Bereskin & Parr LLP

Reviewing regulator action

As well as civil remedies, complainants in Canada can also turn to a regulator and request that it investigate and pursue available remedies

If a competitor considers that an advertising claim is false or unsubstantiated, unfairly discredits its product or business, depreciates the goodwill attaching to its trademark or is otherwise misleading, civil remedies are available under statutes including the Trademarks Act. However, a competitor may also complain to a regulator and request that it investigate and pursue available remedies.

The Competition Act is the principal statute in Canada regulating marketing activity such as promotional contests and advertising. Most deceptive marketing practices are regulated as 'reviewable conduct' or conduct that is subject to review by a court or the Competition Tribunal on application by the commissioner.

Section 74.01(1)(a) of the act makes it reviewable conduct to make a representation to the public for the purpose of promoting – directly or indirectly – the supply or use of a product or any business interest that is false or misleading in a material respect. To establish that an advertiser has acted contrary to this provision, the commissioner must prove all elements of the reviewable conduct on a balance of probabilities. First, the representation must be false or misleading. The general impression conveyed by the representation and the literal meaning will be taken into account. It is not necessary to prove that anyone was actually misled by the representation.

Second, the representation must be false or misleading "in a material respect", which is interpreted as meaning that the representation leads a person to a course of conduct that, on the basis of the representation, he or she believes to be advantageous. Materiality is likely not an issue with most comparative advertisements, since the claims are designed to influence consumer preference towards one product or service over another.

Third, the representation must be to the public. Advertisements distributed through the media are obviously considered to be public representations. Other representations deemed to be made to the public include representations expressed on a product or its wrapper, container or insert, expressed at the point of sale or expressed during in-store, door-to-door or telephone solicitations.

Under the act, false or misleading advertising can also be prosecuted as a criminal offence if the representations are made "knowingly or recklessly". In its guidelines the Fair Business Practices Branch of the Competition Bureau sets out some of the factors that the commissioner will take into consideration in deciding whether to initiate criminal prosecution or to pursue a matter as reviewable conduct. These include:

- whether there is clear and compelling evidence that the representations were made knowingly or recklessly;
- the seriousness of the representation (as measured by such factors as the vulnerability of the intended audience of the representation and the advertiser's failure to make timely and effective attempts to remedy the adverse effects of the representations); and
- whether criminal prosecution is in the public interest.

The commissioner has stated that he will initiate criminal prosecutions only in the most egregious cases of misleading advertising.

Section 74.01(1)(b) of the act makes it reviewable conduct to 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 burden of proof rests with the person making the misrepresentation.

The act does not define what constitutes an 'adequate and proper' test. Rather, this is determined on a case-by-case basis, considering such factors as the scope and nature of the claim, and whether the relevant industry provides any guidance on the manner of testing a particular product. However, the act does make it clear that testing must be completed before the representation is made, and that the burden of proving the tests' adequacy and propriety rests with the advertiser.

The Competition Bureau has stated that most performance claims raising an issue under the act fall into two broad categories: those that are inappropriate in the context of the actual tests that were conducted and those that are based on poorly designed test methodologies.

There are cases where advertisers have failed to substantiate comparative claims because the testing was found to be inappropriate for the claim made. For example, in *R v Bristol-Myers of Canada Limited* ((1979), 45 CPR (2d) 228), the court concluded that the claim "Fleecy in the rinse softens right through the wash for *three times more softness* than any dryer product" was not supported by an adequate and proper test. Bristol-Myers relied on panels of consumers who were asked to compare the softness of fabrics washed with varying amounts of fabric softener. Consumers reported that fabrics washed with the recommended amount of the Fleecy fabric softener were softer than fabrics treated with three times the recommended amount of the competing fabric softeners. The court acknowledged that although the qualitative

consumer testing was the only means of measuring softness, it could not be used to support a quantitative claim. A more appropriate claim would have been that fabric treated with Fleecy fabric softener 'feels softer' than other brands.

Under the act, the commissioner may bring an application to the Competition Tribunal, the superior court of a province or the Canadian Federal Court (Trial Division) for a determination that an advertiser has engaged in reviewable conduct and an order requiring the advertiser to do one or more of the following:

- cease engaging in reviewable conduct;
- publish a corrective notice, usually with the same penetration as the false or misleading representation or unsubstantiated product claim; or
- pay an administrative monetary penalty. In the case of an individual, the penalty may be up to C$750,000 for a first offence and up to C$1 million for subsequent offences. In the case of a corporation, the penalty may be up to C$10 million for a first offence and up to C$15 million for every subsequent offence.

If the advertiser can demonstrate that it exercised due diligence to prevent the reviewable conduct from occurring, it may be ordered only to cease the reviewable conduct. Once the commissioner has filed an application, it is possible for an advertiser to consent to an order that may require it to do one or more of the above. Once filed with the court, the consent order will have the same force and effect as if it had been issued by a court.

In July 2010 one of Canada's largest telecommunication companies, Rogers Communications Inc, and its wholly owned subsidiary Chatr Wireless Inc launched a national campaign, in which they claimed that the discount Chatr carrier had "fewer dropped calls than the new wireless carrier", and later that new subscribers would have "no worries about dropped calls". One of the new wireless carriers – WIND Mobile – filed a complaint with the Competition Bureau alleging that the claims were false and misleading.

Given that there were significant competition issues between a senior player and a new market entrant, the Competition Bureau investigated and, in November 2010, the commissioner commenced legal proceedings against Rogers and Chatr seeking an administrative monetary penalty of C$10 million and a corrective notice, among other things, on the basis that the claims were false and misleading. In March 2011 the commissioner amended his pleading to include an allegation that the claims were not based on adequate and proper testing and sought a prohibition on Rogers from making any claims about dropped calls for 10 years. The commissioner alleged that the claims were:

- false, because in certain cities Chatr's dropped call rate was higher than that of any other carrier;
- misleading, because they created the general impression that there was an appreciable difference in dropped calls between carriers when there was not; and
- supported by automobile-based drive tests, which were inappropriate to support the claims for many reasons, including the fact that the tests were not performed in all major cities.

On August 19 2013 the Ontario Superior Court of Justice released its decision with a partial victory for Rogers and Chatr. In *The Commissioner of Competition v Chatr Wireless Inc* the court used the test of the credulous and technologically inexperienced consumer of wireless services to determine the general impression of the claims, concluding that the claims were not false or misleading, and that drive tests were in fact adequate and proper testing for the claims made. The court did not accept that the difference in the number of dropped calls must be discernible. Nevertheless, it recognised that there are circumstances where differences are still important to consumers even though they are not discernible, and that dropped calls can have a significance to consumers that is not quantifiable.

Although Rogers and Chatr failed to conduct adequate and proper testing against competitors in certain cities before making the claims, the court concluded that they had engaged in reviewable conduct contrary to Section 74.01(1)(b) of the act. A further hearing will be held to determine the remedies against Rogers and Chatr.

Rogers is one such example of how the commissioner of competition will pursue allegations of false and misleading advertising, especially on the complaint of a competitor which is presumed to have special knowledge of the industry. In *Rogers* the court noted that the act is intended to maintain and encourage competition in Canada to "provide consumers with competitive prices and product choices". WTR

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