

BOOK REVIEW

Gordon Kaiser, "World Law of Competition, Unit A - North America, Vol. A3, Canada", published by Matthew Bender, New York, 1981-1982.

This book is a strongly-bound loose-leaf volume with over 500 pages of text and over 300 pages of appendices. A measure of the value of the work is that its merits shine through an appalling thicket of transcription errors, which particularly blight the early chapters. Many of the errors are trivial, like spelling and punctuation errors, though even these are irritating. Some are mildly amusing, such as the reference on page 1-45 to "creative commerce" instead of "trade and commerce"; or the reference on page 3-28 to "the French charge" instead of "the offence charged". Some of the transcription errors, however, are non-trivial. Here are two examples. On page 1-6 the text reads as follows, "this section does not apply to companies, workmen or employees without reasonable protection as workmen or employees". What the text was intended to say (with changes underlined) is: "This section does not apply to combinations of workmen or employees for their own reasonable protection as workmen or employees". At page 5-17, the text reads: "A government statement indicates that the provision was introduced: 'For the express purpose of circumventing the ban against resale price maintenance and price discrimination..'",. It appears that the text was intended to read (with changes underlined): "A government statement indicates that the provision was meant to deal with consignment selling when it was introduced: 'For the express purpose of circumventing the ban against resale price maintenance and price discrimination..'",. Fortunately it is the publisher's intention that the volume should be revised annually, and revised pages are expected to be published early in 1983. The best advice a reviewer can give is this: Buy the book--but wait for the first batch of revised pages to be published.

The significant merits of the work are easily identified. In the first place, the organization of the material makes it outstandingly easy to use. The opening chapters involving an introduction dealing with such matters as history, jurisdiction and constitutionality, a discussion of common law restraints and a discussion of enforcement issues, are followed by ten chapters in each of which economically related matters are grouped together. Thus, the chapter on pricing practices treats price discrimination, promotional allowances, regional price discrimination, predatory pricing and price maintenance; the chapter on distribution practices deals with refusals to supply, consignment selling, exclusive dealing, tied selling and market restrictions; the chapter on unfair sales practices cover federal legislation on misleading advertising and deceptive marketing practices; the chapter on provincial marketing legislation covers provincial law in the same area plus warranty and other consumer protection legislation; the separate chapters on agreements to restrict competition, monopoly, mergers and acquisitions, and regulated industries, cover the subjects implied by their titles; the chapter on patents, trade marks and copyrights covers such subjects as unlawful monopolization, price maintenance, refusal to

supply, product and territorial restrictions and infringement action defences; and finally the chapter on international aspects of competition covers the liability of Canadians under foreign law, the liability of foreigners under Canadian law, export agreements, anti-dumping legislation, economic boycott legislation, and federal and provincial restrictions on foreign investment. The appendices include the full text of the Combines Investigation Act; the rules relating to practice and procedure before the Restrictive Trade Practices Commission; a table of cases under the Combines Investigation Act grouped according to 27 subject-matter headings; a list of all the reports of the Restrictive Trade Practices Commission and predecessor commissions; copies of selected prohibition orders, consent orders and undertakings; and the full text of certain related legislation including the Shipping Conferences Exemption Act, the Foreign Investment Review Act (which is wrongly headed the Foreign Proceedings and Judgments Act) and the Anti-Dumping Act. The usefulness of the volume is further enhanced by a 28-page index, which however could be improved upon.

A second outstanding characteristic is that (errors aside) the text is extremely readable. Because of the international focus of the series, and because the author frequently draws parallels with U.S. jurisprudence, the volume will be particularly useful to U.S. counsel and others familiar with U.S. law who want to examine the Canadian scene. Among other things this may be important for any Canadian law firms retained by Canadian affiliates of multi-national enterprises, because these law firms can assume that U.S. companies and U.S. counsel will have mastered Kaiser's text covering any issue about which they are concerned. The volume is likely to be even more useful to non-specialists in the legal profession. Because of the potential saving in effort and time, no law office which is ever required to provide advice on combines matters can afford not to have access either to this volume, or to one of its main rivals which are referred to below. (For example, Chapter III provides an extremely useful review of the jurisprudence covering the exercise of inquiry powers under the Act and other enforcement issues).

A third feature of the Kaiser volume is that it provides the history and the rationale for each section of the Act. When combined with the superior organization and easy accessibility of the language of the study, this has important implications for public understanding, for compliance by the business community, and even perhaps for the development of the jurisprudence. This volume makes the law accessible in a comprehensive way for the interested layman, including the student, journalist and the businessman. No longer will there be any excuse, if there ever was one, for otherwise sensible journalists to make such fatuous comments as the often repeated statement that the Canadian law is the weakest in the Western world. The law is indeed in urgent need of reform, but the interests of the country have been badly served by the existence of two solitudes which finds journalists, some economists and most government bureaucrats on one side taking the position that the enforcement record is a joke, and businessmen and lawyers on the other side complaining that the administration of the Combines Act is a constant harrassment. It will therefore

not be easy for university libraries to do without the series, where the university has a faculty of law, where the university is serious about commerce or business administration, or where the economics department provides courses in industrial organization.

A fourth important merit of this work is that where the courts have not yet pronounced upon a particular matter, Kaiser, in order to elucidate the issues, frequently cites the opinion of the Restrictive Trade Practices Commission, or the Director under the Act, or the Bureau's Misleading Advertising Bulletin. None of these interpretations, of course, is binding, but normally they are carefully prepared and in the case of the Director's opinion they affect the questions of whether an inquiry will get underway. For the most part, the author allows controversial judgments to speak for themselves. For example, the disarray created by the Supreme Court's ambiguous finding in the Eastern Sugar case about the double intent required for conviction in conspiracy prosecutions, is made plain without being referred to explicitly. Similarly, in the references to the K.C. Irving case, the bizarre meaning given by the Supreme Court of Canada to the word "competition" (i.e., competition was to some degree intensified by the takeover of all the English-language newspapers in New Brunswick) is left hanging. (It would appear that on this interpretation, a mighty General Motors could acquire control of all economic activity in Canada, and so long as a certain rivalry was maintained among Chevrolet, Oldsmobile and other divisions of the company, the public interest would not suffer).

However, with respect to other matters, Kaiser does offer his own opinion from time to time. Though always interesting, some of these interpretations are arguable. For example, he rightly points out (page 4-8) that unlike the situation in the United States, functional discounts are not allowed in Canada. (The apparent severity of this rule, of course is greatly mitigated by the fact that before discrimination can occur, customers must be in competition with each other and must buy in equal quantities). Cost differences in selling to different purchasers, Kaiser says, are not a justification for price discrimination. He adds, however, that the price can vary by the difference in transportation expense, provided a separate charge is made for the transportation expense. The point has not been determined by the courts, but it seems highly unlikely that a Canadian court would convict in a criminal case, where, for example, the seller enjoyed the same mill-net price from all buyers even if he did not make a separate charge for transportation. (Conversely, it seems equally improbable that a court would convict where the seller charged the same delivered price throughout the country and therefore necessarily received varying mill-net prices). On another subject, Kaiser makes the fascinating point that there are approximately 200 prohibition orders currently in force in Canada (page 3-45). He then concludes that given the detailed nature of some prohibition orders, the scope for civil liability is substantial. It is likely that there are differing opinions about this. On yet another point, Kaiser expresses the view that the merger and monopoly section has not been actively enforced. This choice of words may perhaps not reflect

his real intention, because elsewhere he says that the explanation for the limited number of merger cases and the lack of success in those cases which have been brought, is simply that the jurisprudence requires a virtually monopoly before a merger will be held unlawful (page 10-2). Even this is not the whole story, because, as he mentions later, there is also a major problem in merger and monopoly cases about the meaning of detriment. Underlying the whole issue is the basic conflict between the uncertainty involved in any economic forecast, including the prediction of the likely consequences of a merger, and the proof beyond a reasonable doubt required by criminal law. There are, of course, other places where this reviewer has no quarrel with the opinions expressed by the author. There is, for example, a good discussion of conscious parallelism. In the United States, the author writes, "Liability will result in the case of conscious parallelism 'plus'". But, says Kaiser, "Conscious parallelism 'plus' is nothing more than inferential conspiracy". This reviewer agrees with Kaiser and believes that unnecessarily heavy weather has been made of this subject by Stanbury and others.

The fifth special merit of this volume, which particularly reinforces its usefulness in certain areas, is that it covers related provisions of other legislation. At the federal level, it deals with the Foreign Investment Review Act, the Shipping Conferences Exemption Act, the Anti-Dumping Act and a series of statutes which deal with subjects close to misleading advertising, including the criminal code provisions on lotteries and trading stamps, the Bank Act, the Hazardous Products Act, the Textile Labelling Act, the Precious Metals Marking Act, the Food & Drugs Act, the Trade Marks Act, and the Consumer Packaging and Labelling Act. The chapter on provincial marketing legislation makes the point that the scope of provincial consumer and deceptive trade practices legislation now greatly exceeds the federal provisions. This state of affairs invites two comments. Fortunately the federal and provincial administrators have used good sense in seeking to avoid conflicts in enforcement. But in no way does this justify the absurdity of the extensive duplication of much of the federal legislation by the provinces, who began to get interested in the field only in 1967. The provinces have even copied the search powers which are conferred on the Director under the Combines Act. Worse still, in some cases the provincial administrators have the power, on their own initiative, to freeze assets, to issue cease and desist orders, and to issue orders for immediate compliance. The Director under the Combines Act was endowed with his search powers because enforcement in the areas of conspiracy, and merger and monopoly is extremely difficult--it is unlikely that such powers would ever have been conferred upon him for enforcement in the misleading advertising area alone. One assumes that advertising, whether or not it is misleading, is not generally concealed! It is not self-evident, therefore, that an ordinary search warrant would not be adequate to deal with exceptional cases. A second comment is that if Canadians are ever to enjoy the full benefits of a common market, the elaboration of eleven different regulatory regimes covering much the same subject has got to be brought to an end. There would be less objection if the provinces merely supplemented the federal legislation. But there is no point in our political leaders' getting

exercised about Canada's abysmal record in improving productivity, if provincial barriers to trade and unnecessary variations in the rules governing business conduct are to be allowed to proliferate in this fashion.

The obvious question with which to conclude is whether the World Law of Competition fills a need not met by its nearest rivals. The answer is that on the world scene Matthew Bender has rendered obsolete its main competitor, the OECD Guide to Legislation on Restrictive Business Practices. The Canadian section of the Guide, as an example, numbers only 100 pages, of which half are taken up by a reproduction of the Combines Investigation Act. The OECD should consider shifting resources from publication of the Guide towards improvements in its publication of the Annual Development Reports which are submitted by the enforcement agencies of member countries, and which often contain extremely interesting and useful material that is not otherwise available. What is required is a single annual volume, with some editing to reduce the attention paid to relatively routine matters.

There are two well-known rivals for the Kaiser volume specifically, on the Canadian market. These are C.J. Michael Flavell, "Canadian Competition Law - A Business Guide", McGraw-Hill Ryerson Limited, Toronto, 1979 and R.J. Roberts' "Anticombiners and Antitrust", Butterworths, Toronto, 1980. However, these can be considered complements as much as rivals. The Flavell volume is somewhat less current than Kaiser, but is extremely readable and is forthright in expressing the author's thoughts and views about likely interpretation of the law where the courts have not yet made a pronouncement. The Roberts volume is a comparative study of Canadian and U.S. law and in this respect is generally much more detailed than Kaiser or Flavell, but for this reason much less easily accessible to the business reader. The Kaiser volume alone covers related legislation in any detail, and of course is intended to be kept current.

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