



# **Key Differences Between U.S. and Canadian Antitrust/Competition Laws**

October 26, 2005

## Table of Contents

	Tab
<b>Agenda</b>	<b>1</b>
<b>Firm and Practice Group Overview</b>	<b>2</b>
<b>PowerPoint Presentations</b>	<b>3</b>
Pricing and Distribution - Comparisons and Contrasts by <i>Anthony F. Baldanza, Mark A. A. Warner &amp; Frank P. Monteleone</i>	
Cartel Enforcement - Compliance and Defense Strategies by <i>Neal J. Smitheman, Mark A. A. Warner and Frank P. Monteleone</i>	
Class Actions - Responding to the Challenge by <i>Paul J. Martin and Frank P. Monteleone</i>	
<b>Speakers Biographies</b>	<b>4</b>
Anthony F. Baldanza	
Paul J. Martin	
Hon. William P. McKeown, Q.C.	
Frank P. Monteleone	
Neal J. Smitheman	
Mark A. A. Warner	



## **Agenda**

- 11:45 a.m. Registration and Networking Reception
- 12:15 p.m. Luncheon Program - Opening Remarks  
by *Hon. William P. McKeown, Q.C. and Ronald Peppe, Vice President, Law and Technology, ACC*
- 12:20 p.m. Pricing and Distribution - Comparisons and Contrasts  
by *Anthony F. Baldanza, Mark A. A. Warner & Frank P. Monteleone*
- 12:45 p.m. Cartel Enforcement - Compliance and Defense Strategies  
by *Neal J. Smitheman, Mark A. A. Warner and Frank P. Monteleone*
- 1:10 p.m. Class Actions - Responding to the Challenge  
by *Paul J. Martin and Frank P. Monteleone*
- 1:35 p.m. Q and A session

# An Overview of Fasken Martineau

## A Full Service National and International Firm

Fasken Martineau is a leading national business and litigation law firm in Canada with offices in the country's major business centres. Its New York and London locations make it one of only two Canadian firms with an established presence in the two major financial centres of the world and its Johannesburg office is the first of a Canadian law firm anywhere in Africa.

With approximately 580 lawyers practising in 50 practice areas, the firm provides services in virtually all areas of Canadian law to clients located within Canada and internationally, and in almost all industry sectors. Fasken Martineau has expertise in both of Canada's legal systems, common law and civil law, in both English and French.


Fasken Martineau is acknowledged for its particular experience in cross-border M&A and securities work, banking and financial services, competition, insolvency and restructuring, tax, litigation, labour, estates and trusts, and arbitrations, as well as in computer and information technology law and intellectual property.

The firm's clients include both public and private companies, individuals, government agencies and professional regulatory bodies. Fasken Martineau acts for Canadian and foreign-owned chartered banks, Canadian insurance and trust companies, major industrial and processing firms, Canadian and foreign-owned investment dealers and underwriting firms, mutual fund groups, administrative tribunals, radio, television and cable broadcasting companies, natural resource corporations, telecommunication companies, high technology companies and accounting and receivership firms. The firm also acts for a number of non-profit and charitable organizations such as hospitals, art galleries, churches, libraries and colleges.

Fasken Martineau has long-standing relationships with clients such as Air Canada, AT&T, BMO Nesbitt Burns, Canada Post Corporation, CP Rail, DaimlerChrysler Canada, De Beers, DuPont, ING Canada, O&Y Properties Corporation, PricewaterhouseCoopers, RBC Dominion Securities, Rogers Wireless Communications, Scotia Capital, TD Bank Financial Group, The Bank of Nova Scotia, and The National Bank of Canada, among other household names.

Our litigators appear regularly before all levels of federal and provincial courts, as well as various administrative tribunals in Canada. We provide our clients with nationally-recognized litigation, arbitration and alternative dispute resolution skills, and we work as a team with our clients to achieve optimal results. We make extensive use of state-of-the-art litigation support and case management technology to deliver services to our clients as quickly and as cost-efficiently as possible. We have frequently acted for both Canadian and U.S. clients in a wide variety of cross-border legal matters, and we are often retained by U.S. attorneys to act as Canadian agents for their clients when they become involved in Canadian litigation.

Our New York office advises on business law matters having a cross-border component. The range of expertise in the New York office includes mergers & acquisitions, corporate finance,



capital markets, banking, anti-trust, international joint ventures and Canadian regulatory matters. In addition to regularly providing a broad range of business law advice, representative briefs include cross-border equity/debt offerings, and acquisitions and divestitures of Canadian businesses. New York office clients include Morgan Stanley & Co. and Goldman Sachs & Co.

The London office works closely with UK and continental European lawyers and other professional advisers to advise and assist clients with business and other transactions having a Canadian dimension. The London office's areas of expertise include business acquisitions, corporate finance, capital markets, international joint ventures, banking, insolvency, Canadian regulatory requirements, project finance and privatisation.

The Johannesburg office of Fasken Martineau provides legal advice to North American and European companies looking to invest in the African continent as well as South African companies looking for foreign debt and equity finance, cross-border and cross-continent mergers and acquisitions, privatizations, public-private partnerships, restructuring and trade. Many of the Johannesburg office engagements are resource or energy-related matters.

## Our Offices

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## Antitrust/Competition & Marketing Law Group

### Our Lawyers

The core membership of our Antitrust/Competition & Marketing Law Group consists of 14 lawyers in the Toronto office, three in the Vancouver office and three in the Montreal office. Group lawyers include both lawyers with a business law background, and litigation lawyers who represent our clients in proceedings before the courts and the Competition Tribunal.

### Experience and Expertise

We have extensive experience and expertise in all areas of competition law, including mergers, criminal matters, reviewable practice and reviewable conduct matters, pricing and distribution issues, marketing and advertising matters, and competition law litigation. We provide advice, assistance and representation to clients in designing, negotiating and implementing transactions, commercial relationships, advertising and marketing programmes and competition law compliance programmes, and in responding to actions and initiatives of third parties whose interests may be adverse to those of our clients. We have considerable experience in advising clients that participate in concentrated industries, where there are often significant competition law issues. We also have substantial experience in representing clients in connection with criminal investigations under the Competition Act, including 'dawn raids' and information demands made by the Canadian Commissioner of Competition under Section 11 of the Competition Act ("Section 11 Orders").

We understand the economic principles underlying competition policies and the application of competition rules. Our lawyers have, in many cases, both an economic and legal background. Furthermore, some of our lawyers have worked on the staff of, or as counsel to, the Canadian Competition Bureau, the Canadian Competition Tribunal and international organisations dealing with competition matters such as the OECD.

The following is a summary of the principal categories of competition law services that the firm provides:

#### **i. Mergers**

In this area, we provide advice and representation to clients in relation to a wide range of merger transactions, including take-over bids, negotiated acquisitions and combinations, joint ventures and strategic alliances. We regularly assist clients wanting to advance a merger, and those seeking to oppose a merger, and those (such as arbitrageurs and hedge funds) who seek advice as to the prospects of a proposed merger being successfully completed.

We work with clients at all stages of a merger transaction to:

- determine the impact of the Competition Act and, where applicable, other relevant regulatory legislation including the Investment Canada Act and industry-specific legislation (such as the Bank Act, the Insurance Companies Act and the Telecommunications Act) upon the transaction;
- structure the transaction so as to maximize the prospects of receiving competition law clearance while achieving the client's business objectives;
- develop a strategy and a timetable within which to deal with all competition law issues in the most effective, efficient and expeditious manner possible;
- prepare advance ruling certificate and advisory opinion requests and pre-merger notifications under the Competition Act;
- prepare competitive impact submissions, where appropriate with the assistance of economists;
- respond to information requests from the Competition Bureau;
- represent the client in meetings with the Competition Bureau to address areas of concern;
- where necessary, negotiate and settle hold-separate arrangements and Competition Tribunal consent orders and consent agreements to allow a transaction to proceed;
- where applicable, with the assistance of counsel in other relevant jurisdictions, identify potential antitrust/competition filing requirements in those other jurisdictions and coordinate same;
- where applicable, represent the client before the Competition Tribunal and the courts in respect of the merger.

We have an excellent working relationship the Competition Bureau's Mergers Branch as a result of our frequent involvement in merger transactions and our leadership roles in the Competition Law Section of the Canadian Bar Association.

## **ii. Criminal Matters / Cartels**

Our practice in this area includes advising clients how to avoid contravening the criminal provisions of the Competition Act, including the pricing and conspiracy provisions noted above, and defending against and responding to allegations, investigations or charges under the Competition Act. We have substantial experience in representing clients in criminal investigations under the Competition Act (including in respect of dawn raids and Section 11 Orders), defending clients against criminal charges under the Competition Act, and providing



advice and representation in respect of private civil actions brought in relation to conduct alleged to be contrary to the criminal provisions of the Act.

### **iii. Pricing and Distribution Issues, Abuse of Dominance**

Certain agreements, distribution contracts, supply contracts and various pricing practices may be the subject of criminal prosecution and/or private civil court action or be reviewed by the Canadian Competition Tribunal under the civil reviewable practices provisions of the Competition Act. The criminal provisions of the Act include those governing conspiracies, price maintenance, price discrimination, disproportionate promotional allowances, predatory pricing, geographic price discrimination, and those relating to agreements between federal financial institutions. Reviewable practices generally involve abuse of dominance and non-price vertical restraints of trade, including exclusive dealing arrangements, territorial restraints or market restrictions, tying arrangements, and the refusal to supply a customer. We have extensive experience in advising clients respecting pricing and distribution issues, and do so routinely for a large number of clients in a wide range of industries.

### **iv. Competition Litigation**

Fasken Martineau's Litigation Group has a pre-eminent practice in complex, multi-jurisdictional litigation. We are frequently retained as lead counsel in the defence of a multitude of claims commenced throughout North America.

Fasken Martineau's Antitrust/Competition & Marketing Law Group has extensive litigation experience, regularly providing advice and representation to clients in a broad range of competition proceedings. We regularly defend against, and in some instances pursue, civil actions based on conduct alleged to be contrary to the criminal provisions of the Competition Act. We have also acted as counsel for the Commissioner of Competition in challenging merger transactions and in claims alleging abuse of dominance and exclusive dealing.

Fasken Martineau has consistently been ranked by Lexpert as one of the two or three leading class action firms in Canada. We have particular expertise in defending against class actions based on alleged violations of the Competition Act. The types of competition class action that we have handled include claims based on conspiracy, price-fixing, misrepresentation and price discrimination.

We are experienced in:

- providing advice and assistance in responding quickly and decisively to Section 11 Orders;
- implementing the appropriate procedures for collecting, organizing and storing large volumes of evidence;
- using our experience and know-how to conduct settlement negotiations to achieve practical and timely business solutions;

- aggressively defending claims brought against our clients and protecting our clients' interests at hearings if warranted; and
- devising effective litigation strategies to ensure a successful result in the most expeditious, cost-effective and least disruptive manner.

#### **v. International**

Fasken Martineau lawyers are regularly involved in cross-border mergers often requiring multi-jurisdictional notifications and reviews. Similarly, with respect to cartel investigations, Fasken Martineau lawyers are also frequently involved in cases requiring international coordination of defense strategies arising from multi-jurisdictional governmental investigations and class actions.

Given the increasing prominence given to international cartels and multi-jurisdictional enforcement cooperation, Fasken Martineau has strengthened its capacity to meet this new challenge with the recent addition of Mark Warner. The firm's commitment to be at the forefront of the international competition law practice is reflected in Mark's experience in the OECD advising Members and emerging market Non-Members on trade and competition law issues for WTO negotiations and on international aspects of merger review, cartel enforcement and distribution issues. In particular, Mark was involved in the OECD's pivotal work on international enforcement cooperation. He has also advised governments in South America, Asia and Africa on designing and implementing competition laws.

Fasken Martineau is a leader in legislative and case-law developments in the international competition law arena. Our lawyers regularly submit comments on the legislative proposals tabled by competition authorities, participate in International competition forums (ICC Competition Commission, Business and Industry Advisory Committee to the OECD (BIAC), IBA, ABA, etc.), deliver presentations at conferences and publish articles in this field.

#### **vi. Marketing and Advertising**

In addition to representing clients before the courts and Advertising Standards Canada, we regularly provide advice with respect to specific marketing and advertising programmes before they are undertaken in order to reduce the risk of criminal prosecution or challenge by regulatory agencies or clients' competitors. We provide general marketing and advertising law advice to clients in various industries, including advice in relation to print and other forms of advertising, packaging and labelling, telemarketing, promotional contests and other forms of promotions.

#### **vii. Competition Law Compliance Programmes; Assisting Trade Associations**

Many violations of Canada's competition laws do not arise due to a willful disregard of the law, but rather due to the complex nature of Canada's competition laws and the fact that they are frequently not well understood by businesses. We have extensive experience in assisting clients with the design and implementation of programmes to ensure compliance with Canada's competition laws. Such programmes are tailored to meet the specific needs of each client and may include, among other things, a competition and marketing law seminar programme, a

compliance policy and manual, a periodic bulletin and, in some instances, compliance audits. Our role in the design and implementation of a compliance programme can range from that of complete responsibility to 'back-office' support of in-house counsel in their delivery of the programme.

In addition to helping businesses avoid conflicts with the competition laws, the existence of a compliance programme can influence the Competition Bureau in its deliberation of alternative case resolutions and immunity and sentencing recommendations. Also, by conveying an understanding of the laws, we are able to assist clients in pursuing profitable activities that they might otherwise have thought to be illegal, thereby assisting clients in competing to the fullest extent permitted by law.

We also assist trade associations in developing codes of conduct and in conducting their operations so as to achieve their legitimate objectives without offending Canada's competition laws.

## Our Clients

The Group has experience and expertise in a wide range of industries (including various regulated industries) – for example, advertising, agriculture, airlines, airports, automobile manufacturing, auto parts, beverage alcohol, broadcasting, building automation and safety, building construction, cement, chemicals, computers and technology, consumer products, electricity, financial services, food and beverage processing, health care, internet services, logistics, manufacturing, mining, natural resources, packaging materials, pharmaceuticals, precious metals, professional services, railway, real estate, retailing, retail and wholesale distribution, shipping, software, steel, telecommunications and trucking, among others.


Our clients include some of Canada's largest domestic and international corporations, domestic and foreign governments and governmental agencies, professional and trade associations, advertising agencies, not-for-profit corporations, individuals and other law firms.

## Our Client Service Approach

Our overriding goal is to help the client achieve its objectives in a timely, efficient and cost-effective way. We employ a team approach to client service, to ensure ready availability of informed and knowledgeable counsel, and to ensure that lawyers with the appropriate level of experience provide the requested advice.

## Fees

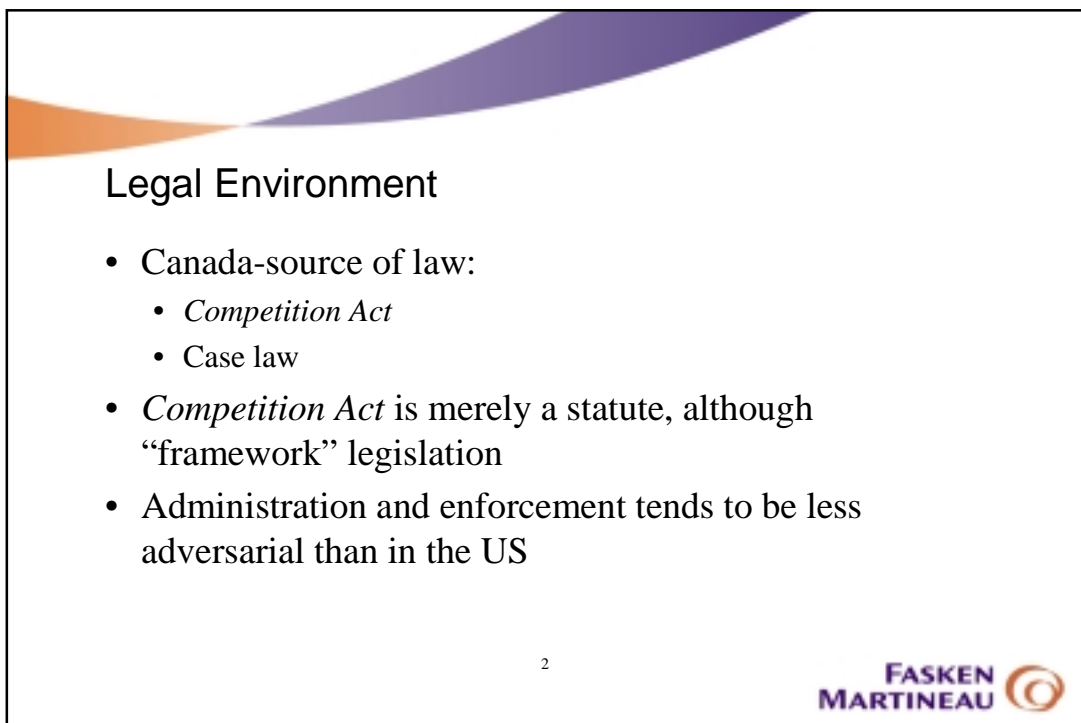
We normally charge fees for services based on the standard hourly rate of the lawyer/paralegal involved. Hourly rates vary, depending on the level of experience of the lawyer/paralegal involved and are competitive with those charged by other major law firms. Staffing of a file will be based on the general principle that, subject to client preferences, the best qualified lawyer



charging the lowest hourly rate will be assigned to work on any matter. Paralegals assigned to any file will be supervised by an appropriate level lawyer.

While lawyers' hourly rates are the standard approach to billing, we would be pleased to discuss and implement alternative billing arrangements, including, for example, arrangements involving a “blended rate” approach, value based billing or flat fees.

Our flexible and innovative approach to providing legal services is reflected in part by our partnering arrangements with various clients. For example, a few years ago we were selected as a DuPont Primary Law Firm and we are now leaders within the DuPont Law Firm Network. This arrangement has led to a high level of service and cost savings to DuPont and networking benefits and increased workflow to Fasken Martineau and the other members of the network. We also have a highly successful partnering relationship with Canadian Pacific Railway.



## Legal Environment

- US-source of law:
  - *Sherman Act*
  - *Clayton Act*
  - *Robinson-Patman Act*
  - State antitrust statutes
  - Case law
- Antitrust laws are “quasi-constitutional”

3

## Enforcement in Canada

- Commissioner of Competition
- Competition Bureau
- Attorney General of Canada
- Competition Tribunal
- Courts
- Minister of Industry (to a limited extent)
- Private Plaintiffs

4

## Enforcement in the US

- Antitrust Division Department of Justice (DOJ)
- Federal Trade Commission (FTC)
- State Attorneys-General
- Private plaintiffs
- Federal and State Courts

5

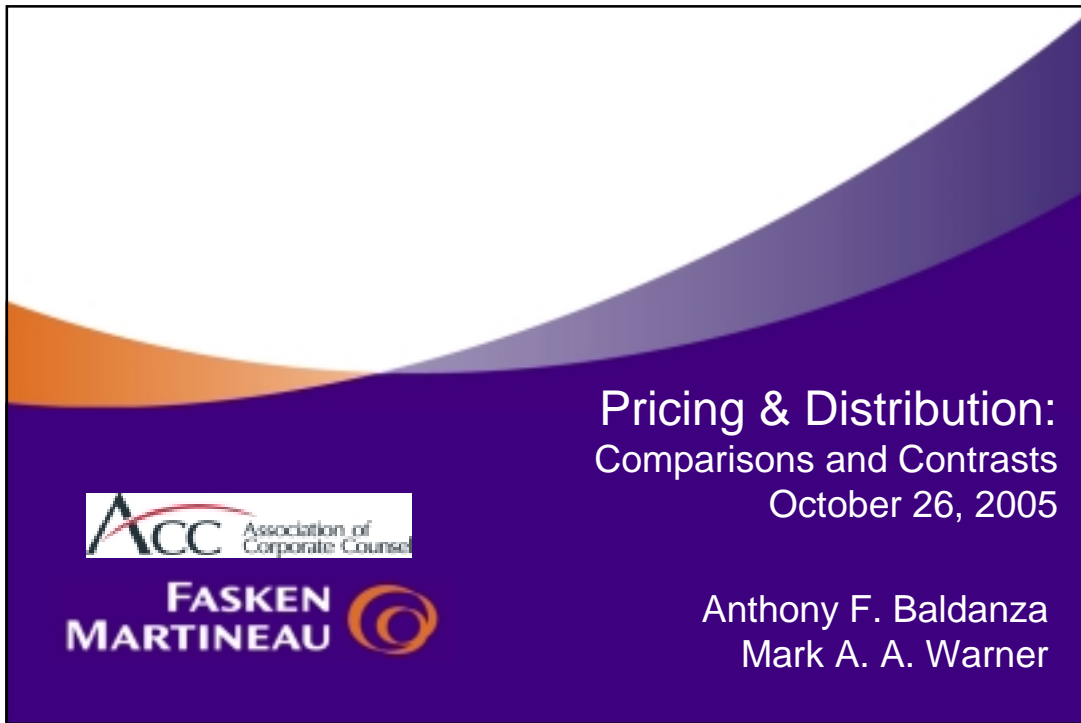


## What We Will Cover


- Pricing and distribution
- Cartels
- Class actions

6



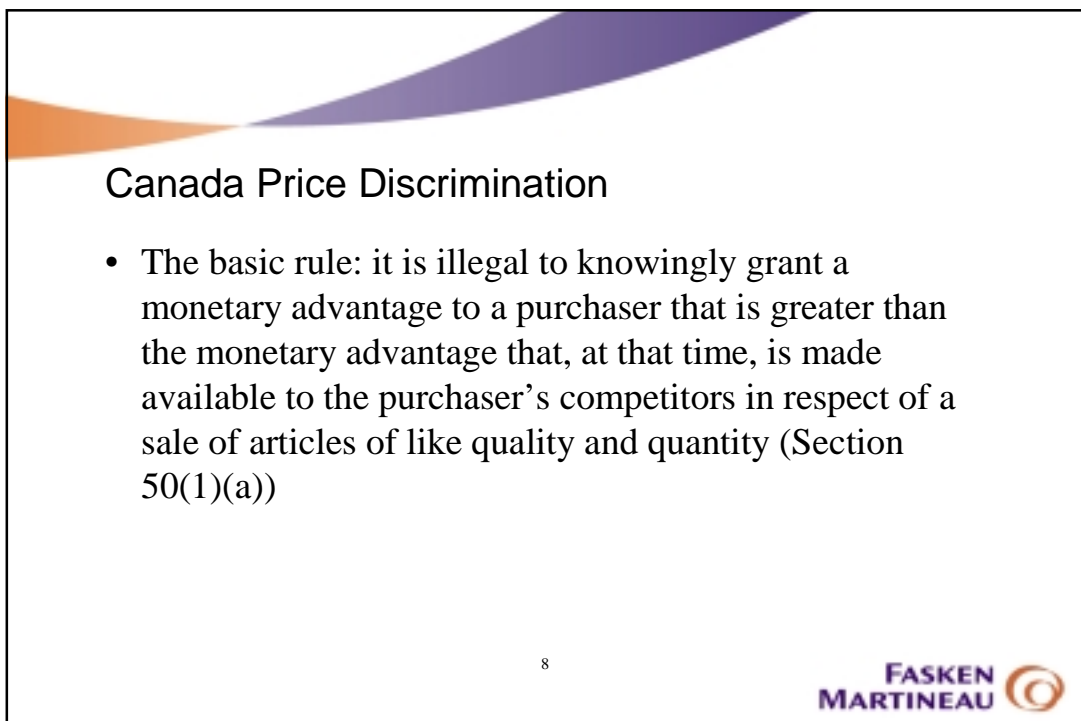


**ACC** Association of Corporate Counsel

**FASKEN  
MARTINEAU** 

**Pricing & Distribution:  
Comparisons and Contrasts**  
October 26, 2005


Anthony F. Baldanza  
Mark A. A. Warner



**Canada Price Discrimination**

- The basic rule: it is illegal to knowingly grant a monetary advantage to a purchaser that is greater than the monetary advantage that, at that time, is made available to the purchaser's competitors in respect of a sale of articles of like quality and quantity (Section 50(1)(a))

8

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## Canada Price Discrimination (cont'd)

- Key features:
  - *per se* offence
  - not applied to purchasers, although a purchaser may be liable for counseling price discrimination contrary to Section 22 of the *Criminal Code* or be found to have engaged in an abuse of dominance contrary to Section 79.
  - no explicit affiliate exception

9

## Canada Price Discrimination (cont'd)

- Key features:
  - applies to “sales” and not to leases, licenses or consignment arrangements
  - applies only to sales of “articles” and not to services
  - at the relevant time
  - “knowingly”
  - a “practice”
    - a function of duration, repetition, consistency and purpose
    - may exclude meeting competition
    - excludes store openings, stock clearances, etc.
  - competing purchasers

10

## Canada Price Discrimination (cont'd)

- “Like quality”
- “Like quantity”
  - buying groups used for compliance-avoidance
- “Available”
  - monetary advantages must be “available” to competing purchases
  - unilateral versus negotiated

11



## Canada Price Discrimination (cont'd)

- enforcement policy exceptions include:
  - conditional discounts
  - volume-based discounts
  - functional discounts
  - exclusive dealing discounts
- liability even where a transaction is not completed

12



## Canada Price Discrimination – Major Developments

- *Bill C-19* proposes to repeal Section 50(1)(a)
  - not inherently harmful to economic welfare
  - could be beneficial to competitors
  - price discrimination law discourages pro-competitive activities
- Recourse will be under abuse of dominance provision: competitive effects-based analysis

13



## Canada Promotional Allowances

- The basic rule: it is illegal to grant a promotional allowance (PA) to a purchaser that is not offered on proportionate terms to competing purchasers (Section 51)
- Key features
  - PAs are monetary advantages offered or granted for advertising or display purposes and not applied directly to the selling price
  - significant differences relative to price discrimination:
    - requires offer
    - applies to articles *and* services
    - “proportionate terms”
    - no practice required

14



## Canada Promotional Allowances (cont'd)

- Major Developments
  - Canada: *Bill C-19* proposes to repeal Section 51
  - Recourse will be under abuse of dominance provision: competitive effects-based analysis

15

## U.S. Price Discrimination

- **Section 2(a)** of the Robinson-Patman Act requires sellers to sell to everyone at the same price
- **Section 2(f)** of the RPA requires buyers with the requisite knowledge to buy from a particular seller at the same price as everyone else.
- **Sections 2(c), 2(d), and 2(e)** of the RPA prohibit sellers and buyers from using brokerage, allowances, and services to accomplish indirectly what sections 2(a) and 2(f) of the RPA directly prohibit.
- **Section 3** of the RPA also provides criminal sanctions for price discrimination.

16

## U.S. Price Discrimination – Harm to Competition

- *FTC v. Morton Salt Co.* (1948)
  - rebuttable inference of harm to competition
- *Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation* (1993)
  - “by its terms, the [RPA] condemns price discrimination only to the extent that it threatens to injure competition. . . . Congress did not intend to outlaw price differences that result from or further the forces of competition.”

17



## U.S. Price Discrimination – Jurisdiction and Standing

- The RPA applies to transactions which involve the sale of commodities for “use, consumption or resale within the United States”.
- Indirect purchasers may also bring claims when the intermediary is considered the "alter ego" of the primary seller. (“Same Seller Rule”)

18



## U.S. Price Discrimination – Price Discrimination Injury

- “**Primary line**” - injury to competition between the seller granting the discriminatory discount and other sellers.
- “**Secondary line**” - injury to competition between the favoured customer of the seller who receives the discriminatory price and the seller's disfavoured customers.
- “**Tertiary line**” – injury to the competing customers of the disfavoured purchaser, respectively. (Cases are rare.)

19



## U.S. Price Discrimination – Price Discrimination and Predation

- In *Brooke Group* (1993)

“primary-line competitive injury under the [RPA] is of the same general character as the injury inflicted by predatory pricing schemes actionable under 2 of the Sherman Act.”

20



## U.S. Price Discrimination Defenses

- “Cost Justification Defence”
  - a defendant typically must establish through "rigorous accounting" that the price differential at issue precisely equals the additional costs it incurs in selling to the plaintiff.
    - *Texaco v. Hasbrouck* (1990)

21



## U.S. Price Discrimination Defenses (cont'd)

- “Meeting the competition”
- “Functional Discounts”
- “Functionally available”
- “Changing Conditions”

22



## U.S. Price Discrimination New Developments

- Section 3 criminal sanctions apparently have not been enforced for over 30 years, and have rarely ever been enforced.
- Few cases of any kind have interpreted Section 3 because the Supreme Court held that violations of Section 3 do not give rise to civil claims for damages. *Nashville Milk Co. v. Carnation Co.* (1958).
- U.S. Antitrust Modernization Commission is discussing repealing Section 3

23



## U.S. Promotional Allowances

- Section 2(d) and 2(e) of the RPA
- FTC “*Fred Meyer Guides*”
  - “Proportionally Equal Terms”
  - Seller “Plan”

24





## Canada Predatory Pricing

- The basic rule: it is illegal to engage in a policy of selling products at prices unreasonably low having the effect or tendency of substantially lessening competition or eliminating a competitor or designed to have that effect (Section 50(1)(c));
- Key features:
  - “policy”
  - “unreasonably low”
  - effect/tendency or design
- 1992 *Predatory Pricing Enforcement Guidelines*

25



## Canada Predatory Pricing (cont'd)

- 2002 Draft Illegal Trade Practices Guidelines
  - Ability to recoup not a pre-condition
  - “avoidable cost” is the relevant cost concept: all costs that could have been avoided by a firm had it chosen not to sell the product(s) in question
- Major Developments: *Bill C-19* proposes to repeal section 50(1)(c):
  - Rely on abuse of dominance provision as in *Nutrasweet* and *Air Canada*

26



## Canada Geographic Predation

- Basic rule: It is illegal to engage in a policy of selling products in any area of Canada at prices lower than exacted by the seller elsewhere in Canada with the intention or effect of substantially lessening competition or eliminating a competitor (Section 50(1)(b))
- 2002 *Draft Illegal Trade Practices Guidelines*
  - To avoid inhibiting legitimate competition, the Bureau will only investigate cases where the policy will harm the process of competition
- To be repealed by *Bill C-19* and covered by abuse of dominance

27

## U.S. Predatory Pricing

- Section 2 Sherman Act - monopolization or attempted monopolization
- Section 2(a) of the RPA - primary line injury
- More emphasis on proof of recoupment than in Canada:
  - *Matsushita* (1986)
  - *Brooke Group* (1993)
  - *U.S. v. AMR Corp.* (10th Cir. 2003)
- “Appropriate measure of cost” predation standard
  - judicial resistance to “avoidable cost”

28

## Canada Price Maintenance

- The basic rules (Section 61):
  - Illegal to, directly or indirectly, by agreement, threat, promise or any like means attempt to influence upward or discourage the reduction of the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada.
  - Illegal to refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.
  - Illegal to, by agreement, threat, promise or any like means, attempt to induce a supplier, as a condition of doing business with the supplier, to refuse to supply product to a person because of the low pricing policy of that person.

29

## Canada Price Maintenance - Some Key Features

- *per se* offence
- applied vertically and horizontally
- establishing maximum price not prohibited
- extended affiliate exception
- suggestions of retail prices are allowed under certain conditions
- advertisements of retail prices must indicate that products may be sold for less
- no unfavourable inference may be drawn in respect of a refusal to supply where belief the refused person engaged in loss leadering, bait and switch selling, misleading advertising or insufficient servicing

30

## U.S. Resale Price Maintenance

- Resale Price Maintenance
  - Minimum = *per se* illegal under Section 1 of the *Sherman Act*
  - Maximum = Subject to a “Rule of Reason” Analysis under Section 1 of the *Sherman Act*

31



## U.S. Resale Price Maintenance

- “*Colgate Doctrine*”
  - Manufacturer can unilaterally suggest or announce a price to a distributor in advance, and can terminate a dealer for non-compliance but this must not be a disguised agreement between manufacturer and one or more dealers to fix prices.

32



## Canada - Abuse of Dominance

- The basic rule in Canada: it is an abuse of dominance for one or more businesses with market power to engage in a practice of anti-competitive acts that is likely to prevent or lessen competition substantially (Section 79)
- 2001 *Abuse of Dominance Enforcement Guidelines*

33

## Canada - Abuse of Dominance (cont'd)

- Key features
  - Civil provision
  - Prohibition, structural and behavioral orders may be issued by the Tribunal, on application of the Commissioner
  - Administrative Monetary Penalties (“AMPs”) may be ordered in respect of domestic airline service

34

## Canada - Abuse of Dominance (cont'd)

- “Anticompetitive act” conduct that is predatory, exclusionary or disciplinary *vis-à-vis* competitors, having regard to:
  - Evidence of effects of the act
  - Business justification
  - Subjective intent

35

## Canada - Abuse of Dominance (cont'd)

- Major Developments:
  - *Canada Pipe*
  - Bill C-19
    - AMPs
    - Repeal airline provisions

36

## Canada - Refusal to Deal

- The general rule is that you are free to deal with whom you wish to deal. *Competition Act* exceptions are as follows:
  - where the refusal is due to a person's low pricing policy, the refusal may be illegal price maintenance
  - where the refusal is by a person with market power, *may* be abuse of dominance (e.g. essential facilities)
  - otherwise may be covered by civil refusal to deal provision (Section 75).  
The basic rule is:
    - the Tribunal may compel supply where a person is substantially affected in or precluded from carrying on its business because it is unable to obtain adequate supplies on usual trade terms due to insufficient competition among suppliers where the refusal is likely to have an adverse effect on competition

37

## Canada - Refusal to Deal (cont'd)

- Key features:
  - applications by Commissioner or person granted leave
  - modified competitive effects test
- Major developments: private access

38

## Canada Tied Selling, Exclusive Dealing and Market Restriction

- The basic rule: where a practice of tied selling, exclusive dealing or market restriction is found to be likely to substantially lessen competition, the Competition Tribunal may issue an order in respect of the practice
- Some key features:
  - applications by Commissioner or a person granted leave
  - prohibition orders (including any requirement necessary to overcome the substantial lessening of competition or to restore or stimulate competition) may be issued

39

## Canada Tied Selling, Exclusive Dealing and Market Restriction (cont'd)

- Selected exemptions
  - For facilitating entry
  - Having regard to technological relationship of tied and tying products
  - For securing loans
  - extended affiliate exemption
  - private access with leave (section 103.1)
- Major Developments:
  - *Canada Pipe*

40



## U.S. Monopolization or Attempt to Monopolize

- Section 2 of the *Sherman Act*
  - Can be prosecuted civilly or criminally, but no criminal prosecution since the 1940s.
  - Antitrust Modernization Commission is discussing the repeal of Section 2 criminal liability.
  - Structural and behavioural remedies

41



## U.S. Monopolization – Elements of the Offense

- The *Sherman Act* does not condemn the mere possession of monopoly power.
- The elements of the monopolization offence are:
  - the possession of market power; and
  - some kind of anticompetitive (exclusionary) conduct.

42



## U.S. Monopolization – Market Power

- “**Market power**” is the power to control prices or exclude competition.
- “**Monopoly Power**” is a high degree of market power
- Market power for Section 2 analysis requires a higher quantum of power than does market power for Section 1

43



## U.S. Monopolization – “Loyalty” or “Fidelity” Rebates

- *Canada Pipe* (Comp. Trib. 2005) – permissive
- *BA / Virgin* (2nd Cir. 2001) – permissive
- *Dentsply* (3rd Cir. 2005) – restrictive
- *Le Pages* (3rd Cir. 2003) - restrictive

44



## Monopolization

- Refusal to Deal, Exclusive Dealing and Market Restriction
  - can be analyzed under Section 2 or Section 1 Rule of Reason standard.
- “Concerted” refusal to deal or “Group boycotts” and “Tied selling”
  - analyzed under Section 1 “per se” illegality standard, but increasingly this standard is along a flexible continuum.

45



## U.S. Monopolization – Refusal to Deal / Essential Facilities

- In general, no restriction on the right of an entirely private business to freely choose with whom it will deal.
  - *Colgate* (1919)
- “Refusals to Deal” and “Essential Facilities”
  - Valid business justifications / Terminations
  - *Terminal Railroads* (1912), *MCI v. AT&T* (1983), *Aspen Skiing* (1985) and *Verizon v. Trinko* (2004)

46



## Cross-Border Cartel Enforcement

Neal J. Smitheman  
Mark A. A. Warner



### Canada: Elements of the Offence

Section 45 of the *Competition Act*

- Indictable Criminal Offence
- To Conspire or otherwise agree with another person to prevent or lessen competition “unduly” in the provision of a good or service in Canada
- “Partial Rule of Reason”, not a “per se” offence
- Limitation period

## Canada: Related Conspiracy Provisions

### Section 61 of the *Competition Act*

- Price Maintenance – “Per Se” Illegal

### Section 46 of the *Competition Act*

- Implementation of a foreign conspiracy in Canada
- Lack of knowledge not a defence
- Aiding and abetting under the Criminal Code of Canada
  - Mitsubishi Case

50

## Cartel: Jurisdiction

### Extraterritorial Application

- “Effects” Doctrine
- Real and substantial link
- Service of initiating documentation

51

## Canada: Evidence Gathering

- Search Warrants - Dawn Raids
- Computer Records
- Wire Taps
- Compulsory Production (Section 11)
- Foreign Affiliates Provision (Section 11(2))
- MLAT

52

## Canada: Immunity

### Requirements

- “First in”
- Immediate termination of illegal activity
- Secondary or tertiary role
- Full, frank and truthful disclosure
- Full, continuous cooperation/revocation
- Restitution

### Proffer Practice

### Director, Officer and Employee Immunity

53

## Canada: Immunity Plus

- Provisional Immunity
- Leniency
- Confidentiality

54

## Canada: Penalties

- Maximum 10 million dollars
- Incarceration - 5 years
- Multiple counts
- Prohibition Orders
- CSO's

55

## Canada: Criminal Matters

- Recent Cases
- Immunity Program
- Regulated Conduct Doctrine
- Legislative Amendment Proposals

56

## U.S.: Analysis of the Offense

- Section 1 of the Sherman Act
  - Civil v. Criminal Enforcement
  - *Per Se*
  - “Rule of Reason” and “Quick look” analysis
    - *California Dental v. FTC* (1999)

57



## U.S.: Evidence Gathering

- Civil Investigative Demand (CID)
  - can be used to compel production of information and documents if voluntary requests are judged to be inadequate or inappropriate for the Division's needs.
- Grand Jury
  - if a civil investigation uncovers evidence indicating that criminal prosecution is more appropriate, a grand jury investigation should be opened; further investigation may not be conducted by CID.

58

## U.S.: Evidence Gathering

- Current wiretap authority does not include a provision for wiretaps seeking evidence of cartel activity.
- The Antitrust Modernization Commission is reviewing this question now.
- Nonetheless, the FBI directed the covert recording of conspiratorial meetings on audiotapes and videotapes in the DOJ's investigation of price fixing in the lysine industry.

59

## U.S.: Jurisdiction

- *American Banana* (1909)
- *ALCOA* (2<sup>nd</sup> Cir. 1945)
- *Hartford Fire Insurance* (1993)
- *Nippon Paper Industries Co.* (1<sup>st</sup> Cir. 1997)
- *Empagran* (2005)
  
- *Foreign Trade Antitrust Improvement Act* (1982)

60



## U.S.: Penalties

- Fine not exceeding \$100,000,000 if a corporation
- Fine not exceeding \$1,000,000 if an individual or imprisonment not exceeding ten years
- *Criminal Penalty Enhancement and Reform Act of 2004* increased penalties, de-trebled civil damages and eliminated “joint and several liability” for civil damages for immunity applicant.

61



## U.S.: Penalties

- The maximum fine for both corporations and individuals may be increased to:
  - twice the gain derived from the crime, or
  - twice the loss suffered by the victims of the crime
- if either of those amounts is greater than the statutory maximum fine.
- In doubt, post *Blakely* (2004) and *Booker* (2005) decisions on U.S. Sentencing Guidelines.

62



## U.S.: Penalties

- Over \$2 billion dollars in criminal fines imposed in cartel cases since FY 1997.
- Fines of \$10 million or more against U.S., Dutch, German, Japanese, Belgian, Swiss, British, Luxembourgian, Norwegian, and Liechtenstein-based companies.
- In 39 of the 46 instances in which the DOJ has secured a fine of \$10 million or greater, the corporate defendants were foreign-based.

63



## U.S.: Penalties

- The average jail sentence in the 1990's was 8 months but has nearly doubled over the past five years.
- The DOJ has prosecuted foreign executives from Austria, Belgium, Canada, France, Germany, Italy, Japan, Korea Mexico, Norway, the Netherlands, Sweden, Switzerland, and the United Kingdom.
- Foreign defendants from Canada, France, Germany, Sweden, Switzerland, the Netherlands, Norway, the United Kingdom, and Japan have served, or are currently serving, prison sentences in U.S. jails for violating U.S. antitrust laws.

64



## U.S.: Leniency

- Paperless filing
- “Amnesty Plus” and “Penalty Plus”
- *Stolt-Nielsen* (Pa. 2005) and Withdrawal of Leniency
  - Failure to (a) take “prompt and effective action” to end conspiratorial activities and (b) cooperate fully and completely

65

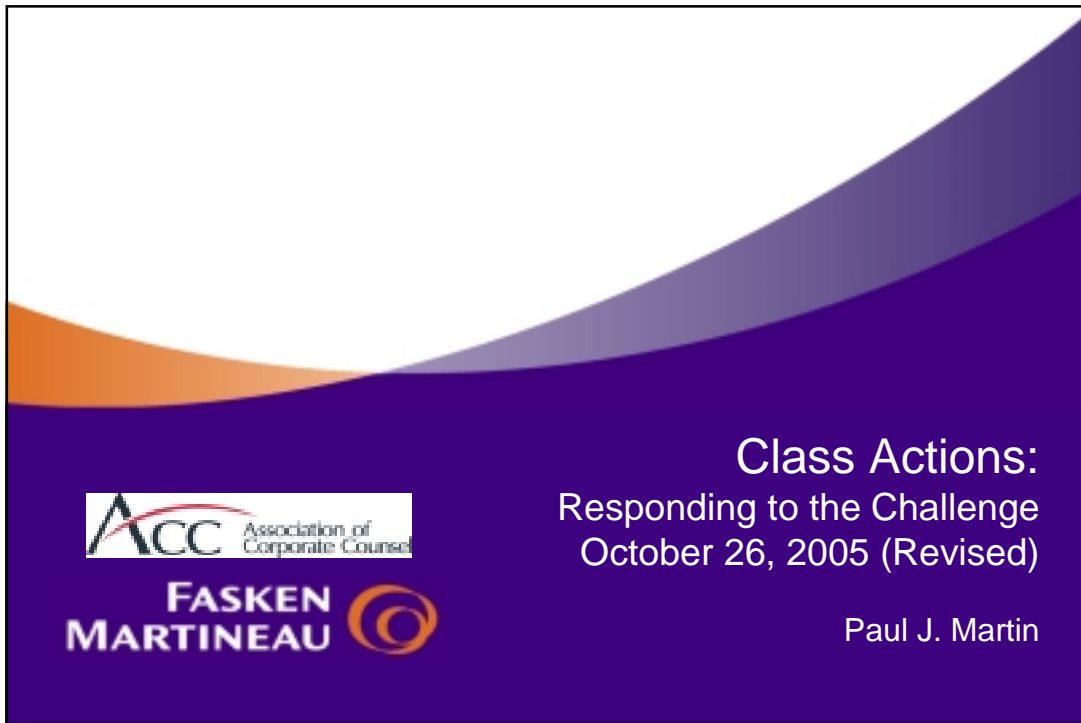




## U.S. - Canada: Enforcement Cooperation

- Sharing of documents obtained by subpoena and search warrant;
  - Sharing of documents obtained from foreign defendants pursuant to plea agreements;
  - Jointly interviewing witnesses;
  - Joint document analysis; and
  - Conducting parallel and coordinated plea negotiations.
- 
- Fifth Amendment Privilege, Grand Jury Testimony and MLAT Issues after *Balsys* (2001)

66

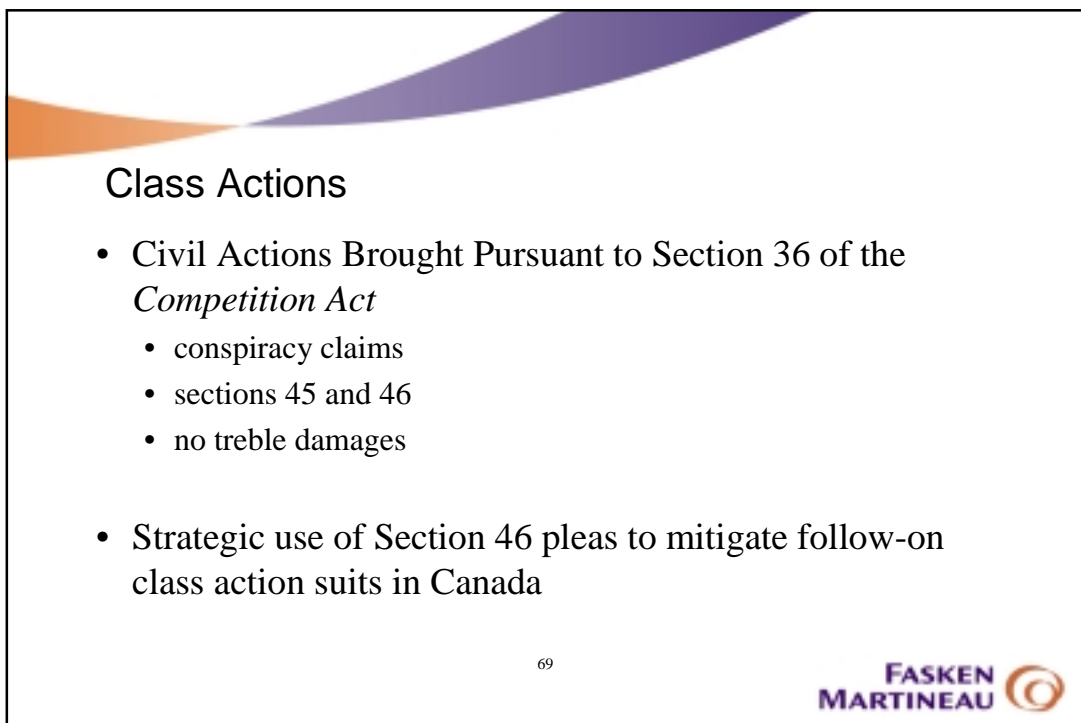




  
**FASKEN  
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**Class Actions:  
Responding to the Challenge  
October 26, 2005 (Revised)**


Paul J. Martin



**Class Actions**

- Civil Actions Brought Pursuant to Section 36 of the *Competition Act*
  - conspiracy claims
  - sections 45 and 46
  - no treble damages
- Strategic use of Section 46 pleas to mitigate follow-on class action suits in Canada

69

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MARTINEAU** 

## Class Actions

- Jurisdiction over Civil Actions
  - a less restrictive approach than criminal prosecutions
  - a real and substantial connection
  - would not offend principles of international comity
  - *Wilson v. Servier*
  - *Vitapharm v. F. Hoffman-LaRoche Ltd.*

70

## Class Actions

- Canadian Plaintiffs in the U.S. - the Effects of *Empagran* (Vitamins Cartel) in Canada
  - US Supreme Court (2004)
    - the *Sherman Act* does not apply to conduct that is significantly foreign insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim
  - D.C. Circuit Court of Appeals (2005)
    - *FTAIA* jurisdiction requires “proximate causation” not “but for” causation between domestic effects and the claimed foreign injury
- still access to U.S. courts

71

## Class Actions

- Procedural Matters
  - Loser Pays
  - No Jury Trials
  - No Multidistrict Litigation Panels
  - Competing Provincial Actions and Regimes

72

## Class Actions

- Substantive Issues
  - No Treble Damages
  - No Passing-on Defence or Direct/Indirect Purchaser Distinctions
  - Recognition of Foreign Judgments
  - Proof of Actual Loss

73



## Class Actions

- Anti-Motion Motions: Access by Canadian Plaintiffs to Evidence in Foreign Proceedings
- *Ford v. F. Hoffman-LaRoche Ltd.*
- *In re Linerboard Antitrust Litigation*
- Versus production and discovery only after certification
- Section 36 – evidence of prior proceedings

74



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75



*This material is not intended to provide legal opinions and readers should not act on the basis of these articles without first consulting a lawyer who will provide analysis and advice on a specific matter. Fasken Martineau DuMoulin LLP is a limited liability partnership under the laws of Ontario and includes law corporations.*

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## Anthony F. Baldanza

Tony Baldanza is a partner in the Toronto office of Fasken Martineau. The focus of Tony's legal practice is on assisting his clients in achieving their business objectives by providing timely and knowledgeable advice and representation. He carries on a general business law practice, with particular emphasis on competition law and foreign investment law, and is chair of the firm's national Antitrust/Competition & Marketing Law Group.

In his competition law and foreign investment practice he has handled merger transactions in a wide range of industries, including aggregates, automobile manufacturing, auto parts, beverage alcohol, broadcasting, cement, consumer products, dairy products, financial services, food processing, health care, internet services, logistics, mining, packaging materials, pharmaceuticals, precious metals, railway, retailing, shipping, software, steel, and telecommunications. He regularly assists clients in clearing such transactions through the Canadian Competition Bureau, the Investment Review Division of Industry Canada and, along with counsel in other jurisdictions, the competition law/antitrust authorities of other jurisdictions.

Tony regularly advises companies on how to structure distribution and licensing arrangements to avoid competition law problems, and counsels companies and professional and trade associations on the scope of permissible activities.

Tony also assists clients on corporate/commercial matters, including acquisitions, dispositions and reorganizations, joint venture and partnership arrangements, distribution agreements, supply agreements, etc.

Tony has been recognized by, among others, Chambers, Euromoney, Practical Law Company, Global Counsel Competition Law Handbook and Law & Business Research as one of Canada's leading competition law lawyers.

### Areas of Practice

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### Education

LL.B., 1978  
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### Called to the Bar

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## Publications and Speaking Engagements

Tony has written and spoken on foreign investment and competition law matters and in relation to mergers and acquisitions in various forums. The following is a selection of his published work and speaking engagements:

- Panellist, "Practical Strategies for Establishing an Effective Competition Law Compliance Program", Canadian Institute (2005)
- Chair and panellist, "Revised Canadian Merger Enforcement Guidelines", ABA Brown Bag Presentation (2005)
- Co-chair, Essentials of Competition Law Seminar, Ontario Bar Association (2005)
- Panellist, Mergers, Joint Ventures and Strategic Alliances Panel, Essentials of Canadian Competition Law Seminar, Ontario Bar Association (2005)
- Panel Chair, "The New (and Improved?) MEGs", Annual Conference on Competition Law, CBA National Competition Law Section (2004)
- Co-Author, "The Revised Merger Enforcement Guidelines - What's New in the New MEGs", Annual Conference on Competition Law, CBA National Competition Law Section (2004)
- Panel Chair, "Competition Law Implications of Dealing with Competitors", Canadian Corporate Counsel Association National Spring Conference (2004)
- Author, "Dealings Between Competitors: Mergers", Canadian Corporate Counsel Association National Spring Conference (2004)
- Co-Author, "More Changes to Canada's Competition Act in the Offing?", *Global Competition Review* (2003)
- Panel Chair, "Fundamentals of Mergers, Antitrust Economics and Civil Reviewable Matters", *Annual Conference on Competition Law, CBA National Competition Law Section* (2003)
- Chair, *2002 CBA Annual Fall Conference on Competition Law*
- Co-Author, "Efficiencies and Anti-Competitive Effects: Superior to Date", a paper presented at the *Annual Conference on Competition Law, CBA National Competition Law Section* (2001)
- Co-Author, "Regulated Conduct Doctrine in Canada", *State Action Practice Manual*, Section of Antitrust Law, American Bar Association (2000)
- Co-Author, "In Canada, Efficiencies May Save Anti-Competitive Mergers", *Metropolitan Corporate Counsel* (2000)
- Author, "Efficiencies May Save Anti-Competitive Mergers in the Financial Services Sector", *National Banking Law Review* (2000)
- Panel Chair, "Interdependence Effects in Merger Analysis: Theory, Practice and Policy", *Annual Conference on Competition Law, CBA National Competition Law Section* (2000)
- Subject of Interview, "Canadian Competition Bureau's Draft Abuse of Dominance Guidelines", *LawMoney.com* (2000)
- Subject of Interview, "Developments in Relation to Microsoft", *Report on Business TV* (2000)

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- Co-Author, "Recent Developments in Canadian Competition Law", *Canadian Business Law Journal* Vol. 32, No. 2 (1999)
- Speaker, "Amendments to the Merger Provisions of the Competition Act", *Annual Meeting of the National Competition Law Section, Canadian Bar Association* (1999)
- Speaker, "Competition Compliance Programs", *Municipal Electric Association* seminar (1999)
- Speaker, "The Use of Product Groupings in Evaluating Canadian Bank Mergers", *Annual Meeting of the National Competition Law Section, Canadian Bar Association* (1998)
- While Vice-Chair of the Mergers Committee of the National Competition Law Section, Canadian Bar Association (1997-99), he co-authored submissions in relation to the recent amendments to the *Competition Act* (Bill C-20 and its predecessors), and the Notifiable Transactions Regulations.
- Co-Author, "Competition Law", Chapter 20, *Doing Business in Canada* (Matthew Bender) (ongoing)
- Numerous Contributions, *Mergers & Acquisitions in Canada*
- Numerous Contributions, *CCH Commercial Times*
- Contributor, Mergers & Acquisitions Committee Newsletter, ABA Section of Antitrust Law (ongoing)

### Professional Activities

- Private Sector Advisor to Commissioner of Competition in respect of the Notification and Procedures Subgroup, International Competition Network (2003-present)
- Contributor, Joint Comments of the American Bar Association's Section of Antitrust Law and Section of International Law and Practice on Merger Enforcement Guidelines (Draft for Consultation March 2004) of the Competition Bureau of Canada (2004)
- Chair, Organizing Committee, 2002 CBA Annual Conference on Competition Law
- Chair, Mergers Committee of the National Competition Law Section, Canadian Bar Association (1999-2001)
- Member, American Bar Association - Business Law and Antitrust Sections
- Member, International Bar Association - Business Law Section, Committees G (Business Organizations) and C (Antitrust and Trade Law)
- Member, Canadian Council for International Business - Competition Law and Policy Committee and International Competition Law and Policy Task Force
- Member, Task Force on Joint Ventures, Negotiated Acquisitions Committee of Section of Business Law, American Bar Association (1999-2000)
- Instructor, Negotiations Workshop, Bar Admission Course, Law Society of Upper Canada (1992-93)
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Paul Martin has an extensive practice in all aspects of civil, administrative and quasi-criminal litigation at all levels of court in Ontario, with particular emphasis in the areas of class actions, competition, product liability, defamation, shareholder rights, employment, financial institutions, insurance, securities regulation, taxation and intellectual property. He has been counsel in matters before the Federal Court, the Supreme Court of Canada, the Ontario Municipal Board, the Tax Court of Canada, the Ontario Securities Commission, the Commercial Registration Appeal Tribunal, the Pensions Appeal Board and various administrative tribunals.

Paul joined the firm in 1984 and became a partner in 1990. He is director of the Toronto office's Class Actions practice group and a member of the firm's Antitrust/Competition & Marketing practice group.

### Areas of Practice

Class Actions

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### Education

LL.B., 1982  
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### Called to the Bar

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### Class Action Experience

Paul has defended numerous class actions in the areas of competition, product liability, insurance, employment, securities, environmental, construction, institutional abuse and mass torts. These cases included such well known Canadian class action subject matters of automotive after-market parts, price fixing, breast implants, contaminated water, vanishing premiums, automobile insurance deductibles, pension surpluses, mass terminations, overtime claims and mould contamination. Paul is also counsel in the prosecution of several plaintiff class actions. He is frequently called upon to write and speak on all aspects of class actions particularly in relation to competition and product liability law.

### Competition Law Experience

Paul has defended numerous class actions in respect of allegations of conspiracy and international cartel activity. He has defended both criminal and civil actions in the areas of tied selling, refusal to deal, misleading advertising, price discrimination and claims of misrepresentation pursuant to the provisions of the *Competition Act*.

# Paul J. Martin

## Professional Activities/Associations

- Member, Canadian Bar Association
- Member, American Bar Association (Section of Litigation-Class Action and Derivative Suits Committee and Antitrust Litigation Committee)
- Member, Association of Trial Lawyers of America - Commercial Litigation and Product Liability Subsections
- Member, Toronto Lawyers Association
- Instructor, Bar Admission Course and Ontario Centre for Advocacy Training (OCAT)

## Recent Publications

- Co-Author, *Antitrust Class Actions North of the Border: Uncharted Territory* (2005)
- Author, *Defending Product Liability Class Actions: Emerging Trends and Issues* (2005)
- Author, *Costs Redux: Observations on the Temperature of Ontario's Class Action Regime* (2004)
- Co-Author, *Recent Developments in the Law Relating to Executive Compensation* (2004)
- Author, *Private Actions for Anti-Competitive Activity*, in *Doing Business in Canada* (2004)
- Co-Author, *Class action and defamation* (2003)
- Author, *Class Actions in Ontario - Recent Developments of Importance* (2003)
- Author, *Developments in Canadian Class Actions Law* (2003)
- Co-Author, *Employment Class Actions* (2003)
- Co-Author, *Class Actions: A Year in Review* (2003)
- Co-Author, *Products Liability: the Quintessential Class Action? - A Defense Perspective* (2003)
- Co-Author, *Environmental Class Actions* (2003)
- Author, *Class Actions - It Could Happen to You* (2002)
- Co-Author, *Class Actions - Recent Developments of Importance* (2002)
- Co-Author, *Class Actions - Recent Developments of Importance* (2001)
- Co-Author, *Class Actions: A Year in Review* (2001)
- Author, *Class Action Certification: The Growing Uncertainty* (2001)
- Author, *The Developing Role of Class Actions in Canadian Civil Justice Reform* (2000)
- Author, *Class Actions in Ontario - Recent Developments of Importance* (2000)
- Co-Author, *The 'Merger' of Class Actions and Competition Law* (1999)
- Author, *Class Actions: A Year in Review* (1998)
- Co-Author, *Recent Certification Decisions - The 'Trilogy'* (1999)
- Author, *Divining Preferences: An Examination of Ontario's Class Proceedings Act's 'Preferable Procedure' Requirement* (1998)
- Co-Author, *Class Action Battles: Recent Significant Decisions* (1998)



## **Frank Monteleone**

Frank Monteleone is the Vice-President Legal Affairs, General Counsel, Corporate Secretary and Chief Privacy Officer of Pfizer Canada Inc. He joined Pfizer in September 2004 from Cassels Brock & Blackwell LLP in Toronto where he specialized in competition law/antitrust and intellectual property.

Pfizer was one of Mr. Monteleone's major clients while at Cassels Brock and he headed up the Competition Law team which cleared the Warner-Lambert (2001) and Pharmacia Canada (2003) mergers through the Competition Bureau. His competition law experience started in 1976 when he articulated at the Bureau.





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Prior to joining Fasken Martineau, Mr. McKeown served as counsel at Canadian General Electric Company Limited from 1965 to 1974, then as Deputy Director of Investigation and Research (under what was then known as the Combines Investigation Act) from 1974 to 1977. Mr. McKeown practised law with Stephens, French, McKeown in Toronto from 1977 to 1986. In 1986, he was appointed to the Supreme Court of Ontario and was a member of the Ontario Court of Justice (General Division) from 1990 to 1993.

From 1993 to 2002, Mr. McKeown served as a Justice of the Federal Court of Canada, Trial Division, as well as a judicial member and Chairman of the Competition Tribunal. During his tenure as Chair he oversaw some of Canada's most significant competition cases including those involving Air Canada, Superior Propane and A.C. Nielsen. Prior to his appointment to the Competition Tribunal in 1993, he served with the Supreme Court of Ontario and the Ontario Court of Justice.

### Publications

- *Can a terminated distributor or dealer obtain relief under the Competition Act?*
- *10 key developments in Canadian competition law in 2004*
- *Legislation introduced to amend Competition Act*
- *Canadian companies with connections to international cartels may become subject to U.S. antitrust laws*
- *New practices and procedures at the Competition Tribunal*



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His corporate commercial litigation practice results in frequent appearances on behalf of clients before the Ontario Superior Court of Justice and the Ontario Court of Appeal. Neal's experience as a commercial litigator has resulted in him being retained to act on behalf of clients in several significant cases currently before the Ontario Superior Court.

Neal has also developed an extensive criminal and quasi-criminal practice. In addition to defending individuals and corporations charged under various regulatory statutes, Neal is frequently retained to represent clients in administrative law matters.

Neal's Civil Law Degree provides him with the background necessary to negotiate with, and assist, lawyers practicing civil law and, in certain instances, to represent multi-national clients in the Province of Quebec.

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- Member, Criminal Matters Committee, Canadian Bar Association, Competition Section
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Mark Warner is a recognized and experienced international competition and trade law expert, author and frequent guest speaker at bar, business, government and academic conferences around the world.

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New York, 1995

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Mark has specialized in competition and trade matters in international law firms in Washington, D.C., New York, Brussels and Toronto for clients including foreign and domestic firms. Mark's experience includes advising on merger notification and review, cartel investigations, distribution agreements and compliance programs for firms in the pharmaceutical, petro-chemicals and transportation sectors. From 1996 to 2000, Mark was a legal counsel in the OECD advising Members and emerging market Non-Members on competition law and trade issues for WTO.

Mark has also advised governments in Africa, Asia, South America, Eastern and Central Europe and Central Asia on designing and implementing competition and trade laws for CIDA, COMESA, ECLAC, the EU PHARE program, UNCTAD, USAID, the World Bank and the WTO. He was also a WIPO arbitrator for ICANN domain name disputes, and served as Rapporteur of the Hague Conference on Private International Law Commission on Jurisdiction for Torts in Electronic Commerce. Mark has also taught competition and trade law courses at: the University of Leiden (Netherlands), the World Trade Institute (Switzerland), the International Institute for Management in Telecommunications (Switzerland), the University of Western Cape (South Africa), and the International Law Institute (Uganda).

Mark is co-author of the leading Canadian trade law treatise with a former Canadian Minister of Foreign Affairs. He has also published several chapters in books, and his publications include articles on competition, trade and investment law and policy in: Antitrust, World Competition, International Trade Law and Regulation, the American Journal of International Law, Law & Policy in International Business, the Vanderbilt Journal of Transnational Law, the Northwestern Journal of International Law & Business, the Brooklyn Journal of International Law, the Canadian Business Law Journal and in The Legal Times.

# Mark A. A. Warner

Mark is Counsel in the firm's Antitrust/Competition & Marketing Practice Group in Toronto, with an adjunct office in London, England.

## Professional Activities

- Former Chair of the American Bar Association Section of Antitrust Law's International Antitrust Committee (1997-1999)
- Member of the Section's Task Forces on Antitrust in the Global Economy (1997-1999) and on the North American Free Trade Agreement (1993-1995)
- Former Chair of the Section Working Groups on: the E.C. Merger Regulation (1996); Policy on Vertical Restraints (1997); Amendments to the Canadian Competition Act (1995) and Canadian Information on Strategic Alliances (1994)
- Member of the Business and Industry Advisory Committee to the OECD (BIAC) and the IBA Antitrust and Trade Law Committee, ICC Competition Commission
- Co-Chair, ICC Competition Commission Working Party on E-Commerce and Competition Policy (2001)
- Invited to testify at the International Competition Policy Advisory Committee to the U.S. Department of Justice (DOJ) (1999), and the Federal Trade Commission (FTC) Workshop on Emerging Issues for Competition Policy in the World of E-Commerce (2001)

## Languages

- English
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