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The Application of the  
*Competition Act* to Online Advertising

- by -

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# **THE APPLICATION OF THE COMPETITION ACT TO ONLINE ADVERTISING**<sup>1</sup>

## **I. INTRODUCTION**

The use of online advertising has grown at a dramatic pace over the past five years. For example, while Canadian online publisher sites generated revenues of approximately \$86 million in 2001, these revenues have grown to more than \$800 million in 2006 and are expected to surpass \$1 billion in 2007.<sup>2</sup> Similar increases have also been experienced in many other countries around the world.

The tremendous increase in the use of online advertising has resulted from a number of factors, including the growth and increasing popularity of the Internet and online shopping. The Canadian Internet Project ("CIP") has, for example, estimated that approximately 72% of all Canadians use the Internet.<sup>3</sup> Similarly, CIP has estimated that approximately 52% of Canadian Internet users have made an online purchase.<sup>4</sup> By way of comparison, approximately 39% of all

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<sup>2</sup> Interactive Advertising Bureau of Canada, IAB Canada Newsletter, "2005 Canadian Internet Advertising Grows by 54 Percent Over 2004; Canadian Internet Advertising Revenue To Top \$801 Million in 2006" (26 July 2006), available online at [www.iabcanada.com/newsletters/060726.shtml](http://www.iabcanada.com/newsletters/060726.shtml).

<sup>3</sup> Canadian Internet Project, "Canada Online! A Comparative Analysis of Internet Users and Non-Users in Canada and the World: Behaviour, Attitudes and Trends 2004" (October 2005) at 5, available online at [www.cipic.ca/en/documents/Canada%20Online%20Final%20English%20Version%2010302005.pdf](http://www.cipic.ca/en/documents/Canada%20Online%20Final%20English%20Version%2010302005.pdf). Similarly, the Interactive Advertising Bureau of Canada has estimated that there are over 21 million unduplicated users online in Canada every month, which represents approximately 62% of the total Canadian population. *Supra* note 2. By way of comparison, only approximately 57% of the total U.S. population uses the Internet every month. *Id.*

<sup>4</sup> Canadian Internet Project, *id.* at 9. By way of comparison, CIP has found that approximately 48% of German Internet users, 41% of Swedish Internet users, 40% of Japanese Internet users and 39% of U.S. Internet users have made an online purchase. *Id.* at 11.

Canadians used the Internet in 2000<sup>5</sup> and approximately 18% of these Internet users made at least one online purchase.<sup>6</sup>

The increased use of online advertising offers consumers and businesses many advantages. As stated in the Information Bulletin on the Application of the *Competition Act* to Representations on the Internet (the "Internet Bulletin"), "[online advertising] gives consumers access to a rich source of information that can help them to compare products and prices and can lead to more informed purchasing decisions".<sup>7</sup> Similarly, "[i]t also grants businesses the benefits of access to a global market and can provide smaller firms the opportunity to compete on an equal footing with larger firms".<sup>8</sup>

However, at the same time, the increased use of online advertising also brings with it an increase in risk and responsibility. Regulators around the world have become increasingly concerned that the Internet provides a vehicle on which misleading representations could be made, thereby dampening consumer confidence in the electronic marketplace. To combat this, a number of regulators, including the Competition Bureau (the "Bureau"), have targeted fraudulent, misleading or unfair commercial activities online.<sup>9</sup> Businesses must therefore remain diligent about the accuracy and currency of any representations made online.

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<sup>5</sup> Based on 11,949,000 Canadians online as at May 2000 (see ComScore Networks, News Release, "Measuring the Internet Age" (14 June 2002), available online at [www.comscore.com/press/release.asp?press=282](http://www.comscore.com/press/release.asp?press=282)) and a Canadian population of 31 million in 2000 (see Statistics Canada, Population Projections for Canada, Provinces and Territories, 2000-2026, Catalogue No. 91-520, available online at <http://dsp-psd.communication.gc.ca/Collection-R/Statcan/91-520-XIB/0012691-520-XIB.pdf>).

<sup>6</sup> See N.D. White & N. Quann, "Electronic Commerce" (January 2002), available online at [www.justice.gc.ca/en/ps/rs/rep/qa/qa02-1/qa02-1\\_003.html](http://www.justice.gc.ca/en/ps/rs/rep/qa/qa02-1/qa02-1_003.html).

<sup>7</sup> Competition Bureau, "Information Bulletin on the Application of the *Competition Act* to Representations on the Internet" (18 February 2003) at 2, available online at [www.competitionbureau.gc.ca/PDFs/ct02500e.pdf](http://www.competitionbureau.gc.ca/PDFs/ct02500e.pdf).

<sup>8</sup> *Id.*

<sup>9</sup> See, for example, Organisation for Economic Co-operation and Development, "Guidelines for Consumer Protection in the Context of Electronic Commerce" (2000) at 11, available online at [www.oecd.org/publications/e-book/9300023E.PDF](http://www.oecd.org/publications/e-book/9300023E.PDF). See also S. Scott, "The Challenges of Fighting Fraud in an Internet World" (Speaking notes for address to the 12th Annual ACFE Canadian Fraud Conference, 24 May 2006) at 1, available online at [www.competitionbureau.gc.ca/PDFs/InternetFraud-SheridanSpeech-May06.pdf](http://www.competitionbureau.gc.ca/PDFs/InternetFraud-SheridanSpeech-May06.pdf), in which Scott notes that, "in the case of the [I]nternet, one of the greatest dangers lies in one of humanity's oldest professions: fraud".

This paper focuses on the application of the *Competition Act* (the "Act") to online advertising.<sup>10</sup> More specifically, this paper provides an overview of both the Act and the general misleading advertising provisions in the Act. It also describes how the misleading advertising provisions are applied to representations made on the Internet. Finally, it provides an overview of the Bureau's recent enforcement efforts as they relate to allegedly false or misleading online advertising.

## II. OVERVIEW OF THE *COMPETITION ACT*

The Act is federal legislation that applies, with a few exceptions, to all business in Canada.<sup>11</sup> The purpose of the Act is to maintain and encourage competition in Canada in order to (a) promote the efficiency and adaptability of the Canadian economy, (b) expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, (c) ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and (d) provide consumers with competitive prices and product choices.<sup>12</sup>

The responsibility for the enforcement of the Act lies with the Commissioner of Competition (the "Commissioner"),<sup>13</sup> who is the head of the Bureau. The Bureau provides the administration and enforcement necessary for the Commissioner to enforce the Act.

The Act contains both criminal and civil provisions. The criminal provisions are concerned with conspiracies, bid-rigging, price maintenance, predatory pricing, price discrimination, misleading

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<sup>10</sup> R.S.C. 1985, c. C-34, available online at <http://laws.justice.gc.ca/en/C-34/index.html>. Online advertising is also regulated by a number of other federal and provincial statutes. For example, the *Consumer Packaging and Labelling Act*, R.S.C. 1985, c. C-38, the *Textile Labelling Act*, R.S.C. 1985, c. T-10, the *Precious Metals Marking Act*, R.S.C. 1985, c. P-19, the *Food and Drugs Act*, R.S.C. 1985, c. F-27, and the *Criminal Code*, R.S.C. 1985, c. C-46, are federal statutes that may apply to online advertising. Similarly, various provincial consumer protection statutes, such as the *Consumer Protection Act*, R.S.O. 1990, c. C-31, may apply to online advertising. Finally, various by-laws passed by local municipalities may also apply to online advertising. These additional statutes and by-laws are beyond the scope of this paper and are therefore not discussed herein.

<sup>11</sup> For a detailed discussion of the businesses and activities that are exempt from the Act, see C. Goldman & J. Bodrug, eds., *Competition Law of Canada* (New York: Juris Publishing 2004) at § 1.04.

<sup>12</sup> *Supra* note 10 at s. 1.1.

<sup>13</sup> Sheridan Scott is the current Commissioner. Prior to March 1999, the Commissioner was known as the Director of Investigation and Research.

advertising and deceptive telemarketing.<sup>14</sup> Prosecutions relating to these provisions are brought in the criminal courts. Parties convicted of violating the criminal provisions are subject to fines and/or imprisonment. The civil provisions are, on the other hand, concerned with mergers, abuse of dominance, refusal to deal, exclusive dealing, tied selling, market restriction and certain deceptive marketing practices.<sup>15</sup> Conduct that falls within the scope of the civil provisions is considered to be legal and desirable until found to be anti-competitive by the Competition Tribunal (the "Tribunal")<sup>16</sup> or, in the case of the civil deceptive marketing practices provisions, by the Tribunal, Federal Court of Canada – Trial Division or a Superior Court.<sup>17</sup>

The Act also includes a provision which allows a private plaintiff to sue for and recover "an amount equal to the loss or damage proved to have been suffered by him" as a result of a defendant engaging in conduct contrary to criminal provisions in the Act or failing to comply

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<sup>14</sup> For a detailed discussion of the criminal provisions included in the Act, see C. Goldman & J. Bodrug, *supra* note 11.

<sup>15</sup> For a detailed discussion of the civil provisions included in the Act, see C. Goldman & J. Bodrug, *id.*

<sup>16</sup> The Tribunal is a specialized administrative tribunal composed of judges of the Federal Court of Canada – Trial Division and lay persons.

<sup>17</sup> See, for example, *Procter & Gamble Co. v. Kimberly-Clark of Canada Ltd.* (1991), 40 C.P.R. (3d) 1 at 55 (F.C.T.D.), in which Teitelbaum J. noted that "abuse of dominant position ... is not a criminal or even civil illegality. It is a reviewable practice under Part VIII of the Act and any proceedings relating to the practice are conducted before a civil administrative tribunal. There is no improper conduct until such time as the Competition Tribunal so finds." See also *Harbord Insurance Services Ltd. v. Insurance Corp. of British Columbia*, [1993] B.C.J. No. 3036 at § 12 (S.C.), in which Hutchinson J. stated that "[t]he practices of 'exclusive dealing', 'market restriction' and 'tied selling', in the absence of legislation prohibiting them, are legitimate, are lawful and *prima facie* not contrary to public policy".



with an order made pursuant to the Act.<sup>18</sup> This is the only provision in the Act that allows persons to sue for damages.<sup>19</sup>

### III. MISLEADING ADVERTISING PROVISIONS

The Act contains both civil and criminal provisions that prohibit a person from making certain false or misleading representations. The purpose of these provisions is to preserve the integrity of the marketplace, including, most importantly, marketplace information.<sup>20</sup>

As discussed in more detail below, the civil misleading advertising provisions prohibit any person, for the purpose of promoting the supply or use of a product or business interest, from making a representation to the public that is false or misleading in a material respect.<sup>21</sup> The criminal misleading advertising provisions are substantially similar to the civil provisions, but also require that a false or misleading representation be made "knowingly or recklessly".<sup>22</sup>

#### **Representation**

Both the civil and criminal provisions apply to false and misleading "representations". The term "representation" has been interpreted very broadly and includes, for example, verbal or written

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<sup>18</sup> Specifically, subsection 36(1) of the Act provides as follows:

36. (1) 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 this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

<sup>19</sup> As a result of amendments that came into force on June 21, 2002, section 103.1 of the Act now provides private parties with a limited right of access to the Tribunal under the refusal to deal, exclusive dealing, tied selling and market restriction provisions. The remedies available to a successful applicant are, however, limited to those found in sections 75 and 77 of the Act, which do not include damages.

<sup>20</sup> See, for example, S. Scott, *supra* note 9 at 2.

<sup>21</sup> *Supra* note 10 at s. 74.01(1). The civil misleading advertising provisions are set out in full in Appendix "A" to this paper.

<sup>22</sup> *Id.* at s. 52(1). The criminal misleading advertising provisions are set out in full in Appendix "A" to this paper.

statements, illustrations or photographs.<sup>23</sup> Representations also include statements of fact, promises regarding future conduct and statements of opinion.<sup>24</sup> In addition to positive actions, representations also include the omission of certain material facts.<sup>25</sup> In terms of form, there is no limit as to the medium in which a representation can be made.<sup>26</sup> In fact, the misleading advertising provisions provide that no one shall make false or misleading representations to the public "by any means whatever".<sup>27</sup>

### **Purpose**

In order to fall within the scope of the misleading advertising provisions, a representation must be made "...for the purpose of promoting, directly or indirectly, the supply or use of a product...or...any business interest..."<sup>28</sup> This requirement has been broadly construed and, in practice, is fairly easy to establish. For example, the requisite purpose need not have resulted in financial gain, profit or remuneration to the maker of the representation.<sup>29</sup> Representations made solely for a political or charitable purpose do not, however, fall within the scope of these provisions.<sup>30</sup>

### **Public**

The misleading advertising provisions prohibit the making of false or misleading representations "to the public".<sup>31</sup> It is the Bureau's position that a representation to just one person constitutes a representation to the public.<sup>32</sup>

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<sup>23</sup> B. Pritchard & S. Vogt, *Advertising and Marketing Law in Canada* (Toronto: LexisNexis Butterworths, 2006) at 37. See also D. Young & B. Fraser, *Canadian Advertising and Marketing Law* (Toronto: Thomson Canada, 2006) at 1-15.

<sup>24</sup> Young & Fraser, *id.* at 1-16 to 1-18.

<sup>25</sup> *Id.* at 1-16.

<sup>26</sup> *Id.* at 1-18.

<sup>27</sup> *Supra* note 10 at ss. 52(1) and 74.01(1). For a list of the types of representations that have been found to contravene the false and misleading advertising provisions, see C. Goldman & J. Bodrug, *supra* note 11 at § 6.02[3].

<sup>28</sup> *Supra* note 10 at ss. 52(1) and 74.01(1).

<sup>29</sup> Young & Fraser, *supra* note 23 at 1-8 to 1-10.

<sup>30</sup> Competition Bureau, "Misleading Advertising Guidelines" (1991) at 2.

<sup>31</sup> *Supra* note 10 at ss. 52(1) and 74.01(1).

### **False or Misleading in a Material Respect**

To contravene the Act, a representation must be "false or misleading in a material respect".<sup>33</sup> This phrase has been interpreted to mean that the representation leads a person to a course of conduct that, on the basis of the representation, he or she believes to be advantageous and does not depend on the monetary value involved.<sup>34</sup> Significantly, the criminal provisions provide that it is not necessary to prove that any person was actually deceived or misled.<sup>35</sup> Rather, such provisions simply require that the representation convey a false or misleading impression to the average person to whom the advertisement is directed<sup>36</sup> and would be likely to influence such a person.<sup>37</sup>

In determining whether a representation is false or misleading in a material respect, both the literal meaning and "general impression" conveyed by the representation are relevant.<sup>38</sup> Thus, an

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<sup>32</sup> *Supra* note 30 at 2. See also E. McNaughton, "Fundamentals: Marketing Practices" (Paper presented at the 2001 Annual Fall Conference on Competition Law) at 4, in which the author indicates that the term "public" includes "a small or restricted group", so long as the advertisement was targeted to such individuals.

<sup>33</sup> *Supra* note 10 at ss. 52(1) and 74.01(1).

<sup>34</sup> See, for example, *supra* note 7 at 3 and 4. See also *R. v. Kenitex Can. Ltd.* (1980), 51 C.P.R. (2d) 103 at § 10 (Ont. Co. Ct.), in which Misener J. stated as follows:

[A] representation will be false or misleading in a material respect if, in the context in which it is made, it readily conveys an impression to the ordinary citizen which is, in fact, false or misleading and if that ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered.

<sup>35</sup> *Supra* note 10 at s. 52(1.1).

<sup>36</sup> See, for example, *R. v. Total Ford Sales Ltd.* (1987), 18 C.P.R. (3d) 404 (Ont. Dist. Ct.); *R. v. Groupmark Canada Ltd.* (1991), 38 C.P.R. (3d) 167 (Ont. Gen. Div.); and *R. v. Muralex Distributions Inc./Distributions Muralex Inc.* (1987), 15 B.C.L.R. (2d) 151 (Co. Ct.), leave to appeal refused (May 10, 1989), Doc. No. CA008106, [1989] B.C.W.L.D. 1521 (B.C.C.A.).

<sup>37</sup> See, for example, *Kenitex*, *supra* note 34 and *R. v. Marlo Homes Ltd.* (1980), 51 C.P.R. (2d) 73 (Alta. Prov. Ct.).

<sup>38</sup> In *F.T.C. v. Sterling Drug Inc.*, 317 F.2d 669 at 674 (2d Cir. 1963), cited by Clement J.A. in *R. v. Imperial Tobacco Products Ltd.* (1971), 3 C.P.R. (2d) 178 at 195 (Alta. C.A.), the general impression test was articulated as follows:

The buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied.

This determination would likely include consideration of: (1) consumer and competitor perspectives, (2) illustrations or graphics used, (3) omissions of important information and (4) placement and wording of disclaimers. See McNaughton, *supra* note 32 at 4.

advertisement can be literally true and still constitute misleading advertising if the "general impression" is false or misleading.<sup>39</sup> For instance, a failure to disclose essential information, such as additional costs or conditions or restrictions relating to the supply of a product, may permit a misleading impression to be conveyed.<sup>40</sup>

### **Knowingly or Recklessly**

The criminal misleading advertising provisions apply only where there is compelling evidence suggesting that the accused "knowingly or recklessly" made a false or misleading representation to the public.<sup>41</sup> An example of such evidence is the continuation of a practice by the accused after complaints have been made by consumers directly to the accused.

### **Enforcement – Choice of Criminal or Civil Track**

The Bureau's Information Bulletin on Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the *Competition Act* (the "Choice of Track Bulletin") outlines the approach that the Commissioner will apply when choosing how to pursue false and misleading representations.<sup>42</sup> According to the Choice of Track Bulletin, the Commissioner will, in most instances, pursue the civil track unless there is clear and compelling evidence that the accused knowingly or recklessly made a false or misleading representation to the public and a criminal prosecution would be in the public interest.<sup>43</sup> The factors that will be taken into account in making this public interest determination will vary from case to case, and may include the seriousness of the alleged offence and the presence of mitigating factors.<sup>44</sup> The seriousness of the alleged offence will include a consideration of a number of factors, including

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<sup>39</sup> The general impression test codifies the principles of law developed under pre-1976 jurisprudence to the effect that the context in which words are used may affect the impression that they convey. See, for example, *R. v. Imperial Tobacco Products Ltd.*, *id.* and *R. v. Big Mac Investments Ltd.* (1988), 24 C.P.R. (3d) 39 (Q.B.).

<sup>40</sup> See, for example, *supra* note 30 at 8.

<sup>41</sup> *Supra* note 10 at s. 52(1).

<sup>42</sup> Competition Bureau, "Information Bulletin on Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the *Competition Act*" (22 September 1999), available online at [www.competitionbureau.gc.ca/PDFs/ct01181e.pdf](http://www.competitionbureau.gc.ca/PDFs/ct01181e.pdf). A copy of this Information Bulletin is attached as Appendix "B" to this paper.

<sup>43</sup> *Id.* at 1.

<sup>44</sup> *Id.* at 2.

(a) whether there was substantial harm to consumers or competitors which could not be adequately dealt with by available civil remedies; (b) whether the deceptive practices targeted or took unfair advantage of vulnerable groups (e.g., children and seniors); (c) whether the persons involved failed to make timely and effective attempts to remedy the adverse effects of the conduct, or whether the conduct continued after corporate officials became aware of it; (d) whether the conduct involved a failure to comply with a previous undertaking, a promised voluntary corrective action or a prohibition order; and (e) whether the persons had engaged in similar conduct in the past.<sup>45</sup> Mitigating factors will include a consideration of (a) whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive and (b) whether the company or entity has in place an effective compliance program.<sup>46</sup>

Once the Commissioner has commenced proceedings along one of the tracks, she cannot proceed against the same person on the basis of the same or substantially the same facts on the other track.<sup>47</sup> The Commissioner has, however, taken the position that where she commences proceedings along the civil track, new evidence that the representation was made knowingly or recklessly would constitute a substantial change in facts with the result that she could then proceed by way of the criminal track.<sup>48</sup>

### **Penalties Under Criminal and Civil Tracks**

The penalties that may be imposed against persons found to have breached the criminal misleading advertising provisions depend on whether the prosecution proceeded summarily or by way of indictment. A summary conviction could result in a fine of up to \$200,000 and/or imprisonment for up to 1 year.<sup>49</sup> Conversely, a conviction by way of indictment could result in a fine in the discretion of the court and/or imprisonment for up to 5 years.<sup>50</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1-2. See also *supra* note 10 at ss. 52(7) and 74.16.

<sup>48</sup> *Id.* at 1.

<sup>49</sup> *Supra* note 10 at s. 52(5)(b).

<sup>50</sup> *Id.* at s. 52(5)(a).

Parties found to have breached the civil misleading advertising provisions may be (a) prohibited from making similarly false or misleading representations with respect to the product in question for a period of up to 10 years; (b) ordered to publish or otherwise disseminate a corrective notice; and/or (c) required to pay an administrative monetary penalty ("AMP").<sup>51</sup> For a first offence, the AMP can be up to \$50,000 in the case of an individual, and up to \$100,000 for corporations.<sup>52</sup> For subsequent offences, these amounts could double to \$100,000 and \$200,000, respectively.<sup>53</sup> Proposed amendments to the Act would have increased the maximum AMP for a corporation's first offence to \$10 million.<sup>54</sup> While these proposed amendments were not passed, some commentators have suggested that they could resurface at a later date.<sup>55</sup>

### **Liability for False or Misleading Representations**

In general, the liability associated with making a false or misleading representation attaches to the person who caused, either by actively making or passively permitting, the representation to be made.<sup>56</sup> In determining who caused a representation to be made, one needs to consider who had control or decision-making authority over the content of the representation as well as the nature and degree of such control.<sup>57</sup>

Different degrees of liability could potentially attach to different actors depending on the particular role played in respect of the representation. The various roles could include those of creator, disseminator and person on whose behalf the creator and the disseminator acted.<sup>58</sup> In the online context, the role of the creator is analogous to that of the webpage designer, who helps create the representation, while the role of the disseminator is analogous to that of the website

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<sup>51</sup> *Id.* at s. 74.10(1) and (2).

<sup>52</sup> *Id.* at s. 74.10(1)(c).

<sup>53</sup> *Id.*

<sup>54</sup> Bill C-19, which was introduced in the House of Commons on November 2, 2004, proposed increasing the maximum AMP for corporations from \$100,000 to \$10,000,000 for a first offence, and from \$200,000 to \$15,000,000 for each subsequent offence. Bill C-19 also proposed increasing the maximum AMP for individuals from \$50,000 to \$750,000 for a first offence, and from \$100,000 to \$1,000,000 for each subsequent offence. On December 2, 2004, discussion of Bill C-19 was suspended indefinitely.

<sup>55</sup> See, for example, Pritchard & Vogt, *supra* note 23 at 42.

<sup>56</sup> *Supra* note 7 at 5.

<sup>57</sup> *Id.* at 6.

<sup>58</sup> *Id.* at 5-6.

host, which owns or operates the servers from which the representations are disseminated, and/or the Internet service provider, which provides access to the Internet.<sup>59</sup> Ultimately, the Bureau will seek to enforce the misleading advertising provisions against those persons who are responsible for or have control over the content of a representation or cause the representation to be made, rather than those persons who merely perform a conduit function by way of dissemination or distribution.<sup>60</sup>

Under both the criminal and civil provisions, responsibility for advertising content should also be examined in the context of the deeming provisions found in subsections 52(2) and 74.03(1) of the Act.<sup>61</sup> In the view of the Bureau, these provisions are intended to clarify the responsibility of different persons in the chain of supply of a product or service for representations in breach of the law. While these provisions do not specifically address online advertising, the Bureau has stated that those involved in online advertising are governed by these provisions to the same extent as traditional media.<sup>62</sup>

Finally, it is worth noting that the civil misleading advertising provisions provide a statutory publisher's defence for a person who simply "prints or publishes or otherwise disseminates a representation, including an advertisement, on behalf of another person in Canada", as long as the person "recorded the name and address [of the person on whose behalf the representation was being made] and accepted the representation in good faith for printing, publishing or other dissemination in the ordinary course of that person's business".<sup>63</sup> The publisher's defence is

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<sup>59</sup> *Id.* at 6.

<sup>60</sup> *Id.* at 7.

<sup>61</sup> *Supra* note 10. These provisions provide that, subject to certain exceptions, a representation that is (a) expressed on an article offered or displayed for sale or its wrapper or container, (b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale, (c) expressed on an in-store or other point-of-purchase display, (d) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or (e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public, is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained.

<sup>62</sup> *Supra* note 7 at 6-7.

<sup>63</sup> *Supra* note 10 at s. 74.07(1). The publisher's defence is not required in the context of the criminal misleading advertising provisions since *mens rea* must be proved in order for a person to be convicted under those provisions.

consistent with the principle that liability will generally not attach to a person who does not have decision-making authority or control over the content of the representation.

### **Correcting False or Misleading Representations**

In order to minimize the risk of liability, false or misleading representations should be identified and corrected as soon as possible after they are detected. Corrective notices should, for example, be published in the same media in which the representations were originally made. Corrective notices should also be posted at the point of sale. In addition, errors in a catalogue or on the order page of a website should be brought to the attention of any purchaser at the time of order, not at the time of delivery.

## **IV. INTERNET ADVERTISING**

The misleading advertising provisions discussed above apply to representations made "by any means whatever", including representations made on the Internet. In this regard, the Bureau has stated that:

The Act applies equally to false or misleading representations regardless of the medium used. The same basic rules that govern truthfulness in traditional advertising and marketing practices apply to on-line representations and on-line marketing practices. The relevant provisions of the Act address the substance of a representation rather than the means by which it is made.<sup>64</sup>

However, in recognition of the fact that representations made on the Internet may raise unique concerns, the Bureau has released the Internet Bulletin.<sup>65</sup> The Internet Bulletin is designed to ensure that those who are making representations on the Internet understand their responsibilities under the misleading advertising provisions of the Act. While the Internet Bulletin focuses primarily on the application of the Act to representations made on commercial websites and in

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<sup>64</sup> *Supra* note 7 at 2-3.

<sup>65</sup> A copy of the Internet Bulletin is attached at Appendix "C" to this paper. The United States Federal Trade Commission (the "FTC") has also released a staff working paper entitled "Dot Com Disclosures", which discusses online advertising. A copy of this working paper is available online at [www.ftc.gov/bcp/online/pubs/buspubs/dotcom/index.pdf](http://www.ftc.gov/bcp/online/pubs/buspubs/dotcom/index.pdf).



marketing e-mails, it also notes that, depending on the circumstances, communications within chat rooms, news groups or message boards on the Internet could also run afoul of the Act.<sup>66</sup>

### **Disclaimers**

Much of the Internet Bulletin is concerned with the use of disclaimers as a means of preventing a representation from being false or misleading when read on its own. In this regard, just as the use of disclaimers plays a key role in managing the general impressions created in the offline context, the same can be said of disclaimers contained in an online advertisement.<sup>67</sup>

Disclaimers may affect the general impression created by a representation in one of two ways. First, a disclaimer may clarify an ambiguous claim in the primary representation. However, a disclaimer can neither save an ambiguous representation which is fundamentally false or misleading, nor contradict the primary representation.<sup>68</sup> For example, a disclaimer which notes that "additional charges and fees apply" likely would not be able to save an advertisement which says "You Can Sell Your Home for \$1,000", assuming that these additional charges and fees are material. Second, a disclaimer may support an otherwise incomplete claim by disclosing additional relevant information.<sup>69</sup> For example, if an endorsement is not representative of the

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<sup>66</sup> *Supra* note 7 at 4.

<sup>67</sup> *Id.* at 8.

<sup>68</sup> See, for example, the Internet Bulletin, *id.*, which provides that "[t]he Bureau takes the position that disclaimers which expand upon and add information to the principal representation do not raise an issue under the Act. A disclaimer can only qualify a representation; it cannot cure or retract a false or misleading representation." See also Consumer and Corporate Affairs Canada, "Misleading Advertising Bulletin" (January/March 1986) at 3, which provides as follows:

Disclaimers in small print are unlikely to raise concern if they relate to a relatively minor aspect of the ad. A disclaimer may properly clarify any possible ambiguity or provide any reasonable qualification provided the general impression conveyed by the ad is not misleading. However, the main body of the advertisement, apart from the disclaimer, should be capable of standing alone. In most cases, it seems unlikely that a single disclaimer statement is capable of having a significant effect on the general impression conveyed to an average purchaser by a false or misleading advertisement. However, having regard to the nature of likely purchasers, the nature of the ad and the nature of the product advertised, greater leeway may be allowed in cases where it is reasonable to assume that consumers will carefully consider all available information.

<sup>69</sup> *Supra* note 7. At the same time, it should be emphasized that some disclaimers, which may at first glance appear to provide additional information, also have the effect of restricting or even contradicting the generality of the disclaimed words, which may give rise to issues under the Act. In this regard, the Bureau has offered the following advice: "An easy guide is to examine the disclaimed text alone. What is the plain meaning readers would ascribe to it? Is the fine print being used to protect the advertiser from the

performance that consumers can expect to achieve with a product, advertisers can disclose this fact in a disclaimer so that consumers are not misled.

The overarching concern regarding the use of disclaimers on websites is that qualifying information be presented both clearly and conspicuously.<sup>70</sup> The Internet Bulletin provides guidance in this respect in the form of a non-exhaustive list of factors that can be used to determine the sufficiency of disclaimers in an online context.

### *Location of Disclaimer*

In order to maximize its effectiveness, the disclaimer should be placed, where possible, as close to and on the same screen as the representation to which it relates.<sup>71</sup> Similarly, the disclaimer should be presented in a technology-neutral format so that the consumer can view it independent of the particular hardware or software being used.<sup>72</sup> To the extent that same screen placement is not possible, then the next best solution calls for the use of visual or other cues to draw the consumer's attention to the existence of the disclaimer.<sup>73</sup> For example, text that clearly continues below the screen, whether spread over an entire page or in a column, would indicate that the reader needs to scroll for additional information. Alternatively, an advertiser may want to insert a vertical bar which extends past the bottom of the screen on the monitor to indicate that more information is available.<sup>74</sup> Moreover, one should use explicit text prompts that emphasize the nature and importance of the disclaimer so as to encourage the consumer to actually read it. For

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consequences of that meaning? If yes, then the fine print is being used to limit or contradict the general impression conveyed by the disclaimed text." See Director of Investigation and Research, "Misleading Advertising Bulletin" (4/1990) at 3.

<sup>70</sup> *Supra* note 7 at 7.

<sup>71</sup> *Id.* at 8.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> According to Dot Com Disclosures, *supra* note 65 at 8, "[a] scroll bar on the side of a computer screen is not a sufficiently effective visual cue. Although the scroll bar may indicate to some consumers that they have not reached the end of a page, many consumers may not look at the scroll bar. In fact, some consumers access the Internet with devices that don't display a scroll bar."

example, according to the Internet Bulletin, "a text prompt such as 'see below for restrictions on eligibility' may be appropriate, whereas 'see below for details' may not".<sup>75</sup>

### *Use of Hyperlinks*

The more integral the information provided in the qualifying disclaimer is to ensuring that the representation is not misleading, the more important it is to ensure that the consumer is able to read the disclaimer in conjunction with the main representation. In these situations, the representation and the disclaimer should appear on the same page and the use of hyperlinks should, where possible, be avoided.<sup>76</sup> This is particularly true for cost information or certain health and safety disclosures. For example, if the total cost of a product is advertised on one page, but there are significant additional fees that the consumer would not expect to be charged, the existence of those additional fees should be disclosed on the same page and immediately adjacent to the total cost claim. Conversely, where the situation involves multiple triggers which require repetition of the disclaimer, then the use of hyperlinks is likely more acceptable.<sup>77</sup>

Where a hyperlink is used, it should be obvious and clearly-labelled in a way that would give the consumer being targeted by the representation a reason to click on it.<sup>78</sup> One way to accomplish this is to include part of the disclaimer in the hyperlink to emphasize the hyperlink's nature and relevance.<sup>79</sup> For example, a jeweller advertising diamond rings on its website may want to include the following language in a hyperlink: "Diamond Weights are Not Exact. Click here for

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<sup>75</sup> *Id.* The Internet Bulletin also provides that "[b]usinesses should not assume that consumers read an entire Web site, just as they do not read every word on a printed page. Accordingly, information required to be communicated to consumers to ensure that a representation does not create a false or misleading impression should be presented in such a fashion as to make it noticeable and likely to be read." *Id.* at 5. See also Misleading Advertising Bulletin, *supra* note 69 at 3-4, which provides as follows:

Advertisers often fail to realize that advertisements are not the same as legal contracts. They will not in every case be able to rely on the fine print. While the ability to rely on limitation or exclusionary clauses in contracts may not depend on whether the existence of such clauses had been brought to the attention of the other party, the *Competition Act* effectively requires that these clauses be likely to come to the attention of the readers of the main representations. It is not sufficient merely for the disclaimer to be present, it must also be likely to be read to alter the general impression conveyed by the advertisement as a whole.

<sup>76</sup> *Id.* at 9.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

Weight Ranges".<sup>80</sup> By the same token, the use of asterisks alone, or a single word or phrase, to perform the signalling function may not be sufficient.<sup>81</sup> In this regard, it is possible that consumers may view an asterisk or other symbol as just another graphic on the page.

An advertiser should also be consistent in the use of hyperlink styles. For example, if hyperlinks are usually underlined on a particular website, chances are consumers will not recognize italicized text as being a hyperlink. Similarly, the use and choice of text, graphics or colour should not obfuscate the existence or relevance of the disclaimer.<sup>82</sup>

Finally, the webpage the hyperlink leads to should contain the complete disclaimer, which should be displayed clearly and prominently. Distracting visual factors, extraneous information, and many "click-away" opportunities to link elsewhere before viewing the disclaimer may diminish its effectiveness.

#### *Use of Attention-Grabbing Tools*

The Bureau has recognized that the use of attention-grabbing tools, such as graphics, flash images and the like, may effectively draw attention to a disclaimer so that it is more likely to be read.<sup>83</sup> However, businesses must be careful not to design or use attention-grabbing tools in other parts of an advertisement in such a way that they distract the consumer's attention away from the disclaimer, making it unlikely that the consumer will notice the disclaimer or recognize its importance.<sup>84</sup>

#### *Prominence*

The prominence, and hence ultimate effectiveness, of the disclaimer is partly a function of the size and colour of the font.<sup>85</sup> In general, the preference is for the use of larger and higher-contrast fonts. This is consistent with the goal that disclaimers should be clear and compelling,

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<sup>80</sup> *Supra* note 65 at 35.

<sup>81</sup> *Supra* note 7 at 9.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

not "hidden or buried".<sup>86</sup> In addition, audio disclaimers should be set at a volume level and cadence to allow a consumer to hear and understand them effectively.<sup>87</sup>

### *Accessibility*

Disclaimers should be provided with a view to making them accessible to all users.<sup>88</sup> Audio disclaimers may not be appropriate in all circumstances. In this regard, there is no guarantee that consumers will be accessing a website on a computer with fully-enabled audio capability. Also, in light of the speed with which consumers could surf the Internet and the level of detail some disclaimers may contain, advertisers would be well-advised to consider whether it would be appropriate to offer the disclaimer to the consumer in durable form (i.e., either printing a hard copy or saving it locally in electronic form). This way, the advertiser would be in a better position to demonstrate that the requisite information has been read and sufficiently understood. At a minimum, visual disclaimers should be displayed for a duration sufficient for consumers to notice, read and understand them.

### *Repetition*

It is often advisable to repeat a disclaimer on multiple pages of a website. This is especially true where, for example, a representation that was made on a previous page has since disappeared from the consumer's mind by the time he or she arrives at an order page.<sup>89</sup> Repetition of the disclaimer on several pages can be used to mitigate this remoteness effect. It is also true where a consumer may be accessing a website not through its home page, but directly from some other page, such as another website or a search engine.<sup>90</sup> Consumers who access a website in this fashion could very easily bypass the webpage on which the disclaimer is located. In order to minimize the risk of this occurring, businesses may want to consider making it compulsory for consumers to click-through the disclaimer.<sup>91</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 10.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

### *Language*

While not discussed in the Internet Bulletin, it is important that disclaimers be drafted in language that consumers can understand. Accordingly, advertisers should use clear language and avoid legalese or technical jargon. In other words, disclaimers should be as simple and straightforward as possible and should not incorporate extraneous material that may diminish the message that must be conveyed to consumers.

### **Substance of Representations Made Online**

In addition to the particular form and placement of disclaimers, attention should also be given to the substance of the actual representations being made on the website. In this regard, while the Act does not generally set out what specific information needs to be disclosed in order to ensure that representations are not false or misleading in a material respect, the Internet Bulletin does provide some guidance with respect to representations that are made concerning an advertiser's products, services or business.

### *Representation About Products and Services*

Consumers cannot physically inspect products and services being offered for sale on the Internet. Instead, they rely heavily upon the representations being made by the advertiser. Accordingly, it is very important for an advertiser to ensure that all representations about a product or service, including accompanying text, pictures, illustrations and audio, are accurate and do not mislead the consumer in any material way. For example, where an illustration forms part of a representation, it should be in accord with the accompanying text.<sup>92</sup> Similarly, photography, artwork or audiovisual representations should accurately and fairly illustrate the product or service offered.<sup>93</sup>

### *Representation About Businesses*

It is also important that the website not contain any false or misleading representations regarding any material aspect of the business in question. Specifically, the website should not create a false or misleading impression regarding the identity or physical location of the business, the

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<sup>92</sup> *Id.* at 11.

<sup>93</sup> *Id.*

type of business, the purpose of the representation, or the relationship between the person making the representation and the actual supplier of the product or service.<sup>94</sup> Additionally, an advertiser should be wary of using any "text, graphics, logos, marks, seals or trustmarks, accreditations or other representations" that could create "false impressions of affiliation, sponsorship, endorsement or popularity".<sup>95</sup>

### *Different Purchasing Environments*

The Internet Bulletin also notes that businesses should take care to disclose differences between online and in-store purchasing environments.<sup>96</sup> For example, any price differences that exist between an online purchase and in-store purchase should be disclosed. Similarly, advertisers should be careful to disclose any additional charges that may apply to online purchases, such as shipping and handling charges.<sup>97</sup> Not disclosing these differences could be viewed as being materially misleading.<sup>98</sup>

### **Jurisdictional Issues**

The global nature of the Internet means that representations made online by an advertiser located in one country can be viewed by consumers located throughout the world. This raises a number of significant issues for both advertisers and enforcement agencies, including, for example, which enforcement agencies should seek to apply their laws to the representations in question.

While there is no doubt that the Act applies to persons making representations online in Canada that are accessible online in Canada, it is not always clear when and under what circumstances the Act will apply to representations that originate in foreign jurisdictions but are accessible in Canada. The Bureau has, however, stated that it is prepared to "assert Canadian jurisdiction over foreign entities...whenever necessary to protect the Canadian market from misleading

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 4-5.

<sup>97</sup> In this regard, the Bureau has noted that "[i]f any representation is made concerning the price of a product, any such additional required payment should be disclosed at the same time". See *supra* note 30 at 8.

<sup>98</sup> *Supra* note 7 at 5.

representations and deceptive marketing practices".<sup>99</sup> Similarly, the Bureau has stated that "[I]ability under the Act for misleading representations and deceptive marketing practices will be determined on a case-by-case basis, having regard to all relevant factors, as well as any emerging law and changes in technology".<sup>100</sup>

As a general rule, there are three ways in which a Canadian court may assert jurisdiction over an out-of-country defendant.<sup>101</sup> First, it may assume jurisdiction if the defendant is physically present within the territory of the court. Second, the foreign resident may consent to submit the dispute to the court's jurisdiction. Third, the court may assert jurisdiction where there is a real and substantial link between Canada and the conduct in question.<sup>102</sup>

Determining whether a real and substantial link exists is often a complicated exercise that must be made on a case by case basis. The Federal Court's recent decision in *Desjean v. Intermix Media, Inc.*<sup>103</sup> does, however, provide some helpful guidance. In that case, Desjean brought a class action against Intermix Media, Inc. ("Intermix"), a publicly-traded Delaware corporation with its principal offices in Los Angeles, California, alleging that Intermix violated the criminal misleading advertising provisions in the Act. Specifically, Desjean alleged that Intermix bundled "spyware" or "adware" with the free software that it offered on various Internet websites without disclosing the bundling of such spyware or adware to consumers who downloaded the free software. Intermix subsequently sought an order dismissing Desjean's action on the basis that, among other things, the Federal Court lacked jurisdiction over Intermix and the matter.

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<sup>99</sup> *Id.* at 12.

<sup>100</sup> *Id.*

<sup>101</sup> *Infra* note 103 at § 23.

<sup>102</sup> See, for example, *Libman v. The Queen*, [1985] 2 S.C.R. 178 at 209, in which La Forest J. commented that "[t]his country has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence [in Canada]". Consequently, La Forest J. held that, "[a]s I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a 'real and substantial link' between an offence and this country...". *Id.* at 212-213. See also *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, *R. v. Vezina*, [1986] 1 S.C.R. 2 and *United States of America v. Cotroni* (1989), 48 C.C.C. (3d) 193 (S.C.C.). For a detailed discussion of the Canadian and U.S. approaches to the extraterritorial enforcement of their domestic laws, see G. Addy, C. Margison and R. Doig, "National Sovereignty and the Enforcement of Competition Law: Striking the Right Balance" (Paper presented at the 2004 Annual Fall Conference on Competition Law).

<sup>103</sup> [2006] F.C.J. No. 1754.



Referring to a prior decision of the Ontario Court of Appeal,<sup>104</sup> the Federal Court noted that there are eight factors which courts should look to when dealing with the issue of jurisdiction. These factors include the following: (1) the connection between the forum and the plaintiff's claim; (2) the connection between the forum and the defendant; (3) unfairness to the defendant in assuming jurisdiction; (4) unfairness to the plaintiff in not assuming jurisdiction; (5) involvement of other parties to the suit; (6) the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis; (7) whether the case is interprovincial or international in nature; and (8) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.<sup>105</sup>

With respect to the application of these factors, the Federal Court wrote as follows:

In the present case, the application of these factors, none of which is determinative in and of itself, clearly indicates that the connection between the forum and the defendant or between the forum and the subject matter is not substantial enough to warrant this Court's intervention.

While the plaintiff allegedly suffered damages to a computer located in Canada, that is not enough to confirm this Court's jurisdiction. There is clearly no connection between the forum and the defendant. Intermix has no servers in Canada. The impugned Website is not hosted on servers located in Canada, but on a server situated in California.

Intermix does not have, nor has it ever had, any employees in Canada. Intermix currently has a contractual relationship with two independent contractors in Canada that provide newsletter edition services unrelated to the matters at issue in the present litigation.

Intermix does not have any offices in Canada. It did, in the past, subsidize office space for contractors working on two websites Intermix had purchased, but ceased doing so more than three years ago and has never itself maintained or leased office space in Canada.

Further, Intermix has in no way availed itself of Canadian laws as it does not do any business in Canada through the Website at issue.

Intermix has no bank accounts in Canada. Intermix does not pay taxes to either the federal government or any provincial government and it is not registered for

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<sup>104</sup> *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577.

<sup>105</sup> *Supra* note 103 at § 27.

GST or PST/HST purposes. Intermix is not registered as doing business in any Canadian jurisdiction.

Intermix has no direct advertising, marketing or solicitation aimed at the Canadian market. No person affiliated with Intermix, either directly or indirectly, as an employee or director, has ever attended trade shows or any other Internet industry promotional events in Canada. The only three transactions which Intermix entered into with Canadian companies were for short-term purposes and fall far short of establishing a significant connection between Canada and Intermix.

Furthermore, it would be manifestly unfair to subject Intermix to this Court's jurisdiction since it would, in effect, mean a U.S.-based operator of a website, with no business assets in Canada and no physical presence in the jurisdiction, could be sued in this country as well as in any other country from which a plaintiff might choose to download its products. Despite the inconvenience for plaintiffs in similar situation of having to pursue their claims in foreign jurisdictions, this is only one factor to be taken into consideration. As the law now appears to stand, this is not enough to bring a claim within the jurisdiction of a Canadian court. It would put much too great an onus on foreign website operators or any foreign commercial undertakings with no real presence in Canada which happen to deal with Canadian residents.

With respect to the fourth factor, Intermix could not reasonably expect to be sued in Canada for allegedly breaching the criminal provisions of Canadian competition legislation because of alleged false advertising on its website – one which is solely supported by a server located in the U.S. Clearly, any alleged false representations, if made, were made by Intermix in the U.S., hosted by a server situated in the U.S. and thus not within this Court's jurisdiction. Jurisdiction cannot be founded simply upon the fact that the plaintiff was in Canada when he downloaded the foreign content. Plaintiff's inconvenience in suing Intermix in the U.S. is also insufficient to justify this Court's jurisdiction.

The sixth factor also favors Intermix. The *Foreign Extraterritorial Measures Act* ... is a clear expression by Canada that foreign antitrust judgments involve its national interests. More specifically, paragraph 8(1)(a) of the Act allows the Attorney General of Canada to declare, in appropriate circumstances, that a foreign antitrust judgment should not be "recognized or enforceable in any manner in Canada." If Canada reserves the right to refuse enforcement of American antitrust judgments, this Court should not be placed in the position of applying Canadian competition law to American corporations doing business in the U.S. and having no assets in Canada, thereby compelling a plaintiff to seek enforcement in the U.S. of a Canadian antitrust judgment.

Finally, the seventh and the eighth factors lead to the same conclusion. As the Ontario Court of Appeal recognized in *Muscutt* ... at paragraph 95, "[t]he decisions in *Morguard*, *Tolofson* and *Hunt* suggest that the assumption of jurisdiction is more easily justified in interprovincial cases than in international

cases." Moreover, there are only limited circumstances where damages sustained within a jurisdiction because of a wrong committed elsewhere would be accepted as a basis for assumed jurisdiction...<sup>106</sup>

Future cases will no doubt provide further guidance as to the application of the real and substantial connection test in the online context.

## V. BUREAU ENFORCEMENT ACTION INVOLVING INTERNET ADVERTISING

The Commissioner has, over the past few years, entered into a number of Consent Agreements with advertisers designed to address her concerns that certain online advertising violated the civil misleading advertising provisions of the Act. Similarly, the Bureau has participated in a number of Internet sweeps aimed at combating misleading and deceptive advertising found on the Internet.<sup>107</sup> These enforcement actions are discussed in more detail below.

### Consent Agreements

#### 1. *The Commissioner of Competition v. Urus Industrial Corporation*<sup>108</sup>

**Facts:** Urus Industrial Corporation, which carries on business as Koolatron, is a company that manufactures and/or sells a variety of home, health and beauty, sport and fitness, automotive and camping products. From December 2001 to August 2002, Koolatron made representations to the public on a television infomercial and on an Internet website for the promotion of the AB Energizer, an electronic muscle stimulation device. These representations consisted of performance claims regarding the performance, efficacy or length of life of the AB energizer that, according to the Commissioner, were not based on adequate and proper tests.

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<sup>106</sup> *Id.* at §§ 28-38. See also A. Gahtan, M. Kratz & J. Mann, eds., *Electronic Commerce: A Practitioner's Guide* (Toronto: Carswell, 2003) at 8-5, citing *Braintech Inc. v. Kostiuk* (1999), 171 D.L.R. (4<sup>th</sup>) 46 at § 60 (B.C.C.A.), which further cites *Zippo Manufacturing Co. v. Zippo Dot Com Inc.*, 952 F. Supp. 1119 at 1122-4 (U.S. W.D. Pa. 1997); Pritchard & Vogt, *supra* note 23 at 296, referring to *Bangoura v. Washington Post*, 2005 CarswellOnt 4343 (Ont. C.A.) at § 25, reversing *Bangoura v. Washington Post*, 2004 CarswellOnt 340 (Ont. S.C.J.), additional reasons in 2005 CarswellOnt 7304, leave to appeal refused 2006 CarswellOnt 932 (S.C.C. Feb 16, 2006); *Burke v. NYP Holdings Inc.*, 2005 CarswellBC 2166 at § 29 (B.C.S.C.); B. Sookman, *Sookman: Computer, Internet and Electronic Commerce Law* (Toronto: Carswell, 2006, Rel. 5) at 11-37; and *Pro-C Ltd. v. Computer City, Inc.* (2000), 7 C.P.R. (4<sup>th</sup>) 193 (Ont. S.C.J.) at § 123, rev'd (2001), 12 C.P.R. (4<sup>th</sup>) 441 (Ont. C.A.), leave to appeal refused (2001), 294 N.R. 399 (S.C.C.).

<sup>107</sup> See, for example, A. Rosen, "Misleading Advertising and Deceptive Marketing Practices: A Year in Review" (Paper presented at the 2005 Annual Fall Conference on Competition Law).

<sup>108</sup> CT-2004-011, Consent Agreement, July 22, 2004, available online at [www.ct-tc.gc.ca/CMFiles/CT-2004-011\\_0001a\\_53JAN-4222005-8689.pdf?windowSize=popup](http://www.ct-tc.gc.ca/CMFiles/CT-2004-011_0001a_53JAN-4222005-8689.pdf?windowSize=popup).

**Terms of the Consent Agreement:** Koolatron agreed to immediately cease the sale and marketing of the AB Energizer, by any means whatsoever, including the Internet. Koolatron further agreed not to make any representations to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of the AB Energizer or a similar device unless such representations were based on adequate and proper tests. Koolatron also agreed to refund the purchase price to customers who purchased an AB Energizer marketed in Canada and to broadcast a corrective notice in a television spot and on its website. Finally, Koolatron agreed to pay an AMP in the amount of \$75,000 and to implement and maintain a formal corporate compliance program.

2. *The Commissioner of Competition v. Performance Marketing Ltd.*<sup>109</sup>

**Facts:** Performance Marketing Ltd. ("Performance") is engaged in the promotion and/or sale of a variety of health and sexual aid products, including diet patches, through various means including over the Internet. Beginning around January 2004, Performance made or caused to be made representations to the public through various channels, including Performance's websites and through the distribution of more than 37,000 spam messages. The Commissioner alleged that these representations, which consisted of statements regarding the performance and efficacy of the diet patches, were materially false and misleading and not based on adequate and proper tests.

**Terms of the Consent Agreement:** Performance agreed to cease making, by any means whatsoever (including on its websites and by way of spam), any representations to the public that are false or misleading in a material respect. Similarly, it agreed to cease making any representations to the public regarding the performance or efficacy of any product which is not based on adequate and proper tests. Performance also agreed to post a corrective notice that would be accessible on its websites. Finally, Performance agreed to establish, implement and maintain a corporate compliance program and to refund the purchase price of the diet patches. Performance was not required to pay an AMP.

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<sup>109</sup> CT-2004-014, Consent Agreement, December 13, 2004, available online at [www.ct-tc.gc.ca/english/CaseDetails.asp?x=228&CaseID=244#334](http://www.ct-tc.gc.ca/english/CaseDetails.asp?x=228&CaseID=244#334). See also Competition Bureau, News Release, "Consumers to Receive Full Refund for Bogus Diet Patches" (31 December 2004), available online at [www.competitionbureau.gc.ca/internet/index.cfm?itemID=236&lg=e](http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=236&lg=e).

3. *The Commissioner of Competition v. Fabutan Corporation and Douglas Scott McNabb*<sup>110</sup>

**Facts:** Fabutan Corporation operates 19 corporate indoor tanning studios and has contracts with 131 franchise studios across Canada. Douglas Scott McNabb is the sole shareholder of the corporation that owns Fabutan Corporation (collectively, "Fabutan"). Following an inquiry that began in April 2003, the Commissioner alleged, among other things, that certain representations made on Fabutan's website regarding the benefits of indoor tanning were false and misleading in a material respect and were not based on adequate and proper tests.

**Terms of the Consent Agreement:** Fabutan agreed not to make, by any means whatsoever, any statements to the public for the purposes of promoting indoor tanning services that represent, or convey a general impression, that moderate tanning has been conclusively shown to provide proven health benefits, unless such representations have been substantiated in a prescribed manner. Fabutan also agreed to ensure that its representations to the public for the purpose of promoting indoor tanning services would include certain prescribed statements. Moreover, Fabutan agreed to post a corrective notice on its website; establish, implement and maintain a formal corporate compliance program; and pay an AMP of \$62,500. Finally, Douglas Scott McNabb agreed to donate \$12,500 to the Direct MS Charity of Alberta.

4. *The Commissioner of Competition v. Mike Stothers*;<sup>111</sup> *The Commissioner of Competition v. Cory Grattan and Tracey Grattan*;<sup>112</sup> *The Commissioner of Competition v. Everette Grattan*;<sup>113</sup> and *The Commissioner of Competition v. Joe Walsh*<sup>114</sup>

**Facts:** Each of these proceedings involved certain individuals (the "Respondents") who were involved in the promotion and/or sale of a variety of products and services through various means, including over the Internet. On September 26, 2005, the Commissioner commenced an

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<sup>110</sup> CT-2005-003, Consent Agreement, February 27, 2006, available online at [www.ct-tc.gc.ca/CMFiles/CT-2005-003\\_0032\\_45PQU-2282006-3996.pdf?windowSize=popup](http://www.ct-tc.gc.ca/CMFiles/CT-2005-003_0032_45PQU-2282006-3996.pdf?windowSize=popup).

<sup>111</sup> CT-2005-011, Consent Agreement, December 16, 2005, available online at [www.ct-tc.gc.ca/CMFiles/CT-2005-011\\_0001a\\_38OQO-12162005-727.pdf?windowSize=popup](http://www.ct-tc.gc.ca/CMFiles/CT-2005-011_0001a_38OQO-12162005-727.pdf?windowSize=popup).

<sup>112</sup> CT-2005-012, Consent Agreement, December 19, 2005, available online at [www.ct-tc.gc.ca/CMFiles/CT-2005-012\\_0001a\\_38JPI-12202005-9757.pdf?windowSize=popup](http://www.ct-tc.gc.ca/CMFiles/CT-2005-012_0001a_38JPI-12202005-9757.pdf?windowSize=popup).

<sup>113</sup> CT-2005-013, Consent Agreement, December 21, 2005, available online at [www.ct-tc.gc.ca/CMFiles/CT-2005-013\\_0001a\\_53PEH-12222005-2368.pdf?windowSize=popup](http://www.ct-tc.gc.ca/CMFiles/CT-2005-013_0001a_53PEH-12222005-2368.pdf?windowSize=popup).

<sup>114</sup> CT-2006-001, Consent Agreement, January 9, 2006, available online at [www.ct-tc.gc.ca/CMFiles/CT-2006-001\\_0001a\\_45KAN-1102006-393.pdf?windowSize=popup](http://www.ct-tc.gc.ca/CMFiles/CT-2006-001_0001a_45KAN-1102006-393.pdf?windowSize=popup).

inquiry into certain alleged deceptive marketing practices of the Respondents, including the sale and promotion of the Fuel Saver Pro. All parties agreed that, from at least January 1, 2002 to May 31, 2004, the Respondents made representations to the public through spam for the purposes of promoting the Fuel Saver Pro and that such representations were false or misleading in a material respect and were not based on adequate or proper tests.<sup>115</sup>

**Terms of the Consent Agreements:** The Respondents agreed to comply with the misleading advertising and deceptive marketing practices provisions of the Act in their marketing of products and services, including with respect to representations made on the Internet and by way of e-mail. The Respondents also agreed not to make any representations whatsoever in Canada or available to consumers in Canada by any means whatsoever, including on the Internet and by way of e-mail, which are false or misleading in a material respect, including representations in the form of a statement, warranty, or guarantee of the performance, efficacy or length of life of a product that are not based on adequate and proper tests. Some of the Respondents were also required to pay AMPs ranging from \$2,000 to \$5,000. Finally, the Respondents agreed to conduct their businesses in a manner consistent with the Bureau's Information Bulletin on "Corporate Compliance Programs".<sup>116</sup>

5. *The Commissioner of Competition v. Strategic Ecomm Inc. and Matthew Hovila*<sup>117</sup>

**Facts:** Strategic Ecomm Inc. and Matthew Hovila (the "Respondents") operated certain websites and promoted the sale of Internet resume distribution services to the public in Canada and around the world. Following an inquiry that began in April 2003, the Commissioner alleged that the Respondents had, between September 23, 2002 to May 30, 2005, made materially false and

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<sup>115</sup> See Competition Bureau, News Release, "Competition Bureau Joins U.S. Law Enforcement in Derailing Bogus Fuel Saving Scam" (20 December 2005), available online at [www.competitionbureau.gc.ca/internet/index.cfm?itemID=2016&lg=e](http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2016&lg=e).

<sup>116</sup> Director of Investigation and Research, "Program of Compliance" (Minister of Supply and Services Canada, March 1993), available online at [www.competitionbureau.gc.ca/PDFs/complianceen.pdf](http://www.competitionbureau.gc.ca/PDFs/complianceen.pdf).

<sup>117</sup> CT-2006-003, Consent Agreement, February 22, 2006, available online at [www.ct-tc.gc.ca/CMFiles/CT-2006-003\\_0001\\_38NVF-2242006-3863.pdf?windowSize=popup](http://www.ct-tc.gc.ca/CMFiles/CT-2006-003_0001_38NVF-2242006-3863.pdf?windowSize=popup).

misleading representations to the public in the promotion of an online resume distribution service on two Internet websites.<sup>118</sup>

**Terms of the Consent Agreement:** The Respondents agreed to comply with the civil misleading advertising provisions in the Act. They also agreed to cease making any representations whatsoever in Canada or available to consumers in Canada or elsewhere by any means whatsoever, including on the Internet, which are false or misleading in a material respect with respect to online services. In addition, they agreed that, for a period of six months following the registration of the Consent Agreement, they would notify the Commissioner of any material changes to the two relevant websites at least two days in advance of such changes becoming accessible to the public. They also agreed that, for a period of two years following the registration of the Consent Agreement, they would notify the Commissioner of any new commercial websites over which any Strategic Ecomm Inc. personnel or related persons exercise control. Finally, the Respondents agreed to pay an AMP of \$100,000 and publish a corrective notice on their websites.

In general, the Consent Agreements reached in the above cases remain in effect for 10 years after registration. From these cases, it is apparent that many of the Consent Agreements reached include the payment of an AMP of widely-varying amounts. These Consent Agreements also entail a significant non-monetary component as well. For example, many of the agreements include a promise by the advertiser to cease the contravening conduct, to implement and maintain a corporate compliance program and to publish a corrective notice in the relevant forms of media.

### **Internet Sweeps**

In addition to entering into the Consent Agreements summarized above, the Bureau has also participated in a number of Internet sweeps aimed at combating misleading and deceptive advertising found on the Internet, including the following:

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<sup>118</sup> The Commissioner also alleged that, contrary to section 74.02 of the Act, the Respondents posted testimonials of past customers without establishing that the testimonials were previously made and without having received written permission from the persons making the testimonials before posting them on the websites.

- In April 1997, the Bureau announced that it, along with the FTC and members of provincial, territorial and state law enforcement agencies, had collaborated in an initiative to identify potential scams making false or unsubstantiated earnings claims on the Internet.<sup>119</sup>
- In February 2000, the Bureau participated in an international search to identify Internet-based "get rich quick" schemes, such as illegal lotteries, investment scams and deceptive offers to provide work or services from home. The search was led by the FTC, in partnership with the International Marketing Supervision Network, which represents law enforcement authorities from more than two dozen countries, including Canada. The Bureau coordinated Canadian participation in the search with other provincial agencies and approximately 200 websites were examined.<sup>120</sup>
- In August 2001, the Bureau launched regular Internet sweeps to evaluate Canadian online marketing sites for compliance with the Act, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*. Sweeps focussed on websites marketing a variety of products and business opportunities, including textile products, articles containing precious metals and work-at-home businesses.<sup>121</sup>
- In February 2002, the Bureau announced that it had participated in a search targeting websites making deceptive or misleading claims for health products and services. Eight officers with the Bureau's Fair Business Practices Branch took part in the sweep, looking for Canadian-based sites offering miracle cures or making unrealistic performance claims

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<sup>119</sup> Competition Bureau, News Release, "Online Anti-Competitive Behaviour Hit by Canadian Competition Bureau and U.S. Federal Trade Commission" (24 April 1997), available online at [www.competitionbureau.gc.ca/internet/index.cfm?itemID=673&lg=e](http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=673&lg=e).

<sup>120</sup> Competition Bureau, News Release, "Competition Bureau Targets Online Activities" (31 October 2000), available online at [www.competitionbureau.gc.ca/internet/index.cfm?itemID=581&lg=e](http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=581&lg=e).

<sup>121</sup> Annual Report of the Commissioner of Competition for the Year Ending March 31, 2002 at 12-13, available online at <http://strategis.ic.gc.ca/pics/ct/ct02444.pdf>.



for health products. The officers filed reports on over 50 websites, approximately half of which were considered "problematic".<sup>122</sup>

- In April 2004, the Bureau launched Project FairWeb, a dedicated Internet surveillance and enforcement program. In carrying out Project FairWeb's mandate, Bureau officers conduct regular Internet sweeps and identify potentially off-side websites, which are then checked for compliance against the misleading representations and deceptive marketing practices provisions of the Act. Notices are then sent out to owners of offending websites, which may invite them to voluntarily alter their websites to comply with the Act, or may request substantiation of any claims made. As of April 2005, Project FairWeb had identified approximately 300 questionable websites through its Internet sweeps. Over 80% of the businesses that received notices of non-compliance removed the performance claims in question or indicated an intention to comply. When businesses do not respond to the Bureau's concerns, enforcement action may be considered, including contested court proceedings.<sup>123</sup>
- In February 2005, the Bureau announced that it, along with 76 other government agencies around the world, had just completed a special two-day Internet surveillance and enforcement program targeting bogus product claims found on the Internet. The Bureau officers participating in this initiative searched for Canadian-based websites making unrealistic performance claims and collected spam using e-mail "harvest" accounts.<sup>124</sup>
- In December 2005, the FTC announced that it, along with the Federal Bureau of Investigation, the U.S. Postal Inspection Service, Canadian consumer protection officials (including the Bureau) and three state Attorneys General, had set out an enforcement initiative "targeting spammers who are cluttering consumers' mail boxes with millions of

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<sup>122</sup> Competition Bureau, News Release, "Competition Bureau Participates in International Internet Sweep Day" (28 February 2002), available online at [www.competitionbureau.gc.ca/internet/-index.cfm?itemID=389&lg=e](http://www.competitionbureau.gc.ca/internet/-index.cfm?itemID=389&lg=e).

<sup>123</sup> Competition Bureau, Information Notice, "Project FairWeb" (13 December 2004), available online at [www.competitionbureau.gc.ca/internet/index.cfm?itemID=237&lg=e](http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=237&lg=e).

<sup>124</sup> Competition Bureau, News Release, "Competition Bureau Participates in Worldwide Blitz on Scams and Spam" (27 February 2005), available online at [www.competitionbureau.gc.ca/internet/-index.cfm?itemID=202&lg=e](http://www.competitionbureau.gc.ca/internet/-index.cfm?itemID=202&lg=e).

illegal and unwanted e-mail messages". As part of this initiative, the FTC targeted three operations, the Bureau settled two cases, and the Attorneys General of Florida, North Carolina and Texas filed complaints seeking to block the illegal spamming of three more operations. U.S. federal criminal authorities have executed search warrants as part of this initiative.<sup>125</sup>

- In March 2006, the Bureau announced that it, along with 61 other government agencies around the world, had just completed a special three-day Internet surveillance and enforcement program targeting bogus product claims found on the Internet. As they did in February 2005, the Bureau officers participating in this initiative searched for Canadian-based Internet sites making unrealistic performance claims about their products' abilities to cure serious diseases and collected spam using e-mail "harvest" accounts.<sup>126</sup>

## VI. CONCLUSION

In light of the foregoing, it is important for an advertiser to monitor and update its website on a regular basis in order to ensure that all representations being made are accurate and fairly illustrate the product or service being offered. While this can be a substantial undertaking, failing to do so could result in serious issues arising under the misleading advertising provisions in the Act.

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<sup>125</sup> Federal Trade Commission, News Release, "Cross-border Law Enforcement Team Targets Spammers" (20 December 2005), available online at [www.ftc.gov/opa/2005/12/buttonpushers.htm](http://www.ftc.gov/opa/2005/12/buttonpushers.htm).

<sup>126</sup> Competition Bureau, News Release, "Competition Bureau Participates in Worldwide Blitz on Hidden Traps Online" (3 March 2006), available online at [www.competitionbureau.gc.ca/internet/-index.cfm?itemID=2031&lg=e](http://www.competitionbureau.gc.ca/internet/-index.cfm?itemID=2031&lg=e).

## **APPENDIX "A"**

### **FALSE AND MISLEADING ADVERTISING PROVISIONS**

#### **CRIMINAL PROHIBITIONS**

##### **False or misleading representations**

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.

##### **Proof of deception not required**

(1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that any person was deceived or misled.

##### **Permitted representations**

(1.2) For greater certainty, a reference to the making of a representation, in this section or in section 52.1, 74.01 or 74.02, includes permitting a representation to be made.

##### **Representations accompanying products**

(2) For the purposes of this section, a representation that is

- (a) expressed on an article offered or displayed for sale or its wrapper or container,
- (b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,
- (c) expressed on an in-store or other point-of-purchase display,
- (d) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or

- (e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2.1).

### **Representations from outside Canada**

(2.1) Where a person referred to in subsection (2) is outside Canada, a representation described in paragraph (2)(a), (b), (c) or (e) is, for the purposes of subsection (1), deemed to be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.

### **Deemed representation to public**

(3) Subject to subsection (2), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subsection (1) is deemed to have made that representation to the public.

### **General impression to be considered**

(4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

### **Offence and punishment**

(5) Any person who contravenes subsection (1) is guilty of an offence and liable

- (a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both; or
- (b) on summary conviction, to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding one year, or to both.

### **Reviewable conduct**

(6) Nothing in Part VII.1 shall be read as excluding the application of this section to a representation that constitutes reviewable conduct within the meaning of that Part.

### **Duplication of proceedings**

(7) No proceedings may be commenced under this section against a person against whom an order is sought under Part VII.1 on the basis of the same or substantially the same facts as would be alleged in proceedings under this section.

R.S.C., 1985, c. C-34, s. 52; 1999, c. 2, s. 12.

## **CIVIL PROHIBITIONS**

### **Misrepresentations to public**

74.01 (1) 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;
- (b) makes 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; or
- (c) makes a representation to the public in a form that purports to be
  - (i) a warranty or guarantee of a product, or
  - (ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,

if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.

...

### **General impression to be considered**

(6) In proceedings under this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

1999, c. 2, s. 22.

...

### **Representations accompanying products**

74.03 (1) For the purposes of sections 74.01 and 74.02, a representation that is

- (a) expressed on an article offered or displayed for sale or its wrapper or container,
- (b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,
- (c) expressed on an in-store or other point-of-purchase display,
- (d) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or
- (e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2).

### **Representations from outside Canada**

(2) Where a person referred to in subsection (1) is outside Canada, a representation described in paragraph (1)(a), (b), (c) or (e) is, for the purposes of sections 74.01 and 74.02, deemed to be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.

### **Deemed representation to public**

(3) Subject to subsection (1), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in section 74.01 is deemed to make that representation to the public.

1999, c. 2, s. 22.

...

### **Saving**

74.07 (1) Sections 74.01 to 74.06 do not apply to a person who prints or publishes or otherwise disseminates a representation, including an advertisement, on behalf of another person in Canada, where the person establishes that the person obtained and recorded the name and address of that other person and accepted the representation in good faith for printing, publishing or other dissemination in the ordinary course of that person's business.

### **Non-application**

(2) Sections 74.01 to 74.06 do not apply in respect of conduct prohibited by sections 52.1, 53, 55 and 55.1.

1999, c. 2, s. 22; 2002, c. 16, s. 9.

...

### **Determination of reviewable conduct and judicial order**

74.10 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

- (a) not to engage in the conduct or substantially similar reviewable conduct;
- (b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including
  - (i) a description of the reviewable conduct,
  - (ii) the time period and geographical area to which the conduct relates, and
  - (iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and
- (c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding
  - (i) in the case of an individual, \$50,000 and, for each subsequent order, \$100,000, or
  - (ii) in the case of a corporation, \$100,000 and, for each subsequent order, \$200,000.

### **Duration of order**

(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.



### **Saving**

(3) No order may be made against a person under paragraph (1)(b) or (c) where the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.

### **Purpose of order**

(4) The terms of an order made against a person under paragraph (1)(b) or (c) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.

### **Aggravating or mitigating factors**

(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):

- (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 affected 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 this Act by the person who engaged in the reviewable conduct; and
- (h) any other relevant factor.

### **Meaning of subsequent order**

(6) For the purposes of paragraph (1)(c), an order made against a person in respect of conduct that is reviewable under paragraph 74.01(1)(a), (b) or (c), subsection 74.01(2) or (3) or section 74.02, 74.04, 74.05 or 74.06 is a subsequent order if

- (a) an order was previously made against the person under this section in respect of conduct reviewable under the same provision;
- (b) the person was previously convicted of an offence under the provision of Part VI, as that Part read immediately before the coming into force of this Part, that corresponded to the provision of this Part;
- (c) in the case of an order in respect of conduct reviewable under paragraph 74.01(1)(a), the person was previously convicted of an offence under section 52, or under paragraph 52(1)(a) as it read immediately before the coming into force of this Part; or
- (d) in the case of an order in respect of conduct reviewable under subsection 74.01(2) or (3), the person was previously convicted of an offence under paragraph 52(1)(d) as it read immediately before the coming into force of this Part.

1999, c. 2, s. 22.

...

### **Proceedings commenced under Part VI**

74.16 No application may be made by the Commissioner for an order under this Part against a person where proceedings have been commenced under section 52 against that person on the basis of the same or substantially the same facts as would be alleged in proceedings under this Part.

1999, c. 2, s. 22.

**APPENDIX "B"**

**INFORMATION BULLETIN ON MISLEADING REPRESENTATIONS  
AND DECEPTIVE MARKETING PRACTICES: CHOICE OF CRIMINAL  
OR CIVIL TRACK UNDER THE *COMPETITION ACT***





Government  
of Canada

Gouvernement  
du Canada

# INFORMATION BULLETIN

## MISLEADING REPRESENTATIONS AND DECEPTIVE MARKETING PRACTICES:

### CHOICE OF CRIMINAL OR CIVIL TRACK UNDER THE *COMPETITION ACT*

Canada 





# MISLEADING REPRESENTATIONS AND DECEPTIVE MARKETING PRACTICES: CHOICE OF CRIMINAL OR CIVIL TRACK UNDER THE *COMPETITION ACT*

## INTRODUCTION

The purpose of the *Competition Act* is to maintain and encourage competition in the Canadian marketplace. The misleading representations and deceptive marketing practices provisions of the Act aim to improve the quality and accuracy of marketplace information and discourage deceptive marketing practices. The Act applies to most businesses in Canada, regardless of size.

This Information Bulletin outlines the approach that the Commissioner of Competition is taking in choosing whether to pursue the criminal or civil track with respect to misleading representations and deceptive marketing practices. The guidelines contained in this Bulletin are not law. However, they may be relied upon as reflecting the Commissioner's interpretation of how the law is applied on a consistent basis by Competition Bureau staff.

## CHOICE OF CRIMINAL OR CIVIL TRACK

The Act provides two adjudicative regimes to address misleading representations and deceptive marketing practices. The relevant provisions of the Act read as follows:

### PART VI - OFFENCES IN RELATION TO COMPETITION

#### Duplication of proceedings

**52(7)** No proceedings may be commenced under this section against a person against whom an order is sought under Part VII.1 on the basis of the same or substantially the same facts as would be alleged in proceedings under this section.

### PART VII.1 - DECEPTIVE MARKETING PRACTICES

#### Proceedings commenced under Part IV

**74.16** No application may be made by the Commissioner for an order under this Part against a person where proceedings have been commenced under section 52 against that person on the basis of the same or substantially the same facts as would be alleged in proceedings under this Part.

Section 52, the general criminal prohibition requiring mens rea, deals with the most egregious matters while Part VII.1, the civil regime, addresses most instances of misleading representations and deceptive marketing practices.

## GENERAL PRINCIPLES

1. In most instances, the civil track will be pursued unless the criteria outlined below are satisfied.
2. The amendments do not specify any time period or other statutory requirement limiting the amount of time the Bureau may take to decide which adjudication route to follow. Every effort will be made to arrive at this decision as quickly as possible and to notify the parties concerned once a decision is taken.
3. The choice of proceeding along the civil track against a party will preclude the laying of criminal charges against the same party, based upon the same or substantially the same set of facts. New evidence that the representation was made knowingly or recklessly would constitute a substantial change in facts.
4. While the Bureau may initially choose to proceed under the criminal regime, the Bureau may subsequently decide to expedite the matter by pursuing the civil track.

5. The adjudication route may not be changed once charges have been laid or once an application has been filed with the Tribunal.
6. The Bureau will strive for consistency in the approach to enforcement, recognizing that the choice of approach in any particular case will be decided upon according to the facts of that case.

## **GUIDELINES**

1. In order to proceed on a criminal track both of the following criteria must be satisfied:
  - (a) there must be clear and compelling evidence suggesting that the accused knowingly or recklessly made a false or misleading representation to the public. An example of such evidence is the continuation of a practice by the accused after complaints have been made by consumers directly to the accused; and
  - (b) if there is clear and compelling evidence that the accused knowingly or recklessly made a false or misleading representation to the public, and this evidence is available, the Bureau must also be satisfied that criminal prosecution would be in the public interest.
2. The factors to be taken into account in making this public interest determination will vary from case to case, and may include the seriousness of the alleged offence and mitigating factors.
3. The seriousness of the alleged offence will include a consideration of:
  - (a) whether there was substantial harm to consumers or competitors which could not be adequately dealt with by available civil remedies;
  - (b) whether the deceptive practices targeted or took unfair advantage of vulnerable groups (e.g., children and seniors);
  - (c) whether the persons involved failed to make timely and effective attempts to remedy the adverse effects of the conduct, or whether the conduct continued after corporate officials became aware of it;
  - (d) whether the conduct involved a failure to comply with a previous undertaking, a promised voluntary corrective action, or a prohibition order; and
  - (e) whether the persons had engaged in similar conduct in the past.
4. Mitigating factors will include a consideration of:
  - (a) whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive; and
  - (b) whether the company or entity has in place an effective compliance program.
5. If, on balance, the Bureau is satisfied that the circumstances of the case warrant criminal prosecution, a recommendation may be made to the Attorney General of Canada who will make the ultimate determination of whether to proceed.



## **HOW TO CONTACT THE COMPETITION BUREAU**

Anyone wishing to obtain additional information about the *Competition Act* or file a complaint under the provisions of the Act should contact the Competition Bureau's Information Centre at:

### **Telephone**

Toll free: 1-800-348-5358  
National Capital Region: (819) 997-4282  
TDD (for hearing impaired): 1-800-642-3844

**Facsimile** (819) 997-0324

### **Address**

Information Centre  
Competition Bureau  
Industry Canada  
50 Victoria Street  
Hull, Quebec  
K1A 0C9

### **Web site**

<http://competition.ic.gc.ca>

### **E-mail**

[compbureau@ic.gc.ca](mailto:compbureau@ic.gc.ca)



**APPENDIX "C"**

**INFORMATION BULLETIN ON THE APPLICATION OF THE  
COMPETITION ACT TO REPRESENTATIONS ON THE INTERNET**





Government  
of Canada

Gouvernement  
du Canada

# INFORMATION BULLETIN

## APPLICATION OF THE *COMPETITION* *ACT* TO REPRESENTATIONS ON THE INTERNET

Canada 



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## Preface

This information bulletin has been drawn from jurisprudence, written opinions, input from the consultative process and other public statements by the Competition Bureau (the “Bureau”). In striving for clarity and brevity, it has been necessary to sacrifice legal precision and comprehensiveness to some extent. Readers are advised to consult the *Competition Act* (the “Act”)<sup>1</sup> in circumstances requiring precise statements of the law.

Any examples contained in this bulletin are for the purpose of illustration only and are not intended to provide an exhaustive list of prohibited practices. Further details or elaboration may be obtained from the Bureau listed in the "How to Contact the Competition Bureau" section. Businesses with specific questions concerning proposed promotional plans are reminded to take advantage of the Competition Bureau’s Program of Written Opinions.<sup>2</sup> The views expressed in this bulletin are for assistance only and do not bind the Commissioner of Competition (the “Commissioner”).

Readers should note that the misleading representations and deceptive marketing practices provisions of the Act comprise only a portion of the relevant law in Canada. The Bureau also enforces and administers the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.<sup>3</sup> The potential application of these statutes to Internet advertising will be briefly discussed in this bulletin. Most provinces and other federal departments and agencies also administer legislation dealing with advertising and marketing practices. This bulletin does not attempt to provide information on these statutes administered by other agencies.

## 1. INTRODUCTION

Internet advertising offers consumers and businesses many advantages. It gives consumers access to a rich source of information that can help them to compare products and prices and can lead to more informed purchasing decisions. It also grants businesses the benefits of access to a global market and can provide smaller firms the opportunity to compete on an equal footing with larger firms. While the number of companies advertising on-line and consumers shopping on-line has risen considerably over the past several years, underlying concerns about the potential for falling victim to misleading representations or deceptive marketing practices can undermine consumer confidence.

The Act applies equally to false or misleading representations regardless of the medium used. The same

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<sup>1</sup> R.S.C. 1985, c. C-34, available on-line at: <http://laws.justice.gc.ca/en/C-34/index.html>.

<sup>2</sup> Certain fees apply. Please refer to the Competition Bureau’s *Fee and Service Standards at*: <http://strategis.ic.gc.ca/SSG/ct01249e.html>.

<sup>3</sup> *Consumer Packaging and Labelling Act*, R.S.C. 1985, c. C-38 available at: <http://strategis.ic.gc.ca/SSG/cp01007e.html>. *Textile Labelling Act*, R.S.C. 1985, c. T-10 available at <http://strategis.ic.gc.ca/SSG/cp01144e.html>. *Precious Metals Marking Act*, R.S.C. 1985, c.P-19 available at <http://strategis.ic.gc.ca/SSG/cp01001e.html>.

basic rules that govern truthfulness in traditional advertising and marketing practices apply to on-line representations and on-line marketing practices. The relevant provisions of the Act address the substance of a representation rather than the means by which it is made.

This bulletin aims to provide details of the Bureau's approach to Internet practices as they relate to the misleading representations and deceptive marketing practices provisions of the Act. The Bureau's position is that the enforcement of the Act will not bias business activity either toward or away from the Internet.

## **2. THE COMPETITION ACT GENERALLY**

To understand how to comply with the Act when making representations on-line, it is appropriate to first review its basics. It is a federal law governing business conduct in Canada. Most businesses, both small and large, are governed by the Act. It ensures that all Canadians enjoy the benefits of competitive prices, product choice and quality services. In this regard, accurate and honest information on which consumers can make informed choices is essential to assure that markets are competitive and dynamic.

The Act contains criminal and civil provisions prohibiting misleading representations and deceptive marketing practices in promoting the supply or use of a product or any business interest. Any representation, in any form, which is false or misleading in a material respect, is prohibited.<sup>4</sup> A representation is material if it could lead a person to a course of conduct that, on the basis of the representation, he or she believes to be advantageous.

The Act specifically prohibits deceptive telemarketing and schemes of pyramid selling, and sets out the responsibilities for operators and participants in multi-level marketing plans.<sup>5</sup> Other prohibited deceptive marketing practices include advertising at a bargain price a product that is not available in reasonable quantities; selling a product at a price above the advertised price; and conducting a contest, lottery, or game of chance or skill, without making fair and adequate disclosure of, among other things, facts that materially affect the chances of winning.<sup>6</sup>

Breaches of the Act pertaining to materially false or misleading representations made knowingly or recklessly, as well as multi-level marketing, pyramid selling, double ticketing, deceptive telemarketing and use of deceptive notices of winning a prize are addressed only through the criminal courts.<sup>7</sup> On summary conviction under the general criminal provision, a person is liable to a fine of up to \$200,000, imprisonment for up to one year or both. If convicted on indictment, the person is liable to a fine at the discretion of the court, imprisonment for up to five years or both.<sup>8</sup>

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<sup>4</sup> Refer to subsections 52(1), 74.01(1) and sections 74.02 and 74.03 of the *Competition Act*.

<sup>5</sup> Refer to sections 52.1, 55.1 and 55 of the *Competition Act*.

<sup>6</sup> Refer to subsections 74.01(2), 74.01(3) and sections 74.04, 74.05, 74.06 of the *Competition Act*.

<sup>7</sup> Refer to sections 52, 52.1, 53 54, 55, 55.1 of the *Competition Act*.

<sup>8</sup> Refer to subsection 52(5) of the *Competition Act*.

Alternatively, for matters arising under the civil provisions of the Act<sup>9</sup>, the Commissioner may apply to the Competition Tribunal, the Federal Court - Trial Division, or the superior court of a province (the “courts”) for an order requiring the person to cease the activity, publish a corrective notice and/or pay an administrative monetary penalty. If a court finds that a civil provision has been breached, individuals are liable to penalties of up to \$50,000 and corporations are liable to penalties of up to \$100,000. These amounts could double for subsequent occurrences.<sup>10</sup> Matters falling under the civil provisions may alternatively be dealt with under the criminal provisions, if the person responsible for breaching the relevant provision of the Act did so knowingly or recklessly.

In those situations where the Commissioner has a choice of proceeding on either the civil or criminal track, most often the civil track will be pursued unless there is clear or compelling evidence that the party making the representation in question had knowingly or recklessly made a false or misleading representation to the public, and it would be in the public interest to pursue the matter criminally. Further information on the Bureau’s policy on choice of track can be found at <http://strategis.ic.gc.ca/SSG/ct01181e.html>.

The Act prohibits false or misleading representations to the public; accordingly this bulletin focuses primarily on the application of the Act to commercial Web sites and marketing strategies using e-mail. However, depending on the circumstances, communications within chat rooms, news groups or message boards on the Internet could run afoul of the Act.

## 2.1 Understanding “materiality”

To contravene certain provisions of the Act, a representation must be “false or misleading in a material respect”. This phrase has been interpreted to mean that the representation could lead a person to a course of conduct that, on the basis of the representation, he or she believes to be advantageous. It is important to note that omitting relevant information could also be viewed as material.

Often the test for materiality is whether the representation could influence a consumer to buy a product or service. As one court has stated:

“ [A] representation will be false or misleading in a material respect if, in the context in which it is made, it readily conveys an impression to the ordinary citizen which is, in fact, false or misleading and if that ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered”.<sup>11</sup>

This test is not limited to representations which could influence strictly on-line purchases, but includes on-line representations which could influence off-line purchasing decisions as well. Businesses should take care to disclose differences between purchasing environments. For example, businesses may have different prices for various sales channels (whether on-line, in-store or by catalogue). If price differences exist

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<sup>9</sup> Refer to sections 74.01 to 74.06 of the *Competition Act*.

<sup>10</sup> Refer to subsection 74.1(1) of the *Competition Act*.

<sup>11</sup> *R v. Kenitex Can. Ltd. et al.* (1980), 51 C.P.R. (2d) 103.



between an on-line purchase and in-store or other purchase methods it is important that consumers are not misled. Not disclosing these differences could be viewed as being materially misleading.

## **2.2 Understanding the “general impression test”**

In determining whether a representation is false or misleading in a material respect, a court will take into account the general impression conveyed by the representation, in addition to its literal meaning.<sup>12</sup> The general impression should be evaluated in the context of the medium used.

For illustration, consider a situation where consumers are thinking of buying a product on-line, and are basing their purchasing decision on availability, 24-hour on-line shopping and 24-hour on-line technical support. In this case, consumers are influenced by the business’ on-line representations that prominently display that it is offering “24-hour on-line shopping” and “technical support available on-line”, without disclosing any limitation for technical support. Consumers may have the general impression that they have the ability to shop at their convenience on-line as well as having 24-hour access to on-line technical assistance to help them install the product or to deal with other technical questions. By placing side-by-side “24-hour on-line shopping”, and “technical support available on-line” without any qualifying information, the representation is giving the impression that access to technical support staff is available 24 hours a day, when, in fact, it is only available during regular store hours. By not disclosing that technical support is only available during regular business hours, it may have created the general impression of 24-hour availability for technical service, in the mind of these consumers.

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.

Businesses should not assume that consumers read an entire Web site, just as they do not read every word on a printed page. Accordingly, information required to be communicated to consumers to ensure that a representation does not create a false or misleading impression should be presented in such a fashion as to make it noticeable and likely to be read.

## **3. LIABILITY FOR INTERNET REPRESENTATIONS**

The misleading representations and deceptive marketing practices provisions of the Act attribute liability to the person who has caused the representation to be made, i.e., the person who makes or permits it to be made.<sup>13</sup>

With respect to traditional forms of advertising, the Bureau has been called upon to consider the respective roles of the advertising agencies who help create the advertisements, the media outlets such as print, television and radio which disseminate them, and the businesses on whose behalf the representations are

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<sup>12</sup> Refer to subsections 52(4), 52.1(4) and 74.01(6) of the *Competition Act*.

<sup>13</sup> Refer to subsection 52(1.2) of the *Competition Act*.

made and disseminated.

In the on-line environment, the Bureau will be called upon to consider the respective roles of the Web page designers who help create the representations, the Web hosts who own or operate the servers from which the representations are disseminated, the service providers who provide access to the Internet and the businesses on whose behalf the representations are made and disseminated. In both the on-line and off-line world, there are additional parties who may play a role, and a determination of whether or not they should bear responsibility will be made on a case-by-case basis.

In its enforcement efforts, the Bureau focuses on the party who “causes” the representation to be made. Determining causation requires an analysis of the facts to ascertain which player possesses decision-making authority or control over content and to assess the nature and degree of their authority or control.

When assessing whether it is appropriate for a person to be held liable for misleading representations, the Bureau will consider as a guiding principle the nature and degree of control that the person who makes a representation exercises over the content.

To illustrate, the following situations may be helpful:

- A business hires an advertising and marketing agency to create an e-mail marketing campaign promoting its products, services or business interests. The business has the power to decide whether the campaign proceeds, and has ultimate control over the content. The business would be the focus of any investigation by the Bureau in respect to misleading representations or deceptive marketing practices.
- A business contracts with a Web designer to create a Web site promoting the business’ products, services or business interests. The business contracts with a company which provides Web hosting services to host the Web site. The Web host operator and the Web designer may or may not be the same company. The business has control over the content of the Web site and would be the focus of any investigation by the Bureau in respect to any misleading representations or deceptive marketing practices.
- A consumer obtains access to the Internet through their Internet service provider. The consumer uses their access to visit a manufacturer’s Web site which is hosted by the manufacturer’s Web host. The consumer is influenced by the representations made on the manufacturer’s Web site and decides to purchase the product from a local retailer. The manufacturer has control over the content of the Web site. The consumer’s Internet service provider has no control over the content on the manufacturer’s Web site. The manufacturer’s Web host would not typically screen content before it is posted to the site and thus would not likely be the focus of the Bureau’s investigation. In this situation the manufacturer would be the focus of any investigation by the Bureau. A retailer, or other businesses in the supply chain of the product, could also be the subject of such an investigation if they are actively involved or have a degree of control over the making of representations about the product.

Under both the criminal and civil provisions, responsibility for advertising content should also be examined

in the context of the deeming provisions found in subsections 52(2) and 74.03 (1) of the Act. In the view of the Bureau, these provisions are intended to clarify the responsibility of different persons in the chain of supply of a product or service for representations in breach of the law. While these provisions do not specifically address the electronic commerce context, those involved in electronic commerce are governed by these provisions to the same extent as traditional media.

For reviewable conduct under sections 74.01 to 74.06 of the Act, a defence is found in subsection 74.07(1) for a person who merely “prints or publishes or otherwise disseminates a representation, including an advertisement, on behalf of another person in Canada”, so long as certain conditions are met. This exception is sometimes referred to as the “publisher’s defence” but, provided its conditions are met, it applies to any person who merely disseminates or distributes a misleading representation. In other words, it is available to any person who does not have decision-making authority or control over the content. The required conditions which must be met under this exception are:

- The disseminating person accepted the representation for dissemination in good faith and in the ordinary course of its business; and
- The person on whose behalf the representation is being made is in Canada, and the disseminating party recorded its name and address.

The Bureau will focus its enforcement efforts primarily on businesses which are responsible for content or have a degree of control over that content, rather than on businesses operating as a conduit, that is, a disseminator or distributor of the content. Any enforcement action will be taken in a manner consistent with the Bureau’s enforcement approach for choice of a criminal or civil track.<sup>14</sup> In most instances, where a choice exists under the Act, the civil track will be pursued unless there is clear and compelling evidence that the accused knowingly or recklessly made a false or misleading representation to the public, and a criminal prosecution would be in the public interest.

#### **4. APPLYING THE *COMPETITION ACT* ON-LINE: SOME PRACTICAL ADVICE ON HOW TO AVOID COMMON PITFALLS**

While the Act applies regardless of the medium used to convey representations, the Internet nevertheless poses challenges and opportunities for assuring that consumers receive the clear and accurate information required to make an informed choice. Accordingly, this bulletin focuses on providing guidance to businesses to enable them to structure their on-line representations in a manner that is likely to avoid conflict with the misleading representations and deceptive marketing practices provisions of the Act.

##### **4.1 Disclosure of relevant information: Disclaimers**

If qualifying information is necessary to prevent a representation from being misleading when read on its own, businesses should present that information clearly and conspicuously. Businesses frequently use disclaimers, often signalled by an asterisk, to qualify the general impression of their principal representation

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<sup>14</sup> Refer to <http://strategis.ic.gc.ca/SSG/ct01181e.html> for more information on choice of track.

when promoting their products or services. As mentioned earlier, the general impression conveyed by the representation, as well as its literal meaning, are taken into account in determining whether a representation is false or misleading.

The Bureau takes the position that disclaimers which expand upon and add information to the principal representation do not raise an issue under the Act. A disclaimer can only qualify a representation; it cannot cure or retract a false or misleading representation.

When determining whether an on-line disclaimer is sufficient to alter the general impression created by the principal representation, the Bureau will consider the following general principles for guidance. It is recognized that this list is not exhaustive. Businesses should be aware that each case will be assessed independently.

(a) The location of the disclaimer on the Web site

Generally, the disclaimer should appear on the same screen and close to the representation to which it relates. This may not always be possible:

- various hand-held appliances and other computers have different monitor sizes, operating systems and Web browsers which display Web pages differently; and
- some lengthy disclaimers are difficult to place next to the representations they qualify.

Businesses should design their pages so as to alert consumers to the existence of the disclaimer and, by use of visual cues or otherwise, encourage consumers to read the disclaimer. A text prompt indicating a disclaimer should be explicit rather than vague and should convey the nature and importance of the information. For example, a text prompt such as “see below for restrictions on eligibility” may be appropriate, whereas “see below for details” may not. The text prompt should be tied to the representation to which it relates.

Businesses should take into account new technologies and ensure that the disclaimer is viewable by consumers no matter what hardware or software they use. For example, with respect to scrolling marquees (information that scrolls through a box on a Web site), some systems do not support or display frames properly. There are Internet tools which address this concern by determining whether a consumer’s browser can view frames and, if not, serving a page that is formatted differently. The bottom line is that in promoting a product, service or business interest, the business should choose methods which ensure the effective communication of any information necessary to ensure that a representation is not misleading.

(b) *Hyperlinks* to disclaimers

Disclaimers sometimes are on a Web page separate from the relevant representation but linked to the representation. The link may be designed such that the disclaimer appears in a frame or pop-up “within” the initial page and viewable simultaneously with the initial page. In some cases, the disclaimer that pops up may obscure the initial page; in other cases, the link takes the consumer to a separate page which

contains the disclaimer.

The Bureau takes the position that hyperlinks can be an effective means of providing disclaimers. Each situation must be assessed to determine the general impression and whether the consumer is likely to be misled. The Bureau recognizes that linking and easy navigation are central to the Internet experience. Hyperlinks are useful, for example, if a disclaimer needs to be repeated because of multiple triggers. However, if the nature of the information is critical to ensuring that the principal representation is not misleading, it may not be appropriate to use linking to navigate to a disclaimer appearing on a separate page. In this case, the representation and the qualifying information should be read at the same time.

In circumstances where use of a hyperlink is appropriate, it should be obvious and clearly labelled. A label should give consumers a reason to click on it. While the label itself does not need to contain a complete disclaimer, it may be advisable to incorporate part of the disclaimer to indicate the nature and relevance of the information to which the link leads.

A Web site should be consistent in its use of hyperlink styles, i.e., the text, graphic or colour assigned to it. If hyperlinks are usually underlined in blue on a site, consumers will not likely recognize italicized text as being a link. Asterisks or other symbols by themselves may not be effective. While there may be an indication on the Web site that a particular symbol denotes a hyperlink, consumers may miss this notice. Similarly, hyperlinking a single word or phrase in an advertisement may not be adequate.

(c) Use of *attention-grabbing tools* such as graphics, sounds or flash images

Businesses may effectively draw attention to a disclaimer so that it is more likely to be read by using attention-grabbing tools to display the disclaimer. In doing so, businesses must be careful not to design attention-grabbing tools in other parts of the advertisement in such a way that they distract the consumer's attention away from the disclaimer, making it unlikely that the consumer will notice the disclaimer or recognize its importance.

(d) Prominence of the disclaimer

To ensure that a disclaimer is noticeable and likely to be read, consideration should be given to the size of the font and the colour used. Disclaimers should not be hidden or buried. Information in a colour that contrasts with the background stands out, whereas information in a colour that blends in with the background is likely to be missed. Audio disclaimers should be set at a volume level and cadence to allow a consumer to hear and understand them effectively.

(e) Accessibility of the disclaimer by all potential users

Visual disclaimers should be displayed for sufficient duration to ensure that they can be read and understood. Businesses should consider whether the length or importance of the information contained in the disclaimer is such that it should be presented in durable form, i.e., in such a way that consumers may save or print the information if they wish to do so. A business should be aware that not all consumers have audio technology, and that audio disclaimers alone may not be acceptable.

(f) Repetition of the disclaimer

Businesses should consider whether in particular circumstances, there is a need to repeat a disclaimer. Consider, for example, where a consumer may be accessing the Web site not through its home page, but on some other page such as, another Web site or a search engine. Consumers may miss the disclaimer, depending on where they enter the site and how they navigate through it. In appropriate circumstances, businesses should make clicking through a disclaimer compulsory. In some circumstances, it is not sufficient that the disclaimer appear only on the order page. Consumers may not necessarily associate a disclosure on the order page with information they viewed several pages earlier. It is also possible that consumers may make an offline purchase after viewing the business' marketing Web pages. It is unlikely that these consumers accessed the ordering page, and therefore they would not be aware of disclaimers placed only on that page.

## **4.2 Required Disclosures**

Unlike some other laws, the Act does not generally set out what specific information needs to be disclosed in order to ensure that a representation is not false or misleading in a material respect. However, there are several exceptions to this general rule.

For multi-level marketing plans under section 55 of the Act, representations made to prospective participants regarding earnings are required to include disclosure of the compensation likely to be received by a typical participant. Further information on the Bureau's policy on multi-level marketing plans can be found at <http://strategis.ic.gc.ca/SSG/ct01141e.html>.

Pursuant to section 74.06 of the Act, in contests designed to promote a product or business interest, adequate and fair disclosure must be made of certain information, including facts which materially affect the chance of winning. Further information on the Bureau's policy on promotional contests can be found at <http://strategis.ic.gc.ca/SSG/ct01306e.html>.

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".

The considerations relevant to disclaimers will also be relevant in determining whether there has been compliance with the specific disclosure requirements. Businesses should be aware that in instances where the information is so critical that it is an integral part of the representation, it may not be appropriate to use a hyperlink to a separate page. In these cases, it should be possible to read the representation and the required disclosure at the same time.

Subsection 53(1) of the Act makes it an offence to send deceptive notices of prizes.<sup>15</sup> A notice is deceptive where, among other things, there has not been adequate and fair disclosure of certain information, including facts which materially affect the chances of winning.<sup>16</sup> The offence applies to sending the prize notification or causing it to be sent, whether “by electronic or regular mail or by any other means”. Further information on the Bureau’s policy on this offence can be found at <http://strategis.ic.gc.ca/SSG/ct02279e.html>.

### **4.3 Representations About the Product or Service**

In the on-line environment, as in other forms of distance selling such as catalogue or mail order, consumers cannot physically inspect products available for sale, and therefore rely significantly upon representations. Accordingly, to ensure compliance with the Act, all representations about a product, including accompanying text, pictures, illustrations and audio, should be crafted to ensure that they do not mislead consumers about any aspect of the product or service being marketed. Where an illustration forms part of a representation, it should be in accord with the accompanying text. Photography, artwork or audio-visual representations should accurately and fairly illustrate the product or service offered.

Businesses are also reminded that the Act prohibits making a representation in the form of a statement, warranty or guarantee about the performance, efficacy or length of life of a product if that representation is not based on an adequate and proper test.<sup>17</sup>

### **4.4 Representations About the Business**

Representations about the nature or attributes of a business or its affiliates can result in non-compliance with the Act if the representations are false or misleading. Representations about a business can be particularly influential in situations where the consumer’s only contact with the business is through the Internet. The Bureau recommends that the businesses ensure that:

- (a) The Web site in question does not create a false or misleading impression as to the physical location or identity of the business.
- (b) The use of text, graphics, logos, marks, seals or trustmarks, accreditations or other representations do not create false impressions of affiliation, sponsorship, endorsement or popularity.
- (c) The representations do not mislead consumers as to the type of organization making the representations or as to the purpose of the representations.
- (d) The representations do not mislead consumers as to the relationship between the party making the

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<sup>15</sup> *Competition Act*, R.C.S. 1985, c. C-34, as amended by S.C. 2002, c. 16, s. 6 (in force 21 June 2002).

<sup>16</sup> Refer also to subsections 53(2) and 53(3) of the *Act*.

<sup>17</sup> Refer to subsection 74.01(1)(b) of the *Competition Act*.

representation and the supplier of the product or service.

## **5. SECTION 52.1: TELEMARKETING AND INTERNET ADVERTISING**

Section 52.1 addresses the use of telecommunications in the marketing of products, services, or business interests and deals with situations involving “interactive telephone communications”. The Bureau interprets the terms "interactive telephone communications" to mean live voice communications between two or more persons, but not automated prerecorded messages and fax communications. As technology evolves with regard to telecommunications and Internet services, new modes of communications will be evaluated on a case-by-case basis.

Further information on the Bureau’s guidelines with respect to section 52.1 and telemarketing can be found at <http://strategis.ic.gc.ca/SSG/ct01180e.html>.

## **6. JURISDICTIONAL ISSUES**

The global nature of the Internet means that representations made on-line by a person situated in Canada can be viewed by consumers all over the world, thereby raising the possibility of incurring liability not only under the Act, but also under the legislation of foreign jurisdictions. Similarly, the Canadian public has access to representations originating from outside of Canada, which may raise concerns under the misleading representations and deceptive marketing practices provisions of the Act. In this globalized environment, the issue of potential liability in different jurisdictions is a legitimate concern for those making commercial on-line representations. Persons making representations on-line from Canada that are accessible on-line in Canada are required to comply with the Act.

Liability under the Act for misleading representations and deceptive marketing practices will be determined on a case-by-case basis, having regard to all relevant factors, as well as any emerging law and changes in technology. Those making representations on-line from Canada to consumers in foreign countries and those making representations on-line from outside Canada should seek legal advice on whether their representations could give rise to legal liability in Canada.

Canadian law governing jurisdiction on-line is evolving with the growth in electronic commerce. It is therefore difficult to predict how the courts or the Competition Tribunal will interpret jurisdictional questions in respect of liability for misleading representations and deceptive marketing practices carried out in whole or in part over the Internet.

The Bureau will assert Canadian jurisdiction over foreign entities to the fullest extent authorized by law whenever necessary to protect the Canadian market from misleading representations and deceptive marketing practices. The Bureau will also actively seek the assistance and co-operation of foreign agencies to address misleading representations and deceptive marketing practices having an effect on the Canadian market. Such co-operation is facilitated through agreements and arrangements at both



the government and agency level.<sup>18</sup>

## **7. ON-LINE REPRESENTATIONS AND THE CONSUMER PACKAGING AND LABELLING ACT, THE TEXTILE LABELLING ACT AND THE PRECIOUS METALS MARKING ACT AND THEIR RESPECTIVE REGULATIONS**

False or misleading representations pertaining to prepackaged non-food products, consumer textile fibre products and precious metals articles are also captured under the *Consumer Packaging and Labelling Act* (CPLA), the *Textile Labelling Act* (TLA), and the *Precious Metals Marking Act* (PMNA) respectively. These statutes also prescribe and prohibit certain disclosures in advertising. Application of these statutes would also extend to representations that are made via the Internet. Further information on the CPLA can be found at <http://strategis.ic.gc.ca/SSG/op01007e.html>. Further information on the TLA can be found at <http://strategis.ic.gc.ca/SSG/op01144e.html>. Further information on the PMMA can be found at <http://strategis.ic.gc.ca/SSG/op01001e.html>.

## **8. CONSUMER PROTECTION ON-LINE**

This bulletin is limited to the application of the Act as it relates to misleading representations and deceptive marketing practices found on-line. However, the Bureau is involved in other initiatives designed to further consumer protection on-line. Businesses and consumers are encouraged to review the *Principles for Consumer Protection for Electronic Commerce - A Canadian Framework*.<sup>19</sup> Those interested are also invited to examine the *Guidelines for Consumer Protection in the Context of Electronic Commerce*<sup>20</sup> developed by the Organisation for Economic Co-Operation and Development. In order to avoid making misleading representations, these documents support the view that businesses engaged in electronic commerce should provide accurate information about the terms, conditions and costs associated with a transaction in order to enable consumers to make informed decisions on whether to enter into the transaction.

Currently, a working group of representatives from Canadian businesses, consumers associations and governments are working to produce a Canadian Code of Practice for Consumer Protection in

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<sup>18</sup> Information on the international agreements relating to Canada's competition law and its application can be found at: <http://strategis.ic.gc.ca/SSG/ct02124e.html>.

<sup>19</sup> Refer to <http://strategis.ic.gc.ca/SSG/ca01182e.html> for more information on the *Principles of Consumer Protection for Electronic Commerce - A Canadian Framework*.

<sup>20</sup> Refer to <http://www.oecd.org/bookshop/communications> for more information on the *Guidelines for Consumer Protection in the Context of Electronic Commerce* and [www.oecd.org](http://www.oecd.org) for *Best Practice Examples under the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce*.

Electronic Commerce. Further information about on-line shopping can be found at:  
<http://strategis.ic.gc.ca/SSG/ca01192e.html>.

## CONCLUSION

The objective of this bulletin is to encourage those who are making representations on-line to consider their responsibilities under the Act and, more specifically, to give serious consideration to some of the variables affecting the general impression created by their representations. While practical advice and examples of key concepts have been provided wherever possible, readers are reminded that these are for illustration purposes only and are not exhaustive. It is important to note that other laws or regulations may apply and thus it remains the responsibility of those who are making representations on-line to ensure that they comply with them.

The Bureau places an increased emphasis on prevention, education and voluntary compliance to limit the need for contested proceedings. The Bureau recognizes that neither the single-minded pursuit of legal proceedings nor an approach based solely on educational and non-adversarial responses is the most effective manner in which to fulfil the Bureau's responsibilities. To support a balanced approach, the Bureau has developed a variety of educational, compliance and enforcement instruments. Collectively, these instruments are known as the "Conformity Continuum".<sup>21</sup>

Under its Program of Written Opinions, the Bureau has historically provided its views on proposed actions by businesses. Anyone can seek advice on whether a proposed course of action would raise an issue under the Act. Effective April 1, 2003, persons will be able to apply to the Bureau for a binding written opinion on the application of any provision of the Act or regulations.<sup>22</sup>

When seeking a binding written opinion, an applicant will be required to submit all supporting information relating to the request. The Bureau may then provide the applicant with a written opinion. Such an opinion will be binding on the Commissioner if the material facts on which the opinion is based are accurate. The opinion will remain binding for so long as the material facts remain substantially unchanged and the conduct or practice is carried out substantially as proposed.

## HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, or the *Precious Metals Marking Act* or file a complaint under the provisions of any of these Acts, should contact the Competition Bureau's

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<sup>21</sup> Refer to the Competition Bureau's *Conformity Continuum Information Bulletin* at <http://strategis.ic.gc.ca/SSG/ct01768e.html>.

<sup>22</sup> Certain fees apply. Please refer to the Competition Bureau's *Fee and Service Standards* at: <http://strategis.ic.gc.ca/SSG/ct01249e.html>.

Information Centre at:

**Telephone**

Toll free: 1-800-348-5358  
National Capital Region: (819) 997-4282  
TDD (for hearing impaired): 1-800-642-3844

**Facsimile**

(819) 997-0324

**Address**

Information Centre  
Competition Bureau  
Industry Canada  
50 Victoria Street  
Gatineau, Quebec K1A 0C9

**Web site**

[www.cb-bc.gc.ca](http://www.cb-bc.gc.ca)

**E-mail**

[compbureau@ic.gc.ca](mailto:compbureau@ic.gc.ca)