

Dawson Committee

TRADE PRACTICES ACT REVIEW

**Supplementary Submission No. 3
by the
National Association of Retail Grocers of
Australia**

November 2002

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**DAWSON COMMITTEE
TRADE PRACTICES ACT REVIEW**

NARGA SUPPLEMENTARY SUBMISSION No. 3

**CANADIAN COMPETITION BUREAU
*PRICE DISCRIMINATION ENFORCEMENT GUIDELINES***

In keeping with its commitment to provide the Committee with Canadian material of relevance to NARGA's recommendation regarding a prohibition on anti-competitive price discrimination, NARGA attaches a copy of the Canadian Competition Bureau *Price Discrimination Enforcement Guidelines*.

These Guidelines demonstrate that the Canadian prohibition against price discrimination is a long standing one dating back to 1935. Significantly, while NARGA is only calling for a civil prohibition against anti-competitive price discrimination, the Canadian prohibition has been a criminal prohibition since the outset. Clearly, Canada views price discrimination as so potentially detrimental to competition that it has seen fit to make it a criminal offence under the country's competition laws.

Given that Canada is an economy of comparable size to Australia, it is noteworthy that the Canadian competition laws deal so firmly with price discrimination. Indeed, by making the prohibition criminal in nature, Canada has long been sending a clear signal that price discrimination is anti-competitive in appropriate circumstances and, accordingly, not to be allowed to distort the competitive process between comparable rivals.

From the Guidelines, it is clear that a prohibition against anti-competitive price discrimination is concerned with ensuring that comparable rivals are treated in a comparable manner. It is not a guarantee that all rivals are treated equally, but rather an acceptance that the competitive process can be distorted where one competitor is given a price advantage over a comparable rival not justifiable in the circumstances. Such a

distortion means that the price disadvantaged, but comparable, rival is not able to offer the same competitive tension as it would have been able to provide in the absence of the price discrimination. Over time, the price disadvantaged, but comparable, rival is 'priced out of the market' enabling the price advantaged rival to secure higher margins or use its price advantage to drive out the disadvantaged rival.

Importantly, the Guidelines emphasize that it is the availability of comparable prices that is critical in protecting a supplier against a breach of the Canadian prohibition against price discrimination. Where a competitor is given a favourable price in return for delivering on a particular pre-determined outcome, the supplier is to make available the same favourable price to others in return for delivering on the particular pre-determined outcome. In short, the prohibition focuses on the *availability of comparable* prices to *comparable* customers - customers that purchase comparable volumes, provide comparable services and meet comparable pre-determined outcomes as agreed with suppliers. The prohibition does not prevent suppliers from offering different prices to different customers.

The Guidelines also demonstrate that the Canadian prohibition is capable of enforcement, in that despite the prohibition requiring a criminal burden of proof there have been three convictions recorded under the prohibition. With a civil burden of proof, an Australian prohibition against price discrimination would be similarly (and possibly more) capable of enforcement as the Canadian prohibition.

Finally, the Canadian Guidelines clearly show that any business uncertainty arising from an Australian prohibition against anti-competitive price discrimination could be minimised significantly through appropriately drafted guidelines from the ACCC - guidelines that would undoubtedly benefit from the Canadian Guidelines.

NARGA commends the Canadian Competition Bureau *Price Discrimination Enforcement Guidelines* to the Committee - Guidelines which, when considered together with the following additional finalised or draft Guidelines from the Bureau, offer clear international evidence in support of key NARGA recommendations to the Committee:

- *Predatory Pricing Enforcement Guidelines;*
- *Draft Enforcement Guidelines: The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Retail Grocery Industry; and*
- *Draft Enforcement Guidelines: Illegal Trade Practices: Unreasonably Low Pricing Policies.*

Competition Bureau

Price Discrimination Enforcement Guidelines

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The Director of Investigation and Research is responsible for the administration and enforcement of the Competition Act, legislation which is designed to maintain and encourage competition in Canada. This document is the Director's Enforcement Guidelines for price discrimination as defined by section 50(1)(a), (2) and (3) of the Competition Act.

To obtain copies of this document or additional information on the subjects discussed in it, readers may contact:

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Preface

The criminal sanction against price discrimination has been part of Canada's competition law since 1935. Section 50(1)(a) of the Competition Act, as the provision is now known,

reflects the concern that competition in relation to articles should not be unfairly influenced or hampered by discriminatory pricing practices of suppliers.

The term "price discrimination" is a broad one with different meanings in different contexts, such as business, legal and economic. However, the price discrimination which section 50(1)(a) prohibits is a particular type of pricing behaviour which has a relatively specific application to commercial activity in Canada. For an offence to occur, many different elements, as set out in the provision, must each be satisfied.

Placing a criminal ban on certain pricing behaviour, as section 50(1)(a) does, carries with it the risk that business persons may, because of uncertainty about the application of the law, refrain to some extent from engaging in forms of pricing behaviour which would be healthy and beneficial for the markets involved. Misunderstandings may arise because the wording of section 50(1)(a) is complicated and its various elements can be given widely varying interpretations. At the same time there has been virtually no jurisprudence to guide business.

Therefore, it was determined that, as part of our program of compliance, it would be helpful to publish guidelines to clarify the enforcement policy of the Director of Investigation and Research with respect to section 50(1)(a) to ensure that the business community better understands the circumstances which may lead to an investigation under the Act. At the same time, the business community should be aware that a different interpretation of the provision could be advanced by parties seeking to recover damages privately under section 36 of the Act.

These Guidelines address a number of key issues raised by the provision but they cannot anticipate all questions that may arise in the marketplace. They may be updated from time to time to account for future developments in law and policy.

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Interpretation

These Guidelines supersede all previous statements made by the Director of Investigation and Research or other officials of the Bureau of Competition Policy that may differ from anything stated herein.

This document provides the general approach that is taken by the Director of Investigation and Research to the review of price discrimination matters under sections 50(1)(a), (2) and (3) of the Competition Act. Because the specific standards set out in the Guidelines must be applied to a broad range of factual circumstances, it cannot be a binding statement of how discretion will be exercised in a particular situation. Guidance regarding a specific situation may be requested from the Bureau through its Program of Advisory Opinions. The Bureau will apply the standards of the Guidelines reasonably and flexibly to the particular facts and circumstances to such situations.

The Guidelines are also not intended to bind or affect in any way the discretion of the Attorney General in the prosecution of matters under the Competition Act. Nor are they intended to be a substitute for the advice of legal counsel. Final interpretation of the law is the responsibility of the courts.

For the sake of brevity the following terms are used throughout these Guidelines:

"The Act" refers to the Competition Act, R.S.C. 1985, c. C-34, as am. R.S.C. 1985, c. 27 (1st Supp.), ss. 187, 198; R.S.C. 1985, c. 19 (2nd Supp.), Part II; R.S.C. 1985, c. 34 (3rd Supp.), s. 8; R.S.C. 1985, c. 1 (4th Supp.), s. 11; R.S.C. 1985, c. 10 (4th Supp.), s. 18; S.C. 1990, c. 37 ss. 27-32.

"Section 50(1)(a)" is meant to include the related subsections 50(2) and 50(3).

"The price discrimination provision" or "the provision" or "the section" refers to section 50(1)(a), (2) and (3).

"The Bureau" refers to the Bureau of Competition Policy, Consumer and Corporate Affairs Canada.

"The Director" refers to the Director of Investigation and Research of the Bureau of Competition Policy.

"The Guidelines" refers to this publication, the Price Discrimination Enforcement Guidelines.

"Price concession" or "concession" should be read to mean discount, rebate, allowance of price concession or other advantage.

References to sections of the Act are referred to as "sections".

References to parts of these Guidelines are referred to as "parts".

Executive Summary

What constitutes "price discrimination"

Part 1 of the Guidelines describes the rationale of price discrimination, as described by section 50(1)(a) of the Competition Act, and points to a particular range of pricing behaviour to which the provision applies.

The section applies only to the practice of granting price concessions or other advantages to one purchaser which are not available to competing purchasers in respect of a sale of articles of like quality and quantity. While it is one of the criminal law provisions of the Competition Act, there have only been three convictions under the section with fines

ranging between \$15,000 and \$50,000. Unfortunately, these cases have provided little guidance in the interpretation of the section.

Enforcement guidelines

Part 2 outlines the approach taken by the Director in assessing each of the elements of the price discrimination provision. It is noted that the section applies only to sales of articles by persons engaged in a business. The provision applies only to those persons or firms involved on the selling side of a transaction. It does not apply to those involved on the purchasing side. Because the section is directed at "sale" transactions only, it does not apply to leasing, licencing or consignment arrangements or other transactions where title is not transferred.

Section 50(1) (a) does not provide a specific affiliate exception in the Competition Act. As such, transactions between affiliations may be subject to section 50 (1) (a). On the other hand, affiliates may transfer articles at a price reflective of their interests acting as a single economic entity. In such circumstances "concessions" are not negotiated subject to the competitive conditions of the marketplace. Firms that are parties to such transactions may not be granting "concessions in respect of a sale" as the section requires. Transactions of this nature would not be subject to further review.

The section generally does not apply to a sale of services. Where a sale often involves both services and articles, the section will ordinarily not be applied if the articles are sold only incidentally to the sale of the service, for example as in most sales of maintenance services.

Under section 50(1)(a), price discrimination only occurs if a discount, rebate, allowance, price concession or other advantage is granted to one purchaser over and above the price concession or other advantage available to competing purchasers of like quality and quantity as a matter of a practice. The term "other advantage" applies only to price related advantages; that is, those which are like a "discount, rebate, allowance or prior concession" in that they will affect the net price paid for the articles which are the subject

of the sale. The section may also apply to discriminatory credit arrangements, but sellers are not prohibited from imposing reasonable conditions on these arrangements. Non price related advantages such as the use of equipment, or access to technical assistance, are not covered by the provision.

A key issue in these matters will be whether the price concession is "available." The extent to which a price concession should be disclosed to competing purchasers in order for the Director to consider it "available" varies depending on the circumstances. If the seller unilaterally decides to offer a price concession, such as a volume rebate, it should be communicated to competing purchasers of like quality and quantity. By contrast, such broad disclosure is not required if the seller grants a price concession only as a result of negotiations initiated by a purchaser who agrees to provide a service in exchange for the concession. Here, for the concession to be considered "available" it need only be communicated to those competing purchasers who ask for similar concessions on similar terms as the favoured purchaser. The seller is not obliged to extend such a concession to a purchaser who simply asks for the "seller's best deal" as a matter of form.

Conditional discounts are a common form of price concession that should raise no issue under the section as long as they are "available" to competing purchasers of like quality and quantity.

The supplier may, for example, choose to offer price concessions contingent upon the purchaser fulfilling or complying with one or more conditions attached to the sale. Examples discussed in the Guidelines include concessions granted on the condition that: 1) the purchaser increases purchases as compared with a previous time period (commonly known as "growth bonuses," "volume incentive allowances," "loyalty rebates" and "fidelity discounts"); 2) the purchaser provides a service of value to the supplier, such as providing warehouse facilities or facilitating delivery of the articles (commonly known as "functional discounts"); and 3) the purchaser undertakes to buy articles from the supplier rather than from the supplier's competitors ("exclusive dealing discounts").

There are two areas related to conditional discounts which must be considered. First, the conditions to achieve the discount should not be contrived to unreasonably favour or deprive certain customers. Second, the conditions should be verifiable as to when they have been satisfied and the Seller should consistently grant the price concession when the conditions are met.

Whether an issue regarding group volume discounts is raised under the section usually depends on who is the true "purchaser" of articles in a given transaction. This question often arises in the context of buying groups, franchise operations and international corporate buying arrangements. In determining which party is the "purchaser" the Director is prepared to review all the circumstances of a transaction. The true purchaser in any transaction will normally be the firm that has made the necessary contractual commitment to acquire the goods sold.

For buying groups, this will generally be satisfied if the group assumes liability to pay for the articles purchased. For franchise systems and international volume price concessions, the franchiser or multinational parent company would satisfy this requirement by committing their franchisees or international subsidiaries respectively to purchase from the seller granting the concession.

Section 50(1) (a) does not restrict sellers from revising their price lists or concessions from time to time. The relevant "time" for the purpose of the section need not be the time when title was transferred or when the contract was completed. For example, in contracts where an option to purchase articles at a future point in time is offered, the relevant "time" may well be when the contract was entered into, not when the option was exercised.

Price discrimination under section 50 (1) (a) can only occur in relation to concessions granted to one or more purchasers which are not available to "competing purchasers." The focus of the Director's analysis here is whether the purchasers compete in selling their products, not whether they compete in the purchase of articles from the seller.

The section applies only to transactions involving competing purchasers of articles of "like quality and quantity"; it does not apply if the competing purchaser buys a different article or buys appreciably less than the favoured purchaser. Articles may be differentiated physically, by function or performance, or even by a brand name or trademark. One test for determining whether quality is sufficiently different to avoid the application of the section is to ask whether consumers would likely pay more for one of the two articles.

With respect to "like quantity" in order to determine whether one quantity is "like" another, the Director will generally consider industry practices in pricing the articles. Where sellers aggregate purchasers' volumes of different articles for the purpose of calculating volume rebates, no issue should be raised if the same rebate scheme was "available" to competing purchasers.

Section 50 (1) (a) provides that the seller must knowingly discriminate for an offence to occur. This means that the seller, in order to violate the provision, must be shown to have had "knowledge" with respect to all of the elements of the offence, including knowledge with respect to whether or not particular purchasers are competitors of one another. In assessing "knowledge" the Director will also consider whether there has been willful blindness on the part of the seller. Willful blindness arises where a person who has become aware of the need for some investigation declines to do so in order to avoid learning the facts.

Finally, section 50(2) provides that the price concession or other advantage must be granted as part of a practice of discriminating before an offence can occur. Generally, the longer the seller charges different prices to two competing purchasers of like quality and quantity and the more often this occurs, the more likely it is that a sale is part of a practice of discriminating. Occasional discounts for store openings, clearances or anniversary sales, or temporary allowance granted to win new accounts, enter a new market or match a competitor's pricing initiative will not likely be viewed as a "practice of discriminating".

Appendices

Appendix 1 provides a brief review of other sections in the Competition Act that may be relevant to price discrimination practices. Of particular note are the criminal prohibitions in sections 50 (1) (b) and (c) relating to predatory pricing practices (see the Director's Predatory Pricing Enforcement Guidelines) and section 51 dealing with price concessions or other advantages offered or granted for advertising or display purposes. The reader may also wish to consider practices reviewable by the Competition Tribunal under section 77 where price concessions to induce exclusive dealing or tied selling are reviewed in terms of their effect on competition, and under section 79 where the practice of price discrimination is engaged in by a seller or purchaser as an abuse of a dominant position as defined by that section.

PART 1 – PRICE DISCRIMINATION

1.1 The Statutory Provisions

Section 50 of the Competition Act states as follows in relation to price discrimination:

(1) Every one engaged in a business who...

(a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity,

... is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

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

(3) Paragraph (1) (a) shall not be construed to prohibit a cooperative association, credit union, caisse populaire or cooperative credit society from returning to its members, suppliers or customers the whole or any part of the net surplus made in its operations in proportion to the acquisition or supply of articles from or to its members, suppliers or customers.

1.2 Elements of the Offence

The statute sets out a number of factors which must be satisfied for an offence to have been committed. There must be a "sale" of "articles" by a "person engaged in a business". The sale must involve a "discount, rebate, allowance, price concession or other advantage" being "granted" to one "purchaser" which is "over and above" that which is "available" to the purchasers "competitors" in respect of "articles of like quality and quantity." The comparison must relate to the prices "available" to the competitors "at the time the articles are sold to the purchaser." The sale may discriminate "directly or indirectly." The seller must have "knowledge" that the sale is discriminatory. Finally, the sale must be "part of a practice of discriminating."

1.3 Rationale of Section 50(1)(a)

Price discrimination, as described by section 50(1) (a) of the Competition Act, refers to the practice of a seller granting price concessions to one purchaser, which are not

available to competing purchasers in respect of a sale of articles of like quality and quantity.

The provision applies only in the case of discrimination between competitors. Thus, it falls far short of banning all forms or instances of sales at different prices. Sellers have always been, and remain, free to charge different prices and offer different concessions in their dealings with customers who are not one another's competitors.

Furthermore, in their dealings with customers who are one another's competitors, sellers are only governed by the section in respect of sales of articles of like quality and quantity. Nothing in the statute prevents sellers from granting different discounts or rebates if purchasers are not buying similar articles or similar volumes of articles, whether or not they are competitors.

The theory behind section 50(1) (a) is that competing purchasers, when they purchase articles of similar quality and quantity, should not have their ability to compete with one another negatively affected by unequal pricing treatment at the hands of the seller.

By enacting this provision, Parliament has supported the proposition that, at least in terms of the prices which competing seller pay for their goods, those purchasing like quality and quantity can be assured that they should have an opportunity to be on an equal cost footing with their competitors with the market outcome determined by their own entrepreneurship and abilities, and not by the actions of third parties operating elsewhere in the distribution system.

1.4 Enforcement Perspective

In the entire history of the price discrimination provision, there have only been three convictions, all since 1984. These were not contested prosecutions. All three companies pleaded guilty and fines ranging from \$15,000 to \$50,000 were imposed by the courts.¹ Thus, there is little jurisprudence to assist the Director and the business and legal communities in interpreting the legislation.

In spite of the rarity of formal proceedings under the section, the price discrimination provision regularly generates many requests for advice and interpretation from the Bureau. This is taken as a strong indication that the business community is seeking to comply with the law, but is in need of clearly enunciated guidelines setting out the Director's enforcement policy with respect to this complex provision.

Through issuing guidelines, the Director wishes to foster compliance with the law, while ensuring that the business community recognizes the legitimate scope which exists, within the law, for the adoption of innovative pricing practices and strategies.

PART 2 – ENFORCEMENT GUIDELINES

2.1 General Remarks

Assessment of complaints under Section 50(1)(a) essentially involves a retrospective examination of the selling conditions which were at play at the time competing purchasers were engaged in dealing or negotiating with a common seller to acquire articles from the seller. Price discrimination, unlike many other sections of the Act, does not involve the application of competitive-effects tests, and does not require the Director to show the extent to which competition is lessened in the markets involved.² The statutory provision contains none of the familiar qualifiers, such as "unduly", "substantially" or "significantly", which often appear elsewhere in the legislation. However, as criminal law, there is a requirement to prove the offence beyond a reasonable doubt.

The provision contains many elements which must each be satisfied for an offence to occur. Failure to satisfy only one element will render the section inapplicable.

The crux of reviewing a matter under the section involves determining what prices (including concessions) were "available" to the allegedly disadvantaged competitors at

the time of the sale in question to the allegedly favoured purchaser. If the same prices were available to both purchasers but not acted upon, the fact that they paid higher prices would not raise a question under the section, even if all of the other elements of the provision were satisfied. The Director's interpretation of the term "available" is explained in Part 2.5.3 below.

The rest of this Part explains the Director's approach to the various elements contained in section 50(1)(a). Where it is not stated, it should be understood that, for ease of exposition, the discussion of each element assumes that the other elements of the provision are satisfied.

It also should be noted that while some kinds of behaviour may not cause a problem under section 50(1)(a), they may potentially offend other provisions of the Competition Act. As much as possible in the text, reference has been made to these other provisions where appropriate.

2.2 Parties to an Offence

Section 50(1)(a) of the Competition Act applies to "everyone engaged in a business" in Canada that meets the requirements of the section. However, the Act and its jurisprudence provide for certain exceptions. For example, pursuant to section 2.1, the Act applies to Crown corporations only in respect of those commercial activities engaged in by the corporation in competition, potential or actual, with other persons.

The words "party, or privy to, or assists in any sale" imply that persons in addition to the actual seller of articles may be liable under the section. For example, the agents of the seller, such as brokers who assist in negotiating and executing the sales transaction, may be persons who assist in a discriminatory sale. These words are also broad enough to encompass individuals acting either as officers or agents of the seller.

The words "a purchaser of articles from him" lead to the conclusion that a purchaser can never violate section 50(1)(a). In the Director's view, buyers should not be inhibited from

bargaining vigorously so as to obtain lower prices that they can pass on to their customers. However, if the Director's examination reveals that the buyer possessing significant purchasing power has prevailed upon a seller to grant an illegal advantage over a competitor, the Director will consider whether or not such behaviour might constitute the counselling of a price discrimination offence. Similarly, other provisions of the Competition Act are available to deal with situations where competition is harmed as a result of the actions of purchasers with market power.

2.3 TYPES OF TRANSACTIONS COVERED

2.3.1 General

Most of the substantive provisions of the Competition Act refer to "supply" rather than "sale". The requirement of a "sale" in section 50(1) (a) limits the application of the price discrimination provision to a sale, as opposed to other forms of supply such as renting, leasing and licensing.

The words "any sale" and "is available" imply that section 50 (1) (a) requires only one sale to occur for an offence to be committed if that sale was part of a practice of discriminating among competing purchasers. The section does not require that the competitors actually purchase articles at higher effective prices in order for them to be considered victims of price discrimination. They may, for example, refrain from purchasing articles from the seller precisely because, absent the price concessions which a competitor is receiving, the seller's offering is simply not attractive enough to induce them to make a purchase.³

The transfer of legal title will generally distinguish a sale from a non-sale. For example, "consignment arrangements" do not give rise to a "sale" for the purposes of this provision. Consignment arrangements are generally transactions where the article remains the property of the original seller until the dealer disposes of it to the ultimate consumer. ⁴ Accordingly, section 50(1)(a) will not apply.

2.3.2 Transactions Between Affiliates

Section 50(1) (a) does not provide a specific affiliate exception in the Competition Act. As such, transactions between affiliates may be subject to section 50 (1) (a). On the other hand, affiliates may transfer articles at a price reflective of their interests acting as a single economic entity. In such circumstances "concessions" are not negotiated subject to the competitive conditions of the marketplace. Firms that are parties to such transactions may not be granting "concessions in respect of a sale" as the section requires. Transactions of this nature would not be subject to further review.

A situation that is similar to a transaction between affiliates involves prior concessions given to a purchaser who assisted the seller in entering into the business of supplying an article. For example, a purchaser who finances the plant of an unrelated corporation may expect a concession over and above what is available to its competitors. The Director will not ordinarily consider the price concession given by the supplier to its benefactor to raise a question under section 50 (1) (a) where the concession is essentially a form of return to the purchaser on its investment in the sellers business. Accordingly, the seller can grant price concessions over and above those attainable by competing purchasers of like quality and quantity without likely raising a question under section 50 (1) (a).

2.4 Types of Products Covered

Most of the substantive provisions of the Act apply to "product(s)". Section 2 of the Act defines "product" as including both "articles" and "services", which themselves are further defined.

The price discrimination provision, unlike most others, applies only to the sale of "articles". It makes no distinction between articles which may be purchased for resale and those which may be purchased as business inputs or otherwise consumed by the purchaser. The section does not apply to services except for those specifically included in the extended definition of "article" provided by section 2 of the Competition Act.

Section 2 defines articles as follows:

"article" means real and personal property of every description including

(a) money,

(b) deeds and instruments relating to or evidencing the title or right to property or an interest, immediate, contingent or otherwise, in a corporation or in any assets of a corporation,

(c) deeds and instruments giving a right to recover or receive property,

(d) tickets or like evidence of right to be in attendance at a particular place at a particular time or times or of a right to transportation, and

(e) energy, however generated;

Section 2(d) raises the issue of the extent to which the price discrimination provision applies to transport services. In the Directors view, the provision applies to passenger transport but not to freight transport because the word "tickets" is used in relation to passengers, not goods. The rest of section 2(d) modifies or is subsidiary to the word "tickets". In practice, the scope of application of section 50(1) (a) to passenger transport is likely to be limited because of the requirement that purchasers be competitors.⁵

When the transaction involves the sale of an article and a service, it is the Director's view that the provision does not apply if the article is supplied only incidentally to the sale of the service.

For example, consider a contract for the sale of maintenance services that involves the supply of various repair parts. The Director would not have reason to believe that a price discrimination offence has been committed if the value of the repair parts is small relative

to the maintenance service, if the parts are not normally charged to the customer separately from the service, or if there are other indications that the service is the principal part of the transaction.

A second example of this nature concerns the sale of an article whose only value is that it entitles the owner to have a service performed. The Director does not consider the sale of postage stamps, for example, to be a sale of articles within the meaning of section 50 (1) (a), since the stamp is a means of selling postal services.

2.5 Sale Must Discriminate

The section specifically defines what constitutes discrimination. Only sales that place a firm at a disadvantage vis-à-vis one or more of its competitors are considered discriminatory, and then only if they involve articles of like quality and quantity, in transactions taking place or being negotiated within the same time frame.

The form of the discrimination is the granting of a "discount, rebate, allowance, price concession or other advantage" which is "over and above" the concession or advantage "available" to "competitors" of a "purchaser".

2.5.1 "Discount, Rebate, Allowance, Price Concession or Other Advantage"

The terms "discount", "rebate", "allowance", and "price concession" typically refer to monetary arrangements advanced by a seller which reduce the effective price paid by a purchaser to a level below that of the face or nominal transaction price. These are familiar terms and are part of common business practice.

The Director is of the view that the general expression other "advantage" is to be interpreted in a manner consistent with the meaning of the specific words (i.e. "discount," "rebate," "allowance," and "price concession") which precede it in the section. Accordingly, "other advantage" can be used to describe any monetary arrangement by which the seller confers upon the purchaser a lower net price per unit of article sold.

Advantages of any other sort, such as the use of equipment, the provision of technical assistance, gifts of tickets to theatrical or sporting events, to name a few examples, would not normally fall within the meaning of "other advantage" as contemplated by the section.

The offering of credit arrangements would generally fit within the concept of "other advantage" and, depending on the payment terms themselves, might well fit the meaning of a "discount". If a seller, for example, gives some purchasers 30 days to pay the face value of an invoice, while requiring their competitors to pay the face value either at the time of delivery or in a time frame of less than 30 days, the result may well raise a question under section 50(1)(a). Similarly, if one purchaser is given a "discount" for prompt payment, while competitors are not accorded similar treatment, the Director may wish to consider the matter further.

On the other hand, section 50(1) (a) does not restrict sellers from requiring that purchasers meet reasonable conditions to qualify for a prompt payment discount or other advantageous credit terms. For example, a seller is entitled to notify its customers that late payments would cause the suspension of a prompt payment discount or other concessions for a period of time. In the Director's view, this would constitute a reasonable incentive to pay debts in a timely fashion and should raise no issue under the price discrimination provision.

In summary, section 50(1)(a) should not inhibit sellers from withholding credit terms from certain customers for cause (e.g., new unproven accounts or those which have developed a history of payment problems). The question is whether or not the withholding is reasonable (i.e. cause-related), having regard to all of the circumstances.

2.5.2 "Over and Above"

The law only applies to situations in which a seller, as a practice, grants advantages to one firm that exceed those attainable by the firm's competitors. "Over and above" simply carries the connotation of being superior to, greater than, or more valuable than that which others with an entitlement under the provision may obtain.

2.5.3 "Available"

2.5.3.1 Disclosure - An offence occurs under section 50(1)(a) when a seller grants a greater price concession or other advantage to one purchaser than is "available" to that purchaser's competitors (articles of like quality and quantity, and same time frame assumed). If the same price concessions or other advantages are (were) "available" to all competing purchasers, action by the Director would be unwarranted, even if some purchasers, in the end, paid higher prices than others. The key issue is the nature of the disclosure that will satisfy the Director that a price concession is "available".

The dictionary definition of "available" refers to such expressions as: "at one's disposal"; "within one's reach"; and "accessible or obtainable." These definitions capture the sense in which the Director will interpret the term "available" in assessing matters under section 50(1)(a). A price concession that is accessible or obtainable by a purchaser, but not acted upon, is nevertheless "available" to the purchaser and will raise no issue under section 50 (1) (a).

Section 50 (1) (a) does not require the seller to "offer" price concessions, in contrast to section 51 which requires those who grant promotional allowances to offer them on proportionate terms to competing purchasers. However, the Director takes the view that the obligation on the seller to disclose a price concession to competing purchasers varies depending on whether the price concession is granted unilaterally by the seller or results from negotiations with a purchaser.

If the seller unilaterally decides to offer a price concession, such as a volume rebate, it should be disclosed to competing purchasers of like quality and quantity for it to be considered "available" in terms of section 50 (1) (a). Whatever form the communication takes, it should be sufficiently timely and complete to enable the purchaser to make a sound business judgment as to the measures necessary to achieve the concession.

By contrast, such broad disclosure is not required if the seller grants a price concession only as a result of negotiations initiated by a purchaser who agrees to provide a service in

exchange for the concession. Here, in order for the Director to be satisfied that the concession is "available," the seller's sole obligation is to respond to the initiatives of those competing purchasers who ask for similar concessions on similar terms as the favoured purchaser. For example, assume a purchaser negotiates a concession on the basis that it will take delivery at the seller's dock in order to distribute the article itself to remote locations. The seller, in the Director's view, is not obliged to communicate the same deal to all competing purchasers. However, if a competitor of the favoured purchaser offers to provide essentially the same service, a question under section 50 (1) (a) would likely be raised if the same concession is not extended to this purchaser.

As already stated, section 50 (1) (a) does not oblige the seller to offer a concession to competing purchasers (although the seller may choose to do so for business reasons). If it did, there would be little incentive for a purchaser to negotiate a deal knowing that it must share the advantage with other customers who benefit, at no cost to themselves, from the purchasers innovation and negotiating skill. While, in the Director's view, the seller should be prepared to extend the same concession to competing purchasers who offer to provide similar services as a favoured purchaser, the seller is not required to communicate this concession to a purchaser who simply asks for the seller's "best deal," as a matter of form.

Finally, other situations may arise where a purchaser approaches a seller and seeks to obtain a concession without offering to performing any service for, or meet any condition of, the seller. If the seller grants such a concession to the purchaser, but does not extend it to competing purchasers of like quality and quantity, the matter would likely raise a question under the section.

2.5.3.2 Conditional Discounts - Conditional discounts are a common form of price concession that should raise no issue under the section as long as they are "available" to competing purchasers of like quality and quantity. These are discounts that are granted if the purchaser fulfills a condition such as reaching a sales objective or performing some service for the seller.

There are two areas where the seller should take special care in order to avoid raising a question under section 50(l) (a). First, the conditions to achieve the discount should not be contrived to unreasonably favour or deprive certain customers. A condition that appears to have little or no commercial value to the seller will raise an issue of whether the advantage would be truly "available" to competing purchasers of like quality and quantity, or whether the condition is designed to prevent one or more of the purchasers from obtaining the advantage. This may arise where the seller knows that the purchaser in question does not possess the required facilities and cannot obtain them anywhere in the market on usual trade terms.

Second, the condition should be verifiable as to when it has been satisfied and the seller should consistently grant the price concession when the condition is met. Some of the most common vehicles for providing conditional price concessions are discussed below. These are "volume-based discounts," "functional discounts" and "exclusive dealing discounts." The comments also apply to other types of arrangements, such as, meeting minimum percentage-of-requirements targets, lengthening contract terms, or offering resale priors below maximum levels.

2.5.3.3 Volume-based Discounts - Sellers are not obligated to grant price concession based on quantity differences. They may, if it suits their purpose, establish a single price system regardless of purchase volumes. Although the single-price option is open to sellers, many choose to offer volume discounts or rebates, according to which net prices decrease as the quantities purchased increase. Volume rebate plans are a well established practice and do not ordinarily raise an issue under the section.

Sellers providing volume rebates may prepay a price concession based on estimated or historical purchases, so long as they are prepared to make appropriate adjustments to the price paid by the purchaser should the actual purchases fall short of the quantity required to obtain the concessions.⁶

Certain price concessions relate to increases in the volume purchased compared to a previous period (these are variously called "growth bonuses," "volume incentive allowances", "fidelity discounts" or "loyalty rebates"). For example, the seller may grant a price concession to customers who increase their purchases by 10 percent over the previous year. Thus, one purchaser may qualify for this price concession buying only 400,000 units in Year 2 while a competing purchaser buys 500,000 units but does not qualify due to a failure to increase purchases by the required amount. However, if the conditions for achieving the concession were known in advance to both purchasers, then it would appear that the advantage is "available" to both. Failure on the part of the second purchaser to achieve the incentive does not affect its availability. Under these circumstances an inquiry by the Director would not likely occur.

2.5.3.4 Functional Discount - Questions have often arisen about the granting of "functional" discounts by sellers; that is, price concessions which are granted in return for the purchaser performing some service which the seller would otherwise have to perform at its own expense, such as the provision of warehouse facilities, transport of goods, or other services. If, instead of arranging for the provision of the service through the medium of a functional discount, the seller merely entered into a separate contractual arrangement for the provision of the service, no issues under the section would be raised.

Should buyers and sellers use functional discounts in transacting business between themselves, there is no reason to suppose that the result will necessarily offend section 50(1)(a). So long as the seller's functional discount offerings are "available" to competing purchasers with respect to purchases of like quality and quantity, the Director's view is that such discounts would not raise an issue under the section. On the contrary, buyers and sellers should be encouraged to seek together the most efficient way of transacting business between them; if the purchaser can transport or warehouse goods more efficiently than the seller, then the seller should not be prevented from offering inducement to purchasers willing to perform these services.

The fact that a firm could only qualify for a discount by agreeing to perform services which the firm does not presently offer does not, by itself, mean that the advantage is not

available. For example, the seller may make available a discount on the condition that the purchaser provide warehousing for the seller's product. The Director would not examine the matter further if the seller reasonably believes that the purchasers in question are capable of obtaining warehousing facilities, even if they do not presently possess them.

2.5.3.5 Exclusive Dealing Discounts - Other forms of discounts or price concession have been the subject of controversy under the section. Should a seller, for example, be able to offer customers a separate prior concession in return for the customer's agreement to deal exclusively in the seller's articles?

A price concession granted in return for the purchaser's agreement to deal exclusively in the seller's products will ordinarily not raise a question under the section if it is "available" to competing purchasers of articles of like quality and quantity. Customers faced with the question of whether they wish to take advantage of the concession will no doubt wish to consider many factors in deciding to accept the offer of an exclusive dealing discount. Not the least of these factors will involve an assessment of the relative advantages they may be sacrificing by depriving themselves of access to competing lines of goods.

If a purchaser concludes that greater advantage lies in continuing to deal in a number of competing brands or lines of article, the Director would likely consider it unreasonable to question the transaction merely on the basis that other purchasers have reached the opposite conclusion.⁷

2.5.4 Purchaser

2.5.4.1 General - "Purchaser" is the term used in the section to describe a customer of the seller who is given some form of preferential price concession or "other advantage" which is "over and above" the concession available to one or more of its competitors.

The issue often raised by the term is whether the recipient of a volume-based price concession is a legitimate "purchaser" for the purposes of the section. Does the quantity purchased by a buying group qualify for a volume rebate or should only the quantities purchased by each of its members qualify? Is it the franchisor's volume or that of its franchisees that qualifies? Can the seller grant a price concession based on the international purchases of a group of multinational companies or is it restricted to considering only the purchases of the Canadian subsidiary of this group?

In determining which party is the "purchaser," the Director is prepared to review all the circumstances of the transaction. The true purchaser in any transaction will normally be the firm that has made the necessary commitment to acquire the goods sold.

In most transactions, there is little ambiguity about the identity of "the purchaser". The seller may reasonably determine, in a simple sale transaction, that "the purchaser" is the party that ordered the articles, took delivery of them and paid the seller for them.

However, none of these factors is necessarily determinative. It is the substance of the transaction taken collectively, and not its form or any single factor, which counts.

The seller may reasonably determine that a buying group is its purchaser in circumstances where the group has undertaken liability to pay for the goods. In these circumstances, even though the individual members may take delivery of the goods, the Director will likely view the buying group and not the individual members as the purchaser for the purposes of section 50 (1) (a). Moreover, in many situations, the buying group's undertaking is valuable to the seller in that it now shares the interest of, and generally assists, the seller in ensuring that the members buy the seller's article and not a competitive product, often saving the seller the promotion and sales cost of convincing each member of the group separately to buy the product.

Similarly, the seller may reasonably determine that the franchiser is its purchaser, even in situations where the franchisee orders and is solely liable for the articles. If the seller has negotiated with the franchiser the right to supply its franchisees, and the franchiser can

contractually compel its franchisees to deal with suppliers that it designates or approves, this commitment is likely sufficient, in the Director's view, to justify the seller's granting a larger discount than it would grant to the competing independent outlet that acquired the same volume as the franchisee. Due to the franchisor's commitment, the seller will justifiably view a transaction with the franchise system as one that is quite different from a transaction with the independent outlet.

Finally, the seller may reasonably determined that the multinational parent of the Canadian subsidiary is the true "purchaser" for the purposes of section 50(1) (a), even though the subsidiary orders and pays for the articles, where the seller or its parent has negotiated with the purchasing subsidiary's parent the right to supply the multinational subsidiaries at a discount determined by those negotiations.

Each of these situations is examined in more detail below.

2.5.4.2 Buying Groups - The term "buying group" refers to any association of independent firms which combines the volumes of their purchases for the purpose of qualifying for or earning price concessions based on large volume transactions. This definition includes a wide variety of different organizations offering a range of services to their members.

Buying groups are prevalent in many industries. From the perspective of group members, participation in the group serves to reduce purchase costs as the group's purpose is to qualify for volume discounts or rebates which would be unattainable to the individual buyers. Due to these savings, small firms are able to be more competitive in terms of resale prices, especially in competition with their larger rivals. Buying groups are also often able to obtain more information about the price concessions and other advantages that sellers offer than the members can obtain negotiating individually.

Buying groups appeal to sellers since many of them assist in reducing marketing costs and credit risks, which would often be much higher if the seller had to deal with

numerous small buyers instead. Consumers benefit from the existence of buying groups to the extent that reduced purchasing costs (resulting not only from price concessions themselves, but also from improved efficiencies on the seller's part) are passed on to consumers in the form of lower retail prices. 8

When confronted with a buying group, three characteristics especially would appear to be important indicators relevant to the seller's determination of whether the group is a true purchaser. These are:

1. the group should be a legal entity capable of acquiring property in the articles purchased;
2. the group should in fact acquire title in the articles, though it need not take possession; and
3. the group should be liable and assume responsibility for payment of the goods purchased.

Concerning the first, the group can adopt any form it wishes so long as the group, in that form, can be held legally liable for purchases made in its name.

Regarding the second, a buying group need not document a second transaction in which it conveys the articles to its members if this transaction can be deemed from the circumstances or by agreement with the members. Nor does the seller have to concern itself with the agreement between the group and its members so long as it is satisfied that the group has purchased the articles.

Finally, with respect to the third characteristic, if the seller requires other purchasers to meet the financial requirements, the group should be in a position to satisfy the sellers that it has the ability to meet those requirements. For example, the seller may normally require its purchasers to be able to satisfy all or a portion of the debts incurred in its name. In these circumstances, the buying group should be able to meet this requirement

either by retaining revenues from administration or membership fees and undistributed rebate payments, by agreement with its members to collect a surcharge in the event of shortfall, or by some other means. The amount of assets required to satisfy the seller in respect of the group's liability should be determined by the amount normally required by the seller of its other purchasers. Industry norms may provide an indication of what the seller would normally require.

It should be stressed that these characteristics are indicia; they are not rules or criteria that purport to definitively establish which party, the buying group or its member, is the "purchaser" for the purposes of section 50(1) (a). However, in the absence of these indicia, it may appear that the buying group is simply an artifice established to allow otherwise separate purchasers to enjoy larger rebates than those to which they are legally entitled and the Director would want to review the matter further.

For example, assume a seller grants a price concession to a buying group based on combined purchases of various members. Assume further that the seller can only take legal recourse against the individual members, and not the buying group, if purchase obligations are not met. If the seller requires its other purchasers to take liability and satisfy this liability when debts are incurred, it would appear that the seller gave a concession to the buying group knowing that it was not a "purchaser" for the purpose of section 50(1) (a). If the seller ordinarily ceases to deal with a purchaser that consistently refuses to honour purchase obligations, but continues to deal with a buying group that acts in the same manner, doubt would be cast on the validity of the seller acceptance of the group as a purchaser for the purpose of granting price concessions under section 50 (1) (a).

The seller may decide that it is prudent to require or accept a buying group member's guarantee or a third party's guarantee of the debt owed by the buying group. The Director will generally not question this decision, however, if the buying group is unable or unwilling to satisfy its liabilities when called upon to do so, an issue may be raised as to the identity of the true purchaser for the purposes of section 50 (1) (a).

2.5.4.3 Franchise Systems - In many instances, franchise systems are operated in a manner whereby the franchiser purchases articles directly from its suppliers; alternatively, the franchisee may make purchases on behalf of the franchiser. The franchiser will be liable for payment for the articles and may actually pay the seller directly for purchases of goods that its franchisees resell. The franchisor may even take delivery of the articles and distribute them to its franchisees. These situations are unlikely to raise issues under the price discrimination provision.

However, the franchise system's affairs may be organized so that the franchisee purchases articles on its own behalf and it is the only legal entity liable for payment for the articles purchased. This situation, while raising more questions than the alternatives raised above, should not necessarily lead to the conclusion that an offence would be committed if the seller grants the franchiser a price concession based on the calculation of the volume of the total purchases of the franchisees.

In reviewing the matter, the Director may determine that the seller has legitimately granted a concession based on the entire franchise systems purchases in light of the commitment made by the franchiser to the seller. This will likely be the case if the franchiser commits, by contract, all of its franchise to purchase from sellers designated or approved by the franchisor.

In these circumstances, the seller may be quite justified in viewing the franchiser and not the franchisee as its true purchaser, for the purposes of section 50(1) (a). The substance of this transaction, as in the transaction where the franchisor was liable for purchases, is that the seller is dealing with a single economic unit, not several distinct units of franchisees. Accordingly, the seller may grant a price concession based on the calculation of the purchases made by all of the franchisees without likely causing further examination by the Director.

2.5.4.4 International Volume Price Concessions - The third situation which deserves special mention concerns transactions involving what are commonly called "international volume price concessions." A firm receives an international volume price concession

where the seller charges a price based on the total international volume of all purchases. Had the seller not considered the volume purchased by the international affiliates, the price charged would have been higher. A potential issue under section 50 (1) (a) is raised where competing purchasers in Canada order, take title and liability, and pay for a like quantity of the article from a Canadian seller, but one of the purchasers does not have access to international volume price concessions and, therefore, pays a higher price than its competitors.

An international volume price concession will not likely raise an issue if the parent firm contracts to purchase these articles and commits its Canadian subsidiary and other affiliates to purchase from the seller. Indeed, but for this agreement, the Canadian subsidiary may have chosen a different supplier for the same articles. In this situation, the Canadian subsidiary simply makes orders and pays for the articles pursuant to the basic agreement.

Seen in this light, it is quite reasonable for the seller to identify the multinational parent as the true "purchaser" for the purposes of section 50(1) (a). As in the franchise situation described above, the substance of this transaction from the seller's point of view is the sale to a single economic unit, not a sale to each of its diverse parts. Accordingly, the seller or its subsidiary may, in Canada, grant a price concession that accounts for the total volumes purchased by the multinational without likely offending section 50(1) (a).

2.5.5 Competitors of a Purchaser

Section 50(1)(a) only prohibits a seller from knowingly discriminating against "competitors" of a purchaser of articles from it. If a seller has granted a price concession to one customer that is not available to another purchaser of like quality and quantity, it is then necessary to determine whether these customers compete in the same market.

The primary concern motivating the enactment of the price discrimination legislation was the adverse effect that price disadvantages might have on the competition among purchasers in the resale of the articles affected. Accordingly, it is not competition in the

purchase but competition in the downstream market of sale which is of relevance. Since the language of the provision does not distinguish between articles purchased for resale or articles purchased as an input of production, both types of sales are considered by the Director under the section.

The Director's assessment essentially attempts to determine whether or not the alleged victim(s) of the purported price discrimination are rivals for the custom of the same buyers pursued by the allegedly favoured firm. Whether or not firms are competitors is essentially a question of fact which the Director attempts to assess by examining the market circumstances in existence at the time of the disputed transaction(s).

This exercise will involve identification of the relevant product markets and geographic markets in which the purchasers operate. Obviously, if the purchasers are not in the same geographic and product markets, they would not be considered competitors.

The Director is guided by the methodology of defining relevant markets and competitors described in the Merger Enforcement Guidelines.⁹ Essentially this involves a measure of how one firm's pricing policy may be affected by the behaviour of other firms.

What this means for the seller vis-à-vis the price discrimination provision is that those customers that set their prices with close regard to the pricing policies of other customers are likely "competitors" and should be accorded equal pricing treatment, if all the other elements of the section are satisfied.

In practice this may be revealed to the seller in the course of doing business with its customers. The seller will often become aware of customers views, strategies and behaviour with respect to the market in which they operate and who they consider to be their direct competitors. For example, the seller may know which of its customers pays close attention to each others advertised prices. Alternatively, the seller may be approached by a customer seeking a price concession to enable it to better compete with another of the seller's customers. Both of these situations should give the seller an insight as to those purchasers that it should consider competitors.

Where a seller may be in some doubt about the "competitor" status of one or more customers, there is nothing which would preclude the seller from making inquiries of the customers sufficient to resolve the doubt.

A seller who could not reasonably have been expected to know that particular customers were competitors, and who accordingly failed to deal with them similarly would not face further review by the Director because the "knowledge" requirement of the section would not have been met. However, a seller's willful blindness will not be sufficient to escape the "knowledge" requirement.¹⁰

Finally, since individual consumers do not normally compete in the business of reselling or processing the articles, sales to these consumers are not affected by the price discrimination provision.

Similarly, sales to non-profit organizations such as educational and charitable institutions are not ordinarily subject to the provision. For the same reason, sales to federal, provincial and municipal governments are ordinarily not covered by the provision. On the other hand, sales to nonprofit organizations, Crown corporations or public utilities engaged in actual or potential competition with other enterprises are subject to section 50(1)(a).

2.5.6 Relevant "Time"

The Director's examination will focus on determining what price concessions are "available" to competitors "at the time the articles are sold" to the allegedly favoured "purchaser."

In the case of straightforward single-transaction sales, the issue of "time" is not complicated. However, not all sales are of this type. Some may involve, for example, complex purchase and sale agreements providing for the prices which will apply over an

extended period, perhaps determined by the application of some agreed upon formula or schedule.

Suppose, for example, that two parties agree to the sale of an article in year 1, with an option to purchase a minimum volume in year 2 at the year 1 price. If in year 2 the seller raises its prices generally, but in conformity with the above agreement continues to make sales in year 2 to one customer at the year 1 price, competitors may argue that they are being discriminated against in terms of purchases made in year 2.

In this example, the Director would consider that the relevant "time" for purposes of comparison with the year 2 prices being paid by the competitors was the "time" at which the sale agreement had been entered into in year 1. As long as the competitors also had "available" to them the same option of entering into a similar forward reaching agreement for articles of like quality and quantity, an issue would not be raised. It would not be considered relevant in the above circumstances to compare only the prices being paid by all parties in year 2.

Sellers are, after all, not restricted from changing their prices (either upward or downward) over time. Section 50(1)(a) should not be used to extract from sellers prices which are no longer generally available because of changed market circumstances.

It is difficult to formulate one rule with respect to the determination of the relevant "time" to cover all conceivable marketing circumstances. In some cases, the relevant time may be the time when all of the elements of the definition of a "sale" – offer and acceptance, transfer of title and consideration, were completed. In others, such as the example discussed above, determination of the relevant time may involve looking beyond particular individual transactions to discover the "time" at which the pricing which governs those transactions was agreed upon between the parties.

2.5.7 Directly or Indirectly

Section 50(1)(a) is all-encompassing with respect to the means of discrimination. Simply put, the seller cannot do by indirect means that which would be impermissible if done directly. For example, assume competing purchasers X and Y buy like quantities of the same article from a seller and each is entitled to the same volume price concession under section 50(1)(a).

However, the seller incorporates a separate company whose sole purpose is to sell this article and grant concessions to X that are larger than the concessions available to Y. While it perhaps cannot be said that the seller has, in this case, discriminated directly against a competitor of a purchaser of articles from it, it would appear that it has discriminated indirectly against Y.

2.5.8 Like Quality and Quantity

The term "like" does not mean "identical". It is a relative term to be given the meaning "similar" or "not dissimilar". Only sales of articles of "like quality and quantity" are subject to the price discrimination provision. Sales which do not involve articles of "like quality and quantity" may take place at different prices, involving the granting of different price concessions or other advantages, without contravening section 50(1)(a).

2.5.8.1 Like Quality - In determining whether or not articles are of "like quality" several attributes may be considered by the Director. The physical or chemical composition of the articles, their functional or performance characteristics, and their physical appearance may all be relevant factors. In addition, the concept of fungibility may serve as a useful test. If two articles command similar retail prices at the same time this would be a suggestion as to their likeness. Dissimilar prices would suggest that buyers believe the products are not of "like quality."

The determination of "like quality" is not ordinarily a vexing issue in price discrimination matters. Most matters, in fact, deal with the prices paid by competitors purchasing identical articles.

However, like quality can be a contentious issue when the seller's offerings include articles which are, to some extent, deliberately differentiated for any number of reasons. The seller's offerings may include articles which differ only in physical appearance (e.g. they may be offered in a variety of colours, or exhibit other cosmetic-only differences). They may differ somewhat functionally, as is often the case with a wide assortment of consumer electronics products. Finally, they may be somewhat differentiated by virtue of labelling or trademarks.

In the Director's view, a trademark or label alone may be sufficient to distinguish otherwise similar articles from one another for the purposes of the price discrimination provision. In general, a trademark or label or other attribute which causes purchasers to perceive a difference significant enough to be reflected in the price they are willing to pay for the article, suggests to the Director that the article so differentiated should not be considered to be of "like quality" when compared with physically identical articles lacking the trademark or other differentiating feature. Two examples will illustrate how this test applies.

Assume that a supplier manufactures identical articles sold to retailers under a brand name or label of the supplier's choice, and a brand of the retailer's choice. Assume further that the supplier engages in heavy local and national advertising to promote its own brand, successfully cultivating a consumer preference for it, and that the advertising is successful to the extent that both the retailer and consumers ordinarily pay a different price for it than they pay for the retailer's private brand. In this situation, the brand differentiation will generally be sufficient to cause the Director to conclude that the articles are not of "like quality".

In the second example, assume that a supplier sells articles to well-informed commercial enterprises for their own consumption. If different labels were to be affixed to the containers, it would likely not matter to these customers, who would normally be aware that the articles are functionally and in every other way identical. In this case, given that the purchasers do not indicate a purchasing preference based on label differentiation, the Director would conclude that the articles were of "like quality".

2.5.8.2 Like Quantity - It is difficult to provide a numerical rule of thumb as to "like quantity" that will apply to all industries. In order to determine whether one quantity is "like" another, the Director will generally consider industry practices in pricing the articles.

Volume rebate plans have already been discussed in part 2.5.3.3. Such plans may, in some circumstances, prompt an issue under the Act relative to what is considered "like quantity."

The chief area of concern is with respect to multi-line sellers of article, who may wish to aggregate purchasers' volumes of different articles for the purpose of calculating volume rebates. Such sellers may have a variety of customers, including some who purchase all or most of the articles offered by the seller, and some who purchase only one, or a few of them.

No issue is raised by the seller aggregating different categories of articles as long as the related volume rebates are available to competing purchasers.

The purchaser who may pick and choose among the articles, when all are available for purchase from the supplier, should not, in the Directors view, be able to complain successfully about the larger rebates earned by competitors who take full advantage of the supplier's broad offering. If the same rebate scheme was available to all buyers, failure to take advantage of what was on the table should not afford sufficient grounds for complaint.¹¹

2.5.9 Knowledge

To commit an offence under the price discrimination provision, a seller must participate in a sale that discriminates "to his knowledge". This amounts to a requirement that, at the moment of the sale, the seller have "knowledge" with respect to each and every one of the factors which, taken together, constitute a discriminatory sale under section 50(1)(a).

Such "knowledge" may be demonstrated by the Director by resort to direct evidence, or it may be inferred from all of the circumstances surrounding the case.

The concept of willful blindness prevents a seller from avoiding liability by deliberately remaining ignorant. Willful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the facts. The person who deliberately fails to enquire while knowing there reason for enquiry is the legal equivalent of knowledge. An example of a situation where the doctrine of wilful blindness applies may occur when a seller arbitrarily categorizes its purchasers into broad classifications and grants rebates based upon forecast purchase volumes without adjusting for actual volumes purchased. Negligence may be mitigating factors in some situations, but a question may be raised where the seller is aware of the danger that its conduct could bring about a result prohibited by section 50(1)(a), and still deliberately persists in omitting to make the necessary inquiries.

An example will suffice to illustrate how the "knowledge" requirement is assessed by the Director. Suppose that a seller has two customers, one operating a retail establishment in Montreal and the other operating a similar establishment in Toronto. Based on all of the information available to the seller, these customers are not in competition with one another in any way.

Although they purchase articles of like quality and quantity, the seller price differentiates between them, as the law permits it to do.

Unknown to the seller, the Montreal retailer, who is paying the higher prices, opens a store in Toronto, shipping stock from its Montreal location to its new Toronto outlet. Now the two retailers are competing purchasers but the seller does not realize that their relationship has changed. The seller continues to price differentiate between them on the usual basis.

A complaint brought to the Director at this point by the Montreal retailer would fail on the grounds that the seller clearly had no "knowledge" that discrimination occurred between competing purchasers.

If, on the other hand, the Montreal retailer had, at the outset, advised the seller about the opening of the Toronto outlet and the price differentiation had persisted, the Director would be forced to conclude that the seller had possession of all of the information required to recognize that the purchasers were now competing, and that the seller had not discharged the obligation to adjust its pricing behaviour accordingly.

Suppliers who make no attempt to identify those customers who may be competing purchasers run the risk that their price concession plans may ultimately offend against the section.

2.6 A Practice of Discriminating - Section 50(2)

The word "practice" is not defined in the Competition Act although it is found in other sections of the Act: sections 45, 61, 76, 77, 79 and 81. For the purposes of section 50(2), it is the Director's view that a "practice" refers to a systematic pattern of behaviour as distinct from isolated acts or reactions to competitive market changes. "Practice" certainly contemplates more than the adoption of a temporary expedient designed to win a new account, enter a new market or match a competitor's pricing initiatives.

The number of repeated incidents or the length of time required to constitute a practice may vary depending on the nature of the article and the market concerned. Generally, the longer the seller charges different prices to two competing purchasers of like quality and quantity and the more often this occurs, the more likely it is that a sale is part of a practice of discriminating. However, in considering whether or not a given sale is part of a practice for the purposes of this section, the Director will consider not only the frequency but also the duration, consistency and purpose of the pricing behaviour.

Temporary allowances to subsidize customers in meeting competitors' prices during a price war will generally not constitute a practice of discriminating. Occasional selective price concessions or the granting of free goods for events such as store openings, clearance or anniversary sales or similar one-time offers would not likely be viewed as part of a practice of discriminating. Similarly, advancing more generous credit terms to attract a new account would not normally constitute a practice.

2.7 The Co-operative Exception Section 50(3)

"Paragraph (1)(a) shall not be construed to prohibit a cooperative association, credit union, caisse populaire or cooperative credit society from returning to its members, suppliers or customers the whole or any part of the net surplus made in its operations in proportion to the acquisition or supply of articles from or to its members, suppliers or customers."

In the view of the Director, the exception provided by subsection 50(3) is restricted to the associations listed in the subsection. It should be noted that the subsection refers to "members" rather than shareholders and to "associations" rather than corporations. It is evident that the subsection does not exempt all conduct engaged in by these associations from the price discrimination provision.

APPENDIX 1

Other Relevant Sections

Other sections of the Competition Act may be relevant to fact situations raising issues of price discrimination.

Section 50(1)(b) (regional price predation) prohibits business persons from engaging in the policy of selling products in any area of Canada at prices lower than those

charged elsewhere in Canada with the effect, tendency or design of substantially lessening competition or eliminating a competitor. Sellers may choose to reduce prices by granting price concessions such as discounts, allowances or rebates. Such price differences do not raise issues under section 50(1)(a), however, unless the purchasers compete in the same market.

Section 50(1)(c) (predatory pricing) prohibits business persons from engaging in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect. Price concessions or other advantages that reduce the selling price below the supplier's cost may give rise to concerns under this provision in certain circumstances. The Director's Predatory Pricing Enforcement Guidelines provides information on how allegations of predatory pricing are examined by the Director.

Section 51 (disproportionate promotional allowances) applies to certain price concessions offered or granted for advertising or display purposes. These concessions must also be collateral to a sale or sales of products. Allowances applied directly to the selling price, for example in the form of reductions appearing on the face of the invoice, are excluded from the definition in subsection 51(1). Section 51(3)(c) establishes rules of proportionality that differ significantly from the provisions of section 50.

Section 51 provides as follows:

- (1) In this section, "allowance" means any discount, rebate, price concession or other advantage that is or purports to be offered or granted for advertising or display purposes and is collateral to a sale or sales of products but is not applied directly to the selling price.
- (2) Every one engaged in a business who is a party or privy to the granting of an allowance to any purchaser that is not offered on proportionate terms

to other purchasers in competition with the first-mentioned purchaser, which other purchasers are in this section called "competing purchasers", is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

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

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

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

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

The Director will first examine price concessions relating to advertising and display purposes pursuant to section 51, not section 50(1)(a). Section 51 was first enacted in 1960 to cure a perceived deficiency in the price discrimination provision. However, allowances that do not meet the definition provided for advertising and display allowances in section 51 may be reviewed pursuant to section 50(1)(a).

Section 61(1)(b) prohibits discrimination in the context of price maintenance. For example, questions would be raised if a seller does not directly refuse supply to a discounting distributor, but instead charges the distributor a higher price than the price charged to other distributors with a view to discouraging the discounter from ordering products.

In the Director's view, consignment arrangements do not give rise to a "sale" under section 50(1)(a). However consignment sales may be subject to review by the Competition Tribunal. Section 76 provides that the Tribunal may order the seller who ordinarily sells the product for resale to cease carrying on the practice of consignment selling where it is found that the practice has been introduced by the seller for the purpose of discriminating between consignees or between dealers and consignees, or for the purpose of controlling resale prices.

Section 75 (refusal to deal) may be called into play if a seller effectively refuses to deal with a customer able to qualify for price concessions.

Section 77 concerning exclusive dealing, tied selling and market restriction, applies to price discrimination in that the definitions of those practices include offers of price concessions. Under these definitions, the section applies to practices of offering price concessions or extracting penalties on the condition that the purchaser buy products only from the seller or the seller's nominee, that the purchaser buy more than one product from the seller or that the purchaser deal only in restricted areas or in other ways as defined by section 77. In these cases, questions are raised only if the practice is likely to have exclusionary effects in the market such that competition is or is likely to be lessened substantially.

Section 79 (abuse of dominant position) applies to a practice of price discrimination in respect of an article or a service that is engaged in by a dominant seller and has the effect of substantially lessening competition in a market. If a seller in a dominant position engages in price discrimination for the purpose of impeding or preventing the

entry of a competitor or potential competitor, with the effect that competition is or is likely to be substantially lessened, then the Director will review this practice under section 79 as well as section 50(1)(a). The Director would also consider proceeding under section 79 in situations where a buying group substantially or completely controls a class of business and uses this position to coerce discriminatory price concessions from suppliers, with the result that competition is or is likely to be lessened substantially.

Section 36 of the Competition Act provides for private actions. In 1989, the Supreme Court of Canada upheld the constitutional validity of this provision. Individuals or corporations may wish to explore this avenue of redress if they are of the view that damage has been suffered as a result of conduct contrary to the criminal provisions of the Act including section 50(1)(a). The Director would appreciate being informed of any such actions.

Footnotes

1 *Commodore Business Machines Ltd. v Canada (Director of Investigation and Research)* (1988), 27 O.A.C. 310, 63 O.R. (2d) 737, 50 D.L.R. (4th) 559, 41 C.C.C. (3d) 232, 21 C.P.R. (3d) 396, 36 C.R.R. 147; *R. v. Simmons Limited*, Ont. Prov. Ct. (Criminal Division), October 15, 1984, Richards P.C.J. (unreported); *R. v. Neptune Meters Ltd.*, Ont. Dist. Ct., June 2, 1986, Borins D.C.J. (unreported); reasons for committal are found in *R. v. Neptune Meters Ltd.*, Ont. Prov. Ct. (Criminal Division), June 23, 1983, Hashborn P.C.J. (unreported).

2 Situations where different prices to customers appear to lessen competition to a certain degree could be examined under a number of different provisions of the Act, as explained in Appendix 1.

3 That does not mean that section 50(1)(a) will be invoked to remedy refusal to supply situations. Other provisions of the Competition Act, such as section 75, are designed to deal with refusals to supply, in given circumstances.

4 Note that the Competition Tribunal may order that a seller discontinue the practice of consignment selling under section 76 of the Competition Act where it finds that the practice has been introduced for the purpose of price discriminating.

5 See part 2.5.5 for the more general point that since consumers (individuals) do not normally compete in the business of reselling or processing articles for resale, sales to consumers are not affected by the price discrimination provision.

6 See also how the meaning of "like quantity" impacts on volume discount schedules, discussed in part 2.5.8.2, below.

7 Note that section 77 of the Act permits the Competition Tribunal to make an order prohibiting the practice of granting price concessions to induce exclusive dealing if certain requirements are met, including the requirement that the practice lessens or is likely to lessen competition substantially

8 Care should be taken, however, to ensure that members of a buying group do not use the group as a forum for agreeing on resale prices, output restraints, market allocation or similar agreements in a manner that would violate section 45, the conspiracy provision, of the Competition Act.

9 See the Director's Merger Enforcement Guidelines, part 3, "Market Definition" pp. 7-18.

10 Willful blindness is discussed in part 2.5.9.

11 A concession which induces customers to acquire other products from the supplier may raise issues under the "tied selling" provision in section 77 of the Act.