# COMMENT / COMMENTAIRE

## *ALCON—CASE COMMENT*
## PATENT ABUSE: HOW BROAD ARE ANTI-COMPETITIVE ACTS?

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*In a matter of first impression under the* Competition Act, *on May 13, 2014 the Competition Bureau released a Position Statement in the* Alcon *case regarding what it refers to as "product hopping" or "product switching". "Product hopping" refers to conduct designed to switch demand from an established product (potentially subject to competition) to a new or reformulated product (often subject to patent protection) with the goal—at least in the context of prescription pharmaceuticals—of making generic entry more difficult. The Bureau ultimately discontinued its inquiry after Alcon agreed to resume supply of the original drug, having concluded that the product in question had only been withdrawn from the market for a limited period of time, such that no injury had occurred. That said, the Bureau affirmed its intention to challenge product hopping in appropriate circumstances and this type of conduct remains subject to scrutiny in the United States and elsewhere. This case note considers the potential application of the* Competition Act *to product hopping, within the broader context of the interface between competition law and intellectual property law, and concludes that the statutory basis upon which the Bureau could proceed against product hopping as an abuse of dominance or as patent abuse under the* Patent Act *is still uncertain and subject to debate. That debate will not be resolved until such time as the Bureau brings a case and jurisprudence emerges on this point.*

*Comme première impression concernant la* Loi sur la concurrence, *le Bureau de la concurrence a publié, le 13 mai 2014, une déclaration de position dans le cadre de l'affaire* Alcon *au sujet de ce qu'il appelle la « substitution de produit » ou « permutation de produit ». La « substitution de produit » décrit un comportement visant à faire basculer la demande d'un produit établi (pouvant donc faire l'objet d'une concurrence) vers un produit nouveau ou reformulé (souvent protégé par un brevet) avec pour objectif, du moins dans le contexte des produits pharmaceutiques délivrés sur ordonnance, de compliquer l'entrée des produits génériques sur le marché. Le Bureau a mis fin à son enquête après qu'Alcon a convenu de reprendre la mise à disposition du produit d'origine, ayant conclu que le produit en question n'avait été retiré du marché que pour une période limitée, ne causant ainsi aucun préjudice. Ceci étant dit, le Bureau a affirmé son intention de remettre en question la substitution*

*de produit dans les circonstances appropriées, et ce genre de comportement demeure dans la ligne de mire aux États-Unis et ailleurs. Cette analyse de cas envisage la possible application de la* Loi sur la concurrence *à la substitution de produit dans le plus vaste contexte de l'interface entre le droit de la concurrence et le droit de la propriété intellectuelle. Elle conclut que le fondement législatif sur lequel le bureau pourrait s'appuyer pour lutter contre la substitution de produit en tant qu'abus de position dominante en vertu de la* Loi sur les brevets *demeure incertain et sujet à controverse. Cette question ne sera pas réglée tant que le Bureau n'intentera pas de poursuites, créant ainsi une jurisprudence sur ce point.*

## Introduction

In a matter of first impression under the *Competition Act*, on May 13, 2014 the Competition Bureau released a Position Statement in the *Alcon* case[1] regarding what it refers to as "product hopping" or "product switching." In the context of prescription pharmaceuticals, this refers to conduct by a pharmaceutical company that is designed to switch demand from one of its products to another, with the alleged goal of making generic entry more difficult.

In its Position Statement, the Competition Bureau describes a typical pharmaceutical product hopping case as a situation in which a pharmaceutical company is concerned about potential competition from a generic version of its soon to be off-patent drug. As a result, the company will introduce a new product that may have limited (or even no) therapeutic advantages over the original product, but that does have longer patent protection. After sufficiently marketing the new product, and before generic competition can enter to compete with the older product, the pharmaceutical company will remove the original product from the market in order to require physicians to update their prescribing habits in favour of the new product. Generic versions of the original product will then find it difficult to compete and gain traction as most prescriptions written by physicians will relate to the new product for which the generic cannot be easily substituted.[2]

In the *Alcon* inquiry, the Competition Bureau's investigation concerned whether the alleged "product hopping" conduct in question violated the *Competition Act*'s abuse of dominance provisions. The Bureau ultimately discontinued its inquiry because the product in question had only been withdrawn from the market for a limited period of time, such that no injury occurred.

The interesting legal question arising out of the case, however, is whether a supplier withdrawing a patent-protected product from the marketplace—and introducing a new product—can ever constitute an

anti-competitive act under the *Competition Act*'s abuse of dominance provisions. While there are reasonable arguments each way, for the reasons set out below, we think the better view is that the refusal to supply a patent-protected product *cannot* be an anti-competitive act.

## International Background

Product hopping has raised antitrust concerns in both the US and Europe. In the US, courts agree that, generally, the introduction of new products is pro-competitive. Consequently, in the normal course, introducing a new product does not raise antitrust concerns. That said, US courts have articulated antitrust concerns where the entry of a new product is combined with some other act or acts, such that the comprehensive effect is likely to stymie competition and reduce consumer choice.[3] However, reallocating resources to promote a new product, but leaving the original product on the market, has not attracted censure.[4]

Most recently, in December 2014, the United States District Court for the Southern District of New York granted the New York Attorney General's motion for a preliminary injunction to require the defendant pharmaceutical company to continue selling its older product that was going off patent, where the defendant had planned to remove the product from the market. The court found that the "hard switch" would injure competition and the defendant's plan to remove the older product was intended to avoid state generic substitution laws. In January 2015, the Second Circuit Court of Appeals denied the defendant's motion for a stay of the injunction, but did grant its motion for an expedited appeal.[5]

Similarly, in European product hopping cases the authorities have maintained that the practice of encouraging consumers to switch to a newer version of a drug is an acceptable practice in and of itself. However, European authorities are concerned when the introduction of a new product is accompanied by what has been viewed as an improper use of regulatory procedures which has no reasonable business justification other than restricting or limiting the entry of generic competition.[6]

## The *Alcon* Case

Alcon Canada Inc. ("Alcon") was a supplier of the patented anti-allergy drug Patanol. One of the two patents protecting Patanol was set to expire in the Fall of 2012 and generic entry appeared likely to occur shortly thereafter. A short time before that, Alcon had introduced a new drug, Pataday, with much longer patent protection. The Competition Bureau alleged that Alcon began restricting the stock of Patanol

available in the marketplace from July 2012 in order to accustom or "habituate" physicians to prescribing Pataday.[7] Pataday is indicated to address the same allergy concerns as Patanol, although it is a longer lasting formulation. Pataday's sales were increasing but were much smaller than those of Patanol until September 2012, when Patanol was no longer available in the marketplace. Sales of Pataday then replaced the vast majority of the sales of Patanol.

The Competition Bureau's theory appeared to rest on the notion that Alcon abused its dominant position in the market to influence physicians' prescribing habits. To become established in the marketplace, generic drugs generally depend on substitution by pharmacists of the generic drug for the prescribed brand name drugs. That is, if two drugs—one brand name and one generic—are chemically equivalent, pharmacists can (and under many drug plans must) substitute the less expensive generic for the more expensive brand name drug. However, insofar as prescriptions are no longer written for the original brand name drug and are instead written for a chemically different replacement drug, for which—because of extended patent protection—there is no generic substitute, the pharmacist cannot substitute a generic version of the withdrawn brand name drug on prescriptions written for the newly introduced and chemically different brand name drug. This can deprive the generic drug of significant sales, and may discourage generic manufacturers from introducing the drug into the marketplace at all.

As noted above, the Bureau closed its Alcon inquiry in March 2014. It found that while Patanol had been withdrawn in the Summer of 2012 it was reintroduced into the marketplace relatively soon after the Bureau launched its inquiry. By May of 2013, which was the beginning of the allergy season during which demand for the drug was high, Patanol's sales were back where they had been prior to the withdrawal, which presumably demonstrated that physicians had not been "habituated" to prescribe Pataday. Further, the Bureau noted that competitors subsequently entered the marketplace with generic versions of Patanol and captured a significant market share.

## Discussion

### 1. Overview

This is the first instance—at least the first publicly known instance—of the Competition Bureau pursuing product hopping as an anti-competitive act under the abuse of dominance provisions of the *Competition Act*. The Bureau notes in its Position Statement[8] that life cycle management strategies in the pharmaceutical sector are not

inherently anti-competitive, and may bring significant advancements in health care. Nevertheless, there is clearly a concern that product hopping may be anti-competitive.

As noted above, the key issue in cases such as this is whether the refusal to supply a patent protected product constitutes an anti-competitive act, which is a necessary element in establishing an abuse of dominance. This issue involves a consideration of not only the provisions of the *Competition Act*, but also Canada's intellectual property laws, and the jurisprudence governing the interface between competition and intellectual property laws.

### 2. Refusal to Supply as Anti-Competitive Conduct

Whether the refusal to supply *any* product constitutes anti-competitive conduct (even without the patent/IP issue) is, by itself, a controversial question. In US jurisprudence, the Supreme Court's judgment in *Aspen Skiing*,[9] which required the owner of a ski resort on mountains adjacent to the plaintiff's ski resort to continue established co-operation in the provision of multi-mountain lift tickets, has been described as "at or near the outer boundary"[10] for antitrust liability for refusal to supply a product. Nevertheless, as noted above, US and EU law has sometimes recognized antitrust liability in the product hopping context.

Under the abuse of dominance provisions of the *Competition Act* there is some recognition that failure to supply a needed product can have anti-competitive effects. Subsection 78(b) (buying up suppliers); subsection 78(e) (pre-emption of scarce facilities); and subsection 78(h) (preventing suppliers from supplying others) of the *Competition Act*[11] all deal with the issue of depriving rivals of needed inputs or facilities. In no case, however, is the act of failing to supply itself defined as an anti-competitive act—it is instead precurser acts which are identified. Nevertheless, these provisions suggest that refusal to supply an essential input could itself be anti-competitive conduct. While the product hopping scenario is not the refusal to supply an allegedly essential input to a rival, there is an argument that, in essence, it comes to much the same thing. The Bureau's 2012 Abuse of Dominance Guidelines[12] do not address this question directly, but do state that conduct that "makes customers more difficult for rivals to acquire"[13] may amount to an anti-competitive act.

Assuming, for the purpose of considering the issue, that refusal to supply an essential input to a rival—or to the marketplace when the result is that failure to do so will keep rivals out of the marketplace—can constitute an anti-competitive act (although also recognizing the

historic reluctance of courts and antitrust authorities to make orders regarding supply), the additional challenge in the product hopping situation becomes determining the importance to the analysis of the fact that the product in issue is patent protected.

### 3. IP Guidelines

The Bureau's recently replaced *Intellectual Property Enforcement Guidelines* (*Old IP Guidelines*)[14] stated that the "mere exercise" of intellectual property rights—including refusing to supply someone with intellectual property rights—would not, in the Bureau's view, constitute an infringement of the *Competition Act*, except possibly under the special remedies provisions in Section 32.[15] Specifically, the Old IP Guidelines provided:[16]

> The mere exercise of an IP right is not cause for concern under the general provisions of the *Competition Act*. The Bureau defines the mere exercise of an IP right as the exercise of the owner's right to unilaterally exclude others from using the IP. The Bureau views an IP owner's use or *non-use* (emphasis added) of the IP also as being the mere exercise.

In September 2014 the Bureau published revised *Intellectual Property Enforcement Guidelines (New Guidelines)*,[17] updating the *Old IP Guidelines* given statutory changes in the interim. Interestingly, virtually the only substantive change in the *New Guidelines* was with respect to non-use of intellectual property. Under the *New Guidelines*, the Bureau takes the view that a refusal to use intellectual property could be challenged under the abuse of dominance provisions. Thus, in the *New Guidelines*' parallel paragraph to the above, the words "or non-use" were deleted.

### 4. Canadian Jurisprudence

The issue of whether non-use of a right by the holder of an intellectual property right, or refusal to supply an IP protected product, can constitute actionable anti-competitive conduct has been the subject of some jurisprudence, although in the context of other types of intellectual property, not patents. In the *Tele-Direct*[18] case, dealing with refusal to allow third party use of trade-marks as an alleged anti-competitive act in an abuse of dominance proceeding, the Tribunal stated:[19]

> The Tribunal is in agreement with the Director that there may be instances where a trade-mark may be misused. However, in the Tribunal's view, something more than the mere exercise of statutory rights, even if exclusionary in effect, must be

present before there can be a finding of misuse of a trade-mark. Subsection 79(5) explicitly recognizes this.

> The respondents' refusal to license their trade-marks falls squarely within their prerogative. Inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to grant a licence; selectivity in licensing is fundamental to the rationale behind protecting trade-marks. The respondents' trade-marks are valuable assets and represent considerable goodwill in the marketplace. The decision to license a trade-mark -- essentially, to share the goodwill vesting in the asset -- is a right which rests entirely with the owner of the mark. The refusal to license a trade-mark is distinguishable from a situation where anti-competitive provisions are attached to a trade-mark licence. [...]
>
> While the evidence suggests that Tele-Direct is motivated, at least in part, by competition in its decision to refuse to license its trade-marks, the fact is that the *Trade-marks Act* allows trade-mark owners to decide to whom they will license their trade-marks. The respondents' motivation for their decision to refuse to license a competitor becomes irrelevant as the *Trade-marks Act* does not prescribe any limit to the exercise of that right. [...]
>
> While independent advertising agencies and consultants may wish to use the respondents' trade-marks, there is simply no basis for granting an order requiring the respondents to license their trade-marks.[30] Although the respondents may have been zealous in protecting their trade-marks, both in refusing to license and in threatening litigation for infringement, the irrefutable fact is that the respondents have been, through the provisions of the *Trade-marks Act*, accorded the right to refuse to license their trade- marks, even selectively. The exercise of this right is protected from being an anti-competitive act by subsection 79(5) of the Act.

In the *Warner Music*[20] case, dealing with refusal to supply copyright materials in the context of a section 75 (refusal to deal) proceeding, the Tribunal stated:[21]

> Copyright subsists in Canada for Warner Canada by reason of subsection 5(1) of the *Copyright Act* and in Canada for WEA by reason of the treaty provisions referred to in section 5. Since 1993, there has been no provision in the *Copyright Act* which limits the copyright holder's sole and exclusive right to licence. These conclusions mean that as a matter of copyright law the

> respondents have the right to refuse to licence the Warner master recordings to BMG (Canada).
>
> The *Copyright Act* is similar to the *Trade-marks Act*, in that it allows the trade-mark owner to refuse to license and it places no limit on the sole and exclusive right to license.

The take-away from both of these cases is that failure to supply an IP protected product is, at least *prima facie*, an inherent right associated with the IP grant, and not subject to challenge under the general provisions of the *Competition Act*. However, as noted, these cases did not involve patent protected products, but rather other types of intellectual property.

### 5. The *Patent Act*

The *Patent Act* is somewhat different than the *Copyright Act* and the *Trade-marks Act*. Prior to 1993 the *Patent Act* contained a provision that made "non-working" of a patent a form of patent abuse.[22]

> 65(2). The exclusive rights under a patent shall be deemed to have been abused in any of the following circumstances:
>
> (a) if the patented invention (being one capable of being worked within Canada) is not being worked within Canada on a commercial scale, and no satisfactory reason can be given.

Among the remedies available for such patent abuse were the ability of the Commissioner of Patents to grant a compulsory license, or if that would not attain the object of the section, to revoke the patent. In 1993 that provision (65(2)(a)) was repealed as part of the implementation of the North American Free Trade Agreement ("NAFTA").[23]

The granting of a patent is regarded as part of a bargain between the inventor and the state. In exchange for full disclosure of a new and useful invention, the state grants the inventor a limited monopoly right.[24] The pre-NAFTA provision recognized that the inventor was not holding up his or her end of the bargain by withholding the benefit of the invention from the public. While that form of patent abuse was removed from the *Patent Act*, other forms of patent abuse remain. The *Patent Act* continues to provide that the rights under a patent shall be deemed to have been abused:[25]

> (c) if the demand for the patented article in Canada is not being met to an adequate extent and on reasonable terms;
>
> (d) if, by reason of the refusal of the patentee to grant a licence or licences on reasonable terms, the trade or industry of Canada

> or the trade of any person or class of persons trading in Canada, or the establishment of any new trade or industry in Canada, is prejudiced, and it is in the public interest that a licence or licences should be granted;
>
> (e) if any trade or industry in Canada, or any person or class of persons engaged therein, is unfairly prejudiced by the conditions attached by the patentee, whether before or after the passing of this Act, to the purchase, hire, licence or use of the patented article or to the using or working of the patented process; or
>
> (f) if it is shown that the existence of the patent, being a patent for an invention relating to a process involving the use of materials not protected by the patent or for an invention relating to a substance produced by such a process, has been utilized by the patentee so as unfairly to prejudice in Canada the manufacture, use or sale of any materials.

Thus, cutting off the supply of the older form of a drug in Canada prior to the expiry of the patent, in order to move users to the newer version, as was the concern underlying the Commissioner's Alcon investigation, *may* arguably constitute patent abuse under Section 65(2)(c). No case has explored the question. The remedy provided by the *Patent Act*, however, is to permit the Attorney General of Canada or any person interested (such as a generic drug manufacturer) to commence proceedings before the Commissioner of Patents to seek a compulsory license. The Commissioner of Competition might be a "person interested," although the matter has not been tested. If the Commissioner of Patents finds that a compulsory license may not attain the objects of s. 65, he or she has the power to revoke the patent.[26]

## 6. Analysis

The fact that refusing to supply a patent protected product might constitute patent abuse—with the remedies available under the *Patent Act* for that conduct—does not necessarily mean that such conduct is an anti-competitive act for the purposes of the *Competition Act's* abuse of dominance provisions. It is submitted that the logic of the *Tele-Direct* and *Warner Music* cases, with respect to the *Trade-Marks* and *Copyright* acts, respectively, also applies to the *Patent Act*. In other words, if a statutory monopoly—whether a copyright, a patent or a trade-mark—confers the right to exclude others, it follows that the right to refuse to supply the protected product is inherent in that statutory monopoly as well.

The difference between the *Copyright Act* or *Trade-marks Act* and the *Patent Act*, however, is that the latter contains the non-working

provisions which allow for certain specific remedies. The *Copyright Act* has no non-working provisions which are analogous. A work is still subject to copyright whether or not it is published, reproduced, or performed. Indeed, copyright includes the exclusive right to publish an otherwise unpublished work. There is no concept in the *Copyright Act*, as there is in the remaining provisions in section 65 of the *Patent Act* respecting patent abuse, of adequately satisfying demand for the protected work. That said, the *Trade-marks Act* does contain a mechanism, in the form of the expungement procedure, for clearing unused trade-marks from the registry so that the trade-mark can be available for others to use. If an owner fails to use a registered trade-mark, any party may require the Registrar of Trade-marks to require the registered owner to file proof of use within the three-year period preceding the notice. If satisfactory proof is not filed, the mark is liable to being expunged.[27] This provision of the *Trade-marks Act* was not relevant to the Tribunal in the *Tele-Direct* case. Can the fact that the *Patent Act* has such remedies take what would otherwise—arguably—have been a perfectly proper right not to supply a patented product and change it into an anti-competitive act as part of abuse of dominance?

As noted in the *Tele-Direct* case, the abuse of dominance provisions of the *Competition Act* themselves contain a provision relevant to the issue. Section 79(5) of the *Competition Act* provides:[28]

> For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

The argument of the Competition Bureau would be, presumably, that because of the abuse provisions of the *Patent Act* (section 65(2)), refusal to provide the patented product is not an act engaged in pursuant only to the exercise of a right or enjoyment or an interest derived under the *Patent Act*. The opposite argument, however, is that such a refusal to supply is *exactly* such an act. It is just that, in certain circumstances, the *Patent Act* provides that there are particular remedies that can be taken if a problem develops.

In addition to the above analysis, the *Competition Act* also contains, in Section 32,[29] a set of provisions to address the alleged abuse of intellectual property rights. As noted in the *Old IP Guidelines*, the non-use of intellectual property was seen as part of the mere exercise of the right granted by the statute and was only challengeable by competition authorities under Section 32 of the *Competition Act*. While the *New IP*

*Guidelines* change this approach, without any cited authority, it is not clear to us that the change is justified. If the issue is alleged misuse of patent rights giving rise to anti-competitive outcomes, Section 32 was Parliament's remedy to such a situation.

## Conclusion

The argument as to whether refusal to supply a patent protected product can constitute anti-competitive conduct is an interesting one. We incline to the view that, given the case law, and the provisions of both Sections 79(5) and 32 of the *Competition Act*, refusal to provide a patent protected product does not constitute abuse of dominance—but the point is open. Given the Competition Bureau's stance—that it will seek to challenge product hopping in appropriate circumstances—it is likely that we will get jurisprudence considering this issue at some point. Until then, the debate is likely to continue.

## Endnotes

[1] Canada, Competition Bureau, "Competition Bureau Statement Regarding the Inquiry into Alleged Anti-Competitive Conduct by Alcon Canada Inc." (May 13, 2014), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03686.html> [Alcon Statement].

[2] *Ibid.*

[3] *In Re: Suboxone (Buprenorphine Hydrochloride and Naloxone) Antitrust Litigation*, 2:13-md-02445-MSG, Mem Op (ED Pa 2014) at p 18.

[4] *Walgreen Co v AstraZeneca Pharmaceuticals LP*, 534 F Supp 2d 146 (DDC 2008) [Walgreen].

[5] *The People of the State of New York v Actavis PLC et al*, 1:14-cv-07473 (SDNY 2014) on appeal at *The People of the State of New York v Actavis PLC et al*, 14:4624 (2d Cir Ct App).

[6] Case COMP/A.37.507/F3—*AstraZeneca* (15 June 2005), online: European Commission <http://ec.europa.eu/competition/antitrust/cases/dec_docs/37507/37507_193_6.pdf>, upheld on appeal to the General Court at Case T-321/05—*AstraZeneca v Commission* (1 July 2010), [2010] ECR II-2805, upheld on appeal to the European Union's Court of Justice at *AstraZeneca v Commission of the European Communities* (C-457/10 P) [2010] OJ C301/18; See also Decision No CA98/02/2011 (12 April 2011), Case CE/8931/08, non-confidential version online: Office of Fair Trading <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_oft/ca-and-cartels/rb-decision.pdf>.

[7] Written Representations of the Commissioner of Competition, *Commissioner of Competition v Alcon Canada Inc*, Federal Court of Canada, Court File No T-2223-12 at para 10.

[8] Alcon Statement, *supra* note 1.

[9] *Aspen Skiing Co v Aspen Highlands Skiing Corp*, 472 US 585 (1985).

[10] *Verizon Communications v Law Offices of Curtis V Trinko*, LLP, 540 US 398 at p 7 (2004).

[11] *Competition Act*, RSC 1985, c C-34, s 78(b), 78(e), 78(h) [*Competition Act*].

[12] Canada, Competition Bureau, "Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)" (September 2012), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03497.html>.
[13] *Ibid*, s 3.2.1.
[14] Canada, Competition Bureau, "Intellectual Property Enforcement Guidelines" (September 2000), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01286.html> [Old IPEGS].
[15] Section 32 has only been employed very rarely, and decades ago. It was employed in two cases that both involved Union Carbide of Canada. In the first case, the Attorney General challenged licences granted by Union Carbide relating to certain of its patents. See Information, *R v Union Carbide Canada Limited*, Exchequer Court of Canada, Court No. B-1979 (Oct 12, 1967); Minutes of Settlement, *R v Union Carbide Canada Limited*, Exchequer Court of Canada, Court No. B-1979 (Dec 12, 1969); see also "Report of the Director of Investigation and Research, *Combines Investigation Act*," for the year ended March 31, 1970. In the second case, the Attorney General filed an application against Union Carbide and five other companies shortly after the Minutes of Settlement were filed in the first case. It alleged that the terms of certain Union Carbide licences attempted to exclude small purchasers from a substantial part of the relevant market. See Information, *R v Union Carbide Canada Limited, Atinco Paper Products Limited, Gait Paper Products, Subob Paper Products Limited and Atlantic Packaging Company*, Court No. B03495 (Dec 15, 1969); Minutes of Settlement, *R v Union Carbide Canada Limited, Atinco Paper Products Limited, Gait Paper Products, Subob Paper Products Limited and Atlantic Packaging Company*, Court No. B03495 (Jun 19, 1971); see also "Report of the Director of Investigation and Research, *Combines Investigation Act*," for the year ended March 31, 1972.
[16] Old IPEGS, *supra* note 14, para 4.2.1.
[17] Canada, Competition Bureau, "Intellectual Property Enforcement Guidelines" (September 18, 2014), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03808.html>.
[18] *Director of Investigation and Research v Tele-Direct (Publications) Inc*, CT-1994-003 (Comp Trib).
[19] *Ibid*, pages 40-42.
[20] *Director of Investigation and Research v Warner Music Canada Ltd*, CT-1997-003 (Comp Trib) [*Warner*].
[21] *Ibid*, pages 11, 17. See also *Harris v Glaxosmithkline Inc.* 106 OR (3d) 661.
[22] *Patent Act*, RSC 1985, c P-4, s 65(2)(a).
[23] *Patent Act Amendment Act*, SC 1993, c 2, s 5; *North American Free Trade Agreement Implementation Act*, SC 1993, c 44.
[24] *Apotex Inc v Wellcome Foundation Ltd.*, [2002] 4 SCR 153 especially at para 82.
[25] *Supra* note 22, s 65(2).
[26] *Ibid*, s 66(1)(d).
[27] *Trade-marks Act*, RSC 1985, c T-13, s 45. At the time of writing, the federal government is considering significant legislative changes to the *Trade-marks Act*, including the removal of the "use" requirement for registration of a trade-mark and the adoption of the *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks*.

See *Bill C-31* (*Economic Action Plan 2014 Act, No. 1.*), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6495200&Language=E&Mode=1&Col=1>. However, the current process for expunging a registered trade-mark for three years of non-use will remain in effect. Therefore, while use will not be a prerequisite for registration, it will still be a requirement to maintain registration.

[28] *Competition Act, supra* note 11, s 79(5).

[29] *Ibid*, s 32.

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# CANADIAN COMPETITION LAW REVIEW

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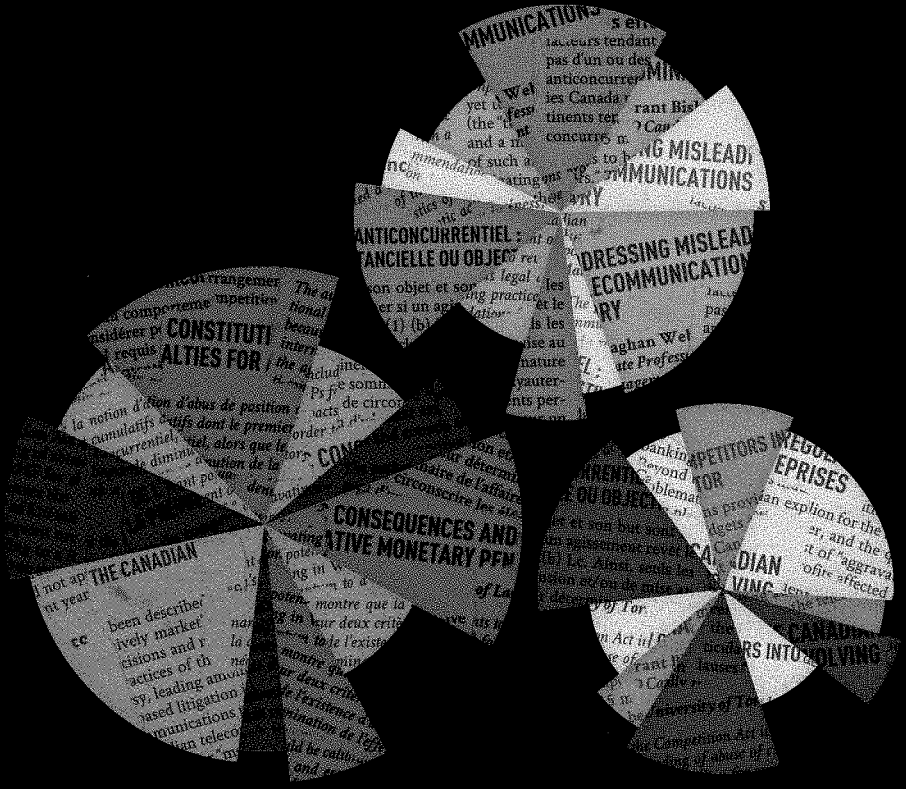

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