

THE REGULATION OF PRICE DISCRIMINATION UNDER THE COMBINES INVESTIGATION ACT

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I. Introduction.

The Canadian law prohibiting price discrimination has received little academic and judicial comment. It is, however, of considerable practical importance to those called upon to advise businessmen on the legality of various pricing policies as well as to those concerned with planning economic policy.

There is little Canadian judicial authority in this area. There is, however, substantial American jurisprudence. The American legislation differs from the Canadian legislation in certain respects but is similar in others. Therefore, because American cases may well be persuasive in certain circumstances, as well as for purposes of comparison, reference will be made to American authority. In an attempt to lay down some guidelines, reference will also be made to the reports of the administrative bodies responsible for undertaking investigations and making recommendations: the annual *Reports* of the Director of Investigation and Research of the Combines Investigation Branch,¹ and the *Reports* of the Restrictive Trade Practices Commission.²

Sections 34(1)(a), (2), (3), and 35 of The Combines Investigation Act³ are the relevant statutory provisions relating to price discrimination. Section 34 was originally enacted as an amendment to the 1927 Criminal Code⁴ and transferred to The Combines Investigation Act in 1960 as section 33A.⁵

Section 35, originally enacted in 1960 as section 33B of The Combines Investigation Act,⁶ prohibits a specific category of price discrimination, that of granting disproportionate advertising and promotional allowances.

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¹ Hereinafter referred to as Reports of the Director.

² Hereinafter referred to as the R.T.P.C.

³ R.S.C., 1970, c. C-23.

⁴ S.C., 1935, c. 56, s. 9, re-enacted S.C., 1953-54, c. 51, s. 412.

⁵ S.C., 1960, c. 45.

⁶ *Ibid.*

Section 34(1)(c) prohibits predatory pricing. Section 34(1)(b), sometimes referred to as the "regional price discrimination" provision, really prohibits a more specific type of predatory pricing. A review of these subsections is beyond the scope of this article.⁷

At present the regulation of price discriminatory activity is carried out through the threat of criminal sanctions, the offence being an indictable one with a maximum penalty of two years imprisonment. Bill C-256⁸ would have changed the format of regulation from criminal prohibition to that of regulation by the so-called Competitive Practices Tribunal which would have had the authority to prohibit individual instances of price discrimination on a case-by-case basis. This proposal never reached fruition as Bill C-256 died on the order paper. Bill C-2 would maintain the essential criminal nature of the legislation, but would add the service sector within the scope of its prohibition. As of the date of writing, Bill C-2 has received second reading in the House of Commons.⁹ However, there may yet be further proposed changes, price discrimination being one of those areas of competition policy reserved for Phase Two of Amendments to The Combines Investigation Act.¹⁰

As of the date of writing, there have been no reported cases under section 34(1)(a), although there have been numerous complaints to the Director of Investigation and Research of the Combines Investigation Branch of the Department of Consumer and Corporate Affairs which have resulted in inquiries being undertaken by the Director in accordance with either section 7 or section 8 of the Act.¹¹ Most of the inquiries undertaken have

⁷ Predatory pricing refers to behaviour in which the effect or intent of a pricing policy is to discipline or eliminate a competitor of the firm engaging in that policy. S. 34(1)(c) contains the general prohibition of such pricing activity. S. 34(1)(b) prohibits differential pricing in different areas of Canada where the effect or intent is the same as in s. 34(1)(c). Only s. 34(1)(a) prohibits discriminatory pricing where the harm to competition occurs as a result of disfavoured purchasers being at a competitive disadvantage.

⁸ 3rd Sess., 28th Parliament, 1970-71.

⁹ 1st Sess., 30th Parliament, 1974. The bill has now been adopted as the Combines Investigation Amendment Act, S.C., 1974-75-76, c. 76.

¹⁰ News Release, May 29th, 1975, Department of Consumer and Corporate Affairs.

¹¹ S. 7 provides that any six persons may apply to the Director for an inquiry to be made when they are of the opinion that an offence under Part V has been or is about to be committed. S. 8 provides that the Director shall cause an inquiry to be made whenever a complaint under

been "discontinued" in conformity with section 14 of the Act,¹² because the evidence was either insufficient or "conflicting", or because a defence inherent in the legislation would have applied had the case gone to trial. Two prosecutions have been undertaken under section 35 resulting in one acquittal and one conviction.¹³ One order of prohibition has been successfully sought under section 30(2).¹⁴ In at least two cases the R.T.P.C. has recommended, on the basis of its findings, that further action be taken. However, the Attorney General's Department took no further action.¹⁵ In another case where a successful prosecution might possibly have been undertaken the inquiry by the Director was discontinued because the firm under investigation had, by the date of the inquiry, already changed its pricing policy to bring it into conformity with the Act.¹⁶

This dearth of Canadian jurisprudence and of prosecutions implies that there has been no serious attempt at enforcement, or that there is no harmful business activity in the nature of price discrimination presently being practised, or that there are serious flaws in the legislation as it presently stands, which effectively permit most instances of price discrimination. It is the thesis of this article that the legislation is ineffective in the goal of pro-

s. 7 has been launched, or when he himself is of the opinion that an offence under Part V has been or is about to be committed, or upon the direction of the Minister.

¹² S. 14 provides that the Director may discontinue an inquiry where he is of the opinion that the matter does not justify further inquiry; however, the written concurrence of the R.T.P.C. is required to discontinue an inquiry where a statement of evidence has been submitted to the Commission under s. 18.

¹³ See *R. v. William E. Coutts Co. Ltd* (1968), 67 D.L.R. (2d) 87 (includes trial and appeal judgments). Rubbermaid Canada Ltd pleaded guilty to five counts under s. 35 on Oct. 7th, 1974.

¹⁴ S. 30(2) provides for a procedure under which future conduct of the type complained of can be restrained without actually prosecuting. The prohibition order arose out of the Report of the R.T.P.C. Concerning the Distribution and Sale of Mary Maxim Knitting Wool, Patterns, and Accessories Thereof in Canada (1966). The Commission concluded that an instance of illegal price discrimination had occurred and recommended further proceedings be undertaken. The order of prohibition was granted on May 16th, 1968.

¹⁵ See Report of the R.T.P.C. Concerning the Distribution and Sale of Gasoline in the Toronto Area (Alleged Price Discrimination—The British American Oil Company Limited) (1961); the Report of the R.T.P.C. Concerning the Distribution and Sale of Gasoline in the Toronto Area (Supertest Petroleum Corporation Limited) (1961).

¹⁶ Inquiry into Household Cleaners, Report of the Director (1967), p. 59.

hibiting anti-competitive price discriminatory activity because of inherent defects in the legislation itself. An attempt will also be made to explore some of the legal problems that arise in any instance of price discriminatory activity, as well as to propose reforms. With this in mind, a detailed analysis of the legislation follows.

II. *The Discrimination in Price Must be Against Competitors of the Favoured Purchaser.*

Section 34(1)(a) reads:

Everyone 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.

The requirement that the discrimination in price, whether by way of "discount, rebate, allowance, price concession, or other advantage" must be against competitors of the favoured purchaser raises several implications.

The first is that any business entity selling to ultimate consumers at different prices cannot, by definition, come within the ambit of the section. This is so because no purchaser from such an entity is in competition with any other purchaser from the same entity, all purchasers being consumers, none being in the business of reselling the articles bought or of utilizing the articles bought in some business capacity. Being a competitor of the favoured purchaser necessarily implies being in business. Consumers are not. Thus, complaints against a retail chain that it is selling to inhabitants of a poorer part of a city at a higher price than it is selling in another part of the same city ought not to lead to prosecution under section 34(1)(a).¹⁷

¹⁷ Interestingly enough an inquiry along these lines was conducted by the Trade Practices Branch of the Director's Office in an attempt to substantiate allegations that supermarket chains were charging residents of lower income areas in the Metropolitan Vancouver area higher prices than those in upper income areas. The inquiry did not confirm the allegations. However, even if significant price differentials were found, the chains could not have been prosecuted under s. 34(1)(a). See Study on Alleged Discriminatory Pricing Practices by Supermarket Chains in Vancouver, Report of the Director (1973), p. 16.

Likewise, a wholesaler who sells to both retailers and directly to consumers does not come within the purview of the section merely because it sells to the retailers at lower prices. The reverse situation, in which a supplier provided bulk discounts to "customers who purchase gasoline for use in their own operations", which discounts were not available to dealers of the supplier, was the subject of an inquiry by the Director. However, because none of those benefiting were dealers in gasoline, they could not logically be regarded as competitors of those not given discounts. The inquiry was, therefore, discontinued.¹⁸

Difficult considerations arise in determining to what extent a supplier may discriminate in price among purchasers serving different economic functions, for instance, jobbers, wholesalers, retailers. The answer to this question ultimately depends on whether the purchasers are in fact competitors and whether the supplier has knowledge of this fact, since these are two constituent elements of the offence.

In many instances of functional discounts, the purchasers will not be in competition with each other. Wholesalers ordinarily do not compete with retailers and thus a discount granted to such a wholesaler which is not available to a retailer would not be an offence. However, the separation of economic functions is not always so clear-cut. "Retailers may operate as local, regional, or national chains, or as mail-order houses or department stores and they may perform wholesale as well as retail functions. It is when such 'retailers' are accepted as qualifying for a functional discount at a stage closer to the supplier and compete with unintegrated sellers — who do not qualify for the larger discount — at some later stage of distribution, that charges of 'unfair competition' are likely to be heard."¹⁹

Complaints of this type were considered in at least two inquiries. In one, the inquiry was discontinued²⁰ because it was found that the "volume discount" exemption applied.²¹ In the other inquiry,²² a manufacturer of wagons and tricycles sold to

¹⁸ Inquiry into Petroleum Products, Report of the Director (1962), p. 25. For an American authority along similar lines see *Secatore's, Inc. v. Esso Standard Oil Co.* (1959), 171 F. Supp. 665.

¹⁹ R.T.P.C. Report on Discriminatory Pricing Practices in the Grocery Trade (1958), p. 34.

²⁰ Gasoline — Sarnia, Report of the Director (1973), p. 63.

²¹ Volume discounts will be dealt with *infra*.

²² Inquiry into Bicycles and Tricycles — Alleged Predatory Pricing and Price Discrimination, Report of the Director (1964), p. 47.

a wholesaler at a lower price than it was selling to the retailer complainants. The wholesaler was associated with and sold exclusively to a supermarket chain so that the chain had a competitive advantage over the complainants. The Combines Branch came to the conclusion that, "... while the wholesaler was classified as a jobber by the manufacturer, such a label did not necessarily exclude it from being a purchaser in competition with the individual cycle dealers in a particular aspect of its dealings ...".²³ The inquiry was eventually discontinued on the grounds that the manufacturer was not aware of the wholesaler's exclusive dealing with its associated retail stores²⁴ and that the manufacturer was no longer selling directly to the independent cycle dealers.²⁵ This statement from the Director's Office is probably a correct statement of the law. In the above inquiry the discrimination was somewhat blatant since the wholesaler could almost be regarded as a corporate sham implemented by the chain to disguise direct selling to them.²⁶

It can be seen, therefore, that a supplier who knowingly sells to a "wholesaler-retailer" at a price less than that available to a retailer may run afoul of the prohibition against price discrimination if the wholesaler is in competition with the less favoured retailer. This is so because the basic ingredients of the offence will be present: a price differential among customers who are *prima facie* in competition with each other and the necessary *mens rea* on the part of the supplier.²⁷ There appears to be

²³ *Ibid.*, p. 48.

²⁴ The fact that the manufacturer's unawareness of the wholesaler's activities provided a complete defence to any prosecution under s. 34(1)(a) arises from the wording in the section that the sale must be one that "discriminates to his knowledge, directly or indirectly, against competitors of a purchaser ...".

²⁵ The manufacturer's ceasing to sell directly to the independent dealers does not, of course, provide a complete defence to any prosecution. It only means that any offence that has occurred in the past is no longer continuing.

²⁶ It would have been no defence to argue that because the wholesaler did not sell to the same individuals that the independent dealers sold to, the wholesaler was never in competition with the independent dealers. The establishment of a separate corporate entity to funnel goods to the chain only implies that there was no "direct" price discrimination. However, the section forbids discrimination in price that occurs "directly or indirectly". The additional words "or indirectly" in effect allows the corporate veil to be pierced in situations such as existed in the *Tricycle Inquiry*, *op. cit.*, footnote 22.

²⁷ This analysis assumes that the other possible defences are not available.

nothing in the section allowing a supplier, as of right, to sell to a wholesaler at a lower price than that offered to retailers. The section makes no mention of wholesalers or retailers; it merely states that the discrimination must be between competitors. The reason that in practice suppliers can sell to wholesalers at a price lower than that made available to retailers is that most wholesalers do not sell on a retail basis and are therefore not in competition with retail outlets.

As well, the volume discount exemption may be available to suppliers who sell in large quantities to wholesalers where such quantities cannot possibly be ordered by small retail customers of the supplier. This exemption, however, loses some of its efficacy where the discrimination is between a large retail chain and a large "retailer-wholesaler".

Given the assumption that a supplier who sells to both retailer-wholesalers and retailers can be guilty of price discrimination if he sells to the former at a lower price, is it any defence that the proportion of retail sales by the retailer-wholesaler amounts to only a small percentage of his total sales volume? This question arose in an American decision involving section 2(a) of The Clayton Act²⁸ as amended by The Robinson-Patman Act.²⁹ In *Universal-Rundle Corporation v. Federal Trade Commission*,³⁰ a supplier sold at two prices, a wholesaler's net price and a truck load price which was ten percent less. There was only one buyer getting the benefit of the ten per cent discount. It was found that any competition which did exist between a favoured and disfavoured purchaser was of the *de minimus* variety. The court held that "... the evidence must show a substantial degree of existing competition because it is irrational to presume that in a situation involving minimal or sporadic competition anything more than a remote lessening thereof could ever come to pass ...".³¹ This decision is in accord with commercial reality. However, in Canada the decision might have been different. Section 2(a) of The Clayton Act refers to a substantial lessening of competition and to the injury, destruction, and prevention of competition. Section 34(1)(a) of The Combines Investigation Act refers only to a discrimination between competitors; it contains no reference to harm to competition as such. Thus, a strict interpreta-

²⁸ 1914, 15 U.S.C. §13.

²⁹ 1936, 15 U.S.C. §13.

³⁰ (1967), 382 F. (2d) 285 (7th Cir.).

³¹ *Ibid.*, at p. 287.

tion of section 34(1)(a) could cover a discrimination in price involving only *de minimus* harm to competition in terms of the disfavoured purchaser's lost sales.

A closely related problem arises where the supplier sells to both a wholesaler and to a retailer who do not directly compete with each other, and where the retail customers of the wholesaler compete with the retailer to whom sales are directly made. In such a situation the competitive disadvantage to which the "indirect retailer" is put may be just as real as if the supplier had sold to the indirect retailers at higher prices directly. On the other hand, the reason for the competitive disadvantage may be more the wholesaler's pricing policy (or general inefficiency) than that of the supplier. American jurisprudence has dealt with this issue by treating the wholesaler and supplier as one distinct entity in regard to pricing (and thus selling directly to competitors of the direct retailers) if the supplier exerts the requisite amount of control over the wholesaler's resale prices.³²

There is one further issue in relation to functional discounts that remains to be considered. This is whether a price discrimination between purchasers who are serving different economic functions (and who are yet competitors) is justifiable solely on the grounds that the favoured purchaser incurs greater costs in relation to the goods. For example, a wholesaler or jobber may very well incur distribution or inventory costs which a retailer will not incur so that the discount received by a wholesaler will be eaten up by the extra costs and the disfavoured retailer will not be at a disadvantage. Such defence was raised in *Purolator Products Inc. v. Federal Trade Commission*³³ and rejected. This decision makes economic sense since to hold otherwise would, in effect, allow a supplier to subsidize inefficiency. However, where the extra costs incurred by a purchaser also represent actual economic savings to the supplier, it is arguable that there is no discrimination under section 34(1)(a), only a price differential. A supplier is surely entitled to sell at different prices where the price differential represents a difference in cost to the supplier.³⁴

³² For a discussion of the American position on this issue, see generally Aaronson, *The Disfavoured Indirect Purchaser Under the Robinson-Patman Act: Can the Small Businessman Survive?* (1974-75), 48 S. Cal. L. Rev. 899; Oppenheim and Weston, *The Lawyer's Robinson-Patman Act Source Book* (1971), pp. 33 *et seq.*

³³ (1965), 352 F. (2d) 874 (7th Cir.).

³⁴ Under s. 2(a) of The Clayton Act as amended by The Robinson-Patman Act, *supra*, footnotes 28-29, there is a specific cost justification

It can be concluded, therefore, that it is only necessary to determine whether the discrimination is between competitors rather than arbitrarily classifying the purchasers along functional lines. This analysis holds true in situations other than the wholesaler-retailer dichotomy. Thus, housing contractors may be competitors of normal retail outlets in the sale of electrical appliances and a grocery chain may be in competition with hardware stores in the sale of household cleaners.³⁵ This conclusion also seems to be in accord with American authority to the effect that:

... a seller is not forbidden to sell at different prices to buyers in different functional classes and orders have been issued permitting lower prices to one functional class as against another, provided that injury to commerce as contemplated in the law does not result. . . .³⁶

Excluded from the operation of section 34(1)(a) are those situations where a vertically integrated manufacturer-distributor sells at a price to independent distributors such that it can undercut the independent distributors at its own distributing level of operations. This, of course, is a classical example of a price squeeze. The independent distributors will be at the same competitive disadvantage as would exist had the supplier sold to them at a higher price than they were selling to their competitors. However, because the section requires a sale to a favoured purchaser not available to competitors of that purchaser, no prosecution under section 34(1)(a) will lie, there being no sale from one phase of the supplier's operation to the other. Conceivably a prosecution might lie under section 34(1)(c) for predatory pricing, particularly where the intent is to slowly force the independent distributors out of business as the supplier gradually expands its distributing level of operations. If the vertically integrated seller is integrated in economic terms, but there are in fact two separate corporate entities for the manufacturing and dis-

defence. No such defence is specifically included in s. 34(1)(a) of The Combines Investigation Act. Nevertheless, it is arguable that the word "discriminates" in s. 34(1)(a) connotes differential treatment of purchasers in respect of whom the supplier bears identical costs as opposed to differential treatment of purchasers in respect of whom the supplier bears differential costs. *Quaere*: Whether such "cost saving" allowances must reflect only the actual savings to the supplier and no more?

³⁵ This was the opinion of the Director's Office in *Inquiry into Large Electrical Appliances — Alleged Price Discrimination*, Report of the Director (1964), p. 49; *Inquiry into Price Discrimination — Household Cleaners*, Report of the Director (1967), p. 59. Both inquiries were discontinued for other reasons.

³⁶ *In the Matter of General Foods Corporation* (1956), 52 F.T.C. 798, at p. 824.

tributing level of operations, it is uncertain whether a prosecution under section 34(1)(a) may lie. It is certainly arguable that in the absence of an agency relationship between parent and subsidiary, there must by definition be a sale from the manufacturing entity to its related distributing subsidiary and as long as the invoice price entered on the books of the subsidiary is less than that available to competitors of the subsidiary, then section 34(1)(a) could operate.³⁷ In the United States, the courts have looked at substance rather than form and have held that a subsidiary distributor is not in fact a separate purchaser where the parent asserts significant control over the subsidiary even though there may be a technical sale of goods.³⁸

A closely analogous situation to the price squeeze example just postulated occurs where the supplier, instead of selling at different prices to different purchasers, markets the goods by way of consignment (either to both favoured and disfavoured purchasers or simply to one purchaser whom the supplier specifically seeks to favour or disfavour). Under such an operation, the supplier retains title to the goods until they are sold to the ultimate consumer. By selling the goods at retail at differential prices, he can achieve the same ends as he would have achieved had he engaged in direct price discrimination. The effects are that the dealer who was previously a disfavoured purchaser is now an agent who will make fewer sales and have fewer commissions than the more favoured agent since some of his sales will have been diverted to the more favoured agent in competition with him. This arises from the favoured agent's lower retail price. It is quite clear that the technique of selling to consumers at differential prices via consignment cannot be contrary to section 34(1)(a) since there is no "sale" to a favoured competitor (or in some circumstances no "sale" to a disfavoured purchaser), there being only an agency relationship. The ability to consign goods in this manner provides a convenient mechanism for favouring or punish-

³⁷ The example is a bit academic since the manufacturer could sell to its subsidiary at the same price that it sells to other distributors and require its subsidiary to price at a minimum or no markup. The effect of this would be to maintain the price squeeze and retain the profits in the parent corporation. However, a prosecution might in such circumstances lie against the subsidiary for predatory pricing under s. 34(1)(c), particularly if the subsidiary priced its goods at below its costs as recorded in its invoices.

³⁸ See *Reines Distributors, Inc. v. Admiral Corporation* (1966), 256 F. Supp. 581. In this case the court commented that there may be a remedy for the price squeeze under s. 2 of The Sherman Act, 1890, 15 U.S.C. §1, which prohibits monopolization and attempts thereat.

ing a particular dealer without running afoul of section 34(1)(a). In such circumstances the consignment of goods to dealers ought to be regarded as a colourable device cloaking price discrimination.³⁹ The implementation of price discrimination by consignment selling has been the subject of several inquiries, particularly in relation to the gasoline industry.⁴⁰ It is for this reason that in Bill C-2 a provision was inserted which will give the R.T.P.C. the authority to prohibit the practice of consignment selling when used by a supplier who ordinarily sells the product for resale, where the purpose of the practice is to implement either price discrimination or resale price maintenance.⁴¹ It is interesting to note that the use of consignment selling as an anti-competitive device has been considered by the American courts in various contexts. However, a satisfactory test for determining whether consignment selling in any given instance is serving a legitimate commercial function as opposed to being a colourable device to permit various restrictive practices has not been set forth.⁴²

The requirement that the discrimination must be between competitors causes evidentiary problems where the purchasers are territorially separated so that it is in fact uncertain whether there is any competition between them. This evidentiary problem was the central issue in two inquiries conducted by the Director's Office. In the first inquiry it was found that the gasoline companies were selling gasoline to dealers in the Niagara Falls area at lower prices than they were selling to dealers in the St. Catharines area. In order to determine whether the dealers in the two areas were competing with each other, the sales volume of the dealers in each area was examined over a nine month period to determine whether any diversion of sales had been caused by the price differentials. The evidence was found to be inconclusive and the inquiry was therefore discontinued.⁴³ In the second

³⁹ The technique of consignment selling can be used to effect resale price maintenance in the same manner and for the same reasons. See Report of the R.T.P.C. Relating to the Distribution and Sale of Gasoline in the City of Winnipeg and Elsewhere in the Province of Manitoba (1966).

⁴⁰ *Ibid.*, p. 17 and An Inquiry into Gasoline, Toronto, Report of the Director (1960), p. 27. The latter inquiry was discontinued for the very reason that what was complained of amounted to consignment selling.

⁴¹ This proposal is found in clause 12 of the Bill which would add a new s. 31.3.

⁴² See *United States v. General Electric Co.* (1926), 272 U.S. 476; *Simpson v. Union Oil Co.* (1964), 377 U.S. 13; *United States v. Arnold, Schwinn & Co.* (1967), 388 U.S. 365.

⁴³ Inquiry into Gasoline, Niagara Falls-St. Catharines Area, Report of the Director (1960), p. 25.

inquiry, also involving the sale of gasoline to dealers, the complainant, the disfavoured dealer, was located ten miles away from the favoured dealers. Traffic flows in the community were examined and it was found that "the general flow of traffic in the area was not between the location of the dealer in question, and other dealers obtaining gasoline from his supplier . . .".⁴⁴ The inquiry was therefore discontinued.

It can be seen then that one test for determining whether there is competition between geographically separate purchasers is whether there has been any diversion of sales caused by the price differential in question. Of course, in any given line of commerce, any dealer will in one sense be competitive with any other dealer, even if separated by large distances, if the difference in price is large enough. However, the section is not referring to potential competitors, but to competitors as of the date that the discrimination occurs. (Indeed, the section reads, ". . . that, at the *time* the articles are sold to such purchaser, is available . . .".) It should not be assumed, however, on the basis of the above inquiries that purchasers in different cities or areas are automatically non-competitors. This will depend on other factors such as the nature of the trade or industry, and whether any diversion has in fact occurred. For example, it is possible for wholesalers in cities 1,000 miles apart to be competitors if they are selling to the same retail customers. This "before and after" test must be applied very carefully. At best it is only an evidentiary tool. A change in market percentages might be attributable to factors other than one dealer having attracted customers of the disfavoured dealer, so that in fact there has been no diversion. Conversely, a finding that there has been little or no change in market percentages does not necessarily imply that there has been no diversion to the more favoured dealer. It might very well be the case that in the absence of price discrimination the disfavoured dealer's market share would have increased appreciably. In the latter case, there has in fact been a diversion, but it is not obvious.

The requirement that the price discrimination must be between competitors is consistent with the basic philosophy of

⁴⁴ Inquiry into Gasoline — Alleged Price Discrimination and Resale Price Maintenance, Report of the Director (1964), p. 51. For an interesting American case involving gasoline dealers 15 miles apart, see *The American Oil Co. v. Federal Trade Commission* (1963), 325 F. (2d) 101 (7th Cir.), cert. denied (1964), 377 U.S. 954. In this case a minor decrease in sales was found, but could not be attributed to the price differential.

The Combines Investigation Act. The policy behind the Act is that of protecting the interest of the public in free competition. If an instance of price discrimination between non-competitors is found, there may be an inequity, but it is axiomatic that there is no harm to competition.

The real problems in this area are ones of definition and evidence. It is not always easy to determine whether purchasers are competitors, and sometimes the decision will be an arbitrary one. Nevertheless, the requirement that the discrimination must be between competitors is justifiable.

Consignment selling does present difficult problems in that it can be and has been used as a colourable device to cloak price discrimination. The reforms proposed in Bill C-2 are therefore desirable.

III. *The Offence is that of Price Discrimination in Respect of a Sale of Articles of Like Quantity — the Volume Discount Exemption.*

It is not an offence under section 34(1)(a) for a seller to grant an allowance based on volume of sales as long as the same allowance or discount is available to competing purchasers should they wish to take advantage of the allowance by purchasing the same quantity. Of course, if the discount or allowance is granted only when purchasers buy very high volumes, there will be no way in which small buyers can take advantage of the volume discount even though the discount may be theoretically available to them. Such volume discounts may take two forms. The per unit price of each shipment may decrease depending on the quantity of goods in that shipment. This is the so-called straight "quantity discount". The other form which the volume discount may take is the granting of an allowance based on the quantity of goods purchased over a period of time. Such allowance may be paid to a buyer either in a lump sum rebate at the end of the period in question or interim allowances may be made with an adjustment at the end of the period. Discounts of the latter type are sometimes referred to as "cumulative discounts".⁴⁵ As long as these discounts are available to competing purchasers, there will be no offence.⁴⁶ Given the fact that volume discounts must

⁴⁵ *Op. cit.*, footnote 19, pp. 96, 97.

⁴⁶ See Henry, *Unfair Distribution and Pricing Practices* (1963), Law Soc. U.C. Lectures, p. 1, at p. 45.

be available to competitors of a favoured purchaser, will the seller satisfy the requirement of availability if he is merely willing to grant the same discount if so asked by a purchaser or must the supplier take active steps to announce ahead of time the volume discounts which he is offering? D.H.W. Henry, the former Director of Investigation and Research of the Combines Investigations Branch, has stated that such discount schemes must in fact be announced ahead of time "... so that all may have an opportunity of attaining the volumes that give rise to this concession".⁴⁷

In order to take advantage of the availability of discounts based on volume sales, small independent buyers may sometimes seek to combine for the purposes of buying in volume. The legality of such joint buying arrangements apparently depends on the legal characterization of the relationship between the supplier, the joint buying entity, and the independent buyers. If the joint buying entity buys as agent for the independent buyers, the buyers will be the recipients of a discount based, not on the total volume purchased by the joint buying agency, but on the volume which the independent buyer actually buys. If such discounts are not made available to competing purchasers buying from the supplier without the aid of the joint buying agency, an offence will have been committed. On the other hand, if the joint buying entity actually buys the goods and resells them to the independent buyers (as opposed to being a mere agent), the discount will be based on volume purchased by the joint buying entity and thus permissible under the legislation.⁴⁸

"Conditional discounts" present a special problem for the unwary supplier. Sometimes discounts are offered to buyers based upon the extent to which purchasers, in a given time period, exceed purchases in a prior time period. These are not truly volume discounts in that buyers purchasing the same volume in the same time period can receive differential discounts. They are thus illegal.⁴⁹

⁴⁷ *Ibid.*

⁴⁸ Henry, Notes for an Address to the Rotary Club of London, London, Ontario, April 12th, 1965, p. 11.

⁴⁹ Henry, Notes for an Address to the Annual Joint Meeting of the Etobicoke Industrial Association and Rexdale Association, Toronto, Ontario, February 20th, 1962, p. 4.

Numerous inquiries have been discontinued on the grounds that what was really involved was a volume discount permitted by the legislation.⁵⁰

The volume discount exemption allows purchasers with great market power, such as retail chains and department stores, to exact price concessions from the supplier which are not practically available to smaller purchasers. This will obviously give these larger purchasers a competitive advantage over smaller purchasers, be they independent retailers or small wholesalers, and may ultimately force the latter out of the market entirely, accelerating the trend towards increased concentration and oligopoly. Is this necessarily undesirable? The answer lies in the policy behind the legislation. The legislation was enacted precisely to prevent pricing wherein one purchaser derives an unfair advantage over a competitor. In the instance of price discrimination, this unfair advantage will most frequently occur in the instance of a purchaser with large market power, the very essence of this market power being its ability to buy larger amounts than those of competing purchasers. Thus, by enacting legislation prohibiting price discrimination and then exempting volume discounts, Parliament has effectively allowed those instances of price discrimination which will be the most frequent, of the longest duration, and of the greatest harm to competition.

This is not to say that all volume discounts should be prohibited. Where volume discounts are predicated on reduced costs of the supplier, a discount should be allowed, if it is in proportion to the reduced costs. Volume discounts based on real cost savings encourage more efficient channels of distribution in our economy. The fact that smaller and necessarily less efficient purchasers would ultimately be forced out of the market is not at all inconsistent with our competition policy. The ultimate goal of our competition policy ought to be to protect competition, not competitors.

However, the legislation as it presently stands exempts all volume discounts, whether based on cost savings or not. It is

⁵⁰ Inquiry into Lubricating Oils, Report of the Director (1961), p. 32; Inquiry into Plywood and Other Building Products, Report of the Director (1963), p. 37; Inquiry into Flour, Report of the Director (1965), p. 61; Inquiry into Gasoline, N.B., Report of the Director (1973), p. 63; Inquiry into Gasoline, Sarnia, Report of the Director (1973), p. 63. See also, the Report of the R.T.P.C. into the Distribution and Sale of Mary Maxim Knitting Wool, Patterns, and Accessories Thereof in Canada (1966), in which the Commission found an incentive plan giving volume rebates to the T. Eaton Co. Ltd to be non-discriminatory.

useful to compare the Canadian experience with that in the United States. In the United States quantity discounts not based on cost savings were banned in 1936.⁵¹ In a noted American case involving quantity discounts, Mr. Justice Black summarized the impact of the American legislation:⁵²

The legislative history of The Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale. . . .

On the issue of quantity discounts, Canadian legislative authorities could learn much from their American counterparts.

It is interesting to note that in 1960 The Combines Investigation Act was amended by adding what is now section 35.⁵³ The effect of this section is to prohibit allowances which a supplier may grant to a buyer for advertising or display services which the buyer provides unless the allowance is offered to competing purchasers on proportionate terms.⁵⁴ "Proportionate" is defined in terms of total sales volume, so that a smaller purchaser can take advantage of an advertising allowance and would thus not be at a competitive disadvantage.⁵⁵ The reason section 35 was added as a separate section is that such allowances for promotional or

⁵¹ Prior to 1936 quantity discounts whether based on cost savings or not were permissible in the United States. It became apparent that differences in quantities sold could almost always be raised as a successful defence. In the depression years of the 1930s, pressure from small retailers (particularly in the food trades) was put upon American legislative authorities which eventually culminated in the enactment of The Robinson-Patman Act of 1936, *supra*, footnote 29. In Canada prior to 1935, there was no price discrimination legislation of any sort. However, in the 1930s, similar pressures were mounting in Canada. Thus, largely as a result of the recommendations of the Royal Commission on Price Spreads, 1935, the present Canadian legislation was enacted. It should be noted, however, that the Commission acknowledged (at pp. 224-228) that quantity and other discounts unrelated to cost savings are unjustifiable. The legislation ultimately enacted, however, permitted quantity discounts to be offered whether cost justified or not.

⁵² *Federal Trade Commission v. Morton Salt Co.* (1948), 334 U.S. 37, at p. 43.

⁵³ *Supra*, footnote 5.

⁵⁴ See generally Bromstein, *Disproportionate Advertising Allowances in the United States and Canada* (1972), 4 C.P.R. (2d) 154.

⁵⁵ *Ibid.*, at p. 165.

advertising services are often not "in respect of a sale of articles", but are simply allowances for services rendered.⁵⁶ (Indeed, the way section 35 is worded, it cannot apply if the allowance is applied directly to the selling price.)

It can be seen then that section 35, which can only be regarded as supplementary to section 34(1)(a), prohibits the granting of advertising or promotional allowances which are a) collateral to a sale or sales of articles,⁵⁷ b) not applied directly to the selling price, and c) not available to competing purchasers on proportionate terms.

However, if the allowance, whether for promotional services or otherwise, is applied directly to the selling price, it does not have to be offered on proportionate terms to all competing purchasers, but can be based on volume sales which smaller purchasers cannot conceivably attain. This must be regarded as a remarkable inconsistency in The Combines Investigation Act. It is an unusual criminal prohibition which prohibits an individual from doing indirectly that which the law permits him to do directly.

IV. *The Discrimination Must be in Respect of Articles of Like Quality.*

In economic terms, price discrimination has been defined as occurring "whenever goods are sold at prices which differ from each other by more than long-run average costs".⁵⁸ Besides the obvious case of the same goods with the same cost base being sold at different prices, price discrimination may occur where different goods with different costs are sold at the same price, or when the same goods with different cost bases are sold at the same price.⁵⁹ However, any attempt to enforce a policy prohibiting price discrimination occurring other than in the instance of the same goods with the same cost base would impose an oppressive administrative burden on the investigative and law enforcement authorities.

Thus, the requirement that the discrimination must involve articles of like quality is patently sensible. Whether articles are

⁵⁶ *Op. cit.*, footnote 19, pp. 173-191.

⁵⁷ The requirement under s. 35 that the allowance must be collateral to a sale can be difficult to prove. In *R. v. William E. Coultts Co. Ltd.*, *supra*, footnote 13, a charge under s. 35 was dismissed because the allowance was not collateral to a sale even though the amount of the allowance was ascertained by the increase in sales.

⁵⁸ Kaysen and Turner, *Anti-Trust Policy* (1965), p. 179.

⁵⁹ *Ibid.*

of like quality will usually be a question of fact. However, one point of law undecided in Canada is whether sales of physically identical articles under different brand names at differential prices come within section 34(1)(a).

In *Federal Trade Commission v. Borden*,⁶⁰ the Supreme Court of the United States was faced with deciding whether milk sold under the manufacturer's own brand name was of "like grade and quality" to chemically identical milk sold at a lower price under private brand names. This question was decided in the affirmative. White J., delivering the majority judgment stated:⁶¹

If two products, physically identical but differently branded, are to be deemed of different grade because the seller regularly and successfully markets some quantity of both at different prices, the seller could, as far as s. 2(a) is concerned, make either product available to some customers and deny it to others, however discriminatory this might be and however damaging to competition. . . .

The seller, to escape the Act, would have only to succeed in selling some unspecified amount of each product to some unspecified portion of his customers, however large or small the price differential might be. The seller's pricing and branding policy, by being successful, would apparently validate itself by creating a difference in "grade" and thus taking itself beyond the purview of the Act.

Henry has suggested that in Canada the legal position might be that a manufacturer's brand and a private brand are not of like quality, whereas two different private brands are.⁶²

It is submitted that whether or not a private brand ought to be regarded as of the same quality as a national or manufacturer's brand depends not so much on an *a priori* classification but on the extent to which consumers prefer the national brand over the private brand. If it is found that consumer demand is such that the private brand can only be sold at a lower price, the effect of prohibiting such discounts will be to deprive the ultimate consumer of the choice of selecting the lower priced product. This does not serve the goals of competition policy, in fact the result is a lessening of competition. On the other hand, if consumers have no preference as between private and national brands, the granting of the discount will present the favoured private brand purchasers with an unfair competitive advantage, which by definition will not be offset by greater consumer preference

⁶⁰ (1966), 383 U.S. 637.

⁶¹ *Ibid.*, at pp. 644, 645.

⁶² *Op. cit.*, footnote 49, p. 3.

for the national brand. In the latter instance the granting of a discount to private brand buyers is really a device to conceal competitively harmful price discrimination.

It must be emphasized that this perplexing legal problem will not normally be of any consequence in Canada since most private brand purchasers will be large economic units purchasing in quantities which the smaller purchasers of the national brand cannot attain. Thus, the volume discount exemption would apply.⁶³

V. *Section 34(2) — The Discrimination Must Form Part of a Practice of Discriminating.*

Section 34(2) reads:

It is not an offence under paragraph (1)(a) to be a party or privy to, or assist in any sale mentioned therein unless the discount, rebate, allowance, price concession or other advantage was granted as part of a practice of discriminating as described in that paragraph.

The fact that there is no offence under section 34(1)(a) unless the advantage conferred was granted as part of a practice of discriminating, would seem to imply that a supplier could discriminate at least once since one sale does not constitute a practice. It is uncertain what number of sales must take place or over what length of time the discrimination must occur in order to constitute a practice.

A resolution of this issue will be necessary whenever a supplier gives one of its dealers faced with abnormal price competition, perhaps a price war, a temporary allowance not available to other competing purchasers. In the *British American Oil Inquiry*, the R.T.P.C. found a continuing allowance over a three-month period to be insufficient to constitute a practice of discriminating.⁶⁴ In the words of the Commission, "... the granting of such an allowance was not part of the normal pricing system of the Company and was clearly designed as a temporary expedient to enable a customer of the Company to meet an immediate and local competitive situation".⁶⁵ Henry has stated that "... meeting spot competition, giving a store-opening special, an anniversary

⁶³ See, for example, *Inquiry into Bicycles and Tricycles*, *op. cit.*, footnote 22.

⁶⁴ R.T.P.C. Report Concerning the Distribution and Sale of Gasoline in the Toronto Area (Alleged Price Discrimination — The British American Oil Company Limited) (1961).

⁶⁵ *Ibid.*, p. 29.

special or a stock clearance special, all of which might be described in trade terms as a 'one shot' effort, would not give rise to an inquiry under the Act".⁶⁶

This particular defence is open to criticism on two grounds. First, since it is unclear at what point in time a "temporary expedient" becomes permanent or when an abnormal pricing policy becomes normal, the application of the defence is quite uncertain. Since a breach of section 34(1)(a) is a criminal offence, specifying with sufficient clarity the kind of conduct prohibited is of paramount importance. Second, it is arguable that a supplier should not be allowed either a "one shot effort", or the excuse that he only discriminated in order to assist a dealer facing extreme price competition. The harm to unfavoured purchasers in terms of being at a competitive disadvantage will still be present. The ability to "spot price" may in fact be helpful to one dealer but it necessarily results in competing dealers being at a competitive disadvantage. But there may be more important reasons why "spot pricing" should be prohibited. These reasons have been well stated by the Supreme Court of the United States in *Federal Trade Commission v. Sun Oil Co.*⁶⁷ The facts of the case are similar to those in the *British American Oil Inquiry*.⁶⁸ Sun Oil granted an allowance to only one of its dealers in an area in order to make it easier for that dealer to compete with a Supertest dealer across the street, who had reduced his prices below normal. Sun Oil argued that not allowing it to spot price in such circumstances would encourage price rigidity and in fact be harmful to competition. This contention was not accepted by the court:⁶⁹

...we think that the contrary is the case. While allowance of the discriminatory price cut here may produce localized and temporary flexibility, it inevitably encourages maintenance of the long-range and generalized price rigidity which the discrimination in fact protects. So long as the wholesaler can meet challenges to its pricing structure by wholly local and individualized responses, it has no incentive to alter its overall pricing policy. Moreover, as indicated, the large supplier's ability to "spot price" will discourage the enterprising and resourceful retailer from seeking to initiate price reductions on his own....

While the analysis of the court in the *Sun Oil* case is plausible, Kaysen and Turner in assessing American policy see a

⁶⁶ *Op. cit.*, footnote 46, pp. 43-44.

⁶⁷ (1963), 371 U.S. 505.

⁶⁸ *Op. cit.*, footnote 64.

⁶⁹ *Supra*, footnote 67, per Mr. Justice Goldberg, at p. 523.

different inference that can be drawn from certain instances of discriminatory pricing,

. . . in imperfect markets, especially those with important oligopoly elements, price discrimination is often an indispensable element of price competition. Oligopolists may be willing to test the market by discriminatory price cuts, which they hope to keep secret for at least some time, when they are unwilling to make general changes in prices to which their rivals will immediately react. In such market, periods of "chiselling"—discriminatory price concessions—almost always precede downward price changes.⁷⁰

They conclude by recommending that discrimination against buyers ought to have occurred frequently, or for a period of more than one year or for two successive contract periods in order to constitute an offence.⁷¹

The essence of the problem can be summed up as follows. A prohibition of discriminatory pricing without regard to whether it constitutes a practice may lead to one of two consequences. It may result in the price discriminator simply not lowering prices at all to anybody. Such a result is admittedly undesirable. On the other hand, as was pointed out in the *Sun Oil* case, it may force an otherwise unwilling supplier to grant price concessions to everybody. There is no way of determining which is the more likely outcome. However, a continuing policy of price discrimination is clearly anti-competitive and is not likely to be accompanied by an overall price cut.

On balance, therefore, it can be concluded that the Canadian requirement of a practice of discrimination is justifiable in that it seeks to prohibit only those cases of price discrimination which are significantly anti-competitive. The major difficulty lies in the uncertainty inherent in the words "practice of discriminating". It would be in the interest of both the public and the business community if a definition of practice was spelled out in the Act along the lines of the recommendations of Kaysen and Turner.

VI. *The Service Industry.*

At present The Combines Investigation Act prohibits price discrimination only in respect of a sale of articles. "Article" is defined in section 2 of the Act as "an article or commodity that may be the subject of trade or commerce". This means that it is not illegal to discriminate in price between two purchasers of services.

⁷⁰ *Op. cit.*, footnote 58, pp. 179-180.

⁷¹ *Ibid.*, p. 186.

Admittedly most purchasers of services are consumers, not businessmen. Thus, in most instances of price discrimination relating to services, the "competing purchaser" requirement would not have been met in any event. However, a purchaser of a service may sometimes utilize that service in the carrying on of its business. To the extent that a competitor of that businessman is granted a price concession in respect of the same service not available to the disfavoured businessman, he will have a competitive advantage.

An example of price discrimination in the supply of services was investigated by the Combines Investigation Branch in an *Inquiry into Alleged Price Discrimination — Telephone Directory Covers*.⁷² A company was engaged in the business of soliciting merchants to place advertising on plastic telephone directory covers which they then distributed free of charge to the telephone subscribers. This same company offered a twenty-five per cent discount to certain customers while not offering it to the remaining customers. This inquiry was ultimately discontinued on the grounds that "... since the subject of sale was advertising space, there was no sale of an article within the meaning of section 2(a) of the Act".⁷³

Clause 16 of Bill C-2 would amend the present Act by substituting the word "products" where "articles" now appears. Clause 1 of the Bill defines "product" as including an article and a service; "service" is defined as a "service of any description whether industrial, trade, professional or otherwise". While extending the scope of the price discrimination provisions to cover the service industry, Bill C-2 would exempt from that extended coverage two categories of suppliers of services. Clause 16(2) would permit newspaper publishers and broadcasters to grant more favourable advertising rates to persons advertising a product for sale at specified premises than that charged to persons advertising a product for sale without reference to the premises at which their product may be obtained. The supposed rationale for this exemption, as outlined by the Consumer and Corporate Affairs Department, is that persons advertising a product for sale at a specified premises will normally be local advertisers whereas persons advertising a product for sale without reference to a place of business will be national advertisers; the former are said to

⁷² *Alleged Price Discrimination — Telephone Directory Covers*, Report of the Director (1962), p. 23.

⁷³ *Ibid.*, p. 24.

contain a news element which the latter do not have.⁷⁴ Clause 16(2) would also permit the granting of more favourable interest rates to some customers than to others where such rates are based on a reasonable assessment made in good faith of the comparative risks. There are thus two criteria which must be met in order for this latter exemption to apply: (1) the assessment must have been made in good faith, and (2) the assessment must be a reasonable one. It should be noted that this exemption would apply only to persons engaged in the business of lending money and not to suppliers who grant credit terms in the sale of various products. Thus, a vendor who grants credit in relation to the sale of goods or services at varying rates would come within the scope of the proposed new price discrimination section.

VII. *Buyer Liability.*

There remains to be considered the liability of a purchaser who negotiates more favourable treatment from his supplier than is available to competing disfavoured purchasers. Henry has speculated that a buyer may indeed be guilty of the offence,⁷⁵ but the point is as yet undecided.

The relevant statutory provisions are sections 21(1), 22(1), 422(a) of the Criminal Code.⁷⁶ Section 21(1) reads:

- Everyone is a party to an offence who
- (a) actually commits it,
 - (b) does or omits to do anything for the purpose of aiding any person to commit it, or
 - (c) abets any person in committing it.

Is then a buyer an actual perpetrator of an offence within the meaning of section 21(1)(a)? Section 34(1)(a) of The Combines Investigation Act reads in part:

- Everyone 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. . . .

The words "party or privy to, or assists in" imply that persons other than the actual vendor may be actual perpetrators of the offence. But this does not necessarily mean that these other persons include the purchaser. Indeed, it seems more likely that they

⁷⁴ Department of Consumer and Corporate Affairs, *Proposals for a New Competition Policy (1973)*, pp. 75, 76.

⁷⁵ *Op. cit.*, footnote 46, p. 45.

⁷⁶ R.S.C., 1970, c. C-34, as am.

were intended to render liable agents who while not being actual vendors themselves, do assist and facilitate particular sales transactions. This would seem to be a particularly appropriate interpretation when considering the liability of a corporate entity (the actual legal vendor) and of the executive or agent who actually negotiated the sale. Such interpretation is supported by the words ". . . against competitors of a purchaser of articles from *him* . . .", (that is, from the vendor). These words would seem to imply that only the vendor, parties assisting him, or his agent can be liable as actual perpetrators.

Can then the purchaser be liable as an aider or abettor or both under section 21(1)(b), (c) of the Criminal Code? Without more specific words indicating that such is the intent, it would be unjust if a purchaser could be liable as an aider or abettor to an offence, the substantive element of which is selling, not purchasing. In any event the necessary specific intent (knowing that other competing purchasers are not getting equivalent discounts or allowances) would have to be proved.

Section 422(a) of the Criminal Code raises an interesting possibility. Under that section an individual counselling, procuring, or inciting an offence which is not committed is liable to the same punishment as one who attempts to commit that offence. Conceivably, therefore, a purchaser who attempts to negotiate a better price than he knows his competitors are getting from the same supplier but who is unsuccessful in his attempts, could be liable for counselling a criminal offence under section 422(a).

Whatever the present liability of a purchaser in a transaction of this sort, changes in the law are necessary. First, no one should be liable for a criminal act unless there are clear words expressing such intention. Second, a buyer who negotiates a better price than that available to competing purchasers, and who knows that his price is lower, ought to be liable under the legislation. After all it is the buyer who is seeking to place himself in a more favourable competitive situation, not the seller. Presumably the seller would prefer not giving the buyer a discount or allowance; it is the buyer's market power which forces the supplier to grant this discount. The policy considerations behind making a buyer liable become all the more apparent where the buyer inserts a term in the contract of sale to the effect that the seller is not to give competing purchasers an equivalent discount.

VIII. *Conclusion and Proposals for Reform.*

It is important to stress the reasons why price discrimination merits legal control. Price discrimination, to the extent that it gives a favoured purchaser a competitive advantage over competing disfavoured purchasers, when such discrimination cannot be justified under basic economic criteria, is an unfair trade practice. As is the case with many unfair trade practices, it necessarily reflects some degree of market power in the supplier and in many cases substantial market power in the favoured purchasers. Price discrimination by a supplier may simply reflect an attempt by a firm with significant market power to maximize its profits at the expense of smaller customers. From another point of view, the same pricing behaviour represents an attempt by a firm to keep powerful purchasers as customers by the granting of discounts and allowances which competitive pressures do not force it to grant to smaller customers. The point is that price discrimination is rational economic behaviour and can be expected to be engaged in by powerful suppliers, subject only to whatever constraints are imposed by law. The short-run effects are to present the disfavoured and normally smaller purchaser with an immediate competitive disadvantage. Here, the primary goal as an end in itself, should be simply to deter what is an unfair competitive practice. The long-term effects, however, may be more far-reaching. Ultimately a point may be reached where it becomes impossible for smaller firms to stay in business, thus aggravating the central problem of excessive market power, and in circumstances in which there may be no justification for such increased concentration in terms of increased real distributional efficiencies. It is therefore essential that those instances of price discrimination which cause significant anti-competitive effects be proscribed or at the very least regulated in some manner.

However, regulation is complicated by the fact that certain instances of price discrimination may not only have very little or no anti-competitive effects, but may on balance even be beneficial to competition. As has been pointed out already, most instances of price discrimination beneficial to competition will be engaged in by an oligopolist shaving his prices secretly on a random basis, in order to prevent his competitors from responding. In such circumstances price discrimination may be the only form of competition that is feasible in that market. Because it will necessarily be engaged in on a random basis, there will not normally be any long-term competitive disadvantages.

This then is a central dilemma in competition policy: how to deter competitively harmful price discriminatory behaviour while at the same time encouraging, or at least not discouraging, beneficial instances of price discrimination. There are three distinct approaches to this problem that can be adopted:

- (1) Direct regulation of pricing behaviour.
- (2) A "case-by-case" approach in which price discrimination is not illegal but in which a board or tribunal may after a hearing issue an order against a particular firm prohibiting a particular practice. Normally there will be statutory guidelines as well as statutory defences.
- (3) Criminal prohibition of price discrimination with appropriate exemptions for those instances of benign price discrimination. This represents the present state of the law.

While Bill C-2 retains, with minor modifications, the criminal prohibition against price discrimination, the government will be reviewing the practice of price discrimination under its so-called Phase Two of its review of competition policy. Therefore, an evaluation of the three approaches is desirable.

Direct regulation of pricing behaviour is an efficacious method for protecting the public interest, already extensively utilized in regulating certain natural monopolies. However, to adopt it for all business activity (as would be necessary to adequately prevent price discrimination) would require a political consensus on economic and social philosophy which is not yet present in Canada. Indeed, such a solution would dispense with the need for all anti-trust laws. Realism dictates that direct regulation of pricing policies be reserved for those areas presently regarded as being outside the "market sector" of our economy.

The only realistic policy options left are the "case-by-case" and "criminal prohibition" approaches. The "case-by-case" approach was proposed in Bill C-256 to regulate price discrimination (as well as certain other trade practices). Under Bill C-256 price discrimination would not have been illegal *per se*; instead a civil tribunal would have been given the discretion to prohibit any firm from engaging in price discrimination once a hearing had taken place. As well, there would have been no fewer than twelve statutory defences. The primary utility in this "case-by-case" approach lies in its flexibility. Not all instances of price discrimination are regulated or prohibited by what are perceived to be the same rigid rule-oriented criteria. Instead a detailed investigation of such factors as market concentration, past

economic behaviour, likelihood of repetition, and any beneficial effects can be undertaken by the administrative authorities. A decision can be made based upon whether the beneficial effects of the behaviour in question outweigh the anti-competitive effects. At the same time if it is found necessary to prohibit an instance of price discrimination, it can be done without proscribing the behaviour generally or even market wide. It is only the pricing behaviour of one firm which need be regulated by order of a tribunal.

While it appears to be an ideal economic solution, the "case-by-case" approach can be criticized on two grounds. First, it imposes a considerable administrative cost. In order to be at all effective, surveillance and investigation would have to be carried out over a wide range of markets, if only to determine whether price discrimination is occurring, not to mention the necessity of analyzing the extent and effects of the behaviour in question. As well, the economic costs of the adversarial hearing itself must be considered. The second and more important criticism is that the anti-competitive behaviour in question, if ultimately prohibited, would be so prohibited only after significant competitive harm had occurred. The behaviour in question would be illegal only after an order had been issued. Given the time necessary for surveillance, investigation and the hearing before a tribunal, it is not unrealistic to expect that a period of years could elapse from the time price discrimination was first engaged in until the order was finally issued. Since conduct would be illegal only if it violated an order of the tribunal, the deterrent effect on firms not subject to such an order would be nil.

Given these disadvantages, the regulation of price discriminatory behaviour on a "case-by-case" basis by a civil tribunal ought only to be adopted if outright prohibition (with appropriate exemptions) fails to adequately fulfill the goals of our competition policy.

This depends upon whether those instances of harmful price discrimination can be accurately defined and prohibited while at the same time exempting price discriminatory behaviour which is actually beneficial to competition, and whether the prohibition and exemptions can be defined with sufficient clarity so that firms subject to the law can plan their pricing policies without inadvertently running afoul of the legislation.

It is submitted that price discrimination is not the type of business practice that requires a "case-by-case" approach. Most

cases of continuing price discrimination between competing purchasers are, where the discrimination is not predicated on cost savings to the supplier, anti-competitive. Those cases of price discrimination which represent a form of competition in what would otherwise be a relatively non-competitive market can be and are at present exempted from the basic prohibition by the requirement that in order to constitute an offence, the discrimination must form part of a "practice of discriminating". I can only conclude that any future governmental proposals to revive the approach set forth in Bill C-256 would be a step backward.

While the policy of criminal prohibition which exists in the present legislation is preferable to delegating decision-making power to a civil tribunal, it must be emphasized that even the most cursory review of investigations undertaken by the Combines Branch and the R.T.P.C. reveals that the present legislation has not deterred most competitively harmful forms of price discrimination. The reason for this is undoubtedly the blanket volume discount exemption. The present exemption of volume discounts without regard to whether such discounts are justified by actual cost savings to the supplier, effectively places the small businessman at a competitive disadvantage in circumstances where the small businessman may be as efficient as the larger buyer. Therefore, any future reviews of competition policy ought to give serious consideration to deleting the volume discount exemption as it presently exists. Indeed, it can be concluded that as long as the volume discount exemption is maintained in its present form, the prohibition of harmful price discrimination will be an exercise in futility.

In addition to the deletion of the volume discount exemption, the present legislation can be made more precise in three respects:

- (1) It ought to be made clear that a buyer who knowingly seeks and acquires a discriminatory allowance is liable to the same criminal sanctions as the supplier.
- (2) What constitutes a "practice of discriminating" should be defined in terms of length of time, and numbers of sales and contract periods.
- (3) An exemption ought to be enacted so that it is clear that a supplier is permitted to grant discounts or allowances where such discounts are predicated on actual cost savings to the supplier. Since the accused has the best access to its own economic data, the burden of proof ought to be on the accused, except in the case

of a prosecution of a buyer (who obviously will not have the same access to cost data of his supplier).

An appraisal of Bill C-2 leads to the conclusion that the proposals contained therein are warranted. Certainly the proposal to include the service industry within the ambit of the present legislation removes an anomalous and unjustifiable exemption. Likewise granting a discretion to the R.T.P.C. to prohibit consignment selling where utilized as a colourable device to implement price discrimination is a worthwhile proposal. Nevertheless, both proposals will be of cosmetic value only as long as the volume discount exemption is retained in its present form.⁷⁷

⁷⁷ Since the writing of this article, Bill C-2 as ultimately enacted did not extend the coverage of s. 34(1)(a) to include the service industry. *Supra*, footnote 9.