Consumer and Corporate Affairs Canada
Consommation et Corporations Canada

How to avoid Misleading Advertising

Guidelines

Canada

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Preface

Members of the business community have frequently expressed the need for a concise and readily accessible set of guidelines to assist them in interpreting and applying the misleading advertising and deceptive marketing practices provisions of the *Combines Investigation Act*. These *Guidelines* have therefore been published by the Marketing Practices Branch in an effort to meet such need. It is hoped that the *Guidelines* will provide advertisers with a better understanding of the law, with the ultimate result that violations of the provisions may thereby be avoided.

Several *caveats* are in order, however. The contents of the *Guidelines* have been drawn from jurisprudence, back issues of the *Misleading Advertising Bulletin*, advisory opinions and other well established statements of Branch policy. In striving for simplicity and brevity, it has been necessary to sacrifice precision and comprehensiveness to some extent. Readers are advised to consult either the actual sections of the Act provided in Appendix I or the original Act in circumstances requiring exact statements of the law. Examples contained in the *Guidelines* 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 Branch Headquarters or from any one of the field offices (addresses are listed in Appendix II). Advertisers with specific questions concerning proposed promotional plans are reminded to take advantage of the Director's Program of Compliance. *The views expressed in these Guidelines are for assistance only and should not be considered as binding on the Director of Investigation and Research.*

Finally, *readers should note that the misleading advertising and deceptive marketing practices provisions of the Combines Investigation Act entail only a portion of the relevant law in Canada*. Most provinces and other federal departments and agencies administer legislation dealing with advertising and marketing practices. These *Guidelines* do not attempt to provide information on such other legislation.

Contents

1 Introduction

The views expressed in these guidelines are for assistance only and should not be considered as binding on the Director of Investigation and Research. Readers should also note that The Combines Investigation Act is only a portion of the relevant law in Canada.

1.

Introduction

There is no legislation of general application in Canada that contains regulatory powers requiring an advertiser to withdraw or amend an advertisement. Some statutes however provide a degree of regulation of the content and style of an advertisement either in relation to certain classes or types of products, as in the case of the Food and Drugs Act, the Consumer Packaging and Labelling Act and the Textile Labelling Act, or in relation to specific situations, as in the case of the Broadcasting Act. 1—1

The Combines Investigation Act, which is administered by Consumer and Corporate Affairs Canada, is the only federal statute of general application to all Canadian media advertising. In Canada, the first major impetus toward effective misleading advertising laws came in 1960, and it was due to pressure from business not consumers. Businessmen were concerned that misleading regular price comparisons were making genuine sale advertising less credible to consumers and that these misrepresentations were giving their originators an unfair competitive advantage. Consequently, a section to this effect was added to the Combines Investigation Act and over the years other broader provisions have been added. 1—2

A. General Scope of the Misleading Advertising and Deceptive Marketing Practices Provisions

These provisions apply generally to anyone promoting, directly or indirectly, the supply or use of a product (which includes both an article and a service) or any business interest by any means. It therefore does not include advertisements or representations made by political parties, charitable organizations, consumer groups, etc. 1—3

All methods of making representations, including printed or broadcast advertisements, oral representations, audio-visual promotions and illustrations, are within the general scope of the Act, but some provisions specifically relate only to advertisements (for example, see section 37 and 37.1). 1—4

The legislation refers to representations made "to the public." However, it has been determined that a representation to just one person is a representation to the public. It should also be noted that it is not necessary to prove that any person was in fact misled; all that is required is that the representation is in violation of the Act. 1—5

The interpretation of expressions containing the word material as in "misleading in a material respect" was considered as early as 1968 and was held to mean that the representation leads a person to a course of conduct that, on the basis of the representation, he believes to be advantageous. The criteria 1—6

of the word "material" is not the value of the product to the purchaser, but rather the degree to which the purchaser is affected by the representation in deciding whether or not to purchase.

Finally, it should be noted that although the Act provides for some specific offences, there are cases which do not necessarily fall within the scope of the specific provision and which are therefore considered under the general prohibition against misleading advertising i.e. paragraph 36(1)(a). For example, the non-availability of an advertised product or a "bait and switch" practice is prohibited under subsection 37(2) where a bargain price is involved. If there is no representation (express or implied) of a bargain price, the case would be pursued under the general prohibition – paragraph 36(1)(a). 1—7

B. The General Impression Test

The general impression test (subsection 36(4)) requires a court to consider the overall impression conveyed by a representation. This test applies only to offences under: 1—8

paragraph 36(1)(a) – general misleading representations
36(1)(b) – performance claims not based on adequate and proper tests
36(1)(c) – misleading warranty/guarantee representations
36(1)(d) – ordinary price misrepresentations

The application of the general impression test is particularly important where: 1—9

(1) A representation is partially true or partially false, or the representation is capable of two meanings, one of which is false.
(2) The representation is literally true but is, in fact, misleading since it fails to reveal certain essential information (see non-disclosure of material information).
(3) The representation is literally or technically true but creates a false impression, e.g., the advertised results of a test of a product may not be significant to its use or efficacy but the representation makes it appear otherwise (see inappropriate performance claims).
(4) The representation is literally true insofar as the oral or written statements are concerned but the visual part of the representation may create a false impression, e.g., it depicts a different model of the advertised product (see use of illustrations).

Examples

Two cases that resulted in conviction in 1978 may provide useful illustrations of the application of this test. 1—10

A house represented as having a new furnace – where the word "new" although understood by the industry to mean a replacement and not the original furnace, was found by the court to give the impression to a purchaser that the furnace was in fact new.

A catalogue contained the statement "you are entitled to 33 1/3 per cent discount off all items in this catalogue" – where the representation was literally true, but the word discount gave the impression of a bargain price which in fact was no bargain since the quoted prices were fictitious.

Representations Relating to Supplier or his Business

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2.

Representations Relating to Supplier or his Business

Representations considered here relate to the nature and size of the business and its market position, reasons for sale (circumstance-related events), employment or business opportunities, attributes of supplier, and image advertising. Such representations are dealt with in terms of paragraph 36(1)(a) – representations that are false or misleading in a material respect. 2—1

It has not been found that suppliers face any particular uncertainties in this area, however, and the examples given below indicate the obvious false or misleading nature of the representations.

A. Nature and Size of the Business and its Market Position

A representation that implies that a retail business is not in fact retail i.e., "manufacturer," "wholesaler," "factory outlet," even if the implication is contained in a registered trademark or the registered name of the company should not be used unless it is also clearly expressed that the business is a retail operation. 2—2

Examples

A representation that furniture was manufactured in the accused's factory – where the accused had a factory but did not manufacture the advertised furniture. 2—3

A representation contained in the name of the accused that it was a manufacturer – when it was only a retailer.

Words such as "only" or similar claims of exclusivity or superiority of the supplier should not be used if untrue. 2—4

Examples

"More sales than next three competitors" – "The only manufacturer of prefabricated homes" – "The only full-time swimming pool company in the area" – "The only oil service company licensed to do electrical work in the area" – where in each case the representation was not true. 2—5

B. Reasons for Sale (Circumstance-Related Events)

It should not be represented, directly or indirectly, that a specific event e.g., bankruptcy, end of lease, etc., is causing the supplier to sell off all of his existing stock or all the stock purchased from a third party unless such a representation is not misleading. 2—6

Examples

"Giant Bankruptcy Sale including 6,000 coats from (certain) bankruptcy stock" – where only part of the stock was as represented. 2—7

"Bankrupt stock sale of (specific) merchandise" – where most of the merchandise did not form part of the bankrupt stock.

"The end of the big and final sell out – everything reduced to clear – entire stock must be sold by 4 pm" – where the supplier was not selling out his business.

"The end-signs coming down. Goodbye . . . this is the final . . . carpet sale" – where most of the merchandise was not part of the named company's stock.

C. Employment/Business Opportunities

A representation that an employment or a business opportunity exists should not be made, where employment is not in fact being offered or where an advertised business opportunity is little more than a "get-rich-quick" scheme. 2—8

In advertising a business opportunity, care should be taken to ensure that words such as "earn," which convey the impression that employment is being offered, are not used. Further, when an advertisement for an employment or a business opportunity appears in the classified section of the newspaper, the advertiser should ensure that it is inserted under the appropriate heading. 2—9

Examples 2—10

An advertisement under the heading "Men Wanted" advertised part-time employment – when in fact, no employment was offered and the advertiser was attempting to sell automobile polishers and equipment.

"Earn money stuffing envelopes in your spare time" – where employment was not offered.

In addition, it should be noted that some envelope stuffing schemes or similar practices may also violate the pyramid selling provision (see section 36.3). 2—11

D. Attributes of Supplier

No claim of association with, authorization by, or relationship to a third party should be made unless such claim is in fact true. If no formal agreement exists between the advertiser and the third party, it is a good indication that such a claim should not be made. 2—12

Examples

Recent cases have included the use of: 2—13

"Authorized agent" – where the accused was not authorized as an agent to sell airplane tickets for the specified airlines.

"CMHC Approved" – where neither the product nor the accused had such approval.

"Associated with" a specific well-known food supplier – where such association did not exist.

E. Image Advertising

The term "image advertising" is used to describe all forms of non-product advertising. The fact that an advertisement does not specifically mention the advertiser's product does not automatically transform it from a commercial attempt to expand or retain the advertiser's market into an altruistic exercise in social responsibility. To the extent that any such advertisement could materially misrepresent or falsely portray market information, it would so long as it promotes a business interest be subject to the same scrutiny under the Act as are the more familiar product claim advertisements. 2—14

Although this type of advertising has not yet been considered by the courts, the following illustration may clarify the type of representation that could be dealt with under paragraph 36(1)(a). Where, for example, a pulp and paper mill mounts an advertising campaign to publicize its considerable investment in reforestation and the amount of investment is substantially exaggerated, the representation would clearly be soliciting the approval of environmentally conscious consumers who would be swayed by such a display of corporate conscientiousness. Such a representation could therefore be found to be in violation of the Act. 2—15

Representations Relating to the Product

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3.

Representations Relating to the Product

Any representation relating to a product that is being offered for sale should contain all the information necessary to enable a purchaser to make a sound decision. Consideration is given here not only to the use of specific claims relating to the product, but also to such matters as testimonials and endorsements, non-disclosure of material information, hidden charges, and the use of illustrations. These matters would generally be reviewed under paragraph 36(1)(a) and the effects of the general impression test should therefore be considered. 3—1

A. Testimonials and Endorsements

In recent years, the practice of promoting the sale of merchandise by means of representations expressing the views of prominent figures, recognized organizations, experts or other consumers has increased greatly. Representations contained in endorsements or testimonials must be free from all ambiguity, since the public would normally attach greater weight to such representations when made by prominent figures and experts. Consumers would be likely to identify with assessments of a product made by other consumers based on practical use and conveyed with a candour that may itself vouch for the reliability of the assessments. 3—2

The following areas should therefore be given careful attention by advertisers.

(1) Requirement of Actual Test or Use

It can be reasonably expected that in many cases consumers would assume that a third party commending a product had in fact used or tested the product before commenting on it. 3—3

An endorsement to the effect that a company's entire line of products are reliable that is based on exposure to *some but not all* of a company's wares would be misleading. 3—4

(2) Continued Use, Approval

A related problem would arise if a commendation were to imply continued use or experience with a product. Apart from situations in which regular use is implied as the *basis* of a third party's assessment, the continued use problem could typically arise where, for example, a commercial was broadcast repeatedly over an extended length of time and the third party's brand preference or assessment of the product had changed. 3—5

(3) Relevance of Experience or Use

The third party's experience must be relevant to the views offered. Thus it could be deceptive to base a representation about a motor oil additive on the views solicited from someone dressed as a competitive racing driver 3—6

and appearing in a competitive racing setting, if, in fact, he was not a racing driver.

The relevance of the third party's use of the product could also be questionable if his assessment was based on use of the product in circumstances that were not representative of the typical circumstances in which a consumer would use the product, or if the features assessed did not fairly relate to the range of tasks the product would normally be expected to perform. 3—7

(4) Partiality

This problem would typically arise if the third party had an undisclosed connection with the advertiser or its product, e.g., where 3—8

(a) the third party had an undisclosed financial interest in the firm responsible for the representation (shareholder, employee, etc.) or in the advertised product (supplier to the advertiser); or

(b) what was implied to be an independent testing agency or unaffiliated organization was in fact financed or controlled by or similarly related to the advertiser.

Such factors would be relevant even if the third party's assessment was uninfluenced by them, since the public attaches weight not only to the reputation or status of the source of a commendation but also to its independence. 3—9

(5) Payment of Endorser

Where a prominent figure offers his or her opinion, the public would normally assume that person has been paid or has otherwise benefitted from making the *representation*. In such cases non-disclosure of payment would not be misleading. Exceptions could arise if 3—10

(a) the format of a commercial suggested that the party had volunteered his or her services because, for example, of concern about deteriorating standards in an industry; or

(b) in the case of a member of the professional or scientific community, the representation implied that the party was exercising disinterested professional judgment.

(6) A Canvass or Survey of Consumer Preferences, Attitudes or Beliefs

It is essential that a survey questionnaire be devoid of bias so as to truly reflect consumer views and so that the reporting of such views do justice to the actual findings. Similarly if, for example, the format of a television commercial implied, directly or indirectly, that a number of consumers *other than* the persons interviewed in the commercial were canvassed and that the views of the persons interviewed were representative of the consumers surveyed, it would be deceptive if the views of persons interviewed in the commercial did not represent a fair sampling of the opinions expressed by the persons approached. 3—11

B. Comparative Advertising

Comparative performance claims would most likely fall within the purview of either paragraph (a) or (b) of subsection 36(1). Under paragraph (a) it is an offence to make a misleading or untrue representation by any means whatever, while paragraph (b) makes it an offence to make a claim for the performance or efficacy of anything that is not based on a proper and adequate test. 3—12

The following are a few of the potential areas of concern.

(1) Generalized Superiority Claims

Comparative data should not be used to imply general superiority for a product unless such a claim would be accurate over a comprehensive range of normal conditions of use for the product. If the superiority of the product is limited to a certain range of conditions, then any superiority claim should be qualified to reflect that limited range. For example, if a brand of gasoline were to be advertised as producing better mileage than several competitive brands and the claim would be accurate under highway driving conditions but inaccurate under city conditions, the limitation should be clearly expressed. 3—13

(2) Performance Tests

Another related issue involves the question of the reliability of performance tests. This issue is considered below with references to paragraph 36(1)(b). 3—14

(3) Demonstrations

(a) Comparisons demonstrating the relative effectiveness of competing products should be shown under equivalent conditions. For example, a demonstration of the different effects of two types of paints on a wall should be displayed under equal lighting conditions. 3—15

(b) Demonstrations of the relative effectiveness of products should not attempt to compare a product in a use,or under a method of application, for which it was not intended. For example, various oven cleaners are designed to be applied in different ways; some are intended for immediate scrubbing following application, whereas others are designed to be scrubbed only after a waiting period of several hours. Obviously, if an advertiser of the first type of oven cleaner were to compare his product with a cleaner of the second type, both products would have to be used as intended and directed by the manufacturer. 3—16

C. Paragraph 36(1)(b) – Unsubstantiated Claims

There is an onus upon advertisers to ensure that claims relating to the performance, efficacy or length of life of their products have been substantiated by adequate and proper tests. The test must, therefore, have been concluded before the representation is made. A subsequent substantiating test would not exempt an advertiser from liability under this provision. 3—17

The onus of proof upon the accused is higher than that imposed by the majority of criminal offences (including the balance of the misleading advertising and deceptive marketing practices provisions of the Act) where the accused need only raise a reasonable doubt. 3—18

The effect of this reverse onus clause was considered in the case of *R. v. Bristol-Myers of Canada Ltd.*,[1] which involved a television commercial promoting the relative effectiveness of Fleecy Fabric Softener over comparable dryer products. 3—19

"While it may well be onerous upon those promoting a product to be called upon to justify that their tests were adequate and proper ... I interpreted (paragraph 36(1)(b)) to require an accused to lead evidence in support of the tests and that upon so doing it was open to the Crown to lead evidence to show that such testing was not adequate and proper."[2] 3—20

The phrase "adequate and proper test" has not been defined by the legislation in order to preserve flexibility in an increasingly complex and highly technical field of expertise. However, performance claims that may raise a question under the Act fall into two broad categories – those that are inappropriate in relation to actual test results and those that are based on poorly designed test methodology. 3—21

(1) Inappropriate Claims

(a) If the performance claim is broad, the existence of proper tests on only one portion of the claim or under only one condition of use is not sufficient. For example, where a national representation of savings relates to the tested performance of a heat pump, and it is shown that the test was conducted under the climatic conditions of Southern Ontario, the results should not be generalized to all areas of the country. 3—22

(b) Results must be not only significant, but must be meaningful to the consumer. For example, a representation that an air conditioner is quieter than another brand where the difference could not be detected by the human ear should not be used. 3—23

(c) Consumer panel testing of product characteristics that are perceptible only to the senses can sometimes establish relative superiority; but it can not usually quantify the extent of the superiority. Consequently such testing, if proper, could substantiate claims such as "feels softer" or "tastes better" but not a claim such as "three times more softness." 3—24

(2) Test Methodology

"Tests should be expected to show that the result claimed is not a mere chance or one time effect".[3]

(a) Non-repetition of test – The reliability of the data resulting from a test is conditional upon the achievement of similar results from a repetition of the test. 3—25

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1. (1979), 48 C.C.C. (2d) 384.

2. SUPRA at p. 385.

3. R. V. ALPINE PLANT FOODS, Provincial Court of Middlesex, June 1981, unreported.

(b) User-tests – When consumers are asked to use and evaluate a product, various 'test effects' can influence their behaviour. For example, a user testing a gas saving device may modify his driving habits to a degree sufficient to affect the observed performance. Further, since such tests are not conducted under "ideal controlled test conditions," other factors such as climate and location would also have an effect. Unless such weaknesses are controlled, user tests would not be adequate and proper. 3—26

(c) Unrepresentative samples may produce biased test results. If, for example, subjects selected for the test were already known users of the product (and therefore biased in its favour) the use of such results unless expressly qualified in the representation would be likely to raise a question under this provision. 3—27

Example

Most prosecutions under this provision have related to representations made where no tests had been undertaken or where user tests (notably of gas saving devices) have not been found adequate to substantiate the claim. 3—28

"20% to 40% better gas mileage" – where there was no adequate and proper test.

D. Non-disclosure of Material Information

Any information that would affect a purchaser's decision should be included. Failure to disclose the information as shown in the following examples has resulted in conviction (see also "Free"). 3—29

Examples

Carving leather of various weights available at specified prices – where it was not disclosed that the sale price only applied to the purchase of a full side of leather. 3—30

8% mortgages advertised – where it was in fact 11½% mortgages reduced to 8% by means of a CMHC interest reduction loan.

Photocopier advertised for $2995 – where an integral part of the copier was not included in that price.

Cars and trucks advertised for sale with "free Autopac insurance" – where the insurance was only included if the full asking price of the vehicle was paid.

Sewing machines represented as capable of certain functions – where an additional item was required before the machine could perform as advertised.

"No charge for children under 12 in same room as parents" – where the special rate was charged only when specifically requested.

Carpet cleaning service would "clean all fibres deep down to the backing" – where the offer did not include removing the dirt and shampoo.

"Casino of discounts, purchaser entitled to participate in game of chance for 10-40% discounts" – where a minimum purchase was required to become eligible to participate.

E. Hidden or Additional Charges

This subject is similar to non-disclosure, but relates specifically to unexpected costs to the purchaser. If any representation is made concerning the price of a product, any additional required payment should be disclosed at the same time. 3—31

Examples:

Recent cases have included: 3—32

"Replacement mufflers installed for $4.95" – where there was an additional $1.45 charged.

"Service check of automatic transmission for $15.88 plus tax" – where there was an additional charge of $15 for labour.

"Supercycle Bikes, completely assembled and rarin' to go" – where there was an additional charge of $3 for assembly.

"Edmonton to Glasgow – seat sale return $359" – where there was no direct flight and an additional charge of $42 was payable to connect with the flight.

On assuming the builder's mortgage on a home, the legal fees would be included in the cost of the home – where some purchasers were charged more than $1,000 for this service.

Customers only to pay for the prints they liked – where there was an additional $2 processing fee.

F. Use of Illustrations

The general impression test (referred to above) ensures that a court will consider all aspects of a representation. Where an illustration forms part of a representation, it must accord with the accompanying text of the advertisement or in the case of broadcast advertisement with the script. Care must therefore be taken to ensure that no erroneous impression can result. 3—33

Examples

Coats depicted with fur collars in a broadcast advertisement were represented to be reduced to $49 – where the coats that were being sold at that price did not have fur collars as represented. 3—34

An illustration of a TV represented as being on sale from $499 – where the illustrated model was not being sold at that price.

G. Adaptation of Manufacturer's Promotional Material

The deeming provisions contained in subsections 36(2) and (3) are referred to below in connection with the manufacturer's liability, but it should be noted here that a retailer who takes a representation made by a manufacturer and transforms it into an advertisement of his own has chosen to promote the product *himself* and would therefore be liable for any violations of the misleading advertising or deceptive marketing practices provisions. 3—35

H. Miscellaneous Untrue Representations

Over the last three years, other representations which have been found to be untrue have related to the following: 3—36

- non-availability of represented facilities and amenities;
- non-inclusion of items or parts;
- quality claims, i.e., genuine leather, solid oak, sterling silver, 100% organic, made in Canada, handcrafted;
- prior history, i.e., one owner;
- performance claims;
- claims as to size or quantity of product.

Representations as to Price

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4.

Representations as to Price

Price representations often involve a comparison of two prices or a "savings" claim. These representations are usually considered under paragraph 36(1)(d). This provision is similar to the misleading price provision originally included in the Act in 1960 and, because of the large number of cases reported over the years under this (and the former) provision, only a few recent examples are included. 4—1

A. Paragraph 36(1)(d) – Misleading Price Representation

This section explicitly states that the relevant market is used for determining regular price unless the representation clearly states that the quoted regular price is the seller's own regular price. 4—2

(1) General Guide

A simple general test that can be applied to determine whether use of an expression may be in violation of the provision is: 4—3

> "Would use of the expression lead a reasonable shopper to conclude that the comparison price quoted is that at which the product has been ordinarily sold?"

If the answer to this question is yes and the comparison price is not the regular market price, such a comparison should not be made. 4—4

(2) The Concept of Ordinary Selling Price

The interpretation given to the term "ordinary price" has evolved from early decisions regarding representations about price consisting of words such as "regular" and "comparable." Generally speaking, courts have adopted the broad meaning of words used in the representation and disregarded semantic differences; phrases such as "*Compare to*," "*Was*," "*Cents Off*," "*Special*," and "*Value*," have been held by the courts to convey the impression that the comparison price so designated is that at which the product has been ordinarily sold. 4—5

(3) Reference to Price in Market Area

A seller should ensure that he knows the fair market price of the product before using an expression such as "regular." If the seller does not know the market price, but the price at which he wishes to sell is a reduction from *his* regular price, then he should qualify the comparison price by saying, for example, "our regular price." In addition, care should be taken not to quote the regular price prevailing in another geographical region, for example, an Ottawa retailer should not rely on a Toronto regular price. 4—6

(4) Comparison Price Should be Recent and Relevant

The advertiser should not rely on ancient history. The comparison price should be one at which the article was sold during a period sufficiently 4—7

recent as to have relevance or, in the case where the representation relates to an introductory offer, the existence of the offer should not be unduly prolonged. Furthermore, the comparison price should reflect a substantial sales volume. If, for example, the price of the product were to be raised for a few weeks in which very few sales took place and then reduced, the retailer should not attempt to suggest that the inflated price was the regular one. What would be regarded as a "substantial sales volume" will depend on the nature of the product and the industry; but it can be said that there should be a sufficient number of sales so that a consumer would be justified in assuming that the amount of the reduction from the price represents a genuine bargain or saving.

(5) Consumer Bargain

An advertiser should not consider the fact that a consumer is getting a bargain as a means of evading the section. If, for example, the actual market value of a product was $15.00, a representation of "Reg. $20.00 – Sale price $10.00" would violate this provision. 4—8

(6) Manufacturer's Suggested List Price

There would seem to be strong reason to believe that the use of terms such as Manufacturer's Suggested List Price in comparison with a retailer's price can be deceptive to a substantial portion of the public when used with respect to a product where it does not reflect its ordinary selling price. Further, it is not necessarily reliable as an indication of market price since in many product areas such prices are significantly higher than the market price. 4—9

Examples

In each of the following cases, the first or comparison price was shown not to be the ordinary selling price and a conviction resulted under this provision. Some variations on the use of regular price and sale price that have recently occurred include: 4—10

"Compare at ... Our price ..."

"Regular ... now only ..."

"Tagged (price) ... Special ..."

"Our regular suggested list ... save ... reduced to only ..."

"Regular price ... private backdoor sale (price)"

"Save ... (same or similar product) ordinarily sold for 3 times the price."

B. Paragraph 36(1)(a)

Price related representations, other than those relating to ordinary selling price, are considered under paragraph 36(1)(a). The following words and expressions used in circumstances where they are found to be untrue or misleading in a material respect have been considered in prosecutions completed and reported in the last three years: sale; percentage reductions; discounts; wholesale or manufacturer's prices; lowest prices; and half price. 4—11

Examples

"Sale prices in effect" during specified sale period – when the prices remained unchanged before, during and after the period. 4—12

"Reductions of 40% – 70% on all merchandise" – when some items were not reduced as represented.

"Special of the week – 50% off in this section" – where a number of items were not reduced as represented.

"Your discount – 50% off all prices shown in this catalogue" – where the discount price was in fact the ordinary selling price.

"Discount for diesel fuel of 17¢ per gallon" – where the discount was refused to some purchasers.

"Because you're buying directly from the manufacturer you can save up to 60%" – where the accused was not the manufacturer.

"Factory to you savings" – where the accused did not manufacture the advertised item.

"Selling gold jewellery wholesale to the public" – where the prices were not in fact wholesale prices.

"The lowest price for printing tickets" and "the lowest prices we've seen" – where the prices were not the lowest in the market area.

"Half-price fur sale" – where the accused inflated the regular price before marking it down to half price.

C. Free

In addition, representations similar to "half-price" sales involve the use of "2 for 1" or "1¢ sale." These, however, are usually considered together with the representation "free." 4—13

It has been well established for more than a decade that a representation for a "free" or other refund or coupon offer should not contain an essential feature or condition that is hidden from a purchaser. To allow such methods of promotion would enable a manufacturer to include conditions that would subsequently be discovered by a purchaser who might not be willing or able to comply with them. 4—14

Examples

"Free 3 felt pens see details inside" appeared on the outside of a package, where the details hidden inside disclosed that an additional purchase was necessary to obtain the "free" pens. 4—15

"Free insurance with the purchase of a car" – where the free offer only applied when the full asking price was paid.

"Free Florida vacation with the purchase of a snowmobile" – where the "free" offer did not include transportation and meals and there were restrictions imposed as to age and sex.

Further, where an article is advertised as being free with the purchase of another article but a discount or lesser price is given in place of the "free" article, then the article is not in fact free. 4—16

Example

"When you leave your color print film for developing and processing, we will give you a new roll of film at no charge" – where the processing price was inflated to cover the "free" film and refunds were given to customers not requiring the film. 4—17

Nor is it "free" in a two-for-one situation where the price of the first article is inflated to cover the cost of the second. 4—18

Example

"Buy one (real estate lot) . . . receive your next choice absolutely free" – where the price of the first lot was inflated to cover the cost of the "free" lot. 4—19

Representations or Practices Solely by Manufacturer

5

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5.

Representations or Practices Solely by Manufacturer

A. Deeming Provisions Related to Offences Under Section 36

Subsections 36(2) and 36(3) of the Act clarify the responsibility of different parties in the chain of supply of a product, e.g., manufacturer-distributor-retailer, for representations made by them that are in violation of sections 36 and 36.1. The primary purpose of subsection 36(2) is to protect a person in the supply chain from possible liability for representations that originated further up the chain, and that are contained in material passed on by him, e.g., brochures, labels, etc., to identify the person responsible for the representation and to impose liability solely on the originator. On the other hand, representations that violate section 36 but that are only made within the chain of supply are deemed by subsection 36(3) to be made to the public. 5—1

Retailers who display products on their shelves are not potentially liable for representations on labels and other point-of-sale material designed and produced by the manufacturer of the product unless the representations were made at the retailer's specific request or unless the product was foreign manufactured and the retailer was also the importer of the product. However, a retailer who takes a representation made by a manufacturer and transforms it into an advertisement of his own, e.g., a label claim into a newspaper advertisement, could not avoid liability by relying on subsection 36(2). In this situation the retailer has *chosen* to promote the product himself and is, therefore, responsible for the claim. 5—2

Example

An instore sign for a gas-saving device represented fuel savings of 25% – although the retailer was merely repeating the representation made to him, he was convicted on the basis that he had chosen to promote the product himself. 5—3

A situation might arise where both a manufacturer and a retailer could be subject to investigation for similar representations. For example, if a manufacturer, in attempting to persuade a retailer to carry his product, were to misrepresent the product to the retailer, and the retailer were then to make a similar representation in a newspaper advertisement, both parties might be liable although the particulars of each offence would differ slightly. The manufacturer would be liable for his representations to the retailer pursuant to subsection 36(3), and the retailer would be liable for the representation in the advertisement. It is likely, however, that for the efficient use of resources the inquiry would be focussed on only one party. Factors such as the relative sizes of the retailer and the manufacturer, the type of claim, and the capacity and knowledge of the retailer in the relevant field, would likely influence the direction of an inquiry. 5—4

B. Package Information

Manufacturers must bear the responsibility for representations that they make on their products as they appear on the retail shelf. Subsection 36(2) states that any such representation is deemed to have been made only by the person who caused it to be made, i.e., the manufacturer unless the manufacturer is not in Canada, in which case the importer is responsible. 5—5

This provision may also affect a manufacturer who puts "special," "cents-off" or "free" offers on the packaging of his product, if a retailer's subsequent pricing actions have the effect of making the representation untrue to the public (see price representations above). 5—6

Example

"Special $1.49" was printed on a label attached to a bottle of shampoo by the manufacturer – where the label had been used for at least six months, the special price was no longer "special" and had become the ordinary selling price. 5—7

C. Paragraph 36(1)(c) – Misleading Warranties

Although paragraph 36(1)(b) also relates to warranties and guaranties and is considered above, this provision operates where the warranty is itself misleading or where there is no reasonable prospect that it will be carried out. It would also include warranties that reduce a purchaser's usual rights and guarantees that are worthless. 5—8

Example

Where a tire warranty contained the representation "adjustment prices are intended to, but may not in all cases, represent current average selling prices" and in 85 per cent of the cases the adjustment prices were higher than the average selling prices, the accused was found to have violated this paragraph. 5—9

Other Price Related Representations

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6.

Other Price-Related Representations (Sections 36.2, 37 and 37.1)

A. Section 36.2 – Double Ticketing

The offence created by this section only occurs when a product is supplied at the higher of two or more prices marked on the product. 6—1

In this connection, it should be noted that the definition of "supply" includes an offer to sell. This section does not affect shelf stock revaluation if the old price is removed or is obscured so that it is no longer clearly expressed. 6—2

In recent years most cases have related to grocery and drug store items on which two prices were clearly marked but the items were sold at the higher prices. 6—3

(1) Different Price Stickers on Identical Units of a Product

Questions have been raised relating to whether the section would prohibit the pricing and sale of identical items of a product at different prices. An inquiry would not be initiated under this section where a price of $X was marked on one item of a product and a price of $Y was marked on another identical item , so long as each was sold at its marked price. This view is based on the assumption that only one price is clearly expressed on each unit and that there are no other prices displayed at point-of-purchase. 6—4

(2) Manufacturer Preticketing Price

Where a product has been preticketed by the manufacturer and the retailer has subsequently affixed a higher price to the public and supplied it at the higher price, no prosecution involving such preticketing will be undertaken under this section unless both prices can be shown to have been expressed by the retailer or by someone acting expressly on his behalf. 6—5

B. Section 37 – Non-availability of Advertised Specials

This section is specifically designed to deal with the practice of advertising products at bargain prices that are not available in reasonable quantities. 6—6

There is, however, considerable uncertainty in the business community over the application of the section and it will likely be some time before the courts have an opportunity to consider all the potential issues associated with the section. The following are, however, some general comments. 6—7

(1) Bargain Price

The section does not come into play in all cases of non-availability. It is only relevant where a product is being advertised at a "bargain price" as defined in the section. The use of words in an advertisement such as "sale price" or "special" could bring an advertisement within the purview of this definition. In addition, if a product is advertised at a price that is significantly lower than the normal price for that product in the market, then the definition could also apply even if there is no direct mention in the advertisement that the advertised price is a bargain price. 6—8

(2) Nature of the Market

This phrase is not specifically defined in the Act but it appears to refer to considerations such as geographic location, method of advertising, and type of product advertised. 6—9

(3) Nature of Advertisement

An advertiser is still able to clear out a few items of old stock that would not normally amount to a reasonable quantity without contravening the section if he *clearly* specifies in the advertisement the number of items available. However, use of a general phrase such as "quantities are limited" would *not* be an absolute defence to a charge under this section, although it may reduce the quantity that would otherwise be required for a reasonable supply in a given situation. 6—10

(4) Advertiser – Supplier Relationship and Franchise Advertising

The section was drafted in contemplation of situations where the person who advertises the product would be the same as the person who supplies the product. Quite often, however, retail outlets are operated as franchises,which may mean that the franchisor is not the same as the entity operating an individual store. In these circumstances, there may be a co-operative agreement with respect to advertising. Many franchise operations share advertising costs with the parent company and in return the head office marketing department provides advertising such as newspaper supplements or flyers to promote products on behalf of franchised retailers. In such cases, a franchisee could be regarded as coming within the purview of the section if he is responsible for the non-availability to the public of reasonable quantities of an advertised special. In addition, the franchisor could be liable if it did not supply reasonable quantities of the advertised specials to the franchisees. However, it is recognized that problems relating to availability of advertised products may arise, for example, in the following circumstances: 6—11

(a) where small retail outlets do not have the facilities to carry a full line of stock at all times;

(b) where products are seasonal or are a special head office purchase made available to the retailer on request; or

(c) where there is limited supply in clearance sales of slow-moving or discontinued stock.

For the advertiser, the promotion of those products that are subject to any of the above circumstances entails a corresponding responsibility to ensure that the public is properly informed of the applicable supply restrictions. Lacking such disclosure, a complaint of non-availability from the public could provide the Director with grounds to commence an inquiry. In order to avoid such an outcome, advertisers should take all possible steps to disclose prominently their store policy and the conditions generally applicable to their flyer sale advertising. Advertisers might therefore wish to consider the following suggestions for inclusion in their flyer sale advertising: 6—12

(d) if a discontinued line or clearance sale is being promoted, total quantity of the product available nationally or regionally, if known, could be stated noting that some stores may not have access to any supply;

(e) where items listed in a sale flyer may have become totally unavailable before the commencement of the sale due to events beyond the retailer's control, a correction notice should, if possible, be placed on the front of the flyer; and

(f) where items listed in a sale flyer will only be available in some stores, the portion of the advertisement relating to those items should be distinguished from the advertising of the products generally available. The phone numbers and retail store addresses of participating retailers should then be provided with an indication that customers should phone ahead to check for supply availability of any items specially distinguished in the flyer.

(5) Defences Provided in Subsection 37(3)

(a) Inability to Supply

There may often be legitimate reasons for an advertiser's inability to supply an advertised product. Since, for example, catalogue sale advertisements must be prepared weeks and even months in advance and goods are often ordered for a delivery date to coincide with the opening of the sale, any transportation delays due to bad weather or strikes could make it impossible to have the product available for the advertised sale period. 6—13

(b) Reasonable Quantities

Although the crux of this offence depends on the definition of this term, it is not possible to specify what quantities might be considered reasonable. What is reasonable will depend on the factors outlined in the section, some of which have already been discussed. In general, the best guide for an advertiser would be the history of consumer demand for the same or comparable products during previous sales using similar advertisements. If a reasonable quantity was available, the advertiser would have a good defence. 6—14

(c) Rainchecks for Non-Available Items

Offering and fulfilling rainchecks is another defence available to retailers should any allegations be made that no *reasonable* supply of the special was made available. 6—15

Retailers should *prominently* display the terms and conditions of any raincheck policy in their stores as well as in their advertising. It has been found that many complaints and subsequent preliminary investigations could have been avoided if the customer had known of the existence and of the terms and conditions of a raincheck policy. 6—16

Recent Cases

Recent prosecutions under this provision have related to sales of air conditioners, televisions, electronic ignition kits and diapers and in all cases the point at issue was the lack of reasonable quantities of the product. 6—17

C. Section 37.1 – Sale Above Advertised Price

Section 37.1 of the Combines Investigation Act makes it an offence to *supply* a product at a price that is higher than the price *advertised* in the market to which the advertisement related. 6—18

(1) Market May Be Restricted

Subsection (4) of section 37.1 gives the advertiser the opportunity to define the market more narrowly in the advertisement than the market to which the advertisement could otherwise reasonably be expected to reach. Therefore an advertisement in a local paper may, if it is clearly indicated in the advertisement, restrict the offer to a specific store branch of a multi-store operation or even to a specific department of that branch. For example, an advertisement could be clearly restricted to the "bargain basement." Similarly, a business that has both catalogue and normal retail operations may limit its advertised prices to its catalogue operations. 6—19

(2) Exemptions

The section does not apply in respect of an advertisement that appears in a catalogue in which it is prominently stated that the prices contained therein are subject to error if the advertiser establishes that the price advertised is in error. Also, if an advertisement containing a price error is immediately followed by another corrective advertisement, the section would not apply. 6—20

In cases where securities are sold at a higher price on an open market during a period when the prospectus relating to that security is still current, a limitation has been placed in the section to remove the possibility of prosecution. In addition, the proposed amendments to the Combines Investigation Act would expand this limitation to include other similar transactions, e.g., real estate sold at higher prices than listed if the seller is not in the business of selling real estate. 6—21

(3) Advertisement

It should be noted that the section applies only to an *advertisement* of a product for sale or rent in a market. It does not apply to representations in other forms such as oral statements and labels as do most of the other misleading advertising and deceptive marketing practices provisions. 6—22

(4) Sale Flyers

The question has arisen as to whether sale flyers that appear as newspaper supplements could be considered as catalogues and consequently whether the catalogue exemption would be applicable. 6—23

This special defence is not applicable to newspaper supplements since they have much shorter lead times than catalogues and there would usually be ample opportunity to publish an immediate correction. 6—24

Examples

A large number of prosecutions under this provision have occurred in the last three years. More than 20 of these cases related to advertisements by supermarket chains and their franchise operations for food items. An additional 10 cases related to household, hardware and automotive products. The following examples also occurred: 6—25

Airline tickets were advertised at a reduced rate of $31 – but were supplied at a higher price.

Coats were advertised for sale at a specified price and an accompanying illustration showed the coats to have fur collars – but in fact the coats with fur collars were supplied at a higher price.

7

Other Practices

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Other Practices

A. Section 36.1 – Untrue, Misleading or Unauthorized Use of Tests and Testimonials

(1) General

The section prohibits publishing a testimonial or representing that another person has made a test as to the performance, efficacy or length of life of an advertised product, except: 7—1

(a) where the third person who gave the testimonial or made the test has *himself* previously *published* the testimonial or represented that he had made the test;

(b) where the person, prior to publishing the testimonial or representation that another had conducted a test, had secured *in writing* the third party's approval of the testimonial or representation *as well as* permission to publish or make it.

A letter from the third party to the person does not amount to publication and, unless approval is received from the third party, the use of the letter as a testimonial is in violation of this provision. Furthermore, the representation or testimonial made or published by the person must accord with the representation or testimonial the third party had previously made, published or approved. An example of this could arise where a "quote" was taken out of context e.g., where a reputable lab report of a product test is published and it expresses favourable comments or results on certain points, but these comments or results are heavily qualified. If the representation presents the favourable comments or results without the important qualifications, the representation may be found to be in violation of this provision. 7—2

Example:

A representation for liquid fertilizer stated that a third party had made a test – but since the third party's permission had not been obtained, the representation was found to be in violation of this provision. 7—3

(2) Use of Actors to Portray Consumers in Consumer Testimonials

Advertisers have inquired whether the wording of section 36.1 "... accords with the representation or testimonial previously made, published or approved ..." means that a broadcast consumer testimonial can only be given by the actual consumer and that an actor may not be used to portray the consumer. They have suggested that often genuine testimonials cannot be used to promote products because of some external factor such as a camera-shy consumer. The use of actors to portray consumers in such circumstances would not give rise to an inquiry under the Act, subject to the following: 7—4

(a) a cosmetic effect is not being portrayed or appearance is not material as it might be, for example, in the case of an advertisement for clothing;

(b) the testimonial as presented in the advertisement had been given by the actual consumer;

(c) the testimonial would not raise any issue under subsection 36(1).

B. Section 36.3 – Pyramid Selling Scheme

A pyramid selling scheme that is licensed or otherwise permitted by a province[4] is not within the scope of this section. Under this section, a person who induces or invites another to participate in a pyramid selling scheme, as defined, commits an offence. The definition of a scheme of pyramid selling does not include a sale to an ultimate consumer with no right of participation. 7—5

There are three basic areas of concern in respect of pyramid selling schemes: "head-hunting fees," "inventory loading" and lack of product flow to retail sale, i.e., to ultimate consumers who have no further right of participation. 7—6

The "head-hunting" fee is the term associated with the initial investment or buy-in aspects of a multi-level marketing scheme. The representations used to promote these schemes emphasize the quick and sizeable profits that can be realized through the recruitment of others, and tend to present the actual product sales as very secondary considerations. The definition set out in paragraph 36.3(1)(a) applies to a scheme that contains aspects of this kind, i.e., the right to receive a benefit in respect of the recruitment of others into the scheme or for sales made to recruits. 7—7

"Inventory loading" or "front-end loading" are terms used to describe a practice of selling large volumes of inventory to a new recruit usually as an entry requirement. The definition set out in paragraph 36.3(1)(b) applies to schemes of this kind. Basically this paragraph defines a pyramid as one that pays bonuses to an individual in respect of the sale of goods that are not sold to him or by him or to the final consumer, i.e., one who is not a member of the scheme. 7—8

The third area of concern is product flow to retail. It is possible that a scheme may have no initial investment and not be characterized by conventional inventory loading as described above, yet still raise an issue under the Act. Where, for example, bonuses are paid to sponsors on the basis of purchases made by recruits from the company and the goods do not reach the retail level, the scheme could come within this definition. 7—9

Such a system, where the bonus is paid to a sponsor, who is no longer the supplier, and where goods on which the bonus is calculated do not reach the ultimate consumer, who is not a member of the scheme, could bring this scheme within the meaning of the definition set out in paragraph 36.3(1)(b) of the Act. 7—10

4. Saskatchewan and Alberta have specific licensing type provisions; other provinces prohibit only certain types of practices.

C. Section 36.4 – Referral Selling

A referral selling scheme that is licensed or otherwise permitted by a province[5] is not within the scope of this section. Under this section, an offence occurs when a person induces or invites another to participate in a scheme of referral selling as defined in the section. 7—11

Interpretation

The definition contained in this section applies where a person's decision to purchase a product is influenced by the fact that he will receive a rebate if other sales are transacted by anyone associated with the company to other persons whose names he has supplied. 7—12

The aim of the prohibition is to discourage the practice of inducing the person to purchase on the strength of the prospect of a future benefit. Such a practice can lead to purchase decisions that are not based on the qualities of the product. It could also prompt a person to recommend a product to another person, whose name he has supplied, not because of its merits or price but rather in order to gain the promised rebate. 7—13

D. Section 37.2 – Contests

Section 37.2 requires that a person conducting a contest must ensure that there is no undue delay in distributing prizes, and that selection is made by random choice or by skill in any area to which prizes have been allocated. There are also requirements for adequate and fair disclosure of the number and approximate value of prizes and of any fact within the advertiser's knowledge that would materially affect the chances of winning.[6] Thus the effect of the section is to require the positive performance of certain actions rather than, as is the usual scheme of the Act, to prohibit specified activities. 7—14

Adequate and Fair Disclosure

Disclosure should be made in a reasonably conspicuous manner at a time before the potential entrant is inconvenienced in some way or committed to the advertiser's product or to the contest, e.g. a retailer should ensure that if a contest is promoted in the media, the relevant details are disclosed before consumers are drawn to the retail outlet. 7—15

It should be noted, however, that this section does not refer to advertisements or representations. It therefore does not necessarily require that all the information be disclosed in each and every advertisement. 7—16

The issue of adequate disclosure is important in relation to each of the following points:

(1) "Approximate Value"

The section requires the disclosure of the "approximate value" of the prizes. This should normally mean the approximate regular market value of 7—17

5. *None of the provinces appear to license such schemes, but most provide that a contract to enter such a scheme is voidable.*

6. *In addition to complying with section 37.2, a contest must be lawful under the Criminal Code, other federal and provincial statutes and local by-laws.*

the product. However, where the final value of a prize in a contest is dependent upon the location in Canada of the winner, e.g., a trip from the winner's residence to the Caribbean, the inclusion of a few representative examples or of the range of possible values of the prizes would meet the requirements of the section. Depending on the circumstances of each case, there may be other acceptable methods.

(2) Regional Allocation

Uncertainty may also exist concerning contests where the prizes are allocated on a regional basis, e.g., one for entrants from the Atlantic Provinces, one for entrants from Québec, etc., while the promotion for the contest takes place on an inter-regional basis. In any such case, any regional allocation of prizes should be clearly disclosed. 7—18

(3) Chances of Winning

Whenever the total number of any production run or other population in which prizes are to be seeded is known, this matter would be a "fact within the knowledge of the advertiser that affects materially the chances of winning" and should therefore be disclosed. For example, in any case where winning coupons are packed in specially marked containers and the total number of specially marked containers is known, that fact should be disclosed. Similarly in a case where sets of tokens, e.g., under bottle caps are distributed, the availability of scarce tokens needed to complete a set should be disclosed. 7—19

(4) Series of Prizes

It should be noted that when a contest involves a series of prizes to be awarded at different times, care should be taken to ensure that the promotional material does not imply that all of the prizes remain to be won when some have, in fact, already been awarded. For example, in a contest where a prize of $1,000 is to be awarded each month for a series of five months, advertisements for the contest should not continue to imply, after the first month of the contest, that five $1,000 prizes are to be awarded. 7—20

Prosecutions have related to:

- the non-disclosure of the number and value of prizes; 7—21
- the area to which the prizes relate;
- delay in the distribution of prizes.

These recent cases have mostly involved relatively small, local businesses which may not have been aware of the Director's Program of Compliance. The Branch encourages all advertisers, particularly those intending to conduct a contest, to submit the relevant material under this program (for details of which see below). 7—22

Miscellaneous and Program of Compliance

8

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8.

Miscellaneous and Program of Compliance

A. Liability of Advertising Agencies

To anyone who views advertising agencies as passive participants in the dissemination of marketplace information, it may seem unduly harsh to fix these agencies with responsibility for the accuracy of such information. However, it is unrealistic to view advertising agencies as merely conveying information when an agency may have initiated the marketing concept or strategy, the implementation of which resulted in a contravention of the Combines Investigation Act, or where it is the creative resources of the agency which gave to a promotional effort its critical design. Subsection 37.3(1) of the Act contains a general defence (often referred to as a publisher's defence) which, in certain circumstances[7], will also be available to advertising agencies. 8—1

In this connection, the conviction of an advertising agency under the misleading advertising provisions should be noted. In this case the accused agency, which had been retained by a client to create a television commercial, in turn hired a research firm to prepare a survey, the results of which became the basis of the representations made in the commercial. The agency prepared the wording of the commercial and arranged for airing in Canada. 8—2

Even where an agency does no more than "accept" a representation or advertisement for printing, publishing, etc., the agency must act in "good faith." When a representation appears suspect or contains a claim that requires substantiation, the agency is responsible for ensuring that the information provided to it is accurate and can be substantiated. The expertise of an agency in relation to the promotion of a particular product or industry or the use of a promotional technique, e.g., contests, will be considered in determining whether an agency acted in "good faith." 8—3

B. Common Law Defence of Due Diligence and Subsection 37.3(2)

A statutory defence to a charge of misleading advertising under section 36 or 36.1 has been available to advertisers since 1976. In order to avoid liability, an advertiser must establish the four essential elements listed in the following paragraphs of subsection 37.3(2): 8—4

(a) that the act or omission giving rise to the offence with which he is charged was the result of error;

(b) that he took reasonable precautions and exercised due diligence to prevent the occurrence of such error;

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7. Readers should note that the defence is only available when the advertising agency acts on behalf of an advertiser situated in Canada. Where the client firm is located outside Canada, the defence would not be available to the agency.

(c) that he, or another person, took reasonable measures to bring the error to the attention of the class of persons likely to have been reached by the representation or testimonial; and

(d) the measures referred to in paragraph (c) ... were taken forthwith after the representation was made or the testimonial was published.

In 1978 the Supreme Court of Canada[8] gave judicial recognition to a common law defence of due diligence that is of general application to strict liability offences. The defence is available to an accused who proves that he reasonably believed in a mistaken set of facts and that he took all reasonable steps to avoid the event giving rise to the offence. 8—5

The Supreme Court decision gave rise to speculation as to whether the broader common law defence would be applicable in cases involving sections 36 and 36.1 for which a statutory defence has been specifically provided. The position adopted by the Branch was that the common law defence would have no application in such cases. The recent Ontario Court of Appeal decision of R v. CONSUMERS DISTRIBUTING COMPANY LIMITED[9] has lent judicial weight to this position. 8—6

That case involved a false representation made by the company to the effect that a gas-saving device had "actually achieved fuel savings of up to 25%." The representation was in the form of a sign situated in one of the company's retail outlets. The company had not complied with the requirements of paragraphs 37.3(2)(c) and (d). Consumers Distributing raised in its defence the fact that it had honestly believed in the accuracy of the representation and that such belief was based on a consideration of the independent test results and the testimonials of reliable users provided by the supplier of the device. 8—7

The Court of Appeal concluded that the common law test was met by the company in that its consideration of the material provided by a reputable supplier constituted the taking of reasonable steps to ensure the reliability of its representation. There was no onus upon Consumers Distributing to depart from the usual trade practices and conduct its own testing of the device. 8—8

However, the Court held that Parliament, by providing a defence to the charge of false and misleading advertising several years before the common law defence was established by the Supreme Court of Canada, intended that it should be the only defence available to the charge. It is interesting to note that the Court was of the view that paragraphs (a) and (b) of subsection 37.3(2) are the statutory equivalent of the common law defence. Although Consumers Distributing had satisfied the first two requirements of the section, it did not take the requisite corrective measures of advising persons likely to have been affected by its advertisement and was therefore unable to rely on subsection 37.3(2). 8—9

8. R. v. THE CITY OF SAULT STE. MARIE (1978), 40 C.C.C. (2d) 353.

9. (1980), 57 C.C.C. (2d) 317.

C. Advertising Error Correction Notices and Subsection 37.3(2)

While correction notices are generally placed promptly in newspapers once an error has been detected, this may not be sufficient to "bring the error to the attention of the class of persons likely to have been reached by the representation." The following additional steps should also be considered, where appropriate: 8—10

(a) Where newspaper advertisements containing an error are displayed in the store a correction should be displayed as prominently as the original advertisement.

(b) Correction notices should be placed at point of sale immediately.

(c) Sale flyers should, where possible, have the correction notice on the front of the flyer (see above).

(d) Correction notices should appear in the same media as the original inaccuracy.

(e) Errors in catalogues should be brought to the attention of the purchaser at the time of order, not on delivery.

D. Program of Compliance

The Director of Investigation and Research is always available to give advisory opinions to members of the business community under this program. With respect to the misleading advertising and deceptive marketing practices provisions, these opinions are simply an expression of whether, on the basis of the information put before him, the Director would be obliged to initiate an inquiry if a proposed advertisement were to be published or a practice to be established. These opinions are neither regulatory in nature nor binding on either party but are intended to avoid the commission of an offence that might otherwise occur. This program is of particular assistance to potential contest holders in interpreting section 37.2 as well as to any advertiser encountering specific difficulties with other sections of the Act. 8—11

9

Appendices

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Appendix I

Misleading Advertising and Deceptive Marketing Practices Provisions of the Combines Investigation Act (sections 36 to 37.3).

36. (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) make a representation to the public that is false or misleading in a material respect;

(b) make a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies upon the person making the representation;

(c) make a representation to the public in a form that purports to be

(i) a warranty or guarantee of a product, or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result

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

(d) make a materially misleading representation to the public concerning the price at which a product or like products have been, are or will be ordinarily sold; and for the purposes of this paragraph a representation as to price is deemed to refer to the price at which the product has been sold by sellers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold by the person by whom or on whose behalf the representation is made.

(2) For the purposes of this section and section 36.1, a representation that is

(a) expressed on an article offered or displayed for sale, its wrapper or container,

(b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,

(c) expressed on an in-store or other point-of-purchase display,

(d) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or

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

shall be deemed to be made to the public by and only by the person who caused the representation to be so expressed, made or contained and, where that person is outside Canada, by

(f) the person who imported the article into Canada, in a case described in paragraph (a), (b) or (e), and

(g) the person who imported the display into Canada, in a case described in paragraph (c).

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

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

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

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years or to both; or

(b) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both.

36.1 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of any product, or for the purpose of promoting, directly or indirectly, any business interest

(a) make a representation to the public that a test as to the performance, efficacy or length of life of the product has been made by any person, or

(b) publish a testimonial with respect to the product,

except where he can establish that

(c) the representation or testimonial was previously made or published by the person by whom the test was made or the testimonial was given, as the case may be, or

(d) the representation or testimonial was, before being made or published, approved and permission to make or publish it was given in writing by the person by whom the test was made or the testimonial was given, as the case may be,

and the representation or testimonial accords with the representation or testimonial previously made, published or approved.

(2) Any person who violates subsection (1) is guilty of an offence and is liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years, or to both; or

(b) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both.

36.2 (1) No person shall supply a product at a price that exceeds the lowest of two or more prices clearly expressed by him or on his behalf, in respect of the product in the quantity in which it is so supplied and at the time at which it is so supplied,

(a) on the product, its wrapper or container;

(b) on anything attached to, inserted in or accompanying the product, its wrapper or container or anything on which the product is mounted for display or sale; or

(c) on an in-store or other point-of-purchase display or advertisement.

(2) Any person who violates subsection (1) is guilty of an offence and is liable on summary conviction to a fine not exceeding ten thousand dollars or to imprisonment for one year or to both.

36.3 (1) For the purposes of this section, "scheme of pyramid selling" means

(a) a scheme for the sale or lease of a product whereby one person (the "first" person) pays a fee to participate in the scheme and receives the right to receive a fee, commission or other benefit

(i) in respect of the recruitment into the scheme of other persons either by the first person or any other person, or

(ii) in respect of sales or leases made, other than by the first person, to other persons recruited into the scheme by the first person or any other person; and

(b) a scheme for the sale or lease of a product whereby one person sells or leases a product to another person (the "second" person) who receives the right to receive a rebate, commission or other benefit in respect of sales or leases of the same or another product that are not

(i) sales or leases made to the second person,

(ii) sales or leases made by the second person, or

(iii) sales or leases, made to ultimate consumers or users of the same or other product, to which no right of further participation in the scheme, immediate or contingent, is attached.

(2) No person shall induce or invite another person to participate in a scheme of pyramid selling.

(3) Any person who violates subsection (2) is guilty of an offence and is liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years or to both; or

(b) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both.

(4) This section does not apply in respect of a scheme of pyramid selling that is licensed or otherwise permitted by or pursuant to an Act of the legislature of a province.

36.4 (1) For the purposes of this section, "scheme of referral selling" means a scheme for the sale or lease of a product whereby one person induces another person (the "second" person) to purchase or lease a product and represents that the second person will or may receive a rebate, commission or other benefit based in whole or in part on sales or leases of the same or another product made, other than by the second person, to other persons whose names are supplied by the second person.

(2) No person shall induce or invite another person to participate in a scheme of referral selling.

(3) Any person who violates subsection (2) is guilty of an offence and is liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years or to both; or

(b) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both.

(4) This section does not apply in respect of a scheme of referral selling that is licensed or otherwise permitted by or pursuant to an Act of the legislature of a province.

37. (1) For the purposes of this section, "bargain price" means

(a) a price that is represented in an advertisement to be a bargain price, by reference to an ordinary price or otherwise; or

(b) a price that a person who reads, hears or sees the advertisement would reasonably understand to be a bargain price by reason of the prices at which the product advertised or like products are ordinarily sold.

(2) No person shall advertise at a bargain price a product that he does not supply in reasonable quantities having regard to the nature of the market in which he carries on business, the nature and size of the business carried on by him and the nature of the advertisement.

(3) Subsection (2) does not apply to a person who establishes that

(a) he took reasonable steps to obtain in adequate time a quantity of the product that would have been reasonable having regard to the nature of the advertisement, but was unable to obtain such a quantity by reason of events beyond his control that he could not reasonably have anticipated;

(b) he obtained a quantity of the product that was reasonable having regard to the nature of the advertisement, but was unable to meet the demand therefor because that demand surpassed his reasonable expectations; or

(c) after he became unable to supply the product in accordance with the advertisement, he undertook to supply the same product or an equivalent product of equal or better quality at the bargain price and within a reasonable time to all persons who requested the product and who were not supplied therewith during the time when the bargain price applied and that he fulfilled the undertaking.

(4) Any person who violates subsection (2) is guilty of an offence and is liable on summary conviction to a fine not exceeding twenty-five thousand dollars or to imprisonment for one year or to both.

37.1 (1) No person who advertises a product for sale or rent in a market shall, during the period and in the market to which the advertisement relates, supply the product at a price that is higher than the price advertised.

(2) Any person who violates subsection (1) is guilty of an offence and is liable on summary conviction to a fine not exceeding twenty-five thousand dollars or to imprisonment for one year or to both.

(3) This section does not apply

(a) in respect of an advertisement that appears in a catalogue in which it is prominently stated that the prices contained therein are subject to error if the person establishes that the price advertised is in error;

(b) in respect of an advertisement that is immediately followed by another advertisement correcting the price mentioned in the first advertisement; or

(c) in respect of the sale of a security obtained on the open market during a period when the prospectus relating to that security is still current.

(4) For the purpose of this section, the market to which an advertisement relates shall be deemed to be the market to which the advertisement could reasonably be expected to reach, unless the advertisement defines the market more narrowly by reference to a geographical area, store, department of a store, sale by catalogue or otherwise.

37.2 (1) No person shall, for the purpose of promoting, directly or indirectly, the sale of a product, or for the purpose of promoting, directly or indirectly, any business interest, conduct any contest, lottery, game of chance or skill, or mixed chance and skill, or otherwise dispose of any product or other benefit by any mode of chance, skill or mixed chance and skill whatever unless such contest, lottery, game or disposal would be lawful except for this section and unless

(a) there is adequate and fair disclosure of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the knowledge of the advertiser that affects materially the chances of winning;

(b) distribution of the prizes is not unduly delayed; and

(c) selection of participants or distribution of prizes is made on the basis of skill or on a random basis in any area to which prizes have been allocated.

(2) Any person who violates subsection (1) is guilty of an offence and is liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years or to both; or

(b) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both.

37.3 (1) Sections 36 to 37.2 do not apply to a person who prints or publishes or otherwise distributes a representation or an advertisement on behalf of another person in Canada, where he establishes that he obtained and recorded the name and address of that other person and that he accepted the representation or advertisement in good faith for printing, publishing or other distribution in the ordinary course of his business.

(2) No person shall be convicted of an offence under section 36 or 36.1, if he establishes that,

(a) the act or omission giving rise to the offence with which he is charged was the result of error;

(b) he took reasonable precautions and exercised due diligence to prevent the occurrence of such error;

(c) he, or another person, took reasonable measures to bring the error to the attention of the class of persons likely to have been reached by the representation or testimonial; and

(d) the measures referred to in paragraph (c), except where the representation or testimonial related to a security, were taken forthwith after the representation was made or the testimonial was published.

(3) Subsection (2) does not apply in respect of a person who, in Canada, on behalf of a person outside Canada, makes a representation to the public or publishes a testimonial.

Appendix II

MARKETING PRACTICES FIELD OFFICES – CONSUMER AND CORPORATE AFFAIRS CANADA

WEST

Pacific Centre Ltd.,
P.O. Box 10059,
700 W. Georgia St.,
VANCOUVER, British Columbia
V7Y 1C9
Tel. 666-6971

Oliver Building,
10225 – 100th Avenue,
EDMONTON, Alberta.
T5J 0A1
Tel. 420-4289

2919-5th Avenue N.E.,
Bag #60, Station J,
CALGARY, Alberta
T2A 4X4
Tel. 231-5608

2212 Scarth Street,
REGINA, Saskatchewan.
S4P 2J6
Tel. 359-5387

Room 201,
260 St. Mary Avenue.,
WINNIPEG, Manitoba.
R3C 0M6
Tel. 949-5567

ONTARIO

781 Richmond Street,
LONDON, Ontario.
N6A 3H4
Tel. 679-4032

4900 Yonge Street,
6th Floor,
WILLOWDALE, Ontario.
M2N 6B8
Tel. 224-4065

NATIONAL CAPITAL REGION

50 Victoria Street
HULL, Québec
K1A OC9
Tel. 997-4282

QUÉBEC

1410 Stanley St.,
11th Floor,
MONTRÉAL, Québec.
H3A 1P8
Tel. 283-7712

Galerie Paquet Syndicat
410 Charest Blvd. east,
Room 400
QUÉBEC, Québec
G1K 8G3
Tel. 694-3939

EAST

Windmill Place,
1000 Windmill Road,
Suite 1,
DARTMOUTH, Nova Scotia
B3M 1L7
Tel. 426-6080

Terminal Plaza Building
1222 Main Street
3rd Floor
MONCTON, New Brunswick
E1C 1H6
Tel. 388-6633

Sir Humphrey Gilbert Bldg.,
5th Floor,
165 Duckworth Street,
ST. JOHN'S, Newfoundland.
A1C 1G4
Tel. 737-5518

The views expressed in these guidelines are for assistance only and should not be considered as binding on the Director of Investigation and Research. Readers should also note that The Combines Investigation Act is only a portion of the relevant law in Canada.

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