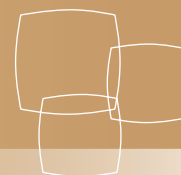




Competition Bureau
Canada

Bureau de la concurrence
Canada



Enforcement Guidelines

Application of the *Competition Act* to Representations on the Internet



This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*.

This publication replaces the following Competition Bureau publication:

Information Bulletin – *Application of the Competition Act to Representations on the Internet*, February 18, 2003

For information on the Competition Bureau's activities, please contact:

Information Centre
Competition Bureau
50 Victoria Street
Gatineau QC K1A 0C9

Tel.: 819-997-4282
Toll free: 1-800-348-5358
TTY (for hearing impaired): 1-800-642-3844
Fax: 819-997-0324
Web site: www.competitionbureau.gc.ca

This publication can be made available in alternative formats upon request. Contact the Competition Bureau's Information Centre at the numbers listed above.

Permission to reproduce

Except as otherwise specifically noted, the information in this publication may be reproduced, in part or in whole and by any means, without charge or further permission from the Competition Bureau provided due diligence is exercised in ensuring the accuracy of the information reproduced; that the Competition Bureau is identified as the source institution; and that the reproduction is not represented as an official version of the information reproduced, nor as having been made in affiliation with, or with the endorsement of the Competition Bureau. For permission to reproduce the information in this publication for commercial redistribution, please e-mail droitdauteur.copyright@tpsgc-pwgsc.gc.ca.

Cat. No. Iu54-1/2009E-PDF
ISBN 978-1-100-13787-2
60666

2009-10-16

Aussi offert en français sous le titre Application de la Loi sur la concurrence aux indications dans Internet.

PREFACE

The Competition Bureau is an independent law enforcement agency that contributes to the prosperity of Canadians by protecting and promoting competitive markets and enabling informed consumer choice. Headed by the Commissioner of Competition, the Bureau is responsible for the administration and enforcement of the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.

This publication has been drawn from jurisprudence, written opinions, input from the consultative process and other public statements by the Competition 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*¹ in circumstances requiring precise statements of the law.

Any examples contained in this publication 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 Opinions². The views expressed in this publication are for assistance only and do not bind the Commissioner of Competition.

Readers should note that the false or 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*³, the *Textile Labelling Act*⁴ and the *Precious Metals Marking Act*⁵. The potential application of these statutes to Internet advertising will be briefly discussed in this publication. Most provinces and other federal departments and agencies also administer legislation dealing with advertising and marketing practices. This publication does not attempt to provide information on these statutes administered by other agencies.

1 *Competition Act* (R.S., 1985, c. C-34), available at: www.laws.justice.gc.ca.

2 Certain fees apply. Refer to the publication entitled *Fee and Service Standards Handbook* available on the Competition Bureau Web site at: www.competitionbureau.gc.ca.

3 *Consumer Packaging and Labelling Act*, (R.S., 1985, c. C-38) available at: www.laws.justice.gc.ca.

4 *Textile Labelling Act*, (R.S., 1985, c. T-10) available at www.laws.justice.gc.ca.

5 *Precious Metals Marking Act*, (R.S., 1985, c. P-19) available at: www.laws.justice.gc.ca.

TABLE OF CONTENTS

■ 1. INTRODUCTION.....	1
■ 2. THE <i>COMPETITION ACT</i> GENERALLY	2
2.1 Understanding "materiality".....	3
2.2 Understanding the "general impression test".....	4
■ 3. LIABILITY FOR INTERNET REPRESENTATIONS.....	5
■ 4. APPLYING THE <i>COMPETITION ACT</i> ON-LINE: SOME PRACTICAL ADVICE ON HOW TO AVOID COMMON PITFALLS	7
4.1 Disclosure of Relevant Information: Disclaimers.....	7
4.1.1 The location of the disclaimer on the Web site.....	7
4.1.2 Hyperlinks to disclaimers	8
4.1.3 Use of attention-grabbing tools such as graphics, sounds or flash images.....	9
4.1.4 Prominence of the disclaimer	9
4.1.5 Accessibility of the disclaimer by all potential users	9
4.1.6 Repetition of the disclaimer.....	9
4.2 Required Disclosures.....	9
4.3 Representations About the Product or Service.....	10
4.4 Representations About the Business	11
■ 5. SECTION 52.1: TELEMARKETING AND INTERNET ADVERTISING.....	12
■ 6. JURISDICTIONAL ISSUES.....	13
■ 7. ON-LINE REPRESENTATIONS AND THE <i>CONSUMER PACKAGING AND LABELLING ACT</i> , THE <i>TEXTILE LABELLING ACT</i> AND THE <i>PRECIOUS METALS MARKING ACT</i> AND THEIR RESPECTIVE REGULATIONS.....	14
■ 8. CONSUMER PROTECTION ON-LINE	15
■ 9. CONCLUSION AND WRITTEN OPINIONS	16
■ 10. HOW TO CONTACT THE COMPETITION BUREAU.....	17



I. 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 false or 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 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 publication aims to provide details of the Bureau's approach to Internet practices as they relate to the false or 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 false or 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 prohibited⁶. 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 plans⁷. 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 winning⁸.

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 courts⁹. 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 14 years or both¹⁰.

Alternatively, for matters arising under the civil provisions of the Act¹¹, the Commissioner may apply to the Competition Tribunal, the Federal Court, 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 \$750,000 and, for each subsequent order, \$1,000,000. Corporations are liable to penalties of up to \$10,000,000 and, for each subsequent order, \$15,000,000. In situations where a person has made materially false or misleading representations about a product to the public, the court may also make an order

6 Refer to subsections 52(1), 74.01(1) and sections 74.02 and 74.03 of the *Competition Act*.

7 Refer to sections 52.1, 55.1 and 55 of the *Competition Act*.

8 Refer to subsections 74.01(2), 74.01(3) and sections 74.04, 74.05, 74.06 of the *Competition Act*.

9 Refer to sections 52, 52.1, 53, 54, 55, 55.1 of the *Competition Act*.

10 Refer to subsection 52(5) of the *Competition Act*.

11 Refer to sections 74.01 to 74.06 of the *Competition Act*.

for restitution, requiring the person to compensate consumers who bought such products, and an interim injunction to freeze assets in certain cases¹².

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 in the publication entitled *Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track Under the Competition Act*, available on the Competition Bureau Web site.

The Act prohibits false or misleading representations made to the public. Under the law, it is not necessary to demonstrate that any member of the public to whom the representation was made was within Canada or that the representation was made in a place to which the public had access. This publication focuses primarily on the application of the Act to commercial Web sites and marketing strategies using e-mail. In light of the foregoing, 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"¹³.

¹² Refer to subsection 74.1(1) and section 74.111 of the *Competition Act*.

¹³ *R v. Kenitex Can. Ltd. et al.* (1980), 51 C.P.R. (2d) 103.

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 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 meaning¹⁴. 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.

¹⁴ Refer to subsections 52(4), 52.1(4) and 74.03(5) of the *Competition Act*.



3. LIABILITY FOR INTERNET REPRESENTATIONS

The false or 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 made¹⁵.

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 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 false or 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 false or 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 false or misleading representations or deceptive marketing practices.
- A consumer obtains access to the Internet through their Internet service provider. The

¹⁵ Refer to subsection 52(1.2) of the *Competition Act*.

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 false or 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 track¹⁶. 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.

¹⁶ Refer to the publication entitled *Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track Under the Competition Act* available on the Competition Bureau Web site at: www.competitionbureau.gc.ca.



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 publication 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 false or 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 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 their principal representation 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.

4.1.1 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.

4.1.2 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.

4.1.3 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.

4.1.4 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.

4.1.5 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.

4.1.6 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 in the publication entitled Multi-level Marketing Plans and Schemes of Pyramid Selling – Sections 55 and 55.1 of the Competition Act available on the Competition Bureau Web site.

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 in the publication entitled Promotional Contests – Section 74.06 of the Competition Act available on the Competition Bureau Web site.

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 prizes¹⁷. 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 winning¹⁸. 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 with respect to section 53, can be found in the publication entitled Deceptive Notices of Winning a Prize – Section 53 of the Competition Act available on the Competition Bureau Web site.

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

¹⁷ *Competition Act*, (R.S., 1985, c. C-34) as amended by An Act to amend the *Competition Act* and the *Competition Tribunal Act* (2002, c. 16, s. 6), in force 21 June 2002.

¹⁸ Refer also to subsections 53(2) and 53(3) of the *Competition Act*.

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 test¹⁹.

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 representation and the supplier of the product or service.



¹⁹ Refer to subsection 74.01(1)(b) of the *Competition Act*.



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 policy with respect to section 52.1 and telemarketing can be found in the publication entitled Telemarketing – Section 52.1 of the Competition Act available on the Competition Bureau Web site.



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 false or 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 false or 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 false or 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 false or misleading representations and deceptive marketing practices. The Bureau will also actively seek the assistance and co-operation of foreign agencies to address false or 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.²⁰

20 Refer to the Competition Bureau Web site at www.competitionbureau.gc.ca (under A-Z Index and under International Efforts), for information on the international agreements relating to Canada's competition law and its application.



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 consumer products, consumer textile articles and precious metal articles are also captured under the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, and the *Precious Metals Marking Act* 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 these statutes can be found in the following publications available on the Competition Bureau Web site:

- *Guide to the Consumer Packaging and Labelling Act and Regulations;*
- *Guide to the Textile Labelling Act and Regulations;*
- *Guide to the Precious Metals Marking Act and Regulations.*



8. CONSUMER PROTECTION ON-LINE

This publication is limited to the application of the Act as it relates to false or 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 of Consumer Protection for Electronic Commerce : A Canadian Framework*²¹. Those interested are also invited to examine the *Guidelines for Consumer Protection in the Context of Electronic Commerce*²² developed by the Organisation for Economic Co-Operation and Development. In order to avoid making false or 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.

A working group of representatives from Canadian businesses, consumers associations and governments has produced the *Canadian Code of Practice for Consumer Protection in Electronic Commerce*. The Code was endorsed by federal, provincial and territorial ministers responsible for consumer affairs on January 16th, 2004. The Code establishes benchmarks for good business practice for merchants conducting commercial activities with consumers online. The Code leaves unchanged rights, remedies and other obligations that may exist as a result of consumer protection, privacy or other laws and regulations, or other general or sector-specific voluntary codes of conduct to which vendors may subscribe. This Code is available on the Consumer Measures Committee Web site at: www.cmcweb.ca.



21 Refer to the Consumer Measures Committee Web Site at www.cmcweb.ca, for more information on the *Principles of Consumer Protection for Electronic Commerce : A Canadian Framework*.

22 Refer to the OECD Web Site at www.oecd.org, for more information on the *Guidelines for Consumer Protection in the Context of Electronic Commerce* and *Best Practice Examples under the OECD Guidelines on Consumer Protection in the Context of Electronic Commerce*.



9. CONCLUSION AND WRITTEN OPINIONS

The objective of this publication 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".²³

The Competition Bureau facilitates compliance with the law by providing various types of written opinions subject to fees. Company officials, lawyers and others are encouraged to request an opinion on whether the implementation of a proposed business plan or practice would raise an issue under the *Competition Act*. These written opinions are binding on the Commissioner of Competition when all the material facts have been submitted by or on behalf of an applicant for an opinion and when they are accurate. A specific written opinion will be based on information provided by the requestor and will take into account previous case law, prior opinions and the stated policies of the Bureau.

23 Refer to the publication entitled *Conformity Continuum Information Bulletin* available on the Competition Bureau Web site at: www.competitionbureau.gc.ca.



10. 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*, the *Precious Metals Marking Act*, or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

Web site

[www.competitionbureau.gc.ca

Address

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

Telephone

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

Facsimile

[819-997-0324