

Misleading Advertising and the Combines Investigation Act*

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*Advertisements contain the only truths
to be relied on in a newspaper.*

Thomas JEFFERSON

*To protect his clients from being persuaded by persons
whom they do not know to enter into contracts which
they do not understand to purchase goods which they
do not want with money which they have not got.*

Lord GREENE, M.R., on the function of a lawyer.

I. Introduction

1. *Advertising: Some Preliminary Remarks*

In the free world, advertising is big business, and perhaps nowhere is it bigger business than in North America.

From twelve and a half billion dollars in 1962, advertising has now grown to an eighteen billion dollar industry¹ in the United States.² This growth would seem to be confirmed by the fact that, in the United States, almost one hundred new advertising agencies were formed in the first seven months of 1969.³

* This article is an updated and expanded version of a portion of the *Interim Report on False Advertising in Canada* submitted by the writer to the Canadian Consumer Council in September 1969. In its present form, the article will appear as a chapter of the full *Report* to be submitted to the Council in September, 1970.

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¹ There is at least a question whether the advertising business can properly be called an industry at all. It certainly cannot be described as a monolithic industry with one set of problems which can be solved by one simple formula: Ira M. Millstein, *The Federal Trade Commission and False Advertising*, (1964), 64 Colum. L. Rev. 439, at p. 440. This is particularly true in the case of the subject-matter of this article.

Advertising is basically "an effective means of selling" and, as such, is employed at all levels of industry, whether that of manufacturing, distributing, wholesaling or retailing, and the means of coping with misleading advertising perpetrated at each of these levels may be different.

² *Newsweek*, Aug. 18, 1969, p. 62.

³ *Ibid.*

Although advertising expenditure is necessarily smaller in Canada, it has enjoyed a considerable surge here as well, increasing by 128% absolutely between 1954 and 1965 and growing relatively as a percentage of the gross national product from 1.60% in 1954 to 1.75% in 1965.⁴ It has been suggested that the rate of growth of advertising expenditures in Canada has been decreasing, rather than increasing, over the last several years and that promotional techniques other than advertising have been growing significantly more quickly over that period of time.⁵

More relevant, though, than the "bigness" of advertising is its importance to North American society, to the producer or seller, on the one hand, and to the consumer, on the other. Its meaningfulness on this continent may be underlined most easily by mentioning the role which it plays and the rising level of importance which it has begun to attain in the Soviet Union, a nation whose political philosophy would seem to deny the relevance of an industry which is taken as the very symbol of capitalist free enterprise. It has been presumed there that a good product needs no advertising, but this presumption now appears untrue for reasons outlined in the following statement:

Thanks to well-organized advertising, the consumer can more rapidly find the goods needed by him, purchase them with a smaller expenditure of time, and select the goods according to his taste... This function of advertising not only reflects the new relation to the consumer, care about the population, and its needs, but it also has important economic significance. It creates the precondition for a more economic and rational use of material goods which are created by society, and permits a more satisfied customer.⁶

Even the presumption that a good product needs no advertising is dying:

...the latter supposition has been clobbered so hard in recent years by overwhelming homegrown evidence to the contrary that it is really on its last legs.⁷

It will be the purpose of this article to examine certain controls which have been placed on this vast "industry" by a review of the relevant legislative provisions of the *Combines Investigation Act*⁸

⁴ The latest year for which Dominion Bureau of Statistics figures are available. D.B.S., *Advertising Expenditures in Canada*, 1965, p. 6. See also O.J. Firestone, *The Economic Implications of Advertising*, (Toronto, 1967), pp. 34-38.

⁵ See Firestone, *op. cit.*, pp. 7, 8 and 37.

⁶ D. Kurnin, *Iz Opyta Sovetskoi Torgobloi Reklamy*, Sovetskaia Torgovlia, Feb., 1958, pp. 46-47, quoted in Marshall I. Goldman, *Product Differentiation and Advertising: Some Lessons from Soviet Experience*, in *Speaking of Advertising*, (Toronto, 1963), pp. 352-353.

⁷ David Levy, *Soviets Hike Capitalist Advertising*, *Montreal Star*, July 26, 1969, p. 17, col. 1.

⁸ R.S.C. 1952, c. 314.

and all of the cases decided in accordance with these enactments.^{8a} Before entering into the heart of the discussions, this article will discuss advertising and some of the problems which it raises as well as the history and purpose of sections 33C and 33D of the Act.

2. *Advertising: Definition and Problems*

What then is advertising? To define it is probably more difficult than to describe its *raison d'être*.

Its purpose is generally, of course, to sell something.⁹ One sells in different ways at different levels of commercial activity, but the basic motivation remains the same. Manufacturers who wish to "push" a product and, ultimately, to take advantage of economies of scale must attract the largest possible number of buyers to achieve this end.¹⁰ Some producers must use advertising defensively, namely, to combat the growing strength of the retailer — particularly the large department or chain store operation — and to go "over his head" directly to the consumer who, after all the alternatives have been presented, must make his choice. Nor is that a welcome prospect, for the consumer is a fickle being who indulges his every fancy, sates his every curiosity and changes brands (and even substitutes products) with relative ease.

To combat this danger the producer must not only communicate with potential buyers. He must also persuade them that his product has a kind of uniqueness which makes it one product which should not be subject to substitution by other products. If advertising can successfully perform this function it then becomes possible for the seller to extend his use of advertising to help create barriers to potential competitors. Once consumers are thoroughly persuaded that the advertiser's product is uniquely necessary to maximum levels of satisfaction of particular kinds of need, competitors will have much more difficulty entering that market. These factors account for the powerful persuasive feature of advertising for many products, long after the product has attained wide circulation and is known to virtually everyone.¹¹

^{8a} Many of these, not hitherto reported, are reproduced in the "Unreported Judgments" section of this number of the *McGill Law Journal*, *infra*, beginning at p. 651. The texts have been provided by the Combines Branch of the Department of Consumer and Corporate Affairs.

It is hoped that these judgments will be of some interest and utility to the reader who will now be able to refer to nearly all of the section 33C cases in various accessible publications. Only a few decisions which are, in the opinion of the writer, less meaningful have been omitted.

⁹ Some might argue that certain institutional advertising is intended as a "donation" to the publications in which it appears, but the quantity of such advertising is marginal and need not, for our purposes, be considered.

¹⁰ Or as the *Report of the Royal Commission on Consumer Problems and Inflation*, (1968), (the "Prairie Report") aptly put the matter: "Thus, the producer must dispose of large and growing volumes of product if his enterprise is to remain profitable." (p. 247)

¹¹ *Ibid.*, p. 249.

Retailers face similar, or at least analogous, problems. The larger and more aggressive retailers who aim at continually growing profits must always attempt to increase income relative to overhead, something which may generally be accomplished by augmenting volume. This is also true to a lesser extent of smaller retailers who must struggle to at least retain a share of the market if they are to survive. The nature of advertising at this level of industry is, of course, different. Its purpose is not so much to *laud* the virtues of the product as to *sell* it by promoting its availability at the advertiser's place of business, the service which will accompany the goods into the hands of the buyer or the special price at which the item may be purchased. Emphasis on one or another of these points will vary according to the quality of the retail outlet and the income level of the group at which the advertisement is aimed. Into the broad category of retailer must fall as well the "promoter" who has no business other than fleecing the public and who will use whatever product or gimmick which allows him to accomplish this end.

In addition to taking advantage of economies of scale, it is only fair to point out that advertising serves additional purposes from the point of view of the seller. He aims as well "to advise a potential buyer of goods and services for sale, their quality, their usefulness, their effectiveness, their availability, their price, and all the other elements of information which may affect the buyer's decision to purchase the items advertised."¹²

From the point of view of the consumer, the purpose of advertising is to provide him with information relating to the qualitative and quantitative characteristics of the product which is being advertised. Professor Travers has observed:

Although there are available other sources of information — professional studies like *Consumer Reports* and neighborhood scuttlebutt, for instance — most Americans rely upon advertising for their information about the goods and services available.^{12a}

The Prairie Royal Commission has suggested five main services which advertising provides to the consumer: information, acquaintance with the variety of existing products, acquaintance with new products and changes, pre-shopping accumulation of knowledge to save time and to better arm the consumer with facts necessary to the purchase, and acquaintance with claims of producers.¹³

¹² Firestone, *op. cit.*, p. 1.

^{12a} Arthur H. Travers, J., *Foreword to Symposium: Federal Trade Commission Regulation of Deceptive Advertising*, (1969), 17 *Kans. L. Rev.* 551, at p. 554.

¹³ The *Prairie Report*, pp. 252-253.

By and large, though, one may draw the following useful distinction, namely, between the "informative" and "persuasive" aspects of any advertisement.

The *informative* content brings to the attention of a potential buyer the type of the commodity or service for sale, its quality, serviceability, usefulness and price.

The *persuasive* content of an advertising message refers to that part of the advertisement that attempts to translate latent wants on the part of an individual into effective demand for a good or a service, encouraging the prospective customer to purchase a specific product or service advertised.¹⁴

For either the manufacturer or the retailer to achieve his purpose, he must promise something to the consumer and it is the promise which, if anything, is the product of the advertising industry.¹⁵ Thus, the conflict between the seller and the buyer becomes clear: the former must, within the bounds of truth, make claims which will result in the maximum attraction of the buyer to the product; while the latter wants as much relevant factual information, without unnecessary or deceiving puffery, as possible.

It is evident that the promise may occur in either the informative or the persuasive portions of any advertisement. It is far easier, of course, to assess the veracity of a promise made in the former area, and, morally speaking, it is no doubt true that the use of false or misleading promises intended to be informative is more reprehensible to the majority of people than the making of a promise which is intended only to persuade.¹⁶

In the United States, where advertising is regulated at the federal level¹⁷ under the *Federal Trade Commission Act*,¹⁸ both the informative and persuasive aspects of the content of any advertisement may be questioned in virtue of section 5 which prohibits "[u]nfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

In Canada, on the other hand, federal legislation until recently dealt only with false information and then only insofar as it related to misleading representations as to the ordinary price at which a

¹⁴ Firestone, *op. cit.*, pp. 2-3.

¹⁵ Millstein, *loc. cit.*, p. 443.

¹⁶ This is not to say that both uses of the promise should not be controlled but only that an untruthful statement as to the tar and nicotine content of a cigarette, for example, will generally be more objectionable than an indication that the smoking of that cigarette will raise one's status in the eyes of the opposite sex.

¹⁷ Most of the states have the old "Printer's Ink Statute" which is largely ineffective, but 29 of the states now have laws reaching most fraudulent advertising practices and six of these have the "little F.T.C. Act" on the books.

¹⁸ 38 Stat. 717 (1914), 15 U.S.C. 41, 52 Stat. 111 (1938).

product is sold.¹⁹ Even when the power of the federal government to deal with misleading advertising was recently strengthened by the passage of section 33D,²⁰ which is considerably broader in scope, the Minister responsible for the administration of the section himself indicated²¹ that the enforcement of the new provision would be aimed at the following practices, all of which relate to the informative aspects of advertising:

1. A misleading statement of fact in an advertisement:

Example: "Below our cost" when the selling price is in fact higher than the delivered price of the article to the retailer.

2. A statement of performance which is not supported by an adequate test:

Example: Rope advertised as "2,000 pound test" where no adequate and proper test of the rope has been made.

3. Deceptive use of contests:

Example: "You are the lucky winner of our grand award" when in fact the "award" was not exceptional in that many people received the identical mailing piece.

4. "Free" offers that are not in fact free:

Example: Receipt of the "free" gift is contingent on the purchase of another article or articles which could be purchased through conventional channels at lower prices.

5. "Bait-and-switch" operations where the item used as bait was not in fact held for sale by the advertiser. This is the practice of advertising an article at an exceptionally low price with the intention, not of selling that article but of switching customers to other goods:

6. Contest purporting to award prizes where such prizes are not in fact available:

Example: An advertiser announces planned distribution of \$25,000 in prizes but in fact does not provide for the distribution of prizes.

7. The "stuffed flat":

Example: An advertiser using the classified section purports to be selling his household furniture whereas in fact he is selling goods supplied from other sources.

8. "Clip-and-paste" solicitations:

Example: This is a direct mail device in which typically the customer is invited to verify a listing in a directory but which when signed and returned amounts to an order for which he may be invoiced.

9. Misrepresentation as to origin:

Example: A manufacturer encloses a foreign made article in a display package marked "made in Canada".

¹⁹ Sec. 33C, the text of which is reproduced *infra* at p. 628.

²⁰ Added by 17-18 Eliz. II, S.C. 1968-69, sec. 116. It was proclaimed on July 31, 1969.

²¹ In his *News Release* of July 31, 1969.

II. The Law

1. *The Combines Investigation Act*

There are only two sections in the *Combines Investigation Act* which deal with false advertising, namely, sections 33C and 33D, the texts of which are as follows:

33C. (1) Every one who, for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public, by any means whatever, concerning the price at which such or like articles have been, are, or will be, ordinarily sold, is guilty of an offence punishable on summary conviction.

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

33D. (1) Every one who publishes or causes to be published an advertisement containing a statement that purports to be a statement of fact but that is untrue, deceptive or misleading or is intentionally so worded or arranged that it is deceptive or misleading, is guilty of an indictable offence and is liable to imprisonment for five years, if the advertisement is published

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

(b) to promote a business or commercial interest.

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

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

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

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

Section 33C is itself a relatively new section, having only been added to the combines legislation in Canada in 1960.²² The curious thing about this provision in the Act is that it is the only offence in the *Combines Investigation Act* (except, of course, for certain

²² 8-9 Eliz. II, S.C. 1960, c. 45, sec. 13.

of the new offences created by section 33D) which is punishable on summary conviction and not by indictment.²³

The reason for the insertion of the provision has been stated by Mr. David Henry, the Director of Investigation and Research, in the following terms:

This provision was inserted after the combines branch had a number of cases brought to its attention where a vendor, in order to make it appear that the price at which he was offering an article was more favourable than was actually the case, misrepresented the price at which the article was ordinarily sold in the market generally. Besides being dishonest and likely to mislead the buying public, this kind of tactics was regarded as unfair as a basis of competition.²⁴

As he pointed out elsewhere, the section had also the purpose "to inhibit a form of fraud on the public arising out of attempts on the part of sellers to overstate the extent of the bargain to be had if the purchaser will buy at the seller's advertised price."²⁵ The intention of the section is clearly not to inhibit price competition "but merely to protect the public from being misled as to the extent of the bargain advertised when reliance is placed on the word of the seller as to the ordinary price at which the goods are sold."²⁶

The judges deciding cases under section 33C have also from time to time expressed their opinions as to the reason for the insertion of this section in the Act. It has, for example, been held that the section "is based on protecting a gullible and often stupid public who rely in the good faith of merchandisers, a reliance often misplaced."²⁷ Another magistrate has held that the purpose behind the section is "to protect the unthinking little man, who hasn't the advantage or access to every manufacturer's price lists and tends to believe what he sees written in a newspaper. That man may well be subject to more abuse by comments like this, and this is the concern, I take it, which is behind the section."²⁸ Mr. Justice

²³ This, of course, does have a beneficial result. The proceedings must be instituted within six months of the date of the commission of the offence (sec. 693(2) Cr. C.) and the formality of submitting a Statement of Evidence to the Restrictive Trade Practices Commission for a Report is thus necessarily averted. Evidence in sec. 33C cases is referred directly to the Attorney-General of Canada for action pursuant to sec. 15 of the Act.

²⁴ *Address to the 64th Annual General Meeting of the Proprietary Association of Canada*, Sept. 26, 1960, p. 18. See also Mr. Henry's *Address to the Conference on Combines Legislation, Canadian Manufacturers' Association*, Jan. 10, 1961, p. 4.

²⁵ *Address to the New York State Bar Association, Anti-Trust Law Section*, Jan. 30, 1964, p. 33.

²⁶ *Address to the Executive Seminar, School of Business, University of Toronto*, June 18, 1962, p. 17.

²⁷ Sherwood, J., in *R. v. Colonial Furniture Company (Ottawa) Limited*, (1962), 15 McGill L.J. 651.

²⁸ Enns, J., in *R. v. Miller's T.V. Ltd.*, (1968), 56 C.P.R. 237, at pp. 241-242.

Pothier of the Quebec Superior Court has given the following specific example:

It seems obvious that the public, on learning that an article has been or is being sold at the price of \$54 and that it can be had for the sum of \$27, will be interested by the bargain and encouraged to buy it. This is precisely the situation which the legislator intended to present when representation proves to be false.²⁹

Generally and simply, it has been stated that the section "is designed to provide consumer protection by establishing as an offence in relation to trade any misrepresentation as to the regular price of an article."³⁰ Solomon, Co. Ct. J., has observed that the section was "passed to regulate merchandising in our free enterprise society."³¹ Other judges have observed that, while the principal object of the section is the protection of the consumer from the effect of misleading price advertising, there is an ancillary object of promoting fair competition between competing sellers within the framework of an ethical standard of advertising.³² The most socially significant explanation for the presence of the section, however, is that given by Matheson, Co. Ct. J., in *R. v. Colgate-Palmolive Ltd.*:³³

This legislation is the expression of a social purpose, namely the establishment of more ethical trade practices calculated to afford greater protection to the consuming public. It represents the will of the people of Canada that the old maxim *caveat emptor*, let the purchaser beware, yield somewhat to the more enlightened view *caveat venditor* — let the seller beware.

As has been pointed out above, section 33D is an extremely recent addition to the Act although its history is long. It is a wholesale transportation of section 306 of the Criminal Code.

The predecessor of section 306 as it first appeared in the Code in 1917 "was initially directed against the fraudulent land sales which accompanied the western real estate boom."³⁴ Since then, of course, this section has been amended many times to embody a more sweeping prohibition of deceptive advertising practices. The strange thing, however, is that the many amendments have not

²⁹ *R. v. Trans-Canada Jewelry Importing Co. Ltd.*, unreported; rev'd on other grounds, [1968] B.R. 179. The translation is that of the Department.

³⁰ Matheson, J., in *R. v. Colgate-Palmolive Limited*, [1969] 1 O.R. 731, at p. 733, 3 D.L.R. 3d 707, at p. 709, 57 C.P.R. 221, at p. 223; rev'g (1968), 54 C.P.R. 190.

³¹ *R. v. Genser & Sons Limited*, (1969), 15 McGill L.J. 676, at p. 679.

³² *R. v. Simpsons-Sears Limited*, (1969), 58 C.P.R. 56, at p. 60. Cf. *R. v. Kellys on Seymour Limited*, (1969), 60 C.P.R. 24.

³³ [1969] 1 O.R. 731, at p. 733, 3 D.L.R. 3d 707, at p. 709, 57 C.P.R. 221, at p. 223.

³⁴ The Honourable Ron Basford, Minister of Consumer and Corporate Affairs, *Address to the Toronto Advertising and Sales Club*, Sept. 24, 1968.

achieved what one can only imagine their purpose to have been, namely, to result in more prosecutions of offenders. There has only been one reported case under the section, *R. v. Thermo-Seal Insulation Ltd.*³⁵ and that case was simply a charge laid in virtue of section 406(3)(b) of the Code, the predecessor of section 306(4) of the present Criminal Code. The explanation for the paucity of prosecutions under this section would seem to be that the provinces were responsible for its administration in virtue of section 92(14) of the *B.N.A. Act*.³⁶

Now, with the proclamation of the Criminal Code amendments, section 306 has been placed in the hands of the federal government for enforcement as section 33D of the *Combines Investigation Act*. The intention of the government is clearly to go full speed ahead in terms of activating this long dormant provision.³⁷ Because there has been no experience with the section judicially, Basford pointed out that test cases will now be prepared with the utmost care, the obvious object of the exercise being to test the limits of the legislation as a law enforcement mechanism in the area of consumer protection. The Minister was quick to point out that, in the event that the wording of the section proves to be deficient, there will be no hesitation in drafting amendments which will do the job.

It would, indeed, appear as though there will be some problems involved in prosecutions under this section. In the first place, section 33D(1) is an indictable offence punishable by five years in prison, although, of course, fines may be imposed in lieu of imprisonment.^{37a} There has been, as we shall see below, a certain reluctance on the part of the courts to enforce section 33C as effectively as might be possible because of its criminal nature and the offence therein created is merely a summary conviction offence.

One wonders, therefore, just how far the courts will be prepared to go in terms of punishment, particularly where, as in this case, *mens rea* is not required. But this is perhaps the least of the problems of section 33D(1). The words "a statement that purports to be a statement of fact" raise certain questions. Who is to judge whether a statement purports to be factual and what standards should be applied? Should the viewpoint be objective or subjective? If sub-

³⁵ (1951), 15 C.P.R. 42, 102 C.C.C. 68, 12 Fox Pat. C. 45 (Ont. Mag. Ct.).

³⁶ Most provincial law enforcement agencies do not have commercial fraud squads equipped to deal with this kind of problem. No doubt, this sort of offence is, furthermore, not regarded as being worthy of the protection accorded to "criminal" offences.

³⁷ See the statement to this effect in the *News Release* of the Honourable Ron Basford on July 31, 1969.

^{37a} Sec. 622 Cr. C.

jective, from the point of view of the advertiser or the consumer? And if from the point of view of the consumer, an ordinary reasonable consumer, a sophisticated one or a slow-witted one, who, after all, requires more protection than his more intelligent brother? Lest these questions seem foolish to the reader, it may be pointed out here that the standard of intelligence which the American Federal Trade Commission employs in the exercise of its discretion is considerably lower than average.³⁸

One might also wonder whether section 33D will be more restricted in its application than section 33C since 33D refers in each of its sub-sections to an *advertisement* while section 33C speaks of a *representation*, which is unquestionably broader in meaning than a published advertisement. Will the former term, for example, include floor and window displays? Will the definition be as broad as that suggested by section 15(a)³⁹ of the *F.T.C. Act*? These questions will only be resolved by the litigation which will undoubtedly commence in the near future.⁴⁰

2. *The Jurisprudence under Section 33C*

It is essential to the existence of an offence under section 33C that there be a representation made: (a) to the public; (b) for the purpose of promoting the sale or use of an article; (c) concerning the price at which such or like articles have been, are, or will be, ordinarily sold; and, of course, (d) that representation must be materially misleading.

³⁸ Millstein has observed that: "It may be said that the FTC has selected an extremely low intelligence level, and that the Courts have not significantly disturbed the Commission's determinations in this respect" (*loc. cit.*, at p. 458). See also *F.T.C. v. Standard Education Society*, (1937), 302 U.S. 112; *Charles of the Ritz Dist. Corp. v. F.T.C.*, (1944), 143 F. 2d 676 (2d Cir.); and *Heinz W. Kirchner*, (1963), 63 F.T.C. 1282, at p. 1290.

³⁹ The section reads as follows:

The term "false advertisement" means an advertisement other than labelling which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal the facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions described in said advertisement, or under such conditions as are customary or usual.

⁴⁰ Prosecution has commenced but there have only been two cases concluded to date in both of which "guilty" pleas were entered and there were, consequently, no written notes.

The first issue to be discussed is the definition of the word "public". This is important, not so much to determine whether the representation has been made *publicly*, but rather to define the *extent of the public* to which the representation has been made for the purpose of determining the true regular or ordinary selling price of the article in question. With respect to the less important meaning of the word "public" it might, however, be pointed out that any representation made in an establishment which "is open to the general public" would qualify as a representation made to the public.⁴¹ It has also been held that the fact that the representation was made to an investigator who was not fooled or deceived thereby would not be a bar to a successful prosecution.⁴²

Until the recent case of *R. v. Simpsons-Sears Ltd.*,⁴³ the secondary sense of "public" had nowhere been defined by the cases, although "the *public* was equated to the consumers or shoppers in the limited geographical area where the accused store or business was operating, comparable shopping prices in this limited area being presented as evidence of the price at which each of the items in question were ordinarily sold."⁴⁴ In that case, Judge Beaulne was presented with an unusual set of circumstances which required him to look very carefully at the meaning of the word "public". Certain refrigerators were listed in the accused's catalogue as a regular \$149.95 value on sale for \$129.95. The Crown had the choice of proceeding against the company in virtue of either the catalogue representation or the representation made in one of the Ottawa stores. They chose to proceed against the accused on the basis of the misrepresentation made in the catalogue, with the unhappy results detailed below.

While, generally, the importance of defining the "public" is evident since, if the public is generally equated to the consumers or shoppers in the limited geographical area where the accused operates his store or business and makes his representation, the evidence in the case will relate to comparable shopping prices in this limited area, the judge in this case carried the argument to its extreme. Since the accused ran 32 retail stores (of which two were in the Ottawa area) and some 355 catalogue sales offices throughout Canada, it was vital to determine the extent of the area in which the ordinary price would be found.

The judge concluded that the advertisement in question was directed at the catalogue operations consumer and not at the retail

⁴¹ *R. v. Carmen Jewelry Mfg. Co. Inc.*, unreported.

⁴² *R. v. Mountain Furniture Co. Ltd.*, (1966), 15 McGill L.J. 662, at p. 665.

⁴³ (1969), 58 C.P.R. 56. The case is presently being appealed by the Crown.

⁴⁴ *Ibid.*, at p. 59. Emphasis original.

store consumer and, on this basis, it was, not surprisingly, extremely difficult for the Crown to adduce evidence as to the price for which the refrigerators in question had been or were ordinarily sold by the accused's main competitor. Simpsons-Sears was accordingly acquitted. The judge stated that "in the Court's opinion one must then define the consumer depending on the facts of each case and on the type of business involved in such case."⁴⁵ The effect of this decision is devastating on the Crown's ability to prove its case in such circumstances and wholly contrary, it may be assumed, to the intention of the Act.^{45a}

Whether the representation has been made to promote the sale or use of an article is not a difficult point to prove. As Magistrate Elmore made the point in the first judgment rendered under section 33C:

Now, can there be any doubt that the representations in this advertising were made for the purpose of promoting sales? I think not.⁴⁶

Since the question has hardly arisen as a serious issue in the cases, it would appear as though there almost exists a presumption that any representation made is for the purpose of promoting the sale or use of an article. And well might this be assumed for, if the primary purpose of advertising is to sell the product advertised, what further indication of this intention need be sought other than the publishing of the advertisement itself, the making of the "pitch" verbally to the potential customer, or the use of the promotional material in whatever form it takes.

To promote the sale or use of an article, the representation can be made by any means whatsoever and prosecutions have been successful in cases of floor or window displays, circulars, and pre-ticketing, as well as newspaper advertisements. It should be noted, though, that section 33C refers only to *articles* and not to services, a loophole which not only would free a service industry from judicial pursuit, but might also render conviction of a part-service, part-commodity operator more difficult. The obvious example is the carpet field which is wide open to all sorts of fraudulent abuses and schemes — many of which do not qualify for section 33C protection⁴⁷ — and the ease with which a rug vendor who advertised

⁴⁵ *Ibid.*, at p. 61.

^{45a} See also the discussion on a similar point, *infra*, at p. 636.

⁴⁶ *R. v. Eddie Black's Limited*, (1962), 38 C.P.R. 140, at p. 141.

⁴⁷ The passing-off of "seconds" as "firsts" and the sale of carpet by brand name when that brand comes in several different weights (at extreme discrepancies of price — perhaps up to \$2 per square yard on a weight difference of 4 or 5 ounces per square yard, a difference which, to the untrained eye, is practically unnoticeable) are only two ways of "beating" the buyer. The stuffed

both the carpet and its installation for a unit price might be permitted to evade this provision is disconcerting.

From a technical point of view, it has been decided in the leading case of *R. v. Morse Jewellers (Sudbury) Ltd.*⁴⁸ that only one offence was created by Parliament and not three separate offences and that a charge which refers to the "have been, are, or will be, ordinarily sold" phrase in one count is not void for duplicity:

From a careful perusal of s. 33C(1) it would appear that the gist of the offence is making a materially misleading representation as to price for the purpose set out in the section. The language is intended to include any materially misleading representation as to price of the character mentioned. I am satisfied that Parliament did not intend to create separate offences for misleading representations as to past, present and future prices. The words "have been, are or will be ordinarily sold" are only used for the purpose of giving a comprehensive description of the type of misleading representation as to price which constitutes the offence.⁴⁹

Since the offence is criminal in nature, the Crown has the onus of proving its case beyond a reasonable doubt.⁵⁰ The wording of the Act is such that the prosecution must adduce evidence that the ordinary selling price, against which the "bargain" is apposed, is not as stated in the advertisement. The cases have held that, although the Crown need not establish a specific ordinary price to which all firms in the area conformed,⁵¹ it must prove beyond a reasonable doubt that the ordinary price is lower than represented in the area in which the effect of the ad will be felt. Thus, where a catalogue was circulated across the whole of Canada, the Crown was unable to make its case by proving the ordinary price in the Ottawa area alone.⁵² More surprising perhaps was the decision in *R. v. F. W.*

flat and bait-and-switch tactics are favorites of the less reputable carpet dealers and more sophisticated methods, such as patching together first quality carpet from a roll sold by the mill as "seconds" (and perhaps as much as 20% of all roll carpet manufactured contains imperfections which qualify it as seconds) because 10% or more of the roll is imperfect, result in enormous profits for the vendor who will sell first quality carpet, all right, but with *many* more seams than would ordinarily be necessary.

For some reason, the carpet industry is subject to many such abuses which its more responsible representatives are seeking to curb on a self-policing basis.

⁴⁸ [1963] 2 O.R. 107 (Mag. Ct.); rev'd [1964] 1 O.R. 103, [1963] 3 C.C.C. 304, 41 C.R. 21, 42 C.P.R. 130 (High Ct.); aff'd [1964] 1 O.R. 466, [1964] 1 C.C.C. 293 (C.A.).

⁴⁹ [1964] 1 O.R. 103, at pp. 109-110, [1963] 3 C.C.C. 304, at p. 311, 41 C.R. 21, at p. 28, 42 C.P.R. 130, at p. 139, per Fraser, J.

⁵⁰ *R. v. Allied Towers Merchants Limited (I)*, (1965), 15 McGill L.J. 654, at p. 655.

⁵¹ *R. v. Miller's T.V. Ltd.*, (1968), 56 C.P.R. 237, at p. 240.

⁵² *R. v. Simpsons-Sears Ltd.*, (1969), 58 C.P.R. 56. See discussion *supra*, at pp. 633-634.

*Woolworth Co. Ltd.*⁵³ where the accused placed an advertisement in the Regina *Leader-Post* and the court was unsatisfied with proof of the ordinary selling price in the Regina area alone.

There appeared to me that in the evidence there was a preoccupation with the specific 20 sets and with the City of Regina, without particular attention being given disposition of the T.V. model other than the residue. It is incumbent in my view that the prosecution satisfy me that the model of set was not available in the trade area of the *Leader-Post* advertisement, not just the City of Regina. The confines of the trade area is problematical, but it seems clear to me that it extends beyond the limits of this City.^{53a}

The irony of this sort of ruling, of course, is that, the more widespread the deception, the more difficult it is for the Crown to obtain judgment. It would appear that these decisions go right against the spirit, if not also the letter, of the Act.

Generally speaking, the Crown makes every effort to introduce evidence relating to most of the sales of the product in the area where the representation is made. In the opinion of the writer, the Crown should not be obliged to go this far to obtain a conviction, for such a requirement has as its unhappy result the effect of increasing the difficulty of the prosecution's obtaining a conviction where the goods are cheaper and their circulation is more widespread or where the urban area is larger and more of the items are sold. In this regard, the better point of view would be that, where the accused itself has sold more of the product than any other dealer or where the accused itself has even sold a substantial quantity of the commodity, the record of the accused indicating the price at which it has generally sold the product should be particularly relevant, if not the most important factor, in determining the regular price.⁵⁴

Where, on the other hand, the product is only sold or is mainly sold by one retailer in the area, the Crown may show, from evidence gathered from the accused's own files, that the retailer itself has never sold the item at the higher price or that articles of similar quality have not been sold by other retailers in the area at the higher price. In this regard, expert testimony may in fact be necessary to show that products are similar in quality and, once this point

⁵³ (1969), 58 C.P.R. 223.

^{53a} *Ibid.*, at p. 225. The decision in *R. v. R. & A. Cohen Limited*, (1965), 15 McGill L.J. 659, where the Crown, basing its accusation on advertisements appearing in the *Ottawa Journal* and the *Ottawa Citizen*, successfully obtained a conviction by adducing proof of the ordinary price in the Ottawa area alone would appear to make far more sense.

⁵⁴ *R. v. Advance T.V. & Car Radio Centre Ltd.*, (1969), 15 McGill L.J. 630, at p. 632; *R. v. Amalgamated Carpets & Furnishing Ltd.*, (1970), 15 McGill L.J. 670; *contra*, *R. v. Allied Towcers Merchants Limited (I)*, (1965), 15 McGill L.J. 654.

is satisfactorily made, evidence may then be introduced to prove the ordinary selling price of the similar articles.⁵⁵ Where no other firm in the region sells the brand and it can be shown that the accused has not sold the goods at the higher price, a conviction may also be obtained.⁵⁶ In one of the more liberal judgments rendered under section 33C, Magistrate Enns held that, where "the accused sold more [T.V. sets] than any other dealer, the prices at which it sold are particularly relevant."⁵⁷ This statement must be appreciated in context, however, and it would probably not be applicable where a dealer, although selling at a low price, referred to the true price at which other dealers were in fact selling the same product. It might be held to apply, though, where the accused itself sold 90% of the model in question in the area.

There are other circumstances where many of the same considerations apply, namely, where the product in question is only manufactured or marketed by the accused. Two different kinds of situations arise in the circumstances. In the first, a department store or chain of stores may sell products manufactured outside under its own house name. The seller may then be tempted to cite as the regular price either the price at which the same unit is sold by other dealers carrying it under the label of the manufacturer or the manufacturer's list price itself.

The advertiser may, on the other hand, offer the item at the suggested list price or even the ordinary selling price of other similar articles. Any dealer would appear to be legally entitled to make a comparison between the price at which he is selling his house brand and the regular selling price of either the same article or a *similar* article but the court appears to have gone too far in the case of *R. v. F. W. Woolworth Co. Ltd.* where the fact that the television sets in question were sold in the Regina area by the accused at a price \$200 lower than what they had suggested was the retail price did not alter the decision.⁵⁸

⁵⁵ *R. v. Mountain Furniture Co. Ltd.*, (1966), 15 McGill L.J. 662, at p. 665.

⁵⁶ *R. v. Trans-Canada Jewelry Importing Co. Ltd.*, (1967), unreported.

⁵⁷ *R. v. Advance T.V. & Car Radio Centre Ltd.*, (1969), 15 McGill L.J. 680, at p. 682.

⁵⁸ For some unexplained reason, the Crown has been singularly unsuccessful in obtaining satisfactory results in its prosecutions before the Regina courts. Aside from the *F.W. Woolworth Co. Ltd.* case, there are the following examples.

In the first prosecution against *C.P. Kaufmann Ltd.*, the Court fined the company \$50 plus costs on a guilty plea but refused to grant a prohibition order; in the second case against *C.P. Kaufmann Ltd.*, a guilty plea was again entered and the Court sentenced the company to pay a fine of \$100 and once again refused to grant a prohibition order. In an appeal lodged against the sentence, the Crown was unsuccessful in obtaining a higher fine. The appeal

In the second type of circumstance, the product in question is manufactured and sold, whether directly or indirectly, by the manufacturer. As a part of the marketing technique, the producer will often feature a "cents-off" label. The accused manufacturer is in a position, when using this promotional gambit, not unlike the position of the ordinary retailer except that the regular price of the product will generally be established by the accused itself, not so much by what it has stated the regular price to be but rather by its marketing practices. It has been held, for example, that "a company cannot itself set the regular price, and regard must be had to the actual selling price of the merchandise in the community in which the complaint arose."⁵⁹ Thus, where 90% of the sales of the product in question are made at the special price and only 10% of the sales at the so-called regular price, it will be in order to convict.⁶⁰ This position has been recently upheld in the case of *R. v. Andrew Jergens Co. Ltd.*,⁶¹ in which the label on the bottle was marked "special \$1.19 — regular \$1.79 size". The judge there remarked:

I am also satisfied that only a very small percentage of its regular shampoo is marketed at \$1.79 — and that only over a period of some months.⁶²

It has not yet been determined what percentage of the sales must be at the "regular" price before it is possible to make a representation as to that price. As indicated in *R. v. Thomas Sales Agencies (1963) Ltd.*,⁶³ it has been established that this figure must exceed 10% but the cases have not gone so far as to lay down a general guideline. One manufacturer visited by the writer suggested that two-thirds of the sales should be at the so-called regular price but the courts may be still more lenient than that. In this context, it might also be noted that the use of a "cents-off" label for an extended period of time may result in a conviction against the company since a new

against the sentence is reported at (1969), 60 C.P.R. 138. In the case of *MacLeod Stedman Ltd.*, the company also pleaded guilty on two counts and was fined \$75 on the first and \$1 on the second. The Court did not grant a prohibition order and an appeal against the sentence by the Crown was also dismissed. This appeal is reported at (1969), 60 C.P.R. 135.

From the review of the sentences which is discussed *infra* at p. 649, it will readily be seen that these fines are considerably lower than the average penalties assessed by the courts across Canada. They can hardly serve as anything more than a licence to perpetrate such offences with regularity as the *Kaufmann* cases appear to attest.

⁵⁹ *R. v. Thomas Sales Agencies (1963) Ltd.*, judgment of Mag. Swabey, Ottawa, July 19, 1968, unreported; rev'd in part by [1969] 2 O.R. 587, 6 D.L.R. 3d 208, 58 C.P.R. 210, [1969] 4 C.C.C. 124.

⁶⁰ *Ibid.*

⁶¹ (1969), 15 McGill L.J. 675.

⁶² *Ibid.*

⁶³ [1969] 2 O.R. 587, 6 D.L.R. 3d 208, 58 C.P.R. 210, [1969] 4 C.C.C. 124.

selling price for the product will have been established over that protracted period. Thus, in *R. v. Produits Diamants Ltee.*,⁶⁴ the court held that the use of the "cents-off" price over a period of three years resulted in the establishment of the lower price as the regular price.

There can be no doubt that the use of such a price over a period of three years would result in the formulation of a new regular price. Nor can there be any doubt that the sale of 90% of certain merchandise at the so-called special price would have a similar result. It would appear that, in the future, when the courts are faced with analogous circumstances in which the time and market history factors are not so exaggerated they will have to examine the question more closely. It is submitted by this writer that one must logically look at the combination of these two factors, for the sale of as much as 100% of the merchandise at the low price over a short period of time is totally justifiable while the sale of 50% of the goods over an extended period of time may well not be permissible.

As indicated above, it is not necessary that the proof of the Crown relate to the precise article with respect to which the representation is made. Thus, even where the particular mattresses in regard to which the charge was made in *R. v. Featherweight Mattress Ltd.*,⁶⁵ were only sold by one outlet in Peterborough, the Crown was permitted to adduce proof of the regular selling price of mattresses of similar quality sold in the local area even though these did not necessarily have the same specifications. In the case of *R. v. Mountain Furniture Co. Ltd.*,⁶⁶ Magistrate Philp explained the point at great length.

If the Crown must establish that such an article must be ordinarily sold at a given price in the area where the representation with which we are concerned is made, then any arrangement on the part of a retailer, of the nature of a special franchise or sole sales agency in a given area, would appear to render the legislation effective. I would find that the phrase means, articles of similar quality. Minor differences in specifications, not known or observed by the public, but only determinable by an experienced person, after a mattress is opened, and its construction is observed in detail, I would find, does not bar such articles as being similar.⁶⁷

As the wording of the Act suggests, it is not sufficient that there be a mere misrepresentation; the misrepresentation must be material.⁶⁸ Since there is no definition of this phrase "materially misleading", the words must be accorded their normally accepted

⁶⁴ (1965), 15 McGill L.J. 658.

⁶⁵ (1966), 15 McGill L.J. 667.

⁶⁶ (1966), 15 McGill L.J. 662.

⁶⁷ *Ibid.*, at p. 665.

⁶⁸ *R. v. Kellys on Seymour Limited*, (1969), 60 C.P.R. 24.

meaning.⁶⁹ In *R. v. Patton's Place Limited*,⁷⁰ Magistrate Carson stated:

I think the word "material" used here must bear its normal meaning and that is, it is a representation which is calculated to, and in effect does, lead a person to a certain course of conduct because he believes the information put before him indicates that this would be advantageous to himself.⁷¹

In the case of *R. v. Kellys on Seymour Ltd.*,⁷² Magistrate Hume defined "material" in the following way:

The criteria [*sic*] of the word "material", in my opinion therefore, is not the value to the purchaser, but rather the degree to which the purchaser is affected by these words and coming to a conclusion as to whether or not he should make a purchase. And if these words, or this picture in this case, has [*sic*] a material effect on the mind of the purchaser, then this is what material means.⁷³

Certain specific examples of materially misleading representations can be given. In *R. v. F. W. Woolworth Co. Ltd.*,⁷⁴ it was held that the regular price must have been "a prevailing price consequently less than" the price represented to be the ordinary price.⁷⁵ Where the price tag on a toy read "9958 Whol. \$26.65 R. \$39.95", and the evidence indicated that the sales made of such toys in the area ranged from approximately \$23 to approximately \$28, the discrepancy of \$12 was held to be materially misleading.⁷⁶ A difference of \$70 on an item with a supposed regular price of \$229.95 was held to be materially misleading.⁷⁷ This was also the case where a company advertised that the regular price of a television set which it was selling was \$399 and the evidence indicated that such sets had never sold for more than \$319.⁷⁸ A difference of \$40 on an alleged ordinary price of \$359 has also been held to be materially misleading.⁷⁹ A discrepancy of \$40 on an item for which the regular price was said to be \$669.50 was also sufficient⁸⁰ as was a difference

⁶⁹ *R. v. Millers T.V. Ltd.*, (1968), 56 C.P.R. 237, at p. 241, and *R. v. Patton's Place Limited*, (1968), 57 C.P.R. 12, at p. 16.

⁷⁰ (1968), 57 C.P.R. 12.

⁷¹ *Ibid.*, at p. 16.

⁷² (1969), 60 C.P.R. 24.

⁷³ *Ibid.*, at p. 26.

⁷⁴ (1969), 58 C.P.R. 223.

⁷⁵ Note that the difference between the ordinary selling price in the Regina area and the price which had been represented as the ordinary selling price was about \$200. The accused was acquitted on the grounds that the proof which had been made related only to the ordinary selling price in the Regina area and not in the entire area in which the *Regina Leader-Post* was circulated.

⁷⁶ *R. v. Michael Benes*, (1969), 15 McGill L.J. 673.

⁷⁷ *R. v. Patton's Place Limited*, (1968), 57 C.P.R. 12.

⁷⁸ *R. v. Genser & Sons Limited*, (1969), 15 McGill L.J. 676.

⁷⁹ *R. v. R. & A. Cohen Limited*, (1965), 15 McGill L.J. 659.

⁸⁰ *Ibid.*

of \$50 on a camera ordinarily selling, according to the advertisement, for \$154.⁸¹ In a more unusual set of facts, where a circular indicated an ordinary price of \$9.95 and it was satisfactorily indicated to the court that the price on the circular should have read \$8.95, the fact that the item in question had normally sold in the area at price between \$3.44 and \$6.88 led similarly to a conviction.⁸²

Since the statute is a criminal one, it is inevitable that the issue of *mens rea* would arise. In the first test of the necessity for its existence, Magistrate Dnieper ruled that *mens rea* was necessary to convict and, although he found all the other ingredients of the offence present, he acquitted the accused solely by reason of the absence of *mens rea*, this despite his finding that the company was "more than negligent" in its insertion of the untrue higher price in its advertisement.⁸³ This decision was reversed by Jessup, J., in the Ontario Supreme Court.⁸⁴ In that case, he laid down the rule, so often referred to in the later cases, that *mens rea* is not a necessary ingredient of the offence under section 33C.

There is nothing in the express language of s. 33C(1) disclosing any intention that *mens rea*, in the sense that the materially misleading representation made must be known to be such by the accused, is not an essential ingredient of the offence. But in my opinion such an intention is derived by necessary implication from s.-s. 2. If it is necessary to the offence that the accused knows the representation he makes, is in fact materially misleading a publisher who accepted an advertisement in good faith for a publication in the ordinary course of business would not require the special defence provided by s.-s. 2. I, therefore, conclude that s. 33C(1) is an offence of strict liability and that *mens rea*, in the sense I have mentioned, is not an ingredient of the offence. I reach such conclusion for the additional reason that in my opinion the class of acts legislated about in s. 33C(1) are not criminal in any real sense but are acts prohibited under a penalty.⁸⁵

This *dictum* has been followed almost universally⁸⁶ and only once has it been ignored as stated, whether purposely or accidentally.

⁸¹ *R. v. Allied Towers Merchants Limited (II)*, [1965] 2 O.R. 628, [1966] 1 C.C.C. 220, 46 C.P.R. 239.

⁸² *R. v. Allied Towers Merchants Limited (III)*, [1968] 2 O.R. 346, 69 D.L.R. 2d 300, 57 C.P.R. 52, [1969] 1 C.C.C. 179.

⁸³ *R. v. Allied Towers Merchants Limited (II)*, judgment of Magistrate Dnieper, unreported.

⁸⁴ [1965] 2 O.R. 628, [1966] 1 C.C.C. 220, 46 C.P.R. 239.

⁸⁵ *Ibid.*, at p. 631 O.R., pp. 223-224 C.C.C., pp. 242-243 C.P.R.

⁸⁶ See, for example, *R. v. Featherweight Mattress Ltd.*, (1966), 15 McGill L.J., 667; *R. v. Trans-Canada Jewelry Importing Co. Ltd.*, (1967), unreported; *R. v. Miller's T.V. Ltd.*, (1968), 56 C.P.R. 237; *R. v. Colgate-Palmolive Ltd.*, [1969] 1 O.R. 731, 3 D.L.R. 3d 707, 57 C.P.R. 221; *R. v. McGrath & Smith*, (1967), 56 C.P.R. 160; *R. v. Allied Towers Merchants Limited (III)*, [1968] 2 O.R. 346, 69 D.L.R. 2d 300, 57 C.P.R. 52, [1969] 1 C.C.C. 179.

In *R. v. Genser & Sons Limited*, Gyles, J., restated the rule as follows in his own terms:

I feel that *mens rea* is an element of the offence, but that it can be inferred if there was, in fact, a misrepresentation, and then there of course is an onus upon the accused to explain away this apparent inference.⁸⁷

The strictness of the liability is illustrated by the fact that, even where the advertisement is worded by a newspaper advertising salesman, the accused, in whose name the ad after all appears, cannot avoid responsibility for its contents.⁸⁸ This point of view was expanded somewhat by Magistrate Enns in the recent case of *R. v. Advance T.V. & Car Radio Centre Ltd.*⁸⁹

At the same time, as I indicated in the course of the trial, I do believe that it is necessary that there is proof that what appears or what is done in the furtherance of a promotional technique such as an advertisement was caused to be done or done by a direct act or deliberate act of the accused, not some accidental or inadvertent thing. And so if there is evidence that the accused corporation through its officers intended to cause the advertisement that is complained of to be published, even if the advertisement in itself is composed by others, I see no necessity of seeking further evidence of intent other than the intent to publish the complained of advertisement. In that sense I would concur with the defence that some element of *mens rea* is necessary but no further than what I have indicated, in my view.

The publisher has, of course, the protection of sub-section 2 of section 33C for ads which he accepts in good faith for publication in the ordinary course of his business. Although there have been no prosecutions of publishers, one wonders whether the words "in good faith" could not be interpreted to mean "without negligence and/or total disregard for the contents of the advertisements accepted and in fact published." Clearly, those corporations publishing or broadcasting false advertisements which are blatantly misleading or which at least give rise to serious suspicion could be held not to have published or broadcast "in good faith". A newspaper which goes to the trouble of providing artistic and technical assistance in laying out an ad or in preparing the actual text can surely be expected to have the expertise to question seemingly fallacious claims which are obvious enough to any ordinary consumer possessed of moderate sophistication.

The fact that a company possesses a manual of advertising acceptability principles will not serve as a valid defence, even where these are breached by an employee without the explicit sanction

⁸⁷ (1968), 54 C.P.R. 160; rev'd [1969] 3 C.C.C. 87, 57 C.P.R. 17, 6 C.R. n.s. 140, 67 W.W.R. 19.

⁸⁸ *R. v. R. & A. Cohen Limited*, (1965), 15 McGill L.J. 659.

⁸⁹ (1969), 15 McGill L.J. 680, at p. 681.

of the firm itself.⁹⁰ It appears that the only defence, from the point of view of intention, would be inadvertence. Magistrate Hume, in *R. v. Kellys on Seymour Ltd.*,⁹¹ has given the following indication of the meaning of inadvertence:

I would agree with one of the cases referred to that if the inadvertence was something which occurred outside the control in the ordinary operation of the company that this might be a defence unless negligence were involved.⁹²

Thus, although Magistrate Hume was prepared to find as a fact that there may have been an innocent misunderstanding or misrepresentation by the accused, and, even giving the accused the benefit of the doubt that there was no intent to mislead, he felt compelled to conclude that a conviction was warranted since *mens rea* is not an essential ingredient to the charge.

It is submitted by the writer that a judgment of acquittal on the grounds of a lack of intent under section 33C would be inappropriate except in circumstances where it could be shown *by the accused* that there was an error committed by the person responsible for publishing the ad, an error resulting from faulty composition of the information as it was given to the publisher and not one resulting from wording or layout suggested by the publisher to the advertiser, since the advertiser must in all circumstances be presumed to be more familiar than the publisher with the representations which he is making relating to the products which he is offering for sale. Even in the case where a mistake has been made by the publisher, the vendor has the obligation, *if the copy which he has submitted is returned for his verification and approval*, to ensure that the representations made in the advertisement are correct. This must also be true of promotional material qualifying as a "representation to the public" for the seller has even greater control of this material before it is brought to the attention of the public.

It might be noted that the fact that the merchandise in question constitutes good value is not any defence since the issue is that the public were misled into believing that they were getting a much better bargain than they were in fact getting.⁹³ The court cannot concern itself with the value of the merchandise; from its point of

⁹⁰ *R. v. Allied Towers Merchants Limited (III)*, [1968] 2 O.R. 346, 69 D.L.R. 2d 300, 57 C.P.R. 52, [1969] 1 C.C.C. 179.

⁹¹ (1969), 60 C.P.R. 24.

⁹² *Ibid.*, at p. 27.

⁹³ *R. v. R. & A. Cohen Limited*, (1965), 15 McGill L.J. 659; *R. v. Patton's Place Limited*, (1968), 57 C.P.R. 12; *R. v. Kellys on Seymour Limited*, (1969), 60 C.P.R. 24.

view, the only issue is the price.⁹⁴ Even where the accused was selling television sets at the best price the public could hope to find, the judge was unwilling to take this factor into consideration since the section does not refer to the necessity of any direct detriment or loss to the public.⁹⁵

"Regular price", as defined in the *Eddie Black's* case⁹⁶ and by Judge Sweet in the first *Allied Towers* case,⁹⁷ is "the price at which it [an article] is ordinarily sold generally in the area in which the representation [as to regular price] is made."⁹⁸ "Value" has been similarly defined in the *Thomas Sales* case:⁹⁹

I believe in the context herein that the word "value" must be given its ordinary meaning — exchangeable value — the price in the market.

Where a discount of over \$200 was given "for cash", it was held that the practice amounted to a promotional technique and that the real selling price in the ordinary sense of the term was the cash which was actually paid.¹⁰⁰ The situation may be slightly complicated where there are trade-ins but where these trade-ins themselves are sold either alone or in a lot for a particularly cheap price, it has been held that the true selling price is actually and simply the cash which has been paid by the customer. Where, on the other hand, it could be proven from the records of the accused that the difference (between the price which he claimed was the ordinary or regular price and the price in fact paid by the customer) could be accounted for by a trade-in which he accepted *and later sold for the difference between the two prices*, a verdict of acquittal should be entered.

When the words "list price" are used, it appears from the cases that the position of the advertiser is less clear than when the words "regular price" are employed. In the first *Allied Towers* case¹⁰¹ Judge Sweet held that the former expression did not necessarily imply that the price indicated was that for which the goods were normally sold. He pointed out that where "there is no evidence of dishonesty or bad faith on the part of the manufacturers in suggesting the retail prices" the use of the words is not misleading. Furthermore, he observed that "list price" is not an unfamiliar term to retail

⁹⁴ *R. v. Patton's Place Limited*, (1968), 57 C.P.R. 12.

⁹⁵ *R. v. Advance T.V. & Car Radio Centre Ltd.*, (1969), 15 McGill L.J. 630.

⁹⁶ (1962), 38 C.P.R. 140.

⁹⁷ (1965), 15 McGill L.J. 654.

⁹⁸ *Ibid.*, at p. 658.

⁹⁹ [1969] 2 O.R. 587, at p. 589, 6 D.L.R. 3d 208, at p. 210, 58 C.P.R. 210, at p. 213, [1969] 4 C.C.C. 124, at pp. 125-126.

¹⁰⁰ *Ibid. Contra: R. v. Podersky's Limited*, (1967), 58 C.P.R. 140.

¹⁰¹ (1965), 15 McGill L.J. 654.

buyers and that these people realize that retailers sometimes sell below their price. He concluded:

To find that "list price" as used here is a material misrepresentation would, I think, be tantamount to a finding that words which are factually true in a well-recognized context are misleading in the manner in which they were used. There may, indeed, be circumstances under which that would be so, but I do not think that it has been established that that is so in this case.¹⁰²

The validity of this view was seriously put in doubt by Magistrate Dnipier in the second *Allied Towers* case. He stated there that:

It may very well be that the manufacturer suggests a list and suggests this price but witnesses for the Crown in the trade all indicated that this was a fictional [*sic*] price which they never received.¹⁰³

He related this point of view to section 33C(1) and continued:

The word "sold" in this section means, in my opinion, an actual sale made and not "sold" in the trade sense that they are offered for sale at. The word "sold" in this subsection I do not believe means a price written on an article as an invitation to trade.¹⁰⁴

This interpretation is certainly the one which gibes with the legislative intent of the section, for any reference to price, whether to retail price, suggested retail price, list price, manufacturer's list price, ordinary price, regular price, former price, and so on, implies that the goods are or have been *ordinarily sold* at that price and any such reference is misleading if untrue. In a subsequent case, the words "Mfg. regular" were held to be interpreted by persons reading the advertisement as meaning "manufacturer's list price".¹⁰⁵ It is not clear from this case whether such an interpretation would have resulted in an acquittal since there was no manufacturer's list price in existence according to the proof and, under the circumstances, the words "Mfg. regular" were held to constitute a representation as to the ordinary price.

Although there has not yet been a case decided under section 33C where the comparison was clearly made between the advertiser's selling price and the manufacturer's list price, it is obvious that the situation is likely to arise. It strikes the writer that the position

¹⁰² *Ibid.*, at p. 656. This statement is acceptable only insofar as it includes the words "in a well-recognized context" for sec. 33C offers no defence to the accused on the grounds that the representation is *factual*. The criterion is the *misleading* nature of the representation alone.

This is the more so true in the case of sec. 33D which refers to "a statement that purports to be a statement of fact" but that is either "untrue" (presumably factually), "deceptive or misleading" (presumably not on a factual, but rather on an inferential, basis). See the text of the section, *supra*, at p. 628.

¹⁰³ *R. v. Allied Towers Merchants Limited (II)*, unreported.

¹⁰⁴ *Ibid.*

¹⁰⁵ *R. v. Patton's Place Limited* (1968), 57 C.P.R. 12.

taken by Magistrate Williams in the third *Allied Towers* case¹⁰⁶ to the effect that "there might have been some merit to this argument had in fact the ad made reference to the manufacturer's list price" is an untenable one. If list prices were used solely for the information of the retailer, to give him some assistance in arriving at a price which would be competitive and profitable, there would be no difficulty. When, however, such price lists are brought to the attention of the consumer as a comparison with the price at which the advertiser is offering the product for sale, there can be no doubt but that there exists an intention on the part of the seller to indicate to the buyer that he is getting a bargain or beneficial price. Any other view of the motivation behind this technique would be particularly naive. When the higher price is not, in fact, that at which goods have been regularly sold, then both the letter and the spirit of the section have been violated and conviction is in order.

This is as well the position taken by the Federal Trade Commission in the United States in both their decisions¹⁰⁷ and their *Guides Against Deceptive Pricing*.¹⁰⁸ The *Guides* read in pertinent part as follows:

Many members of the purchasing public believe that a manufacturer's list price, or suggested retail price, is the price at which an article is generally sold. Therefore, if a reduction from this price is advertised, many people will believe that they are being offered a genuine bargain. To the extent that list or suggested retail prices do not in fact correspond to prices at which a substantial number of sales of the article in question are made, the advertisement of a reduction may mislead the consumer.

...

There would be little problem of deception in this area if all products were invariably sold at the retail price set by the manufacturer. However, the widespread failure to observe manufacturers' suggested or list prices, and the advent of retail discounting on a wide scale, have seriously undermined the dependability of list prices as indicators of the exact prices at which articles are in fact generally sold at retail. Changing competitive conditions have created a more acute problem of deception than may have existed previously. Today, only in the rare case are *all* sales of an article at the manufacturer's suggested retail or list price.

But this does not mean that all list prices are fictitious and all offers of reductions from list, therefore, deceptive. Typically, a list price is a price at which articles are sold, if not everywhere, then at least in the principal retail outlets which do not conduct their business on a discount basis. It will not be deemed fictitious if it is the price at which substantial (that is, not isolated or insignificant) sales are made in the advertiser's trade area (the area in which he does business). Conversely, if the list price is signifi-

¹⁰⁶ [1968] 2 O.R. 346, 69 D.L.R. 2d 300, 57 C.P.R. 52, [1969] 1 C.C.C. 179.

¹⁰⁷ See, for example, the article by Carleton A. Harkrader, *Fictitious Pricing and the FTC: A New Look at an Old Dodge*, (1962), 37 St. John's L. Rev. 1, at pp. 18-19.

¹⁰⁸ 16 C.F.R., Part 233. These *Guides* were promulgated on January 8, 1964.

cantly in excess of the highest price at which substantial sales in the trade area are made, there is a clear and serious danger of the consumer being misled by an advertised reduction from this price.

It is submitted, therefore, that this is the proper view to take of representations which include reference to "manufacturer's list price" and even of those which attempt in some way to disclaim elsewhere in the advertisement any necessary connection between the manufacturer's list price and the highest price at which the advertiser has sold the product in question.¹⁰⁹ The inclusion of such a disclaimer is almost, in itself, an admission that the statements elsewhere are misleading and, where they are, one doubts the ability of an accused to avoid conviction by disclaiming their apparent nature and intent. Commissioner Elman has "sympathized" with the attorney drawing up a clause, in the following way:

One may well sympathize with its draftsman, who had a herculean if not impossible assignment set before him, comparable to drafting a brief arguing that "black" does not necessarily mean "black" and can also mean "white". The draftsman's problem, of course, arose from the fact that the Commission had already made abundantly clear its view that the term "manufacturer's list price" may popularly be understood as meaning the generally prevailing price for the product in the area, and can truthfully be used as a basis for price comparison only when it is in fact that price. It was thus essential, for the draftsman's purposes, that the disclaimer should specifically disavow any such implication.^{109a}

Similar, or at least analogous, comments would be relevant in the case of the words "save over . . .". In one of the earlier cases decided under section 33C, the court held that the words "save over \$100" coupled with the inclusion of the advertiser's price did not necessarily disclose an offence under section 33C notwithstanding the fact that the highest price at which such items had previously been sold was \$269, somewhat less than the \$296 which was suggested by the ad. These words were held by the judge to be capable of more than one interpretation, although he did not proffer any alternatives, and the judge concluded that, since the words were by no means unequivocal, the accused had to be acquitted on the grounds that the section, being of a quasi-criminal nature, was to be strictly interpreted.¹¹⁰ In a more recent case, the use of the same words was interpreted differently. In *R. v. Patton's Place Limited*,¹¹¹ Magistrate Carson declared:

And, I think if this advertisement had not in heavy print not said "Save \$100" the case might be interpreted differently. But, that phrase "Save \$100!"

¹⁰⁹ *Giant Food, Inc.*, (1962), 61 F.T.C. 326, at pp. 348-351.

^{109a} *Ibid.*, at p. 349.

¹¹⁰ *R. v. Becker*, (1963), 15 McGill L.J. 654.

¹¹¹ (1968), 57 C.P.R. 12.

"Mfg. Regular - \$229.95" and the heavy print \$129.95 clearly indicates to the purchaser or reader of the ad that in other places he would have to pay \$229.95 but by dealing with Patton's Place Ltd. he could save himself \$100. And, \$100 in relation to \$229 is a very material difference. I think with that in mind — I am reading the whole advertisement together — that this must be interpreted as a material difference. As Mr. Patton himself said that unless some considerable advantage can shown to the person price-wise, he is liable not to come into the store.¹¹²

Even the words "compare at" or "special" when used without *explicit* reference to price have been held to *implicitly* refer to an ordinary selling price and, in the result, to be misleading. In the second *Allied Towers* case,¹¹³ Magistrate Dnieper observed, when considering the meaning of the words "compare at":

Next we must consider what does "compare at". Does it mean "Mr. Consumer, look at this item, see our price and compare our price with the price of our competitors. That is, compare our camera at the price of our competitors."

Or does it mean "Mr. Consumer, look here, here is an item..." — in this instance a camera — "...which we are selling for \$59. Compare this camera with the cameras which are sold by our competitors for the price of \$154.90."

It is not reasonable to assume that the advertisement was placed to have the consumer compare the relative merits of the goods. There is only one reasonable construction to be placed on the advertising and that is that the "compare at" price was put in to indicate to the customer that he was getting such and such a bargain. Any other construction would be naive in the extreme.¹¹⁴

At another level, it has been held that the phrase "compare at" should be interpreted as meaning "compare this price with the price such an article ordinarily or usually sells for" and not as meaning compare this price with the manufacturer's list price or the manufacturer's suggested retail price or various other terms.¹¹⁴

The word "special" has been interpreted in the *Colgate-Palmolive Limited* case:¹¹⁵

A reasonable shopper upon reading the words and numbers "Special \$1.49" upon the diagonal red band might very well conclude that he was being offered Economy Size Halo Shampoo at a price below which it is ordinarily sold.¹¹⁶

¹¹² *Ibid.*, at pp. 16-17.

¹¹³ (1964), unreported.

¹¹⁴ *Ibid.*

^{114a} *R. v. Miller's T.V. Ltd.*, (1968), 56 C.P.R. 237.

¹¹⁵ [1969] 1 O.R. 731, 3 D.L.R. 3d 707, 57 C.P.R. 221.

¹¹⁶ *Ibid.*, at p. 734 O.R., p. 710 D.L.R., p. 225 C.P.R.

It is perhaps worthy of note that, of 82 cases concluded to date,¹¹⁷ there have been 72 convictions or pleas of guilty, 8 acquittals¹¹⁸ and 2 cases where charges were withdrawn due to inability to locate the accused. Of the 82 cases, 70 were against retailers, 4 against distributors and 8 against manufacturers. All 8 acquittals were entered in favour of retailers. Of the charges laid, the greatest number, 11, were with respect to camera equipment. Watches were involved in 5, television sets in 10, radios and phonograph equipment in 7, records in 3 and carpets in 5. Prohibition orders have only been obtained in 37 of the cases and fines have generally been extremely low, averaging \$281.44 per case.^{118a} This is extremely low when one considers that there is a potential fine of \$500 *per count* or \$1,500 *per count* in the case of corporations, according to the position taken by the Combines Branch. When one considers the profits which may accrue, as a result of the deceptions, to the deceivers, one may well look upon the fines in most cases as a license for doing business.

The factors to be considered are those applicable to criminal law generally. Thus the fact that an accused had not before been convicted would weigh in his favour as would the size of the business operation.¹¹⁹ It must not be forgotten, however, that, while the small enterprise need not be fined excessively, a larger corporation must be subjected to a higher penalty if the punishment is to have any affect at all. In this vein, Judge Marin, in the *Andrew Jergens* case,¹²⁰ although fully convinced that this first offence would not be repeated, insisted that, from the aspect of deterrence, he had an obligation to inflict a more significant penalty for its deterrent value not only against the accused but also as it would apply to other companies in the field of cosmetics. Although he did suggest that the issue of retribution was a doubtful principle as far as criminal law was concerned, he maintained that it was a very valid one when applied to offences under the *Combines Investigation Act*.

Where there has been a previous offence and a prohibition order issued, there is every indication that courts will deal harshly with a violation of the order. In the only such case on record to date, *R. v. Allied Towers Merchants Limited (IV)*,¹²¹ the judge imposed a fine of \$1,500 on the company. He pointed out that the fine was lenient

¹¹⁷ As of July 31, 1970.

¹¹⁸ One of which remains under appeal by the Crown.

^{118a} The average would be considerably lower on a "per count" basis but the minimal extent of the fines on a "per case" basis is sufficiently surprising.

¹¹⁹ *R. v. Miller's T.V. Ltd.*, (1968), 56 C.P.R. 237.

¹²⁰ (1969), 15 McGill L.J. 675.

¹²¹ June 24, 1969, Provincial Court (Criminal Division), Metropolitan Toronto, Judge Dnieper, unreported.

since the company had given every indication that it intended to stop this sort of practice. He said: "Were it not for this obvious desire of the company to comply, the penalty would be infinitely higher." As he also pointed out, the offence is neither a summary conviction offence nor an indictable offence, but rather a peculiar offence created by Parliament. It follows that the six month prescriptive provision does not apply and that there is neither a maximum nor minimum penalty provided in the Act. Furthermore, the accused may be convicted both of a section 33C offence and, as in this case, of a violation of the prohibition order¹²² since the act in question breaches two laws.

III. Conclusion

Whatever be the cause or motivation, it may now be observed that section 33C is finally being implemented in accordance with the fondest hopes of those legislators responsible for its very existence. Of the 72 judgments rendered since 1960, 53 date from February 1968. Eighty-eight percent of these have resulted in convictions and a not insignificant body of case law has developed in the result. Although not all the judgments have been broad-minded nor all the penalties powerful deterrents, there obviously exists a strong tendency towards acceptance of the consumer revolution. It is to be hoped that this direction continues and expands from the narrow confines of section 33C into the broader judicial attitudes which will be required for the proper administration of section 33D.

¹²² *Combines Investigation Act*, sec. 31 (3).