

BOOK REVIEW

JOHN S. TYHURST, *CANADIAN COMPETITION LAW AND POLICY*

Simon Kupi, Dentons Canada LLP

Despite Canada holding the distinction of enacting the world's first competition legislation in 1889, the development of its regulatory framework has followed a circuitous road. Canada's early criminal law-based prohibitions proved largely toothless in reigning in anti-competitive mergers and conduct before the courts, while decades of start-stop reform initiatives failed to remedy the situation. Only with the changes leading up to the 1986 *Competition Act* did the more economic-influenced modern regime familiar to practitioners today begin to take shape.

Few authors would be better placed to pen a comprehensive account of the evolution of Canada's competition framework than litigator John Tyhurst. Tyhurst's career accolades include contributing to the 1986 reform process, serving as counsel to Competition Bureau for a decade, appearing for the Commissioner of Competition in several leading Supreme Court cases, and more recently teaching competition law at the University of Ottawa. In *Canadian Competition Law and Policy*, Tyhurst provides a broad overview of the *Competition Act's* framework distinguished, most of all, by the author's detailed attention to the statute's policy context and history. As the latest entry in Irwin Law's longstanding *Essentials of Canadian Law* series, the text also continues that imprint's tradition of synthesizing legal subjects in a comprehensive but accessible and easy-to-read manner. As such, Tyhurst's work is particularly suited to a student audience, although its depth of coverage should also make it a useful reference text for practitioners.

In Chapter 1, Tyhurst first provides a high-level introduction to competition enforcement, characterizing it as the metaphorical "referee in a hockey game" of Canada's market economy. Tyhurst then guides the reader through the *Competition Act's* enforcement and adjudicative mechanisms and their history in Chapter 2, presenting a detailed and often colourful account of the actors as well as the political, economic and social drivers behind how Canada's competition framework evolved over time. Tyhurst continues with an overview of the *Competition Act's* statutory objectives and relevant economic concepts in Chapter 3. Here, the book's liberal use of

explanatory graphs and tables is particularly effective at simplifying topics, such as the hypothetical monopolist framework, that might prove less intuitive to students or others new to competition law.

Not unlike other texts on the market, *Canadian Competition Law and Policy* dedicates a chapter to market definition analysis in Chapter 4. However, readers will appreciate Tyhurst's extensive use of case law examples as well as his touching on "two-sided" and "zero-priced" market issues central to modern digital economy cases. Chapter 5, on mergers, similarly goes well beyond simply rehashing the *Merger Enforcement Guidelines*. Particularly useful is Tyhurst's detailed discussion of the controversial efficiencies defence—no doubt aided by Tyhurst's own experience as counsel to the Commissioner in the Supreme Court's *Tervita* proceeding. For example, beyond describing the concepts themselves, Tyhurst uses a table to present the Competition Tribunal's specific quantification of the efficiencies, "socially adverse" wealth transfer and deadweight loss at issue in *Superior Propane*.

Chapter 7 addresses both criminal and civil enforcement of agreements among competitors. As in other parts of the text, here Tyhurst valuably weaves in relevant U.S. and other international authorities. Tyhurst does so not only to contextualize the development of Canada's headline conspiracy and civil collaborations provisions, but also the less frequently studied export cartel and professional sport agreement provisions, for example. The coverage of the *Competition Act's* abuse of dominance, vertical distribution practices and pricing provisions in Chapters 8, 9 and 10, respectively, is likewise in-depth, tracking relevant Canadian decisions from 1951's *Eddy Match* through to 2019's *Vancouver Airport Authority*. Again, Tyhurst drives home the policy foundations underlying these provisions, whether in parsing through the work of Chicago School and post-Chicago economists, the recommendations of the Economic Council of Canada or more recent legislative materials tied to the 2000s-era *Competition Act* amendments. The text then concludes in Chapter 11 with an overview of the misleading advertising provisions, which Tyhurst argues to be no less fundamental to the statute's market-serving aims.

While Irwin Law previously released a compendium of essays in 2006 on competition class actions, followed by another in 2009 on the competition/intellectual property interface, *Canadian Competition Law and Policy* is its first publication in the competition area in over a decade and the first of this scope. It joins an increasingly rivalrous field occupied by longstanding texts such as LexisNexis' *Competition and Antitrust Law – Canada and the*

United States and Carswell's *Fundamentals of Canadian Competition Law* (currently in their fifth and third editions, respectively), as well as a "new entrant" in Emond Montgomery's 2018-published *Competition Enforcement and Litigation in Canada*, among other recently published or updated texts focused on specific topics. As the latest of these publications, one potential shortcoming of Tyhurst's 528-page text is the relative brevity of its otherwise valuable discussion of the emerging, digital economy-related competition policy issues that have preoccupied legislators and competition authorities in Canada and worldwide in recent years.

This hardly detracts, however, from the success of Tyhurst's larger effort to breathe life into the policy substance of Canada's law as it stands today. Each chapter triangulates between legislative, academic, historical and international sources to provide the reader with a broad and multi-faceted appreciation of each of the *Competition Act's* core provisions and the institutions and processes surrounding them. It does so without sacrificing detailed, practical and well-referenced commentary on key cases and legal tests. At the same time, Tyhurst's plain language and ample use of illustrations, tables, graphs, pull-quotes and lists keeps the text accessible and digestible throughout. All of this makes *Canadian Competition Law and Policy* a worthy addition to law library bookshelves for students, practitioners and others seeking a comprehensive and current guide to Canada's competition framework.