RECENT DEVELOPMENTS IN THE COMPETITION POLICY TREATMENT OF TIED SELLING IN THE U.S. AND CANADA

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The recent decision of the U.S. Supreme Court in Jefferson Parish Hospital District No. 2 v. Hyde marks a potential watershed in the antitrust treatment of tied selling - a form of vertical restraint in which one product or service is offered for sale on condition that another also be purchased.[1] The Court's majority opinion did not overturn the U.S. "per se" rule against tying, but its acceptance of the arrangement in this case manifests an increasingly tolerant approach to tying and the related practice of exclusive dealing. The U.S. Vertical Restraints Guidelines, released by the Department of Justice on January 23, 1985, re-inforce the new liberal treatment of these practices.[2] In Canada, the decisions of the Restrictive Trade Practices Commission and the Federal Court in the case of B.B.M. Bureau of Measurement have provided some guidance on the application of the tying provisions of Part IV.1 of the Combines Investigation Act.[3] In addition, the case of Consumers Distributing Co. Ltd. v. Seiko Time Canada Ltd., decided by the Supreme Court of Canada on June 21, 1984, has helped to clarify the status of vertical restraints in relation to other aspects of commercial law.[4]

This article surveys these developments, in the context of existing Canadian and U.S. law. In particular, Part I reviews the evolution of the U.S. antitrust treatment of tied selling prior to the Hyde case. Part II examines the majority opinion of the U.S. Supreme Court in Hyde, as well as the more far-reaching opinion of Madame Justice Sandra Day O'Connor in the case. Part III reviews the treatment of tied selling under the Combines Investigation Act, noting the similarity of the Canadian law to the emerging permissive standard of review for tying in the U.S. Part IV reflects on the competition policy significance of tied selling.

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I. The Antitrust Treatment of Tied Selling in the U.S.

In the U.S. tying arrangements were first considered by the Supreme Court in the context of cases involving the exploitation of patents. The 1912 case of Henry v. A.B. Dick Co. involved the sale of a patented mimeograph machine on the condition that buyers also purchase ink and related supplies exclusively from the patent holder.[5] The Court considered but rejected an argument that this arrangement violated section 1 of the Sherman Act, in that it expanded the manufacturer's patent monopoly beyond its intended scope.[6] Concern about extension of monopoly power through tying arrangements was buttressed by the passage of the U.S. Clayton Act in 1914 and the accompanying Congressional policy statements. The House of Representatives' Report on the Clayton Act stated: "Where the (firm) making these contracts is already great and powerful,...the exclusive or 'tying' contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man."[7] Section 3 of the Clayton Act prohibits tying arrangements and exclusive dealing, involving patented or unpatented goods, where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Under this provision, a contract tying the lease of patent shoe machinery to purchase of related supplies from the patent holder was held illegal by the Supreme Court in United Shoe Machinery Corp. v. United States in 1922.[8]

In the 1947 case of International Salt Co. v. United States, the Supreme Court ruled a tying arrangement to be illegal per se under both section 1 of the Sherman Act and section 3 of the Clayton Act.[9] The case involved an agreement tying the lease of the International Salt Co.'s patented salt dispensing machines to the purchase of salt and salt tablets exclusively from the Company. The Court stated that, "It is unreasonable, per se, to foreclose competition in any substantial market." The case is also important because the Court inferred the existence of substantial market power on the part of the Company from the existence of the patents on its machines. In subsequent tying cases, the courts have repeatedly found the existence of a patent or copyright to justify the presumption of substantial market power in the tying product market.[10] The Court explained the basis of its policy on tying in the 1953 case of Times-Picayune Publishing Co. v. United States. It stated "the essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next."[11] This view became known as the "leveraging" theory.

The per se rule on tying under section 1 of the Sherman Act was affirmed by the Court in 1958 in Northern Pacific Railway Co. v. United States.[12] This case involved an arrangement tying the sale of land by the Northern Pacific Railway Co. to shipment of goods produced or manufactured on the land via the Northern Pacific. In declaring the arrangement illegal, the Court set out two threshold elements for application of the per se rule: (i) sufficient economic power with respect to the tying (original) product market to appreciably restrain free competition in the market for the tied product; and

(ii) impact on a 'not insubstantial' amount of interstate commerce. The Court's strict rule against tying was in contrast to its more lenient policy on exclusive dealing, which is prohibited only in cases of proven anti-competitive impact.[13]

The 1969 case of Fortner Enterprises v. United States Steel Corp. ("Fortner I") revealed some of the problems inherent in the Supreme Court's policy on tying and ultimately forced a partial re-consideration of the policy.[14] The case involved the provision of low-cost credit by U.S. Steel for purchase of pre-fabricated homes from the Corporation. In a five-to-four split, the Supreme Court remanded the case for trial, on the basis that the arrangement tied the sale of credit (the "tying product") to the sale of houses (the "tied product") and the amount of commerce in the tied product market was substantial.[15] Following trial of the case, the issues were re-considered by the Supreme Court in United States Steel Corp. v. Fortner Enterprises ("Fortner II") (1977).[16] The second judgement reflects a partial reconsideration and retreat by the Court from the stand taken in Fortner I. The Court upheld the legality of the arrangement, reasoning that "the unusual credit bargain offered to Fortner proves nothing more than a willingness to provide cheap financing in order to sell expensive houses." The Court's opinion in Fortner II underscores the importance of an additional, now generally accepted, threshold element in tying cases: a coherent basis for viewing the tied and tying products as separate.

In recent years the per se rule and the underlying leveraging theory have been subjected to increasing criticism. The critics have pointed out that a seller with monopoly power in one market would have to accept lower profits in that market in order to obtain monopoly power in a second market.[17] Regarding the use of tying in patent cases, the critics have suggested that the tying of patented capital equipment and complementary goods is probably efficient, in terms of facilitating rapid introduction of new technology in the marketplace and wider use of patent inventions. Specifically, tying can enable a manufacturer to 'meter' differences in demand among users, thereby obtaining payments based on their differing valuations of the technology.[18] Tying may also be viewed as facilitating efficient sharing and reduction of the risks associated with investment in new technology.[19] In either case, tying can contribute to earlier introduction and expanded use of the new technology.

The possible anti-competitive impact of tying generally lies not in the "leveraging" of monopoly power from one market to another, but in raising entry barriers in the original product market. In most instances tied selling also entails exclusive dealing, insofar as the manufacturer requires the buyer to purchase the tied product exclusively from him. This exclusive dealing aspect of tying can raise the level of entry barriers by requiring a potential entrant to enter both the tying and tied product markets simultaneously.[20] As discussed in Section IV, this horizontal, entry-deterring effect is recognized as the primary concern raised by tying in the new U.S. Vertical Restraints Guidelines. These changing perceptions regarding the role of tied selling form the background to the U.S. Supreme Court decision in the Hyde case.

II. The Hyde Case and its Implications

In Jefferson Parish Hospital District No. 2 v. Hyde, the U.S. Supreme Court considered the validity of an arrangement requiring patients undergoing surgery at East Jefferson Hospital to use exclusively the anesthesiological services of Roux and Associates, a professional medical corporation. East Jefferson Hospital is located in Jefferson Parish, a suburban community near New Orleans, Louisiana. In 1971 the hospital signed a five year contract with Roux giving the Corporation control over admittance of anesthesiologists to the hospital's staff, and providing that all anesthesiological services in the hospital be performed by Roux. The essential provisions of the contract were renewed for a further 5 years in 1976.

In July 1977, the respondent, Edwin G. Hyde, applied for admission to the Hospital's staff as a practising anesthesiologist. The hospital's medical executive committee recommended approval, but the hospital's board rejected the application, citing its exclusive contract with Roux. Hyde then commenced a private action in the local District Court, seeking a declaration that the hospital's contract with Roux was unlawful under section 1 of the Sherman Act. The District Court denied relief, holding that the anti-competitive effects of the contract were minimal and were outweighed by significant patient health care benefits.[21] The Court of Appeals for the Fifth Circuit reversed the trial court decision, holding that the arrangement tied the sale of hospital services (the tying product) to the purchase of anesthesiological services (the tied product) and was illegal per se under section 1.[22] On March 27, 1984, the U.S. Supreme Court reversed the Court of Appeals' decision, upholding the validity of the contract.

The majority of the Supreme Court, in its opinion by Mr. Justice Stevens, did not overturn the per se rule against tying, but narrowed its application by taking a stricter approach to the threshold requirements of the rule. In essence, the majority held that the rule applies only if (i) the seller has substantial market power in the tying product market; and (ii) there is a substantial adverse effect ("forcing") in the tied product market.[23] In this case, Justice Stevens emphasized that there are at least 20 hospitals in the New Orleans metropolitan area, and about 70% of the patients residing in Jefferson Parish go to hospitals other than East Jefferson. On this basis, the Court concluded that the Hospital lacked both the requisite market power in the hospital services market and the ability to "force" consumers' decisions in the market for anesthesiological services. The majority considered but rejected an argument that the Hospital's market power was enhanced by special characteristics of the hospital market, such as the prevalence of third party health insurance plans and the alleged resulting lack of price consciousness by consumers.[24]

The decision not to apply the per se rule against tying in Hyde is important, in that it manifests the increasingly tolerant treatment of vertical restraints by the Supreme Court.[25] Nevertheless, in our view the majority

opinion of the Court remains mired in an excessively structuralist approach to the evaluation of such restraints. In particular, it continues to refer to the possible anti-competitive effect of tying in terms of "forcing", a concept reminiscent of the now-discredited leveraging theory. It also takes a narrow approach to the single product-or-two products issue raised in the case, maintaining that this issue turns only on the nature of the demand for the products, and not on the functional relation between them.[26] Finally, while effectively diluting the per se rule by placing new emphasis on its "threshold" requirements, the majority paradoxically maintains that "It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se'."[27]

In contrast, the strongly-worded opinion of Madame Justice Sandra Day O'Connor in the case, concurring with the majority in result, calls for a new, explicitly behavioural approach to the treatment of tying, urging that "the time has...come to abandon the 'per se' label." She argues that the threshold elements of the 'per se' approach to tying have always required a detailed analysis of the effects of the practice in each case. Moreover, tying should not be subject to a stricter standard than other non-price vertical restraints which, like tying, may be harmful or beneficial in particular cases.[28] Her opinion was joined in by Chief Justice Warren Burger and two other judges.

Justice O'Connor bases her decision to uphold the agreement on the ground that "there is no sound economic reason for treating surgery and anesthesia as separate services."[29] Since patients are interested in purchasing anesthesiological services only in conjunction with hospital services, the Hospital cannot acquire additional market power by selling the two services together.[30] Justice O'Connor also found that the Hospital's arrangement with Roux improves patient care and facilitates efficient operation of the hospital in several ways, including: (i) standardization of medical procedures; (ii) more effective monitoring of the quality of service; and (iii) more efficient screening of the anesthesiologists than could be undertaken by patients. The tie also made possible more efficient utilization of the anethesiologists' time than would occur in an "open" market.[31] Such efficiencies of team production and service bundling were the primary rationale for the tying arrangement in the case.

One particular aspect of the majority opinion of the Court bears further comment, as it is very likely to resurface in future tying cases involving intellectual property rights. In discussing the threshold requirement of market power in the tying product market, Justice Stevens stated:

> If the government has granted a seller a patent or similar monopoly over the product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power. Any effort to enlarge the scope of the patent monopoly by using the market power it confers to restrain competition in the market for

> the second product will undermine competition on the merits in that second market. Thus, the sale or lease of a patented item on condition that the buyer make all his purchases of a separate tied product from the patentee is unlawful.[32]

The Court thus affirmed its previous holding that the existence of a patent or copyright satisfies the threshold requirement for per se prohibition of tying.

The Court's patent dictum is misleading, in that it overlooks the above-noted efficiency benefits of tying in the sale or lease of patented capital equipment. Further, while patents can be an important source of market power, they should not be assumed to create such power in all cases. In cases where the relevant product market is broader than the scope of the patent, the availability of substitutes may prevent the exercise of market power. As J. Paul McGrath, U.S. Associate Attorney General for Antitrust, has subsequently observed, "Whether or not a patent produces any market power is a factual question that can only be resolved by the same detailed economic analysis that would be required to determine whether any other asset produced market power."[33]

III. The Competition Policy Treatment of Tied Selling in Canada

In Canada, tying arrangements were not specifically covered by provisions of the Combines Investigation Act until the coming into force of Part IV.1 of the Act, as part of the Stage I amendments in 1976. Prior to that time such arrangements were subject to the ancient common law doctrine of restraint of trade, particularly when they also involved exclusive dealing. The doctrine of restraint of trade applies to agreements whereby "one party agrees with another party to restrict his liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses."[34] Under the test laid down by Lord Macnaghten in the Nordenfelt case, such agreements are unenforceable if they are unreasonable with respect to the interests of the parties or the public interest.[35]

The common law doctrine is potentially applicable to a broad range of tying arrangements, since tying usually involves the purchaser agreeing to buy the tied good exclusively from the seller. In the past, Canadian courts have declined to give substantial force to the doctrine. In its 1975 decision in the case of Stephens v. Gulf Oil Canada Ltd., the Ontario Court of Appeal reversed a trial court decision that an exclusive arrangement between Gulf Canada and a Gulf service station owner was unenforceable under the Nordenfelt test.[36] The arrangement required the station owner to deal exclusively in Gulf products and gave Gulf a right of first refusal on resale of the station. The trial court considered that the agreement was unreasonable both as between the parties and with respect to the public interest, since such agreements raise entry barriers in the oil refining and related industries by foreclosing retail outlets to suppliers.[37] The Court of Appeal's decision appeared to narrow the scope for application of the common law doctrine in future cases.[38]

The need for statutory provisions to deal with tied selling and exclusive dealing in Canada was identified in the context of the automobile service station industry, in the 1962 TBA Report of the Restrictive Trade Practices Commission (RTPC).[39] In this report, the Commission undertook a systematic examination of the sale of tires, batteries, accessories (TBA) and other non-gasoline products by service stations, particularly those subject to franchises or other forms of vertical control. Based on perceived evidence of monopolistic abuse, the Commission recommended that tied selling and exclusive dealing should be prohibited when they are "likely to lessen competition substantially, tend to create a monopoly or exclude competitors from a market to a significant degree." The need for such provisions was supported by the Economic Council of Canada's Interim Report on Competition Policy in 1969.[40] These recommendations led to the enactment of section 31.4 of the Combines Investigation Act in 1976, to deal with tied selling, exclusive dealing and market restriction, along with related amendments to govern refusal to deal and consignment selling, and to bring service industries within the scope of the Act.

For the purposes of section 31.4, tied selling is defined broadly, to include both (i) its classic form, where sale of the tying product is conditional on purchase of the tied product from the same manufacturer or a designated supplier; and (ii) discounts or inducements to purchase the tied product with the tying product. Under section 31.4, the RTPC may make an order prohibiting tied selling where it finds that:[41]

(i) The practice "is engaged in by a major supplier of a product or...is widespread in a market;" and

(ii) Because of (i), the practice "is likely to a) impede entry into or expansion of a firm in the market, b) impede introduction of a product into or expansion of sales of a product in the market, or c) have any other exclusionary effect in the market;" and

(iii) Because of (ii), "competition is or is likely to be lessened substantially."

The critical test appears to be item (iii), i.e., whether competition is or is likely to be lessened substantially. Section 31.4 thus provides for "rule of reason" treatment of tied selling - i.e., prohibition only in cases of proven anti-competitive impact. It is important to note that exclusive dealing is made subject to the same standard of review under this section.

Section 31.4(4) of the Act stipulates that the Commission may not make an order prohibiting tied selling in three particular situations. First, an order is not to be made where the practice "is reasonable having regard to the technological relationship between or among the products to which it applies" (section 31.4(4)(b)).[42] Second, an order may not be made where the practice is reasonably necessary for the purpose of securing loans. Third, and perhaps most

important, an order may not be made where tied selling is engaged in between or among affiliated firms. The definition of affiliation includes both the standard concept of common control,[43] and a situation where one party grants to another the right to use a trade mark or trade name in the context of the distribution or sales of goods - e.g., a franchise system.[44]

Since 1976, the RTPC has issued an order prohibiting tied selling in only one case, B.B.M. Bureau of Measurement. B.B.M., an incorporated association of advertisers, advertising agencies and radio and television broadcasters, had a virtual monopoly respecting the sale of radio audience data in Canada, as well as an 88% share of the market for television audience data. The case involved (i) tying of the sale of radio audience measurement data to the purchase of television audience data; and (ii) a complex rate structure and billing system used by B.B.M. that effectively tied the sale of television audience data to the purchase of radio audience data. In other words, B.B.M. was engaged in 'two-way' tying of radio and television audience data. The Commission found that these practices were likely to impede entry of other firms into both the television and radio audience data markets, as well as to impede the expansion of B.B.M.'s only competitor, the A.C. Nielsen Company of Canada, in the television data market, and that competition was likely to be lessened substantially in both markets. On December 3, 1981, the Commission issued an order prohibiting B.B.M. from continuing to engage in these practices.[45]

The B.B.M. case is significant for several reasons. First, the Commission's decision rested on the impact of the arrangements in terms of entry deterrence in the television and radio audience data markets, and not on "leveraging" of monopoly power from one market to another. This reasoning is consistent with the above-noted emerging U.S. treatment of tied selling, which identifies horizontal entry deterrence as the primary anti-competitive impact of such practices. Second, the Commission rejected an argument that the tying was reasonable in view of a technological relationship between the two services and should therefore fall within the exception in section 31.4(4)(b). The Commission found that this exception is restricted to situations where technological reasons justify the tied sale and not merely joint production of two products.[46] Third, on appeal of the Commission's decision under section 28 of the Federal Court Act, the Court upheld the RTPC's order and affirmed that section 31.4 is intra vires Parliament, under the general branch of the federal trade and commerce power. The Court's decision thereby helped to alleviate a longstanding concern about the constitutional validity of the civil provisions of the Combines Investigation Act.[47]

The recent case of Consumers Distributing Co. Ltd. v. Seiko Time Canada Ltd. has helped to clarify the status of vertical restraints in relation to other aspects of commercial law. While this case did not involve the application of provision of the Combines Investigation Act, it nevertheless illustrates the potential impact of exclusive dealing and tying. The case involved the parallel importation and marketing of Seiko watches by Consumers

Distributing in competition with Seiko Time Canada, which had been appointed by the Japanese parent company as the exclusive distributor of Seiko watches in Canada. Seiko Time Canada applied for and obtained an injunction barring Consumers from holding itself out as an authorized Seiko dealer, and from advertising the watches as protected by the international Seiko guarantee. In addition, it applied for a second injunction prohibiting Consumers from advertising and selling Seiko watches in Canada, arguing that continued marketing of the watches by Consumers unfairly traded on the goodwill of the Seiko name and its distribution system.[48] In effect, Seiko Time Canada was arguing that the watches should not be sold without the international warranty, which only it could provide. The second injunction would have deprived consumers of the alternative of buying the watches at discount prices, unsupported by the international warranty. The Supreme Court denied the injunction, considering that the mere marketing of watches under the terms of the first injunction would not damage Seiko's goodwill, and that prohibiting Consumers from selling the watches would be contrary to the public interest in competition.[49]

IV. The Competition Policy Significance of Tied Selling

In many instances tied selling is consistent with competition policy objectives. The Hyde case illustrates one important pro-competitive rationale for the practice: efficiencies of team production and bundling in the provision of complementary services. As noted, the use of tying in the sale or lease of patented capital equipment may also be efficient, in facilitating earlier introduction and wider use of new technology. Other pro-competitive uses of tying may include: (i) the protection of goodwill in the tying product, by ensuring appropriate maintenance and servicing; and (ii) reduction of information costs and prevention of over-searching.[50] This view of tying is adopted in the recent U.S. Department of Justice Vertical Restraints Guidelines, which state unequivocally that "Tying arrangements generally do not have a significant anti-competitive potential."[51]

It is important, however, to recognize that in individual instances tying can have anti-competitive effects. As illustrated in the B.B.M. Bureau of Measurement case, tying can raise entry barriers by forcing a potential entrant to enter both markets simultaneously. This concern becomes critical in markets where the practice is widespread. Even in cases where tying is ostensibly undertaken for pro-competitive reasons, it may heighten the level of entry barriers. This supports the need for a rule of reason treatment of tying under competition legislation, as provided in section 31.4 of the Combines Investigation Act. Under the new Department of Justice Vertical Restraints Guidelines, the U.S. is moving toward such a standard of review. While the new approach has not yet been fully incorporated in the U.S. Supreme Court's doctrine on tying, the Court's acceptance of the arrangement in Hyde and Madam Justice O'Connor's plea to abandon the per se label suggest that it will eventually be adopted by the Court.

The role of intellectual property rights is a recurrent theme in judicial decisions and economic literature on tying. While it is important not to assume that patents and copyrights always create market power, it is equally important to recognize their potential to create such power. In Canada, where the vast majority of patents and copyrights originate abroad, it is particularly important to ensure that such property rights do not facilitate monopoly abuse.

NOTES

1. Jefferson Parish Hospital District No. 2 v. Hyde, U.S. Supreme Court, (March 27, 1984), 104 S. Ct. 1551.

2. United States, Department of Justice, Vertical Restraints Guidelines, January 23, 1985.

3. BBM Bureau of Measurement v. Director of Investigation and Research, 82 C.P.R. (2d) 60 (Federal Court of Canada, March 6, 1984).

4. Consumers Distributing Co. Ltd. v. Seiko Time Canada Ltd., 10 D.L.R. (4th) 161 (Supreme Court of Canada, June 21, 1984).

5. 224 U.S. 1 (1912).

6. Section 1 of the Sherman Act states, "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade...is declared to be illegal."

7. H.R. Rep. No. 63-627, 63rd Cong., 2nd Sess., 12-13 (1914).

8. 258 U.S. 451 (1922).

9. 332 U.S. 392 (1947).

10. See, e.g., United States v. Loew's Inc., 371 U.S. 38 (1962) and United States v. Paramount Pictures, 334 U.S. 131 (1948).

11. 345 U.S. 594 (1953). The U.S. Supreme Court's general view of tying arrangements during this era was summarized by Mr. Justice Felix Frankfurter in an exclusive dealing case, Standard Oil Co. of California v. United States ("Standard Stations"), in which he stated, "Tying agreements serve hardly any purpose beyond the suppresion of competition." 337 U.S. 293 (1949), at 305-6.

12. 356 U.S. 1 (1958).

13. See Tampa Electric Company and Nashville Coal Co., 365 U.S. 320 (1961).

14. 394 U.S. 495 (1969).

15. The four dissenting judges argued, in contrast, that the arrangement in the case could not be meaningfully viewed as tying at all. In their view, the cheap credit was not a second product but a way of lowering the effective price of houses.

16. 429 U.S. 610 (1977).

17. That is, to obtain additional profits in a second market through 'leveraging', a seller would have to incur lower profits in his primary market. Robert Bork, The Antitrust Paradox (New York: Basic Books, 1978), pp. 372-74.

18. Ward S. Bowman, Patent and Antitrust Law (Chicago: University of Chicago Press, 1973), pp. 64-119.

19. If the manufacturer uses the tie to lower the price of the tying capital equipment (e.g. a tabulating machine) while raising the price of the tied complementary good (e.g. tabulating cards), the unit costs of capital services will vary with the extent of use. With little demand for tabulating services during a bad year, a firm will enjoy lower unit costs than in a more successful year. The tie-in thereby reduces the user-specific risks of investment in new technology. See S.J. Liebowitz, "Tie-in Sales and Price Discrimination," Economic Inquiry, vol. 21, July 1983, pp. 387-99.

20. "It has been posited that tying arrangements may be used to eliminate independent suppliers of the tied product and thereby exclude rivals who produce the complementary, tying product. The exclusionary effect in such cases flows, however, not from tying but from any exclusive dealing or vertical integration that accompanies the tying. In the absence of exclusive dealing requirements, the supplier of the tying product cannot deprive its rivals' customers of access to other sellers of the tied product." U.S. Department of Justice, Vertical Restraints Guidelines, supra note 2, page 40.

21. 513 F. Supp. 532 (ED La. 1981).

22. 686 F. 2d 286 (1982).

23. Supreme Court, supra note 1, pp. 9-14.

24. Supreme Court, supra note 1, pp. 23-24.

25. See, generally, Frank H. Easterbrook, "Vertical Arrangements and the Rule of Reason," Antitrust Law Journal, vol. 5, 1984, pp. 135-176.

26. Supreme Court, supra note 1, pp. 16-22.

27. Supreme Court, supra note 1, pp. 5-6.

28. Justice O'Connor, concurring, p. 3, Supreme Court, supra note 1.

29. Justice O'Connor, concurring, pp. 11-12, Supreme Court, supra note 1.

30. Justice O'Connor, concurring, p. 12, Supreme Court, supra note 1.

31. "The tie made it possible for the MD anesthesiologists to make an unbiased choice between supplying their services and those of nurse anesthetists, who can perform many of the routine aspects of care." Frank H. Easterbrook, supra note 25, at pp. 145-46.

32. Supreme Court, supra note 1, p. 13.

33. J. Paul McGrath, "Patent Licensing: A Fresh Look at Antitrust Principles in a Changing Economic Environment," Patent and Trademark Review, vol. 82, no. 9, September 1984.

34. Diplock, L.J. in Petrofina (GT Britain) Ltd. v. Martin, (1966) Ch. 146 (C.A.) at 180.

35. Nordenfelt v. Maxim Nordenfelt Guns & Ammunication Co. Ltd., (1984) A.C. 535 at 565. The doctrine in this case was also cited by the Supreme Court of Canada in the recent Seiko case, discussed below at notes 48-49 and accompanying text.

36. Stephens v. Gulf Oil Canada Ltd., 25 C.P.R. (2d) 64 (Ontario Court of Appeal, December 4, 1975).

37. The trial court judge was Mr. David H.W. Henry, formerly Director of Investigation and Research, Combines Investigation Act.

38. See Mark Q. Connelly, "Vertically Imposed Restrictions in the Gasoline Industry at Common Law," Osgoode Hall Law Journal, vol. 14, no. 3, June 1976, pp. 1-27.

39. Restrictive Trade Practices Commission, Report on an Inquiry into the Distribution and Sale of Automotive Oils, Greases, Antifreeze, Additives, Tires, Batteries, Accessories and Related Products (Supply and Services Canada, 1962).

40. Economic Council of Canada, Interim Report on Competition Policy (Ottawa: 1969).

41. Under Bill C-29, An Act to Amend the Combines Investigation Act, introduced in the House of Commons on April 2, 1984, jurisdiction over tied selling and other civil reviewable matters in the current Part IV.1 of the Act would have been transferred from the RTPC to the civil courts.

42. Presumably this exception would cover the relationship between the delivery of medical and anesthesiological services that Justice O'Connor found in Hyde.

43. Under Bill C-29, supra note 41, the definition of control would have been amended to make it consistent with the definition of control in the new merger provisions of the Act.

44. The exemption from section 31.4 for distribution systems using a trade mark or trade name is a potentially important limitation on the section, given the prevalence of tying and exclusive dealing within such systems. The exception, however, is further qualified: it applies only in situations of "the sale or distribution, pursuant to a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers," and then only if "no one product dominates such business." This exception would not necessarily cover, for example, tying arrangements within automotive service station franchise systems, since the products sold are often obtained from a single manufacturer and the business is dominated by a single product (gasoline). See Mark Q. Connelly, "Exclusive Dealing and Tied Selling under the Amended Combines Investigation Act, Osgoode Hall Law Journal, vol. 14, no. 3, December 1976, pp. 522-569 at 537-38.

45. Reprinted in Director of Investigation and Research, Annual Report for the Year ended March 31, 1982, pp. 52-53. In addition, in 1982 the Director initiated an inquiry into the alleged tying of automotive radios and passenger cars by an automobile manufacturer in Canada. Customers were subsequently advised that the radios were a standard feature in the cars, but could be deleted for credit. Accordingly, the inquiry was discontinued on April 15, 1983. See Director of Investigation and Research, Annual Report for the Year ended March 31, 1984, p. 44. In 1983 the Director discontinued an inquiry into exclusive dealing and tied selling of exhibition products. The evidence indicated that the rental of retail space to independent businessmen was tied to the purchase of essential supplies from a designated manufacturer. The practice was discontinued before an application under section 31.4 could be filed by the Director of Investigation and Research. See Director of Investigation and Research, Annual Report for the Year ended March 31, 1983, p. 52.

46. An argument that section 31.4 was inapplicable because B.B.M. was merely a cooperative supplying data to its own members was also rejected.

47. BBM Bureau of Measurement v. Director of Investigation and Research, 82 C.P.R. (2d) 60 (1984).

48. The action was based on the tort of "passing off" - i.e., Seiko Time Canada argued that Consumers Distributing was deceiving the public by marketing the watches without the international warranty and authorized distribution system. Consumers Distributing Co. Ltd. v. Seiko Time Canada Ltd, 10 D.L.R. (4th) 161.

49. The Supreme Court based its argument, in part, on the Nordenfelt case, supra note 35 and the common law doctrine of restraint of trade.

50. Roy W. Kenney and Benjamin Klein, "The Economics of Block Booking", Journal of Law and Economics, vol. XXVI, no. 3, October 1983, pp. 497-540.

51. U.S., Department of Justice, supra note 2, p. 40.