IN THE COURTS

R.T.P.C. DECLINES TO UPSET BOMBARDIER'S EXCLUSIVE DEALING ARRANGEMENTS

The Restrictive Trade Practices Commission, in a decision released on October 14, 1980, dismissed an application by the Director of Investigation and Research for an Order under s. 31.4(2) of the Combines Investigation Act prohibiting Bombardier Limited from engaging in exclusive dealing.* It is the first substantive decision by the R.T.P.C. under the 1976 amendments which empowered it to issue remedial orders in respect of specified kinds of restrictive practices. A number of applications by the Director have been withdrawn following settlement of the issues with the parties before completion of proceedings before the Commission.

The Director's application called for an Order that would require Bombardier to cease the practice of exclusive dealing in their snowmobile products and to resupply certain snowmobile dealers that the Company had ceased supplying for carrying a competing line of snowmobiles. The relevant parts of s. 31.4 are:

> "31.4(1) For purposes of this section, 'exclusive dealing' means
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> > (a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to
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> > > (i) deal only or primarily in products supplied by or designated by the supplier or his nominee, or
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> > > (ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or his nominee ...
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> (2) Where, on application by the Director, and after affording every supplier against whom an order is sought a reasonable opportunity to be heard, the Commission finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

*Mr. O.G. Stoner, Chairman, Mr. L.A. Couture, Vice Chairman and Dr. F. Roseman, Member, heard the case.

> (a) impede entry into or expansion of a firm in the market,
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> (b) impede the introduction of a product into or expansion of sales of a product in the market, or
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> (c) have any other exclusionary effect in the market,
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> with the result that competition is or is likely to be lessened substantially, the Commission may make an order directed to all or any of such suppliers prohibiting them from continuing to engage in such exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market."

The Director alleged that Bombardier was a major supplier and that as a result of its exclusive dealing arrangements "the ability of other manufacturers, distributors and retailers of snowmobile products to gain entry into or expand sales in the given markets has been impeded with the result that competition among manufacturers, distributors or retailers has been and is likely to be lessened substantially..." Bombardier admitted it entered into exclusive arrangements with dealers but denied it was a major supplier or that its policy had the effects claimed by the Director.

The Commission found that Bombardier was a "major supplier" at all three market levels and it rejected the view that the legislation intended the term to include only a supplier accounting for the greater part of the relevant market. The markets in this case were Ontario, Quebec and the Maritimes. The Commission stated:

> "A major or important supplier is one whose actions are taken to have an appreciable or significant impact on the markets where it sells. Where available, a firm's market share is a good indication of its importance since its ability to gain market share summarizes its capabilities in a number of dimensions. Other characteristics of a supplier which might be used in assessing its importance in an industry are its financial strength and its record as an innovator. However, the characteristics which are most relevant will vary from industry to industry."

Bombardier's share of North American sales, which the Commission found to be the relevant market at the manufacturing level, was of the order of 30 per cent. At the level of distribution, Bombardier's share of sales in Quebec and the Maritimes was about 60 per cent and in Ontario it was about 40 per cent. In terms of local retail markets, the sales position of Bombardier in the foregoing Provinces suggested to the Commission "a strong market position".

The Commission found, however, that Bombardier's exclusive dealing arrangements had not substantially lessened competition. It found no evidence of such an effect at the manufacturing level, and evidence relating to the entry and expansion of sales and dealerships by Bombardier's competitors did not show a substantial lessening or reduction of competition nor a liklihood thereof.

With regard to manufacturing, the Commission stated:

> "The market areas with which this Application is concerned account for approximately 20 per cent of North American sales. Bombardier accounts for about one half of these sales and, therefore, the current percentage of the North American market affected by an exclusive dealing policy in the markets covered by the Application is 10 per cent. The long-term viability of Bombardier's competitors in manufacturing would not be threatened if they were denied access to that portion of market shares. This conclusion of course has a bearing on the effects, present or likely, of exclusive dealing policy. There is no evidence that its competitors' product offerings or their ability to produce at competitive cost levels have been affected. The evidence, as urged by the Respondent, is, in fact, that there is very active and effective competition in innovation. To the extent that competition has been affected in the market areas involved, the effects have not had any discernible impact at the manufacturing level, nor are they likely to. The existence and continued viability of strong competitors to Bombardier means that the most serious potential effects of an exclusive-dealing policy are not present."

Nevertheless, the Commission added:

> "If firms should effectively be impeded from entering into or expanding in local area markets or broader distribution areas, their strength at the manufacturing level would not be translated into the markets in Ontario, Quebec and the Maritimes, with the result that competition to consumers would be reduced."

There was no doubt, according to the Commission, that the large number of Bombardier dealers were prevented by the exclusive dealing policy of taking on competing brands and were not available as outlets to other suppliers. However, the Commission found that the importance of this was lessened by evidence that entry at the retail level was generally easy, that competing suppliers could and did find other dealers and that the average volume of sales per dealer in Eastern Canada was substantially higher than in the United States.

The Commission noted that North American sales had declined sharply since 1972 and a number of manufacturers had withdrawn from the market. In terms of market shares in the relevant Canadian market, however, the remaining competitors of Bombardier had picked up most of the market shares of the discontinued lines and Bombardier's share had changed relatively little. The Commission concluded:

> "These figures indicate that, at least at a provincial or regional level, Bombardier's competitors were able to overcome whatever barriers to their expansion were created by Bombardier's exclusive dealing policy. In addition, there is no evidence that the level of absolute sales obtained by Bombardier's competitors is insufficient to enable them to support adequate distribution systems. The one exception appears to be Scorpion prior to its merger with Arctic Cat. The evidence is, however, that Scorpion had not made a significant investment in dealer recruitment."

The Commission also stated:

> "A more serious problem would be raised if there were a number of communities where Bombardier was the only dealer. However, there is no evidence on this matter."

The Commission dealt finally with the argument of the Director that the expansion of Bombardier's dealers had been impeded by its exclusive dealing policy with the result that they were prevented from spreading their overhead. The Commission stated:

> "The essential question in applying s. 31.4(2) is whether competition at the retail level would be increased in the absence of Bombardier's policy There is no evidence that dealers who carry more than one brand market more aggressively, employ lower margins or otherwise behave more competitively than single-line dealers."

PRICE MAINTENANCE BAN DOES NOT OUTLAW RESALE PRICE ADVERTISING

The Ontario Court of Appeal held, in a majority judgment on September 23, 1980, that advertisements by a manufacturer showing a resale price for a product do not violate the prohibition of price maintenance unless an attempt to influence the price upward by agreement, threat or promise is proven. The judgment confirmed the acquittal on February 21, 1980 in the Judge's Criminal Court of the County of York of Philips Electronics Ltd. on two counts of price maintenance under s. 38(1)(a) of the Combines Investigation Act. The Crown is appealing to the Supreme Court of Canada.

The charges stemmed from two newspaper advertisements of television cable converters by the accused. The ads listed stores where the converters could be purchased. One of them mentioned a price of "only $44.95" and the other mentioned "$49.95". The relevant parts of s. 38 as amended in 1976 are:

> "38.(1) No person who is engaged in the business of supplying a product...shall, directly or indirectly,
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> > (a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any person engaged in business in Canada supplies or offers to supply or advertises a product within Canada;
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> > .....
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> > (3) For the purposes of this section, a suggestion by a producer or supplier of a product of a resale price or minimum resale price in respect thereof, however arrived at, is, in the absence of proof that the person making the suggestion, in so doing, also made clear to the person to whom the suggestion was made that he was under no obligation to accept the suggestion and would in no way suffer in his business relations with the person making the suggestion or with any other person if he failed to accept the suggestion, proof of an attempt to influence the person to whom the suggestion is made in accordance with the suggestion.

> (4) For the purposes of this section, the publication by a supplier of a product, other than a retailer, of an advertisement that mentions a resale price for the product is an attempt to influence upward the selling price of any person into whose hands the product comes for resale unless the price is so expressed as to make it clear to any person to whose attention the advertisement comes that the product may be sold at a lower price."

Goodman, J.A., in delivering the majority judgment, pointed out that the Crown must prove "not only that an attempt was made by the respondent to influence upward or to discourage the reduction of the price but also that the attempt was made in a manner set forth in s. 38(1)." It was not disputed that the ads constituted an attempt to influence upward or to discourage the reduction of the selling price and were conduct covered by s. 38(4). Counsel for the Crown submitted, in addition, that the effect of s. 38(4) is to deem "for the purposes of this section" that such conduct is a "like means" under s. 38(1)(a). He argued that to interpret s. 38(4) otherwise would render it meaningless and of no effect.

Goodman, J.A. rejected the Crown arguments that the ads constituted a "like means" and that s. 38(4) would otherwise be meaningless. With regard to the first argument, he stated:

> "I am satisfied that the impugned advertisements standing by themselves are in no way similar to an agreement, threat or promise and accordingly are not included within the purview of the words 'any like means'.
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> ...
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> "If Parliament had intended that to be the case, it should have so stated in the section. The fact that it has not done so, is more consistent with the view which I take that it did not intend that such conduct be deemed 'any like means'."

Regarding the argument that s. 38(4) is thereby rendered meaningless he held that, while s. 38(4) does not relieve the Crown of the onus of proving conduct contrary to s. 38(1)(a), it does remove the necessity of proving that conduct described in s. 38(4) constitutes an attempt to influence the price upward. He stated:

> "It is my view that the contents of the advertisements are equally as consistent with an attempt on the part of the respondent to influence its customers not to sell at a higher price as with an attempt to influence its customers not to sell

> at a lower price. Indeed, in the face of such an advertisement, it would be most difficult for such customers to extract higher prices from the ultimate consumers but it would be much easier for them to sell the product, if they offered to sell it at a price lower than those advertised by the respondent. It can readily be seen therefore that merely proving publication of the advertisement would not discharge the onus on the Crown to prove an attempt under s. 38(1), in the absence of the provisions of s. 38(4). Parliament has, however, by enacting s. 38(4), relieved the Crown of the burden of showing that conduct described in s. 38(4) constitutes an attempt. The Crown need only prove the conduct. Once proven, it constitutes an attempt notwithstanding any evidence adduced or argument which might be made by an accused that it had an entirely different purpose, no matter how compelling such evidence an argument might be. To that extent the provisions of s. 38(4) are very meaningful and effective and this is so even though the section is not given the interpretation suggested by the applicant, namely, that the conduct set out in s. 38(4) should be deemed 'any like means' within the meaning of s. 38(1). In effect it removes the necessity of the Crown proving intent or 'mens rea' on the part of the accused in so far as conduct falling within the provisions of s. 38(4) is concerned."

Goodman, J.A. applied the same reasoning to s. 38(3). He stated:

> "It is clear that under s. 38(3) a producer or supplier of a product may suggest a resale price or minimum resale price provided that he otherwise complies with the provisions of the section."

Crown counsel cited s. 11 of the Interpretation Act which provides:

> "11. Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

He submitted it was the duty of the Court to give effect to the intention of Parliament and to adopt a construction of the Statute which would best effect that intention.

Goodman, J.A. pointed to s. 3(3) of the Interpretation Act which provides:

> "3(3) Nothing in this Act excludes the application to an enactment of a rule of construction applicable thereto and not inconsistent with this Act."

And he stated:

> "Although there can be no doubt that s. 11 applies to the penal provisions of any Canadian statute, I am of the opinion that the application of the common law principle requiring strict interpretation of the provisions of a penal statute to such statute is not inconsistent with the provisions of that section."

Mr. Justice Jessup dissented and would have directed a verdict of guilty. He described s. 11 of the Interpretation Act as "a clear and mandatory directive" and held that a strict interpretation of s. 38 in accordance with common law principles was not required. He stated:

> "...the (federal and provincial) Interpretation Acts are not confined to remedying defects in the common law but rather direct the interpreter of a statutory provision to effect its object, i.e. its purpose or intent, which may be one of positive social utility.
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> ...
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> "I have expressed my opinion in (Xerox of Canada Limited v. Regional Assessment Commissioner, July 14, 1980, unreported) as to the limited application of the common law principle of 'ambiguity' permitted by section 11, i.e. the principle can only be invoked where the object, intent or purpose of a section to be construed cannot be ascertained even by giving its words a fair, large and liberal construction. My brother Goodman quotes section 3(3) of the federal act but as it clearly implicit in Robinson* the other common law principles of construction are also, almost entirely, inconsistent with section 11 for the simple reason that they also deny or diminish the factor of intent that is the governing factor under section 11."

Regarding s. 38 of the Combines Investigation Act, he stated:

* R. v. Robinson(1951), S.C.R. 522

> "In this case the words 'any like means' are clearly intended to have a very broad meaning because they must embrace means as diverse as those like an agreement, threat or promise. Then, the plain purpose of sections 38(3) and (4) is to proscribe the suggestions or advertisements (a subtle form of suggestion) therein described. It is, therefore, clear to me that to effect the purpose or intent of section 38 as a whole 'like means' must be taken to include the advertisements in this case."

SUPREME COURT OF ONTARIO HOLDS RIGHT OF CIVIL ACTION UNDER COMBINES LAW UNCONSTITUTIONAL

The Supreme Court of Ontario, in a judgment by Mr. Justice J. Holland on June 5, 1980, has held that s. 31.1 of the Combines Investigation Act is ultra vires of the Parliament of Canada (Seiko Time Canada Ltd. and Consumers Distributing Company Limited). S. 31.1, which came into force in 1976, provides a right of civil action where a person has suffered loss or damage as a result of conduct contrary to Part V of the Act or failure of any person to comply with an order of the Restrictive Trade Practices Commission or a Court under the Act.

Seiko, in its suit against Consumers sought, inter alia, damages at common law and under s. 31.1 for advertising and selling Seiko watches. Seiko, which has the exclusive distributorship in Canada, claimed that the product marketed in Canada by it under the Seiko name was a watch bearing the Seiko name, warranty and service. Seiko claimed that Consumers was advertising and selling a different product, being a watch bearing the Seiko name but lacking Seiko point of sale service, warranty and after service, thereby confusing and misleading the public and that this was 'passing off' both at common law and under s. 7 of the Trade Marks Act.

The Court found for the Plaintiff by virtue of the common law test of 'passing off' although, relying upon MacDonald et al v. Vapor Canada Limited (1977) 2. S.C.R. 134, it declared s. 7 of the Trade Marks Act to be ultra vires.

The Court was satisfied that the Plaintiff had suffered recoverable damage even without the assistance of s. 31.1 of the Combines Investigation Act but pointed out that the amount might differ if s. 31.1 were intra vires. For purposes of his judgment Holland, J. was prepared to assume without finding this as a fact that an offence under the Combines Investigation Act had been committed.

In finding that s. 31.1 was ultra vires he stated that "The ratio of the MacDonald case is equally applicable to s. 31.1". He also took into account two other recent cases (both of which are described in the June issue of the Record). In the first, Rocois Construction Inc. v. Quebec Ready Mix Inc. et al. (1979) 51 C.C.C. (2d) 516, the Federal Court of Canada, Trial Division, found the parts of s. 31.1 with which it was concerned to be ultra vires. In the second, Regina v. Hoffman-LaRoche Limited the Supreme Court of Ontario, in convicting the accused of an offence under s. 34(1)(c) of the Combines Investigation Act, held that the Act is supportable under all three relevant provisions of s. 91 of the British North America Act - peace, order and good government, Head 2 (trade and commerce) and Head 27 (criminal law). That judgment was referring to the Act generally and did not refer specifically to s. 31.1 which is peripheral to other sections. Both cases are under appeal. Holland, J. stated:

> "It is argued that (the Rocois) decision is is in conflict with the decision of Linden J. of this Court in Regina v. Hoffman-LaRoche Limited... In that case Linden J. was dealing with the criminal power of the Parliament of Canada and considering whether s. 31 was supportable under s. 91(27). These cases are not in conflict. One is a civil action dealing with the powers of the Parliament of Canada to legislate regarding trade and commerce, whereas the other addresses the power of Parliament in relation to criminal matters.
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> "In the present case, I am concerned only with a civil action for damages from tort, and not at all with the criminal jurisdiction of Parliament."

Seiko has appealed the decision that s. 31.1 is unconstitutional and Consumers has appealed the decision respecting the common law test of "passing off".

The September issue of the Record describes another judgment which was delivered by the Court of Queen's Bench of Alberta very shortly after Seiko. That Court held s. 31.1 to be within the legislative competence of the Parliament of Canada as legislation pertaining to the general regulation of trade and commerce throughout Canada under Head 91(2) of the British North America Act. The Court found, however, that s. 31.1 could not be sustained under the peace, order and good government power or as criminal law. The decision was on a pre-trial motion relating to an action by Henuset Bros. Ltd. against Syncrude Canada Ltd., Alberta Energy Company Ltd. et al.

R.T.P.C. HEARS ARGUMENT ON INTER-CONNECTIONS IN TELECOMMUNICATIONS INQUIRY

The Director of Investigation and Research under the Combines Investigation Act, Bell Canada, Northern Telecom Ltd. and the Government of Ontario presented arguments relating to interconnection of subscriber owned equipment before the Restrictive Trade Practices Commission in hearings which were held in September and October 1980.

The hearings were in the context of the Telecommunication Equipment Inquiry which was commenced in 1975 as a general inquiry under s. 47 of the Combines Investigation Act. In his Statement of Material filed in 1976, the Director called for a recommendation by the Commission that Bell be required to divest itself of its interests in Northern. The Commission called the September hearings in order to permit the parties to sum up their cases in respect to the interconnections phase of the inquiry. That aspect of the inquiry is of particular importance at the present time because of the recent interim decision by the C.R.T.C. to require Bell to permit interconnections (see September issue of the Record). The C.R.T.C. will hold hearings in the spring of 1981 before final disposition of the matter. For its part, the R.T.P.C. plans to issue its report in two parts, the first dealing with interconnections and the second with vertical integration.

All parties at the R.T.P.C. hearing expressed support at least in principle for a liberalized interconnections policy. However, except for the Director of Investigation and Research, they made their support conditional upon the introduction of some means to protect Canadian industry from excessive imports which they feared would follow.

The Director of Investigation and Research called for enactment of the C.R.T.C. interim decision in permanent form along with two additional procedures. First, the C.R.T.C. should establish a procedure whereby any carrier may obtain a waiver from C.R.T.C. interconnection requirements where the carrier establishes to the satisfaction of the C.R.T.C. that the carrier has suffered economic harm as a result of liberalized attachment policies. Second, he argued that the C.R.T.C. should "unbundle its rates for terminal equipment service in a fashion which provides separate equipment and network charges."

The Director also took the position that Bell, in addition to its regulated activities, should be permitted to complete indirectly with other interconnect companies in the sale of equipment, subject to the following limitations:

"1. Bell Canada should be prohibited from engaging directly or indirectly, in the direct sale of terminal equipment on any subscriber's premises unless such activity is carried out through a separate arms length subsidiary to which Bell Canada has contributed no financing.

2. Bell Canada should be prohibited from obtaining an exclusive distributorship for equipment of any manufacturer, including Northern Telecom, with respect to Bell Canada's activities, directly or indirectly, in the direct sale equipment market.

3. Bell Canada should be prohibited from granting itself, directly or indirectly, a preference in the configuration or arrangement of terminal equipment sold to subscribers where competitors are not permitted to install subscriber owned equipment on the basis of similar configurations or arrangements.

4. Any Bell Canada subsidiary engaged in the direct sale of equipment should be prohibited from acquiring inside wiring owned by Bell Canada at terms less favourable than its competitors.

5. Bell Canada should be prohibited for a period of five years from acquiring, directly or indirectly, any company competing directly or indirectly with Bell Canada with respect to the sale of equipment."

Bell Canada, while supporting a liberalized interconnection policy, took the position that it should be implemented on a national basis and be accompanied by measures to ensure that Canadian equipment producers can compete effectively with imports. Bell argued that those measures should include:

"(a) The right of Bell Canada to compete on equal terms for the terminal market with all other participants, including all other telephone companies, subject only to a requirement to be imposed by the CRTC that Bell Canada demonstrate to it that its activities in the terminal market on a global basis are not being subsidized by its regulated activities. The public interest is that subscribers of Bell Canada should not subsidize Bell Canada's activities in the competitive marketplace;

b) Apart from the regulation suggested above Bell Canada should be subject, as its competitors are, only to laws of general application ensuring that it does not engage in predatory pricing so that its competitors will not have any advantage over it in this area;

c) as the Clyne Committee suggested, Canada should follow some of the practices used by almost every other country in the world to ensure that its telecommunications industry has the advantages enjoyed by others;

d) The Buy-Canadian policy now being pursued by the federal government should be reinforced and should be supported by all provincial governments;

e) Canada should make available to the industry, assistance to foster research and development which is as generous as that provided by Canada's principal competitors in this field;

f) Canada should, as various government studies have suggested, adopt a policy of reciprocity in the terminal field and should employ whatever methods are necessary to ensure this result; and

g) The federal and provincial governments should work together to develop a network applicable to the whole of Canada for the introduction of terminal attachment;"

Bell emphasized that a company would require substantial resources to be successful in the interconnect market and opportunities would be limited largely to a few very efficient companies. In support of affiliations of equipment producers with telephone companies, Bell stated:

"14) The present success of the Bell/Northern Group has been the result of the close working relationship which Northern has enjoyed with Bell Canada. A similar relationship seems to be developing between B.C. Tel. and A.E.L. Microtel. Major unaffiliated Canadian suppliers such as Mitel should be encouraged to become affiliated with an unaffiliated Canadian telephone company in order to get the advantages derivable from such a relationship;"

Northern Telecom, while expressing the view that some form of interconnect policy was inevitable, took the position that a distinctly Canadian solution to the problem of import competition would have to be developed. The company did not regard any of the proposals which had so far been advanced as entirely satisfactory, and it emphasized that the United States open market approach was not suitable for Canada.

A representative of the Government of Ontario appeared at the hearing to support a petition which it had made to the Government of Canada on August 18 to vary the interim decision of the C.R.T.C. in order to establish a principle of reciprocity respecting imports. The letter of August 18 stated in part:

> "Telecom Decision CRTC 80-13 does not take into consideration the importance of encouraging the development of Canadian manufacturing in the telecommunications sector. There is nothing in the decision which would in any way inhibit foreign manufacturers from exporting to Canada while many of these countries effectively preclude the import of Canadian manufactured telecommunications goods and equipment. In fact, in my view the decision would encourage this.
>
> I would therefore petition His Excellency to vary Telecom Decision CRTC 80-13 to permit the interconnection of equipment to Bell Canada's network only from those countries which allow Canadian-manufactured equipment to be similarly imported and connected. I fully recognize the benefits to consumers of freer terminal attachment policies and would in no way suggest a reversal of the C.R.T.C. decision. However, Canada must take steps - at this early stage - to ensure that its own manufacturers will have the opportunity to compete fairly in the world market and maintain a strong telecommunications manufacturing sector in Canada. The federal government could put to good use the period between the interim and final decisions on this matter to seek modifications in the procurement policies of other countries in a manner consistent with the principle of reciprocity. The Government of Ontario would be willing to co-operate in such an endeavour."

GARBAGE COLLECTION CONTRACTORS ACQUITTED ON CONSPIRACY COUNT

The Manitoba Court of Queen's Bench, in a judgment by Mr. Justice Hunt on December 1, 1980, acquitted three garbage collection contractors on one count under s. 32(1)(c) of the Combines Investigation Act as it was before the amendments of 1976. Those acquitted were:

Browning-Ferris Industries of Winnipeg (1974) Ltd.

Acme Sanitation Services Ltd.

Haul-A-Way Waste Services Ltd. (later amalgamated with with Acme and continuing as Acme Sanitation Services (1979) Ltd.

The charge was to the effect that they had fixed the minimum prices at which waste disposal containers would be rented or supplied to the public. During the period 1974-5 to which the charge related, s. 32(1)(c) applied inter alia to the rental or supply of an article but until 1976 did not apply generally to services.

According to the judgment, the parties met, considered a rate schedule for garbage removal services which one of the parties had issued to its salesmen, agreed to the reasonableness of the charges, and also to abide by them more or less. However, Hunt, J. found that what had been agreed was not a true rental. He stated:

> "It is clear from the evidence that customers were charged at a monthly rate for the furnishing of a disposal container to collect garbage for pick-up and disposal by the parties concerned. It also included a rate noted as 'per pick-up', depending upon the size of the box concerned. It is also clear that the boxes were not available for rental, except as incidental to the service being provided by the accused. None of the boxes would be supplied to a customer for full use by himself or for pick-up and disposal by himself or others. This, in my opinion, is not a true rental.
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> ...
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> "I find that the supply of disposal containers by the accused, for the purpose of gathering garbage, so that it might be picked up and disposed of by the equipment of the accused, was not a rental, but was a service, incidental to the removal of the garbage, and an integral part of the contract to pick-up and dispose of the garbage concerned."

While stating that the foregoing would be enough to dispose of the matter, he also dealt with some other aspects of the evidence. He found that, although it was not incumbent upon the Crown to prove a monopoly, the accused had controlled less than half the market, and he took into account evidence that whatever agreement had been entered into had not been very effective in practice. He stated:

> "From the evidence it appears that there continued to be competition, even among the parties concerned, and that there was no lessening thereof. They did not, among all of them, control, or have a monopoly over even one-half of the market concerned. There continued to be discounts offered by all parties, and they each continued to service the proportionate percentage of the market which they had before. There is no evidence that there was a prevention or a lessening of competition, and, therefore, no evidence that whatever agreements may have been entered into were 'undue'...
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> ...In my opinion the parties met; they considered the state of the market; they considered rates set by the company holding the largest percentage of the market, and in order to bring some order out of chaos. While this may have resulted in conscious parallelism of prices, it is not evidence to establish undue limitation of competition. Not enough of the market was involved."

JEANS MANUFACTURER GUILTY OF RESALE PRICE MAINTENANCE

The Court of Sessions of the Peace, District of Montreal, in a lengthy judgment by Judge Marcel Beauchemin on November 19, 1980, convicted H.D. Lee of Canada Ltd. on four counts under s. 38 of the Combines Investigation Act as it was prior to 1976.

The offences all occurred in 1971 and the Information was laid in 1974. One count involved refusal by Lee to supply jeans to Army and Navy Department Stores Limited because the latter had resold or offered to resell at less than a specified price. The Court also held that on the evidence the defences of loss-leader selling, bait and switch, and failure to provide a reasonable level of servicing (paragraphs 38(5)(a), (b) and (d)) did not apply in this case. The other counts involved inducing Hudson's Bay Company and attempting to induce Army and Navy and Birt Saddlery Company to resell at a specified price. The offences occurred in Montreal, Winnipeg and Regina.

COMPETITION DIRECTOR WITHDRAWS REFUSAL TO DEAL CASE AGAINST OIL COMPANIES

The Director of Investigation and Research, Combines Investigation Act, has withdrawn his application to the Restrictive Trade Practices Commission for an Order under s. 31.2 of the Act requiring Imperial Oil, Petrofina and Irving Oil to supply Perrette Dairy Limited with gasoline on usual trade terms.

S. 31.2 empowers the R.T.P.C. to issue a remedial order where it finds that:

> "(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,
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> (b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,
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> (c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of such product, and
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> (d) the product is in ample supply,"

According to the Director's application, which was made in November, 1979, Perrette operates a chain of convenience stores in the Province of Quebec, of which 32 have gasoline bars. By July, 1979 Perrette, which was being supplied by sources other than the Respondents, was only able to operate its gas bars at about 60 per cent of the normal level. Imperial and Petrofina would not agree to supply except on a consignment basis and Irving's policy was not to sell to independent distributors. In July, Perrette called for tenders from 19 suppliers but none was willing to supply. About fifteen days of hearings were held before the R.T.P.C., at which the Respondents placed heavy emphasis upon the gasoline shortages which were experienced in 1979.

In his letter of withdrawal, dated October 8, 1980, Mr. J. Claude Thivierge, Q.C., Deputy Director, indicated that, while Perrette's requirements had not been fully met, it had arranged for new supplies and was no longer being substantially affected in its business. He stated:

> "The Director's objective in this case was to secure supplies for Perrette. Furthermore, the Director was concerned with the viability of the entire independent reseller sector. Perrette, an expanding reseller of gasoline, was a dynamic new entrant into the Quebec gasoline retailing market. Perrette's inability to obtain adequate supplies of gasoline not only affected Perrette as a competitor of the vertically integrated branded retailers, but, in the Director's opinion, it was likely to affect entry and expansion of others, thereby affecting competition in the gasoline retail market."
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> "Although Perrette has, at this time, succeeded in obtaining supplies of gasoline, the record in this case indicates that the situation of the independent reseller sector in general continues to be difficult. The Director remains concerned that refiners do not foreclose entry or expansion by independent resellers by means other than superior performance, on a sustained basis, in supplying goods and services to the public."

An official of Imperial Oil made the following comment upon the Director's decision to withdraw the application:

> "We are pleased that the director has made this decision as Imperial believes that the Commission would not be satisfied that the facts justify an order to supply.
>
> "It was always Imperial's contention that Perrette's difficulty in obtaining gasoline was due to inadequate supply in the Quebec market and not due to lack of competition. In fact gasoline supplies during the period in question were barely adequate to meet the normal requirement of our existing customers."

Consumer and Corporate Affairs Minister Andre Ouellet commented favourably on the outcome of the case in a speech on November 26 to the Canadian Federation of Independent Petroleum Marketers. After noting that steps had been taken by the Government to enable independents to acquire crude oil from Alberta through the Interprovincial Pipe Line for conversion by eastern refineries and that Petro-Canada had become a significant new source of supply, he stated:

"Should, however, the denial of refining services impair your processing crude for your own needs, then I will ask for an application to be made to the Restrictive Trade Practices Commission for an order requiring a refiner to process. Since refinery capacity in Ontario and Quebec is not in short supply, the Commission has jurisdiction to look carefully into whether any particular instance of a refusal to supply refining services gives it sufficient grounds to issue an order requiring a refiner to enter into a processing agreement."

R.T.P.C. COMMENCES HEARINGS ON BBM BUREAU OF MEASUREMENT TIED SELLING CASE

Public hearings were held on November 25 through 27, 1980 before the Restrictive Trade Practices Commission on an application by the Competition Director in respect of BBM Bureau of Broadcast Measurement. Further hearings were expected to be held in December and in 1981.

The Director has applied for an Order by the Commission under s. 31.4(2) of the Combines Investigation Act prohibiting BBM "from continuing to engage in tied selling and containing any other requirement that, in the opinion of the Commission, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market". BBM supplies data on Canadian radio and television audiences to broadcasting stations, station representatives, advertisers and advertising agencies. According to the application, BBM is the sole supplier of the radio data and a major supplier of the television data. A.C. Neilson Company of Canada Limited is also a supplier of television data. The Director alleges that BBM induces its station representative and advertising agency member subscribers to acquire its television data by offering to supply its radio data on more favorable terms than if they only acquire the latter. Discounts on the price of the radio data are said to range from 58 to 96 per cent depending upon class and size of subscriber. The Director alleges that the tied selling is likely to :

"(a) impede the expansion of A.C. Neilson Company Limited or of its sales of 'television data' in 'the market';

(b) impede the entry of other firms or the introduction or expansion of their sales of 'television data' in 'the market'; or

(c) eliminate or reduce the sales of 'television data' by A.C. Neilson Company of Canada Limited or by other firms in 'the market',

with the result that competition in the supply of 'television data' in 'the market' has been and/or is likely to be lessened substantially."

BBM has denied many of the alleged facts as well as the alleged results.