The Shifting General Impression of Disclaimers

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Canadian Bar Association
2012 Competition Law Spring Forum:
Best Practices in a Time of Active Enforcement

May 2, 2012

1. Introduction

Disclaimers have never been hotter.[1] This is largely due to two recent cases: *Commissioner of Competition v. Bell Canada*,[2] which was settled in June 2011; and the *Richard v. Time*[3] case from the Supreme Court of Canada in early 2012.

The *Bell* case was, at least in significant part, about disclaimers and their adequacy or inadequacy. While it created little "law" in that it was a settlement, it created lots of "buzz" (assuming Bell can buzz), because it involved the payment of an Administrative Monetary Penalty in the amount of $10 million. This is far and away the largest financial misleading advertising penalty – whether criminal or civil – which has ever been awarded. Even for a company the size of Bell Canada, ten million dollars is unlikely to be regarded as irrelevant, or a license fee, or in fact to be regarded as anything except a very significant amount of money. Certainly, this case got the attention of marketers, and even, briefly, the markets, as no doubt it was intended to.

The *Time* case involved the *Quebec Consumer Protection Act* rather than the *Competition Act*, but it may have implications for future *Competition Act* matters – and not in a business-friendly manner.

Shortly after the *Bell* settlement, the Commissioner of Competition, in a speech on October 6, 2011,[4] returned to the topic of disclaimers. She said "[i]ncluding a fine-print disclaimer is no license to advertise prices that are not available". She went on to note, in a manner likely to keep the attention of marketers, "[i]t is important for you to know that we are

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[1] If, by hot, one means mildly interesting to a small subset of the legal profession. We have not always found that to be the general impression created by the word "hot".

[2] *Commissioner of Competition v. Bell Canada, Bell Mobility Inc. and Bell Expresssvu Limited Partnership* (Consent Agreement), (28 June 2011), CT-2011-005, online: Competition Tribunal <www.ct-tc.gc.ca> [*Bell Canada*].

[3] *Richard v. Time*, 2012 SCC 8.

[4] Melanie L. Aitken, Commissioner of Competition, Address (Keynote Speech delivered at the Canadian Bar Association 2011 Fall Conference, Hilton Lac-Learny, Quebec, 6 October 2011), online: Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03424.html>.

investigating several industries where we are concerned that Canadians have been taken advantage of, in this or related ways. All I can say at this point is stay tuned".

This paper is an attempt to analyse the state of the general impression test in the context of disclaimers, in an effort to stay legally tuned.

As a practical matter, marketers have tended to regard disclaimers as a bit of an afterthought. Often, when one obtains draft advertising copy to review, the advertising layout will come with whatever images are involved sketched out along with the main headlines, and then with a number of lines of disclaimer which, upon closer review, are rendered in Latin. On rare occasions the Latin has made it into the published advertisement. This is some indication that disclaimers are not front and centre in marketers' minds when they compose, or even publish, their advertisements; or perhaps it is evidence that most advertising professionals are Latin scholars. Another indication that disclaimers are not always top of mind with advertisers might be the fact that one of Canada's leading advertising and marketing law texts[5] contains a section with the heading "Mice Type", wherein disclaimers are discussed. It is certainly true that at least some marketers sometimes refer to disclaimers in exactly that way.

The fact that disclaimers are not the primary focus of marketers' interest when they are composing advertisements is both good and bad. For the reasons we discuss below, it is good because the primary advertising message should be able to stand more or less on its own, without significant reliance on disclaimers to avoid legal problems. Such reliance is, as Bell Canada recently learned, sub-optimal. However, it is bad because marketers by and large do not give enough thought in advance to what can and cannot be effectively dealt with by disclaimers. Sometimes this results in the creation of advertising claims which, no matter how ingeniously disclaimed, cannot be supported. A number of cases explored in this paper illustrate that principle.

[5] Brenda Pritchard & Susan Vogt, *Advertising and Marketing Law in Canada*, 3d ed (Markham: LexisNexis Canada, 2009).

2. The Basic Rule – Is the General Impression Created False or Misleading in a Material Respect?

The basic prohibition in the *Competition Act*[6] with regard to misleading advertising is the making of a representation which is false or misleading in a material respect. This requirement – that the representation be false or misleading in a material respect – is found both in the criminal provision of the *Act* (section 52(1)), as well as the civil reviewable conduct provision (section 74.01(1)). That is, not all representations which are false or which are misleading will constitute legally challengeable misleading advertising – only those which are *materially* misleading. So, you can legally make a joke which is false and likely to be understood to be false. You can also legally engage in false puffery. Further, representations found on an advertisement will be read in the context of the entire advertisement – not just the literal meaning of a specific representation taken out of context (see sections 52(4) and 74.03(5) of the *Act*).

This is where disclaimers come into play. Whether the disclaimer is a small print asterisked disclaimer, or a disclaimer found in the main text of the advertisement, the question is whether the message received by the person reading or viewing the advertisement is likely to mislead. This turns on the nature of the representation found in the advertisement, and the effectiveness of the disclaimer in qualifying or disclaiming those portions which, if not disclaimed, might constitute a materially misleading representation. Materiality is defined as being of consequence or importance, or pertinent or essential to the matter.[7]

The test as to whether something is materially misleading is generally applied in the context of an average purchaser or average reader or viewer of the advertisement. [8] The cases have also said that at least with respect to the purchase of some products, the Courts will assume a

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[6] *Competition Act*, RSC 1985, c C-34 ["Act"].

[7] See David M.W. Young & Brian R. Fraser, *Canadian Advertising and Marketing Law*, loose-leaf (Toronto: Carswell, 1990 -). See also *R. v. Kenitex Canada Ltd. et al* (1980), 51 CPR (2d) 103, [1980] OJ No 2758 (Ont Co Ct); *Maritime Travel Inc. v. Go Travel Direct.Com Inc.*, 2008 NSSC 163, 265 NSR (2d) 369, aff'd 2009 NSCA 42, 276 NSR (2d) 327 [*Maritime Travel*].

[8] *R. v. Viceroy Construction Co* (1975), 11 OR (2d) 485, 1975 CarswellOnt 582 (Ont CA) [*Viceroy*]; *R. v. Bussin* (1977), 36 CPR (2d) 111, 1977 CarswellOnt 1242 (Ont Co Ct); *R. v. RM Lowe & Pastoria Holdings Ltd* (1978), 39 CPR (2d) 266, 40 CCC (2d) 529 (Ont CA) [*RM Lowe*]; *R. v. Park Realty Ltd.* (1978), 43 CPR (2d) 29, 1978 CarswellMan 2 (Man Prov Ct); *Telus Communications Co v. Rogers Communications Inc.*, 2009 BCSC 1610, 2009 CarswellBC 3168 aff'd 2009 BCCA 581, 2009 CarswellBC 3424.

sophisticated purchaser, particularly where the product being advertised is a relatively sophisticated product.[9] As noted by Young and Fraser,

> "[a] degree of sophistication may be expected of a consumer not so much because of expert training in relation to a product (such as might give an intimate understanding of its technical workings and performance capabilities, for example) but rather as a result of prior consumer experience with the product or similar products. If there is a "sophisticated consumer" standard, then, the sophistication inherent in the standard is more the result of the frequency of use or purchasing of the product, than of the consumer's knowledge of the product technical complexity or the financial investment represented by the purchase of the product." [10]

The Supreme Court's decision in *Time* defines a very different standard, as discussed below. It is a matter of some considerable interest as to whether that standard will displace the established approach under the *Act*.

Another relevant principle is the proposition of law that if an advertisement contains two equally plausible meanings, one of which is false or misleading in a material respect and one of which is not, the advertisement, as a matter of law, will not be found to violate the *Act*.[11] Disclaimers may be relevant in that context, although typically one would expect that a disclaimer would identify which of the possible interpretations should be drawn from the advertisement.

The bottom line here is that the advertisement, taken as a whole, and read, viewed or experienced by a consumer of ordinary sophistication – or perhaps in some cases a reasonably sophisticated consumer – or, if the *Time* case revises the standard, a consumer of, to be charitable, modest sophistication – will be found to be contrary to the *Act* if it conveys a general impression which is false or misleading in a material respect. In determining whether a representation is false

[9] *R. v. International Vacations Ltd.* (1980), 33 OR (2d) 327, 56 CPR (2d) 251 (Ont CA).

[10] Young & Fraser, *supra* note 7 at 1-37.

[11] *RM Lowe*, *supra* note 8.

or misleading in a material respect, a court will consider the general impression created by the advertisement in question.[12]

The general impression test is critical in relation to the issue of disclaimers. Assuming that the disclaimer is correct and accurate, the literal meaning of the advertisement, if read like a contract, may well be accurate. However, to take an extreme example, in a contract it is customary to have a set of definitions. One could define the word "black" to mean "white" for the purposes of a contract. One could try to do similar things in an advertisement disclaimer, but that would not solve a misleadingness problem.[13] Insofar as a strong general impression is created by the main message or text of the advertisement, it will be difficult – and in many cases impossible – for a disclaimer to change that general impression. Thus, even if the advertisement is literally true when read carefully and with all disclaimers fully absorbed, since advertisements are typically not read that way, disclaimers do not typically protect an advertisement from being found to be false or misleading in a material respect.

The fact that there are disclaimers in the advertisement will be taken into account as part of the general impression that the advertisement conveys. However, disclaimers are not magic bullets – they are simply part of the overall impression created. Insofar as they are less likely to be noticed or understood, or insofar as they are contradictory of the main message rather than simply providing additional detail as to what the main message is seeking to convey, disclaimers are unlikely to change an impression which is otherwise false or misleading in a material respect.

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[12] See *R. v Imperial Tobacco Products Ltd.*, [1971] 5 WWR 409, 3 CPR (2d) 178 (Alta SC AD), quoting *Federal Trade Commission v. Sterling Drug Inc.*, 317 F (2d) 669 (2nd Cir 1963) at 674: "It is therefore necessary in these cases to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately. The buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied."

[13] Consumer and Corporate Affairs Canada, *Misleading Advertising Bulletin*, No 4 "Asterisks, Disclaimers, and Other Fine Print" (Ottawa: Consumer and Corporate Affairs, 1990) at 3.

3. Bureau Guidance

Over the years, the Competition Bureau has provided considerable guidance[14] on the topic of disclaimers. The Commissioner has regulated the use of disclaimers by way of terms

[14] There are a number of other aspects of the Competition Bureau giving guidance, or warning, about the proper or improper use of disclaimers:

In 1986 the Competition Bureau published an article, ***Use of Disclaimers***, in its Misleading Advertising Bulletin No. 2 (1986), in which it noted "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 of misleading advertisement."

In a speech by Rachel Larabie-Lesieur, Deputy Director of Investigation and Research, Marketing Practices Branch: **"Modern Communications and Global Markets – Enforcement Challenges and Deceptive Marketing Practices: An Update on Operations and Priorities"** (Address delivered at the Canadian Institute Conference On Misleading Advertising - Advertising and the Law in the Electronic Age, Toronto, Ontario, 23 October 1995), Ms. Larabie-Lesieur spoke about, *inter alia*, mail solicitations. In particular, she referred to prize notifications and stated that "[m]any mail solicitations provide disclaimers in fine print which are informative concerning the true nature of the offer; however, these critical details are often difficult to read or are subtly concealed within the promotional material provided."

In August 2003, the Competition Bureau provided a written opinion (Competition Bureau, Written Opinion, 3063032, **"Hair-Loss Prevention Products - Multi-level Marketing and Pyramid Selling**" (19 September 2003)) as to whether a proposed multi-level marketing plan with regard to hair loss prevention products would raise concerns under the *Act*. One of the concerns raised by the Bureau in its review of the advertising materials was that the materials contained a three page disclaimer with important information for participating in the multi-level marketing plan. However, this disclaimer was "buried" and "hidden" in a scrolling marquis at the bottom of a distributor agreement webpage. This allowed only a few lines of disclaimer to be read at a time and did not allow for the full disclaimer to be printed. The Bureau considered this an ineffective disclaimer.

In 2006, the Bureau provided written opinions (Competition Bureau, Written Opinion, 3099991 & 3100446, **"Long-Distance Prepaid Calling Cards"** (9 June 2006 & 20 October 2006)) to a long distance pre-paid calling card company. The Bureau concluded that there was a problem under the *Act* with respect to the proposed advertising materials because, amongst other things, they contained fine print disclosures contradicting the general impression created about the advertised rates and minutes available.

In November 2007, the Bureau reviewed a consumer complaint with respect to the website of a major national retailer. The Bureau noted in its news release (Competition Bureau, Alternative Case Resolution, 3101907, **"Misleading Online Advertised Price"** (November 2007)) that while the website contained clarifying information in a fine print disclaimer at the bottom of the web page, the online advertised pricing for the products could create the false general impression that the advertised price was the price whether the product was purchased online or in the store. The Bureau's view was that the 'fine print disclaimer' was insufficient. The matter was resolved on the basis of a change to the website by the retailer.

In the due diligence checklist attached to the Corporate Compliance Programs Bulletin (Competition Bureau, Bulletin, Iu54-28/2010E-PDF, **"Corporate Compliance Programs"** (27 September 2010)), under the misleading advertising provisions, the Bureau includes a tick box which reads "[e]nsure that fine-print disclaimers are avoided. If used, ensure that the overall general impression created by an advertisement and a disclaimer are not false or misleading". The Bulletin also includes the following point: "[e]nsure that information that may alter the principal representation when promoting a product or service is not placed in a disclaimer".

In this one page publication by the Bureau (Competition Bureau, Fraud Prevention Resources, **"Recognize It!"** (1 December 2011)), one of the few items the Bureau determined to be of sufficient importance to outline focused on fine print disclaimers. It stated, "[f]raudsters are professional criminals that know what they are doing. Fraudsters rely on some basic techniques to be successful. These include:[…] hiding the true details in the fine print".

of certain consent agreements.[15] Perhaps the most thorough review of disclaimers by the Bureau is a feature article in its July/December 1990 Misleading Advertising Bulletin. The article, *Asterisks, Disclaimers and Other Fine Print* [16] is amongst the most detailed examination of the question of disclaimers to be found in Canadian law. Some of the principal aspects of guidance it contains are as follows:

- Fine print that adds information will generally not raise issues under the *Competition Act* as long as the representation, taken as a whole, is not materially misleading. There may be an issue if a disclaimer restricts or contradicts the generality of the disclaimed words.

- Disclaimers raise concerns when they run counter to the general impression created by the main message.

- There is cause to be concerned when small print disclaimers seek to negate or otherwise limit the plain meaning of the larger text.

- In many instances, the likelihood that the disclaimer will have a significant effect on the general impression conveyed to an average purchaser is small. In fact, it is arguable that the manner of presentation of disclaimers usually ensures the very opposite result: "[a]fter all, if the author of the advertisement had wanted to ensure that his or her audience would absorb the disclaimer information, it would have been included in the main part of the advertisement and in a format likely to be read and understood".

The current Commissioner of Competition has taken a significant interest in enforcement of the law with respect to disclaimers. In addition to the recent ***Bell Canada*** case, she devoted a fair bit of her recent speech at the annual Canadian Bar Association's Fall Competition Law Conference (Aitken, *supra* note) to discussing Fair Business Practices matters, and placed particular emphasis on disclaimers: "[i]t's very simple – don't mislead the public by hiding charges or conditions in fine print, or by making claims you can't back up". She then went on to make specific reference to the *Bell Canada* case, noting that since December 2007, Bell had charged higher prices than advertised for many of its services, including home phone, Internet, satellite T.V. and wireless. She asserted "[i]t's pretty easy: when a price is offered to consumers, it better be accurate. Including a fine-print disclaimer is no license to advertise prices that are not available."

[15] See ***Commissioner of Competition v. Elkhorn Ranch and Resort Ltd.*** (Consent Agreement), (23 November 2009), CT-2009-018; and ***Commissioner of Competition v. Phonetime Inc.*** (Consent Agreement), (5 November 2009), CT-2009-017

[16] See note 13

- Disclaimers generally should not contain information which materially limits or contradicts the main text.[17]

- It is not sufficient merely for the disclaimer to be present. It must also be likely to be read and likely to alter the general impression conveyed by the advertisement to be effective in avoiding conclusion that the advertisement is materially misleading.

- Greater leeway may be allowed in cases where it is reasonable to assume that consumers will carefully consider all available information, especially where sophisticated target audiences are involved.

By way of a summary of its principal message, the article offers – perhaps somewhat tongue in cheek – the following footnote: "[a]n 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 consequence of that meaning? If yes, then the fine print is being used to limit or contradict the general impression conveyed by the disclaimed text".

In addition to the article's principal thesis – that disclaimers may properly add or supplement information, but will not have the effect of contradicting the main message of the advertisement, and therefore will not make lawful an otherwise misleading claim – the article also contains guidance with respect to the placement, prominence and format of disclaimers. The guidance includes the following:

- Advertisers should seek to ensure the placement of disclaimers is consistent within advertising materials.

- When multiple disclaimers appear at the foot of the same page or in close proximity to each other, advertisers should seek to ensure that the beginning of each separate disclaimer is readily apparent – often by the use of a reference symbol. Marking a new disclaimer with a new reference symbol at the start of a new line is likely to be the least confusing way to include multiple disclaimers in a single advertisement. The same symbol should not be used for more than one disclaimer on the same page and the

[17] This was a position which the Bureau had taken in its 1986 Misleading Advertising Bulletin, noted above (Consumer and Corporate Affairs Canada, *Misleading Advertising Bulletin*, No. 2 (Ottawa: Consumer and Corporate Affairs, 1986)) as well.

symbol should be placed close enough to the disclaimer text to make it clear to which text the disclaimer refers.

- Disclaimers should be of a size that that is clearly visible. The more important the information, the larger the disclaimer should be – not only the absolute size but also the relative size is important.

- Where a specific target audience may be expected to have difficulty reading small print this should be taken into account in the size of any disclaimers. It is also worth considering whether a disclaimer could appear in a medium that might make it very small.[18]

- Disclaimers in a print size smaller than 7 point will not save a representation from being misleading.

- Television commercials which use print disclaimers of less duration than necessary to be read and comprehended in one normal viewing will not be effective.

- Both radio and television, voiceover disclaimers, will be subject to analysis as to whether they are likely to be heard and understood. The article makes reference to reading such disclaimers quickly and in a monotone voice as evidence that they may not be comprehended.

The article concludes with the following summary position:

> It is the Director's position that a simple disclaimer in a small but reasonably legible print is unlikely to raise concerns if it relates to a relatively minor aspect of an advertisement. Disclaimers may properly clarify some ambiguities or provide reasonable qualifications provided the general impression conveyed by the advertisement is not mistaken. However, the main body of the advertisement, apart from the disclaimer, should be capable of standing alone (i.e., incapable of being misleading when read alone)."

[18] Note that at the time of the article, the possibility of disclaimers appearing in mobile devices was not contemplated. However, if advertisements are likely to be read by a material portion of the audience on mobile devices, the size of the disclaimer is of importance. As a practical point, it is unlikely small print disclaimers would ever be read on those devices.

In 2009, the Bureau published its update to the Internet advertising bulletin: *"Application of the Competition Act to Representations on the Internet"*. These Guidelines[19] replaced earlier guidelines issued in February of 2003. With regard to the reference to disclaimers, the new Guidelines largely parallel the earlier set, noting:

> If qualifying information is necessary to prevent a representation from being false or 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 the principal representation when referring to their products or services…The Bureau takes the position that disclaimers which expand upon and add information to the principal representation do not raise issues under the Act. A disclaimer can only qualify a representation; it cannot cure or retract a false or misleading representation.

The Guidelines then set out the following principles, amongst others, to determine whether an online disclaimer is sufficient to alter the general impression created by the principal representation:

- Generally, the disclaimer should appear on the same screen and close to the representation to which it relates, although this may not always be possible.
- Advertisers should design web pages so as to highlight the fact that disclaimers exist and encourage consumers to read them.
- Text prompts indicating a disclaimer should be explicit rather than vague. For example, "see below for details" may not be sufficient.
- Businesses should ensure that disclaimers are viewable by consumers regardless of the technology platform they are using.
- Hyperlinks may be appropriate in some cases to show disclaimers. If used, hyperlinks should be clearly labelled and displayed in a consistent format.
- Disclaimers should not be hidden or buried. The use of colour or contrast may be helpful to make disclaimers noticeable.

[19] Competition Bureau, Enforcement Guideline, Iu54-1/2009E-PDF, "Application of the *Competition Act* to Representations on the Internet" (16 October 2011) online: Competition Bureau <http://www.competitionbureau.gc.ca/> ["Guidelines"].

- Audio disclaimers should be set so that volume levels and variations in pitch and tone allow consumers to hear and understand disclaimers effectively.

- Audio disclaimers alone may not be sufficient, as not all consumers have audio technology.

- Visual disclaimers should be displayed for a sufficient duration to ensure that they can be read and understood.

- It may be necessary to repeat disclaimers, particularly if consumers will enter the webpage at different points.

These Guidelines are largely consistent with the Bureau's earlier advice, but are focused specifically on the online setting. Of course, they can be applied more broadly.

4. The *Canadian Code of Advertising Standards*

The *Canadian Code of Advertising Standards*[20], administered by Advertising Standards Canada, is a code used by the advertising industry for self regulatory advertising review. If an advertiser believes that another advertiser's claims, either about the advertiser's own product or the complainant's product, are improper and contrary to the Code, it can bring a challenge to the advertised claim. The key provision of the Code is section 1 (Accuracy and Clarity) which provides that advertisements must not contain inaccurate or deceptive claims, statements, illustrations, or representations, either direct or implied, with regard to a product or service. Section 1(d) of the Code specifically provides that "Disclaimers and asterisked or footnoted information must not contradict more prominent aspects of the message and should be located and presented in such a manner as to be clearly visible and/or audible."

5. Some Leading Cases

As in many areas of Canadian competition law, jurisprudence with respect to disclaimers is not extensive, but some does exist. Here we attempt to provide a collection of leading cases, although it is far from a complete listing of all cases involving disclaimers. As is

[20] Advertising Standards Canada, *Canadian Code of Advertising Standards*, Toronto: ASC, 2006, Advertising Standards Canada online: <http://www.adstandards.com> ["Code"].

apparent from a review of the synopsis of each, these cases cannot all co-exist in perfect harmony, but we think there are some basic principles which can be discerned.

A. *R. v. Kraft Foods Ltd*.[21]

In this case, Kraft was convicted of publishing misleading advertisements for its contest promotion, "Explore Canada'70". The court found that "15 Big Chances to Win" was misleading and that the detail in both the small print and in the rules was insufficient to change the impression created by the headline. The court specifically noted:

> It is true that regulation 4 of the competition, providing for weekly drawings and the awarding of prizes on a regional basis, could be construed as a warning. However, it was a warning which only a keen eye and a suspicious mind would have been likely to detect. And even so, the type of media chosen, the name of the sponsor, and the size of campaign did not hint at underlying circumstances as exceptional as those above stated.[22]

B. *R. v. Viceroy Construction Co.*[23]

This case involved an advertisement by way of a catalogue and price list for various prefabricated homes. The catalogue for a particular model, the Willowdale, indicated that there was an upper level and a lower level, and the drawings in the catalogue indicated the same. The defence argued that the specification sheet when examined would have indicated that the price only provided for a single level house. The court noted:

> If the catalogue conveys, by the words used, the impression to the average person to whom it is directed, and who in the ordinary course would read it, that the home in question is a two storey house, when in fact is a one storey house, then the advertisement is deceptive and misleading, notwithstanding that such impression might be dispelled by a careful examination of the specification sheet, together with the quoted price list and the architectural symbols used[...][24]

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[21] *R. v. Kraft Foods Ltd.* (1972), 11 CCC (2d) 406, 1972 CarswellQue 201 (Que QB).

[22] *Ibid* at para 13.

[23] *Viceroy*, *supra* note 8.

[24] *Ibid* at para 15.

C. *R. v. International Vacations Ltd.*[25]

This case involved an advertisement for flights to Europe. It was alleged that at the time the advertisements were published some flights were already sold out. At the bottom of the advertisements, there was a statement that the schedules published were the carriers' schedules, and that it was necessary to check individual flight availabilities with a travel agent or with International Vacations as some of the flights might be sold out. In this case, the appellate court found:

> [...] I am of the respectful opinion that the learned County Court Judge erred in compartmentalizing Intervac's advertising and treating the important statement which appears under the schedules as if it were separate from the main text. It is, on the contrary, an integral part of the advertisement. It makes it clear beyond any possibility of doubt that Intervac does not hold out that seats are available on all flights listed in the schedules… I am unable to conceive how the matter could be put any more plainly."[26]

D. *R. v. Intra Canada Telecommunications Ltd*.[27]

This case involved a fairly typical false invoice scam, in which businesses received a mailing of what looked like an invoice for Yellow Pages advertisements. To determine what the document actually was, one was required to read "[a] notice in one continuous unbroken paragraph, first in French with the English version following in mid line, hidden as it were, the statement 'This is a solicitation for services and not a bill, invoice or statement of account due. You are under no obligation to make any payments on account of this offer unless you accept this offer'."

Also, on the reverse side of the form "in very fine and very faint print, difficult both to notice and to read, the accused included a notice that the distribution of the directory would be limited to those firms who had placed and paid for advertisements in the directory."

A conviction was entered against the company.

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[25] *R. v. International Vacations Ltd.* (1980), 22 CR (3d) 382, 1980 CarswellOnt 74 (Ont. C.A.).

[26] *Ibid* at para 13.

[27] *R. v. Intra Canada Telecommunications Ltd.* (16 March 1984), York 11-138-089 (Ont Co Ct).

E. *R. v. Pepsi-Cola Canada Ltd*.[28]

This case involved advertisements for Hostess Chips during a contest involving playing cards, in which the front of the bag was marked with "Playing Card Inside." The contest rules were set out on the rear of the bag in small print, including a warning that not all packages may contain playing cards. The disclaimer stated "[d]uring the contest over 19 million playing cards will be distributed. Not all specially marked bags contain a playing card." [29] The Crown failed to do a thorough sampling of packages to determine which chip bags had cards and which did not. Based on the limited sample available, it seemed that a majority of purchased packages did in fact have cards, although a significant minority did not.

In considering the disclaimer issue, the court noted "I am not satisfied at all that there has been a misrepresentation, considering all of the information contained on the packages. I reject the notion that only the front face of the package should be examined on this point."[30]

F. *National Hockey League v. Pepsi Cola Canada Ltd.*[31]

In this trademark infringement case, the court said in passing with respect to the use of disclaimers by the defendant "[t]he prominence to be given to a disclaimer must, to some extent, depend on the likelihood of a false impression being conveyed to the public if there is no disclaimer. The greater the likelihood the more prominent must be the disclaimer."[32]

G. *R. v. Multitech Warehouse Direct*[33]

This case involved an advertisement which provided that purchasers of microwave ovens would receive a fantasy holiday giveaway. The advertisement read "Pick any one of these dream vacation destinations and we'll fly you there…Free! Really? Yes Really! With purchase of select items...we'll supply airfare travel certificates for two people FREE!"[34] There was a

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[28] *R. v. Pepsi-Cola Canada Ltd.* (1991), 40 CPR (3d) 242, 1991 CarswellOnt 680 (Ont. Gen. Div.).

[29] *Ibid* at para 8.

[30] *Ibid* at para 16.

[31] *National Hockey League v. Pepsi-Cola Canada Ltd.* (1992), 92 DLR (4th) 349, 1992 CarswellBC 215 (BC SC).

[32] *Ibid* at para 54.

[33] *R. v. Multitech Warehouse Direct* (1993), 124 NSR (2d) 378, 1993 CarswellNS 493 (NS SC).

[34] *Ibid* at para 5.

disclaimer: "[l]uxury accommodation not included, some restrictions apply".[35] The court found that if the disclaimer statement had simply been "some restrictions apply", that would have been sufficient. However, by inserting the words "luxury accommodation not included", the advertisement became misleading, because not only was it not included, it was necessary to purchase the luxury accommodation in order to receive the airfare, and that specific fact was not set out in the disclaimers. After running the advertisement for only one day, and without any complaint, Multitech changed the disclaimer to read "with purchase of accommodations, some restrictions apply".[36]

The court found that while the original disclaimer, and therefore the original advertisement, was misleading, the advertiser was not convicted as it found that the advertiser had met the due diligence standard. The decision turned at least in part on the fact that Multitech had telephoned the Competition Bureau for advice prior to placing the advertisements.

H. *Purolator Courier Ltd v. United Parcel Service Ltd.*[37]

This interesting private injunction case turned on a 'disclaimer' found in the body of the relevant advertisement. Purolator brought a claim for misleading advertising against UPS with respect to radio and television advertisements regarding UPS's guaranteed overnight delivery by 10:30 a.m. the next day. The claim was "UPS guarantees overnight delivery before 10:30 a.m. usually at rates up to 40% less than other couriers charge".[38] In the television advertisement, the caption read "UPS 10:30 a.m. guaranteed for less" with the voiceover "Which is why UPS guarantees overnight delivery before 10:30 a.m. usually at rates up to 40% less than other couriers charge".[39]

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[35] *Ibid* at para 6.

[36] *Ibid* at para 9.

[37] *Purolator Courier Ltd – Courrier Purolator Ltée v. United Parcel Service Canada Ltd.* (1995) 20 BLR (2d) 270, 1995 CarswellOnt 335 (Ont. Gen. Div.).

[38] *Ibid* at para 1.

[39] *Ibid* at para 2.

Here the court noted that UPS gave as much prominence to the qualifications (that is, the phrases "usually" and "up to") as to any other part of the text. The court determined:

> [a] disclaimer does not automatically nullify a misleading impression created by an ad. Its effect will depend on several factors, including the degree to which a representation misleads the public without the disclaimer, the prominence which it is given in the context of the entire advertisement, the degree of sophistication that the public to whom the advertisement is directed exhibits, and the likelihood that the audience would recognize the disclaimer. It is a question of fact whether, in the circumstances, a disclaimer is sufficient to ensure the representation is not otherwise misleading."[40]

I. *R. v. Woolworth Canada Inc.*[41]

This case involved charges under section 57(2) of the *Competition Act* with respect to the so-called bait and switch offence of advertising products at a bargain price without sufficient supply of such products, as well as the basic misleading advertising offence. Both charges were based on the fact that there was allegedly insufficient availability of the products in issue. The advertisements were set out in a flyer, which itself contained a disclaimer providing that the products advertised were "subject to availability in our stores". With regard to that disclaimer the court said "I accept the Crown's argument that such a qualification cannot be seen to remove any obligation to supply the advertised product, but I accept the defence submissions that it has to be considered as a factor in evaluating whether the representations to the public were misleading or whether the defendants exercised 'due diligence'."[42]

There was an acquittal of the charges of bait and switch selling. There was also an acquittal on the misleading advertising charge based on the defence of due diligence by the advertiser.

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[40] *Ibid* at para 51.

[41] *R. v. Woolworth Canada Inc.* (2000), 5 CPR (4th) 465, 2000 CarswellOnt 175 (Ont. CJ).

[42] *Ibid* at para 122.

J. *Commissioner of Competition v. Forzani Group Ltd.*[43]

In this case, Foranzi agreed to settle by way of a Consent Agreement. This Consent Agreement related to concerns by the Commissioner that Forzani was engaged in misleading ordinary price advertising. The Consent Agreement stated that Forzani advertised prices as original prices, and then showed discounts from those prices while using a disclaimer indicating that the original prices did not represent prices at which the products were ordinarily sold. The Competition Bureau was of the view that the disclaimer was insufficient to achieve compliance with the Act in those circumstances. Amongst other remedies, Forzani agreed to pay an administrative monetary penalty of $1.2 million as well as $500,000 for the costs of the Bureau.

K. *Commissioner of Competition v. Goodlife Fitness Clubs Inc.*[44]

In this case, Goodlife agreed to settle a misleading advertising complaint by way of a Consent Agreement. The Consent Agreement provided that Goodlife had made price offers which failed to provide adequate disclosure of the additional fees consumers would have to pay to acquire memberships. A number of the aspects of the resolution involved disclaimers. For example:

- "Goodlife shall, and shall cause any entity which it has the ability to control to, ensure that any fine print they use, in any form of print advertisement or representation, be large enough that it is clearly visible and readable without having to resort to unusual means."[45]

[43] *Commissioner of Competition v. Forzani Group Ltd.* (Consent Agreement), (6 July 2004), CT-2004-010 online: Competition Tribunal <www.ct-tc.gc.ca>.

[44] *Commissioner of Competition v. Goodlife Fitness Clubs Inc.* (Consent Agreement), (9 February 2005), CT-2005-001, online: Competition Tribunal <www.ct-tc.gc.ca>.

[45] *Ibid*, s 4.

- "Goodlife shall…ensure that the placement of disclaimers in any form of print advertisement or representation be readily apparent and distinguishable."[46]

- "Goodlife shall…ensure that any representation they make, with respect to television advertising which use print disclaimers, be of a duration long enough to be read and comprehended in one normal viewing."[47]

L. *Tele-Mobile Co. Partnership v. Bell Mobility Inc.*[48]

In this case Tele-Mobile Co. known as "Telus" sued Bell for allegedly false advertising claims. The proceeding involved requests for cross injunctions against one another with respect to advertising campaigns. Both parties were making speed claims against one another. Bell's advertising was affected by the fact that Telus entered the market with an EV-DO service (then new technology) earlier than Bell had expected. With regard to the Telus claim, since Bell agreed to cease its advertising there was no basis for an injunction.

One of Bell's claims against Telus related to Telus' claim that Telus had "the fastest wireless high-speed network". On the record before the court, it was in fact a network partially shared between Telus and Bell. Telus' use of that network was not faster than Bell's use of that network. Telus relied on a disclaimer stating that its advertising comparison was to the Rogers network, not to Bell's network. Accepting the effectiveness of that disclaimer, the court stated "I am not satisfied that Bell has established that there is a serious issue to be tried or that the balance of convenience favours the granting of an injunction in light of the disclaimer provided. I do note that the disclaimers are small but they are disclaimers nonetheless. They are readily apparent to inform the consumers who would be considering responding to the ad what the basis of the ad is."[49]

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[46] *Ibid,* s 5.

[47] *Ibid,* s 6.

[48] *Tele-Mobile Co., A Partnership v. Bell Mobility Inc.,* 2006 BCSC 161, 2006 CarswellBC 430.

[49] *Ibid,* at para 60.

M. *Commissioner of Competition v. Premier Fitness Clubs*[50]

This case involved registration of a Consent Agreement with Premier Fitness Clubs with respect to its advertising between October 1999 and July 2004 related to the cost of obtaining membership to the fitness club. The Consent Agreement included an administrative monetary penalty of $200,000. The nature of the concern with respect to the advertising was that the Commissioner believed additional fees were not adequately disclosed in the advertisements. Premier Fitness Clubs specifically agreed in the Consent Agreement that "the disclaimers they use, in any form of print advertisement or representation, do not contain information which materially contradicts the main text"; "any fine print they use, in any form of print advertisement or representation, shall be large enough that it is clearly visible and readable to the naked eye, with or without corrective lenses, and does not contradict the main text"; "the placement of disclaimers in any form of print advertisement or representation shall be readily apparent and distinguishable"; "any representation they make with respect to television advertising which uses print disclaimers, shall be of a duration long enough to be read and comprehended in one normal viewing"; "any representation they make, with respect to radio advertising which use oral disclaimers, be clear enough and of a duration long enough to be heard and comprehended in one normal hearing."[51]

N. *Telus Communications Co. v. Rogers Communications Inc.*[52]

This case involved a civil claim by Telus against Rogers with respect to Rogers' long-standing advertising campaign that it had the most reliable network. Rogers claimed that its wireless telephone network was more reliable, based on various testing, than its competitors' networks. Rogers' network had significant advantages in its data transmission capability. The claim that Rogers was the most reliable network usually appeared (although not always) with the following disclaimer in very fine print "[m]ost reliable network refers to call clarity and dropped calls (voice), and to session completion rate (data) as measured within Rogers HSPA footprint

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[50] *Commissioner of Competition v. Premier Fitness Clubs* (Consent Agreement), (27 November 2007), CT-2008-009 online: Competition Tribunal <www.ct-tc.gc.ca>.

[51] *Ibid* at para 6.

[52] *Telus Communications Co v. Rogers Communications Inc.*, 2009 BCSC 1610, 2009 CarswellBC 3168 [*Telus* BCSC], aff'd 2009 BCCA 581, 2009 CarswellBC 3424.

and comparing with competitor's voice and data 1xEvdo networks. Rogers HSPA network not available in all areas".[53]

The factual context of this case was that Bell and Telus had launched a new partially shared network together. As a result, the networks against which Rogers had tested and made its prior claims was no longer Telus' only network, although it remained the network on which the vast majority of Telus customers operated.

The court noted "[t]hat the literal meaning, when the disclaimer is included, may be correct, is, as I see it, much to the effect of saying that the representation is based on a comparison that is now irrelevant and of no help to the consumer – assuming that one understands what the fine print says. I am satisfied, however, that most consumers would not understand the significance of the reference to "Rogers HSPA footprint" and "competitor's voice and data 1xEvdo networks".[54] Consequently the court concluded that the general impression, whether or not one includes the fine print disclaimer, was that the Rogers network was more reliable than any other network in Canada.

O. *R. v. Stucky*[55]

This case involved criminal charges against a direct mail business that sold lottery tickets or portioned out rights to the winnings of groups of lottery tickets to persons outside of Canada. In relation to the accused's defence that the disclaimer was sufficient to protect from a finding that the advertisement was false or misleading in a material respect, the court stated:

> While arguably displayed in a "clear and conspicuous" manner…[the terms and conditions of the promotion] were anything but readable and comprehensible. While a disclaimer may have contained all pertinent information as it related first to the lottery promotion, and then to the sweepstakes, the verbiage was so technically and graphically dense as to make it, ultimately, of little value to a reader who might take the time to read it with acuity.

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[53] *Ibid*, Telus BCSC at para 19.

[54] *Ibid* at para 33.

[55] *R. v. Stucky* (2006), 53 CPR 4th 369, 2006 CarswellOnt 7827 (Ont SCJ), rev'd 2009 ONCA 151, 2009 CarswellOnt 745.

> Indeed there was evidence to suggest that the prospective purchasers do not routinely read the almost mandatory terms and conditions, depending on their location and apparent readability, which latter term I use both in respect of form and content. In fact, as I recollect, none of the purchaser/witnesses testified that they had read the terms and conditions or fully understood them, if they were read at all. I say "almost mandatory" because, Mr. Stucky's evidence notwithstanding, I am of the view that direct marketers include terms and conditions almost perfunctorily, and perhaps on the advice of counsel or because such accords with industry practice. In the final analysis, I am not persuaded that the terms and conditions used in this promotion meet the test described in *Purolator Courier Ltd./Courier Purolator Ltée.* and negative the misrepresentation that has been established.[56]

P. *Maritime Travel Inc. v. Go Travel Direct.com Inc.*[57]

This case, the first to award damages in a private action for misleading advertising, involved comparison price advertisements between two travel agencies for southern vacations. The court found that advertisements run by Go Travel Direct in certain years were not misleading, although the advertisement in one year was found to be misleading. The court found that the offending advertisement created the misleading general impression that Go Travel Direct's prices were lower than its competitor's prices generally. In fact, it had simply reduced its price for a very limited time on a specific destination, in order to facilitate its advertisement campaign. In the advertisement that was found to be misleading, Go Travel advertised that "Go Travel Direct offers vacations for less by eliminating the travel agent middle man and passing the savings on to you". In very small print at the bottom of the ad it said "Price comparison based on Maritime Travel prices and Go Travel Direct prices available on Tuesday January 6, 2004".[58]

The court concluded by noting "even on a careful reading by someone contemplating spending close to $950.00 per person (without meals, etc.), the impression would be that Go Travel Direct was the less expensive choice. The disclaimer referring to prices on January 6, 2004, in no way lessens this impression. There is no indication in the ad that Go

[56] *Ibid* at paras 130 - 131.

[57] *Maritime Travel, supra* note 7.

[58] *Ibid* at para 68.

Travel Direct's price is for a limited time or is a special or sale price. Nor is it in large enough type to bring the date to a reader's attention".[59]

Q. *Canada (Commissioner of Competition) v. Yellow Page Marketing B.V.*

The recent case brought by the Commissioner against *Yellow Page Marketing B.V.*[60] involved "fake invoices" for a business directory that, it was alleged, victims of the recipients of the marketing materials would mistakenly believe was the traditional Yellow Pages.

The case involved offshore entities and a refusal by the principals to present themselves for cross-examination in Canada. The Ontario Superior Court found the invoices to be deceptive. The contracts entered into were declared to be null and void; an administrative monetary penalty of $8,000,000 was ordered as against the corporate respondent and a total of $1,035,000 against the individual respondents, collectively; an order for corrective notices on websites and letters to all those previously targeted by the scam; and finally, an order for full restitution was made.

There were prosecutions with some more proceedings against the respondents in the United States and Australia and a trademark-related order against them and in the Netherlands.

It is often the case that cases that might have been pursued as fraud often do not give very useful guidance to legitimate businesses with respect to how to conduct their advertising.

Part of the defence argued was that the term "yellow pages" was a generic term and that the respondent had an application pending the federal court to expunge that and related trademarks. If that expungement were successful, then it would be easier to argue that the use by the respondent of the words "yellow" and "pages" was not so obviously deceptive. The Superior Court rejected this submission, on the basis that trademark violation was not part of the case.

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[59] *Ibid* at para 70.

[60] *Canada (Commissioner of Competition) v. Yellow Page Marketing B.V.*, 2012 ONSC 927.

R. *Commissioner of Competition v. Bell Canada, Bell Mobility Inc. and Bell ExpressVu Limited Partnership*[61]

On June 28, 2011 Bell Canada and the Commissioner of Competition resolved the Commissioner's concerns with respect to Bell's advertising, which the Commission concluded was false and misleading, by way of a Consent Agreement registered with the Competition Tribunal. In the Consent Agreement, Bell Canada agreed to pay the maximum available administrative monetary penalty: $10 million dollars. This is the first time that the administrative monetary penalty of anything approaching $10 million has been awarded for misleading advertising, although in this case on consent.

The press release issued by the Bureau in conjunction with the resolution provided "since December 2007, Bell has charged higher prices than advertised for many of its services, including home phone, internet, satellite T.V. and wireless. The advertised prices were not in fact available, as additional mandatory fees, such as those related to TouchTone, modem rental and digital television services were hidden from consumers in fine-print disclaimers".[62]

The recitals to the Consent Agreement provide that "the Commissioner has concluded that consumers would be required to review disclaimers on the Respondents' website or elsewhere to identify the additional fees for which consumers were liable".[63] Further the recitals provide that "the Commissioner has concluded that the disclaimers were in any event insufficient to alter the general impression of the representations to which they related".[64]

By way of the order itself, one of the things that the Respondents were ordered to do was to "make no price representation that uses a disclaimer that contradicts the general impression of the representation to which it relates."[65]

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[61] *Bell Canada, supra* note 2.

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

[63] *Bell Canada, supra* note 2 at 2.

[64] *Ibid.*

[65] *Ibid* at para 2.

This case has refocused attention onto the question of disclaimers and their appropriate use. A key reason for this is, of course, the size of the administrative monetary penalty. Beyond that, however, is the question of what the case really means for advertising practice, and where disclaimers can properly be used or not be used. Mobile telephone service, Internet service, television service – all of these are highly complex products which involve many options. Each consumer may make different choices which will inevitably vary the price.

In the *Bell* case, the publicly available information indicates that the headline price was not available to any consumers at all. To take a more common situation, however, the headline price might be available to some small number of consumers but the vast number of consumers might have to purchase additional things or get additional services. That situation would appear to be a classic occasion for the proper use of disclaimers, as long as they were sufficient in size, appropriately placed and sufficiently clear. Whether the Bureau would regard the use of disclaimers in that situation as appropriate or not, however, is unclear given the *Bell* case. This is a matter of some practical importance given the number of products with complex pricing schemes.

S. *Richard v. Time Inc.*[66]

In this case, brought pursuant to Quebec's *Consumer Protection Act*, a contestant in a Time Inc. contest sued Time over his receipt of a "Official Sweepstakes Notification". The notification contained phrases such as

> "[o]ur Sweepstakes are now final: Mr. Jean Marc Richard has won a cash prize of $833,337.00", "[w]e are now authorized to pay $833,337 in cash to Mr. Jean Marc Richard", "[a] bank cheque for $833,337 is on its way to [an address]"[67]

and the like.

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[66] *Richard v. Time Inc.*, [2007] QJ No 7531, 2007 CarswellQue 6654 (Que SC), rev'd 2009 QCCA 2378, 2009 CarswellQue 12570, leave to appeal to SCC granted (2010), 209 NR 381 (note) (SCC).

[67] *Ibid* at para 7.

However, these banner headlines were preceded by the phrase, in much smaller print

> "If you have and return the prize winning entry on time and correctly answer a skill testing question, we will officially announce that,"[68]

and

> "[i]f you have and return the grand prize winning entry in time and correctly answer a skill testing question, we'll confirm that".[69]

Based on the language, the court concluded that it was impossible to conclude that Time had made an unconditional offer to pay the prize to Mr. Richard. However, with regard to moral and punitive damages, the court noted that the document was specifically designed to mislead the recipient and it contained misleading and even false representations contrary to the *Consumer Protection Act*. Article 219 of the *Consumer Protection Act* provided that "No merchant, manufacturer or advertiser may, by any means whatsoever, make false or misleading representations to a consumer". The court determined that under the *Consumer Protection Act*, the general impression left with the consumer is important, along with the literal meaning of the words used.

As well, the court noted that the average consumer in Quebec would be a francophone, and that this document was written entirely in English. The court awarded moral damages of $1,000, and punitive damages of $100,000.

The Court of Appeal of Quebec reversed the trial court decision. Time Inc. was given the benefit of the actual words in the document, which set out that the offer was to enter a sweepstakes and be granted a prize if the winning number was yours.

On the core issue of the entitlement to the Grand Prize, the Court of Appeal found that "they could not conclude that the advertisement might give the average Quebec consumer the general impression that the recipient was the Grand Prize winner. The Court of Appeal stated (in translation):

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[68] *Ibid* at para 10.

[69] *Ibid* at para 11.

> "With respect, I see eye-catching text in the documentation sent to the [appellant], but I do not see misleading, under-handed or deceitful statements. I even suspect that the [appellant], a well informed businessman who worked locally and internationally in both French and English, understood the sweepstakes and his chance of winning perfectly well from the very start."

The Court of Appeal held that the proper interpretation for misleading advertising purposes was the meaning of the advertisement to the average consumer, in this case a francophone consumer. The Court of Appeal found that Time Inc. was not guilty of false or misleading statements in the circumstances. It did not believe that the documents led the addressee to believe that he was the winner of $833,337. The court stated that the average consumer understands that, regardless of their language, "money doesn't fall from the sky". "Who would believe they won this amount of money from a lottery but they did not know the existence of it and for which they did not buy a ticket?".

The matter was appealed to the Supreme Court of Canada. The Supreme Court of Canada characterized the Court of Appeal's analysis as saying "it is, in a word, up to consumers to be suspicious of advertisements that seem too good to be true." The decision deals in significant detail in matters of statutory interpretation relating to the *Consumer Protection Act* of Quebec. This analysis focuses on the possible impact of this decision on the law of misleading advertising more generally.

While the Supreme Court's analysis of the *Consumer Protection Act* will be important for the law of Quebec, it may also have an impact on cases both private and public under the *Competition Act*'s misleading advertising provisions. The decision deals with the "general impression" test, and how the notional consumer is to be defined in the administration of this analysis. These concepts, though arising under the QCPA, apply under the *Competition Act* as well. While it is not a certainty that the reasoning in this case will be adopted in future *Competition Act* cases, it will be certainly argued by the government and private plaintiffs in injunction or damages claims based on allegedly false or misleading advertising.

The relevant provision of the QCPA, section 218, required that an advertising representation is to be evaluated based on "the general impression it gives, and, as the case may be, the literal meaning of the terms used therein [being taken] into account". This wording is very close to subsections 52(4) and 74.03(5) of the *Competition Act*: subsection 52(4) provides:

> "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."

The QCPA wording was based on a predecessor to the *Competition Act* provision.

The Supreme Court analyzed a number of cases and learned articles focused on the QCPA. The Supreme Court stated that "general impression" does not mean "instant impression" but that it is "that of the first impression". It is the impression "a person has after an initial contact with the entire advertisement, and it relates to both the layout of the advertisement and the meaning of the words used." Interestingly, the Supreme Court stated that the test is similar to the one that must be applied under the *Trade-marks Act* to determine whether a trademark causes confusion. The fact that the documents in question (a direct mail advertisement) were in the possession of the consumer for a lengthy period of time and that he was able to read them carefully on several occasions before sending in the official entry certificate - and in fact did so - was not relevant to the Supreme Court's analysis.

On the question of "who is the consumer", the Supreme Court used the same phrase that of the Court of Appeal and that of most decisions under the *Competition Act*: the "average consumer". The average consumer, a legal fiction, is an imaginary consumer to whom a level of sophistication is attributed. For the purposes of this case, this was done by the Supreme Court with a view to the purposes of the QCPA. Existing Quebec authority held that the average consumer should be deemed to be "credulous and inexperienced". The Court of Appeal held that an average consumer also has "an average level of intelligence, skepticism and curiosity". The Supreme Court stated "in conformity with the objective of protection that underlies such legislation [i.e., consumer law], the courts have assumed that the average consumer is not very sophisticated." The Court then went on to use prior decisions involving trademarks as a good example of this interpretive approach.

The standard for determining whether a trademark causes confusion is that the average consumers for such purposes are "ordinary hurried purchasers" and that "the standard is not that of people 'who never notice anything' but of persons who take no more than 'ordinary care to observe that which is staring them in the face'"[70].

The Supreme Court analyzed a long line of Quebec cases that used terms such as "credulous" and "inexperienced" to describe the notional consumer. It stated that these cases relied on the *Imperial Tobacco Products Limited*[71] case, a 1971 decision under the predecessor of the *Competition Act*. The Supreme Court concluded:

> "Thus, in Quebec consumer law, the expression "average consumer" does not refer to a reasonably prudent and diligent person, let alone a well informed person. To meet the objectives of the CPA, the Courts view the average consumer as someone who is not particularly experienced at detecting the falsehoods of subtleties found in commercial representations."

The Supreme Court then explicitly rejected the "average consumer" as someone having "an average level of intelligence, skepticism and curiosity" as "inconsistent with the letter and the spirit" of the QCPA.

The Quebec caselaw analyzed by the Supreme Court in this case relies upon the "credulous man" test adopted in the *Imperial Tobacco* case. Under the *Combines Investigation Act* and its successor, the *Competition Act*, this test has evolved significantly. The Court of Appeal for Ontario, in its 1975 decision in *R. v. Viceroy Construction Company* (1975), 23 CPR (2d) 281, adopted the "average purchaser" test. This decision and its later decision in *R. M. Lowe Real Estate Limited* (1978), 39 CPR (2d) 366, the Court used the "average purchaser" test[72]. The level of sophistication imputed to the "average purchaser" under the *Competition Act* analysis varies with respect to the type of product and the target audience. These later cases under the *Competition Act* were not argued in this matter.

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[70] *Mattel, Inc. v. 3894207 Canada Inc.* [2006] S.C.R. 772.

[71] *R. v. Imperial Tobacco Products Ltd. Supra* note 12.

[72] See also: *R. v. International Vacations Ltd.* (1980), 59 C.C.C. (2d) 557 (Ont. C.A.).

The Supreme Court rejected the Court of Appeal's inclusion of "an average level of skepticism" and "an average level of curiosity", stating that it assumes that

> "the average consumer must take concrete action to find the "real message" hidden behind an advertisement that seems advantageous. This analytical approach can only weaken the general impression test, since a skeptical person will be inclined not to believe an advertisement solely on the basis of the general impression it conveys. Similarly, a consumer with "an average level of curiosity" will not be so stupid or naïve as to rely on the first impression conveyed by a commercial representation but will be curious enough to consider the impression more closely."[73]

With respect, the Supreme Court's analysis is flawed. One can only determine what the appropriate "general impression" test is by viewing an advertisement in its contest as would the consumer to whom it is directed. The Supreme Court's reasoning makes the "general impression" a much harsher test for the advertiser. It makes the advertiser responsible to ensure, effectively, that no consumer will be misled. The Court of Appeal's inclusion of skepticism and curiosity did not undermine the general impression, rather it was part of the general impression.

The Supreme Court concluded:

> "With respect, we find it hard to understand how a credulous and inexperienced consumer could deduce [all the details of the offer including the contest rules] after reading the Document for the first time. The first sentence that leads off the page is the following one:
>
> **OUR SWEEPSTAKES RESULTS ARE NOW FINAL:**
> **MR. JEAN-MARC RICHARD HAS WON**
> **A CASH PRIZE OF $833,337.00!**"

The Supreme Court stated that it was unreasonable to assume that the average consumer would be particularly familiar with the special language rules of such a sweepstakes and would clearly understand all the essential elements of the offer made to the appellant in this case. It is not clear that there was any evidence before the Court on this issue.

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[73] *Richard v. Time*, 2012 SCC 8 at para. 76.

The Supreme Court's formulation of the general impression test for the purposes of the QCPA was based on the legislative purposes of the QCPA, summed up as "*caveat venditor* – let the seller beware". By contrast, the purpose of the *Competition Act* is defined as follows:

> "The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."

The Supreme Court engaged in a lengthy analysis of the various provisions of the QCPA, as to whether they allowed for damages – both compensatory and punitive – in cases where a contract is and is not formed with a consumer. The Court stated that "the purpose of the [Q]CPA is above all to purge business practices in order to protect consumers as fully as possible."

For purposes of the QCPA, the Court found that where certain violations are committed, it is no defence that the consumer suffered no prejudice. It should be noted that damages under the *Competition Act*, including for violations of the misleading advertising provisions, only arise where actual harm has been suffered by the plaintiff.

The larger question for advertisers, and for the law of misleading advertising, is whether the *Time* reasoning will be applied to cases under the *Competition Act.* Despite the different legislative purposes of the *Competition Act* and the QCPA, the language with respect to misleading advertising is very similar. Nevertheless, there are reasons to think that the tests under the two statutes should not be the same. These reasons include that the *Competition Act* has much broader purposes than the QCPA, and that there are forty years of cases defining the general impression test and, no *Competition Act* cases after 1975 were before the Supreme Court.

While there are good arguments that the reasoning in the *Time* case, and in particular the standard of average consumer under the QCPA should not apply to cases under the *Competition Act*, it is at present an entirely open question. Even if this approach does not translate to the *Competition Act* however, it may encourage more cases under the QCPA (and similar consumer protection statutes) in other provinces.

For instance, under the Ontario *Consumer Protection Act*, 2002[74], the making of false, misleading or deceptive representations is deemed to be a "unfair practice". Similar to the Quebec statute, damages (including punitive damages) are available.

Thus, if the Supreme Court's reasoning is applied to other consumer statutes, then a right to nominal damages without the need to show prejudice to the consumer may become the basis for future class actions. These types of class actions exist now of course, but this decision will likely encourage more.

6. Tentative Conclusions

As is apparent from the review of the foregoing, the question of disclaimers has, over the years, taken up a good deal of attention in the courts, the Competition Tribunal, and at the Competition Bureau. While the Competition Bureau has been reasonably consistent in its position, that disclaimers generally cannot alter the general impression in the main text, the courts have not always been as consistent. Some cases seem quite hospitable to the use of disclaimers, while others do not. Further, the Bureau's position leaves considerable practical uncertainty. The Commissioner, in her recent speech, indicated that "[i]t's very simple - don't mislead the public by hiding charges or conditions in fine print".[75] But, in fact, it is not always so simple. It is easy to state the principle that the disclaimer can supplement information but cannot contradict the main message, but defining the precise line between a supplement and contradiction is not always as clear as one would hope.

[74] S.O. 2002, c. 30.

[75] Aitken, *supra* note 4.

We have the recent practical example of the *Bell* case. If the headline price was available to no one, then it is a reasonably straightforward proposition that one should never advertise a headline price which no one can achieve, whatever the disclaimer may say. However, if the headline price is available to at least one consumer, but the vast majority will have to pay a higher price, is that situation a good candidate for the use of disclaimers? Historically, one would have thought so. Particularly in the case of a complex product, where most consumers will be in different positions from one another, so that they will need or wish to purchase different combinations of goods and services. The case simply does not tell us how to address such a situation, and at that is the important practical question for marketers of complex products.

As well, the Supreme Court's decision in the *Time* case will affect the standard of consumer credulity, and as a result will likely influence the general impression test under consumer protection legislation outside Quebec, and may do so under the *Competition Act*. There are arguments that it should not, but the matter is clearly open at this time. If that occurs, it will materially change the risk calculation for advertisers, and the manner in which advertising can be carried out, including in particular, the use, and effectiveness, of disclaimers.