Exclusive Dealing and Tied Selling under the Amended Combines Investigation Act

Mark Q Connelly

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EXCLUSIVE DEALING AND TIED SELLING UNDER THE AMENDED COMBINES INVESTIGATION ACT

By Mark Q. Connelly*

CONTENTS

A. INTRODUCTION 522

B. ANTECEDENTS TO THE NEW LEGISLATION 525
   1. TBA and Other Reports 525
   2. The Pros and Cons of the Practices 527

C. THE STATUTORY LANGUAGE 533

D. EXCLUSIVE DEALING AND TIED SELLING UNDER U.S. LAW 538
   1. Exclusive Dealing in the Courts 538
   2. Exclusive Dealing and the FTC 543
   3. Tied Selling 546
   4. The TBA Trilogy 554

E. THE AUSTRALIAN Shell PROCEEDING 557

F. SUMMARY AND CONCLUSIONS 562

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* Professor Connelly is Assistant Professor of Law, Osgoode Hall Law School, York University. The writer gratefully acknowledges the numerous helpful suggestions of Professors Warren M. H. Grover and Reuben A. Hasson and the research assistance of Patrick J. Cihon and Graham P. Smith.
A. INTRODUCTION

Part of the broadened scope of Canadian combines law effected by the recent amendments to the *Combines Investigation Act*1 is the creation of a class of trade practices reviewable by the Restrictive Trade Practices Commission (RTPC) at the behest of the Director of Investigation and Research. The Commission may make orders prohibiting suppliers from continuing to engage in any of the practices where the Commission finds certain anticompetitive effects to be present. These practices, five in number, describe generally certain restrictions sometimes imposed by suppliers of products upon their customers; hence the practices may be denominated generically 'vertical restraints' — to distinguish them from the 'horizontal' agreements entered into by producers with each other in order to restrain competition among themselves. The practices reviewable under the amended *Combines Investigation Act* are consignment selling, refusal to deal, market restriction, exclusive dealing and tied selling.2

This paper is concerned solely with the last two of the listed practices — exclusive dealing and tied selling. The considerations that the writer believes should be relevant to the Commission's consideration of these practices will be discussed, and certain outlines of the law relating to exclusive dealing and to tied selling as it is believed likely to develop in Canada will be sketched. In considering these practices, the RTPC will have almost no Canadian precedent by which to be guided.3 Therefore, the Commission might well take as points of departure the law that has developed in the United States and in Australia, in both of which jurisdictions there is legislation substantively very similar to the exclusive dealing and tied selling provisions of the *Combines

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2 C.I.A., ss. 31.2 (refusal to deal), 31.3 (consignment selling), 31.4 (market restriction, exclusive dealing and tied selling). The Commission is also empowered, at the instance of the Director, to make orders against the implementation in Canada of foreign judgments, decrees, laws or directives where the effect of such implementation would be to injure trade, commerce or competition in Canada. C.I.A., ss. 31.5, 31.6.

Exclusive Dealing

Investigation Act. This paper will review the law of those jurisdictions. The main industry considered in this paper as illustrative of exclusive dealing and tied selling is the retail distribution of gasoline and related products: that industry provides convenient textbook examples of the practices, and in fact

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4 The law in the United Kingdom has not really advanced beyond its common law status, set out in Esso v. Harper's Garage, supra, note 3. Under s. 1(1) of the Restrictive Trade Practices Act 1976, c. 34, an agreement between two or more persons carrying on business within the U.K. in the production or supply of goods, under which restrictions in respect of certain specified matters enumerated in s. 6 of the Act are accepted by two or more parties, must be registered with the Director-General of Fair Trading. Unless insignificant, a registered agreement is then reviewed by the Restrictive Practices Court, which determines whether any of the restrictions are contrary to the public interest: ss. 1(2)(c), 1(3), 2(2). An agreement found to be contrary to the public interest shall be void with respect to the offending restrictions (s. 2(1)) and the Court may make an order restraining the parties from carrying out the agreement in respect of the restrictions (s. 2(2)). Exclusive dealing agreements are, however, generally exempt from registration by the terms of s. 28 and Schedule 3 of the Act, and a tying agreement would not be registrable unless both parties to it accepted one or more of the restrictions specified in s. 6. There are no reported cases in which the Restrictive Practices Court has considered either exclusive dealing or tied selling, except incidentally where they have appeared as parts of larger, horizontal restrictive arrangements among suppliers. Exclusive dealing and tied selling may also be investigated by the Monopolies and Mergers Commission, on a reference from the Director-General of Fair Trading or the Secretary of State, where it appears that a "monopoly situation" exists: s. 6 and Part IV, Fair Trading Act 1973, c. 41; and see, Report on the Supply of Petrol to Retailers in the U.K., 1965 H.C.P. 264 and Report on the Supply of Beer, 1969 H.C.P. 216.


Since the United Kingdom's accession to the E.E.C. on 1st January 1973, the E.E.C. rules of competition have become part of U.K. law: European Communities Act 1972, c. 68, s. 2(1). The complex subject of the interaction of U.K. restrictive practices legislation and the E.E.C. rules of competition is dealt with in s. 10 of the European Communities Act. See generally, Korah at 227-30.

6 Not included within this paper is price discrimination, a highly charged topic in the gasoline industry today because of the complaints of the 'independent' brand-name service station operators that their suppliers, the large oil companies, are price discriminating in favour of company owned and operated outlets. See, e.g., Ontario Retail Gasoline and Automotive Service Association, Brief to the Royal Commission on Petroleum Products Pricing — Ontario (January 21, 1976) at 10-11, 14. See also remarks of M. Bertrand (Director of Investigation and Research) in H.C. Standing Committee on Finance, Trade and Economic Affairs, Proceedings, No. 52 (May 29, 1975) at 7-8, to the effect that the alleged problem of price discrimination in the gasoline industry is not within the scope of the section of the Act dealing with exclusive dealing and tied selling. On the law relating to price discrimination, see, R. S. Nozick, The Regulation of Price Discrimination Under the Combines Investigation Act (1976), 54 C.B.R. 309. Prof. Nozick concludes (at 317) that, because s. 34 (1)(a) requires that price discrimination, in order to be illegal, must be among different groups of purchasers and because favourably treated, manufacturer-owned outlets are not purchasers, therefore "those situations where a vertically integrated manufacturer-distributor sells at a price to independent distributors such that it can undercut the independent distributors at its own distributing level of operations" are excluded from the operation of s. 34(1)(a).
it has frequently been cited as an example in the legislative history of section 31.4. Furthermore, the industry has occasioned a wealth of jurisprudence and scholarly comment in the relevant jurisdictions.

Exclusive dealing is the practice whereby a supplier sells a product on condition that the customer take all of his requirements of that product from that supplier or, what is the same thing, refrain from purchasing products of the same class from the supplier's competitors. An exclusive dealing arrangement may exist between any two levels of distribution from production to consumption. For example, firm X, which is both a producer and wholesaler of gasoline, may insist that service station retailers to whom it sells deal only in X-brand gasoline. Or firm Y, a miller, may require bakeries to which it sells flour to use exclusively Y-brand flour in baking. This latter type of exclusive dealing arrangement, where the restrained customer is itself the ultimate user of the product, rather than a dealer in it, is sometimes called a 'requirements' contract.7

Tying or tied selling is the practice whereby the supplier of a product sells or leases that product (the tying product) upon condition that the purchaser or lessee agrees to take his requirements of some other product (the tied product) from that supplier or another designated by him. A tying arrangement, therefore, is a form of exclusive dealing that involves two distinct products. Frequently the tied product is something used in conjunction with the tying product, such as punch cards in a computer or paper in a photocopier. Where the supplier of the tied product is not the supplier of the tying product, but rather a source designated by the latter, the arrangement is referred to as 'directed buying'. Directed buying usually implies some form of 'market access arrangement' whereby, in the most common form, the designated supplier of the tied product agrees to pay a commission to the supplier of the tying product on sales made to the latter's customers.8 An example of this type of arrangement would occur where firm X, an oil company, requires its service station dealers to stock exclusively (or predominantly) the tires manufactured by firm R, a rubber company. Under typical arrangements, firm R would pay a commission to firm X on all sales of tires by R to X's dealers. Where a tying arrangement takes the form of a supplier declining to furnish a dealer with one product unless the dealer will agree to stock other products made by the same supplier, it is called 'full-line forcing'.9

To summarize: in exclusive dealing, the supplier says to the customer,

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6 H. C. Committee Proceedings, supra, note 5, No. 49 (May 20, 1975) at 28, No. 51 (May 27, 1975) at 28, No. 52 (May 29, 1975) at 13-17, No. 55 (June 3, 1975) at 93-94; Senate Standing Committee on Banking, Trade and Commerce, Proceedings, No. 35 (April 23, 1975) at 23, No. 66 (November 27, 1975) at 5-6.

7 Kaiser, supra, note 1 at 161. Some of the literature uses the term requirements contract to indicate an obligation imposed by the customer upon the supplier to fill all of the customer's requirements for the product. Requirements contracts in this latter sense are not within the purview of s. 31.4 of the C.I.A. But see, text following note 94, infra.


9 Id.
"I will sell you my widgets only if you will buy all of your widgets from me"; in tying, the supplier says, "I will sell you my widgets only if you buy my gadgets."

B. ANTECEDENTS TO THE NEW LEGISLATION

1. TBA and Other Reports

In 1962 the Restrictive Trade Practices Commission published its Report on an Inquiry Into the Distribution and Sale of Automotive Oils, Greases, Anti-Freeze, Additives, Tires, Batteries, Accessories and Related Products — popularly known as the TBA Report. The Commission recommended that the practices of exclusive dealing and tied selling, including full-line forcing and directed buying, should be included within the coverage of the Combines Investigation Act and that the practices should be prohibited where they would be "likely to lessen competition substantially, tend to create a monopoly or exclude competitors from a market to a significant degree." In 1971, the Royal Commission on Farm Machinery recommended that exclusive dealing arrangements in farm machinery be made illegal. Meanwhile, in 1969 the Economic Council of Canada's Interim Report on Competition Policy, to which much of the Stage I Combines Act amendments is more or less directly traceable, had recommended that exclusive dealing and tied selling be included among a group of practices to be reviewable by a "Competitive Practices Tribunal." The Tribunal would have been empowered to enjoin a practice where it determined that the effect of the practice was to lessen competition to the detriment of final consumers. The Council made this recommendation with particular reference to the retail distribution of petroleum and related products. Two aspects of the recommendations of the ECC that have not been followed in the legislation were that the tribunal should have an interim injunctive power pending final disposition of a case and that a member of the public, as well as the Director of Investigation and Research, should be able to bring cases to the Tribunal's attention. The Government's determination not to follow this latter recommendation, in particular, may constrict substantially the ultimate development of the law.

The TBA Report looked comprehensively at the manner in which all products other than gasoline were distributed at service stations. The Report divided both the classes of service station and the types of products distributed thereat in a manner that is of continuing usefulness. Service stations were broken down into four categories: company owned and operated stations, where the operator is in effect an employee of the oil company; lessee operated

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10 Ottawa: Queen's Printer, 1962.
11 TBA Report, at 133.
12 Report of the Royal Commission on Farm Machinery (Ottawa: Queen's Printer, 1971) at 255.
13 Supra, note 8 at 122.
14 The Council noted (id. at 124) that in the request made to it in 1966 to study combines, mergers and related matters, the President of the Privy Council had stated that it was unlikely that the recommendations of the RTPC in the TBA Report could be carried out under an exclusively criminal law regime for competition law.
stations; financially assisted stations, which are owned by an operator to whom the oil company has extended financial assistance, frequently secured by a mortgage; and independent, brand stations, whose operators either own them or lease them from third parties.\textsuperscript{16} Even in these latter stations, the \textit{Report} found that usually the dispensing equipment was obtained on loan from the oil company or via a conditional sales agreement with the oil company.\textsuperscript{16}

The products sold at service stations were also divided into four categories: gasoline, with which the \textit{Report} was not concerned; other petroleum products, such as lubricating oils and greases; anti-freeze; and tires, batteries and accessories (t.b.a.). Accessories include such items, among many others, as spark plugs, points, condensers, windshield wiper blades, hose clamps and floor mats.

The \textit{TBA Report} found that most of the oil companies insisted upon exclusive dealing with respect to petroleum products.\textsuperscript{17} In fact, there can be some nice questions of terminology with respect to the petroleum products. If all petroleum products distributed through service stations are considered one product, then it is correct to refer to exclusive dealing. If, on the other hand, gasoline, the main product, is considered a separate product, then the other petroleum products are tied to it. Or it may be considered that the petroleum products as a whole are tied to the service station's license to use the oil company's trade name.\textsuperscript{18}

With respect to non-petroleum products, that is, anti-freeze and t.b.a., the oil companies were found not to manufacture these items, but two kinds of oil company sponsorship were found to be present. Occasionally a very large oil company would purchase these products from an independent source manufacturing to the oil company's specifications and under its brand name, as in the case, for example, of Imperial Oil Company and Atlas tires and batteries. Other oil companies had 'market access' arrangements with independent manufacturers, whereby the oil company would promote sales of the manufacturer's products to the oil company's brand-name service stations in return for a commission paid by the manufacturer to the oil company on all such sales. Whether or not the purchase-resale and market access arrangements can correctly be called tied selling or full-line forcing depends upon the

\textsuperscript{16} \textit{Supra}, note 10 at 10-11. The last category of stations should not be confused with independent, non-brand stations, which are not contractually bound to any particular oil company. The only thing "independent" about the independent, brand stations is that they are not owned by or mortgaged to an oil company.

\textsuperscript{16} The Commission (id. at 18) found that as of 1958 company-operated accounted for 0.9\% of all service stations in Canada, lessee operated — 25.6\%, financially assisted — 15.4\%, and independent, brand — 58.1\%. On the whole, the leased stations tended to be larger volume outlets than the dealer-owned stations. Id. at 23.

\textsuperscript{17} Id. at 40-48.

degree of coercion practiced by the oil companies upon the service stations.\(^\text{19}\) For these purposes, the company operated stations can be ignored since within a single firm there is no sale of products. While the *TBA Report* found considerable variety among the various oil companies with respect to the marketing of non-petroleum products by their service stations, it was found that lessee stations were much more subject to oil company pressure in this regard than were the various types of owner-operated stations.

2. *The Pros and Cons of the Practices*

Most of the objections to the practices of exclusive dealing and tied selling that have made them a matter of legislative concern were adumbrated in the *TBA Report*. It is appropriate, however, first to look at the practices’ alleged benefits, of which the writer has been able to identify from the *TBA Report* and other sources some seven.

First, in the case of automotive service stations, the oil companies have very large investments in those which are lessee operated or otherwise financially assisted. Such investments are not recouped by the rents or the interest charged on loans and therefore, from a company’s point of view, can be justified only as investment in outlets for the exclusive sale of that company’s products. Why should any company make an investment in what may prove to be an outlet for its competitor’s products?

Secondly, forcing a producer’s brand-name outlets to deal exclusively avoids customer confusion. Customers can rely on being sold only the products made or sponsored by the company whose trade name is used by the retailer. If a service station bears in huge letters the name of Gulf, for example, certainly customers expect to purchase the gasoline manufactured by Gulf and not that of some other company. Customer expectations with respect to the other products sold at service stations is a somewhat more doubtful matter upon which to speculate.

Third, exclusive dealing as applied to products that require a lot of servicing, such as automobiles, may promote a legitimate interest of producers in having their distributors maintain sufficiently specialized service departments.

Fourth, exclusive dealing may aid producers’ efficiency, thereby lowering their costs by permitting planning on the basis of a relatively known demand. It is doubtful, however, just how beneficial from the public’s point of view this benefit to producers would be. As one eminent American antitrust scholar has observed:

\begin{quote}
This objective, of course, cannot be truly achieved by resorting to exclusive contracts, for sellers will still have to contend with fluctuations in the ultimate demand for their goods. Whatever stability is achieved, therefore, must result from the protection that ‘exclusives’ provide against fluctuations resulting from the loss of
\end{quote}

\(^{19}\) See, *infra*, notes 113-15, 142-61 and accompanying text.
sales to competitors. Such stability, however, is hardly to be given much weight under a statute expressly designed to preserve competition, for the constant danger of losing business to one’s rivals strikes close to the heart of ... a competitive system.  

Fifth, exclusive dealing is claimed to provide numerous advantages to dealers, and requirements contracts allegedly provide similar gains to users of the product in question. They are assured of continuous supply even in times of shortage, at least if the contract contains no escape clause for the supplier. At the same time, dealers are relieved of the need to carry large inventories. In the example of gasoline, they may benefit from the cheaper prices made possible by deliveries in large "drops." To the extent exclusive dealing yields these advantages, one would expect dealers to favour it even in the absence of coercion from producers. In fact, the TBA Report did not reveal widespread dissatisfaction on the part of service station operators with the practice of exclusive dealing in petroleum products. As for full-line forcing of t.b.a., where the oil company uses a purchase and resale method of distribution, it can expect to realize economies of large scale purchasing, which it may pass on to its service station dealers. It should be noted that under market access arrangements for t.b.a., such economies will not occur, since each service station dealer must still purchase individually from the designated supplier.

Sixth, as to tied selling, when it is employed by a firm that offers the tying product at a low price on condition that the tied product be purchased also, the effect may be to benefit users of the tying and tied products. The arrangement could benefit competition in the user’s industry if entry into that industry is facilitated by virtue of the low amount of capital required to obtain the tying product under the arrangement as compared to a much greater capital outlay that would be required to obtain it in the absence of the arrangement. In such a case, “the user agrees to the arrangement, not because he must buy the controlled product from the supplier, but because the tying arrangement

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[The exclusive dealing] contracts ... have had the further result and effect of enabling respondent to operate its facilities at top capacity, consistent with its foreseeable selling ability, and avoiding the fluctuations incident to high and low production periods, thus reducing unit costs to a minimum, advantages denied respondent's competitors who did not indulge in respondent's practice of securing full-requirement contracts.

The Commission found that Anchor's competitors were unable to find wholesale outlets for their products because the wholesalers, in turn, were unable to compete with those who got a lower price from Anchor. Anchor, in other words, passed on its cost savings.

21 Tampa Electric Co. v. Nashville Coal Co. (1961), 365 U.S. 320 at 334. In the gasoline industry, however, it is common not to provide an absolute obligation to supply on the part of the oil company. Rather, in the event that the company is unable to make deliveries, the dealer is then free to purchase from other sources.
provides the most advantageous method of securing both machinery and supplies. Where a supplier in a tied selling arrangement offers the tying product at an unremunerative rate, he may in effect merely be cutting the price on the tied product. If the tied product industry is oligopolistic, then there is not likely to be much price competition because of the phenomenon of mutual recognition of interdependence. Therefore, whatever price competition there is to be in the tied product must take more devious forms, such as offering the tying product cheaply. "One may prefer 'hard' competition, yet still prefer the substitute to no competition at all."

Finally, tying arrangements may protect the producer's good will in technologically complicated products, by specifying the products that are to be used with them for proper functioning.

As against these asserted advantages of exclusive dealing and tied selling, what are the alleged anti-competitive aspects?

Taking exclusive dealing first, the most common objection is that it creates barriers to new competition in the production of the subject product. For example, if in the gasoline industry the vast majority of service stations are limited to dealing in the products of one supplier, then any new producer of gasoline or lubricating oil or anti-freeze must enter the industry not only at the production level but also at the distribution level because the existing channels of distribution have already been sewn up by the other producers. The fact that new entry must occur at more than one level makes such entry difficult and tends toward the maintenance of the industry as the preserve of the firms with exclusive dealing contracts. The capital required to enter at every level will likely be a great deal higher than that required to enter at the production level only, and this will tend to impede entry. The effect of such arrangements, especially in oligopolistic markets, may be "to enable the established suppliers individually to maintain their own standing and at the same time collectively, even though not collusively, to prevent a late arrival from wresting away more than an insignificant proportion of the market."

In the TBA Report, the Director of Investigation and Research concluded that the oil companies' various exclusive dealing practices resulted in the exclusion of independent producers and wholesalers (those that are neither oil companies nor have market access arrangements with oil companies) from a "significant" proportion of the service station market for all products other than accessories.

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22 Lockhart and Sacks, supra, note 20, at 948. In FTC v. Sinclair Refining Co. (1923), 261 U.S. 463 at 475, the U.S. Supreme Court on this reasoning found a tying arrangement (pumps tied to gasoline) not to violate the Clayton Act.

23 See the dissenting opinion of Mr. Justice White in Fortner Enterprises, Inc. v. United States Steel Corp. (1969), 394 U.S. 495 at 510.


26 Supra, note 10 at 75. "Significant" was defined in the TBA Report (at 67) to mean at least 15 to 30%. 
The barriers to entry theory is the chief objection to the practice of exclusive dealing, but the theory's validity has not gone unchallenged.\textsuperscript{27} The contrary argument is to the effect that where there is a profit to be made efficient capital markets will allocate sufficient funds to the new producer so that entry can be made at all the necessary levels. If the barriers to entry theory were effectively demolished by empirical studies showing that entry has been frequent into industries characterized by exclusive dealing, then exclusive dealing as an area of concern in competition policy would, at a minimum, have to be carefully rethought. There are, however, other objections sometimes advanced against the practice. In the automotive products situation, for example, the RTPC concluded that full-line forcing and market access arrangements tend to raise prices to consumers because to the extent suppliers have assured markets they have little incentive to compete vigorously as to price and because, in the case of market access arrangements, the commissions payable to the oil companies by the t.b.a. producers raise the latter's costs.\textsuperscript{28} Furthermore, market access arrangements were found to favour the larger manufacturers of the subject products since "oil companies with national or large regional service station networks are likely to enter into exclusive arrangements with manufacturers who operate on a national basis or have extensive distributive facilities."\textsuperscript{29} The Commission also concluded that the oil companies' various exclusive dealing practices resulted in an "unnecessary duplication and proliferation" of service stations.\textsuperscript{30} This was thought to follow logically from the companies' claim that one reason they need exclusive dealing is because the rents they receive on service stations they own are not sufficient to justify the capital investment. Assuming that the lessees cannot be made to pay a higher rent, in the absence of exclusive dealing there would be fewer stations built for lease. It is difficult to declare with absolute confidence that the very large number of service stations presently to be found in metropolitan areas is excessive, and from the public's point of view the cost in unsightliness may be felt to be recouped in terms of convenience and no queuing. It

\textsuperscript{27} The authorities pro and con the barriers to entry theory are reviewed in Note: Refusals to Deal by Vertically Integrated Monopolists (1974), 87 Harv. L. Rev. 1720 at 1725-32. See also, D. Needham, "Potential Entry Into Oligopoly" in Readings in Microeconomics, Breit and Hochman eds., (Hinsdale, Illinois: Dryden Press, 1971). The failure of the barriers to entry theory to win the universal assent of economists was noted by Mr. Justice Harlan, concurring in FTC v. Proctor & Gamble Co. (1967), 386 U.S. 568 at 581, a case involving a "product extension" type merger under s. 7 of the Clayton Act.

\textsuperscript{28} Id. at 128. One would expect, however, that the costs represented by the commissions would be to some extent offset by lower advertising costs for the t.b.a. producers with market access arrangements as compared with producers without such arrangements.

\textsuperscript{29} Id. at 132.

\textsuperscript{30} Id. at 124-25.
seems unlikely, however, that an intolerable degree of queuing would necessarily occur in the absence of a gas station on every corner.

When the practice of tying the sale of one product to that of another is engaged in by a firm with market power over the tying product, American jurisprudence has relegated the practice to the status of a per se antitrust violation on the theory that its sole purpose and effect is to limit competition in the market for the tied product. It is said that the tying represents simply an attempt to extend monopoly power from the market for the tying product into the market for the tied product. Probably few other judicially developed theories in American antitrust law have been subjected to such sustained academic criticism as the monopoly extension theory of tying. The critics point out that in most cases where the tying and tied products are used together the monopoly revenues that accrue from controlling the supply of the tying product cannot be increased from a monopolization of the tied product market. A monopolist who under given demand and cost conditions is maximizing his profits from the tying product and who then imposes an additional cost on his customers by obligating them to purchase the tied product from him is effectively raising the price of — and by definition decreasing the profit earned from — the tying product. Imposition of the tie raises the price of the tying product above the profit maximizing level. What is gained on one side is lost on the other. A theory of tying that has gained wide recognition in lieu of the monopoly extension theory explains tying in terms of price discrimination. A monopolist who must set one uniform price for his product (that is, who cannot charge each potential purchaser of his product exactly what such purchaser is willing to pay for it), will price the product so as to produce an output where marginal cost exactly equals marginal revenue. With a price so chosen, it is inevitable that there are some purchasers of the product who would have bought it even at a higher price and there are still other would-be purchasers who are unwilling to pay the monopoly price but would be willing to pay a lower price, but one still greater than or equal to the marginal cost of production. With an efficient system of price discrimination, all of these purchasers can be made to purchase at a price that closely approximates the full value of the product to them, and the monopolist can thereby increase his

31 See infra, notes 100-125 and accompanying text.


33 Bowman, id. at 20-21.
profits over what they would be at any single price. This type of price discrimination is probably socially beneficial, for it allows the monopolist "to expand his total output and to sell to customers who, while valuing the product above its marginal cost, cannot afford to pay the uniform price which the monopolist would charge in the absence of price discrimination." Overt price discrimination in the monopolist's product may be impossible, however, because of the difficulty of identifying the different values attached to the product by the different users or because of statutes outlawing price discrimination or because of the difficulty of preventing arbitrage among the different purchasers.

Where the product in question is used in conjunction with some other product, such as punch cards with computers or paper with photocopierson or cans with can-closing machinery, tying may be a neat solution to all three problems. The tying product, the product with respect to which there is monopoly power, may be sold or leased at a price near marginal cost. By insisting that all punch cards or paper or tin cans to be used with the machinery be purchased from him, the monopolist has a convenient counting or metering device. Through their purchases of the tied product, those persons who use the tying product most intensively will pay the most for it.

Under the price discrimination model, the producer of the tying product

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**Fig. 1a**

- A monopolist who must charge a single price for his product will set price at $P$ in Fig. 1a so as to equate marginal revenue with marginal cost (which has been made to equal average cost for the sake of simplicity), will produce output $A$ and will earn profits equal to the rectangle $PYXB$. In Fig. 1b, if the monopolist were able to engage in perfect price discrimination he would produce output $A^1$ and would earn profits equal to the triangle $DGB$. The triangle $DGB$ is larger than the rectangle $PYXB$.

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84 A monopolist who must charge a single price for his product will set price at $P$ in Fig. 1a so as to equate marginal revenue with marginal cost (which has been made to equal average cost for the sake of simplicity), will produce output $A$ and will earn profits equal to the rectangle $PYXB$. In Fig. 1b, if the monopolist were able to engage in perfect price discrimination he would produce output $A^1$ and would earn profits equal to the triangle $DGB$. The triangle $DGB$ is larger than the rectangle $PYXB$.

85 Harv. L. Rev. Note, supra, note 27 at 1728 n. 52.


89 This statement overlooks a subtle assumption upon which the model is based: that demand schedules of the individual consumers of the tying product are price sensitive in inverse proportion to the intensities of their respective uses of the product. That is, it is assumed that the more intensively a particular consumer uses the tying product, the less price elastic will be his demand for it.
is not interested in extending his monopoly into the market for the tied product, and indeed he cannot expect to do so for those tied products that have uses other than in conjunction with the tying product. If the price discrimination model is accepted as accurately describing a substantial number of tying cases in the real world, then the important policy question is what attitude to adopt toward the already existing monopoly in the tying product. For example, the intent behind the patent laws (a source of legitimate monopoly power) to encourage innovation might be best served by allowing the patentee to maximize his profits during the life of the patent. This would indicate either that tying should be tolerated in patent situations or that the law relating to price discrimination should be rethought. On the other hand, it must be recognized that for those tied products for which there is not a great demand other than for use in conjunction with the tying product, the effect, if not the intention, of the tying policy will be to extend monopoly into the market for the tied product and to shut out competing sellers thereof.\footnote{Supra, note 24 at 63 n. 42.}

The price discrimination model, for all its theoretical neatness, must be approached with some caution because of the numbers of occurrences of tied selling that it does not explain. It could conceivably explain only those examples where many units of the tied product are consumed in the course of using the tying product so that the tied product can truly be said to perform a metering function. It would not give a convincing rationale for the majority of litigated cases discussed in Part D.3 of this paper \textit{infra}. In particular, the price discrimination model does \textit{not} explain the practices of full-line forcing and directed buying in the gasoline industry, and therefore tying in that industry may be viewed as a classical extension of power from the market for petroleum products to the market for non-petroleum automotive products.

In the catalogue of pros and cons of exclusive dealing and tied selling, a final factor that might be mentioned is a concern to prevent dealers from being overreached by their suppliers, a concern to maintain dealers’ freedom of action for its own sake. Although a charter of freedom for dealers is doubtless a worthy legislative goal, this paper has little to say on the topic except as it relates to the state of competition in the market place,\footnote{For example, if we assume that dealers enjoying wider freedom from control by suppliers would sell different products from the ones they actually sell, that relates directly to competition, both among dealers and among their suppliers.} which is the chief concern of section 31.4 of the \textit{Combines Investigation Act}.

C. THE STATUTORY LANGUAGE

Exclusive dealing is defined in section 31.4 of the \textit{Combines Investigation Act} to include

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

(i) deal only or primarily in products supplied by or designated by the supplier or his nominee, or

(ii) refrain from dealing in a specified class or kind of product, except as supplied by the supplier or his nominee,

\footnote{Supra, note 24 at 63 n. 42.}
and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to him on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

Clause (a) of the definition is straightforward enough. The concern is only with exclusive dealing requirements that amount to a "practice" of the supplier, perhaps because it was not thought that anything short of a practice could have the effect of substantially lessening competition. On the other hand, the term "practice" when combined with "requires" avoids any implication of the formalities of "contract" or the voluntariness of "agreements." The language "or primarily" was inserted in order to disable suppliers from evading the coverage of the section simply by specifying that some proportion less than 100 per cent of the customer's requirements must be taken from the supplier or other designated source.42

Clause (b) is more troublesome. One of the most frequently asserted defences of the practice of exclusive dealing is that it reduces suppliers' costs because it enables them to plan production on the basis of a known demand and it also reduces their promotional costs. While one may be skeptical as to both the frequency of occurrence and the quantity of cost savings generated by exclusive dealing, subclause (b) could be interpreted to discourage suppliers from engaging in schemes to pass on these cost savings, where they do exist, to their customers. It is appreciated, of course, that exclusive dealing is not a criminal offense under the Act and that an order against it is not to be made except where, as a result of it, competition is likely to be substantially lessened. However, the legislative determination to define a certain practice as "reviewable" will likely have a 'chilling effect'; it will discourage businessmen from engaging in the practice so that they may safely avoid the possibility of governmental examination of their affairs. If a dominant supplier of a product in a market offered a price reduction to customers in return for their exclusive dealing, and as a result many customers so dealt, it is possible that the Commission could find that competition had been substantially lessened. If the price reduction were cost justified, however, the result of a finding of substantial lessening of competition could be to penalize the efficient firm, to protect competitors rather than competition.43 In its Interim Report on Competition Policy, an early precursor to the present legislation, the Economic Council of Canada recommended that efficiency should be "the sole objective" of competition policy. "We are in effect saying that no individual competitor, corporate or otherwise, has an inherent right to stay in business."44 The answer to the possible difficulty created by subclause (b) is that discounts offered should be based on volume purchased and not on exclusive dealing.

Section 31.4 of the Act defines tied selling to be:

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

43 See generally, M. A. Adelman, Integration and Antitrust Policy (1949), 63 Harv. L. Rev. 27.
44 Supra, note 8 at 20.
(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 subparagraph (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.

The definition appears to cover comprehensively the various types of tied selling. The same remarks as were made above with respect to exclusive dealing may be made with respect to cost justified inducements in tied selling.

Exclusive dealing and tied selling are not offenses; they are practices reviewable by the Commission only — and only upon application of the Director of Investigation and Research. Where the Director makes such an application, the statute does not give to the Commission discretion to decline to review the practice. The question of whether or not the practice sought to be reviewed does in fact fit within the definition of exclusive dealing or tied selling goes to the Commission’s jurisdiction, and presumably a respondent can raise it by way of preliminary objection. Every supplier against whom the Director seeks an order must be given notice and opportunity to be heard, including opportunity to cross examine witnesses. Before bringing an application for review before the Commission, the Director will presumably have made use of his broad investigatory powers to construct his case. In proceedings before the Commission, the burden of proof is upon the Director.

The Commission may make an order against the continuation of exclusive dealing or tied selling where it finds that:

First: The practice “is engaged in by a major supplier of a product in a market or . . . is widespread in a market”; and
Second: because of the presence of the first factor, 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
Third: because of the presence of the second factor, “competition is or is likely to be lessened substantially”.

In all the verbiage, the significant item appears to be the third: that the practice in question does or is likely to substantially lessen competition. The first factor, it is submitted, is a sine qua non for the third: competition cannot be lessened substantially by a practice that is neither engaged in by a major supplier of a product nor widespread in a market. The second factor as well appears to be of small practical significance: it is difficult to construct an

45 Supra, text following note 7.
46 Where, however, the Commission after reviewing a practice does make an order with respect to it, failure to comply with such an order would be an offense under s. 46.1 of The Act.
47 C.I.A., ss. 31.4(2), 31.8(3).
49 C.I.A., s. 31.8(2).
50 C.I.A., s. 31.4(2).
example where the practice of exclusive dealing or of tied selling would substantially lessen competition other than by impeding entry or expansion of sales of a firm or a product in the market or by having some other exclusionary effect. Thus, it is suggested, the first and second factors are simply basic, perhaps gratuitous, economics lessons delivered by Parliament for the Commission's edification concerning just how the practices in question could be likely to result in a substantial lessening of competition. In the writer's opinion, the effect of section 31.4(2) would be unchanged if it read: "The Commission may make an order where it finds [include here procedural standards] that exclusive dealing or tied selling lessens competition substantially or is likely to do so."

Where the Commission finds that exclusive dealing or tied selling has the proscribed effect it may make an order directed to any supplier who has been given notice of the proceedings and an opportunity to be heard prohibiting such supplier from engaging in the practice and containing any other requirement that in the Commission's opinion "is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market."

Although the *Combines Investigation Act* does not provide for any appeal from orders of the Commission, a supplier against whom the Commission makes an order under the reviewable trade practices sections will presumably be able to seek review of the order in the Federal Court of Appeal under section 28 of the *Federal Court Act* upon the ground that the Commission failed to observe a principle of natural justice or otherwise acted beyond its discretion, erred in law in making its decision, or based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

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51 The best example the writer can construct, but not one in which he has much confidence, is to the following effect: Assume that Firm A manufactures a superior line of computers and that it has a substantial share of the computer market. Assume further that it limits the sale or lease of its computers to those users who will agree to use exclusively A-brand punch cards. Assume that there is one other manufacturer of punch cards, Firm B, which is manufacturing and selling punch cards to capacity, has no desire to expand, and sells the cards somewhat cheaper than A-brand cards. The users of A-brand computers would purchase B-brand cards if they could, since B-brand cards are cheaper, but they are prohibited by the tie from doing so. Firm A's tying practice has substantially lessened competition in the sale of punch cards, since users of the A-brand computer are an important segment of the total market for computer punch cards, and they cannot buy from Firm B. However, since B is producing to capacity, it is suffering no exclusionary effect.

This example, however, is flawed. If B is a normally profitable firm selling cards at a lower price than A, then it is logical to assume, if production costs for cards of the two firms are equal, that A is earning a supra-normal profit from its card operations. If so, then competition theory tells us that there are other firms that would enter this supra-normally profitable line of business (sales of punch cards to users of the A-brand computer) but for the fact of being excluded from the card market by A's tying policies.

52 R.S.C. 1970 (2nd supp.) c. 10 (as am. S.C. 1970-71-72, c. 1). That the review provisions of s. 28 are available with respect to orders of the Commission is conceded both by the Commission's present Chairman and by the Director of Investigation and Research. J. J. Quinlan, *The Restrictive Trade Practices Commission: Its Function and Duties* (1975), 44 Antitrust L.J. 492 at 506; Dep't. of Corporate and Consumer Affairs, *Background Papers to Stage One Competition Policy* (Ottawa: Queen's Printer, 1976) at 3.
There are four situations specified in section 31.4(4) of the Act where
the practices of exclusive dealing or tied selling would not be subject to an
order of the Commission. They are listed here, although the implications of
some of the exemptions will be drawn out more fully in the remaining parts
of the paper. First, and probably of most practical importance, neither ex-
clusive dealing nor tied selling is subject to an order of the Commission where
it occurs between or among affiliated firms.\(^5\)

The definition of 'affiliated' includes the conventional one of common control between the respective firms. There is, however, an additional definition that is not the one familiar to corpo-
rate and securities lawyers: two firms are affiliated in respect of any agreement
between them whereby one party grants to the other party the right to use a trade mark or trade
name to identify the business of the grantee, provided

(i) such business is related to 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

(ii) no one product dominates such business.\(^64\)

This exemption for franchise systems was introduced by the Government be-
tween the second and third readings of Bill C-2 in the House of Commons,\(^5\)
apparently in response to the Opposition's constantly reiterated argument that
the effect of section 31.4 would be to destroy franchising, a form of business
organization alleged to be socially desirable because franchisees are small
business owners rather than mere employees of huge companies.\(^56\) Sentiment
was expressed in favour of a flat exemption from the vertical restraint pro-
visions for franchised businesses.\(^57\) The Government took the positions that
an exemption for all firms conducting business by franchising would virtually
read the vertical restraint provisions out of the Act and that, in any event,
most franchise operations would not run afoul of the Act's substantial-lessen-

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\(^5\) The statutory wording (s. 31.4(4)) is: "no order made under this section applies
in respect of exclusive dealing . . . or tied selling between or among companies, partners-
ships and sole proprietorships that are affiliated." Suppose, in an example of directed
buying, that a parent corporation makes available to its subsidiary a product manu-
factured by the parent upon condition that the subsidiary purchase all of its requirements
of some other product from a non-affiliated company. Is the tied selling between affiliated
companies? The answer, it is submitted, is yes; the important affiliation is between the
firm imposing the obligation and the firm upon which the obligation is imposed.

\(^64\) C.I.A., s. 31.4 (5)(c). This franchise exemption for exclusive dealing and tied
selling should not be confused with s. 31.4(7) of the Act, exempting from reviewability
geographic and customer market restrictions in the fast food and soft drink franchise
businesses.

\(^56\) Can. H.C. Debates (Oct. 16, 1975) at 8278.

\(^57\) H.C. Committee Proceedings, supra, note 5 at 50:8-10, 24-25; 51:16; 52:20-23,
27-31; 53:7-8; 55:89-98. The term "franchising" indicates a pattern of contractual re-
lationships whereby a firm, the franchisor, which has developed a pattern or formula
for the manufacture and sale of a product, extends to other firms, the franchisees, the
right to engage in the business, using the trademark or trade name of the franchisor,
subject to certain restrictions and controls. See generally, Thompson, supra, note 32 at
10-26; J. T. McCarthy, Trademark Franchising and Antitrust: The Trouble with Tie-ins
Eventually the Government relented and introduced the amendment that is now section 31.4(5)(c). The main interpretive problem with the exemption is with the word "obtained" in "obtained from competing sources of supply." Obtained by whom — by the franchisor, the franchisee, or either one? In the debates, section 31.4(5)(c) was referred to as the IGA exemption, but its applicability to operations such as IGA is in fact unclear. While IGA franchised grocers typically sell a multiplicity of products, no one of which is dominant, obtained from competing sources of supply, the obtaining is done not by the grocers themselves but by the franchisor. In the arrangements that are common between oil companies and brand-name service stations, the exemption would not be available both because the various products sold are not obtained, either by the companies or by the stations, from a multiplicity of suppliers and because one product — gasoline — does dominate the business.

Of the three remaining exemptions, one relates to exclusive dealing only and two to tied selling only. Exclusive dealing is not subject to an order where it is "engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market." Tied selling is not subject to an order where it "is reasonable having regard to the technological relationship between or among the products to which it applies." Finally, "tied selling that is engaged in by a person in the business of lending money for the purpose of better securing loans made by him and is reasonably necessary for such purpose" is not subject to an order. The rationale for this exemption for financial institutions is not clear from the legislative history, but its purpose may be to leave banks free to require their borrowing customers to maintain compensating balances in non-interest bearing (that is, chequing) accounts with the lending bank or otherwise to conduct their banking business with the lending bank. Such a specific exemption might be felt to be necessary since the "products" of which section 31.4 speaks include both articles and services.

Having considered at least briefly the words chosen by Parliament to express its concern with the practices under discussion, and some of the sources of that concern, we turn next to the American law, which provides by far the largest body of relevant decisions and legal commentary.

D. EXCLUSIVE DEALING AND TIED SELLING UNDER U.S. LAW

1. Exclusive Dealing in the Courts

If there is a leading case in the law of exclusive dealing, it is doubtless Standard Oil Company of California v. United States (the Standard Stations
case), decided in the Supreme Court. The Standard Oil Company of California was the largest marketer of gasoline in the “Western area” of the United States — a seven state region which the court took to be the relevant geographic market. Under exclusive dealing agreements with about 6,000 independent service stations (comprising 16 percent of the retail service stations in the area), Standard sold 6.8 percent of the total gasoline sold in the area. Most of the outlets were bound to deal exclusively with Standard for petroleum products only, although some contracts covered t.b.a. as well.

The case was decided under section 3 of the Clayton Act, which provides in relevant part that

> It shall be unlawful for any person ... to lease or make a sale or contract for sale of goods ... or fix a price charged therefor ... on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods ... of a competitor ... of the lessor or seller, where the effect ... may be to substantially lessen competition or tend to create a monopoly. ... 67

The court, affirming the trial court, held that Standard’s contracts violated section 3 and that the requirement of showing that the effect of the agreements “may be to substantially lessen competition” is satisfied by proof that a substantial portion of commerce is affected. It was not necessary “to show that competitive activity has actually diminished or probably will diminish” over what it would be in the absence of exclusive dealing. Amplifying its holding, the court stated:

> [T]he qualifying clause of §3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected. It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, and it is clear that the affected proportion of retail sales of petroleum products is substantial.70

The court espoused a test of simple quantitative substantiality as sufficient for illegality under section 3 notwithstanding that in fact Standard had not increased its share of the market during the time it employed the exclusive dealing contracts; that the duration of the contracts was “not excessive”; that Standard could not by itself be said to dominate the market; and that exclusive

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64 Supra, note 25.

65 “Independent” as used by the court meant not company-owned. Outlets owned by Standard accounted for another 6.8% of total sales, and sales to industrial users for 9.5%. Standard thus accounted for 23% of the total gasoline gallonage sold in the Western area. It is not clear from the opinion whether the company-owned stations were company-operated or lessee-operated or both.

66 The opinion focuses upon the former type of contracts. The latter contracts, covering t.b.a., are characterized as tying contracts (supra, note 25 at 305 n. 8), and, from the Courts discussion of the law of tying contracts (id. at 304-06), it is reasonably clear that the t.b.a. contracts would have been held illegal per se, had their particular status been at issue.


68 Supra, note 25 at 299, 314. About 60 million dollars worth of petroleum products were sold by Standard under exclusive dealing contracts.

69 Id.

70 Id. at 314.
dealing contracts could be of advantage to buyers as well as sellers.\textsuperscript{71} The trial court, whose judgment was affirmed, had declined to consider evidence proffered by the defendant on the economic merits of these particular exclusive dealing contracts and on the flourishing state of competition in the industry.\textsuperscript{72} The Supreme Court said that "serious difficulties" would attend the attempt to apply tests that as a matter of economic reasoning would be relevant to the actual effect of the contracts on the state of competition in the industry.\textsuperscript{73} For one thing, since all of Standard's major competitors were also using exclusive dealing contracts, having introduced them at about the same time as Standard, at the end of whatever investigation might be made "it would not be farfetched to infer that their effect has been to enable the established suppliers individually to maintain their own standing and at the same time collectively, even though not collusively, to prevent a late arrival from wresting away more than an insignificant proportion of the market."\textsuperscript{74

Secondly, the court said, an investigation into the actual anticompetitive effects of a given practice would involve a standard of proof "most ill-suited for ascertainment by courts" — although not for specialized tribunals like the Federal Trade Commission (FTC), whose concurrent jurisdiction the court noted.\textsuperscript{75} In this respect, of course, the \textit{Clayton Act} is to be contrasted with section 31.4 of the \textit{Combines Investigation Act}, which gives sole jurisdiction over exclusive dealing and tied selling to a specialized tribunal.\textsuperscript{76} The role of the specialized tribunal as opposed to the generalist court is taken up more fully below.

\textsuperscript{71} \textit{Id.} at 306-09.
\textsuperscript{72} \textit{Id.} at 298-99.
\textsuperscript{73} \textit{Id.} at 308.
\textsuperscript{74} \textit{Id.} at 309.
\textsuperscript{75} \textit{Id.} at 310. The FTC, through agency adjudication, and the Department of Justice, through injunctive actions in the federal courts, share enforcement responsibility for the \textit{Clayton Act}. 15 U.S.C. §§ 21, 25. In addition, the FTC has exclusive authority to enforce s. 5 of the \textit{Federal Trade Commission Act} (15 U.S.C. § 45, declaring unlawful "unfair methods of competition in commerce"), subject to court review of its "cease and desist" orders. Indirectly, the FTC has enforcement power with respect to ss. 1 (combinations in restraint of trade) and 2 (monopolization) of the Sherman Act (15 U.S.C. §§ 1, 2) because the Supreme Court has held that any practices violative of the Sherman Act can be proceeded against by the Commission under s. 5 of the \textit{Federal Trade Commission Act}. Fashion Originators Guild of America Inc. v. FTC (1941), 312 U.S. 457; FTC \textit{v. Cement Institute} (1948), 333 U.S. 683.
\textsuperscript{76} Dissenting in \textit{Standard Stations} (supra, note 25 at 322), Mr. Justice Jackson found it "unfortunate" that the \textit{Clayton Act} "submits economic issues to judicial determination." See also Lockhart and Sacks, \textit{supra}, note 20 at 942. The Attorney General's Committee to Study the Antitrust Laws rejected the notion that all antitrust functions should be transferred from the Department of Justice to the Commission, \textit{Report of the Attorney General's National Committee to Study the Antitrust Laws} (Washington D.C., 1955), at 375, and any movement in such direction appears exceedingly unlikely now, granted U.S. political and academic disenchantment with the performance of the regulatory agencies generally and the FTC in particular. See authorities cited \textit{infra}, note 202.
In his famous dissent in *Standard Stations*, Mr. Justice Douglas predicted that the practical effect of the majority's judgment would be to encourage the large oil companies to integrate vertically by merger, if they were foreclosed from doing so by contract, thus turning the auto service station industry from an industry of small proprietors into an industry of clerks. While conceding that an industry regime characterized by exclusive dealing contracts is far from ideal from either the dealers' or the nation's point of view, Mr. Justice Douglas saw the alternative as far worse. This is a matter for some concern in the Canadian context, where agreements among affiliates are exempt from section 31.4, and a law controlling mergers is probably some years off.

Mr. Justice Frankfurter's majority opinion, which seemed to lay down a rule of *per se* illegality for exclusive dealing arrangements where "a substantial portion of commerce is affected", was greeted with a torrent of adverse comment. The main body of the criticism, while not unsympathetic to the court's view that wide-ranging economic investigations were beyond the competence of the judiciary, insisted that since the legislature had banned only some exclusive dealing arrangements — those likely to lessen competition substantially — some investigation of likely effects of a particular arrangement would have to be made. It was hard to see how, without flying in the face of the legislative intent, the judiciary, by ritualistic deprecation of its own sphere of competence, could turn the fact that an arrangement affected a substantial

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77 Supra, note 25 at 315. In 1950, one year after the *Standard Stations* case, Congress strengthened s. 7 of the *Clayton Act* (15 U.S.C. § 18), dealing with mergers, to cover asset acquisitions as well as share acquisitions. See, *Brown Shoe Co. Inc. v. United States* (1962), 370 U.S. 294. After the *Standard Stations* decision, the Standard Oil Company did not in fact engage in a policy of buying up its former customers and turning them into employees. But it did resort increasingly to the consignment or agency device for distribution of its product. F. Kessler and R. H. Stern, *Competition, Contract and Vertical Integration* (1959), 69 Yale L.J. 1 at 38-39. See also Thompson, supra, note 32 at 399. There is reason to believe, however, that in recent years company-owned and operated outlets have become increasingly important as compared with lessee-operated and independently owned outlets both in Canada (supra, note 5) and in the U.S. (*Antitrust & Trade Reg. L. Reptr.*, Washington D.C.: Bureau of National Affairs, July 1, 1975 at A-23).

78 The Douglas dissent is a classic elegy to the virtues of the small businessman. It is as much a document of American political sociology as of antitrust law. In the romantic, despairing prose, the small entrepreneur is hailed as an endangered species, a sort of twentieth century noble savage.

79 The Government has recently published the proposals of an independent committee of consultants to the Minister of Corporate and Consumer Affairs relating to Stage II changes in Canadian combines law, *Dynamic Change and Accountability in a Canadian Market Economy* (Ottawa: Queen's Printer, 1976). The matter of mergers will be taken up as part of the Stage II amendments.

portion of commerce into the conclusion that competition had been *foreclosed* in so much commerce as was *affected*.\(^8\)

By the time of its next full-dress hearing of an exclusive dealing case, *Tampa Electric Co. v. Nashville Coal Co.*,\(^8\) the Supreme Court seemed to have backed away from the quantitative substantiality test. Tampa, an electric utility, had agreed to purchase from Nashville, a coal producer, all of its requirements of coal for generating plants in Florida over a 20-year period. The value of coal involved was to have been not less than $128 million. (Thus, the contract was of much longer duration than those in *Standard Stations* and involved twice the dollar volume). Before deliveries were to have begun, Nashville reneged, and in the ensuing litigation it defended on the ground that the requirements contract was illegal under section 3 of the *Clayton Act*. This argument was sustained in the lower courts, largely on the basis of *Standard Stations*. The Supreme Court reversed, stating that "a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence."\(^8\) What was more significant was the volume of commerce involved in the contract as a proportion of the total volume of commerce in the relevant product and geographic markets. Taking the product market as coal, the market foreclosed was to be defined not with reference to the purchaser's location but rather with reference to the total coal production in that region where the defendant Nashville produced: the eight state region known roughly as Appalachia. The relevant market foreclosure is that suffered by the producer's actual and putative competitors. So construed, the particular contract

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\(^8\) In the writer's view, the most cogently expressed criticism of Mr. Justice Frankfurter's opinion was that of the Attorney General's Committee, *id.* at 146-47 (emphasis in source):

The central inquiry, we believe, is whether a system of challenged exclusive arrangements in fact "forecloses" competitors from a substantial market. It is, of course, elementary that every bilateral contract for the sale of goods correspondingly prevents third parties from getting that business, and to this extent excludes a rival's trade. Hence an exclusive arrangement may be no more restrictive than an ordinary mercantile agreement; a flexible short-term requirements contract, for example, may leave greater opportunities to rivals than an absolute sale of a large quantity which would fill the buyer's needs for a longer time.

* * *

In our view, the mere coverage of a substantial volume of commerce by exclusive dealing arrangements, while a factor to be considered, is not tantamount to "foreclosure" of rivals from access to a substantial market, so that some analysis of particular distributive patterns is essential to any determination of actual foreclosure.

\(^8\) *Supra*, note 21. The court had dealt with exclusive dealing in two cases between *Standard Stations* and *Tampa*: in *FTC v. Motion Picture Advertising Service Co. Inc.* (1953), 344 U.S. 392, it upheld as supported by substantial evidence the Commission's finding that certain long-term exclusive dealing contracts constituted an unfair method of competition under s. 5 of the *Federal Trade Commission Act*; in *Richfield Oil Corp. v. United States* (1952), 343 U.S. 922, it affirmed *per curiam* the judgment of the trial court that the oil company's exclusive dealing and full line forcing practices were illegal under the *Sherman* and *Clayton* Acts. The Supreme Court's opinion was limited to citation of *Standard Stations*.

\(^8\) *Supra*, note 21 at 329.
foreclosed substantially less than one percent of the total coal market. The court did not find such foreclosure to be substantial:

There is here neither a seller with a dominant position in the market, nor myriad outlets with substantial sales volume, coupled with an industry wide practice of relying upon exclusive contracts, nor a plainly restrictive tying arrangement. On the contrary, we seem to have only that type of contract which may well be of economic advantage to buyers as well as to sellers.\(^8\)

The particular advantage to the buyer here, a public utility, was the assurance of a steady and ample supply of fuel so that customers would not be exposed either to service failures owing to shut downs or to constantly escalating rates.\(^5\)

Shortly after its decision in *Tampa*, the Supreme Court, in reviewing section 3 of the *Clayton Act* and in an apparent attempt to reconcile *Tampa* with *Standard Stations*, cited *Tampa* for the proposition that

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\text{a requirement contract may escape censure if only a small share of the market is involved, if the purpose of the agreement is to insure to the customer a sufficient supply of a commodity vital to the customer's trade or to insure to the supplier a market for his output and if there is no trend toward concentration in the industry.}\(^8\)\]

2. Exclusive Dealing and the FTC

Despite the quite sharp distinction drawn by the Supreme Court in *Standard Stations* between the type of economic inquiry into the actual competitive effect of a given practice that could suitably be undertaken by a court and what could be undertaken by a specialized tribunal such as the FTC, the latter body eventually came to deal with exclusive dealing under a *per se* quantitative substantiality test.

In the first exclusive dealing case to come before it after *Standard Stations*, the Commission did indeed take the position that it should make the full scale inquiry into actual anti-competitive effects that the Supreme Court had abjured. In *The Maico Company, Inc.*\(^8\) the hearing examiner had excluded from the record certain evidence relating to the effect on competition of the exclusive dealing provisions in the respondent's contracts with distributors of its hearing aids. The examiner found a violation of section 3 solely on the bases of the large absolute amount of business done by the respondent under such contracts and the respondent's relative position in the industry. The full Commission reversed and remanded to the hearing examiner to receive the respondent's proffered evidence.

We believe the structure of the Federal Trade Commission was specifically de-

\(^{84}\text{Id. at 334.}\)

\(^{85}\text{It may be doubted whether adequate protection of the public interest really required a 20-year requirements contract since, when Nashville reneged, Tampa found no shortage of suppliers waiting and anxious to step into the breach: see, Bok, supra, note 20 at 284.}\)

\(^{86}\text{Brown Shoe Co. v. United States, supra, note 77 at 330-31. It is to be noted that there are three separate factors here: small market share affected and no trend toward concentration and a purpose to ensure either a source of supply to the customer or an outlet to the supplier.}\)

\(^{87}\text{(1953), 50 FTC 485.}\)
signed to make decisions involving this type of complex economic problem. To refuse to exercise our talents as an administrative tribunal in these cases because the courts feel "ill suited" to weigh all of the relevant factors, would deprive the country of the very services which we were created to furnish. 88

But by 1960, some seven years after Maico, the Commission had changed its view. In Mytinger & Casselberry, Inc. 89 the hearing examiner had found that the exclusive dealing contracts between the respondent, a marketer of a vitamin-mineral food supplement, and its door-to-door distributors violated section 3, solely on the evidentiary bases of the respondent's large share of the relevant market and the large number of distributors involved. The hearing examiner had declined to consider certain economic evidence relating to the respondent's constantly declining market share and to the low cost that competitors would face in establishing their own systems of distributors. The Commission affirmed the hearing examiner and announced that it would no longer follow its earlier expressed views in Maico as to the relevancy of economic evidence because "since the date of the Commission's action in the Maico case, the courts have made it clear that in a situation such as that shown to exist in this record, the plain language of Section 3 makes irrelevant those economic considerations urged by respondents." 90

In Canda, where jurisdiction over exclusive dealing and tied selling will lie solely in the RTPC, it should be clear enough that all economic evidence going to the issue of a practice's actual or likely effect upon competition will be relevant, indeed, of the essence. However, the views of the American FTC in Mytinger & Casselberry and the judicial decisions relied upon therein reveal a confusion that could, in the absence of care, creep into Canadian proceedings: that is, a failure to distinguish between evidence going to the issue of the presence or absence of substantial anti-competitive effect, actual or likely, and evidence attempting to show a business justification for a practice found to be substantially anti-competitive. Evidence of the first type must be received; evidence of the second type is correctly excluded unless it tends to establish one of the legislatively created defenses, for example, in Canada, new supplier, affiliation and technological relationship. The tribunal's role is to assess anti-competitive effects, not to forgive them. 91

The distinction between the two types of evidence is illustrated both by Mytinger & Casselberry itself, and by the cases therein relied upon by the Commission as authorities for rejecting all economic evidence. In Mytinger & Casselberry the matters of respondent's declining market share and the low cost of establishing distributorships are clearly relevant to the question of anti-competitive effect.

In Anchor Serum Co., 92 evidence was proffered, and rejected, to the effect that the exclusive dealing contracts were necessary to protect the

88 Id. at 488.
89 (1960), 57 FTC 717.
90 Id. at 741. The Commission's view was in turn affirmed by the Court of Appeals for the District of Columbia Circuit, (1962), 301 F. 2d 534, over the dissent of Judge, now Chief Justice, Burger.
91 Cf., A.G. Committee, supra, note 76 at 148.
92 (1954), 50 FTC 681, aff'd., 217 F. 2d 867 (7th Cir.).
“Anchor” trade name, since some of Anchor’s distributors were contractually entitled to use “Anchor Serum” as part of their names. Rejection of the evidence on this point was probably correct since, as the Court of Appeals pointed out, judicial creation of such a defense would mean that, irrespective of its effect upon competition, any exclusive dealing arrangement could be justified by including in the contract a privilege for the purchaser to use the trade name of the seller. The other evidence rejected in Anchor Serum related to the respondent’s claim that in many cases the impetus for exclusive dealing contracts came not from it but from the distributors, who wanted to have an assured source of supply. In affirming the Commission, the court stated that so long as there was, in the words of section 3, a “condition, agreement or understanding” for exclusive dealing which had the proscribed effect upon competition, it was of no concern whether buyer or seller had instigated the arrangement. “We think it is a novel theory that the rights, liabilities and obligations of parties to a contract depend upon which of the parties propose it.”

Suppose that under the Combines Investigation Act a dealer in or user of a product wishes to obtain an assured source of supply. Surely it would be a rare supplier who would agree to accept an absolute obligation to stand ready always to meet a customer’s requirements without demanding in return that the customer deal exclusively for such product with that supplier. The result in such a case would be, to paraphrase the language of section 31.4(1), that the supplier would induce the customer to deal exclusively with that supplier by offering the goods on particularly favourable conditions — that is, assuring the customer that all of its requirements of the product will be filled. As a result, Canadian law may be expected to follow Anchor Serum in this regard.

In Dictograph Products, Inc., the rejected evidence was again of two types. The first was designed to show that the technological theory underlying the respondent’s hearing aids was different from that of its competitors’ hearing aids, and that therefore respondent had to insist upon exclusive dealing from its distributors in order that its product be properly presented to the public. Evidence of this sort of “business necessity” justification, of which there was no mention in the Clayton Act, was quite properly rejected since

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93 217 F. 2d at 871. There is not in the Clayton Act, or in the Combines Investigation Act, any defence to exclusive dealing for the protection of a trade name. But see, Susser v. Carvel Corp. (1964), 332 F. 2d 505 at 516-17 (2nd Cir.), cert. dismissed, (1965), 381 U.S. 125. See also, infra, notes 135-37, 194-95, 207-09 and accompanying text.

94 217 F. 2d at 870.


96 In fact there are no defences written into s. 3 of the Clayton Act, as there are in s. 31.4 of the C.I.A. However, some of the same defences as appear in the Canadian statute would in practice also be available under the American one. If a producer and a distributor are affiliated, for example, (C.I.A., s. 31.4 (4)), then there will probably be absent a purchase or lease between the parties, necessary to bring s. 3 of the Clayton Act into play. Where a new supplier engages in exclusive dealing for only a “reasonable period”, then it is hard to see how the effect could be to “substantially lessen competition.” As for the technological relationship defence to tied selling in the U.S., see, infra, notes 126-34 and accompanying text.
it will almost always be true, *ceteris paribus*, that exclusive dealing produces more effective marketing of the product exclusively dealt in. The other evidence rejected, however, was to the effect that during the time the respondent had engaged in exclusive dealing its competitors in the manufacture of hearing aids had increased from twenty to eighty. Exclusion of this evidence clearly was wrong, since it is hard to see what could be more relevant to the effect of a practice upon competition than a sharp increase or decrease in the number of competitors.  

Whatever the logical merits of the FTC's decision to exclude economic evidence and to follow a rule of *per se* illegality where a substantial amount of the relevant market was tied up in exclusive dealing arrangements, the decision to proceed in this way was probably a legal necessity so long as court and Commission were to have concurrent jurisdiction over section 3 enforcement. For it was clear from the Supreme Court's *Standard Stations* opinion how the federal trial courts were to approach exclusive dealing, and if the Commission were to have persisted in approaching it differently, that is with greater economic sophistication, then the result might have been different standards of legality for the same practice depending on whether it was litigated before a court or the Commission.  

While the Commission might have continued to consider all economically relevant factors on the assumption that the *Tampa Electric* case represented an abandonment by the Supreme Court of its extreme anti-economic evidence position in *Standard Stations*, that is not what happened. In affirming the FTC in *Mytinger & Casselberry*, the Court of Appeals took *Standard Stations* as the guide post and distinguished *Tampa Electric* on the basis of the small percentage of the relevant product market there involved.  

There has not been very substantial development of exclusive dealing doctrine in either the courts or the Commission after *Tampa Electric*. The Commission has been fairly active in its enforcement efforts against exclusive dealing, but the vast majority of complaints have resulted in consent decrees.

### 3. Tied Selling

The law of tied selling in the United States has developed under two statutory provisions, section 1 of the *Sherman Act*, which prohibits contracts, combinations and conspiracies “in restraint of trade”, and Section 3 of the *Clayton Act*. Because Section 3 of the *Clayton Act* relates only to “commodities”, its specific language directed at tied selling has not availed in all
cases, and resort has frequently been had to the more general provisions of the Sherman Act. Under Section 3 of the Clayton Act the Supreme Court has developed a rule of virtual per se illegality: a tied selling arrangement is illegal whenever it covers a substantial volume of commerce in the tied product. This simple rule has been developed because, in the court's view, "[tying agreements serve hardly any purpose beyond the suppression of competition] in the market for the tied product." The requirement of substantiality can be satisfied either in absolute dollar terms — $500,000 worth of salt was enough in International Salt Co. v. United States — or in terms of the proportion of the market for the tied product that is affected. The threshold of substantiality is indeed a low one, having been equated by the court with "not insubstantial", not "de minimis" and "not paltry."

Under the more general language of section 1 of the Sherman Act, a tying arrangement will be illegal only if unreasonable; it will be unreasonable per se if the defendant has a dominant position in the market for the tying product and a substantial volume of commerce in the tied product is restrained. The requisite dominance in the tying product market will always be present where the tying product is itself patented or subject to copyright or is inherently unique — as land. Even if tying challenged under the Sherman Act is not per se unlawful, (as where the requisite tying product dominance is absent),

102 Of the nine cases in the Supreme Court of the United States involving the legality of tied selling under the antitrust laws (as opposed to the question whether a tying seller can sue for patent infringement of the tying device), five have arisen under the Sherman Act, three under the Clayton Act and one under both statutes. Sherman Act cases: Fortner Enterprises, Inc. v. United States Steel Corp. (1969), 394 U.S. 495; United States v. Loew's Inc. (1962), 371 U.S. 38; Northern Pacific Railway Co. v. United States, supra, note 100; Times-Picayune Publishing Co. v. United States (1953), 345 U.S. 594; United States v. Paramount Pictures, Inc. (1948), 334 U.S. 131. Clayton Act cases: International Business Machines Corp. v. United States (1936), 298 U.S. 131; FTC v. Sinclair Refining Co. (1923), 261 U.S. 463; United Shoe Machinery Corp. v. United States (1922), 258 U.S. 451. International Salt Co., Inc. v. United States (1947), 332 U.S. 392 was brought under both statutes.

103 International Salt, id.; see, Times-Picayune Publishing Co., id. at 608-09.

104 Standard Stations, supra, note 25 at 305-06.

105 Supra, note 102.

106 See, Fortner Enterprises, supra, note 102 at 501-02.

107 Id.

108 Times-Picayune Publishing Co., supra, note 102 at 608-09.

109 International Salt, supra, note 102. Furthermore, the conclusive finding of dominance is not negatived by the fact that there are many substitutes available for the patented product. Northern Pacific, supra, note 100 at 9; Fortner Enterprises, supra, note 102 at 503-05.

110 U.S. v. Loew's, supra, note 102; U.S. v. Paramount Pictures, supra, note 102.

111 Northern Pacific, supra, note 100. A trademark, however, will not necessarily confer the requisite dominance upon the tying product. Capital Temporaries Inc. of Hartford v. Olsten Corp. (1974), 506 F. 2d 658 at 663 (2nd Cir.); Susser v. Carvel Corp. supra, note 93 at 519. Contra: Siegel v. Chicken Delight, Inc. (1971), 448 F. 2d 43 at 49-50, cert. denied, (1972) 405 U.S. 955. A trademark, as opposed to a patent or a copyright, does not confer upon its owner the right to prevent copying of the product subject to the mark but gives him only the right not to have the mark itself misappropriated.
it may still be illegal under general Sherman Act standards relating to illegal purpose or effect of a challenged arrangement.\textsuperscript{112}

Since section 31.4 of the \textit{Combines Investigation Act} covers both "articles" and "services" and since "articles" are defined comprehensively in section 2 of the Act as "real and personal property of every description", the Canadian law of tied selling can develop along a unitary path, rather than the bifurcated one that has characterized U.S. developments. And if the RTPC takes as negative a view of the merits of tied selling as does the U.S. Supreme Court, then eventually the rule in Canada could come to look much like the American \textit{Clayton Act} rule: tied selling would be found to be likely to lead to a substantial lessening of competition wherever a substantial amount of commerce in the tied product was involved. The writer would not consider the emergence in Canada of such a \textit{per se} rule as either unlikely or inappropriate simply because the practice has been committed to the jurisdiction of a specialized tribunal. It would, however, appear remarkable for such a rule to emerge very early in the Commission's tied selling proceedings and before the Commission had had some experience in considering the phenomenon.

The question of dominance in the American \textit{Sherman Act} proceedings is worth some consideration in the context of the \textit{Combines Investigation Act}, however, because in the absence of tying product dominance it is doubtful that tied selling can exist or, at any rate, that its effect upon competition could be substantial.\textsuperscript{113} The purpose of a tying arrangement is to induce the purchaser to purchase the tied product in circumstances where, in the absence of the agreement, he would not do so.\textsuperscript{114} If the same amount of the tied product would be consumed in the absence of the tying arrangement as with it, that is, if the tied product would sell equally well on its own unaided merits, then no effect has been achieved by the arrangement other than possible alienation of some of the prospective consumers of the tying device.\textsuperscript{115} The consumer agrees to alter his purchasing pattern in the tied product from what his self-interest would otherwise dictate simply because the tying product has

\textsuperscript{112} \textit{Fortner Enterprises}, supra, note 102 at 500; \textit{Times-Picayune Publishing Co.}, supra, note 102 at 614.

\textsuperscript{113} As Mr. Justice Black stated in \textit{Northern Pacific}, supra, note 100 at 6: [W]here the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most.

\textsuperscript{114} In recognition of those cases (like \textit{Northern Pacific}, \textit{id.} at 3) where the obligation to purchase the tied product is conditional upon better price or other terms not being available elsewhere, perhaps the phrase "might not do so" would be more accurate in the text. These types of tying arrangements can be anti-competitive in their effect since the tying seller is obligated merely to meet its competitors' terms to keep the business in question, while the competitors must beat the tying seller's terms to get the business for themselves. See, \textit{International Salt}, supra, note 102 at 397.

\textsuperscript{115} A private plaintiff seeking treble damages who cannot show that he was "coerced" by the tying arrangement into making a purchase of the tied product where he would not otherwise have done so cannot succeed. \textit{American Manufacturers' Mutual Ins. Co. v. American Broadcasting-Paramount Theatres Inc.} (1971), 446 F. 2d 1131 (2nd Cir.), cert. denied, (1972), 404 U.S. 1053; \textit{Capital Temporaries v. Olsten}, supra, note 111; \textit{Ungar v. Dunkin' Donuts of America, Inc.} (1976), 531 F. 2d 1211 (3rd Cir.).
some particular appeal for him. When the onus of the obligation to purchase the tied product is subtracted from the appeal of the tying product, the result is still better for the purchaser than doing without the tying product. That is what dominance in the tying product means. In *Northern Pacific Railway Co. v. United States*, the court stated that the very existence of tying arrangements is compelling evidence of a defendant's "great power" in the market for the tying product, at least in the absence of some other explanation, and the circle was closed completely when the Court explained that the requisite amount of "dominance" was that amount "sufficient . . . to impose an appreciable restraint on free competition in the tied product." In other words, the test for *per se* illegality under the *Sherman Act* was really one and the same as that under the *Clayton Act*.

By the time of its most recent tying case, *Fortner Enterprises, Inc. v. United States Steel Corp.*, the Supreme Court was still espousing economic power in the tying product market and restraint of a substantial volume of commerce in the tied product market as separate elements of Sherman Act *per se* illegality, and the result was confusion all around. In *Fortner Enterprises*, a private treble damage action, the plaintiff was the owner of a large tract of land near Louisville, Kentucky, suitable for residential development. The defendant Steel Company was anxious to market the prefabricated steel homes manufactured by its Homes Division. The defendant approached the plaintiff with a plan whereby the plaintiff would erect the defendant's prefabricated homes on the building lots, and the defendant's Credit Corporation subsidiary would extend to the plaintiff on favourable terms credit to finance

110 *Northern Pacific*, supra. note 100 at 8.

111 Id. at 6, 11.


Concomitantly with [the explosion in antitrust litigation] has come the increased use of the class action device . . . A class action of many thousands or indeed millions of class members, based upon novel restraints found unlawful in government action after years of litigation can now confront a defendant with claims running into the hundreds of millions if not billions of dollars. This produces a risk factor of incalculable proportions.

In Canada, the private action arising out of exclusive dealing and tied selling is by comparison quite restricted. It is available only where the RTPC makes an order against the practice and the order is violated, thus causing injury to the plaintiff, *C.I.A.* s. 31.1 (1)(b).

119 Supra, note 102.
the purchase and construction of the homes and the development of the lots. An agreement embodying the understandings was entered into, the credit was extended and the development proceeded. Eventually the plaintiff-developer ran into serious financial difficulties, allegedly due in the main to the defective quality of the homes, and the litigation followed. The theory of the plaintiff's case was that the defendant had illegally tied the availability of its credit to purchase of its prefabricated homes. The case reached the Supreme Court on appeal from a summary judgment in favour of the defendant.

The court, in a five-to-four split, reversed and remanded for trial. The majority, per Mr. Justice Black, held that the uncontroverted facts indeed made out a tying case and that the amount of commerce in the tied product, the houses, affected by the arrangement was substantial. The case was remanded for trial on the issue of the Steel Company's power in the market for the tying product — credit. In the dissenters' view, this was really not a tying case at all, unless a commodity could be said to be tied to its own price. What was being sold was one item, prefabricated steel homes, and not two. The dissenters saw the cheap credit simply as a form of price competition in the sale of the homes themselves, and, of course, encouragement of price competition is a policy close to the heart of antitrust law. Mr. Justice Fortas concluded with respect to the applicability of tying doctrine:

To apply this rule to a situation where the only "leverage" is a lower price for the

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121 There were in fact two dissenting opinions, one by Mr. Justice White, concurred in by Mr. Justice Harlan, and another by Mr. Justice Fortas, concurred in by Mr. Justice Stewart. They were in general agreement and, therefore, an amalgam is presented in the text.

122 There can be no tied sale where there is only one product sold. In Times-Picayune Publishing Co., supra, note 102, the defendant published the sole morning and one of two evening newspapers in New Orleans, and it refused to sell advertising space in either one separately. The majority of the court concluded (at 613-14) that in essence what was being sold to advertisers was readership and that since there was no evidence in the record relating to "generic qualities differentiating morning from evening readers in New Orleans", there was no basis upon which to conclude that advertising space in the morning newspaper was a product different from advertising space in the evening newspaper. See also, Washington Gas Light Co. v. Virginia Electric & Power Co. (1971), 438 F. 2d 248 (4th Cir.); M. E. Wheeler, Some Observations on Tie-ins, the Single Product Defense, Exclusive Dealing and Regulated Industries (1972), 60 Calif. L. Rev. 1557.
article sold or more advantageous financing or credit terms . . . is to distort the doctrine, and, indeed, to convert it into an instrument which penalizes price competition for the article that is sold.\textsuperscript{123}

Any arrangement viewed as price competition can be challenged under the antitrust laws only as predatory pricing in connection with monopolization. The writer agrees with the dissent in \textit{Fortner Enterprises} and is of the opinion that what was involved was not really tied selling at all. The Steel Company was not in the business of selling credit generally but used it only as a sales device for its houses.\textsuperscript{124} Thus, \textit{Fortner Enterprises} was not the sort of case that would be presented, for example, if the Canadian chartered banks were permitted entry into the equipment leasing business and then attempted to beat out non-bank leasing competitors by offering cheaper than normal credit to customers who would lease from the banks.\textsuperscript{125}

Under U.S. law, defences available in a tied selling case are few. One of those most frequently advanced — that the tying product would be in danger of malfunctioning if used in conjunction with anything but the tied product, thus endangering the goodwill in the tying product — has generally not been received with favour because there is usually available an alternative less restrictive of competition than tying, namely, specification of the type and quality of the product to be used in conjunction with the tying device.\textsuperscript{126} "The only situation, indeed, in which protection of goodwill may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be supplied."\textsuperscript{127} Another situation where speci-

\textsuperscript{123} \textit{Fortner Enterprises}, supra, note 102 at 523. Compare, \textit{FTC v. Sinclair Refining Co.}, supra, note 102, holding the oil companies' practices of leasing gasoline pumps at nominal rates on condition that the pumps be used exclusively to dispense the respective respondents' gasoline not violative of the \textit{Clayton Act}, notwithstanding allegations of injury to small oil companies that could not afford to subsidize cheap pumps and small pump producers that had no gasoline sales from which to recoup losses on below cost leasing of pumps. The decision was grounded on the court's view that the service station proprietors were free to secure as many pumps and sell as many different types of gasoline as they pleased. But as to the actual feasibility of split-pumping, see Kessler and Stern, supra, note 77 at 38 n. 165.

\textsuperscript{124} See, dissent of Mr. Justice Fortas in \textit{Fortner Enterprises}, supra, note 102 at 521. See also, Dam, supra, note 32 at 18, 23-31; D. I. Baker, \textit{Another Look at Franchise Tie-ins After Texaco and Fortner} (1969), 14 Antitrust Bull. 767 at 776.

\textsuperscript{125} See, \textit{Financial Post}, August 28, 1976, at 4, col. 5. In \textit{Fortner Enterprises}, Mr. Justice Fortas was of the view (\textit{supra}, note 102 at 522) that there was no tying involved — period. Mr. Justice White (\textit{id. at 516}) would have been prepared to entertain the action as a tying case were there any possibility that plaintiff could show that the Steel Company had independent monopoly power in the market for credit, but he interpreted plaintiff's pleadings and affidavits as falling far short of making out any allegation of such power.

\textsuperscript{126} \textit{Standard Stations}, supra, note 25 at 306; \textit{I.B.M. v. U.S.}, supra, note 102 at 139; \textit{Harley-Davidson}, supra, note 97 at 1067. But see, \textit{Dehydrating Process Co. v. A. O. Smith Corp.} (1961), 292 F. 2d 653 (1st Cir.), cert. denied, 368 U.S. 931, finding no violation of the \textit{Clayton Act} where defendant refused to sell its patented grain unloading device except for installation in its patented silo. The defendant had received numerous complaints concerning the unloader's operations where it was installed in silos manufactured by others.

\textsuperscript{127} \textit{Standard Stations}, \textit{id. at 306}.
fication would serve no purpose is where the only device suitable by its specifications for use in conjunction with the main device is itself patented.\textsuperscript{128}

In \textit{United States v. Jerrold Electronics Corp.},\textsuperscript{129} the defendant was a manufacturer of community antenna television systems. Technologically, such a system consists of four distinct parts. The defendant sold only the system as such and refused to sell any of the components separately;\textsuperscript{130} furthermore, it sold the system together with a mandatory installation and service contract. The court absolved the defendant from liability for both aspects of the tied sales during the defendant's early years in business on the basis that the ties were reasonably necessary to protect the defendant's good will. The defendant was the pioneer in manufacture of community antenna television systems; the equipment involved was delicate; installation and servicing were complex matters; and it was essential for the continued viability of defendant's business that there not be a rash of systems failures at the start (as there had already been on a small scale before the defendant had resorted to mandatory installation and servicing).\textsuperscript{131} With the legitimacy of the mandatory servicing contract established, it was easy to justify the full system requirement on the basis that the defendant could not render the service it promised and deemed necessary if the customer could purchase any kind of equipment.\textsuperscript{132} The court sustained these defences, however, only for that period when Jerrold was "launching a new business with a highly uncertain future" and not for the period after the defendant had become fairly well established.\textsuperscript{133} Thus, \textit{Jerrold Electronics} stands for a sort of new producer's technological relationship defence.\textsuperscript{134}

Another situation that has called for judicial recognition under U.S. law of a defense to the otherwise \textit{per se} strictures against tied selling is protection of the goodwill value of a trademark.\textsuperscript{135} Some courts have held in the fran-

\textsuperscript{128} Furthermore, where the tied product is itself patented there may not be any competition to be substantially lessened with respect to it. Cf. \textit{Coniglio v. Highwood Services, Inc.} (1974), 495 F. 2d 1286 (2nd Cir.), \textit{cert. denied}, 429 U.S. 1022, holding no violation of the \textit{Sherman Act} where the Buffalo, N.Y. professional football club refused to sell regular season tickets except in a package with exhibition game tickets. The club had a monopoly of exhibition professional football in the Buffalo area. The result in a given case will depend upon tied product market definition, and the court in \textit{Coniglio} (\textit{id.} at 1292) was satisfied that exhibition professional football was the relevant tied product market.


\textsuperscript{130} The court discussed and dismissed (\textit{id.} at 559-60) the contention that the system was but a single product.

\textsuperscript{131} \textit{Id.} at 549-62.

\textsuperscript{132} \textit{Id.} at 560.

\textsuperscript{133} \textit{Id.} at 557-58.

\textsuperscript{134} A new producer's defense to tied selling was recognized by the Supreme Court in \textit{Brown Shoe Co. v. United States}, supra, note 77 at 330 (dictum).

chised business context that the licence to use a trademark may itself be a tying device under the Sherman Act. Many of the cases have arisen in the context of the “fast food” industry where tied products have included, for example, ingredients for the food, the machinery used to prepare it and the packaging in which it is sold. The trademark is only as good as the food sold by the franchisees and absolute consistency across time and space is of the essence. To the extent the food is prepared under a secret formula, as, for example, in the cases of soft ice cream or fried chicken, specification is obviously not a feasible alternative to tying. Even, however, where there is no secret recipe, as perhaps in the case of hamburgers, it may not be practicable to police quality control by any method short of tied selling, that is, indicating the sources from which the ingredients or the food are to be purchased by the franchisee. As we move further away from the food itself, however, to the packaging, for example, the justification for tying becomes slimmer because simultaneously the policing problem becomes less acute while the feasibility of specification as an alternative increases.

The Combines Investigation Act provides a defence for “tied selling that is reasonable having regard to the technological relationship between or among the products to which it applies.” “Reasonable” is, to be sure, a word most receptive of a broad or a restrictive interpretation. If, however, the RTPC takes the rather jaundiced view of tying arrangements that prevails in the United States, it will probably similarly limit the technological relationship defence to those situations where specification is not practicable. There is no “new business” defence in the Combines Investigation Act for tied selling, as opposed to exclusive dealing. However, the phraseology of the “technological relationship” defence is probably broad enough to cover facts similar to those in Jerrold Electronics. Also, careful examination of the definitions in The Act will reveal that tied selling, as therein defined, is a sub-classification of the more generally defined phenomenon of exclusive dealing. Therefore a new product defence could conceivably be made available by treating cases of tied selling as exclusive dealing, although at the cost of violating the familiar canon of statutory construction that the

136 Susser v. Carvel Corp., id. at 519; Siegel v. Chicken Delight, Inc., id. at 47; Warriner Hermetics, Inc. v. Copeland Refrigeration Corp. (1972), 463 F. 2d 1002 at 1015-16 (5th Cir.) cert. denied, 409 U.S. 1086; Carpa, Inc. v. Ward Foods. Inc. (1976), 536 F. 2d 39 at 48. Contra: Kugler v. AAMCO Automatic Transmissions Inc. (1972), 460 F. 2d 1214 (8th Cir.); Redd v. Shell Oil Co. (1975), 524 F. 2d 1054 (10th Cir.); Carvel Corp. (1965), 68 FTC 128 at 174-76. See generally, McCarthy, supra, note 35 at 1108-09; Comment, Franchise Tie-ins and Antitrust: A Critical Analysis, [1973] Wisc. L. Rev. 847 at 860-62. While a trademark may be a tying device under s. 1 of the Sherman Act, it probably cannot be a tying commodity under s. 3 of the Clayton Act. See, Ungar v. Dunkin' Donuts, supra, note 115 at 1213 n. 4. Furthermore, a trademark does not necessarily have such dominance as to satisfy the requirements for per se illegality under the Sherman Act, supra, note 111.


138 S.I.A., s. 31.4(4)(b).

139 Supra, note 129.

140 Compare clause (a)(1) of the respective definitions in s. 31.4(1) of The Act.
specific governs over the general. Protection of trade names is not an enumerated defence to tied selling under the Combines Investigation Act. In a statute which lists all exemptions, rather than leaving them to be developed on a case-by-case basis, the omission seems fairly serious. Conceivably the technological relationship defence could be stretched to fill the void, but it would indeed require a stretch.¹⁴¹

4. The TBA Trilogy

A series of three cases initiated in 1956 by the FTC under section 5 of the Federal Trade Commission Act established the illegality of market access arrangements between the major oil companies and the major producers of t.b.a.¹⁴² A market access arrangement in the service station industry is an agreement between an oil company and a t.b.a. producer whereby the oil company agrees to recommend (to use a neutral term) to its service station dealers the products of the t.b.a. company, which pays to the oil company a commission on all t.b.a. sales made to the oil company's dealers.¹⁴³

In the first of the cases to reach the Supreme Court, Atlantic Refining Co. v. Federal Trade Commission, the court affirmed the Commission's orders prohibiting Atlantic from being a party to any market access arrangement with any t.b.a. producer and similarly prohibiting Goodyear Tire & Rubber Company (the party with which Atlantic had the arrangement in litigation and a party to the proceeding) from being a party to any such arrangement with an oil company.¹⁴⁴ Atlantic was found to have very significant leverage over its dealers in the form of short term leases, equipment loan contracts and contracts for the supply of gasoline. The Commission found (and Atlantic did not appeal this finding) that Atlantic, with the active aid and encouragement of Goodyear, had coerced its dealers, by direct threats of termination of their status as such, into purchasing t.b.a. from Goodyear. The Supreme Court, emphasizing this practice of direct and overt threats,¹⁴⁵ affirmed both the Commission's finding of "an unfair method of competition" under section 5 and the broad relief ordered. Curiously, the court stated that "the Goodyear-Atlantic contract is not a tying arrangement" because "Atlantic is not

¹⁴¹ Furthermore, expansion of the technological relationship defense in this way would, in the case of fast food and beverage operations, be open to a sort of expressio unius objection since there is in s. 31.4(7) of The Act an exemption for market restriction arrangements in those industries.

The franchise-affiliation exemption, s. 31.4(5)(c), for exclusive dealing and tied selling would probably not be available in most cases, since it is required for that exemption that "no one product" dominate the business. See text accompanying notes 54-59, supra.

¹⁴² Atlantic Refining Co. v. FTC (1965), 381 U.S. 357; Shell Oil Company v. FTC (1966), 360 F. 2d 470 (5th Cir.), cert. denied, 385 U.S. 1002; FTC v. Texaco, Inc. (1968), 393 U.S. 223. The t.b.a. producers in the cases, respectively the Goodyear, Firestone and Goodrich rubber companies, the three largest in the United States, produced their own tires and certain automobile accessories. In addition, they sold under their respective names batteries produced for them by other companies.

¹⁴³ Supra, text accompanying note 8.

¹⁴⁴ Before instituting the market access method of t.b.a. distribution, Atlantic had purchased t.b.a. itself and resold it to its dealers, (supra, note 142 at 364 n. 6), but the purchase-resale method was not before the Commission or the court.

¹⁴⁵ Id. at 368.
required to tie its sale of gasoline . . . to purchase of Goodyear” products and because Atlantic does not “expressly require such purchases of its dealers.”\footnote{Id. at 369. The first factor cited by the court does not appear to the writer to be significant in determining whether there was a tying arrangement in the form of directed buying. What counts for the existence of tying is not what Atlantic was required to do under its agreement with Goodyear but only what Atlantic required of its dealers. The finding of overt coercion was a finding that in fact Atlantic required its dealers, as a condition of remaining Atlantic dealers, to purchase t.b.a. from Goodyear — in sum, a tied sale.} But having said that what was involved was not a tying arrangement, the court then proceeded to analyze the case as precisely that, citing tied sale cases and stating that “the central competitive characteristic” was the same as in tying: “the utilization of economic power in one market to curtail competition in another.”\footnote{Id. at 369-71.} Furthermore, said the court, citing \textit{Northern Pacific Railway Co. v. United States}, the Commission was justified in not considering evidence of the oil companies’ legitimate business purposes in adopting market access arrangements “considering the destructive effect on commerce that would result from the widespread use of these contracts by major oil companies.”\footnote{Id. at 371.}

The next t.b.a. case to come before an appellate court on the merits was virtually a replay of the Atlantic-Goodyear arrangements, but without proof of overt coercion by the oil company against its dealers. In \textit{Shell Oil Company v. Federal Trade Commission}, the U.S. Court of Appeals for the Fifth Circuit read \textit{Atlantic Refining} as approaching “only to the brink of holding t.b.a. sales commission contracts \textit{per se} unlawful” and stated that the rationale of the earlier decision depended upon “three essential components”: first, the oil company’s dominant economic power over its dealers; second, exercise of that power; and, third, anti-competitive effects of the use of the power.\footnote{\textit{Shell v. FTC}, supra, note 142 at 477.} The court in \textit{Shell} had little problem in finding the first element. The oil company’s dominant power over its dealers rested in its “firm velvet-gloved grip on control devices”, such as short term leases and equipment loan contracts, both terminable on little if any notice, control of dealers’ advertising and control ultimately of their gasoline supply.\footnote{Id. at 477.} Secondly, the court found that Shell did indeed use its economic power over its dealers to cause them to buy sponsored t.b.a. (produced in this case by the Firestone Tire & Rubber Company) although without resort to the overt coercion employed by Atlantic. Shell never missed an opportunity to extol to its dealers the merits of stocking sponsored t.b.a., and frequently Shell’s own salesmen would visit dealers in conjunction with Firestone salesmen. Since the reports of the oil company’s salesmen are key in determining renewal of dealerships, the message behind the double teaming was presumably not lost on the dealers, a number of whom in fact were under the impression that they were required to purchase sponsored t.b.a. and that their franchises would be in jeopardy if they did not do so.\footnote{Id. at 481.} And, boosting proof with prose, the court concluded:
A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord. When he hears that Shell will benefit from his patronage of sponsored t.b.a. outlets, the velvet glove of request has within it the mailed fist of command.\textsuperscript{162}

On the third factor, anti-competitive effect, the court found that Shell dealers clearly were choosing Firestone t.b.a. because of Shell's sponsorship rather than on a disinterested evaluation of its merits.\textsuperscript{163} Anti-competitive effects were found in that other marketers of t.b.a. were not able to compete with Firestone for the patronage of Shell's dealers and the dealers, in turn, were placed at a competitive disadvantage with respect to dealers free to stock several brands of t.b.a.\textsuperscript{164} On the other hand, the court referred to the statistical picture as "muddy".\textsuperscript{165} Quite so. In none of the three t.b.a. cases was any serious attempt made to estimate the proportion of a relevant geographic market for t.b.a. foreclosed by the market access arrangements, and in each case the courts were satisfied with reference to the enormous dollar amounts, in the tens of millions, of t.b.a. sold under the arrangements in question.\textsuperscript{166}

The final case in the trilogy, \textit{Federal Trade Commission v. Texaco, Inc.} ,\textsuperscript{167} is indistinguishable on its facts and its rationale from \textit{Shell}. Indeed its significance lies in the complete adoption by the Supreme Court of the Fifth Circuit's views in \textit{Shell}. Under \textit{Texaco}, a market access arrangement is illegal where (1) the oil company has dominant economic power over its dealers and (2) uses it with (3) an anticompetitive result. The requisite power will be found in the case of any large oil company; its use will always be established, granted the \textit{Texaco} court's declaration that "the sales-commission system for marketing t.b.a. is inherently coercive";\textsuperscript{168} and anti-competitive effect is presumed from the formulation of the problem as a tying one: extension of power from the market for one product to the market for another. The proposition becomes one, if not of \textit{per se}, at least of \textit{res ipsa loquitur}: the rubber companies are not paying the oil companies a ten percent commission for nothing.\textsuperscript{169}

\textsuperscript{162} \textit{Id.} at 487.
\textsuperscript{163} \textit{Id.} at 484-86.
\textsuperscript{164} \textit{Id.} at 484.
\textsuperscript{165} \textit{Id.} at 479 n. 21.
\textsuperscript{166} In \textit{FTC v. Texaco} (\textit{supra}, note 142 at 230 n. 2), however, there was evidence from 31 sellers of competing, non-sponsored t.b.a. that they were unable to sell to particular Texaco stations because of the dealers' concern that Texaco would disapprove of their purchase of non-sponsored products.
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{Id.} at 229.
\textsuperscript{169} \textit{Id.} It is not entirely clear, however, just why the oil companies entered into these arrangements, whether to earn "windfall profits" in the form of the commissions, or as a defensive measure to ensure their respective market positions in the sale of gasoline and other petroleum products, or simply because they considered it good business practice to keep a tight rein generally on what suppliers their dealers patronized, lest the dealers become accustomed to wandering. The commissions were not all profit since the oil companies apparently incurred considerable expenditures in promoting sponsored t.b.a. See \textit{Shell v. FTC, supra}, note 142 at 472 n. 3.
Exclusive Dealing

While in both Atlantic Refining and Texaco, the Supreme Court made ample reference to the deference owed to the Commission in interpreting section 5 of the Federal Trade Commission Act, and although the Commission may find a practice "unfair" under section 5 even though such practice does not amount either to a Sherman Act or a Clayton Act violation, the market access t.b.a. cases cannot be dismissed as "mere" section 5 cases. Despite the refusal of the court to call them tied selling cases, the analysis employed was mainstream tied sale analysis.

Under section 31.4 of the Combines Investigation Act, a market access arrangement in the automotive service station industry will fall within the definition of tied selling in those cases where the oil company can be said to "require" its dealers to purchase the sponsored t.b.a. as a condition to the purchase of another product or where the company can be said to "induce" its dealers so to act by offering the tying product on more favourable terms than otherwise. The tying product might be construed to be the gasoline or perhaps, more generally, a dealer's status as such. "Dealer's status", in turn, is the sum of the value to the dealer of the company's trade name plus the other benefits flowing to a dealer under its relationship with a particular company: leased premises, financing, dispensing equipment or whatever. To see whether a reviewable practice was present, each case would have to be judged very much on its own facts for identification both of the tying product and of the element of requirement or inducement.

E. THE AUSTRALIAN SHELL PROCEEDING

The Trade Practices Commission in Australia has recently considered at length the status under the Trade Practices Act, 1974-1975, of exclusive dealing arrangements for the retail distribution of petroleum products.

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161 Indeed, even before the t.b.a. trilogy of cases, two courts of appeals in private, treble damage actions had held market access arrangements for t.b.a. distribution to constitute tied selling: Osborn v. Sinclair Refining Co. (1960), 286 F. 2d 832 at 840 (4th Cir.), cert. denied (1961), 366 U.S. 963 (arrangement unlawful per se under s. 1 of the Sherman Act); Lessig v. Tidewater Oil Co. (1964), 327 F. 2d 459 at 467-70 (9th Cir.), cert. denied, 377 U.S. 993.

On the other hand, in two private actions after the t.b.a. trilogy, both arising out of the very arrangements considered in those cases, the courts refused to find the market access arrangements unlawful per se under the Sherman or Clayton Acts: Lee National Corp. v. Atlantic Richfield Co. (1970), 308 F. Supp. 1041 (E.D. Pa.); Belliston v. Texaco, Inc. (1972), 455 F. 2d 175 at 183-84 (10th Cir.), cert. denied, 408 U.S. 928. The courts in these latter cases emphasized that the trilogy arose under s. 5 of the Federal Trade Commission Act, that in the trilogy the deference owed to agency findings came into play and that the Supreme Court had expressly declined to call the plans tied selling. On the substantive law differences that may arise depending upon whether the action is government-instituted or private, see note 118, supra.

162 Trade Practices Act, 1974-75 (Ch.).

163 In the Applications of the Shell Company of Australia Limited and Neptune Oil Company Pty. Limited for Authorization Pursuant to Sub-Section 88(1) and Sub-Section 88(6) of the Trade Practices Act 1974-1975, decision dated December 9, 1975.
Although the ultimate question before the Australian Commission was not the same as will face the Canadian RTPC under Section 31.4 of the Combines Investigation Act, the proceeding is of considerable interest as the work of a specialized tribunal, not dissimilar in concept to our own, in applying the provisions of a new statute relating to exclusive dealing. In a proceeding in which it was required to deal with a mass of more or less technical economic data, the Trade Practices Commission in The Application of Shell Company of Australia Limited managed to deliver an opinion that is both intelligent and intelligible to the layman.

Section 47 of the Trade Practices Act defines exclusive dealing generally as the supply of goods or services, or the setting of a price for the supply of goods or services, upon condition that the consumer will not acquire the goods or services of a competitor of the supplier. Exclusive dealing contravenes the Act when it "is likely to have the effect of substantially lessening competition in a market for goods or services."\(^{104}\) Under such circumstances, a supplier engaging in exclusive dealing may be subject to a variety of civil actions for pecuniary penalties,\(^{105}\) injunctive relief\(^{106}\) or damages to a private party suffering injury.\(^{107}\) In order to shield itself from these various liabilities, a party proposing to engage in "conduct that would or may . . . constitute exclusive dealing" may, under section 88(6), apply to the Commission for an "authorization" to engage in such conduct, and if the authorization is granted, such conduct cannot be held to violate section 47. When an application for an authorization is made, the Commission is to publish notice of it, consider the submissions of interested parties and, where appropriate, hold a public hearing.\(^{108}\) The Commission is not to grant the authorization unless it is satisfied that the conduct to which the application relates

results, or is likely to result in a substantial benefit to the public . . . that would not otherwise be available, and that, in all the circumstances, that result, or that likely result . . . justifies the granting of the authorization.\(^{109}\)

Shell Oil Company of Australia and its subsidiary, Neptune Oil Company, made applications under section 88(6) for authorizations of their exclusive dealing arrangements in petroleum products with their various classes of service station dealers.\(^{110}\) The Commission chose to treat the applications as a "test case"; it held extensive public hearing and received both written submissions and evidence from all of the major oil companies as well as from the smaller companies and from distributor and dealer groups.\(^{111}\)

\(^{104}\) Trade Practices Act, s. 47(5).

\(^{105}\) Id. s. 76.

\(^{106}\) Id. s. 80.

\(^{107}\) Id. s. 82. Criminal proceedings, on the other hand, do not lie with respect to exclusive dealing, id., s. 78.

\(^{108}\) Id. ss. 89(2), 90(2), 90(3).

\(^{109}\) Id. s. 90(5).

\(^{110}\) At issue were petroleum products only, that is, gasoline and lubricating oils, and Shell did not have tied sale arrangements for t.b.a. (supra, note 163 at 4). Thus the proceedings presented issues more analogous to the American Standard Stations case than to the t.b.a. trilogy of cases or to the Canadian TBA Report.

\(^{111}\) Supra, note 163 at 1, 9, Appendices F, G, and H.
At the outset,\textsuperscript{172} the Commission emphasized that under the terms of Section 90(5) of the Act three separate elements had to be present for the grant of an authorization: (1) the practice would be likely to result in a substantial benefit to the public, (2) that was not otherwise available, and (3) in all of the circumstances such benefit would justify granting the authorization. In particular, the Commission held that it was not called upon to decide whether, in the absence of an authorization, the conduct in question would violate section 47, that is, whether it would be likely to have the effect of substantially lessening competition. This interpretation followed from the wording of section 88(6) of the Act which provides that upon application an authorization may be granted where the conduct “would or may” constitute exclusive dealing. A party makes an application where it believes that its conduct, if not authorized, might be in breach of the Act. The Commission’s duty is then to decide the application on the public benefit grounds spelled out in the Act. It is not one of those grounds that the application might appear to be unnecessary.\textsuperscript{173} The effect of the practice upon competition was seen by the Commission, however, as a highly relevant part of the “circumstances” to be considered in deciding whether to grant an authorization, and, indeed, much of the Commission’s lengthy opinion was devoted to an assessment of the state of competition within the industry.

In 1973, Shell was the largest oil company in Australia, with approximately 22 percent of a highly oligopolized market wherein the top three firms had 53 percent of the market, the top four 66 percent and the top five 76 percent.\textsuperscript{174} There were no independent refiners in Australia, that is, each of the eight refineries was owned by a major oil company actively engaged in the retail end of the business.\textsuperscript{175} Thus, the small marketers were, and any new entrant into petroleum marketing would be, totally dependent upon one or more of the “majors” for a source of supply. Therefore, a new entrant’s desire to compete with the majors by price cutting could be expected to be considerably dampened by considerations of prudence.\textsuperscript{176}

The Commission found gasoline of a given grade to be fungible among the different oil companies, and the demand was found to be relatively price inelastic.\textsuperscript{177}

\textsuperscript{172} Id. at 13-15.

\textsuperscript{173} Even assuming that the company’s exclusive dealing arrangements had in fact violated s. 47, a matter that the Commission scrupulously avoided ruling upon, it was not subject to the risk of private damage actions because the Commission had granted for the pendency of the proceeding an interim authorization under the terms of s. 91(2) of the Trade Practices Act, and therefore the practice could not violate s. 47 during the effectiveness of the interim authorization.

\textsuperscript{174} Supra, note 163 at 17. See also, D. F. Dixon, \textit{Some Competitive Effects of Vertical Relationships in Australian Petrol Distribution} (1976), 17 Antitrust Bull. 791. Prof. Dixon observes (id. at 795, 806) that, while between the early 1950’s and late 1960’s the very largest Australian oil companies experienced a declining market share and there was vigorous new entry, that history is not likely to be repeated since all the refineries are now owned by the major companies and exclusive dealing has tied up most of the desirable retail sites.

\textsuperscript{175} Id. at 22.

\textsuperscript{176} Id. at 30.

\textsuperscript{177} Id. at 25, 26.
Shell retail gasoline outlets were by number 40 per cent company-owned and lessee-operated, 58 percent dealer-owned and 2 percent company-owned and operated. In terms of volume of Shell gasoline sold, however, the figures were 73 percent, 22 percent and 5 percent, respectively. The notable point is that the dealer-owned stations were generally small volume operations.\textsuperscript{178} Both lessee-dealers and proprietor-dealers were contractually bound to refrain from dealing in the petroleum products of any producer other than Shell.\textsuperscript{179} In the case of the lessee-dealers, the terms of the lease reserved to the company many other forms of control over the conduct of the lessee's business, and typically at termination of the lease the lessee was bound to refrain from dealing in the products of another oil company within a two mile radius for a period of two years.\textsuperscript{180}

Notwithstanding the general regime of exclusive dealing demanded by the major oil companies of their retailers, one company that marketed lubricants only, Castrol Limited, had access to the service stations tied to three of the major companies, including Shell. Two of these companies were the ones from which Castrol purchased nearly all of its oil, and even so, Castrol's product was not permitted display space at a given station equal to that provided for lubricants of the major oil company to which the service station was tied.\textsuperscript{181}

Shell, which was the first of the oil companies in Australia to introduce exclusive dealing,\textsuperscript{182} staked its argument of substantial benefit to the public upon the very substantial economies in transport costs achieved by delivering gasoline in large 'drops' occurring at regular intervals so that the trucks' routes could be computer programmed. In addition, these deliveries were in many cases made at night, when there was no attendant present at the service station, and payment was made by means of a locked box to which the delivery man had the key. Although payment by the dealers was theoretically made upon delivery to them of the gasoline, in order to encourage dealers to accept gasoline in very large drops, the company effectively extended them credit, for example, by accepting post-dated cheques from dealers so that they did not pay for the gasoline until at least part of it was sold.\textsuperscript{183} The very considerable cost economies achieved by this system would be lost, Shell argued, if dealers were not bound to take all of their gasoline from one company. The result would be a perceptible rise in the price of gasoline to the consumer. Thus, exclusive dealing conferred a significant benefit to the public not otherwise available.\textsuperscript{184}

In the proceeding, it was conceded by all parties that the transport system presently in effect was a great deal more efficient than that which had pre-

\textsuperscript{178} Id. at 34, 37.  
\textsuperscript{179} Id. at Appendix E.  
\textsuperscript{180} Id. at 76.  
\textsuperscript{181} Id. at 18-20.  
\textsuperscript{182} Id. at 33.  
\textsuperscript{183} Id. at 48-52.  
\textsuperscript{184} Id. at 81.
vailed in the early 1950’s and that this more efficient system constituted a significant benefit to the public. The contentious point was whether the benefit would be lost in the absence of exclusive dealing. With the issues so framed, the respective parties assumed what, from the perspective of Canadian and American exclusive dealing legislation, would be a decidedly odd posture: company counsel attempted to show that in the absence of an authorization multibrand trading would become common, while Crown counsel argued that if the authorization were denied the practices of service station dealers would change little. The Commission agreed with the latter view, and therefore it declined to grant the authorization.

It was not seen as likely that any new oil companies would be appearing on the Australian scene as marketers of gasoline, since all of the eight Australian refineries were owned by the “majors” and new refineries were not in the cards. Thus, in the absence of an authorization (assuming that the companies would not continue to demand exclusive dealing of their dealers without an authorization), competition for the gasoline business would continue to be among the majors for the most part. The great majority of service stations, in terms of gallons sold, were under lease to the majors. No major company, nor any other marketer dependent upon a major company for supply, would attempt to sell gasoline to a site leased to another major for fear of retaliation. Similar considerations would prevent an active campaign to attract a desirable site away from another major at expiry of a lease. The only sites, then, available as arenas for competition were the dealer owned ones, and they generally were small gallonage operations that would not be very attractive customers to an oil company. The evidence indicated to the Commission that, in the absence of an authorization, there would be a few dealers who would wish to engage in multi-brand trading; they would be supplied by more than one company only if more than one company found it efficient to do so. As to dealers’ switching to solo trading with other com-

185 In the earlier period, multi-brand trading was the rule, but the Commission pointed out (id. at 92) that it was not until many years after exclusive dealing became the uniform practice that real transport economies were achieved.

186 The application for an authorization is initiated by the entity subject to the Trade Practices Act, and it is not clear just who, if anybody, is to represent the public interest or assume the role of devil’s advocate, although s. 27 of The Act provides that the Commission is to have a staff. In Appendix H to the Shell decision, there is an appearance listed for “Assistant Crown Solicitor’s Officer assisting the Commission.”

187 Supra, note 163 at 30-32, 73-74, 87. The Commission contrasted this with the situation prevailing in the United States where there are over 150 refiners independent of the major oil companies and a sizeable number of regional, private brand marketers. See also, Adelman, supra, note 43 at 61-62, Dixon, supra, note 174 at 806.

188 Supra, note 163 at 61-62, 85. If in fact, in the absence of exclusive dealing, the oil companies would respect the sanctity of each other’s sites to the extent indicated by witnesses before the Commission, that might suggest some sort of gentlemen’s agreement among the companies that would amount to a classic horizontal conspiracy in restraint of trade. The point was not explored by the Commission.

189 Id. at 75. The trend in Australia was quite markedly toward fewer and larger gallonage service stations and, to this end, Shell was engaged in a 15-year plan to reduce the number of its lessee outlets, id. at 63.

190 Id. at 90.
panies, that would not be at all inconsistent with continued transport economies; there had probably been entirely too little of it in the past; and the possibility of switching where another company is prepared to offer better terms might at least apply some much needed competitive pressure at the margins.\footnote{101 Id. at 91.}

With regard to lubricants, the picture was quite different. On the one hand, the asserted economies of large volume delivery were not of a scale remotely equal to the case of gasoline, and, on the other, there were a number of companies engaged in the manufacture of lubricants only that under the exclusive dealing regime had virtually no access to service stations.\footnote{102 Id. at 19, 98.} The end of exclusive dealing in lubricants was likely to produce more real change — and welcome change — in service stations’ practices than in the case of gasoline.\footnote{103 Id. at 99.}

The Commission declined to authorize the contracts that bound dealers to refrain from dealing in the petroleum products of competitors of Shell, and it also denied authorization for the lessees’ covenants not to compete after termination of their leases.\footnote{104 Id. at 105.} Nonetheless, it authorized Shell to require that equipment bearing its trade name be used exclusively to distribute its products, as protection for the trade name and to avoid deceiving the purchasing public.\footnote{105 Id. at 96, 105.}

The Commission emphasized that its decision left the companies free to bargain with dealers on delivery sizes, thereby preserving transport economies. Furthermore, the companies might continue to require acceptance by dealers of night deliveries and the locked box system of payment, thereby keeping the companies’ expensive equipment in continuous operation.\footnote{106 Id. at 92, 106-107.} Presumably the companies could refuse altogether to supply those dealers who would not or could not accept deliveries of minimum efficient volume. All that was not authorized was the contractual requirement of exclusive dealing. What was achieved was, at most, a slight shift in the balance of power between producers and dealers. Indeed, little else was foreseen by the Commission, and it was precisely on assumptions of little practical change that it based its decision. Probably Shell saw things that way too, for it decided not to exercise its statutory right of appeal to the Trade Practices Tribunal.\footnote{107 Trade Practices Act, s. 101.}

F. SUMMARY AND CONCLUSIONS

The approach of the \textit{Combines Investigation Act} in committing a substantial segment of antitrust law to the jurisdiction of a specialized administra-
tive agency has much to commend it, at least in theory. Hopefully, the specialized agency can develop a coherent, consistent policy which could not be done in a multiplicity of courts or perhaps even in one court that was occupied with very many different types of litigation. And in the informed disposition of individual cases, as well, the agency may be more efficacious than the court. As K. C. Davis has put it:

A court is passive. It has no obligation to search for evidence which parties fail to present. A regulatory agency has an affirmative duty to carry out a program, to protect a public interest which frequently is otherwise unrepresented. When parties fail to produce needed facts, the regulatory agency typically must take the initiative in aggressively making its own factual investigation. Unlike a court, a regulatory agency employs staffs of specialists, wields independent powers of investigation, and accumulates vast storehouses of information about its specialized field.198

The specialized agency approach has particular appeal in an area where much of the evidence that will be needed to make adjudications is of an economic nature; courts are exceedingly hesitant, even in combines cases, to confront any question that vaguely smacks of that branch of learning called economics. In particular, a specialized agency may be better equipped than a generalist court to handle the tasks of product and geographic market definition, tasks that, unfortunately, can be exceedingly complex but that are obviously essential to a determination whether "competition is or is likely to be lessened substantially" and to the fashioning of relief "necessary to restore or stimulate competition in the market."199

If, however, we are to applaud the jurisdiction of the expert agency, it is only fair to inquire just how expert it is. The Restrictive Trade Practices Commission has been in existence since 1952,200 but until the most recent amendments it has had no substantive jurisdiction; its activities have been limited to oversight of the investigations conducted by the Director of Investigations and Research and to the issuance of reports on various industries. With all respect, the Commission just has not had much to do, and so there is little basis upon which to judge its expertise.201

The thrust of academic writing on the performance of the RTPC's neighbour to the south, the Federal Trade Commission, would lead one to believe that as an economically expert tribunal the FTC has been something of a

201 In the reports issued to date, furthermore, of which there are over fifty, it is generally not easy to differentiate between the input of the Director of Investigation and Research and his staff and that of the Commission itself.
booming failure. The reasons assigned for this failure have been various, and not all would be applicable to the RTPC. The FTC's effective functioning is seen as having been seriously compromised by the jurisdictional split between itself and the courts; the FTC has had remarkably few professional economists in the ranks of its members or its staff; appointments to the Commission have often been of poor quality, being distributed frequently as consolation prizes for defeat in political elections; and continuity has been lacking, as most commissioners, however un-expert in economics upon appointment, have served terms far shorter than the seven years contemplated by the statute before retiring to greener economic pastures. On the other hand, the FTC has been more amply provided with budget and staff than can realistically be expected for the RTPC, even on a proportional basis. One criticism, in particular, of the FTC that has an ominous ring with respect to the RTPC concerns the great number of years consumed in deciding cases. If one looks at recent industry reports of the RTPC, one often notes a very large gap between the time periods to which the data relate and the date of publication of the particular report.

Early in the course of exercising its jurisdiction over the various "reviewable practices", the RTPC may have to decide whether it has a mandate to preserve a regime of small producers of goods, even at the cost of efficiency. Of particular concern in section 31.4, particularly with respect to exclusive dealing, is definitional language that could be interpreted as prohibiting cost justified reductions in price for volume purchasing. Presumably the distinction that is to be drawn is between discounts granted for volume purchases and discounts granted for refraining from dealing with the discounter's competitors. If the volume discounts are for an amount of purchases such as effectively to produce the result of exclusive dealing, then, it is submitted, just so long as they are cost justified, the Commission ought not interfere. The Commission also will have to decide whether the competition that is not to be substantially lessened by exclusive dealing and tied selling has reference solely to the opportunities open to the suppliers' or whether it includes damage to the state of competition among dealers impeded from carrying the various brands of goods that their business judgments would otherwise dictate. Hopefully, the Commission will opt for the more inclusive interpretation.


203 Supra, text accompanying notes 75 and 98.

204 Kramer, supra, note 202 at 363.

205 E.g., Draught Beer, Metropolitan Toronto (RTPC No. 54, 1972); Electric Large Lamps (RTPC No. 53, 1971). In the TBA Report, supra, note 10, all of the data was from four to eight years old at the time of publication (1962).

206 Supra, text accompanying notes 43 and 44.
The legislative decision to set out the exemptions in the Act, rather than to leave them to be developed under some sort of common law of the RTPC, will be taken by the Commission to deprive it of jurisdiction to recognize further exemptions. Yet some further exemptions may prove desirable, and the writer is not at all certain that meritorious cases will always be able to be dealt with on the basis that competition has not been substantially lessened. For example, there is no protection of trademark exemption for either exclusive dealing or tied selling. Without it, can a large national company license the use of its trade name and assure itself that only its products will be sold under its name? If a filling station trades under the prominently displayed name “Gulf”, motorists probably expect to be sold only gasoline produced by Gulf Oil Company, even if many know that gasoline of a given grade is fungible. Can Howard Johnson’s demand of its franchisees that they not sell Baskin-Robbins ice cream? The section of the Act relating to tied selling has been drafted totally without reference to the law of trademarks; yet it would appear that a trademark owner who has licensed use of the mark may be obligated to exercise very substantial controls over the licensees in order that the mark not lose its distinctiveness. While there is a new producer exemption available in the case of exclusive dealing, there is not such an exemption for tied selling. Yet conceivably on such facts as were present in the Jerrold Electronics case, such an exemption would be warranted.

An additional cause for concern is the rather awkwardly drawn “affiliation” defense for both exclusive dealing and tied selling in favour of certain franchise businesses selling “products obtained from competing sources of supply and a multiplicity of suppliers [where] no one product dominates such business.” One questions simultaneously whether the exemption will avail those businesses for whose benefit it was apparently intended and whether, on the contrary, it will eventually cut a huge hole right through section 31.4.

These examples are cited not so much as a criticism of the exemptions included in the statute but rather by way of questioning the wisdom of writing in the exemptions at all, as opposed to letting them develop through adjudication, as has occurred to some extent in the United States. It would have

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207 This example has been chosen because presumably the franchise-affiliation defense of s. 31.4(5)(c) would not apply since one product — gasoline — dominates the business. In the service station example, what may occur is that many stations will no longer advertise the supplying company’s name in banner headlines; rather, the company’s name will appear only on the pumps themselves. If so, that would constitute a substantial loss of value to the trade name.

208 Here the availability of the franchise-affiliation defense is doubtful since the franchise does not obtain the multiplicity of products it sells from competing sources of supply. See supra, notes 54-59 and accompanying text.

209 D. R. Bereskin, Trade Mark Licensing and Registered Users in Canada (1973), 11 C.P.R. (2d) 244.

210 Supra, note 129.

211 C.I.A., s. 31.4(5)(c).

212 Supra, note 59 and accompanying text.

213 Supra, notes 129-37 and accompanying text.
been a very tricky business indeed to have drafted exemptions to cover all the problems. While, for example, one may find it quite reasonable that only Gulf gasoline can be sold at stations trading under the name "Gulf", one might feel differently in the case of tires. Is the line to be drawn between exclusive dealing in what the supplier itself manufactures and what the supplier purchases from others for sale under the supplier's trade name? We then draw the lines of competition policy along corporate forms. What if Gulf should purchase or incorporate a tire producing subsidiary?  

Exclusive dealing comprehends basically three types of arrangements, corresponding to the different motivations of the parties, and not all of the types would be subject to the Combines Investigation Act. The first type of arrangement, which this paper has taken as typical and to which the Act most clearly is directed, involves the supplier who will sell to dealers or other customers only on the basis that they refrain from purchasing the goods of the supplier's competitors. Occasionally, however, the impetus for exclusive dealing may come from the customer, who wishes to assure himself of a source of supply. A supplier in such a case will usually not commit itself to fill the requirements of a customer over a given period without the customer assuming a reciprocal obligation to deal exclusively with that supplier. The agreement in substance, then, will import the notion of the supplier "requiring" the customer to "deal only or primarily in products supplied by... the supplier", and thus will be subject to section 31.4 of the Act. Moreover, there is no apparent reason why such a practice ought not be prohibited where it is likely to have the effect of substantially lessening competition in the sale of the subject product. Under the third type of arrangement, the balance of power between supplier and customer is switched completely: the customer makes it a condition of dealing with a particular supplier that the customer be the exclusive outlet for the supplier's goods and that the supplier not sell to the customer's competitors. Such a practice clearly would not fall within the terms of section 31.4, which speaks of requirements imposed by suppliers. The problem, however, is far from fanciful and could have serious anti-competitive effects in the customer's industry. Exclusive dealing is not always a matter of David dealers and Goliath suppliers. Surely such retaining giants as Eaton's and Simpson's, for example, must be more powerful firms than a good many, if not most, of their suppliers.

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214 Compare the recent acquisition in the United States of Marcor Inc. by the Mobil Oil Corporation. Marcor is the corporate parent of, inter alia, Montgomery Ward & Co., the retail giant. At the time of the acquisition, Montgomery Ward operated some 600 auto service centres. See, Wall Street Journal, August 13, 1974, at 9, col. 2; September 25, 1974, at 8, col. 3.  
216 E.g., Columbia Broadcasting System, Inc. v. FTC (1969), 414 F. 2d 974 (7th Cir.), cert. denied, (1970), 397 U.S. 907. This arrangement can exist not only between suppliers and dealers but also between suppliers and consuming customers that are themselves manufacturers; the item in question might be a particularly useful input for the customer's product and the customer might be seeking to gain an edge over its competitors by shutting them off from access to the input.  
217 See also Bok, supra, note 20 at 283-84.
In making determinations whether challenged exclusive dealing arrangements are likely to have the effect of substantially lessening competition, the RTPC should direct its inquiries toward at least the following areas:\textsuperscript{218}

(1) What is the percentage of dealers in the relevant product and geographic areas tied up by the arrangement? A related question is the market share accounted for by the supplier in question. Where the exclusive dealing is with consumers rather than dealers, the second question will be particularly important.

(2) What is the trend in the supplier’s market share?\textsuperscript{219}

(3) To what extent are other suppliers in the industry also using the exclusive dealing device? For example, in \textit{Standard Stations}, while Standard sold only 6.7 percent of the gasoline in the western area of the United States, it and its six major competitors had tied up 50 percent of the market under exclusive dealing arrangements.\textsuperscript{220}

(4) How great would be the costs faced by a new competitor in the industry in establishing its own distribution network? If, for example, the product is usually sold by outlets that deal in many different types of products the cost to a new competitor of establishing suitable new outlets will probably be a great deal higher than if the product is distributed typically by outlets dealing only in that product. In \textit{Mytinger & Casselberry}, Judge Burger (as he then was) dissented in the Court of Appeals for the reason, among others, that the distribution outlets were door-to-door salesmen, of which there were potentially a near-infinite number available to other makers of food supplements.\textsuperscript{221}

(5) The duration of the contracts is important, and upon occasion in the United States jurisprudence an exclusive dealing contract, rather than being declared illegal, has been pared down in duration.\textsuperscript{222} The shorter the duration for which the dealer or other customer is bound, the more will be the competitive opportunities for other suppliers to gain the trade. In many cases the real duration of an arrangement must be distinguished from its nominal duration.

\textsuperscript{218} The list of factors follows largely the work of Lockhart and Sacks, \textit{supra}, note 20. See also, Bok, \textit{supra}, note 20 at 295-304; A.G. Committee, \textit{supra}, note 76 at 144-148; \textit{Standard Stations}, \textit{supra}, note 25 at 308. The list of relevant factors assumes that what will in many cases prove to be the most difficult task, product and geographic market definition, has been accomplished.

\textsuperscript{219} For example, in \textit{Mytinger & Casselberry}, \textit{supra}, note 89, the consistent trend in the respondent’s market share over a period of some years was downward, a fact to which the FTC paid little heed in its rush to follow a test of quantitative substantiality.


\textsuperscript{221} \textit{Supra}, note 90 at 541-43.

\textsuperscript{222} \textit{FTC v. Motion Picture Advertising Service Co.}, \textit{supra}, note 82 (contracts obligating movie theatre owners to exhibit exclusively the advertising films of respondents held an “unfair method of competition” when of five-year duration but not “an undue restraint on competition” when limited to one year).
Where a dealer, as in the Australian Shell proceeding, is bound not to distribute the goods of a competitor of the supplier after termination of an exclusive dealing arrangement, a contract of short nominal duration could be of near-perpetual real duration. A service station operator may not wish to become a door-to-door vitamin salesperson.

(6) Is there vigorous growth of new competition notwithstanding the arrangement?

Once the anti-competitive effects of a particular case of exclusive dealing have been measured, there are two other factors, apart from the possible availability of an exemption, that the RTPC may wish to consider. First is the matter of cost justifications. As indicated earlier, cost savings to the supplier will have to be treated with care because a sufficiently dominant supplier may not be inclined to pass such cost savings on to consumers\textsuperscript{223} and because the origin of the saving may be precisely that the supplier knows that he will not have to contend with competition.\textsuperscript{224} As for cost savings realized by dealers or customers, such as savings on inventory, these will exist only where the supplier is positively obligated to fill all of the dealer's requirements. It is not uncommon in the gasoline industry, for example, for the oil company effectively to leave itself an escape clause whereby the dealer may purchase from other companies when its regular supplier is unable to make deliveries. There will, nonetheless, arise cases in which real cost savings, either to supplier or dealer or both, can be shown, and this favourable factor will have to be put into the balance of judgments to be made. All of the factors listed are just that: factors. Taken individually they will point toward different results in the same case, and it is not possible to state in the abstract which should be given decisive weight. One final item to be added to the calculus is a consideration of the least of the evils: would the result of a ban on exclusive dealing be vertical integration by consignment sales or by merger?\textsuperscript{225} This is a particularly cogent consideration in the absence of a merger law with teeth.

As for tied selling, it would not be surprising to see the RTPC eventually adopt the decidedly jaundiced view that the American courts have taken of the practice, although it may be noteworthy that in the wording of the legislation Parliament has not, apart from the list of defences, distinguished tied selling from exclusive dealing: they are equally subject to the standard of likelihood of substantial lessening of competition. Yet the Commission may find much force in Mr. Justice Frankfurter's \textit{obiter} that tied selling serves hardly any purpose beyond the suppression of competition.\textsuperscript{226} The question of real importance in a particular case, then, will not be "Is competition suppressed?" but rather "How much is substantial?" The writer would hazard

\textsuperscript{223} TBA Report, \textit{supra}, note 10 at 95 (recounting views expressed by Professor Dixon, an expert witness); Lockhart and Sacks, \textit{supra}, note 20 at 926.

\textsuperscript{224} Bok, \textit{supra}, note 20 at 307.

\textsuperscript{225} Consignment selling is itself a practice reviewable by the RTPC under section 31.3 of The Act, but only when engaged in to facilitate either resale price maintenance or price discrimination, and not when used in lieu of exclusive dealing.

\textsuperscript{226} Supra, note 25 at 305-06.
the guess that more of a showing on the substantiality score would be demanded by the RTPC than by the American courts. It is to be hoped that the Commission will approach with some caution, not exhibited by American courts, the adjudication of tying situations where the tying product is supplied at a cheap price. Such a situation could represent a form of price competition in the tied product and, particularly where the tying product is leased, might further competition in the customer's industry by reducing the capital costs incurred to enter that industry as compared with what they would be if the tying product had to be acquired at its full "market" price.

Although there is a substantial body of scholarship that views tied selling as a device whose purpose, in very many cases, is the maximization of monopoly profits in the tying product rather than the creation of a further monopoly in the tied product,\(^\text{227}\) nonetheless the Combines Investigation Act is concerned primarily with effects. If the patent or copyright laws do not furnish sufficient rewards for the creative elements in society, it is doubtful that the gap should be filled by the antitrust laws.\(^\text{228}\)

\(^\text{227}\) Supra, notes 32-40 and accompanying text.
