



## Canadian Institute's 17<sup>th</sup> Annual Advertising & Marketing Law Conference January 21, 2011

Misleading Advertising: What's New at the Bureau and Elsewhere 2009 – 2011

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# I. The Very Very Bad – Selected Criminal Cases

1. J.D. Marvel Products, et al and John Dragon
  - Trial December 20, 2010
  - Consumer products advertised by mail order, internet, coupons. Not delivered, or delivered late.
  - Section 52

# I. The Very Very Bad – Selected Criminal Cases...cont.

## 2. Infotel and 3 “Frank” Brothers

- April 12, 2010
- Charges of deceptive telemarketing
- Infotel alleged to have raised \$60 million between 1999 & 2004 by posing as the victim’s ordinary supplier of business directories.
- Charged with both the misleading representation and failure to disclose aspects of Section 52.1.

# I. The Very Very Bad – Selected Criminal Cases...cont.

## 3. R. v. Michael Reynolds

- Cancer cure therapy – made unsubstantiated representations
- Trial date April 6, 2010 (vacated) - accused failed to attend. Bench warrant issued
- Section 52

# I. The Very Very Bad – Selected Criminal Cases...cont.

## 4. DataCom Marketing et al

- December 15, 2009
- \$15 million dollar fine (\$12.9 million profits/\$158 million in revenues) imposed on for ten year business directory scam –.
- Manager sentenced to 2 years imprisonment for breach of telemarketing provisions
- telemarketing offence

# I. The Very Very Bad – Selected Criminal Cases...cont.

## 5. Steczko, Ahn-Phone Vo & Kornelson

- November 13, 2009
- Breach of telemarketing provision
- Section 52.1
- Business Directories on CD. Assumed sale technique
- 6 month conditional sentence for 3 leaders of business

# I. The Very Very Bad – Selected Criminal Cases...cont.

## 6. David Stucky

- August 31, 2009
- Guilty plea and fined \$2 million (twice revenue received) +18 month probation +\$100,000 charitable donation – regarding ticket reselling scheme to foreigners
- Section 52

# I. The Very Very Bad – Selected Criminal Cases...cont.

7. Infogroup Data Inc. & 3 other companies
  - June 16, 2009
  - Business Directory Publishers
  - Pled guilty
  - Paid \$725,000 fine regarding improper business directory offences. Directors received prohibition orders.
  - Section 52.1



## II. The Merely Bad – Civil Conduct Investigations and Outcomes

1. Nine Hot Tub Suppliers (including Avonlee Pies and Fine Bakers Ltd. - doing business as WET N'WILD HOT TUBS)
  - Alleged to engage in misleading advertising regarding Dynasty Hot Tubs – EnergyStar certification
  - Settled with 9 retailers
  - Settlement requires customers notification, removal of claims
  - Consent Agreements dated June 17, 2009 (7), October 5, 2009 and December 8, 2009

## II. The Merely Bad – Civil Conduct Investigations and Outcomes...cont.

### 2. Dynasty Hot Tubs et al

- The supplier of the hot tubs with the alleged misleading EnergyStar certification.
- Subject to challenge under s. 74.1 of Act before Tribunal
  - application filed July 20, 2010
- Allegations are that such certification, administered by Natural Resources Canada, is not available for hot tubs at all.
- Application seeks cease and desist order, corrective advertising and an Administrative Monetary Penalty

## II. The Merely Bad – Civil Conduct Investigations and Outcomes...cont.

### 3. Elkhorn Ranch & Resort

- Entered into consent agreement in November 2009.
- Various breaches of the contest rules
  - Grand Prize of a car – actually only car lease (small print)
  - Series of prizes – some not available – no disclosure of number
  - No disclosure of chances of winning

## II. The Merely Bad – Civil Conduct Investigations and Outcomes...cont.

- Chances of winning different if attended time share presentation
  - Not clear how could get prize all without attending
  - Contest dates not disclosed
  - Decision to award prizes not random
- Order required comply with Act, and in particular detailed contest rules
  - \$150,000 AMP + \$20,000 costs
  - Corrective Notice
  - Compliance Program, monitoring, etc.

## II. The Merely Bad – Civil Conduct Investigations and Outcomes...cont.

### 4. Phone Time Inc.

- November 5, 2009 – Consent agreement regarding advertising for Pre-Paid Phone Cards – representation regarding rates per minute and minutes on the cards
- AMP of \$250,000
- Restitution of 78% of value to customers – with proof of purchase
- Costs of \$50,000
- Corrective Notice and other usual terms

## II. The Merely Bad – Civil Conduct Investigations and Outcomes...cont.

### 5. Curry's Art Store

- Consent Agreement March 31, 2009
- Representation re savings from list price, which was not ordinary selling price
- \$60,000 AMP, Corrective Notice and usual provisions

## II. The Merely Bad – Civil Conduct Investigations and Outcomes...cont.

### 6. Bioenergy Wellness Centers

- February 19, 2009
- Consent Agreement
- Cancer treatment claim not subject to adequate and proper test
- No AMP, but restitution of purchase price

## II. The Merely Bad – Civil Conduct Investigations and Outcomes...cont.

### 7. Premier Career Management

- October 16, 2009- FCA overturned decision of Tribunal in case, which had dismissed case on basis of no representation “to the public”
- Claims included “screening” representations, “contracts” representation and “90 day/good job” representation
- Section 74.03(4)(c) enacted after initial decision (not necessary that representation be made in a place to which the public has access)



## II. The Merely Bad – Civil Conduct Investigations and Outcomes...cont.

- Court of Appeal decision “The public did have access; it just accessed the representation one at-a-time rather than collectively”
- We are left with the odd wording of Section 74.03(4)(c) – not clear what its breadth will be – any misrepresentation may now be misleading advertising?
- The Competition Tribunal ultimately ordered Premier Career Management and Minto Roy to pay a \$10,000 and a \$20,000 monetary penalty, respectively

## II. The Merely Bad – Civil Conduct Investigations and Outcomes...cont.

### 8. Cogeco

- December 15, 2009
- Claim of “Fastest Internet” in Drummondville Saint-Hyacinthe – no “free coupon”
- Undertaking – agreed to stop claims
- “In the internet service field, speed and price are key factors in consumers’ purchasing decisions”

## II. The Merely Bad – Civil Conduct Investigations and Outcomes...cont.

### 9. Mexx Canada/Liz Claiborne

- April 6, 2010
- Card given, with purchase, providing a discount for additional purchases
- Additional purchase requirement not disclosed
- Undertaking to make sure terms and conditions of gift card clearly displayed in all advertising

## II. The Merely Bad – Civil Conduct Investigations and Outcomes...cont.

### 10. Reitmans/Smart Set

- March 13, 2010
- “Savings Pass”
- Failed to disclose need to spend additional \$50, or time limit on use of Savings Pass
- Undertaking that purchase requirement waived and coupon period of use extended to December 31, 2010

## II. The Merely Bad – Civil Conduct Investigations and Outcomes...cont.

### 11. Zellers

- June 29, 2010
- \$10 savings card with purchase of Avatar DVD
- Requirement of \$50 purchase not advertised
- Undertaking - consumer can get \$10 savings with no purchase until August 6, 2010

## II. The Merely Bad – Civil Conduct Investigations and Outcomes...cont.

### 12. U.S. Paint Case

- August 31, 2010
- Implied manufactured in Canada by use of a large Maple Leaf
- It also claimed the part was “Made of biodegradable material” although it apparently released substance in concentrations harmful to the environment – contrary to the Bureau’s Environmental Guidelines
- Agreed to remove maple leaf and not repeat the representations

## II. The Merely Bad – Civil Conduct Investigations and Outcomes...cont.

### 13. Chatr Wireless

- November 19, 2010
- Application in Ontario Superior Court of Justice (commercial list)
- Represented “Fewer dropped calls than the new wireless carriers” and “No worries about dropped calls”
- Allegation is, essentially, that while there were fewer dropped calls – at least in most cities – the difference was not significant

## II. The Merely Bad – Civil Conduct Investigations and Outcomes...cont.

- Application refers to Government's efforts to increase competition in the wireless marketplace
- Seek \$10 million AMP/Restitution of \$20/month per customer



### III. The Choice of the Very Very Bad or Merely Bad “Track”

- 1999 Information Bulletin Provides
  - In most instances use civil track
  - Once a decision made, will not change to criminal track unless have evidence of knowing or reckless
  - Once proceeding commenced, cannot change track

### III. The Choice of the Very Very Bad or Merely Bad “Track”...cont.

- For Criminal Track there must be:
  - Clear and compelling evidence of known or reckless conduct
  - Prosecution must be in the public interest (such things as substantial harm to consumers or competitors, target vulnerable age groups, continuation of conduct without remedy, breach of prior undertaking, prior conduct)
- Might consider case of Dragan (criminal-for late delivery of goods) – Reynolds (criminal – cancer treatment), Elkhorn Resort (Civil – contests), Bioenergy Wellness (Civil – cancer treatment)

## IV. The Potential Consequences of the Very Very Bad and Merely Bad Tracks

### 1. Criminal Consequences

- Unlimited fine
- Jail for 14 years
- Possible civil claims/class actions
- Important to be able to show that advertiser did not act knowingly or recklessly

# IV. The Potential Consequences of the Very Very Bad and Merely Bad Tracks...cont.

## 2. Civil consequences

- \$10 million AMP (\$15 million for repeat)
- \$ restitution up to amount paid
- Important to be able to show due diligence
- Consequences can be severe – In the Chatr case the Commissioner is seeking a \$10 million AMP + \$20/month restitution

## V. What's New on Ordinary Selling Price?

1. Ordinary Price Claim Bulletin – Updated in 2009 – still the “Bible”
  - Can base ordinary price on either time offered for sale or volume sold
  - Can base it on sellers' own price or price generally in the market
  - Substantial volume – 50% / substantial period of time 50%
  - Use of time test the practical option
  - Issue of offering for sale “in good faith” under the time test remains biggest challenge

## V. What's New on Ordinary Selling Price?...cont.

2. The “Not Otherwise Misleading” defence (Section 74.01(5))
  - Refer to MSRP, clearance sale, etc. (avoid “savings” statement)
  - Its limits have not been tested
3. Old cases – Sears; Grafton Fraser; Suzy Shier; Forzani
4. Not as active now – Curry's Art Store case
5. Recent focus on discount coupons with purchases

## VI. Mail in Rebate Issues

- 2009 Enforcement Guidelines on Consumer Rebate Promotions
  - Key Point: If the after-rebate price is stated, need to state that this price is subject to conditions, and ensure that this information as to the conditions is prominently disclosed in a manner that is likely to come to consumers' attention.

## VI. Mail in Rebate Issues...cont.

### Recent Cases:

- The Brick (March 2009): An \$80 mail-in rebate with a purchase appeared to be for cash or cheque, but was for a gift card instead. The Brick agreed to issue cheques instead, remove all promotional signage and post notices in stores.
- Whirlpool (December 2010): Offered a mail-in rebate to customers who purchased certain appliances allegedly without clearly disclosing that it only applied to certain “participating” retailers. Certain consumers were denied a rebate on the basis that they purchased appliances at Whirlpool dealers who were not “participating” in the promotion. Whirlpool agreed to reimburse nearly 400 customers whose mail-in rebates were rejected.



## VII. New Statutory Provisions with respect to Electronic Notices Sections 52.01/74.011 – False or Misleading Information

- Fighting Internet and Wireless Spam Act (FISA)
  - New offences/reviewable practices under the *Competition Act* relating to sending false or misleading electronic messages – in sender information or subject matter information or locator (e.g. URL)
  - Committed by those permitting the message to be sent, as well as those who actually sent them
  - Applies as well to materially false or misleading representation anywhere in an electronic message

## **VII. New Statutory Provisions with respect to Electronic Notices Sections 52.01/74.011 – False or Misleading Information...cont.**

- On indictment, unlimited fine, 14 years imprisonment, or both
- On summary conviction, \$200,000 maximum fine, 1 year imprisonment, or both

## **VII. New Statutory Provisions with respect to Electronic Notices Sections 52.01/74.011 – False or Misleading Information...cont.**

- Section 74.011 amendments to the civil regime very similar to those proposed in 52.01 in the context of the criminal regime
  - Individual: First occurrence: \$750,000; Second and subsequent \$1 million
  - Corporation: First occurrence: \$10,000,000; Second and subsequent \$15 million
- Received Royal Assent on December 15, 2010 (expected to be in force by Summer 2011)

## IX. Telemarketing Change

- Sections 52.1 and 74.03(1)(d)
- Definition of telemarketing to be “by communicating orally by any means of telecommunication...” clarifying its scope

## X. Other Bill C-28 Issues

- Simplified grounds for obtaining injunctions: “it appears to the court” that a person is engaging in reviewable conduct (no longer a strong prima facie case of reviewable conduct) (74.11(1))
- Enhanced powers of assistance to foreign states regarding misleading advertising and related conduct (s. 74.012)
- Representation made orally by telecommunications to persons as ultimate user are “to the public” (s. 74.03(1)(d))

## XI. Those Darn Disclaimers

1. Remain a difficult issue – what is enough prominence. How much can you “qualify”
2. Key recent cases here are Chatr and Elkhorn
3. Chatr
  - Representations were sometimes, although not always, accompanied by a disclaimer stating “Based on: cell site density; quality of indoor and underground reception; and seamless call transition when moving out of zone”
  - “The disclaimer was, and is, inaccurate and ineffective to address the nature of the conduct at issue”

# XI. Those Darn Disclaimers...cont.

## 4. Elkhorn Resort

- Big Print said “WIN A CAR”
- Small print said – get a 1 or 2 year lease on a car, pay the security deposit and return in immaculate condition

## XII. Promotional Problems

1. Key recent case on promotions is the Elkhorn case
2. Did almost everything wrong
  - Odds of winning not disclosed
  - Nature of prize misleading (car vs. car lease)
  - Number and value of prizes not disclosed
  - Contest dates not disclosed
  - Got a double chance to win if went to sales pitch
3. AMP of \$150,000 + \$20,000 costs



## XII. Promotional Problems...cont.

4. Also recent cases of Mexx, Reitmans and Zellers
5. Not contests – but Bureau clearly has a focus on promotional savings cards

## XIII. Recent Injunction Cases

1. Telus Communications Co. v. Rogers Communications Inc., [2009] B.C.J. No. 2329; aff'd: [2009] B.C.J. No. 2520
  - Claim: “the most reliable network”
  - Rogers’ defence related to disclaimer language clarifying that comparative claim was made against the established Telus’ and Bell networks and not their newly established partially shared HSPA networks.

## XIII. Recent Injunction Cases...cont.

- Court concluded that the disclaimer did not change the general impression, which was “that Rogers’ is more reliable than any other network in Canada.” It was not possible to have testing against the newly launched network at that time. An injunction was issued by the British Columbia court.
- This injunction was upheld on appeal by the British Columbia Court of Appeal.

## XIII. Recent Injunction Cases...cont.

### 2. Rogers Wireless Partnership v. Bell Canada, 2009 B.C.S.C. 1884

- “Most reliable” claim. Injunction granted. Bell’s claim to be “most reliable” was undermined because its new network had no track record as yet.

## XIII. Recent Injunction Cases...cont.

### 3. Bell Aliant Regional Communications Ltd. v. Rogers Communications Inc. 2010 NBQB 166

- Rogers' claims to offer the "fastest" and the "best and most reliable" home internet service was challenged by Bell Alliant. Bell Alliant had recently launched upgraded service in certain urban areas. The use of a disclaimer to clarify the claim was unsuccessful. The New Brunswick Court of Queen's Bench granted an injunction against advertisements.

## XII. Recent Injunction Cases...cont.

### 4. Bell Canada v. Rogers Communications Inc., [2009] O.J. No. 3161

- Bell sought an injunction against Rogers, with respect to Rogers' advertising relating to home internet service. Bell alleged that the advertisements questioned the efficiency of its internet services and alleged that Rogers' offer to customers to check their internet speed with an independent test site was misleading because the test was, it was alleged, not sufficiently independent.
- Rogers made some alterations to its advertising. The court found that the balance of convenience favoured maintaining the status quo and not granting the injunction. The court recognized that Rogers had a legitimate interest in making commercial representations.

## XII. Recent Injunction Cases...cont.

### 5. Bell Canada v. Rogers Communications Inc., [2010] O.J. No. 2032

- Bell alleged that Rogers' advertising with respect to home internet and wireless services were misleading, especially with respect to the claim that Bell's services were less reliably available due to weather conditions.
- The court found a "serious issue to be tried". The court held that they could not find any irreparable harm to Bell that would arise from the advertising. Therefore, the balance of convenience did not favour the granting of an injunction. The court invited Bell to counter any effects it claimed Rogers was causing in the marketplace through its own advertising.

## XII. Recent Injunction Cases...cont.

### 6. Bell Canada v. Rogers Communications Inc., [2010] O.J. No. 2229

- Bell sought to restrain Rogers from claiming that its internet service was “fastest” or “most reliable” or any combination thereof.
- Rogers claimed to have testing to support these claims.
- The court agreed with Bell that it was a serious issue to be tried but the 19 month delay between the appearance of the advertising claim and the initiation of litigation undermined Bell’s claim to suffer irreparable harm.
- The court declined to “interfere in the advertising war between these two large corporations”.





# THANK YOU

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