



CASSELS BROCK
LAWYERS

Mark Nicholson & Chris Hersh

Hot Topics In Competition Law

November 29, 2005

Enforcement Priorities

- **Deceptive Marketing**
- **Abuse of Dominance**
- **Conspiracy**

Deceptive Marketing

- **Bureau's General Focus is**
 - Outright fraud (criminal)
 - Deceptive telemarketing (criminal)
 - Large/high profile targets (reviewable)

Abuse of Dominance

- **Bureau Loss in Canada Pipe (under appeal)**
 - Bureau looking for a case to prove that abuse provisions are alive and well

Abuse of Dominance

- **Who Should be Concerned**
 - Companies having at least one product with a market share over 50%
 - Companies who are in a concentrated industry

Conspiracy

- **Continued Enforcement Priority**
 - Focus on agreements among competitors that lessen competition (e.g., price fixing, market sharing, etc.)
 - Enforcement against international cartels increasingly important as international competition authorities co-ordinate enforcement activities

Conspiracy

- **This is important to companies**
 - Involved in high profile industries
 - In industries with strong industry associations
 - Where there is frequent contact/interaction between competitors

Tribunal Cases – Recent Developments

- **Private Application Decisions**
- **Joint Venture Challenged Under Merger Provisions**

Private Applications

- **Introduced in Late 2002**
- **Available For:**
 - Refusals to Deal
 - Exclusive Dealing/Tied Selling/Market Restriction

Private Applications

- **11 Applications Brought To-Date**
- **Bulk of Tribunal Caseload**
- **To-Date No Decisions on Merits**

Private Applications

- **Recent Decisions Regarding**
 - Test for obtaining leave
 - Interim injunctive relief
 - Costs
- **Trends Now Discernable**

Private Applications – Trends

1. Low Test for Obtaining Leave

- Very low evidentiary/legal threshold
- No right to challenge evidence
- Only denied where little/no evidence on key issues

Private Applications – Trends

2. Interim Relief Likely

- Essentially Mandatory Injunction
- Not Considered “Extraordinary” Remedy
- Very different from civil standard

Private Applications – Trends

3. Costs

- **No costs awarded in first decided case**
 - Application on merits withdrawn
 - Issue of “divided success”
 - Entirely Discretionary
 - Reluctance to award costs against applicants

Private Applications – Summary

- **Leave Likely Except in Clearest Cases**
- **Injunctive Relief as a Matter of Course**
- **Costs Awards Unlikely**
 - Weak deterrent

Private Applications – Implications

- **Impair organization of distributors & franchises**
- **Override contracts**
 - In particular notice provisions
- **Risk should be addressed proactively**

Tribunal Cases – JV Challenged

- **Grain Handling Joint Venture**
 - Challenged as a “Merger”
- **Increased Bureau Interest in Competitive Impact of Joint Ventures**

Competition Class Actions

- **Class Actions Now Common**
- **Flow From Criminal Conduct**
 - Also from breach of Tribunal order
- **Serious Financial Exposure**

Class Actions – Trends

- **Class Counsel Increasingly Aggressive**
- **Cases Now Brought Before Conviction**
- **Broader Claims**
 - Products or duration beyond criminal allegations

Class Actions – Trends

- ***Empagran* Decision In U.S.**
 - Canadian claims will be brought in Canada
 - Number of class actions will likely increase
- **Québec Increasingly a Forum of Choice**
 - Pro-plaintiff test for certification
- **Continued Use of “National” Classes**

Class Actions – Trends

- **Increased Cross-Border Cooperation**
 - Plaintiff's counsel working together
 - Canada/U.S. and interprovincial
- **Canadian Access to U.S. Discovery**
 - U.S. documents and depositions
 - Before entitled to discovery in Canada
 - U.S. discovery is much broader

Class Actions – Implications

- **Counsel Must Coordinate Efforts**
 - Between jurisdictions
 - Within jurisdictions (i.e., defence group)
- **Coordination of Criminal & Civil Cases**
 - Immunity and defence efforts
 - Cases must be managed in parallel

Proposed Amendments

- **Civil Misleading Advertising**
- **Abuse of Dominant Position**
- **Market Inquiries**
- **Proposals Raise Serious Concerns**

Civil Misleading Advertising

- **Increased Administrative Monetary Penalties**
 - From \$50,000 to \$750,000 for individuals
 - From \$100,000 to \$1 million for corporations
 - Higher for subsequent offences
- **Effectively Criminalization**

Civil Misleading Advertising

- **Likely to Chill Aggressive Advertising**
- **Proposed AMPs Are Punitive**
- **Likely Raise Constitutional Issues**

Civil Misleading Advertising

- **Tribunal Power to Award Restitution**
- **Tribunal Power to Freeze Assets**
 - To ensure restitution is made
- **No Guidance For Awarding Restitution**
 - Where appropriate?
 - Amount?

Abuse of Dominance

- **Proposal to Introduce AMPs**
 - \$10 million for first offence
 - \$15 million for subsequent offences
- **Conduct in Question is Legal**
 - Only abusive if engaged in by dominant firm and substantially lessens/prevents competition

Abuse of Dominance

- **Chill Legitimate Competitive Initiatives**
- **Criminalization of Legal Conduct**
- **AMPs Raise Constitutional Issues**

Market Inquiries

- **Bureau Power to Initiate Industry Inquiry**
- **Compulsory Production of Information**
 - Sensitive business records
 - Oral testimony
- **Expensive & Time Consuming**

Status

- **Bill to be Tabled December 1, 2005**
- **Election May Kill Bill**
 - But likely to be re-introduced (if Liberals win)
- **May Still be Able to Influence Process**

Bureau Initiatives

- **Report on Efficiency Defence**
 - Recommends retaining defence
 - Suggests considering efficiencies in all mergers

Bureau Initiatives

- **Draft Bulletin on Merger Remedies**
 - Addresses Two Important Issues
 - Bureau approach to remedies
 - Reflects desire for effective merger remedies
 - January 20, 2006 deadline for private comments

Bureau Initiatives

- **Draft Regulated Conduct Bulletin**
 - Outlines Bureau approach when dealing with conduct regulated by other agency/law
 - Significant retrenchment from earlier position
 - February 3, 2006 deadline for private comments

Bureau Initiatives

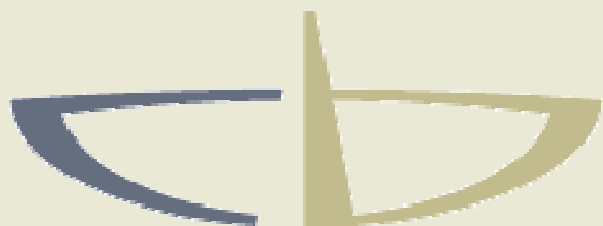
- **Bulletin on Use of Section 11**
 - Compulsory production of information
 - Little guidance
 - Not reflective of our experience

Bureau Initiatives

- **Immunity Program FAQ**
 - Practical guide for immunity applicants
 - Clarifies application of immunity program

Bureau Initiatives

- **Conspiracy – Private Study**
 - Conspiracy reform remains a priority (they say)
 - Modeling possible enforcement regimes



CASSELS BROCK

LAWYERS

Cassels Brock & Blackwell LLP

2100 Scotia Plaza, 40 King Street West,

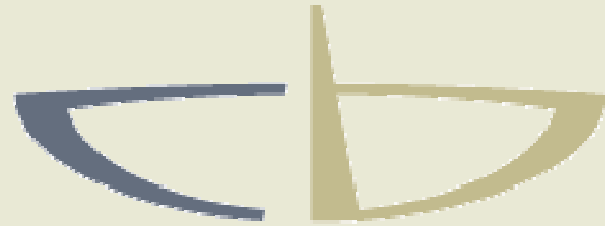
Toronto, Canada M5H 3C2

Phone 416 869 5300 Fax 416 360 8877

www.casselsbrock.com

© 2005 Cassels Brock & Blackwell LLP. Cassels Brock and the CB logo are trade-marks of Cassels Brock & Blackwell LLP.

™ Trade-mark of Cassels Brock & Blackwell LLP. All rights reserved.



CASSELS BROCK
L A W Y E R S