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Rogers Challenges the Competition Bureau:

Administrative Monetary Penalties for Misleading Representations and

The "Adequate and Proper Test" Provision of the *Competition Act*

In 2010 Rogers Communications Inc. ("Rogers") advertised its Chatr discount wireless telecommunications service with the claim that it had "fewer dropped calls" than new wireless carriers. Following a complaint to the Competition Bureau by Globealive Wireless, the parent company of the new entrant Wind Mobile, the Bureau conducted a two-month investigation and concluded that there was no discernible difference in dropped call rates between Rogers/Chatr and the new entrants. The Competition Bureau then initiated legal proceedings in the Ontario Superior Court alleging that Rogers had made misleading representations to the public, contrary to the misleading representations reviewable conduct provision of the *Competition Act*, (the "Act") s.74.01(1)(a) and (b). The Bureau is seeking an order which would, among other things, require Rogers to pay an administrative monetary penalty ("AMP") of $10 million, pursuant to s.74.1(1)(c)(ii) (the "AMPs Provision") of the Act.[1] In response, Rogers is seeking declarations that both the AMPs Provision and s.74.01(1)(b) (the "Adequate and Proper Test Provision") of the Act violate the *Canadian Charter of Rights and Freedoms* (the "Charter") and are therefore of no force or effect.

AMPs Provision. With respect to the AMPs Provision, Rogers is arguing that $10 million AMPs are unconstitutional because penalties of that "magnitude are criminal in nature and constitute true penal consequences". However, pursuant to the AMPs Provision the AMPs can be imposed following a civil proceeding, where a defendant

[1] The Competition Bureau's November 19, 2010 press release, "Competition Bureau Takes Action Against Rogers Over Misleading Advertising" is available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03316.html.

does not have the Charter-guaranteed protections of criminal procedure, including the requirement that the case against it be proven beyond a reasonable doubt.

The increase in the magnitude of AMPs, from $200,000 to $10 million, was one of the many amendments made to the Act in 2009. Challenges to the constitutionality of the new AMPs Provision were anticipated when those amendments were made, and prior to that, when $10 million AMPs were proposed for the abuse of dominant position provision of the Act. However, it is notable that one of Rogers' most important competitors seems to have accepted that the AMPs Provision is constitutionally valid. In 2011 Bell Canada agreed to a settlement with the Competition Bureau, with respect to pricing claims for bundled services, on terms that included the payment of a $10 million AMP.[2] It is worth noting, too, that in a case where significant civil penalties provided for in the *Investment Canada Act* were challenged as being impermissible penal consequences, they were upheld by the Federal Court. In its June 14, 2010 decision relating to U.S. Steel's acquisition of Stelco,[3] the Court held that fines of up to $10,000 per day, which could be ordered where a non-Canadian investor was found not to have complied with undertakings, were not unconstitutional. It reviewed the nature of the proceedings at issue and noted that the magnitude of a penalty cannot be assessed in isolation and must be sufficiently significant to be effective, such that it not be capable of being considered to be simply the cost of doing business.

Adequate and Proper Test Provision. The Adequate and Proper Test Provision provides that reviewable conduct can be found where a business promotes a product or business interest, directly or indirectly, by making a representation to the public in the form of a performance claim statement that is not based on an "adequate and proper test". Rogers is arguing that because the test is required to be conducted before a business makes the performance claims, the provision infringes its freedom of expression as guaranteed by the Charter. In a 2008 decision,[4] the Competition Tribunal held that the Adequate and Proper Test Provision violated s. 2(b) of the Charter, but went on to hold that the violation was justified under the Charter's s.1. That

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[2] See the Bureau's June 28, 2011 press release, available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03388.html.

[3] The Federal Court's decision is available at: http://decisions.fct-cf.gc.ca/en/2010/2010fc642/2010fc642.htm.l

[4] *Canada (Commissioner of Competition) v. Imperial Brush Co*., 2008 Comp. Trib. 2.

determination is not binding on the Ontario Superior Court and Rogers argues that, particularly in the age of the Internet when consumers "can expose false or misleading performance claims within milliseconds", they are no longer at a disadvantage as compared to the business making the performance claim. Market forces, combined with the Act's other misleading representations provisions – specifically, s. 74.01(1)(a) which prohibits false or misleading representations to the public as reviewable conduct and s. 52(1), the criminal misleading representation provision – are sufficient to deter false performance claims. Rogers argues that the Adequate and Proper Test Provision does not minimally impair freedom of expression and is overbroad. The U.S. Federal Trade Commission's requirement that a business has a "reasonable basis" for making a product claim is described as a more flexible approach, which allows for the consideration of post-claim evidence and which strikes a "balance between the costs associated with substantiation and the expected benefits of substantiation". It is Rogers' position that the purported benefits of the Adequate and Proper Test Provision "do not outweigh its infringement on the very significant Charter right to freedom of expression."

The Court's rulings with respect to both the AMPs Provision and the Adequate and Proper Test Provision will provide important guidance to Canadian businesses in all industries, with respect to their advertising and marketing.

Please address any questions about the misleading representations provisions of the *Competition Act*, or any other competition law matter, to Carol Anne O'Brien at caob@caobrienlaw.com, or (416) 640-7270.

Carol Anne O'Brien's law practice is focused on regulatory matters including communications law (broadcasting and telecommunications), competition law, advertising and marketing, Internet domain names and privacy.