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Canadian and U.S. Antitrust Law--Areas of Overlap between Anitrust and Import Relief Laws

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I. ANTITRUST LAW

A. Price Discrimination

Price discrimination generally involves charging customers different prices by differentiating between groups of customers. Laws which prohibit certain forms of price discrimination fall into one of the most criticized areas of antitrust law. The criticism is based on the concern that the law promotes fairness or equality of treatment, rather than economic efficiency and aggressive buying behavior by purchasers. The concern is that the law has an anticompetitive, rather than a procompetitive effect.

1. Canadian Law on Price Discrimination

Section 34(1)(a) of the Competition Act prohibits certain forms of price discrimination. This section, unlike its companion sections 34(1)(b) and (c), governs that relationship between suppliers and buyers. It is therefore a vertical price discrimination section and is not concerned with horizontal discrimination.

Section 34(1)(a) provides that every one engaged in a business who

> 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 granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to such purchaser, is available to such competitors in respect of a sale of articles of like quality and quantity; is guilty of an indictable offense and is liable to imprisonment for two years.

Section 34(2) creates a defense to price discrimination. It reads as

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follows: "It is not an offense 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."

Similarly Section 34(3) creates special rules for cooperative societies. It reads as follows:

> Paragraph (1)(a) should not be construed to prohibit a co-operative association, credit union, caisse populaire or co-operative 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 such members, suppliers or customers.

There are elements to the price discrimination offense created by the law. They are the requirements of: being engaged in business; being a party or privy to, or assisting in a discriminatory sale; knowledge; discrimination among competing purchasers; the purchase of articles, not services; discrimination on the basis of a discount, rebate, allowance, price concession or other advantage; discrimination in sales being made at the same time; the availability of the price concession to other purchasers; like quality and quantity; and discrimination as part of a practice.

Although there has been considerable discussion of the price discrimination provisions of the Competition Act, there have not been a significant number of cases brought to trial.[1] Because of its practical significance in the day-to-day operation of business, however, probably

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[1] There have only been four cases initiated by the government under the price discrimination law. Regina v. Mary Maxim Knitting Wool, an unreported decision of the Exchequer Court of Canada in 1968, resulted in a prohibition order along the lines recommended by a report of the Restrictive Trade Practices Commission. The case of Regina v. The Hobart Manufacturing Company Limited, involving five counts of price discrimination, was dismissed at the preliminary hearing in 1980. It is unreported. In December, 1981, an Information alleging a violation of section 43(1)(a) was laid against Neptune Motors Limited. The accused was committed to stand trial, but the defendant pleaded guilty in June, 1986, and was fined $50,000. A prohibition order was also issued. The last government prosecution involved Simmons Ltd. They were charged with two counts of price discrimination on November 17, 1983. On October 15, 1984, Simmons pleaded guilty and was fined $30,000. A prohibition order was issued and the company was required to provide the Director under the Combines Act, for three years, with a detailed description of any company plans relating to rebates.

There are three private actions involving the price discrimination section. The first case, Direct Lumber Co. Ltd. v. Western Plywood Co. Ltd., 1962 S.C.R. 646, was dismissed on the basis that no independent civil cause of action existed. Malo v. Shell Oil Company of Canada Ltd., 1965 C.S. 197 (1965) a 1965 decision of the Quebec Superior Court was dismissed. The third case is the 1985 decision of the British Columbia Superior Court in 57134 Manitoba Ltd. v. Palmer, Smith Paper Ltd. et. al. The court in this case found that the price discrimination section of the Combines Act had been violated, although the discrimination issue was incidental to the main issues at stake.

An excellent review of the law is the article Nozick, *The Regulation of Price Discrimination under the Combines Investigation Act*, 54 CAN. BAR REV. 309 (1976).

more legal attention is paid to this section than any other provision of the Act. There are five significant reasons for the attention.

First, the section only applies to the sale of *articles*. Unlike the rest of the Combines Act, the price discrimination provisions do not apply to the sale of services. The rationale for excluding services from the provisions when the Act was extended to cover the service sector in 1976, was the difficulty in applying the notion of quality and quantity to services. Although this may be true in some service sectors, it equally may not be true in others, such as transportation.

Second, the section, in addition to the criminal obligation of proving mens rea, explicitly requires that the person engaged in the discrimination have knowledge of the fact that he is discriminating. This requirement has the most significance in shielding sellers from violating the Act if they are unaware that buyers are in competition with one another.

Third, the section deals only with discrimination between competing purchasers. The government has enforced the law as applying only to purchasers in competition with each other at their level of trade. They have not attempted to argue that all purchasers from a particular supplier are in competition for the purchase of the articles in question. The government has confined its enforcement to purchasers engaged in the same business in the same market.

Fourth, the most important basis for discrimination under the law is discrimination on the basis of quantity. The law permits sellers to discriminate if they are selling to different purchasers in different quantities. The quantity requirement does not mean that the seller must be able to cost justify the lower price he is giving to the purchaser who makes the larger volume purchases. The fact that discrimination is permissible on the basis of quantity has meant that large purchasers have gained advantages over their smaller purchasers. This in turn has led smaller purchasers to form joint buying groups to take advantage of volume rebates.

Fifth, the law requires that the discrimination be part of a practice of discrimination. This means that isolated incidents of discrimination, such as promotional discounts or time-limited discounts, will be permitted in order to meet competition. The government does not interpret the practice requirement of the law as permitting a generalized meeting competition defense. The fact that there is no meeting competition defense in the law has made it very difficult for sellers to engage in what would often be seen as healthy procompetitive activities.

There are other important consequences of the price discrimination law which need to be noted. First, it is not entirely clear whether the section applies to buyers as well as sellers. Those who argue that the law reaches buyers look at the words of the Act which state that everyone who is party or *privy* to or *assists* in a sale may commit the offense. It has been argued that if a buyer is privy to knowledge that the seller is discriminating against other buyers, or if he assists either through encour-

agement or other means, then he may be caught by the section. Running against that view are the words of the section which say that the discrimination must be against competitors of a purchaser of articles from him. The underlined words would seem to refer only to a seller and would not include a buyer.

It has also been suggested that a buyer who encouraged a practice of discrimination could be found guilty of the offense of aiding and abetting the commission of an offense under the Criminal Code.[2] However, in the final analysis, the law clearly speaks most directly to sellers and the government has never made any attempt to enforce the law against buyers.

Another issue that is raised by the section is whether it applies to purchases where the buyer is not just engaging in the resale of the articles. In other words, does the section apply if the buyer uses the purchased article as an input to the production of another product? The words of the Act would appear to cover such a situation, although there have been no cases pursued on such a theory.[3] A seller might well be able to rely on the "knowingly" requirement of the section to defend himself against such a charge since he may well not know whether his purchasers are in competition with each other.

Another important issue covered by the law is the question of volume incentive programs. The position of the government, which led to a conviction in the *Simmons* case, is that it is not permissible for a supplier to institute an incentive program whereby a purchaser obtains a percentage rebate if he increases his sales by a certain amount over that in a previous accounting period. This has been held to be illegal if the end result is sales of the same quantity at different prices to different buyers.

Finally, the treatment of functional discounts under the law is important. The Director's Office has usually taken the position that a different price that is based on the buyer performing special functions, such as central warehousing, is not permissible.[4] An issue that has not been tested is whether it is justifiable to sell an article that is combined with a service to thereby avoid the section. The argument would be that the combination of article and pre- or post-sale service creates a product distinguishable from the article alone. If this argument is sustainable, it could create a kind of functional discount defense. Of course, since section 34(1)(a) does not cover services, it is arguable that the section would not apply in any event.

There are many other technical questions which relate to the operation of the price discrimination section, but those noted above are probably the most significant from a commercial viewpoint.

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[2] *See* the discussion of this point in G. KAISER, WORLD LAW OF COMPETITION, Unit A, North America, Volume A3, Canada, at section 4.02(9).

[3] D.H.W. Henry discusses this issue in a speech he gave as Director of Investigation and Research to the Etobicoke Industrial Association on February 20, 1962.

[4] *Id.*

Section 34(1)(b) provides that every one engaged in a business who . . .

> engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in such part of Canada, or designed to have such effect . . . is guilty of an indictable offense and is liable to imprisonment for two years.

The elements are therefore: (i) sales of the same product in different places in Canada; (ii) sales at different prices in one place compared to prices in another place; (iii) a policy of selling at these different prices; and (iv) the effect or tendency or intent to have the effect or tendency of substantially lessening competition or eliminating a competitor. Section 2 defines product such that it includes both goods and services.

With respect to sales of the same product in different places in Canada, there is very little judicial comment on what constitutes an area of Canada. In *Regina v. Carnation Co. Ltd.*,[5] the accused admitted selling at higher prices in Ontario than in Alberta and British Columbia, and the question of an area of Canada was not discussed. It has been suggested that an "area" would have to provide a distinct enough market to avoid a loss of sales from a supplier's high price outlet to his own low price outlet.[6] Also it is arguable that in interpreting the words elsewhere in Canada, it must be shown that the lower price is lower than the level of price generally charged elsewhere in Canada. In other words, an identical lower price charged in several places against an identical higher price charged in several other places might not constitute an offense since there are prices charged elsewhere in Canada that are identical to the lower price.[7] Presumably, the relevant prices are effective prices, net of rebates, bonuses, allowances, discounts and the like. Delivery charges would also presumably be taken into account.[8]

The question of what amounts to an effect or tendency or a design to have an effect or tendency to substantially lessen competition is dealt with in the following section of this paper on predatory pricing. Although section 34(1)(b) does not require that unreasonably low prices be shown but only that there be different prices in different areas of Canada it may, nevertheless, be useful to show that the prices in the lower price area are unreasonably low in order to demonstrate a design to lessen competition substantially or eliminate a competitor.

Section 34(1) creates an indictable criminal offense. Anyone convicted of the offense is liable to imprisonment for two years. In the case

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[5] Regina v. Carnation Co. Ltd., 4 D.L.R.3d 133, 58 C.P.R. 112, 1970 3 C.C.C. 190 (Alta. C.A.) (1969).

[6] C.J.M. FLAVELL, CANADIAN COMPETITION LAW: A BUSINESS GUIDE, (1979), 221.

[7] *Id.* at 222.

[8] *Id.*

of a corporation, this would authorize a judge to fine the corporation an amount in its discretion. In addition, section 30(1) of the Act authorizes a court, on conviction, to issue a prohibition order to prevent the continuation or repetition of the offense or anything directed towards the commission of the offense. Section 30(2) of the Act basically authorizes a court, prior to obtaining a conviction, to issue a prohibition order to prevent the commission of an offense.

Section 31(1) of the Act allows a court, where any person is convicted of a criminal offense under the Act, to require a person, for a period of not more than three years, to submit information with respect to his business as the court deems advisable. This section is used to allow the government to monitor the behavior of the company and ensure that is does not continue to violate the law. This information disclosure requirement was used recently in the *Simmons* case. Finally, any person who has suffered damages as a result of a price discrimination offense can sue to recover those damages under section 31.1 of the Act.

Although section 34(1)(a) is an extremely important law for most sellers in the economy, and is a subject of much advice by lawyers, it has not been aggressively enforced by the government over the years.[9] This may be because either it is difficult to prove the necessary elements of an offense or because the government has not been convinced of the importance of the section that promotes competition. There have been no convictions under section 34(1)(b).

2. U.S. Law on Price Discrimination

In the United States, section 2 of the Clayton Act, amended by the Robinson-Patman Act,[10] generally prohibits discrimination in prices, services, or facilities. The most frequently used section, section 2(a) makes it unlawful for

> any person engaged in commerce, in the course of such commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition . . . .

Thus, it is apparent that the elements of a price discrimination claim are: (1) a purchase in commerce, (2) a discrimination in the prices charged by the seller, (3) two different purchasers, (4) of commodities, (5) of like grade and quality, and (6) that causes competitive injury. In a private claim, currently more common than Government enforcement, there is also a further requirement of proof of direct injury to plaintiff proximately caused by the violation. While the Robinson-Patman Act may be enforced criminally as a misdemeanor by the Justice Department, no

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[9] *See supra* note 1.

[10] 15 U.S.C. § 13 (1982).

such enforcement has taken place for many years. Future criminal enforcement is unlikely.

Section 2(a) requires that the person be "engaged in commerce" and charge discriminatory prices "in the course of such commerce," in addition to the requirement that "either or any of the purchases involved in such discrimination" be "in commerce."[11] If proof is given on the issue of either purchase being involved in commerce, the other commerce requirements are necessarily true.[12] The requirement that at least one sale be in commerce can be satisfied only if one of the sales being compared actually crosses a state line.[13] Thus, the reach of the Robinson-Patman Act is not as extensive as the Sherman Act. In *Gulf Oil Corp. v. Copp Paving Co.,*[14] the Court rejected the argument that the transactions involved were interstate because they had a nexus to interstate commerce.

In order to violate section 2(a), it is necessary that there be some discrimination in the prices charged by a seller. In *FTC v. Anheuser-Busch, Inc.,*[15] the Supreme Court stated that a price discrimination is merely a price difference. The courts will attempt to determine the actual net prices paid, after deducting discounts, rebates, surcharges, and other factors that alter the net price.[16] An additional element in finding discrimination is that the sales which are compared must be reasonably contemporaneous.[17] Thus it is not to say that a seller is inflexibly bound to continue to charge the same prices, but he may change prices from time to time as long as those who purchase at roughly the same time are treated equally.

A discrimination under section 2(a) requires at least two sales transactions.[18] Thus, a sale at one price and a mere offer to sell at a higher price, or a sale and a refusal to sell or other combinations which do not involve two sales, do not come within section 2(a). Section 2(a) does not apply to discriminations in transactions that are not sales—such as leases of real estate—to licenses, to agency arrangements, etc.

Section 2(a) prohibits discrimination only in sales of commodities. The Act uses the words commodities almost interchangeably with words such as goods, products, and wares or merchandise.[19] The Act does not apply to leases of realty, to the licensing of the right to exhibit movies, to

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11 15 U.S.C. § 13 (1982).

12 *See, e.g.*, Lehrman v. Gulf Oil Corp., 464 F.2d 26, 36-37 (5th Cir.) *cert. denied* 409 U.S. 1077 (1972).

13 *See* Bacon v. Texaco, Inc., 503 F.2d 946 (5th Cir. 1974), (per curiam), *cert. denied*, 420 U.S. 10005 (1975).

14 Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974).

15 FTC v. Anheuser Busch, Inc., 363 U.S. 536 (1960).

16 *See* Indian Coffee Corp. v. Proctor & Gamble Co., 482 F. Supp. 1104 (W.D. Pa. 1980). (Consumer coupons are not an element of prices to retailers.)

17 *See* Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, (1947).

18 *Bruce's Juices*, 330 U.S. at 755.

19 15 U.S.C. §§ 13(a), (d), (1982).

licenses under patents, to the lending of money, or to other similar transactions which involve intangibles.

Discriminatory prices on commodities of unlike grade and quality are not unlawful under the Robinson-Patman Act.[20] In the seminal case of *FTC v. Borden Co.*, the Supreme Court upheld a finding that brand names and labels are not determinants of grade and quality. In this case, Borden had charged lower prices for its private-label evaporated milk than for its otherwise indistinguishable Borden brand evaporated milk. The Court rejected the argument that the Borden brand was of a different grade because of significant consumer preference and the regulatory framework in which it sold at a higher price. The Supreme Court held that grade and quality are to be determined "by the characteristics of the product itself."[21] Since *Borden*, the cases suggest that bona fide physical differences which affect marketability, even though small and having little or no effect on a seller's costs, should be sufficient to cause products not to be of like grade and quality.[22]

As is true of many of the trade laws, the Robinson-Patman Act does not prohibit all price discrimination; but only discrimination that has an adverse effect on competition. The requisite injury to competition may occur at the level of the sellers' competitors, primary line injury; at the level of the seller's disfavored customers who compete with the seller's favorite customers, second line injury; and so on.[23] It is important to note that while section 2(a) prohibits price discrimination—the effect of which may be to lessen competition substantially—section 4 of the Clayton Act,[24] requires that a plaintiff must show actual injury as a result of the violation of section 2(a) in order to prevail in a private treble damage suit.

As to primary line injury, some courts have held that the competitive injury requirement can be met either by actual evidence of injury to competition at the seller's level or by showing that the price discrimination was carried out with predatory intent, from which it can be inferred that injury to competition may result.[25] Predatory intent has been found on the basis of a course of conduct that evidences such intent, or has been inferred from evidence of predatory below cost sales.[26] Findings of competitive injury also have been based on a competing seller's loss of customers and its financial crippling due to price reduction.[27] The FTC,

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20 15 U.S.C. § 13(a) (1982).

21 FTC v. Borden Co., 383 U.S. 637, 641 (1966).

22 *See* William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 461 F. Supp. 410, 421 (N.D. Cal. 1978), *aff'd in part* and *rev'd in part on other grounds*, 668 F.2d 1014 (9th Cir.), *cert. denied*, 103 S. Ct. 58 (1982).

23 *See* Perkins v. Standard Oil Co., 395 U.S. 642 (1969).

24 15 U.S.C. § 15 (1982).

25 *See* FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960).

26 Anheuser-Busch, 363 U.S. at 536.

27 Dean Milk Co. v. FTC, 395 F.2d 96 (7th Cir. 1968).

taking a view criticized by the courts, may also take into account diversion of business whereby injury is found when customers are diverted from the plaintiff to the seller by the lower price.[28]

For a secondary line competitive injury, the courts and the FTC require that evidence go beyond merely showing the existence of a price difference.[29] Generally, in order for there to be substantial injury to competition at the customer level, there must be competition between favored and unfavored customers or between their customers. In the *Falls City* case, the Supreme Court held that "injury to competition is established *prima facie* by proof of substantial price discrimination between competing purchasers over time."[30] The inference test, affirmed by the Court in *Falls City*, is used often when there is substantial discriminatory pricing between customers who are highly competitive with one another and operate on low profit margins.[31] Decisions which do not infer injury to competition from a price differential have often turned on a finding that the price differential was not sufficiently substantial in light of the circumstances to cause substantial injury to competition.[32]

There are a number of statutory defenses to a section 2(a) price discrimination claim.[33] Discriminatory prices otherwise unlawful are defensible under section 2(b) of the act when the seller acts "in good faith to meet an equally low price of a competitor."[34] The meeting competition defense is an absolute defense to an otherwise prohibited discrimination.[35] The FTC set forth the applicable standard of good faith as follows: "[t]his is a flexible and pragmatic, not a technical or doctrinaire concept. The standard of good faith is simply the standard of the prudent business man responding fairly to what he reasonably believes is a situation of competitive necessity." The Supreme Court has held that the test for determining whether defendant has a valid meeting competition defense is whether the seller can show "the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would, in fact, meet the equally low price of a competitor."[36]

A second defense is the cost justification defense, under which price differentials otherwise unlawful are permitted when such differentials "make only due allowance for differences in the cost of manufacture,

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28 Lloyd A. Frye Roofing Co., 68 FTC 217, 260 (1965), *aff'd.*, 371 F.2d 277 (7th Cir. 1966).

29 *See, e.g.*, Falls City Industries, Inc. v. Vamco Beverage, Inc., 103 S. Ct. 1282, 1288 (1983).

30 *Id.*

31 *See* Beatrice Foods Co., 76 FTC 719 (1969), *aff'd sub nom.* Kroger Co. v. FTC, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971).

32 FTC v. Sun Oil Co., 371 U.S. 5050, 527 (1963).

33 15 U.S.C. § 13(b) (1982).

34 *See* Shell Oil Co. v. Younger, 580 2nd F.2d 34 (9th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979).

35 *See* Falls City, 103 S.Ct. 1282 (1983). *See* Continental Baking Co., 63 FTC 2071, 2163 (1963).

36 U.S. v. J.I. Case, Inc., 438 U.S. 422, 451 (1978).

sale, or delivery resulting from the differing methods or quantities" in which the goods are "sold or delivered."[37] The plaintiff has the burden of proving that a price differential is justified.

Since the *Borden* and *Bowman* cases, it has been very difficult to use successfully the cost justification defense.[38] These cases have reduced difficulty in finding an acceptable cost study to prove the cost differential.

Section 2(a) of the Clayton Act also allows a changing conditions defense. Section 2(a) provides:

> Nothing herein contained shall prevent price changes from time to time wherein response to changing conditions effecting the market for or marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business and the goods concerned.[39]

Proof of changing conditions constitutes a complete defense to an alleged section 2(a) violation. Some cases have intimated that various changes in the market are a defense,[40] but the holdings in other cases have suggested that the available defenses are only those similar to those listed in the statute.[41]

A functional discount may be allowed where the discount relates to additional services which are provided by the buyer and where the buyer does indeed perform those services with respect to the purchases for which he receives the discount.[42] The position with respect to incentive discounts is not clear.[43] Incentive discounts may, however, be allowed where they do not cause competitive injury.

3. Comparison of Canadian and U.S. Laws on Price Discrimination

There are some differences in the Canadian and U.S. laws with respect to price discrimination which affect their overlap with import relief laws and the degree to which they can substitute for import relief laws.

In the United States, pursuant to section 2 of the Clayton Act as

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37 15 U.S.C. § 13(a) (1982).

38 United States v. Borden Co., 370 U.S. 460 (1962); United States v. Bowman Dairy Co., *Id.* (single opinion for both cases).

39 15 U.S.C. § 13(a) (1982).

40 *See* Marty's Floor Covering, Co. v. GAF Corp., 604 F.2d 266, 270 (4th Cir. (1979), *cert. denied*, 444 U.S. 1017 (1980).

41 *See, e.g.*, Moore v. Meade Service Co., 190 F.2d, 541 (10th Cir. 1951) *cert. denied*, 342 U.S. 902 (1952).

42 *See, e.g.*, Doubleday and Co., 52 F.T.C. 169 (1955); Mueller Co., 60 F.T.C. 120 (1962) *aff'd.* 1963 Trade Cases ¶ 70,880, 323 F.2d 44 (7th Cir. 1963); Boise Cascade Corp., 1986 Trade Cases ¶ 22,330.

43 *See, e.g.*, J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981) where there was a question of incentive discounts but the Supreme Court found there was not sufficient evidence before the Federal District Court to support a finding of a violation of the Robinson-Patman Act.

amended by the Robinson-Patman Act, there must be discrimination "where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition. . . ." Section 34(1)(a) of the Canadian Competition Act has no such effect on the competition test.

The United States has a cost justification test while the Canadian law requires sales of like quantities. The cost justification test is hard to prove and thus tends to rigidify prices where sellers were trying to avoid a price discrimination violation. The quantity test used in Canada is easier to apply and should track costs fairly well, thus approximating a cost justification test without the difficulties inherent in proving a cost justification.

The United States has a meeting competition defense which is not specifically available under the Canadian law. It may be, however, that if a seller has to meet the competition with respect to one purchaser, but not with respect to another, then those purchasers may not be competing purchasers and thus the seller would not be in violation of section 34(1)(a) of the Canadian Competition Act.

The price discrimination provisions in the United States can be used to attack primary line injury. Section 34(1)(a) of the Canadian Competition Act cannot be used for this purpose although an action for primary line injury may be available under section 34(1)(b) or (c).

As discussed above, incentive discounts can result in a violation of the Canadian price discrimination law. Incentive discounts may, however, be an acceptable basis for discriminations in price in the United States. Also, as discussed above, functional discounts (discounts for performing special functions, such as warehousing) may well not be permissible under Canadian price discrimination law but are permissible under the U.S. law.

In summary, the differences are a lessening of competition defense provided in the United States but not in Canada; a cost justification test in the United States as opposed to a like quantity test in Canada; a meeting the competition defense in the United States as opposed to a possibly similar effect in the Canadian law; the availability of the price discrimination provisions for attacking primary line injury in the United States; and, the differences in permitting incentive and functional discounts.

B. Predatory Pricing

Predatory pricing involves an attempt to injure or remove a competitor by pricing at a level low enough to drive the competitor out of the market. Predatory pricing is often referred to as primary line price discrimination in that its injurious effect is directed towards persons at the same level of production or distribution.

The economic rationale for prohibiting predatory or primary line price discrimination is to maintain competition by preventing the lessen-

ing or elimination of competition by selling at prices that might force competitors out of the market or discourage entry into the market. The driving out of existing rivals is known as classical predation.[44] The notion of classical predation, as expressed in *Hoffmann-La Roche*,[45] involves a predator who drives a competitor out of business by selling at very low prices and then subsequently increases the price to more than compensate for the loss that results from the period of low prices. The pre-emption or deterrence upon entry to the market by adopting low prices is known as strategic predation.[46]

There is some doubt as to whether predatory pricing can exist; or if it does exist, it is argued that it is so rare as not to be of importance in competition policy.[47] The existence of predatory pricing seems doubtful since it would require sufficient entrance barriers to allow an increased price that is high enough to recoup the losses from the predatory pricing. There may often be less costly methods, such as acquisition, to remove a competitor. However, it has been suggested that predation in one geographic market may be effective and profitable as a threat to deter entry in other markets.[48]

1. Canadian Law on Predatory Pricing

Subsection 34(1)(c) of the Act prohibits engagement in predatory or so-called primary line price discrimination (that is, price discrimination directed at rival sellers). Subsection 34(1)(c) prohibits sales at unreasonably low prices that have the effect or tendency or are designed to have the effect or tendency of substantially lessening competition or eliminating a competitor.

Section 34(1)(c) provides that every one engaged in a business who

> engages 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 such effect, is guilty of an indictable offense and is liable to imprisonment for two years.

The elements of the offense are that: (1) one be engaged in a business; (2) one be engaged in a policy of selling products; (3) at unreasonably low prices; and (4) having the effect or tendency or designed to have the effect or tendency of substantially lessening competition or eliminating a competitor.[49]

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[44] McFetidge and Wong, *Predatory Pricing in Canada: The Law and the Economics* 63(4) CAN. B. REV. 685 at 703 (1985).

[45] Regina v. Hoffman-La Roche, 28 O.R. 2d 164 at 192.

[46] *See* McFetidge & Wong *supra* note 42, at 703.

[47] McGee, *Predatory Pricing Revisited* 23 J. LAW & ECONOMICS 289 at 294 (1980).

[48] Posner, *Exclusionary Practices and the Antitrust Laws* 41 U. CHI. L. REV. 506 (1974).

[49] *See* Regina v. Hoffmann-La Roche, 28 O.R. 2d 164 at 193-213, 14 C.R. 3d 289, 48 C.P.R. 2d 145, 55 C.C.C. 2d 1, 109 D.L.R. 3d 5 (1980), *aff'd.* 33 O.R. 2d 694, 24 C.R. 3d 193, 58 C.P.R. 2d 1, 62 C.C.C. 2d 118, 125 D.L.R. 3d 607 (C.A. 1981).

The term "engaged in a business" has not been subject to much judicial comment. It has not been in issue in cases which deal with section 34(1) and thus is presumably a rather straightforward element to show.

It was held in *Regina v. Producers Dairy Ltd.* that to show that the alleged predatory pricing is part of a policy requires more than a short-term reaction to the actions of competitors.[50] In *Regina v. Hoffmann-La Roche*, two six-month periods of supplying drugs to hospitals for free was found to constitute a policy.[51] It was also noted in *Hoffmann-La Roche* that to come within the word policy, all that is required "is a planned and deliberate course of conduct by responsible employees of the company."[52]

In relation to the offense of discriminatory pricing under subsection 34(1)(a), subsection 34(2) requires that for there to be an offense under subsection 34(1)(a), there must be a practice of discriminating. The meaning of the word practice in subsection 34(2) may be of use in interpreting policy in subsections 34(1)(b) and (c).[53] D.H. Henry, a former Director of Investigation and Research, in considering the word practice, suggested that "meeting spot competition, giving a store-opening special, an anniversary special or a stock clearance special, all of which might be described in trade terms as a 'one shot' effort, would not give rise to an inquiry under the Act."[54]

It appears then that the existence of a policy depends on the length of time over which sales are made and the frequency of sales. A one shot or brief effort will not constitute a policy.

On the word selling, it is noteworthy that Judge Linden in *Hoffmann-La Roche* found that giveaways by Hoffmann-La Roche did constitute selling since the giveaways were "part of a commercial operation, not a charitable one."[55]

The question of an unreasonably low price was dealt with in *Hoffmann-La Roche*, and in *Regina v. Consumers Glass*.[56] In *Hoffmann-La Roche* the trial judge listed four factors that must be considered in determining whether a price is unreasonably low: the difference between the production cost or accounting cost and the sale price; the length of time during which sales at the questionable prices take place; the circumstances of the sales such as whether a price cut is defensive in response to a competitor's actions or proposed actions; and, whether any long-term

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50 Regina v. Producers Dairy Ltd., 50 C.P.R. 2d 265 at 270-71 (Ont. C.A. 1981).

51 Regina v. Hoffman-La Roche, 28 O.R. 2d 164 at 213.

52 *Id.* at 194.

53 *See* the discussion of the word "practice" in the discussion of Price Discrimination earlier in this Part C.

54 Henry, D.H.W., *Unfair Distribution and Pricing Practices*, Law Soc. of Upper Canada Special Lectures - Trade Competition, 1, 43, 44 (1963).

55 28 O.R. 2d 164 at 196.

56 Regina v. Consumers Glass Co., 33 O.R. 2d 228, 14 B.L.R. 172, 60 C.C.C. 2d 481, 124 D.L.R. 3d 274 (H.C. 1981).

economic benefits will accrue to the seller by reducing its prices below cost.[57] Unfortunately, Judge Linden did not define production cost or accounting cost.

With respect to the difference between the cost and the sale price, the judge stated that if an article is sold for more than production or accounting cost, it can never be held to be unreasonable.[58] If an article is sold for less than cost, this may or may not be held to be unreasonable.[59] In *Consumers Glass*, it was held that a price cannot be said to be unreasonably low, regardless of the intent behind the pricing policy, if the price charged is greater than the average variable cost and there is no suggestion that the price is below the marginal cost.[60] Variable costs vary with changes in output and average variable cost is the sum of variable costs divided by output. Marginal cost is the increment to total cost that results from producing an additional increment of output.[61]

The court in *Consumers Glass* quoted extensively from an article by Areeda and Turner that suggests that sales below marginal cost are unreasonably low but that given the difficulties in calculating marginal costs, average variable costs would have to be used as a proxy.[62] Unfortunately, what constitutes a variable cost and assessing to which units a variable cost applies are not always easy matters to determine. Consequently, the determination of average variable costs is not necessarily straightforward and there may often be a range of arguably reasonable average variable costs. Therefore, either the test may not be helpful in a number of situations or, in attempting to apply the test, the court may end up having to assess arbitrarily the average variable cost at some amount within a range set by expert evidence.

In summary, the cases indicate that a price will probably not be found to be unreasonably low if it is above the average variable cost of the item sold. If the price is below the average variable cost, then the factors set out in *Hoffmann-La Roche* will be considered to determine whether the price is unreasonably low.

As noted above, section 34(1)(c) requires that a policy of selling at unreasonably low prices must also be shown to have the effect or tendency or be designed to have the effect or tendency of substantially lessening competition or eliminating a competitor. One must then show either that there was an actual effect or tendency to lessen competition substantially or eliminate a competitor, or that there was a design to have

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57 28 O.R. 2d 164 at 200-201.

58 *Id.* at 200.

59 *Id.*

60 Consumers Glass, 33 O.R.2d at 255.

61 These definitions of variable costs and marginal costs are noted in Areeda and Turner, *Predatory Pricing and Related Practices Under Section 2 of The Sherman Act*, 88 HARV. L. REV. 697-733 (1975) and were quoted by O'Leary J. in Regina v. Consumers Glass, 33 O.R. 2d 228 at 248 (1981).

62 *See* Areeda and Turner, *supra* note 59. *See* Regina v. Consumers Glass Co., 33 O.R. 2d 228 at 249 - 250 (1981) where this part of the Areeda and Turner article is quoted.

the effect or tendency to lessen competition substantially or eliminate a competitor.[63] There is no significant judicial authority that outlines what would constitute an actual effect or tendency to lessen competition substantially or eliminate a competitor. In *Hoffmann-La Roche*, however, it was noted that causing a competitor to withdraw from the market when it had only a very small share of the market was probably not a substantial lessening of competition and since the competitor still made some sales, competition was not eliminated.[64] As to a design or intent to have an effect or tendency to lessen competition substantially, a motive of self-preservation[65] or an attempt to minimize losses[66] does not constitute such an intent. It may be difficult to show what is sufficient to amount to a substantial lessening of competition; it may in fact be easier to succeed in cases where there is an elimination of competition even though the initial amount of competition was not substantial.

The court will look to evidence of intent such as the internal documents of the accused.[67] Section 34(1) is a criminal law provision and so it is necessary to show an intent to lessen competition substantially beyond a reasonable doubt.[68] If there are no other indicia of intent other than unreasonably low prices and if there is no actual effect or tendency to lessen competition, then the intent can only be inferred if there is no other explanation for the low prices.[69]

Section 34(1) provides, as a penalty, for a maximum of two years of imprisonment. A fine would most likely be substituted for imprisonment where the fine may be unlimited and within the discretion of the court.[70] Upon obtaining a conviction, a prohibition order may be issued in addition to any other penalty.[71] Where criminal proceedings have been commenced, but prior to a conviction, the court may issue a prohibition order where it appears that a person has done, is about to do, or is likely to do any act or thing that would constitute a section 34(1) offense.[72] Furthermore, any person who has suffered a loss as a consequence of predatory or geographic price discrimination may sue for damages.[73]

There are very few reported cases on section 34(1)(c). *Regina v. Hoffmann-La Roche* resulted in a conviction under section 34(1)(c) and is the only conviction that has been obtained on section 34(1)(c).[74] It seems reasonable to conclude that the difficulties involved in showing

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63 *See* Regina v. Hoffmann-La Roche, 28 O.R. 2d 164 at 205 (1980).

64 *Id.* at 205 - 206.

65 Regina v. Ray, Police Court, South Burnaby, B.C., Dec. 11, 1957 (unreported decision).

66 Regina v. Consumers Glass, 33 O.R. 2d 338 at 252, 255 (1981).

67 Regina v. Hoffmann-La Roche, 28 O.R. 2d 164 at 206-213 (1980).

68 Regina v. Fairmont Plating (Alta.) Ltd., Alta. S.C., 1977 (unreported decision).

69 *Id.*

70 Criminal Code, R.S.C. ch. C-34, s. 646(1) (1970).

71 Combines Investigation Act, R.S.C. ch. C-23, as amended, s. 30(1) (1970).

72 *Id.* at s. 30 (2).

73 *Id.* at s. 31.1.

74 *See generally* FLAUELL *supra*, note 6.

unreasonably low prices and the need to show a design or actual effect or tendency to eliminate competition or substantially lessen competition (with doubt as to what would constitute substantially) make section 34(1)(c) a difficult provision to enforce.[75]

2. U.S. Law on Predatory Pricing

In the United States, predatory pricing on the part of a dominant firm can be challenged as monopolization under section 2 of the Sherman Act.[76] Such pricing by non-dominant firms can, under some circumstances, be challenged as an attempt to monopolize section 2, or, if done in concert with others, as a combination in restraint of trade under section 1 of the Sherman Act.

The elements of the monopolization offense as it applies to predatory pricing are: first, the possession of monopoly power and second, the use of predatory pricing to acquire or maintain such power.[77]

A company has monopoly power if it has "the power to control market prices or exclude competition."[78] The existence of that power can be shown by direct evidence of the exercise of control over price or competition; by evidence of a dominant market share in a properly defined product and geographic market;[79] or by other evidence of market power which would include regulatory and nonregulatory barriers to entry, the extraction of higher than normal profits over an extended period of time, or significant economies of scale and other cost advantages. Generally, none of these factors are by themselves conclusive; rather,

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75 Refer to the introduction where it is noted that there is some doubt as to the existence of predatory pricing.

76 15 U.S.C. § 2 (1982).

77 *See, e.g.*, United States v. American Tobacco Co., 221 U.S. 106, 160, 182 (1911); Standard Oil Co. v. United States, 221 U.S. 1, 43 (1911); Southern Pacific Communications Co. v. American Telephone & Telegraph Co., 740 F.2d 980, 1000, 1002 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1359 (1985); Janich Bros. v. American Distilling Co., 570 F. 2d 848, 855 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).

78 United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 291 (1956).

79 In the famous Alcoa case (United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945)), Judge Learned Hand stated that a market share of 90% "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not." Subsequent cases, while varying somewhat in the precise numbers, have generally adhered to thes parameters. *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Weiss v. York Hospital, 745 F.2d 786, 827 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1777 (1985) (market share in excess of 80% sufficient); Dimmitt Agri Industries, Inc. v. CPC International, Inc., 679 F.2d 516 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983) (25% insufficient).

The courts disagree over how strong an inference of lack of market power can be drawn from low market shares (*e.g.* less than 50%). Compare Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 207 n.2 (5th Cir. 1969) ("something more than 50% of the market is a prerequisite to finding a monopoly") with Hayden Publishing Co., Inc. v. Cox Broadcasting Corp., 730 F.2d 64, 69 n.7 (2d Cir. 1984) ("a party may have monopoly power in a particular market, even though its market share is less than 50%").

they are weighed together to form a judgment as to whether the firm in question can control prices or exclude competitors.

Once it is established that a firm possesses monopoly power, the next issue is whether the firm has engaged in predatory pricing. That is, pricing that tends "to eliminate rivals and create a market structure enabling the seller to recoup his losses."[80] There appears to be general agreement that prices below marginal cost, or average variable cost as its surrogate where marginal cost is difficult to determine, are presumptively predatory.[81]

There is less agreement on whether prices above marginal cost can ever be predatory. U.S. courts have regarded this as a difficult issue in light of the procompetitive policy of the antitrust laws. The Second Circuit held that: "[p]redatory pricing is difficult to distinguish from vigorous price competition. Inadvertently condemning such competition as an instance of predation will undoubtedly chill the very behavior the antitrust laws seek to promote."[82]

In order to avoid such a chilling effect, some courts have adopted an irrebuttable presumption that a price that exceeds both incremental and average total cost does not constitute predatory pricing.[83] Other courts, while accepting a general presumption that a price above marginal cost is nonpredatory, allow such a price to be challenged if the plaintiff can show by clear and convincing evidence that the price was predatory in the sense of being aimed at eliminating or disciplining competition in order to achieve higher future profits.[84] The Supreme Court has recently stated, in dictum, that predatory pricing in a section 2 case "means pricing below some appropriate measure of cost."[85] It remains to be seen what influence this dictum will have on the issue that now divides the lower courts.

The elements of an attempt to monopolize, in most U.S. courts, are: conduct arising out of a specific intent[86] to acquire a monopoly in the relevant market, and a dangerous probability that the attempt would be successful. The Ninth Circuit,[87] however, dispenses with the latter re-

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80 William Inglis & Sons Baking Co. v. ITT Continental Baking Co. 668 F.2d 1014, 1035 (9th Cir. 1981), *cert. denied* 459 U.S. 825 (1982).

81 *See, e.g.*, Inglis, 668 F.2d at 1036; Northeastern Telephone Co. v. American Telephone & Telegraph Co., 651 F.2d 76, 88 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

82 Northeastern Telephone Co. v. American Telephone & Telegraph Co., 651 F.2d at 88.

83 Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983); Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050 (6th Cir.), *cert. denied*, 105 S. Ct. 510 (1984).

84 *See* Transamerica Computer Co. v. IBM Corp., 698 F.2d 1377, 1388 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983); William Inglis & Sons Baking Co. v. ITT Continental Baking Co. 668 F.2d 1014, 1035 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

85 Matsushita Electric Industrial Co. v. Zenith Radio Corp. 106 S. Ct. 1348, 1355 n.8 (1986).

86 'Specific Intent', generally, requires an intent in fact to do the impuned act beyond just a presumed intention from the logical consequences of one's acts.

87 The Ninth Circuit is composed of the states of California, Oregon and Washington.

quirement in some instances.[88]

The issues in an attempt to monopolize case that involve predatory pricing are similar to those in a monopolization case. Although a defendant does not need to be a monopolist to be guilty of an attempt to monopolize, it is still necessary—in those jurisdictions in which a dangerous probability of success must be proven—to show the factors that make it plausible that the defendant could become a monopolist. These factors usually involve a showing of a substantial market share on the part of the defendant.[89] Moreover, the issue of whether pricing is predatory is essentially identical to that in a monopolization case.[90] A plaintiff must, however, demonstrate that the "defendant had a specific intent to destroy competition or build monopoly,"[91] not simply the mere intent to do the act, as would be sufficient where the defendant is a monopolist.

An agreement among some competitors to price at predatory levels, so as to discipline or eliminate another competitor, can be a per se violation of section 1 of the Sherman Act.[92] However, in those cases where the agreement cannot be proved directly, but must be inferred from circumstantial evidence, the Supreme Court has held that the inherent implausibility of such an agreement must be taken into account. Beginning with the premise that predatory pricing schemes, even by a single firm, are rarely tried, and even more rarely successful, the Court reasoned that a collective predatory scheme "is incalculably more difficult to execute than an analogous plan undertaken by a single predator. The conspirators must allocate the losses to be sustained during the conspiracy's operation, and must also allocate any gains to be realized from its success."[93]

In view of the unlikelihood of success, the Court concluded that defendants had no plausible motive to conspire, and in the absence of such a motive, unambiguous evidence was necessary to permit a jury to find that such a conspiracy had indeed taken place.[94]

3. Comparison of Canadian and U.S. Laws on Predatory Pricing

The Canadian and U.S. laws on predatory pricing are very similar and have only a few possible and minor differences. The differences are insignificant given that both the U.S. and Canadian laws on predatory

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[88] *See, e.g.*, Lessig v. Tidewater Oil Co., 307 F.2d 459, 474-75 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

[89] *See, e.g.*, United States v. Emoire Gas Corp., 537 F.2d 296, 305 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977) (50% share not sufficient to show dangerous probability).

[90] *See, e.g.*, William Inglis & Sons Baking 668 F.2d at 1031-39.

[91] Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626 (1953).

[92] In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 306 (3d Cir. 1983), *rev'd on other grounds sub nom.* Matsushita Electric Industrial Co. v. Zenith Radio Corp., 106 S. s Ct. 1348 (1986).

[93] Matsushita Electric Industrial, 106 S. Ct. at 1358 (1986).

[94] *Id.* at 1362.

pricing are difficult to enforce and have not been enforced very successfully in recent years.

It may be that it is easier to establish the U.S. standard of a dangerous probability of success at attempting to monopolize than it is to establish the Canadian standard of an actual or designed effect, or tendency of lessening competition substantially or eliminating a competitor.

Although it is not yet clear, it appears that the Canadian cost test may be slightly different than in the United States. Although the average variable cost appears to be the standard in both the United States and Canada, U.S. courts generally have a per se violation rule for below average variable cost pricing while Canadian courts may consider other factors in conjunction with prices below average variable costs. The U.S. courts generally presume that prices above average total costs are not predatory while prices between average variable costs and average total costs should be considered in light of other factors. The Canadian law appears to be that prices above average variable costs are presumed to be nonpredatory. Overall, the above-noted differences in the Canadian and U.S. laws are not really significant in light of the lack of enforcement of these laws.

II. IMPORT RELIEF LAWS

A. Dumping

1. Summary of Canadian Law on Dumping

Canadian anti-dumping law is set out in the Special Import Measures Act,[95] and generally follows the Anti-dumping Code under GATT.[96] Under the Special Import Measures Act, anti-dumping duties are imposed where:

> dumping is taking place, that is, the "normal value" (or price in the home market) for the goods exceeds the "export price" (or the price at which the goods are sold to the Canadian buyer); and the dumping has caused, is causing or is likely to cause material injury to Canadian production or has caused or is causing material retardation to the establishment of the production of like goods in Canada.[97]

The Deputy Minister of National Revenue is responsible for the determination of the existence and extent of dumping[98] while the Canadian Import Tribunal is responsible for determining whether there is material injury.[99] The procedure for the assessment of an anti-dumping duty be-

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[95] S.C. ch. 25 (1984), as amended S.C. ch. 1 (1986).

[96] Article VI of the General Agreement on Tariffs and Trade, Geneva, 1979.

[97] *Special Import Measures Act*, S.C. ch. 25, s. 3 (1984).

[98] *Id.* at ss. 38-41.

[99] *Id.* at ss. 42-43. (The "Canadian Import Tribunal" is established under s. 63 - s. 77 of the Special Import Measures Act).

gins by an investigation by the Deputy Minister. The investigation is initiated by:

(1) the Deputy Minister on his own initiative;
(2) within 30 days of receiving a properly documented complaint;
(3) on receiving a direction from the Canadian Import Tribunal with respect to goods similar to those already under investigation; or
(4) on advice from the Canadian Import Tribunal that there are reasonable grounds to believe that dumped goods which the Deputy Minister has decided not to investigate are causing material injury.[100]

On receipt of a properly documented complaint, the Deputy Minister has thirty days to determine whether to initiate an investigation on the basis of whether there is evidence of dumping and evidence of past, present or future material injury.[101] The question of the existence of past, present or future material injury can be referred to the Tribunal within thirty days of a decision not to investigate or to terminate an investigation due to lack of evidence of material injury.[102] The Tribunal renders its decision on such a reference without a hearing, on the basis of the information before the Deputy Minister, and within thirty days.[103]

When an investigation is started, notice is given to exporters and importers of the goods in question, to the complainant, and to others as prescribed.[104] The investigation generally begins with questionnaires being sent to importers and exporters of the goods.

The Deputy Minister has ninety days to make his preliminary determination:[105] 135 days in exceptionally difficult or complex cases.[106] The Deputy Minister has a further ninety days to make a final determination based on any further evidence received. For each determination, the Deputy Minister must specify the goods and the margin of dumping (i.e., the difference between the normal value of the goods and the export price).[107] The payment, or the posting of security for payment, by the importer of a provisional duty on the imported goods begins on the day of the preliminary determination.[108]

After the preliminary determination by the Deputy Minister, the Canadian Import Tribunal begins its inquiry into material injury.[109] The Tribunal's decision must be made within 120 days of notice of the Deputy Minister's preliminary determination.[110] The Canadian Import Tri-

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100 *Id.* at s. 31.
101 *Id.* at s. 31(1).
102 *Id.* at ss. 33(2)(b), 34(b), 35(2)(b).
103 *Id.* at s. 37.
104 *Id.* at s. 34(1)(a).
105 *Id.* at s. 38(1).
106 *Id.* at s. 39(1).
107 *Id.* at s. 38(1)(a).
108 *Id.* at s. 8.
109 *Id* at s. 42.
110 *Id.* at s. 43(1).

bunal will hold hearings at which all interested persons, as specified in the Regulations,[111] may make representations and present evidence including the calling of witnesses. A person interested in the public interest can make representations, and the Tribunal may, on considering such representations, recommend to the Minister of Finance that the full amount of the duties not be imposed.[112]

A finding of injury specifies the goods and, where applicable, the supplier and the country of origin.[113] Exporters of the goods from that country, unless excluded from the injury finding, as well as new entrants to the industry supplying those goods in that country, will be subject to the finding of the Tribunal.[114] The importer is responsible for payment of the anti-dumping duties and "any person interested in the importation of the goods" can request, through the Deputy Minister, to have the Canadian Import Tribunal determine[115] who "is in reality the importer of the goods."[116]

Undertakings can be made to revise prices to eliminate the margin of dumping.[117] The undertakings can be made only if made prior to the preliminary determination of the Deputy Minister;[118] if the importers or exporters account for substantially all the exports to Canada of the goods in question,[119] and if the Deputy Minister is satisfied that the undertaking will not cause prices to importers to increase by more than the margin of dumping and would not be impracticable to administer.[120] The investigation can be reopened where the undertaking is violated; new information comes before the Deputy Minister and the Deputy Minister reopens the investigation; or where the complainant, exporters or importers move to have the investigation reopened.[121]

Undertakings between the government and a number of importers or exporters may permit the government to effectively form a cartel in an industry with respect to the goods that are the subject of the dumping action.

A final determination of dumping can be appealed by obtaining a redetermination by an officer designated under the Customs Act[122] and by a request to the Deputy Minister for a redetermination.[123] The Dep-

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111 S.O.R./84-927, CAN. GAZ., Part II, vol. 118, No. 25, p. 4286, s. 41.

112 Special Import Measures Act, S.C. (1984), ch.25, s. 45.

113 *Id.* at s. 43.

114 *Id.* at s. 42.

115 *Id.* at s. 89 and *see* ss. 90-95 for the rules and procedures governing the determination of the true importer by the Tribunal.

116 *Id.* at s. 2(1), definition of "importer."

117 *Id.* at ss. 49-54.

118 *Id.* at s. 49(2)(b).

119 *Id* at s. 2(1) definition of "undertaking."

120 *Id.* at s. 49(2)(a), (c).

121 *Id.* at s. 51 and s. 52.

122 *Id.* at s. 57.

123 *Id.* at s. 59.

uty Minister's redetermination can be appealed to the Tariff Board[124] and from there to the Federal Court of Canada on a question of law.[125] The Canadian Import Tribunal's decisions on injury can be appealed on matters other than questions of fact to the Federal Court of Canada.[126]

The margin of dumping is the difference between the normal value of the goods and the export price.[127] Generally, normal value is determined by considering sales of like goods to nonassociated purchasers at the same trade level as the importer, in the same quantities, under ordinary commercial and competitive conditions, during a sixty day period (or a longer period as is necessary) selected by the Deputy Minister, and in the place from which the goods were shipped directly to Canada.[128] Where these conditions are not met, other bases for determination can be used.[129] Certain adjustments are made such as for taxation and differences in terms of sale.[130]

The export price is determined according to the lesser of the exporter's adjusted sale price or the importer's adjusted purchase price. The adjustments are the deduction of costs to prepare goods for shipment to Canada over and above those costs on sales of like goods in the country of export; duties or taxes imposed by a law of Canada or of a province; and all other costs or charges resulting from the exportation of the goods.[131] Special rules for the calculation of the export price provide for exceptional circumstances.[132]

The factors considered in assessing material injury to Canadian production of like goods to those being dumped includes such things as loss of domestic production and sales, loss of market share, loss of employment, loss of profit, lowering of return on investment, and decrease in capacity utilization.[133] The material injury must occur as a consequence of the dumping. A showing of consumer preference,[134] strikes,[135] inferior quality,[136] inefficient marketing,[137] or some similar reason for the injury to domestic production can avert a finding of material injury. The

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124 *Id.* at s. 61.

125 *Id.* at s. 62.

126 Federal Court Act, R.S.C. 2nd supp, ch. 10, s. 28.

127 Special Import Measures Act, S.C. 1984, ch.25, s. 2(1) definitions of "margin of dumping," "normal value" and "export price."

128 *Id.* at s. 15.

129 *Id.* at ss. 16-23.

130 S.O.R./84-927, s.5.

131 Special Import Measures Act, S.C. 1984, ch.25, s.24.

132 *Id.* at ss. 25-28.

133 Von Kalinowski, *World Law of Competition*, Unit A, Vol. A3, *Canada*, by Gordon Kaiser, 1985, pp. 13-42 to 13-43.

134 For instance in Bronze or Brass Values, 1 C.E.R. 118, (1979) it was found that the exporter offered a product which met distinctive market requirements.

135 In Asbestos Cement Pressure Pipe,, 1 C.E.R. 42, (1979) it was found that the material injury was due to declining demand and strikes.

136 In Steel Sheet Piling, ADT 10-80, Dec. 10, 1980, it was found that the material injury was due to technical imperfections in the product.

Tribunal can consider the Deputy Minister's determination of the margin of dumping in assessing material injury.[138]

In summary, an anti-dumping duty is imposed where there is dumping (as determined by the Deputy Minister) which has caused, will cause or is causing material injury to the production of like goods in Canada or has caused or is causing a material retardation of the establishment of the production of like goods in Canada (as determined by the Canadian Import Tribunal).

2. Summary of U.S. Law on Dumping

The Anti-dumping Act of 1912 provides a remedy against below home market pricing of imports. Under the Anti-dumping Act, 19 U.S.C. §§ 1671-1677 (Supp. 1984), if a foreign manufacturer is selling goods in the United States at less than fair value and these sales cause or threaten material injury to a U.S. industry or materially retard its establishment, then a duty in an amount equal to the amount by which the foreign market value exceeds the U.S. price shall be imposed upon the imports from the foreign country in question as the anti-dumping duty. This duty is an additional duty that is assessed on top of all regular duties imposed by law.

Consideration of the two primary issues under the anti-dumping law is undertaken by two agencies, the International Trade Commission (ITC) and the Department of Commerce.

The determination of the existence of sales at less than fair value (LTFV) can be initiated by the Department of Commerce or pursuant to a petition by an interested party.[139] Upon the filing of a petition, the Department of Commerce has twenty days to determine whether there is sufficient evidence of dumping to warrant an investigation.[140]

A preliminary determination on injury is made by the ITC within forty-five days from the date a petition is filed or the date it receives notice that the Department of Commerce has commenced an investigation without a petition.[141] A preliminary determination of the sales at LTFV is made by the Department of Commerce within 160 days of the filing of a petition or the commencement of an investigation without a petition, or within ninety days of such time if the petitioner and the interested parties verify the information available after sixty days and submit to a preliminary determination on that basis.[142] In complex cases the preliminary determination of the Department of Commerce can be ex-

137 In Ceramic Tiles, 2 C.E.R. 134 (1980), it was found that the material injury was due to the failure of the complainant to respond to needs of the Canadian market.

138 Remington Arms of Canada Ltd. v. Les Industries Valcatier, [1982] 1 F.C. 586 (C.A.).

139 19 U.S.C. § 1673a. "Interested party" is defined in 19 U.S.C. § 1677.

140 19 U.S.C. § 1673a(c).

141 19 U.S.C. § 1673b(a).

142 19 U.S.C. § 1673(b).

tended to 210 days.[143]

A final determination is generally made by the Department of Commerce within seventy-five days of its preliminary determination.[144] The ITC, where it has made an affirmative preliminary determination (i.e., a preliminary finding of material injury), makes its final determination on injury before the later of 120 days from an affirmative preliminary determination by it or forty-five days from a final determination of the Department of Commerce.[145] Where the ITC has made a negative preliminary determination it has up to seventy-five days after reversing this negative finding to render its final determination.[146]

Once a preliminary determination of sales at LTFV is made, a cash deposit, bond or other security as deemed appropriate must be posted with respect to imports of merchandise subject to the order.[147] The security is equal to the estimated average amount by which the foreign market value exceeds the U.S. price.[148] Upon an affirmative final determination by the ITC, anti-dumping duties must be assessed in the amount that the foreign market value exceeds the U.S. price within six months of there being satisfactory information to assess the amount, and in any case no later than twelve months after the end of the annual accounting period of the manufacturer in which the merchandise was sold or consumed.[149] In the interim, a deposit of the estimated anti-dumping duties is required pending liquidation of entries of merchandise.[150]

Investigations can be terminated by agreements (i.e., undertakings) by exporters to cease exports or to revise prices so as to eliminate the difference between foreign market value and the U.S. price. Investigations can also be terminated by certain circumstances where the injurious effect of the exports can be completely eliminated with a revision of prices.[151] The investigation can be continued on request by an interested party or by an exporter or exporters who account for a significant proportion of exports of the merchandise to the United States.[152] The investigation may also be resumed where the agreement is violated.[153]

The anti-dumping law specifies the criteria for determining the existence of sales at LTFV.[154] To determine if the sales are at LTFV, the foreign market value is compared to the U.S. price.

Foreign market price is calculated on the basis of the wholesale

143 19 U.S.C. § 1673(c).
144 19 U.S.C. § 1673d(a).
145 19 U.S.C. § 1673d(b)(2).
146 19 U.S.C. § 1673d(b)(3).
147 19 U.S.C. § 1673b(d).
148 19 U.S.C. § 1673b(d).
149 19 U.S.C. § 1673e(a)(1).
150 19 U.S.C. § 1673(a)(3).
151 19 U.S.C. § 1673c.
152 19 U.S.C. § 1673c(g).
153 19 U.S.C. § 1673c(i).
154 19 U.S.C. § 1677b, 19 C.F.R. § 353.3.

price, after certain adjustments, for sales in ordinary commerce in the home market. If the merchandise is not sold in the home market or if the determination of the home market price is not practical, then there are alternative methods of calculating the foreign market value.[155] The U.S. price is defined as the purchase price, or the exporter's sales price, again, with appropriate adjustments.[156]

The ITC determines whether the dumping is likely to cause material injury, or threat thereof, to an industry in the United States or materially retard the establishment of an industry thereof. Policies and procedures for the ITC on this matter are set out in the ITC Regulations. In making this determination, the ITC is required to (1) define an industry, and (2) determine if that industry has been materially injured. The law defines industry to mean "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product."[157] The law also authorizes the ITC, in appropriate circumstances, to divide the United States into two or more product markets and treat the producers within each market as separate industries if: "(i) the producers within such markets sell all or almost all their production of the like product in question in that market, and (ii) the demand in that market is not supplied to any substantial degree by producers of the product in question located elsewhere in the United States."[158]

In determining whether material injury exists, the factors to be considered include the volume of imports, the effect of imports on prices, and the impact of imports on domestic producers of like products.[159] The law spells out how the ITC will evaluate these factors.

With respect to the volume of imports, section 771(7) states that "the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." An import penetration of .2% was found to be clearly insignificant,[160] while a maximum volume of imports of 4.5% was accepted as significant.[161]

As to price, section 771(7) directs the ITC to consider whether there has been significant price undercutting by the imported merchandise, and whether the effect of imports otherwise depresses the price to a signifi-

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155 19 C.F.R. § 353.3.

156 19 C.F.R. § 353.10.

157 19 U.S.C. § 1677.

158 *Id.*

159 19 C.F.R. §§ 207.26 and 207.27.

160 Secondary Aluminum Alloy in Unwrought Form from the United Kingdom, 731-TA-40 (Preliminary), May 1981, 2 I.T.R.D. 5515.

161 Atlantic Sugar, Ltd. v. United States, 2 Ct. Int'l Trade 174, 2 I.T.R.D. 1630, 519 F. Supp 916 (1981).

cant degree or prevents price increases which otherwise would have occurred to a significant degree.

As to the impact of imports on the domestic industry, the section directs the ITC to:

> evaluate all relevant economic factors which have a bearing on the state of the industry, including, but not limited to: actual and potential decline in output, sales, market share, profits, productivity, return on investments and utilization of capacity, factors affecting domestic prices, and actual and potential negative affects on cash flow, inventories, employment, wages, growth, availability to raise capital, and investments.[162]

In determining whether there is a likelihood of threat of material injury, an examination of trends will be important. For example, "the rate of increase of subsidized or dumped exports to the U.S. market; capacity in the exporting country to generate exports; and, the availability of other export markets."[163] Under section 771(7)(f), the ITC is directed to consider eight economic factors, including, among others: increased capacity in the exporting country, rapid increase in U.S. market penetration, and the probability that imports will enter the United States at prices which will suppress or depress U.S. prices.

Under the statute, the causal relationship between the dumped imports and the existence of material injury is stated as "by reason of." A petitioner for anti-dumping duties must demonstrate that there is a causal link between the dumping and material injury. However, no particular standard has been imposed,[164] and the standard applied is not as stringent as the proximate cause of injury standard in U.S. antitrust and tort laws.

The Anti-dumping Act of 1916, made it unlawful "commonly and systematically" to import goods into the U.S. market "at a price substantially less than the actual market value or wholesale price" of such goods in their home market with an intent to injure or destroy an industry in the United States. These types of sales have become known as "predatory dumping." The 1916 Act has been an ineffective remedy from the point of view of U.S. industry. No plaintiff has ever recovered in a private treble damage action. The requirement that plaintiffs prove the defendant was dumping his goods with a predatory intent has essentially barred recovery.[165] At the time of its enactment, Congress recognized the potential problem the intent requirement would create in private treble damage actions; nevertheless, it felt the requirement was necessary because of the provision that made predatory dumping a criminal of-

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162 19 U.S.C. § 1677.

163 19 C.F.R. § 207.26(d).

164 Outboard Marine Corp. v. Pezetzel, 461 F.Supp. 384 (D. Del. 1978).

165 53 CONG. REC. 10,751 (1916) (remarks of Rep. Helvering).

fense.[166] Not surprisingly, this practical inability to recover damages under the statute has led to various proposals over the years to amend the 1916 Act.

A recent proposal by Senator Specter (R.-Pa.), would amend the 1916 Act to provide a far more accessible remedy for U.S. industry.[167] It may also create a separate track for recovery under the U.S. antitrust laws by amending the Clayton Act to include the Anti-dumping Act of 1916 within the definition of the antitrust laws. Finally, the bill would provide a private right of action against customs fraud.

Dumping has its counterpart in price discrimination and predatory pricing. Because the Anti-dumping Act has an intent requirement for predatory dumping, it does not impose a harsher requirement that would be required for a domestic predatory pricing action. However, an anti-dumping action under § 1671 does not allow defenses which are available under a domestic price discrimination claim. The anti-dumping laws lack a meeting competition defense, nor is there a changing conditions defense. Both of these defenses are designed to avoid punishing rational economic behavior. Nevertheless, because adjustments to price are permitted, a de facto cost justification defense is permitted.

B. Countervailing

1. Summary of Canadian Law on Countervailing

As is the case for anti-dumping law in Canada, the imposition of countervailing duties is governed by the Special Import Measures Act.[168] Countervailing duties can be imposed by the Governor in Council on certain conditions and on the advice of the Minister of Finance,[169] or they can be imposed upon a determination by the Deputy Minister of National Revenue of an amount of the subsidy and upon a finding by the Canadian Import Tribunal that the subsidization caused, is causing or is likely to cause material injury to the production of like goods in Canada, or has caused or is causing material retardation to the establishment of the production of like goods in Canada.

The Governor in Council may order an investigation to determine the amount of the subsidy on subsidized goods. Upon a determination by the Deputy Minister of the amount and upon the authorization of Canada by the Committee of Signatories' established pursuant to Article 16 of the GATT Subsidies and Countervailing Duties Agreement[170] to impose countervailing duties on such subsidized goods, the Governor in

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166 *See* Remington Arms of Canada Ltd. v. Les Industries Valcartiey, Federal Court of Appeal, June 8, 1981.

167 S. 1655, 99th Cong., 1st Sess. (1985).

168 S.C. 1984, ch.25, as amended S.C. 1986, ch.1.

169 *Id.* at s. 7.

170 Agreement on Interpretation and Application of Articles VI, XVI, XXIII of the General Agreement on Tariffs and Trade, signed at Geneva, Dec. 17, 1979.

Council may on the recommendation of the Minister of Finance make an order imposing a countervailing duty.[171] The order applies to subsidized goods that are the product of the country specified in the order and that are of the same description as the goods in respect to which the Deputy Minister has made his determination. The amount of the duty is limited to the amount of the subsidy in cases where the duty imposed would otherwise exceed the subsidy.[172]

The Deputy Minister of National Revenue is responsible for determining the amount of a subsidy.[173] The investigation by the Deputy Minister into the amount of subsidy is initiated by the Deputy Minister:

(1) on his own initiative;
(2) within 30 days of receiving a properly documented complaint;
(3) on receiving a direction from the Canadian Import Tribunal with respect to goods similar to those already under investigation; or
(4) on advice from the Canadian Import Tribunal that there are reasonable grounds to believe that subsidized goods which the Deputy Minister has decided not to investigate are causing material injury.[174]

On receipt of a properly documented complaint, the Deputy Minister has thirty days to determine whether to initiate an investigation on the basis of whether there is evidence of subsidization of the goods and whether there is evidence of past, present or future material injury.[175]

Notice of the investigation is given to exporters and importers of the goods in question, to the complainant and to others as are prescribed.[176] The Deputy Minister has ninety days to render a preliminary determination[177] or 135 days in exceptionally difficult or complex cases.[178] The Deputy Minister has a further ninety days to make a final determination.[179] For each determination, the Deputy Minister must specify the goods, the amount of subsidy, the amount of the subsidy that is an export subsidy, and the name of the importer of the goods.[180]

The Canadian Import Tribunal begins its inquiry into material injury upon receipt of notice of a preliminary determination.[181] The Tribunal's decision must be made within 120 days.[182] Hearings are held at which all interested persons, as specified in the Regulations,[183] as well as

171 Special Import Measures Act, S.C. 1984, ch. 25, s. 7(1).
172 *Id.* at s. 7(2).
173 *Id.* at ss. 38-41.
174 *Id.* at s. 31.
175 *Id.* at s. 31(1).
176 *Id.* at s. 34(1)(a).
177 *Id.* at s. 38(1).
178 *Id.* at s. 39(1).
179 *Id.* at s. 41.
180 *Id.* at s. 38(1)(a).
181 *Id.* at s. 42.
182 *Id.* at s. 43.
183 S.O.R./84-927, s. 41.

persons interested with respect to the public interest,[184] may make representations. The Tribunal can recommend to the Minister of Finance that the full amount of the duty not be imposed where it would not be in the public interest to do so.[185]

A finding of material injury specifies the goods and, where applicable, the supplier and country of origin. The importer is responsible for payment of the countervailing duty.[186] Any person interested in the importation of the goods can request, through the Deputy Minister, to have the Canadian Import Tribunal determine who "is in reality the importer of the goods."[187]

The countervailing duty can be avoided by making an undertaking to revise prices to eliminate the effect of the subsidy and the material injury or retardation resulting from the subsidy.[188] The undertakings can be made only prior to the preliminary determination of the Deputy Minister;[189] if the importer or exporters account for substantially all the exports to Canada of the goods in question;[190] and if the Deputy Minister is satisfied that the undertaking will not cause prices to importers to increase by more than the estimated amount of the subsidy and would not be impracticable to administer.[191] The investigation can be reopened where the undertaking is violated; new information comes before the Deputy Minister and the Deputy Minister reopens the investigation; or where the complainant, exporters or importers move to have the investigation reopened.[192]

A final determination of the amount of a subsidy can be appealed by obtaining a redetermination by an officer who is designated under the Customs Act[193] and by a request to the Deputy Minister for a redetermination.[194] The Deputy Minister's redetermination can be appealed to the Tariff Board[195] and from there, to the Federal Court of Canada on a question of law.[196] The Canadian Import Tribunal's decisions on injury can be appealed on matters other than questions of fact to the Federal Court of Canada.[197]

The meaning of "subsidy" is not limited by any precise definition in

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184 Special Import Measures Act, S.C. 1984, ch. 25, s. 45.

185 *Id.* at s. 45(1).

186 *Id.* at s. 8 and s. 11.

187 *Id.* at s. 89.

188 *Id.* at s. 49.

189 *Id.* at s. 49(2)(b).

190 *Id.* at s. 2(1) (definition of "undertaking").

191 *Id.* at s. 49(2)(a), (c).

192 *Id.* at s. 51 and s. 52.

193 *Id.* at s. 57.

194 *Id.* at s. 59.

195 *Id.* at s. 61.

196 *Id.* at s. 62.

197 Federal Court Act, R.S.C. ch. 10, s. 28 (1970).

the Special Import Measures Act, but, what is included in the term subsidy is set out as follows:

> Subsidy includes any financial or other commercial benefit that has accrued or will accrue, directly or indirectly, to persons engaged in the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export or import of goods, as a result of any scheme, program, practice or thing done, provided or implemented by the government of a country other than Canada, but does not include the amount of any duty or internal tax imposed on goods by the government of the country of origin or country of export from which the goods, because of their exportation from the country of export or country of origin, have been exempted or have been or will, be relieved by means of refund or drawback.[198]

The amount of the subsidy generally means the amount determined and adjusted in the manner provided for in the regulations.[199] The regulations provide rules for calculating the subsidy on the goods in circumstances where the subsidy is in the form of a grant, a loan at a preferential rate, income tax credits, refunds or exemptions, deferral of income tax, a refund of indirect taxes upon the export of goods, or goods or services are provided by a government on terms more favorable than for goods destined for domestic consumption.[200] Provision is made for the deduction of expenses or charges incurred in obtaining the subsidy.[201] Where the manner of determining the amount of the subsidy has not been prescribed or where sufficient information has not been furnished or is not available to determine the amount of the subsidy in the prescribed manner, then the amount of the subsidy on the goods is to be determined and adjusted in the manner specified by the Minister of National Revenue.[202]

There have been no cases on the question of material injury in a situation that involved a countervailing duty, however, it is reasonable to expect that the same factors in a dumping case will be considered in a countervailing duty case. A summary of the factors considered in a dumping case are noted above in the section on the Canadian law on dumping.

In summary, a countervailing duty can be imposed where there is a subsidy (as determined by the Deputy Minister of National Revenue) which has caused, is causing or will cause material injury to the production of like goods in Canada or has caused or is causing material retardation to the establishment of the production of like goods in Canada (as

198 Special Import Measures Act, S.C. 1984, ch. 25 s. 2(1).

199 The definition of "amount of the subsidy" and the manner provided in the Regulations is set out in S.O.R./84-927, ss. 26-36.

200 S.O.R./84-927, ss. 26-36.

201 S.O.R./84-927, s. 26.

202 Special Import Measures Act, S.C. 1984, ch. 25, s. 2(1) (definition of "amount of the subsidy").

determined by the Canadian Import Tribunal). A countervailing duty can also be imposed by the Governor in Council on the advice of the Minister of Finance where there is a subsidy, as determined by the Deputy Minister, and where the GATT Committee of Signatories has authorized the duty.

2. Summary of U.S. Law on Countervailing

The countervailing duty law complements the anti-dumping law by providing a legal weapon to defend against a frequently used foreign unfair trade practice: the foreign subsidization of exports. If the foreign manufacture, production or export of merchandise is being subsidized, a domestic producer of a competing product may have a remedy under the countervailing duty laws.

In 1979, Congress amended the countervailing duty laws to apply to countries that are signatories to the Subsidy Code.[203] Section 303 of the Tariff Act of 1930 still applies to exports from countries that are not parties to the Agreement. Nevertheless, section 303 was amended to provide that countervailing duties shall be prescribed under regulations of the administrating authority in accordance with the amended law. The regulations prescribed by the administrating authority, apply the same substantive and procedural law to section 303 and Title VII cases with the exception that is discussed below.

In essence, the countervailing duty laws provide that the Secretary of Commerce determines whether a country or citizen or a national thereof is providing—directly or indirectly—a subsidy of the manufacture, production or exportation of the merchandise imported into the United States; and when required by Title VII, the ITC determines an industry in the United States is materially injured, threatened with material injury, or its establishment is materially retarded by reason of imports of such merchandise, or be reason of sales of such merchandise, then a countervailing duty equal to the amount of the net subsidy shall be imposed upon such merchandise in addition to any other duty to which it is subject. The subsidy may emanate from government or private sources; however, all countervailing duty determinations to date have arisen from foreign governmental actions and not private activities.

The term subsidy is defined in Title VII, as having the same meaning as the term bounty or grant in section 303. The law indicates, however, that the term subsidy includes but is not limited to: the export subsidies listed in Annex A to the Agreement; and a list of domestic subsidies if provided to a specific enterprise or industry. The section makes clear that a subsidy is a preferential benefit. An export subsidy is a benefit which prefers exports over products sold domestically. A domestic subsidy is a benefit provided to a specific industry or group of industries in a manner inconsistent with normal commercial considera-

203 *See* 19 U.S.C. § 1671-1677g ("Title VII").

tions. A nationwide government economic program, which is not an export subsidy, is not subject to countervailing duties by another government.[204] This principal was narrowed in *Bethlehem Steel Corp. v. United States*,[205] where the court drew a distinction between generally available benefits which may bestow specific grants to specific enterprises.

One of the earliest, and still common forms, of government incentive has been the granting of tax rebates to exporters. A principle followed by the United States since the late 1800's was that the nonexcessive remission of an indirect tax by reason of the export of products did not constitute a bounty or a grant. A remission was considered nonexcessive if it did not exceed the amount of the tax paid or due. This view was upheld in *Zenith Radio Corp. v. United States*.[206] The Supreme Court found that Congress intended to require countervailing duties to be applied to a net export bounty; that is, a tax advantage beyond a remission of an indirect tax upon export.

If the product is from a country that is a signatory to the Subsidy Code, then Title VII requires the application of a material injury standard. In cases where the country is not a signatory, section 303 does not require an injury determination. The ITC which makes the determination of injury, is required to consider, among other factors, the volume of imports, the effect of the imports on prices, and the impact of imports on domestic producers. Material injury is defined as harm which is not inconsequential, immaterial, or unimportant. In addition, a causal connection must be shown between the subsidization and the material injury.

C. *Other Import Relief Laws*[207]

In addition to the anti-dumping and countervailing laws of the United States, section 337(a) of the Tariff Act of 1930 prohibits:

> Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States.[208]

This section has generally been used to attack alleged infringements of U.S. patents, trademarks and copyrights by the importation of products. Section 1105(a)(2) of the Trade Agreements Act of 1979 amends section

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204 *See* Carlisle Tire & Rubber Co. v. United States, 5 Ct. Int'l Trade 229, 564 F.Supp. 834 (1983).

205 Bethlehem Steel Corp. v. United States, 590 F. Supp. 1237 (1984).

206 Zenith Radio Corp. v. United States, 437 U.S. 443 (1978).

207 This discussion of s. 337 relies heavily on Thomas, J.C., "Competition Policy and Canada—United States Comprehensive Trade Arrangement," Report for the Bureau of Competition Policy, Department of Consumer and Corporate Affairs, pp. 70-75.

208 19 U.S.C. § 1337.

337 of the Tariff Act of 1930 to require the ITC to not consider dumping or subsidy complaints that are characterized as section 337 complaints.

Generally, section 337 requires the complainant to show: unfair competition; the effect or tendency of which is to destroy or substantially injure an industry; the industry is efficiently and economically operated; and the industry is operated in the United States.

The standard for substantial injury is reasonably low. "[E]ven a relatively small loss of sales may establish . . . the requisite injury. . . ."[209] The requirement of showing an effect or tendency can be satisfied by showing that some component of the injury resulted from unfair imports.[210] That the industry is operated in the United States can apparently be shown by domestic economic activity as evidenced by significant value added domestically.[211] Very little weight appears to be attached to the requirement that the industry be efficiently and economically operated.

Pending an investigation and upon a reasonable belief by the ITC that there has been a violation of section 337, a temporary exclusion order can be made that requires a bond to be posted with respect to goods entering the United States.[212] If section 337 is found to have been violated, an exclusion order that bars entry of the goods into the United States, or a cease and desist order with respect to the unfair acts can be made.[213] For policy reasons the President may override a remedy.[214]

Contrary to the competition policy perspective, section 337 can be violated without an injury to competition.[215] The penalty goes far beyond what is necessary or appropriate from a competition policy stand point.[216]

A safeguards provision permitted under the GATT Article XIX is implemented in the United States by section 201 of the Trade Act of 1974.[217] The purpose of the safeguards provision is to allow a gradual and orderly adjustment to trade liberalization and to permit protection of the national interest.[218] Section 201 permits import relief to be granted where an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat thereof.[219]

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209 Bally/Midway Manufacturing Co. v. USITC, 714 F.2d 117, (Fed. Cir. 1983).

210 *Id.*

211 In re Certain Air-tight Cast Iron Stoves, Inv. No. 337-TA-69, USITC Pub. No. 1126 (1981) at 11.

212 19 U.S.C. § 1337(c) (1976).

213 19 U.S.C. §§ 1337(d), (f)(1) (1976).

214 19 U.S.C. § 1337(g)(2) (1976).

215 *See supra* note 207, at 74.

216 *Id.* at 75.

217 *Id.* at 75-83.

218 *Id.* at 77.

219 19 U.S.C. § 2251 (1976).

The ITC investigates a section 201 complaint, and if serious injury is proven, it makes a recommendation to the President. The President, subject to limited congressional review, decides whether the recommendation should be implemented. Relief can be granted in the form of tariff increases, quotas, financial assistance, and the negotiation of orderly marketing agreements. The test of injury is made in the same way as in an anti-dumping or countervailing duties case, but the standards for causation and for injury are higher. The imports must be a substantial, rather than contributing, cause and there must be serious injury rather than just material injury.

As far as competition policy considerations are concerned, they are for the most part only considered by the President in his decision about the ITC's recommendation. The President can consider "the effect of import relief on consumers . . . and on competition in the domestic markets for such articles."[220] Section 201 in its application otherwise is inconsistent with competition policy.

D. Comparison of United States and Canadian Import Relief Laws

The Canadian anti-dumping laws set out in the Special Import Measure Act are quite similar to the below-home-market anti-dumping laws in the U.S. Anti-dumping Law of 1912. There is, however, no Canadian equivalent of the U.S. Anti-dumping Act of 1916 that deals with predatory dumping. This difference is significant given current proposals to make the U.S. Anti-dumping Act 1916 more effective.

As between the Special Import Measures Act and the U.S. Antidumping Law of 1912, the time limits for determinations of dumping and injury are similar as are the requirements. Timing in the United States is somewhat more drawn out than it is in Canada; a final determination on the existence of dumping may take up to 295 days from the filing of a petition in the United States while a final determination may take up to 255 days in Canada. A final determination of injury may take up to 340 days from the filing of a petition in the United States while in Canada it may take up to 285 days.

Both the Canadian Special Import Measure Act and the U.S. Antidumping Law of 1912 require posting of security upon a preliminary determination of dumping. Under the U.S. law, this preliminary determination generally can take up to 160 days; while under the Canadian law, it generally can take up to ninety days. Security may have to be posted sooner under the Canadian law than under the U.S. law.

The Canadian provisions allow for possible competition policy considerations in that they permit public interest groups to be represented at injury hearings. The U.S. Antidumping Law of 1912 does not allow for

220 19 U.S.C. § 2252(c)(4) (1976).

representation by public interest groups nor does it provide in any other way for consideration of competition policy.

Under the U.S. Anti-dumping Law of 1912, it is generally easier to show material injury. For instance, in the United States a maximum volume of imports into the relevant region of 4.5% has been accepted as significant, [221] whereas in Canada a volume of imports of 8% has been found not to be material.[222]

Generally, the Canadian Anti-dumping Act,[223] now the Special Import Measures Act, has been ineffective at discouraging imports from the United States while the U.S. Anti-dumping Act of 1912 has been effective at discouraging Canadian exports to the United States.

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221 *See supra* note 143.

222 Refined Sugar, ADT-8-84, July 23, 1984.

223 R.S.C. C.15 (1970), as amended; repealed S.C. 1983-84, ch. 25, s. 110.