

CANADIAN COMPETITION LAW AND UNFAIR TRADE PRACTICES

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Canada has always offered enterprising foreign companies new horizons for virtually unlimited growth. The untapped potential of Canadian markets has enticed a steady stream of investment by American firms.¹ Difficulty often arises, however, because American investors fail to realize that, in spite of its geographical proximity, Canada's business environment is different from that of the United States and merits individual analysis and study. Existing American marketing programs must often be revised to conform with Canadian economic conditions, tastes, customs, buying habits, investment capabilities, currency differentials, sources of supply, and government regulations and licensing requirements. One potential problem area deserving of thorough investigation is Canada's competition policy—in particular, legislation concerning unfair trade practices.

This article will outline the basic policies underlying Canadian competition laws in general and the provisions regarding unfair trade practices in particular. It will examine the efficiency with which the existing machinery for enforcing these provisions carries competition policy into effect. Special consideration will be given to potential changes in the law embodied in the proposed Competition Act.

I. COMPETITION LEGISLATION: PRESENT AND FUTURE

Existing legislation pertaining to unfair trade practices is codified entirely in the Combines Investigation Act,² a statute of the Parliament of Canada. The language of the Act, and its legislative and judicial history reveal the lack of agreement as to the specific statutory intent. This lack of agreement has given rise to a continuing controversy as to whether the legislative objectives have been achieved and whether amendment of the statute is required.

On its face, the Act prohibits certain practices that operate directly or indirectly to reduce the level of free competition among private enterprise. Thus, it appears to be based on the theory that the public

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¹ A governmental task force reported in 1968 that U.S. residents controlled 97% of the capital employed in the manufacturing of automobiles, 90% in rubber, 54% in chemicals and 66% in electrical appliances. It was further ascertained that foreign long term direct investment in Canada grew from \$2.7 billion in 1945 to \$15.9 billion in 1964. Of this \$15.9 billion, U.S. direct investment accounted for \$12.9 billion or 80%. Foreign Ownership and the Structure of Canadian Industry, Report of the Task Force, Ottawa, 1968.

² Combines Investigation Act, Can. Rev. Stat. c. C-23 (1970).

interest in efficient production, distribution, and consumption of goods is best served by the natural functioning of competitive market forces.³ To accomplish this, the regulatory system attempts to ensure a diffusion of economic power and to prevent the private imposition of artificial economic restraints.⁴ The sanctions presently utilized are found exclusively in the criminal law, for the constitutionality of the Combines Investigation Act rests on the exclusive power of the Parliament to enact criminal law.⁵ Consequently, the present law tends to be quite rigid and inflexible, since criminal offenses must be proved beyond a reasonable doubt. This problem was highlighted in the Interim Report on Competition Policy:

Courts have no latitude to consider all the economic and commercial qualifications which might apply to particular cases and are compelled to adopt an "all or nothing" approach in deciding whether offences have been committed. In addition, the classification of commercial arrangements as criminal has created a bad psychological background for administration. . . .⁶

The criminal law foundations of the Act also tend to give it a negative posture, emphasizing punishment for improper conduct, rather than reflecting a positive economic philosophy meant to induce proper conduct and to correct abuses.

In view of these shortcomings of the present Act, it was recommended by the Interim Council that part of Canada's competition policy

³ 1970 Report of the Director of Investigation and Research, Combines Investigation Act at 9.

⁴ Economic Council of Canada, Interim Report on Competition Policy at 6 (1969) [hereinafter cited as Interim Report].

⁵ It is to be noted that Canada's constitution is federal in nature, allocating enumerated powers between the federal and provincial governments. Under section 91 of the British North America Act, power is conferred on the Parliament of Canada to enact laws, *inter alia*, in relation to criminal law and procedure. The anti-combines legislation, as it exists today, has been held to be a valid exercise of the power of Parliament to legislate in the field of criminal law. For further discussion of the constitutionality of this legislation, see, *In Re Board of Commerce Act and the Combines and Fair Prices Act of 1919* [1919-20] 60 Can. S. Ct. 456 (1920); *In Re A Reference as to the Validity of the Combines Investigation Act*, R.S.C. 1927, c. 26, and of Section 498 of the Criminal Code, [1929] Can. S. Ct. 409 (1929); *Proprietary Articles Trade Ass'n v. A.-G. Can.*, [1931] 2 D.L.R. 1 (1931). Reference Re Section 498A of the Criminal Code, [1936] 3 D.L.R. 593 (1936); *A.-G. B.C. v. A.-G. Can.* Reference Re Section 498A of the Criminal Code, [1937] 1 D.L.R. 688 (1937); Reference Re Dominion Trade and Industry Commission Act, [1936] 3 D.L.R. 607 (1936); *A.-G. Ont. v. A.-G. Can.*, Reference Re Dominion Trade and Industry Commission Act, 1935, [1937] 1 D.L.R. (1937); *Regina v. Goodyear Tire & Rubber Co. of Canada Ltd.* [1954] aff'd sub nom. *Goodyear Tire & Rubber Co. of Canada Ltd. et al. v. The Queen*, [1956] 2 D.L.R. (2d) 11 (1956); 46 D.L.R. (2d) 83 (1964), appeal dismissed, [1966] 58 D.L.R. (2d) 673 (1966).

⁶ Interim Report, supra note 4, at 109.

be expressed as civil legislation.⁷ Such a change would have the beneficial effect of bringing the substance of the competition laws and the procedures for implementing them more into line with the national policy and principles upon which they are based.

It was against this background that the Competition Act was introduced by the Canadian Minister of Consumer and Corporate Affairs.⁸ The philosophy of the proposed legislation, which differs very little from that of the Combines Investigation Act, is expressed in a preamble to the bill:

Whereas competition in the private sector is ordinarily the best means of allocating resources, of enhancing efficiency in the production and distribution of goods and services and of transmitting the benefits of efficiency to the public, and competition also furthers individual enterprise by decentralizing economic power and reducing the need for government intervention in the achievement of economic objectives It is therefore desirable to promote competition actively and also to remove, throughout Canada, obstacles to competition . . . created by [anti-competitive] practices, and such objectives can only be achieved through the recognition, encouragement and enforcement of the role of competition as a matter of national policy⁹

Although the Competition Act is not modeled after any particular legislation, Canadian or American, this preamble reveals an economic rationale similar to that of the Sherman and Clayton Antitrust Acts.

One of the most significant sections in the proposed Competition Act provides machinery for enforcement through civil proceedings. Accordingly, mergers, specialization agreements, export agreements, franchising agreements, price discrimination, promotional allowances, exclusive dealing and tying arrangements, and refusal to deal—all of which are important matters requiring sophisticated economic and business analysis—will, if the bill is enacted, become the responsibility of a special civil tribunal. On the other hand, certain proscribed practices such as price fixing, misleading advertising, and other predatory

⁷ Id.

⁸ Bill C-256, 28th Parl. 3d Sess. (1971). The Minister of Consumer and Corporate Affairs, the Hon. Ron Basford, stated at the time of the initial presentation of the bill for first reading that it would not be proceeded with, but allowed to die with the third session of Parliament. Primarily, the intent was to present the bill as a starting point, in order to initiate public discussion of the bill. It will most likely be reintroduced at a later session of Parliament in amended form. Thus, all references to the proposed legislation should be understood as representing only the language of the draft of the bill as originally introduced.

⁹ Id.

practices meant to injure a competitor will remain, as at present, within the jurisdiction of the ordinary criminal courts.

Despite the size and complexity of the proposed bill, the new legislation does not represent a major departure from established Canadian competition policy, but expresses a desire for precision and certainty while maintaining flexibility.¹⁰ This flexibility is very aptly reflected in the provisions concerning unfair trade practices, which would not be treated as unlawful *per se*. Rather, the presumption would be that while the practices could well be innocuous, or even beneficial to the public in some circumstances, they could be harmful in others. It would be the function of the new tribunal to determine, in view of the various economic factors, when these trade practices become harmful and to impose or recommend appropriate remedies. The sections of the article which follow examine the various unfair trade practices in detail.

A. *Price Discrimination*

Section 34(1) of the Combines Investigation Act presently prohibits a supplier of goods from discriminating in price among his competing purchasers who are buying like quantity and quality of goods from him.¹¹ Under the statute, five factors must be present in order to find a defendant guilty of price discrimination: (1) there must be sales to two or more persons in order to afford a comparison; (2) there must be a discount, rebate, allowance, price concession or other advantage granted to one purchaser that is not made available to another; (3) the persons among whom the supplier has discriminated must be competitors; (4) the discriminatory prices must apply to goods of like quantity and quality; and (5) the discriminatory transaction must be part of an overall practice of discrimination. Significantly, the price discrimination section contains no provision for "cost justification," such as exists under the Clayton Act in the United States. Such a provision would allow a supplier who had made a practice of discriminating to escape liability if he were merely passing on a cost saving to a customer.

Although there have been no court cases concerning this section,

¹⁰ The Competition Act-Explanatory notes, The Minister of Consumer and Corporate Affairs, June 29, 1971 at 1.

¹¹ Can. Rev. Stat. c. C-23 § 34(1)(1970) provides:

Every one engaged in a business who (a) is a party or privy to or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to such purchaser, is available to such competitors in respect of a sale of articles of like quality and quantity; . . . is guilty of an indictable offence and is liable to imprisonment for two years.

questions as to its application have frequently been raised by businessmen during informal discussions with the Director of Investigations and Research.¹² These questions were partially answered during an investigative inquiry conducted by the Director in 1966.¹³ In that case, it was found that a dealer-classification system used by Miss Mary Maxim, Ltd., a manufacturer and distributor of knitting yarns, was discriminatory within the meaning of Section 34(1)(a) of the Act because discounts granted to certain dealers were not made available to competing retail store customers purchasing like volumes.¹⁴ The dealers were classified according to Mary Maxim's estimate of the purchases that each would make, and different discounts from retail prices, ranging from thirty-six to forty-two percent, were granted depending on the purchasing dealer's classification. The estimates utilized were made without due regard for any definite period of time, and no subsequent readjustment of prices was made at the end of a period based on actual purchases during that period. In addition, there was no firm policy with respect to the quantum of purchases that determined reclassification or against which either actual or potential volume would be measured. The report of the Director concluded that such discriminatory sales practices were clearly unjustified.¹⁵

Pursuant to his authority under Section 18 of the Act,¹⁶ the Director submitted this case to the Restrictive Trade Practices Commission for further consideration. The Commission concurred with the determination of the Director, and further noted that a price concession may be awarded only on the basis of the quantity of goods purchased at a particular time or the volume of purchases within a definite period. In

¹² To a considerable degree, the enforcement of the present Combines Investigation Act depends on the voluntary compliance of businessmen. The program of compliance is one in which businessmen are encouraged by the Director of Investigation and Research to discuss their problems with his department before they decide to implement policies which might prove to be in conflict with the Act.

¹³ A Report in the Matter of an Inquiry Relating to the Distribution and Sale of Mary Maxim Knitting Wool, Patterns and Accessories Thereof in Canada, 1966 Report of the Director of Investigation and Research, Combines Investigation Act, at 58.

¹⁴ A discount applied to individual sales of a specified size is a quantity discount; a discount applied to total purchases over a particular time period is a volume discount.

¹⁵ 1966 Report of the Director of Investigation and Research, Combines Investigation Act, *supra* note 13, at 59.

It is difficult to conceive of a non-discriminatory plan of volume rebates where the volume requirements are not clearly delineated and where no definite period of time is specified within which the qualifying volume must be purchased, in accordance with an objective and ascertainable system. Nor does it seem possible to administer such a plan properly without a system whereby, at the end of the specified period, each customer's purchases are compared with the volume set for the appropriate discount or rebate category and readjustments made accordingly

Id.

¹⁶ Can. Rev. Stat. c. 28 § 18 (1970).

addition, such concession must be available to all competing purchasers who are "seeking to serve the same customers."¹⁷

One of the key attributes of the provisions of the proposed Competition Act which deal with price discrimination is a clarity which unfortunately is lacking under the existing Section 34(1)(a). Basically, the new provisions would forbid giving to one customer a price advantage over his competitor by means of a lower price, discount, rebate, allowance, or by any other device.¹⁸ However, the proposed legislation provides for important exceptions to this general rule. For example, there would be no price discrimination where price differentials result from differences in delivery costs, where they are reasonably necessary to assist entry into a new market, where no significant competitive advantage is given to the favored customer, where a general reduction of prices will result, or where the advantage is necessary to meet import competition.¹⁹ Where none of these justifying factors is found, the Competitive Practices Tribunal may order the offending party to cease such price discrimination and may issue a supplementary order requiring that an injured customer be supplied on terms equivalent to those received by other customers.

The objective of the proposed legislation is to avoid some of the pitfalls prevalent in analogous United States legislation such as the 1936 Robinson-Patman Act.²⁰ This Act has been heavily criticized by informed observers on the ground that it is unclear whether its purpose is to suppress price discrimination where it operates as an anticompetitive device, or to protect small business from price disadvantages.²¹ Furthermore, enforcement has concentrated on price *difference* rather than price discrimination, and there have been several administrative problems. As one commentator argues, Robinson-Patman may have resulted in the suppression of some anticompetitive pricing practices, but it has also prevented certain acceptable and even desirable forms of differential pricing—e.g., those which can be

¹⁷ The Commission does not equate "available" to "must be offered" in the sense that whether or not there is a practical possibility of his qualifying for it, every quantity or volume discount. However, where a supplier provides a discount on the basis of quantity or volume purchases he should be prepared to provide any competing purchaser who makes an inquiry and who shows reasonable prospect of being able to purchase like quantity or volume, all information respecting the level of purchases required for eligibility for a discount or rebate, the amount of the discount or rebate, the manner in which the discount will be applied or the rebate paid, and of other details.

1966 Report of the Director of Investigation and Research, Combines Investigation Act, at 59.

¹⁸ Bill C-256, 28th Parl., 3d Sess. § 38(1) (1971).

¹⁹ Bill C-256, 28th Parl. 3d Sess. § 38(2) (1971).

²⁰ 15 U.S.C. §§ 13a-c, 21a (1970).

²¹ C. Kaysen and D. Turner, *Antitrust Policy: An Economic and Legal Analysis* 181 (1965).

justified by cost differences, and those which constitute one of the more important ways in which price competition periodically "breaks out," in oligopolistic markets to the benefit of the consumer.²²

B. *Promotion Allowances*

Under Section 35 of the Combines Investigation Act, any person granting an allowance to a purchaser that is not offered on proportionate terms to competing purchasers is guilty of an indictable offense.²³ A promotional allowance, according to the Act, means a discount, rebate, price concession or other advantage that is offered or granted for advertising or display purposes, and is collateral to a sale of articles but is not applied directly to the selling price. Only once has this section been the subject of a court proceeding.²⁴ Two charges were filed under section 35 against a greeting card distributor based on payment of allowance to a retail outlet in Ottawa that was not offered on proportionate terms to other purchasers of greeting cards who were in competition with it. The court found, however, that the proprietor of the outlet in question had, on his own initiative, suggested to the seller a novel promotional scheme, and that the allowance he received was, in fact, compensation for his efforts to develop new retail marketing techniques for greeting cards. In acquitting the defendant on the section 35 charges, the court held that

²² A.D. Neale, *The Antitrust Laws of the United States of America* 463-69 (1960).

²³ Can. Rev. Stat. c. C-23 § 35 (1970) provides:

(1) In this section "allowance" means any discount, rebate, price concession or other advantage that is or purports to be offered or granted for advertising or display purposes and is collateral to a sale or sales of articles but is not applied directly to the selling price.

(2) Every one engaged in a business who is a party or privy to the granting of an allowance to any purchaser that is not offered on proportionate terms to other purchasers in competition with the first-mentioned purchaser (which other purchasers are in this section called "competing purchasers"), is guilty of an indictable offence and is liable to imprisonment for two years.

(3) For the purpose of this section, an allowance is offered on proportionate terms only if:

(a) The allowance offered to a purchaser is in approximately the same proportion to the value of sales to him as the allowance offered to each competing purchaser is to the total value of sales to such competing purchaser;

(b) In any case where advertising or other expenditures or services are exacted in return therefor, the cost thereof required to be incurred by a purchaser is in approximately the same proportion to the value of sales to him as the cost of such advertising or other expenditures or services required to be incurred by each competing purchaser is to the total value of sales to such competing purchaser, and

(c) In any case where services are exacted in return therefor, the requirements thereof have regard to the kinds of services that competing purchasers at the same or different levels of distribution are ordinarily able to perform or cause to be performed.

²⁴ *Regina v. William E. Coutts*, Supreme Court of Ontario, 1966 (unreported).

[W]hile in the correspondence such payment was referred to as an advertising allowance, [the dealer] was in fact being compensated for his original and experimental method of testing the value of these new forms of offering [the defendant's] cards to the public. None of the other competitors in the sale of [the defendant's] cards attempted such a method of increasing their sales, nor did they ask the accused company for such an allowance.²⁵

As in the case of price discrimination legislation, one of the major difficulties of existing legislation concerning promotional allowances is its lack of clarity. This is especially evident when one tries to ascertain if a particular practice or plan involves the granting of an "allowance" within the meaning of this section. To some extent, the meaning of the term "allowance" has been clarified by inquiries addressed to the Director of Investigation and Research. For example, in 1962 the Director was asked by a manufacturer of specialty food products whether payments made to a promotional firm for advertisements on a television program sponsored by a retail grocery chain were promotional allowances paid to that chain within the meaning of Section 35 of the Act.²⁶ The Director found that the program was the property of the promotional firm whose contract with the chain provided for a fixed payment by the latter. Originally all advertising was on behalf of the chain. However, because the program involved audience participation, it had wide appeal, and commercial spots were sold by the promoting firm to other advertisers at prevailing commercial rates. Amounts paid to the promoting firm by these other advertisers were deducted from the sum otherwise payable by the sponsoring chain to the promoting firm. As a result of increased participation by other advertisers, the cost of the program to the chain was reduced. Most, but not all, of the other advertisers were suppliers of the chain. The firm which brought the matter to the attention of the Director wished to know if the suppliers of the chain who participated as advertisers and made payments credited to the chain were obliged to offer similar advantages to other customers. Some suppliers felt that the program was really a promotion of the chain and that the promoting firm served only to run the promotion and receive payments from the chain. In defense, it was asserted that the chain was merely a participant in a joint advertising plan for which it paid its share.

The Director concluded that it would be difficult to establish that

²⁵ *Id.*

²⁶ 1964 Report of the Director of Investigation and Research, Combines Investigation Act 44.

the payments to the promoting firm by the other participating advertisers were discounts, rebates, price concessions or other advantages granted by the original sponsoring chain; nor was there any evidence of pressure by that chain that would support a finding that a payment so made was an allowance collateral to a sale. Finally, since the promotion and sale of advertising time were carried out by a separate legal entity totally unrelated to the chain, it did not appear that the payments were made for the purpose of having the chain carry out the advertising or display. The Director therefore determined that the plan did not involve the granting of an allowance within the meaning of section 35.

The proposed legislation in the Competition Act concerning promotional allowances²⁷ is based on the premise that such practices ought not to be banned as offenses per se. Promotional allowances would not be prohibited where they are designed to achieve one of the purposes allowed under the price discrimination provision mentioned previously.²⁸ Only where there was reason to suppose that the use of such an allowance in a particular situation might have a deleterious effect on the public interest would it become the subject of further investigation.²⁹ The responsibility of the Competitive Practice Tribunal would be to examine cases where harmful effects are suspected and to impose or recommend appropriate remedies.

The proposed legislation follows closely the Economic Council's recommendation that the paramount consideration for the Tribunal must be whether the practice was likely to lessen competition to the detriment of the final consumer.³⁰ The interest of particular competitors would be secondary. It appears that the Tribunal would be entrusted with substantial discretionary powers. In effect, the Tribunal would have the power to dictate many of the terms on which business is conducted in Canada and substantially shape the future of Canadian industry. For example, in the exceptional cases where promotional allowances would be permitted by the Competition Act, such allowances must be "reasonable in time and quantity." The Act, however,

²⁷ Section 39 of the proposed Competition Act provides:

(1) Subject to subsection (2), for the purpose of section 37, "promotional allowance" means any benefit that purports to be or is offered or granted by a supplier to a person who deals in commodities or services of the supplier in consideration of the advertising, display or other promotion by that person of any such commodities or services.

(2) A benefit is not a promotional allowance if it meets one or more of the conditions described in paragraphs 38(2)(b) or (e) and (1).

²⁸ See text at p. 1308 *supra*.

²⁹ Interim Report, *supra* note 4, at 120.

³⁰ *Id.* at 122.

does not specify what is meant by "reasonable" and this would presumably be left to the Tribunal.

Another disturbing aspect of the new legislation is that a regular purchaser buying in large quantities is not entitled to a better unit price than a random purchaser buying one small consignment. The elimination of the quantity of purchases as a price factor seems to contradict one of the basic elements of business practice in Canada. No doubt, before the bill is finally passed, many of these provisions will be challenged by various Canadian pressure groups.

C. *Misleading Price Advertising*

Section 36 of the Combines Investigation Act is designed to protect consumers by making it an offense to misrepresent the regular price of an article. Under this section, an offense has been committed when a "materially misleading representation" has been made (1) to the public, (2) for the purpose of promoting the sale or use of an article, and (3) concerning the price at which the article has been, is or will ordinarily be sold.⁸¹ Such misrepresentation is an offense per se and no mens rea need be shown.⁸²

One of the principal difficulties arising out of section 36 is that of identifying a "materially misleading representation." It has been held that the term "misleading" denotes "a representation which is calculated to and in effect does, lead a person to a certain course of conduct because he believes the information put before him indicates that this would be advantageous to himself."⁸³ In deciding whether such a misleading representation is material, "the criteria [sic] . . . is not the value to the purchaser, but rather the degree to which the

⁸¹ Can. Rev. Stat. c. C-23 § 36(1) (1970).

⁸² There is nothing in the express language of s. 33C(1) [now 36(1)] disclosing any intention that mens rea, in the sense that the materially misleading representation made must be known to be such by the accused, is not an essential ingredient of the offence. But it is submitted that such an intention is derived by necessary implication from s-s.(2). If it is necessary to the offence that the accused knows the representation he makes is in fact materially misleading a publisher who accepted an advertisement in good faith for publication in the ordinary course of business would not require the special defence provided by s-s.(2). It is therefore concluded that s. 33C(1) [now 36(1)] is an offence of strict liability and that mens rea, in the sense I have mentioned, is not an ingredient of the offence. . . . To paraphrase the words of Farell, L. J. at p. 481 of *Hobbs v. Winchester Corp.*, [1910] 2 K.B. 471, in my opinion the Legislature intended that the maker of a materially misleading representation should take the risk and that the public should be protected irrespective of the guilt or innocence of the maker subject to the exception provided by s-s. 2.

Regina v. Allied Towers Merchants Ltd., [1965] 2 O.R. 628 (1965).

⁸³ *Regina v. Patton's Place Ltd.*, [1969] 57 C.P.R. 12, 16 (1968).

purchaser is affected by these words in coming to a conclusion as to whether or not he should make a purchase.³⁴

Unlike the provisions of the Act previously discussed, Section 36 has been the object of much litigation, and a number of general principles have emerged from these cases. The advertising of articles for sale at "regular prices" which in fact are higher than those prevailing in the advertiser's selling area is a misleading representation concerning the price at which goods are ordinarily sold.³⁵ It is also an offense for a manufacturer to intentionally suggest unrealistically high retail prices which a knowing retailer can then use to persuade prospective purchasers that they would be buying advantageously if they acquired the article for substantially less than that amount.³⁶ Similarly, pre-ticketing with a "regular" or "list" price designed to be marked down by the retailer so as to imply the customer is receiving a bargain when in fact the regular price was not prevailing in the selling area is prohibited.³⁷ A "guarantee," whatever it may involve, can have no effect on the price of an article.³⁸ The word "value" may only be used to refer to the price at which articles have been, are, or will ordinarily

³⁴ *Regina v. Kelly's on Seymour Ltd.*, [1970] 60 C.P.R. 24, 26 (1969).

³⁵ *Regina v. Eddie Black's Ltd.*, [1962] 38 C.P.R. 140, 141 (1962). This case concerned the advertising of photographic and other items at "sale" prices alleged to be considerably below "regular" prices. These alleged "regular" prices, however, were in fact higher than the ordinary prevailing retail prices in the advertiser's selling area. On the basis of this decision the Director has taken the position that "the so-called regular price must be the price at which the goods have actually been sold by the majority of the dealers in the market in question. It is not sufficient, therefore, that one or two qualifying sales have been made by the seller himself at the so-called regular price." 1967 Report of the Director of Investigation and Research, Combines Investigation Act at 63.

³⁶ *Regina v. Allied Towers Merchants, Ltd.*, County Court of the County of Wentworth, Ontario, March 17, 1965 (unreported). In this case, the charges arose out of an advertisement in a newspaper describing a camera with a "list price" of \$199.95 and a projector with a "list price" of \$69.50. The advertisement offered the camera for \$129.88 and the projector for \$42.88. It was held that the manufacturer was not guilty of dishonesty or bad faith in suggesting the retail prices. However, the use of the words "list price" was held to be a violation of section 33C since it suggested that this was the price at which the goods were sold in the advertiser's selling area. See also *Regina v. Ace Liquidators Ltd.* (unreported) analyzed briefly in 1967 Report of the Director of Investigation and Research, Combines Investigation Act at 63.

³⁷ *Regina v. Imperial Industries* (unreported). See 1967 Report of the Director of Investigation and Research, Combines Investigation Act at 65.

³⁸ *Regina v. Trans-Canada Jewelry*, 1968 B.R. 179. In that case a man's watch was offered for sale at \$27 under the representation that it regularly retailed for \$54. Inquiries revealed that watches of this quality would not ordinarily be sold in the selling area for \$54. The defendant company argued that the quoted regular retail price was not misleading because it included a 5 year guarantee. The court, however, reasoned that "if in fact, this guarantee meant that the buyer could have it repaired free of charge for a period of five years, this would be a service which he was buying and the value of the article would not be affected by it. If this watch had been purchased for \$54, the buyer would be paying \$27 for the article and \$27 for the five years service. It would not, then, be the article which sold for \$54.00."

be sold.³⁹ It is no defense for an advertiser to prove that he did not know that his representation was misleading.⁴⁰

Most of these principles have been embodied in section 20(7) of the proposed Competition Act.⁴¹ Under the proposed legislation, the "ordinary," "usual," "normal," or other price used in advertising, packaging or other forms of promotion to show a price reduction must be the price at which the product ordinarily was sold during a period of sixty days preceding the offered reduction in the same marketing vicinity as the sale price. If the total of the price at which the commodity is offered and the announced price reduction is greater than the actual ordinary selling price in the sixty day period, it is conclusive proof of a misleading representation.⁴²

It is submitted, therefore, that practices by manufacturers such as "cents-off," "special price," or other promotional techniques relating to prices on packaging or used in the various forms of advertising, will require great care. The test for ordinary price is a local one and it would be necessary for a producer to know the price normally charged for his product in various markets or segments of markets, to be cer-

³⁹ Regina v. Thomas Sales Agencies (1963) Ltd., [1969] 2 O.R. 587 (1969). In that case a company manufacturing shampoo marked on the labels, "\$3.00 VALUE/SPECIAL PRICE \$1.99." The company admitted that this shampoo never sold for \$3.00 and in fact had always sold for \$1.99 or less. The Court of Appeal, reversing a lower court acquittal, stated:

[I]n the context herein . . . the word "value" must be given its ordinary meaning—exchangeable value—the price in the market. This market price has been established for a period of four or five years at \$1.99. It was a materially misleading representation to say . . . "special price \$1.99" when in fact this was the regular or ordinary price. Conjoined, these statements tended to suggest a one-third discount from regular price.

⁴⁰ See note 32 supra.

⁴¹ Bill C-256, 28th Parl. 2d Sess. § 20(7) (1971) provides:

Where (a) a commodity, (b) a wrapper or container of a commodity, (c) anything attached to, inserted in or accompanying a commodity or its wrapper or container, (d) anything on which a commodity is mounted for display or sale, (e) any in-store or point-of-purchase display of a commodity, or (f) any advertisement relating to a commodity or service, carries a representation to the effect that the commodity or service is being offered at a reduction from the ordinary price thereof, any person who displays the commodity or offers or advertises the commodity or service for sale shall be deemed, for the purpose of paragraph (1)(d), to have made a representation to the public that the commodity or service has been ordinarily sold at a price calculated by adding to the price at which the commodity or service is actually being sold, offered or advertised for sale the amount of the apparent reduction, and unless such person establishes that the commodity or service was ordinarily sold in the vicinity in which he carries on business or in which he published the advertisement or by him at or above the price so calculated within sixty days preceding the date upon which he deemed to have made the representation, the price so calculated shall be conclusively deemed to be higher than the price at which the commodity or service was ordinarily sold.

⁴² The Competition Act—Explanatory Notes, The Minister of Consumer and Corporate Affairs at 95 (1971) [hereinafter cited as Explanatory Notes].

tain an advertised price reduction would comply with the Act. The prohibition applies to all participants in the distribution system, from manufacturer to wholesaler to retailer.⁴³

It is to be noted that misleading price representation would, under the proposed law, still be considered a criminal offense and thus be subject to criminal proceedings. It would seem that the new provisions aim to counter-balance the omission of possible proceedings based on "unfair methods of competition," such as exists under Section 5 of the U.S. Federal Trade Commission Act. Under existing Canadian legislation, legal proceedings may only be launched to the extent that such practices are specifically prohibited by the Combines Investigation Act.

D. *Misleading Advertising*

The provisions concerning false and misleading advertising are currently contained in Section 37 of the Combines Investigation Act,⁴⁴ which was formerly Section 306 of the Criminal Code. Under the authority granted by this section, the Director established an initial set of misleading advertising categories.⁴⁵ The purpose of these categories

⁴³ Id. at 96.

⁴⁴ Can. Rev. Stat. c. C-23 § 37 (1970) provides as follows:

(1) Every one who publishes or causes to be published an advertisement containing a statement that purports to be a statement of fact but that is untrue, deceptive or misleading or is intentionally so worded or arranged that it is deceptive or misleading, is guilty of an indictable offence and is liable to imprisonment for five years, if the advertisement is published

(a) to promote directly or indirectly, the sale or disposal of property or any interest therein, or

(b) to promote a business or commercial interest.

(2) Every one who publishes or causes to be published in an advertisement a statement or guarantee of the performance, efficacy or length of life of anything that is not based upon an adequate and proper test of that thing, the proof of which lies upon the accused, is, if the advertisement is published to promote, directly or indirectly the sale or disposal of that thing, guilty of an offence punishable on summary conviction.

(3) Subsections (1) and (2) do not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.

(4) For the purposes of subsection (2), a test that is made by the National Research Council of Canada or by any other public department is an adequate and proper test, but no reference shall be made in an advertisement to indicate that a test has been made by the National Research Council of Canada or by any other public department unless the advertisement has, before publication, been approved and permission to publish it has been given in writing by the President of the National Research Council or by the deputy head of the public department, as the case may be.

(5) Nothing in subsection (4) shall be deemed to exclude, for the purposes of this section, any other adequate or proper test.

⁴⁵ The categories are as follows:

(a) A misleading statement of fact in an advertisement (e.g., "Below our cost" when the selling price is in fact higher than the delivered price of the article to the retailer);

was to give notice to advertisers of the particular advertising practices which would be considered violative of section 37. However, the plethora of complaints received by the Director in the year following the passage of the Act⁴⁶ indicated that the Act and the categories promulgated under it were insufficient to provide advertisers with a clear understanding as to which practices constituted misleading advertising. Even today, misleading advertising continues to present problems by distorting free competition and bringing adverse publicity to the market as a whole.

In order to remedy the problem, Section 20 of the Competition Act⁴⁷ proposes to clarify the intent of existing legislation by providing

(b) a statement of performance which is not supported by an adequate test (e.g., rope advertised as "2,000 pound test" where no adequate and proper test of the rope has been made); (c) deceptive use of contests (e.g., "You are the lucky winner of our grand award" when in fact the "award" was not exceptional in that many people received the identical mailing piece); (d) "free" offers that are not in fact free (e.g., receipt of the "free" gift is contingent on the purchase of another article or articles which could be purchased through conventional channels at lower prices); (e) "bait-and-switch" operations where the item used as bait was not in fact held for sale by the advertiser; (f) contest purporting to award prizes where such prizes are in fact available; (g) the "stuffed flat" (e.g., an advertiser using the classified section purports to be selling his household furniture whereas in fact he is selling goods supplied from other sources); (h) "clip-and-paste" solicitations (this is a direct mail device in which typically the customer is invited to verify a listing in a directory but which when signed and returned amounts to an order for which he may be invoiced); (i) misrepresentation as to origin (e.g., a manufacturer encloses a foreign made article in a display package marked "made in Canada").

⁴⁶ Twelve months after this section was proclaimed as part of the Combines Investigation Act, some 1,000 complaints were received. Many of these complaints were multiple in nature and involved a number of promotional schemes widely advertised in direct mail announcements. Others focused on the exaggerated or nonexistent performance of the commodity to be sold. For example, it was brought to the attention of the Director that an advertisement on an Ottawa television station promoted the sale at the Central Canada Exhibition of an article described as a "jet ignition unit with transistors," manufactured by United Automotive Manufacturing, Inc. The advertisement contained the statement that the unit was "engineered to give better gas mileage, easier starting and better performance." Tests revealed that the claims made in the advertisement could not be substantiated and the device was useless. Other complaints brought to the attention of the Director centered around misleading advertising which promised the consumer savings if he purchased from the advertising store. For example, a gasoline station advertised that if a customer purchased gasoline from them he would save six cents per gallon. However, it was revealed that the customer received only a six cent coupon which could be used on the purchase of anything bought at the station with the exception of gasoline. 1970 Report of the Director of Investigation and Research at 69.

⁴⁷ Bill C-256, 28th Parl., 3d Sess. § 20(1) (1971) provides:

No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a commodity or service or for the purpose of promoting, directly or indirectly any business interest, by any means whatsoever,

- (a) make a misleading representation to the public;
- (b) make representation to the public as to the performance, efficacy or length of life of a commodity or service that is not based upon a reasonable test;
- (c) make a representation to the public in a form that purports to be
 - (i) a warranty or guarantee of a commodity or service,
 - (ii) a promise to replace, maintain or repair a commodity or any part

a more precise statement as to the practices which constitute misleading advertising and are thus prohibited. In addition, the proposed legislation widens the scope of responsibility for misleading advertising by extending liability to retailers as well as wholesalers.⁴⁸ Thus, through more precise definition and extended responsibility, the new legislation proposes to eliminate misleading representations before they can influence market decisions.

E. Resale Price Maintenance

Section 38 of the Combines Investigation Act prohibits a manufacturer or supplier from requiring or inducing one who purchases his goods for resale to resell an item at or above a specified price, nor may a dealer refuse to supply a customer who refuses to resell his goods at or above a specified price.⁴⁹ The evils of resale price maintenance

thereof or to repeat or continue a service until it has achieved a specified result

if such form of purported warranty or guarantee or promise is misleading or if there is no reasonable prospect that it will be carried out; or

(d) make a representation to the public concerning the price at which a commodity or service or like commodities or services have been, are, or will be ordinarily supplied where such representation is misleading.

See also Explanatory Notes, *supra* note 42, at 94.

⁴⁸ For example, if the misleading representation is made on the container of the commodity, the person offering the commodity for sale is guilty of an offense.

⁴⁹ Can. Rev. Stat. c. C-23 § 38 (1970) provides:

(1) In this section "dealer" means a person engaged in the business of manufacturing or supplying or selling any article or commodity.

(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

(a) at a price specified by the dealer or established by agreement,

(b) at a price not less than a minimum price specified by the dealer or established by agreement,

(c) at a markup or discount specified by the dealer or established by agreement,

(d) at a markup not less than a minimum markup specified by the dealer or established by agreement, or

(e) at a discount not greater than a maximum discount specified by the dealer or established by agreement, whether such markup or discount or minimum markup or maximum discount is expressed as a percentage or otherwise.

(3) No dealer shall refuse to sell or supply an article or commodity to any other person for the reason that such other person

(a) has refused to resell or to offer for resale the article or commodity

(i) at a price specified by the dealer or established by agreement,

(ii) at a price not less than a minimum price specified by the dealer or established by agreement,

(iii) at a markup or discount specified by the dealer or established by agreement,

(iv) at a markup not less than a minimum markup specified by the dealer or established by agreement, or

(v) at a discount not greater than a maximum discount specified by the dealer or established by agreement; or

may best be illustrated by the practice of co-operative advertising. Under such a plan the supplier contributes one half of the retailer's cost of advertising, provided that the sale price stated in the advertisement is the price designated by the supplier. Failure to use the designated price results in loss of the advertising funds, thus inducing the retailer to resell at what may be an artificially inflated price. Since an inducement to advertise at a specified price has the same potentially deleterious effect on commerce as an inducement to sell at a specified price, it is therefore a violation of Section 38(2) of the Combines Investigation Act.⁵⁰

Despite the language of section 38 prohibiting resale price maintenance, the law permits a manufacturer or other supplier to suggest resale prices for his products, to give advice to retailers about resale prices, and in some instances, to encourage retailers to adopt resale prices suggested by the supplier as long as such efforts do not reach the state of requiring or inducing, or attempting to require or induce, a retailer to accept a specified price or discount.⁵¹ In addition, Section 38(5) of the Combines Investigation Act provides four defenses for a supplier charged with a refusal to sell. The defendant must "satisf[y] the court that he and anyone upon whose report he depended had reasonable cause to believe and did believe" that his customer was using the article as a loss-leader, for bait-and-switch selling, in misleading advertising, or was not providing adequate service in connection with sales of the article. This provision represents a legislative condemnation of advertising schemes in which a retailer sells an item below cost in order to attract customers to his store for the purpose of selling him other goods instead of (bait and switch) or in addition to (loss leading) that which was advertised.⁵² The continued use of a particular item as a loss-leader may cause other retailers to discontinue the marketing of the item and may eventually lead to the elimination of competition.⁵³ Thus, the supplier's refusal to sell to a particular retailer whom he suspects of this practice is considered to be predicated upon a desire to retain a fair price and wide distribution

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- (b) has resold or offered to resell the article or commodity
 - (i) at a price less than a price or minimum price specified by the dealer or established by agreement,
 - (ii) at a markup less than a markup or minimum markup specified by the dealer or established by agreement, or
 - (iii) at a discount greater than a discount or maximum discount specified by the dealer or established by agreement.

⁵⁰ Can. Rev. Stat. c. C-23 § 38(2) (1970). See also *Regina v. Moffats Ltd.*, [1957] O.R. 93 (1956) and *Regina v. British Oil Co.*, Magistrate's Court, Toronto, March 10, 1961 (unreported), for examples of cases decided under § 38 of the Combines Investigation Act.

⁵¹ *Regina v. Philips Appliances Ltd.*, [1969] 2 D.L.R. (3d. ed.) 558.

⁵² *Id.*

⁵³ *Regina v. William E. Coutts Co.*, Sup. Ct. of Ont., Oct. 17, 1966 (unreported).

for his product rather than upon a desire to maintain an artificially high price.

The legislation proposed in the Competition Act expands the definition of resale price maintenance to include the practice of manufacturers and suppliers of advertising and packaging their goods with a "suggested retail price" as an inducement "to influence upward" the retailer's price.⁵⁴ Suggested minimum resale prices would be permitted only where the supplier clearly indicated that the product could be sold at a lower price and no penalties would be incurred by the retailer for non-compliance.⁵⁵ Only the retailer would be permitted to

⁵⁴ Bill C-256, 28th Parl., 3d Sess. § 18 (1971) provides:

(1) No person engaged in the business of producing or supplying a commodity within or without Canada or who has, within or without Canada, the exclusive rights and privileges conferred by a patent, trade mark, copyright or industrial design shall, either directly or indirectly,

(a) by any means whatever, whether taken within or without Canada, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada sells or offers for sale or advertises for a sale a commodity within Canada; or

(b) refuse to supply a commodity to any other person engaged in business in Canada because of the low price at which the other person

(i) has previously sold or offered for sale or advertised a commodity within Canada, or

(ii) proposes to sell or offer for sale or advertise a commodity within Canada.

(2) Subsection (1) does not apply where the person attempting to influence the conduct of another person or the person refusing to supply a commodity to another person and that other person are directors, officers or employees of

(a) the same company, partnership or sole proprietorship; or

(b) companies, partnerships, or sole proprietorships that are affiliated.

(3) For the purposes of this section, a suggestion by a producer or a supplier of a commodity of a resale price or minimum resale price with regard thereto, however arrived at, is, in the absence of evidence that the person making the suggestion, in so doing, also made it clear to the person to whom the suggestion was made that he was under no obligation to accept the suggestion and would in no way suffer in his business relations with the person making the suggestion or with any other person if he failed to accept the suggestion, proof of an attempt to influence the person to whom the suggestion is made in accordance with the suggestion.

(4) For the purposes of this section,

(a) the placing by a producer or supplier of a commodity of a price or suggested price on the commodity or its container by direct application or by attaching thereto a ticket or otherwise, is an attempt to influence upward the price at which any retailer, into whose hands the commodity comes, sells the commodity; and

(b) any advertisement of a commodity published in Canada by a supplier other than a retailer, that mentions a retail or suggested retail price for the commodity, is an attempt to influence upward the price at which any retailer into whose hands the commodity comes, sells the commodity; unless, in the case of a suggested retail price, the suggested price is so expressed as to make clear to any person to whose attention it comes, that it is a suggested price only and that the commodity may be sold at a lesser price.

⁵⁵ For example, the requirements of the law could be met by a label stating the sug-

advertise or quote a firm price on anything from cars to chewing gum. The justification for the new provisions has been described as follows:

Suggested resale¹ price can have advantages in providing an indication of the price a product might reasonably sell for in terms of its cost and value. This is particularly true in the case of smaller sellers faced with the task of working out individual prices on relatively small quantities of many items. With no other qualification, "suggested price" and other similar terms create the impression that the price quoted is the fair and prevailing price and thus has an influence on both seller and purchaser to accept it or a price close to it. The influence becomes even stronger when the "suggested price" is used in advertising and packaging. With no clear indication that the "suggested price" does not necessarily represent the price at which the product is ordinarily sold, therefore, this could be used as an indirect device to influence the selling price.⁵⁶

Significantly, the prohibition of the proposed Act would not extend to the labelling or advertising of *maximum* suggested resale prices.

In comparing the existing law with the proposed legislation, it is to be noted that the use of a "suggested resale price" to indirectly influence resale prices is not expressly mentioned in the Combines Investigation Act and the use of a suggested price would never constitute an offense unless an attempt were made to enforce it. The prohibition in the Competition Act, however, specifically includes indirect as well as direct attempts to maintain or influence upwards the price of an article. Under existing legislation, improper conduct by a retailer with respect to a particular item may be raised by a supplier only in defense to disprove the allegation of "denial of supply for price maintenance reasons." The new Act, however, specifically deals with such activities as bait-and-switch selling and misleading advertising. These things would themselves become offenses which could be proceeded against directly. At the present time, the opportunity to discipline a retailer by cutting off supply permits abuses of resale price maintenance to occur under the guise of these reasons for refusal to supply.⁵⁷ Under the proposed Competition Act, if such a complaint were raised in defense, the

gested price as "less than \$10." In addition, a supplier who refuses to deal with a retailer for not accepting a minimum resale price suggestion can be required, under other sections of the Combines Investigation Act, to provide the goods refused as well as pay damages resulting from the illegal refusal to supply.

⁵⁶ Explanatory Notes, *supra* note 42, at 87.

⁵⁷ *Id.* at 87-90.

defendant might well be called upon to respond as to why he had not already brought an action directly against the offending retailer.

F. Collusive Marketing and Price Agreements

Section 32 of the Combines Investigation Act⁵⁸ prohibits collusive marketing and price agreements which are designed to "unduly" lessen or limit competition. The interpretation of the word "unduly" has caused the courts some difficulty, but the tendency has been to define "unduly" in terms of the degree of control exercised within a particular market.⁵⁹ However, the percentage of the market which must be shown to be under the control of the conspirators has never been specifically determined and has ranged from eighty or ninety percent⁶⁰ to fifty-six or seventy-four percent.⁶¹

Section 16(1) of the proposed Competition Act⁶² is designed to al-

⁵⁸ Can. Rev. Stat. c. C-23 § 32 (1970) provides:

(1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article,

(b) to prevent, limit or lessen, unduly, the manufacture or production of an article, or to enhance unreasonably the price thereof,

(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of an article, or in the price of insurance upon persons or property, or

(d) to restrain or injure trade or commerce in relation to any article, is guilty of an indictable offence and is liable to imprisonment for two years.

⁵⁹ *Howard Smith Paper Mills Ltd. v. The Queen*, 1957 S.C.R. 403. However, earlier decisions focused on the word "express" in interpreting "unduly." *The King v. Elliott*, 90 L.R. 648, 657 (1905). It would seem that the qualifying word "unduly" in the existing section 32, however, has not been interpreted by the courts in a manner that allows meaningful reference to case law to determine if a proposed action would be considered illegal by the courts. Explanatory Notes, *supra* note 42, at 80.

⁶⁰ *Howard Smith Paper Mills Ltd. v. The Queen*, [1957] Can. S. Ct. 403 (1956).

⁶¹ *Regina v. Abitibi Power & Paper Co.*, 131 C.C.C. 201 (1960).

⁶² Bill C-256, 28th Parl., 3d Sess. § 16(1) (1971) provides:

(1) No person shall conspire, combine, agree or arrange with another person,

(a) to fix or determine, in any manner whatever, the minimum price or any other term or condition at or upon which any commodity or service will be supplied or the maximum price or any other term or condition at or upon which a commodity or service will be acquired by such persons to or from any other person, whether determined or undetermined,

(b) to fix or determine, in any manner whatever, the minimum price or any other term or condition at or upon which a tender will be submitted for the acquisition of a commodity or service or to refrain or cause any other person to refrain from submitting such a tender,

(c) to divide or allocate between or among themselves any market for the acquisition or supply of a commodity or service,

(d) to lessen or limit the production of a commodity or service, or the supply of a commodity or service for or in any market,

(e) to lessen or limit the quality, grades or kinds of a commodity or service that is or are supplied to or may be acquired in any market,

leviate the problem of determining the legislative intent behind the word "unduly." This objective is accomplished by specifying ten types of agreements⁶³ which are prohibited per se, thereby eliminating the necessity of examining the degree of market control in order to determine if an agreement "unduly" lessens competition. The precise adumbration of the prohibited agreements enables businessmen to formulate their market conduct along clear guidelines.

There are a number of exceptions to the general rules laid down under section 16 which are meant to exempt agreements not necessarily anti-competitive in themselves or which, although they have the apparent effect of limiting competition, are nonetheless considered necessary and even beneficial to legitimate Canadian economic objectives. These exceptions are as follows: (a) agreements between directors or officers of a company, the company and its subsidiaries, or subsidiaries of the same parent company;⁶⁴ (b) specialization, export, or franchise agreements registered with the Tribunal;⁶⁵ (c) joint venture agreements relating to a single project that is established as being impractical for any of the participants to undertake alone and where full disclosure of the agreements has been made in advance to all interested parties;⁶⁶ (d) agreements relating to cooperation between competitors for the purpose of promoting efficiency, or collaboration on other matters of a non-competitive nature, including the exchange of statistics not relating to specific business transactions or customers, the definition of product standards and commercial terminology, the exchange of credit information, cooperation in research and development, and restriction of advertising or other promotions not related to prices;⁶⁷ (e) joint purchasing agreements designed to reduce delivery costs and to

(f) to lessen or limit facilities for the production, acquisition, supply or distribution of a commodity or service for or in any market,

(g) to lessen or limit the channels or methods of acquisition, supply or distribution of a commodity or service for or in any market,

(h) to prevent or impede the entry of any person into, or the expansion of the business of any person in, any market,

(i) to cause any person to abandon or withdraw from any market, or

(j) to boycott the suppliers or acquirers of a commodity or service to or in any market,

and no person shall do anything within Canada that is directed to the implementation of a conspiracy, combination, agreement or arrangement, wherever entered into, that has, is intended to have or, if implemented would be likely to have, in Canada, one or more of the effects described in paragraphs (a) to (j).

⁶³ Bill C-256, 28th Parl., 3d Sess. §§ 16(a)-(j) (1971).

⁶⁴ Bill C-256, 28th Parl., 3d Sess. § 16(3)(a) (1971).

⁶⁵ Bill C-256, 28th Parl., 3d Sess. § 16(3)(b) (1971).

⁶⁶ Bill C-256, 28th Parl., 3d Sess. § 16(3)(c) (1971).

⁶⁷ Bill C-256, 28th Parl., 3d Sess. § 16(3)(d) (1971). This prohibition represents a continuation, with certain changes, of an existing policy established by Section 32 of the Combines Investigation Act.

facilitate economically beneficial buying practices;⁶⁸ (f) consumer boycotts;⁶⁹ (g) normal market arrangements between a supplier and his customer regarding the definition of sales territories, product lines, and similar matters;⁷⁰ and (h) covenants not to compete for a certain period or in a certain area contained in contractual agreements relating to the sale of a business, the sale or leasing of business premises, or employment contracts. (This final exception, however, does not apply when one of the parties to the contract is in a monopoly position as defined in the Act.)⁷¹

G. Tied Sales, Directed Selling, Exclusive Dealing, and Reciprocal Buying

Since the Combines Investigation Act makes no express provision for exclusive dealing, tied sales, directed selling or reciprocal buying, a supplier in Canada is not presently required to sell to all comers.⁷² Tying arrangements have existed to a very large extent in Canada in the distribution and sale of automotive oils, greases, anti-freeze, additives, tires, batteries, accessories, and related products. Unfortunately, there have been no convictions up to now concerning this practice within the oil industry.⁷³

The proposed Section 40 of the Competition Act⁷⁴ addresses the shortcomings of existing legislation by clearly defining tied sales,

⁶⁸ Bill C-256, 28th Parl., 3d Sess. § 16(3)(e) (1971).

⁶⁹ Bill C-256, 28th Parl., 3d Sess. § 16(3)(f) (1971).

⁷⁰ Bill C-256, 28th Parl., 3d Sess. § 16(3)(g) (1971).

⁷¹ Bill C-256, 28th Parl., 3d Sess. § 16(4) (1971).

⁷² However, if the supplier enjoys a monopoly position, section 33 might apply, in that such a supplier would be viewed as owing a greater obligation to supply potential purchasers than if he were merely one among a number of vigorous competitors. See note 11 supra.

⁷³ It is interesting to note that in 1962 an inquiry was held by the Restrictive Trade Practice Commission concerning the distribution of these products, and one of the recommendations made by the Commission was the following:

[That] definitions of exclusive dealing and tying arrangements be included in the Combines Investigation Act which would embrace policies involved in full line forcing and directed buying as disclosed in the inquiry and that there should be a prohibition of exclusive selling and tying arrangements as defined, which are likely to lessen competition substantially, tend to create a monopoly or exclude competitors from the market to a significant degree. That arrangements or agreements which give one or more suppliers exclusive or preferred access to a group of outlets in return for a commission on sales to such agreements or arrangements are likely to lessen competition substantially, tend to create a monopoly or exclude from the market to a significant degree competitors.

Report: On an Inquiry into the Distribution and Sale of Automotive Oils, Greases, Anti-Freeze, Additives, Tires, Batteries, Accessories and Related Products: Restrictive Trade Practice Commission, Dept. of Justice, Ottawa, 1962, at 133. The Interim Report of the Economic Council of Canada, at 120-23, maintained that such agreements or arrangements should not be treated as undesirable "per se," but should be analyzed on their individual merits.

⁷⁴ Bill C-256, 28th Parl., 3d Sess. § 40 (1971).

directed selling, exclusive dealing, reciprocal buying and refusal to sell, and by permitting the court to forbid these selling practices, where the seller or supplier "is able to influence significantly either the price or volume" in a given market. These activities are grouped together in the Act by virtue of the restrictive effect they have on the relationship between a customer and his suppliers; consequently, in situations where tied sales and exclusive dealing do not constitute a restrictive practice, they are not prohibited. Such a situation exists where there are technological relationships between the products or services involved, franchise agreements or other arrangements by which two or more businesses operate under a common trade designation, or a new firm or product enters into an existing market. In the event that the Tribunal finds a restrictive practice has been pursued, it can enjoin such practice and issue supplementary orders requiring goods to be supplied to the injured party under normal terms and conditions. It may also order modifications of any patent, trademark or other similar rights that are involved in a restrictive practice.

II. ADMINISTRATION OF THE COMPETITION LAWS

Under the Combines Investigation Act, responsibility for enforcement of the provisions regarding unfair trade practices is divided among the Director, the Restrictive Trade Practices Commission and the courts.

Pursuant to Sections 7 and 8 of the Act, the Director is required to investigate instances of restrictive practices and to commence a formal inquiry whenever he has "reason to believe that an offense against the Act has been or is about to be committed." In practice, most such inquiries are initiated as a result of an informal complaint, a letter, or other source of information coming to the attention of the Director.⁷⁵ Furthermore, the statute permits any six Canadian citizens to instigate an investigative proceeding by addressing a formal application to the Director's attention. If the application has merit, the Minister of Justice may then instruct the Director to commence an inquiry. It is to be noted that the Director does not act as agent for the complainant in conducting an inquiry arising from a complaint, and he will not automatically effect the desired relief.

Although the proposed Competition Act changes the title of the Director to "Commissioner," his duties and powers would remain substantially unchanged. However, the Act would expand the role of the Commissioner by enabling him to provide businessmen with a more precise statement of the legal status of a proposed activity.⁷⁶ For

⁷⁵ It has been pointed out that

[T]he certainty of the prohibitions and the heavier reliance on civil procedures

example, if a company felt that a proposed activity might violate the Act, it could seek a registered exemption from the Competitive Practices Tribunal.⁷⁰ The Commissioner could, at the same time, give a precise indication of the conditions under which he would not oppose the application. In effect, the Competition Act would enable the Commissioner to place greater emphasis on prevention of contraventions through co-operation and consultation with businessmen, and also to settle actual cases through use of the consent order.⁷⁷

will enable the Commissioner to place more emphasis on assisting business in complying with the Act than is now possible. Under the existing Act the usefulness of discussions on proposed business activity is limited since branch officials cannot anticipate conclusively how the courts might rule and can thus only indicate whether or not the Director would commence an inquiry.

Explanatory Notes, *supra* note 42, at 35.

⁷⁰ The procedure of registration has been introduced into the proposed Act. As a general principle, all agreements restricting competition are prohibited. However, to provide "gateways" in cases where production, marketing or other agreements are beneficial in terms of greater efficiency, better resource allocation, and economies of scale, sections 27-31 contain provisions whereby such agreements can be registered with the Tribunal and gain exemption from the general prohibition of section 16.

Three types of registered agreements can be approved by the Tribunal according to the following criteria:

(a) Specialization Agreements—Pooling of production facilities is permitted under these agreements, so that a number of companies may agree to allocate production of various items among themselves for the purpose of achieving economies of scale from longer production runs or from some other concentration of effort in the area of manufacture or distribution. Bill C-256, 28th Parl., 3d Sess. § 27(6) (1971). In such cases the Tribunal must be satisfied that the resulting economies will lower retail costs significantly. Competition, as a result of the agreement, may be reduced significantly, and thus the Tribunal must be satisfied that a substantial part of the savings will be passed on to the public in the form of lower prices or better products. Furthermore, specialization agreements could also be approved where they are necessary to meet competition from imports, with the same requirement that savings be passed on to the public.

(b) Export Agreements—The Tribunal will accept and register export agreements if competition in Canada will not be adversely affected as a result of the agreement. Bill C-256, 28th Parl., 3d Sess. § 27(7) (1971). Again, even if the agreement has an adverse effect upon competition, it will still be approved if the Tribunal is satisfied that it will result in substantial gains for the participants, part of which will be passed on to the Canadian public in the form of lower prices or better products.

(c) Franchise Agreements—In accordance with the proposed Act, "franchise agreement" is defined as an arrangement whereby business is carried on by a group of independent businesses using a common trade name or symbol to achieve economies in operation or management. As soon as these agreements are filed with the Tribunal, they become exempt from Section 16 of the Act, unless they are challenged by the Commissioner. If the Commissioner seeks to show cause why a franchise registration should be cancelled the Tribunal must order a hearing. The Tribunal, following the hearing, may cancel the registration if it finds that the arrangement significantly restricts competition. Bill C-256, 28th Parl., 3d Sess. §§ 30-31 (1971).

⁷⁷ Explanatory Notes, *supra* note 42, at 36. To facilitate the speedy conclusion of issues before the Commissioner, if parties and the Tribunal are agreed, provision is made for the issuing of consent orders by the Tribunal. Bill C-256, 28th Parl., 3d Sess. § 62 (1971).

Current legislation provides that after the Director gathers all the pertinent information he may submit a statement to the Restrictive Trade Practices Commission if he believes that an offense contrary to a provision in Part V of the Act has been committed. The Restrictive Trade Practices Commission is not in any way comparable to the United States Federal Trade Commission. The Canadian Commission's function is merely to hear arguments and receive evidence relating to a particular alleged offense. After all such persons have had an opportunity to be heard, a report is drawn up. The Commission does not adjudicate issues, determine rights and liabilities or issue cease and desist orders, nor does it have the power to regulate industry. Its functions are limited to reviewing the evidence placed before it, appraising the effect of the proposed activity on the market and making recommendations as to the application of remedies under the Act. Of course, the public interest is a major consideration in arriving at such recommendations. Reports of the Commission are submitted to the Minister responsible under the Act and must be made public within thirty days after receipt by the Minister unless the Commission recommends against publication of the report.

Under the proposed Competition Act, the Restrictive Trade Practices Commission would disappear and be replaced by the Competitive Practices Tribunal. This would be the principal vehicle for administering provisions of the new Act relating to mergers, specialization and export agreements and trade practices. In addition, the Tribunal would provide a forum for the resolution of specific and general disputes relating to competition policy as defined in the Act. The responsibilities of the Tribunal would include seven main functions: 1) approval and review of application for registered export and specialization agreements, and receipt of registrations relating to franchise agreements;⁷⁸ 2) maintenance of a register of foreign and domestic mergers, and prohibition of such mergers or interlocking directorates as are found to be improper under criteria laid down in the Act relating to possible adverse effects on competition;⁷⁹ 3) receipt of evidence relating to contravention of those sections of the Act concerning price discrimination, promotional allowances, tied sales, directed selling, exclusive dealing or reciprocal buying, and issuance of orders prohibiting such trade practices when found in individual cases to be harmful to competition;⁸⁰ 4) conduct of hearing on its own initiative or upon request of the Minister to examine any matter within its jurisdiction and the subsequent publication of guidelines presenting the Tribunal's views on

⁷⁸ Bill C-256, 28th Parl., 3d Sess. §§ 27-31 (1971).

⁷⁹ Bill C-256, 28th Parl., 3d Sess. § 36 (1971).

⁸⁰ Bill C-256, 28th Parl., 3d Sess. §§ 37-42 (1971).

the matter examined for the information of the parties concerned;⁸¹ 5) drafting of advance rulings on the request of private parties or the Commissioner as to the Tribunal's position concerning a merger or proposed merger, or any other matter within its jurisdiction, such advance rulings to be binding on the Tribunal but not on the parties requesting the ruling;⁸² 6) conduct of general inquiries into any matter relevant to the objectives and policies of the Act, when they are requested by the Minister;⁸³ and 7) examination of foreign laws, decrees or government directives to ensure that they will not operate in Canada contrary to Canadian competition policy.⁸⁴

Although designated as a court of record,⁸⁵ the Tribunal would have no power to levy punishment. At the conclusion of any hearing, it can apply or recommend the following remedies: a) issue a prohibition order to prevent continuance of restrictive trade practice;⁸⁶ b) order one or more Canadian suppliers to deal with a businessman who was unable to obtain supplies due to a refusal to deal resulting from the non-competitive or monopolistic character of a market;⁸⁷ c) recommend to the cabinet that customs duties be removed, reduced or remitted to remedy a refusal to deal;⁸⁸ d) issue interim injunctions;⁸⁹ e) issue supplementary orders requiring individuals found in contravention of the provisions relating to restrictive practices to take certain actions to remedy the situations caused by the contravention;⁹⁰ f) forbid the implementation of foreign decrees or directives in Canada that would be harmful to competition or to Canadian trade and commerce;⁹¹ and g) modify rights relating to the use of patents, trademarks, copyrights and registered industrial designs if these contravene the Act.⁹²

The significant change wrought by the proposed legislation is that the Tribunal would be empowered to apply actual remedies and is not restricted to recommendations alone. Under present legislation the Commission can only recommend injunction, while under the proposed legislation, the Tribunal would have authority to issue interim injunctions. Additional affirmative powers given to the Tribunal indicate that it will be more than an advisory body.

Civil proceedings, whether brought by the Crown or by private

⁸¹ Bill C-256, 28th Parl., 3d Sess. § 44 (1971).

⁸² Bill C-256, 28th Parl., 3d Sess. § 45 (1971).

⁸³ Bill C-256, 28th Parl., 3d Sess. § 46 (1971).

⁸⁴ Bill C-256, 28th Parl., 3d Sess. §§ 49-50 (1971).

⁸⁵ Bill C-256, 28th Parl., 3d Sess. §§ 3-15 (1971).

⁸⁶ Bill C-256, 28th Parl., 3d Sess. § 37 (1971).

⁸⁷ Bill C-256, 28th Parl., 3d Sess. § 43 (1971).

⁸⁸ Bill C-256, 28th Parl., 3d Sess. § 43 (1971).

⁸⁹ Bill C-256, 28th Parl., 3d Sess. § 47 (1971).

⁹⁰ Bill C-256, 28th Parl., 3d Sess. § 48 (1971).

⁹¹ Bill C-256, 28th Parl., 3d Sess. §§ 49-50 (1971).

⁹² Bill C-256, 28th Parl., 3d Sess. § 51 (1971).

citizens are unavailable under current legislation. The only available remedy is through the Criminal Code. Following a report of the Restrictive Trade Practices Commission or a direct referral by the Director, the Attorney General may institute legal proceedings in the criminal courts if he deems such action necessary.

The Competition Act would change existing law in three ways. In certain instances it would allow the courts to order an offender to pay double damages to the person injured as a result of the offense.⁹³ Other sections of the proposed legislation permit the attorneys general of the various provinces as well as the Attorney General of Canada and the Minister of Consumer and Corporate Affairs to institute proceedings. In addition, six citizens, through an application to the Commissioner can cause the Minister to lay charges. Finally, penalties up to a maximum of one million dollars or two years in prison or both may be imposed for an indictable offense. The maximum penalty is increased to a fine of two million dollars or five years imprisonment or both.

Despite these three changes, conduct which is prohibited *per se* remains within the jurisdiction of the criminal courts. Similarly, procedures and rules of evidence remain the same as under the Combines Investigation Act. It is submitted that the Competition Act does not go far enough in changing the role of the courts. Providing for civil actions to be instituted directly by injured individuals would have circumvented the time consuming procedure of applying to the Commissioner and would have brought more pressure, through the fear of private litigation, to bear upon manufacturers who engage in deceptive and unfair trade practices.

CONCLUSION

The primary objective of the Combines Investigation Act has been the encouragement of economic efficiency. However, the myriad factors, in addition to competition policy, which affect the efficiency of a nation's economy make the success of this legislation in achieving its objective difficult to measure. On the other hand, the existing Act has served as a strong deterrent in three primary areas of prohibited business conduct—collusive price fixing, resale price maintenance, and misleading advertising. Nonetheless, in respect to mergers, which can have an important impact on economic efficiency, the present com-

⁹³ Bill C-256, 28th Parl., 3d Sess. § 80(1) (1971) provides:

Subject to subsection (2), a court that convicts an accused of an offence under section 73 or subsection 74(2) may, on application of any person who suffered loss or damage as a result of the act or neglect that gave rise to the conviction, at the time sentence is imposed, order the accused to pay to that person an amount equal to double the amount of the loss or damage proved to have been suffered by him.

business legislation has been all but inoperative. In view of these shortcomings, it has been recommended and proposed that competition policy in Canada be framed in terms that provide as much precision and certainty as possible while ensuring enough flexibility to permit the economic judgments of the marketplace to be brought to bear on the day-to-day decisions of businessmen. Unfortunately, however, it would seem that the proposed Act attempts to introduce a set of business ethics which is in direct contradiction with the concepts of a normally ethical businessman. Furthermore, the framing of the proposed legislation in concise but general language is of little use to a businessman who seeks to know whether a particular situation would be classified as having a "significant" restraint on competition. It would seem that even though the concept of "undueness" has been removed from the Act, the alternative phraseology in using the term "significant" does not create more precision and certainty in the legislative language. Furthermore, the formation of a Tribunal of seven individuals who would then be in a position to shape national policy in areas of great economic importance appears to be an excessive grant of power. In accordance with the proposed legislation, this quasi-judicial body will be able to determine whether, and to what extent, Canadian companies may grow larger by merger, may attain more efficient production or distribution by a cooperative effort, or engage in certain trade practices of questionable benefit to the public interest. As a result, it would appear that by establishing a Tribunal with such powers, many of the day-to-day business practices in Canada would be regulated by a detailed code of business ethics based on a highly theoretical view of competition policy. No doubt, there is a need for a tribunal which is better qualified to judge economic realities than the criminal courts. However, this need must be balanced against the questionable wisdom of creating a quasi-judicial body whose powers might greatly curtail business initiative.