exception of the unbanked) have access to and use each of these payment methods. According to the Canadian Banker's Association, 94% of Canadians have a debit card and 88% of Canadian households have at least one major credit card.

*Canada's efficient and secure payments system*, Canadian Banker's Association, April 2012, online: http://www.cba.ca/contents/files/backgrounders/bkg_paymentssystem_en.pdf

379. In addition to publicly available evidence, the evidence at the hearing supported this conclusion. For example:

(a) Dr. Frankel confirmed his understanding that most consumers have a credit card, although they do not use it all the time; sometimes they will pay with a credit card and sometimes they will pay with a different method

Frankel Evidence, Hearing Transcript, p. 1006, line10 to p. 1009, line 8

(b) Professor Winter confirmed his understanding that the overwhelming majority of Canadians have access to a credit card, that these Canadians also have access to debit cards, and that everybody has access to cash.

Winter Evidence, Hearing Transcript, p. 2065, line 10 to p. 2069, line 15

(c) Mr. Gauthier found in his survey evidence that 93% of Canadians possess a debit card and 87% of Canadian households possess at least one general purpose credit card. The Commissioner did not contest the accuracy of this finding.

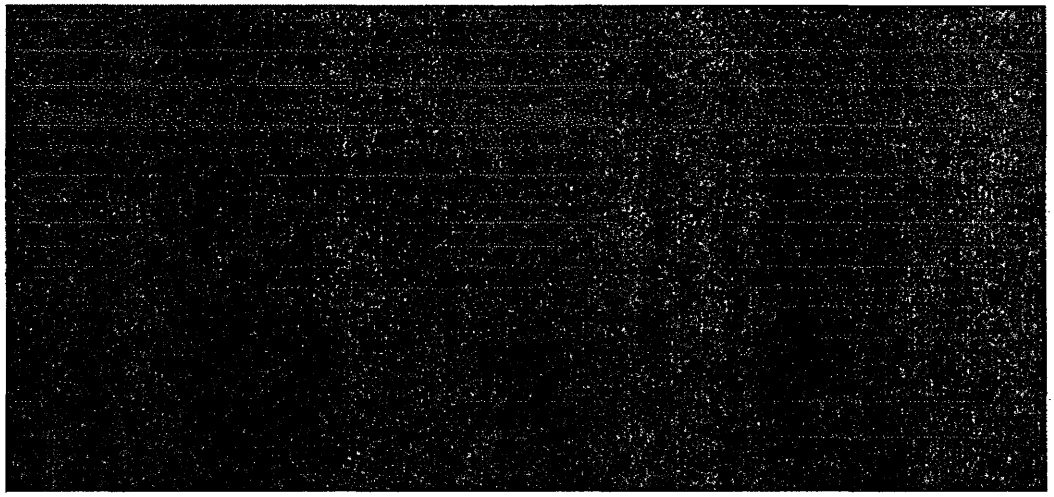
Gauthier Expert Report, s. 3.1

(d) Mr. McCormack agreed that "virtually all Canadians who have credit cards, also have debit cards".

McCormack Evidence, Hearing Transcript, p. 663, lines 16-21

(e)

(f)



380. Accordingly, to the extent there is any element of a "cross-subsidy," it occurs on a transaction-by-transaction basis rather than from one set of individuals to another. The overwhelming majority of Canadians might bear the burden of a cross-subsidy on one transaction but could benefit from a cross-subsidy on their very next transaction, and likely

switch roles several times throughout each day or week. Professor Winter and certain merchant witnesses acknowledged this on cross-examination.

Winter Evidence, Hearing Transcript, p. 2067, lines 13-20

[redacted]

Symons Evidence, Hearing Transcript, p. 349, line 20 to p. 350, line 1

(iv) *Cross-subsidies of the type alleged by the Commissioner occur all the time, every day*

381. The evidence at the hearing confirmed that "cross-subsidies" of the kind alleged by the Commissioner in this case (i.e., where two different types of consumers pay the same price for a product but do not obtain the same benefits because of differences in use) occur routinely in commercial life and retail environments in particular (for example, car drivers are subsidized by those who take public transportation to stores and those who stay to drink coffee at Starbucks get subsidized by those who order a coffee to go). Professor Carlton acknowledged that this is the case, as did other witnesses. Professor Elzinga commented that "it would take a massive regulatory effort to align all the price signals in modern marketing with the precise opportunity costs to businesses."

Carlton Evidence, Hearing Transcript, p. 1319, line 7 to p. 1322, line 14

Shirley Evidence, Hearing Transcript, p. 1648, line 19 to p. 1650, line 9

Elzinga Expert Report, para. 188

Church Expert Report, Appendix D, para. 12

Church Evidence, Hearing Transcript, p. 2881, line 20 to p. 2883, line 5

382. The Commissioner and her experts point to the notion that in those frequently cited examples of cross-subsidies, the merchant has the choice to charge a higher price, for example,

for customers who use a parking lot, yet because of the Visa Rules, merchants are unable to exercise any equivalent choice.

> See for example, Frankel Expert Report, para. 123 and Frankel Reply Report, para. 117

383. However, this argument is unsustainable for at least two reasons. First, in the hundreds (if not thousands) of situations of such cross-subsidies where merchants could decide to send transparent "price signals" to consumers by charging a different price based on use, merchants choose not to do so (this point was raised by Justice Phelan in his Lordship's question to Mr. De Armas of Wal-Mart). Presumably, this is because merchants want customers of all stripes to enter their stores and buy goods and services, rather than having certain customers feel like they are being discriminated against. Accordingly, as set out above, even if merchants were given the ability to surcharge or discriminate, it is not at all clear that they would exercise that choice.

> De Armas Evidence, Hearing Transcript, p. 334, line 14 to p. 335, line 2
>
> Frankel Evidence, Hearing Transcript, p.1015, line 7 to p. 1026, line 2

384. Second, in any event, and notwithstanding all of the factual issues outlined above regarding the existence or amount of a cross-subsidy, if there is any cross-subsidy to be accounted for, merchants today have the ability – under the current Visa Rules – to "undo" that subsidy by offering a lower price in the form of a discount for cash, debit or any other payment type (including a discount for non-premium credit cards). However, in most cases merchants (as they do with virtually all of other types of cross-subsidies) choose not to exercise that choice.

**(c) No evidence retail prices would be lower in the absence of the Visa Rules**

385. The Commissioner's Notice of Application alleges that:

> The Merchant Restraints adversely affect competition in the supply of Credit Card Network Services ... by
>
> ...
>
> (c) increasing retail prices for customers of merchants. As merchants need to cover payment processing costs, merchants pass some or all of the increased costs from higher Card Acceptance Fees onto customers in the form of higher retail prices for goods and services. These costs are borne by all customers of the merchant, including those that use other, lower-cost methods of payment, such as cash or debit cards.
>
> Notice of Application, para. 93(c)

386. Similarly, the Commissioner claims in her Reply that consumers who pay with cash or debit are "unambiguously" harmed by the Visa Rules by having to pay higher retail prices without receiving any of the benefits associated with the use of credit cards. However, other than the bald assertions by a few merchant witnesses, there is no evidence from the hearing (and certainly none that is independently verifiable) that retail prices are higher because of the Visa Rules, or that retail prices are lower in those jurisdictions where surcharging is permitted.

> Commissioner's Reply, para. 73 (Emphasis added)
>
> Buse Statement, paras. 23-24
>
> Reserve Bank of Australia, *Reform of Australia's Payment System: Preliminary Conclusions of the 2007/08 Review* (April 2008), Exhibit I to Buse Statement, p.22
>
> Stillman Report, pp. 3, 13, 33
>
> Sheedy Statement, para. 81
>
> Elzinga Expert Report, paras. 20, 101

387. There simply is no evidence upon which this Tribunal can be satisfied that the Commissioner's burden of proof in this regard has been met. Indeed, it is difficult to imagine how the Commissioner or her experts are able to claim with any credibility that customers are "unambiguously" harmed by higher retail prices resulting from the Visa Rules.

**(d) The retail industry is not a relevant antitrust market**

388. Dr. Frankel initially asserted that the issue of higher retail prices (even if supportable) is not directly relevant to an analysis of whether the Visa Rules result in an adverse effect on competition in a market or whether the Visa Rules satisfy the "influence upward condition." For example, in the first paragraph of his main report, under the heading "Higher Costs Resulting from the Merchant Restraints are Funded from the Retail Prices Paid by All Consumers," Dr. Frankel stated:

> Although not directly relevant to the question of whether the Merchant Restraints have an adverse effect on competition (or to the question of whether the Merchant Restraints influence upward or discourage the reduction of Card Acceptance Fees paid by merchants), it bears noting that the Merchant Restraints also harm the public in several ways.
>
> Frankel Expert Report, para. 175 (Dr. Frankel then goes on to discuss his views regarding higher *posted* prices at retail).

389. In his Reply Report, Dr. Frankel suggested that for the purposes of his analysis, one of the "competitive effects" of the Visa Rules is that they have an upward influence on card acceptance fees leading to higher "retail prices paid by all consumers." Dr. Frankel further stated that "the economically relevant measure of output in this case is the sale of goods and services by merchants in Canada."

> Frankel Reply Report, paras. 59, 147
>
> Frankel Summary, slide 19

390. Similarly, Professor Carlton argues that the Visa Rules have adverse economic effects "on merchants" and "on consumers who use forms of payment other than credit cards."

> Carlton Summary, slide 10

391. Whether or not "retail prices paid by all consumers" are higher or lower as a result of the Visa Rules is not relevant under paragraph 76(1)(b). "Retail prices" or "consumers" are not properly considered relevant antitrust markets. The statute and case law is clear that paragraph 76(1)(b) is concerned with adverse effects on competition "in a market". The Commissioner has not identified, let alone introduced evidence of, any particular retail segment that could constitute a relevant antitrust market for these purposes (in an exchange with Justice Phelan, Professor Winter appears to have recognized this reality).

Winter Evidence, Hearing Transcript, p. 2094, line 18 to p. 2095, line 20

**(e) The cross-subsidy argument is fundamentally at odds with the Commissioner's theory of price maintenance**

392. As with a number of other aspects of the case, the Commissioner's cross-subsidy argument and theory of price maintenance are internally inconsistent. The Commissioner and her experts asserted that the high cost of credit cards (as compared to cash or debit) results in cash and debit customers cross-subsidizing cardholders and this would be addressed by merchant surcharging. However, the Commissioner's theory of price maintenance relies on the ability of merchants to negotiate for a reduced interchange and/or network fee by agreeing *not to surcharge*. Under this theory, surcharging by merchants cannot coincide with reduced interchange or network fees. There is no way of estimating the price reduction in interchange such negotiations would bring. Accordingly, even if the Commissioner's price maintenance theory is accepted as plausible and the desired remedy is obtained, merchants would ultimately not be engaged in surcharging and the alleged cross-subsidy would be left unaddressed because the cost of acceptance of credit cards would still be incorporated into the merchant's retail prices.

393. Under the Commissioner's theory, the potential for a cross-subsidy would remain unless the costs of credit card acceptance are reduced to zero and credit card acceptance is essentially provided to merchants for free. Professor Winter acknowledged this in his report: "[c]ash and debit customers bear higher prices as a result of the Merchant Rules, *at any given level* of Interchange and Network Fees." This only serves to further demonstrate the absurdity of the cross-subsidy argument presented by the Commissioner and her experts in this case.

Winter Expert Report, para. 103 (emphasis added)

## XII. THE COMMISSIONER'S MARKET DEFINITION ANALYSIS IS FLAWED

394. As noted above, the principal flaws in the Commissioner's theories of anticompetitive harm are not dependent on the outcome of a market definition or market power analysis; they remain regardless of whether the Commissioner's views on market definition and market power are accepted by this Tribunal. That being said, there is little reason to debate the adverse effect on competition theories advanced by the Commissioner and her experts if the Tribunal rejects the Commissioner's market definition analyses as being flawed. If the Tribunal finds that the Commissioner has not correctly defined the relevant market, then the Commissioner's expert economic evidence is not relevant, let alone probative, i.e. the Commissioner cannot demonstrate that the Respondents have market power or that the Respondents' conduct has adverse effects on competition in a market.

395. For the purposes of this proceeding, the Commissioner states that the relevant product market is the supply in Canada of Credit Card Network Services. Visa and MasterCard do not take issue with the geographic market. However, as explained below, there are a number of

fundamental errors with the manner in which the Commissioner and her experts have defined the relevant product market:

(a) First, the Commissioner (incorrectly) defines the relevant product market too narrowly; competition faced by Visa extends beyond MasterCard and American Express. Visa also competes with other payment methods for transaction volume. This competition is driven by consumer choice at the point of sale.

(b) Second, the Commissioner ignores the significant implications of the fact that Visa provides network services simultaneously to two sets of customers whose demand is inter-related, producing cross-network effects, i.e., Visa operates a two-sided platform.

(c) Third, the Commissioner and her experts conflate the network services provided by Visa to Acquirers and Issuers with the services provided by Acquirers to merchants even though these are two very distinct sets of services (Visa competes neither with Acquirers nor Issuers).

(d) Fourth, these errors manifest themselves in the Commissioner's experts' misapplication of the hypothetical monopolist test.

(e) Fifth, the Commissioner's definition of the market is incongruent with the theory of anticompetitive harm advanced and the remedy sought, in this case.

Notice of Application, para. 80

396. In addition, this section addresses the case law referenced by the Commissioner and her counsel concerning market definition in payment networks.

**(a) Visa competes for transaction volume which is driven by consumer choice**

397. As a preliminary matter, it is axiomatic that the question of market definition needs to be considered with a proper understanding of the business being engaged in by the firm or firms in question (and in the context of the specific conduct at issue). In this respect, William Sheedy, Group President, Americas, of Visa Inc. described for the Tribunal the business in which Visa is engaged:

> At a basic level, we are a payments company. We're a payments network company. And what that means is that we have relationships with financial institutions, those that sign up merchants to accept the card and those that issue cards to consumers, issuers and acquirers. It's a two-sided market in the way that we think about things. So there are institutions that participate in either or both of the issuing or the acquiring business.
>
> ... And ultimately we make those investments to ensure the efficiency, the safety, the security of the payments network.
>
> Lastly, given that there are 16,000 financial institutions globally that participate in the Visa network, over 30-million merchants, we invest in platforms, products, marketing programs, operating regulations in support of what is a fairly complex payments value chain, where all of the parties come together to make the business happen. So we publish those rules, or operating regulations, to ensure that there is harmony and alignment in the system and make it all work.
>
> Sheedy Evidence, Hearing Transcript, p. 2162, line 1 to p. 2163, line 2
>
> See also Sheedy Statement, para. 6

398. To be clear, Visa does not provide acquiring services to merchants, nor does it provide issuing services to cardholders. Rather, Visa operates a network that brings together the customers of Acquirers (merchants) and the customers of Issuers (cardholders) in order to generate revenue by maximizing the volume of transactions that are processed over the Visa network. Visa's credit card business is based on having those transactions paid for with a Visa branded credit card so that they are processed over the Visa network, as opposed to being

transacted by a rival method of payment, such as a different credit card network, cash, Interac (debit) or cheque, in which case Visa would not generate revenue. As Visa states in its Form 10-K, "[w]e derive revenues primarily from fees paid by our clients based on payments volume, transactions that we process and other services that we provide."

Visa Inc. 10-K, Exhibit A-419, p. 4, 11

399. From Visa's perspective, the competitive choice that impacts its bottom line is the decision exercised by consumers as to what method of payment to use at the point of sale for each transaction. The consumer is faced with the choice of whether to pull out of his or her wallet a Visa credit card, Interac card, cash or cheques.

Weiner Evidence, Hearing Transcript, p. 2316, line 19 to p. 2317, line 3

Sheedy Statement, para. 14

Elzinga Expert Report, paras. 19, 54

400. The evidence before this Tribunal makes clear that Visa operates in competition with a variety of payment methods, not just other general purpose credit cards:

> We compete in the global payment marketplace against all forms of payment, including paper-based forms, principally cash and checks; card-based payments, including credit, charge, debit, ATM, prepaid, private-label and other types of general purpose and limited-use cards; and other electronic payments, including wire transfers, electronic benefits transfers, automatic clearing house, or ACH, payments and electronic data interchange.

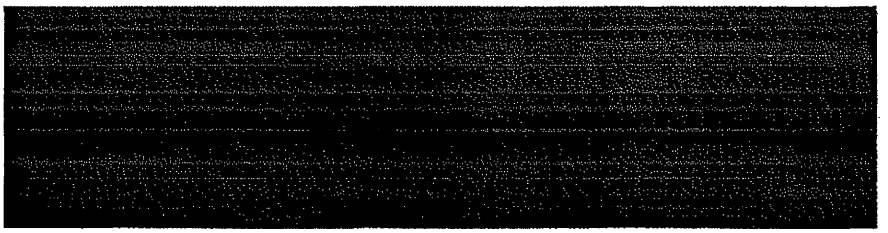
Visa Inc. 10-K, Exhibit A-419, p. 16

401. Mr. Weiner of Visa Canada testified that Visa's share of consumer expenditures is estimated to be 20%. His witness statement attaches several Visa internal documents demonstrating that Visa considers itself in competition with cash, debit, PayPal and other electronic payment providers.

Sheedy Statement, para. 29

Weiner Statement, para. 7-19

Weiner Evidence, Hearing Transcript, p. 2309, lines 9-15



Francine Kopun, "New PayPal service takes a bite out of banks, credit card companies", *Toronto Star* (15 March 2012), Exhibit E to Weiner Statement

DeVita Statement, para. 20

Stanton Statement, paras. 50-61

402. Furthermore, as explained below, the Commissioner's theory of anticompetitive harm is itself predicated on consumers' ability to switch payment methods as between credit cards of various brands and types as well as to cash, debit and other payment methods. The Commissioner's experts seem to have no problem referring to this "market" in making out their cause.

403. To properly understand the rivalry that Visa faces from payment methods of all types, one needs to look no further than Visa's business model, the perspectives of its business people, and the real world evidence apparent in the choices consumers make every day as to how to pay for transactions.

**(b) The Commissioner ignores the implications of the two-sided nature of Visa's business**

404. There is an "emerging consensus" that when dealing with two-sided platforms, traditional methods used in antitrust analysis, including for purposes of market definition, are not reliable. This is because two-sided platforms such as payment cards entail cross-network effects due to

the inter-related demand of each side (in this case, the acquiring/merchant side and the issuing/cardholder side). For example, a recent OECD Roundtable on two-sided markets noted in its Executive Summary (which is typically agreed to after review by the individual OECD member country delegations that are involved):

> Given that two-sided markets involve two different sets of customers, a question arises as to how to treat the two sides when defining the relevant product market. Or to put it differently, there is the question of whether the two sided should be analyzed jointly or separately. There seems to be an emerging consensus that a precise relevant product market definition is less important than making sure the linkages between the two sides, and the complexity of the interrelationships among customer groups, are taken into account. Mechanical market definition exercises that exclude one side usually lead to errors. Since two-sided platforms face a different profit maximization problem from the one that single-sided firms face, the traditional competition analysis methods and formulas from single-sided analysis, like the hypothetical monopolist test, do not apply to two-sided markets unless they are modified.
>
> The price level, i.e., the sum of all prices, rather than individual prices or the price structure, is the appropriate means of measuring the competitiveness of a market and should be the focus of policy analysis.
>
> OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, *Two-Sided Markets*, Policy Roundtables, DAF/COMP(2009)20 (2009), Exhibit REF-R-400 at 11-12 (Emphasis added)

405. Likewise, it has been suggested that:

> In antitrust cases involving two-sided platforms, market definition and market power analyses must take into account several economic issues that do not arise in other contexts. The two sides of a platform business are closely linked, with interdependent prices and outputs and intertwined strategies....To understand the relevant competitive relationships, one must consider both sides of the platform business...
>
> Most standard approaches to market definition, such as the small but significant and nontransitory increase in price (SSNIP) test, diversion ratios and other economic models and formulae, do not apply to two-sided markets without modification, occasionally radical in nature.

American Bar Association, *Market Definition in Antitrust: Theory and Case Studies* (Chicago: American Bar Association Section of Antitrust Law, 2012) at 438 ("*Market Definition in Antitrust*")

406. Professors Elzinga and Church pointed out for the Tribunal that the Commissioner's experts failed to properly consider the implications of the fact that Visa and MasterCard operate in a two-sided market for purposes of determining whether the Visa Rules have an adverse effect on competition in a market.

Church Expert Report, paras. 38-50

Church Evidence, Hearing Transcript, p. 2864, line 6 to p. 2868, line 11

Winter Evidence, Hearing Transcript, p. 2001, lines 12-25

Elzinga Expert Report, paras. 21-36

Elzinga Evidence, Hearing Transcript, p. 2714, line 2 to p. 2716, line 18

407. Indeed, rather than fully understanding and incorporating this fundamental aspect of Visa's business, the Commissioner and her experts equate payment cards with any other traditional market. For example, Professor Winter explained away the importance of a proper two-sided market analysis in his reply report:

> My initial report offers the following rationale for focusing upon one side of a two-sided market in assessing the competitive effects of the Merchant Rules. First, as a background point, note that the 'balancing' problem that a credit card company faces between low prices for merchants and increased expenditures on issuing activities is the same problem that any firm faces in balancing between low prices and non-price promotions or strategies.

Similarly, Professor Frankel's summary presentation begins with a discussion of "how competition constrains prices *in typical markets.*"

Winter Reply Report, para. 48

Summary of Expert Report of Alan S. Frankel, Ph.D., Exhibit A-54 ("Frankel Summary"), slide 4.

Frankel Expert Report, paras. 80-81

Frankel Reply Report, para. 14

408. All of the examples that Professors Frankel and Winter provided – coffee and tea; chefs and restaurants; Coke and Pepsi – involve traditional one-sided markets. Professor Winter admitted that his example was over-simplified (in his own words: "I am hesitant to describe that [his coffee and tea example] as analogous to payment cards, or my earlier example of restaurants as analogous to payment cards") and Professor Frankel conceded that he was seeking to "simplify away" the two-sided aspect of the market. This provides another reason why these examples are irrelevant to this case.

Frankel Evidence, Hearing Transcript, p. 1142, lines 16-17

Winter Evidence, Hearing Transcript, p. 2032, lines 3-5

409. Professor Winter sought to analogize competition in two-sided industries with the relationship that any firm considers between price and non-price competition. However, Professor Church explained that in so doing Professor Winter ignored the cross-network effects that are inherent in two-sided platforms such as payment networks, or as Professor Church referred to it: usage externalities and membership externalities.

Winter Expert Report, paras. 76-78

Church Expert Report, paras. 38, 67, 70

Summary of the Expert Report of Jeffrey Church, Exhibit R-493 ("Church Summary"), slide 7

Church Evidence, Hearing Transcript, p 2864, line 6 to p. 2868, line 11

410. This reluctance to properly consider the two-sided nature of the payments industry permeates the Commissioner's analysis, from market definition to market power to anti-competitive effects. For example, Professor Carlton's first conclusion stated: "A relevant market

consists of credit card network services provided to acquirers." In fact, credit card network services are provided to Acquirers and Issuers simultaneously, and demand is inter-related. Thus, as a starting point, it is incorrect to focus only on one side of the market. Similarly, Professor Frankel begun by defining a market as "credit card network (acceptance) services in Canada." But Visa provides network (not acceptance) services to Acquirers *and Issuers simultaneously* (and their demand is inter-related), so it is wrong to commence the analysis by focusing only on the acceptance side of the platform. From here, the Commissioner's experts continued on their one-sided path by focusing on the "price" to Acquirers and merchants, rather than considering the sum of the price to the acquiring and issuing sides together, which would be appropriate.

Carlton Summary, slide 2

Frankel Expert Report, para. 11

Elzinga Expert Report, paras. 10-11, 30-36

411. In the 2007 paper entitled "Market Definition: Use and Abuse" prepared for the Economic Analysis Group of the Antitrust Division of the US Department of Justice, Professor Carlton acknowledged the importance of the implications of a two-sided market analysis. The article was referenced by Professor Elzinga in his examination in chief.

Dennis W. Carlton, "Market Definition: Use and Abuse," Economic Analysis Discussion Paper EAG 07-6, (U.S. Department of Justice, Antitrust Division, April 2007)

412. In that paper, Professor Carlton devoted an entire section to market definition in two-sided markets because of the unique analysis required. He concluded that section by explaining:

> My sense is that this problem of using the right "price" will make market definition in two-sided markets more difficult than in the typical case and

> will therefore further limit reliability of market definition and market shares.
>
> *Ibid.* at 31

413. To describe the importance of the two-sided analysis, Professor Carlton used the example of a merger between two shopping malls, explaining:

> Following an approach similar to the Guidelines, we ask which nearby malls must a hypothetical monopolist control in order for it to be profitable for the merged firm to raise the "price" by, say 5%. But just as in the earlier discussion of market definition when multiple substitutes were in the market, one must define what "price" means. Is it the rent of one particular retail store, average rent or total rent that has to rise? In the earlier discussion of market definition when the market contained multiple products, I recognized the ambiguity in the definition of "price" but said that I doubted that it should matter much, though I indicated a preference to focus on the products of the merging firms, rather than all products in the market. But here, there is no one type of retail store to focus on. [FN 29] Therefore, one should focus on an aggregate measure of rent.
>
> Moreover, we know that because of the two-sided nature of the market it is unlikely that it is optimal for the hypothetical monopolist to raise rents to all stores by 5%. Indeed, the whole point of having a mall is to charge different rents to different types of stores.
>
> *Ibid.* at 30-31 (Emphasis added)

414. In Professor Carlton's example, the two types of retail stores reflect the two sides of the market in a shopping mall merger. At footnote 29 of that article, Professor Carlton explained:

> Notice that the product is "malls", not individual retail stores. If one does mistakenly focus on rent to only a particular type of retail store, one must recognize the two-sided nature of the market in which feedback effects occur in other retail stores in the mall. An increase in the percent of sales charged as rent to the bookstore could lead to higher book prices and fewer customers to the bookstore and, thereby, to all other stores in the mall. The fall in mall customers leads to a decline in sales in other retail stores and a decline in rents from these stores. Failure to understand this feedback effect could lead one to overestimate the profitability to the mall owner of raising rents to the bookstore and, thereby, lead one to define markets too narrowly and overestimate market power.

*Ibid.* at FN 29 (Emphasis added)

415. The Commissioner's experts made the very same mistake that Professor Carlton warned against in this article: they "mistakenly" focused on one side of the market (merchants) and effectively ignored the feedback effects inherent in payment networks. Not surprisingly, this lead the Commissioner's experts to "define markets too narrowly and overestimate market power."

416. Professor Carlton, in his expert report, agreed with many of the points regarding two-sided markets discussed in the publications above. For instance, Professor Carlton explained that "the demands faced by the two different sides of the market can be expected to be related" and "[b]ecause changes in one price in a two-sided market may affect the price on the other side of the market, market definition in two-sided markets may be more difficult, and may have different implications, than in the typical case". However, he simply posited without explanation that for "certain" questions, it can be appropriate to analyze only one price in a two-sided market. Professor Carlton does not state in his report whether this case is one of those cases, or why it would make sense to only analyze one side in certain cases (or more importantly in this case). In cross-examination, Professor Carlton appeared to acknowledge that the two-sidedness of the payment card industry should be (and allegedly was) considered in his analysis, but there is no such analysis in his expert report or slide presentation (with the exception of one bald mention of two-sided markets on slide 8).

Carlton Expert Report, paras. 34-38

Summary of the Expert Report of Dennis W. Carlton, Exhibit A-68 ("Carlton Summary"), slide 8

Carlton Evidence, Hearing Transcript, p. 1278, lines 6-13

417. In fact, Professor Carlton conceded that "in the case of the Visa and MasterCard networks, actions that raise the price paid by merchants for credit card network services could lower the price paid by cardholders for using a credit card." By the same token (and as a noteworthy aside), the converse is also true. Actions that lower the price paid by merchants (which is what the Commissioner seeks) could raise the price paid by cardholders for using a credit card. There is evidence of exactly this outcome from Australia as a consequence of the regulation downward of Visa and MasterCard's interchange rates (cardholders did not observe a complete "one-to-one" increase in fees relative to the decrease in interchange). This leads to the absurd outcome if the Commissioner's (flawed) effects-based concept of price maintenance were accepted: Visa or MasterCard would be engaged in price maintenance by increasing interchange if the effect is an increase in the prices paid by merchants. However, Visa or MasterCard would also be engaged in price maintenance by lowering interchange (as the Commissioner and merchants desire) in that the effect would be a price increase to Issuers/cardholders. This absurdity serves to illustrate that the proper way to analyze Visa and MasterCard's conduct is by considering the two-sided nature of the payment card industry (and that the Commissioner's effects-based price maintenance theory is fundamentally flawed).

McCormack Evidence, Hearing Transcript, p. 707, line 2 to p. 709, line 15

Howard Chang, David So Evans, and Daniel Garcia-Swartz (2005) 4:4 *Review of Network Economics* 328, Exhibit R-42, p. 349

Carlton Expert Report, para. 38

**(c) The Commissioner and her experts confuse and conflate the services provided by credit card networks with the services provided by Acquirers**

418. The Commissioner relies on the definition of Credit Card Network Services set out in the Notice of Application, i.e., "a network [operated by each of the Respondents] that provides

infrastructure and services enabling merchants to obtain authorization, clearance and settlement of transactions." However, the Commissioner's experts defined the term Credit Card Network Services somewhat differently, focusing on the businesses of Acquirers rather than Visa and MasterCard (see below).

Notice of Application, para. 6

419. Through the use of the term "Credit Card Network Services," the Commissioner and her experts confused and conflated two very different things: 1) the "network services" that Visa provides to Acquirers and Issuers simultaneously, which entail inter-related demand and cross-network effects (see below); with 2) the business of Acquirers, i.e., the payment card processing services that Acquirers provide to merchants, which are not only different in kind and scope but importantly, do not in themselves entail inter-related demand and cross-network effects.

Van Duynhoven Statement, paras. 13-81

Van Duynhoven Evidence, Hearing Transcript, p. 2501, line 6 to p. 2505, line 16

Cohen Statement, paras. 13-17, 25-39

Cohen Evidence, Hearing Transcript, p. 3283, line 4 to p. 3284, line 2

McCormack Expert Report, para. 158-163

McCormack Reply Report, para. 34-39

420. The conflation of the business of Visa and MasterCard with the business of Acquirers is a fundamental error in the market definition analysis conducted by the Commissioner and her experts. A market definition analysis, including the hypothetical monopolist test, should be conducted on the market in which Visa and MasterCard (the firms whose conduct is at issue) participate, not a downstream market engaged in by entities who are not subject to these

proceedings (in this case, Acquirers). Professor Carlton does not seem to take issue with this fairly basic proposition.

> For example, in an economic analysis of the likely effects of a proposed merger, the ultimate question of interest typically involves evaluating whether the proposed transaction will lead to a substantial increase in price. To answer that question, it often is useful to first determine the markets in which the merging parties participate.
>
> Carlton Expert Report, para. 28

421. However, that is not what Professors Carlton and Frankel do in respect of this case. Professor Carlton, at paragraph 32 of his report, suggested:

> In the context of the issues in this litigation, it is appropriate to apply the hypothetical monopolist test to credit card network services such as those provided by members of the Visa and MasterCard networks. This test evaluates whether a hypothetical monopolist acquirer would be able to profitably set its fees to merchants five percent, for example, above the competitive level (i.e., the level that prevails with multiple competing acquirers). Suppose that a monopolist acquirer of Visa and MasterCard transaction processing raised the credit card acceptance fee by five percent above the competitive level.
>
> Carlton Expert Report, para. 32 (Emphasis added)

422. And at footnote 17:

> For the purpose of my market definition analysis, I hold constant everything except the level of competition among acquirers (e.g., I hold constant the interchange fee, annual fees to cardholders, and the level of rewards). In the hypothetical monopolist test, I ask whether a monopoly acquirer would be able to increase the credit card acceptance fee above the competitive level.
>
> Carlton Expert Report, fn. 17 (Emphasis added)

423. As noted above, Professor Frankel made the same error as demonstrated, for example, by reference to paragraph 57 of his report:

> Applying the hypothetical monopolist test, such a conclusion would require the finding that even if there were only one acquirer in Canada to which merchants could turn to obtain Credit Card Network Services, that hypothetical monopolist acquirer could not profitably charge merchants more for Credit Card Network Services than merchants pay in the presence of competition among networks and acquirers.
>
> Frankel Expert Report, para. 57

424. It is possible that the reason for the conflation on the part of the Commissioner and her experts stems from the fact that Professors Carlton and Frankel relied on market definition analyses undertaken by courts or other adjudicative bodies or academics prior to 2007/2008, when the credit card networks were not-for-profit associations owned and governed by member financial institutions that were engaged in the acquiring business (several of the articles Professors Carlton and Frankel cite for support pre-date the 2008 re-organizations of the credit card companies). As explained below, in those cases (which would have involved a joint venture analysis of competition among financial institutions) one could argue that competition among Acquirers (i.e., member financial institutions) was in issue. However, that is not the issue for this case.

425. Regardless, the problem with Professor Carlton's and Professor Frankel's focus on the acquiring market is twofold. First, whether or not there is a separate "credit card acquiring market" is not germane to the issues in this case. (In fact, the Commissioner and her experts take the position that the "acquiring market" in Canada is in fact very competitive.) As mentioned, Visa and MasterCard—the firms whose conduct is at issue—do not provide acquiring services. To argue that the networks and Acquirers both provide "credit card network services" obscures the question because the actual services provided by the payment networks and Acquirers are very different. In fact, networks and Acquirers cannot both provide credit card network services

(as the Commissioner suggests) because networks do not compete with Acquirers, which is necessary to be in the same relevant market. The Competition Bureau itself recognizes this. In its prior reviews of the proposed bank mergers, the Competition Bureau noted that acquiring services and Credit Card Network Services (i.e., provided by the networks) were not the same and indeed were different relevant markets:

> Within this category [credit cards], we defined the following relevant product markets:
>
> - General purpose credit card issuing to businesses
>
> - Visa merchant acquiring
>
> - General purpose credit card network services
>
> - MasterCard merchant acquiring
>
> - General purpose credit card issuing to individuals
>
> - Primary merchant acquiring
>
> Letter from Konrad von Finckenstein, Q.C., Director of Research and Investigation, Competition Bureau to John E. Cleghorn, Chairman and Chief Executive Officer, Royal Bank of Canada and Matthew W. Barrett, Chairman and Chief Executive Officer, Bank of Montreal, (11 December 1998), online: <http://www.competitionbureau.gc.ca/ eic/site/cb-bc.nsf/eng/01612.html> ("Merger Letter")

426. The Appendix accompanying the Competition Bureau's findings regarding the proposed bank mergers also makes it clear that acquiring, issuing and network services provided by Visa and MasterCard are each distinct sets of services:

> **Credit card acquiring**
>
> The services provided by credit card acquirers to merchants that enable merchants to accept credit card payment from their customers and to receive payment for credit card purchases. Financial institutions providing only the processing and payment settlements of credit card purchases are referred to as Visa or Mastercard merchant acquirers. Financial institutions that also provide the computer terminal and software along with the

processing and payment settlements services are referred to as primary merchant acquirers.

**Credit card issuing**

The provision of the plastic credit card to consumers. A credit card issuer typically refers to a financial institution that issues a card which can be used by a consumer to purchase goods or services on credit.

**Credit card network services**

The system that enables individual cardholders to have their cards widely accepted for the purchase of goods and services. The two major credit card networks in Canada are Visa and Mastercard.

Appendix A to Merger Letter

427. Second, it is patently incorrect to impute an analysis of the acquiring business onto the business of credit card networks. At paragraph 58 of his report, Professor Frankel attempted to do just this:

> To illustrate, suppose following such a hypothetical merger to monopoly in the credit card industry the sole remaining acquirer of credit card transactions in Canada increased Card Acceptance Fees by 5 percent for at least one year ... If the market were broader than Credit Card Network Services, the credit card monopolist would find that it would lose so many transactions to PayPal, cash, etc. that the price increase would be unprofitable.
>
> Frankel Expert Report, para. 58

428. As demonstrated throughout this proceeding, the economics of the acquiring business are very different from the economics of operating a credit card network business. For starters, the acquiring business is one-sided (its customers are merchants), while the credit card network business is two-sided (its customers are Acquirers and Issuers, and their demand is interrelated). Moreover, it is of little value to suggest that cash, debit and cheques are not substitutes for a credit card acquiring business. The whole point of credit card acquiring is that it is acquiring

services for credit card acceptance. If the market is pre-determined to be credit card (acceptance) services, there is little doubt that alternative forms of payment would not be in the relevant market; this is a tautology.

**(d) The Commissioner's experts misapply the hypothetical monopolist test**

429. The analytical errors discussed above are demonstrated by the Commissioner's experts' attempt to conduct the hypothetical monopolist test on the acquiring business, and apply the results of that test to the payment networks business.

430. The evidence demonstrates that in conducting the hypothetical monopolist test, Professors Carlton and Frankel focused on the "merchant fee" or "Card Acceptance Fee," i.e., the fee paid by merchants to Acquirers as the relevant price. However, as discussed above, this is not a fee paid to Visa or MasterCard. Rather, it is charged by Acquirers to merchants and so it is not the correct price to be analyzed for purposes of this case. Faced with this problem, the Commissioner's experts refer to the concept of derived demand to explain why the hypothetical monopolist test was conducted on the Acquirer level rather than the network level.

Carlton Summary, slide 5

Carlton Evidence, Hearing Transcript, p. 1420, line 5 to p. 1421, line 20

Frankel Summary, slide 24

Winter Expert Report, para. 51

431. However, the explanation of "derived demand" fails in this situation because the Card Acceptance Fee is predominantly comprised of interchange – which is merely a tool to balance both sides of the payment system and does not generate revenue for Visa and MasterCard; it is paid to Issuers. The hypothetical monopolist test is premised on the notion of a monopolist

increasing its price to maximize profits. Professor Winter made the same mistake by using his "Acquirer Fee" as the relevant price but defining the Acquirer Fee to include both the network acquirer fee paid to Visa or MasterCard and interchange fee (which is not paid to Visa or MasterCard). In any event, to the extent that demand is considered to be "derived," it is ultimately derived from consumers' choices of payment method at the point of sale, which includes various brands of credit cards, Interac and cash.

Carlton Evidence, Hearing Transcript, p. 1420, line 5 to p. 1421, line 20

Winter Expert Report, para. 51

Elzinga Expert Report, para. 36

Church Expert Report, paras. 11, 60-62

432. Accordingly, as demonstrated on cross-examination and by Professors Church and Elzinga, it is incorrect for the Commissioner's experts to use the card acceptance fee as the relevant price for purposes of the hypothetical monopolist test and then apply that result to the payment network business to define the relevant market.

Church Expert Report, paras. 11, 60-62

Church Evidence, Hearing Transcript, p. 2860, lines 7-17; p. 2884, line 11 to p. 2887, line 23

Elzinga Expert Report, para. 36

Elzinga Evidence, Hearing Transcript, p. 2714, line 22 to p. 2716, line 18

Carlton Evidence, Hearing Transcript, p 1420, line 5 to p. 1421, line 20

Winter Evidence, Hearing Transcript, p. 2015, line 4 to p. 2012, line 13

433. The Commissioner and her experts failed to recognize interchange for what it is for the payment networks: a balancing tool, not a source of revenue. In so doing, the Commissioner in effect imputes both the one-sidedness and breadth of an acquiring market onto the payments

market which is two-sided and broader (and complex in nature). In the end, the analysis is flawed.

434. These flaws in the Commissioner's market definition analysis were also demonstrated by the break-even critical sales loss (BECSL) analysis undertaking by the Commissioner's expert, Professor Winter. In his report and direct testimony, Professor Winter suggested that the application of the hypothetical monopolist test shows that Visa and MasterCard would need to lose approximately 50% of volume from a 5% "price" increase for the market to be broader than credit card network services. Since, according to Professor Winter, that is highly unlikely to happen, he concluded that the market is no broader than credit card network services.

> Winter Expert Report, para. 63
>
> Summary of the Expert Report of Ralph Winter, Exhibit A-74 ("Winter Report"), slides 7-8

435. However, in Professor Church's report and testimony, and on cross-examination of Professor Winter, it was demonstrated that Professor Winter's BECSL was flawed for the same reason as Professor Carlton's and Professor Frankel's hypothetical monopolist test were flawed. In particular, by wrongly including interchange in the measure of a "price increase" for purposes of the hypothetical monopolist test, Professor Winter was able to significantly inflate the required loss of volume that would demonstrate a broader market than CCNS. In fact, as demonstrated by Professor Church, using Professor Winter's own figures—but correctly accounting for interchange as a balancing tool, and not as a source of revenue to Visa and MasterCard — the BECSL demonstrates that the market that Visa and MasterCard are engaged in (not Acquirers) is quite likely broader than credit card network services.

> Winter Evidence, Hearing Transcript, p.2078, line 5 to p.2083, line 1

Church Evidence, Hearing Transcript, p.2888, line 4 to p.2896, line 22

Church Summary, slides 20-25

Church Expert Report, paras. 72-77

**(e) The Commissioner's market definition "bait and switch"**

436. Economists, including those that have testified in this proceeding, generally agree that market definition is not an end in itself, but is a tool used for purposes of an antitrust analysis into certain conduct (e.g., merger). For example, the Competition Bureau's Merger Enforcement Guidelines provide that: "[t]he ultimate inquiry is not about market definition, which is merely an analytical tool – one that defies precision and can thus vary in its usefulness – to assist in evaluating effects." In this regard, there is little disagreement that "[t]o provide an accurate basis for analyzing market power, the definition of the market must be congruent with the theory of anticompetitive harm."

Carlton Expert Report, para. 28

Frankel Expert Report, para. 51

Merger Enforcement Guidelines, para. 3.2

*Market Definition in Antitrust, supra* at p. 21

437. Here, the Commissioner relies on a narrow definition of the market (credit card network services). Yet, the Commissioner's theory of anticompetitive harm is dependent on cardholders using alternative payment methods in response to a (presumably less than 5%) surcharge, and output of these alternative payment methods (e.g., cash and debit) expanding relative to the market the Commissioner has defined (credit cards). In her Notice of Application, the Commissioner asserts that the Visa and MasterCard rules adversely affect competition by "reducing output of lower-cost payment methods. The Merchant Restraints constrain or prevent

merchants from promoting the use of lower-cost methods of payment and, as such, result in reduced use of these less-expensive methods of payment." Professor Carlton also provided:

> That is, the Merchant Restraints cause a distortion in the "price signals" received by consumers using credit cards to make purchasers [sic]. In a but-for world without the Merchant Restraints, the total use of debit cards and cash likely would expand relative to the use of credit cards, at merchants that accept credit cards, as those merchants would be allowed to give price signals to consumers to use the less costly payment channel.
>
> Notice of Application at para. 93
>
> Carlton Expert Report, para. 44 (emphasis added)

438. However, if "credit card network services" is the relevant market, then steering towards cash and debit should be irrelevant; but that is precisely what the Commissioner seeks here. The Commissioner is trying to have it both ways: on the one hand defining the market narrowly to exclude cash, cheques, debit and other payment methods, yet on the other hand seeking a remedy whose objective is to drive increased output of these very same payment methods to impose "competitive discipline" on credit card acceptance fees. As Professor Elzinga explained in his expert report:

> While the Commissioner's experts propose a relevant product market no more inclusive than card acceptance services for credit card networks, one of the Commissioner's objectives in pursuing this litigation is to give merchants more leverage to make it more attractive for their customers to put their credit cards aside and make purchases with other payment means such as debit cards, cash, and cheques. This also is peculiar. When it comes to defining the relevant product market, the Commissioner and her experts do not regard these alternative means of payment as viable substitutes for credit cards. But when it comes to predicting the effects of tampering with the Respondents' operating rules, they anticipate that consumers will be induced to switch to these same means of payment, presumably the closest substitutes for using credit cards. This position has all the marks of the Commissioner trying to have it both ways.
>
> Elzinga Expert Report, para. 14

439. In several instances, the pleadings and the evidence in this proceeding expose the conundrum that the Commissioner faces. A few of these are provided below:

(a) As noted above, the Commissioner and merchant witnesses regularly drew comparisons between the costs to merchants of accepting credit cards to the costs to merchants of accepting cash or debit. However, if the cash, debit and cheques are not in the same relevant market as credit cards, then one wonders why such a comparison is relevant at all.

(b) Similarly, virtually all of the merchant witnesses compared the percentage of sales in their establishments that are paid for by credit cards versus cash, versus debit, or combination thereof. Again, if cash and debit are not in the same relevant market as credit cards, one wonders why such a comparison is relevant at all (to merchants, it clearly is relevant).

De Armas Statement, para. 19

Jewer Statement, para. 24

Symons Statement, para. 16

Shirley Statement, para. 12

Li Statement, paras. 11-12

Houle Statement, para. 16

Broughton Statement, para. 4

Daigle Statement, para. 14

(c) In explaining his cost-externalization hypothesis, Professor Winter stated: "[c]onsider what happens when, as in the real world, the market includes some customers paying with cash or other methods of payment."

Winter Reply Report, Appendix A, para. 3

440. The Commissioner's market definition "bait and switch" is perhaps best illustrated by the evidence of Dr. Frankel. The starting point is paragraph 18 of his original report: it is clear that the relevant market Dr. Frankel posited is the market for the provision of general purpose credit card network (acceptance) services by Acquirers to merchants, which is defined as "Credit Card Network Services" (CCNS). That is the "bait."

Frankel Expert Report, para. 18

441. As became clear on cross-examination, the "switch" occurs when Dr. Frankel relied on the choice of method of payment from the perspective of consumers (not the market for CCNS from the perspective of merchants) as the salient competition question. Dr. Frankel's point was this: faced with a surcharge, which Dr. Frankel agreed would be a small price difference from the consumer's perspective (Dr. Frankel agreed that 2% would be a probable surcharge), consumers would regard other forms of payment as viable substitutes – i.e., the market includes other forms of payment. The "relevant market" being referenced here is the payments market from the perspective of consumers, not the CCNS market from the perspective of merchants.

> MR. KWINTER: And your thesis is that in response to that 2 percent or so price difference, that cardholder is more likely to view debit, cash, or otherwise, as a substitute and switch to that. That is the point in your article, right?
>
> DR. FRANKEL: A fair number of cardholders are likely to switch. Not everybody, but some of them.
>
> MR. KWINTER: And they're going to switch in response to that 2 percent price difference, right?
>
> DR. FRANKEL: It is 2 percent of the purchase price.
>
> MR. KWINTER: Right.

DR. FRANKEL: Yes.

MR. KWINTER: From the cardholder's perspective, they see a 2 percent difference. Are we good?

DR. FRANKEL: Yes.

Frankel Evidence, Hearing Transcript, p. 1038, lines 5-23

442. But if consumers would, as Dr. Frankel agreed, switch to other forms of payment in response to 2% price increase, that represents a classic application of the SSNIP test, demonstrating that the relevant market includes all forms of payment to which consumers would switch in response to the surcharge. Indeed, this is the basis of the Commissioner's theory of price maintenance in the case: cardholders would switch to other forms of payment in sufficient numbers to negatively impact credit card network volumes, which would incent Visa to reduce interchange and network fees. As such, the relevant market for the purposes of the Commissioner's theory should be the consumer payments market in Canada, a market in respect of which, as noted above, Visa has an uncontradicted share of consumer expenditures of approximately 20%.

443. In her Reply, the Commissioner seeks to explain away this dilemma by suggesting that "[t]he fact that *consumers* may elect to use another method of payment in the event that credit cards are subject to a surcharge does not alter the fact that, even in the face of a significant increase in card acceptance fees, *merchants* are unable to elect to accept only other forms of payment while declining to accept Visa and MasterCard credit cards." However, the issue of increases in card acceptance fees to merchants is a matter that is relevant to an analysis of the (one-sided downstream) acquiring market, not the (two-sided upstream) network business that Visa and MasterCard are engaged in. And it is odd that the Commissioner does not take the

perspective of consumers (over the perspective of merchants) on such a fundamental aspect of this case, particularly given the fact that the conduct at issue relates to experiences at the point of sale. As the Federal Court of Appeal stated in *Nadeau*: "the object of competition legislation is to protect consumers, and to protect market participants only to the extent that doing so can be shown to protect consumers."

> Reply of the Commissioner of Competition, para. 66
>
> *Nadeau* (FCA), *supra* para. 99

444. The Commissioner's explanation, above, suffers from the same fallacy as the Commissioner's experts' reliance on the acquiring market as the basis for their market definition analysis. Visa and MasterCard are in the business of expanding transaction volume, which is dependent upon choices made by consumers at the point of sale. As Professor Elzinga explained in his report:

> The second reason the Commissioner asks the wrong question is this: even if the hypothetical monopolist test were to be applied only to the merchant side of this two-sided market, the relevant decision maker is not the merchant but the consumer.
>
> ...[T]he competition in which the Commissioner wants a larger role for merchants is the competition for consumers' choices among payment mechanisms when consumers are in the act of purchasing goods and services from merchants. To see whether the Commissioner's proposed credit card market passes the "one-sided hypothetical monopolist test" would mean investigating how tenaciously consumers would cling to their credit cards if it meant paying 5% or 10% more than with an alternative payment mechanism at the point of sale.
>
> Elzinga Expert Report, paras. 146-147

**(f) Prior cases on market definition cited by the Commissioner are not germane to this proceeding**

445. The Commissioner and her experts cite a number of prior cases, including cases involving credit card networks, for the contention that the market should be defined narrowly to exclude methods of payment other than credit cards and only the merchant side of the credit card business.

> Opening Statement of the Commissioner of Competition, Hearing Transcript, p. 68, line 3 to p. 71, line 15
>
> Frankel Expert Report, paras. 60-63
>
> Carlton Expert Report, paras. 54-58

446. A number of points regarding the cases cited by the Commissioner and her experts are worth noting for the Tribunal, as they demonstrate why reliance on these cases would be inappropriate in the context of this proceeding.

447. First, as noted above, a market definition inquiry is not an end in itself but rather a tool used by most (but not all) antitrust authorities and economists in order to analyze the conduct at issue in any particular case. In this regard, none of the cases relied upon by the Commissioner and her experts dealt with an inquiry into whether the Visa Rules constitute price maintenance and, if so, whether such price maintenance led to an adverse effect on competition in a market.

448. Second, none of the judicial decisions relied upon by the Commissioner and her experts were commenced after Visa was transformed from a not-for-profit association, owned and controlled by member financial institutions, to an independent profit seeking entity distinct from its member financial institutions (now its customers). This is a key distinction. Prior to Visa's transformation into an independent entity, the antitrust analysis primarily focused on horizontal

competition issues concerning joint ventures (e.g., the collective setting of interchange fees, whether there is was a lessening of competition among member financial institutions as pertaining to the acquiring business, or issues concerning membership in the associations). In addition, as not-for-profit associations owned by its members, Visa and MasterCard had different incentives than they now do. This is particularly relevant in relation to the European cases cited by the Commissioner because, unlike in North America, in Europe the governance over the association (including interchange) remained with the banks rather than an independent card network. In this case, the analysis is not concerned with the nature of a joint venture; rather, the antitrust analysis is concerned with the unilateral conduct of Visa and MasterCard as independent, profit-seeking entities with an undisputed incentive to generate transaction volume to maximize their profits.

> *MasterCard, Inc. et al. v. Commission*, T-111/08, [2012] E.C.J. at paras. 24, 27
>
> *National Bancard Corporation v. Visa U.S.A.*, 596 F.Supp. 1231 at 1258 (S.D. Fla. 1984), aff'd 779 F.2d 592 (11th Cir. 1986) ("*NaBanco*")
>
> *MountainWest Financial v. Visa, U.S.A.*, 36 F.3d 958 (10th Cir. 1994)
>
> *United States of America v. Visa and MasterCard*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001)
>
> EC, Commission Decision 2002/914/EC of 24 July 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, [2002] O.J. L 318/17 (Case No COMP/29.373 — Visa International — Multilateral Interchange Fee) ("*Visa International Multilateral Interchange Fee*")
>
> EC, Non-Confidential Version of the Commissioner Decision of 19 December 2007 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/34.579 MasterCard, COMP/36.518 EuroCommerce and COMP/38.580 Commercial Cards) ("*European Commission re MasterCard*")
>
> *In Re Visa Check/Mastermoney Antirust Litigation*, No. 96-CV-5238, 2003 U.S. Dist. LEXIS 4965 (E.D.N.Y. April 1, 2003)

*In Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 562 F. Supp. 2d 392 (E.D.N.Y. 2008)

Sheedy Evidence, Hearing Transcript, p. 2181, line 14 to p. 1281, line 1

449. Third, the Commissioner and her experts suggest that the only possible reading of the cases cited supports the market definition advanced by the Commissioner. However, that is not quite right. *NaBanco*, which was upheld by the US Court of Appeal for the Eleventh Circuit, upheld a "payment services market" and while the European Commission in *Visa International – Multilateral Interchange Fee* did not support an all payments market, that decision and the decision of the *European Commission re MasterCard* were open to a payment card market that includes both credit and debit.

*NaBanco, supra*

*Visa International Multilateral Interchange Fee, supra*

*European Commission re MasterCard, supra*

450. With respect to Canada, the Commissioner's counsel points to *Southam* as precedent for a Canadian decision involving a two-sided industry (newspapers), which focused only on one side of the business. *Southam* is not a relevant, nor a binding, precedent. The *Southam* case was initiated in late 1990 and ultimately decided by the Tribunal in 1992 and the issue of two-sidedness was not argued before, nor considered by, the Tribunal. As Professor Church explained:

> MR. FANAKI: And you would agree with me that the Tribunal in that case [Southam] determined that the relevant market was one side of the market? Specifically the focus was on the supply of advertising services?
>
> PROFESSOR CHURCH: ... I suspect the answer is 'no', because all of this stuff on market definition on two-sided networks happens after the Southam case. We figured this out afterwards, not at the time of the Southam case.

Church Evidence, Hearing Transcript, p. 2922, lines 3-25

*Canada (Director of Investigation and Research) v. Southam Inc. et al*, (1992) Carswell Nat 637 (Comp. Trib.), rev'd (1995), 127 D.L.R. (4th) 263 (F.C.A.), aff'd [1997] 1 S.C.R. 748

451. By way of contrast, as explained above, there is now more or less a consensus among economists (and antitrust enforcer members of the OECD) that two-sided industries with inter-related demand are deserving of a distinct economic analysis. That does not mean that *Southam* was wrongly decided or needs to be overturned. It just means that the issue was never debated in that case. Since the time of *Southam*, there have been many cases by antitrust authorities where the two-sided nature of the industry has been a relevant factor. For example, in *Google/DoubleClick*, the European Commission defined one market by taking into account the perspective of both publishers and advertisers. In this context, it discussed indirect network effects and the impact of multi-homing. In *Bloemenveiling Aalsmeer / FloraHolland*, the NMa considered that in defining the relevant market, the buyers' side and the growers' side of the market must be assessed together. The NMa also assessed the impact of indirect network effects on the critical loss analysis. And as discussed below, the U.K. OFT explicitly considered the two-sided nature of the newspaper business and indirect network effects as providing an additional reason to clear the merger of two competing newspapers.

Commission Decision of 11 March 2008, Case COMP/M/4731 Google/Doubleclick

NMa case 5901/184 21 August 2007 Bloemenveiling Aalsmeer / FloraHolland

OFT, Press Release, 45/12, "OFT clears Nottingham newspapers merger" (1 June 2012) online: <http://www.oft.gov.uk/news-and-updates/press/2012/45-12>

OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, *Two-sided Markets*, Policy Roundtables, DAF/COMP(2009)20 (2009), Exhibit REF-R-400 at 11-12

*Market Definition in Antitrust* at p. 437-439

452. As noted, the U.K. OFT recently had occasion to evaluate a merger of newspapers and noted the following in its press release announcing the decision to clear the merger in spite of the apparently high market shares:

> The OFT found that the appropriate frame of reference for an assessment of the transaction was the supply of local newspapers in the Nottingham area. The OFT did not consider that online media formed part of the same relevant market as local newspapers but took into account the constraint from online and other media in its overall competitive assessment.
>
> In Nottingham, the merging parties had high combined market shares in the supply of local newspapers. However, the OFT found that a number of factors, taken in the round, meant that advertisers would be protected against price increases or reductions in quality. These factors included: the fact that some advertisers, either directly or through advertising agencies, procure advertising space across many different local areas or regions, giving them the opportunity to compare prices across different media channels and geographic areas; some segments of advertisers would continue to have online alternatives such as property or motors websites; and some advertisers were able to self-supply through distributing printed literature direct to homes, as an alternative to newspaper advertising.
>
> In addition, all types of advertisers may be protected by the two-sided nature of the market, meaning that that the merged entity would need to take into account the impact on advertisers, on the one hand, and on readers, on the other, when taking pricing or other business decisions (referred to as indirect network effects).
>
> OFT, Press Release, 45/12, "OFT clears Nottingham newspapers merger" (1 June 2012) online: <http://www.oft.gov.uk/news-and-updates/press/2012/45-12> (emphasis added)

## XIII. The Commissioner's Market Power Analysis is Flawed

453. As with the Commissioner's market definition analysis, the Commissioner's analysis of market power is also defective in a number of respects.

**(a) The Commissioner's references to increases in merchant's cost of acceptance are not evidence of market power**

454. The Commissioner and her experts assert that: "[t]he Respondent's market power is evidenced by the fact that, despite increases in the merchants' costs of accepting the Respondents' credit cards, there has been no reduction in the number of merchant outlets that accept Visa or MasterCard credit cards." Similarly, Professor Frankel cited as "direct evidence" of market power the notion that the number of merchants accepting credit cards and the number of transactions processed by Visa and MasterCard have increased as card acceptance fees (interchange fees and network fees) have increased. He referred to this as price inelasticity on the part of merchants. However, this analysis is also misleading. Because of the two-sided nature of the industry, the "increases in the merchants' costs of accepting" credit cards cannot be considered in isolation from the greater benefits merchants receive from credit card acceptance.

Notice of Application, para. 91

Frankel Summary, slide 31

Symons Statement, para. 24

Jewer Statement, paras. 36-42; see especially para. 42

(i) *Absolute increases in cost of acceptance are reflective of increased use of the system*

455. To the extent that merchants' costs of acceptance are higher in absolute terms, that is simply a function of a greater number of transactions being processed using credit cards (i.e., consumers are choosing to pay with credit cards, which affirms the merchants' decision to accept credit card transactions). In spite of Professor Frankel's testimony, it is difficult to fathom a scenario where output expansion alone is considered to be probative evidence of market power.

Daigle Evidence, Hearing Testimony, p.456, line 9 to p.457, line 5

Van Impe Evidence, Hearing Testimony, p. 1668, line 18 to p.1669, line 5; p. 1707, line 19 to p.1708, line 19

De Armas Evidence, Hearing Testimony, p.262, line 7 to p.263, line 18

(ii) *Increases in interchange fee are not evidence of market power*

456. To the extent that merchants' costs of acceptance are higher in percentage terms as result of allegedly higher interchange, that higher interchange is used to fund the issuing side of the business, such as increased cardholder rewards (e.g., air miles, cash back) that provide an effective discount to cardholders at retail outlets *that is not otherwise paid for by merchants.* This attracts more cardholders to those merchants that accept credit cards, which means that the price of acceptance may be higher but the product purchased by the merchants is of greater value to them.

Weiner Statement, para. 21

457. Interchange fees do not generate revenues directly for Visa and MasterCard, and as such it would be incorrect as a matter of economics to rely on increases in interchange as evidence of market power. In describing the economics of payment markets, Professor Church explained that:

> Interchange is simply a flow-through. The magnitude of interchange does not determine Visa and MasterCard's margin directly, as it is not retained by Visa or MasterCard. Raising the interchange does not raise the margin of Visa and MasterCard. This means the level of interchange is not related to or indicative of the degree of market power exercised by a credit card company, including Visa and MasterCard.

Church Evidence, Hearing Transcript, p. 2869, lines 17-25

458. In this connection, Professor Frankel suggested that the "two sided nature of the marketplace does not alter [his] analysis" of market power. His principal assertion was that, on the merchant side "increases in interchange fees are fully passed on to merchants as increased

Card Acceptance Fees" but on the issuing side "not all increases in Interchange Fees are, in fact, passed on to cardholders who hold credit cards that provide for benefits." Regardless of the (in)accuracy of these statements, from an evidentiary perspective, Professor Frankel missed the point. Whatever results higher or lower interchange have on merchants fees or cardholder benefits (i.e., how interchange is dealt with as between Acquirers/merchants on the one hand, and Issuers/cardholders on the other hand) is irrelevant – that is a function of competition between Acquirers and competition between Issuers. The point is that, whatever the outcome, interchange is not revenue generating for Visa or MasterCard (other than as a balancing tool to maximize volume on the network). Visa and MasterCard have no interest in seeing interchange higher or lower, provided that it maximizes transaction volume on the network.

Frankel Summary, slides 32-33

Frankel Evidence, Hearing Transcript, p. 880, lines 8-17; p. 882, lines 7-12; p. 1010, line 19 to p. 1114, line 14

459. Fluctuations in interchange (including in some cases lower interchange) are not evidence of market power; rather, fluctuations are evidence of competition among payment networks to find the right balance between acquiring and issuing in order to maximize volume. This competition is rational and indeed pro-consumer as evidenced by the many types of cardholder benefits associated with the issuing side of the business. An increase in interchange is effectively a decrease in the price paid on the issuing side of the business. As Professor Church explained:

> [C]ompetition responses occur on both sides of the market, both sides of the platform. That does not result in perverse competition where high interchange fees is interpreted as a high price and a sign of strength, paradoxically. Instead, a high interchange fee means a low price to issuers. Such a low price would be expected to lead to an increase in

> competition by issuers. That would lead to increased cardholders and increased usage by cardholders. From this perspective, it is not necessarily surprising that an increase in interchange leads to an increase in MasterCard's volumes and market share.
>
> Church Evidence, Hearing Transcript, p. 2872, line 7 to p. 2873, line 4
>
> Leggett Witness Statement, paras. 28-30
>
> Elzinga Expert Report, paras. 54, 61, 62

460. Competition in respect of interchange rates is not perverse, as Dr. Frankel suggested. It can only be considered "perverse" if one ignores cardholders (effectively consumers) as stakeholders in the payment network system. Merchants may not like the fact that competition occurs among Issuers for the benefit of cardholders, and that this affects Visa's and MasterCard's businesses because of the two-sided nature of the industry and the inter-related demand, but they are not the only stakeholders affected by interchange or, for that matter, the Visa Rules.

461. In any event, increases in Visa Canada's effective interchange rate have been modest over time and rates have been lowered for certain (high value) segments. Contrary to the suggestion that Visa Canada's interchange rates have increased dramatically over the years, Mr. Weiner testified that over the past five years, Visa Canada's effective default interchange rates have only increased by approximately five basis points. And, with respect to some merchants, interchange rates have remained unchanged [redacted] Furthermore, emerging segment rates have been applied to tax, utility and rent payments, in addition to transactions greater than $1000 paid to schools/universities or for child care. Mr. Weiner explained:

> These lower default interchange rates are intended to grow acceptance of Visa credit cards in certain merchant segments that are considered to be

strategically important to achieving network growth and where credit card acceptance as a method of payment is low.

Weiner Statement, paras. 28, 31, 43

[redacted]

462. This is further evidence that interchange rates are not reflective of market power, but rather that Visa and MasterCard utilize interchange as a tool to maximize volume on their networks. Ironically, the Commissioner points to differences in interchange rates as indicating market power on the basis that Visa and MasterCard have market power because they are able to "price discriminate." Yet, her theory is premised on individual merchants having the ability to negotiate for lower interchange from Visa and MasterCard (presumably not all at the same level) on the basis that the merchant's ability to surcharge or discriminate and other aspects of that particular merchant's bargaining position such as the volume of transactions processed on credit cards by that merchant.

Notice of Application at para. 91

(iii) *There is no objective evidence of market power on the part of Visa and MasterCard*

463. Once the role of interchange is considered appropriately, it becomes clear that the Commissioner has not presented any credible evidence or analysis of market power on the part of Visa. For instance, there is no evidence demonstrating that Visa's margins have increased steadily over time; nor is there any analysis of whether such margins were used to fund investments in infrastructure, R&D or innovation, all of which are generally required in high technology-oriented businesses.

464. With respect to network fees, any increases in network fees charged by Visa over time cannot be considered true price increases unless all other factors are held constant. It is quite possible (and there is no evidence to the contrary) that any increase in Visa's network fees are used to fund network infrastructure, security, efficiency and operability – all of which benefit merchants as well. The Commissioner and her experts have neither conducted nor presented any analysis of any increases in Visa's network fees.

465. Perhaps most telling, however, is that of all of the 31 witnesses testifying in this proceeding, including 15 on behalf of the Commissioner, no actual competitor (such as American Express) or customer (an Issuer or Acquirer) of Visa or MasterCard testified that Visa or MasterCard have a significant degree of market power.

**(b) The Commissioner's references to Visa and MasterCard market shares are not evidence of market power**

466. As explained above, Professor Carlton's market definition (hypothetical monopolist) analysis related to the acquiring market which Visa and MasterCard do not participate in. Yet, he claimed that Visa and MasterCard have market power in an alternative relevant market. Professor Carlton and other experts pointed to the combined percentage of general purpose credit/card charge volume held by Visa and MasterCard. However, as Professor Elzinga noted, this masks the vigorous competition *between* Visa and MasterCard:

> The second point I have here is that this 92 percent SOM -- that is, share of market -- the 92 percent SOM figure is misleading, because it masks the competition between Visa and MasterCard.
>
> And my point here is a very simple one. Even if you take the relevant market, as intended by Professor Carlton and Dr. Frankel, as being the right relevant market, the 92 percent share figure covers or masks the active competition between Visa and MasterCard. There is no evidence

> that I know of that these two firms are in cahoots with one another or that it is appropriate to think of them as one firm with 92 percent of the market.

Professor Elzinga also noted that there are no material capacity constraints imposed on rival credit card companies that one normally associates with market power.

> Carlton Summary, slide 8
>
> Elzinga Evidence, Hearing, p. 2716, line 19 to p. 2717, line 6
>
> Elzinga Expert Report at paras. 165-168, 180

467. According to the Competition Bureau's own guidelines, "the Bureau has adopted the view that high market share is usually a necessary, but not sufficient, condition to establish market power." In addition, pursuant to the same guidelines, the relative distribution of market shares is a relevant consideration. In other words,

> [A] firm's likelihood of being able to sustain prices above competitive levels increases with its market share, and as the disparity between its market share and the market shares of its competitors increases. Consider the position of a single firm that holds 55 percent of a relevant market. That firm's ability to exercise market power may be at a certain level when it faces one competitor with a 45 percent market share, but at a very different level when facing a disparate group of smaller rivals, none of which has a share larger than 10 percent.
>
> Competition Bureau, *Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act*, (Gatineau: Competition Bureau, 2001) at 14-15

468. The Commissioner's reliance on market shares is unwarranted in this industry for at least two additional reasons.

469. First, the payments industry is significantly influenced by technological advances and innovation, as evidenced by the emergence of new applications (such as contactless and mobile) and new entrants (such as PayPal). As noted in the Competition Bureau's Intellectual Property Enforcement Guidelines: "evidence of a rapid pace of technological change and of the prospect

of firms being able to 'innovate around' or 'leap-frog over' an apparently entrenched position is an important consideration that may, in many cases, fully address potential competition law concerns."

Sheedy Statement, para. 29

Elzinga Expert Report, para. 155

Leggett Statement, para. 24

Intellectual Property Enforcement Guidelines, section. 5.2.2

470. Second, intuitively, the Commissioner's standard application of market shares as being informative of market power does not fit here. According to the Commissioner and her experts, the problem that the desired remedy seeks to address is the high fees borne by merchants. However, in the market that the Commissioner has defined, the entity with the *largest* market share (which, according to the Commissioner, is Visa) has, on average, the *lowest* interchange, and in consequence of which, merchants generally pay the lowest card acceptance fees. MasterCard is the next largest credit card network and has the next lowest interchange and card acceptance fees. American Express (which would not be subject to a remedy arising from these proceedings) has the *lowest* market share but the *highest* card acceptance fees.

471. The irony of the logic underlying the Commissioner's case is that if market shares were to even out among Visa, MasterCard and American Express (which is presumably what the Commissioner views as a desirable outcome if high market shares are indicative of market power), then American Express would grow in market share. That would mean merchants would be paying *more* in card acceptance fees than they do today – not less – because American Express is the higher cost credit card network from the merchants' perspective. In addition, as explained above, it would not be appropriate for the Commissioner to suggest that card

acceptance fees for American Express would be lower because Visa and MasterCard's interchange rates would be lower after the remedy was implemented. With respect to Australia, the Commissioner argued that it is the ability to surcharge – not competition from lower interchange on the part of the Visa and MasterCard – that brought down American Express' card acceptance fees. Yet, in Canada, because American Express is not subject to these proceedings, American Express would be permitted to prevent merchants from surcharging American Express transactions.

472. Finally, it is worth noting that Professor Winter acknowledged that in his view, in the absence of the contested rules, competition between Visa and MasterCard would not result in supra-competitive prices. This analysis of competition between Visa and MasterCard in the absence of the Visa Rules suggests price competition between two relatively homogeneous suppliers without material capacity constraints, structural features that economists normally associate with competitive markets. These same structural features apply to Visa and MasterCard with the Visa Rules intact, as it is clear that Visa and MasterCard compete in dimensions other than merchant fees (e.g., on the issuing side), suggesting an outcome that is competitive in nature.

Winter Expert Report, para. 72

Church Testimony, at p. 2965, line 14 to p. 2968, line 6

**(c) Merchants are not "required" to accept Visa or MasterCard (let alone both); they do so because they derive significant value from accepting credit cards**

473. The Commissioner and her experts routinely referred to the notion that merchants are "required" to accept Visa and MasterCard as evidence of market power on the part of the Respondents. When analyzed properly, however, this argument is little more than rhetoric.

474. First, to be clear, there is no legal or regulatory obligation on the part of any merchants to accept Visa or MasterCard credit cards, let alone both. Merchants are free to choose not to accept Visa or MasterCard, or both, and many merchants do not accept credit card as part of their business model (e.g., Costco, No Frills). [redacted]

Weiner Statement, para. 32.

[redacted]

De Armas Evidence, Hearing Transcript, p. 308, lines 3-10

Jewer Evidence, Hearing Transcript, p. 1740, line 25 to p. 1741, line 3

Houle Evidence, Hearing Transcript, p. 544, line 14 to p. 545, line 3

475. Second, there is no evidence that the Visa Rules contain any penalties assessed on Acquirers whose merchants terminate acceptance of Visa (or that Acquirers must assess on merchants for terminating acceptance of Visa credit cards), nor that the Rules contain any long term "lock up" provisions that have the effect of requiring merchants to accept credit cards for years or even months or weeks. In fact, nothing in the Visa Rules limits the ability of merchants to choose to no longer participate in the Visa system every day. In addition, the Visa Rules contain no element of exclusivity when it comes to acceptance: if a merchant accepts Visa, they may continue to accept all other methods of payment, including competing brands. In fact, the Code of Conduct – which preserved the No Surcharge Rule and Honour All Cards Rule as applied to credit cards – provides for greater protection for merchants in a number of these respects.

Code of Conduct, Exhibit RM-8 Visa International Operating Regulations, Sheedy Statement, Exhibit D

476. The Commissioner argues:

> [B]ecause MasterCard and Visa each have a substantial share of credit card transactions and widespread acceptance in Canada, many merchants cannot refuse to accept Visa and MasterCard credit cards, as they would face serious economic consequences including losing sales to rivals that accept such credit cards.

This statement merely reflects the fact that merchants compete with other merchants, and one aspect of that inter-merchant competition is the range of methods of payment that the merchant is willing to accept.

Notice of Application at para. 90

Daigle Evidence, Hearing Transcript, p. 382, line 20 to p. 384, line 2

Houle Evidence, Hearing Transcript, p. 544, line 19 to p. 545, line 3

Li Evidence, Hearing Transcript, p. 1525, lines 8-24

Shirley Evidence, Hearing Transcript, p. 1636, line 24 to p. 1637, line 15

477. As a matter of principle, complaints about too much inter-merchant competition cannot credibly be cited by the Commissioner as evidence of market power on the part of Visa and MasterCard. One would not normally consider a "requirement" to provide a good or service or to compete as evidence of market power. In effect, merchants (through the Commissioner) are asking this Tribunal to relax an element of inter-merchant competition that each of them faces. This claim is all the more unfounded given that several of the merchants who testified at this proceeding have competitors that do not accept Visa or MasterCard. For example, Wal-Mart, Ikea, Sobeys, Shoppers and Best Buy would likely consider each other and Costco a competitor, and Costco chooses not to accept Visa or MasterCard as part of its business model. Similarly, Sobeys (and other RCC grocery members, and likely Wal-Mart) consider No Frills to be a

competitor, and No Frills chooses, as part of its business model, not to accept Visa or MasterCard as a method of payment.

De Armas Statement, para. 11

De Armas Evidence, Hearing Transcript, p. 254, line 16 to p. 255, line 18

Symons Statement, para. 9

Symons Evidence, Hearing Transcript, p. 1621, line 17 to p. 1622, line 3

Jewer Statement, para. 16

Jewer Evidence, Hearing Transcript, p. 1728, lines 13-16

Jewer Evidence, Hearing Transcript, p. 1751, line 8 to p. 1752, line 21

Daigle Statement, para. 10

Shirley Statement, para. 8

[redacted]

478. In reality, merchants that accept Visa or MasterCard credit cards choose to do so because the benefits of doing so outweigh the costs. On cross-examination, the Commissioner's expert, Professor Winter, agreed that merchants can choose to not accept credit card and said: "This is a free-enterprise economy. Merchants are not compelled to purchase a service. They're free to purchase it, and they will purchase it if the benefits of doing so are greater than the cost."

Winter Evidence, p. 2046, line 21 to p. 2047, line 4

479. As also explained above, several of the merchant witnesses' testimony support this notion. For example:

(a) Air Canada and WestJet would presumably not operate as efficiently if their customers paid for all of their tickets in person, by cash or cheque. On cross-examination, Mr. Houle admitted that it would be "very inconvenient" for Air

Canada's customers to come to the airport to purchase their tickets using cash. Air Canada also does not accept cash onboard its flights for various reasons including "convenience."

Houle Evidence, Hearing Transcript, p. 520, lines 6-11

Houle Evidence, Hearing Transcript, p. 485, line 14 to p. 486, line 14; p. 506, lines 18 to p. 508, line 23

(b) Ms. Li testified that WestJet switched to a "no cash" policy aboard their flights because processing of credit cards was a faster process than providing change to customers and reconciling cash: "So the decision was made to go with the credit card, because it was faster. We would be able to complete the service in that flight time, you know, during the time we are in the air."

Li Evidence, Hearing Transcript, p. 1580, line 19 to p. 1581, line 25; see especially p. 1581, lines 15-18

(c) Ms. Van Impe explained that the University of Saskatchewan recognizes that there are benefits to accepting credit cards (including that the University gets cash in hand sooner, and that cash lessens the administrative burden) and it is for this reason that the University absorbs approximately half the cost of accepting credit cards for tuition payments. Ms. Van Impe went on to say that credit card acceptance benefits both students and the school.

Van Impe Evidence, Hearing Transcript, p. 1679, lines 11-24; p. 1686, lines 13-24

480. In addition, Mr. McCormack agreed that merchants would not accept credit cards if it was costing more to accept than they were gaining from the acceptance, i.e., that merchants would cease acceptance if they didn't think they were getting value.

McCormack Evidence, Hearing Transcript, p. 696, line 22 to p. 697, line 17

**(d) Visa and MasterCard face significant competitive constraints**

481. As a general matter, as Professor Elzinga explained in his direct testimony, every firm possesses some element of market power: the question is to what degree and what are the constraints. The evidence in this proceeding shows that Visa and MasterCard face significant constraints on any exercise of market power from a range of participants in the system.

Elzinga Evidence, Hearing Transcript, p. 2699, line 7 to p. 2701, line 15

482. First, whether one defines the market narrowly as the Commissioner does or properly to include payment methods other than credit cards, Visa and MasterCard face significant constraints from their competitors. To be sure, Visa faces significant competition from MasterCard (and vice versa) in a variety of respects, e.g., price, quality, service, innovation. Kevin Stanton of MasterCard said that the competition between Visa and MasterCard is "vigorous and occurs on both sides of the two-sided Canadian credit card business."

Stanton Statement, paras. 50, 56, 108

See also Weiner Statement, para. 10; Sheedy Statement, paras. 29, 41

483. American Express is another formidable competitor that has driven Visa and MasterCard to generate business models associated with premium cards. In his witness statement, Mr. Weiner (Visa Canada) identified American Express as a "primary competitor" of Visa and described Visa's competition with American Express as "particularly intense with respect to the premium credit card segment and the business to business segment." Mr. Weiner went on to say that American Express is a "formidable competitor that is continually seeking to erode Visa Canada's business by offering cardholders significant rewards and merchants significant benefits, and increasing brand presence and awareness in Canada in order to maximize volume

on its system." Messrs. Sheedy and Stanton also identify American Express as a competitor. The Commissioner has not demonstrated that these two competitors fail to provide effective competitive constraints on Visa.

Weiner Statement, paras. 10, 15, 36

Sheedy Statement, paras. 29, 41

Stanton Statement, paras. 50, 108, 129

484. Nevertheless, Visa also competes for transaction volume that is traditionally carried over the Interac network or cash, most recently with respect to fast-food restaurants, grocery stores, gas stations and merchants that sell smaller ticket transactions. For example, Visa has only recently been accepted at McDonald's and Tim Horton's in Canada. Mr. Weiner testified that grocery stores and gas stations attract lower interchange rates "in order to preserve and promote acceptance of Visa credit cards in the fact of strong competition from other payment methods."

[redacted] as noted earlier, Visa offers "emerging segment" rates (lower default interchange rates) to certain merchant segments (like tax, utility, and rent/tuition payments) "that are considered to be strategically important to achieving network growth and where credit card acceptance as a method of payment is low."

Weiner Statement, paras. 27-28

[redacted]

485. Second, Visa faces significant competitive pressure from its customers (issuing and acquiring financial institutions) to provide improved prices and fees, service, quality (e.g., reliability of the network) and innovative products. These financial institutions are some of the

largest and most sophisticated companies in Canada, and exert significant competitive pressure on Visa with respect to all aspects of their businesses.

Livingston Statement, para. 10

Weiner Statement, paras. 12, 19, 35

486. One example of innovation driven by competitive constraints faced by Visa and MasterCard is in the area of contactless payment technology and its application into new segments where cash and debit have traditionally been prevalent. For example, Mr. Weiner testified that Visa Canada has introduced "Visa payWave" – contactless technology whereby a cardholder can simply wave his or her card over a contactless reader to complete a transaction without the need to swipe a card, enter a PIN, or sign a receipt. Mr. Weiner explained that, "[t]his enables Visa transactions to be completed more quickly and allows Visa Canada to compete more effectively with cash for low-volume payments, a market segment in which Visa Canada has traditionally had difficulty competing and one where speed and convenience are customer priorities." Similarly, Professor Elzinga noted in his report that "Visa and MasterCard have adopted product innovations in Canada that improve their ability to handle transactions formerly done predominantly with cash. One of these is eliminating the need for a cardholder's signature on small purchases, another is developing contactless systems."

Weiner Statement, para. 18

Elzinga Expert Report, para. 155

487. Third, Visa and MasterCard continue to face significant pressures to remain competitive because of technological advances by new and potential entrants. Particularly in today's electronic age – with the advent of actual and potential competitors such as PayPal, Microsoft, mobile companies, Google, Facebook and others – technology and innovation are continually

driving Visa and MasterCard to stay ahead of the game in terms of efficiency, security, network operability and infrastructure, and card features, all for the benefit of consumers and merchants in order to drive transaction volume.

488. While the Commissioner's expert Professor Frankel claimed that there has been "no significant entry in decades," Visa executives beg to differ. For example, in Mr. Weiner's Witness Statement, he stated that in March 2012, PayPal introduced "PayPal Here," a product in Canada which allows merchants to accept PayPal payments in-store. In his Witness Statement, Mr. Sheedy also testified to the intense competition that Visa faces from mobile and electronic payments that are arising from rapid innovation. As Professor Elzinga noted, Visa and MasterCard have been required to compete vigorously to provide faster, more efficient, more secure, and more innovative products, to the benefit of consumers, such as introducing technology that does not even require the card to be swiped through an electronic terminal. To quote Professor Elzinga: "From my perspective, Visa and MasterCard have not had a quiet life. You don't get from the knuckle buster to the payWave by just sitting around and resting on your laurels."

Frankel Summary, slide 30

Weiner Statement, para. 11

Weiner Evidence, Hearing Transcript, p. 2309, line 24 to p. 2310, line 14

Sheedy Statement, para. 29

Elzinga Evidence, Hearing Testimony, p. 2721, lines 8-11; see also p. 2717, line 7 to p. 2721, line 11

Elzinga Summary, slide 15

See also Leggett Statement, para. 24

489. In sum, Visa and MasterCard face a number of significant competitive constraints that maintain more than adequate checks on any ability to exercise a significant degree of market power. There is no evidence that competition in the industry has slowed – output continues to expand as more consumers choose to pay with Visa or MasterCard branded cards, innovative products are rolled out, new technologies are invested in, developed and implemented, and the firms continue to adapt in the face of new entry. This is the essence of a competitive marketplace, notwithstanding what the Commissioner might argue by way of rudimentary market share figures based on rigid market definition.

Elzinga Expert Report, paras. 152-181; 197-210

Church Expert Report, para. 60-71

Weiner Statement, paras. 7-19

Sheedy Statement, para. 29

490. As explained above, the Commissioner's allegations of market power are not sustainable. When the rhetorical references made by the Commissioner to "increases in merchant fees," "high market shares" and a supposed "requirement" to accept Visa are properly considered, it becomes clear that the analysis provided by the Commissioner in this regard is flawed and the evidence deficient.

* * *

491. For the foregoing reasons, the Commissioner's application must be dismissed with costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 19th day of June, 2012.

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APPENDIX A

## APPENDIX A – CHART OF CONDUCT IN OTHER RESALE PRICE MAINTENANCE CASES

| 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 distributor 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 program. |
| *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 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. |

APPENDIX A

| Case | Product sold from producer to retailer | Product sold from retailer to consumer | Nature of alleged conduct |
|---|---|---|---|
| *R. v. North Sailing Products Ltd.* (1987 Ont. Dist. Ct.) | Marina hardware (e.g. shackles, compasses, blocks, winches &c) | 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. |
| *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. |

APPENDIX A

| Case | Product sold from producer to retailer | Product sold from retailer to consumer | Nature of alleged conduct |
|---|---|---|---|
| *R. v. Superior Electronics 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. |
| *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 representatives 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 heavy 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. |

APPENDIX A

| Case | Product sold from producer to retailer | Product sold from retailer to consumer | Nature of alleged conduct |
|---|---|---|---|
| *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-laddering 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. |
| ***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 larger inventory.. |

APPENDIX A

| Case | Product sold from producer to retailer | Product sold from retailer to consumer | Nature of alleged conduct |
|---|---|---|---|
| *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. |

CT-2010-010

**AND IN THE MATTER OF** the *Companies Act*, R.S.C., 1985, c. C-34, as amended;
**AND IN THE MATTER OF** an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;
**AND IN THE MATTER OF** certain agreements or arrangements implemented or enforced by Visa Canada Corporation and MasterCard International Incorporated.

**B E T W E E N:**

| | | |
|---|---|---|
| **THE COMMISSIONER OF COMPETITION**<br>Applicant | - and - | **VISA CANADA CORPORATION et al**<br>Respondents |

**THE COMPETITION TRIBUNAL**

# CLOSING ARGUMENT OF VISA CANADA CORPORATION

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