THE APPRAISAL OF DISCRIMINATORY TRADE PRACTICES BY THE CANADIAN RESTRICTIVE TRADE PRACTICES COMMISSION

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SCOPE AND CONTENTS:

The Restrictive Trade Practices Commission exists in Canada to provide an objective appraisal of the effects of particular practices on the public interest, divorced from the actual procedure of prosecution under the Combines Investigation Act. The work examines from the Commission's published reports the appraisal by the Commission of discriminatory trade practices.

The history of the legislation and the development of the Restrictive Trade Practices Commission are discussed, to indicate the Commission's terms of reference. A chapter is then devoted to an economic analysis of discriminatory practices, and its conclusions are used to criticise strongly the Commission's appraisal of such practices.

Preface

The allocation of federal and provincial areas of jurisdiction in Canada is such that the protection of the Canadian public from unfair and restrictive trade practices cannot be maintained through an administrative board or tribunal,[1] but must instead be accomplished through a body of prohibitive federal legislation, which is criminal in nature. The Restrictive Trade Practices Commission has, however, been developed to allow an objective appraisal of restrictive practices divorced from the procedure of prosecution. It can be contended that the Commission's appraisals are not objective, not divorced from the procedure of prosecution, and fail to protect the public interest in an expert fashion. The present study examines one particular sphere of the Commission's work; the appraisal of discriminatory trade practices.

The first two chapters describe the provisions of Canadian anti-combines legislation and the evolution of the functions of investigation and appraisal of restrictive practices, to indicate the Commission's terms of reference.

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1. See pp. 12 - 14 below.

Chapter 3 then provides a description of the main types of discriminatory trade practices, and indicates the effects which these may be expected to have on economic performance. After a short introduction to the reports of the Restrictive Trade Practices Commission in Chapter 4, the final chapter analyses the Commission's reports specifically concerning discriminatory practices, and criticises the basis for appraisal which emerges from these.

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Contents

CHAPTER 1

Legislation concerning discriminatory trade practices in Canada

Canadian restrictive trade practices legislation originated as early as 1889, when an Act of Parliament was passed "to declare the law relating to conspiracies and combinations formed in restraint of trade and to provide penalties for violation of the same."[1] This Act passed into the Criminal Code in 1892,[2] and from there into the Combines Investigation Act in 1960,[3] but the wording remained substantially the same. The relevant section of the present Combines Investigation Act

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1. S.C. (1889), c.41, Preamble.

2. In 1892 the 1889 Act was repealed and its provisions became section 520 of the newly-formed Criminal Code. In subsequent renumbering the section became s.498 (1) in 1906, and s.411(1) in 1954.

3. From 1910 to 1919, and from 1923 to 1960 the Criminal Code and the Combines Investigation Act both prohibited combinations in restraint of trade (for an account of the development of the Combines Investigation Act see Chapter 2 below.) In 1935 it was provided by S.C. (1935), c.54, s.28 that no person should be charged under both the Code and the Act in proceedings arising out of the same situation. However, the Act still overlapped the Code to a considerable extent, and so in an attempt to consolidate the combines legislation s.411 of the Code was transferred into the Act in 1960, as s.32 of the Combines Investigation Act, R.S.C. (1952), c.314, as amended by S.C. (1960), c.45.

reads as follows:

> '32. (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 any 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.'

This section contains what has remained the key provision of Canadian combines legislation since its inception: the prohibition of agreements which restrict competition unduly. While the imprecision of the words "competition" and "unduly" poses an immediate problem in interpreting this section, the emphasis of the section is on the act of combination by businessmen. Thus discriminatory practices were not specifically condemned by the original legislation, being strictly illegal only if they involved both the undue prevention or lessening of competition, and, more importantly, a conspiracy, combination or agreement. At the time of the original enactment in 1889, growing public concern over the existence of industrial combinations and trusts had prompted an investigation . . .

by a House of Commons Committee.[1] The Committee had indicated the harmful effects of a number of these combinations, and the legislation was intended specifically to curb this form of activity.

However, the depression years brought an awareness of the vulnerability of small business units relative to large organised units in the face of deflation. The latter appeared able to maintain and even strengthen market positions, while the former went to the wall, complaining bitterly of unfair advantages gained by their stronger rivals. Accordingly, an investigation into competitive practices was conducted in 1934-5 by the Royal Commission on Price Spreads. The Commission, being particularly concerned with employment and wage levels, considered the public welfare by regarding all individuals in their capacities as producers, rather than as consumers. Hence the public interest was considered harmed if individuals were harmed by becoming unemployed or by receiving lower incomes. Much of the Commission's concern was with practices in the distributive trades where it was felt that the mass (oligopsonistic) buyer could use his size and bargaining power to exact unfair advantages in trade, forcing producers to accept lower prices whilst maintaining prices to consumers.

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1. Select Committee appointed February 29, 1888, to investigate and report upon alleged combinations in manufacture, trade and insurance in Canada. A 750-page report was submitted by the Chairman of the Committee, N.C.Wallace, M.P., on May 16, 1888.

"In summary the complaints against the mass buyer can be classified under two heads:-

(a) That they have depressed the prices of manufactured goods and of agricultural produce ... That they are responsible, through depressing prices, for the sweat-shop conditions existing in certain industries.
(b) That they are driving the independent retailers to the wall and that these dependents should be protected for the following reasons:-
- (1) They constitute a valuable social group which communities cannot afford to have wiped out.
- (2) They can defend themselves from "fair" but not from "unfair" competition.
- (3) Their elimination will result in growth of monopoly in the retail field." 1

The Commission's Report duly included among its recommendations the prohibition of certain practices not encompassed by the existing legislation. However, despite the fact that the Commission was considering discriminatory advantages mainly of the type gained by the mass buyer, the recommendation was in a much more general form:

"We feel that certain practices which we have examined should very definitely be considered "unfair" under the Act. They are so widespread and generally condemned that their complete prohibition ... is justified. We refer specifically to -

- (1) discriminatory discounts, rebates and allowances
- (2) territorial price discrimination and predatory pricing." 2

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1. <u>Report of the Royal Commission on Price Spreads, Ottawa: King's Printer, 1935</u>, p. 224.

2. <u>Ibid</u>., p. 270.

The recommendation was carried into effect in this general form in 1935 by the addition to the Criminal Code of a new section 498A. The section essentially followed the Commission's recommendation in prohibiting three types of practice:

(a) discrimination between competitors buying similar quantities of the same goods at the same time,

(b) geographical discrimination substantially lessening competition or eliminating a competitor,

(c) predatory pricing substantially lessening competition or elimaniting a competitor.

The section then remained unchanged, and more importantly, unused, as no proceedings were instituted under it, until 1952. In 1950 the House of Commons appointed a committee to study combines legislation, under J.H. MacQuarrie of the Supreme Court of Nova Scotia. In a broad survey of combines administration the committee considered the section of the Criminal Code relating to discriminatory practices. As a result of representations received, the committee was led to state:

"We are of the opinion that paragraph (a) clause (a) above is defective in being directed against a single transaction and that what should be forbidden is rather a course of action. This would allow a supplier freedom to meet spot competition while forbidding him to make it a practice to descriminate among his customers. We, therefore, recommend that paragraph (a) be redrawn so as to make it clear that it is directed against a practice and not against a single transaction." 1

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1. Report of the Committee to Study Combines Legislation, Ottawa: Queen's Printer, 1952, p. 39.

The committee's justification for this statement is not clear from the Report,[1] nor did it emerge from the debate of the Report in the House of Commons.[2] The committee merely states that "representations" proposed that suppliers be allowed to meet spot competition by meeting the price of a competitor. In fact, neither the committee nor the House were particularly concerned over this recommendation, as others of the committee's proposals were far more revolutionary, and therefore stole the attention. Nevertheless, the legislation was amended to allow for this qualification.

Section 498A of the Criminal Code was renumbered section 412 in 1954, and in 1960 was transferred bodily into the Combines Investigation Act as section 33A, which constitutes the main part of the present legislation on discriminatory practices. The section reads as follows:

> "33A. (1) Every one engaged in 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;
> (b) engages in a policy of selling articles in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in such part of Canada, or designed to have such effect; or

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1. Ibid., pp. 8-9.
2. See House of Commons Debates, 1952, pp. 3111-19, 3130-47.

> (c) engages in a policy of selling articles at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have such effect, is guilty of an indictable offence and is liable to imprisonment for two years.
> (2) It is not an offence under paragraph (a) of subsection (1) to be a party to 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..." 1

A further section 33B was added to the legislation in 1960, prohibiting the granting of disproportionate promotional or advertising allowances to competing purchasers, filling what was felt to be a loophole in the existing legislation.

It can be seen that subsection (1) (a) of section 33A is particularly sweeping, literally prohibiting participation in any discriminating sale, without even the usual tempering condition that competition must be unduly restricted. Its inclusion in the legislation was intended by the Royal Commission on Price Spreads to curb the power of the mass buyer to exact discriminatory concessions from weak suppliers, whereas subsections (1) (b) and (1) (c) were aimed at discrimination by sellers. However, this is not apparent from the wording of subsection (1) (a), and the scope of its influence would thus appear to be extremely wide. Even subsections (1) (b) and (1) (c) would seem to be less vigorously qualified than are the prohibitions of combinations in section 32 (1) of the Act, requiring only that the practices have the "effect or tendency"

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1. Combines Investigation Act, R.S.C. (1952), c. 314, as amended by S.C. (1960), c. 45, s. 33A.

of substantially lessening competition, as opposed to restricting competition "unduly" as specified in s.32(1). However, it must also be noted that subsections(1)(b) and (1)(c) perpetuate the protection of the "pigmies of unorganised, small-scale, competitive enterprise" from the "giants of monopoly and imperfect competition"[1], by their prohibition of the relevant practices if they have "the effect or tendency of eliminating a competitor."

In summary, the legislative prohibition of discriminatory practices has remained virtually unchanged since 1935, and would appear extremely potent relative to the other provisions of Canadian combines legislation. Essentially, the law states that it is a criminal offence in Canada to grant or receive discriminatory advantages in the sale of any article; whatever the intentions of the legislators, the letter of the law would seem extremely uncompromising.

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1. Report of the Royal Commission on Price Spreads, op. cit. p.8.

CHAPTER 2

The development of the functions of investigation and appraisal of restrictive trade practices.

Though combinations in restraint of trade were prohibited by the Act of 1889, it was not until 1910 that machinery was created for their investigation. It had been found in proceedings under the Act that evidence was particularly difficult to compile, and so a specific procedure and agency was provided for this purpose by the Combines Investigation Act of 1910. This Act supplemented the Criminal Code provisions in prohibiting combinations, mergers, trusts or monopolies which operated "to the detriment of consumers or producers",[1] and provided for their investigation. Any six citizens could apply for a court order directing that an investigation be held, and if this was obtained, the Minister of Labour was required to appoint a board of three commissioners to conduct the investigation. The board had wide powers to order the appearance of witnesses and documents, and to prepare a report of its findings and recommend required remedies. If the board considered that the combination contravened the provisions of the Criminal Code or the Act, it became an indictable offence to continue the activity.

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1. Combines Investigation Act, S.C. (1910), c.9,s.2.(c).

However, the most important sanction against combines activity was felt to be the distribution of the facts of the case to the general public. Accordingly, the board's reports were to be published in the Canada Gazette and to be readily available to the press.

However, this machinery proved most ineffective, being handicapped both by the lack of a permanent investigatory agency and by the reluctance of private citizens to undertake the lengthy and costly business of setting the procedure in motion. Partly to remedy this situation, but mainly as a by-product of an attempt to directly control inflation, a permanent Board of Commerce was set up by an Act of 1919, charged with the administration of the Combines and Fair Prices Act of that year, which included the functions of investigation and appraisal of alleged combinations. The Board, consisting of three Commissioners, was able to begin investigations whenever it felt that the public interest was being injured, without necessarily receiving a complaint. After investigation, the Board was empowered to order the cessation of practices which it considered illegal under the Act. Furthermore, the Board could inquire into, and if necessary, prohibit, any practice of gaining excess profits.

The powers of the Board were therefore extremely potent compared to the earlier combines investigation machinery, but the Board was very short-lived. The constititutional validity of the powers of the Board was called into question in 1920, and in 1921 the Privy Council declared the legislation _ultra vires_ of the Federal Parliament.[1] It was felt that the Board's power to decide individual cases on its own initiative, rather then simply applying some general principles of legality or illegality laid down by Parliament, amounted to control of property and civil rights, which are the responsibility of the individual Provinces under the British North America Act. The 1919 Act therefore ceased to exist, and the Board of Commerce was dissolved.

New machinery for the administration of the combines legislation was therefore necessary, to provide some sanction against combinations, but without the arbitrary degree of initiative in decisions allowed to the Board of Commerce. The Combines Investigation Act of 1923 duly created a new agency of investigation and appraisal, to be distinct from the penalising agency. A permanent Registrar was appointed, who could begin investigations on his own initiative. If, after preliminary inquiry, he felt that a thorough investigation was warranted, a Special Commissioner would be appointed to carry this out and prepare a report, which was required to be published after reaching the Minister. Unlike the Commissioners under the 1919 Act, the Special Commissioner was required merely to appraise the effects of the practices considered, from the evidence and hearings before him,

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1. _Reference re The Board of Commerce Act etc._ (1922), A.C., 191.

without making an administrative decision to end the practice. This could only be achieved by a decision of the court in any judicial proceedings which might follow the publication of the Commissioner's report. Such powers as the Commissioner possessed were found to be within the powers of the Federal Parliament to endow, in a constitutional reference to the Privy Council.[1]

However, a further attempt at an administrative tribunal was made, when, on the recommendation of the Royal Commission on Price Spreads, the Dominion Trade and Industry Commission was created by the Dominion Trade and Industry Commission Act of 1935. The Commission was charged with the administration of the Combines Investigation Act, and was not only empowered to direct investigations into alleged combinations, but could in fact sanction industrial agreements if it was felt that these were necessary to prevent "wasteful or demoralising competition",[2] and no prosecution could then take place. The Commission was also for the first time to consider "unfair" trade practices, and to hold industrial conferences to discuss group practices, but again the Commission was given the power to decide whether the practices should cease. True to form, the administrative discretion

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1. Proprietary Article Trade Association v. Attorney General for Canada (1931), A.C., 310.

2. Dominion Trade and Industry Commission Act, S.C. (1935), c.59. s.14(1)

allowed by the Act was subjected to a constitutional reference, and was declared to be beyond the power of the Federal Parliament to bestow.[1] The main innovation of the Act was thus eliminated, and the Act was subsequently repealed.

Again faced with the problem of reorganising combines administration, Parliament returned in 1937 broadly to the policy of the 1923 Act. The Registrar was replaced by a single permanent Commissioner, with a greatly extended role of investigation. As under the 1923 Act, investigations could be begun on the application of six citizens or upon ministerial direction, requiring the Commissioner to make a preliminary inquiry and an assessment of whether a full investigation was necessary. However, whereas the 1923 Act provided for the appointment of _ad hoc_ Special Commissioners to conduct such full investigations, the 1937 legislation[2] invested this duty also in the office of permanent Commissioner. Special Commissioners could still be appointed, but to supplement rather than supplant the Commissioner. Armed with extensive powers to command the appearance of documents and witnesses, the Commissioner would view the evidence and have counsel prepare a brief of allegations, if any. The parties concerned would then be allowed a further hearing before the Commissioner, who would finally review the evidence and

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1. _Reference re Dominion Trade and Industry Commission Act (1936), S.C.R. 379._
2. _Combines Investigation Act Amendment Act, S.C. (1937), c.23._

produce a report. An administrative pronouncement of guilt could not be made in the report, but the Commissioner could indicate his opinion of whether an offence has been committed, based on the facts at his disposal. Publication of the report was mandatory, and the decision to prosecute rested with the Minister.

It is apparent that the amended legislation gave the Commissioner very great powers with respect to the investigation of restrictive practices. An amendment in 1946 also returned to the Commissioner the power to begin inquiries on his own initiative,[1] allowing him therefore to conduct the investigation from start to finish, with a great deal of discretion over the course it took. In fact pressure increased to reduce the Commissioner's initiative, and finally in 1949, the Commissioner, Mr. F. A. McGregor, resigned after his report on an alleged combine in the flour-milling industry[2] had not been published ten months after it had been received by the Minister of Justice.[3] Apparently strong

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1. A power held by the Registrar between 1923 and 1937.
2. The report was presented to the Minister in December 1948, and was finally published in late 1949: Commissioner, Combines Investigation Act, <u>Report of an alleged combine in the flour-milling industry</u>, Ottawa: King's Printer, 1949.
3. The administration of the combines legislation was transferred in 1949 from the Ministry of Labour to the Ministry of Justice.

elements in the Government were determined to limit the effectiveness of combines legislation:

> "I have in mind such proposals as those to eliminate the commissioner's initiative in launching inquiries, to place serious limitations on the requirement that reports be made public, and to provide for exemption, after prior approval, of certain types of agreements to restrict production or eliminate price competition".[1]

The argument over Mr. McGregor's resignation, and consequently over the Government's conviction in its administration of the combines legislation, was silenced by the appointment of the Committee to Study Combines Legislation (MacQuarrie Committee) in June 1950. The Committee was apparently impressed by the many representations received claiming that the Commissioner's reports tended to be merely the first stage in prosecution, and that as he was responsible for both investigation and appraisal of trade practices, he had become "at one and the same time prosecutor and judge."[2] The Committee presented arguments to indicate that the Commissioner could not adequately conduct both investigation and appraisal, and also that these roles were somewhat inconsistent.[3] Furthermore, the Committee proposed that a further function be added to the administration of combines legislation, that of research into monopolistic conditions, to build a store of information and experience of market situations conducive

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1. From a memorandum by Mr. McGregor attached to his letter of resignation, Oct. 29, 1949, quoted in House of Commons Debates, Second Session, 1949, p. 1516.
2. MacQuarrie Report, op. cit., pp. 29-30.
3. Ibid.

to restrictive practices.[1] The Committee therefore recommended the creation of two new agencies of administration: the first to be charged with both general research and specific investigation, and the second to be responsible for the subsequent appraisal of restrictive practices.

The MacQuarrie Report was honoured by important legislative changes regarding the investigation and appraisal of restrictive practices in 1952,[2] among which was included the separation of the functions of the office of Commissioner.[3] Despite subsequent amendments to combines legislation, the functions and procedure of investigation today remain those of the 1952 legislation. The responsibility for investigation of restrictive practices was vested in the Director of Investigation and Research, while the task of appraisal was to be carried out by a separate agency, the Restrictive Trade Practices Commission. The Director inherited the Commissioner's function and initiative of beginning an investigation on the formal application of six citizens, on direction by the Minister, or "whenever he has reason to believe" that an offence has been or will be committed. Having gathered the necessary verbal and written information, if the Director considers an offence to have been committed,

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1. In fact this was not altogether a novel suggestion; an amendment in 1946 to the 1937 Act had given the Commissioner the power "to compile information and make studies concerning the existence in Canada of monopolistic conditions." S.C. (1946), c.44, s.3.
2. Combines Investigation Act, R.S.C. (1952), c.314.
3. Ibid., ss. 5-28.

he submits a statement of evidence, together with his allegations, to the Restrictive Trade Practices Commission, and to the persons against whom the allegations are directed. Essentially, the Director's role in the process ends here, although he may be called upon to present further evidence at a later time. Though the MacQuarrie Committee recommendation that a research agency be initiated was nominally implemented by the new section 42 of the Act, in fact the proposed separate research department within the Director's office was not included in the legislation, and the function of research was almost eclipsed by that of investigation.

The restrictive Trade Practices Commission was to consist of not more than three members, appointed for a ten-year term by the Governor in Council, and eligible for re-appointment. The Commission to some extent supervises the investigation stage of the procedure, in that all powers of search for and seizure of evidence, and also of discontinuing inquiries, rest with the Commission, and the Director is obliged to the Commission for written orders granting him such powers. However, the main function of the Commission is the appraisal of the Director's allegations and findings. On receipt of the Director's Statement of Evidence, the Commission fixes a time and place at which to hear arguments and receive evidence from or on behalf of any person against whom allegations have been made. Once such persons have been given full opportunity to be hear, the Commission is required to prepare a report; explicitly:

> "19. (1) The Commission shall as soon as possible after the conclusion of proceedings taken under section 18, make a report in writing and without delay transmit it to the Minister; such report shall review the evidence and material, appraise the effect on the public interest of arrangements and practices disclosed in the evidence, and contain recommendations as to the application of remedies provided in this Act or other remedies." [1]

The report is required to be published within thirty days of its receipt by the Minister concerned,[2] unless the Commission considers that "the public interest would be better served by witholding publication", in which case the Minister decides whether the report shall be published. After discussing the content of the report with counsel, the decision of whether or not to prosecute is made by the Minister.

The 1952 legislation therefore freed the task of appraisal from that of investigation, the hearing before the Commission being strictly to aid the Commission's appraisal of the practices as specified in the Director's Statement of Evidence. However, the new legislation did much more than that: it also liberated the task of appraisal from its strict relevance to the existing law. Although, as shown above, the prohibition (or legal sanction) of restrictive practices by

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1. Ibid., s.19. (1).
2. After 1945 combines administration was the responsibility of the Minister of Justice, but was transferred to the Dept. of the Registrar General on October 1st., 1966, and from there to the Dept. of Consumer and Corporate Affairs on December 21, 1967.

an administrative board is considered unconstitutional in Canada, at the same time all of the agencies charged with appraising practices before 1952 were directed to give at least an opinion of whether an offence had been committed. Thus while the Board of Commerce of the 1919 Act and the Dominion Trade and Industry Commission of the 1935 Act were deemed to have been assigned powers unconstitutionally, still in 1937 the Amendment Act empowered the Commissioner to remit any evidence to the Attorney General of a Province to begin prosecution, "whenever in the opinion of the Commissioner an offence has been committed against any of the provisions of the act."[1] The Commissioner was still therefore required to view the investigation as a search for contraventions of the Act, and to appraise the practices in terms of their legality or illegality. The activity of the Commissioner was very similar to that of a police agency: initiating the inquiry, collecting the evidence (often by seizure), and himself writing the report, together with allegations and supporting evidence. True, if the Commissioner believed an offence to have been committed the case was necessarily passed on to the courts for prosecution, but by that stage much of the case for the prosecution was complete, and in fact published and generally available.

The Restrictive Trade Practices Commission, on the

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1. Combines Investigation Act, S.C. (1937), c.23, s.12. (1).

other hand, was created not only as a separate appraising agency, but was also given very significantly different powers of report. The law specifically states that the report shall appraise the "effect on the public interest", of the practice concerned, with no mention being required of the Commission's opinion of the legality of the practices. Neither was this change accidental, having been strongly supported by the MacQuarrie Committee:

> "There has been some tendency for the report to become merely a preliminary stage in prosecution. This tendency should be checked. The report should review the evidence, set out the facts of the conditions or practices complained of and inform the Minister and the public as to how, in its opinion, the practices worked. Nothing that is helpful in understanding the conditions or practices or will contribute to the maintenance of competition and the lessening of monopoly should be excluded from the report. It should reach conclusions on whether or not competition has been restricted or lessened and whether in the opinion of the board the conditions or practices have operated or are likely to operate to the detriment of the public. The board should not, however, be required or expected to determine specifically whether or not, in its opinion, an offence has been committed.
>
> We do not think the report should recommend prosecution or non-prosecution. This should be left to the Minister's decision on the basis of the report and such advice as he may seek. We consider that the report has important functions other than that of furnishing a preliminary verdict as to whether or not the accused shall be prosecuted." 1

Unfortunately, the significance of this amendment was overlooked by the House of Commons in their somewhat

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1. MacQuarrie Report, op. cit., p. 34.

perfunctory debate of the Bill for amendment and their concurrence must be presumed.[1]

When sponsoring the Combines Investigation Bill in 1923, Mr. Mackenzie King proposed:

> "...there are certain classes of offences, those particularly which relate to social and economic conditions, which publicity is infinitely more effective to prevent and to redress than penalty... What is the power of the criminal code to prosecute some particular person or group of persons in comparison with spreading broadcast through the land accurate and true information with regard to a situation which is inimical to the public interest..." [2]

The writing and publication of reports on alleged restrictive trade practices maintain their traditional significance in combines administration to this day. The MacQuarrie Committee not only endorsed Mr. Mackenzie King's beliefs, but in fact proposed that the scope of the report might be widened and its significance strengthened.[3] Though this belief in the power of informed public opinion may be extremely optimistic, the fact remains that the reports are potentially very significant through their ability to educate not only the public, but perhaps more importantly the judiciary, in the appraisal of restrictive practices. In this, the Restrictive Trade Practices Commission is in a unique position in the history of Canadian combines administration. The Commission has the power, and the duty, to consider not the legality or

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1. House of Commons Debates, 1952, pp. 2815-26, 3111-19, 3130-47, 3255.
2. Ibid., 1923, pp. 2603-05.
3. MacQuarrie Report, op. cit., p. 34.

illegality of restrictive practices, but their effect on the public interest. Given the traditional dedication of the anti-combines machinery to establishing the existence of offences against the legislation, the appraisal of practices by the Commission allows the only opportunity for objective analysis of the practices by the economist.

CHAPTER 3

An analysis of discriminatory practices.

An apparent contradiction in Canadian combines legislation is that, while purporting to support "free and open competition",[1] the law at the same time forbids certain seemingly competitive practices. The businessman may find himself being condemned for cutting his prices in some of his markets, or even for pricing his goods "unreasonably low."[2] Such practices, at first glance being apparently indications of vigorous competition, may be condemned as being "discriminatory" and therefore "unfair", and perhaps prohibited by law. We must examine the basis for the definition and condemnation of practices as "discriminatory."

It must be stressed that this attempt to define discrimination is for purposes of clarification only. It is not to be argued that this discrimination is necessarily "good" or bad." In fact it will be shown that different types of discrimination may be expected to have different

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1. Report of the Director of Investigation and Research, Combines Investigation Act, for the year ended March 31, 1967, Ottawa: Queen's Printer, 1967, p. 7. The Director is required to produce an annual report of proceedings under the Combines Investigation Act; cited hereafter as Director's Annual Reports.
2. Combines Investigation Act, s.33A. (1)(c).

economic consequences, which may be judged good or bad according to criteria of economic performance. Discrimination has remained undefined in the legislation, but the definition employed below has been accepted in the literature of economics.[1]

Discrimination occurs in a transaction if the seller in some way grants concessions to one buyer or a group of buyers, over and above those granted to other buyers. However, a differential in absolute price or service need not necessarily involve a concession, nor need exactly the same price and service to all customers preclude discrimination. For a concession to be made to one buyer, the seller must receive less profit on the units concerned than he would receive on those same units from a non-preferred buyer. Discrimination therefore occurs when buyers receive differential treatment in relation to product quality and service, unrelated to the differences in cost to the seller of providing such quality and service. Thus a seller discriminates when he charges different prices or grants different allowances for different units of an identical good with identical marginal costs. However, discrimination also

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1. See for example, J.S. Bain, Price Theory, New York: Henry Holt & Company, 1952, pp. 400-401; G. J. Stigler, The Theory of Price, New York: The MacMillan Company, 1961, pp. 214-15; A. R. Oxenfeldt, Industrial Pricing and Market Practices, New York: Prentice-Hall, Inc., 1951, p. 233

occurs when a seller charges identical prices for different units of a physically identical good with different marginal costs.[1] An absolute difference in price or service to different buyers need not exist for discrimination to occur; discrimination occurs whenever differences in marginal costs are not reflected in proportionate differences in price and service.

Furthermore, when considering sellers producing more than one good, we may distinguish not only discrimination among buyers of the same good, but also discrimination among buyers of the different goods. Often similar goods can be produced by one manufacturer, sharing the same production facilities, and therefore incurring joint costs, but even if the goods are produced by quite different processes, the seller may be said to discriminate if he takes a lower percentage mark-up on one good than on another.[2]

Nor need discrimination be described solely in terms of actions by the seller. The balance of power among buyers may be such that one buyer or group of buyers is able to exact

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1. See M.S. Massel, Competition and Monopoly: Legal and Economic Issues, Washington, D.C.: The Brookings Institution, 1962, pp. 172-73, on legal and economic definitions of price discrimination.

2. See E.W. Clemens, "Price Discrimination and the Multiple-Product Firm", Review of Economic Studies, v.19(1) (1950-51), pp. 1-11; F. Machlup, "Characteristics and Types of Price Discrimination", in National Bureau of Economic Research, Business Concentration and Price Policy, Princeton: Princeton University Press, 1955, pp. 398-99; and C.D. Edwards, The Price Discrimination Law, Washington, D.C.: The Brookings Institution, 1959, p. 3.

discriminatory concessions from a particular seller.[1] In fact, it will be recalled[2] that recognition of the power of the mass (oligopsonistic) buyer contributed greatly to the agitation for legislative prohibition of price discrimination in Canada.

Discrimination need not manifest itself through price, but "price discrimination" may be discussed as being typical of discriminatory practices. Allowances against regular price may be granted by a seller for bulk shipments, advertising and promotion programmes, handling and storage by the buyer; the seller may himself pay the costs of transporting his goods to geographically-separated markets without charging correspondingly differing prices; or the seller may grant different qualities of service: all may involve concessions to some customers relative to other customers, and all may be discriminatory. The value of such allowances and service qualities to the seller could all be translated into differences in his price, thus it seems legitimate to consider price discrimination as representative of discriminatory practices generally, and this will be done in much of the following description and analysis.

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1. Machlup goes so far as to mention "buyer discrimination", occuring when "buying...at prices disproportionate to the marginal productivities of the factors bought... ." While defining a form of discrimination in buying intermediate goods or factors, such a definition does not relate to discriminatory concessions exacted by buyers of final goods. See Machlup, <u>op. cit.</u>, pp. 398-99.

2. Chapter 1 above.

Price discrimination and perfect competition vs. "workable" competition.

Economists in the Pigovian tradition viewed price discrimination as being evidence of the exercise of monopoly power, and therefore as evidence of misallocation of resources.[1] For discrimination to take place, market imperfections must exist, preventing the movement of buyers from the dearer to the cheaper market, and preventing the entry of new sellers into the higher-priced market. In perfectly-competitive static equilibrium the individual exercise of rational choice competes away excess profits, driving prices everywhere down to the level of marginal costs; prices paid therfore reflect the opportunity costs of the resources concerned, and resources are allocated optimally. The profit-maximising monopolist, on the other hand, prices his product at more than marginal cost, thus restricting his output below that which would obtain if the industry were perfectly-competitive, and using too few resources relative to less monopolised industries. The power to discriminate emerges only with imperfectly-competitive market structures, and is thus evidence of the existence of a misallocation of resources relative to the perfectly-competitive situation.

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1. See A.C. Pigou's comparison of discriminating monopoly and "simple" competition: The Economics of Welfare, 4th. ed., London: MacMillan and Co., 1952, pp. 275-90.

It has long been recognised[1] that price discrimination may provide a means of gaining an unfair advantage over competitive rivals. At the level of the seller, it may be possible for a time or in one geographical region of operations to sell goods at a loss, supported by accumulated profits, in order to intimidate or remove a competitor; at the level of the buyer, by threatening to withdraw his custom, it may be possible for a major buyer to obtain a price concession relative to other buyers. However, the analysis of price discrimination developed with the theory of monopolistic competition, and tended rather to ignore the collusive or coercive aspects of the practice. Instead the analysis concentrated on building precise models to depict the pricing policy of a single-good firm in an imperfect market, faced with the ability to separate its market into groups, each having differing price elasticities of demand in the single-price situation. The firm will then increase its profits by charging higher prices to the groups with lower demand elasticities, and lower prices to the groups with higher demand elasticities. The motivation for discrimination in this classic Robinsonian analysis[2] is purely

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1. See for example Alfred Marshall, Industry and Trade, London: Macmillan and Co., 1919, pp. 521-22.
2. J. Robinson, The Economics of Imperfect Competition, London: MacMillan and Co., 1964, pp. 179-202

profit maximisation, and its condemnation rested not in the practice being somehow "unfair" but in its inherent misallocation of resources relative to the perfectly competitive situation.

However, such an argument provides a basis for condemning all systems of markets other than that in which the relationship between price and marginal cost is one of equality, while the typical modern industrial economy consists of markets exhibiting varying degrees of monopolistic and monopsonistic competition. In this situation, trade practices must be examined, not with respect to some unattainable ideal system of resource allocation, but with respect to the "best attainable" system. Unfortunately, this "best attainable" system has successfully eluded most economists. Recognising that "perfect" competition is unattainable, economists have attempted to define some system of "workable" or "effective" competition.[1] However, the concept of workable competition has been defined in several different ways by different authors. In fact there appears to be a conflict over what is being defined: whether workable competition is intended to be a system designed to achieve the best possible allocation of resources given the imperfections of the market, or whether the term is used to

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1. The term "workable competition" was coined by J.M.Clark in an article, "Towards a Concept of Workable Competition", American Economic Review, v.30 (1940), pp. 241-56.

describe a politically feasible system. Thus Corwin D. Edwards considers workable competition to exist when the following conditions are satisfied:

> "1. There must be an appreciable number of sources of supply and an appreciable number of potential customers for substantially the same product or service. Suppliers and customers do not need to be so numerous that each trader is entirely without individual influence, but their number be great enough that persons on the other side of the market may readily turn away from any particular trader and may find a variety of other alternatives.
> 2. No trader must be so powerful as to be able to coerce his rivals, nor so large that the remaining traders lack the capacity to take over at least a substantial portion of his trade.
> 3. Traders must be responsive to incentives of profit and loss: that is, they must not be so large, so diversified, so devoted to political rather than commercial purposes, so subsidized, or otherwise so unconcerned with results in a particular market, that their policies are not affected by ordinary commercial incentives arising out of that market.
> 4. Matters of commercial policy must be decided by each trader separately without agreement with his rivals.
> 5. New traders must have an opportunity to enter the market without handicap other than that which is automatically created by the fact that others are already well established there.
> 6. Access by traders on one side of the market to those on the other side of the market must be unimpaired except by obstacles not deliberately introduced, such as distance or ignorance of the available alternatives.
> 7. There must be no substantial preferential status within the market for any important trader or group of traders on the basis of law, politics or commercial alliances." 1

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1. C.D. Edwards, Maintaining Competition: requisites of a governmental policy, New York: McGraw Hill Co., 1949, pp. 9-10.

The major emphasis of such a description of workable competition is on the availability of a considerable number of producers of closely related products, operating free from collusion or coercion,[1] and therefore contributing a prescription for both structure and conduct in the market. Survival of an individual firm in such a situation depends on efficiency, and the system is therefore expected to achieve the best attainable allocation of resources. The system may be seen however to relate little more to the typical structure and conduct pattern of modern industry than does perfect competition. Freedom of entry and lack of coercive power are not normally attained in the real world, and nothing short of governmental demolition of existing oligopolistic structures would permit them. Government intervention could perhaps rebuild the economy to conform to Edward's definition, but the question must necessarily arise of the extent of politically acceptable government control.

Much of the literature concerning "workable competition" makes the assumption, as does Edwards, that there is no limit to the extent of government intervention. Workable competition may then be defined as an ideal state, but may be no more attainable than perfect competition. J. Markham in his attempt to define workable competition states:

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1. See corroboration from G.J. Stigler, "The Extent and Bases of Monopoly", American Economic Review, v. 32, Suppl. (1942), pp. 2-3.

> "An industry may be judged to be workably competitive when, after the structural characteristics of its market and the dynamic forces that shaped them have been thoroughly examined, there is no clearly indicated change that can be effected through public policy measures that would result in greater social gains than social losses." 1

By stating: "no clearly indicated change that can be effected through public policy measures" Markham is defining workable competition as an ideal state. For practical purposes, what is workably competitive is the best politically feasible system. It is refreshing therefore to find G.W. Stocking describing workable competition as "a term economists give to that rather ill-defined market situation that is socially acceptable. It is the best available and it is good enough."[2] Though evading the problem of specifically defining workable competition, this statement makes a great contribution in recognising that whether competition is deemed workable depends on the extent to which intervention in private enterprise is permitted. The whole question of workable competition is inextricably enmeshed with the acceptibility of anti-combines policy. A particular arrangement or practice must be appraised, not in relation to some ideal

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1. J.W. Markham, "An Alternative Approach to the Concept of Workable Competition", American Economic Review, v. 30 (1940), pp. 349-61, reprinted in R.B. Heflebower and G.W. Stocking, eds., Readings in Industrial Organisation and Public Policy, Homewood, Ill.: Richard D. Irwin, Inc., 1958, p. 94.

2. G.W. Stocking, Workable Competition and Antitrust Policy, Nashville, Tenn.: Vanderbilt University Press, 1961, p. 242.

pattern of market structure and conduct, but in relation to the best attainable pattern, given the limits to public intervention. An absolute standard cannot therefore be set up, and what is involved is "a consideration of whether a different structure of the market and set of business practices ... will be better, in some sense, than existing structure and practices."[1]

Relating this to the problem of discriminatory practices, condemnation of these must rest not on a comparison of such practices with an ideal price structure, but on a comparison with a price structure feasibly attainable. For example, consider a firm which absorbs freight costs from the factory to sell its (identical) product at a uniform price across the continent, thus discriminating against customers nearer the point of production. The argument may be proposed that if the firm is able to absorb freight costs to distant areas, it is able to cut its price in nearer areas, until the discrimination is removed. However, the prohibition of discrimination in this case may persuade the firm to withdraw into its local market instead of cutting its price. It is to this alternative that the discriminatory practice must be compared.[2]

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1. E.S. Mason, "The Current Status of the Monopoly Problem in the United States", Harvard Law Review, v. 62 (1949), pp. 1268-85, reprinted in the Heflebower and Stocking, op. cit., p. 392.

2. A similar emphasis is placed on the relevance of the alternative situation in the case of appraising mergers, by P.L. Cook and R. Cohen, Effects of Mergers, London: George Allen and Unwin, 1958, pp. 11-12.

Aspects of economic performance to be considered.

The question now arises of the dimensions of economic performance which discriminatory practices may be expected to affect. The major dimensions to be considered are the allocation of resources between uses, the productive efficiency of individual firms, and the distribution of income. The effects of discrimination on competition must be analysed with respect to these dimensions of performance.

The allocation of resources

A Paretian, of first-best, optimum allocation of resources requires the satisfaction of such rigid conditions that its achievement has been recognised to be impossible, at least in a sophisticated industrial economy. On the other hand, a "second-best" optimum allocation is considered unattainable due to a lack of knowledge of the relevant variables and a lack of precision of available techniques to implement public policy.[1] The most to be hoped for must then be some imperfect attempt at the achievement of a second-best optimum, and Mishan has shown that this world of the "third best" is not as gloomy as might be expected.[2] Accepting Mishan's conclusions, it can be said that in an economy with widely varying market structures, the allocation of resources

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1. R.G. Lipsey and K. Lancaster, "The General Theory of Second Best", Review of Economic Studies, v. 24(1) (1956) pp. 11-32.

2. E.J. Mishan, "Second Thoughts on Second Best", Oxford Economic Papers, 1962 (oct.) pp. 205-17.

will be distorted, the industries with higher price-marginal cost ratios being underallocated relative to those with lower price-marginal cost ratios. Then returning to discrimination, it can be seen that discrimination allowing an increase in industry output may either improve or worsen the allocation of resources, depending on whether the industry was previously under- or over-allocated.

Also, the situation is further complicated by the fact that discrimination produces differing price-marginal cost ratios for the same good. Now the allocation of resources if further distorted, the sub-markets with higher price-marginal cost ratios being under-allocated relative to those with lower price-marginal cost ratios.[1] This is particularly important when the good in question is an intermediate good used in different industries - the distortion then being further transmitted through the system by the promotion of one use of the good as opposed to another.[2]

Productive efficiency

The efficiency of an individual firm depends on both the short-run consideration of whether existing capacity is being optimally utilised, and on the longer-run consideration

1. See J. Robinson, op. cit., p. 206
2. See the examples cited by A.R. Burns, "The Anti-Trust Laws and the Regulation of Price Competition", reprinted in American Economic Association, Readings in the Social Control of Industry, Philadelphia: The Blakiston Company, 1949, pp. 198-99.

of the relationship of the existing scale of production to the optimum scale.

If technological conditions are such that the firm's productive capacity is not fully utilised, the firm will reap additional profits as long as the extra production is sold at a price greater than its marginal cost. Consideration of this situation led J.M. Clark to propose that, "Discrimination is the secret of efficiency",[1] recognising that discrimination may be <u>necessary</u> to achieve capacity utilisation, the necessary demand not being forthcoming under the uniform-price, profit-maximising policy.

The longer-run problem involves the impac of discrimination on the achievement of an optimal scale of operations - not merely on the utilisation of the existing scale, but on the achievement of a combination of factors which comprise the minimum point on the firm's long-run average cost curve. The consideration is therefore whether the possibility of discriminating provides the firm with a greater incentive to expand operations to the optimum scale. Mrs. Robinson considered that discrimination will tend to increase output,[2] but whether with existing or expanded plant remains undetermined. Presumably the existence of economies

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1. J.M. Clark, <u>The Economics of Overhead Costs</u>, Chicago: University of Chicago Press, 1923, p. 416.
2. Robinson, <u>op. cit.</u>, pp. 188-202, 205-06.

of scale provide an incentive to expand the scale of operations as output is expanded. Further, if profit-maximisation is practised, discrimination will only be used if profits thereby increase, and increased profits may encourage and facilitate investment in new plant, if economies of scale exist.

Moreover, discrimination may be employed to gain entry to a particular market specifically because it is realised that economies of scale do exist. Thus a firm may discriminate by charging a lower price-marginal cost rate in one market, in the knowledge that increased output will produce economies of scale, thus raising the price-marginal cost rate with price unchanged, and removing the discrimination.

Of course, the above discussion assumes that discrimination promotes an increase in output, whereas the classic analytical case involved the lowering of the price in the more elastic sub-market, and the raising of the price in the less elastic sub-market.[1] Output is therefore increased in the former and decreased in the latter, and in aggregate may rise, fall, or remain the same, relative to the single-price profit-maximising situation before discrimination. Discrimination reducing the firm's output may further reduce capacity utilisation, and will naturally preclude the achievement of any economies of larger scale operation.

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1. Ibid., p. 181.

<u>The distribution of income</u>

Discriminatory practices affect the distribution of income in two main ways: first, by redistributing income among consumers; and second, by favouring producers as opposed to consumers. On the first point, Mrs. Robinson states:

> "When some output would be produced even if discrimination were forbidden, it is only possible to say definitely whether price discrimination is damaging to the interests of the customers, as compared with a single price monopoly, if we identify ourselves with one or other group of customers. As compared with simple monopoly, discrimination must always be disadvantageous to those for whom the price is raised, and advantageous to those for whom the price is reduced, and it is impossible to set the gains of one group against the losses of the other. But we may have some reason to prefer the interest of one group above those of the other. For instance, members of the more elastic markets (for whom the price is reduced) may be poorer than members of the less elastic markets, and we may consider a gain to poorer buyers more important than a loss to richer buyers. ... On the other hand, the less elastic market may be at home and the more elastic market abroad, so that the interests of the members of the stronger market are considered more important than the interests of the weaker market." 1

The second point is raised by the likelihood that discrimination will increase the profits of the discriminating firm. Again a value judgement is required to determine whether this is socially acceptable.

It is apparent therefore that discriminatory practices may improve or worsen the allocation of resources; increase or reduce productive efficiency; and we may or may not be amenable to the resulting change in the distribution of income.

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1. <u>Ibid.</u>, p. 204.

We will now consider some of the more common discriminatory trade practices, indicating the impact which they may be expected to have on economic performance.

Traditionally, collusive and predatory discriminatory practices have been condemned for their elimination of competition, and we will consider the basis of this condemnation. First, however, we will deal with the various forms of discrimination which may be practised by an individual firm, free from collusion, in the pursuit of maximum profit.[1]

Discrimination under a policy of independent maximisation.

The nature of discrimination practised by an individual firm will often depend on the extent of the firm's power to divide and keep separate its markets. Where the firm has considerable power over its customers, discrimination may be expected to be systematically organised and enforced. As power over customers decreases, the practice may be expected to be less systematic, being dependent instead on individual agreements struck between buyer and seller.

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1. Various classifications of discriminatory practices have been suggested - for example, see Machlup, op. cit., p. 400; A.R. Oxenfeldt, op. cit., p. 234. The present classification follows that suggested by A.G. Papandreou, in a comment to Machlup, in National Bureau of Economic Research, op. cit., pp. 437-40.

A. Discrimination in independent maximisation with the seller as price maker

The extreme form of discrimination possible in theory is Pigou's "first degree" discrimination,[1] whereby a different price is charged for each unit of the good, exacting the highest possible bid for each unit, to leave no consumers' surplus. Under such "perfect" discrimination no customer willing to pay more than the marginal cost of the good is refused, thus output is expanded beyond the monopolistic level, up to that level which would be achieved if the industry were perfectly competitive. However, if monopolistic conditions still exist elsewhere in the economy, perfect price discrimination will cause the industry to be overallocated relative to remaining imperfectly-competitive industries. Even so, the misallocation might be insignificant relative to that with restricted output, without discrimination, and the practice may therefore be applauded. Distributionally, the major result of perfect discrimination is to transfer consumers' surplus to the producer, increasing his profits to their limit. Our disposition toward producers relative to consumers will determine how we accept this.

In reality, the power over the market necessary for the practice of first-degree discrimination is very unlikely to exist, and Pigou concluded that it would never occur.[2]

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1. Pigou, op. cit., p. 279.
2. Ibid., pp. 279-80.

However, it seems possible that the practice might be approximated, if not successfully completed: Pigou admitted the theoretical possibility of a second degree of discrimination in which different prices are not charged for each unit, but the market is "segmatized"[1] into different strata, and a uniform price is charged within each strata, "in such wise that all units with a demand price greater than x were sold at price x, all with a demand price less than x and greater than y at a price y, and so on".[2]

This second-degree discrimination may exist as an attempt at first-degree discrimination, though lacking the power to differentiate among customers sufficiently to charge a different price for each unit. Generally such practices will group purchasers according to some personal or physical characteristic which is believed to indicate the relative strength of their effective demand. The most oft-quoted example is of sellers such as doctors or lawyers who guess the income of their customers, charging higher prices to richer than to poorer customers. Similarly, in the market for transport, the value of the good being shipped may be taken as an indication of the value of the service to the customer, more valuable goods being charged more per mile than those less valuable, regardless of the costs of the transport. Finally,

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1. Clemens, op. cit., p. 274 and footnote 23.
2. Pigou, op. cit., p. 279.

services may be priced higher at peak than at off-peak times, the seller assuming that the service is worth more to the customer at peak times. For example, electricity, gas, water and other public utilities are subject to wide variations in demand, with definable and predictable peaks at certain times of the day or year, at which times discriminatory high prices may be charged.[1]

It is apparent therefore that such second-degree discriminatory practices involve imprecise classifying of customers according to the strength of their effective demand, and it is only this imprecision which precludes the achievement of perfect discrimination. Generally it may be expected that output will be larger than in the situation without discrimination, as producers will tend to meet the demand of any customer willing to pay a price greater than the marginal cost of supplying him. Also therefore capacity will tend to be more optimally utilised than in the situation without discrimination. In fact, increased capacity utilisation may be the sole motivation for the discrimination, especially in the case of such public utilities as discussed

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1. Of course, the marginal cost of the service might be much lower at off-peak than at peak times, in which case it is possible that the price differential between peak and off-peak service might be relatively smaller than the difference in marginal cost, and the practice will discriminate against off-peak users. Further, in the case of a public utility, sales of which are not immediately controllable, peak users may be charged a very high price in order to ration peak use. It must also be noted that where truly joint costs of production exist, which cannot be allocated to either peak or off-peak use alone, it is meaningless to speak of discrimination as here defined.

above, and transport systems for which demand fluctuates regularly. The total capacity of the plant or network is attributable to the peak demand, and may necessarily remain idle at other times. Then any business which can be induced in the off-peak periods is profitable at any price which is greater than marginal cost, and this may be extremely low. Discrimination may in this case contribute greatly to productive efficiency compared to the alternative of monopolistic pricing without discrimination. As for the overall allocation of resources, the increase in output under second-degree discrimination may or may not constitute an improvement, depending on whether the industry was previously under- or over-allocated; in the short run, the increased use of capacity may at any rate be prized more highly than its effects relative to this ill-defined goal of "ideal allocation."

The subdivision of consumers into groups, and the maintenance of the division, is the essence of seller's discrimination. In second-degree discrimination the division is effected on the basis of some personal characteristic of the customers - perhaps their income, their trade, or the time at which they demand the product. However, the major feature of second-degree discrimination is that it is an attempt to define different strata of total demand - to divide customers <u>horizontally</u>, according to the price they are willing to pay. A further large group of discriminatory practices under independent profit maximisation involve a very different classification of customers: a vertical division according to some easily distinguishable attribute, but an arbitrary division in that a full range of demand prices will exist in each group. The seller thus considers each group as an independent market, and the profit-maximising price and output for each market are nicely determinate in theory: by the equating of marginal revenue in each market to marginal cost for the total output.[1] This type of discrimination has received the most attention in economic theory, following Pigou's assertion that such "third-degree" discrimination is the only form of discrimination to found in the real world,[2] supported by the fact that Mrs. Robinson's ingenious geometric model for the independent-maximising case has no counterpart in the case of collusive discrimination.

Third-degree discrimination again is essentially an independent profit-maximising practice, when the seller holds the initiative, and attempts to gain the most from his operation, with a single price in each sub-market, but with discrimination among markets. The most important methods of defining individual markets are by either geographic location, or by real and imaginary differences in the product, which may be responsible for different elasticities of demand in the sub-markets.

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1. This method of price determination is shown geometrically in Robinson, *op. cit.*, pp. 182-85.
2. Pigou, *op. cit.*, p. 279.

Spatial discrimination of this third degree would be a direct result of the existence of observable differences in the elasticity of demand in different regions, combined with the ability of the seller to prevent interaction among buyers in the different regions. The regions would therefore need to be separated by perhaps great distances, or, more importantly, by national borders. Different nations with different competitive industrial structures and different tariff policies are likely to exhibit different elasticities of demand for the same product, which may be sufficient to permit imports to compete on a profitable basis. If we are considering delivered prices to the final customer, discrimination now occurs if prices are not in the same proportion to the marginal production costs plus marginal transport costs of the product. The results of discrimination in this case are again similar to those of second-degree discrimination: capacity utilisation and resource allocation may be improved, while some groups of customers are favoured relative to others. There may now be strong grounds for supporting the interests of various groups, however, as nations may be involved, and a country will naturally favour the interests of its own nationals relative to foreigners, and favour friendly relative to hostile foreigners. Similarly, considering discrimination regionally within one country, certain regions are often favoured by public policy for their relatively depressed economic condition. Such considerations may serve to either overrule or reinforce the allocational argument for or against discrimination.

This purely independently-maximising form of spatial discrimination may in fact be extremely unrealistic, representing instead the classic theoretical model. However, one important form of thire-degree discrimination may be considered probable, given the competitive structure of modern markets. This is the practice known as "dumping", in which a producer sells off his surplus output cheaply in a remote market to avoid disturbing his home territory.[1] Such a practice may be predicted for example when a firm's base market is oligopolistic in nature, but the product subject to fluctuations in supply, and perishable; the individual firm with temporary surplus production may be wary of retaliation if it reduces price in the base market, and instead "dumps" the surplus in another market, at any price in excess of marginal cost. Once again, the discrimination may be condemned as an indication of the lack of competition in the base market, but if this cannot be remedied, the discrimination can be condoned.

Third-degree discrimination is perhaps more importantly practised in the case of individual pricing policies for the individual products of a multi-product

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1. See Robinson, op. cit., pp. 204-06; Machlup, op. cit., pp. 409-410.

firm.[1] The extent of discrimination will in this case be shown by a comparison of prices in individual markets with the marginal costs of individual items. The elasticities of demand may be expected to vary considerably among markets, unless the products are complementary, and discrimination among customers of the different products may be expected to be the norm under an independent-maximisation policy. Clemens strongly believes in the policy as a necessary prerequisite to modern industrial efficiency, driving the price of the marginal good down near to marginal cost, as the firm is able to expand profits and utilise spare capacity if sales can be made at a price at least equal to marginal cost.[2] Such may indeed be the case where monopolistically competitive market structures exist, with few restrictions on the entry and exit of firms. However, rigid oligopolistic structures may instead allow monopolistic exploitation of individual sub-markets by this form of discrimination.

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1. In fact Clemens maintains that third-degree discrimination is a problem of multiple product behaviour: "The strict, but useless, concept of price discrimination as the sale of a single product at several prices obscures the fact that the purposes and practices of price discrimination are essentially the same as those of multi-product production. What appears in the former as discriminatory pricing appears in the latter as accepting different percentages of profit. The distinction between the two becomes more irrelevant when it is remembered that intrafirm product differentiation is often the means by which price discrimination is made possible, and is, in fact, one of the fundamental objectives of management." Clemens, op. cit., p. 264.

2. Ibid.

However, a very important consideration in a discussion of multi-product firms is whether the differentiation of the products is in fact real or imaginary. Product differentiation is a widespread competitive tactic, not only to reduce the substitution of the firm's product with those of other firms, but also to distinguish between the individual firm's own products, to create separate sub-markets. Thus a product may be offered in different grades or qualities, and different forms of service may be offered with the product, creating sub-markets between which independent profit-maximising policies entail discrimination. Where in fact differences in quality of service do exist, the products are to all intents and purposes different, and Clemens' analysis of the multi-product type of discrimination will be applicable; for example, in the case of discrimination involved in cheap and expensive theatre tickets, the price difference will generally reflect a difference in the quality of the service, and customers are free to choose the quality they require, thus the discrimination may be harmless, or even beneficial in allowing fuller capacity utilisation. However, the differences in the products may be mainly in the brand-names assigned to them by the producer. In the extreme case, the producer may indicate different qualities in his brand-names when the product itself is exactly the same in each case,[1] and different prices are possible through consumer ignorance. A much more common case is that of the producer claiming exaggerated differences in quality, and charging corresponding differences in price. In these cases, the discrimination is only made possible by misrepresentation of the product, and can be eliminated by prohibition of the misrepresentation. However, a further means of imaginary product differentiation to allow discrimination is simply the existence of different brand-names for the product, without any claims of superiority of one over the other. Supported by heavy advertising of some brands relative to others, consumer ignorance may again allow discrimination. If the policy is unsystematic, the unadvertised brands appearing only irregularly, this practice may be one of dumping surplus production. Otherwise the practice capitalises on consumer ignorance and serves no useful purpose; again the remedy is not to prohibit the discrimination as such, but to promote consumer awareness of conditions in the market.

Distinct from independent discrimination according to geographic location or to the nature of the product is the very widespread form of third-degree discrimination involved in the attempt to gain new custom. Promotional campaigns often involve discrimination against existing customers,

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1. Machlup cites a case reported by the U.S. Federal Trade Commission of a manufacturer of pillows, claiming five different prices for five different grades, which were found to be of the same quality, op. cit., p. 419.

perhaps unable to participate in the campaign by virtue of their known status as existing customers, as for example in the case of cheap magazine subscriptions available only to new subscribers. However, any competitive price reduction must involve a form of temporal discrimination against previous buyers, and must not be condemned for this. The appraisal of promotional discrimination must instead consider the nature of the new market, and the nature of the product. The market may be completely new, in that the product itself is a new development. Discrimination against the firm's existing customers may then be necessary to promote public experimentation with the new product, and establish the market, the price later being raised. Acceptance of this form of discrimination will rest upon the contribution which the new good is considered to make to the range of products facing the consumer. It can easily be imagined that such a pricing policy is necessary to promote a technologically superior good against its established antecedents. Secondly, the discrimination may be necessary, and positively advantageous, to allow the expansion of the market and the benefits of economies of scale, allowing cost reductions, and eliminating discrimination without an upward revision in prices. This may be tempered by the nature of competition existing in the relevant market: the entry of a new firm into an existing market may reduce the output of established firms below an efficient scale, in which case promotional pricing by the entrant is destructive to overall market efficiency. Naturally, if instead the new firm's entry allows the destruction of a restrictive oligopolistic structure in the market, this may again be considered beneficial to economic performance.

B. Discrimination in independent maximisation with competitive bargaining

With the independently-maximising firm as price maker, the firm's price and output policies will tend to be systematic and regular;[1] the firm settling on the profit-maximising prices and outputs and maintaining them. Naturally, the process of price and output determination must involve some form of competitive bargaining, the customers' demand curve restricting the profit-maximising position. However, if the producer can determine the nature of the demand curve and predict its stability, he can then determine a systematic profit-maximising policy. When the power of the buyer increases, the producer's power to predict the demand curve diminishes, and his pricing policy becomes dependent on individual bargains struck with buyers. Much of the producer's initiative may therefore be removed: if discrimination occurs, it is to some extent because the seller

1. Exceptions occur when the seller has imperfect control of his supply, and dumping may be necessary; or when the firm enters new markets, and promotional discrimination is practised.

is forced to adopt such a policy. Furthermore, whereas discrimination is usually only possible if the buyers can be kept apart by some means, to prevent arbitrage, when the buyers possess sufficient power, they will prevent arbitrage by their own individual secrecy, or may even play off seller against seller.[1]

The seller may be unable to locate a demand curve specifically for his product when the market involves many sellers, and a fluctuating group of buyers, able to make comparisons of prices and services. Transactions will then depend on the bargaining process between individual buyers and sellers, the astute buyer being able to force the seller to compete for his custom, and the astute seller perhaps occasionally being able to charge a high price to a relatively ignorant buyer. Thus for example the used car market may exhibit such features, where many sellers compete for the custom of the individual buyer, who often considers such a major purchase very seriously before finally making the transaction. Though such a procedure may often be discriminatory, the markets concerned will generally be very competitive, and the discrimination harmless.

The market need not, however, be as disorganised as this for discriminatory concessions to be exacted by the buyer. The larger customer invariably possesses some

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1. Oxenfeldt in fact classifies discriminatory practices according to whether they are "secret" or "public", op. cit., pp. 234-52.

monopsonistic power if he can change his source of supply with ease. Thus cases of monopsonistically-obtained discriminatory concessions may be expected in a range of market structures from one of almost perfect competition between sellers to a rigid oligopoly of sellers, as long as an inequality of power exists among buyers. In these cases we may distinguish the impact of the discrimination on economic performance at two levels: that of the seller, and that of the buyer. The seller will only allow himself to be forced into concessions if he benefits over the alternative, but the advantage he thus gains over his competitors is not based necessarily on his superior efficiency. Incentives are thus perhaps destroyed at the sellers' level, and resources misallocated as opposed to the situation without discrimination. Further, the large buyer may be powerful enough to exploit his weak suppliers by denying them normal profits. On the other hand, such practices force the reduction of prices, albeit irregularly, in situations of sellers' competition when prices might be rigidly maintained otherwise. In fact it is considered that secret price concessions to individual buyers constitute a most essential element of price flexibility in oligopolistic situations. Buyers able to obtain concessions from one seller may successfully claim concessions from competing sellers, and as the concessions lose their secrecy they tend to be translated into general price reductions. In such cases, "to require open, non-discriminatory pricing may ... deprive oligopoly markets of their only sources of price flexibility and rivalry."[1] Whether discrimination forced by the buyer is considered advantageous will therefore tend to be indicated by the degree of seller concentration in the market; where concentration is initially low, discrimination in favour of one buyer may be expected to grant unfair advantages among sellers, and promote survival on a basis other than efficiency; where concentration is initially high (oligopoly), discrimination may be praised as allowing otherwise impossible price competition.

At the level of competition among buyers, discriminatory concessions obtained by the buyer may again either promote or hinder economic performance. The favoured buyer is given a cost advantage over his rivals which allows him to lower his prices to the final consumer and increase his share of the market. This in turn forces his competitors to attempt to achieve more efficient production, and perhaps to put pressure on their suppliers for better terms - again promoting increased efficiency at the level of the sellers.[2] On the other hand, the favoured buyer may be content to retain his existing market share and make higher profits without decreasing his final prices. (In this case the buyer rejects the principle of independent profit-maximisation,

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1. J.B. Dirlam and A.E. Kahn, Fair Competition: The Law and Economics of Antitrust Policy, Ithaca, N.Y.: Cornell University Press, 1954, p. 204.
2. Ibid., p. 234.

and this situation will be dealt with below under collusive discriminatory practices). Much of our appraisal of discrimination at the level of the buyer must depend on the emphasis placed on the existence of alternative sources of supply. Despite being based on more efficient means of production, and the subsequent passing on of benefits to the final consumer, discriminatory advantages may remove competitors of the buyer, and allow the growth of oligopolistic concentration.

Collusive price discrimination

The discriminatory practices so far discussed have been distinguishable in that their conception is assumed to be a purely independent action by a profit-maximising buyer or seller, given the existence of some degree of monopolistic or monopsonistic power, or both. However, discrimination may also be practised as a result of a specific agreement among business-men designed to free the parties to the agreement from the pressures of competition. We may distinguish between such agreements made vertically between buyers and sellers, and those made horizontally among firms at the same level of production or distribution.[1]

Discrimination in vertical combinations is chacterised by preferential treatment of those involved, where such

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1. Such a distinction is found in A.G.Papandreou and J.T. Wheeler, Competition and its Regulation, New York: Prentice-Hall, Inc., 1954, pp. 400-35.

treatment is not available to competitors of the preferred parties. Thus a seller may normally pursue a policy of granting rebates and allowances proportional to cost savings made in supplying large, regular orders, or in eliminating certain functions otherwise performed by the seller.[1] If such allowances are instead available to one large customer but not another, with whom the transaction would offer the same cost saving, the transaction is not only discriminatory, but also collusive, in that the seller must have some motive other than an economic one for supplying the former but not the latter. Such forms of discrimination may be condemned in that they are likely to promote sucess on a basis other than efficiency, and are also likely to raise barriers to entry of new competitors into the market,[2] thus encouraging the growth of monopoly power in the long run. The restrictiveness of the system is more obvious when the collusion encompasses a complete group of competitors but will refuse the entry of new competitors into the favoured group. Thus, for example, concessions granted to wholesalers as a group may discriminate against retailers as a group, while it is

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1. It is interesting to note that such a "cost justification" of price differences is recognised, and actively sought, in U.S. cases of alleged discrimination, while the Canadian legislation and anti-combines administration has not specified whether such a justification would constitute a defence in cases of alleged discrimination.

2. See B.S. Yamey, "Aggregated Rebate Schemes and Independent Competition", Oxford Economic Papers, v.12 (1960), pp. 41-51.

very difficult for a retailer to achieve wholesaler status, despite the fact that he may buy a larger volume and allow the seller larger cost savings than does a wholesaler. The wholesalers thus exist in a protected position, and efficiency at the retail level is made less effective.[1] Similarly, the seller may stratify customers into groups supposedly according to volume of purchase and consequent cost reductions, with different allowances granted to each group accordingly. Collusive behaviour would be evidenced here by the inability of customers to move into more favoured groups, despite achieving the required volume of purchases.

Of course, while being vertically collusive, such practices are made more effective if they also involve horizontal collusion - the particular strata of competitors agreeing to reinforce a vertical coalition by restricting entry to their group uniformly. The case of spark plug pricing examined by the U.S. Federal Trade Commission provides a striking example:[2] the three major companies, accounting for ninety per cent of total sales of spark plugs in the U.S.A. sold plugs as original equipment to vehicle manufacturers at between five and seven cents each, but the price to distributors

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1. For discussion of specific examples of such "functional" discrimination which have come before the U.S. Federal Trade Commission, see C.D. Edwards, <u>The Price Discrimination Law</u>, pp. 286-348.

2. See the discussion of the case in Dirlam and Kahn, <u>op. cit.</u>, pp. 217-25.

for replacement plugs was between 27 and 36 cents each. The manufacturers attempted to justify the low price for plugs as original equipment ("often 'below cost'")[1] by showing that the vehicle manufacturers would otherwise have begun their own plug production. However, the price policy had become institutionalised, with little if any competition among the sellers, and the discrimination forestalling the entry of any new competition. The vehicle manufacturers were content to obtain their cheap supplies, and to protect the plug manufacturers by not reselling. The implied collusion would seem to have effectively eliminated competition in the market.

Horizontally collusive discrimination has achieved more spectacular success when the collusion extends over geographically-separate regions. Geographic discrimination may be condoned when it is part of an independent firm's policy to exploit different price elasticities in different regions, meeting and stimulating price competition in different regions. However, collusive agreements may be made to enforce a system of discriminatory delivered prices of a good at any geographical location, regardless of the points of production. Such a practice is known as a basing-point

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1. Ibid., p. 217.

system,[1] achieving notoriety through the publicity given to cases before the U.S. Federal Trade Commission involving the pricing of cement and steel, among others.[2] The system involves the adherence by the whole industry to a set of published prices, consisting of a fixed price at the base point, where most of the producers are situated, plus the transport cost from the base to the location of the buyer. Regardless of the location of the producer, he sells to any location according to this formula. Producers at the base point are thus able to compete on an equal price basis in any distant market with the producers in that market. It has been argued that the system guarantees the buyer a choice among sellers, and prevents non-base producers from building local monopoly power. However, if the system did not exist, the non-base producers would obviously have to charge a lower price than that which would exist under the basing-point system, in order to overcome competition from the base producers. The abolition of a basing-point system could therefore only reduce prices in distant areas rather than increase them. The system obviously works to the advantage of the base-point producers, in preventing their exclusion

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1. See C. Kaysen, "Basing Point Pricing and Public Policy", in Heflebower and Stocking, op. cit., pp. 153-75; J.M. Clark, Competition as a Dynamic Process, Washington, D.C.: The Brookings Institution, 1961, pp. 325-49; D. Dewey, "A Reappraisal of F.O.B. Pricing and Freight Absorption", Southern Economic Journal, v. 22 (1955-6), pp. 48-54.

2. See examples discussed in Dirlam and Kahn, op. cit., pp. 124-29.

from distant markets. The non-base producer is unable to take advantage of his lower costs in supplying local customers, and thus an efficient location of producers is discouraged. Furthermore, the system is conducive to a wastage of transport facilities, as distant sellers are placed on equal competitive terms with local sellers. In fact, one seller may sell close to a distant seller, while the latter sells close to the former - such "cross-hauling" was judged to be "substantial" in the U.S. cement industry.[1]

Predatory price discrimination.

Much of the argument against the growth of monopoly power in a single firm is based on the possibility that this power is used to coerce or eliminate weaker competitors, or prospective competitors. A powerful firm operating in a number of geographically-separate markets may be able to sell at a price below even marginal cost in one region, while still making an overall profit on its operations, in order to threaten or remove a localised competitor in the particular region. Similarly, the powerful producer may be in a position to accept an overall loss for a while to prevent the successful entry of a new competitor into the market. The consumers in the regions concerned will benefit by the price cuts in

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1. J.M. Clark, "Basing-Point Methods of Price Quoting", Canadian Journal of Economics and Political Science, 1938, p. 482.

the short run, but such predatory practices are by nature only temporary, the intention being to return to the old price policy, of a higher one, after the competitor concerned has been successfully disciplined or removed. The intended result of such practices is the reaffirmation or the strengthening of the stronger producer's power, and the buyer is doomed to suffer, either by paying higher prices, or by being faced with fewer alternative sources of supply.

The major problem involved in the appraisal of predatory pricing is that it may be very difficult to identify, at least until the competitors have been rendered inactive and prices restored or increased. An independently-maximising firm may grant discriminatory concessions in one geographical area to meet competition, utilise spare capacity, or promote new custom, yet his policy may appear predatory: he may only succeed at the expense of existing sellers in that market. However, it may be possible to identify the motive for the discrimination by an examination of price relative to marginal cost, and of the nature of the product. The independent profit-maximising firm will not price below marginal cost simply to meet competition in a local market, or to increase capacity utilisation. Yet he may do so to promote new custom, in the anticipation that acceptance of his product will allow him to reap economies of scale and reduce costs, and then his continued existence in the market need not require an increase in his price. However, the product must in this case be a significant addition to the products presently on the market, by virtue perhaps of embodying an advance in technology. It may then be concluded that a policy of selling a recognised product below marginal cost in a localised market is intended to restrict competition and will restrain economic efficiency, at least in the longer run.

Summary.

Discrimination may be practised as part of a collusive system of pricing, or independently by a seller to coerce or remove rivals, or in pursuit of an independent profit-maximising policy. In the case of collusive practices, discrimination tends to be incidental to the overall policy of the colluding parties, and will be removed, at least as a systematic policy, by the destruction of the collusion. Both predatory and profit-maximising discrimination succeed only at the expense of competitors, but the former may be condemned for its specific intention to increase monopoly power. Even if predatory practices allow the eventual success of only the most efficient sellers, the resulting economies of scale may be outweighed by the loss to the consumer of alternative sources of supply as protection against the long-run abuse of monopoly power.

When considering discrimination practised as an independent profit-maximising policy, the harm to the un-favoured customers relative to the favoured customers is the basis for much condemnation of the practice, especially when the good concerned is an intermediate good, and the discrimination favours one final use of the good as opposed to others. However, the practice must always be considered relative to the practicable alternatives in its absence. Discrimination may be felt to allow an improvement over the alternative economic performance in the following situations:

1. Where there exists excess capacity, and any further sales at prices above marginal cost allow a more efficient utilisation of present capacity.
2. In a normally oligopolistic situation with price rigidity, when secret price cuts, perhaps under pressure from a large customer, may allow an otherwise impossible degree of price flexibility.
3. When a firm operates in a number of geographically-separate markets, and discrimination allows the firm to enter an otherwise uncompetitive market, promoting efficiency in this market.

Most importantly, the advantages and disadvantages of various discriminatory practices must be weighed in particular cases. For example, a particular policy might allow the achievement of economies of scale, and at the same time contribute to the unequal distribution of income. An appraisal of discriminatory practices in terms of the public interest must balance the various effects of individual policies on the different dimensions of economic performance.

CHAPTER 4

The reports of the Restrictive Trade Practices Commission.

The uncompromising appearance of the legislative prohibition of discriminatory practices in Canada was shown in Chapter 1 above, while Chapter 3 indicates that the impact of discriminatory practices on economic performance is far from certain. This situation is reflected in the separate roles of investigation and appraisal of restrictive trade practices. The Director of Investigation and Research is expected to begin an inquiry when he believes that the law is being broken, and later to prepare and submit a report if he believes that the evidence obtained discloses a breach of the law. The Restrictive Trade Practices Commission, on the other hand, is required to describe and appraise the effect on the public interest of arrangements and practices disclosed in the evidence. It has been shown that an appraisal of discriminatory practices on the basis of their impact on economic performance may condone them, when the law would condemn them. Economic performance, when defined to include the acceptability of the relevant distribution of income to the society in question, must be a major consideration in judging the effect on the public interest of a particular practice. Thus a case may be made for the inclusion in the Commission's reports of an evaluation of the effects on economic performance of the practices considered, and for the inclusion of specialist economists on the Commission. This is certainly not to argue for the special competence of any particular group of persons in evaluating the impact of the practices on social goals other than that of efficient use of scarce resources, particularly in evaluating a redistribution of income. However, the economist may be better equipped to analyse and describe such effects, even if not to evaluate them. If the Commission is expected to appraise the redistribution of income, this must presumably be in accordance with accepted government policy. Such decisions must necessarily be political, and will in any case be considered by the Minister when he decides whether or not to porsecute, following receipt of the report.

In fact however, the Commission has been consistently staffed by men with predominant legal training: of eight appointments to the Commission, six have been lawyers, and only two economists.[1] The Chairman of the Commission has always been a lawyer,[2] as was the only Vice-Chairman.[3] Furthermore, though one of the two economists has always sat

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1. Appendix (B) identifies the members of the Commission, their qualifications, and their terms of office.
2. C. Rhodes Smith from 1952-62, and Robert S. MacLellan from 1962 to the present time. See Appendis (B).
3. Mr. L. A. Couture. See Appendis (B).

on the Commission,[1] it has been maintained that only Mr. A.S. Whiteley "could be considered to possess competence in the field of the control of monopolistic practices."[2] It may be expected therefore that an expert evaluation of the effect of particular practices on economic performance is unlikely to be contained in the Commission's reports. This will be considered in the next chapter; the present chapter is concerned with the features of the reports generally, and the types of practices covered.

Each report of the Commission tends to follow the chronological sequence of the Commission's actions in undertaking the investigation and appraisal of practices. First a description is provided of the reference of the particular case to the Commission by the submission of the Director's statement of evidence, together with the Director's specific allegations. Then follows a detailed factual description of the particular industry concerned, and an account of the operation of the arrangement or practice, supported by evidence obtained by the Director and in hearings before the Commission. Finally the Commission presents its conclusions, generally considering

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1. Mr. A.S. Whiteley from 1952-62, and from 1967 to the present, and Mr. W.D.R. Eldon from 1963-67. See Appendix (B).

2. L.A. Skeoch, <u>Restrictive Trade Practices in Canada</u>, Toronto: McLelland and Stewart, 1966, p. 94. Mr. Eldon diverted his attention to this field only upon his appointment to the Commission in 1963.

each of the Director's allegations separately, and stating whether or not the Commission believes the practice to be harmful.

This method of presenting the reports can be seen to reflect the legal background of their authors, especially in the individual consideration of each of the Director's allegations. Practices are considered only if and when the Director believes an offence has been committed. Rather than attempting to consider the overall performance of the firm or industry concerned, the Commission's approach tends often to minimise the inter-relationships between the practices considered, perhaps with individual chapters being written on individual practices.

However, a perhaps more important general criticism of the reports, in view of the emphasis placed by the legislation on the need to give publicity to restrictive practices, is that they are extremely dull. Of course, their main purpose is that of presenting the facts of a case to the Minister, who must use these to decide whether prosecution is necessary. In fact Skeoch describes many of the reports as "first-rate examples of legal briefs."[1] Publicity has long been considered in Canada to be a potent alternative to prosecution of such practices, yet the particular method of presentation of the reports seems designed to avoid their

1. Ibid.

publicity. The mass of fact must be commended, but the presentation of the subject matter is such that the general reader is confronted with a confusing sequence of names of company officials and dates of correspondence and meetings. Following a particularly scorching criticism of the reports, Rosenbluth and Thorburn complain that "their length, dullness, and drab format have served to make them one of the most uninviting of all government publications."[1] Only the most determined reader would attempt to fully understand the content of the reports. Whilst the format was recently improved, the presentation of the reports is still such that they reach only a very narrow audience.

The practices considered in the reports of the Restrictive Trade Practices Commission

Between May 1, 1953 and May 9, 1968, the Commission published a total of seventy reports. A great variety of practices were considered, and often several practices were considered in a single report. A classification of the reports by subject is therefore difficult, but a possible classification is suggested by the tendency of the reports to consider each practice in its relationship to the law. The practices forbidden by the legislation are conveniently

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1. G. Rosenbluth and H.G. Thorburn, Canadian Anti-Combines Administration 1952-1960, Toronto: University of Toronto Press, 1963, pp. 38-39.

grouped within the Act, and the reports consider each practice according to the offence alleged by the Director to have been committed. A classification is possible therefore according to the type of offence alleged - thus one report may be included in more than one category, depending on the number of types of practice considered by the report. Appendix (A) lists the reports chronologically, indicating the alleged offence(s) in each case. From this it can be seen that the overwhelmingly dominant alleged offence is that of "combination", which includes all practices prohibited by section 32 of the Combines Investigation Act;[1] thirty-three of the reports contained such allegations. Mergers and monopolies are both prohibited by section 33 of the Act,[2] and thirteen of the reports dealt with allegations of merger, while seven dealt with allegations of monopoly. Practices alleged to be discriminatory, prohibited by sections 33A and 33B of the Act, were considered in ten reports. Finally, allegations of resale price maintenance[3] were dealt with in fifteen of the reports.

Five of the reports fall wholly outside this classification, being the reports of general inquiries into monopolistic situations. These the Director is empowered to pursue as a research activity, directed not towards the

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1. see p. 2 above.
2. See Combines Investigation Act, s.2(e) and (f) for definitions of "merger" and "monopoly" respectively.
3. See Ibid. s. 34.

abolition of particular actions considered to contravene the law, but towards the compilation of background information on groups of practices, or activities within a particular industry. The procedure is the same as with particular allegations however: the Director submits evidence to the Commission, which the latter examines, publishing the findings as a report.

One such general report is concerned specifically with discriminatory pricing practices in the grocery trade.[1] Thus discriminatory practices have been formally considered in eleven of the total of seventy reports of the Commission. This is not to imply that the Commission has devoted over one seventh of its time to the appraisal of discriminatory practices, as the reports differ greatly in length and the time and effort spent by the Commission varies considerably.[2] Nor have those reports dealing with discriminatory practices necessarily devoted much effort to the consideration of these practices alone - in fact four of the reports dealing with allegations of discrimination deal also with other practices. However, the fact remains that the commission has

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1. Department of Justice, Restrictive Trade Practices Commission, Report, transmitting a study of Certain Discriminatory Pricing Practices in the Grocery Trade, Ottawa: Queen's Printer, 1958. No. 22, Appendix (A). The other four general reports are No's 9, 31, 42, 48, Appendix (A).

2. For example, only two reports were produced in 1957 while eight were produced in 1960 - indicating at least an unequal allocation of time to individual reports.

discussed discrimination in more than one in seven of the reports and discussed the practice exclusively in six of the reports. While the Commission's method of analysis of discrimination may perhaps not be representative of the Commission's work generally, it must be recognised that the Commission has devoted sufficient attention to discrimination that this analysis must be considered a significant example of the Commission's work.

CHAPTER 5

A critique of the appraisal by the Restrictive Trade Practices Commission of discriminatory practices

Before considering the appraisal by the Restrictive Trade Practices Commission of discriminatory practices, it is most important to emphasise that this consideration will be based solely upon the Commission's reports. This may give a misrepresentation of the Commission's attitude to discriminatory practices and the Commission's approach to appraisal for two major reasons. Firstly, the procedure of investigation and appraisal is such that the Commission does not itself choose which practices it will consider. The Director of Investigation and Research makes the initial decision to conduct an investigation, and passes to the Commission for appraisal only those cases in which he considers that the evidence discloses an offence against the combines legislation. If during the early stages of an inquiry the Director is of the opinion that further inquiry is not justified (i.e. that evidence of an offence against the legislation is lacking), he can take steps to discontinue the investigation. The Commission may in this case exercise some control over the practices which it will consider, as the Commission's consent must be obtained for the discontinuance of any inquiry in which evidence has already been formally presented before the Commission.[1] However, when this latter is not the case, inquiries are abandoned without even reference to the Commission, let alone any formal appraisal. For example, in the case of an investigation of a complaint of price discrimination in the sale of televesion sets, the Director reported:

> "As a result of the complaint, further information was obtained by interview from the complaining dealer and by interview and informal questionnaire from the manufacturer. Because the information so obtained was inconclusive and conflicting, it was considered that a more formal investigation was not warranted and the complainant was so advised." 2

Between 1960 and 1967 the Director reported specifically the discontinuance of thirty-nine cases involving allegations of discrimination, in seven of which the consent of the Commission was required to discontinue the inquiry.[3] While the Commission presumably considers the evidence obtained in such cases, they are abandoned with little public explanation.

The other major reason why the reports of the Commission may not be fully representative of the Commission's

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1. Required by s. 14 of the Combines Investigation Act.
2. Director's Annual Report, 1958, pp. 28-9.
3. Director's Annual Reports, 1960-67. The Director also reported in 1961 that within the 1960-61 fiscal year "some sixteen complaints that cigarettes were being sold at prices unreasonably low were examined", but no inquiries were deemed necessary. The practices were therefore not considered by the Commission.

appraisal of discriminatory practices is inherent in the fact that the reports are necessarily only <u>summaries</u> of the evidence presented to the Commission. In writing the report the Commission is not expected to present all the evidence, and it is quite possible that the report contains only a fraction of the mass of evidence which leads the Commission to its conclusions in the appraisal. The evidence in the report may therefore not appear to be completely conclusive in its support of the Commission's appraisal. More particularly, the report may present sufficient evidence to establish the <u>illegality</u> of a practice, while the Commission neglects to present evidence showing how the practice operates <u>against the public interest</u>. However, if this neglect does in fact occur, the Commission may not be excused for it. The Commission is required to present in the reports a reasoned appraisal of the effects of the relevant practices on the public interest. When the emphasis placed on the publicity of restrictive practices is taken into account, it must be recognised that evidence neglected by the Commission may as well not exist.

Thus, while recognising that the Commission has little power over the choice of actual cases which it appraises, it seems legitimate to consider the Commission's reports on discriminatory practices as representing the Commission's attitude to such practices.

<u>The nature and extent of discrimination in cases appraised by the Restrictive Trade Practices Commission.</u>

A most basic requirement for an appraisal of a discriminatory practice is that the direction and magnitude of the discrimination be indicated. An examination of whether the requirement is met in the reports of the Commission concerned with allegations of discriminatory practices will serve not only to introduce the Commission's attitude to such practices, but also to conveniently introduce the cases considered in these reports.

For purposes of comparison with the reports concerned with specific allegations, the Commission's general report concerning discriminatory pricing practices in the grocery trade[1] provides a remarkable example of what is supposedly the work of the Commission. This report presents a great deal of empirical evidence of types of practice in the Canadian grocery trade which may be discriminatory, but is prefaced by a lengthy general analysis of discriminatory practices. In fact the study was the work of an economist on the staff of the Director of Investigation and Research, which was submitted almost without comment as the report of the Commission. The Commission circulated the study in the

1. No. 24, Appendix (A).

form as received from the Director, and invited comment from individuals and business firms. When no such representations were forthcoming, the Commission assumed that general agreement existed on the validity of the study, and presented the study intact, without evaluation or conclusions concerning the practices.[1] It must be presumed therefore that the Commission also agreed with the analysis contained in this general report, although it is far from obvious from the reports concerning specific practices that the Commission has ever seen a definition of discrimination. The general analysis of prices discrimination in the grocery trade report includes an attempt to define price discrimination, which concludes:

> "... by way of summary, price discrimination may be defined roughly as: (1) variations in price of the same product sold under similar conditions to different purchasers; (2) uniform prices charged to different purchasers for product-services that are not the same; (3) different prices to different purchasers for different varieties of the same product (or of various technically similar products) if the price differences are not the same as or proportional to the differences in their cost of production." 2

and the report stresses again:

> "... the Primary test of economic price discrimination is based on the relationship between the return received for the product-service in question and the "cost" of providing it. Price differentials which do not accord with cost differentials are regarded as discriminatory." 3

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1. See Restrictive Trade Practices Commission, Report transmitting a study of certain discriminatory pricing practices in the grocery trade, Part 1, pp. 1-8.
2. Ibid., p. 13.
3. Ibid., p. 39.

The Commission therefore in 1958 endorsed the definition of discrimination employed in Chapter 3 above. However, it becomes obvious from the reports on specific allegations of discrimination that such a definition has not in fact been used by the Commission, either before or since 1958.

The first report of the Commission to deal with discrimination was only the second report produced by the Commission. The allegation contained in the report was that a manufacturer of metal products and household appliances granted discounts or rebates which discriminated between two retail hardware dealers in North Bay, Ontario.[1] The report establishes that the manufacturer granted a volume discount to one of the retailers, which was not available to the other, on sales of a range of goods known as "wares". However, whether or not discrimination is involved in this practice remains undisclosed - the report makes no mention of the relative costs to the manufacturer of supplying the two customers. This is particularly surprising in that much of the manufacturer's defence to the allegations was that the favoured retailer was also a franchised dealer in products of the company other than "wares", and that these purchases contributed to the volume of goods used in establishing that retailer's discount on wares. The implication is therefore that cost savings were possible on larger volume purchases, but this is never even mentioned,

1. No. 2, Appendix (A)

let alone established in the report. The report complains of "differential treatment"[1] of the two retailers, and this we must presume to be the Commission's criterion for the existence of discrimination in this case; the word discrimination is not in fact used in the Commission's appraisal of the case, but certainly not because the Commission has established the absence of the practice.

The granting of discriminatory discounts was also the Director's allegation in the other three of the Commission's reports dealing solely with price discrimination. These are each concerned with the granting of differential discounts by an oil company to gasoline retailers during a price war in Toronto. The first deals with the case of Texaco Canada Limited supplying an independently-owned retail outlet at prices less than those charged to a nearby outlet rented from Texaco.[2] The evidence disclosed that Texaco pursued this policy in normal times, and that during the price war the independent outlet for a time received an additional discount greater than the one gained by the rented outlet. Neither the extent nor even the existence of discrimination are established in this case, no mention being made of the costs of Texaco of supplying the two outlets, despite a considerable difference in the quantities supplied to the

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1. Restrictive Trade Practices Commission, Report concerning alleged price discrimination between retail hardware dealers in North Bay, Ontario, (1953), p. 27.
2. No. 36, Appendix (A).

two.[1] Furthermore, the relationship to Texaco's overall pricing policy of the prices to these two outlets is not disclosed. Not only are the price differentials not related to relative costs in this report, but even the extent of price differentials within Texaco's policy is not shown.

Practices essentially the same as those in the Texaco case are considered in the other two of these reports, one concerning Supertest Petroleum Corporation, Limited,[2] and the other The British American Oil Company Limited.[3] Again the company in each case granted a discount to an independently-owned outlet which was not available to a rented outlet, and granted differing temporary discounts to the two outlets during the price war. The Supertest report is unique among these cases in the consideration it gives to a cost justification for the discount granted normally. Supertest attempted to show that the costs of supplying the independently-owned outlet were lower than those of supplying the rented outlet, by including in the cost calculations of the latter the costs of building and maintaining the premises and equipment. The Commission rightly condemns this procedure, maintaining that "the property charges and return on

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1. Restrictive Trade Practices Commission, Report concerning the distribution and sale of gasoline in the Toronto area (alleged price discrimination - Texaco Canada Limited), R.T.P.C. No. 12 (1961), pp. 21-22.
2. No. 37, Appendix (A).
3. No. 38, Appendix (A).

investment ... are not related to the cost of making a sale of gasoline but, rather, to the provision of service station facilities".[1] Supertest claimed that the costs of delivering the gasoline were the same to all outlets, so in this case the Commission rightly decided that a price differential was evidence of discrimination.

The above criticism of the Commission's consideration in the Texaco case applies also to the British American case, however. Again no mention is made of the costs of supplying the various outlets, nor of the overall pricing policy of the company, and thus the extent and direction of the discrimination are not demonstrated. Despite this, the Commission states with reference to the discount granted to the independently-owned outlet, "It is obvious that a difference in price of this character which is being secured by one competitor constitutes price discrimination with respect to the other competitor not receiving an equivalent reduction in price."[2] The evidence presented by the Commission makes this far from "obvious"; the Commission is here demonstrating a conviction that a price differential constitutes discrimination, regardless of cost considerations.

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1. Restrictive Trade Practices Commission, Report concerning the distribution and sale of gasoline in the Toronto area (alleged price discrimination - Supertest Petroleum Corporation, Limited), R.T.P.C. No. 13, (1961), p. 55.

2. Restrictive Trade Practices Commission, Report concerning the distribution and sale of gasoline in the Toronto area (alleged price discrimination - The British American Oil Company Limited), R.T.P.C. No. 14 (1961), p. 30.

Another of the Commission's reports deals solely with predatory pricing - the allegation being one of selling at prices "unreasonably low". To achieve the aim of intimidating or removing competitors the seller must price either below or very close to his own or competitors' costs, rendering competitors unable to earn a normal profit. The low prices may be localised, supported by higher prices and profits in a different region; in fact this report also involves elements of such geographical discrimination. The report deals with price reductions on cigarettes and confectionery made by a grocery wholesaler in Edmonton,[1] which were felt by other wholesalers to involve concessions on cigarettes and confectionery relative to other products, and to be designed to eliminate competition. The accused firm, Macdonalds Consolidated Limited, argued that the costs of handling and delivery were sufficiently lower on cigarettes and confectionery than on other goods to justify the price cuts, and the Commission endorses this, indicating that the wholesaler was in fact taking advantage of its greater efficiency relative to many of its competitors.[2] However, the Commission indicates that after the price cuts Macdonald's margin over costs in the case of cigarettes and chocolate bars was three and a half per cent, while that on most other

1. No. 23, Appendix (A).

2. Restrictive Trade Practices Commission, Report concerning the wholesale trade in cigarettes and confectionery in the Edmonton district (1958), pp. 53-56.

goods was five per cent. This is direct evidence of discrimination using the definition provided in Chapter 3 above, and in the Commission's general report on discrimination in the grocery trade, yet the Commission fails completely to indicate this:

> "The evidence indicates operating costs in handling cigarettes are among the lowest experienced by Macdonalds Consolidated Limited, and it would not be unreasonable for the mark-up to be similarly related. ...No conclusion with respect to the price of cigarettes can be inferred from the circumstance that the mark-up on cigarettes established by Macdonalds... was among the lowest of its mark-ups." 1

Certainly the conclusion could be made that the price was discriminatory, whether or not the discrimination was subsequently condoned. The Commission appears in this case to believe that a lower cost justifies a lower price-cost relationship, which is clear evidence of discrimination under the definition employed in Chapter 3 above.

Moreover, the Commission was also aware that in making the price cuts Macdonalds was charging less in the Edmonton area for the goods concerned than in other areas in which the firm operated. No evidence concerning costs in the other areas was presented to support this, and the Commission merely stated:

> "... the only conclusion which the Commission considers can be drawn... is that competitive situations in the various territories in Alberta where branches of Macdonalds Consolidated Limited operate have been different." 2

Having already confused the cost justification for the low

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1. Ibid., p. 55.
2. Ibid., p. 57.

price in Edmonton, the Commission fails entirely to establish whether geographic discrimination exists in the case.

The absence of evidence on costs is even more obvious in another of the reports, concerned solely with an allegation of geographic discrimination. The report considers a practice of the Carnation Company Limited of selling at prices in Western Canada lower than those in Eastern Canada during a price war early in 1960.[1] The war took place in Western Canada between Carnation and the two major producers of evaporated milk located in that region. The Commission established that Carnation, while producing its evaporated milk in Ontario, normally sold in the west at prices not sufficiently above the Toronto price to compensate for the freight charges.[2] Assuming that production costs are the same for evaporated milk destined to be sold in Ontario or in Western Canada, such freight absorption produces discrimination against consumers in Ontario. Yet this appears to have eluded the Commission; Carnation's costs of production are not indicated and the possibility of discrimination is not mentioned. The allegation of discrimination is related to the period of the price war in Western Canada, and the possibility of discrimination being the normal practice is overlooked. Furthermore, during the price war Carnation

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1. No. 46, Appendix (A).

2. Restrictive Trade Practices Commission, Report concerning the manufacture, distribution and sale of evaporated milk and related products, R.T.P.C. No. 22 (1962), p. 24.

sold in Western Canada at prices considerably below those in Eastern Canada,[1] but still no evidence concerning Carnation's costs of production is presented by the Commission, and again the nature and extent of discrimination are not established.

The Commission comes nearest to explicitly declaring when it believes discrimination to occur in a recent report concerning the pricing practices of a knitting wool firm, known as Miss Mary Maxim Limited.[2] The firm pursued a policy of dividing customers into three groups roughly according to volume of purchases, and granting different percentage rebates to each group, that group containing the so-called biggest customers gaining the largest rebates.[3] The Commission shows concern over the somewhat arbitrary classification of customers into the three groups, and the lack of movement among the groups by customers, despite changes in their purchases. The Commission here boldly states:

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1. Ibid., p. 55.
2. No. 62, Appendix (A).
3. Restrictive Trade Practices Commission, Report relating to the distribution and sale of Mary Maxim knitting wool, patterns and accessories in Canada, R.T.P.C. No. 38 (1966), pp. 2-4.

> "A non-discriminatory price concession may be awarded only on the basis of quantity or volume. ... Obviously where a concession is granted to one customer, every other competing customer who purchases the same quantity or volume of goods is entitled to receive the same concession. If, for example, a rebate is paid to one customer on the basis of his purchases of a certain volume of goods in a certain period of time it is the responsibility of the supplier to seek out every other competing purchaser who has purchased a like volume in the same period and grant the rebate to each". [1]

This statement effectively denies the relevance of price-cost relationships in determining the nature and extent of discrimination; if differences exist in the marginal costs of supplying different customers, the above quotation is entirely erroneous on the basis of the definition of discrimination endorsed by the Commission in the report on discriminatory practices in the grocery trade. Needless to say, the Commission does not consider the costs to Mary Maxim of supplying different customers, merely looking to relative purchases to determine whether discrimination exists. This neglect is particularly important as the report considers a specific allegation that Mary Maxim granted the largest rebate to the Eaton group, and that this rebate discriminated against competitors of Eaton. The Commission condones the practice by recognising that the Eaton group was Mary Maxim's largest single customer.[2]

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1. *Ibid.*, p. 32.
2. *Ibid.*, p. 35.

Yet evidence earlier in the report demonstrated that Mary Maxim delivered individually to large Eaton stores across the continent.[1] Whether or not this fact would be significant could only be shown by comparing the costs to Mary Maxim of supplying each of the Eaton stores individually with those of supplying other customers. It seems likely that there would be little justification for aggregating total sales to the Eaton group in determining the rebate; at least the rebate cannot be condoned without some reference to Mary Maxim's costs.

The surprising thing is then that the Commission does not always neglect costs; in fact some of its considerations of costs are extremely thorough. Probably the best utilisations of price-cost relationships are to be found in the analysis of allegations of predatory practices contained in the remaining three reports. However, there are peculiar reasons for the Commission's consideration of costs in each of these cases. One of the reports deals with a price war among milk distributors in Ottawa in 1961,[2] during which milk was widely sold at half its normal price. The special nature of this case is that the competing dairies belonged to an association which negotiated jointly the price of milk from the producing farmers. The cost of the milk was therefore the same to each of the dairies, and the

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1. *Ibid.*, p. 16.
2. *No. 54*, Appendix (A).

selling price in the price war was easily established by the Commission to be below initial cost. The dairies' overall costs are cursorily examined,[1] but the Commission was readily able to demonstrate the intention of the dairy responsible for the war to intimidate competitors, both by the evidence of selling generally at a loss, and also by further evidence that the same dairy negotiated the agreement to end the war and restore prices.

Again the Commission has a special reason to consider costs in a report on alleged predatory pricing in the sale of cast iron soil pipe in Western Canada.[2] The firm concerned was seen to be originally pricing higher than competing firms,[3] but then to cut prices drastically. The firm maintained however that it was still able to obtain a high rate of profit, and produced evidence to show the margin over costs before the price reduction, and also to show that mechanisation at the time of the reduction allowed great cost savings.[4] The nature of the firm's defence against the allegations here forced evidence of costs upon the Commission.

Finally, the most complicated case involved in the

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1. Restrictive Trade Practices Commission, Report in the matter of the sale and distribution of milk in the Ottawa, Ontario, area, R.T.P.C. No. 30, pp. 7-8.
2. No. 68, Appendix (A).
3. Restrictive Trade Practices Commission, Report concerning the production, manufacture, supply and sale of cast iron soil pipe in the Prairie Provinces and British Columbia, R.T.P.C. No. 44 (1967), pp. 51 and 57-58.
4. Ibid., pp. 51 and 59 respectively.

Commission's reports on discriminatory practices also contains an analysis of costs in the consideration of an allegation of predatory pricing. The case is complicated in that it involved allegations of both price discrimination and predatory pricing, in which the former was distinct from, but responsible for, the latter. The Canadian zinc oxide industry was the subject of the inquiry, the allegation being that the Zinc Oxide Company of Canada Limited (ZOCO) attempted to remove its only two domestic competitors by selling at prices unprofitable to them, while ZOCO was supplied with cheaper raw zinc than was available to the competitors.[1] As this cheap source of material made ZOCO's price cuts possible, the Commission included in the report a comparison of ZOCO's costs with those of the competitors.[2]

However, turning from the allegations of predatory pricing back to one of ordinary price discrimination, we again find an analysis of costs completely neglected in the appraisal of the allegations of discrimination by ZOCO's supplier of zinc, the Hudson Bay Mining and Smelting Company Limited. From the evidence we find that ZOCO took one third of Hudson Bay's domestic sales of zinc, but that other major users of zinc are the galvanising, die cast alloy and brass industries, and furthermore, the bulk of Canadian zinc metal

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1. No. 22, Appendix (A).
2. Restrictive Trade Practices Commission, Report concerning the distribution and sale of zinc oxide, (1958) pp. 152-59.

is exported. Three possible sources of discrimination therefore emerge: between ZOCO and other zinc oxide firms; between the zinc oxide industry and other zinc-using industries; and between the zinc oxide industry and foreign consumers of Canadian zinc. The report indicates that the other zinc oxide producers were offered zinc by Hudson Bay only at prices higher than those obtained by ZOCO,[1] and that Hudson Bay sold zinc in the U.K. at price considerably below the price to ZOCO.[2] However, no mention is made of the costs to Hudson Bay of supplying these various customers, so no discrimination can be proven. Moreover, the zinc supplied to ZOCO was for a considerable time reputed to be a special grade, and in its attempt to establish the existence of discrimination among the zinc oxide producers, the Commission spends considerable space showing that this special grade differed little in quality from the normal grade supplied to ZOCO.[3] Obviously, to establish the existence of discrimination the Commission was bound to consider not the quality of the special grade, but its production cost relative to the normal grade.

It must be concluded therefore that the Restrictive Trade Practices Commission has never successfully established the extent of discrimination in its appraisal of discriminatory practices. True, the Commission has in a few of the reports

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1. *Ibid.*, pp. 65-67.
2. *Ibid.*, pp. 32-33.
3. *Ibid.*, pp. 52-60.

considered the relationship between price and cost, but usually for some special reason, and never systematically. In appraising the allegations of predatory pricing the Commission does tend to investigate costs, using the profit margins of the firms concerned as indications of whether the prices are "unreasonably low", or being forced to consider costs as the firms involved attempt to justify their price reductions in terms of lower costs. However, the Commission never views predatory pricing as a discriminatory practice, concentrating on the low price rather than comparing prices and costs over time or among regions. Relative price-marginal cost ratios are not sought by the Commission to indicate discrimination - as evidenced dramatically in the report on cigarettes and confectionery in Edmonton, in which the Commission is faced with details of different percentage mark-ups on different items, and fails to recognise the discrimination. In the reports in which forms of discrimination other than predatory pricing are examined, the neglect of costs is almost complete, and the Commission can be observed looking for differences in volume or quality of purchases for evidence of discrimination. In terms of the definition of discrimination used in Chapter 3 above, and, perhaps more significantly, presented in the Commission's own general report on discriminatory practices in the grocery trade, the Commission has never in its specific reports shown the nature and extent of discrimination.

<u>The appraisal by the Commission of the effects on economic performance of discriminatory practices.</u>

It was concluded in Chapter 3 above that an appraisal of any pricing policy from the point of view of the "public interest" must consider and evaluate the effects of the practice on economic performance - *i.e.* on the allocation of resources and the distribution of income. Throughout the evaluation, the effects of the practice must be compared to the alternative situation in the absence of the practice; the practice must necessarily be condoned when the practicable alternative produces worse economic performance. In appraising alleged discriminatory practices the Restrictive Trade Practices Commission must particularly consider whether output is increased or decreased, and the firm operates nearer to or further from full capacity, whether the practice allows or hinders price flexibility in the type of sale concerned, and whether the resulting distribution of income is to be preferred to the alternative. Each of these is stressed in the Commission's general report on such practices in the grocery trade.

Returning to the specific reports concerning allegations of discriminatory practices, it is sometimes possible from the evidence presented to indicate the effects which the practices may be expected to have on particular aspects of the allocation of resources. In the reports dealing with differential discounts and rebates to retailers, the volume of goods involved is generally very small relative to the overall output of the supplier, and the effects of the practices concerned on the allocation of resources within industry may be negligible. For example, in the report dealing with the supply of wares to retail hardware dealers, and similarly in the reports dealing with the supply of gasoline to service stations in Toronto, the volume of the supplier's sales involved may be expected to be very small, and the Commission may perhaps be excused for not considering the effects of the practices on the allocation of resources. However, when the practice concerned is part of the seller's general policy, his level of output will be dependent on the practice, and the allocation of resources to the seller will be affected. Further, the seller's capacity utilisation may be a function of his differential pricing policy, the concessions being made to utilise capacity more than is allowed by the alternative single-price policy. However, in order to determine whether the concessions allow more efficient production by the seller, the Commission would need to supply far more information concerning the seller's overall conditions of output. In these reports dealing with supply to retailers the Commission fails to indicate whether the seller's output is at all affected by the rebates and discounts.

It was established in Chapter 3 that geographic price discrimination may be practised by an independently-maximising firm precisely to achieve a fuller utilisation of capacity. Such "dumping" can allow the firm greater profits from selling surplus at any price above marginal cost, and may account for a firm selling at a lower price in a distant market than in that nearer the point of production. Relating this to the Commission's report on the evaporated milk market, it becomes possible that the practice of the Carnation company of absorbing freight costs to Western Canadian markets could have promoted a more efficient utilisation of the firm's capacity than any practicable alternative. The possibility was not however discussed in the report. Again no information relating to Carnation's conditions of production is presented.

The pricing policy of zinc metal revealed in the report on the zinc oxide market may also have been determined in part in order to promote efficiency in the firm involved, the Hudson Bay Mining and Smelting Company. Hudson Bay regularly sold zinc metal at prices much lower in the U.K. than in Canada.[1] If the Canadian price was informally fixed by fear that price cuts would provoke harsh retaliation from the sole domestic competitor, Hudson Bay may have promoted efficiency by selling in the low-price U.K. market. On the

1. Report - zinc oxide, pp. 31-33.

other hand the evidence indicates that Hudson Bay's policy diverted the allocation of resources away from domestic zinc oxide producers and toward foreign zinc-using industry, as in part of the period considered by the report one eighth of Canadian zinc oxide requirements were imported, mainly from the U.K.,[1] while the Canadian producers had much excess capacity.[2] The alternative of a uniform price at home and abroad may have resulted in Hudson Bay pricing everywhere at the high Canadian price or at a lower price. If the former occurred and reduced the efficiency of Hudson Bay, the original policy could have been condoned; if the latter occurred and allowed a more optimal allocation to the domestic zinc oxide industry, the original policy could be condemned. Of course, much of this is speculation, and unfortunately the issue was not resolved in the report; the Commission merely mentioned the difference in zinc price to the U.K., without considering Hudson Bay's capacity, or the rigidity of zinc prices in the Canadian duopoly market, let alone the consequences of prohibiting the price policy.

A more ambitious appraisal of the effects of pricing policy on the allocation of resources would attempt to compare the pricing policy of the firm in question to policies

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1. See domestic sales and imports of zinc oxide for the years 1953 and 1954, ibid., p. 43.
2. "ZOCO had a plant with a capacity about double the domestic demand", ibid., p. 35.

throughout the economy. A firm with a higher price-marginal cost ratio than that prevailing among most firms would tend to be underallocated relative to the norm, and discrimination lowering the particular price-marginal cost ratio toward the norm would allow an improvement in allocation. Such a comparison may well be impossible in practice, but it is likely that the relative pricing policies of substitute goods may be particularly relevant to the allocation of resources, and that a comparison of these policies may be possible.[1] It can be expected that a pricing policy allowing the price-marginal cost ratio of a good to conform more closely to those of its substitutes will promote a more efficient allocation of resources among the substitutes. It may be possible to consider this in the appraisal of discriminatory practices; for example, in the Commission's report on cast iron soil pipe it is disclosed that several substitute products existed, made from copper and plastic, among other materials.[2] A comparison of the price-marginal cost ratios for cast iron pipe and the substitutes would have allowed an assessment of the direction of any misallocation, and a judgement of whether allocation within the soil pipe market as a whole was improved or worsened by the price cuts in cast iron soil pipe. Beyond

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1. The acceptability of this argument relies on the reasoning toward a "third best" presented by E.J. Mishan, "Second Thoughts on Second Best", op. cit., pp. 214-216.
2. Report - cast iron soil pipe. p. 1.

mentioning the existence of substitutes for cast iron soil pipe, the Commission gives no recognition to the existence of a general soil pipe market, distinct from that for cast iron pipe.

It is apparent that the Commission does not consider the allocation of resources as such in the appraisal of discriminatory practices. It might be expected, however, that the effects of the practices on price flexibility would receive more of the Commission's attention, being a much more obvious indication of the effects of the practices on performance. True enough, in the cases of alleged predatory pricing in the Edmonton cigarettes report and the cast iron soil pipe report, the Commission examines in some detail the price policies prevailing in the markets concerned before and after the practices were initiated, and concludes in both cases that the price cuts were perfectly fair competitive actions, in both cases reflecting the greater efficiency of the firm concerned relative to competitors. However, these cases both involve general price reductions; where the cases involve selective price differentials for the same good, the Commission tends not to consider the possibility that selective price cuts may be preferable to no price cuts, which in a rigid oligopolistic situation is likely to be the alternative. The three reports dealing with the sale of gasoline to retailers in Toronto may have disclosed just such a situation. The major oil companies form a formidable oligopoly, and it could be expected that prices to retailers would tend to be normally rigid. The practice of allowing discounts off tank-wagon price to independently-owned retail outlets is apparently a recognised practice of the oil companies, and it may indeed represent a major source of price-flexibility in the market. The practice specifically does not involve general price reductions and so may be accepted without retaliation by the oil companies. No evidence on the general rigidity of prices in the market is presented by the Commission, although the conclusion is reached that such practices are detrimental:

> "It would appear that the discrimination in price... would be remedied by the discontinuance by Supertest of any difference in price in the sale of gasoline to the two competing dealers. In order to ensure this result the Commission recommends that a court order be sought ... which would restrain Supertest from granting ... to Barter Motors any price advantage not offered to Mr. Hearl." 1

The Commission does not consider the possibility that the "result ensured" might be the elimination of a major source of price flexibility in the market.

Interestingly enough, the Commission tacitly condones a form of geographic discrimination which appears to promote price competition in two of the reports. In the report on the evaporated milk market the Commission indicates that the Carnation company normally sold at a lower price in Western

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1. Report - gasoline in Toronto (Supertest), pp. 56-57. A similar conclusion is reached in the British American case, Report - gasoline in Toronto (B.A.), p. 32.

Canada than the sum of the price at the point of production in Eastern Canada plus freight costs.[1] Similarly, in the report on cast iron soil pipe, the Commission shows that a producer in British Columbia absorbed freight costs to undersell the Alberta producers in their own territory.[2] Neither of these practices was condemned by the Commission. Either because the Commission considered them to be beneficial to price competition, or more likely, because they were not recognised by the Commission to be possibly discriminatory, their effects were not discussed. In both reports the practices are revealed only in the general description of prevailing market conditions.

The ability of discrimination to achieve otherwise impossible price flexibility is therefore not discussed by the Commission. In fact the reports are concerned in each case with the "unfair" concession granted to one buyer rather than another, when the buyer is also not an individual but a firm, and the concession is felt likely to overrule personal enterprise as the determinant of business success. The reason for condoning discrimination when it is the only source of price flexibility is that at least some consumers will receive the benefit, when the market structure prevents all consumers from benefiting. Naturally if there are middlemen in this process, some of these receive perhaps unfair

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1. <u>Report</u> - evaporated milk, p. 24.
2. <u>Report</u> - cast iron soil pipe, p. 35.

competitive advantages, and others may even be forced out of business. The relative merits of the welfare of the consumers and businesses involved must be decided by value judgements, and these must in the final analysis govern any appraisal of restrictive practices. In fact the Commission appears to accept a value judgement that discrimination harming competitors is to be condemned, regardless of the benefits which might accrue to final consumers. The reports on sales of gasoline in Toronto show this most clearly: the discrimination is discussed purely in terms of its effects on competing retailers, without a single mention of final consumers. In the Supertest case the evidence shows that the independent dealer gaining the special discount passed on the benefit to consumers to the extent of taking a lower percentage mark-up than did the competing dealer who did not receive the discount.[1] Still the Commission condemned Supertest's practice of favouring one customer rather than another.

Again in cases concerning geographic discrimination, some mention at least must be made of the relative weights to be attached to the welfare of the different groups of consumers. In the evaporated milk case, Carnation's pricing policy favoured consumers in Western rather than Eastern Canada, yet the report considered the effect of the practice

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1. Report - gasoline in Toronto (Supertest), p. 32.

only upon Carnation's competitors.

In fact, in none of the reports does the Commission even mention the effects of the practices involved on the final consumer. The cases all deal with alleged discrimination among buyers who are firms and not individuals, and the Commission tends not to indicate even the final prices to consumers.[1] The "public interest" would naturally include an interest in the relative welfare of competing producers, but, though it is presumptuous to define this public interest, it is doubtful that the interests of competing producers should receive as much weight relative to the interests of the consuming public as is given by the Commission.

It becomes obvious therefore that the Commission does not appraise discriminatory practices in terms of their effects on economic performance. Yet it has been shown that such an approach is possible. The effects on the allocation of resources would have to be examined by a consideration of the position of the firm in question relative to competitors, and to other firms with which this firm conducts business, at all levels of production and distribution. The effects on the distribution of income would have to be examined by a consideration of favoured and disfavoured individuals, as both producers and consumers.

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1. Final prices are given exactly only in the gasoline reports.

Moreover the Commission must attempt to predict the resulting alternative policy in the event of prohibition of the discrimination. The present chapter has indicated realistic aspects of performance which the Commission could have considered in the cases to date. Unfortunately, the reports fail significantly in the depth of evidence presented, and in sophistication of the analysis undertaken.

Thus if the Commission manifestly does not consider the effects of discriminatory practices on economic performance, the question arises of the nature of the criteria actually employed by the Commission in condemning or condoning practices.

The basic error in the Commission's appraisal of discriminatory practices lies in an implicit assumption that the public interest lies in the promotion of the letter of the law on such practices. The law states that practices which discriminate "against a competitor of the Purchaser",[1] and discrimination "lessening competition or eliminating a competitor",[2] are illegal. The Commission considers it sufficient to show in the report that the practices have had such an effect on the buyer's competitors, and thus that discrimination as prohibited by law has taken place. The Commission rejects any obligation to consider a wider public interest, and to consider the <u>effects</u> of the practices;

1. <u>Combines Investigation Act</u>, s. 33A. (1)(a).
2. <u>Ibid.</u>, s.33A. (1)(b) and (c).

the reports merely attempt to prove or disprove the existence of discrimination as described in the Act. The following two quotations provide dramatic examples from two of the reports:

> "In the opinion of the Commission the maintenance of a price differential of this character must be regarded as a form of discrimination on the part of Supertest against Mr. Hearl." 1

and

> "It is the opinion of the Commission that the fact that temporary allowances were not granted by Texaco to Mr. Edmunds in the periods mentioned in the Statement of Evidence did not form part of a practice of discriminating on the part of Texaco." 2

These statements appear not, as may be expected, as part of the introduction to an appraisal of the cases, but as the very last sentences in the conclusion of their respective reports! The Commission is obviously attempting to merely prove or disprove the existence of discrimination, and condemning or condoning practices purely on this basis.

To this end, the Commission is prepared to consider only the practices which are named in the allegations:

> "The allegations made by the Director relate only to the differences in prices on sales of gasoline by Texaco ... arising out of the granting of temporary allowances". 3

The Commission therefore did not draw conclusions relating to the permanent discount granted to the independently-owned outlet. Similarly in the report dealing with

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1. Report - gasoline in Toronto (Supertest), p. 56.
2. Report - gasoline in Toronto (Texaco), p. 27.
3. Ibid.

cigarettes and confectionery in Edmonton, the Commission concluded that the case did not involve predatory pricing, and then stated:

> "The conclusions which the Commission has reached with respect to the allegations of unreasonably low prices makes it unnecessary to attempt to arrive at definite conclusions as to the effects which have been produced by the prevailing competitive prices or which may be expected to be produced, because the essence of the allegation is in the charge of unreasonably low prices". 1

The Commission even follows the law to the extent of attempting interpretations of obscure clauses in the Act. The report on cast iron soil pipe finds the Commission attempting to decide whether the production involved constitutes "a 'class or species of business' within the meaning of section 2(f) of the Combines Investigation Act";[2] while in the report on Mary Maxim knitting wools the Commission probes the meaning of "available to competitors" within the Act.[3]

This obsession with the law may be a consequence of the training of the personnel of the Commission, as suggested in Chapter 4. It may be the case that the personnel are not themselves able to conduct an appraisal of discriminatory practices when defined as in Chapter 3, and in terms of economic performance rather than of status according to law. However, the law is reasonably explicit

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1. Report - cigarettes and confectionery in Edmonton, p. 60.
2. Report - cast iron soil pipe, pp. 73-74.
3. Report - Miss Mary Maxim, p. 32.

when it states:

> "... such report shall review the evidence and material, appraise the effect on the public interest of arrangements and practices disclosed in the evidence, and contain recommendations as to the application of remedies provided in this Act or other remedies." 1

Given such a legislative provision, for the Commission to consider only the legality or illegality of discriminatory practices is inexcusable.

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1. Combines Investigation Act, s.19.(1).

<u>Conclusion.</u>

The legislative prohibition of discriminatory trade practices in Canada appears to be extremely uncompromising, yet the effects of such practices upon economic performance are far from certain. Sections 33A. and 33B. of the Combines Investigation Act essentially prohibit discrimination in similar sales to competing buyers; geographic discrimination lessening competition; and predatory pricing lessening competition. These practices may take a great variety of forms, however, and may operate in widely differing market structures, therefore the various practices can be expected to affect the allocation of resources and the distribution of income in different ways. Most importantly, the practices may only be meaningfully evaluated when compared to the practicable alternatives. Thus without an analysis of individual cases it is impossible to determine whether a particular practice is to be condemned.

The Restrictive Trade Practices Commission exists in Canada specifically to perform an analysis of individual cases of alleged breaches of the combines legislation. The prescribed function of the Commission is unique in the history of Canadian combines administration, in that in its appraisal of restrictive practices the Commission is not required to even suggest whether an <u>offence</u> has been committed:

> "We consider that the Report has important functions other than that of furnishing a preliminary verdict as to whether or not the accused shall be prosecuted." 1

Instead the Commission is directed to consider and explain whether practices operate to the benefit or the detriment of of the public interest. To further this end, the Commission is empowered to employ expert assistance, and to obtain any evidence which it considers pertinent.

The Commission's reports on discriminatory practices, however, tend to be as lacking in analysis in terms of economic performance as their format is in popular appeal. If it is recognised that the public interest lies in the achievement of certain aims of allocation of resources and distribution of income, then it is in terms of the effects on these that restrictive practices must be considered. In the reports dealing with discriminatory practices, to merely attempt to determine whether the practices alleged by the Director to be illegal in fact are illegal within the Act is in direct contradiction to the Commission's terms of reference. The reason for dividing the functions of investigation and appraisal of restrictive practices in 1952 was precisely to remove from the appraisal its emphasis on the legal status of practices, and to set up an

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1. MacQuarrie Report, op. cit., p. 34.

objective appraising agency removed from the procedure of prosecution of practices. Certainly in its appraisal of discriminatory practices the Commission has denied much of its responsibility to that aim. As long as the public interest is unconditionally equated with enforcement of the law, the reports cannot be other than a stage in prosecution.

APPENDIX (A).

1 Number and date of report.	2 Title of report.	Alleged offence.
1. May 1, 1953.	Soap products, Montreal district.	Resale price maintenance.
2. May 28, 1953	Retail hardware dealers North Bay, Ontario.	Price discrimination.
3. Dec. 29, 1953.	Certain household goods, Chicoutimi-Lake St. John, Quebec	Resale price maintenance.
4. Feb. 16, 1954.	Distribution and sale of gasoline, Vancouver.	Combination.
5. Mar. 10, 1954.	China and earthenware	Resale price maintenance.
6. Oct. 25, 1954.	T.V. Sets, Toronto.	Resale price maintenance.
7. Nov. 5, 1954.	Wire fencing.	Combination.
8. Nov. 22, 1954.	Distribution and sale of coal, Timmins-Schummacher area.	Combination.
9. Mar. 28, 1955.	Loss-leader selling.	General inquiry.
10. May 16, 1955.	Distribution and sale of beer.	Merger.
11. Aug. 29, 1955.	Asphalt and tar roofings.	Combination.
12. Oct. 17, 1955.	Advertising plan of household appliances.	Resale price maintenance.

13.	Dec. 12, 1955.	Transmission and conveyor equipment.	Combination.
14.	Jan. 9, 1956.	Winnipeg Coal.	Combination.
15.	Mar. 5, 1956.	Quilted goods.	Combination .
16.	June 20, 1956.	Boxboard grades of paperboard.	Combination.
17.	Nov. 1, 1956.	Flue-cured tobacco	Combination.
18.	Jan. 7, 1957.	Sugar, Western Canada.	Merger.
19.	July 24, 1957.	Metal culverts.	Combination.
20.	Mar. 31, 1958.	Pulpwood, Eastern Canada.	Combination.
21.	May 14, 1958.	Yeast.	Merger.
22.	July 3, 1958.	Production, distribution and sale of zinc oxide.	Combination, merger, monopoly, price discrimination, and predatory pricing.
23.	Sept. 25, 1958.	Cigarettes and confectionery, Edmonton.	Predatory pricing.
24.	Dec. 9, 1958.	Discriminatory pricing practices in the grocery trade.	General inquiry.
25.	(R.T.P.C. 1) Feb. 3, 1959.	Ammunition.	Monopoly.
26.	(R.T.P.C. 2) May 1, 1959.	Electrical construction materials.	Combination.
27.	(R.T.P.C. 3) May 19, 1959.	Surgical rubber gloves, etc.	Resale price maintenance.
28.	(R.T.P.C. 4) Feb. 3, 1960.	Sugar, Eastern Canada.	Combination.
29.	(R.T.P.C. 5) Feb. 25, 1960.	Gasoline, Toronto area.	Resale price maintenance.

30. (R.T.P.C. 6) Mar. 11, 1960.	Speciality bags.	Combination.
31. (R.T.P.C. 7) May 16, 1960.	Automobile insurance.	General inquiry.
32. (R.T.P.C. 8) July 26, 1960.	Coal, Sault Ste. Marie.	Combination.
33. (R.T.P.C. 9) Aug. 16, 1960.	Newspapers, Vancouver.	Merger.
34. (R.T.P.C. 10) Dec. 6, 1960.	Transparent packaging products.	Combination.
35. (R.T.P.C. 11) Dec. 16, 1960.	Belts.	Combination.
36. (R.T.P.C. 12) Apr. 28, 1961.	Gasoline, Toronto, (Texaco).	Price discrimination.
37. (R.T.P.C. 13) Apr. 11, 1961.	Gasoline, Toronto, (Supertest).	Price discrimination.
38. (R.T.P.C. 14) Apr. 12, 1961.	Gasoline, Toronto, (B.A.).	Price discrimination.
39. (R.T.P.C. 15) July 12, 1961.	Cameras (arrow).	Resale price maintenance.
40. (R.T.P.C. 16) Aug. 3, 1961.	Meat-packing.	Merger.
41. (R.T.P.C. 17) Oct. 13, 1961.	Cameras (Garlick).	Resale price maintenance.
42. (R.T.P.C. 18) Mar. 23, 1962.	Automobile oils and accessories.	General inquiry.
43. (R.T.P.C. 19) Aug. 2, 1962.	Paperboard shipping containers.	Combination and mergers.
44. (R.T.P.C. 20) Aug. 2, 1962.	Acquisition of shares - paper companies.	Merger.
45. (R.T.P.C. 21) Aug. 2, 1962.	The acquisition of Wilson Boxes, Ltd. by Bathurst Power and Paper Co., Ltd..	Merger.

46.	(R.T.P.C. 22) Aug. 28, 1962.	Evaporated Milk.	Price discrimination.
47.	(R.T.P.C. 23) Oct. 4, 1962.	Electric Appliances (Sunbeam).	Resale price maintenance.
48.	(R.T.P.C. 24) Jan. 24, 1963.	Drugs.	General enquiry
49.	(R.T.P.C. 25) Dec. 16, 1963.	Tenders for sewers etc. Town of Duvernay.	Combination.
50.	(R.T.P.C. 26) Feb. 7, 1964.	Heating supplies, Montreal.	Combination.
51.	(R.T.P.C. 27) Feb. 26, 1964.	Newspapers, Sudbury.	Monopoly.
52.	(R.T.P.C. 28) June 24, 1964.	Plumbing supplies.	Combination.
53.	(R.T.P.C. 29) July 13, 1964.	Tenders for road surfacing.	Combination.
54.	(R.T.P.C. 30) Sept. 2, 1964.	Ottawa milk.	Combination and predatory pricing.
55.	(R.T.P.C. 31) Sept. 23, 1964.	Pencils.	Combination.
56.	(R.T.P.C. 32) Feb. 18, 1965.	Propane.	Combination, monopoly, merger.
57.	(R.T.P.C. 33) Mar. 30, 1965.	Acquisition of a newspaper company in Fort William.	Merger, monopoly.
58.	(R.T.P.C. 34) June 17, 1965.	Shipping Conferences.	Combination.
59.	(R.T.P.C. 35) Aug. 25, 1965.	Street paving tenders, Hull.	Combination.
60.	(R.T.P.C. 36) Nov. 29, 1965.	John St. pumping station contract Toronto.	Combination.
61.	(R.T.P.C. 37) Dec. 30, 1965.	Pesticides.	Combination, resale price maintenance.

62. (R.T.P.C. 38) Mar. 8, 1966.	Pricing Practices of Miss Mary Maxim Ltd.,	Price discrimination, resale price maintenance.
63. (R.T.P.C. 39) Mar. 24, 1966.	Pricing of ready-mixed concrete, Windsor.	Combination.
64. (R.T.P.C. 40) June 27, 1966.	Gasoline consignment plans	Resale price maintenance.
65. (R.T.P.C. 41) Nov. 30, 1966.	Phosphorous products and sodium chlorate industries.	Monopoly. Merger.
66. (R.T.P.C. 42) Feb. 17, 1967.	'Specials' in eggs, Kingston.	Resale price maintenance.
67. (R.T.P.C. 43) July 11, 1967.	Glued-laminated timbers.	Combination.
68. (R.T.P.C. 44) Oct. 10, 1967.	Cast iron soil pipe.	Monopoly, merger, price discrimination.
69. (R.T.P.C. 45) Apr. 1, 1968.	Corning glassware.	Resale price maintenance.
70. (R.T.P.C. 46) May 9, 1968.	Dairy products, Montreal.	Combination.

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1. The numbering of the reports from 1 to 70 is unofficial, but chronological, and the reports are referred to by these numbers in the above text.

2. The titles are abbreviated, using the Commission's own abbreviations where these exist.

APPENDIX (B).

Commissioner	Reports during term of office.
C. Rhodes Smith, Q.C., M.A., LL.B., B.C.L.; Chairman 1952 to 1962.	No's 1-47.
Guy Favreau, Q.C., B.A., LL.B.; Member 1952-55.	No's 1-4, 6-10.
A.S. Whiteley, B.A., M.A.; Member 1952-62, 1967 to present.	No's 1-3, 5-9, 11-47, 66-70.
Guy Roberge, Q.C., B.A., LL.L.; Member 1955-57.	No's 12, 13, 15-18.
Pierre Carignon, Q.C., B.A., LL.L; Member 1960-64.	No's 34-52.
R.S. MacLellan, B.A., LL.B.; Chairman 1963 to present.	No's 49-70.
W.D.R. Eldon, A.M., Ph.D.; Member 1963-67.	No's 49-65.
L.A. Couture, Q.C.; Vice-chairman 1964 to present.	No's 54-70.

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