

BOOK REVIEW/COMPTE RENDU

ANTONIO DI DOMENICO: COMPETITION ENFORCEMENT AND LITIGATION IN CANADA

By Michael Binetti, Affleck Greene McMurtry LLP

Readers of the *Canadian Competition Law Review* who practise competition law have likely faced the following question from clients and friends: “What is competition law?” The answer is not always easy to explain, at least not for me, especially when attempting to describe what is involved in litigating competition matters. Antonio Di Domenico’s book, *Competition Enforcement and Litigation in Canada*, gives its readers the tools that are helpful in that endeavour.

The book targets different audiences. To the competition lawyer who is not a litigator, it gives an end-to-end study of what happens in various contested competition scenarios. To the senior competition litigator, it provides an easy-to-find resource to brush-up (or learn) what may be required at any particular stage of a litigious competition matter. Most importantly, each senior competition litigator should hand a copy of this book to their junior competition lawyers to give them a jump start on what they need to know in this practice.

The first section of the book is a pithy description about the history and origins of competition law in Canada. Di Domenico then describes the key actors in competition enforcement: the Competition Bureau, the Director of Public Prosecutions, the Competition Tribunal, provincial courts, and private persons who can bring competition-related actions. These first twenty-one pages should be required reading if anyone wants an answer to the question about what exactly competition law is all about.

The book then moves into the sometimes opaque world of competition investigations. Having worked at the Competition Bureau, Di Domenico takes the reader through the process by which the Commissioner of Competition decides whether to commence an investigation into alleged anti-competitive conduct or a proposed merger. How does the Commissioner decide? Can anyone else pressure the Commissioner to commence an investigation? What happens after an investigation is commenced? On this last point, Di Domenico’s book describes the how the Competition Bureau will gather information and from whom, which is invaluable insight for anyone intending to practise in competition law to know.

What happens when the Competition Bureau exercises its powers under the *Competition Act* to obtain information pertinent to an investigation? Here, Di Domenico takes the reader through the applicable tests and arms the competition litigator with the knowledge required to be able to respond to such an application and protect the client's interests.

A large part of the book, and indeed competition litigation, involves competition law offences: conspiracies, bid-rigging, false or misleading representations, deceptive telemarketing, and others. Di Domenico takes the reader through the applicable test (for a conspiracy, it would involve defining competitors, agreements, and conspiracies) and then he discusses the applicable case law. What is different about this book is that Di Domenico marries the tests and the case law with the Competition Bureau's own pronouncements on such matters. In this way, he saves the reader from having to look up the statute, read the cases, and then read the Competition Bureau's *Competitor Collaboration Guidelines*, for example, to understand where particular alleged anti-competitive conduct falls in the analysis. Very helpful is the inclusion of the defences to alleged anti-competitive conduct available for the competition litigator to advance on behalf of their client. When faced with a complaint, the competition litigator will be able to look-up in Di Domenico's book the conduct in question and have ready possible defences as supported by the case law.

If a matter proceeds to litigation, then the competition litigator can use this book to understand how the case against a client will proceed and how to defend it. Criminal competition law cases are not frequent and thus, having this book by the wayside will help the competition litigator to know how a criminal prosecution will proceed and the procedure to follow from the trial through to sentencing. Very helpful.

It takes at least two persons to conspire (from the latin, *conspirare*, to breathe together). When one of those persons wants to cooperate with the Competition Bureau in exchange for immunity from prosecution for competition offences, Di Domenico's book helps the competition litigator navigate the Competition Bureau's immunity and leniency program: what is required to co-operate, when information must be shared and what kind, who must help, when the Competition Bureau can decline to grant immunity. This part of the book is particularly useful because there is no guidance in the statute as to what is involved when a client wants to apply

for immunity (or leniency if they are not the first to approach the Competition Bureau).

On this point, I especially liked the guidance Di Domenico provides on interviewing the employees of one's corporate client, how to warn them about your role as lawyer for the company, how to collect and use their documents. The guidance moves into the world of making a proffer to the Competition Bureau and what a *Queen for a Day* actually is (when a witness provides information to the Bureau on the promise that it will not be used against them). This is the kind of information that some of us learned first-hand from senior litigators. It would have been nice to have all of the options in one place.

Another large part of the book is devoted to unilateral conduct (refusing to deal with a business, price maintenance, tied selling, market restrictions, abuse of dominant position/monopolization) and merger review. Di Domenico breaks down the applicable tests into easy-to-understand pieces and shows—as supported by the case law. For example, in an abuse of dominant position case, the Di Domenico discusses what is required for the Competition Bureau to make-out a case against a person in a market who is allegedly abusing its dominant position. How does this person control the market? What percentage of market share leads to a finding of dominance? How does technology and innovation play into the analysis? How is a market defined geographically?

What I most enjoyed about the book is the next-to-last chapter dealing with proceedings before the Competition Tribunal. Just as with criminal matters, there are not a lot of matters before the Competition Tribunal. This book expands upon and helps the reader understand the Competition Tribunal rules of procedure through the pleadings stage, timetabling of matters, discovery, experts and trial. This is perhaps the only book that does this in such detail.

The book ends with a how-to for private actions and class actions with a great procedural chart similar to ones that appear in our *Rules of Civil Procedure* books. Di Domenico's book lays out all the expected steps in private actions and class actions in a user-friendly format.