

The Court commented that the effect of subsection 61(4) is limited to removing the necessity of the Crown proving intent or *mens rea* on the part of the accused insofar as conduct falling within the provisions of the subsection. On the other hand, some commentators have argued that the effect of this decision has been to render the subsection ineffective.

An accused charged with "refusal to supply" a product pursuant to paragraph 61(1)(b) may raise a successful defence if it can be shown that the accused believed, on reasonable grounds, that the person who was refused supplies made a practice of using the products in question as loss-leaders or as a means to attract customers for the purpose of selling other products, engaged in misleading advertising with respect to the product, or failed to provide a reasonable level of servicing. In order to establish the basis for these defences, the accused need not prove that the person refused had observed these practices in fact, but must demonstrate, on a balance of probabilities, that the accused itself had reasonable cause to believe that the customer had acted in such a manner. The reason for refusing to supply a particular person is a question of fact to be decided by the trial court.

Such subsection 61(10) defences are limited, however, and are not available for attempts to influence price upwards under s. 61(1)(a) or for other types of discrimination prohibited under 61(1)(b). The asymmetric application of these defences could lead to a problematic result since a supplier may, without communicating any concerns to its purchaser or dealer, terminate that customer where the supplier has a reasonable belief that the customer is engaged in loss-leading. On the other hand, the same supplier could be held liable under s. 61 if the supplier first communicates its concerns and "threatens" to cut off a customer if the latter does not cease the practice.

One of the first tests of the loss-leader defence is to be found in *R. v. Sunbeam*.<sup>42</sup> The accused established a "minimum profitable resale price plan" ("MPRP") which was designed to maintain resale prices on electric shavers. The MPRP was based on alleged "cost" estimates made by Sunbeam of the "average operating costs" of retailers to whom it sold. It then set resale prices that would cover these costs plus a "reasonable profit". This information was sent to retailers along with a statement that lower prices would be considered "loss-leading" and could lead to a refusal of supplies. Sales personnel then visited dealers in order to persuade them to adhere to prices set by the MPRP. There was no evidence that any loss-leading had in fact occurred and Sunbeam argued that it was attempting to prevent the practice. The Court concluded, however, that the defence could not be used as a

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<sup>42</sup> 1 O.R. 661 (Ont. C.A.) (1967).