FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

U.S. DEVELOPMENTS

By: Stuart E. Benson
-and-
A. William Mackie,
Graham & James, Washington, D.C.

Public Affairs

Since the last issue of the *Canadian Competition Policy Record*, the Supreme Court nomination of Judge Robert H. Bork has been defeated in the Senate following lengthy debate. President Reagan's second nominee, Douglas H. Ginsburg, the former Assistant Attorney General of the Antitrust Division and current member of the D.C. Circuit Court of Appeals, withdrew from consideration following extensive public controversy. In his place, the President has nominated Judge Anthony M. Kennedy of the Ninth Circuit Court of Appeals. Judge Kennedy is generally regarded as an experienced and conservative, but nonideological, jurist with an accomplished record. It is difficult to assess Judge Kennedy's views on antitrust matters since apparently he has not written on this subject.

On October 9, 1987, Charles F. Rule, the current Chief of the Antitrust Division at the Department of Justice, delivered an address on merger enforcement policy to the annual meeting of the American Bar Association's Antitrust Law Section. In this speech, Rule reiterated his commitment to an active merger enforcement policy, a theme he had earlier stressed in his first press conference. Mr. Rule agreed that the Administration's current merger analysis had become increasingly "sensitive to the economic benefits of mergers." He denied, however, that this emphasis implied any lack of commitment towards enforcement. He cited as evidence of this the Antitrust Division's challenges to five major merger transactions in a five-month period during late 1986 and early 1987. Stressing that "the only defensible standard for merger enforcement policy is consumer welfare," Rule sharply criticized those who "view merger enforcement as a tool for social or political objectives" which can be manipulated to promote "parochial economic interest...at the expense of national economic welfare." Rule also elaborated on the Antitrust Division's "ease of entry" analysis of prospective mergers which he views as the most "persistently misunderstood" portion of the Division's merger guidelines. The most significant factors of this analysis, according to Rule, are:

> ...the perceptions of the most likely entrants, the cost of entry relative to likely annual revenues, previous attempts to enter the market, ease of exit, the importance of the reputation of incumbent firms and the strategies used by incumbent firms to deter entry.

The landmark draft U.S-Canadian free trade agreement released on October 5, 1987. contains a number of provisions with potential significance for business combinations on both sides of the border. Under the proposed terms, the Canadian government's ability to review direct investments in Canada by U.S. companies would be severely limited and its review of indirect investments eliminated completely after three years. The draft agreement would also require national treatment by each country of parties establishing new businesses or acquiring existing businesses in their jurisdictions. Further, the draft agreement would bind both nations not to adopt any policies requiring minimum equity levels of nationals in domestic firms acquired or controlled by investors of the other party.

Officials in the Antitrust Division have been closely involved in the negotiations leading up to this agreement and have participated in joint discussions concerning related antitrust issues. While the draft agreement does not contain any specific antitrust provisions, its general goal of free trade and investment has important implications for U.S. antitrust policy. For example, the successful reduction of trade barriers in a given market might affect the Division's market analysis of a particular merger by prompting consideration of the merger in the context of the larger, combined U.S.-Canadian market.

Legislative Report

Due largely to the protracted hearings on the unsuccessful nomination of Judge Bork, the Senate Judiciary Committee has delayed action on a number of pending antitrust bills. These include S.80 and S.1299 (seeking repeal of the antitrust exemption for the insurance industry), S.1407 (*The Antitrust Remedies Improvements Act*) and S.443 (*Clayton Act* Amendments). The Senate has given approval to S.1068 (the *Interlocking Directorate Act*) and has sent it on to the House of Representatives where it is currently in subcommittee.

The Deputy Undersecretary of Commerce for International Trade recently voiced the Administration's strenuous opposition to the "foreign antitakeover" provisions of the pending trade reform bill as "totally inconsistent with our overall investment policy." One of these provisions, the "Bryant Amendment," would require more parties involved in prospective mergers, particularly foreign persons, to file pre-merger notifications. Reports have recently surfaced of a proposal to drop the Bryant Amendment from the trade bill in exchange for assurances that the Senate Commerce Committee would hold public hearings on the issue. Support for this amendment appears to be waning in both parties.

In related developments, recent efforts to reconcile the House and Senate trade bills have reportedly led to a possible compromise on a provision in the Senate bill known as the "Exon Amendment" which would allow the President to bar certain foreign investments in the U.S. deemed harmful to national security. The reported compromise would make it easier than under the Exon amendment to initiate investigations of mergers or takeovers by foreign firms but more difficult to determine harm to national security. Still unresolved is whether the Exon Amendment would supersede current bilateral investment and trade agreements, such as the proposed U.S.-Canadian free trade agreement discussed above. This issue is significant because of provisions in many bilateral agreements according national treatment to foreign investors. The Administration has indirectly stated that the President will veto any controls on foreign investment in the U.S., but other key lawmakers - including House Republicans - appear ready to accept some form of compromise.

The Senate Judiciary Committee has also recently held joint subcommittee hearings on S.438 (*The Intellectual Property Antitrust Protection Act*). This bill seeks to ensure:

- that intellectual property licensing arrangements will not be evaluated under the *per se* doctrine but will instead be evaluated under the antitrust "rule of reason" standard; and
- that there is only a single damage recovery, rather than the usual treble damages, in antitrust actions involving such arrangements.

On October 20, 1987, Assistant Attorney General Rule delivered a statement to the committee expressing the Administration's strong support for this legislation. Mr. Rule emphasized that licensing arrangements can be pro-competitive by increasing the level of intellectual property protection and thereby can encourage research and development, investment and increased innovation. When licensing leads to more efficient uses of technology and encourages investment, he noted, it improves the competitiveness of U.S. firms and benefits the consumer.

As reported here last December, intellectual property licensing was one of the subjects that received attention during the recent revisions to the Antitrust Division's *1977 Antitrust Guide for*

International Operations. The *1977 Guide* reflected a restrictive view toward many licensing practices and considered certain types of these practices (e.g., tie-ins, tie-outs, package licenses and grant back agreements) to be *per se* violations of the antitrust laws absent specified conditions. Recent pronouncements by Mr. Rule concerning the revision of the *1977 Guide* indicate that the Administration now favors a less restrictive policy based on the rule-of-reason analysis i.e., that unless a licensing restriction is clearly anticompetitive, it should not be condemned.

The House Judiciary Committee has approved H.R. 585 (the *Freedom From Vertical Price Fixing Act*), a bill designed to ease the burden on plaintiffs seeking to prove resale price maintenance by overturning the restrictive evidentiary standard of *Monsanto Co. v. Spray-Rite Services Corp.* (1984) and establishing the *per se* illegality of such arrangements. The Senate Judiciary Committee has already approved a somewhat more expansive companion bill, S.430 (the *Retail Competition Enforcement Act*), which was drawn from the original language of H.R. 585. This legislation could revive interest in efforts to extend antitrust law protection to allow recovery of damages by indirect purchasers for resale price maintenance, not currently possible under the Supreme Court's *Illinois Brick* doctrine discussed here in the last issue. However, Assistant Attorney General Rule has said that the Department of Justice will recommend a veto arguing that this bill is too broad and would catch legitimate behaviour in its net.

Judicial Developments

During the recently commenced October 1987 term, the Supreme Court will consider two important antitrust immunity cases: *Patrick v. Burget* and *Allied Tube Conduit Corp. v. Indian Head, Inc.* The Supreme Court will consider in *Patrick* whether the exemption for state action shields participants in a state-mandated peer-review process from antitrust action notwithstanding bad-faith abuse of the process for anticompetitive reasons. The Ninth Circuit Court of Appeals earlier held in the affirmative, overturning a $1.9 million damage award to a surgeon forced to resign from a hospital's staff as a result of a state-authorized peer-review investigation allegedly motivated by the desire of competitors to prevent the plaintiff from establishing a new business.

Indian Head involves the refusal of the Second Circuit Court of Appeals to extend *Noerr-Pennington* immunity (for petitioning the Government to adopt anticompetitive measures) to certain types of lobbying activities directed at private associations that set industry safety standards which are often incorporated into state codes and statutes. As reported here earlier, the Second Circuit had found that *Noerr-Pennington* immunity covered lobbying of private organizations involved in establishing industry standards or codes but did not protect abusive behavior such as "ballot stuffing" in connection with the adoption by such organizations of industry standards. The Supreme Court plans to consider whether "ballot stuffing" qualifies as a type of lobbying activity protected under the *Noerr-Pennington* doctrine and whether lobbying of this type before a private organization is eligible for *Noerr-Pennington* immunity if a jury finds it "subverts" the rules of such organization.

The *Noerr-Pennington* doctrine was also the subject of two recent Federal Court of Appeals decisions. In *Sessions Tank Liners, Inc. v. Joor Manufacturing Inc.*, the Ninth Circuit Court of Appeals considered an allegation by a storage tank repair company (Sessions) that the demand for its services had been reduced as a result of an amendment to the Uniform Fire Code of the Western Fire Chief Association (WFCA). This amendment had been proposed to the WFCA and vigorously lobbied by the president of a competitor of the plaintiff who served in a leadership capacity with the WFCA. Alleging that the amendment to the code would eliminate its business, Sessions had brought suit against the competitor under the *Sherman Act*. The Ninth Circuit held that the *Noerr-Pennington* doctrine would protect the defendant competitor from antitrust liability for lobbying activities before a private association engaged in promulgating industry standards and codes to be used in legislative and executive decisions. The court held, however, that abuses of the code

promulgating process that are designed primarily to harm competitors are a "sham" and fall outside *Noerr-Pennington* protection. In doing so, it appeared to arrive at essentially the same conclusion as that reached by the Second Circuit in *Indian Head*, albeit by a somewhat different analysis.

The gravamen of the plaintiff's complaint in this case was that the defendant tank manufacturer had used deceptive material to persuade the WFCA to adopt the amendment in question. The Ninth Circuit held, however, that such misrepresentations do not necessarily destroy *Noerr-Pennington* immunity, and an antitrust plaintiff cannot invoke the "sham" exception merely by showing that the defendant made misrepresentations while pursuing legislative action. At the same time, the court noted that this principle does not extend to alleged misrepresentations made outside the lobbying process and before the code was amended. The court reasoned that misrepresentations made to executive or administrative officials fall between the clear rules established in the legislative context, where misrepresentations are not actionable, and the adjudicative context, where they are. The court remanded the case to determine whether the alleged misrepresentations were made to officials in their adjudicative capacity or were made in a legislative context.

A U.S. District Court in New Jersey considered a somewhat related question under the *Noerr-Pennington* doctrine in *Cipollone v. Liggett Group, Inc.* The court ruled in *Cipollone* that the *Noerr-Pennington* doctrine does not preclude the admission of evidence that the defendant offered employment to members of Congress who voted favorably on legislation affecting the defendant's industry and, in some limited circumstances, does not preclude the admission of evidence that the defendant submitted false and misleading information to influence such legislation.

In a decision of potential import for providers of international services, the Second Circuit Court of Appeals ruled in *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, that the act-of-state doctrine defeated antitrust claims brought by a provider of liquid bulk cargo tanker service against certain Colombian shipping companies that were operating under the Government of Colombia's "cargo reservation laws." These reservation laws required at least 50 per cent of licensed imports of liquid bulk cargo to be transported on Colombian-owned vessels or on vessels chartered by a Colombian company. The defendants used these laws to enter into agreements giving them a near monopoly of this trade, with the approval of the Colombian government. When they applied for approval of their agreements by the U.S. Federal Maritime Commission, however, that body ruled that their activities were illegal under U.S. maritime law and ordered them to cease and desist. O.N.E. then brought suit under sections 1 and 2 of the *Sherman Act*, charging the defendant companies with a concerted refusal to deal with the plaintiff, a conspiracy to exclude competitors, exclusive dealing, a conspiracy to fix prices, a conspiracy to divide markets and allocate customers and an attempt and conspiracy to monopolize the shipping trade in liquid bulk cargo to Colombia. While conceding that the defendant carriers had taken advantage of the Colombian laws to limit the plaintiff's business, the court noted that the Government of Colombia had clearly stated its interest in these laws and had approved the agreements. It also noted that the agreements were among foreign parties and related to Colombian commerce. In this case, Colombia's laws were "alleged to be at the core" of the harm upon which the plaintiffs claim rested. The court held that "when the causal chain between the alleged conduct and plaintiff's injury cannot be determined without an inquiry into the motives of the foreign government, claims made under the antitrust laws are dismissed" under the act-of-state doctrine.

Lastly, in *Metrix Warehouse, Inc. v. Daimler-Benz Aktengesellschaft*, the Fourth Circuit Court of Appeals held that the Supreme Court's 1935 decision in *Pick v. General Motors Corp.* did not create an "automobile exception" to the modern *per se* rule prohibiting tying arrangements between manufacturers and their dealers. Metrix, an independent wholesale distributor of automobile parts, had brought an action under the *Sherman Act* against Mercedes-Benz of North America (MBNA) alleging that MBNA effectively

obligated all their dealers through their franchise agreements to buy Mercedes-Benz parts only from MBNA and not from independent distributors like Metrix. MBNA sought to persuade the court that under the *Pick* decision such tying arrangements were not invalid *per se* but should be evaluated on the basis of the "reasonableness" of the arrangement. The *Metrix* court rejected this theory, finding that the Supreme Court in *Pick* did not create a blanket exception for automobile manufacturers. Moreover, the court concluded that *Pick* had been decided more than 10 years before the Supreme Court first applied the modern *per se* rule to tying arrangements, and nothing in the *Pick* decision justified a departure from the current *per se* analysis.

BOOK REVIEW

REVIEW OF B. DUNLOP, D. McQUEEN AND M. TREBILCOCK *CANADIAN COMPETITION POLICY* (Toronto, Canada Law Book, 1987)

By: D.G. McFetridge
Department of Economics
Carleton University, Ottawa

Canadian Competition Policy has the ambitious goal of providing an integrated analysis of the legal and economic foundations of competition policy in terms that can be understood by both non-lawyers and non-economists. The book is largely successful in achieving its goal in that it presents a non-technical yet balanced and comprehensive discussion of contemporary Canadian competition policy issues.

A book on competition policy can deal with any or all of the following questions:

- What is the law?
- What should the law be?
- How does the law work?

This book deals very well with the first question. It provides a succinct commentary on the *Competition Act*, on past judicial interpretation of some of its provisions and on possible interpretations of some of its newer sections.

The book is a qualified success in dealing with the second question. The authors make use of economic analysis to determine whether various trade practices are likely to enhance or reduce economic efficiency. They find that some practices such as price and market-sharing arrangements (cartels) are unambiguously efficiency-reducing and recommend that they be illegal *per se*. They find that other practices, such as horizontal mergers, price discrimination and vertical restrictions can, depending on the circumstances, be either efficiency-reducing or efficiency-enhancing. The authors are sometimes rather vague about the rules and standards that ought to be applied to practices of this nature. Moreover, in their desire to provide a balanced discussion, they occasionally cite and apparently give weight to arguments, the price-theoretic validity of which is questionable.

The book does not attempt to deal with the third question in any detail. It is not a practitioner's handbook. While there is some discussion of the types of evidence which might bear upon the issue of substantial lessening of competition in merger cases, there is virtually no discussion of the specific form in which each type of evidence could be presented or has been presented in other jurisdictions. Similarly, the authors provide only the briefest glimpse into what might constitute an efficiency defence in merger cases.

The book proceeds through three highly readable introductory chapters on the historical background of competition policy, the common law of restraint of trade and the evolution of Canadian competition law respective to what might be termed the central analytical chapters. These are Chapter 4 which defines the appropriate goals for competition policy and Chapter 5 which explains the method of economic analysis employed in the balance of the book.

After examining the goals that competition policy could pursue, the authors conclude that competition policy should be directed toward the achievement of economic efficiency, specifically, allocative, productive and dynamic efficiency. They argue that goals such as income redistribution and the prevention of undue accumulations of wealth and political power are more readily achieved by means other than competition policy. The authors note perceptively that the use of competition policy to achieve redistributive goals carries with it the danger of protecting competitors rather than competition and thus of reducing rather than enhancing economic efficiency.

In Chapter 5 the authors take on the difficult task of explaining the economist's models of perfect competition and monopoly to the uninitiated. They present the familiar graphical analysis of the competitive firm and market in the short run.[1] This is followed by graphical analysis of pure monopoly in the short run. It is noted that the monopolist produces a smaller output and charges a higher price than would a competitive industry under the same circumstances, and a dead weight loss of "valuable output and consumption" results. Inexplicably, the authors postpone both an explicit comparison of monopoly and competitive outputs and prices and the diagramatic illustration of dead weight (allocative efficiency loss) until Chapter 7.

The authors are properly mindful that competition is valued as a means of achieving economic efficiency rather than as an end in itself. Monopoly may be tolerable if it has offsetting virtues such as facilitating the realization of scale economies or serving as a reward for technological or organizational innovation. Mere possession of a monopoly has never been an offence under Canadian competition law. The offence lies in what is done to acquire and defend monopoly power.

The analysis of the polar cases of monopoly and perfect competition is a good way to illustrate how the basic tools of economic analysis are used and to operationalize the concept of economic efficiency. For purposes of competition policy, however, what is important is the vast array of market structures lying between competition and monopoly.

Rather than conducting a frontal assault on the bewildering variety of models of specific market structures, the authors employ what they call the "stretch oligopoly model." The stretch oligopoly model views all market structures as either tending toward competition with its inherent virtues or tending toward monopoly with its attendant vices (and possible offsetting virtues). As indicators of the direction in which a particular market structure tends, the authors suggest the height of entry barriers and the extent of mutual recognition of interdependence prevailing in an industry. Thus, the higher the barriers to entry and the greater the degree of mutual recognition of interdependence prevailing in an industry, the greater is its tendency toward a monopoly price-output configuration.

The authors do not explain how they would measure mutual recognition of interdependence. Their discussion of merger policy hints that they might infer its magnitude from the market shares of the leading firms and from a record of parallel behaviour.

Product differentiation serves to complicate matters further. The authors correctly conclude that free entry may result in either excessive or insufficient product variety (relative to the ideal) so that an increase in monopoly power does not necessarily make things worse. Similarly, monopoly may result in product quality which is excessive relative to the ideal, but the same may also be true of competition.[2] The authors are properly skeptical of the ability of anything but the most detailed case-by-case analysis to render usable evidence on these matters.

While the reluctance of the authors to wade into the oligopoly theory is understandable, the theory does offer some insights into the respective merits of various market structures which could have been made accessible to readers with limited backgrounds in economics. For example, Landes and Posner have used the dominant firm oligopoly model to illustrate the respective roles of market shares, the elasticity of market demand and the supply responsiveness of fringe competitors in determining the ability of a dominant firm to set monopoly prices.[3] Similarly, Ordover, Sykes and Willig have shown how the elasticity of market demand, the distribution of market shares and the industry conjectural variation (the economist's measure of interdependence) can be used to predict the price-output configurations of alternative market structures.[4]

Chapter 6 is devoted to an examination of the law and economics of cartels. The authors argue that cartels restrict output thus misallocating resources while offering no compensating benefits. Indeed, they may stifle innovation and frustrate the rationalization of production. As a consequence, a *per se* prohibition of price-fixing and market-sharing is appropriate.

In their discussion of the Canadian case law, the authors conclude that, the confusion surrounding *Aetna* and *Atlantic Sugar*

notwithstanding, there is effectively a prohibition of price-fixing and market-sharing conspiracies which embrace a large fraction of the market.[5] They criticize, with reason, the failure of the 1986 competition law amendments to eliminate this implicit market share (undue lessening) test, that is, to adopt a *per se* approach.

The authors also review the types of circumstantial evidence upon which inferences of tacit collusion might be based and are unconvinced as to the power of this kind of evidence to distinguish between co-operative behaviour and mere sensitivity to a rival's decisions. Recent discussions of this issue have focused on so-called "facilitating devices," arrangements designed to facilitate co-operation among rivals.[6] Canadian conspiracy cases provide a number of examples of facilitating devices in action, and it might be instructive to discuss this approach in a Canadian context.

Chapter 7 contains an analysis of merger policy together with a brief discussion of the provisions of the *Competition Act* regarding abuse of dominant position. The focus of the discussion is on horizontal mergers which have the greatest likelihood of involving both an increase in monopoly power and a potentially offsetting gain in productive efficiency.

The authors list the factors to be considered in determining whether a merger is likely to lessen competition substantially. These include product substitutability, market shares, market concentration and past market conduct. There is, however, no attempt to illustrate how substantial lessening might be inferred in a specific fact situation. Indeed, the authors choose not to define for their reader the Herfindahl Index which is the most widely used measure of market concentration. The reader is left with the apparent conclusion that a merger which results in the domination of a market by a single firm would be cause for concern while mergers resulting in something less than dominance might or might not be.[7]

The authors also list the motives for merger including:

- facilitating the retirement of owner-managers;
- rescuing a failing or faltering firm;
- supplying capital to a growing firm;
- diversifying product lines; and
- realizing scale and scope economies.

They note that mergers can make a significant contribution to economic efficiency by increasing the transferability of ownership claims.

The question of which of the beneficial effects listed above would qualify for the efficiency defence under section 68 of the *Competition Act* is left unaddressed. For example, if a firm were to be acquired by an important competitor, it would probably not be a defence that this allowed the owner of the acquired firm to realize his investment and retire. Of course, as the authors note, most of the benefits of mergers (including the retirement of owners) could, in principle, be realized by means other than a merger with a competitor. Depending on the practical alternatives which exist, this could disqualify them as section 68 defences.[8]

The focus in Chapter 9 is on price discrimination and predatory pricing. The authors present the familiar diagramatic analyses of first-, second- and third-degree price discrimination. They concede that a price discrimination can be preferable to simple monopoly pricing from a static allocative efficiency point of view. They are apprehensive, however, about the effect of discrimination on future competition. For example, discrimination by wholesalers against small retailers may eliminate a competitive fringe from retail markets and allow large retailers to increase margins.

The implication of this argument is that small retailers have a relatively high price elasticity of demand in the long run, and discrimination against them would not be profitable. Moreover, it is difficult to imagine why wholesalers would knowingly assist in the entrenchment of the monopsony power set against them.

Firmly grounded or not, their apprehension leads the authors to favour a rule against price discrimination when it reduces future competition either in the industry in which it occurs (i.e. is predatory) or in vertically linked industries. They concede that enforcement of a rule of this nature would be a formidable task.

With respect to predatory pricing itself, the authors conclude that because a single predatory act may deter potential competitors for a long time, predation is a viable means of

monopolization and, as such, should remain a criminal offence. The problem lies in distinguishing predation from aggressive competition. A rule deployed against what the authors concede are only occasional instances of genuine predation may routinely deter aggressive competition.

The authors are unimpressed with the many cost-based and other tests for predation.[9] Although they argue in Chapter 7 that the requirement that the Director prove anticompetitive intent is a major defect of the abuse of dominant position section of the *Act*, the authors recommend greater reliance on intent evidence in predatory pricing cases. They would also find evidence of selective price cutting backed up by other (unspecified) actions persuasive.

Chapter 9 contains an excellent discussion of the economic motives and consequences of vertical restraints, to wit, resale price maintenance (RPM), tied sales, territorial restrictions and exclusive dealing. The discussion concludes that vertical restraints can often be justified on efficiency grounds. Traditional cartel or entrenchment of monopoly explanations are persuasive in relatively few instances.

Notwithstanding these conclusions, the authors are apparently comfortable with the *per se* illegality of resale price maintenance (perhaps with an additional defence for complex new products) and with the evaluation of other vertical restrictions in terms of their exclusionary effects.

With regard to resale price maintenance, the authors opt for the status quo (or something very close to it) because:

- there are many cases in which RPM cannot, in their view, be explained by a need to provide point-of-sale service;
- RPM retards the evolution of the retail sector; and
- manufacturers may err in their choice of marketing strategies (i.e. incorrectly choosing RPM).

In response, it might be argued that:

- the benefits associated with RPM go well beyond the direct provision of information on new products by retailers;
- the absence of a retail information rationale for RPM does not necessarily imply that monopolization must be the motive;
- while RPM may have slowed the emergence of discounters, it is incorrect to argue that vertical restrictions have, in general, either retarded or distorted change in retailing;[10]
- RPM or any other practice should not be made illegal because some individuals or firms might incorrectly adopt it;
- while RPM can be detrimental to consumers, existing analytical work shows that the conditions required for this outcome are likely to occur infrequently.[11]

The welfare consequences of other vertical restrictions do not necessarily turn on the presence or absence of exclusionary effects. For example, a bundling or tying arrangement may increase welfare even though it has an exclusionary effect or may reduce welfare even though it has no exclusionary effect. Whether the Competition Tribunal can hope to distinguish between welfare-increasing and welfare-decreasing tying, bundling or other vertical restrictions is an open question. It is clear, however, that this distinction cannot be made solely by reference to exclusionary effects.

In summary, *Canadian Competition Policy* is a laudable and largely successful effort to simplify and summarize a complex body of material. It will be a useful reference and textbook and will, no doubt, go into many editions. In subsequent editions, the authors may wish to strive for a more systematic presentation and application of the tools of economics and a more thorough integration of the discussion of Canadian case law into the economic framework.

Endnotes

1. The authors argue in their discussion that the average total cost (short-run average cost) curve could be L-shaped. Presumably they meant that the long-run average cost or scale curve could be L-shaped. The short-run average cost curve cannot be.
2. A.M. Spence, "Monopoly, quality and regulation," *The Bell Journal of Economics* 6 (Autumn 1975), pp 417-29.

3. W. M. Landes and R. A. Posner, "Market Power in Antitrust Cases," *Harvard Law Review* 94 (March 1981), pp 937-96.
4. J. A. Ordover, A. O. Sykes and R. D. Willig, "Herfindahl Concentration, Rivalry and Mergers," *Harvard Law Review* 95 (June 1982), pp 1857-74.
5. *Aetna Ins. Co. et. al v. The Queen* [1978] 1 S.C.R. 731 and *Atlantic Sugar Refineries Co. Ltd. et. al. v. A-G Can.* [1980] 2 S.C.R. 644.
6. S. C. Salop, "Practices that (Credibly) Facilitate Oligopoly Coordination," in J. E. Stiglitz and G. F. Mathewson eds. *New Developments in the Analysis of Market Structure* (Cambridge, MIT Press, 1986), pp 265-90 and K. Elzinga, "New Developments on the Cartel Front," *Antitrust Bulletin* 29 (Winter 1984), pp 3-26.
7. For a systematic treatment of the considerations involved in the determination of whether substantial lessening is likely see S. C. Salop, "A Practical Guide to Merger Analysis," *Antitrust Bulletin* 29 (Winter 1984), pp 663-703.
8. The determination of whether a practical alternative exists is also an interesting question. How much of a discount from his best offer should a retiring owner be obliged to sell out at?
9. In their discussion of cost-based tests, the authors repeat an error made by Posner. He and they argue that "short-run marginal cost is always less than long-run marginal cost" (p. 226). This is simply incorrect.
10. Franchise arrangements with their attendant vertical restrictions have revolutionized retailing and other service industries.
11. G. F. Mathewson and R. A. Winter, *Competition Policy and Vertical Exchange* (Study published for the Royal Commission on the Economic Union and Development Prospects for Canada by University of Toronto Press, 1985), pp 51-54.