

offence created by the enactment may properly be classified as criminal law, or could have been enacted under the criminal law power. The learned trial judge concluded, rightly in my view, that the Combines Investigation Act could also be supported under the trade and commerce power as well as under s. 91(27)."

### **RTPC FINDING OF TIED SELLING BRINGS FIRST REMEDIAL ORDER**

The Restrictive Trade Practices Commission, in a decision on October 30, found BBM Bureau of Measurement to be engaged in tied selling within the meaning of s.31.4 of the Combines Investigation Act with the result that competition was likely to be lessened substantially and decided to make an order prohibiting BBM from continuing to engage in the practice. (Director of Investigation and Research v. BBM Bureau of Measurement (Oct. 30, 1981) R.T.P.C. No. 3).

It is the second substantive decision under the 1976 amendments which empowered the RTPC to issue remedial orders in respect of specified kinds of restrictive practices. The first was in Director of Investigation and Research v. Bombardier Limitée (October 14, 1980) R.T.P.C. No. 1 in which an application by the Director for an order in respect of exclusive dealing was dismissed. A number of applications by the Director have been withdrawn following settlement of the issues with the parties before completion of the proceedings before the Commission.

The relevant provisions of s. 31.4 are:

"31.4 (4) For the purposes of this section, ... 'tied selling' means

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the 'tying' product) to a customer, requires that customer to

(i) acquire some other product from the supplier or his nominee, or

(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or his nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in sub-paragraph (a)(i) or

(ii) by offering to supply the tying product to him on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;

(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 . . . 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

(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

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 ... 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.

...

(4) The Commission shall not make an order under this section where, in its opinion,

...

(b) tied selling that is engaged in is reasonable having regard to the technological relationship between or among the products to which it applies,

...

and no order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among companies, partnerships and sole proprietorships that are affiliated."

BBM is a non-profit corporation without share capital. It is the sole supplier of Canadian radio audience data and competes with A.C. Nielsen Company of Canada Limited in the supply of TV audience data. Its membership consists largely of advertisers, advertising agencies and radio or television station or network owners, operators and representatives. The annual fees vary according to class and size of member. Broadcasters join largely in order to be included in the audience surveys while advertising agencies require the audience data for their media purchasing decisions. The fees for advertising agencies feature very large inducements to purchase both the radio and TV data. For example, in 1980 the fee for an advertising agency with billings of \$6 millions

was \$6,945 for either the radio or TV service and \$7,620 for both. Prior to 1978 most advertising agencies had no option other than to purchase both sets of data.

The Director sought a remedial order, contending that the fee structure was a tying arrangement which lessened competition substantially by raising barriers to entry for newcomers and impeding the expansion of A.C. Nielsen.

BBM argued that the definition of tied selling in s. 31.4(1) did not apply because it calls for the supply of a product to a "customer", whereas BBM is an association which supplies members rather than customers. The Commission rejected that argument, stating:

"In many respects the BBM organization parallels a professional or trade association. It is non-profit in the sense that its surplus revenue is not paid out to participants; management is selected, and major policies and fee schedules are subject to approval, by general meetings of members; advertising industry executives donate their considerable skills and knowledge without remuneration.

"The purpose of BBM is however, to produce products and to supply them at a price. Members join BBM and pay high amounts, much more substantial than association fees would normally be, to obtain these products, TV data reports and radio data reports. Broadcasters pay membership fees to have their station's ratings included in reports. Advertisers and their agents require the reported information to intelligently purchase media time. While BBM is organizationally structured as an association its members are, in fact, also customers to whom it supplies its products like any commercial firm."

BBM submitted that the Commission should not make an order because there is a technological relationship between the TV and radio data within the meaning of s. 31.4(4)(b); there are common costs including administration, and process costs share many points of convergence such as computer programs and sample design. However, the Commission found:

"Undoubtedly; cost efficiencies and useful technological exchange can be expected to flow from producing two similar products under one roof. However, section 31.4(4)(b) applies to the reasonable requirement of the sale of two products together for technological reasons, not to their production. In effect the section provides a defence or justification of a tied sale on the basis that the reputation of the tying product might be injured or destroyed if the supplier cannot insist on a purchaser using only the tied product in conjunction with it.

"In the present instance there is no suggestion that the reputation or good will of either of BBM's reporting services would be damaged by the purchaser not using the other service. Section 31.4(4)(b) has no application."

The Commission had no difficulty in finding that BBM was a major supplier of both its products. It had a monopoly of the radio service. Of 113 agencies purchasing TV audience reports, 88 purchased from BBM only, 13 purchased from Nielsen only and 12 purchased from both.

BBM argued, contract to the position taken by the Director, that an advertising agency is not a customer and the fee structure did not involve tying or discounting but rather a basic membership fee and a separate fee for each set of rating books. An example cited was a class of member charged \$17,785 for either the radio or TV service and \$18,460 for both. According to BBM, 17,110 was the membership fee which covered fixed costs and some services, \$675 was the price of one of the two books and \$675 was the price of the second book if purchased. The Commission rejected that interpretation, finding the agency is in fact a customer, the price of the first book was \$17,785 and that of the second book was \$675.

Dealing with the effect of the fee structure upon competition, the Commission stated:

"There can be little doubt that an important, if not the most important, factor in Nielsen's failure to expand in the market for TV data has been BBM's tying of its sale of TV data reports to its sale of radio data reports ... It is no answer to say that Nielsen is able to and free to enter radio data service and challenge BBM's monopoly position in that market. The intention of the statute is to free the market so that the producer of any one product has the opportunity to enter and compete on a fair basis.

"Secondly, could a newcomer to either the radio data market or the TV data market compete in fair terms for customers? A person who prefers to purchase TV data from BBM can also purchase radio reports for a further \$245 to \$675. It is difficult to regard the barrier to entry to the radio data market as other than insurmountable. The same is true of a newcomer to the TV data market where the customer must purchase radio data from BBM."

At press time the prohibition order had not yet been issued by the Commission.