

## IN THE COURTS

**MATTRESS MAKER PLEADS GUILTY ON  
PRICE MAINTENANCE AND PRICE  
DISCRIMINATION COUNTS**

Simmons Limited, a producer and distributor of mattresses, box springs and other bedding products, was fined \$150,000.00 and subjected to a Prohibition Order in Peel district Provincial Court on October 15 after pleading guilty on nine counts of price maintenance and two counts of price discrimination under the Combines Investigation Act. Another 14 price maintenance counts were withdrawn by the Crown. The fines included \$13,125.00 on each of eight price maintenance offences, \$15,000.00 on another price maintenance offence which occurred after the commencement of the inquiry, and \$15,000.00 on each of two price discrimination offences.

The Prohibition Order contains some unusual terms in addition to the usual detailed prohibition of any repetition of the offences. Simmons is prohibited, for a period of six months, from suggesting a retail or resale price "in any manner, shape or form" and "without restricting the generality of the foregoing from pre-ticketing goods sold by the said Corporation to any of its customers". In addition, Simmons is required, for three years, to submit to the Director of Investigation and Research:

"a detailed description and explanation of each plan implemented by the Corporation whereby a discount, rebate, allowance, price concession or other advantage is granted to a purchaser of product from the Corporation; provided that such reporting requirement shall not extend to any discount, rebate, allowance, price concession or other advantage implemented by the Corporation as a temporary expedient in response to competition in the market..."

The offences occurred at various times from 1965 to 1983. The price maintenance offences related to ss. 38(1)(a) and (b) and two roughly comparable predecessor subsections which existed prior to 1976, namely ss. 34(2)(b) and 34(3)(b)(i). Ss. 38(1)(a) and (b) make it an offence for anyone in the business of producing or supplying a product:

"(a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or

"(b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person."

An Agreed Statement of Fact summarizes the offences which "on some occasions...were engaged in advertently and with the knowledge of senior management personnel". With regard to the price maintenance offences, the Statement says in part:

"The resale price maintenance involved Simmons publishing a 'suggested retail price' for each type of mattress and box spring that it distributed and taking certain steps, as indicated below, to ensure that the retailer did not sell or advertise Simmons' products at a price below the suggested retail price:

"(a) Dealer Selection

Documents obtained from the offices of Simmons indicate that one criterion used to determine if a new account would be opened was whether or not the potential distributor would maintain the suggested retail price. For example, on four occasions Simmons' representatives visited a proposed new distributor and interviewed the owner to ensure that supplying the new account would not result in future discounting.

"(b) Monitoring the Market

Salesmen's reports indicate that they occasionally monitored retailers who were not maintaining the suggested list price and on seven occasions counselled them to raise their prices. Occasionally the sales personnel were unsuccessful and the problem persisted and on at least six occasions senior personnel became involved to influence the prices upward.

"(c) Refusal to Supply

On two occasions established dealers were refused supply when they refused to adhere to the Simmons suggested retail price. In certain other cases Simmons supplied a private branded line of bedding to a customer rather than allow the Beautyrest line to be discounted.

"(d) Control of Trans-shipping

On two occasions Simmons' sales persons or executives discovered product being sold at discount prices by a retailer who Simmons did not supply. On these occasions they investigated the discounter's source and then warned that party to stop trans-shipping to the discounter. On these two occasions the trans-shipper was ultimately refused supply. Eventually Simmons sought written pledges from certain of the accredited dealers stating that they would not trans-ship so as to control the supply of the Simmons product to discounters.

"(e) Limiting Discount Advertising

Simmons attempted to ensure that their Beautyrest products were not advertised at prices below the suggested list. For certain customers, Simmons influenced the 'off price' advertising by becoming actively involved in the sales promotions, writing the advertising copy, supplying art work and other materials. On occasion, Simmons would demand that the promotional 'suggested retail pricing must be identical to the (manufacturer's) ... suggested retail pricing. In this way other retail stores will be protected and could offer the same value.' For other customers Simmons provided a co-operative advertising program whereby Simmons would pay for a percentage of the retailers advertising costs. Simmons policy in this regard was: 'That we will not participate in the publication of advertisements where the advertised prices are lower than our suggested retail prices'.

"(f) Pricing Control

Simmons maintained strict internal controls over pricing. Careful procedures were adopted to control discounts, clearances of discontinued models and disposition of demonstrator models and salvage. Underlying these procedures was, among other things, concern over eventual retail pricing. Care was taken to see that clearance stock did not find its way into the hands of discounters or off price advertisers."

The price discrimination offences violated ss. 34(1)(a) which provides:

"34.(1) Everyone engaged in a business who

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

...  
is guilty of an indictable offence and is liable to imprisonment for two years."

One of the price maintenance offences involved a "conditional incentive rebate plan" and the other a volume rebate plan, both of which meant

the granting of rebates to some purchasers but not to some competitors of those purchasers on sales of like quality and quantity.

Under the "conditional incentive rebate plan", retailers in the plan received rebates which varied according to the annual increase in the number of Beautyrest brand pieces which they sold. For a number of years annual sales increases of five, ten or fifteen percent brought rebates of 1, 1.5 and 2 percent respectively. According to the the Agreed Statement:

"... a competing purchaser or dealer might receive a rebate based on an increase in his volume of sales which was different than his competitors even though his total sales volume was the same or greater than his competitor. By way of illustration, a purchaser who purchased 100 pieces in 1980 and increased his purchases by 5% to 105 pieces in 1981 receives a rebate of 1.0% whereas a competing purchaser who purchased between 101 and 105 pieces in 1980 and increased his purchases by 5 units or less than 5% in 1981 would receive no rebate even though his overall purchases are the same or greater than the first mentioned purchaser.

"Between 1973 and 1982 Simmons sold Beautyrest products to numerous dealers in Canada in several geographic markets including Halifax, Quebec City, Montreal, Ottawa, Toronto, Kitchener, London, Sarnia, Thunder Bay, Winnipeg, Saskatoon, Calgary, Edmonton and Vancouver. In all of these markets Simmons paid different rebates to dealers who made purchases of like quality and quantity."

Finally, the Agreed Statement describes the volume rebate plan as follows in part:

"Simmons also offered a volume rebate plan to certain of its dealers. This rebate plan was known variously as "The Volume Rebate Plan", "The Volume Discount Plan" and "The Volume Incentive Plan". These discount plans had similar terms and conditions, particulars of which are set out below, although the actual amount of the discount or rebate varied from time to time.

"Prior to implementing each volume rebate or discount plan, Simmons determined the minimum combined total dollar volume of purchases of three product categories (Bedding, Upholstered Goods and Case Goods) for its "Nationally Advertised Lines" that a participating dealer would be required to purchase from Simmons in a given calendar-year in order to be eligible to participate in the scheme. Simmons also determined the number of volume brackets or levels and the corresponding product category rebate percentage that would apply to each volume bracket in any given year.

"Simmons then selected the retail accounts to which it wished to offer a volume rebate plan and determined the purchase volume brackets, as it saw fit, for each participating account. This resulted in an individually-tailored discount plan for each dealer. Following written acceptance of the plan by each participating dealer, each Division of the company notified the Head Office of Simmons of the contract by forwarding to it a copy of the agreement or a copy of a bracket summary report showing the names and brackets for each participating dealer in that Division.

"The structure of the plan led to multiple instances of discriminatory rebates being granted by Simmons. The structural features of the plan which contributed to the discrimination are:

- (a) The initial starting volume bracket varied widely between competitors.
- (b) The range of the volume brackets was inconsistent between competing dealers such that the incremental purchases required to reach a higher rebate bracket varied between dealers.
- (c) For other than the first rebate level, a different percentage rebate was applicable to each of the separate categories of Bedding, Upholstered Goods and Case Goods.
- (d) Although generally consistent between competing dealers, the percentages applicable to a category at any given rebate level occasionally varied between competitors.

"Consequently, a number of competing dealers who did a substantial amount of business with Simmons could not qualify for any rebate under the plan, while competing dealers with smaller dollar purchases from it did receive rebates."

## OUTSIDE THE COURTS

### THRONE SPEECH PROMISES COMBINES ACT REFORMS

"Proposals will be placed before you to improve the market environment by changes in competition laws and the regulatory framework of the financial services industry", the Governor General stated in the Speech from the Throne on November 8. Finance Minister Michael Wilson's paper "A