MISLEADING ADVERTISING AND DECEPTIVE MARKETING PRACTICES UNDER THE FEDERAL *COMPETITION ACT*: A REVIEW OF THE LAST 25 YEARS AND RECENT DEVELOPMENTS

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I. Introduction

The federal *Competition Act*[2] (the "Act") contains a series of criminal and civil provisions governing what can broadly be described as deceptive marketing practices. Certain of these practices are subject to a regime of criminal enforcement, and are found in Part VI of the Act. Others, characterized as "reviewable conduct," are subject to a regime of civil enforcement pursuant to Part VII.1 of the Act.

Since 1999, enforcement of misleading advertising has been effectively a hybrid – in that, depending on the facts, and at the discretion of the Competition Bureau (the "Bureau") and the Public Prosecution Service of Canada ("PPSC"),[3] the prohibition against false or misleading advertising may be enforced via either criminal, or civil, proceedings. This has brought a shift in emphasis from criminal to civil enforcement of misleading advertising in Canada under the Act.

While this article will briefly summarize each of the reviewable "deceptive marketing practices" found in Part VII.1 and certain of the criminal provisions of the Act governing other marketing practices,[4] the principal focus will be the "misleading advertising" provisions of the Act, now found in sections 52 and 74.01 of the Act – their history and certain recent developments of note.

II. Part VII.1: Deceptive Marketing Practices Other Than Misleading Advertising

A. Reviewable Conduct

Prior to 1999, each of the practices summarized below that now constitute "reviewable conduct" were enforced as criminal offences. Since that time, each of these types of "reviewable conduct" has been subject to the full range of civil remedies provided for in Part VII.1 of the Act, as discussed more fully below, including, among other remedies, prohibition orders, corrective notices, and significant "administrative monetary penalties" ("AMPs").

1. 74.02: Representations as to Tests and Testimonials

Section 74.02 of the Act makes it "reviewable conduct" for any person (for the purpose of promoting, directly or indirectly, the supply of a product or any

business interest) to represent to the public that a test has been made as to the performance, efficacy, or length of life of the product or to publish a testimonial with respect to a product, unless that person can establish one of two conditions:

(a) that such a representation or testimonial was previously made or published by the person by whom the test was made or the testimonial was given, or

(b) the representation or testimonial was, before being made or published, approved and permission to make or publish it was given in writing by the person by whom the test was made or the testimonial was given,

and the representation or testimonial accords with the representation or testimonial previously made, published or approved.[5]

In essence, section 74.02 is directed to ensuring two things with respect to tests or testimonials referenced in advertising:

1) they were previously published or approved, and

2) they are accurately reflected in the advertising.

An important third consideration, not explicitly referenced in section 74.02, but which flows from the principles enshrined in sections 52 and 74.01, must also be taken into account. Namely, the advertiser is ultimately responsible for the accuracy of any claim regarding its product contained within its advertising, whatever the source may be. For example, an advertiser who publishes a consumer testimonial, which contains exaggerated or erroneous claims about a particular attribute of the product or its performance, is not saved from liability merely because the testimonial was previously published or approved by the consumer and faithfully reproduced in the advertisement.

The typical testimonial, in practice, is generally given by an actual consumer of the product or by a paid endorser, such as a celebrity or sports figure. The Bureau has established guidelines for the proper use of testimonials.[6] Among other things, these guidelines highlight that an impression of impartiality conveyed by a third party endorser would be misleading if he or she had an undisclosed financial interest connected to the advertiser or was affiliated in some way with the advertiser. This general statement of principle is consistent with important recent guidelines on the use of endorsements and testimonials issued by the US Federal Trade Commission.[7]

It is worth noting that the Bureau guidelines also acknowledge that, in appropriate circumstances, it is not objectionable to use actors to portray consumers who have given consumer testimonials regarding their use of a product.

In the case of tests, consent to publication will not pose difficulties where the advertiser has either conducted the test itself or commissioned a third party to conduct the test on its behalf. This subsection, as it relates to tests in particular, should also be read in conjunction with the provisions of subsection 74.01(1)(b) (discussed more fully below), which requires that any claims as to the "performance, efficacy or length of life" of a product must be based on an "adequate and proper test," the proof of which lies on the advertiser.

2. 74.04: Bargain Price (Bait and Switch)

Section 74.04 of the Act prohibits what is commonly called "bait and switch" advertising. In essence, the provision requires an advertiser to supply "reasonable quantities" of any product that it advertises as being available at a "bargain price" (having regard to the nature of the market, the nature and size of the person's business and the nature of the advertisement). The requirement to supply the product in "reasonable quantities" does not apply where the advertiser:

(a) took reasonable steps to obtain in adequate time a reasonable quantity of the product but was unable to do so due to events beyond its control that could not reasonably have been anticipated;

(b) obtained a reasonable quantity of the product but was unable to meet the demand because it surpassed the advertiser's reasonable expectations;

(c) after becoming unable to supply the product as advertised, undertook to supply the same or an equivalent product of equal or better quality at the same price within a reasonable time to all persons who were unable to purchase the product at the bargain price (i.e. offered a "rain check").

"Bargain price" is defined essentially to mean a price that is held out as a "bargain" when compared with the regular price of a product or a price that a consumer would reasonably understand to be a "bargain."[8]

What constitutes "reasonable quantities" has been the subject of some judicial consideration under the predecessor criminal provisions. For example, in the case of *R v Woolworth Canada*,[9] the advertiser, Woolworth Canada, had advertised certain electronic children's toys at clearance (below cost) sale prices and also sold certain additional, related items. For three of the toys in question, Woolworth carried approximately 70-75% of the inventory it had stocked the prior year and 30% of the inventory it had previously advertised unsuccessfully. The Court concluded, in all of the circumstances, that Woolworth had supplied the products in "reasonable quantities." By contrast, in the case of *R v 279707 Alberta Ltd*,[10] a retailer ran repeated advertisements for television sets and only kept two to five sets on hand. The Court concluded that this did not constitute

"reasonable quantities." A mere warning to the effect that product is in limited supply is not, in and of itself, sufficient to avoid liability.[11]

3. 74.05: Sale Above Advertised Price

Section 74.05 of the Act prevents a person from selling or renting a product at a price higher than that at which it is advertised, during the period and in the market to which the advertisement relates. The section does not apply to certain situations:

(a) to catalogue advertisements which primarily state that the prices are subject to error, if it is established that the advertised price is in error;

(b) where the advertisement with the incorrect price is immediately followed by another advertisement correcting the price;

(c) to the supplier of a security obtained in the open market during the period when the prospectus relating to that security is still current;

(d) in respect of the supplier of a product by and on behalf of a person who is not engaged in the business of dealing in that product (for example, a person selling his or her home).

The Commissioner of Competition (the "Commissioner") has previously expressed the opinion that since the prohibition applies only to an "advertisement" for products, it does not apply to oral representations or representations made on product labels.[12] In addition, in the view of the Commissioner, manufacturers' suggested retail prices ("MSRP") do not constitute advertised prices for the purposes of this provision and so this provision does not apply to sales at prices higher than MSRP.

In the case of *R v Jean Coutu,*[13] the advertiser was convicted, under the criminally-enforced predecessor provision to the current section 74.05 of the Act, of selling products for prices above the advertised price. The evidence showed that of over 40 items, all of which had been advertised at discount prices, the store's cashiers had charged the regular price marked on the product for approximately half of the items.

4. 74.06: Contest Disclosure

Promotional contests or sweepstakes must be carefully structured to ensure that they do not constitute illegal "lotteries" under the provisions of the federal *Criminal Code*[14] ("the Code"). In most cases, this will involve ensuring that no purchase ("consideration") is required to be paid by an entrant in order to enter, and that the contest or sweepstakes involves some element of genuine "skill," such as the ubiquitous "skill testing question."

Separately, Quebec is the only province that requires those conducting a "publicity contest" in the Province to make certain filings with, and pay certain duties to, the Quebec regulator, the Régie des alcools, des courses et des jeux.[15]

In addition to these requirements, section 74.06 of the Act imposes certain disclosure requirements on those conducting contests. Namely, "adequate and fair" disclosure must be made of the number and approximate value of the prizes, of the geographic area or areas to which they relate, and of any fact within the knowledge of the person that affects materially the chances of winning. Section 74.06 also stipulates that distribution of prizes may not be unduly delayed and that the selection of participants or distribution of prizes must be made on the basis of skill or on a random basis in any area to which the prizes have been allocated. In practice, the form which such "adequate and fair" disclosure takes is typically a full set of contest rules made available to participants upon request, and summarized "mini rules" disclosed in advertisements for the contest/sweepstakes.

The Bureau has issued guidelines outlining, among other things, the minimum disclosures that are required in order to satisfy the provisions of section 74.06.[16] The guidelines state that disclosure should be made in a reasonably conspicuous manner prior to the potential entrant being inconvenienced in some way or committed to the advertiser's product or to the contest. In its Enforcement Guidelines, *Application of the Competition Act to Representations on the Internet,*[17] the Bureau further notes as follows:

> "The Bureau takes the position that all required disclosures must be displayed in such a way that they are likely to be read. In the context of representations made on-line, what is considered adequately displayed will depend on the format and design of the Web site. For example, a notice of a contest should not require readers to take an active step, such as sending an e-mail or placing a phone call, in order to obtain the required information. The Bureau does not consider clicking on a clearly labelled hyperlink as being 'an active step.'"

There were a small number of cases involving the imposition of penalties under the (criminally enforced) predecessor to the current section 74.06 for failure to make adequate and fair disclosure of certain material facts relating to promotional contests.[18] An important recent case involving the new civil regime of enforcement is the *Elkhorn Ranch* case.[19] In November, 2009, Elkhorn Ranch entered into a consent agreement under which it agreed to pay an AMP of $150,000, together with $20,000 to cover the Bureau's costs of its investigations. Elkhorn Ranch was also required to publish corrective advertising. In

that case, Elkhorn Ranch had run a promotion in which a number of key elements of the promotion were not properly disclosed, including the fact that the vehicle prominently advertised as a valuable prize was, in fact, merely a lease of the vehicle.[20]

5. Subsections 74.01(2) and 74.01(3): Ordinary Price Claims

Subsections 74.01(2) and 74.01(3) of the Act are designed to ensure, in essence, the validity of price savings in discount claims. They do this by ensuring that any price represented by an advertiser to be the "ordinary" or "regular" price of an item (as a reference point for a savings claim) has been validated by one of two tests: the "time" test or the "volume" test. Subsection 74.01(2) concerns itself with the price represented to be the "ordinary" price offered by suppliers generally in the relevant geographic market, having regard to the nature of the product. Subsection 74.01(3) concerns itself with the price represented by the supplier to be its own "ordinary" price. Under these provisions, it is reviewable conduct to make a representation to the public as to the price at which a product or like-products have been, are, or will be ordinarily supplied (either by suppliers generally in a relevant geographic market or by the supplier itself) unless the supplier:

(a) has sold a "substantial volume" of the product at that price or higher price within a "reasonable period of time" before or after the making of the representation as the case may be (i.e. depending on whether the claim concerns the price point for the product before a sale, or the price that the product will be sold at after the sale period, such as in the case of an introductory price) (the "volume test"); or

(b) has not offered the product at that price or higher price in good faith for a "substantial period of time" recently before or immediately after the making of the representation, as the case may be (again, depending on whether the price representation is effectively retroactive or prospective) (the "time test").

It is important to note that the "ordinary" price can be validated *either* on the basis of the time test or the volume test. Furthermore, subsection 74.01(5) provides that subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not materially false or misleading.

In a simple example, if the claim of "regularly $10, now only $7.50" is made, the supplier must be able to establish that $10 was the price at which it sold a "substantial volume" of the product within a "reasonable period of time" before the sales claim was made or that the supplier offered the product for sale at

that $10 price or higher "in good faith" for a "substantial period of time" before making the savings claim.

The legislation provides no definition of the terms "substantial volume" or "reasonable period of time" for the volume test, nor of the terms "good faith" or "substantial period of time" for the time test. The Bureau has therefore issued guidelines on ordinary price claims.[21] With respect to the "volume test," the Bureau indicates that it will generally consider the "reasonable period of time" to be the twelve months prior to (or following) the making of the price claim, but that this period may be shorter, having regard to the nature of the product, and that the "substantial volume" of product requirement will be met if more than 50% of sales are at or above the reference price (the purported "ordinary price"). With respect to the time test, the Bureau takes the position that it will generally consider a "substantial period of time" to be the six months prior to (or following) the making of the price claim, but that there may be a shorter period of time if the product is of a seasonal nature. The "substantial period of time" requirement will be met if the product is offered at the purported "ordinary price" for more than 50% of the time considered (*i.e.*, for more than 50% of that six month period). The Bureau also indicates its view that the "good faith" requirement will generally require that the product be openly available in appropriate quantities and that genuine sales must have occurred at the offered price.

The leading case on ordinary price claims remains the *Sears* case[22] and, because of its importance, it bears some review. The *Sears* case involved savings claims made by Sears in relation to the sale of automotive tires. The items at issue were five lines of tires offered for sale by Sears at four price points: (a) its "regular" price, being the price of a single tire offered by Sears when the particular tire was not promoted as being "on sale"; (b) the "2 For" price, being the price at which Sears would sell two or more of a given tire, when the tire was not being offered at a "sale" price; (c) the "normal promotional" price, being a set percentage of the "regular" price for each tire; and (d) further discounted "promotional" prices, representing discounts beyond the "normal promotional" price. When the "promotional" prices were advertised, they were compared to the "regular" price for a single relevant tire and not the "2 For" price. Detailed evidence was presented as to sales volumes of each line of tire during the six and twelve months preceding the making of the relevant regular selling price representations. The evidence showed that over the relevant one-year period, Sears had sold less than 2% of all tires at the regular single-unit price. Accordingly, Sears acknowledged that it had not complied with the volume test.

Sears nonetheless argued that its price representations were validated by the

time test and, that, in the circumstances, its representations as to price were not false or misleading in a material respect.[23] The Competition Tribunal (the "Tribunal") rejected these arguments, holding that Sears had failed to satisfy both the "good faith" and "substantial period of time" requirements. With respect to its lack of good faith, Sears admitted that it expected only 5 to 10 percent of the tires to be sold at the ordinary price and that Sears' ordinary price was known to be uncompetitive with its major competitors. On the facts of this case, the Tribunal concluded that 6 months is the appropriate reference period for a "substantial period of time" under the time test (Sears had argued the time frame should be 12 months). Since Sears' product was on sale for half or more than half of the time during the relevant period, the Tribunal concluded that it cannot be said to have been offered at its ordinary price for a "substantial period of time." Finally, the Tribunal found that the general impression conveyed by the representations in Sears' advertising was that consumers who purchased the tires at promotional prices would realize substantial savings. The Tribunal concluded that, since 90 to 95 percent of tires were sold in multiples, not as single tires, this general impression of savings was misleading.

Sears also challenged the constitutionality of subsection 74.01(3) of the Act as a violation of Sears' fundamental right of freedom and expression, as guaranteed under subsection 2(b) of the *Canadian Charter Rights and Freedoms*.[24] The Tribunal concluded that while there was a prima facie violation of subsection 2(b) of the *Charter*, the infringement was a reasonable limit, justified in a free and democratic society in accordance with the test enunciated by the Supreme Court of Canada in the Oakes case.[25]

In the result, Sears paid a $100,000 AMP and $387,000 towards the Commissioner's legal costs.

Since the Sears case, a number of other major Canadian retailers have entered into consent agreements with the Bureau, some involving very substantial AMPs.[26]

B. Criminal Offences

6. Telemarketing

Section 52.1 of the Act is a criminal provision which, in broad terms:

(a) prohibits certain deceptive telemarketing practices; and

(b) requires certain disclosures to be made to consumers in the course of telemarketing activities.

"Telemarketing" is defined in subsection 52.1(1) of the Act as "the practice

of using interactive telephone communications for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest."

The Bureau has issued a series of Enforcement Guidelines in respect of the telemarketing provisions.[27] In these guidelines, the Bureau has indicated that "interactive telephone communications" will be interpreted as live voice communications between two or more persons. Therefore, the telemarketing provisions will not apply to the sending of telecopies, to Internet communications, or to automated pre-recorded messages. Similarly, the Bureau has indicated that customer-initiated calls to a customer relations line and responses to unprompted customer questions in a customer-initiated call will not constitute "telemarketing" for the purposes of section 52.1 if the call is incidental to, and insignificant in relation to, the primary marketing drive nor is it part of a general pattern of representations made to numerous customers. Since the definition of telemarketing refers to "interactive" telephone communications, pre-recorded automated calling and messaging systems that do not provide for two-way interaction with the consumer are also likely to be outside of the scope of the provision.

Subsection 52.1(3) outlines a series of deceptive telemarketing practices that are prohibited, including:

(c) making a representation that is false or misleading in material respect;

(d) conducting a contest, lottery or game of chance or mixed chance and skill, where:

  (i) the delivery of a prize or benefit to the participant is (or is represented to be) conditional on prior payment by the participant; or

  (ii) adequate and clear disclosure is not made of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the person's knowledge, that effects materially the chances of winning;

(e) offering a product at no cost (or for less than fair market value) in consideration of the supply or use of another product, unless fair, reasonable and timely disclosure is made of the fair market value of the first product and of any restrictions, terms or conditions applicable to its supply; or

(f) offer a product for sale at a price grossly in excess of its fair market value, where delivery is (or is represented to be) conditional on prior payment.

Subsection 52.1(2) sets out certain disclosure requirements in terms of what information must be communicated by the telemarketer to the recipient.[28]

Penalties for contravention of subsection 52.1(2) and/or (3) are the following: on conviction on indictment, a fine in the discretion of the court or 14 years' imprisonment or both; or on summary conviction, a fine of up to $200,000 or one year's imprisonment for up to one year, or both.

With the exception of one element of the prohibitions contained in the new telemarketing offence,[29] it could credibly be argued that at the time of the introduction of these provisions in 1999, virtually all of the conduct would already have constituted misleading advertising or fraud. However, the introduction of the telemarketing provisions in 1999 was a regulatory response to what was perceived as a growing problem of predatory and deceptive telemarketing practices being engaged in by various operators within Canada, often targeting foreign consumers. Many of these operators were targeting vulnerable groups, such as seniors. Since the introduction of these provisions, deceptive telemarketing has remained a high priority for the Bureau and an area of significant Canada/U.S. cooperation, involving several successful deportation proceedings to Canada.[30]

7. Deceptive Prize Notices

Section 53 of the Act creates an offence of sending a deceptive notice of winning a prize. It prohibits the sending of any document or notice in any form, whether by electronic or regular mail or by any other means, which gives the general impression that the recipient has won, will win, or will upon doing a particular act win, a prize or other benefit where the recipient is asked or given the option to pay money, incur a cost or do anything that will incur a cost.

The prohibition does not apply if the recipient actually wins the prize or other benefit and the person who sends or causes the notice or document to be sent:

(a) makes adequate and fair disclosure of the number and approximate value of the prizes or benefits, of the area or areas to which they have been allocated and of any fact within the person's knowledge that materially affects the chances of winning;

(b) distributes the prizes or benefits without unreasonable delay; and

(c) selects participants or distributes the prizes or benefits randomly, or on the basis of the participants' skill, in an area to which the prizes or benefits have been allocated.

Penalties for violating section 53 are the same as those that apply under the telemarketing offence: on conviction on indictment, to a fine at the discretion of the court or imprisonment for up to 14 years, or both; or on summary conviction, to a fine of up to $200,000 or imprisonment for up to one year, or both. The section also provides for a defence of due diligence.

In light of the decision of the Supreme Court of Canada in the case of *Richard v Time Inc*[31] (discussed more fully below), it is interesting to speculate on what the result might have been had Time Inc. been prosecuted criminally under section 53 of the Act, rather than civilly under the Quebec *Consumer Protection Act*.[32]

8. Double Ticketing

Subsection 54(1) of the Act creates an offence for "double ticketing"; namely, supplying a product at a higher price than the lowest of two or more prices which are marked:

(a) on the product, its wrapper or container;

(b) on anything attached to, inserted in or accompanying the product, its wrapper or container or anything on which the product is mounted for display or sale; or

(c) on an in-dash store or other point-of-purchase display or advertisement.

Double ticketing is a summary conviction offence of a fine of up to $10,000 or one year imprisonment, or both.

It should be noted that the Bureau has also endorsed the Scanner Price Accuracy Voluntary Code developed by a group of the major Canadian retailer associations.[33]

9. Multi-level Marketing Plans and Pyramid Sale Schemes

Sections 55 and 55.1 of the Act distinguish between "multi-level marketing plans" (which are legal provided certain conditions are met) and illegal "schemes of pyramid selling."

A multi-level marketing plan ("MLM") is a plan with three or more levels (the operator and at least two levels of participants) that promotes the supply of a product to participants in the plan and compensates the participants based on the supply of that product to other participants and/or non-participants.

An illegal "scheme of pyramid selling" is an MLM which:

(a) requires payment for the right to receive compensation for recruiting others into the plan;

(b) requires purchases as a condition of participating in the plan (other than a specified amount of product at the seller's cost for the purpose of facilitating sales);

(c) involves the supply of "commercially unreasonable" amounts of product ("inventory loading") or;

(d) does not provide for a reasonable buy-back, guarantee or return right on reasonable commercial terms, or which fails to inform participants of that right.

Schemes of "pyramid selling" are prohibited outright by subsection 55.1(2).[34] Contraventions of section 55.1 are punishable, on indictment, by a fine in the discretion of the court or a prison term of up to 5 years, or both, or, on a summary conviction, to a fine of up to $200,000 or one year's imprisonment, or both.

Subsection 55.1(2) prohibits an operator or a participant of an MLM plan from making representations regarding the compensation prospective participants can expect, unless there is "fair, reasonable and timely disclosure" of certain information relating to: a) compensation actually received by typical participants in the plan; or b) compensation likely to be received by typical participants in the plan, having regard to any relevant considerations, including the nature of the product, the relevant market, of the plan and similar plans and the form of business organization of the operator.

Subsection 55(2.1) requires the operator of the plan to ensure that any representations made to a prospective participant by a participant in the plan include fair, reasonable and timely disclosure of the information noted above.

There is a due diligence defence available under subsection 55.1(2.2) and penalties for violating the provisions of subsections 55.1(2) or (2.1) are the same as those that apply to conducting an illegal "scheme of pyramid selling."

The Bureau has issued Enforcement Guidelines which describe these provisions in detail, and which give examples of adequate disclosure of compensation for "typical participants" for certain hypothetical plans.[35] Some provinces also require operators of MLM plans to obtain a positive advisory opinion from the Bureau as a condition of obtaining the requisite license.

Section 55.1 has been upheld as a valid exercise of federal power and has also withstood a constitutional challenge under section 15 of the *Charter*.[36]

III. Subsections 52.1 and 74.01(1)(a): Misleading Advertising

A. Prior to 1976

When the *Combines Investigation Act*[37] (the predecessor to the current *Competition Act*) was first enacted (Royal Assent was granted on May 4, 1910), deceptive marketing practices were not addressed in the legislation. Growing concerns with fraudulent land sales in western Canada eventually led, in 1914, to the criminalization of certain marketing practices, under Section 406A of

the Code. Section 406A created the offence of publishing an advertisement containing a false statement or representation, which was intended or was likely to enhance the price of, or promote the sale of, any real or personal property. Between 1914 and 1960, a series of amendments were made to the relevant provisions of the *Code* (including the addition of the substance of what is now subsection 74.01(1)(b) regarding the requirement for adequate and proper testing to support efficacy and performance claims), which gave the prohibition against misleading advertising largely the form it takes today.

In 1960, section 33C of the *Combines Investigation Act* was enacted, establishing for the first time in Canada a specific prohibition against making misleading misrepresentations as to the ordinary price at which a product was sold. In 1969, Parliament transferred the misleading advertising provisions of the *Code* (subsection 306(1)) to the *Combines Investigation Act*, as subsection 33D(1) (the forerunner to the general prohibitions against misleading advertising now found in Section 52(1) and subsection 74.01(1)(a) of the current *Competition Act*).

By 1969, therefore, the *Combines Investigation Act* (as opposed to the *Criminal Code*) contained a comprehensive series of provisions addressing misleading advertising in terms largely similar, though not identical to, the prohibitions now found in sections 52 and 74.01 of the Act.

B. 1976 to 1999

In 1976, the *Combines Investigation Act* contained the following general prohibition against misleading advertising:

> "36.(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,
>
> (a) make a representation to the public that is false or misleading in a material respect..."

The *Combines Investigation Act* also contained provisions essentially identical to those now contained in section 74.02 of the Act regarding tests and testimonials.

These provisions were enforced as criminal prohibitions, punishable on indictment, to a fine in the discretion of the court and/or 5 years imprisonment, or, on summary conviction, to a fine of up to $25,000 and/or one year imprisonment.

Section 31.1 of the *Combines Investigation Act* (the predecessor to what is

now section 36 of the Act) introduced an additional remedy to the legislation by providing a civil right of action to any person who suffered loss or damage as a result of conduct that was contrary to what was then part V of the Act (now part VI).

This civil remedy allowed for redress by private parties, but regulatory enforcement by the Bureau remained a matter of criminal law. Therefore, for more than twenty years subsequent to the 1976 amendments, the only tool available to the Bureau in terms of regulatory enforcement of the misleading advertising provisions of the *Combines Investigation Act* remained the relatively blunt instrument of the criminal law.

The process by which a complaint of a deceptive marketing practice, such as misleading advertising, was investigated and prosecuted was relatively unwieldy.[38] The Director of Investigation and Research (the "Director," as the Commissioner's office was then called) had no standing to apply to a court or to the Tribunal with respect to deceptive marketing practices, including misleading advertising. Moreover, prosecutions for misleading advertising were subject to the same rules, evidentiary standards and potentially subject to the same delays as all other criminal prosecutions.[39] The process of criminal prosecution was seen by the Bureau (and by others, as discussed below) as a cumbersome, expensive, and long, drawn-out process.[40]

In 1976, as part of the "second stage" of competition law reform, the Department of Consumer and Corporate Affairs commissioned a study led by Professor Michael J. Trebilcock on misleading advertising and unfair trade practices. Professor Trebilcock's report recommended the establishment of a parallel system of administrative remedies for misleading advertising and other deceptive marketing practices,[41] which would permit the issuance of orders for corrective advertising, divestiture of profits and compensation on a collective or individual basis.[42] Criminal prosecution would be reserved for particularly egregious cases.

In 1988, the House of Commons Standing Committee on Consumer and Corporate Affairs, chaired by the Honourable Mary Collins, M.P., issued a report which similarly identified certain drawbacks of the existing criminal regime of enforcement for misleading advertising and other deceptive trade marketing practices. Its report recommended that the Act be amended to allow the Director to apply directly to the courts for injunctions stopping conduct contrary to the Act and to permit the courts to issue orders requiring advertisers to run corrective advertising and/or to disclose factual information to consumers.

In 1990, the Director established a working group chaired by Professor Edward Ratushny to examine, specifically, proposals for amendments to the

misleading advertising and deceptive marketing practices under the Act.[43] The report of this working group reached conclusions that were broadly consistent with those of the Trebilcock and Collins reports, in that it recommended the decriminalization of misleading advertising and deceptive marketing practices as well as the establishment of a civil administrative enforcement regime.

The proposals to decriminalize misleading advertising found legislative form in 1998, with the introduction in Parliament of Bill C-20.[44]

Among the groups supporting decriminalization of misleading advertising was the Canadian Bar Association. Its Competition Law Section submitted a detailed brief to the Standing Committee on Industry of the federal House of Commons. Two representatives of the Section appeared before the Committee in April of 1998, during the consideration of Bill C-20. Bill C-20 introduced a series of significant amendments to the Act, including the creation of a "dual track" criminal and civil regime for enforcement of misleading advertising.[45]

C. The 1999 Amendments: Creation of Today's "Dual Track Regime"

In 1999, the Act was amended to create a "dual track" regime for enforcement of the general prohibition against misleading advertising. The criminal offence of misleading advertising was retained, with the explicit addition of the words "knowingly" or "recklessly" to clarify the requisite mental element ("*mens rea*") necessary to secure a criminal conviction.

1. Criminal Track

As a result, the general prohibition in subsection 52(1) now reads as follows:

> "52(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly, make a representation to the public that is false or misleading in a material respect."

2. Civil Track

This basic prohibition (minus the *mens rea* element) was then repeated, in a corresponding civil provision, paragraph 74.01(1)(a) of the Act, which reads as follows:

> "74.01(a) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever:

(a) makes a representation to the public that is false or misleading in a material respect."

In essence, since 1999, there have been two parallel prohibitions against misleading advertising: one which may be enforced by criminal prosecution and one which may be enforced by civil proceedings. Under the 1999 amendments, the criminal offence of misleading advertising was punishable on indictment, by a fine in discretion of the court or by imprisonment for a term of up to five years, or both. Criminal prosecutions may be brought only in a provincial criminal court or Superior Court. Under the new civil regime, applications for enforcement of the prohibition against misleading advertising may be brought before the Tribunal, the Federal Court (Trial Division) or a superior court of a province, directly by the Commissioner.

The potential remedies introduced in the 1999 amendments included the following:

(i) a cease and desist order with a duration of up to ten years, as determined by the Tribunal or court;

(ii) the Tribunal or court may also order correction notices to be published by the advertiser, which may include publication of a description of a prohibited conduct, the time period and area to which the advertising related and a description in the manner in which it was originally published, including the name of the media in which it first appeared; and

(iii) "AMPs – in the case of individual offenders in an amount up to $50,000 for a first time order and up to $100,000 for subsequent orders, and in the case of corporate offenders, up to $100,000 for first time orders and $200,000 for subsequent orders.[46]

In order to avoid "double jeopardy," subsection 52(7) of the Act provides that no proceedings may be commenced under section 52 against an advertiser who is subject to an application for review under Part VII.1 on the basis of the same or substantially the same facts as those which form the basis of the criminal prosecution. However, subsection 52(6), makes clear that the fact that a civil remedy exists for misleading advertising does not preclude criminal prosecution under section 52 if all the elements of the offence are present.

Concern was expressed at the time the 1999 amendments were introduced regarding how and when the choice of pursuing a criminal or civil track would be made. Understandably, there was concern that the Commissioner might use the leverage of a threat of potential criminal prosecution to achieve a negotiated resolution of the matter under the civil provisions. Indeed, since the 1999 amendments, many investigations have resulted in "consent" prohibition

orders entered into between the advertiser and the Bureau, many of which provide for significant AMPs (see the discussion below).

The Canadian Bar Association, among others, called for the Act to specify that the Commissioner must be required to make a choice between the criminal or civil track within a specified timeframe of commencing an investigation. While no such provision was included in the 1999 amendments, in response to this concern, the Bureau issued an Information Bulletin regarding the considerations to be taken into account by the Commissioner when deciding whether to pursue the civil or criminal track.[47]

In addition to confirming that the use of one route would preclude the other, the Information Bulletin contained the following statements of principle:

(i) for the Commissioner to pursue a criminal prosecution, there must be clear and compelling evidence that the accused knowingly or recklessly made false or misleading representations to the public and the Commissioner must be satisfied that a criminal prosecution would be in the public interest;

(ii) in determining the "public interest" the Commissioner will consider the seriousness of the alleged offence (including harm to consumers and competitors), whether there was an attack on a vulnerable group or groups, whether the conduct continued after corporate officials became aware of the problem, whether there was a breach of previous undertakings or other voluntary corrective actions, and whether the accused was a repeat offender.

The 1999 amendments clearly laid the groundwork for a dramatic shift in the enforcement of the misleading advertising provisions of the Act, from criminal to civil proceedings.

D. The Proposed 2004 Amendments (Bill C-19)

In November 2004, a proposal to increase significantly the AMPs to be imposed for violations of section 74.01 of the Act (among other amendments), was introduced. Bill-C-19, proposing these increases, received first reading in the House of Commons in November 2004 and was then referred to Committee.

Among those commenting on the Bill was the Retail Council of Canada, whose objection to the proposed amendments included the significant increase in AMPs. In support of its objections, the Retail Council of Canada tendered a legal opinion from one of Canada's leading constitutional experts, Peter Hogg (who also appeared in October, 2005 before the Standing Committee on Industry, Natural Resources, Science and Technology to present his views). Professor

Hogg concluded that the AMPs as amended would be unconstitutional. While acknowledging that Parliament has the power to impose whatever monetary penalties it sees fit for a breach of federal laws,[48] Professor Hogg believed that Bill C-19 ignored the safeguards guaranteed by section 11 of the *Charter* for "any person charged with an offence." In his view, the increased AMPs involved a "true penal consequence" so that a proceeding to impose an AMP would be, for constitutional purposes, not merely a civil proceeding but a criminal proceeding to which section 11 applies. With the defeat of the then-Liberal government on a budgetary vote of non-confidence in 2005, the issue became moot because Bill C-19 died on the order paper.

E. The 2009 Amendments

In 2009, as part of the Tory government's omnibus "stimulus package" of legislation following the global recession in late 2008, the amendments that had died on the order paper in 2005 were reintroduced and ultimately passed into law. These amendments significantly increased the AMPs for misleading advertising, as originally proposed in Bill C-19 in 2004. Namely, AMPs were increased for individuals to $750,000 for a first violation and to $1 million for any subsequent violation, and for corporations to $10 million for a first violation and to $15 million for a subsequent violation. In addition, the maximum term of imprisonment for the criminal offence of misleading advertising was increased from 5 years to 14 years.

The amendments also empowered the court or Tribunal to order an offending advertiser to make restitution to consumers.[49] The Commissioner may now apply to the court or Tribunal for a temporary cease and desist order,[50] or for an interim injunction prohibiting a person from disposing or otherwise dealing with assets in a manner that will substantially impair the enforceability of a restitution order.[51]

It will be seen that, as a result of the 1999 and 2009 amendments to the Act, the Bureau now has a powerful set of legislative tools to deal with misleading advertising and that the penalties to which an offender may be subject, even in the context of a civil proceeding, are very substantial indeed.

As discussed below, a renewed challenge to the constitutionality of these provisions, including the concerns expressed by Professor Hogg in 2005, is now before the courts in contested civil proceedings brought by the Commissioner against Rogers Communications Inc.[52]

F. CASL Amendments to Competition Act

Included in Canada's new anti-spam law ("CASL")[53] are certain amendments

to the Act, which have not yet been proclaimed in force as of the date of writing. A full review of the complex provisions of CASL is beyond the scope of this paper but, among other things, CASL will amend the Act to create new civil reviewable prohibitions (substantially similar to section 74.01) prohibiting sending, or causing to be sent, a false or misleading representations in an electronic message, whether in the body of the message sender information, subject matter information or locator of the message.[54]

The amendments create a new private right of action for individuals who are affected by reviewable conduct, which permits the Federal Court or a superior court of a province to compensate the individual for actual loss or damage suffered and to impose penalties of $200 per occurrence of the reviewable conduct, up to $1,000,000 per day. These penalties are deductible from any AMPs that may otherwise be awarded in respect of that conduct.

The amendments also expand the definition of "telemarketing" for the purposes of section 52.1 to extend to promotional calls by "any means of telecommunication," rather than restricting telemarketing solely to telephone communications.

The CASL amendments also streamline the grounds on which an application by or on behalf of the Attorney General of Canada or the attorney general of a province may be made for an interim injunction to prevent an offence under Part IV, or by the Commission in respect of reviewable conduct under subsection 74.01(1)(a).

Finally, the amendments also lower the threshold test for applications by the Commissioner for temporary prohibition orders under section 74.11 of the Act, from a "strong *prima facie* case" to the less stringent test of "if it appears to the court."

G. Selected Elements of the Existing Enforcement Regime

Both the "criminal" and "civil" tracks for the enforcement of misleading advertising share certain common statutory elements.

Under both sections 52(4) and 74.03(5), the legislation makes it clear that the general impression conveyed by a representation, as well as its literal meaning, is to be taken into account in determining whether or not the representation in question is false or misleading in a material respect.

Whether in criminal or civil proceedings, it is not necessary to establish that: (a) any person has actually been deceived or misled; (b) any member of the public to whom the representation was made was within Canada; or (c) the representation was made in a place to which the public had access.[55]

For the purposes of either criminal or civil proceedings, a representation that is: (a) expressed on an article offered or displayed for sale in its wrapper or container; (b) expressed on anything attached to, inserted in, or accompanying an article offered or displayed for sale in its wrapper or container, or anything on which the article is mounted for displayed or sale; (c) expressed in an in-store or other point-of-purchase display; (d) made in the course in-store, door-to-door or telephone selling to a person as an ultimate user; or (e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other matter to a member of the public; is deemed to made to the public by and only by the person who caused the representation to be so expressed made or contained, except where the product is imported, in which case it is the importer that is deemed to be responsible for the representation.

The civil track also provides for a statutory defence of due diligence[56] and a "publisher's defence."[57]

H. Performance Claims: Section 74.01(1)(b)

Before leaving the discussion of the current "dual track" enforcement regime, it is also worth briefly examining another subset of the substantive provisions of the Act that fall generally under the rubric of misleading advertising.

Under subsection 74.01(1)(b) of the Act, it is reviewable conduct for any person to make "a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation."

The provision effectively establishes a special rule for advertising claims that relate to "performance, efficacy or length of life of a product" (as opposed to other claims concerning a product) in that it expressly requires the substantiation to be established *before* the claims are made. The Act itself provides no further guidance for the standard of substantiation required (*i.e.*, for what will constitute an "adequate and proper test") and the provision is a "reverse onus" provision. In essence, the provision explicitly places the burden of proving compliance with the provision on the person who is making the representation. There is no "safe harbour" provision, which allows for recourse to any specific testing body.[58] What has or has not qualified as an adequate or proper test has been examined on a case-by-case basis.[59]

A leading recent case is the *Imperial Brush* case,[60] a decision of the Tribunal, which examines the adequacy of testing certain performance claims made with respect to certain stoves and fireplace maintenance products. The Tribunal concluded that a "proper and adequate" test: (a) depends on the claim as

understood by the common person; (b) must be reflective of the risk or harm which the product is designed to prevent or assist in preventing; (c) must be done under controlled circumstances or in conditions which excludes external variables or takes account of such variables in a measurable way; (d) must be conducted on more than one independent sample wherever possible (*e.g.,* destruction testing may be an exception); (e) must be reasonable given the nature of the harm at issue and establish that it is the product itself which causes the desired effect in a material manner; (f) and must be performed regardless of the size of the seller's organization or the anticipated volume of sales.

The question of the adequacy of testing for performance claims has also been an issue in a number of cases involving private civil actions.[61]

As discussed more fully below, the "reverse onus" contained in subsection 74.01(b) and its predecessors have also been subject to constitutional challenges, which are being revisited in the *Rogers* case.[62]

I. Private Civil Remedy: Section 36 of the *Act*

In addition to the regime of regulatory enforcement by the Bureau, as noted above, the Act provides, in section 36, for a private right of civil action on the part of any person who has suffered loss or damage as a result of (a) conduct that is contrary to any provision of Part VI, or (b) the failure of any person to comply with an order of the Tribunal or another court under the Act.

There are two considerations that must be fulfilled in order for the right of private civil action to apply.

First, there must have been conduct contrary to Part VI of the Act; that is, criminal conduct. In the case of misleading advertising, only the criminal offence under section 52 is found in Part VI. The civil prohibition against misleading advertising is found in section 74.01 of the Act, which resides in Part VII.I. What this means for the right of private civil action is that a plaintiff seeking redress under section 36 must effectively prove (albeit on the civil standard of proof – namely, on "a balance of probabilities") that the defendant advertiser acted "knowingly or recklessly," since these words were added to section 52 as part of the 1999 amendments. So, while a private action under section 36 is a civil proceeding (and therefore does not require proof on the criminal standard of "beyond a reasonable doubt") nonetheless, an element of criminal law – the element of *mens rea* - must at least be established as an evidentiary matter by the plaintiff. To date, the specific requirement of demonstrating that the conduct was engaged in "knowingly or recklessly" has not been examined closely in the post-1999 cases under section 36. Yet it remains, at least theoretically, a potential hurdle to success in section 36 cases.

Second, the provision only applies where the plaintiff has "suffered loss or damage" as a result of the offending conduct and only explicitly permits the plaintiff to sue for and recover damages. Accordingly, the question of whether injunctive relief is available under section 36 has been hotly debated.

Claims for relief under section 36 have often been joined with claims for injunctive relief under the *Trade-Mark Act* or a tort claim such as trade libel.[63] Therefore, injunctive relief has been clearly available on those grounds. Interlocutory injunctions have also been granted in civil proceedings under section 36 alone; however, whether permanent injunctive relief is available under section 36 has not conclusively been determined.[64]

Prior to the 1999 amendments to the Act, the hurdle of establishing any *mens rea* element of "knowing" or "reckless" conduct did not apply. Even so, claims for injunctive relief under section 36 were not always granted (even when combined with other causes of action). Some of the leading pre-1999 cases include *UNITEL Communications Inc v Bell Canada,*[65] *Church & Dwight v Sifto,*[66] *Beatrice Food Inc v Ault Foods Ltd,*[67] *Purolator Courier Ltd v United Parcel Service Canada Ltd,*[68] *Mead Johnson Canada v Ross Pediatrics,*[69] and *Unilever Canada Inc v Procter & Gamble Inc.*[70]

In 2009 and 2010, there was a considerable amount of activity in the courts involving private actions between Canada's major telecommunications company seeking injunctive relief under section 36.[71] In addition to confirming, as a practical matter, the availability of interlocutory injunctive relief under section 36 of the Act, the cases also provide a useful review of the test generally to be applied to applications for such relief. While the decision of the court in each case as to whether or not to grant the injunction hinged on the particular facts of the case, collectively they give an instructive reading.

As a practical matter, private civil actions in misleading advertising cases are won or lost at the interlocutory injunction stage since advertising campaigns are, by their very nature, time sensitive, and the assessment of damages caused by a particular advertising campaign is a difficult and expensive process. However, damages have now been determined and awarded in the recent case *Maritime Travel Inc v Go Travel Direct.Com Inc,*[72] which is the first (and, at the time of writing, the only) case to have involved such an award.

V. Recent Developments

I. Disclaimers and the General Impression Test

As noted above, the provision governing both the criminal and civil enforcement of misleading advertising explicitly provides that, in determining

whether a particular representation is false or misleading in a material respect, the "general impression" conveyed by the representation, as well as its literal meaning, must be taken into account. An enunciation of this principle is found in the American case of *FTC v Sterling Drug Inc*[73] as quoted in the Alberta Court of Appeal decision in *R v Imperial Tobacco Products Ltd.*[74]

> "It is therefore necessary in these cases to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately. "The buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reason arises from the sum total of not only what is said, but also of all that is reasonably implied."

Related issues that are inextricably tied up with the question of general impression are the use and effectiveness of disclaimers and the standard of intelligence and scrutiny of the advertisement required by the consuming public – in other words, what is the standard to be applied to the audience of the message in question. In applying the "general impression" test, particularly in cases which have involved the use of disclaimers, the questions of the extent to which the disclaimer should or should not be given effect and the standard to be expected of the consuming public, have regularly been linked.[75]

On the question of disclaimers, the Bureau has issued a series of bulletins that distinguish certain types.[76] According to the bulletins, disclaimers that merely expand upon or add information to the principal representation in an advertisement will not raise an issue under the Act, whereas disclaimers that attempt to cure or retract a false or misleading representation will not be effective. Materiality is also clearly an issue – disclaimers which relate to a relativity minor aspect of the ad are less likely to raise a concern than disclaimers which provide information regarding a material aspect of an advertisement and which are inconsistent with the general impression otherwise created by the main body of the advertisement.

The courts have considered disclaimers in a number of cases which have, in the context of assessing the effectiveness of the disclaimers, also addressed the question of who is the relevant consumer. In the case of *R v Imperial Tobacco Products Ltd,*[77] a case under the predecessor to section 52 of the Act, the trial judge adopted a "credulous man" standard from U.S. cases:

> "it seems to me the protection afforded by the section is for 'the public – that vast multitude that includes the ignorant, the unthinking and the credulous', to use an expression that appears in Federal Trade Commission Prosecution cases in the United States ..."

Since the establishment of the "credulous man" standard in the *Imperial Tobacco* case, a series of subsequent cases seemed to shift the yardsticks in favour of an "average purchaser" test[78] and, depending on the product involved, potentially even a relatively sophisticated purchaser.[79] Not surprisingly, cases which have given effect to disclaimers used in advertising have tended not to apply the "credulous man" standard.[80]

The *Richard v Time* Case

The question of what standard of sophistication can be expected of the consuming public and to what extent small-print text and or disclaimers will be effective, has recently been examined by the Supreme Court of Canada in the case of *Richard v Time Inc.*[81] In this case, the plaintiff, Mr. Richard, received a notification from *Time Magazine* in the form of a letter (English only) containing several explanatory sentences in bold letters, such as "[o]ur Sweepstakes are now final, Mr. Jean Marc Richard has won a cash prize of $83,337," among other similar statements. These bold-faced statements were preceded by qualifying phrases in much smaller fine-print, such as "if you have and return the winning prize entry on time and correctly answer a skill-testing question, we would officially announce that..." Along with the notification were an "official entry certificate" and a return envelope in which the Official Rules of the Sweepstakes appeared in small print. Mr. Richard testified that, after reading the document twice and obtaining a second opinion from the Vice-President of the company he worked for, he was convinced that he had won the large cash prize and immediately returned the reply coupon, subscribing to *Time Magazine* for 2 years as he did so. After pursuing the matter with *Time Magazine*, he was informed that he would not be receiving the cash prize as he did not have the winning entry for the draw.

Mr. Richard began proceedings in the Quebec Superior Court seeking a declaration that he was the winner of the large cash prize and compensatory and punitive damages corresponding to the amount of the grand prize.

The trial court awarded Mr. Richard moral damages of $1,000 and punitive damages of $100,000. The decision of the trial court was, however, reversed by the Quebec Court of Appeal, who were not satisfied that in all the circumstances, the general impression of the notification to the average consumer was that the recipient of the notification was the grand prize winner. Mr. Richard appealed to the Supreme Court of Canada. The Supreme Court confirmed the trial court's award of $1,000 in compensatory damages for moral injury and reduced the punitive damages award to $15,000. In its reasoning, the Supreme Court rejected the definition of the "average consumer" adopted

by the Quebec Court of Appeal – that of a consumer with "an average level of intelligence, skepticism and curiousity." The Supreme Court concluded that the "average consumer" is best described as "credulous and inexperienced," at least for the purposes of Quebec consumer protection law. According to the Supreme Court, the standard to be applied for the general impression test is more the standard of the "ordinary hurried purchaser."

While the *Richard* case was decided under the provisions of the Quebec *Consumer Protection Act* and not under the federal *Competition Act*, it is not unreasonable to expect that it will be influential in future misleading advertising cases under the provisions of the Act - it is a decision of the Supreme Court of Canada and it examined advertising copy in the context of a regime aimed at consumer protection.

The *Bell Disclaimer* Case

A further development of significance with respect to the use of disclaimers is the recent consent agreement reached between Bell Canada and the Bureau in June, 2011, under which Bell agreed to pay an AMP of $10 million.[82] The Bureau had determined that, since December 2007, Bell had charged higher prices than advertised for many of its services, including home phone, Internet, satellite TV, and wireless. According to the Bureau, Bell's advertised prices were not available, since additional mandatory fees, such as those related to TouchTone, modem rental, and digital television services, were disclosed only in fine-print disclaimers. According to the Bureau's press release:

> "As an example, Bell's Web site had been advertising a bundle for home phone, Internet and television services starting as low as $69.90 per month. However, it was impossible for customers to buy the bundle for the advertised price. In fact, the lowest possible price, including the mandatory fees, was $80.27 – approximately 15% higher than advertised. Customers purchasing any of the services individually were also faced with the same misleading information, as additional fees were excluded from those prices as well."

It will be interesting to see what, if any, combined impact the Bell consent agreement and the *Richard* case will have on future assessments by the courts of the validity and effectiveness of disclaimers and/or less prominent disclosures of relevant information in the main body of advertising copy in misleading advertising cases.

II. The Rogers Constitutional Challenge

As noted above, at the time of writing, the *Rogers* case[83] is currently before the Ontario Superior Court of Justice.

In this case, the Commissioner brought an application against Chatr Wireless Inc. and Rogers Communications Inc. (collectively, "Rogers") in respect of certain advertising claims made by Rogers regarding its "Chatr" wireless telephone service in comparison to certain competitors. Among other relief, the Commissioner is seeking an AMP in the amount of $10 million. Rogers is contesting the application by the Commissioner and, in its defence, is challenging the constitutionality under the *Charter* of the reverse onus provisions of subsections 74.01(1)(b) of the Act and the AMPs provided for under subsection 74.1(1)(b)(ii) of the Act.

In the respective outlines of their constitutional arguments, as filed with the court, the Commissioner and Rogers review the existing court decisions of the courts[84] and the Tribunal[85] regarding the constitutionality of the reverse onus clause in subsection 74.01(1)(b) and its predecessor criminal provision. The Commissioner, for her part, argues that (apart from the *Lebski* case,[86] which she distinguishes on the basis that it was effectively undefended on the constitutional issue by the Commissioner) the constitutionality of the reverse onus provision is settled law. For its part, Rogers argues that none of the previous decisions are binding on the court because, in the case of the court decision, they were decided under the predecessor of criminal provisions of the Act and, in the case of the Tribunal decisions, in each case at least one of the two parties failed to make argument on the constitutional point.

The decision of the Ontario Superior Court of Justice in the *Rogers* case will represent the first decision of a superior court (as opposed to the Tribunal) on the reverse onus provision as it is now found in subsection 74.1(1)(b) of the Act. Of even greater potential significance will be the court's ruling on the second leg of Rogers' constitutional challenge – namely, its challenge to the current civil regime of AMPs remedies. Rogers is asserting that the current AMP regime violates section 11 of the *Charter* - in particular, section 11(d) (presumption of innocence), section 11(c), (protection against an accused person being compelled to be a witness in the proceedings) and generally, the right to make full answer and defence.

As outlined in both submissions, the relevant test for determining whether section 11 of the Charter applies is found in the seminal Supreme Court of Canada's decision in *R v Wigglesworth*.[87] The case established a two-fold test for assessing whether a person has been "charged with an offence" for the

purposes of section 11 – firstly, whether the proceedings themselves are "criminal" in nature and, secondly, whether "true penal consequences" are involved. According to the majority in *Wigglesworth*, proceedings which are "of a public nature, intended to promote public order and welfare within a public sphere of activity" fall within section 11. By contrast, "private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity," do not.

On the first part of the *Wigglesworth* analysis, Rogers asserts that proceedings under section 74.1 of the Act are clearly "intended to promote public order and welfare within a public sphere of activity" and therefore attract the operation of section 11 of the *Charter*. In response, the Commissioner argues that the courts have upheld significant AMPs, particularly in the context of economic regulation. In the Commissioner's submission, AMPs may properly be imposed where they are intended expressly to promote conduct and conformity with a legislative scheme, and not with a view to punishment.

On the second part of the *Wigglesworth* analysis, Rogers argues that, based on several considerations (including, among others, the magnitude of the AMPs, the fact that AMPs are paid into the Consolidated Revenue Fund for the benefit of society at large and that stigma and societal condemnation are intended consequences of the AMPs), the AMPs constitute "true penal consequences" and Rogers should therefore be afforded the procedural protections of section 11 of the *Charter*. The Commissioner, argues that the courts have recognized that even very substantial penalties may be necessary to ensure that the penalties are more than simply "the cost of doing business," and must be sufficiently large in order to effectively promote compliance with the Act. The Commissioner also asserts, with respect to the application of section 11(c) of the *Charter*, that a corporation cannot be a witness in proceedings and that, consequently, that provision has no application in this case.

Lastly, each of the parties sets out its respective arguments as to whether, if there is a *prima facie* violation of the *Charter*, the violation is either saved (according to the Commissioner) or not saved (according to Rogers) under section 1 of the *Charter*, as a reasonable limitation on a constitutional right, under the *Oakes* test[88] established by the Supreme Court of Canada.

As the court's decision in this case will represent the first judicial consideration of the current level of AMPs available under the civil track enforcement regime under the Act, it is eagerly anticipated and could have important implications for other civil provisions where AMPs may be imposed.

VI. Conclusion

The prohibition against misleading advertising began in Canada as a criminal offence. In 1999, the calls for a less cumbersome, more effective means of dealing with "non-egregious" instances of misleading advertising resulted in the creation of the *dual track* approach to enforcement reviewed above.

With the significant expansion of the powers of the Bureau as a result of the 2009 amendments – in particular, the ability to seek AMPs at the level of up to $10 million, for a first infraction, against corporations – it is, in the view of the author, not surprising that the question of whether the current "civil" enforcement track under the Act has preserved its "administrative" character, or, by degrees, returned to the realm of criminal enforcement is now before a court.

Currently, and certainly if the current level of AMPs survives a constitutional challenge, it is arguably difficult to see circumstances under which the Commissioner would be motivated to pursue criminal enforcement proceedings under section 52 of the Act when such substantial remedies are available under the civil track, without the hurdles of the criminal process from an enforcement standpoint.

The last 25 years have seen a dramatic evolution in the provisions of the Act regarding misleading advertising and other deceptive marketing practices and it will be very interesting to see what the next few years hold in store.

ENDNOTES

[1] Brian R. Fraser is Co-Leader of the Advertising, Marketing and Regulatory Affairs Practice Group at Gowling Lafleur Henderson LLP. The author wishes to acknowledge, with thanks, the research assistance of Ilene Solomon and Amanda MacNaughton, students-at-law, in the preparation of this paper.

[2] RSC 1985, c 34.

[3] The PPSC is an independent organization, reporting to Parliament through the Attorney General of Canada, responsibly for the prosecution of criminal offences under federal jurisdiction. While the Competition Bureau investigates both civil and criminal offences under the *Competition Act*, decisions to prosecute criminally are taken independently by the PPSC.

[4] For a more complete discussion of each of these provisions, see David MW Young & Brian R Fraser, *Canadian Advertising and Marketing Law* (Toronto: Carswell, 1990) ch 1 [Young & Fraser].

[5] There has been little judicial consideration of this provision, but see *Canada (Commissioner of Competition) v Strategic Ecomm*, 2006 CarswellNat 6427 (Comp Trib).

[6] See Competition Bureau, *Misleading Advertising Guidelines* (2001) at 3.A.(4), online: Competition Bureau <http://www.competitionbureau.gc.ca>.

[7] Federal Trade Commission, *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 CFR Part 255.

[8] See *R v Multitech Warehouse (Manitoba) Direct* (1993), 51 CPR (3d) 195 (Man QB), aff'd 62 CPR (3d) 305 (Man CA). See also Young & Fraser, *supra* note 3 at 1-108.
[9] 1997, 5 CPR (4th) 465 (Ont Dist Ct).
[10] [1991] 5 WWR 561.
[11] Contrast *R v Air Canada* (1987), 17 CPR (3d) 392 (Ont Dist Ct) with *R v International Vacations Ltd* (1980), 56 CPR (2d) 251 (Ont CA). In the circumstances of the former, the disclaimer "some flights may be sold out" was insufficient to avoid liability under the predecessor to this provision, whereas, in the latter, a similar disclaimer was sufficient to avoid liability under the general prohibition against misleading advertising.
[12] *Misleading Advertising Guidelines*, *supra* note 5 at 6.C. (3).
[13] [1985] CSP 1024 (Qc Sup Ct).
[14] RSC 1985, c C-46. For a full discussion of the legal considerations relevant to the structuring of promotional contests, see Young & Fraser, *supra* note 3 at ch 3.
[15] See *An Act respecting lotteries, racing, publicity contests and amusement machines*, RSQ c L-6.
[16] Competition Bureau, *Promotional Contests – Section 74.06 of the Competition Act* (16 October 2009), online: Competition Bureau <http://www.competitionbureau.gc.ca>.
[17] Competition Bureau, *Application of the Competition Act to Representations on the Internet* (18 February 2003), online: Competition Bureau <http://www.competitionbureau.gc.ca>.
[18] See e.g. *R v Simpsons Ltd* (1998), 25 CPR (3d) 34 (Ont Dist Ct) and *R v Pepsi Cola Can Ltd* (1986), 14 CPR (3d) 399 (Ont Prov Ct).
[19] *Canada (Commissioner of Competition) v Elkhorn Ranch & Resort.*, 2009 Carswell Nat 4781 (Competition Trib).
[20] The consent order in the *Elkhorn* case also indicates that the contests run by Elkhorn in 2006 and 2007 failed to disclose: the number of entry ballots; the odds of winning by entering a ballot; the number of keys or bonus codes distributed; the odds of winning by obtaining a winning key or bonus code for a bonus price; the number and value of prizes; and the close and draw dates of the contests.
[21] Competition Bureau, *Ordinary Price Claims, Subsections 74.01(2) and 74.01(3) of the Competition Act* (20 September 2009), online: Competition Bureau <http://www.competition bureau.gc.ca>.
[22] *Canada (Commissioner of Competition) v Sears Canada* (205), 2005 CarswellNat 851, 37 CPR (4th) 65 (Competition Trib).
[23] Subsection 74.01(5) of the Act contains a "saving" provision that permits the advertiser to avoid liability if it can establish that "in the circumstances, a representation as to price is not false or misleading in a material respect."
[24] Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act* 1982 (UK), 1982, c11 [*Charter*].
[25] *R v Oakes*, [1986] 1 SCR 103. The four criteria established under the *Oakes* "test" are: (a) the provision in question has a pressing and substantial objective; (b) the infringement of the right is rationally connected to the realization of the legislative objective; (c) the provision is minimally impairing of the infringed right, in that the provision falls within the reasonable range of alternatives as a means of achieving the objective; and (d) the salutary effects of the provision outweigh its deleterious effects.

[26] See the following consent agreements filed with the Tribunal: *Curry's Art Store Ltd* (31 March 2009), CT 2009-002 ($60,000 AMP, corrective notice and undertakings re: future compliance and implementing a corporate compliance program); *Grafton Fraser Inc* (27 July 2006), CT 2006-007 ($1 million AMP and Bureau's costs in the amount of $200,000, corrective advertising and undertakings re: future compliance and implementing a corporate compliance program); *Suzy Shier Inc* (13 June 2003), CT 2003-006 ($1 million AMP, corrective advertising and undertakings re: future compliance and implementation of corporate compliance program); and the *Forzani Group Ltd* (6 July 2004), CT 2004-010 ($1.2 million AMP and Bureau's costs in the amount of $500,000, corrective advertising and undertaking to implement corporate compliance program).

[27] Competition Bureau, *Telemarketing Section 52.1 of the Competition Act* (16 October 2009), online: Competition Bureau < http://www.competition bureau.gc.ca>.

[28] Firstly, at the beginning of each telephone communication, the telemarketer must disclose in a fair and reasonable manner, the identity of the person on behalf of whom the communication is made, the nature of the product or business interest being promoted and the purposes of the communication. The telemarketer must also disclose, in a fair, reasonable and timely manner, the price of any product whose supply or use is being promoted and any material restrictions, terms or conditions applicable to its delivery and such other information in relation to the product as may be prescribed by regulations. This disclosure must be made during the course of the telephone communication, unless it is established by the telemarketer that the information was disclosed within a reasonable time before the communication, by any means, and the information was not requested during the telephone communication. This requirement of disclosure applies equally to the information that must be disclosed in connection with contests or the supply of the product, as outlined in the prohibitory provisions of subsection 52.1(3).

[29] Subsection 52.1(3) (b) makes it an offence, via telemarketing, to conduct a promotional contest in which some prior payment is required by the participant. Outside of the context of telemarketing, under limited circumstances, (where the prize does not consist of "goods, wares or merchandise"), it is arguable that it is possible to conduct contests in which participants pay some consideration in order to enter, without violating the provisions of section 206 of the *Criminal Code*. To the extent that there is limited scope for promotional contests that do involve some form of consideration, that window is clearly closed when it comes to telemarketing. In terms of the disclosure requirements, the prescriptive nature of the telemarketing provisions create a unique application of the principles that are also found in section 74.06 of the Act, which deals generally with disclosures related to promotional contests.

[30] See *R v Cheung*, 2011 ABQB 225; *United States of America v Edwards*, [2009] BCJ No 2777; *United States of America v Dixon*, [2009] BCJ No 2890; *R v Stucky*, 2009 ONCA 151; and *United States of America v Yemec*, 2010 ONCA 414.

[31] *Richard v Time Inc*, 2012 SCC 8.

[32] RSQ c P-40.1.

[33] *The Scanner Price Accuracy and Voluntary Code* was developed by the Retail Council of Canada, the Canadian Association of Chain Drug Stores, the Canadian Federation

of Independent Grocers, and the Canadian Council of Grocery Distributors. The Code applies to all scanned Universal Product Code (UPC), bar coded, and/or Price Look Up (PLU) merchandise sold in stores, with the exception of goods not easily accessible to public. The Code provides that, where the scanned price of a product at checkout is higher than the price displayed in the store or then advertised by the store, the lower price will be honoured; and (a) if the correct price of the product is $10 or less, the retailer will give the product to the customer free of charge; or (b) if the correct price of the product is higher than $10, the retailer will give the customer a discount of $10 off the corrected price. See, also, in Quebec the *Order in Council respecting the Policy on accurate pricing from merchants who use optical scanner technology issued* under the *Quebec Consumer Protection Act* (RSQ, c P-40.1, s 315.1).

[34] It should be noted that paragraph 206(1) (e) of the *Criminal Code* also prohibits pyramid schemes.

[35] Competition Bureau, *Multi-level Marketing Plans and Schemes of Pyramid Selling – Sections s. 55 and 55.1 of the Competition Act* (2009), online: Competition Bureau <http://www.competitionbureau.gc.ca>.

[36] *R v Shaklee Canada Inc,* [1985] 1 FC 593 (CA), rev'g [1981] 2 FC 730 (Fed TD); aff'd (subnom, *Shaklee Canada Inc v Canada* (AG)) [1988] 1 SCR 662.

[37] RSC 1910, c C-23.

[38] Randy A Pepper, "The Proposed Amendments to the Misleading Advertising Provisions of the *Competition Act*" (Competition Law and Competitive Business Practices, delivered at the Canadian Institute, 10 May 1996). Following a complaint by six citizens or a preliminary investigation by the Bureau raising reasonable grounds for a belief that an offence had been committed, the Director of Competition (now the "Commissioner of Competition") under the Act could initiate an inquiry under what was then section 10 of the Act. The Director of Competition could then, in his discretion, refer the evidence obtained during the inquiry to the Attorney General of Canada who, in turn, could then elect to prosecute the matter. Formal criminal proceedings would then be initiated. The Director of Competition had no standing to apply to a court or to the Tribunal in seeking relief of any kind with respect to deceptive marketing practices, including misleading advertising.

[39] See the discussion in Pepper, *ibid.*

[40] See, for example, the comments of MPP Werner Schmidt in connection with the second reading of Bill C-20, *An Act to amend the Competition Act and to make consequential and related amendments to other Acts,* 1st session, 36th Parl, 1998.

[41] MJ Trebilcock et al, *Proposed Policy Directions for the Reform of the Regulation of Unfair Trade Practices in Canada* (Ottawa: Information Canada, 1976).

[42] Pepper, *supra* note 37 at 5.

[43] Edward Ratushny QC et al, *Effective and Equitable Enforcement: Report of the Working Group on Amendments to the Misleading Advertising and Deceptive Marketing Practices Provisions of the Competition Act* (Ottawa: Bureau of Competition Policy, 1991).

[44] Pepper, *supra* note 37.

[45] It is important to note, however, that the AMPs introduced through Bill C-20 were, as noted below, capped at $50,000 and $100,000 for individuals and $100,000 and $200,000 for corporations (for first and second orders, respectively).

[46] Section 74.1(5) of the Act, enacted in 1999, directs the Tribunal or court to consider the following circumstances, in determining the amount of an administrative monetary penalty:

(a) the reach of the conduct within the relevant geographic market;
(b) the frequency and duration of the conduct;
(c) the vulnerability of the class of persons likely to be adversely effected by the conduct;
(d) the materiality of any representation;
(e) the likelihood of self-correction in the relevant geographic market;
(f) injury to competition in the relevant geographic market;
(g) the history of compliance with the Act by the person who engaged in the reviewable conduct; and
(h) any other relevant factor.

[47] Competition Bureau, *Information Bulletin – Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the Competition Act* (22 September 1999), online: Competition Bureau <http://www.competitionbureau.gc.ca>.

[48] Therefore, in Professor Hogg's view, high numbers were not, in themselves, unconstitutional.

[49] See s 74.1(1)(d)

[50] See s 74.11 (1). The court for Tribunal must find there is a strong *prima facie* case of reviewable conduct and must be satisfied that serious harm is likely to ensue and the balance of convenience favours the order.

[51] See s. 74.111(1). The court must be satisfied there is a strong *prima facie* case of reviewable conduct.

[52] *Infra*, note 82.

[53] *An Act to promote the efficiency and adaptability of the Canadian Economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, SC 2010, c. 23.

[54] It is worth noting that the requirement that the representation be false or misleading in a material respect does not appear in the new provisions addressed to the sender information, subject matter information or locator of the message (as opposed to its general content), which raises the question as to whether this imports a new and stricter standard for these elements of the message, on a stand-alone basis, and as to how it informs the relationship between these elements of the message and the general impression of the electronic message as a whole. For a discussion of this issue, see Dominic Mochrie, "CASL creates new rules for misleading advertising in electronic messages," Lexology (June 19, 2012), Globe Business Publishing Ltd.

[55] See s 52(1.1) and 74.03(4).

[56] See s 74.01(3). Since 1999, with the addition to the criminal prohibition of the requirement for the conduct to be engaged in "knowingly or recklessly," there is no longer a statutory defence of due diligence in the criminal track. The former section

60(2) was repealed in 1999, having been the subject of a successful constitutional challenge in the case of *R v Wholesale Travel Group*, [1991] 3 SCR 154.

[57] Subsection 74.07(1) provides an exemption from liability for a person who "prints, publishes or otherwise disseminates a representation," where the person accepts the representation in good faith for that purpose in the ordinary course of business and records the name and address of the person responsible for the representation.

[58] It is interesting to note that, when the predecessor to this provision was introduced into the *Criminal Code* in 1935, it effectively created a limited "safe harbour" deeming provision for certain tests, as follows:

> "Without excluding any other adequate or proper test, a test by The Honorary Advisory Counsel for Scientific and Industrial Research or any other public department shall be considered an adequate and proper test for the purposes of this subsection, but no reference shall be made in any such advertisement to the fact that a test has been made by such Council or other public department."

[59] See, for example: *R v Bristol-Meyers Can Ltd*, [1979] 45 CPR (2d) 228 (Ont Co Ct); *R v Batt* (1980), 53 CPR (2d) 152 (BC Prov Ct); *R v Colgate-Palmolive Ltd* (1977), 37 CPR (2d) 276 (Ont Co Ct); *R v Bristol-Myers Ltd*, [1980] OJ No 2760 (Ont Co Ct); *R v Bussin* (1977), 36 CPR (2d) 111 (Ont Co Ct); *R v Les Distributions JLL Ltée* (1978), 44 CPR (2d) 154 (Que SC); *R v 359286 Ontario Ltd* (1981), 58 CPR (2d) 169 (Nfld Prov Ct). See also *R v Big Mac Investments* (1988), 24 CPR (3d) 39 (Man QB); *R v Enviro Soft Water Inc* (1995), 62 CPR (3d) (Alta Prov Ct); and *Canada (Commissioner of Competition) v PVI International* [2002] CCTD No 22, 19 CVR (4th) 129.

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

[61] See, for example, *UL Canada Inc v Proctor & Gamble Inc*, [1996] OJ No 624 (Ont Gen Div).

[62] *Infra*, note 82.

[63] See Young & Fraser, *supra* note 3 at 1-145 to 1-152.

[64] For an early discussion of the issue, see Neil Finklestein & Robert Kwinter, "Section 36 and Claims to Injunctive Relief"(1999) 69 Can Bar Rev 297. See also the decision in *TELUS Communications Co v Rogers Communications,* [2009] BCJ No 2520 (BCCA), in which the Court concluded that, notwithstanding that the Act itself does not provide for the issuing injunction at the request of a private party, the inherent jurisdiction of the court has not been displaced by any of the provisions of the Act. The Court also briefly reviewed the Ontario decisions in *947101 Ontario Ltd (cob Throop Drug Mart) v Barrhaven Town Centre Inc* (1995), 121 DLR (4th) 748(Ont Gen Div) and *Mead Johnson Canada v Ross Pediatrics* (1996), 31 OR (3rd) 237, which acknowledged jurisdiction to grant an interlocutory injunction in a claim under s.36 of the Act, while denying jurisdiction to issue a permanent injunction. These comments of the B.C.C.A in this regard were, strictly speaking *obiter*, since the court was not called upon to consider whether a permanent injunction could be granted under s. 36, but the decisions contains useful review of the issue.

[65] [1994] 29 CPC (3d) 159 (Ont Gen Div). In this case, the Court refused to grant UNITEL's application for an interlocutory injunction in that the comparative claim in question did not expressly identify Bell as the competitor, and the Court criticized the validity of UNITEL's consumer research which attempted to establish that UNITEL

was implicitly identified in the commercial.

[66] [1994] 20 OR (3d) (Ont Gen Div). In this case, Church & Dwight, the maker of Arm & Hammer/Cow brand baking soda, sought an interlocutory injunction to prevent Sifto from claiming that its baking soda product was "the purest possible," that it had "no chemical additives," and was "100% pure and natural." An injunction was granted.

[67] [1995] 59 CPR (3d) (Ont Gen Div). In this case, the court refused to grant an injunction against certain claims being made by Ault for its "micro-filtered milk product," including "greater purity…92 times less bacteria." The court concluded that the advertising was not false or misleading in a material respect and that there was nothing in the advertising to suggest that ordinary pasteurized milk was either unsafe or did not meet applicable government standards.

[68] [1995] 60 CPR (3d) 473 (Ont Gen Div). In that case, UPS ran a series of broadcast commercials in which it claimed that its service was "up to" 40% cheaper than the services of competitors. At trial (this case is one of the few reported cases involving s. 36 which proceeded to full trial), Mr. Justice Lederman ruled against the plaintiff, finding that the qualifier "up to" was an important part of the message of the advertising and that the import of those words would be "absolutely clear to the discerning business consumer" (at 489). The case is often cited for the following statement from Mr. Justice Lederman: "There must, however, be a reasonable basis for the representation that is made. So long as that is so, competitors may complain that the ad does not depict the whole picture, but they are just as equipped to tell their side of the story in the commercial marketplace of ideas with emphasis on those matters which they believe to be important. Courts should be reluctant to interfere in the competitive marketplace unless the advertisements are clearly unfair" (at 490).

[69] [1996] 31 OPR (3d). This case involved a claim for an interlocutory injunction under section 36 of the Act in relation to claims made by Ross Pediatrics for its new "Similac Advance" infant formula. These claims included the following: "Clinically proven to offer benefits previously only associated with breast milk…," "for your baby, Similac Advance is the next best thing to breast milk," "Similac Advance is the only formula clinically shown to help strengthen your baby's immune system in ways closer to breast milk" and similar claims. Ultimately, the court found that the conclusions of the study relied on by Ross were "moderately modest" and "quite guarded" and did not appear to justify what the court characterized as the "hyperbole and extensive claims" found in Ross' promotional materials. While acknowledging authority for the proposition that permanent injunctive relief was not available under s. 36, Mr. Justice Brennan concluded that interlocutory injunctive relief was available, and granted the injunction.

[70] [1996] OPJ No 624. This case involved an application for an interlocutory injunction on the basis of claims under s.36 of the *Competition Act*, s. 7 of the *Trade Marks Act*, and the common law torts of injurious falsehood and unlawful interference with economic relations. The case involved a promotional campaign by Procter & Gamble for its Olay Bar, a moisturizing soap bar. Among the claims made by Procter & Gamble in its campaign were the following:

> "THINK YOUR BAR PROTECTS YOUR SKIN'S MOISTURE? WE GUARANTEE THAT YOUR NEW ONE DOES! Compared to the leading beauty bar, Olay

holds more moisture in your skin. Try it. IF YOU DON'T AGREE THAT NEW OIL OF OLAY BATH BAR PROTECTS YOUR SKIN'S MOISTURE BETTER than the LEADING BEAUTY BAR, YOU GET YOUR MONEY BACK."

Certain other, more specific, claims regarding the amount of moisture retention were also made. The crux of the issues in the case was the adequacy of Proctor & Gamble's test regarding the comparative effect of product usage on skin for both Olay Bar and Dove Bar, the competing Unilever product.

Expert evidence and test results were submitted by both sides. After reviewing the expert evidence, the court concluded that, when considered in its entirety, the Procter & Gamble commercial conveyed "the general impression that Olay Bar is superior as regards moisture retention, which is true." After noting that injunctive relief is an extraordinary remedy which should not generally be granted to a party who engages in the same sort of business practice that it seeks to enjoin, the court considered certain prior Unilever advertising and concluded that certain references in Unilever's advertising to Proctor & Gamble's Ivory Bar were "seemingly derogatory and aggressive in comparison with the advertising that UL now seeks to enjoin."

[71] In the first of these cases, *Bell Canada v Rogers Communications,* [2009] OJ No 3161, Bell Canada brought an application for an injunction to bring to a halt a direct mail and website campaign styled "Check your speed," in which Rogers sent a direct mail piece, linked to a website, which warned consumers that "you are paying for what you may not be getting" and invited Internet service customers to "test your connection speed now with an impartial third party." The direct mail piece also urged consumers to sign up or switch to Rogers, where the consumer could get "reliable speed every time you connect." In fact, the server to which consumers would connect was located in Seattle, Washington which Bell alleged, and the court agreed, might well have explained the slower speed experienced by users. During oral argument, Rogers undertook not to repeat the misleading test sight, not to repeat the use of the term "true speed," not to conduct any further direct mailings during the campaign and to preserve the various records needed to permit expert opinion evidence as to the impact of the campaign on the market. In the light of these undertakings, the court declined to issue the injunction. In the absence of these undertakings, however, it seems clear from the judgment of the court that an injunction would have been issued.

In November of 2009, in the case of *TELUS Communications Co v Rogers Communications*, [2009] BCJ. No 2329, TELUS sought an injunction to prevent Rogers from continuing its claim that its wireless network was the "fastest" and the "most reliable" in Canada, in light of the launch by TELUS of its new high speed wireless network (jointly with Bell Canada). The British Columbia Supreme Court granted the injunction, on the basis that Rogers' claim to offer Canada "most" reliable wireless network rested on a comparison that was no longer valid and that, accordingly, the claim could no longer be made in an unqualified way. Of note are comments made by the court regarding a detailed fine print disclaimer purporting to limit the nature of the claim. On that point, the court concluded that the disclaimer was not sufficient to change the general impression created by the "most reliable" claim made by Rogers.

Following on the heels of the *TELUS* decision, in December of 2009, in the case

of *Rogers Wireless Partnership v Bell Canada*, [2009] BCJ No 2815, Rogers brought an application for interlocutory injunctive relief against Bell to prevent Bell from continuing its advertising campaign for its new wireless network (launched in conjunction with TELUS). Among the claims made by Bell in that campaign were that the network was the "best and most powerful" and was the "largest, fastest and most reliable." In the result, the court enjoined only Bell's claim that the network was the "most reliable." (Bell had acknowledged that the bulk of its testing of the new network was done before its commercial launch although it did present evidence of post-launch testing regarding upload and download speeds). The Court concluded that a claim as to "reliability" is by definition a claim to dependable subscriber use and that the "likely general impression left by Bell's claim to be the most reliable network is that it has demonstrably met a higher standard of dependability than the Rogers' network under similar or equivalent conditions of use." The Court concluded that such a claim could not yet be supported by Bell in the circumstances.

In May of 2010, in *Bell Aliant Regional Communications Ltd v Rogers Communications*, [2010] NBJ No 145, the New Brunswick Court of Queen's Bench issued an injunction in favour of Bell Aliant, restraining Rogers from advertising in New Brunswick as the fastest and most reliable speed internet service provider. In this case, the evidence showed that a new technology implemented by Bell Aliant in Fredericton provided high speed internet service and potentially faster internet downloads than the technology used by Rogers throughout its network.

In May of 2010, in the case of *Bell Canada v Rogers Communications*, [2010] OJ No 2229, Bell was unsuccessful in its attempt to enjoin a Rogers advertising campaign, which made certain representations regarding the speed and reliability of its service relative to its competitors. Bell argued that the third party data on which Rogers relied in making its claims was unreliable. However, since Rogers had been making the claim since 2008 and, in that year, Bell had demanded that Rogers cease holding itself out as the fastest and most reliable provider of Internet services, the court concluded that Bell could not establish that it had suffered or would suffer irreparable harm as a result of the campaign and the application for an injunction was denied.

[72] 2008 NSSC 163, 265 NSR (2d) 369, aff'd 2009 NSCA 42, 276 NSR (2d) 327. In this case, the court concluded that a series of 2004 advertisements conveyed a misleading impression of price superiority – that Go Travel was able to offer vacation packages for less than Maritime Travel "without a middleman earning commission." In fact, however, this was a time-limited offer and, because Maritime Travel price-matched, it was not generally true. While denying Maritime Travel's request for an accounting of profits (ruling that only damages for actual injury could be claimed under section 36 of the Act), the Court attempted to assess the position Maritime Travel would have been in "but for" the misleading advertising. Comparing Maritime Travel's market share from representative years when there was no misleading advertising to its share in 2004 when the misleading advertising ran, the court assessed recoverable damages of over $200,000.

[73] 317 F 2d 669 (Cir 1963) at 674.

[74] 3 CPR (2d) 178 (Alta CA).

[75] For an excellent discussion of disclaimers in the context of the general impression

test, and the relevant cases, see James Musgrove & Dan Edmondstone, "The Shifting General Impression of Disclaimers" (2 May 2012) Canada Bar Association 2012 Competition Law Spring Forum [Musgrove & Edmondstone].

[76] See Competition Bureau: *Use of Disclaimer*, Misleading Advertising Bulletin, 1986; *Asterisks, Disclaimers and Other Fine Print*, Misleading Advertising Bulletin, 1990; and *Application of the Competition Act to Representations on the Internet, Enforcement Guidelines*, 2003 (updated 2009).

[77] *Supra* note 73.

[78] See the discussion of this issue in Young & Fraser, *supra* note 3 and Musgrove & Edmondstone, *supra* note 74.

[79] *Ibid.*

[80] See e.g. *R v International Vacations Ltd* (1980), 56 CPR (2d) 251(Ont CA) and *Purolator v UPS* (1995), 60 CPR (3d) 473 (Ont Gen Div).

[81] *Richard v Time Inc, supra* note 30.

[82] Competition Bureau, "Competition Bureau Reaches Agreement with Bell Canada Requiring Bell to Pay $10 Million for Misleading Advertising" (28 June 2011), online: Competition Bureau <http://www.competitionbureau.gc.ca>.

[83] *Canada (Commissioner of Competition) v Chatr Wireless Inc,* [2011] OJ No 2513, 2011 ONSC 3387 (Ont SCJ).

[84] *R v Professional Technology of Canada Ltd* (1986), 12 CPR (3d) 218 (Alta Prov Ct).

[85] See *R v Teixeira* (1986), 12 CPR (3d) (Que CSP); *R v 771135 Ontario Ltd* (1994), 55 CPR (3d) (Ont Gen Div); *Canada (Commissioner of Competition) v Imperial Brush Co Ltd* (2008), 2008 Comp Trib 2 (Comp Trib); *Canada (Commissioner of Competition) v Gestion Lebski Inc*, 2006 CACT 32 (Can LII).

[86] See *Gestion Lebski, ibid.*

[87] [1987] 2 SCR 541. See also *Martineau v Minister of National Revenue*, [2004] 3 SCR 737.

[88] *Supra* note 24.