

CANADIAN COMPETITION RECORD

CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

**BOOK REVIEW: *COMPETITION AND
ANTITRUST LAW:
CANADA AND THE UNITED STATES, 3rd
Edition***

**By: *Brian A. Facey & Dany H. Assaf
(Toronto: LexisNexis Canada, 2006. 592
Pages)***

By: Gordon Kaiser
Vice-Chair, Ontario Energy Board

Like Canada itself, Canadian competition law and policy is surrounded by the outside world and is influenced most profoundly by the laws of the United States. As such, government enforcers and private legal advisors today require cross-border knowledge and expertise. At the same time, competition matters have become increasingly influenced by, and focused on, economics. Despite this, no Canadian text has provided a comparative treatment of the law and economics of competition policy in a comprehensive fashion. *Competition and Antitrust Law: Canada and the United States* (the "Book") does exactly this. It provides an extremely helpful and well laid out comparative analysis of Canadian and U.S. competition and antitrust laws. The Book also provides a healthy dose of understandable economics. It is a "must have" for in-house counsel, government officials, economists and competition lawyers in need of an in-depth knowledge of the competition laws of North America. The Book will also have international appeal, as governments planning on enacting or amending their

own competition rules can access the good and the bad of two important jurisdictions in one work.

The Book is, on its face, the third edition of Jack Roberts' book, first published in 1980. Indeed he is noted as founding author of the Book and is acknowledged by Facey and Assaf. One simply needs to open the cover, however, to see that it is clearly an entirely new book. With 13 chapters, the Book takes the reader on a journey from the "ancient roots of antitrust" (chapter 1), through a foundational understanding of antitrust economics (chapter 3) and a comparative treatment of conspiracy (chapter 5), merger review (chapter 6), abuse of dominance (chapter 7), and vertical pricing and non-pricing practices (chapters 8 and 9), to a chapter on the future of competition law (chapter 13). Along the way we are treated to an excellent chapter penned primarily by Dr. Lawrence Schwartz on market power and market definition (chapter 4). A chapter on misleading advertising is included, in chapter 10, and enforcement on both sides of the border have been spelled out in some detail.

What is perhaps most interesting about the Book is its strong focus on economics, which is not surprising given the importance of economics in antitrust analysis today. For example, even the economics of misleading advertising has been explained. Moreover, you will find concepts such as Bertrand competition, Williamsons' naïve tradeoff model, and Gary Becker's crime and punishment model of deterrence peppered throughout the book and applied to Canadian competition policy.

CANADIAN COMPETITION RECORD

This is not to say that the Book is beyond students, judges and lawyers. The opposite is true. Economic concepts are explained in plain language precisely for this audience. Economists will appreciate the discussion of legal concepts. The authors have kept legalese to a minimum.

What is surprising about the Book is the in-depth treatment of U.S. antitrust law, not only insofar as it may contrast and apply to Canadian law, but in its own right. One leaves the chapter on conspiracy, for example, with a deep appreciation for the development and use of *per se* rules, rule of reason in the United States, and areas of divergence between Canada and the U.S. It is a deeper treatment of U.S. law than one would have expected from Canadian lawyers. This is not just an unexpected treat. It is a critical foundation for the book because, as the authors point out, the U.S. embraced the *Sherman Act* as an "economic constitution" whereas Canada (despite having enacted its antitrust statute in 1889 - one year before the United States) had an enforcement record, which as the authors also note, was spotty until the last 15 years or so. While the authors take care to emphasize that Canada is a much different country and therefore should have somewhat different rules (such as in the treatment of merger efficiencies), they note the many similarities as well, which opens up the vastly more developed body of U.S. jurisprudence and fills the gaps in certain aspects of Canadian law.

If there is a shortcoming to the Book, it is that it is not also focused on European law, given the growth in the importance of EC competition policy in recent years. Clearly, at 520 pages, the Book had its hands full comparing Canadian and U.S. law. And, to its credit, there is repeated reference to EC competition principles on key topics, which is helpful. A further edition would be well served by adding more European content.

Globalization, reform and change are the high level conclusory messages from the Book. This has got to be correct and the authors do a solid job of describing how these forces are likely to play out going forward. Reference is made to Hovenkamp's observation that:

If one hundred years of federal antitrust policy have taught us anything, it is that antitrust is both political and cyclical. Almost every political generation has abandoned the policy of its predecessors in favour of something new.

This quotation is followed by a corroborating discussion of ongoing proposals to change the laws of Canada and the U.S. and the important harmonizing work of the International Competition Network.

In today's electronic age, hard copy works such as the Book must find a way to remain relevant and current. The Book has done that and will stand the test of time. As a treatise, it encapsulates general principles and historical developments well enough to ensure a longer shelf life than a "how to" text. The Book does provide the kind of case by case practical guidance one would expect from a book written by practitioners, but it goes beyond that and fills an academic void on this topic in Canada. It is this latter attribute which will ensure its relevance into the future. The Book is an important work in the comparative analysis of competition law. It is well written - extremely so in some chapters - and a welcome contribution to the field of competition law and policy in an ever-shrinking world economy.

CANADIAN COMPETITION RECORD

INFORMATION NOTICES AND NEWS RELEASES ISSUED BY THE COMPETITION BUREAU DURING THE PERIOD SEPTEMBER 1, 2006 TO MAY 31, 2007

The following Information Notices and News Releases are available on the Bureau's website at <http://www.competitionbureau.gc.ca/internet/index.cfm>

September 11, 2006

NEWS RELEASE: Obstruction and Destruction of Documents Charges Laid

September 22, 2006

INFORMATION: Competition Bureau Publishes Bulletin on Merger Remedies

September 25, 2006

NEWS RELEASE: Tribunal Decision Follows Competition Bureau Investigation Into Bogus Claims

September 26, 2006

INFORMATION: Competition Bureau Seeks Public Comment on its Draft Bulletin on the Abuse of Dominance in Telecommunications

September 28, 2006

NEWS RELEASE: Competition Bureau Obtains Agreement to Stop Marketing of Econopro, a Bogus Fuel Saving Device

September 28, 2006

INFORMATION: GST-HST Reduced Rates

October 19, 2006

NEWS RELEASE: Canada, Mexico and the United States Combat Diabetes Fraud

October 20, 2006

INFORMATION: Attorney General of Canada Challenges Court Decision in St. John's Taxi Case

October 27, 2006

INFORMATION: Man Jailed for Mass Marketing Fraud Charges

October 27, 2006

INFORMATION: Commissioner of Competition Elected New Chairperson of the International Competition Network

October 30, 2006

NEWS RELEASE: Quebec Companies Charged with Bid-Rigging Following Competition Bureau Investigation

CANADIAN COMPETITION RECORD

November 1, 2006

INFORMATION: Competition Bureau Supports Alberta Decision to Allow Greater Competition in Dental Hygiene Services

November 9, 2006

NEWS RELEASE: Competition Bureau Reaches Agreement with the Three Major Cigarette Manufacturers to Stop Using “light” and “mild” on Cigarette Packages

December 7, 2006

NEWS RELEASE: Minister of Industry Moves to Promote the Interests of Canadian Consumers of Telecommunication Services

December 13, 2006

NEWS RELEASE: Lottery Reseller Hit with Record Fine

December 20, 2006

NEWS RELEASE: Bureau Protects Competition in Baby Healthcare Product: Johnson & Johnson to Sell Zincofax

December 20, 2006

NEWS RELEASE: Competition Bureau Investigation Leads to Guilty Plea for Deceptive Telemarketing Activities

January 18, 2007

INFORMATION: Competition Bureau Seeks Comments on Amending the Textile Labelling and Advertising Regulations

January 22, 2007

NEWS RELEASE: Competition Bureau Investigation Leads to Deceptive Telemarketing Charges Against Two Individuals and a Company

February 16, 2007

NEWS RELEASE: Competition Bureau Settles Case Involving Auto Body Shops

March 1, 2007

NEWS RELEASE: Canadians Need to Strike Back in Fight Against Fraud

March 8, 2007

INFORMATION: Competition Bureau Seeks Comments on Environmental Claims Publication

March 23, 2007

NEWS RELEASE: Competition Bureau Flags Latest Scam to Hit Canadian Businesses

March 26, 2007

NEWS RELEASE: Stock Your Shelves Cautiously – Avoid Office Supply Scams

CANADIAN COMPETITION RECORD

March 27, 2007

NEWS RELEASE: Phoney Lotteries: The Odds are Against You

March 28, 2007

NEWS RELEASE: Miracle Cures: A Prescription for Fraud

March 29, 2007

NEWS RELEASE: And the Winner is...

March 30, 2007

NEWS RELEASE: Your Bogus Cheque is in the Mail

March 30, 2007

NEWS RELEASE: Competition Bureau Investigation Leads to Sentencing for Deceptive Telemarketing Operation

April 4, 2007

NEWS RELEASE: Commissioner of Competition Comments on Government's Decision to Deregulate Local Telecommunications Sector

April 11, 2007

NEWS RELEASE: Competition Bureau Appeals Decision in Labatt-Lakeport Merger

April 12, 2007

NEWS RELEASE: Bureau Obtains Judgment Against Polar Spas in Deceptive Marketing Case

April 16, 2007

INFORMATION: Draft Information Bulletin: Sections 15 and 16 of the Competition Act

April 18, 2007

NEWS RELEASE: Commissioner of Competition Approves Purchaser of Port Terminal in Vancouver

April 18, 2007

INFORMATION: Competition Bureau and European Commission Move Towards Greater Cooperation

April 27, 2007

NEWS RELEASE: Multi-level Marketing Operator Banned from Industry

May 1, 2007

INFORMATION: Competition Bureau Publishes Consent Agreement Template for Mergers

May 8, 2007

NEWS RELEASE: Competition Bureau Alleges Deception by Vancouver Career Management Company

May 10, 2007

INFORMATION: Supreme Court Confirms Approach to Abuse of Dominance Cases

CANADIAN COMPETITION RECORD

May 16, 2007

INFORMATION: Adam Fanaki Appointed Special Counsel to the Commissioner of Competition

May 29, 2007

NEWS RELEASE: Telemarketer Fined \$1-Million

May 29, 2007

INFORMATION: Johnson & Johnson Inc. Completes Divestiture of Zincofax® Brand as Required by the Competition Bureau
