COMMENT & ANALYSIS

CATERPILLAR APPEAL A SATISFYING RESULT FOR COMPETITION LAW

By: James Musgrove
Lang Michener, Toronto

Overview

In a previous issue of the *Record*,[1] we reported on the trial decision in *Ed Miller Sales & Rental Limited* v. *Caterpillar Tractor Co.*[2] On August 8, 1996, the Alberta Court of Appeal released its decision in the appeal of that case.[3]

Caterpillar Tractor Co. ("Caterpillar") is a manufacturer of heavy earth moving equipment and parts for such equipment. Caterpillar is "the industry giant" and "had dominance in almost all market segments" of this business. The plaintiff, Ed Miller Sales & Rental Ltd. ("Miller") was engaged in the business of selling, renting and servicing heavy equipment and parts in Alberta. The new and used equipment sold by Miller was manufactured primarily by Caterpillar. Miller was not an authorized Caterpillar dealer. In 1986, Miller went into receivership.

Caterpillar established dealers with primary areas of responsibility in various parts of the world. It did not prohibit shipment of equipment between territories, although it did impose conditions which discouraged transshipment A key aspect of the case was that, as of 1993, Caterpillar prohibited the export of parts from the United States, except through authorized channels. R. Angus Alberta Ltd. ("Angus") was the authorized Caterpillar dealer in a territory which included all of Alberta. Peoria Tractor ("Peoria") was an authorized Caterpillar dealer located in Peoria, Illinois.

Miller alleged that Caterpillar and Angus unlawfully interfered with its contractual and economic interests and induced breach of its contract with Peoria, by limiting Miller's ability to acquire Caterpillar equipment and parts. It claimed damages in the amount of fifty-five million dollars. It alleged conspiracy contrary to section 45 of the *Competition Act* and claimed civil damages under section 36. It also alleged that the conduct constituted common law conspiracy.

The Trial Decision

The *Competition Act* allegations against Caterpillar were rejected by the court of first instance, although, as noted in our 1994 article, the rejection was not as a matter of law, but on the facts of the case. As to the alleged use by Caterpillar of market restriction or other reviewable conduct as the unlawful element in civil tort actions, the Court found as a matter of fact that there was no market restriction. The Court did not address whether or not reviewable conduct could form the unlawful conduct element of such tort actions.[4]

The plaintiff had also alleged *Competition Act* conspiracy. In that regard, the Court noted that vertical restraints could constitute conduct contrary to section 45 of the *Competition Act*, and even suggested that unilaterally imposed terms could constitute such conspiratorial agreements. However, the Court found as a factual matter that there was no agreement which was contrary to section 45 of the Act.

On the tort claims by the plaintiff for unlawful interference with contractual relations/inducing breach of contract, and unlawful interference with economic interests, the trial Court found that by cutting off Miller's source of parts supply, or threatening to do so if that source of supply did not cease to supply Miller, Caterpillar had interfered with Miller's contractual and economic relations. On that basis, damages in the amount of $5 million were awarded against Caterpillar.

Of concern in the trial decision was the approach of the Court, which suggested that attempts by the supplier of a product to control the marketing of that product will be regarded with suspicion. The plaintiff's allegations were essentially that Caterpillar had engaged in a market restriction arrangement in respect of the marketing of its own products. Notwithstanding that such arrangements are *prima facie* lawful and proper, the approach taken by the trial Court in *Caterpillar* suggested that such arrangements are to be regarded with considerable suspicion.

The Appeal Decision

The appeal dealt only with the supply of Caterpillar parts to Miller. The Court of Appeal examined whether Peoria tractor - the U.S. based Caterpillar distributor which had been selling parts to Miller - had breached its contract to supply Miller - and whether Caterpillar had induced Peoria to breach its contract with Miller. The Court equated the tort of inducing breach of contract to that of interference with contractual relations.

The Court of Appeal found that Caterpillar was not liable for inducing breach of contract. One of the elements of that tort is knowledge of the contract, and knowledge that the defendant's conduct would induce breach of the contract. Because Miller and Peoria had told Caterpillar that their contract ran until the end of 1982, and Caterpillar had permitted Peoria to continue supplying Miller through that time, the Court of Appeal found that an element of the tort - knowledge of essential aspects of the contract - was not present.

The contracting parties had expressly informed Caterpillar that their contract ended at the end of 1982, and Caterpillar had conducted itself so as not to require Peoria to stop supply until that time. Caterpillar could not be responsible for the fact that Miller and Peoria had misled it as to when their contract ended.

The Court of Appeal also examined whether the intent to drive Miller out of business by denying it parts from Peoria even if Caterpillar did not know that Peoria had a contract to supply Miller - could give rise to a cause of action for inducing breach of contract or interference with contractual relations. The Court noted that the cases and texts contained "loose, vague and conflicting statements about intent to induce breach of contract" which no one could reconcile. However, the Court of Appeal concluded that there is no authority stating that intent to affect a person's business gives rise to a cause of action for inducing breach of contract, even if the defendant did not know the relevant contract terms of which it is alleged to have induced breach.

The trial decision was also founded on the tort of interference with economic interests involving the use of unlawful means to harm the plaintiff. This cause of action does not require breach or knowledge of a contract. However, the Court of Appeal noted that Caterpillar could be liable only if it used unlawful means to interfere with Miller's economic interests. The only possible unlawful means in this case could have been breach by Caterpillar of the Peoria-Caterpillar dealership agreement. The trial Court had found that Caterpillar had breached its dealership agreement with Peoria by imposing a restriction on the export of parts, without providing reasonable notice of the changed dealership terms. The Court of Appeal upheld the trial Court's finding that the unilateral imposition of the parts export policy was in breach of the Peoria-Caterpillar dealership agreement when it was announced. However, the Court of Appeal noted that that breach did not last for long because Peoria contacted Caterpillar immediately, and it was quickly agreed between them that there would be a delay on the imposition of such a ban until the end of 1982. Peoria agreed to the export ban as of the beginning of 1983. The Court of Appeal found that that represented a consensual amendment to the dealership agreement.

Miller argued that once there was any breach of contract, however minor, damages for the tort of unlawful interference with economic interest were available. The Court of Appeal rejected that argument, and further said even if it was wrong in its rejection, Miller's cause of action could only be temporary, and would not support damages for many years based on a brief breach of contract, which was then renegotiated and agreed to by way of an amending contract. Further, the Court noted that if there were a brief breach of contract here, it was ended by Peoria's agreement to the amendment. No damage to Miller's economic interest occurred until long thereafter. Any damage to Miller's interest flowed not from a breach of contract but from an amended agreement between Caterpillar and Peoria, which was perfectly lawful.

Court of Appeal's Observations Regarding Competition

In significant contrast to the approach taken by the trial court, the Court of Appeal recognized expressly in its decision that aggressive marketplace competition is to be expected. Rather than give rise to legal liability, aggressive competition typically is not only proper its absence may well be improper:

> Competitors often dislike each other. And competitors almost always want to hurt each other's business. Indeed, not to want that might skirt some provisions of the *Competition Act* ... It is commonplace that competition is not only legal, but often mandated, because its absence can be a serious crime. Some competitor somewhere drives another out of a market, or even out of business entirely, every week of the year. So long as it commits no crime, tort, or other actionable wrong, that is perfectly legal. The permissible limits of competition are precisely the limits of criminal, torts, contract and equity prosecutions or suits. What if hating a competitor and wishing that it were out of business were an alternate to any of the orthodox elements of a cause of action? Then many businesses carrying on perfectly fair competition would be guilty of economic torts to their competitors all the time.[5]

That view of the competitive environment may represent the key legacy of the *Caterpillar* litigation.

Summary

In summary, the Court of Appeal's decision in the *Caterpillar* case is, despite the fact that *Competition Act* matters were not addressed expressly, of significant interest to development of competition law. It is of interest, firstly, because business torts - such as interference with contractual interest, inducing breach of contract and unlawful interference with economic interests, are becoming increasingly common pleadings as part of *Competition Act* actions.[6] Often, of course, the unlawful aspect of the conduct alleged is breach of the *Competition Act*. Whether or not that is the case, the types of issues surrounding competitive disputes amongst suppliers and distributors which arise under the *Competition Act* also give rise to allegations of these sorts of torts. Consequently, the Alberta Court of Appeal's comments on these causes of action are instructive.

Perhaps more importantly for competition law, however, is the tone adopted by the Court of Appeal, expressly recognizing that competitors often dislike each other and want to injure one another's interests. The Court explicitly stated that aggressive competition is, and should be, the norm, and that unless there is a separate and distinct actionable wrong there can be no liability. The above quoted description of competitors often disliking one another, and wishing to harm each other's business, may well find itself a home in Canadian antitrust literature, and in defendants' facta. By its tone and approach, the Court of Appeal's decision supports the ability of distributors to control the distribution of their own products, subject only to specific legal requirements. There is no general duty to let anyone do whatever they wish with one's product.

This is a welcome result. It is similar to the result in the *Polaroid* case,[7] although the conclusion is more emphatically stated by the Alberta Court of Appeal in *Caterpillar*. It is in contrast to the approach and tone taken by the Court of Queen's Bench in *Caterpillar*, which seemed to invite attacks on suppliers

whenever they sought to restrict or control the marketing of their products. It reinforces the general proposition that engaging in reviewable practices is perfectly proper and lawful unless or until the Competition Tribunal orders otherwise.

Notes

1 J. Musgrove, "The *Caterpillar* Decision: An Unsatisfactory Result for Competition Law" (1994) 15:2 Can. Comp. Rec. 51.

2 *Ed Miller Sales & Rental Ltd.* v. *Caterpillar Tractor Co., Caterpillar America Co., Caterpillar of Canada Ltd.* and *R. Angus Alberta Ltd.* (1984), 17 Alta. L.R. (3d) 251.

3 *Caterpillar Tractor Co.* v. *Ed Miller Sales & Rental Ltd.* (8 August 1996), (Alta. C.A.) [unreported].

4 For a review of cases addressing that issue, see J. Musgrove, "Remedies for Reviewable Conduct: Adjusting the Balance?" (1995) 16:2 Can. Comp. Rec. 34 and "Civil Actions and the *Competition Act*", (1994) 16:1 Advocates' Q. 94.

5 *Supra*, note 3, at 20.

6 See "Civil Actions and the Competition Act", *supra*, note 4.

7 *Polaroid Canada Inc.* v. *Continent-Wide Enterprises, Ltd.* (1994), 59 C.P.R. (3d) 257 (Ont. Gen. Div.).

PRIVATE PARTY ACCESS TO THE COMPETITION TRIBUNAL

By: Kent Roach and Michael J. Trebilcock
Faculty of Law, University of Toronto

The following is the executive summary of a report prepared for the Amendments Unit of the Competition Bureau. The views expressed are the authors' and not necessarily those of the Director of Investigation and Research or the Competition Bureau.

The role of private enforcement of competition/antitrust laws has been the subject of long-standing and vigorous debates in many jurisdictions throughout the industrialized world. In a Discussion Paper of June 28, 1995, the Director of Investigation and Research of the Bureau of Competition Policy proposed a number of amendments to the *Competition Act*. These proposals included the creation of a right of direct access to the Competition Tribunal by private complainants with respect to reviewable practices such as mergers, abuse of dominant position, vertical distribution practices, and refusals to deal. The proposals envisaged that private parties would only be entitled to the same remedies as the Director (primarily injunctive relief) and that mergers might be excluded from the private enforcement regime. Following release of the Discussion Paper, the Director constituted a Consultative Panel to receive and review reactions to the proposals and to advise the Director. The proposal for private party access to the Competition Tribunal engendered substantial opposition from the business and legal communities and within the Consultative Panel, which recommended further study of the issue. The Bureau commissioned the study from which this paper is derived, which was released in late September 1996. Amendments to the *Competition*

Act were introduced into the House of Commons on November 7th, 1996 (Bill C-67), but did not include the proposed private party access regime, which the Director stated would remain under consideration but action, if any, would be deferred to subsequent amendment processes.

1. The study argues that there are substantial advantages to private enforcement of public laws in general. Private enforcement can supplement public resources with private initiatives and information, which is particularly important if public resources devoted to enforcement are modest or diminishing and there is a need for jurisprudence to flesh out the general standards contained in public law. Private enforcement can also be an effective means of holding public enforcers accountable for decisions not to prosecute. Private as opposed to public enforcement can also allow plaintiffs to achieve corrective justice and seek remedies for both past and future harms. On the other hand, public enforcers may enjoy comparative advantages over private enforcers in terms of economies of scale and investigative tools. Private enforcement can result in over-deterrence if numerous private enforcers are attracted by the prospect of high rewards. Private enforcement presents a risk that it will be employed for strategic and private reasons that are in conflict with the public goals of the laws sought to be enforced. Private enforcement can also disrupt decisions not to prosecute that may be based on a coherent and defensible enforcement policy of public officials. These various advantages of public and private enforcement suggest a need for an appropriate mix of the two, with careful attention being paid to design features of a private enforcement regime such as sanctions for strategic behaviour and allowing public officials to intervene in, or in some cases even terminate, private enforcement which may disrupt prosecutorial policies.

2. U.S. antitrust law from its beginnings has assigned a substantial role to private enforcement as a means of deterring violations of anti-trust laws. For various periods of time, the ratio of private to public enforcement actions has run as high as twenty to one and in recent years seems to have fallen into the ten to one range. In contrast, until 1976, the *Competition Act* and its predecessors conferred no private rights of action on aggrieved parties. In 1976, the Act was amended to provide (in s. 36) a private damage action for parties injured as a result of violations of the criminal provisions of the Act. However, this section has been rarely invoked. No private right of action presently exists under the Act or violations of the reviewable practice provisions contained in Part VIII of the Act. U.S. experience has limited relevance in evaluating the appropriate role for a private enforcement regime with respect to reviewable practices under the *Competition Act*, given major procedural differences between the U.S. and Canadian legal systems: e.g. treble damages; contingent fees; class actions; one-way cost rules; and civil juries.

3. The prominent role assigned to private enforcement under U.S. antitrust laws has generally been justified in terms of promoting optimal deterrence of antitrust violations. This rationale has recently been criticized, on the one hand because multiple damage awards may lead to over-enforcement and strategic behaviour by plaintiffs, and on the other hand, because a properly structured and publicly enforced fine system seems better adapted to securing optimal deterrence. The alternative rationale for private enforcement is securing corrective justice by private parties injured as a result of antitrust violations. While this rationale

for private enforcement has been assigned much less weight than the deterrence rationale in the U.S. case law and literature, it may well be the more compelling rationale for private enforcement of the reviewable practices provision of the *Competition Act*, given the absence of any publicly enforceable deterrence-oriented sanctions for violations of these provisions: if greater deterrence was thought desirable, a more straightforward response would be to provide for a regime of optimally structured and publicly enforced fines. The study concludes that there is a compelling case for private enforcement of the reviewable practice provisions of the *Competition Act*, primarily on corrective justice grounds, but secondarily in terms of enhancing accountability of the public enforcement regime. In order to achieve an optimal mix of public and private enforcement, the study then turns to a number of design variables that require to be addressed.

4. With respect to standing to sue, a standing test based on material, as opposed to direct, effects is superior because it allows legitimate yet indirect claims for compensation to be made and allows a broader range of affected parties to act as private attorneys-general. If damages are not available as a remedy, there may be a case for an even broader standing test that permits public interest standing by consumer, employee and industry associations that may have a genuine and substantial interest in a matter and a superior ability to litigate than individuals who are directly or materially affected.

5. With respect to rights of intervention, parties who are directly affected by the proceedings should have a right of intervention, including a right to advance claims for compensation once liability has been established. If broader public interest intervention is allowed, the Tribunal should have discretion to limit the extent of the participatory rights. Apart from private parties affected by the matter, the Director should have full rights of intervention, including participation in discovery, the calling of evidence and the cross-examination of witnesses so as to mitigate one of the major weaknesses of private enforcement, i.e. that it can disrupt coherent enforcement policies based on a prudent and reasoned exercise of prosecutorial discretion. In the case of time-sensitive transactions such as mergers, there may be a case for allowing private litigants access to the Tribunal to commence a challenge to a merger but then allow the Director to issue a stay, if he or she views this as expedient, after presenting reasons to the Tribunal, thus enhancing public accountability for the Director's decision.

6. In order to prevent or discourage frivolous or improperly motivated private actions, the study argues for a mandatory summary judgement procedure. A mandatory summary judgement procedure could also serve as a convenient cut-off for the application of loser-pay cost rules and be integrated with a case management regime.

7. With respect to limitation periods, the study argues for a general and straightforward limitation period, such as three years from when damages were suffered, but subject to judicial discretion to extend the period in exceptional cases.

8. Along with a mandatory summary judgement procedure, cost awards can also be used to deter frivolous and strategic litigation. However, they also present a risk of deterring meritorious litigation, especially if a plaintiff is not able or likely to obtain damage awards or even the costs of litigation. The study argues that the conventional loser-pay rule may be the appropriate rule to apply to the preliminary stages of litigation up to and including the mandatory summary judgement procedure, but once a case has passed summary judgement, there may be good reasons, depending on the legal context, for applying a variety of no-way and one-way cost rules.

9. As to the remedies available on an application by a private plaintiff, these are likely to determine the efficacy of the private enforcement regime. Preventing the Competition Tribunal from awarding interim relief or damages will make litigation less attractive and may produce countervailing pressures to expand common law actions to include conduct that can be assessed as a reviewable practice. However, there is a risk that private plaintiffs will seek interim relief for strategic reasons and that such relief may restrain pro-competitive behaviour. This risk may justify preserving the Director's exclusive monopoly over requests for interim relief, at least in the merger context. On the other hand, the doctrine for granting interim relief, at least in other contexts, can be tightened and plaintiffs can be required to undertake to pay damages that respondents suffer because of the grant of interim relief that is subsequently overturned. If interim relief is not available, respondents may have to pay damages, at least for injuries they inflict during the litigation process. More generally, damages can both compensate private applicants for harms caused by reviewable practices and give them an incentive to bring an action, especially if a no-way cost rule is employed. Compliance orders will remain an important remedy, but the Tribunal should take great care in ensuring that plaintiffs do not obtain orders that go beyond the purposes of the Act. Settlements and consent orders will also play an important role, but again the Tribunal will need to be vigilant in supervising settlements and issuing consent orders because settlements between private parties cannot be assumed to accord with the purposes of the Act in the same way as settlements with the Director.

10. The study examines the strengths and weaknesses of private enforcement of competition law with particular attention paid to the reviewable practices contained in Part VIII of the Act. Nevertheless, many of the design issues identified in the study may also be relevant to private actions which are presently allowed under section 36 of the Act with respect to criminal competition offences and failures to comply with an order of the Competition Tribunal. Should private parties be allowed access to the Competition Tribunal with respect to reviewable matters, there may also be a case for also allowing or even requiring private parties to utilize the same procedure for section 36 claims. In any event, some attention should be given to integrating, or at least harmonizing, features of the private enforcement regime with respect to criminal offences and the proposed private enforcement regime with respect to reviewable practices.

COMPARATIVE PERFORMANCE CLAIMS ENJOINED: THE CASE OF *MEAD JOHNSON CANADA* V. *ROSS PEDIATRICS*

By: Catherine Coulter
Fraser & Beatty, Ottawa

The Ontario Court has again dealt with the issue of misleading advertising; in which a competitor has sued a rival on the basis of violation of the *Competition Act* misleading advertising prohibition and economic tort. On September 22, 1996, Mr. Justice Lloyd Brennan of the Ontario Court (General Division) issued an interlocutory injunction to enjoin the use of alleged misleading infant formula promotional material prior to trial.

Facts

Mead Johnson Canada, a division of Bristol-Myers Squibb Canada Inc., manufactures a cow-milk based infant formula called Enfalac. Ross Pediatrics, a division of Abbott Laboratories Limited, is the other major competitor in that marketplace. Ross Pediatrics manufactures a cow-milk based infant formula called Similac as well as the product in dispute, Similac Advance. There are two other large manufacturers of cow-milk based infant formula in Canada: Wyeth-Ayerst and Carnation, a division of Nestlé. However, Mead Johnson and Ross Pediatrics are jointly responsible for two-thirds of that Canadian market share.

Since the early 1990s infant formula has been marketed in Canada in three major ways. First, it is dispensed or recommended to new parents by physicians and hospitals. Second, it is sold by retailers with accompanying advertising and price promotions. Third, most of Canada's infant formula manufacturers have "relationship marketing programs" which direct market to parents. Ross Pediatrics' relationship marketing device is a baby club called the Similac Welcome Addition Club.

Similac Advance was approved for sale in Canada by Health Protection Branch in July 1995. The Ross Pediatrics sales force began marketing it to physicians, hospitals and retailers in the spring of 1995. It was shipped to retailers and wholesalers at the beginning of May 1996. The promotional materials which Mead Johnson complained of were as follows: (1) the materials distributed to physicians, called the "Professional Brochure"; (2) a pamphlet left at point-of-purchase in stores, called the "Consumer Brochure"; and (3) materials distributed directly to new parents through the Similac Welcome Addition Club.

Mead Johnson first became aware of some of the advertising materials early in 1996, when the launch of the product occurred. However, Mead Johnson claimed that it was not in a position to take legal action until the Consumer Brochure began to be distributed to the public in a consistent and wide-spread fashion in May 1996. At that time, Mead Johnson retained Consumer Research Group to conduct market studies on the effect of the Consumer Brochure on new parents. The lawsuit and injunction motion were launched at the beginning of July.

Dyson J. granted an adjournment of the injunction motion on July 11, 1996. The terms of the adjournment included a timetable for the delivery of affidavit materials, cross-examination of witnesses and the return of the motion. The injunction motion was heard on September 30 and October 1, 1996.

The general claims alleged by Mead Johnson to be false and misleading included the following: (a) overall superiority to other infant formulas; (b) similarity to breast milk; and (c) Similac Advance is clinically proven to strengthen a baby's immune system. The Professional Brochure, Consumer Brochure and Similac Welcome Addition Club materials all contained specific representations explicitly or implicitly falling into one of the above categories. Many of the representations at issue related to the effect of compounds known as nucleotides which had been added to Similac Advance. Nucleotides, a component of DNA and RNA, have been shown in some animal studies to be a contributor (among many others) to the development of the immune system in living animals. Supplementation of infant formula with nucleotides has been under consideration by Mead Johnson, Ross Pediatrics and others in recent years. Market research previously performed by both parties showed that enhancement of a baby's immune system would be an extremely attractive claim to potential purchasers of infant formula.

As Similac Advance was being developed, Ross Pediatrics commissioned a study, referred to as the Pickering Study, for the purpose of determining the effect of feeding Similac Advance to infants. The experts of both Mead Johnson and Ross Pediatrics commented on the design and conclusions of the Pickering Study. In his reasons for judgment on the injunction motion, Brennan J. stated that he did not consider the merits of the experts' opinions could be adequately weighed in an interlocutory proceeding. However, he did review what the Pickering Study established against the impressions made by the promotional materials.

Test for Interlocutory Injunction

Mead Johnson claimed damages in its Statement of Claim under section 52 of the *Competition Act* as well as damages and the injunction under the torts of injurious falsehood and intentional interference with economic relations. The Court relied on the well-established three part test articulated in *RJR-MacDonald* v. *Canada (Attorney General)*.[1] The test is as follows:

(i) is there a serious issue to be tried?;
(ii) will the applicant suffer irreparable harm if the injunction is not granted?; and
(iii) which party will suffer the greater inconvenience by the granting of the injunction?

Serious Issue To Be Tried

Brennan J. first looked to whether there was a serious issue to be tried with respect to the claim under the *Competition Act*. He reviewed the case of *947101 Ontario Ltd.* v. *Barrhaven Town Centre*[2] which stands for the proposition that the Act does not confer jurisdiction to grant injunctive relief. However, he determined

that that did not end the matter. The Supreme Court of Canada in the recent decision of *BMWE* v. *Canadian Pacific Ltd.*[3] held that the power to issue an interlocutory injunction is a matter of inherent jurisdiction for the courts. Brennan J. relied on that decision to state that if there was a serious issue to be tried, the first part of the test for injunctive relief could be met under the Act's remedy for false and misleading advertising.

Brennan J. found that there was indeed a serious issue to be tried because the "relatively modest conclusions of the Pickering Study and the guarded language of other scientific materials [he had] been shown [did] not appear at [that] stage to justify the hyperbole which [characterized] the Ross promotion program".

Looking next to the tort of injurious falsehood, Brennan J. considered whether Mead Johnson had to be identified by the Ross Pediatrics' promotional materials in order for the tort to be established. Following established caselaw such as *Church & Dwight* v. *Sifto Canada Inc.*,[4] he stated that Mead Johnson, the other major competitor in the infant formula marketplace, would be identified by implication. He also commented on the fact that Mead Johnson was identified as the target in internal materials distributed to the Ross Pediatrics sales force. Finally, he was of the view that any of Ross Pediatrics' competitors might have a cause of action if the representations were false or misleading.

Once that issue was resolved, Brennan J. looked to whether "a serious issue" could be established for both torts. He commented that "advertising is an important part of [a] community's commercial life and that it is the means by which the public is informed of new products and improvements". He further stated that "our society accepts a considerable amount of hyperbole and exaggeration in advertising". However, as with his findings under the Act in relation to this first test for injunctive relief, he found that Ross Pediatrics' representations in the Similac Advance promotional materials may constitute unfair competition and that a serious issue had been raised.

Irreparable Harm

Having determined that there was a serious issue to be tried under both tort claims and the Act, Brennan J. turned to the second part of the test - whether or not Mead Johnson had suffered irreparable harm. He stated that, "in most of the modern cases, the question has become whether damages will constitute an adequate remedy". He then went on to say that he considered the damages question to be better addressed during the third part of the test the relative inconvenience to the parties. He found that the proper question to be asked in determining irreparable harm was whether Mead Johnson [would] "suffer harm which [could not] be put right if an interlocutory injunction [was] not granted". While the validity of both parties' market research was challenged, Brennan J. was satisfied that the promotion of Similac Advance would cause a change in the marketing of infant formula and that the true effect of the promotion would not be apparent for approximately one year.

Balance of Convenience

Brennan J. viewed this third part of the test more broadly than it has been viewed in recent injunction decisions relating to alleged product misrepresentation. He accepted Ross Pediatrics' assertion that to stop its promotion campaign would waste the substantial money already invested in the launch, and would leave the product unsupported. He also accepted Mead Johnson's assertion that it would lose market share and reputation if the claims were allowed to alter the marketplace. He also looked to the question of the inconvenience involved in calculating the damages each party would suffer. In that regard, he found that the calculation of damages would be equally difficult for both parties, but that there would be added inconvenience to Mead Johnson in attempting to counteract Ross Pediatrics' performance claims with its own marketing.

Consideration of Equity Principles

Brennan J. felt it appropriate to comment on other equitable considerations that impacted on his decision. The first was Ross Pediatrics' argument that Mead Johnson should be precluded from an injunction because it had engaged in similar marketing activities. In comparing those marketing activities, Brennan J. found that Mead Johnson's were considerably more modest than Ross Pediatrics'. He also found that the Ross Pediatrics promotional materials to be used for a similar product launch in the United States avoided the overstatement of performance claims which gave rise to Mead Johnson's claims in Canada. Accordingly, the 'similar marketing activities' claim of Ross Pediatrics was disregarded.

Finally, Brennan J. commented briefly on the issue of public interest. Until the early 1990s, infant formula manufacturers in Canada voluntarily complied with the World Health Organization ("WHO") Code. They have all since moved away from voluntary compliance and now market directly to new parents. Brennan J. expressed concern that to meet the claims of Ross Pediatrics, Canadian infant formula producers would have to move yet further from compliance with the WHO Code. He decided that this should not be permitted to occur until the issue of whether the representation was 'false or misleading' has been dealt with at trial.

Comment

Brennan J.'s decision in the case of *Mead Johnson* v. *Ross Pediatrics* appears to put more emphasis on the rights of the parties than on the competitive market. However, that emphasis appears to be based on the facts of this particular case and, in particular, the evidence on the impact of the representations in issue and the specific public interest issues which arise when a product like infant formula is marketed to impressionable new parents. In that sense, this decision does not appear to change the course that has been taken in other recent cases in this area, namely establishing high hurdles to obtain interlocutory injunctions to prevent false or misleading advertising, but it has confirmed that the courts will not hesitate to grant injunctive relief in relation to consumer advertising if relief is warranted on the facts.

Of significance is Brennan J.'s conclusion that an interlocutory injunction is available in a misleading advertising action based on violation of section 52 of the *Competition Act*. As well, Brennan J. rejected arguments that, in an economic tort action, the first branch of the injunction test remained the *prima facie* case test, and not proof of a serious issue to be tried.

Postscript

After Brennan J.'s decision was released, Ross Pediatrics moved for leave to appeal. The motion for leave was heard by O'Driscoll J. on November 7, 1996. Subsequently, O'Driscoll J. released his decision and reasons. Ross Pediatrics' motion for leave to appeal was dismissed.

Notes

1 [1994] 1 S.C.R. 311.
2 (1995), 121 D.L.R. (4th) 748 (Ont. Ct. (Gen. Div.)).
3 (1996), 136 D.L.R. (4th) 289 (S.C.C.).
4 (1994), 20 O.R. (3d) 483 (Ont. Ct. (Gen. Div.)).