

## CANADIAN COMPETITION RECORD

# CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

## BILL C-23 MAKES PROGRESS

By: Daniel G. Edmondstone and James B. Musgrove, Lang Michener

Since the Spring of 2000 there has been ongoing active discussion regarding amendments to the *Competition Act*. The discussion was precipitated by a number of private member's bills introduced into Parliament. The Standing Committee on Industry, Science and Technology of the House of Commons (the "Industry Committee") held hearings in the Spring of 2000 with respect to amendments to the *Competition Act* generally, including some aspects of those private member's bills. The Commissioner of Competition then retained the Public Policy Forum to engage in widespread consultations with respect to the proposed amendments. The Minister of Industry indicated that when that consultation was complete he expected to introduce a Government bill proposing those aspects of the amendments which had generally found favour through the consultation process.

Those amendments were introduced on April 4, 2001 as Bill C-23. In a somewhat unusual move, Bill C-23 was referred to committee after first reading in the House of Commons. The practical effect of this referral to committee at such an early stage was that the Industry Committee was free to propose amendments outside the "four corners" of the Bill. The Industry Committee held public hearings, hearing from a number of witnesses. On December 5, 2001, it reported to the House of Commons with substantial amendments to the Bill, including those respecting private access to the Competition Tribunal, and

respecting competition in the airline industry. Bill C-23 received second reading on December 7, 2001. Third reading of the Bill occurred December 10, 2001. It was introduced in the Senate on December 11, 2001, with first reading. The Bill is reasonably complex. A nutshell summary of the primary parts of the Bill is outlined below.

### Protection of Voluntarily Supplied Information

The protection afforded confidential material provided to the Commissioner by way of one of the formal processes under the *Competition Act* (section 29), which now protects information supplied pursuant to the Commissioner's formal investigative powers or as part of a merger filing or advance ruling certificate application, is to be extended to cover "any information provided voluntarily pursuant to [the Competition] Act." This confidentiality protection will not apply in respect of information that has been made public or any information the release of which has been authorized by the party that supplied it. This extension of the protection of section 29 to voluntarily supplied information gives statutory protection to the Commissioner's established policy of protecting such information. It should help to maintain the established practice of persons subject to inquiry by the Bureau providing information and cooperation to the Bureau.

### Tribunal and Process Reforms

The Tribunal will be permitted to award costs against a party, including the Government, if it finds that proceedings are frivolous or vexatious, or it finds that

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steps have been taken to hinder or delay the progress of a matter.

The Tribunal is also to be given the power to summarily dispose of proceedings under Parts VII.I (Deceptive Marketing Practices) or VIII (Reviewable Conduct) of the Act on an application by any party to the application.

The Commissioner and the subject of an inquiry may refer a matter to the Tribunal for determination of a question of law, mixed fact and law, fact, or jurisdiction, practice and procedure. The Commissioner alone, but (regrettably) not the subject of an inquiry, may refer a matter to the Tribunal for determination on a question of pure law, or jurisdiction, practice or procedure. Indeed, in the case of issues of this sort there may not be any inquiry ongoing. In such a case there will be no opposite party to oppose the Commissioner's proposed interpretation. That may put the Tribunal in a challenging position, and it may find it appropriate to appoint a "friend of the Tribunal" in certain cases to articulate the alternate position.

Consent agreements which could have been the subject of an order of the Tribunal in a contested proceeding may be registered with the Tribunal and will become effective as if they were orders of the Tribunal, without substantive review by the Tribunal. This will be a significant change. Previously, the Tribunal could, and on occasion would, refuse proposed consent orders on its own initiative. The registration will terminate any proceeding with respect to the subject matter, thus eliminating the possibility of challenge by interveners. A person "directly affected" by such consent agreement may apply to the Tribunal within 60 days for recession or variation. Consent agreements will also be possible in private cases under new private access provisions.

The Commissioner is to be given the authority to provide advisory opinions which, if the facts submitted are

accurate, will be binding upon the Commissioner. We note, however, that such option is not binding on a private party for the purposes of civil damage claims under section 36 of the Act.

### Injunctive Powers

The Tribunal is to be given enhanced powers to grant *ex parte* injunctions where an inquiry is being made and an interim order is required to prevent the continuation of the conduct, if the Tribunal finds that in the absence of such order:

- (a) injury to competition that cannot be adequately remedied by the Tribunal is likely to occur;
- (b) a person is likely to be eliminated as a competitor; or
- (c) a person is likely to suffer a significant loss of market share or significant loss of revenue or other harm that cannot be adequately remedied by the Tribunal.

This power to grant injunctions is limited to situations in which the Commissioner has certified that there is an inquiry being made under section 10(1)(b) of the *Competition Act* (i.e. it excludes from the operation of this new *ex parte* injunction provision situations in which the inquiry has been commenced by reason of a six person complaint or a direction from the Minister).

Such an *ex parte* order is effective for ten days and on 48-hours notice the Tribunal may hear an application to extend the interim order for 35 days. The Tribunal may grant two such 35 day extensions. Further extensions beyond this initial 80 day period may be granted by the Tribunal, so it is unclear how important the "35 day" provisions will be.

Before making an application for an order to prevent the continuation of conduct by certain financial

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institutions, including banks and insurance companies (conduct that could be the subject of an order under sections 75, 76, 77, 79, 81 or 84), the Commissioner must consult with the Minister of Finance.

### Private Access to the Competition Tribunal

“Private Access” is the short-form competition law jargon that refers to a long-considered proposal to allow those who feel aggrieved by the actions of a firm which they believe to be contrary to the reviewable conduct provisions of the Act, to bring proceedings, in their own name, against such a firm before the Competition Tribunal. Until now, the right to initiate such proceedings was the exclusive purview of the Commissioner.

The provisions of Bill C-23, as amended by the Industry Committee, that will attract the most attention are undoubtedly the new provisions allowing for a certain amount of private access to the Competition Tribunal.

Under proposed section 103.1, any person will be entitled to make an application for leave to the Tribunal to make an application under section 75 (refusal to deal) or 77 (exclusive dealing, tied selling and market restriction). An applicant for leave must file an affidavit setting out evidence supporting their application under the relevant reviewable practice provision. The party will serve the would-be respondent, as well as the Commissioner. The Commissioner then has 48 hours to inform the Tribunal whether the subject matter of the proposed application is the subject of an ongoing inquiry by the Commissioner or whether it was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the would-be respondent. If there has been a settlement, or if there is an ongoing inquiry by the Commissioner, the Tribunal shall not consider the application for leave. Also, if there is an already existing application submitted to the Tribunal by the government official dealing with

the same subject matter, the Tribunal shall not consider the proposed private application. The prohibition of private proceedings based on a “settlement” with the Commissioner is interesting. Quere whether it may not encourage settlement by firms which would otherwise have been inclined to dispute the validity of the Commissioner’s concerns, refuse to alter their practices, and invite the Commissioner to bring a proceeding if he desires. Such settlement could be by way of an agreement to some remedy, so as to insulate the firm from subsequent private access challenge.

If the application for leave is not barred by reason of the provisions discussed above, then the applicant for leave is so informed, as is the respondent. The respondent has 15 days from that point to respond in writing to the application for leave.

Where a private application for leave has been barred by reason of an ongoing inquiry by the Commissioner, the Commissioner must inform that applicant if the inquiry is discontinued, thus allowing the private applicant to try again.

The Tribunal may, after hearing the proposed respondent’s submissions, grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in his or her business by any practice referred to in one of the sections which could be subject to an order under that section.

Where leave has been granted by the Tribunal to a private applicant, the Commissioner may intervene in the proceedings. A private application under sections 75 or 77 must be made no more than one year after the practice that is the subject of the application has ceased.

Once leave has been granted for a private application, the Commissioner may not make an application under sections 75, 77 or 79 on the basis of the same or

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substantially the same facts as alleged in the private proceeding.

Section 75 (refusal to deal) is to be amended to add a fifth branch to the test requiring that “the refusal to deal is having or is likely to have an adverse effect on competition in a market”. This proposed change is not limited to private applications, and will change the nature of all section 75 applications, arguably for the better, in that an express negative impact on competition will be required to found such a proceeding. However, the test “adverse effect on competition” will be interesting to watch as it develops. It presents a different, and lower, threshold than the sections 77 and 79 test of substantial lessening of competition. It is not clear why it should be any lower threshold. It will also be interesting to see how frequently distributors who have been terminated, a common economic phenomenon, will seek to avail themselves of this sort of challenge procedure.

In granting private parties access to the Competition Tribunal for section 77 matters, Bill C-23 proposes that it be set out explicitly that the Tribunal may not make an award of damages under section 77 to a person granted leave to bring the application. The remedies available to the Tribunal include an order directed at suppliers “containing any other requirement that, in [the Tribunal’s] opinion is necessary to overcome the effects [of the behaviour] or to restore or stimulate competition in the market”. It might have been argued that an award of damages would restore a weakened competitor to a point where it would once again be a viable source of competition in a market. Access to damages under this provision would likely have had the effect of producing a greater flood of applications for leave than will be expected without such a right to claim damages.

### **Airline Amendments**

Bill C-23 will make the administrative monetary penalties available to be levied against “domestic services,” as defined in the *Canada Transportation Act*, as high as \$15 million. Factors that go to aggravate or mitigate the amount of administrative monetary penalty to be levied are now set out in section 79(3.2). They include:

- (a) the frequency and duration of the practice;
- (b) the vulnerability of the class of persons adversely affected by the practice;
- (c) injury to competition in the relevant market;
- (d) the history of compliance with this Act by the entity; and
- (e) any other relevant factor.

### **Marketing Law Amendments**

It will now be an offence, for the purpose of promoting, directly or indirectly, any business interest or for the purpose of supplying a product, to send or cause to be sent by electronic or regular mail, or by any other means, a document or notice in any form if the notice or document gives the general impression that the recipient has won, will win, or on doing a particular act will win, a prize or other benefit and if the recipient is asked or given the option to pay money or do anything that will incur a cost. This amendment is broadly parallel to some aspects of the telemarketing provisions introduced in 1999 (section 52.1).

The proposed provision also creates a “defence” if the person actually wins the prize and the promoter makes adequate and fair disclosure of the number and approximate value of the prizes or benefits, and distributes the prizes without unreasonable delay. There

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is also a due diligence defence. The proposed provision is criminal. Fines of up to \$200,000 and imprisonment for up to one year are to be available on summary conviction, and unlimited fines and imprisonment for up to five years are to be available where the Crown proceeds by way of indictment.

The Bill also proposes to amend section 33 of the Act to allow interim injunctions in the same manner as with respect to the telemarketing provisions. Presumably, this would be used to deny alleged defenders access to postal, internet or other delivery services.

This provision is clearly parallel to the telemarketing provisions already in the *Competition Act*. However, it is not at all clear that consumers receive written (electronic or hard copy) material in the same manner that they deal with telemarketing items. It is difficult to see how the sales pressure that might be created by way of a telephone call could be duplicated in a written medium. Nevertheless, these proposed provisions survived the review of the Industry Committee with only one significant change. The original wording would likely have effectively prohibited most, if not all, standard contest promotions, which require, as a condition of winning, that the contestant's name be drawn and that he or she correctly answer a skill-testing question. The wording in the key provision has been clarified to reduce the possibility of honest, non-misleading promotional contests giving rise to criminal liability because it was possible to enter by way of a product purchase.

Officers and directors of corporations can be charged under this proposed provision unless they can show that they exercised due diligence to prevent the commission of the offence.

### **International Co-operation**

The Act introduces a complex regime, parallel to the search and seizure and section 11 provisions already

existing in the Act, to deal with requests by foreign authorities for assistance in obtaining evidence for investigations which they are undertaking. The procedure includes the opportunity for the party subject to the proceeding to appear before a judicial officer to argue that the materials ought not to be sent to the foreign jurisdiction.

The proposed mutual legal assistance regime sets out detailed provisions with respect to how the Minister of Justice is to approve treaties with foreign states, and how the Canadian law enforcement and judicial system is to deal with requests for assistance from foreign states with respect to warrants, evidence gathering orders, video evidence and the lending of exhibits previously used in Canadian proceedings.

Under the provisions, search warrants may be issued at the request of a foreign state. Such warrants must set out a hearing date and time for a consideration of the execution of the warrant. At that hearing, the person who was subject to the warrant, or anyone who claims an interest in the property seized, may appear and make representations. At the end of such hearing the judge may order that some or all of the seized material be returned either to the person from whom it was seized or some other person claiming an interest. The judge can also order that material be sent to the foreign state with conditions attached that are designed to ensure the preservation of the evidence and its confidentiality, amongst other things. The foreign state must agree to the terms of such order in order to receive the material.

Evidence gathering orders may be issued under this provision. The proposed provision is similar to the current section 11. It allows for an order that an individual appear so as to be examined under oath. It also provides the ability for a judge to order that such person make copies of records and/or produce records. These examinations are to take place before a

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designated person which can, but does not have to, be a judge, Canadian or foreign. Where the designated person is a judge (Canadian or foreign) that person may make rulings on questions refused. Before the transcript and report arising from the examination are sent to the foreign state it must be reviewed by a Canadian judge. Delivery of the transcript can be denied or made subject to conditions. The foreign state must indicate agreement, to the satisfaction of the Minister of Justice, to the terms and conditions attached to the evidence.

Both search warrants and orders for the gathering of evidence (oral examination) may be executed anywhere in Canada.

Under Bill C-23, individuals in Canada may be ordered to provide evidence by video link for foreign proceedings. An order that a person testify by video link in a foreign proceeding is enforceable anywhere in Canada. The person is entitled to the usual conduct money payable to a witness. The provisions in the Bill deal with how refusals to answer questions are to be handled, including claims of privilege based on Canadian law and foreign law. Failure to abide by an order to appear to give evidence will be contempt and an arrest warrant may be issued.

Also, exhibits used in Canadian proceedings, either before a court or the Competition Tribunal, will be able to be lent to foreign states for use in proceedings there.

The use of foreign evidence in Canadian proceedings is provided for. The courts and the Tribunal will be permitted to receive evidence orally or by affidavit, where there is a certificate or other statement pertaining to the record in which a person attests that the certificate or statement is made in conformity with the laws that apply to a foreign state. The statement shall include evidence as to the circumstances in which the

information contained in the record or copy was written, stored or reproduced. Several explicit exceptions to the hearsay rule in the context of these proceedings are created by the provisions of this Bill, to allow for foreign evidence to be received more efficiently.

Treaties governing mutual legal assistance in criminal matters must not be approved by the Minister of Justice unless they set out circumstances in which Canada will refuse a request for assistance from a foreign state, the confidentiality protections required to be afforded to evidence provided to a foreign state, and the conditions governing the use by foreign states of evidence gathered in Canada.

The Industry Committee added a provision to the Bill that makes this new regime for providing assistance to foreign states applicable to records or other material already in the Commissioner's possession.

The mutual legal assistance provisions are detailed and the full implications arising from them will not be known until some experience is developed. At various stages of the procedures set out in these provisions, superior court judges will have the opportunity to review and approve requests and to make orders with conditions built into them when appropriate. How this discretion will be exercised will go a long way to determining how useful these provisions are from a law enforcement perspective, or how dangerous they prove to be to Canadian firms that face legal proceedings in foreign states.

Most of the decisions made by judges in these proposed provisions are subject to limited right of appeal, being with leave, on questions of law alone, to the appropriate court of appeal.

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**Conclusion**

The *Competition Act* amendments achieved by Bill C-23 deal specifically with airlines as a problem area in the competitive landscape; they offer changes, some of which certainly will be improvements, to the Tribunal process; they provide a regime for sharing of information with international authorities; they address perceived abuses in contest promotions; and, most controversially, they allow for private right of access to the Competition Tribunal in respect of conduct pursuant to sections 75 and 77. Few who have followed the process will regard the entire package of amendments as beneficial, or as deleterious, since it is such a mixed bag. There is no controversy, however, that a system of ongoing and regular review and amendment of the Act to keep it relevant and up-to-date is a beneficial exercise. In our view, it is important that such amendments be pursued by Government rather than private members' legislation, in order that changes to the Act preserve the coherent and unified nature of a framework statute of general application. The Bureau's dedication to ongoing legislative review is therefore to be commended. While any given proposal may or may not find favour, the idea of ongoing review and adjustment is certainly advantageous.

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**CHADHA v. BAYER INC.: THE ILLINOIS BRICK OF CANADA?**

By: Glenn Leslie and Chris Hersh\*  
Blake, Cassels & Graydon LLP

Although the particular facts of the case may determine the result, the broader issues in *Chadha v. Bayer*<sup>1</sup> are roughly analogous to those considered in the landmark decisions of the Supreme Court of the United States in the companion cases *Hanover Shoe v. United Shoe Machinery*<sup>2</sup> and *Illinois Brick Co. v. Illinois*,<sup>3</sup> which held that indirect purchasers could not sue for damages

based on the allegation that overcharges resulting from an antitrust violation had been "passed on" to them through the chain of distribution. The *Chadha* case gives Canadian courts their first opportunity to consider the application in Canada of the principles behind the "Illinois Brick Rule".

*Hanover Shoe* involved a claim by a direct purchaser of equipment from United for treble damages for alleged monopolization of the shoe machinery industry in violation of section 2 of the *Sherman Act*. The Supreme Court held that United could not defend the claim by showing that the plaintiff had "passed on" the overcharge to its customers. This ruling was based in part on the Court's conclusion that it would be impracticable, if not theoretically impossible, to engage in a factual analysis of the extent to which antitrust damages had been passed on through various levels of a chain of distribution. The Court found that as a matter of policy, private enforcement of the antitrust laws would be more efficient and effective if treble damage actions were limited to direct purchasers.

In *Hanover Shoe*, the United States Supreme Court made the following statement regarding the use of a pass on defence in antitrust actions:

Since establishing the applicability of the passing on defence would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. On the other hand, it is not unlikely that if the existence of the defence is generally confirmed, anti-trust defendants will frequently seek to establish its applicability. Treble damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories.

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In addition, if buyers are subjected to the passing on defence those who buy from them would also have to meet the challenge that they pass on the higher price to their customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a law suit and little interest in attempting a class action. In consequence, those who violate the anti-trust laws by price-fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble damage actions, the importance of which the Court has many times emphasized, would substantially be reduced in effectiveness.

The reciprocal of *Hanover Shoe* arose a decade later in *Illinois Brick*. In that case, some 700 government entities brought a treble damage action alleging that concrete block manufacturers had engaged in price fixing. The manufacturers sold their product directly to masonry contractors, who in turn sold the product to general contractors from whom the plaintiffs purchased the product in the form of masonry structures. In this case the Supreme Court held that if the "pass on" theory could not be used defensively by a defendant in an antitrust action, the theory could equally not be used offensively by indirect purchasers as plaintiffs. The Court reiterated that permitting antitrust actions for treble damages by indirect purchasers would introduce unmanageable dimensions of complexity to treble damage actions and undermine their effectiveness.

In *Illinois Brick* the United States Supreme Court maintained its view that "antitrust laws will be more effectively enforced by concentrating the full recovery for overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it". With respect to the offensive use

of the pass on theory, the United States Supreme Court stated:

Permitting the use of pass on theory under section 4 [of the *Clayton Act*] essentially would transform treble damages actions into massive efforts for a portion recovery among all potential plaintiffs that could have absorbed part of the overcharge – direct purchasers to middleman to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of a complexity to treble damage suits and seriously undermine their effectiveness.

The decisions in *Hanover Shoe* and *Illinois Brick* make clear that the United States Supreme Court was of the view that, as a matter of antitrust enforcement policy, it was preferable to promote the bringing of treble damage actions by direct purchasers in price fixing cases despite the fact that the absence of the availability of the pass on theory (either defensively or offensively) could undoubtedly have the effect of overcompensating direct purchasers at the expense of indirect purchasers.

The fact that treble damage actions are by their very nature both punitive and overcompensatory promotes the vigorous private enforcement of antitrust laws in the United States. The decisions in both *Hanover Shoe* and *Illinois Brick* are consistent with the American policy of private endorsement of antitrust laws. Specifically, in *Illinois Brick* the United States Supreme Court stated:

We conclude that the legislative purpose in creating a group of 'private attorneys general' to enforce the anti-trust laws ... is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to

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apportion the overcharge amongst all that may have absorbed part of it. ... From the deterrence standpoint, it is irrelevant to whom damages are paid, so long as someone redresses the violation.

In response to the decision in *Hanover Shoe* and *Illinois Brick*, several states in the United States have enacted what have come to be known as “*Illinois Brick* repealer statutes” that expressly allow indirect purchasers to bring actions for antitrust violations. Ironically, although mandated by statute, proposed class actions by indirect purchasers in state proceedings are very frequently denied certification and not allowed to proceed by state courts for much the same reasons that gave rise to the *Illinois Brick Rule* in the first instance, i.e. that such actions would be unmanageable.<sup>4</sup>

The *Chadha* case gives Canadian courts an opportunity to consider the application of the principles behind the American rule in *Illinois Brick* to comparable civil actions for antitrust damages brought under the *Ontario Class Proceedings Act*<sup>5</sup> (the “CPA”). In its judgment of May 14, 2001, the Ontario Divisional Court overturned certification of a class action brought on behalf of purchasers of new homes who alleged damages as a result of Bayer’s alleged involvement in an iron oxide (a pigment used to colour bricks and concrete blocks) price fixing conspiracy. It was estimated that iron oxide represented approximately 5% of the price of the bricks or blocks in question. The proposed class consisted of purchasers of new homes and other end users who had suffered a loss or damages as a result of the alleged conspiracy. The economic evidence presented by class counsel indicated that increased costs to individual class members arising from the alleged conspiracy were between \$70 and \$112 on a \$150,000 house.

At the initial motion for certification, counsel for the defendants argued that on the facts of the case, a class action by indirect purchasers was not the appropriate procedure, and should not be allowed to proceed based on the reasoning used in *Hanover Shoe* and *Illinois Brick*. In granting certification, the motions court held that, while the decisions of the United States Supreme Court merit serious consideration, they were not binding and were based on policy considerations relating to American antitrust laws as opposed to Canadian competition law.

On appeal, the majority of the Ontario Divisional Court expressed similar concerns to those expressed by the United States Supreme Court in *Hanover Shoe* and *Illinois Brick* with regard to the complexity of indirect purchaser actions. Specifically, the majority held that in this case liability could not be established on a common basis due to the “insurmountable problems of proof with respect to the ‘pass on’ issue, given the large number of parties in the chain of distribution and the multiple variables affecting the end purchase price of a building”. Further, the Court stated that “assuming that the respondents can establish the appellants engaged in a conspiracy that increased the price of iron oxide, they would still have to establish on a balance that this price was ‘passed on’ to them. This they are unable to do on a class-wide basis”.

In concluding that a class proceeding is not the preferable procedure, the Divisional Court in *Chadha* cited *Illinois Brick* as follows:

Overcharged direct purchasers often sell in imperfectly competitive markets. They often compete with other sellers that have not been subject to the overcharge; and their pricing policies often cannot be explained solely by the convenient assumption of profit maximization. As we concluded in *Hanover Shoe* ...

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attention to 'sound laws of economics' can only heighten the awareness of the difficulties and uncertainties involved in determining how the relevant market variables would have behaved had there been no overcharge.

In reaching the conclusion that a class proceeding was not the preferable procedure, the Court in *Chadha* emphasized the evidentiary difficulties that the proposed class would have in proving that any overcharge in the price of iron oxide was passed on to them through the various layers of the distribution chain. The Court held that the pass on issue could not be resolved on a class-wide basis, due to the fact that each member's claim would involve different intermediaries and factors.

One of the principal differences between the motions court's decision in *Chadha* and the Divisional Court's decision related to proof of damage. The judge of first instance, Sharpe, J. (as he then was), found that damages could be assessed in the aggregate on the basis of the defendants' "net gain" and then distributed on an average, proportional or even *cy pres* basis in accordance with section 24 of the CPA. In this regard Sharpe, J. found:

The Act contemplates aggregate assessment of monetary relief, and distribution of awards in an average, proportional or even *cy pres* basis: ss. 24, 26. Those statutory provisions specifically contemplate cases where it may be 'impractical or inefficient to identify the class members entitled to share in the award' (s. 24(3)); and cases where 'not all class members can be identified' (s. 26(5)). As the Act specifically contemplates providing a remedy despite the impracticality or inefficiency of identifying class members at the stage of assessment and distribution of damages, it would surely be wrong to

frustrate that statutory policy by insisting on a class definition that avoided impracticality or inefficiency of identifying class members at the certification stage.

The Divisional Court, on the other hand, proceeded on the basis that proof of damages was integral to the existence of a cause of action under section 36 of the *Competition Act* and for the civil tort of conspiracy for each member of the proposed class, and could not be assessed collectively. In this regard the Divisional Court held that section 24 of the CPA is procedural, and does not confer substantive rights.

There is at least one other Ontario decision in Ontario class proceedings brought pursuant to section 36 of the *Competition Act* dealing with the possibility of recovery by indirect or retail purchasers on the basis of a "global" or "aggregate" assessment of damages. Although the action has not reached the certification stage, in the vitamin litigation, where the proposed class includes both direct and indirect purchasers, Cumming, J. specifically envisaged a process whereby the common issues would include a "global assessment" of damages in respect of a particular product followed by a separate decision as to the appropriate manner and means of distribution of those damages amongst the class members, including both direct and indirect purchasers. Like Sharpe, J. in the *Chadha* case, Cumming, J. found that section 24 of the CPA could be used to ensure that any plaintiffs who suffered harm as a result of the conspiracy (including indirect purchasers) were compensated.<sup>6</sup>

Another essential difference between the motions court decision and the Divisional Court decision in *Chadha* was the approach adopted to the issue of whether a class action is the "preferable procedure" for resolution of the common issues as required by section 5 of the CPA. Sharpe, J. held in effect that for these purposes

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only the trial of the common issue itself need be considered. The Divisional Court took the approach that while the common issue need not “predominate” over individual issues,<sup>7</sup> this does not mean that one need only consider the proposed common issue(s) when determining the preferable procedure. The test adopted by the Divisional Court was whether the class proceedings would significantly advance the claims as a whole. This approach has subsequently been approved by the Supreme Court of Canada in its *Hollick v. The City of Toronto*<sup>8</sup>.

The Divisional Court also gave weight to the fact that certification of a class of indirect purchasers, while excluding other parties in the distribution chain, created the possibility that Bayer would be exposed to subsequent litigation on the same issues commenced by direct or intermediary purchasers.

In response to the suggestion that certification should be granted to promote the objective of behaviour modification which is one of the recognized purposes of class actions, the Divisional Court held that the existence and mandate of the Competition Bureau militated against certification on these grounds. The Court reached this conclusion notwithstanding that in this particular case the Competition Bureau had discontinued its investigation of the alleged conspiracy. However, this conclusion is consistent with the fact that unlike the United States and despite the existence of the private right of action for certain violations of the *Competition Act*, to date, it has not been a stated policy or legislative objective to promote private enforcement of competition law in Canada.<sup>9</sup> Section 36 of the *Competition Act* specifically allows private parties to bring a claim for damages sustained as a result of criminal violations of the Act. However, it is clear that section 36, unlike the American antitrust laws which allow punitive treble damages, is purely compensatory in nature. Specifically, section 36 allows

claims to be brought by “any person who has suffered loss or damage” and to recover only such loss or damage “proved to have been suffered by him”.

Despite the Divisional Court’s decision to overturn certification on the basis of disparate individual issues as to damages, the Court clearly stated that its decision did not stand for the principle that indirect purchasers could never assert a cause of action by way of a class proceeding in cases involving violations of the *Competition Act*.

Leave to appeal the Divisional Court decision in *Chadha* to the Ontario Court of Appeal has now been granted. The Court of Appeal is scheduled to hear the appeal in June 2002 and, subject to further appeals, determine whether the principles behind the *Illinois Brick Rule* will continue to be applied in Canada as well as the United States.

## Notes

\* Partner and Associate, respectively, Blake, Cassels & Graydon LLP

<sup>1</sup> 45 O.R. (3d) 29 (Ont. Sup. Ct.), revs’d 54 O.R. (3d) 520, 200 D.L.R. (4<sup>th</sup>) 309 (Ont. Div. Ct.) [hereinafter *Chadha*].

<sup>2</sup> 392 U.S. 481 (1968) [hereinafter *Hanover Shoe*].

<sup>3</sup> 431 U.S. 720 (1977) [hereinafter *Illinois Brick*].

<sup>4</sup> W. A. Page, “The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of *Illinois Brick*” (1999) 67 *Antitrust Law Journal* 1.

<sup>5</sup> 1992 S.O., c. 6.

<sup>6</sup> *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.* [2000] O.J. No. 4594 (Ont. Supp. Ct.).

<sup>7</sup> Both the *Federal Rules of Civil Procedure* in the United States and the *British Columbia Class Action Proceedings Act* require that common issues “predominate” over individual issues in class proceedings: see *Hollick v. City of Toronto* [2001] S.C.C. 68 at 24.

<sup>8</sup> *Ibid.*

<sup>9</sup> Bill C-23 introduces some modest changes in this regard. The Bill provides for private remedies in connection with certain reviewable practices; recourse will be to the Competition Tribunal and will not include any provision for damages.

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### INFORMATION NOTICES AND NEWS RELEASES ISSUED BY THE COMPETITION BUREAU DURING THE PERIOD JULY 1, 2001 TO JANUARY 31, 2002

The following Information Notices and News Releases are available on the Bureau's website at <http://strategis.ic.gc.ca/SSG/ct02003e.html>

**July 4, 2001**

NEWS RELEASE: Competition Bureau Addresses Concerns Raised by Proposed Oilfield Waste Takeover

**July 10, 2001**

NEWS RELEASE: Competition Bureau Charges New Brunswick Chemical Company

**July 17, 2001**

INFORMATION: Competition Bureau Seeks Comments on New Environmental Labelling and Advertising Guidelines

**July 18, 2001**

NEWS RELEASE: Competition Bureau Issues Warning to Canadians about Misleading Mailings for Internet Domain Name Registrations

**July 30, 2001**

NEWS RELEASE: Competition Bureau Investigation Leads to \$1.4 Million Fines in International Price Fixing Conspiracy Case

**August 1, 2001**

NEWS RELEASE: Competition Bureau Releases Guidelines on Enforcement of "Abuse of Dominance Provisions" of the *Competition Act*

**August 15, 2001**

INFORMATION: Competition Bureau will not Challenge Acquisition of Anadime Corporation by Newalta Corporation

**September 21, 2001**

INFORMATION: New Pet Food Labelling and Advertising Guide for Dog and Cat Food Introduced by Joint Industry and Government Working Group

**October 11, 2001**

NEWS RELEASE: Tribunal Decision Preserves Competition in Waste Disposal Services

**October 12, 2001**

NEWS RELEASE: Competition Bureau Requires Divestitures to Resolve Concerns with Canada Bread Acquisition of Multi-Marques

## CANADIAN COMPETITION RECORD

**October 17, 2001**

INFORMATION: Competition Bureau Investigation Leads to Price Maintenance Charge Against Regina Petroleum Supplier

**October 23, 2001**

NEWS RELEASE: Competition Bureau Requires Divestitures to Address Competition Concerns in Diageo plc Acquisition of Seagram Spirits and Wine Business

**October 24, 2001**

NEWS RELEASE: Competition Bureau Investigation Concludes With \$1.5 Million Fine Against Pfizer Inc. in International Price Fixing Conspiracy

**October 25, 2001**

INFORMATION: Competition Bureau Participates in Launch of "International Competition Network"  
INFORMATION: Criminal Charges Laid Against Montreal-Based Telemarketing Companies

**October 26, 2001**

INFORMATION: Competition Bureau Submits Comments on Telecommunications Price Cap Review

**November 1, 2001**

NEWS RELEASE: Competition Bureau to Challenge Part of UGG Acquisition of Agricore

**November 13, 2001**

NEWS RELEASE: Competition Bureau Clarifies Rules for the Marketing of Canadian Diamonds

**November 14, 2001**

NEWS RELEASE: Quebec Company Pleads Guilty to Charges of False and Misleading Representation

**November 15, 2001**

NEWS RELEASE: Canada and Mexico Sign Cooperation Agreement on Competition Law Enforcement

**November 26, 2001**

NEWS RELEASE: Competition Bureau Hosting International Cartel Workshop

**December 5, 2001**

NEWS RELEASE: Paint Company Pleads Guilty to Charges of Shortchanging Consumers

**December 13, 2001**

NEWS RELEASE: Competition Bureau Obtains Order to Stop the Marketing of Anticorrosion Device

**December 17, 2001**

INFORMATION: Competition Bureau Signs Cooperation Arrangement With Chilean Competition Agency  
INFORMATION: Competition Bureau Seeks Comments on Draft Enforcement Guidelines: The Abuse of Dominance Provisions (Sections 78 and 79 of the *Competition Act*) as Applied to the Retail Grocery Industry

## CANADIAN COMPETITION RECORD

**December 18, 2001**

NEWS RELEASE: Competition Bureau Files for Consent Order in the Divestiture of Abitibi-Consolidated Paper Mill

NEWS RELEASE: Competition Bureau Files Application with Competition Tribunal with Consent of Enbridge

**December 21, 2001**

NEWS RELEASE: Competition Bureau Challenges Astral Acquisition of Télémedia Radio Stations in the Province of Québec

**January 16, 2002**

INFORMATION: Agricore United Ordered to Provide Vancouver Port Terminal Access Pending Upcoming Tribunal Hearing

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