COMMENT ON THE BOMBARDIER DECISION*

By R.J. Roberts**

I. INTRODUCTION

In Director of Investigation and Research v. Bombardier Ltee., the first case decided by the Restrictive Trade Practices Commission under the new Part IV.I of the Combines Investigation Act, the Commission addressed several questions that have been raised regarding interpretation of its provisions and in particular, interpretation of Section 31.4(2) relating to "exclusive dealing". The most important of the questions that were addressed by the Commission concerned the definition of "major supplier of a product in a market". This definition not only is important to "exclusive dealing", which was the specific conduct being reviewed in Bombardier, but also to the provisions of Part IV.I of the Act dealing with "Tied selling" and "Market Restriction", where the requirement of a "major supplier in a market for a product" likewise appears.

Another important question addressed by the Commission was what factors are relevant to the determination whether an exclusive dealing arrangement has "an exclusionary effect causing a likely substantial lessening of competition". The Commission's determination in this regard might well have a bearing upon its consideration of cases involving "tied selling" which is lumped together with "exclusive dealing" in Section 31.4(2).

Questions which were left open by the Commission in Bombardier include, what conduct constitutes "exclusive dealing" within the meaning of Section 31.4(1) of the Act and what constitutes a "practice" of exclusive dealing within the meaning of the same subsection. These matters were not addressed by the Commission in Bombardier because the Respondent in that case essentially admitted that it did engage in a "practice" of "exclusive dealing" and that it had, in fact, terminated eight dealers because they breached

*Director of Investigation and Research v. Bombardier Limitee (October 14, 1980) R.T.P.C. #1. The decision is summarized in Canadian Competition Policy Record, December, 1980.

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the term of their agreement with Bombardier requiring them "to deal exclusively in one of its brands of snowmobile".[1]

Another question left unanswered by the Commission was whether future decisions regarding exclusive dealing practices might be influenced by the existence of certain economic advantages in their use, e.g., their usefulness in stimulating inter - as opposed to intra - brand competition.[2] As a result, the Commission has not given any indication whether it might treat exclusive dealing arrangements more leniently than tying arrangements - as the United States courts do - even though, as in the United States, the two practices are subject to the same statutory language.[3]

II. MAJOR SUPPLIER OF A PRODUCT IN A MARKET

In determining the factors that were significant to the question whether Bombardier constituted a major supplier in a market, the Commission apparently declined to adopt the "market power" approach traditionally used in American exclusive dealing cases under Section 3 of the Clayton Act. American cases usually frame this issue in terms of whether the supplier engaging in exclusive dealing has sufficient market share to give it dominance in the relevant product market. In Bombardier, the Commission apparently went out of its way to indicate that a supplier did not have to possess market dominance to be considered a major supplier in the market. Although the application filed by the Director of Investigation and Research was limited to activities of Bombardier in Ontario, Quebec, and the Maritimes, where Bombardier had about 50% of the market, the Commission expanded the scope of its remarks to indicate that Bombardier would be considered to be a "major supplier" in the North American market, where its market share was "of the order of 30 per cent".[4]

This appears to be a lower percentage of the market than would be required under the "market dominance" theory utilized in American exclusive dealing cases. In these latter cases, the lowest market share found to give the supplier market dominance seems to have been 40 percent, and even then only where possession of such a market share nationwide meant that in many small communities in the country, exclusive dealing by the supplier would result in the creation of local monopolies.[5]

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[1] Bombardier, at p.3..

[2] See Roberts, Anticombines and Antitrust (1980), at pp. 309-310.

[3] See id. at pp. 288-289.

[4] Bombardier at p.7.

[5] Standard Fashion Co. v. Magrane-Houston Co.(1922), 258 U.S. 346.

The Commission stated that to be considered a major supplier, a supplier did not have to possess the greater part of market share but only a "great or important" share of the market. This conclusion was based upon consideration of the use of the words, "a major supplier" as opposed to "the major supplier" in the statutory language; a definition of the word "major" found in the Concise Oxford Dictionary; and reference to the French text of the legislation, which apparently reinforced "the Commission's view in respect of the word 'major'".[6]

The Commission then went on to address what factors it deemed relevant to the determination whether a supplier was important enough to be deemed "a major supplier" under the statute, as follows:

> "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 also 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."[7]

Market share, financial strength, and the supplier's record as an innovator seemed to the Commission to be most relevant to identifying a major or important supplier.

When the Commission specifically assessed Bombardier's position with respect to snowmobiles, further indicia of importance emerged. These were the historical position of the supplier in the industry, and the strength of the supplier's participation in activities which were important to development of brand image and development of the product. In this regard, the Commission noted that Bombardier had a strong historical position in the industry and was a strong participant "in trail setting and in racing which are important in product development and brand image."[8] Consideration of all of the above factors led the Commission to conclude that Bombardier qualified as a "major supplier" at the manufacturing, distribution and retail levels.

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[6] Bombardier at p.7.

[7] Id. at p.8.

[8] Id.

III. EXCLUSIONARY EFFECT CAUSING A LIKELY SUBSTANTIAL LESSENING

As was the case with the determination of "major supplier", the Commission charted a course on the question of a likelihood of substantially lessening of competition which appeared to be independent of the jurisprudence developed in American exclusive dealing cases. In the United States, the question usually revolves around assessment of the economic purpose of the exclusive dealing arrangement. The evidence which is most relevant to this question comprises assessment "of the relative strength of the parties; the degree of market control of the supplier; the duration of the exclusive dealing contract; and the business reasons for imposing such requirements. This evidence, in combination with evidence of the market share affected by the arrangement, forms the basis upon which the court draws inference of probable, immediate and future impact upon competition."[9]

Generally, American courts refuse to evaluate on the question of likelihood of substantial lessening of competition, concrete evidence thereof such as the trend in the supplier's market share and whether the supplier's use of exclusive dealing in the past actually forclosed a competitor from any substantial market. As was noted by Professor Mark Q. Connelly in his seminal article, Exclusive Dealing and Tied Selling Under the Amended Combines Investigation Act[10] the decision of the Supreme Court of the United States which led American courts to refuse to evaluate such evidence was met "with a torrent of adverse comment."[11]

Apparently siding with the critics of the approach taken by the American courts, the Commission all but ignored any inquiry into the economic purpose of Bombardier in insisting upon exclusive dealing by the dealers. For example, the decision of the Commission never addressed any evidence of Bombardier's business reasons for insisting upon exclusive dealing arrangements. Rather, the Commission focused upon evaluating whether Bombardier's practice of exclusive dealing created barriers to entry to competitors and examining the trend in market share of Bombardier. The Commission determined that, based upon this information, the exclusive dealing policy of Bombardier did not and was not likely to create a substantial lessening of competition at the manufacturing, distributing, or retailing levels of the market.

With respect to the manufacturing market - which the Commission determined was North America-wide - the Commission stated that a 10 percent foreclosure due to exclusive dealing was insufficient to threaten the long-term viability of Bombardier's competitors; that there existed strong and

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[9] Roberts, Anticombines and Antitrust, at p.310.

[10] (1976), 14 Osgoode Hall L.J. 521

[11] Id. at p.541

viable competitors in the snowmobile market; and that these competitors were in active and effective competition with Bombardier in the field of innovation. The Commission concluded that "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.[12]

The Commission did note that possession of only 10% of the North American market would not necessarily be conclusive in Bombardier's favor if Bombardier's exclusive dealing policy nevertheless excluded its competitors from marketing their products in the more limited geographic area covered by the application for review, i.e., Ontario, Quebec, and the Maritimes. It appears that in this regard the Commission might have been mirroring the viewpoint of the Supreme Court of the United States in Standard Fashion Co. v. Magrame-Houston Co.,[13] where the Court condemned exclusive dealing by a company which faced strong nationwide competition because the exclusive dealing precluded the competitors from access to several local markets throughout the country.

Examining competition among manufacturers for dealers to distribute snowmobiles in Ontario, Quebec and the Maritimes, the Commission found that there wasn't any concrete evidence to support the view that Bombardier's exclusive dealing policy had or was likely to exclude rivals from the market. In this regard, the Commission concluded that while Bombardier's policy prevented its dealers from taking on a second brand of snowmobile, adequate opportunities remained for Bombardier's competitors to recruit other dealers. The Commission relied upon expert evidence by Professors Lawrence Skeoch and Gideon Rosenbluth that entry into snowmobile retailing was easy; direct evidence "on a considerable variety of other lines of retail distribution and services which can be combined with snowmobile sales";[14] evidence that competing manufacturer's recruited considerable numbers of dealers in the relevant geographic areas over successive years; and the high rate of turnover and recruitment of Bombardier dealers. The Commission indicated that the latter two indicia constituted "an indication of the availability of a considerable stock of potential dealers".[15]

To support its conclusion in favour of Bombardier, the Commission also relied upon the trend in market share of Bombardier's competitors in Ontario, Quebec and the Maritimes

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[12] Bombardier at p.9

[13] Supra, n.5.

[14] Bombardier at p.11.

[15] Id.

saying, "the extent to which competitors are able to increase their shares is indirect evidence of the effectiveness of exclusive dealing as an entry barrier".[16] In this regard, the Commission noted that in the period of 1975-1979, the combined shares of Bombardier's major competitors increased while Bombardier's market share generally declined. 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 permit them to support adequate distribution systems."[17]

As to the impact of Bombardier's exclusive dealing policy upon local markets, where exclusive dealing might possibly result in the creation of a local monopoly, the Commission acknowledged that preventing a Bombardier dealer from "dualing" in a competing brand would delay broader consumer choice. However, in the absence of any evidence that "there were a number of communities where Bombardier was the only dealer"[18] the Commission declined to act, saying only that such circumstances would raise a "more serious problem".[19]

Finally, the Commission rejected an argument made by the Director that Bombardier's exclusive dealing policy should nevertheless be prohibited because it impeded the expansion of Bombardier's dealers "with the result that they are prevented from spreading their overhead".[20] The Commission rejected consideration of this contention, apparently based upon a view that it did not relate to the matter of increasing competition in the retail snowmobile market. The Commission stated, "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."[20]

The Application was dismissed because, in the words of the Commission, "The evidence relating to entry and to the expansion of sales by Bombardier's competitors does not show a substantial lessening or reduction of competition nor a likelihood thereof. Moreover, there is no evidence that competition at the manufacturing level was substantially affected by Bombardier's exclusive dealing in the markets covered by the Application."[22]

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[16] Id. at p.12

[17] Id. at p.13

[18] Id. at p.13

[19] Id

[20] Id at p.14

[21] Id.

[22] Id

IV. CONCLUSION

The Bombardier case constitutes an important landmark in Canadian competition law. It was the first case to be decided by the Restrictive Trade Practices Commission under Part lV.I of the Combines Investigation Act. What the Comission had to say in its decision regarding the factors that it considered to be important on the questions of "major supplier in a market" and "exclusionary effect causing a likely substantial lessening of competition" will undoubtedly have implications for future determinations by the Commission far beyond the bounds of the exclusive dealing provision. These elements are present in the Tied Selling and market restriction provisions of Part lV.I. Further, as can be seen from the above discussion of these two issues, the Commission has clearly indicated that it will not necessarily be influenced in its determinations by the same considerations that have influenced the decisions of American courts in similar cases. Particularly with respect to the element of likelihood of substantial lessening of competition, Bombardier shows that the Commission intends to place a great deal of weight upon economic evidence such as the existence or lack of barriers to entry to the market and the trend in the market share of the supplier. In this regard, the Commission aligned itself with the weight of critical authority in Canada and the United States.

Bombardier did leave open several questions which were not essential to the Commission's decision in that case. Because Bombardier admitted to having carried out a policy of exclusive dealing over a long period of time, it was unnecessary for the Commission to address the issue of what constitutes a "practice" within the meaning of Section 31.4(1) of the act, and what constitutes "exclusive dealing" within the meaning of the same provision. Also left for another day was the question whether the Commission will differentiate between tied selling and exclusive dealing cases - in terms of the degree of lessening of competition required for prohibition - on the ground that tying arrangements have little justification other than the suppression of competition while exclusive dealing arrangements can in some instances promote inter-brand competition. As was indicated earlier in this Comment, American courts do make such a distinction even though - as in Canada - exclusive dealing arrangements and tying arrangements are prohibited by the same statutory provision.