Anticombines and Antitrust: The Competition Law of Canada and the Antitrust Law of the United States,

R. J. Roberts, Toronto: Butterworths, 1980. Pp. xxx, 799. $85.00 (cloth).

Anticombines and Antitrust is not an easy book to read nor an easy one for an economist to review. As the author frankly states, "This text is intended to be a reference book which explains the anticombines laws to lawyers, law students and businessmen in Canada and the United States" (p. viii). While the book is "written from a comparative point of view", the references to U.S. antitrust law and jurisprudence are designed to shed light on the breadth, limitations, and interpretations of Canadian anticombines law but not the other way round. The word "text" should not be taken literally: the book is closer to a treatise than a textbook; and for practical purposes more nearly the reference book the author intended than either treatise or text. *Anticombines and Antitrust* is certainly not bedtime reading for anyone, and, as this reviewer learned, it is pretty tough sledding reading it straight through, even over a week's time.

Anticombines and Antitrust is divided into six parts (A through F) composed of twenty three chapters. (In addition, there are nine appendices containing such things as the existing anticombines and antitrust laws, recent proposals to revise the former, recent RTPC reports and proceedings in anticombines cases, *etc.*). Part A of the book gives an overview of Canadian anticombines legal development, policy, and constitutional difficulties. Most of Chapter 1, which provides an historical review of anticombines law in Canada since the first enactment in 1889, is simply excerpted from public documents, in particular *Proposals for a New Competition Policy for Canada, First Stage*[1] issued by the Department of Consumer and Corporate Affairs. Much of Chapter 2 on the rationale for competition policy is excerpted from the Economic Council of Canada's excellent *Interim Report on Competition Policy*[2] plus an earlier article by Roberts drawn from the *University of Western Ontario Law Journal.*[3] Chapter 3 on the constitutional roadblocks to anticombines enforcement and reform is rather short, given the importance of the subject, and needs to be supplemented by the two long articles on this subject by Hogg and Grover and by Grange which are contained in Appendix A of the book.

Part B of *Anticombines and Antitrust* covers the law and jurisprudence relating to the criminal prohibitions contained in section V of the

[1]Economic Council of Canada, *Proposals for a New Competition Policy for Canada*, First Stage, 1973.

[2]Economic Council of Canada, *Interim Report on Competition Policy*, 1969.

[3]Roberts, R.J., "The Death of Competition Policy: Monopoly, Merger and *Regina* v. *K.C. Irving Ltd.*", (1977) 16 *Univ. Western Ont. Law Rev.* 215.

Combines Investigation Act. Of the six chapters one each is devoted to monopoly, conspiracy, merger, price discrimination and resale price maintenance. A sixth chapter covers the issue of "relevant market". For competition policy *aficinadoes*, who know their subject primarily through anticombines cases, Part B is the core — if not the most satisfying part - of the book. The chapters on monopoly and conspiracy (price fixing) contain few surprises. The *Hoffman-LaRoche*[4] case (which ended in a conviction for predatory pricing after the book appeared in print) is aptly included as a monopoly case. But the important *Allied Chemical*[5] decision is, for some reason, not discussed. The best part of the conspiracy chapter (6) is the discussion (pp. 126-128; 131-134) of the relationship between the issues of *mens rea*, beneficial effects, and "unduly", which is now critical as a result of the Supreme Court of Canada's decisions in *Aetna*[6] and *Atlantic Sugar Refineries.*[7] The merger chapter is only 5 pages long (7 if bibliography and table of cases is included), a length that reflects the total lack of success met by the Crown in merger cases, but not the importance of the subject. The brevity of the discussion of mergers is partly attributable to the fact that the *K.C. Irving*[8] (merger-monopoly) case is pretty thoroughly covered in the monopoly chapter and partly the result of an inexplicable failure to discuss the predecessor (to *Irving*) merger cases, *Canadian Breweries*[9] and *B.C. Sugar Refining*[10], which are an important part, in my view, of the Canadian jurisprudential picture. In contrast to the brevity of the merger chapter is the length (43 pages) of the price discrimination-predatory pricing chapter. This is a field where the Canadian anticombines authorities have been almost as unsuccessful (thank goodness!) as in mergers. Oddly, Roberts fails to note that the dearth of traditional price discrimination cases in Canada is directly attributable to the "like quality and quantity" provision in section 34*(a)* which also rendered the price discrimination section (2) of the U.S. *Clayton Act* ineffective, prior to the *Robinson-Patman Act.* Why, then, Roberts has chosen to give so much attention to price discrimination is not clear. It is true that, by way of comparison, there is much U.S. jurisprudence worthy of mention - but the same could also be said of mergers. My suspicion is that Roberts' particular interest is vertical, supplier-distributor related restraints. Thus Roberts gives Canada's resale price maintenance law the substantial attention it deserves and reserves the longest chapter in the book (12) - 62 pages in length - for non-price

[4]*R.* v. *Hoffman-LaRoche Ltd.* (1980), 109 D.L.R. (3d) 5 (Ont. H.C.).

[5]*R.* v. *Allied Chemical Canada Ltd.* (1975), 29 C.C.C. (2d) 460 (B.C.S.C.).

[6]*Aetna Insurance Co.* v. *The Queen* (1977), 75 D.L.R. (3d) 322 (S.C.C.).

[7]*R.* v. *Atlantic Sugar Refineries Co. Ltd.* (1975), 26 C.P.R. (2d) 14 (Que. C.A.).

[8]*R.* v. *K.C. Irving Ltd.*, [1978] 1 S.C.R. 408, 72 D.L.R. (3d) 82 (S.C.C.).

[9]*R.* v. *Canadian Breweries Ltd.*, [1960] O.R. 601 (Ont. H.C.).

[10]R.S.C. 1970, c. C-23.

vertical restraints such as tying and exclusive dealing contracts, market restrictions, refusal to deal, *etc.* for which there was no law in Canada until 1976.

Part C of *Anticombines and Antitrust* contains 4 chapters and is entitled "Matters Civilly Reviewable". The centrepiece is the aforementioned chapter on non-price vertical restraints. Part C also includes a chapter on the conduct of foreign firms and foreign governments as these apply extraterritorially to Canada and a chapter on the civil review provisions of the aborted "Second State" amendments which seem unlikely ever to pass parliamentary muster.

The fourth part, D, covers activities which are exempt from the anticombines laws. Exempt activities include regulated industries and collective bargaining by labour unions. Roberts is to be commended for including chapters on these subjects which are of increasing interest and importance to competition policy. While Parliament has legislated in favour of competition it has also legislated in other areas so as to create monopolies or monopolistic restraints, the wisdom of which are increasingly in doubt.

Part E, which comprises three chapters, is devoted to Services and Professions. Here we see Roberts at his best - or most knowledgeable. In sequence, Roberts treast (i) Trade Associations activities (Chapter 17), an issue which has been given much more attention in the U.S. than in Canada; (ii) the professions (Chapter 18) whose economic activities were, until the mid 1970's, treated as services and thereby were exempt from anticombines law until the "first stage" amendments became law in 1976 (the long section in Chapter 18, on the Legal Profession, is not only very good but will be of particular interest to the book's readership); and (iii) a relative newcomer to anticombines specialists, real estate and shopping centres. The latter two chapters, in particular, are jampacked with interesting details and recent cases which only a very few specialists will be familiar - at least before reading Roberts' book.

The final part of the main text, F, covers Enforcement and Remedies. The first two chapters cover respectively enforcement and remedies under the criminal offence section of the anticombines law, and those provisions which come under the civil section and are administratively reviewable. A third chapter is devoted to private, class, and "substitute" actions, and the final one to the program of information and compliance established by the Director of Investigation of the Combines Investigation Act.

So much for the book's organization. What of its substance? One of the qualities of a reference book is its coverage and up-to-dateness. The scope of *Anticombines and Antitrust* is clearly wide, as I have indicated, although the weight given to individual subjects is not always consistent

with their legal or economic importance. *Anticombines and Antitrust* is generally *au courant* although already slightly dated because it appeared prior to the important Supreme Court decision in *Atlantic Sugar Refineries* and the trial court decision in *Hoffman-LaRoche.* While the latter case opens up virgin territory - it is the first case brought under the predatory pricing section (34(*c*)) of the *Combines Investigation Act*[11] - the former threatens to set back the jurisprudence on conspiracy some 40 years or more. Roberts' speculation that *Hoffman-LaRoche* "might not be vulnerable under the predatory pricing provisions of the Act because of the difficulty of characterizing a gift as a sale" (p. 193) has turned out to be wide of the mark. Roberts' comments on the *Atlantic Sugar* case are no more helpful, but his discussion of the issues of *mens rea*, public benefit, and undueness as these relate to horizontal agreements provides a valuable insight into the crucial *Aetna* and, by way of analogy, *Atlantic Sugar* decisions of the Supreme Court of Canada.

As many readers will know, the trial court judges found for the defendants in both the *Aetna* and *Atlantic Sugar* cases on the grounds that the Crown had failed to show beyond reasonable doubt that the defendants had *intended* to lessen competition unduly. In both cases Appelate Courts reversed indicating the trial judges had erred in law, noting that among other things Kerwin J.'s statement in the *Container Materials*[12] case that intention is "embedded in the agreement". In both cases the defendants appealed to the Supreme Court of Canada and that Court again reversed, reinstating the trial court acquittals. My reaction to the Supreme Court decisions in *Aetna* and *Atlantic Sugar* is that they were simply "wrong" — that they were inconsistent with the thrust of conspiracy (price-fixing) jurisprudence as that was developed by the same Court in *Weidman v. Shragge*[13], *Container Materials,* and *Howard Smith.*[14] However, Roberts' discussion suggests an interpretation of the earlier jurisprudence which might explain the *Aetna* although not, in my opinion, the *Atlantic Sugar Refineries* decision.

According to Roberts, judicial decisions have resolved the *mens rea* issue as follows. Where an agreement has or would have resulted in an undue restraint, *mens rea* is satisfied by showing that the accused intended to enter into an agreement. This is, of course, the *Container Materials* view of the matter. However, where it is not clear that the agreement has or will result in an undue restraint (*e.g.* the accused account for something less than a "virtual monopoly" over industry output) "it is necessary to show that the specific intent of the accused was to create an undue restraint" (p. 126). In *Aetna* the defendants'

[11]*R.* v. *British Columbia Sugar Refining Co. Ltd.* (1960), 32 W.W.R. (n.s.) 577 (Man. Q.B.).

[12]*R.* v. *Container Materials Ltd.*, [1942] S.C.R. 147 (S.C.C.).

[13]*Weidman* v. *Shragge* (1912), 46 S.C.R. 1 (S.C.C).

[14]*R.* v. *Howard Smith Paper Mills,* [1957] S.C.R. 403, 8 D.L.R. (2d) 449 (S.C.C.).

market share declined from 83 to 71 percent over the period of agreement - something less than a "virtual monopoly". Roberts' interpretation of *mens rea* suggests that the trial judge in *Aetna* was within his right in focusing on intent, and in allowing evidence of public benefit to be introduced in court in deciding the issue of intention.

In essence, what Roberts has done, it seems to me, is to put the emphasis on an overlooked aspect of Cartwright J's famous *obiter dicta* in *Howard Smith*. Most judges and other students of anticombines law and jurisprudence have focused on the issue of whether that dictum made a "virtual monopoly" a *necessary* or only a *sufficient* condition for conviction for an *undue* restraint. Narrow or conservative judgments adopted the former; most judicial opinions adapted the latter, more liberal, interpretation. (The issue remained sufficiently clouded that, in 1976, the *Combines Investigation Act* was amended so as to indicate that a virtual monopoly is *not* a necessary condition in finding an undue restraint.) Roberts, instead, focuses on what Cartwright J. had to say about cases where there is an absence of a virtual monopoly (pp. 131-132). In these cases Cartwright J. favored an evaluation of public detriment which implicitly allows for the introduction of evidence regarding the existence, or lack of it, of public benefit. Evidence of benefit or effect reflects upon, or supercedes, *mens rea*.

Roberts discussion makes it easier to understand the "logic" of the trial and Supreme Court decisions in *Aetna*. But, it does not explain the *Atlantic Sugar Refineries* decision since the defendants, in that case, clearly had a virtual monopoly (95 percent of the relevant market). It would have been interesting to know Roberts' views on the *Sugar* decision, in particular the distinction made by Pigeon J. between an agreement which "lessens"competition and one which "eliminates" competition. According to Pigeon J. only the latter is sufficient evidence of an undue restraint, while the former allegedly characterizes the activities of the *Sugar* defendants. Unfortunately, *Anticombines and Antitrust* was published too soon.

The *Atlantic Sugar Refineries* case has been characterized as one of the (at least) four conscious parallelism cases brought by the Crown in the 1970's. These cases are notoriously more difficult to win than the more explicit price fixing cases. Nevertheless, the Crown won two (*Armco*[15] and *Canadian General Electric*[16] and lost two (*Canada Cement Lafarge* and *Sugar*). Roberts discusses these cases under two rubrics: "shared monopoly" (Ch. 4) and "conscious parallelism" (Ch. 6). The former concept emphasizes monopolistic conduct which presumably requires a structural solution, while the latter emphasizes the difficulty

[15] *R.* v. *Armco Canada Ltd.* (1976), 70 D.L.R. (3d) 664 (Ont. C.A.).

[16] *R.* v. *Canadian General Electric Co.* (1976), 75 D.L.R. (3d) 664 (Ont. H.C.).

[17] *R.* v. *Canada Cement LaFarge Ltd.* (1973), 12 C.P.R. (2d) 12 (Ont. Prov. Ct.).

of compiling evidence sufficient to infer an agreement. Roberts does not take sides for or against the recent effort to add a civil law section on "shared monopoly" as was attempted in the aborted Second Stage Amendments. However, his useful discussion of conscious parallelism in the conspiracy chapter reinforces my own view that the proper route is the latter: focus on evidence of parallel behavior *plus* all attempts to prop up agreements and maintain coordination (so-called conscious parallelism "plus") and hope that the judge will be willing to look at the evidence as a whole (as I believe Mackay J. did not in *Atlantic Sugar Refineries*). As Roberts shows, the Courts have long shown some willingness to look at the evidence as a whole, as for example Tachereau J. in *Cote v. The King*[18] and McBride J. in *R. v. McGavin Bakeries Ltd.*[19] (pp. 149-150).

Anticombines and Antitrust is not without blemises. It contains some errors of commission and omission, almost inevitable in a work as lengthy and wide ranging as Roberts' book. These include:

1. Roberts' reference to K.C. Irving's control of all five English language daily newspapers in New Brunswick as a "natural monopoly" (p. 116). This is a mistaken use of a term reserved by economists for industries in which for technological reasons one firm can supply the market more efficiently than two or more firms. There is no evidence that this is the case in newspapers, and, in any event, Irving's monopoly took the form of control of five newspapers, not their collapse into one.

2. The suggestion that there was an implicit rule of "substantiality" in U.S. price-fixing cases prior to the U.S. Supreme Court decision in *United States v. Socony Vacuum Oil Co.*[20] According to Roberts the U.S. Supreme Court "jettisoned a previously understood requirement that for price fixing to be a violation of the Sherman Act it must have been engaged in by members of a combination controlling a substantial part of an industry" (p. 139). My understanding is that the U.S. Supreme Court has employed a *per se* rule in price fixing cases ever since its ruling in *Addyston Pipe and Steel.*[21] The exception is that of *Appalachian Coals.*[22]

3. Roberts' text may inadvertently leave the erroneous impression that in the recent *Atlantic Sugar Refineries* case the trial court convicted the three defendants. He states that "Mckay J. concluded that the three defendant sugar refineries . . . engaged in a market sharing agreement,

[18]*Cote* v. *The King*, [1942] 1 D.L.R. 336 (S.C.C.).

[19]*R.* v. *McGavin Bakeries Ltd. (No. 6)*, [1952] 1 D.L.R. 201 (Alta. S.C.).

[20]*United States* v. *Socony Vacuum Oil Co.* (1940), 310 U.S. 150.

[21]*Addyston Pipe and Steel* v. *United States* (1898), 175 U.S. 211.

[22]*United States* v. *Appalachian Coals* (1933), 53 S. Ct. 471.

upon little more evidence than that over a long period of time each accused settled down to a policy of maintaining their traditional market shares ' " (p. 161). Roberts does not say that, in the event, Mackay J. acquitted the defendants on the grounds the he was not convinced they "intended' to unduly lessen competition.

4. As already noted Roberts' failure to discuss the *Canadian Breweries* and *B.C. Sugar Refining* decisions leaves a large gap in the discussion of merger jurisprudence. He does not mention the unfortunate application of the "virtual monopoly" interpretation of "unduly" to the *Breweries* (merger) case, nor the interpretation of "public detriment" in *B.C. Sugar Refining* which presaged that in *K.C. Irving.*

5. In discussing predatory pricing, Roberts says that the relevant criterion in determining "below cost pricing" is price less than "short term average cost" since a "profit maximizing firm owuld normally . . . attempt to maximize profits or minimize losses in the short run." (p. 222). Roberts should have said "price less than average variable cost" since it is a principle of elementary economics that in the short run a firm can always add to its profits or reduce its losses by producing so long as price is above average *variable* cost.

6. Nowhere in his discussion of the Stage Two Amendments does Roberts mention the important proposal that product-specific tariff or non-tariff barriers be reduced as a means of making an unacceptable (to the Bureau of Competition Policy) merger proposal acceptable or as a means of replacing competitive pressures lost by the grant to resident firms of the right to enter into specialization agreements among themselves.

Anticombines and Antitrust also has faults of an editorial sort, which, in this reviewer's opinion, reflect undue haste on the part of both the author and the book's publisher, Butterworth. I have in mind:

1. The repetition of the same quoted statement on two more or less adjacent pages. I can think of no reasonable explanation for the appearance of the same set of quotes on the following pairs of pages: pp. 46-47 and pp. 50-51; 135 and 136; 141 and 142; 190 and 214; 232 and 242; 289 and 309-10; 407 and 429.

2. The absence of an index of cases. Thus the reader who is interested in a particular case has no quick or simple method of finding the relevant pages in the text. This is surely an unfortunate oversight on the part of both the author and the publisher.

3. The fact that the book is very unevenly written. In part the problem is the subject matter, in part the heavy dependence (too heavy for this reviewer) on quoted statements. These aside, it is not difficult to

find sections where the writing is reasonably crisp (typically in chapters where Roberts seems to have a greater interest and command over his subject - *e.g.* Chapters 8, 12, 18) and sections where the turgidness approaches the grammatical breaking point. An example of the latter is the opening sentence to the section on Relevant Geographic Market (p. 112): "In defining relevant geographic market it is again essential to bear in mind that what is being attempted is to determine whether the defendant possesses a significant level of real or potential market power."

In sum, *Anticombines and Antitrust* is a work of uneven quality which will be useful to specialists and practitioners in the field of anticombines law, but does not command the acclamation of "definitive" or "classic", even through it is the only work of its kind in the field.

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***Sentencing, 2nd edition,* Clayton C. Ruby, Toronto: Butterworths, 1980. Pp. *lvi*, 548. $70.00 (cloth).**

Only a practitioner with the experience of Mr. Ruby could have written this book. The author quickly sets the pace when he states in the preface that sentencing is more often dealt with inadequately by counsel than any other recurring aspect of a Criminal trial.[1] The student will welcome the second edition in an area of Canadian Criminal law lacking in good basic material while the practitioner will find the book useful as a quick reference in even the more hopeless of cases in his pursuit to earn his "fee".

The book's table of contents and index are detailed. The reader is able to quickly cross refer the table of cases with the table of *Criminal Code*[2] sections. The appendix contains thirty-eight pages of useless outdated ciminal statistics from 1962 to 1973. It would be cumbersome to comment on each chapter, however, there are a number that require specific reference.

[1]Ruby, at vii.

[2]R.S.C. 1970, c. C-34.