BOOK REVIEWS

ANTICOMBINES AND ANTITRUST, by R. J. Roberts, Butterworths, Toronto, 1980, pp. 799, $85.00.

Lately there have been several books dealing with Canadian anticombines law. Professor Roberts has undertaken a considerable task in attempting to explain the law in this area. His book is the most comprehensive and useful to date. Indeed, I can only endorse the author's expressed hope that reference to this text would become the first step in researching anticombines law in this country.

Nevertheless the book does have its flaws and shortcomings. I question the editorial judgment of including an appendix of 226 pages, most of which is, in my opinion, unnecessary, and must have added considerably to the book's cost. The following is a list of the appendices:

1. Appendix A consists of two scholarly articles, previously published elsewhere, on the constitutionality of the 1976 amendments to the Combines Investigation Act[1] (hereinafter referred to as CIA).
2. Appendix B — the CIA itself.
3. Appendix C — the practice and procedure rules before the Restrictive Trade Practices Commission (hereinafter referred to as RTPC) in respect of reviewable trade practices.
4. Appendix D — Bill C-13.[2]
5. Appendix E — American Antitrust Statutes.
6. Appendix F — a list of RTPC reports and action taken thereon.
7. Appendix G — a summary of proceedings completed in Anticombines cases referred directly to the Attorney General of Canada in 1976-78.
8. Appendix H — a few paragraphs describing the American Federal Court system.
9. Appendix I — the Court system of Canada complete with flow charts describing Civil Process and Criminal Process in Canada.

All nine of the above appendices are no doubt both useful and relevant. It is, however, questionable whether it was appropriate to include them in this text. The CIA and Bill-13 could not be more relevant; but those individuals with enough interest in the area to actually purchase the book will either already own copies of the Act and the Bill or will have easy access to them. In any event, chapters in the book concerned with particular subject headings quote the applicable sections. The inclusion in appendices of the full Act and Bill serves no purpose other than to force the buyer to purchase an unnecessary copy of the CIA and Bill-13 at considerable expense. (I am no expert in the economics of book publishing, but it would not surprise me at all if the increase in the price of the book necessitated by the extra 98 pages taken up by the CIA and Bill C-13 were a multiple of the retail prices for the two items purchased individually.)

1. R.S.C. 1970, c. C-23, as am..
2. 3rd Sess., 30th Parliament, 1977.

To use the terminology of antitrust law, the forced purchase of the above two items is a "tie-in" of the worst kind. Much the same can be said about the two articles on constitutional law; they are, after all, available elsewhere to anyone interested in the subject matter. Appendix I is probably superfluous to the lawyer or law student and a bit too complicated for the lay reader. Appendices F and G are certainly of value to those engaged in intensive research but will be of little or no value to most readers. They are also available elsewhere. Of the above nine appendices only those outlining RTPC procedures and rules and American Anti-trust statutes ought probably to have been included.

The author's writing style sometimes leaves room for improvement. It seems to me there are far too many quotations from judgments and writers interspersed throughout the general text in circumstances where he is not quoting the judgment or writer as a particular authority on a point of law, but simply in the course of expressing his own general thoughts. In many such instances the author could have expressed in his own words the same thought and simply footnoted the source.

This tendency to quote excessively reaches its apex in Chapters 1 and 2, dealing with the History of Anticombines Legislation and the Policy Basis of Anticombines Legislation. These chapters consist largely of excerpts from certain government tracts. Here the book takes on the attributes of a casebook rather than a text. I, and presumably many other readers, am already familiar with the excerpted materials. I would much rather have read more of what were the author's views. I think that if one writes a text one ought to attempt to synthesize the words of others and express one's own views. In fairness, it should be noted that one of the excerpted materials is that of the author himself. Nevertheless, particularly in respect of Chapter 2, dealing with policy, a most important topic, the discussion and flow of thought is disjointed, largely because most of the material is not the author's own.

Turning now to the author's treatment of the various offences and practices prohibited or regulated under the CIA, I note at the outset the extremely difficult task facing anyone writing in the area of Anticombines law. Some provisions of the CIA, even those in force for some time, have received little or no judicial interpretation; for example, price discrimination. Others, especially those concerning trade practices and the application of the Act to services, have been only recently enacted. As a result, when one attempts in a meaningful way to discuss the law about such provisions one often is reduced to intelligent speculation about the resolution of a particular issue. In addition there is a strong temptation, where American precedents exist, to simply state the American law as that which is likely to prevail in Canada. This is a temptation which should be resisted since in practice American and Canadian law often diverge considerably. Indeed, there is a very different judicial attitude to anticompetitive practices in the two countries.

One of the major criticisms I have of this book is the use the author makes of American materials. The American experience can be useful for purposes of comparison and, where there is no Canadian authority directly on point, it can serve as an indication of a *possible* Canadian judicial reaction to a particular legal issue. Unfortunately, the author sometimes states American law when discussing a Canadian statutory provision in

such a way as to give the impression that the Canadian legal position is, or will become, similar; sometimes even in relation to practices where it is already clear that there is a very big difference between the law of the two countries. This can be misleading. For example, in the discussion of tying and exclusive dealing there are numerous references to the practices as being "forbidden" or as being "prohibitions". Indeed, the author refers to "Remedies for the Violation of the Prohibition of Tied Selling or Exclusive Dealing".[3] Finally, the author speculates that " . . . there is a good chance that the Commission will refuse to adopt the United States virtual *per se* rule regarding tied selling."[4]

In the United States tied selling and exclusive dealing fall under Section 3 of the Clayton Act.[5] The substantive provisions of the Clayton Act, while not constituting criminal offences, are nonetheless prohibitory in nature, such that one can refer to violations of them and to virtual *per se* rules. Court interpretations of them lay down guidelines of general applicability. Further, besides injunctive proceedings by law enforcement authorities, civil damages actions are available to a private plaintiff for "violations" of these provisions.

In contrast, under the CIA, exclusive dealing and tied selling are reviewable trade practices, quite different from the civil Clayton Act provisions. First, the wording of the statutory provisions is different. Whereas Section 3 of the Clayton Act starts off by saying "That it shall be unlawful . . . " s.31.4 of the CIA is not worded in terms of general prohibitory language. Rather it is worded to give the RTPC the discretion (" . . . the Commission *may* make an order . . . "), if the statutory criteria are met, to enjoin the practice against individuals or firms so specified in the order. Rulings of the RTPC operate only in respect of those so named in the order; court decisions under the Clayton Act *do* lay down rules of general applicability. Thus a "violation" of the Clayton Act can operate so as to give a damages action to a private plaintiff; there is on the other hand no such thing as a "violation" of any of the reviewable trade practices under Part IV.1 of the CIA. Likewise there is no civil damages action available in respect of a reviewable trade practice as such. (There is of course the possibility of "violating" an order already issued by the RTPC under Part IV.1 and of a damages action for its violation.)

I do not think this is mere quibbling over semantics. The advice which a lawyer ought to give to a client in respect of a practice likely to be reviewed under Part IV.1 of the CIA will probably be different than that given by his American counterpart about a practice violating the Clayton Act. In the latter instance the American lawyer will probably advise his client not to engage in the practice, knowing that even if the practice is not quickly enjoined, a treble damages action is likely. The Canadian lawyer, on the other hand, ought to consider the following before advising his client not to engage in the practice:

1. The Director may never make an application to have the practice reviewed *vis-a-vis* his client. Only the Director can apply under Part IV.1, not private parties.

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3. P. 317.
4. P. 307.
5. 38 Stat. 730 (1914), as am., 15 V.S.C. #12-27.

2. Even if an application is made it might not be established that all the rather vague criteria specified in the applicable section have been met.
3. Even if the criteria are met there is still the possibility that the RTPC may exercise its discretion not to issue an order.
4. In the midst of any proceedings to have the practice reviewed, the practice can still safely and legally be carried on, there being no provisions in the CIA for an interim injunction in respect of a reviewable trade practice.
5. Even if an order ultimately does come down against his client it operates only *in futuro*, there being not only no criminal sanctions or stigmatization, but also no possibility of civil damages for conduct engaged in before the order was issued.

The Canadian lawyer will know that on a cost-benefit analysis, the only costs associated with engaging in a practice which *might* be reviewed, are: 1) the costs of future legal proceedings, and 2) the costs of changing over business practices to conform to a possible future order of the RTPC. Weighed against this must be the possibility that the costs mentioned above may never actually occur, as well as the benefits associated with actually carrying on the practice. If the benefits are at all large, in most cases it is probably worthwhile continuing the practice.

The impact of a reviewable trade practice is similarly misdescribed in respect of the proposed reviewable trade practice of price differentiation. In lamenting the onerous burden suppliers might have of cost-justifying quantity discounts the author does leave one with the impression that the Canadian law would somehow move to the rather stringent American price discrimination law.[6] This is simply incorrect. American law bans almost all non-cost justified quantity discounts. The proposed reviewable trade practice of price differentiation would only enjoin non-cost justified quantity discounts in respect of those firms so named in an RTPC order. Given the administrative discretion in the Director's office and the discretion in the RTPC itself, one suspects that very few firms indeed, would ever find themselves foregoing " . . . meeting competitive situations with price cuts . . . as a result of the proposed civil price discrimination provision . . . ".[7]

Chapter VI dealing with the all important law relating to conspiracies or agreements is generally well done, sorting out the very vague and often contradictory judicial interpretations of s.32 as it relates to "unduly", the requisite *mens rea*, and the *actus reus*. There is, however, a somewhat surprisingly inaccurate discussion of when, if ever, public benefit can be taken into account in determining the unlawfulness under s.32 of a given conspiracy. First, it is said, referring to the judgment of Cartwright J. in the *Howard Smith Paper Mills*[8] case: " . . . Cartwright J. wrote lengthy Reasons for Judgment indicating his view that evidence of public benefit was relevant".[9]

6. *See* p. 197, note 39.
7. *Id.*
8. [1957] S.C.R. 403.
9. P. 131.

This is followed by a quotation from the judgment supposedly supporting the above statement. However, anyone reading the full unedited judgment could only come to the conclusion that what Cartwright J. said was that while he would like to take public benefit into account, he could not because there was already binding precedent to the contrary. An important part of the judgment not quoted but which ought to have been quoted to put his remarks in proper perspective reads:[10]

> In other words, once it is established that there is an agreement to carry the prevention or lessening of competition to the point mentioned, injury to the public is *conclusively presumed* ... the *relevant* question thus becomes the extent to which the prevention and limitation of competition are agreed to be carried and not the economic effect of the carrying out of the agreement.

Likewise, in referring to *Aetna Insurance* v. *The Queen*,[11] there appears the following: "Public benefit was considered to be relevant to determining the specific intent of the accused".[12]

As I read the case, the major issue in the Supreme Court of Canada was whether certain testimony of a trade association official was admitted to evidence public benefit or for some other purpose. The dissenting judges thought the testimony was admitted because the trial judge had thought evidence of public benefit was relevant. The majority thought the testimony was admissible not because evidence of public benefit could be relevant but because it also went to prove market shares of the conspirators, which definitely is relevant. There is nothing in the judgment of Ritchie J. indicating that evidence showing a public benefit can be in and of itself relevant. Finally, the author states:[13]

> The upshot of the majority and dissenting opinions in *Aetna* appears to be that the Canadian law regarding what factors are relevant to the question of undue lessening of competition is approaching the position of the American courts on what factors are relevant under the so-called Rule of Reason in determining the existence or probability of an "unreasonable" restraint of trade. Of decisive important among these factors are the nature of the restraint and quantity of competition affected by it. Of secondary importance are "the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose herein sought to be attained ... " This is not because a good intention will save an otherwise objectionable [restraint] or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

(The quoted material is from the *Board of Trade of the City of Chicago* v. *United States*.[14]) I cannot agree with this assessment. I also believe that the introduction of American antitrust jargon in this context will only confuse some readers.

Another misstatement concerns the effect of the limitation period on the private civil damages action.

Secton 31.1(4) reads:

> No action may be brought under subsection 1,
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> (a) In the case of an action based on conduct that is contrary to any provisions of Part V, after two years from
>
> (i) A day on which the conduct was engaged in, or
>
> (ii) The day on which any criminal proceedings relating thereto were finally disposed of, whichever is the later ...

10. [1957] S.C.R. 403, at 427.
11. (1977) 75 D.L.R. (3rd) 332 (S.C.C.).
12. P. 134.
13. P. 135.
14. (1918) 246 U.S. 231.

The author interprets this section as follows:[15]

> There will obviously be some difficulty encountered in cases in which the private right of action is revived as a result of criminal proceedings commenced by the Crown. In such a case it would be possible for the private right of action not to be commenced until several years after the relevant conduct on the part of the defendant ceased. In this situation, it is likely that the plaintiff would be entitled to damages based upon the injuries sustained in the final two years of the conduct.

If he means that damages would be recoverable *only* for the final two years, then I think the author is incorrect. If there are criminal proceedings relating to, for example, a ten year conspiracy, and a private action is brought within two years of disposition of such criminal proceedings, I think it is clear from the section that damages are recoverable for the full ten years of the conspiracy, not just the final two years.

The author notes in his discussion of the price discrimination provision that because of the broad definition of "article" in s.2 of the CIA, "the leasing of space in a shopping centre, will fall within the reach of s.34(1)(a)".[16] This may be true if one is referring to the sale of two leasehold interests at different prices. However, two "leases" of real property almost certainly cannot be characterized as "sales", a necessary requirement for s.34(1)(a) to apply. (Eventually, much later in the text in the discussion of shopping centre leases, the author recognizes this problem.)[17]

In describing predatory pricing, it is stated that " . . . the tendency in both Canada and the United States has been to require in deep pockets predatory pricing cases that both below-cost selling and design to eliminate a competitor or lessen competition must be shown".[18] I agree that it is senseless to even talk of predation without some sort of predatory intent and that the law certainly *ought* to be the way the author describes. However, I do not think the legislation or the cases interpreting it support this contention. Section 34(1)(c) reads:

> Everyone engaged in a business who . . .
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> (c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, *or* designed to have such effect,
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> is guilty of an indictable offence and is liable to imprisonment for two years. (My emphasis)

It will be noted that the section requires either anticompetitive effect or the intent to have such effect. The cases do not authoritatively support the contention that anticompetitive design is required. In fact, in the case of *R.* v. *Hoffmann-La Roche Ltd.*,[19] which was not yet reported at the time the book was written, Linden J. clearly states:[20]

> Having decided that the accused has engaged in a policy of selling articles at unreasonably low prices does not lead to a conviction, unless this had the effect or tendency of substantially lessening competition or eliminating a competitor or that it was designed to have such an effect. There is, therefore, an additional element of the offence that must be proven beyond a reasonable doubt before a conviction may be registered.
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> The additional element consists of two possible alternatives: one dealing with the effect of the policy and another dealing with a *mens rea* element. Either will suffice; both are not required.

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15. P. 532, note 21.
16. Pp. 193, 194.
17. P. 481.
18. P. 221.
19. (1980) 109 D.L.R. (3rd) 5 (Ont.H.C.).
20. *Id.* at 46.

In spite of the above described inaccuracies I would recommend that the book be purchased by anyone seriously interested in anticombines law. Most of the chapters in the book are accurate and some contain discussions about topics not discussed in any other book on Canadian combines law. As such the book serves a purpose similar to that of a digest or abridgment; it outlines the problems, issues and leading cases in various areas. However, on the ground of price alone, $85.00, I could not, in conscience, recommend this book as a student text.

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