Unreported Judgments

From time to time, judgments of interest to the legal community, which do not, for one reason or another, appear in the regular reports in this province, will be published in the *McGill Law Journal*. In all cases, the words in smaller type are extracted *verbatim* from the judge's notes; words appearing in larger type are those of the editors.

COMBINES: MISLEADING ADVERTISING

REGINA *v.* COLONIAL FURNITURE COMPANY (OTTAWA) LIMITED, Magistrate's Court, Ottawa, Ont., December 13, 1962, Magistrate Sherwood.

Magistrate Sherwood

I have now had an opportunity to consider the evidence and the gist of this offence is, misleading the public — that is leading them to believe that they are getting a commodity at a price lower than is regularly charged for the same or comparable items in the area, when in fact they are paying the usual or regular price for such an item, or in any event does not usually or normally sell [*sic*] for the higher price shown in the advertising.

Where the advertisement is:

"Regular — — — $"
"Special — — — $"

and the commodity normally sells in the area at the special price, there is a clear offence.

In this case the advertisement is "Comparable $479.00 value", on one side of the advertisement and on the other side "Exceptional Value at $389.00". In this case witnesses called by the Crown established that this MK1 Model is a special value and compares favourably with the costlier Clairtone Princess Model which sold at a price of $479.00 and superior to R.C.A. and Electrohome models selling at $499.00. The section under which the charge is laid is based on protecting a gullible and often stupid public who rely on the good faith of merchandisers, a reliance often misplaced. Here, I am satisfied that the advertisement accurately indicates the value of comparable machine and there is no suggestion in its wording that this machine normally or ever sells at a higher price, and honestly advises the public of an unusually good value.

Under the circumstances no defense evidence is required[.]

Case dismissed.

COMBINES: MISLEADING ADVERTISING

REGINA *v.* BECKER, Magistrate's Court, Niagara Falls, Ont., September 13, 1963, Magistrate Roberts.

Magistrate Roberts

The accused is charged that he did, at the City of Niagara Falls in the Province of Ontario, on or about the 18th of September, 1962, unlawfully

by publication of an advertisement in the *Evening Review*, a newspaper published in the City of Niagara Falls, for the purpose of promoting the sale of Admiral television sets, make materially misleading representation to the public concerning the price at which Admiral television sets have been or are, ordinarily sold, contrary to the provisions of the *Combines Investigation Act.*[1]

This is a charge under sec. 33C(1) of the *Combines Investigation Act.*

The charge against this accused was instituted as a result of an advertisement advertising the sale of Admiral television sets, inserted by the accused, in the September 18th, 1962 issue of the Niagara Falls *Evening Review.* Included in this advertisement was a reproduction of a television set on the picture area of which set were printed the following words:

"TWIN SPEAKERS
23" Console
Only
$196
Save over $100"

Mr. Dennis Olorenshaw, Advertising Manager of the Canadian Admiral Corporation Limited, gave evidence for the Crown that the television set depicted in the advertisement was undoubtedly the Camrose model, C511X. Counsel for the Crown introduced, through this witness, a television price list which showed that the suggested retail price of this particular set was $319.95.

The Crown also called a number of persons who were engaged in the retail sale of television sets in the City of Niagara Falls on or about September 18th, 1962.

Mr. Robert Slinn, a former employee of B. F. Goodrich Company, swore that the firm for which he was employed sold six Camrose models, C511X television sets, and that two of these sets were sold for $269.95 and four of them for $249.95.

Mr. Paul Waselynchuk, a former employee of Rosbergs Department Store, swore that the Camrose model, C511X, was marked for sale at a price of $299.00 but that his best recollection was that the set was in fact sold at $269.00.

Mr. Donald Swalm gave evidence that the Camrose model, C511X, was sold by him at prices ranging from $239.00 to $259.00.

Mr. Oswald Greenwood gave evidence that he sold two Camrose models, C511X, at the retail price of $224.95.

Mr. Ross Overholt swore that his retail price for the Camrose model, C511X, was $234.00, plus tax.

At the conclusion of the Crown's case, Mr. Clement, on behalf of the accused, elected not to call any witnesses and, after hearing argument by both Mr. Tyrrill, counsel for the Crown, and Mr. Clement, I reserved judgment.

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[1] R.S.C. 1952, c. 314, sec. 33C, as amended by 2-3 Eliz. II, S.C. 1953-54, c. 51, 8-9 Eliz. II, S.C. 1960, c. 45, 9-10 Eliz. II, S.C. 1960-61, c. 42, and 11-12 Eliz. II, S.C. 1962-63, c. 4.

The accused is charged with a breach of sec. 33C(1) of the *Combines Investigation Act*, which is as follows:

> "33C. (1) Every one who, for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public, by any means whatever, concerning the price at which such or like articles have been, are, or will be, ordinarily sold, is guilty of an offence punishable on summary conviction.
>
> (2) Subsection (1) does not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business."

It was the submission by counsel for the Crown that the accused made a materially misleading representation to the public when he advertised in the September 18th, 1962 edition of the Niagara Falls *Evening Review* that a purchase of a Camrose model, C511X, Admiral television set from him at a price of $196.00 would result in a saving to the purchaser of more than $100.00.

Mr. Tyrrill argued that the accused ought to have been aware of the prices at which this particular model was being sold by his competitors within the community and that since his advertised price of $196.00 was not more than $100.00 less than the price at which this model was sold by his competitors, he was therefore guilty of an offence under sec. 33C(1) of the *Combines Investigation Act*.

Mr. Clement, on behalf of the accused, submitted to the Court that the words complained of in the advertisement could be interpreted to mean that a price of $196.00 for the Camrose model, C511X Admiral television set was over $100.00 less than the suggested retail price for this particular model.

From the evidence, it is obvious that the Camrose model, C511X Admiral television set had a suggested retail price of $319.95. It would also appear that this particular set was sold by various television dealers in the City of Niagara Falls during the period from January, 1962 to September, 1962, at prices ranging from a low of $196.00, as advertised by the accused, to a high of $269.95.

The accused is charged with an offence of a quasi-criminal nature and I suggest that it is elementary that sec. 33C(1) should be strictly interpreted. On my view of the evidence it is quite obvious that the words complained of in this advertisement are capable of more than one interpretation and are by no means an unequivocal statement, by the accused, that a purchase from him of the television model depicted in his advertisement, at a price of $196.00, would amount to a saving of over $100.00 when compared with the retail price charged by any other dealer in the City of Niagara Falls for that same model.

In my opinion, the Crown has failed to prove, beyond a reasonable doubt, that the accused is guilty of the offence as charged[.]

Charge dismissed.

COMBINES: MISLEADING ADVERTISING

REGINA *v.* ALLIED TOWERS MERCHANTS LIMITED (I), Magistrate's Court, Hamilton, Ont., June 5, 1964, Magistrate Marck.

Magistrate Marck

This is a matter that came before me on the 26th of May, a plea of "Not Guilty" was presented on behalf of Allied Towers Merchants and I remanded the matter until today for judgment.

I have given this matter careful consideration and I have come to the conclusion that the charge must be dismissed. The reasons are two-fold. Firstly, I am not satisfied that sec. 33C(1) of the *Combines Investigation Act* is valid legislation in that the subject matter appears to be adequately legislated in sec. 360 of the *Criminal Code* of Canada; the *Criminal Code* being the criminal statute, I would on that grounds dismiss the charge. Further, on the facts of the matter before me I would only comment this, the price advertised in the newspaper was a list price supplied by the manufacturer. To hold that that was not a proper price would mean I would have to hold that the manufacturer sold his goods and purported to suggest to the retailer that they be sold at a price other than a fair price. In this case, the company involved was the Kodak Company and they supplied a list price. The list price I could only interpret as a fair and reasonable price which the manufacturer feels can be charged off. I could not find the price on the evidence before me as being unrealistic or unreasonable. In these days where there is increasing competition in the retail merchandising field I can honestly say I feel that the consumer is getting a better deal today because of the competition and a better break. We had the evidence from four or five retailers of Canada. For these reasons I would dismiss the charge.

Charge dismissed.

COMBINES: MISLEADING ADVERTISING

REGINA *v.* ALLIED TOWERS MERCHANTS LIMITED (I), County Court, Wentworth County, Ont., March 17, 1965, Mr. Justice Sweet.

Mr. Justice Sweet

There are appeals against three acquittals by His Worship, Magistrate Albert Marck at Hamilton,[1] on three charges of contravention of subsection (1) of sec. 33C of the *Combines Investigation Act.*[1] One of the acquittals was on June 5, 1964. Two of them were on July 2, 1964.

The relevant subsection is:

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

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[1] R.S.C. 1952, c. 314, as amended by 8-9 Eliz. II, S.C. 1960, c. 45.

With the oral consent of counsel the appeal was heard on the evidence taken before the learned magistrate as set out in a transcript of that evidence.

The charges arose out of an advertisement which the Respondent caused to be published in the Hamilton *Spectator* on July 17, 1963. Among other items it dealt with a camera referred to in the advertisement as a Minolta SR-1 35 mm camera; a projector referred to as a Kodak A-15 projector, and film referred to as Kodachrome II movie film.

Associated with the camera in the advertisement was "List price $199.95". In connection with the projector there was "List price $69.50". Related to the film there was "List price $4.95". The advertisement offered those articles at the following prices: the camera, $129.88; the projector, $42.88; and the film, $3.59.

It was submitted on behalf of the Appellant that the use of the words "list price" was a breach of the relevant subsection under the circumstances which existed according to submissions on behalf of the Appellant.

In my opinion, for such an advertisement to constitute a contravention of the subsection there must be:

(a) A representation to that portion of the public to which the advertisement is directed that the price indicated as the list price is the price at which the article is ordinarily sold in the area covered by the advertisement; and

(b) The fact that that price is not the price at which the article is ordinarily sold in that area.

The onus for establishing all of that is upon the Appellant.

Relevant is the meaning of the words "list price" to those at whom the advertisement was aimed, — the potential retail buyers in the area covered by the newspaper.

Generally speaking, though subject to significant qualification, persons using words would be taken to have used them in their ordinary, plain and generally accepted meaning, and those using them and those to whom they are communicated are entitled to have them construed accordingly.

However, words are known sometimes to have different meanings to different people. They might convey to some groupings something different than to others. Their associated connotation may not necessarily be the same everywhere. The context in which words are used might affect the impressions they convey. Their meaning might differ from era to era. Colloquial usage may not be the same as the classical. The impression made by words and intended to be made by them might be governed by the circumstances under which they are used by whom they are used, to whom they are communicated, where they are used, how they are used, when they are used and the purpose of their use.

I find that the manufacturers of the three articles, the camera, the projector and the film suggested prices at which those articles respectively be sold at retail, and that there were, accordingly, manufacturers' suggested retail prices in respect of all of them. I find, too, that when the words "list price" were used in the trade those words meant that price so suggested.

I also find that the prices indicated in the advertisement as list prices were the manufacturer's suggested retail prices and that those prices were in that sense the actual list prices.

It would seem, too, that although the practice of manufacturers suggesting retail prices is not universal in the industry, it is not unusual.

Whatever may be the usual practice of retail dealers in photographers' supplies, the suggestions of the manufacturers regarding the retail prices are not always followed.

It was, in effect submitted on behalf of the Appellant that the evidence does not in any event do more than indicate that it is in the trade that those prices are known as list prices and that whatever knowledge those referred to by counsel for the Appellant as sophisticated buyers may have, the general effect of the use of the words "list price" is that it is a representation that those prices are the prices at which the goods are ordinarily sold.

The advertisement was directed towards the public buying at retail, not te the trade. It would seem that the placing together in the advertisement of the two prices, one referred to as the list price and the other the price at which the Respondent was offering the goods for sale, was to invite comparison for the purpose of promoting a sale. The inclusion of what is indicated as the "list price" would seem to be pointless if it were not intended to indicate, in some way, relationship to retail price.

The fact that the prices advertised as list prices were the prices at which the manufacturer suggested the merchandise be sold at retail does, in my view, give them a significant relationship to retail price. The considered opinon of what a manufacturer honestly believes its products should bring when sold at retail should not, in my opinion, be treated as without relevance.

It would, of course, obviously be wrong for a manufacturer to pretend to suggest a retail price, without believing that such a price is fair and reasonable in order that a retail dealer might have available an exaggerated amount designed for untruthfully persuading prospective purchasers that they would be buying advantageously if they acquired the article for substantially less than that amount.

However, in my opinion such a situation could not, on the evidence in this case, be found to exist here. In my opinion, there is no evidence of dishonesty or bad faith on the part of the manufacturers in suggesting the retail prices. It must, I think, for the purposes of this matter, be assumed that the manufacturers honestly suggested those prices as amounts which they considered the merchandise should reasonably be expected to bring when sold by retail.

I do not think that "list price" is an uufamiliar term to retail buyers in general. It must, I think, be taken that in a considerable range of products the term is known generally to the retail buying public as one indicating the amount which a manufacturer suggests as the retail selling price of an article it produces. Furthermore, I do not think it can reasonably be iuferred that potential buyers in general do not know that a retailer sometimes sells below that price.

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

Furthermore, I think that the basic general principle of the accused being entitled to the benefit of a reasonable doubt on charges under punitive legislation is applicable also in this case where the guilt or innocence of the accused may, at least in some degree, be dependent upon semantics.

I find that it has not been established that the Respondent has represented to the public that the relevant articles were ordinarily sold at the prices indicated in the advertisement as "list prices".

Even if it had been established that the advertisement constituted such a representation the onus would still be on the Appellant to establish that the articles were not ordinarily sold at the prices indicated in the advertisement as list prices.

Among the witnesses called on behalf of the Appellant were persons associated with six firms selling photographers' supplies. One of those firms was the Respondent.

Four of those witnesses gave evidence regarding the number of cameras of the relevant kind sold by firms with which they were associated. Evidence of the quantity sold was not in all cases precise, but the aggregate of all sales of the camera referred to in the evidence by those four was approximately fifty. According to the evidence of five of those witnesses the prices charged by the firms with which they were associated ranged from $129.00 to $169.95.

There was very little evidence regarding sales of the projector. One of the witnesses referred to a price of $59.00.

There was no evidence as to the quantity of the film sold. According to the evidence of five witnesses the prices charged by the firms with which they were associated ranged from $3.99 to $4.39.

If the prices of a sampling of dealers were to be depended upon to establish prices at which articles are ordinarily sold, then, in my opinon it would be necessary to prove beyond a reasonable doubt that the prices charged by those selected dealers were, indeed, the prices at which the commodities were ordinarily sold.

In that event it would seem to me that to determine whether their price ranges should be accepted as indicative and representative of ordinary prices there should be evidence of their sales policies, their method of advertising and their promotional techniques and how they compare with other dealers in the area. I would think, too, that there should be evidence of the number of retail outlets handling the type of merchandise in the relevant area. Without that evidence the percentage which the number sampled bears to the entire number in the area would not be indicated. The quantity of the articles in question sold in the area should also be made known in order that it might be determined whether or not the quantity of that merchandise sold by the selected dealers is sufficient for their prices to have significant probative value.

In my opinion the evidence in this case is inadequate to indicate the sales policies of the selected dealers, how they compare with other dealers in the area covered by the Hamilton *Spectator*, the number of dealers in that area and the aggregate of the relevant goods sold in that area. In some respects the evidence does not even indicate the quantity of goods sold by the selected dealers.

In the view which I take of the matter, it is not necessary for me to decide whether a *prima facie* case could be made on behalf of the Appellant by a sampling of dealers and I do not decide it.

Counsel for the Appellant pointed out that the Respondent never sold the goods at the prices indicated in its advertisement as list prices.

I am of the opinion that the price at which an article is ordinarily sold, within the meaning of the legislation, is not the price at which the person making the representation ordinarily sells it, but what is meant is the price at which it is ordinarily sold generally in the area in which the representation is made.

There is uncontradicted evidence that the prices of those firms with which witnesses were associated were less than the amounts indicated as list prices in the advertisement but for the reasons indicated this is not sufficient under the circumstances for a finding that the prices of those dealers were the prices at which the articles were ordinarily sold within the meaning of the legislation.

In my opinion there is not adequate evidence for a finding that the amounts indicated as list prices in the advertisement were not the prices at which the articles to which they were respectively related, are ordinarily sold within the meaning of the subsection.

In my opinion, the onus which is upon the Appellant has not been met.

Appeals dismissed.

COMBINES: MISLEADING ADVERTISING

REGINA *v.* PRODUITS DIAMANT LTEE, Magistrate's Court, Ottawa, Ont., August 12, 1965, Magistrate Strike.

Magistrate Strike

The accused in this case is charged with making [a] materially misleading representation to the public concerning the price at which jars of Vachon Confiture Aux Fraises avec Pectine were sold contrary to sec. 33C(1) of the *Combines Investigation Act*[1] and amendments thereto.

The evidence in this case is not in serious dispute. The defendant company among other things manufacture strawberry jam in 48 oz. containers. These containers were of two varieties. One was an ordinary round glass jar and the other a more or less fancy jar with an imitation glass top. From time to time, this jar was referred to by the company as a "candy jar" and might be useful to a householder after the contents had been used.

Up until June 1961, the candy jar was marketed at $1.29 and the ordinary jar at $0.99. In June of 1961, however, the company changed its marketing policy and sold the two jars for the same price. However, on the fancy jar there appeared the words "17¢ off/en moins". Both these jars appeared on the shelves of various chain stores and other merchants until at least the 26th of May 1964.

There was some variation in the wholesale price which reflected the various changes which took place in the price of sugar because in the manufacture of jams there is a high content of sugar but at no time was there any difference between the price of the so-called candy jar and the regular jar.

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[1] R.S.C. 1952, c. 314.

I agree with the contention of the Crown that in this case the company when it changed its policy, established a new selling price for both the so-called candy jar and the regular jar. This is borne out by the length of time during which the "17¢ off/en moins" was used. It is also borne out by the correspondence between the company and its distributors and also by the fact that when in 1964 the company changed its label and instead of using the "Off" label used words indicating "Free Kitchen Jar", the price remained the same. While it may be true that the company adopted the new label sometime in March 1964, it would still in my opinion, be responsible for the jars with the "Off" label which were still on the shelves of the merchants who had purchased them from the company.

While I am not able to accept the arguments of counsel for the company, I was rather impressed by the honesty and sincerity of Mr. Robillard who gave evidence on behalf of the company. Mr. Robillard maintained that the public were still receiving a bargain because to use his expression "it was a package deal" and the public were not only receiving [the] value of the jam but also the container which could be useful around the kitchen.

It appears to me, however, that the average person buying the product would consider that the ordinary price of the jam was at least 17¢ more than he or she was paying for it when as a matter of fact the company had established a price which was the same as the price of the regular jar.

I would, therefore, come to the conclusion that for the purpose of promoting sale of the strawberry jam that [*sic*] the company had made a materially misleading representation to the public as charged.

The evidence indicates that when the officers of the Department were making their investigation on the complaint, the company was completely co-operative; gave them every assistance and indeed changed their method of promoting the sale of this product and in assessing a penalty, I would be of the opinion that an order under sec. 31(1) of the *Combines Investigation Act* is quite unnecessary.

Conviction entered
(fine of $100 imposed).

COMBINES: MISLEADING ADVERTISING

REGINA *v.* R. & A. COHEN LIMITED, Magistrate's Court, Ottawa, Ont., November 15, 1965, Magistrate Sherwood.

Magistrate Sherwood

The prosecution consists of seven counts charging the accused with violations of sec. 33C of the *Combines Investigation Act.*

The prosecution arose out of advertisements in issues of the Ottawa *Journal* dated October 2nd and October 23rd, 1964, and the Ottawa *Citizen* of November 20th and December 11th, 1964. These are Ottawa's only two daily newspapers, and both have substantial circulation in Ottawa and the surrounding area for some distance. All four ads were placed on the instructions of the accused and relate to various Electrohome Hi-Fi sets. Price information was obtained either from employees of the accused, or from the tags on the sets, and proofs of the ads were sent to the accused.

Although the ads may have been worded in some cases by the newspaper advertising salesmen, the accused cannot avoid responsibility for them.

These ads used the expression "Regular Price $———", and then showed a lower price either without comment or with such words as "Clearance", or "Special". The *Journal* ad of October 2nd is headed "October Sale", and that of October 23rd is headed "Sale Floor Models". The *Citizen* ad of November 20th is headed "November Specials", and that of December 11th, "Christmas Sale".

Evidence showed that Electrohome published price lists covering the various sets they produced including those which are the subject of these charges.

The price list included a "Dealer Net" which was the price paid by the retailer for the set, and "Suggested List" which was the price at which it was suggested the retailer sell the set. These lists were mailed out to Electrohome franchised dealers of which the accused was one of many in the Ottawa area. The evidence was that the suggested list prices were fair and realistic having regard to the quality of the sets. From time to time both prices would be varied, and in particular, they might be reduced if the sets were not selling well.

In the cases of the sets referred to in these charges Electrohome reduced the prices from those shown as "Regular" in the Cohen ads as follows:

Romano M	from $359.50	to $319.50	June 10th, 1964
Capistrano	from $499.50	to $419.50	February 28th, 1964
Montego 40	from $669.50	to $629.50	June 10th, 1964
Lafayette	from $429.50	to $379.50	May 11th, 1964

Both Magistrate Elmore in *Regina* v. *Eddie Black's Limited*,[1] and Judge Sweet in *Regina* v. *Allied Towers Merchants Limited (I)*[2] have defined the meaning of "regular price", and I accept the combined effect of these judgments as meaning the price at which an article is ordinarily sold generally in the area in which the representation as to "Regular Price" is made. The Crown called as witnesses representatives of all the other franchised Electrohome dealers in Ottawa itself, except one no longer in business, and did not call two other dealers who sell just outside Ottawa, or dealers further outside but within the circulation area of the papers. It tried through oral evidence and invoices to account for all sales of the relevant sets in Ottawa during a period of about one year ending December, 1964. It accounted for many of them, and none were, on their face, sold within eight months prior to October, 1964 at or above the prices shown in the ads as "Regular". The value of some of these figures has been questioned, not without some reason, by counsel for the accused because in some cases a trade-in was taken in addition to the price shown.

The most important piece of evidence from the other retailers was, in my opinion, that each of them swore that they had never knowingly sold a set at a price higher than the Electrohome suggested list prices from time to time, but often sold them for lower prices.

No witnesses were asked in an absolutely unequivocal way whether they were referring to the original suggested list price or that price as

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[1] (1962) 38 C.P.R. 140.

[2] Reported, *supra*, at p. 654.

amended from time to time, but I certainly took the latter meaning from the question, and felt the witnesses did likewise. That dealers reduced their prices when Electrohome reduced suggested list prices seems obvious. Failure to do so would frustrate the whole purpose of the reduction. Apart from the clear impression I got that the dealers were testifying that they followed the suggested list prices from time to time, there is the evidence of H. J. Saslove.... There is also evidence of sales of sets in Ottawa which show sharp reductions in price which coincide generally with Electrohome reductions in suggested list prices.... It seems clear therefore that whatever the real value of these sets may have been, and regardless of the purpose of any reduction in the suggested list price, the regular prices of these sets at the time of the ads in the *Journal* and *Citizen* were substantially lower in all cases than the "regular price" shown in the ads, and would remain lower after the sale and until the sets were cleared.

I am satisfied and so find that members of the public reading the *Journal* ad of October 2nd, 1964, would assume and were intended to assume that by reason of the October sale they could buy a Capistrano set at $399.00 instead of the regular price of $499.50, or a Montego 40 at $599.00 instead of the regular price of $669.50. In fact the regular price of the Capistrano had been $419.50 or less since February, 1964, and of the Montego M $629.50 or less since June, 1964.

Similarly in the same ad the regular prices of the Romano and Lafayette were represented at $359.50 and $429.50 respectively, when in fact they had been $319.50 or less from May, 1964, and $379.50 or less from June, 1964 respectively. Whether or not these sets at the advertised price constituted good value — and there is every reason to believe they did — nonetheless the public were misled into believing they were getting a much better bargain than they in fact were by reason of the October sale.

Turning to the *Journal* ad of October 23rd one finds the Montego again shown as "regular price" $669.50 and now offered as a special floor model sale at $525.00. There is no reason to doubt that the further reduction was by reason of the set being a floor model or that it was a bargain, but it was not the bargain represented by the ad. For over four months this set had been regularly or ordinarily selling at $629.50 or less, not $669.50.

The Ottawa *Citizen* ad of November 20th, 1964, is headed "November Specials" and shows a Capistrano as "Regular $499.00" and "Special $399.00". The same findings apply here. The regular price of this set had in fact been $419.50 for almost nine months, and the ad materially misrepresented the degree of saving to the public by reason of the "November Special" even though the special price may have been excellent value. The final ad is the *Citizen* ad of December 11th, 1964 described as a "Christmas sale". It again represents to the public that certain substantial savings are available to them by reason of the Christmas sale on a wide range of articles. Included is an Electrohome Romano shown as regular $379.00 for $275.00. In fact the regular or normal price in Ottawa for the Romano had been $319.50 or less for some six months. This is the ad in which Crown and defense agreed that the ad should have shown $359.00 not $379.00 as the regular price, the mistake being the newspapers. Nevertheless the ad materially misrepresented to the public the amount of saving offered to it by reason of the Christmas sale.

It follows that there will be a conviction on each count by reason of a misrepresentation in each case of the price at which the article was ordinarily sold in this area.

Convictions entered on each count (fine of $100 imposed on first count; suspended sentence on each of 6 others).

COMBINES: MISLEADING ADVERTISING

REGINA *v.* MOUNTAIN FURNITURE COMPANY LIMITED, Magistrate's Court, Peterborough, Ont., July 19, 1966, Magistrate W. R. Philp.

Magistrate Philp

Mountain Furniture Company Limited, is charged, that on or about the 21st day of October, 1965, at the City of Peterborough, in the County of Peterborough in the said Province, — one — for the purpose of promoting the sale of a Featherweight Firm Rest Mattress, manufactured by Featherweight Mattress Limited, and sold by the said Mountain Furniture Company Limited, at 368 George Street in the said City of Peterborough, by means of a label, bearing the price $99.00 affixed to the said Featherweight Firm Rest Mattress, did unlawfully make a materially misleading representation to the public, concerning the price at which such Featherweight Firm Rest Mattresses, have been, are, or will be ordinarily sold, contrary to sec. 33C(1) of the *Combines Investigation Act*[1] — and secondly — for the purpose of promoting the sale of a Featherweight Firm Rest Mattress, manufactured by Featherweight Mattress Limited and sold by the said Mountain Furniture Company Limited at 368 George Street in the said City of Peterborough, by means of a representation made verbally by a sales clerk on the premises of the said Mountain Furniture Company Limited to the purchaser of the said mattress — Ronald J. Kinsley, at the time of the said purchase, that the said Featherweight Firm Rest Mattress was valued at $79.50, it did unlawfully make a materially misleading representation to the public concerning the price at which such Featherweight Firm Rest Mattresses have been, are, or will be ordinarily sold, contrary to sec. 33C(1) of the *Combines Investigation Act.*

These counts, upon which there has been a plea of not guilty and on which the evidence has been heard, are now before me for judgment.

Re count number one — it reads — for the purpose of promoting the sale of a Featherweight Firm Rest Mattress, manufactured by Featherweight Mattress Limited and sold by the said Mountain Furniture Company Limited at 368 George Street in the said City of Peterborough, by means of a label, bearing the price $99.00 affixed to the said Featherweight Firm Rest Mattress, it unlawfully made a materially misleading representation to the public, concerning the price at which such Featherweight Firm Rest Mattresses have been, are or will be ordinarily sold, contrary to sec. 33C(1) of the *Combines Investigation Act,* and amendments thereto. Mr.

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[1] R.S.C. 1952, c. 314, as amended.

Kinsley, an investigator of the retail branch of the department charged with the enforcement of the *Combines Investigation Act*, observed in the window of the accused's store, in the City of Peterborough, on October the 19th, 1965, a mattress bearing the label, Featherweight "Firm-Rest" Mattress, Manufactured by the Featherweight Mattress Limited, with the pre-ticketed price of $99.00 affixed hereto, together with a sale sign of $34.95. On October the 21st he returned and purchased such a mattress for the said price and took delivery. I find as a fact that on the date of the sale, this particular mattress, Exhibit two, was removed from the second floor and not from the basement. This finding is based on the evidence of Mr. Kinsley and Mr. Blondeau, who gave detailed and specific evidence of the same, as against the evidence of Mr. Carol, who although positive in this particular matter, had to acknowledge that many of the details of the sale were somewhat vague, understandably in that he regarded the sale as merely another one in the ordinary course of business and attached no particular importance thereto. On purchase and payment, Mr. Kinsley obtained a receipt for the same, exhibit one, wherein the mattress was described as "Firm Rest", with the approval of Mr. Winstock, the president of the Company.

On the date of the purchase, Mr. Kinsley was shown a number of mattresses in the basement of the store by Mr. Carol, the store salesman, several of which were inspected, and bore the label, "Siesta", pre-ticketed at $79.50, and manufactured by the Featherweight Mattress Limited. They were on sale also at $34.50. There were other mattresses displayed, pre-ticketed at $69.50. Mr. Carol advised the purchaser both in relation to the Firm Rest Mattress and those in the basement, that the manufacturers were using up some old discontinued lines of labels, that the labels meant nothing and should not be considered, and that all the mattresses on sale, were of comparable value, irrespective of the labels and pre-ticketed prices, and were on sale for $34.50.

It appears from the evidence of Mr. Silverburg, president of the Featherweight Mattress Limited, that his firm had dealt with Mountain Furniture Company Limited, for some years, that his company pre-ticketed mattresses for customers who requested the same, and that this had been the case with the accused's company — that ordinarily the line of Firm Rest Mattresses, were manufactured for one particular retailer, not the accused company, and that the label, "Firm-Rest", pre-ticketed at $99.00, had been affixed to this particular one, exhibit two, in error, by a factory employee. Furthermore, that most of the mattresses sold to the accused, and I believe all that we are concerned with, were designated and billed as between manufacturer and retailer, as "Reverse-A-Mats" — indicating a specific quality of mattress, with different shapes of — or patterns of ticking on the top and bottom, which apparently in the trade indicates a cheaper line of such articles. He states, and it appears correct, that the specific labels attached to the mattresses are of little importance, except possibly in the retail trade, with which he was not concerned, and as mentioned, as between manufacturer and retailer, they were all classed and invoiced as reverse-a-mats. He further declared that the mattress known in the line as Firm Rest, are manufactured by his firm, for the Adams Furniture Company alone, and when pre-ticketed at $99.00 such a price was for an ensemble, consisting of a mattress, spring, headboard, and legs, and when ensembles are sold, the pre-ticketed label attached is attached

to the mattress only. It is apparent that the company has a wide line of labels, setting out various names, as Firm Rest, Siesta, etc., including some bearing the name, Reverse-a-mat, but the latter are not used on the mattress sold to the accused, — merely the names of the particular line. I understand from his evidence, that his company pre-ticketed mattresses at the request of a retailer, at a price specified or agreeable to the retailer, and this is the general course of business in respect to the accused, and that he was unaware of and not concerned with the sales price, to the consumer. The Firm Rest Line was manufactured for the Adams Furniture Company, but that this particular one sold, Exhibit two, though bearing the label of Firm Rest, in fact was a Reverse-a-mat grade. This particular mattress together with the Siesta Line were invoiced to the retailer, at between $16.00 to $17.00, and that no regard was had to the particular name attached to the label, by the accused's salesmen, although the label and pre-ticketed prices were very evident to a potential purchaser. A number of retailers, experienced in the trade, were called by the prosecution. It is admitted that none of them sold a Firm Rest line, or a line identical to Exhibit two. Apparently the accused was the only outlet in Peterborough of the Reverse-a-mat line, manufactured by the Featherweight Mattress Limited, although those retailers were familiar with and sold mattresses of a quality of Reverse-a-mats. On examination, each stated that mattresses similar to Exhibit two would retail at a price range of $35.00 to $40.00, and further that the actual price in this instance of $34.95, was a reasonable price. It appears that Exhibit two, bearing the name of Firm Rest was the only one that Mr. Kinsley observed in the store on the date he purchased. At no time was there any discussion concerning the sale of an ensemble — only a mattress.

I find that the manufacturer had no knowledge of what the retail price would be for the mattress sold to the accused — with the possible exception of the true Reverse-a-mat mattresses line, as explained above, by Mr. Silverberg. The Reverse-a-mat line appears to have been usually pre-ticketed in the manner mentioned, based on Mr. Silverburg's evidence, and what was observed by Mr. Kinsley. The president of the accused's firm in exhibit three states that he never sold these mattresses at the pre-ticketed price, and has never attempted to do so, — merely that he handled many pre-ticketed mattresses, and as Mr. Silverburg explains, they were pre-ticketed if the retailer so desired, and this was a fact in this particular instance.

Section 33C(1) of the *Combines Investigation Act*, provides: "Everyone who, for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public, by any means whatsoever, concerning the price at which such or like articles have been, are, or will be ordinarily sold, is guilty of an offence punishable on summary conviction."

Defence counsel has argued that the name Firm Rest attached to Exhibit two, was affixed in error, that Mr. Kinsley was not misled by the pre-ticketed price attached thereto, and that in fact he was an agent provocateur who deliberatoly selected for purchase a mattress which had the highest pre-ticketed price, that the salesman, Mr. Carol, pointed out to him that the names and pre-ticketed prices meant nothing, that the manufacturer was merely using up labels of a discontinued line of merchandise, on the articles displayed, and that all were of comparable

value and were being sold at the same price — as he stated, just pick out the one that appeals to you. Further that there is no evidence as to what a Firm Rest mattress of the line manufactured for the Adams Furniture Company, is ordinarily sold for in this area. Jessup, J., of the Supreme Court of Ontario, in what I believe to be an unreported case of about March the 19th, 1965, in *Regina* v. *Allied Towers Merchants Limited (II)*[2] on appeal by way of a stated case, from a decision of Magistrate R. B. Dnieper, held that sec. 33C, subsection 1, is an offence of strict liability, and that *mens rea* is not an ingredient of that offence. No doubt Mr. Kinsley as an investigator was not personally misled by anything he saw advertised or by any statement made to him, however we are not concerned with his purpose on making this purchase, as the section refers to [a] materially misleading representation to the public. Mr. Carol would have us believe that a potential customer having before him a choice of mattresses pre-ticketed at $99.00 and $79.50 or $69.95, and being informed by him that the pre-ticketed labels and prices meant nothing — they are all of similar value, being sold at the same price — that such a potential customer would not be influenced by such pre-ticketed prices, as denoting to some degree their respective values.

Defence counsel has drawn my attention to the judgment of Judge Sweet of the County Court of the County of Wentworth, in *Regina* v. *Allied Towers Merchants Limited (I)*[3] wherein he stated, "I am of the opinion that the price at which an article is ordinarily sold, within the meaning of the legislation, is not the price at which the person making the representation ordinarily sells them, but what is meant is, the price at which it is ordinarily sold in general in the area in which the representation is made."[4] It is admitted that the identical mattress manufactured by Featherweight Mattress Limited, is not sold by any other retailer in this community. The prosecution meets this argument by calling a number of retailers experienced in the trade, who have expressed the opinion that the retail price for such a grade and type of mattress, similar to Exhibit two, would be in the 35 to 40 dollar price bracket. If the learned County Court Judge inferred that the articles means a similar article, he would appear to be limiting the provisions of the statute, since the section refers to "concerning the price at which such, or like articles, have been, are, or will be ordinarily sold, etc." — In this context I would assume that like article means similar in quality. If the Crown must establish that such an article must be ordinarily sold at a given price in the area where the representation with which we are concerned is made, then any arrangement on the part of a retailer, of the nature of a special franchise or sole sales agency in a given area, would appear to render the legislation ineffective. I would find that the phrase means, articles of similar quality. Minor differences in specifications, not known or observed by the public, but only determinable by an experienced person, after a mattress is opened, and its construction is observed in detail, I would find, does not bar such articles as being similar.

On the evidence of Mr. Silverburg, the manufacturer, and Mr. Winstock, the president of the accused Company, the pre-ticketed price was not the

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[2] Since reported at [1965] 2 O.R. 628, [1966] 1 C.C.C. 220, 46 C.P.R. 239.
[3] Reported, *supra*, at p. 654.
[4] *Ibid.*, at pp. 657-658.

price at which Exhibit two, or a like product was ordinarily expected to be sold in the area. If the *obiter* in the last mentioned case, and I quote, "The considered opinion of what a manufacturer honestly believes his products should bring, when sold at retail, should not, in my opinion, be treated as without relevance,"[5] is correct, then the facts of that case, and the one before me, shows [*sic*] a startling dissimilarity. In this case, the pre-ticketing of the price was done at the request of the retailer, and apparently the manufacturer was not concerned with what the selling price might be, nor again, was there any concern shown, as to the amount of the pre-ticketed price, with the possible exception of the pre-ticketed price on a true Firm Rest Mattress — the pre-ticketing of Exhibit two, was in error, denoting carelessness at least. On the facts of this case, and all the evidence, the general policy of pre-ticketing, had little or no relevance to the actual retail price of the article, but would appear to be rather a form of advertising, and done for the purpose of assisting sales.

I find therefore, that in the case before me, the pre-ticketed price on Exhibit two, was of such an exaggerated amount, and had the result, though done in error, of untruthfully persuading prospective purchasers that they would be buying advantageously if they acquired the article for substantially less than that amount, and further, that this would be the case even if at the time, such a potential purchaser was informed by the salesman to disregard such pre-ticketing prices entirely.

Therefore I find that the prosecution has established a case and the accused is convicted on the first count.

The second count reads — For the purpose of promoting the sale of a Featherweight Firm Rest Mattress manufactured by Featherweight Mattress Limited and sold by the said Mountain Furniture Company Limited at 368 George Street in the said City of Peterborough, by means of representation made verbally by a sales clerk on the premises of the said Mountain Furniture Company Limited to the purchaser of the said mattress, Ronald J. Kinsley, at the time of the said purchase, that the said Featherweight Firm Rest Mattress was valued at $79.50, it unlawfully made a materially misleading representation to the public concerning the price at which such Featherweight Firm Rest Mattresses have been, are, or will be ordinarily sold, contrary to sec. 33C(1) of the *Combines Investigation Act.*

The evidence given on the first count was adopted as far as applicable in this case. On the date of the sale of Exhibit two, Mr. Kinsley and Mr. Carol inspected a number of mattresses in the basement. All or some of them — there may be a conflict of evidence on this point, were products of Featherweight Mattress Limited, and carried a pre-ticketed label affixed thereto, bearing the name Siesta, and a pre-ticketed price of $79.50. I find that Mr. Carol made the same statement to this line, as mentioned above in connection with the sale of Exhibit two, namely to the effect that the labels on the various mattresses meant nothing, that the manufacturer was merely disposing of old labels — or labels of a discontinued line, and that all the mattresses were of the same comparable value, including exhibit two, and all were being sold at $34.95. Whatever may have been said in this respect, or even that the Firm Rest line of mattresses, such as

[5] *Ibid.*, at p. 656.

Exhibit two, were valued at $79.50, in fact, there was not a Firm Rest Mattress, or any mattress designated as Firm Rest, ticketed at $79.50. I am not concerned with what the result might have been if the count had referred to the specific type Siesta Mattresses, pre-ticketed at $79.50, rather than the Firm Rest, as Exhibit two. On all the evidence, this charge is dismissed.

Conviction entered on the first count (fine of $250 and costs imposed); second charge dismissed.

COMBINES: MISLEADING ADVERTISING

REGINA *v.* FEATHERWEIGHT MATTRESS LIMITED, Magistrate's Court, Peterborough, Ont., July 19, 1966, Magistrate W. R. Philp.

Magistrate Philp

Featherweight Mattress Limited is charged, that on or about the 21st day of October, 1965, at the City of Peterborough, in the County of Petorborough, in the said Province, for the purpose of promoting the sale of a Featherweight Firm Rest Mattress manufactured by the said Featherweight Mattress Limited and sold at Mountain Furniture Company Limited 368 George Street in the said City of Peterborough, by means of a label bearing the price $99.00 affixed to the said Featherweight Firm Rest Mattress, unlawfully made a materially misleading representation to the public concerning the price at which such Featherweight Firm Rest Mattresses have been, are or will be ordinarily sold, contrary to sec. 33C(1) of the *Combines Investigation Act*.[1] The accused pleaded not guilty and the case is before me for judgment.

On October the 19th, 1965, the witness Mr. Kinsley, an investigator for the Department and Branch in charge of the enforcement of the *Combines Investigation Act*, noted from the displays on the store window of the Mountain Furniture Company Limited, Peterborough, at the time, a mattress bearing the label attached thereto of a Firm Rest Mattress, manufactured by the accused including the label, pre-ticketed at $99.00. This mattress was apparently on sale for $34.95.

On October the 29th he returned, purchased, paid for and took delivery of the mattress, at the time located on the second floor of the store — and obtained a receipt, Exhibit one, wherein it was described as a Firm Rest, with the consent of the president of that store. On the same occasion he observed in the basement, a number of mattresses manufactured by the accused, pre-ticketed with labels describing them as Siesta and pre-ticketed at $79.50. They also were on sale at $34.95. The salesman was explicit when showing both the first named mattress, in fact purchased, and the Siesta line in the basement, that the purchaser should pay no attention to the labels or the pre-ticketed prices — all were of equal quality, and the manufacturer was merely using up odd old labels of a discontinued line of merchandise. The discussion between them involves only the sale

[1] R.S.C. 1952, c. 314.

of the mattress — there was no mention whatsoever in the evidence that ensembles were ever discussed (ensembles would be — including mattress, spring, headboard, legs) — or continental units (which is an ensemble less headboard).

Subsequently on December the 7th, 1965, Miss Olivia Lozinski, one of the witnessses herein, and Mr. M. Lecours as representatives of the Director of Investigation and Research, under a search warrant, Exhibit eight, given by the Chairman of the Restrictive Trade Practices Commission, attended at the accused's place of business in Toronto, interviewed Mr. Silverburg, the president of the concern, and other executives. They made such searches of the files and business papers and removed apparently, those documents that might be of interest to them on a subsequent charge, directing their attention particularly to any arrangements, agreements, invoices, etc., bearing on the sales and financial dealings with Mountain Furniture Company. A numbor of these exhibits are filed herein.

Exhibits 3 and 4 are some 17 invoices of the accused company, covering the merchandise sold to Mountain Furniture Company Limited, over a period of approximately one year. These invoices were in the main, for mattresses described therein as reverse-a-mats, and invoiced to the retailer at 16 to 17 dollars. It appears that in the trade reverse-a-mats are mattresses with different coloured tickings on top and bottom, and certain other specifications probably of interest only to the retailer and manufacturer, — and such a line of merchandise is recognized in the trade as definitely a cheaper kind and in the lower price range. A large percentage of the articles so invoiced were for reverse-a-mat mattresses, although a number of reverse-a-mat box springs were sold and separately invoiced — there are three additional articles which are of no consequence in this case. These invoices in Exhibit three specify — pre-ticketed, $79.50. The description reverse-a-mat is used only on the invoices in the trade, as between manufacturer and retailer, rather than any particular name attached to the product, or referred to in advertising, such as Firm Rest, Siesta, etc.

I find as a fact that the accused company would, at the request of the retailer, ticket his order with such a price as the retailer might desire or indicate, and that the accused company was not interested or concerned with either the pre-ticketed price, or with the price that the retailer might sell to the public.

It appears that the accused sold these reverse-a-mats only to the Mountain Furniture Company in Peterborough, although other furniture dealers might sell mattresses of the same general specifications. It is further proven that the accused manufactured for the Adams Furniture Company only, a line of merchandise — mattresses, of a superior quality to the reverse-a-mats, which were sold to the public at $99.00, usually, if not always, as an ensemble. This line is labelled Firm Rest, and are [*sic*] advertised as such, Exhibit thirteen. The Firm Rest line, manufactured for Adams Furniture Company Limited, is not sold in this area. Furthermore, Exhibit two, sold to Mr. Kinsley, was in fact a reverse-a-mat, though bearing the label, Firm Rest.

The accused processed the orders following the specifications given, for the particular grade and name, and eventually the labels were affixed, when desired by the retailer, the labels carried the pre-ticketed price. Mr. Silverburg's explanation is that the label, Firm Rest, $99.00, was affixed to Exhibit two, by an employee in the factory, by error, and

further, that when ensembles or continental units are pre-ticketed, the label is attached to the mattress only. There is no evidence that a true Firm Rest mattress, according to the manufacturer's specifications, had ever been sold by the Mountain Furniture Company Limited. The latter purchased, in the main, reverse-a-mats, or such mattresses and box springs, and possibly could have sold the same as a continental unit or possibly as an ensemble, but there is no evidence that in fact the retailer did so, and upon the sale of Exhibit two, the sale of a mattress only was discussed. There is no evidence that anything but the sale of the mattress was ever discussed on the demonstration of the Siesta line pre-ticketed at $79.50.

In the written argument of the defence, considerable attention was given to the accuracy of describing Exhibit two as a Firm Rest Mattress. Certainly, according to the specifications given by Adams Furniture Company to the accused, and manufactured by them, it was not a Firm Rest Mattress in quality, as Exhibit two is a reverse-a-mat. Defence argues that the name Firm Rest used throughout the charge is consequently in error, and the charge has failed. However, Exhibit two did carry a Firm Rest label, and whether it was done for the purpose of selling this particular mattress, or mattresses of the Siesta and other lines does not in my opinion render the charge defective.

It is admitted by the Crown that the true Firm Rest Mattresses are not sold in this city and indeed, the Mountain Furniture Company Limited is the only retailer in this city that carries any of the products of the accused. There is evidence that the mattresses of the reverse-a-mat quality, and similar to Exhibit two, are sold locally, and that a reasonable price for the same would be in the 35 to 40 dollar price range.

The pertinent section of the *Combines Investigation Act*, sec. 33C(1), provides that, "Anyone who, for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public, by any means whatsoever, concerning the price at which such, or like articles, have been, are, or will be ordinarily sold, is guilty of an offence punishable on summary conviction."

I find that Exhibit two was pre-ticketed in error. In the case of *Regina* v. *Allied Towers Limited (II)*,[2] it was held by Mr. Justice Jessup of the Ontario Supreme Court, on an appeal by way of a stated case, from Magistrate R. B. Dnieper, about March the 19th, 1965, that sec. 33C subsection 1, is an offence of strict liability and *mens rea* is not an ingredient of the offence. The defence admits that the accused is not basing its defence on *mens rea*, but on the fact that the Crown's evidence did not relate to the charge against the accused, and with respect to the name Firm Rest. This latter defence is, I believe, disposed of above.

Both counsel have referred to the judgment of his honour, Judge Sweet of the County Court of the County of Wentworth, dated March the 17th, 1965, in *Regina* v. *Allied Towers Merchants Limited (I)*.[3] He states, "I am of the opinion that the price at which an article is ordinarily sold, within the meaning of the legislation, is not the price at which the person making the representation ordinarily sells it, but what is meant is the price at which it is ordinarily sold in general, in the area where the representation

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

[3] Reported, *supra*, at p. 654.

is made".[4] Mattresses of the specifications of Firm Rest, as sold by the accused as an ensemble were not on sale in this city, but mattresses of the quality of reverse-a-mats, and of a like quality to Exhibit two, though not necessarily the same specific specifications, are sold locally, and the price at which they would be sold is established. Any difference that may exist between Exhibit two and other reverse-a-mats sold in this city were of a variety only determinable by a person with long experience in the trade, and after investigating the construction of the mattress by opening up the interior hereof, and closely examining its constituent parts. I question if such differences are a bar to a finding that two such articles on being compared are "like" articles, within the meaning of and intention of this statute. I find that the Crown has proven the similarity of the product, Exhibit two, and other mattresses of reverse-a-mat quality offered for sale locally, and of course, the selling price of $34.95, and the pre-ticketed price placed on Exhibit two, as represented to the public have been established.

Judge Sweet's reference to the lack of bad faith on the part of the manufacturer is one of the differences between the facts of that case and those of the one at bar. In the instant case, there is at least great carelessness in pre-ticketing Exhibit two, and the fact that the accused pre-ticketed this and other mattresses of the Siesta line, without regard, knowledge, or interest in the price that they might be sold to the consumer. The public would of course have no knowledge that Mountain Furniture had no other mattress identical to Exhibit two and ticketed at $99.00, on sale.

For these reasons and on all the evidence, the accused is convicted.

Conviction entered
(fine of $250 and costs imposed).

COMBINES: MISLEADING ADVERTISING

REGINA *v.* AMALGAMATED CARPETS & FURNISHINGS LTD., Magistrate's Court, Edmonton, Alberta, March 3, 1970, Magistrate G. Forbes.

Magistrate Forbes

In this case we have the evidence of Mrs. Palmer; someone, she doesn't know who came to her and directed the insertion of the advertisement which is now an exhibit in two copies before this Court. There had been previous dealings and previous advertisements and there was no protest about the insertion of the advertisement.

From all the circumstances, those circumstances and other circumstances I draw the conclusion that this insertion of this advertisement was authorized by Amalgamated Carpets, 11330 — 105 Avenue. The documents, exhibits before me which were seized at that address all bear the title Amalgamated Carpets and Furnishings, Ltd., 11330 — 105 Avenue, Edmonton 17; and from that I draw the conclusion by inference that the accused is the legal person who authorized the insertion of the advertisement.

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[4] *Ibid.*, at pp. 657-658.

I have before me the documents seized at the address of the accused covering a substantial period of time. These all indicate sales of the carpet concerned or carpet that was produced to Mr. Kratzenberg and to Mr. McKeller as being the carpet concerned but I have no doubt and it's, of course, not denied before this Court that it was the carpet concerned. It was misdescribed as two tone although that may be just loose language. According to the evidence before me that is not the only misdescription. It is described as a heavy duty nylon carpet; the evidence before me indicates it is not a heavy duty carpet.

However, the evidence convinces me that this is the carpet referred to in the advertisement. We have the evidence of Mr. Kratzenberg and Mr. McKeller in particular who apparently are involved in both contract and retail work. Their evidence indicates the price of $9.95 is a materially excessive one. I think an answer I got from one witness, I can't recall which one, indicates that it is common to advertise a price for carpet including installation and underlay. While this is not set out one way or the other in the advertisement, I think in fairness to the accused I must assume that is the kind of price intended.

There is the evidence of Mr. Bell and Mr. Harris. These would appear to be sales in remote areas and as I understand the law, the price involved in this type of thing is the price in the trading area concerned.

The evidence indicates beyond any doubt that the price in this trading area, the Edmonton trading area of this type of carpet is something substantially less than $9.95. The advertisement, by stating the words, "Retail $9.95 while wholesale stock lasts. Is $3.95 yard," is making the representation that the retail price ordinarily is $9.95. I think the accused's own records are the most substantial evidence to the contrary supported by the other evidence, that the maximum ordinary retail price in the Edmonton area for this carpet installed with underlay is something in the vicinity of $6.50 to $6.95 a yard; on occasions much less.

There will be a finding of guilty.

Conviction entered
(fine of $200 and costs imposed
and prohibition order granted).

COMBINES

REGINA *v.* AMEUBLEMENT DUMOUCHEL FURNITURE LIMITED, Provincial Court (Criminal Division), Ottawa-Carleton, February 6, 1970, Judge T. Swabey.

Judge Swabey

I think this case falls within the decision in the *Mountain Furniture Company, Limited* case.[1] Particularly I refer to the second count in that case, where it reads:

> For the purposes of promoting the sale of a featherweight Firm Rest Mattress manufactured by Featherweight Mattress Limited and sold by

[1] Reported *supra*, at p. 662.

the said Mountain Furniture Company, Limited at 368 George Street in the city of Peterborough by means of a representation made verbally by a sales clerk on the premises of the said Mountain Furniture Company, Limited to the purchaser of the said mattress, Ronald J. Kinsley at the time of the said purchase, that the said featherweight Firm Rest Mattress was valued at $79.50, it did unlawfully make materially misleading representations to the public concerning the price at which such featherweight Firm Rest Mattresses have been, are, or will be ordinarily sold, contrary to section 33C(1).

The representation in that case was made by a clerk to an investigator who, if I am not mistaken, was the same investigator as appears in this case, Mr. Kinsley.

The representation in that case was made by a salesman or a clerk to Mr. Kinsley who was operating as an investigator under the *Combines Investigation Act.* In that case there was a conviction on the charge. At first glance, it may not appear to be right on all fours, because in that case there was pre-ticketing of the mattresses. However, the misleading representation was made verbally, not by the price tag. The clerk in the store made a representation to the effect that the price tags did not mean anything, that it was an old line and that they were discontinuing the line.

In the case before me today I have indicated that I am satisfied that on two occasions, first with Mr. Kinsley and then, on the second occasion when Mr. Rodgers visited the premises, the saleslady, Mrs. Paquette, an employee of the defendant company, made a representation which in fact, in my view, was materially misleading, within the meaning of the section of the *Combines Investigation Act.*

I therefore convict the accused on both counts.

SENTENCE

Judge Swabey

The disturbing feature about these charges is that it has almost become common practice on the part of people in business to make statements such as these — statements which, clearly, are not true, at all. Perhaps it is an indication of the depth to which our ethics in business have dropped. And this causes much concern in these days, when it comes to protection of the consumer. Of course this is a matter for the Government's concern; and the Government's concern is reflected by the number of prosecutions which have been brought before the Courts in the last year.

I intend to award costs — and they will be considerable, in view of the witness having come from Toronto.

The order that has been provided and which has been submitted to the Court will go.

There will be a fine of $200 and costs, and the costs will be the amount of the witness fees, plus travelling.

The Clerk of the Court: Is that on each count?

Judge Swabey: That is $200 on each count.

Conviction entered
(fine of $200 on each of two counts imposed and order of prohibition granted).

COMBINES: MISLEADING ADVERTISING

REGINA *v.* MICHAEL BENES, Provincial Court (Criminal Division), Ottawa-Carleton, October 7, 1969, Judge Fitzpatrick.

Judge Fitzpatrick

Michael Benes is charged that he did: "on or about the 16th day of December in the year 1968, at the City of Ottawa, in the regional municipality of Ottawa-Carleton unlawfully did at premises known municipally as 400 McArthur Avenue for the purpose of promoting the sale of a toy, to wit, an Eldon Custom Bank car set, model 9558, make a materially misleading representation to the public by means of a price tag reading "9558 Whol. 26.65 R-39.95" affixed to the said toy concerning the price at which the said toy has been or is ordinarily sold contrary to section 33C(1) of the *Combines Investigation Act*.[1]

The evidence submitted by the Crown is to the effect that two officers from the Combines Investigation Branch attended at the premises of Universal Agencies, which it is agreed is a wholly owned business carried on by the defendant Michael Benes; that they attained, with extremely little difficulty admission to the premises. They were given a blue card, which is Exhibit one, and which they were asked later on to fill in. They never, of course, did.

On entering the premises — they were in fact looking for Eldon Custom Bank car set, model 9558 because of information which they had received. They found some models of this type of car in the premises of Michael Benes. There is a tag, legend, if you like, which referred to this particular model, which read "9558, wholesale 26.65; retail 39.95". They did not purchase at that time, nor did they subsequently purchase this particular item.

The other evidence which was submitted by the Crown was to the effect that, first of all, Eldon Industries of Canada had made deliveries. Photostatic copies of invoices, which copies had been made by the witness from the company, who was the sales manager for this part of Ontario for that company, showed delivery to Universal Agencies of 24 Custom Bank sets 9558 had been effected by invoice dated August 30, 1968. It showed that the price per unit of those sets to Universal Agencies was $17.80.

There is also another invoice, Exhibit four, Top Value Limited of 98 George Street, Ottawa, again for eight sets of this particular kind, showing a unit price of $17.80 a unit. Exhibit three, which is an invoice, shows that 76 Custom Bank sets, unit price of $18, had been sold to A. J. Freiman Limited on Blair Road, Ottawa. The reason for the difference in the unit price was explained by the company representative as follows: the price of $17.80 was given to Top Value Limited and the company or business owned by the defendant because they were jobbers, and large retail institutions such as A. J. Freiman Limited paid a slightly higher unit price of $18.

Evidence was given by one of the investigators for the Combines Branch that he had made inquiries at 15 retail outlets in the Ottawa area, and had found three which sold this particular model produced by this particular company, and evidence was given by representatives of each of those three companies or places of business, and *the price at which it was sold retail*

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[1] R.S.C. 1952, c. 314, as amended.

in their particular establishment was roughly $28; in one case $28.98, and in another $23.88, substantially lower. I have no hesitation in finding, first of all, that the goods which were displayed at the defendant's place of business and represented to be Eldon Custom Bank car sets, model 9558, were in fact that particular model produced by that particular company.

Mr. Cousineau gave evidence for the defence. His evidence was to the effect that he purchased several of those items or sets at that particular place of business for resale in his retail outlet in Hull. He said that he purchased several Eldon Custom Bank car sets, model 9558, and I have no doubt whatsoever that that was the item that was being sold, legend or tag attached "Wholesale price $26.65; retail $39.95".

With regard to the remainder of Mr. Cousineau's evidence, I must say that I find it to be extremely vague. He did indicate that he had sold two sets, he thought, at a retail price of $39.95. I have very grave doubts whether he did. I do not wish to impugn his evidence as to its thruthfulness; I merely feel Mr. Cousineau was rather confused in his evidence. He had no invoices because unfortunately his place of business was destroyed by fire. Nevertheless, because of the manner in which he gave his evidence, I certainly have very grave doubts whether in fact he actually sold those items at a price of $39.95. I rather suspect that when he brought them to his place of business he very quickly learned they were heing sold at a far less price at other places. I think that if I had to make a judgment on that point I would certainly be inclined to find that Mr. Cousineau immediately dropped his price to the competitive level of the other store.

He mentioned what he called a price war. I do not believe there was any price war at all. I think Mr. Cousineau really reduced his price, certainly not hecause of a price war, but merely because other businesses were selling this particular item at a much lower range.

I think it would be useful if I read into the record at this point sec. 33C of the *Combines Investigation Act*. Subsection 1 reads:

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

I have no doubt that the legend or price tag, which I read into the record, and which mentioned "wholesale $26.65; retail, $39.95" was there for a purpose. What was that purpose? I really have to come to the conclusion that it was there for a misleading purpose. It was there to indicate to a prospective buyer — and the evidence is that at least 20 per cent or more of this particular business during the Christmas season was retail trade, so-called by the trade, people coming in to buy — what the price was. The reason for this tag was to mislead those purchasers into believing they were going to get for $26.65 what would cost them at the ordinary retail price $39.95. And of course this simply was not true. There was no evidence submitted to me that anyone purchased this anywhere, either in this store or anywhere else, at a retail price of $39.95, except for Mr. Cousineau's evidence which, as I say, on the point of resale, I do not care to accept, and resale goes to the heart of the section. That is what it is all about.

There was no suggestion in this tag that the suggested retail price was $39.95. It is a plain statement that the wholesale price is $26.65; the

retail price is $39.95. The only purpose of the tag, as far as the public who came into the store off the street is concerned, is to have them believe that what would normally cost $39.95 in a so-called retail store they were going to get here for $26.65, which is what it was sold for to anyone who came in there. So that, looking at those facts, and bringing them within the terms of the subsection which reads: "Every one who, for the purpose of promoting the sale"; that is what the sign was there for, to sell those articles, "or use of an article, makes any materially misleading representation", is this materially misleading? I have no hesitation in finding that it is. The suggested retail price of $39.95 was in fact not actually so there or anywhere else, for that matter. I continue with the subsection: "— to the public, by any means whatever —". This was after all a very pertinent means to use to mislead the public concerning the price at which those articles were to be sold.

Thefore, having said this, I have no hesitation whatsoever in finding the accused guilty as charged.

Conviction entered
(fine of $100 imposed
and prohibition order granted).

COMBINES: MISLEADING ADVERTISING

REGINA *v.* THE ANDREW JERGENS COMPANY LIMITED, Provincial Court (Criminal Division), Ottawa-Carleton, September 17, 1969, Judge R. J. Marin.

Judge Marin

The charge against The Andrew Jergens Company Limited is pursuant to sec. 33C(1) of the *Combines Investigation Act*.[1]

The facts, simply related, are as follows:

The Andrew Jergens Company Limited offered for sale a bottle of shampoo, size 13.5 ounces, with the label on the bottle reading "Special $1.19 — Regnlar $1.79 size", the said item being sold at the outlet for 86 cents.

I am satisfied that the advertisement, inasmuch as it was represented to be proper and true, was not so; and that it was misleading. Following what I consider to be a satisfactory investigation of a number of outlets in the Ottawa area, there was no indication that $1.79 was indeed the regular price of this shampoo. Nor is there any indication that it was ever sold at that price.

I accept the suggestion that there was some measure of cooperation when the investigating officers visited the offices at Perth of the Andrew Jergens Company; but I am also satisfied that only a very small percentage of its regular shampoo is marketed at $1.79 — and that only over a period of some months.

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[1] R.S.C. 1952, c. 314, as amended.

There are a number of matters to be taken into consideration when imposing sentence. One must keep in mind the factors of rehabilitation, deterrence and retribution. I have no doubt, first, that from the point of view of rehabilitation I need only gloss over the matter. Keeping in mind the fact that this is a first offence, I have no doubt that the reputation of the company is such that the factor of rehabilitation should not be a major or deciding factor.

On the other hand, from the aspect of deterrence, not only do I have to consider the factor of deterrence against the Andrew Jergens Company, but also as it would apply to other companies in the field of cosmetics. I am aware, as I have been reminded today by counsel, of the many offences of this nature in the cosmetics field which have come to the attention of this court in the past year. For reasons unknown to me, there seems to have been a measure of proliferation in these offences.

The court therefore must take the view that a fine imposed must be of such proportion as to provide a real public deterrent. And when indeed a fine fails to act as a deterrent, then there are alternatives, which I would not care to consider this morning.

The other matter I have to take into consideration, in considering deterrence, is that such representations as are indicated iu this case have the effect of misleading the general public. They invite the public to subscribe to or participate in a bargain — which, indeed, is not a bargain. This is where the factor of retribution comes in.

Retribution is the expression of public disapproval, the disapproval of society toward crime. Retribution is a doubtful principle, so far as criminal law is concerned, in its application te persons or property; but I feel that it is a very real principle when applied to the provisions of the *Combines Investigation Act*, and instances such as I have here.

I am satisfied that, taking all these aspects into consideration I must impose a fine which will serve the principles I have outlined.

Conviction entered
($750 fine imposed
and order of prohibition granted).

COMBINES: MISLEADING ADVERTISING

REGINA *v.* GENSER & SONS LIMITED, County Court of Winnipeg, October 21, 1969, Solomon, C.C.J.

Solomon, C.C.J.

The defendant was charged under the provisions of sec. 33C of the *Combines Investigation Act*,[1] that it did:

(1) on the 14th day of January A.D. 1967, at the City of Winnipeg in the Province of Manitoba, for the purpose of promoting the sale of General Electric 23" Console television sets by the publication of an advertisement in the Winnipeg *Free Press* newspaper published in the City of Winnipeg, in the Province of Manitoba, on the 4th day of January A.D. 1967,

[1] R.S.C. 1952, c. 314, as amended.

make a materially misleading representation to the public concerning the price at which the said television sets have been or are ordinarily sold,

— and —

(2) on the 7th day of April A.D. 1967, at the City of Winnipeg, in the Province of Manitoba, for the purpose of promoting the sale of a General Electric 23" Console television set by tags attached to the said set located at its store premises to which the public had access, to make a materially misleading representation to the public concerning the price at which the said television sets have been or are ordinarily sold.

This was a trial under the provisions of the *Summary Convictions Act.* The Magistrate dismissed the two charges and the informant appealed to this court by way of a trial *de novo* under the provisions of the *Summary Convictions Act.*

On the basis of the evidence that was presented to this court I have no difficulty of finding as a fact:

(1) THAT the defendant on the 4th day of January, 1967, advertised in the Winnipeg *Free Press* a General Electric black and white 23" console television set for $288.00 and claimed in the said advertisement that the regular price of the said set was $399.95.

(2) THAT the defendant on the 7th day of April, 1967, did advertise to the public by attaching to a General Electric, black and white 23" console television set, Model 33T65, a sales tag which in effect stated that the sale price of the set was $299.00 with trade and that the regular price was $399.95.

(3) THAT the defendant bought the General Electric, black and white 23" console television sets, Model 33T65, from the General Electric Company at $180.00 each.

(4) THAT Models 33T65, 31T65 and M2330 all had similar deluxe MXL chassis with upright console and wood veneer. They were all General Electric, black and white 23" console television sets, similar in construction and operation but a little different in appearance only.

(5) THAT the actual sale prices to the consumers and the suggested sale prices of the said Models 33T65, 31T65 and M2330, were similar with some small unappreciable variations which resulted from market fluctuations rather than from the value differences of the models.

(6) THAT the defendant was a very knowledgeable businessman who studied and knew values and market fluctuations of the products it was handling as illustrated by the very modest representations made by it through a newspaper advertisement that the defendant filed as Exhibit 11. It states:

> Forty years ago the first Genser's store opened its doors in Winnipeg... from that one small store Genser's has grown to take its place as one of the nation's largest furniture concerns. In forty years you get to know a few things about furniture styles and values. And if you are as big as Genser's you learn how to keep on growing by giving your customers more for their money, BETTER quality, BETTER service at lower prices. GENSER'S customers are special... they know quality, they know honest value when they see it and they KNOW they can get the best values at Genser's every day of the year. The gala celebration starts Thursday.

Come in and take advantage of the low prices that Genser's customers have been taking for granted for years.

(7) THAT the highest market sale price or the suggested sale price of any General Electric black and white 23" upright console television set with MXL chassis was never over $319.00 per set at any time relevant to these proceedings.

The other General Electric dealers in this area testified that they all had suggested sale prices given to them by the General Electric Company. There is not even a suggestion in any part of this evidence that the suggested sale prices of the sets with MXL chassis was at any time over $319.00 per set. It should be noted that most of the dealers were almost unanimous in their presentations that they could not hope to sell these sets at the suggested sale prices. Some of them felt that they were lucky if they could get a mark up of 40% on the purchase price. I do not know whether the evidence established with any certainty the average sale price of these television sets. I am not sure at what price these television sets are ordinarily sold. I am convinced, however, that none of these sets were ever sold at $399.95 per set or at any other price that would begin to approach the said sum of $399.95. Some dealers were selling these types of sets at $270.00; some at $280.00; and others at a little less and others at a little more but nobody sold at a price that would approximate the said sum of $399.95. Even the defendant, as shown by his own advertisement, was selling these sets at a price range from $259.00 to $299.00 per set, well below what it referred to in its promotion gimmick as regular sale price of $399.95. I am satisfied that a fair inference from the evidence before the court can be made to the effect that the ordinary sale price of these sets was below $300.00 per set.

The evidence that General Electric Company regularly circularized its agents with memorandums containing the suggested list prices of General Electric products; the evidence that the purchase price to the agent of these sets was only $180.00 and that the suggested sale price of the said sets was never above $319.00; the evidence that other distributors or agents could not even begin to sell the said television sets at the company's suggested sale price and had to be satisfied with something much less, places the defendant, who, by his own admission, is a knowledgeable merchandiser. in a position that it must have known that the information contained in these advertisements was false, unless a satisfactory explanation is given to the contrary. No such explanation was forthcoming.

I am holding that the defendant, who, according to its own admission, is an experienced, knowledgeable businessman who "knows value" and "quality" and who sells to its customers at "best values" — that these sets which it was buying from General Electric Company for $180.00 per set, were never sold originally or regularly at $399.95 per set. When the defendant was placing these advertisements in the newspaper, which advertisements represented that the regular sale price was $399.95, it knew that the representation was false. When the defendant was attaching a tag to the television set in its store, which tag represented that the regular or original price was $399.95, it knew that the representation was not true, I have no doubt in my mind that the advertisements were intended to mislead the innocent, gullible consumer into believing that these particular sets were ordinarily sold at $399.95 and that by getting these sets at the defendant's store at the price of $299.00 per set the consumer was getting a great

bargain — the truth of the matter was that the unsuspecting customer was actually paying more than the regular price.

Although I am holding in this case that there is sufficient evidence to find, as I do, that the defendant had knowledge of the materially misleading representation when it stated that the regular price was $399.95, I hold, however, that under the law it is not necessary to find that the defendant had knowledge of the misleading representation. Sec. 33C of the *Combines Investigation Act* provides:

> (1) Everyone who, for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public, by any means whatever, concerning the price at which such or like articles have been, are, or will be, ordinarily sold, is guilty of an offence punishable on summary conviction.
>
> (2) Sub-section (1) does not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.

It should be noted that the above section was passed in spite of the already existing similar provision in the Criminal Code, namely 306(1) which provides:

> PUBLICATION OF FALSE STATEMENTS. Every one who publishes or causes to be published in an advertisement containing a statement that purports to be a statement of fact but that is untrue, deceptive or misleading or is intentionally so worded or arranged that it is deceptive or misleading, is guilty of an indictable offence and is liable to imprisonment for five years, if the advertisement is published
>
> (a) to promote, directly or indirectly, the sale or disposal of property or any interest therein, or
>
> (b) to promote a business or commercial interest.

The reason why sec. 33C was passed in spite of the provisions of sec. 306 of the Criminal Code was because it was intended for a different purpose. There is a material difference between the provisions contained in the Criminal Code and the provisions of the *Combines Investigation Act*. The provisions in the Criminal Code created an indictable offence punishable by imprisonment and the provisions in the *Combines Investigation Act* were passed to regulate merchandising in our free enterprise society.

I agree that there is a presumption that *mens rea* is an essential ingredient of every offence. I hold that such presumption can be displaced by words creating an offence or by the subject matter of the legislation. I find that the subject matter of this legislation together with the wording of subsec. (2) of sec. 33C when read together implies that sec. 33C (1) does not require the proof of *mens rea* or knowledge of the wrongful act. I agree with Mr. Justice Jessup of the Ontario Supreme Court in the case of *Regina* v. *Allied Towers Merchants Limited (II)*,[2] when he stated that:

> I therefore conclude that sec. 33C(1) is an offence of strict liability and that *mens rea*, in the sense I have mentioned, is not an ingredient of the offence. I reach such conclusion for the additional reason that in my opinion the class of acts legislated about in sec. 33C(1) are not criminal in any real sense but are acts prohibited under a penalty. To paraphrase the words of Farwell, L.J., at p. 481 of *Hobbs* v. *Winchester*

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

Corporation, [1910] 2 K.B. 471, in my opinion the legislature intended that the maker of a materially misleading representation should take the risk and that the public should be protected irrespective of the guilt or innocence of the maker subject to the exceptions probided by subsection 2.

In order to regulate the normal development of commerce in our society and to prevent undue exploitation of the consumer, the legislators found it necessary to place on the statute books many provisions governing the civil rights of the citizens of this country, which are enforceable in a summary manner as the provisions of sec. 33C herein. To protect the public, remedial legislation of the nature that is covered by sec. 33C imposes strict liability on the offender and *mens rea* as is generally defined in criminal cases, is not an ingredient to the offence. When corporations secure licenses to do business they are given such license to operate their business within the law including the observance of sec. 33C of the *Combines Investigation Act*. For the protection of the consumer the strict observance of sec. 33C of the *Combines Investigation Act* is as essential as the strict observance of the *Weights and Measures Act*, of the *Food and Drug Act* and of other similar remedial measures.

Conviction entered
(fine of $500 per count imposed).

COMBINES: MISLEADING ADVERTISING

REGINA *v.* ADVANCE T.V. & CAR RADIO CENTRE LTD., Provincial Magistrate's Court, Winnipeg, Manitoba, January 9, 1969, Magistrate J.J. Enns.

Magistrate Enns

The accused corporation is charged under sec. 33C(1) of the *Combines Investigation Act*, which subsection reads:

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

and the particular charge facing the accused reads that

> Advance T.V. and Car Radio Centre Ltd. unlawfully did for the purpose of promoting the sale of an Admiral color television set, by the publication of an advertisement in the Winnipeg *Free Press*, a newspaper published at the City of Winnipeg in the Province of Manitoba, on the 15th day of September, 1967, make a materially misleading representation to the public concerning the price at which the said television sets have been or are ordinarily sold, contrary to section 33C(1) of the *Combines Investigation Act*.

On September 15, 1967, an advertisement, five columns wide and approximately covering the lower two-thirds of the ninth page of the Winnipeg daily newspaper known as the Winnipeg *Free Press* appeared. This advertisement is the subject matter of this case. It purports to be an

advertisement for the accused corporation advertising a "store wide moving sale" and makes particular reference to Admiral Consol Color T.V. sets and Admiral Solid State Stereo sets. The Crown's charge is in relation to the T.V. set advertised.

By a statement of agreed facts, it is determined that at all times material to the case the accused was a duly incorporated company under the laws of Manitoba, and carried on business at 636 Sargent Avenue, and 1300 Portage Avenue, Winnipeg, Manitoba, and did so under the names: Advance Television Centre, Advance T.V. & Car Radio Centre and Advance T.V. Sales and Service.

The first issue that must be decided is whether in fact the accused caused the advertisement complained of to be published. From the evidence, I find that this is so, but that the words "with trade" may have been omitted mistakenly. As this omission does not, in my view, affect my decision, I make no finding as to why the omission arose. Further, I specifically find that, in view of two other advertisements dated September 1st, 1967 and September 22nd, 1967, in evidence before me, that the words "Regular $1,025.00" were deliberately included in the advertisement of September 15, 1967.

And as I have just now used the word "deliberately" I wish to insert a brief comment on the issue of *mens rea*, repeating what I said in the *Regina* v. *Miller's T.V. Ltd.* case,[1] firstly where I said:

> as to *mens rea*, I am in agreement with Jessup, J., of the Ontario High Court, as indicated in the *Regina* v. *Allied Towers Merchants Limited (II)* case[2] that the section does not require its proof. It is significant that sec. 33C(1) does not contain the word "knowingly" immediately before the phrase "makes any materially misleading representation."

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

Continuing then, the second issue concerns the identity of the set advertised. After viewing the advertisement which contains a picture of a television set, and viewing the mat used for its printing, containing the number "LK 5311", and on hearing the witness Mr. Ridge and the evidence of Mr. Houston, the government inspector, and considering the evidence as a whole, I find that the set advertised is intended to represent the LK 5311 model. However, in my view, for the purpose of the section under which the accused stands charged, the models LH 5311 and LKU 5311 are "such or like articles". I make the finding on the basis of their being identical or interchangeable in this sales area, according to both Mr. Ridge,

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[1] (1968), 56 C.P.R. 237.

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

and the document (BK 14) seized from the accused in which the phrase "LK 5311 color t.v. (can use LKU models)" is used.

Having found that the accused caused the advertisement to be published, subject to what I said about the possible omission, and having identified the model displayed, I have no difficulty in finding certain lesser yet necessary findings of fact. I find the advertisement was published "for the purpose of promoting the sale of" the television sets, and I find that the wording of the information is proper with reference to the submission by the defence that in the absence of the word "like", no evidence relating to LKU or LH models is relevant. This finding follows from my earlier observations as to their similarity.

Two issues remain. Firstly, was there a materially misleading representation to the public, and, secondly, was that representation, if it exists, concerning the price at which such or like articles are ordinarily sold. I wish to deal with the "ordinary selling price" issue first.

The Crown called, as I tally them, nine Admiral dealers out of 13 known outlets. The accused, of course, was not called by the Crown but documents from the firm were produced. The three remaining, and not called Admiral dealers only purchased 3 model LK 5311's from the Admiral Corporation distributor in Winnipeg. That is, 3 out of a known 55 sets distributed in the Winnipeg area during 1967. I find this, then, not to take from the validity of the evidence of those dealers called and the evidence obtained from the files of the accused, taken altogether, as being not merely a sampling, but a good basis for considering what was the ordinary selling price of the model LK 5311.

In no case, revealed in the evidence, was such a model ever sold for $1,025.00 in Winnipeg in 1967. In several cases the accused corporation sold such sets for $569.00 with no trades, in 1967, both before and after the Sept. 15 advertisement. As the accused sold more than any other dealer, the prices at which it sold are particularly relevant. Many of the other nine dealers sold only single sets and therefore are not perhaps so representative — yet there, too, are numerous examples of prices ranging from $569.00 to $800.00. I find that in such cases where the dealer either doesn't bother picking up the used trade-in model, or where he sells the trade-in model along with 11 others for a total price of $75.00, that in such instances the true selling price was actually simply the cash paid by the customer. Likewise, I find that where discounts of over $200.00 are given "for cash" that the practice amounted to a promotional technique and that the real selling price, in the ordinary sense of that word, was the cash actually paid.

In conclusion, on the issue of the ordinary selling price, I am of the opinion that the Crown has established beyond any doubt that model LK 5311's were not being ordinarily sold for $1,025.00 but for a substantially lower price.

It remains to be considered whether or not the allegation "Regular $1,025.00" was a "materially misleading representation to the public".

Before indicating my view on that, I would mention that in answer to my question as to the legislative purpose for enacting the subsection here under consideration, counsel for the Crown suggested that it was to insure fair competition, in addition to protecting the consumer. In my view the main or paramount purpose was to protect the interests of the buyer. It is because of this view that I make the finding I do with great reluctance on the remaining issue.

I have held the ordinary selling price to be substantially below $1,025.00 for such models — from the evidence, furthermore, I find no realistic selling price (except in a very special compassionate case where a dealer apparently sold one set to a man whose daughter was dying of leukemia) below that sold by the accused of $569.00. In other words I find the accused was selling the sets at generally the best price the public could expect to find.

Nevertheless, the subsection here under consideration does not, in my view, allow me to take that factor into consideration. I believe I have dealt with each essential ingredient in the case and as there is no doubt about any of them in my mind, and as the subsection does not refer to any direct detriment or loss to the public thereby (and here there certainly was no loss but rather some saving to the public, but as it does not permit me to I cannot take that factor into consideration), in my view I must therefore convict the accused accordingly.

[After hearing submissions of Counsel on sentence]

While there are certain similarities as between this and the *Miller* case I do feel there are certain dissimilarities. One of the facts of the *Miller* case was that unlike this case there were several instances where the sale price they advertised was in fact higher than some of the major competitors were selling at, so that I think is quite a distinction from this case where if I recall right, a price of $808 — if I recall right Hudson's Bay Company sold sets for $795, somewhat less than the special being offered by the accused corporation in that case.

Also, this case arose before there was any previous prosecution on just this kind of a matter to my knowledge in the city, and in view of the comments I made in my reasons for judgment I do feel that although I would not classify it as being merely a technical offence — if I did that, then I would be inclined to go along with your submission to impose merely a nominal one dollar fine. I think it is more than that but I do feel that it is a minimal infraction and for that reason firstly there will be a fine of $50 and costs or distress, and I agree with counsel for the defence and I see no compelling reason for insisting on an order as requested.

The Crown has open to it the full force of the law should there be a repetition without an order being enforced and I think that no facts here require such an order to be imposed, and so I'll make no order.

Conviction entered
(fine of $50 imposed).