THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Vol. 29 | 2016 | N° 2

CANADIAN COMPETITION LAW REVIEW

REVUE CANADIENNE DU DROIT DE LA CONCURRENCE

CALL FOR PAPERS

The *Canadian Competition Law Review* (formerly the *Canadian Competition Record*) is published twice a year by the Canadian Bar Association National Competition Law Section. The Can Comp L Rev welcomes submissions of original articles, case comments, book reviews, and essays on significant current issues of competition law and economics in French or English. Submissions are subjected to an editorial review process and are peer-reviewed by selected scholars and practitioners before acceptance for publication. Submissions are only accepted electronically at the following address: cancomplrev@cba.org. Please contact us by email at the same address for more information on our publishing procedures and policies.

DEMANDE DE COMMUNICATIONS

La *Revue canadienne du droit de la concurrence* (anciennement le Canadian Competition Record) est publiée deux fois par an par la Section nationale du droit de la concurrence de l'Association du Barreau canadien. La *Revue* accepte les articles, commentaires d'arrêts, comptes rendus critiques de livres, et essais originaux en français et en anglais sur des développements significatifs et actuels en matière de droit et économie de la concurrence. Les textes soumis seront examinés par le comité de rédaction et par un comité de lecture composé d'universitaires et d'avocats en pratique privée avant d'être sélectionnés pour publication. Les textes sont uniquement acceptés en format électronique à l'adresse suivante : cancomplrev@cba.org. Veuillez communiquer avec nous à la même adresse pour en savoir davantage sur nos politiques de publication.

EDITORIAL BOARD / COMITÉ DE RÉDACTION

ABOUT THE CANADIAN COMPETITION LAW REVIEW

Material published in the Can Comp L Rev does not express the views or the position of the Canadian Bar Association and the National Competition Law Section, or of the organization to which the authors belong. The Can Comp L Rev is distributed regularly to members of the Canadian Bar Association National Competition Law Section. To obtain further information on subscriptions, please contact cancomplrev@cba.org or visit us on the web: http://www.cba.org/Publications-Resources/CBA-Journals/Canadian-Competition-Law-Review.

À PROPOS DE LA REVUE CANADIENNE DU DROIT DE LA CONCURRENCE

Les textes publiés dans la *Revue* ne représentent pas l'opinion ou la position de l'Association du Barreau canadien, de la Section nationale du droit de la concurrence, ou de l'organisation dont fait partie l'auteur. La *Revue* est distribuée régulièrement aux membres de la Section nationale du droit de la concurrence de l'Association du Barreau canadien. Pour plus de détails sur nos abonnements, veuillez nous contacter à l'adresse suivante : cancomplrev@cba.org ou visitez notre site web http://www.cba.org/Publications-Resources/CBA-Journals/Canadian-Competition-Law-Review?lang=fr-CA.

ISSN 1929-6851 (Online) / ISSN 1929-6843 (Print)

THE CANADIAN
BAR ASSOCIATION

L'ASSOCIATION DU
BARREAU CANADIEN

TABLE OF CONTENTS / TABLE DES MATIÈRES

ARTICLES

ARTICLES

ASSESSING GENERAL IMPRESSION UNDER THE *COMPETITION ACT*: THE CREDULOUS MAN WHO WAS NEVER THERE

Anita Banicevic*

When deciding whether an advertisement is false or misleading under the Competition Act*, one must take into account both the "general impression" and literal meaning of the representations at issue. Historically, the dominant approach taken by courts for the purposes of the* Competition Act *was to assess the advertisement from the perspective of the "average person" of the intended audience. For some commentators, the Supreme Court's 2012 decision in* Richard v. Time Inc. *signalled the end of the average person's role as the arbiter of truth and accuracy under the* Competition Act*, and it was argued, the "credulous consumer" would soon step in. However, neither a historical perspective nor cases decided after* Time *are supportive of a wholesale adoption of the viewpoint of a naïve consumer who is not overly sophisticated and accordingly, perhaps more easily misled. Rather, the legislative history and relevant jurisprudence under the* Competition Act *remains supportive of viewing the general impression from the perspective of an average consumer of the relevant product or services.*

Pour déterminer si une publicité est fausse ou trompeuse sous le régime de la Loi sur la concurrence*, il faut tenir compte de l'« impression générale » donnée par les termes employés ainsi que de leur sens littéral dans les représentations en cause. Historiquement, les tribunaux ont principalement adopté, aux fins de la* Loi sur la concurrence*, une approche de l'évaluation d'une publicité centrée sur le point de vue de la « personne moyenne » du public cible. À la lumière de la décision* Richard c. Time Inc. *rendue par la Cour suprême en 2012, certains commentateurs ont signalé la fin de la « personne moyenne » comme arbitre de la vérité et de l'exactitude des publicités en vertu de la* Loi sur la concurrence *en raison de l'arrivée prochaine du « consommateur crédule » qui la remplacerait. Toutefois, l'historique et la jurisprudence qui a suivi l'arrêt* Time *indiquent que l'approche suivant le point de vue d'un consommateur naïf, ayant un faible degré de discernement voulant qu'il soit peut-être plus facilement induit en erreur, n'a pas été retenue de façon intégrale. Au contraire, les antécédents législatifs et la jurisprudence connexe sous le régime de la* Loi sur la concurrence *continuent d'appuyer une interprétation de l'« impression générale » du point de vue du « consommateur moyen » des produits ou services visés.*

Introduction

When deciding whether an advertisement is false or misleading under the *Competition Act*[1], one must take into account both the "general impression" and literal meaning of the representations at issue. As any advertisement may be interpreted differently depending on a person's perspective, this raises an important issue for advertisers. From whose perspective, then, is the general impression of an advertisement to be assessed? Is it the average consumer of the product or service being advertised, or the most credulous member of society? Historically, the dominant approach taken by courts for the purposes of the *Competition Act* was to assess the advertisement from the perspective of the "average person" of the intended audience. Yet in 2012, the Supreme Court of Canada released its decision in *Richard v Time Inc*,[2] in which it held that, for the purposes of Quebec's *Consumer Protection Act*,[3] the appropriate perspective from which to assess the general impression of an advertisement was that of the "credulous" and "inexperienced" consumer.

For some commentators, the Supreme Court's decision in *Time* signalled the end of the average person's role as the arbiter of truth and accuracy under the *Competition Act*, and it was argued, the "credulous consumer" would soon step in. This belief was expressed most forcibly by Adam Newman in a 2013 comment for the Canadian Competition Law Review.[4] However, as discussed below, neither a historical perspective nor cases decided after *Time* are supportive of a wholesale adoption of the viewpoint of a naïve consumer who is not overly sophisticated and accordingly, perhaps more easily misled. Rather, the legislative history and relevant jurisprudence under the *Competition Act* remains supportive of viewing the general impression from the perspective of an average consumer of the relevant product or services. While such a distinction may appear to be a fine one, as discussed further below, it can have implications regarding the applicable threshold for determining whether a particular representation is considered false or misleading, particularly for advertising involving products or industries where the targeted consumer may have more knowledge or sophistication than a credulous and inexperienced Canadian.

A Short History of the Credulous Man

The idea that advertisements should be assessed from the perspective of the "credulous man" first emerged in Canadian competition law in 1970, with the Alberta Supreme Court's decision in *R v Imperial Tobacco Products Ltd*.[5] The case involved what is now referred to as a "scratch and win" contest, and was decided under the criminal misleading

advertising provisions of the *Combines Investigation Act*[6] before the introduction of the "general impression" test. The case concerned certain representations made by the accused in point-of-purchase display cards that were used to promote a new brand of cigarette. The cards stated there was five dollars "in every pack of New Casino" cigarettes, when in fact each pack contained a contest card with only the potential to win five dollars.[7]

At trial, Sinclair J. rejected the accused's argument that the "average person" or "reasonable man" would not have been misled by the promotion into thinking that five dollars was contained in each package.[8] In his view, this was not even the correct standard to apply. Relying on early American jurisprudence as persuasive authority, he held:

> It seems to me the protection afforded by the section [of the *Combines Investigation Act*] is for "the public - that vast multitude which includes the ignorant, the unthinking and the credulous", to use the expression that appears in Federal Trade Commission Prosecution cases in the United States, and of which *Charles of the Ritz Distributors Corporation. v Federal Trade Commission* (1944), 143 F (2d) 676, is an example.[9]

The Alberta Court of Appeal upheld the accused's conviction.[10] However, of the three members of the panel, only Clement J.A. addressed the issue of the proper perspective from which to interpret the advertisements at issue. Justice Clement acknowledged that the American authorities relied upon by the trial judge provided some guidance in determining the correct standard.[11] Ultimately, however, he refused to accept the "credulous man" test on the basis that "[t]he law does not recognize a particular class of the public as ignorant, unthinking and credulous; nor should it measure these matters by standards of the sceptical who have learned by bitter experience to beware of commercial advertisements."[12]

Curiously, although Clement J.A. never adopted the "credulous man" test, *Imperial Tobacco* would later form the basis for a prevailing line of cases under Quebec's *Consumer Protection Act*, where it has been cited as authority for the proposition that the "credulous man" is the proper perspective from which to assess the general impression of an advertisement for the purposes of consumer protection law. As a matter of competition law, however, *Imperial Tobacco* has been cited only occasionally in a handful of cases from the 1970s and 1980s in support of the "credulous consumer" test.[13] Accordingly, whereas the "credulous man" later assumed a prominent role in Quebec consumer protection jurisprudence, its lifespan in the field of competition law was decidedly short-lived.[14]

The Advent of the General Impression Test

Shortly after the decision in *Imperial Tobacco*, courts began to assess advertisements from the perspective of the "average person" of the intended audience. This shift in judicial approach was prompted, at least in part, by significant amendments to the *Combines Investigation Act* in 1976. In that year, Parliament enacted Bill C-2, which introduced, for the first time in Canadian competition law, the "general impression" test that now resides at the heart of all misleading advertising cases under the *Competition Act*.[15]

The provision introduced in Bill C-2 is substantially similar to the civil and criminal provisions dealing with misleading advertising under the *Competition Act* today. It provided:

> 36(5) In any prosecution for a violation of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading in a material respect.[16]

The language of this provision marked a dramatic departure from a similar clause that had been incorporated in Bill C-256, an earlier attempt by the government to introduce significant competition law reform that was tabled in the House of Commons on June 29, 1971. Subsection 20(5) of that bill explicitly mandated the application of the "credulous man" test, as follows:

> 20(5) In any prosecution for a violation of this section, 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.[17]

Bill C-256 died on the order paper and never became law. On October 2, 1974, the government introduced Bill C-2, and in doing so, removed the proposed requirement that all advertisements be assessed from the perspective of the "credulous man".

The change in wording from the "credulous man" test in Bill C-256 to the "general impression" test in Bill C-2 was significant. As one witness and a member of the Standing Committee on Finance, Trade and Economic Affairs commented before the passage of Bill C-2, "the new general impression test was presumably designed to replace the credulous man test that appeared in Bill C-256".[18] At the very least, the revised wording reflected a legislative intention to reject the blanket application of the "credulous man" in future misleading advertising cases.

Indeed, the Supreme Court of Canada has consistently held that, when Parliament has considered and received submissions and has been urged to create rights that are nowhere to be found when legislation is enacted or amended, this is powerful evidence that the legislature made the deliberate decision not to provide for the rights in question.[19] In such circumstances, courts treat the absence of legislation enacting the requested rights as Parliament's answer to the denied requests.[20]

From this perspective, the *Competition Act*'s silence with respect to the "credulous man" standard is telling. Had Parliament intended all advertisements to be assessed from the perspective of a credulous and inexperienced person, it could have simply adopted the "credulous man" test that was expressly proposed in Bill C-256. It did not. Rather, Parliament left it to the courts to determine on a case-by-case basis the appropriate perspective to adopt when evaluating the general impression of an advertisement.

The Average Person of the Intended Audience

Following the advent of the "general impression" test in 1976, courts in the competition law context have examined the impression conveyed by advertisements predominantly from the perspective of the "average consumer", including the relevant demographics of the intended audience, relative intelligence levels and the level of care that the intended audience would apply in purchasing the product.

The movement towards the "average person" standard commenced with the Ontario Court of Appeal's decisions in *R . Viceroy Construction Co*[21] and *R v RM Lowe Real Estate Ltd*.[22] In *Viceroy*, the accused published an advertisement regarding certain homes that it had manufactured.[23] The advertisement conveyed the impression that one of the houses consisted of two stories, when in fact it only comprised one story.[24] Martin J.A., writing for a unanimous Court of Appeal, summarized the test for determining the general impression of the advertisement as follows:

> If the catalogue conveys, by the words used, the impression to the average person to whom it is directed, and who in the ordinary course would read it, that the home in question is a two-storey house, when in fact it is a one-storey house, then the advertisement is deceptive and misleading, notwithstanding that such impression might be dispelled by a careful examination of the specification sheet, together with the quoted price list and the architectural symbols used in relation to the floor plan of the "proposed lower level" by a person who possessed the necessary competence and experience to interpret such material.[25]

Similarly, in *Lowe*, the accused represented that the prices of the homes it was selling were "absolutely the lowest" in Erin Mills.[26] Arnup J.A., writing for a unanimous Court of Appeal, held that "the meaning to be placed upon the advertisement is that meaning which would be discerned by the average reader who was interested in making a purchase of a house in that locality".[27]

In *R v International Vacations Ltd*,[28] the Ontario Court of Appeal adopted Arnup J.A.'s approach in *Lowe* as a "common sense principle which should guide the interpretation of any advertisement".[29] The Court of Appeal then identified the attributes of the "average person" at issue. In that case, the central issue before the Court was whether the accused air travel marketer had held out to the public that seats were available on all flights listed in its advertisement at the time of publication. Writing for a unanimous Court of Appeal, Blair J. rejected this conclusion, holding as follows:

> The average reader interested in making an overseas trip can be taken to be literate, intelligent and unlikely to make a relatively large monetary commitment without carefully reading the advertisement. It seems to me that the import of the advertisement would be absolutely clear to such a discerning reader.[30]

Courts throughout Canada have adopted a similar approach in numerous other decisions since the advent of the "general impression" test. For example, in the 1992 decision of *R v Multitech Warehouse Inc*,[31] The Provincial Court of Nova Scotia cited the Ontario Court of Appeal's decisions in both *Lowe* and *International Vacations* approvingly before concluding that it is required, in such cases, "to examine the advertisement and apply a standard based upon the type of consumer to which the advertisement is directed."[32] According to the Court, "This determination is the foundation for a proper construction to be placed upon the advertisement."[33]

Similarly, in *Purolator Courier Ltd v United Parcel Service Canada Ltd*,[34] a competitor of UPS alleged that UPS had made false and misleading representations by claiming that its prices were "usually at rates up to 40% less than other couriers charge".[35] The competitor argued that this gave the false impression that UPS's rates were always 40% less than those of other couriers.[36] In considering the general impression conveyed by UPS's advertisement, Lederman J. noted that the general impression depends on a combination of factors, including: "the understanding of those who have listened to the commercial, as presented through survey evidence; the use of the qualifiers 'usually' and 'up to'; the nature of the consumers; and the nature of the medium".[37] Lederman J. dismissed the action on the basis that the consumers in

question were not "totally naïve" but rather business individuals "who make these kinds of decisions everyday based on service and price".[38]

More recently, in *Maritime Travel Inc v Go Travel Direct.Com Inc*,[39] the Nova Scotia Court of Appeal considered whether an advertisement comparing the prices of Go Travel Direct's southern vacation packages to those of Maritime Travel was false or misleading under the *Competition Act*. The Court of Appeal upheld the trial judge's assessment of the general impression conveyed by the advertisement from the eyes of its "intended audience", which the trial judge found to be "a literate person of average intelligence contemplating spending $700.00 to $1,000.00 per person for a Southern vacation, who would read the ad carefully and consider the dates of travel and the fact the flights are direct".[40]

Finally, it bears noting that the approach to general impression that has historically taken by the courts is also the standard articulated in the Competition Bureau's own guidance. For instance, the Bureau's most recent advertising-related guidelines issued in 2009 regarding the "*Application of the Competition Act to Representations on the Internet*" state: "In reviewing both on-line and off-line advertisements to determine the general impression conveyed by the representation, businesses should adopt the perspective of the average consumer who is interested in the product or service being promoted".[41] This position is consistent with the Bureau's historical viewpoint as stated in its various advertising guidelines and bulletins.[42]

In summary, the dominant approach taken by courts and the Bureau in cases pre-dating the Supreme Court's decision in *Time* involving misleading advertising under the *Combines Investigation Act*, and later the *Competition Act*, has been to consider the general impression of an advertisement from the perspective of the "average consumer" of the intended audience. Against this legislative and judicial history, it was therefore surprising when, in 2012, many assumed that the Supreme Court's decision in *Time* presaged the imminent return of the "credulous man" to Canadian competition law.

The Supreme Court of Canada's Decision in *Time*

The Supreme Court's decision in *Time* did not concern the misleading advertising provisions of the *Competition Act*. Rather, the case involved a direct mail campaign in which the recipient was promised that he would be awarded a cash prize upon subscribing to Time magazine.[43] Convinced that he had won $833,337, the plaintiff returned the reply coupon that accompanied the "Official Sweepstakes Notification".[44] In doing so, he also subscribed to *Time* magazine for two years.[45]

When Time Inc. refused to award the plaintiff his prize, he commenced proceedings in the Quebec Superior Court alleging that Time Inc. had engaged in prohibited business practices contrary to section 218 of Quebec's *Consumer Protection Act*, which states:

> 218. To determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account.[46]

The Quebec Superior Court granted judgment in favour of the plaintiff at first instance.[47] The Court held that the notification document was specifically designed to mislead the recipient and contained false representations when assessed from the perspective of the average consumer.[48] The Quebec Court of Appeal reversed, however, holding that the "general impression" conveyed by the alleged misrepresentations in the notification document would not be false or misleading to the "average consumer" with "an average level of intelligence, skepticism and curiosity".[49]

The plaintiff appealed to the Supreme Court of Canada, arguing that the criteria used by the Court of Appeal to define the average consumer for the purposes of Quebec's *Consumer Protection Act* undermined certain foundations of Quebec consumer law.[50] The Supreme Court allowed the plaintiff's appeal. In coming to its decision, the Supreme Court analyzed a long line of Quebec cases that used terms such as "credulous" and "inexperienced" to describe the average consumer and concluded as follows:

> Thus, **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 CPA**, the Courts view the average consumer as someone who is not particularly experienced at detecting the falsehoods or subtleties found in commercial representations.[51] [emphasis added]

Despite the superficial similarities in language between section 218 of Quebec's *Consumer Protection Act* and the misleading advertising provisions under the *Competition Act*, the Supreme Court's decision in *Time* contained a number of significant features that clearly distinguished the case from the litany of cases that had applied the "average person" test under the *Competition Act* in the preceding four decades.

First, the Supreme Court repeatedly stated in *Time* that its decision was aimed at determining the appropriate standard for the average consumer exclusively "for the purposes of the CPA".[52] Indeed, the Supreme Court prefaced its judgment by stating explicitly: "We will

not dwell here on the measures adopted by Parliament. Instead, we will be focusing on the Quebec legislation and on how it developed".[53]

Second, the Supreme Court noted that the purpose of Quebec's *Consumer Protection Act* is "to protect vulnerable persons from the dangers of certain advertising techniques".[54] As described in more detail below, this purpose and aim can be distinguished from that of the *Competition Act*.

Third, the representations at issue in *Time* were made to the public at large and not to a targeted group of consumers.[55] As a result, the Supreme Court did not consider the nature of any specific audience targeted by the representation at issue.

Finally, the Supreme Court acknowledged in *Time* that "obviously the adjectives used to describe the average consumer may vary from one statute to another" and that such variations "reflect the diversities of economic realities to which different statutes apply and of their objectives".[56] On this view, the Supreme Court held that "[t]he most important thing is not the adjectives used, but the level of sophistication expected of the consumer".[57]

This last statement is important for understanding the limits of the Supreme Court's holding in *Time*. The objectives of the *Competition Act* are much broader and more varied than the purposes of Quebec's *Consumer Protection Act*, which is concerned exclusively with consumer protection.[58] The misleading advertising provisions of the *Competition Act* were not enacted to protect the most naïve consumers, but passed for the purpose of regulating the marketplace as a whole. Accordingly, it was never clear that the credulous consumer standard could simply be transplanted from Quebec's *Consumer Protection Act* into a long-standing piece of Federal legislation, which was enacted for different purposes under different circumstances by a different legislative body. If anything, the legislative and judicial history of the "general impression" test appeared to foreclose any such outcome.

After *Time*: The Ontario Superior Court's Decision in *Chatr*

The proper role of the credulous and inexperienced consumer under the *Competition Act* moved out of the realm of academic debate and into the courtroom in *Canada (Competition Bureau) v Chatr Wireless Inc*,[59] a contested proceeding commenced by the Commissioner of Competition against Rogers Communications Inc. in November, 2010.

The case concerned representations made by Chatr Wireless Inc., a subsidiary of Rogers Communications Inc., in a number of comparative

advertisements regarding the reliability of its service.[60] The Commissioner claimed that two of Chatr's representations were false or misleading in a material respect, namely: (1) the representation that Chatr has fewer dropped calls than other new wireless carriers; and (2) the representation that Chatr customers have "no worries about dropped calls" on the Chatr network.[61]

At trial, the Commissioner of Competition argued, contrary to the Bureau's existing guidelines, that the general impression conveyed by the representations at issue should be assessed from the perspective of the credulous and inexperienced consumer.[62] In support of this argument, the Commissioner relied on the Supreme Court's decision in *Time* and on the apparent similarities between the "general impression" test found in section 218 of Quebec's *Consumer Protection Act*, which was at issue in *Time*, and the "general impression" test found in section 74.01(5) of the *Competition Act*.[63]

Justice Marrocco released his decision in the matter on August 19, 2013. In his reasons, Marrocco J. implicitly rejected the Commissioner's argument with respect to the appropriate standard for assessing the general impression of the advertisements at issue.[64] To be sure, he held that the "credulous" and "inexperienced" consumer test provided a useful starting point.[65] But in the careful set of reasons that followed, he ultimately refused to apply the "credulous" and "inexperienced" consumer test in exactly the same way that the Supreme Court had done in *Time*.[66]

To begin with, the Court specifically noted that the *Competition Act* and Quebec's *Consumer Protection Act* address different goals and purposes and that these goals must inform the perspective from which the representation at issue is viewed.[67] Specifically, the Court noted that the *Consumer Protection Act* is "intended to protect vulnerable persons from the dangers of certain advertising techniques" while the Competition Act is "intended to maintain and encourage competition in order to 'provide consumers with competitive prices and product choices'...".[68]

Having regard to these important distinctions, the Court ruled that the general impression of an advertisement must be viewed from the perspective of a consumer interested in the services offered.[69] This is an important distinction and signals a nuanced departure from the approach suggested in *Time*. That is, the Court chose to view the general impression from the perspective of consumers who had exposure to the wireless industry and thus, could be presumed to have a greater level of sophistication and awareness than consumers who have had no exposure to the wireless industry.[70] In doing so, the Court applied a

standard consistent with the average purchaser standard articulated in *Viceroy* and other similar cases that followed under the *Competition Act*.

On the facts, the Court found that the advertisements were directed at a segment of the wireless services market that wanted unlimited talking and texting services and that consumers in this segment were in fact knowledgeable with respect to claims regarding certain non-technical aspects of wireless service (such as unlimited zone plans, flat fee payment structures and no-term contracts).[71] Accordingly, the Court held that applying the "inexperienced" portion of the Supreme Court's test in *Time* was difficult in this case because the targeted consumer was clearly experienced with wireless services.[72] The Court therefore adopted a "credulous and technically inexperienced" standard, holding that the average consumer in this case was credulous (in the sense that he or she was willing to believe the representations at issue) but inexperienced only in respect of the advertisement's more technical information.[73]

In summary, the Court's approach in *Chatr* was to modify the approach of the Supreme Court and to not to consider the consumer inexperienced in the ways of the world or advertising more generally, as was the case in *Time*.[74] Rather, the consumer was considered to be inexperienced only in respect of the highly technical information conveyed in the advertisements at issue.[75] The Court thus paid significant attention to the context in which the representations at issue were made, and the character of the audience to whom they were directed. Again, this is an important distinction and the Court reaffirmed the dominant approach taken in earlier competition law cases in which the general impression of an advertisement was assessed from the perspective of the average consumer of the intended target audience.

The Quebec Superior Court's Decision in *Bell*

In a more recent case before the Quebec Superior Court, *Vidéotron senc c Bell Canada*[76], Vidéotron was seeking an interlocutory injunction against Bell, alleging that its advertisement regarding its FTTH (fibre to the home) service was misleading, and infringed both the *Competition Act* and Quebec's *Consumer Protection Act*. According to Videotron, since Bell's FTTH services were not available in the area, these advertisements were misleading and were an attempt by Bell to lure Videotron's customers away by offering them other services.[77]

As the starting point for its analysis, the Court noted the importance of the general impression test under subsections 52(4) and 74.03(5) of the *Competition Act* as well as under section 218 of Quebec's *Consumer Protection Act*.[78] While the Court did not analyze the representations

under each statute separately, the Court nevertheless determined that while *Time* called for the application of the perspective of a credulous and inexperienced consumer, assessing the general impression created by the advertisement in *Bell* required looking at the profile of the specific consumers who were looking into the FTTH services offered by Bell.[79] Effectively, the Court adopted the perspective of an average consumer in the intended audience, albeit without clearly relating this analysis to either the provincial consumer protection legislation or the *Competition Act*.

In particular, the Court found that the consumers in question were knowledgeable about the features of Videotron's services as well as those of Bell's regular and FTTH services.[80] The Court also held that these consumers would only be interested in FTTH because they were aware that FTTH offers faster speeds than Videotron's service, whereas Bell's regular service is slower.[81] Therefore, they would not be misled into opting for Bell's regular service over Videotron's service. As a result, the Court rejected Videotron's motion for interlocutory injunction.[82]

Implications

From a practical perspective, it appears that Courts have been reluctant to adopt the approach of a naïve or unexperienced or credulous consumer for the purpose of assessing the general impression under the *Competition Act*. While the distinction may appear, on its face, to be one of semantics rather than substance, the practical implications are borne out for advertisements where the targeted consumer has more knowledge or sophistication than the average Canadian. For example, if one were to consider the general impression of an advertisement for a product where the average consumer has a college or university degree and has facility with the product being advertised (such as a higher end smartphone), the perspective of how this consumer would be likely to interpret an advertisement could be very different than that of a an average Canadian (who perhaps may not have the same facility with the product or representations typically made in the industry). In cases such as these, applying the perspective of a credulous and inexperienced consumer is somewhat irrelevant. Furthermore, an application of this standard would serve to artificially lower the intended standard of proof for contraventions of the misleading advertising provisions of the *Competition Act*, contraventions that carry with them the potential for serious and significant remedies.

The perspective of the relevant consumer that Courts have consistently adopted is also more consistent with the purposes of the *Competition Act* and its legislative history. In particular, the *Competition*

Act's stated objectives are to protect competition and ensure consumers are provided with sufficient product choices and price competition. These broader aims necessarily warrant a more objective standard for evaluating whether a representation is false or misleading under the *Competition Act*.

Conclusions

Based on the relevant legislative history, the "credulous man" has appeared from time-to-time in the history of Canadian competition law. However, these appearances were fleeting and few. Important legislative changes in the 1970s empowered courts to consider advertisements from the perspective of the average person of the intended audience. Since then, the average person has become the predominant lens through which the general impression of advertisements are viewed for the purposes of the *Competition Act*.

While there was concern expressed when the Supreme Court's decision in *Time* was released that this may lead to a different approach for the purposes of the *Competition Act*, a review of recent jurisprudence relating to the issue suggests that the historical approach has not been displaced. While the "credulous and inexperienced consumer" may now provide courts with a more visible starting point from which to begin their analyses, the assessment of advertisements under the *Competition Act* appears to rightfully remain sensitive to context and contingent on the attributes of the intended audience to whom the advertisement is directed.

Endnotes

* The author would like to thank Nicholas Van Exan for his assistance in preparing this paper.

[1] RSC 1985, c C-34, as amended (the "Act").

[2] 2012 SCC 8 at paras 72, 78, [2012] 1 SCR 265 [*Time*].

[3] CQLR c P-40.1, s 218.

[4] See Adam Newman, "Richard v. Time: The Return of the 'Credulous Man'?" (2013) 26 Can Competition L Rev 275. Newman observes that the credulous consumer described in Time was reminiscent of the naïve and gullible "credulous man" described in earlier case law under the *Competition Act*'s predecessor statute, the *Combines Investigation Act*. In Newman's view, this judicial history, coupled with the Supreme Court's reasoning in *Time*, provided a clear impetus for the return of some form of credulous consumer test in Canadian competition law jurisprudence.

[5] 16 DLR (3d) 470 (SC), 2 CCC (2d) 533 [*Imperial Tobacco Trial Decision*], aff'd 22 DLR (3d) 51, 3 CPR (2d) 178 (CA) [*Imperial Tobacco Appellate Decision*].

[6] SC 1974-75-76, c 76.

[7] *Imperial Tobacco Trial Decision, supra* note 5.

[8] *Ibid*.

[9] *Ibid* at 11.
[10] *Imperial Tobacco Appellate Decision, supra* note 5.
[11] *Ibid* at 57, 64-66.
[12] *Imperial Tobacco Appellate Decision, supra* note 4 at 53.
[13] More recently, Justice Gans relied upon Clement J.A.'s reasons in the *Imperial Tobacco Appellate Decision* to expressly reject the application of the credulous consumer test under the *Competition Act*. See *R v Stucky*, 216 CCC (3d) 148 (Sup Ct), 53 CPR (4th) 369 at 71, rev'd on other grounds, 2009 ONCA 15, 303 DLR (4th) 1.
[14] Indeed, the last reported English-language decision to apply the "credulous man" standard under the *Competition Act* was decided in 1990. See *R v KT Promotions Ltd.*, [1990] BCJ No. 2893 (Prov Ct), which accepted the credulous consumer standard unless a representation is aimed at a specific group within the general public, in which case the interpretation must be made from the point of view of members of that group.
[15] Bill C-2, *An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, 1st Sess, 30th Parl, 1974 (assented to 15 December 1975).
[16] *Ibid*.
[17] Bill C-256, *An Act to promote competition, to provide for the general regulation of trade and commerce, to promote honest and fair dealing, to establish a Competitive Practices Tribunal and the Office of Commissioner, to repeal the Combines Investigation Act and to make consequential amendments to the Bank Act*, 3rd Sess, 28th Parl, 1970-71, cl 20(5) (first reading 29 June 1971).
[18] House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs*, 30th Parl, 1st Sess, No 32 (25 March 1975) at 6 (JC Baillie). See also House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs*, 30th Parl, 1st Sess, No 32 (25 March 1975) at 18 (Hon. Appolloni).
[19] *Tele-Mobile Co v Ontario*, 2008 SCC 12 at para 42, [2008] SCR 305; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at para 73, [2012] 3 SCR 489; *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 at paras 27,43, [2011] 2 SCR 306.
[20] *Ibid*.
[21] *R v Viceroy Construction Co*, 11 OR (2d) 485 (CA), 23 CPR (2d) 281 [*Viceroy*]
[22] *R v Lowe Real Estate Ltd*, 39 CPR. (2d) 266, 40 CCC (2d) 529 [*Lowe*].
[23] *Viceroy, supra* note 21.
[24] *Ibid* at 4.
[25] *Viceroy, supra* note 21 at 15.
[26] *Lowe, supra* note 22 at 1.
[27] *Lowe, supra* note 22 at 3.
[28] 33 OR (2d) 327, 124 DLR (3d) 319 (CA) [*International Vacations*].
[29] *Ibid* at 10.
[30] *Ibid* at 11.
[31] 119 NSR (2d) 52, 18 WCB (2d) 297 (Prov Ct).
[32] *Ibid* at 18.
[33] *Ibid*.

[34] 60 CPR (3d) 473, 20 BLR (2d) 270 (Gen Div).
[35] *Ibid* at 1.
[36] *Ibid* at 18.
[37] *Ibid* at 43.
[38] *Ibid* at 58.
[39] 2009 NSCA 42, 276 NSR (2d) 327.
[40] *Ibid* at 18-31.
[41] Competition Bureau, "Application of the Competition Act to Representations on the Internet" (16 October 2009), online: Competition Bureau <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03134.html>.
[42] See also Competition Bureau, "Asterisks, Disclaimers and Other Fine Print", Misleading Advertising Bulletin (Gatineau: CB, 1 July – 31 December, 1990) at 3-4. While the Bureau has referenced the Supreme Court's approach in *Time* in its June 2015 issue of the Deceptive Marketing Digest, the Bureau also noted that this decision was under the Quebec *Consumer Protection Act*. See Competition Bureau, "Deceptive Marketing Practices Digest", (Gatineau: CB, 10 June 2015), online: Competition Bureau <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-digest-deceptive-marketing-e.pdf/$FILE/cb-digest-deceptive-marketing-e.pdf>.
[43] *Time, supra* note 2 at 8.
[44] *Ibid* at 10.
[45] *Ibid* at 13-14.
[46] *Consumer Protection Act*, CRSQ c P-40.1 at s 218.
[47] *Richard v Time Inc*, 2007 QCCS 7870, [2007] RJQ 2008.
[48] *Ibid*.
[49] *Richard v Time Inc*, 2009 QCCA 2378 at para 50, [2010] RJQ 3.
[50] *Time, supra* note 2 at 2.
[51] *Time, supra* note 2 at 71.
[52] *Ibid* at 72.
[53] *Ibid* at 38.
[54] *Ibid* at 72.
[55] *Ibid* at 43, 139, 175.
[56] *Ibid* at 68.
[57] *Ibid* at 68.
[58] *Supra* note 1 at s 1.1.
[59] 2013 ONSC 5315 [*Chatr*].
[60] *Ibid* at 18.
[61] *Ibid* at 27.
[62] *Ibid* at 123.
[63] *Ibid* at 123-125.
[64] *Ibid* at 132.
[65] *Ibid* at 126-131
[66] *Ibid* at 132.
[67] *Ibid* at 127.
[68] *Ibid* at 126-127.
[69] *Ibid* at 131.
[70] *Ibid*.
[71] *Ibid*.
[72] *Ibid*.

[73] *Ibid* at 131-132.
[74] *Ibid* at 132.
[75] *Ibid* at 131
[76] 2015 QCCS 1663.
[77] *Ibid* at 1.
[78] *Ibid* at 30.
[79] *Ibid* at 55.
[80] *Ibid*.
[81] *Ibid*.
[82] *Ibid* at 66.