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Ontario Court Decision Largely Favours Rogers: Misleading Representations Provisions of the *Competition Act* Applied

In a decision issued this month,[1] the Ontario Superior Court of Justice ruled largely in favour of Rogers Communications Inc. ("Rogers") in the face of the Competition Bureau's challenges to an advertising campaign for Rogers' Chatr Wireless Inc. ("Chatr") subsidiary during 2010 - 2011. Although there were certain instances in which the Court found that Rogers had not done "adequate and proper" testing prior to making the advertising claims at issue, in general the Court found that the claims were not false or misleading and were supported by adequate and proper tests. However, the Court did not uphold Rogers' challenges, based on the *Canadian Charter of Rights and Freedoms*, to the *Competition Act's* requirement for testing before performance claims are made and the availability of $10 million administrative monetary penalties ("AMPs") for misleading representations. While the decision remains subject to a further hearing and decision on the question of the remedies as well as to an appeal that might be filed by the Bureau,[2] the Court's detailed reasons provide guidance for other advertisers with respect to the misleading representations provisions of the *Competition Act*.

Rogers' Chatr Campaign: "Fewer Dropped Calls"

The Rogers campaign was designed to differentiate Chatr's wireless services from those of the new wireless entrants, including Wind Mobile, Public Mobile and Mobilicity. It featured two representations that the Competition Bureau argued were false and misleading and not supported by adequate and proper testing: that Chatr's customers

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[1] Canada (Competition Bureau) v. Chatr Wireless Inc., 2013 ONSC 5135 (Ont. Sup. Ct.) August 19, 2013. Available at: http://canlii.ca/t/g04cv (the "Chatr Decision").

[2] In its August 20, 2013 press release (http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03592.html) the Competition Bureau said that it was considering its next steps. Although it was disappointed that the court did not agree that Rogers' claims were misleading to consumers, it was pleased that the court dismissed Rogers' constitutional challenges and that the court agreed that Rogers did not conduct adequate and proper testing before making its claims about dropped calls in some Canadian cities.

would have "fewer dropped calls than new wireless carriers" and that they would have "no worries about dropped calls". The Court dealt with the two representations as the "fewer dropped calls claim."

The Competition Bureau's challenges to the Chatr campaign were based on two provisions in the *Competition Act* that deal with "deceptive marketing practices", paragraphs 74.01(1)(a) and (b). These describe as "reviewable conduct" representations that are made to the public for the purpose of promoting a business interest and are either (a) "false or misleading in a material respect" or (b) in the form of a statement, warranty, or performance claim that is "not based on an adequate and proper test".

In an application that was filed in November 2010 and amended in March 2011, the Competition Bureau alleged that the fewer dropped calls claim contravened both provisions. The Bureau applied for an order that would, among other things, require Rogers to pay an AMP of $10 million.

Rogers defended the campaign on the basis that the fewer dropped calls claim was not false or misleading and that it was supported by adequate and proper tests. Further, Rogers challenged the "adequate and proper test" provision of the *Competition Act* as violating the s. 2(b) freedom of expression provision of the *Canadian Charter of Rights and Freedoms* and the AMPs provision as constituting an impermissible "true penal consequence," and contrary to the procedural and other safeguards of criminal processes guaranteed by s. 11 of the *Charter*.[3]

In considering whether the fewer dropped calls claim was false or misleading in a material respect, the Court referred to the Supreme Court of Canada's decision, *Richard v. Time Inc*.[4] which considered a direct mail campaign to the public at large which included a claim that the recipient was a prize-winner. The representations had been considered under Quebec's *Consumer Protection Act*. In *Richard v. Time*, the Supreme Court had determined that the average consumer under that legislation was "credulous and inexperienced", a very low threshold for consumer awareness and scepticism. This standard was considered but not adopted outright by the Ontario Court. In light of the

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[3] Rogers' challenges to the AMPs provision and the "adequate and proper test" provision of the *Competition Act* were described in my article at: http://www.caobrienlaw.com/resources.

[4] 2012 SCC 8, [2012] 1 S.C.R. 265 [*"Richard v. Time"*].

different purposes of consumer protection legislation and the *Competition Act*, and noting that the representations were not being made to the public at large, it stated that the relevant consumer for the purposes of considering the Chatr claims was a "person wanting unlimited talking and texting wireless services as well as cost certainty" and a "credulous and technically inexperienced consumer of wireless services."[5] This analysis aligns with traditional analysis under the *Competition Act*, which considers the characteristics of the average purchaser of the product or service at issue, rather than of consumers generally.

The Court considered the literal meaning of the ads, the visual images and sounds used, the relevant time period during which the claims were made and the general impression created by the ads. It determined that in order for the claim to be neither false nor misleading, the Rogers network must have had fewer dropped calls than Wind Mobile or Public Mobile in each of Montreal, Toronto, Ottawa, Edmonton, Calgary and Vancouver during the relevant time period.[6]

"Adequate and Proper" Testing

The Court's analysis began by noting that the *Competition Act* does not define an "adequate and proper test" but leaves the term to be determined in the context of a particular representation and its general impression. Citing the Competition Tribunal's 2008 *Imperial Brush* decision,[7] the Court stated that subjectivity should be eliminated as much as possible and that the test must establish the effect claimed. Although the test need not be as exacting as would be required for publication in a scholarly journal, it should demonstrate that the result claimed is not a chance result.[8]

The Court ruled that Rogers had not conducted adequate and proper tests before making the fewer dropped calls claim with respect to certain markets (Calgary and Edmonton) as required by s. 74.01(1)(b) and that it failed to test its network against Public Mobile's network in Toronto and Montreal. As such, it found that Rogers engaged in reviewable conduct contrary to the Act in those instances.

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5 Chatr Decision, paragraphs 129 and 132.

6 Chatr Decision, paragraphs 133 – 177.

7 Canada (Commissioner of Competition) v. Imperial Brush Co., 2008 Comp. Trib. 2 (Competition Tribunal).

8 Chatr Decision, paragraph 295.

However the Court found that, for the most part, the testing done by Rogers was "adequate and proper". In particular, "drive testing," which involved placing simultaneous calls on competing networks at exactly the same location and containing the same content, was accepted as the international standard test for comparisons of network performance. After reviewing the Bureau's critique of these tests, Justice Marrocco rejected the argument that "switch data" test results were either required or more reliable. He was satisfied that drive test results were capable of adequately and properly testing the fewer dropped calls claim.[9] However he ruled that a "test" is required. Although he was satisfied that Rogers' network did have the technical advantages claimed, these advantages did not relieve Rogers of testing the fewer dropped calls claim.[10]

From the perspective of other advertisers, the Chatr Decision illustrates the detailed analysis that may be undertaken in the context of a challenge to comparative and other performance claims. It provides a good example of the efforts that should be undertaken to design and conduct testing to support these types of claims. Further, it underlines the fact that it may be necessary to replicate testing in a number of markets, to support claims that are specific to those markets. Advertisers should not assume that results can be generalized for the purposes of performance claims.

Rogers' *Charter* Challenges Denied

With respect to Rogers' *Charter* challenges, the Court agreed that the s. 74.01(1)(b) requirement to conduct "adequate and proper" tests prior to making a performance claim does infringe freedom of expression. However, it found that the provision has a "pressing and substantial objective" of protecting consumers, competitive firms and competition from the harmful effects of false or misleading performance claims, that there is a "rational connection" between the provision and the protections to be provided, that it "minimally impairs" freedom of expression, and that its benefits outweigh its deleterious effects. As such the provision is a demonstrably justified reasonable limit to expression and is saved by s. 1 of the *Charter.*

In its analysis of the AMPs provision, the Court referred to the fact that under s. 74.1(4) an AMPs order must be made for the purpose of promoting conduct that is in conformity

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[9] Chatr Decision, paragraphs 316, 335 and 379.

[10] Chatr Decision, paragraphs 336 – 363.

with the Deceptive Marketing Practices Part of the *Competition Act,* and not with a view to punishment, reflecting the principle of proportionality. Noting that the misleading representations provisions are regulatory in nature, the Court concluded that AMPs are not "true penal consequences" and that s. 11 of the *Charter* is not engaged.

As noted above, a hearing remains to be held with respect to the remedy, if any, to be ordered against Rogers. If an AMP is ordered, the amount will provide some guidance to advertisers and their advisors by indicating the level of concern the Court had with the representations and testing involved in the Chatr campaign. The decision is also subject to an appeal by the Competition Bureau.

Based on the Chatr Decision, however, advertisers should appreciate that they may face significant difficulties in attempting to challenge either the *Competition Act's* requirement to conduct adequate and proper tests prior to making a performance claim or the high level of AMPs that may be ordered where a court determines that the reviewable conduct of making misleading representations has occurred. As such, advertisers should take care to ensure that appropriate testing is conducted prior to making any performance claim and continue to carefully review all representations to ensure that they are not misleading in a material respect.

Please address any questions about the deceptive marketing practices provisions of the *Competition Act* or related matters, to Carol Anne O'Brien at caob@caobrienlaw.com, or (416) 640-7270.

Carol Anne O'Brien's law practice is focused on competition law and the specialized regulatory regimes that relate to broadcasting and telecommunications, cultural industries, food, drugs, cosmetics, medical devices and consumer products, Internet domain names and privacy.