

Book Review: The Law of Competition in Canada, by Richard Gosse

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Book Review

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The Law of Competition in Canada. BY RICHARD GOSSE. TORONTO: THE CARSWELL COMPANY LIMITED 1962. Pp. xvi., 357.

There are two principal ways of critically approaching a work such as the present one. The reviewer can ascertain the stated or presumed objective of the author, accept it without criticism and appraise the author's success in achieving what he set out to do. This approach proceeds on the assumption that one should not criticise someone for not doing what he intended to do.

The alternative approach is to criticise the author because he hasn't written the book you wanted him to write, or at least to consider whether the book meets a real need of the moment, and if it does not, whether the author might have met the real need.

While it is a fact of human nature that one responds more to the timely than to the untimely or the not so timely, it is nonetheless the task of the reviewer who aims to be something more than a reporter of his own prejudices to be wary of resting his judgment too much on the sheer factor of timeliness.

It should accordingly be stated immediately that any contribution to the law of competition in Canada as it now stands is timely for a number of reasons. First, there is the general fact of our times involving economies of scale and the general existence of what the economists term "imperfect" or "monopolistic" competition, as opposed to the "perfect" competition that never existed except in the ivory towers of the economists. Second, there are the increasingly monopolistic influences of patents, secret know-how and trademarks on the one hand which are lined up against the competition-inducing existence of alternative products, materials and services for similar end purposes on the other. Third, Canada faces an increasingly competitive world where the National Policy tariff induced branch plant psychology and fragmented production units of much

²⁰ *Supra*, footnote 13, s. 47(3).

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Canadian secondary manufacturing, has resulted in extensive foreign control of this industry and increasingly expressed concern over its ability to compete in home and world markets. Fourth, government regulatory boards have proliferated over the last twenty years or so at both the federal and provincial levels. Fifth, vast changes have taken place in merchandising and industry has frequently demonstrated in a variety of ways a need or desire to maintain some control over its products on the way from the cradle of production to the grave of consumption, through means varying from vertical integration to resale price maintenance, exclusive dealerships and tide-house arrangements. Sixth, growing mass markets which have given rise to chain stores, department stores and discount houses have been matched by growing specialised markets such as flower shops, Scandinavian furniture stores, cheese shops and the like. Seventh, the buying and selling of that factor of production known as labour is subject to the restraining influence of trade union bargaining, and the buying and selling of many products is subject to the influence of powerful purchasing organizations such as the large department stores and chain stores.

If this is a relatively accurate, albeit very general and very brief description of some of the key features of the modern Canadian economy, few of these features have been made directly apparent in the present book, which approaches this exciting world in what is quite an old-fashioned sort of way. This is not to say that the author is unaware of this world, but simply that, while making bows in its direction at various points throughout, the main stream of the book provides what is basically a conventional type, although useful, treatment of an important but only partial aspect of the Canadian law of competition.

The book covers well the charted territory but does not develop in a sustained analytic way any fresh fundamental conceptual work in the context of the world in which we actually live for the purpose of establishing a framework from which some appraisal of the present laws would have been possible. In the result, the author has limited himself primarily to traditional legal materials, and, speaking generally, has approached such materials in a purely legal way.

The book will be useful to persons interested in the common law as it related to the enforceability of contracts in restraint of trade and to the attaching of criminal responsibility for agreeing to restrain trade, or in an analysis of the relationship between the Canadian combines legislation and the common law, or in a detailed discussion of the combines, merger and monopolies provisions of the Combines Investigation Act.

An important criticism of the book, however, is that the title encourages one to expect much more than one gets. None of the prohibitions contained in Sections 33A, 33B, 33C and 34 of the Combines Investigation Act have been discussed at all, let alone

any of the areas subject to special regulation, such as energy, farm products marketing, transportation, oil and gas exploration, and the like. This is unfortunate because these Sections of the Act have become increasingly important to the practising commercial lawyer, as is evidenced both in the last two Annual Reports of the Director of Investigation and Research and by the many speeches to trade associations and other groups given by the Director over the same period.

There is also no real discussion of the effect of the inquiry and hearing procedures under the new provisions whereby, among other things, the Director of Investigation and Research may investigate trade practices not only for the purpose of ascertaining whether there has been an offence committed under the present law, but also for the purpose of ascertaining the existence and effect of conditions or practices having relation to possible monopolistic situations or restraint of trade practices not covered by the existing statute. Far-reaching legislative results may indeed flow from such general research inquiries, should Parliament act on the recommendations contained in the Reports of the Restrictive Trade Practices Commission on the distribution and sale of automotive supplies and accessories and on drugs which have flowed from these inquiries. There is also no detailed discussion of the propriety and effectiveness of the publicity element in Canadian anti-combines legislation and whether or not the present inquiry and hearing procedures of the Director of Investigation and Research and the Restrictive Trade Practices Commission offend traditional legal principles.

Perhaps the most disappointing, and also, at times, most irritating quality of the book is the number of unanswered questions and "maybe's" that have crept into the author's appraisal of the present combines legislation. The reason for this seems to be that the author set himself too large a task, by asking both "Are the rules adequate?" and "Is the administration of the rules as intended?". In effect, he has only dealt effectively with the second question. The fact is that the question "Whether the rules are adequate or not?" would have drawn him into the areas of the real world previously mentioned and any useful conclusion, apart from the selected quotes from other people's conclusions which are contained in the author's Chapter 8 entitled "Conclusion", would have required not merely the detailed analysis of the legal materials provided by the Combines statute itself and by the court's decisions on provisions, which the author gives us, but also a conceptual framework based on an understanding of the real business world today and on developing stated criteria by which to judge "competition" legislation, which would reflect the underlying result and intent of the patchwork of Canadian legislative dealings with the activities of businessmen as they are carried on in Canada in the nineteen-sixties.

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