Comments / Commentaires

RICHARD V TIME: THE RETURN OF THE "CREDULOUS MAN"?

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In Richard v Time ("Time"), the Supreme Court of Canada held that, in order to determine whether an advertisement is misleading, one should consider the general impression conveyed to the hypothetical "credulous and inexperienced" consumer. The "credulous" consumer described in Time is reminiscent of the naïve and gullible "credulous man" described in caselaw interpreting the Combines Investigation Act in the 1970s. As a result of Time, we may soon see the return of some form of "credulous" consumer test in Canadian competition law, to protect consumers who are willing to believe claims that are neither puffery nor immaterial statements of opinion. An application of this standard is consistent with the purpose of advertising, which is to persuade, but not to manipulate or deceive.

Dans l'arrêt Richard c Time (« l'arrêt Time »), la Cour suprême du Canada a statué qu'afin de déterminer si une annonce publicitaire est trompeuse, il faut tenir compte de l'impression générale qu'elle transmet au consommateur « crédule et inexpérimenté » hypothétique. Le consommateur « crédule » décrit dans l'arrêt Time n'est pas sans rappeler « l'homme crédule » et naïf décrit dans la jurisprudence interprétant la Loi relative aux enquêtes sur les coalitions dans les années 1970. Par suite de l'arrêt Time, nous pourrions bientôt voir le retour d'une certaine forme de critère du consommateur « crédule » en droit canadien de la concurrence afin de protéger les consommateurs qui sont prêts à croire des prétentions qui ne sont pas exagérées ni ne constituent des énoncés d'opinion sans importance. L'application de cette norme est compatible avec l'objet de la publicité, qui vise à persuader, mais non à manipuler ou à tromper.

Introduction

In February 2012, the Supreme Court of Canada released its decision in *Richard v Time* ("*Time*"),[2] holding that, in order to determine whether an advertisement is misleading, one should

consider the general impression[3] conveyed to a hypothetical "credulous and inexperienced"[4] consumer. Although the case dealt with the Quebec *Consumer Protection Act* (the "*CPA*"), it has implications for the enforcement of the misleading advertising provisions of the *Competition Act* (the "*CA*").[5]

Recently, in a case against Rogers, the Commissioner of Competition argued that the "credulous and inexperienced" consumer standard articulated by the court in *Time* should be applied to the misleading advertising provisions of the *CA*.[6] While at the time of writing the Rogers case had not yet been decided, the "credulous and inexperienced" consumer standard has already been referred to in a decision regarding a private action under the *CA*.[7] Assuming that this standard will soon be applied in competition law, the question is: what does it mean, and how might it differ from the standard that was applied before *Time* was released? In order to answer these questions, it is necessary to review the *Time* decision, and the history of the hypothetical consumer test under the *Combines Investigation Act* ("*CIA*").

Richard v Time

Mr. Richard, a francophone living in Quebec, received an English-language promotional mailing from Time magazine. The mailing contained a document with several exclamatory sentences in bold uppercase letters, suggesting that he had won a cash prize of $833,337. These exclamatory sentences were preceded by conditional clauses in smaller print, some of which began with the words "If you have and return the Grand Prize winning entry in time."[8]

The next day, Mr. Richard took the document to his workplace, to ask an anglophone vice-president of the company he worked for if he was correct in his understanding that he had won the grand prize. The vice-president agreed that Mr. Richard had won the grand prize. Mr. Richard then returned the reply coupon that was in the envelope. In doing so, he also subscribed to Time magazine for two years.

When Mr. Richard learned that the document mailed to him had not contained the winning entry, and therefore he had not won the grand prize, he commenced proceedings under the *CPA*.

In finding for Mr. Richard, the Quebec Superior Court held that the document was "specifically designed to be misleading...especially to a person who is not reading in his or her mother tongue."[9] The court went on to say:

> ...there is no need to consider whether Mr. Richard was really misled by this document, although he testified that he was, but rather whether the average, credulous consumer would be misled. There can be no doubt here that the unsolicited publicity sent to Mr. Richard indeed had the capacity to mislead if viewed through the eyes of the average, inexperienced French-speaking consumer in Quebec.[10] (emphases added)

On appeal, the Quebec Court of Appeal held that the lower court had erred by considering the advertisement from the point of view of the average "credulous" and "inexperienced" consumer. The court stated that the average consumer in Quebec has "an average level of intelligence, scepticism and curiosity."[11] Also, although the court focused on the hypothetical average consumer, rather than on Mr. Richard, the court noted, in *obiter*, that Mr. Richard is a sophisticated businessman with a good working knowledge of English, who must have understood, when he received the mailing, that he was being invited to participate in a contest, and that he had not yet won the grand prize.[12]

On further appeal, the Supreme Court of Canada stated that, in order to determine whether a representation is misleading under the *CPA*, the test to be applied is that of the "average" or "imaginary"[13] consumer, and went on to describe that consumer as follows:

> ...in Quebec consumer law, the expression "average consumer" does not refer to a reasonably prudent and diligent person, let alone a well-informed person. To meet the objectives of the *C.P.A.*, the courts view the average consumer as someone who is not particularly experienced at detecting the falsehoods or subtleties found in commercial representations.
>
> The words "credulous and inexperienced" therefore describe the average consumer for the purposes of the *C.P.A.*...The word "credulous" reflects the fact that the average consumer is prepared to trust merchants on the basis of the general impression conveyed to him or her by their advertisement...[14]

The court went on to say that although it may be "stupid or naïve"[15]

for a hypothetical consumer to rely on the first impression conveyed by a commercial representation, the hypothetical consumer is nevertheless entitled to rely on that first impression.[16] The court stated that such an interpretation is necessary in order to meet the *CPA*'s objective of protecting all consumers[17], including those with below-average levels of intelligence, scepticism and curiosity.

The hypothetical consumer under the *Combines Investigation Act*

The hypothetical consumer under the *CA* and its predecessor statute, the *CIA*, has been described in many different ways over the years, ranging from "gullible"[18] to "sophisticated,"[19] to just plain "ordinary."[20] In determining the characteristics of the hypothetical consumer, courts have considered the target audience to which the representation was directed.[21]

An early description of the hypothetical consumer under the *CIA* was the so-called "credulous man." That test was applied by a number of courts interpreting the false and misleading advertising provisions of the *CIA* in the 1970s.[22]

The "credulous man" test was set out in Bill C-256, which was tabled in the House of Commons on June 29, 1971. Subsection 20(5) of that Bill provided that, in any prosecution for a violation of the misleading advertising provision, "proof that a credulous man would be misled by the representation alleged to have been made by the accused is sufficient proof that the representation was misleading."[23]

After Bill C-256 was tabled, many parties wrote to the Minister of Consumer and Corporate Affairs to express their opposition to the proposed "credulous man" standard.[24] The hypothetical "credulous man" was described as naïve and unintelligent, and it was lamented that the introduction of the test would be a monstrous insult to the whole of the Canadian population. It was pointed out that the phrase "credulous man" was not a term of art and therefore there was little or no jurisprudence on the subject, and it was feared that the adoption of the standard would introduce an element of uncertainty into the law. Some worried that, by departing from the accepted standard of the "reasonable man", a company could not defend an action brought

against it by providing proof that the advertising was not materially misleading. It was suggested that the Bill be amended to exclude misrepresentations that have no adverse effect on the public.

The Bill died on the order paper, and on November 5, 1973, the government tabled Bill C-227. Section 18 of that Bill proposed to introduce the phrase "general impression" into subsection 36(5) of the *CIA*. The clause-by-clause for that Bill provided:

> Strong representations were received to the effect that a "reasonable man" test be substituted for a "credulous man" test. No reference to either test appears in this Bill and it appears from the jurisprudence that the courts will apply the credulous man test where this is suitable.[25]

Bill C-227 was re-introduced as Bill C-7 on March 11, 1974 and finally as Bill C-2 on October 2, 1974. In a submission to the House of Commons Standing Committee on Finance, Trade and Economic Affairs, published on February 20, 1975, the Investment Dealers Association of Canada stated that:

> ...although the Bill omits specific reference to the "credulous man" that was contained in [Bill C-256], the case law with respect to section 36 [of the *CIA*] strongly suggests that the credulous man test will be applied.[26]

Bill C-2 came into force in 1976.[27] At that time, the phrase "general impression" first appeared in the *CIA*.[28]

The new language was intended to broaden the prohibition against misleading advertising, by prohibiting advertising that gave a "general impression" that was misleading, even if the advertising was literally true.[29] At the same time, the introduction of the materiality requirement was intended to make it clear that the prohibition would not be violated by "a technically misleading representation that, when viewed within the context of the whole representation, should not have been considered as affecting the buying decision of a consumer."[30]

Notwithstanding the phrase "general impression" and the new materiality requirement in the *CIA*, the "credulous man" test continued to be applied by some courts. For example, in *R v Michaud*,[31] the court commented:

> Now in this day and age for anyone to think that they can earn $500 by stuffing a thousand envelopes with all the materials being supplied free, all the supplies free and that is the wording of the ad, free supplies, is a dream at best but obviously people still dream in our society and it is those people I guess that the Legislature has in mind when it passes, or the House of Parliament has in mind when it passes legislation such as the *Combines Investigation Act*.[32]

Eventually, the "credulous man" test fell out of favour and was replaced by the "ordinary citizen" test. In *R v Kenitex*[33], the Ontario Court of Appeal affirmed the following statement by the trial judge:

> The ordinary citizen is, by definition, a fictional cross-section of the public lacking any relevant expertise, but as well possessing the ordinary reason and intelligence and common sense that such a cross-section of the public would inevitably reveal.[34]

The standard set out in *Kenitex* ("ordinary reason and intelligence and common sense") appears quite different from the standard set out in *Michaud* ("people [who] dream"), and it is difficult to reconcile the standards.[35]

The return of the "credulous man"?

As a result of the decision in *Time*, it appears that some form of "credulous" consumer test may now return to Canadian competition law jurisprudence. The "credulous" consumer described in *Time* is reminiscent of the naïve and gullible "credulous man" described in caselaw interpreting the *CIA* in the 1970s. In *Time*, the Supreme Court stated that a "credulous" consumer is someone who is "prepared to trust."[36] The court further stated that the purpose of the relevant part of the *CPA* is "to make it possible for consumers to trust the general impression given by merchants in their advertisements"[37] in order to protect vulnerable consumers,[38] by addressing the problem of information asymmetry between merchants and consumers.[39]

Trust is important. As noted by the United States Supreme Court in 1937, "(t)here is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business."[40]

Trust, however, is not absolute. A "credulous" consumer need not

believe all the representations made to him or her. Some representations may be dismissed as mere puffery or statements of opinion.

Puffery was described as follows by the Manitoba Law Reform Commission in 1994:

> A puff is usually defined as an exaggerated commendation of a product or service. The characteristics of a puff are that the exaggeration is patent and the statement is so uncertain as to be unverifiable. Consequently, no reasonable person would take it seriously and act in reliance on it.[41]

Puffery has been recognized by Canadian courts as "a staple of the advertising industry and of marketers everywhere"[42], and statements of which qualify as puffery will not be considered misleading, for the simple reason that claims which are not believed do not influence the purchasing decisions of consumers.[43] Examples of phrases held to constitute puffery in recent Canadian caselaw include a slogan for a camera company ("you always get your shot").[44] vague claims by a telecommunications company ("the most powerful prices," "on the most powerful network"),[45] and a statement by a vice-president of an investment firm ("the opportunity of a lifetime").[46]

Puffery is sometimes distinguished from statements of opinion, but the two are closely related, as puffery often involves an element of opinion.[47] The general rule is that an expression of opinion by a seller regarding the quality of his goods is not considered a factual representation, and therefore a statement of that nature cannot be the basis for the rescission of a contract or a claim of fraud: *Simplex commendatio non obligat* ("mere recommendation does not bind").[48] The rule applies only where the statement by the seller is not "punctuated by detail, or quantified by figures,"[49] and where the buyer knows or ought to know that the seller lacks sufficient information to guarantee the accuracy or truth of the statement.[50] The rule has been said to be based on the assumption that "both parties had equal knowledge or equal access to knowledge and the representee knew that the statement was necessarily an opinion on a shared informational base."[51] However, in the context of the misleading advertising provisions of the *CA*, this assumption does not often hold true.[52] Additionally, the focus on "access to knowledge" is inconsistent with the decision in *Time*, where the court stated that the hypothetical consumer is not required to take "concrete

action"[53] to assess the accuracy or lack thereof of claims made in an advertisement.

It is only in rare cases, where the knowledge of the hypothetical consumer is equal to that of the seller, and the hypothetical consumer does not need to take any concrete action in order to assess the accuracy of the claims, that the doctrine of *simplex commendatio* might preclude the availability of remedies under the misleading advertising provisions of the *CA*. In those limited circumstances, it might be argued that a statement of opinion by the seller is not misleading "in a material respect," because it would not affect the purchasing decision of the hypothetical consumer.

In summary, the misleading advertising provisions of the *CA* do not apply to statements that are not misleading "in a material respect." Immaterial statements include exaggerated and unverifiable claims that amount to puffery, and statements of opinion made by a seller to a hypothetical consumer who has knowledge that is equal to that of the seller, and who does not need to take any concrete action in order to assess the accuracy of the claims.

For other claims, that may be materially misleading, "(t)he issue issue is not whether consumers reasonably <u>believe</u> the claim, but rather whether they reasonably <u>interpret</u> the advertisement."[54] In other words, if a consumer reasonably interprets the claim made by a representation, the consumer is entitled to believe that claim.[55]

The hypothetical "credulous" consumer is not completely unintelligent. As was pointed out by the court in *Time*, the "credulous" consumer is "[capable] of understanding the literal meaning of the words used in an advertisement if the general layout of the advertisement does not render those words unintelligible."[56] In addition, the "credulous" consumer must be presumed to be capable of deciphering the general impression conveyed by a representation.[57] In summary, the "credulous" consumer is literate but is not a literalist.

In conclusion, we may soon see the return of some form of "credulous" consumer test in Canadian competition law, to protect consumers who are willing to believe claims that are neither puffery nor immaterial statements of opinion. An application of this standard

is consistent with the purpose of advertising, which is to persuade, but not to manipulate or deceive.[58] As noted by one author 50 years ago: "(A)dvertising exists and is made possible only because of the ready willingness of people to believe."[59] Presumably advertisers would not bother making claims if they did not believe that those claims would have some impact on potential consumers. Therefore, when advertisers exploit the credulity of consumers, the law should hold them accountable.

Endnotes

[1] The views expressed in this article are entirely those of the author and do not represent any policies or positions of the Department of Justice or the Competition Bureau. This article provides an overview of the subject-matter and is not intended to be legal advice.

[2] [2012] SCC 8, [2012] 1 SCR 265.

[3] The phrase "general impression" appears in s 218 of the *CPA*. The same phrase appears in ss 52(4), 52.1(4), 53(1) and 74.03(5) of the *CA*. As will be discussed below (*infra*, note 28), the phrase "general impression" first appeared in the *CIA* in 1976, before making its way into the *CPA* in 1978.

[4] *Supra* note 2 at para 72.

[5] In *Time*, the court stated that one of the purposes of the *CPA* is "to eliminate unfair and misleading practices that may distort the information available to consumers and prevent them from making informed choices" (at para 161). This purpose overlaps with the purpose of the misleading advertising provisions of the *CA*. Therefore the decision cannot be ignored. In an article published in the Fall 2012 edition of this publication, Brian Fraser notes that "it is not unreasonable to expect that [the *Time* decision] will be influential in future misleading advertising cases under the provisions of the [*Competition*] *Act*" (25(2) at 509).

[6] *Commissioner of Competition v Chatr Wireless Inc and Rogers Communications Inc* Ontario Superior Court of Justice, Commercial List. Court File No. CV-10-8993-00CL. Closing submissions of the Commissioner of Competition, filed May 9, 2013, at paras 491 – 502.

[7] *Telus v Mobilicity*, [2012] BCSC 1933 at para 26: "(T)aking the phrase in context, I entertain some doubt that a consumer, even a credulous and inexperienced one (see *supra* note 2 at paras 77-78), would take it to mean that he or she can obtain wireless service from Mobilicity free of any contractual terms or conditions."

[8] The back side of the document informed Mr. Richard that he would qualify for a $100,000 bonus prize if he validated his entry within five days, and promised him a free camera and photo album set if he decided to subscribe to Time magazine at the same time as he validated his entry.

[9] *Richard v Time Inc*, [2007] QCCS 3390 at para 40.
[10] *Ibid* at para 49.
[11] *Time v Richard*, [2009] QCCA 2378 at para 50, cited in 2012 SCC 8 at para 63.
[12] *Supra* note 11 at para 51, cited in 2012 SCC 8 at para 30: "I even suspect that the [appellant], a well-informed businessman who worked locally and internationally in both French and English, understood the sweepstakes and his chances of winning perfectly well from the very start." On the same point, the Quebec Superior Court noted, at para 15, that although Mr. Richard's mother tongue is French, "he speaks English in the context of his work on a regular basis". In their factum filed with the SCC, the respondents claim, at para 4, that Mr. Richard is "fluent" in English and note that at trial, Mr. Richard testified that back in 1999, when he received the documents, "his understanding of the English language was good".
[13] *Supra* note 2 at para 62.
[14] *Ibid* at paras 71-72. In applying the "average consumer" test, the court did not comment on the linguistic abilities or sophistication of Mr. Richard.
[15] *Ibid* at para 77.
[16] *Ibid* at para 57.
[17] In its decision, the court makes several references to the need to protect unsophisticated consumers (see, for example, para 65). Additionally, at para 75, the court suggests that even consumers who are "of above-average intelligence" are entitled to the protection provided by the *CPA*.
[18] *R v Genser & Sons Ltd* (1969), 61 CPR 80 at 83.
[19] *R v Robin Hood Multifoods Ltd* (1981), 59 CPR (2d) 57 at 60.
[20] *R v Kenitex Canada Ltd et al* (1980), 51 CPR (2d) 103 at 107.
[21] See, for example: *R v Viceroy Const* (1975), 11 OR (2d) 485 (CA); *R v Lowe* (1978), 40 CCC (2d) 529 (Ont CA); *R v Int'l Vacations* (Ont CA) (1980) 59 CCC (2d) 557 (CA); *R v Stucky* 216 CCC (3d) 148 (Ont SC) at para 71, overturned on other grounds: 2009 ONCA 151; and *Maritime Travel Inc v Go Travel Direct. Com Inc* 2008 NSSC 163 at para 39, aff'd 2009 NSCA 42. While the target audience is generally considered to be more sophisticated than the general public, that is not always the case. In its 1983 *Policy Statement on Deception*, the Federal Trade Commission notes that children, the elderly and the terminally ill may be particularly susceptible to being misled.
[22] For a list of these cases, see David Young and Brian Fraser, *Canadian Advertising and Marketing Law* (Toronto: Carswell, 1990) [looseleaf] at 1-32, fn 109. See also: Michael E Rice and Marshall D Rice, "Section 52(1)(a) of the *Competition Act* – Who is the average person?" (1989) 15 Can Bus LJ 97 at 100, fn 11.
[23] The word "credulous" appeared in the well-known case of *Carlill v Carbolic Smoke Ball Co*, [1892] 2 QB 484, where, in finding for the plaintiff, the court stated that "such advertisements do not appeal so much to the wise and thoughtful as to the credulous and weak portions of the community." The

reference to "credulous" in Bill C-256 appears to have been drawn from a statement quoted with approval by the Alberta Supreme Court in *R v Imperial Tobacco Products Ltd* (1970), 16 DLR (3d) 470, that:

> The law is not made for experts but to protect the public – that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions...(at 472)

While the lower court decision was upheld by the Alberta Court of Appeal (see: (1971), 22 DLR (3d) 51), Clement JA held that the public was neither "credulous" nor "sceptical" (at 68). This led some commentators to note that although *Imperial Tobacco* is often cited as authority for the "credulous man" test, the court of appeal in that case did not expressly adopt that test. (See for example: Reuben Bromstein, "Misleading advertising" (1976) 26 *CPR* (2d) 1 at 5; and Rice & Rice, *supra* note 19 at 100.)

[24] The annual report of the Director of Investigation and Research for the year 1971-72 states at 10:

> Immediately after tabling the document [Bill C-256] the then Minister, The Honourable Ron Basford, made it clear that he did not intend to carry it through the legislative process during the current session but wished to cause a debate to take place for the purpose of perfecting the legislation. He invited all sections of the public to make representations. The representations duly came in, and there were over 300 detailed briefs and hundreds of additional letters.

[25] Clause-by-clause dated November 27, 1973.

[26] At 19:106. The submission by IDAC was dated April 4, 1974, and was in reference to Bill C-7, but was published as part of the proceedings related to Bill C-2. A similar view was expressed by the General Counsel for Dupont of Canada Ltd., when he appeared before the Senate Standing Committee on Banking, Trade and Commerce on May 1, 1974 (at 2:21, per Mr. Hemens).

[27] Bill C-2 received Royal Assent on Dec. 15, 1975, and came into force as SC 1974-75-76, c 76 on Jan. 1, 1976.

[28] Section 18 of SC 1974-75-76, c 76 enacted s 36(4) of the *CIA*, which referred, for the first time, to "the general impression conveyed by a representation". Two years later, the phrase "general impression" appeared in s 218 of the *CPA*. In *Time*, the court noted (at para 45) that s 218 is "based to a large extent" on the predecessor provision in the *CIA*.

[29] A publication explaining the rationale for the amendments set out in Bill C-227 described the "general impression" test as "a broader and more objective test" than the test then existing in s 37(1) of the *CIA*, (i.e., the "intentionally so worded or arranged" test), which included a *mens rea* component. (Consumer and Corporate Affairs, *Proposals for a New Competition Policy: First Stage Bill C-227*, 2d ed (Ottawa: November 1973) at 77). Vaughan Black comments that the introduction of the phrase "general impression" was intended "to preserve the false advertising provision

against some of the literalism and narrow construction normally accorded criminal statutes". He cites a 1974 speech by the Minister, which described the new general impression test as "a broadening of the prohibition against misleading advertising". See: Vaughan Black, "A brief word about advertising" (1988) 20 Ottawa L Rev 509 at 533.

[30] Canada, Consumer and Corporate Affairs, Bureau of Competition Policy, *Background Papers: Stage 1 Competition Policy*, (April 1976), at 40.

[31] (1978), 40 CPR (2d) 63.

[32] *Ibid* at 66.

[33] (1981), 34 OR (2d) 665 (CA).

[34] (1980), 51 CPR (2d) 103 (Ont Co Ct) at 107. The "ordinary citizen" test has been applied in a number of subsequent cases, including *Commissioner of Competition v Sears Canada Inc*, 2005 Comp Trib 2, at paras 323-332.

[35] However, although the standards use very different terminology, courts applying the apparently higher standard have often found that the hypothetical consumer would be misled. For example, in *Kenitex*, the court concluded that the hypothetical ordinary citizen would have been misled by the representation in question. Similarly, in other cases where the *Kenitex* standard has been applied, courts and tribunals have often found that the hypothetical consumer would be misled.

[36] *Supra* note 2 at para 72.

[37] *Ibid* at para 77.

[38] *Ibid* at para 72: "...the legislature's intention to protect vulnerable persons from the dangers of certain advertising techniques."

[39] The court stated that one of the purposes of the *CPA* is "to eliminate unfair and misleading practices that may distort the information available to consumers and prevent them from making informed choices" (at para 161).

[40] *Federal Trade Commission v Standard Education Society*, 302 US 112 at 116: cited in: James B Astrachan, *The Law of Advertising*, vol 1 looseleaf (LexisNexis: 2010) at 18-34.

[41] Manitoba Law Reform Commission, *Pre-contractual Misstatements*, Report # 82 (March 1994) at 7. In its 1983 *Policy Statement on Deception*, the Federal Trade Commission states: "The Commission generally will not pursue cases involving obviously exaggerated or puffing representations, *i.e.*, those that the ordinary consumers do not take seriously."

[42] *Church & Dwight Ltd/Ltee v Sifto Canada Inc* (1994), 20 OR (3d) 483 (Gen Div) at 486. The court in that case found that claims that the product was 100% pure and 100% natural, while not literally true, were defensible because they were puffery. However, ss 4.7 and 4.10 of the Canadian Food Inspection Agency's *Guide to Food Labelling and Advertising* caution against the indiscriminate use of such claims.

[43] Young and Fraser, *supra* note 19 at 1-27: "Puffery constitutes a claim that is exaggerated to the point at which an average consumer reasonably could not be misled. In other words, the claim is not material to the consumer's decision whether or not to purchase since it is not relevant to his or her

making that decision." See also *Maritime Travel Inc v Go Travel Direct.Com Inc*, [2008] NSSC 163 at para 39, where the court held that puffery does not violate s 52 of the *CA* because it is not misleading "in a material respect."

[44] *Williams v Canon Canada Inc*, 2011 ONSC 6711 at para 227.

[45] *Telus v Bell*, [2007] BCSC 518 at para 19.

[46] *Dodd v RBC Dominion Securities Inc*, [2009] ONCA 401.

[47] Manitoba Law Reform Commission, *supra* note 41 at 7: "The distinction between opinion and puff is not a sharp one."

[48] RS Vasan *Canadian Law Dictionary* (Don Mills, Ont: Law and Business Publications, 1980) at 497. Similarly, s 361(2) of the *Criminal Code* provides: "Exaggerated commendation...is not a false pretence unless it is carried to such an extent that it amounts to a fraudulent misrepresentation of fact."

[49] George Spencer Bower *Law of Actionable Misrepresentation*, (London: Butterworths, 1974) at para 50. The author goes on to say that, in that circumstance, the statement "assumes the aspect, and renders the representor liable to the consequences, of a simple statement of fact." Depending on the context, a specific factual statement may be construed as a legally-binding offer (as in the well-known case of *Carlill v Carbolic Smoke Ball Co*, [1893] 1 QB 256 (CA)), or as puffery (as in *Leonard v Pepsico Inc*, 88 F Supp 2d 116, (SDNY 1999), aff'd 210 F3d 88 (2d Cir 2000), where the court found that no reasonable person could have believed that the defendant seriously intended to award the consumer a fighter jet worth apx. $23 million in exchange for $700,000 worth of Pepsi points). Treitel states: "Even a statement that is perfectly precise may nevertheless not be binding if the court considers that it was not seriously meant." (Treitel, *The Law of Contract*, 12th ed (London: Sweet and Maxwell, 2004) at 4-002).

[50] *Halsbury's Laws of Canada* (1st ed) notes: "A statement of opinion has been defined as a statement made to a party who knows or should know that the party who makes it lacks sufficient information to offer a guarantee of its accuracy or truth" (at HCO-121).

[51] Manitoba Law Reform Commission, *supra* note 41 at 6.

[52] At para 160 of the *Time* decision, the court refers to the "informational vulnerability" of consumers. Similarly, in the context of the *CA*, the Competition Tribunal in *Imperial Brush* referred to "the problem of asymmetric information" – the fact that sellers presumably have much better information about their product's attributes than do consumers" (2008 Comp Trib 02 at para 74).

[53] *Supra* note 2 at para 76.

[54] Letter from James C Miller III , Chairman, FTC, to Hon Leroy S Zimmerman, dated Feb. 10, 1984, emphases in original. The FTC *1983 Policy Statement on Deception* was issued on Oct. 14, 1983.

[55] As an example of an unreasonable interpretation of a representation, see *FTC v Kirchner*, 63 FTC 1282 (1963) at 1290, where it was stated that it would be unreasonable for people to believe that "Danish pastry" is made in Denmark.

[56] *Supra* note 2 at para 72.
[57] The phrase "general impression", which appears in several provisions of the *CA*, would be meaningless in the absence of a real or hypothetical consumer who was capable of determining the general impression conveyed by a representation.
[58] "The vast majority of advertisers believe that persuasion is good and necessary and that manipulation is bad and self-defeating....(D)eception is wrong. It is manipulation." (Robert J Moskin, *The Case for Advertising: Highlights of the Industry Presentation to the Federal Trade Commission.* (New York, NY: American Association of Advertising Agencies, 1973) at 47–48.)
[59] Walter Weir, *Truth in Advertising and Other Heresies*, (New York, NY: McGraw Hill, 1963) at 68. Similarly, Rice & Rice, *supra* note 19 at 106 note that "...empirical evidence indicates that the typical consumer does not display a high level of critical evaluation of advertising messages."