

COMMENTS/COMMENTAIRES

OHIO ET AL V AMERICAN EXPRESS CO ET AL— POTENTIAL EFFECTS ON THE COMPETITION BUREAU'S AND COMPETITION TRIBUNAL'S VIEWS OF 'MULTI-SIDED PLATFORMS'

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'Multi-sided platforms' and 'Big Data' are given significant attention by the Competition Bureau's guidelines and discussion papers. Both regulators and practitioners are debating the appropriate lens through which 'Multi-Sided Platforms' should be viewed, whether through the traditional approaches of market definition and the Hypothetical Monopolist Test (the SSNIP test) or through novel, specialized tools and methods. On June 25, 2018, the US Supreme Court ruled in a 5/4 decision that American Express' 'anti-steering provisions' with merchants did not violate U.S. antitrust laws. The Majority opinion defined the relevant market as the credit card network—a transaction platform constituting both sides of a two-sided platform, facilitating a single simultaneous transaction between merchants and cardholders. The Majority rejected the plaintiff's argument that increasing merchant fees was proof of anticompetitive acts, because it did not demonstrate anticompetitive effects on both sides of the credit card market. The Dissent, however, dismissed such a non-traditional market definition as un-precedented in antitrust law. This article analyzes how the US Supreme Court's decision may affect the way Canada's Competition Bureau and Competition Tribunal perceive 'Multi-Sided Platforms'. Will the traditional or novel approach to competition law prevail?

« Plateformes multifaces » et « mégadonnées » sont des sujets récurrents dans les lignes directrices et les documents de travail du Bureau de la concurrence. Les autorités de réglementation et les praticiens débattent encore de la question de savoir sous quel angle il convient d'aborder ces plateformes : par les méthodes traditionnelles de définition des marchés et le critère du monopoleur hypothétique (de la SSNIP), ou bien par des méthodes et outils spécialisés d'un genre nouveau? Le 25 juin 2018, la Cour suprême des États-Unis statuait, dans une décision partagée à cinq voix contre quatre, que les clauses « anti-incitatives » imposées aux commerçants par American Express ne contrevenaient pas aux lois antitrust américaines. Dans l'opinion majoritaire, on définissait le marché en cause comme étant le réseau de cartes de crédit—une plateforme transactionnelle qui constitue les deux versants d'une plateforme biface, facilitant une transaction unique

instantanée entre le commerçant et le titulaire de la carte. La majorité a rejeté l'argument du demandeur selon lequel la majoration des frais payés par les commerçants constituait une preuve d'agissements anticoncurrentiels, estimant que l'existence d'effets anticoncurrentiels de part et d'autre du marché n'avait pas été démontrée. Les juges dissidents, pour leur part, ont rejeté cette définition non traditionnelle du marché, invoquant l'absence de précédent en droit antitrust. Le présent article analyse en quoi la décision de la Cour suprême des États-Unis pourrait changer le regard que portent le Bureau de la concurrence et le Tribunal de la concurrence du Canada sur les « plateformes multifaces ». Tradition contre modernité : quelle approche triomphera?

Introduction

‘Big Data’ is a term that describes collection and commercial use of large quantities of information by technology companies such as Alphabet (Google), Facebook and Amazon.²

‘Multi-Sided Platforms’/‘Two-Sided Platforms’ (collectively MSPs) are often mentioned in the context of ‘Big Data’. MSPs sell distinct products or services to two or more distinct but interdependent customer groups and connects them. The coordination facilitated by the platform creates value for all participants which could not be offered through traditional means of market interaction.³ To name a few examples of MSPs: the credit card network that connects cardholders and merchants, a ride sharing platform such as Uber that connects drivers and passengers, and Airbnb that connects owners and renters.

‘Big Data’ and innovation’s pervasiveness in the Canadian and global economy affects the day-to-day life of Canadians, and therefore MSPs are given significant attention by the Competition Bureau (the “**Bureau**”) in guidelines and discussion papers.⁴ Both regulators and practitioners are debating the appropriate lens through which MSPs should be viewed, whether through the traditional approaches of market definition and the Hypothetical Monopolist Test (the SSNIP Test)⁵ or through novel specialized tools and methods such as a single market definition encompassing two sides of a MSP.

The debate has been furthered in the recent U.S. Supreme Court decision, *Ohio v American Express* (“**Amex**”). A divided Court ruled in a 5/4 decision that American Express’ ‘anti-steering provisions’ with merchants did not violate U.S. federal antitrust laws.⁶ The Majority opinion defined the relevant market as the credit card network—a transaction platform constituting

both sides of a MSP, facilitating a single simultaneous transaction between merchants and cardholders.⁷

The *Amex* Majority rejected the plaintiff's argument that increasing merchant fees was proof of anticompetitive acts because it did not demonstrate anticompetitive effects on *both* sides of the credit card market.⁸ *Amex* resonated locally and globally and sparked economic and political debate between supporters of the traditional views and approaches to antitrust and those advocating for more specialized methods and approaches.⁹

How might *Amex* affect the way Canada's Bureau and the Competition Tribunal (the "**Tribunal**") perceive MSPs? Will the traditional or alternative approach to competition law prevail? This article will address these questions. First, an explanation of the nature of MSPs and the competition issues they raise will be presented. Second, the Bureau's discussion papers and guidelines, as well as Tribunal decisions dealing with MSPs will be examined. Third, a more detailed analysis of *Amex* will be offered, followed by; Fourth, an analysis of *Amex*'s potential implications on Canadian competition law.

1. 'Multi-Sided Platforms'—What They Are, And What Competition Issues Do They Raise

MSPs (such as Airbnb, American Express and Uber) sell distinct products or services to two or more distinct but interdependent customer groups and connect them. The coordination facilitated by the platform creates value for all participant groups, which could not be offered through traditional means of market interaction.¹⁰ To illustrate further, another example of a MSP is the credit card network—a 'transaction platform' run by credit card companies that brings card holders and merchants together. When a cardholder uses a credit card to purchase a product or a service from a merchant, the credit card network facilitates the transaction by providing separate but inter-related services to cardholders and merchants. For cardholders, the credit card network extends them credit which allows them to defer payments and earn rewards based on the amount they spend. To merchants, the credit card network processes the transaction, guarantees the payment and increases the number and value of sales.¹¹

Competition law scholars found 'Feedback Effects' between MSP users: steps taken by the platform may affect one user group, which necessarily affects the second user group and in turn affects the first user group again.¹² For example, price increases on one side of the platform risk losing participants on the other, which in turn, would decrease the value for the first

side and create a feedback loop of declining demand. In the context of the credit card network, increasing costs for cardholders would mean fewer purchases, thereby decreasing the platform's value for merchants.¹³

MSPs are usually discussed in the context of merger review and monopolistic practices. These platforms as well as their users, like traditional businesses, may conspire to fix prices, acquire market power through mergers and attempt to obtain monopoly power through unilateral practices.¹⁴ Nevertheless, the traditional tools of analysis may need to be modified in handling MSPs.¹⁵ For instance, prices below variable cost on one side of a MSP cannot be evidence of predatory pricing, because it is a constant characteristic of many such platforms seeking to attract users to the platform, unrelated to competitive conditions.¹⁶

2. The Current Views of The Competition Bureau And Tribunal On MSPs

MSPs have been addressed by the Tribunal and Bureau through cases, discussion papers, and guidelines. The 2013 *Visa-Mastercard*¹⁷ and 2016 *TREB*¹⁸ Tribunal decisions are covered below, followed by a review of the Bureau's Abuse of Dominance Enforcement Guidelines (The "**Dominance Guidelines**")¹⁹, and the Big Data and Innovation Discussion Paper (the "**Big Data Paper**")²⁰.

2.1 Visa-Mastercard

The Bureau alleged that Visa and MasterCard's 'merchant rules' (no discrimination, honour all cards and no surcharge rules) discouraged the reduction of 'merchant discount fees' (interchange, acquirer network and acquirer service fees) and breached the civil prohibition against price maintenance in s. 76 of the *Competition Act*, RSC 1985, c C-34 (the "**Competition Act**").²¹ The Tribunal considered *one* side of the MSP as the relevant product market and applied the SSNIP test to the price charged to the merchant.²² The Tribunal mentioned, however, that when a hypothetical monopolist may profit from a price increase, it may be necessary to account for cross platform demand interdependence and feedback effects and changes in profit on both the customer and acquirer sides of the platform.²³

2.2 The Toronto Real Estate Board Tribunal Decision (the "**TREB Tribunal**")²⁴

The Bureau alleged that certain information sharing practices of TREB prevented competition substantially in the supply of residential real estate

brokerage services in the Greater Toronto Area, while disadvantaging innovative brokers who operate virtual offices breaching s. 79(1) of the Competition Act.²⁵ The Tribunal expressed its opinion that it will often be neither possible nor necessary to define the product market in s. 79 cases.²⁶ The *TREB Tribunal* decided that the supply of real estate brokerage services to both home sellers and home buyers constitutes a single market. In other words, it included both sides of the platform in a single market definition, somewhat similarly to the *Amex Majority's* market definition.²⁷

2.3 The Dominance Guidelines:

In 2019, the Bureau published its *Dominance Guidelines*, which discuss the Bureau's view of the appropriate way to analyze a MSP when assessing dominance under S. 79 of the Competition Act. Specifically, these guidelines propose different strategies in how to approach market definition, which is an analytical process used to assess whether a participant has dominance within it. The Dominance Guidelines offer the following strategies:

- a) Not define the market at all: The Bureau recognizes that the market is at times impossible to define, nor is its definition necessary in every case. As an example, when services are free ('Zero Monetary Price' —e.g. free use of search engines by a MSP user), then prices are irrelevant and thus the SSNIP test would be unusable;²⁸
- b) Define the market as one side of a MSP,²⁹ which effectively defines the market the traditional way.
- c) When a hypothetical monopolist would profit from a price increase, the Bureau may define the market as one side of a MSP while accounting "for the interdependence of demand, feedback effects and changes in profit on all sides of the platform."³⁰
- d) Define the market to include multiple sides of a MSP.³¹

In the *Dominance Guidelines*, the Bureau left all options on the table and is open to novel approaches to market definition, such as defining the market as multiple sides of a MSP.

2.4 The Big Data Paper

In 2018, the Bureau released its *Big Data Paper*, which states that the traditional and fundamental analytical frameworks of Canadian competition law, including market definition, market power and competitive effects, continue to apply to 'Big Data' and MSPs.³² However, it also accepts that

examining MSPs may require specialized tools and methods if the nature of the transaction or price differs from non-platforms.³³

To illustrate this point, the Bureau provides a scenario in the paper in which a “high” price on one side of the platform might not be indicative of market power or anti-competitive effects when resulting from a “low” price on the other side.³⁴ As an example, a ride sharing platform bringing together drivers and riders might charge the passenger a higher rate during high demand times—the difference would be paid to the driver, while the benefit to the platform remains unchanged.³⁵ In this example, there is no apparent competitive harm—the change in rate is a means to regulate the platform by lowering demand and increasing supply to better allocate the scarce supply of drivers.³⁶

The *Big Data Paper* also discusses ‘Network Effects’, which exist where the value of the MSP to a group of participants depends on how many members of the group participate.³⁷ As an example, a search engine user benefits from use of other users which improves matching search results to searchers’ queries, based on the search result’s popularity. Thus, there is benefit to the customer when the consumer base increases.³⁸ Importantly, ‘Network Effects’ can be both an efficiency and a barrier to entry. Just as competition law enforcement does not challenge use of economies of scale to develop an innovative product while raising barriers to entry if anti-competitive acts are not involved, it would not challenge a firm using ‘Network Effects’ in a similar fashion, absent an anti-competitive act.³⁹

It is apparent from the *Visa-MasterCard* and *TREB Tribunal* decisions, as well as the *Dominance Guidelines* and *Big Data Paper*, that the Bureau and Tribunal are open to novel and specialized market definitions such as a market definition that includes two sides of a MSP, similar to the opinion of the *Amex* Majority, as will be elaborated below.

3. OHIO ET AL v AMERICAN EXPRESS CO ET AL

The issues in *Amex* centred on agreements between merchants and American Express,⁴⁰ Visa and Mastercard, that included anti-steering provisions that prevented merchants from discouraging the use of some cards while encouraging the use of others. In 2010, all three credit card companies were sued by the Department of Justice and several U.S. states. In response, Visa and MasterCard withdrew their anti-steering provisions, but American Express pursued litigation. The District Court ruled for the plaintiffs, but the Court of Appeal of the Second Circuit subsequently ruled in favour of American Express and reversed the lower court’s decision. On June 25,

2018 the U.S. Supreme Court affirmed the 2nd Circuit's decision (5/4), finding no violation of federal antitrust laws.⁴¹

The Majority opinion, written by Justice Thomas, stated that market definition is usually necessary, especially when vertical restraints are involved (as they were in *Amex*). Vertical restraints pose no risk to competition without market power, which can only be evaluated based on market definition.⁴² The relevant market was defined as the credit card network—a transaction platform constituting both sides of a two-sided platform, facilitating a single simultaneous transaction between merchants and cardholders.⁴³

The Majority also found that there were 'Indirect Network Effects', where the value of the platform to one side depends on the number of participants on the other side. Recall, this differs from 'Network Effects' described above, where the value of the platform to a user depends on the number of participants from the same group. In the context of *Amex*, the Court recognized 'Indirect Network Effects' because a credit card is more valuable to cardholders when more merchants accept it, and more valuable to merchants when more cardholders use it.⁴⁴ Due to 'Indirect Network Effects', MSPs cannot raise prices without risking a feedback effect loop of declining demand; the Court established that this serves as a check on market power.⁴⁵

In contrast, when the 'Indirect Network Effects' are minor, one-sided, or not simultaneous, there is no need to consider a market definition consisting of both sides of a MSP. For example, newspaper platforms sell advertisements on a MSP that brings together advertisers and readers. Advertisers will receive higher value if more readers use the news platform, but readers are more often indifferent to the number of ads.⁴⁶

The Majority denied the Department of Justice's argument that increasing merchant fees was proof of anticompetitive effects in the relevant market.⁴⁷ As the Majority explained, the market must be defined to include *both* merchants and cardholders, and that the plaintiff must demonstrate anticompetitive effects on both sides of the credit card market. This would require showing an increase in the overall cost of credit card transactions above the competitive price, a reduced number of transactions or the stifling of competition in the market. The Department of Justice failed to adduce evidence of such effects.⁴⁸

In fact, the Majority held that the increased merchant fees reflected increases in the value of American Express' services and the cost of its transactions, not an ability to charge above competitive prices.⁴⁹ The Majority explained that due to 'Indirect Network Effects', higher merchant fees help

American Express fund its rewards program which increases the value for their customers and attracts more of them to use its cards; this then encourages card holders to make higher-value purchases, thus increasing the value of the MSP for merchants.⁵⁰ The Majority also found that American Express' rewards program affected the card holder side of the platform positively by stimulating competitive innovations and improving the quality of services.⁵¹

It is important to note, however, that the Court in *Amex* by no means reached a consensus; a 5/4 split demonstrates how contentious an issue MSPs can be in antitrust law. While the majority represents a more novel approach to market definition, the dissent was steadfastly against it.

Justice Breyer's dissent stated that market definition is not always required, especially when there is strong direct evidence of adverse effects on competition—as was found by the District Court. This was enough to prove market power.⁵²

But more importantly, the Dissent strongly objected to “abandoning traditional market definition approaches” and adopting special market definitions which consider the relevant market as two sides of the platform,⁵³ because such an approach is unprecedented and unsupported in U.S. anti-trust law.⁵⁴ The Dissent determined that the relevant market is only the side of the platform that is *directly* affected by a challenged restraint; in *Amex*, such a market would only be merchant related card services, which is not a part of the same market as the other side of the platform—shopper related services (despite the two markets complementing each other).⁵⁵

Furthermore, the Dissent rejected the Majority's premise that ‘Indirect Network Effects’ cause shopper related services to serve as a check on the price of merchant related services and therefore did not see *Amex* as an ‘unusual’ case that warrants a market definition that includes two sides of a MSP.⁵⁶

Amex represents a dichotomy of discourse between those jurists who believe that a time of ‘Big Data’ and innovation calls for more specialised tools and methods and others who believe that the traditional tools and methods of antitrust law suffice. The *Amex* Majority supported specialized measures to define the market. The Canadian Bureau and Tribunal seem to be open to these novel approaches and be more on par with the Majority, as will be discussed below.

4. How *Amex* May Affect The Bureau's And Tribunal's View Of 'Multi-Sided Platforms'

As is evident from statements by Bureau officials at Canadian Bar Association competition law conferences, the Bureau has followed all the developments in the *Amex* case very closely. The Bureau (as well as the Tribunal), can thus be expected to consider both the majority and dissenting opinions in its future decisions, discussion papers and guidelines.

As mentioned above, *Amex* presents a split between traditional and alternate approaches to market definition in the context of MSPs. The Majority stated that market definition is usually necessary, especially when vertical restraints are involved,⁵⁷ and that a market can be defined to include both sides of a MSP, when facilitating a single simultaneous transaction.⁵⁸ The Dissent, on the other hand, stated that market definition is not always required, especially when there is strong direct evidence of adverse effects on competition,⁵⁹ and strongly objected to adopting special market definitions inclusive of two sides of a platform.⁶⁰

As seen above, the Bureau seems to be open to novel approaches to market definition, and has left all options on the table including: a) not defining a product market at all (suggested as possible by the *Amex* Dissent); b) defining one side of a MSP as a product market (similar to the *Amex* Dissent); c) defining one side as the product market while considering effects on multiple sides; and d) defining multiple sides of the platform as part of the same product market (similar to the *Amex* Majority).⁶¹

The *TREB Tribunal* also included two sides of the market in a single market definition, somewhat similar to the *Amex Majority's* market definition and displayed an openness of the Tribunal to accept such specialized measures.⁶²

According to the *Amex* Majority, significant 'Indirect Network Effects' led to the market definition of two sides of a platform. In contrast, when the 'Indirect Network Effects' are minor, one-sided or not simultaneous, there is no need to consider such market definition.⁶³ The Dissent, however, rejects that such market definition is warranted because of the existence of 'Indirect Network Effects'.⁶⁴ The Bureau's *Big Data Paper* emphasizes that not all MSPs "are created equal",⁶⁵ and that the strength of the 'Indirect Network Effects' would be a determining factor in defining the market.⁶⁶ The Bureau's approach, therefore, seems to be on par with and may be reinforced by the *Amex* Majority.

On the other hand, when discussing the credit card network in particular, the Tribunal in *Visa-MasterCard* found that demand interdependence and feedback effects are minimal and following a SSNIP test, very few merchants would cease to accept the relevant credit card—which would not diminish its attractiveness to card holders.⁶⁷ This view is more similar to the view of the *Amex* Dissent. Contrast this with the *Amex* Majority, which relied on demand interdependence and feedback effects as checks on market power.⁶⁸

While there are a few similarities, the Bureau's overall approach to MSPs is markedly different from the dissent in *Amex*, which may give competition reformers some solace: Justice Breyer's dissenting opinion stated that even "[t]he phrase 'two-sided transaction platform' is not one of antitrust art—I can find no case from this court using these words".⁶⁹ Fortunately, the Bureau has already used such terms as a given, and has expressed an openness to the idea that MSPs may require specialized tools and methods,⁷⁰ such as a market definition of two sides of a platform.

Furthermore, the *Amex* Majority considered not only the effects of the American Express rewards program and anti-steering provisions on merchants, but also the benefit of these provisions to consumers by stimulating competitive innovations and bettering quality of services.⁷¹ The Big Data Paper follows a similar evaluation, and mentions that the Bureau would not challenge exploiting 'Network Effects' that raise barriers to entry just as it would not challenge a company using economies of scale or develop innovative products which are attractive to the consumer and raise barriers to entry, if anti-competitive acts are not involved.⁷² The Bureau's approach to the importance of innovation when regarding MSPs seems to be level with, and may be reinforced by, the *Amex* Majority.

Finally, the *Amex* Dissent implied that contrary to 120 years of antitrust law, the Majority was affected by state capitalism and political power rather than the free market.⁷³ The 5/4 decision was a result of serious disagreement between the conservative and liberal factions of the US Supreme Court. In Canada, the courts and the political system are less likely to be so polarised.⁷⁴ Even if the Bureau and the Tribunal are open to novel approaches, they would likely be more hesitant than the *Amex* Majority to use such market definitions, to find major 'Indirect Network Effects' and decide that a restraint imposed by a MSP did not prevent or lessen competition substantially.

5. Conclusion

In times when ‘Big Data’s’ and innovation’s effect on Canadian and global economy surrounds our every day lives, MSPs will continue to be a topic of legal and economic debate by regulators and practitioners alike. It is inevitable then, that Canadian competition law will have to respond to the new challenges that MSPs will raise. This paper has highlighted how the Bureau is beginning to adapt to these new challenges, as it develops the early stages of a consistent MSP policy.

The U.S. Supreme Court’s decision in *Amex* highlights the split between traditional and more novel approaches to antitrust law on MSPs. The Bureau and Tribunal have demonstrated openness to novel approaches to market definition and will more likely follow the lines of the Majority rather than the Dissent.

However, the Bureau and Tribunal, while open to discussing specialized tools and methods, would likely be more tempered in their market definitions and considerations of major ‘Network Effects’ than the Majority in *Amex*, and are expected to also consider the dissenting opinion in *Amex*. The Bureau and Tribunal’s approach will likely, then, be guided by the nature of the platform, ‘Network Effects’, the levels of interdependence between the different sides of the platform, and its effects on innovation.

ENDNOTES

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² US Department of Justice, “‘Big Data’ and Competition for the Market: Deputy Assistant Attorney General Antitrust Division U.S. Department of Justice”, remarks as prepared for delivery at the Capitol Forum and CQ: Fourth Annual Tech, Media & Telecom Competition Conference (New York: Department of Justice, 2017) at 3.

³ David S. Evans and Michael Noel, “Defining Antitrust Markets When Firms Operate Two-Sided Platforms” (2005) Colum Bus L Rev 102 [*Evans & Noel*].

⁴ Competition Bureau, *The Abuse of Dominance Enforcement Guidelines* Mar 7, 2019 (Ottawa: Industry Canada, 2019) at paras 1.3, 1.16–1.17 [*Dominance Guidelines*]. Competition Bureau, *The Big Data and Innovation: Key Themes for Competition Policy in Canada* (Ottawa: Industry Canada, 2018) at 4–6 [*Big Data Paper*].

⁵ ‘SSNIP’: the hypothetical monopolist test—imposing and sustaining a small

but significant and non-transitory increase in price. See: Competition Bureau, *Merger Enforcement Guidelines* (Ottawa: Industry Canada, 2011) at 11, para 4.3.

⁶ *Ohio v American Express Co.*, 585 US at 20 (2018) Thomas J [*Amex*].

⁷ *Ibid* at 11–12, Thomas J.

⁸ *Ibid* at 15, Thomas J.

⁹ As examples of such polarised debate, see: Noah Feldman, “Conservative Justices Don’t Much Care For Antitrust Law” *Bloomberg Opinion* (25 June 2018), online: <<https://www.bloomberg.com/opinion/articles/2018-06-25/supreme-court-curbs-antitrust-law-in-american-express-case>>. The Editorial Board, “Another Antitrust Bust” *WSJ—Opinions* (25 June 2018), online: <<https://www.wsj.com/articles/another-antitrust-bust-1529968151>>.

¹⁰ *Evans & Noel*, *supra* note 3 at 102.

¹¹ *Amex*, *supra* note 6 at 1–2, Thomas J.

¹² *Evans & Noel*, *supra* note 3 at 103.

¹³ *Amex*, *supra* note 6 at 12, Thomas J.

¹⁴ *Evans & Noel*, *supra* note 3 at 104.

¹⁵ *Ibid*.

¹⁶ *Ibid*.

¹⁷ *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated* (23 July 2013), CT-2010-010, online: Competition Tribunal <<https://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=333>> [*Visa-MasterCard*].

¹⁸ *The Commissioner of Competition v The Toronto Real Estate Board* (27 April 2016), CT-2011-003 at para 471, online: Competition Tribunal <https://www.ct-tc.gc.ca/CMFiles/CT-2011-003_Reasons%20for%20Order%20and%20Order_385_66_4-27-2016_7296.pdf> [*TREB Tribunal*].

¹⁹ *Dominance Guidelines*, *supra* note 4 at paras 1.3, 1.16–1.17.

²⁰ *Big Data Paper*, *supra* note 4 at 4–6.

²¹ *Visa-MasterCard*, *supra* note 17 at paras 29, 46. For further analysis of the *Visa-MasterCard* decision in the context of S. 76, see: Mark Katz & Erika Douglas, “Resale Price Maintenance in Canada: Where Do We Stand After the Visa/Mastercard Case?” (2013) 1 CPI Antitrust Chronicle, online: <<http://www.albertasenator.ca/flashblocks/data/BT%20Money%20Matters/VisaMastercardCase13November2013.pdf>>.

²² *Visa-MasterCard*, *supra* note 17 at para 205.

²³ *Ibid* at para 189.

²⁴ *TREB Tribunal*, *supra* note 18.

²⁵ *Ibid* at para 2.

²⁶ *Ibid* at para 132.

²⁷ *Ibid* at para 138.

²⁸ *Dominance Guidelines*, *supra* note 4 at paras 1.3, 1.17. Citing *TREB Tribunal*, *supra* note 18 at para 132.

²⁹ *Dominance Guidelines*, *supra* note 4 at paras 1.3, 1.16.

³⁰ *Ibid* at para 1.15, n 16 cites *Visa-MasterCard*, *supra* note 17 at para 189.

³¹ *Dominance Guidelines*, *supra* note 4 at para 1.16.

- ³² *Big Data Paper*, *supra* note 4 at 4–7.
- ³³ *Ibid* at 7.
- ³⁴ *Ibid*.
- ³⁵ *Ibid*.
- ³⁶ *Ibid*.
- ³⁷ *Ibid*.
- ³⁸ *Ibid*.
- ³⁹ *Ibid*.
- ⁴⁰ American Express provides credit card services to merchants and card holders. “When a cardholder buys something from a merchant who accepts Amex credit cards, Amex processes the transaction through its network, promptly pays the merchant, and subtracts a fee”—*Amex*, *supra* note 6 at 1, Thomas J.
- ⁴¹ *Ibid* at 1, 7–8, n 5, Thomas J.
- ⁴² *Ibid* at 10–11, n 7, Thomas J.
- ⁴³ *Ibid* at 11–12, Thomas J.
- ⁴⁴ *Ibid* at 4–5, n 1, Thomas J.
- ⁴⁵ *Ibid* at 12, Thomas J.
- ⁴⁶ *Ibid* at 10–14, Thomas J.
- ⁴⁷ *Ibid* at 15, Thomas J.
- ⁴⁸ *Ibid* at 15, Thomas J.
- ⁴⁹ *Ibid* at 15, Thomas J.
- ⁵⁰ *Ibid* at 4–5, 7, 16, Thomas J.
- ⁵¹ *Ibid* at 6, 18, Thomas J.
- ⁵² *Ibid* at 12, 14, Breyer J, dissenting.
- ⁵³ *Ibid* at 18, Breyer J, dissenting.
- ⁵⁴ *Ibid* at 2, 15, 18–19, Breyer J, dissenting.
- ⁵⁵ *Ibid* at 2, 9–10, Breyer J, dissenting.
- ⁵⁶ *Ibid* at 11–12, 17, Breyer J, dissenting.
- ⁵⁷ *Ibid* at 10–11, n 7, Thomas J.
- ⁵⁸ *Ibid* at 11–12, Thomas J.
- ⁵⁹ *Ibid* at 12, 14, Breyer J, dissenting.
- ⁶⁰ *Ibid* at 2, 15, 18–19, Breyer J, dissenting.
- ⁶¹ *Dominance Guidelines*, *supra* note 4 at paras 1.3, 1.16–1.17
- ⁶² *TREB Tribunal*, *supra* note 18 at para 138.
- ⁶³ *Amex*, *supra* note 6 at 10–14, Thomas J.
- ⁶⁴ *Ibid* at 11, 17, Breyer J, dissenting.
- ⁶⁵ *Big Data Paper*, *supra* note 4 at 6–7.
- ⁶⁶ *Big Data Paper*, *supra* note 4 at 7.
- ⁶⁷ *Visa-MasterCard*, *supra* note 17 at paras 244–245.
- ⁶⁸ *Amex*, *supra* note 6 at 10, Thomas J.
- ⁶⁹ *Amex*, *supra* note 6 at 15, Breyer J, dissenting.
- ⁷⁰ *Big Data Paper*, *supra* note 4 at 7.
- ⁷¹ *Amex*, *supra* note 6 at 6, 18, Thomas J.
- ⁷² *Big Data Paper*, *supra* note 4 at 7.

⁷³ *Amex*, *supra* note 6 at 1, Breyer J, dissenting.

⁷⁴ Sean Fine, “U.S. Supreme Court’s partisan rhetoric should be ‘toned way down,’ Justice Kagan says” *The Globe and Mail* (12 November 2018), online: <<https://www.theglobeandmail.com/canada/article-us-supreme-courts-partisan-rhetoric-should-be-toned-way-down/>>.