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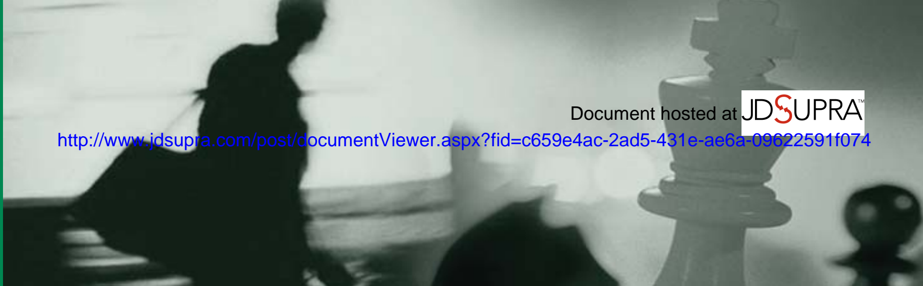

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Competition&MarketingBrief

Winter 2009

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In this issue, James B. Musgrove, Esther Rossman and Janine MacNeil, members of Lang Michener's Competition and Marketing Group, provide guidance on issues likely to feature over the course of the next year in Canadian antitrust law.

They begin by addressing possible amendments to the *Competition Act* arising both from the Speech from the Throne and the Competitiveness Panel's Report.

They proceed to provide an update on *Competition Act* class actions, specifically reporting on two cases which dealt blows to plaintiffs by denying class certification.

They also address the Competition Bureau's latest thinking on Trade Associations and finally, Corporate Compliance Programs.

Government Announces *Competition Act* Amendments

James B. Musgrove

Esther Rossman

During the recent Federal election campaign the now re-elected Conservative government – which may or may not soon face a challenge in the House of Commons – announced that, if re-elected, it would implement a series of *Competition Act* amendments to, in the words of the platform, provide Canadians with a "strong consumer protection plan, to protect Canadians from anti-competitive practices and other abuses." The plan included a series of wide-ranging changes to the *Competition Act*, based in part on a report released in June 2008 by the Competition Policy Review Panel.[1] The proposal also draws upon various Bills and proposals considered over the last few years. The proposals included:

- Establishing a non-criminal track, with a lower evidentiary threshold, for "lesser" anti-competitive offences, such as price discrimination, promotional allowances, predatory pricing and deceptive marketing.

  It is not clear precisely what form this track might take. If, as has been proposed previously, the concept is that such conduct be dealt with as an instance of abuse of dominant market position, that is a possibility which is consistent with the views of most commentators. If it involves the creation of a new set of "offences," that may prove problematic.

- Introducing administrative monetary penalties of up to $10 million ($15 million for repeat offenders) for companies that abuse their dominant market position.

  This proposal would fundamentally alter the nature of the reviewable conduct provisions. They had previously not included penalties, specifically because the framers of the *Competition Act* sought to avoid deterring aggressive competition, even by large firms. Introduction of a significant penalty will inevitably reduce the willingness of large firms to be aggressive. Sometimes this may benefit competition, but sometimes it will hurt consumers and competition.

- Empowering the Competition Tribunal to force companies to pay restitution to victims of deceptive marketing practices, including the ability to freeze assets and to prevent the disposal of property to ensure that money is available for victims.

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- Raising civil penalties for deceptive marketing from the current maximum of $50,000 to up to $750,000 for a first "offence" and up to $1 million for repeat transgressors.
- Raising maximum penalties for criminal anti-competitive offences, namely hard-core cartels and bid-rigging offences, to a $25 million fine and 14 years in prison. (Currently, the maximum penalties are $10 million and five years in prison).
- Increasing penalties for obstructing Competition Tribunal investigations, up to a $100,000 maximum fine (for a summary offence) and up to 10 years' imprisonment (for an indictable offence); and
- Increasing maximum imprisonment terms for criminal deceptive marketing from five years to 14 years.

The increases in jail terms, in particular, are very significant. They are arguably out of step with other more serious criminal offences.

The announced amendment also included a series of non-competition law amendments, such as:

- increasing the frequency of gas pump and heating meter inspections;
- increasing fines for gas companies found to be overcharging consumers;
- preventing telecommunications companies from charging consumers for unsolicited incoming commercial text messages; and
- introducing anti-spam legislation.

These proposals have raised issues among stakeholders. Some concerns are noted above. As well, some commentators have pointed out that the high monetary fines proposed for civil contraventions of the Act are more accurately criminal in nature, and may be subject to constitutional challenge. Still others have wondered whether the implementation of certain proposals, such as anti-spam legislation, will be effective.

The policy announced during the election campaign, and confirmed in the recent Speech from the Throne, is fairly bare bones in nature. Of course, if there is a change in government this matter likely will be up in the air again, although these sorts of changes may prove popular with all parties in the House of Commons. Also, since no party enjoys a majority in the House of Commons, it is possible that after a Bill is introduced by the Government it will be subject to amendment through the legislative process. Over the last number of years, competition legislation has been subject to considerable debate and amendment through the committee process. This was true even under a majority government, but the issue is particularly acute in a minority situation.

1 See our Brief on the subject: "A Mixed Bag Review: The Competition Review Panel's Report Contains Many Good Ideas, But There Is Some Lack Of Focus" in Lang Michener LLP *Competition & Antitrust Brief* –Special Issue (June 30, 2008).

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Class Action Developments

James B. Musgrove

Competition class action plaintiffs continue to struggle in Canada. In our Summer *Competition & Marketing Law Brief* we provided a note on the *Pro-Sys* case,[1] in which plaintiffs in a proposed class action involving an international cartel with respect to Dynamic Random Access Memory Chips were denied certification, due in large part to difficulties in proving injury to indirect purchasers. In that note we reviewed a number of previous cases which had also dealt blows to plaintiffs. In this Brief we provide a report on two more such cases, each very different from the other and from the *Pro-Sys* case, but each denying class certification.

Toyota Drives a Winner

This summer the British Columbia Supreme Court declined *Competition Act* class action certification in the case of *Steele* v. *Toyota Canada Inc.*[2] In the *Toyota* case the plaintiffs avoided the difficulties associated with indirect purchaser claims by suing not only Toyota Canada but a series of Toyota dealers in British Columbia from whom they had purchased cars *directly*. Nevertheless, the motion for certification was refused, on the basis of difficulty in showing injury on a class basis.

The factual basis of the action turned on the "Access Toyota" Program run by Toyota Canada from March 2000 through to March 2003 in various parts of Canada. The Access Toyota Program provided that, in various local mar-

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kets throughout Canada or provinces of Canada, participating Toyota dealers submitted price "votes" as to the price that various Toyota models should be sold at within the relevant area. Toyota would then use a formula to average the price votes, and make available that average price on its website. It also put on its website the "Drive Away" (that is final price inclusive of tax, fees and the like) price for various models, based on the weighted average price on its website. Consumers throughout the area would check the Toyota website to see what the "Drive Away" price would be.

Toyota's position was that this Access Toyota Drive Away price would be a price above which dealers would not sell vehicles in the relevant market, but dealers were free to sell vehicles for less than the Drive Away price in the relevant market. Despite this position – that the Drive Away price was a ceiling price not a floor price – there were various complaints to the Competition Bureau, and the Bureau undertook an investigation. Ultimately, in March 2003 Toyota negotiated a consent prohibition order pursuant to Section 34 of the *Competition Act* with the Commissioner of Competition. The statement of facts filed in that proceeding indicated that sometimes Toyota dealers met to discuss the price votes that they would file in advance of filing them, and that at least some Toyota dealers understood that if they sold cars for less than the Access price they would face penalties.

Toyota did not face criminal penalty arising out of the Access Toyota Program, but it was ordered, pursuant to the consent prohibition order, to cease the program, and it did make a voluntary donation of $2.3 million to charity.

The evidence of a number of individuals given in support of the application for certification of the class action was that each of them went to a number of Toyota dealers in British Columbia looking to purchase a particular vehicle, and they were told by the dealers that the Access Toyota Drive Away price was the price and that they would not find the vehicle at a less expensive price at any dealer.

The Court noted that in order to found a civil cause of action under the *Competition Act*, the plaintiffs must be able to show loss or damage to them caused by the wrongful act of the defendants – that is a clear component of Section 36 of the *Competition Act*. The Court further noted that it is not sufficient to prove enrichment to the defendants without proof of loss to the plaintiffs. The plaintiffs argued that if enrichment to the defendants is proved then deprivation to the plaintiffs may be presumed. But the Court stated "I do not agree that such a proposition forms part of the law in Canada." The Court noted that the onus is on the plaintiffs to provide some evidence to show that proof of loss on a class-wide basis may be possible, and found that it had not succeeded in doing so in the *Toyota* case.

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Kellogg Starts its Day Right

A very different kind of *Competition Act* civil damages case, *Janine Bédard* v. *Kellogg Canada Inc.*,[3] was decided in May, 2007, and confirmed on appeal in April 2008.[4] The *Kellog* case involved an allegation by a consumer that Kellogg, in advertising and packaging claims, asserted that both its Frosted Flakes and its Fruit Loops contained "⅓ less sugar than the original," and thereby engaged in a materially false or misleading claim contrary to Section 52 of the *Competition Act.* Ms. Bédard sought to bring a class action against Kellogg. Kellogg moved to strike out the claim as disclosing no clause of action.

It is apparent from the decision that the parties had very significant factual disagreements with one another as to whether the cereals actually did contain less sugar, how much less sugar, and whether that was misleading or not. The Court concluded that it could not determine these sorts of disputes at a preliminary stage. In addition to the factual disputes, it was also clear that Kellogg had significant *prima facie* evidence that the way it had marketed its product was consistent with, and indeed potentially required by, various food product marketing regulations. Again the Court ruled that these issues could not be determined on a preliminary basis. Ultimately, the Court concluded that it was not sufficiently clear that the plaintiff could not succeed and that the case should not be struck out as not disclosing a cause of action.[5]

On the motion for certification as a class action, however, Kellogg was successful. The certification was rejected primarily because there was no attempt to determine how individual purchasers' claims might be adjudicated. Rather, the class plaintiff proposed that the damage be paid to charity.

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Paragraph 112 of the judgment provides:

> "As the applicant recognized, the most important aspect of this action is not to provide access to justice for purchasers to compensate them, since there is no intention here of reimbursement. The purpose of the action is essentially to penalize and end the respondent's allegedly reprehensible conduct. The legislature has in fact provided specific machinery for this. Ms. Bédard need only file a complaint with the Canadian Food Inspection Agency or with the Competition Commissioner. They certainly have the expertise and authority to terminate the conduct of which Ms. Bédard complains. Moreover the Act provides for severe fines."

Thus, the action was not certified as a class action. This reluctance to certify a *Competition Act* class action, when it is not designed to compensate victims of alleged conduct, but rather to penalize the wrongdoer, and the recognition of the role of the Commissioner of Competition and criminal penalties under the *Competition Act* as an argument against class actions to penalize or to modify behaviour, is consistent with comments found in the *Pro-Sys* case. We may see more proposed *Competition Act* class action cases in which actual "victims" will not receive meaningful compensation being subject to very careful scrutiny before being certified.

Conclusion

The conclusion to be drawn from both of the *Toyota* and *Kellogg* cases, as well as the *Pro-Sys* case we detailed in our Summer 2008 Competition and Marketing Brief,[6] is that *Competition Act* class actions are becoming at least somewhat more difficult to certify, and the primary stumbling block is typically the difficulty in showing injury on a class basis.

1 *Pro-Sys Consultants Ltd.* v. *Infineon Technologies AG*, 2008 BCSC 575, [2008] B.C.J. No. 831.

2 *Steele* v. *Toyota Canada Inc.*, 2008 BCSC 1063, [2008] B.C.J. No. 1496; appeal filed on September 5, 2008 (b.C. Court of Appeal file: CA – 36431)

3 *Bédard* v. *Kellogg Canada Inc.*, 2007 FC 516, [2007] F.C.J. No. 714.

4 *Bédard* v. *Kellogg Canada Inc.,* 2008 FCA 125, [2008] F.C.J. No. 555 (F.C.A).

5 Interestingly, on appeal, the Court of Appeal noted "In light of our conclusion, there is no need to determine whether the judge erred in concluding that the pleadings disclosed a reasonable cause of action, even though we have serious doubts on the point."

6 "The Pro-Sys Case: A Roadblock, or Just a Detour for Antitrust Class Actions in Canada?" in Lang Michener LLP *Competition & Antitrust Brief* (Summer 2008).

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Trade Associations and the *Competition Act*

James B. Musgrove

On the 27th of October the Competition Bureau released, in draft for discussion, an Information Bulletin on the application of the *Competition Act* to trade associations, which is available at http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02730e.html.

Trade associations face particular competition law/antitrust risks because, by definition, they involve meetings, discussions and cooperation amongst various – often virtually all – competitors in a particular line of business. The Bulletin notes that trade associations undertake many legitimate activities, including such things as lobbying, establishing product specifications (although this can involve issues of concern with regard to competition law from time to time), improving the quality and safety of products, publishing trade journals, market research, and advertising and promoting the product. The Bulletin also notes that trade associations can be a good venue to provide *Competition Act*/antitrust education to industry members and can assist the Bureau in reaching members of industries.

Nevertheless, the Bureau notes that when trade associations, or their members, consider such things as pricing, customers, territories, market shares, terms of sale, or advertising restrictions, amongst other matters, there can be anti-competitive concerns.

Issues noted in the Bulletin which could give rise to concerns under the *Competition Act*, when undertaken by or through trade associations, include not only outright agreements between competitors as to price, but also the exchange of competitively sensitive information such as current or future prices, market shares, costs, level of output, strategic or marketing plans, costs, market allocation, production, and market shares, discount payment terms, business strategy and bidding tactics. Where competitively sensitive information is collected and disseminated the Bulletin notes that reasonable measures to reduce *Competition Act* risk may include:

(a) Collecting only historical information;

(b) Disseminating information only in aggregated form with no specific firm information identifiable;

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(c) Using an independent data collection agency; and

(d) Not requiring that data be provided by members – making the information supply voluntary only.

The Bulletin suggests that meetings of association members employ clear agendas, and that minutes be taken that comprehensively note all issues discussed. Issues not on the agenda should not be discussed, and informal conversations or side discussions amongst members should be avoided. The Bureau also recommends that trade associations have legal counsel review agendas and minutes, and attend all association meetings where there is potential for discussion of sensitive subjects. It suggests that the association should have a document retention program setting out what documents are to be kept and for how long.

The Bulletin also notes that association membership should be voluntary, and based on transparent, objective criteria. Association membership becomes a particular concern if being a member of the association is in somehow necessary or at least materially advantageous for a firm's ability to compete.

Specifically with respect to industry fee schedules or guidelines – which have been an area of enforcement activity for the Competition Bureau in the past – the Bulletin recognizes that trade associations often disseminate fee guidelines. The Bureau notes that these guidelines may facilitate agreements on the fees to be charged. Dissemination of a fee guideline genuinely intended to be a source of information as to current fees charged in a particular market should not, in and of itself, raise an issue under the *Competition Act*, but it could raise issues under the *Competition Act* if it is used to establish or facilitate an agreement on prices or to promote adherence to specified fees. That is, members must feel free to deviate from the guideline without fear of recrimination or sanctions. The Bureau notes that fee guidelines which are prepared in a systematic and scientific fashion, are comprised of statistics gathered and compiled by an independent third party, based on questionnaires as to fees charged in the past, and are based on independent verification, are less likely to raise concerns under the Act than otherwise.

The Bulletin also notes that the activity of standard-setting organizations may give rise to concerns under the *Competition Act* if the standards they establish have the effect of restricting entry into an industry, deterring innovation or otherwise inhibiting the ability of persons to compete and those goals are not consistent with the legitimate goals and purposes of the organization.

Finally, the Bulletin recommends that trade associations establish competition law compliance programs to assist them with complying with the requirements of the *Competition Act*.

The full draft Bulletin is available at http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02730e.html.

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Competition Bureau Releases Final Bulletin on Corporate Compliance Programs

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On October 24, 2008, the Competition Bureau released the final version of its Information Bulletin on Corporate Compliance Programs (available at: http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02732e.html), updating the Bureau's original Compliance Bulletin, released in 1997.

Much of the content of the original Bulletin is found in the revised Bulletin, although there are some new aspects as well. The new Bulletin goes into greater detail on the importance and benefits of competition law compliance. The new Bulletin also includes suggestions throughout for business policies and procedures that meet the Bureau's requirements, and a basic Corporate Compliance Program template. Overall however, the document represents a refinement, but not a change in Bureau policy.

Like its predecessor, the 2008 Bulletin sets out the Competition Bureau's view as to elements which should be contained in a Corporate Compliance Program, designed to minimize a firm's risk of violations of the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act* (the "Acts") and discusses the implications of having or not having such a program.

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Compliance Program Benefits

As the Bulletin points out, a Corporate Compliance Program can assist in ensuring that firms comply with competition law and facilitates detection of anti-competitive conduct. It notes that **implementing internal compliance mechanisms allows firms to seek appropriate advice when questions arise, prior to contravention**, thus reducing or avoiding the legal, economic and reputational risks associated with non-compliance.

In a new departure for the 2008 Bulletin, it highlights that **trade associations**, specifically, are exposed to greater anti-competitive risks and can thus benefit even more from the implementation of a compliance policy.

The Bureau notes that an effective compliance program will provide a number of benefits, including:

- maintaining a **good business reputation**, and attracting customers and suppliers who value ethically-operated companies;
- provision of **early warning** respecting potentially illegal conduct;
- **reduction of the exposure** of the corporation and its officers, directors and employees **to criminal, civil or penal liability**;
- **reduction of the risk of adverse publicity** or fines, and the disruption resulting from investigation, prosecutions and litigation;
- **reduction of uncertainty** about what is or is not legal (so as to permit aggressive, yet lawful, competition) and a reduction in the risk of contravention;
- **increased sensitivity** to potentially anti-competitive conduct by the firm's competitors, suppliers or customers; and
- assisting a business, in certain circumstances, in **obtaining a reduced fine or sentence** should a breach of the Acts occur.

The new Bulletin includes suggestions throughout for business policies and procedures that meet the Bureau's requirements, and a basic Corporate Compliance Program template.

Elements of a Compliance Program

The 2008 Bulletin sets out the five elements which are, according to the Bureau, fundamental to the success of any Corporate Compliance Program. The five elements are:

1. **Involvement and support of senior management;**
2. **Development of relevant policies and procedures;**
3. **Ongoing training and education of management and employees;**
4. **Monitoring, auditing and reporting mechanisms; and**
5. **Consistent disciplinary procedures.**

Senior Management Involvement and Support

The Bureau notes that without the visible, clear and unequivocal support of senior management, compliance programs will not succeed. It must be clear that compliance with competition laws is fundamental to a firm's policies in order that such compliance be taken seriously, and in order that there be a climate of compliance established within the firm. **Unless there is true buy-in from senior management, the line business people will not take the policy seriously.** Consequently, in the Bureau's view, senior management must play an active and visible role, both at the time of a compliance program's establishment, and on an ongoing basis.

Relevant Policies and Procedures

The Bureau notes that to make compliance programs effective they must be developed and **tailored to each firm's particular needs** and operations. The content of a compliance program should be conveyed to employees through an accessible company publication, regularly updated to reflect both changes within the business and in the law.

Training and Education

The Bureau notes that an effective compliance program will include ongoing training for all personnel who are in a position to engage in or be exposed to anti-competitive conduct. Such training will assist management and staff in understanding sensitive issues in competition law and in identifying the limits of acceptable business conduct.

Training and education is best achieved by demonstrating how compliance policies affect employees' daily activities. A **training manual** should be provided; however, effective training also includes **small group seminars and workshops**, ideally delivered by experts and senior management. There should be opportunity for discussion and questions from employees. To ensure understanding, the Bureau recommends regular evaluations of the training program, such as by testing employees' knowledge of the law and of the compliance program.

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Monitoring, Auditing and Reporting Mechanisms

The Bureau notes that a credible review and assessment component is fundamental to an effective compliance program. In our experience this is the **most difficult element** to successfully implement, at least for most companies.

Monitoring and auditing not only helps firms confirm that they are (or are not) in compliance with the Acts, but also provides tangible evidence that competition law compliance is a fundamental corporate policy. The Bureau notes that although no particular auditing or monitoring mechanism is perfect for all companies, such mechanisms should be **designated on a firm-specific basis** so as to prevent anti-competitive conduct or detect and address it if and when it does occur.

Monitoring is preventive in nature, and typically involves ongoing procedures to check against potential *Competition Act* violations. An effective monitoring program may provide a firm with a due diligence defence to violations.

By contrast, auditing is designed to be a review of a firm's specific activity, to determine whether a *Competition Act* violation has occurred and, if so, the best way to address the situation. Auditing may be undertaken on a periodic or *ad hoc* basis, or triggered by particular events; as with monitoring, the procedure will vary given a firm's specific risks.

Finally, the Bureau notes that firms should have internal reporting procedures in respect of activity which raises concerns under the Act. The procedure should encourage employees to provide timely and reliable information, and encourage external reporting where applicable. The steps to be followed and the information required of employees should be clearly set out, including information about the Bureau's *Immunity Program* and the *Competition Act*'s whistle blowing provisions.

Consistent Disciplinary Procedures

The Bureau notes that a disciplinary code or policy is important, both for its deterrent effect and also as a reflection of the firm's stance with respect to anti-competitive conduct. The policy should clearly state that disciplinary consequences, **such as suspensions, demotions or dismissals**, can and will result from willful breach of the policy and the Acts.

To best implement a compliance policy, the Bureau suggests offering incentives to employees, in order to encourage adherence to the policy. Any disciplinary measures which are instituted should be applied consistently. The Bureau also notes that any disciplinary action taken should be properly documented and can be used to support a claim of due diligence.

Bureau's Approach to Firms with Effective Compliance Programs

The Bureau notes that whether or not a firm has an effective compliance program will not likely have a significant impact as to whether the Commissioner proceeds with an enforcement action against the firm. Nevertheless, it may increase the chances of a firm receiving consideration for an alternate case resolution, rather than criminal charges. It may also influence considerations as to whether firms or individuals should be granted immunity from prosecution, and may have an effect in influencing proposed sentencing, particularly if the presence of a compliance program has caused the company to take remedial action.

> *Whether or not a firm has an effective compliance program will not likely have a significant impact as to whether the Commissioner proceeds with enforcement action against the firm.*

A compliance program will not have an influence on the Commissioner's views if senior personnel of the firm participated in or condoned the conduct. That would indicate that senior personnel were not in fact committed to compliance with the Acts. In fact, somewhat peculiarly, the Bureau states that "if a program is a sham and used only to conceal or deflect liability, this also may be considered an aggravating factor for sentencing purposes or … administrative monetary penalties." We are concerned that this statement may have the effect, at least in some cases, of discouraging firms from establishing a policy.

As noted above, an effective compliance program may provide the basis for a due diligence defence – i.e., that the firm took all reasonable steps to avoid the commission of the offence. It may also be relevant to resolving disputes via an alternate case resolution, thus avoiding fully contested proceedings. Alternative forms of resolution will be more readily available if the firm can demonstrate that it terminated any anti-competitive conduct as soon as it came to light, that it attempted to remedy the adverse effects of the conduct, that the conduct was not in keeping with the firm's basic corporate policy and that the infringement was not carried out or approved by senior management.

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News & Events

News

James B. Musgrove Appointed Vice-Chair Unilateral Conduct Committee ABA

We are pleased to announce that James B. Musgrove has been appointed the Vice-Chair Unilateral Conduct Committee of the Antitrust Law section of the ABA. James was also the Council Liaison for the Antitrust Law section of the ABA in 2007/2008.

Lang Michener Lawyers Recognized as Best Lawyers in Canada 2009

We are pleased to announce that **James B. Musgrove** and **David Young** were two out of the 19 Lang Michener lawyers who were recognized by their peers in the *Best Lawyers in Canada* 2009 edition. James was recognized for Advertising and Marketing Law & Competition/Antitrust Law and David was recognized for Advertising and Marketing Law.

Events

15th Annual Advertising and Marketing Law: The Latest Legal Updates and Cutting Edge Analysis

January 22 & 23, 2009
Presented by the Canadian Institute
Toronto, ON

Daniel Edmondstone and **David Young** are both speakers at the 15th Annual Advertising and Marketing Law conference. Dan will be speaking on a panel entitled *Checking the Fine Print: Instituting Legal Protections when Running Contests* and David will be speaking on a panel entitled *Benefiting from Customer Referrals while Complying with Privacy Regulations.*

Northwind Professional Institute's 2009 Competition Law and Policy Forum

February 11–13, 2009

James B. Musgrove will be a presenter on the panel entitled: *Single Firm Conduct – Enforcement or Not?*

Competition&MarketingBrief

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