

CANADIAN ADVERTISING & MARKETING LAW

NEWS AND DEVELOPMENTS IN CANADIAN ADVERTISING LAW

by Steve Szentesi of Hakemi & Company Law Corporation

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OVERVIEW

The past year has been a busy and eventful one for Canadian competition and advertising law. Recent developments since 2010 span most key areas of advertising and marketing including the use of disclaimers, social media, e-mail marketing, performance claims and telemarketing.

At the same time, new legislation has been introduced that will impact how companies market in Canada, notably the new federal anti-spam legislation (Bill

C-28), and new cross-border enforcement initiatives were announced, including an international do-not-call enforcement network co-chaired by the CRTC.

These developments mean that it remains important for companies to effectively and efficiently navigate through Canadian advertising and marketing rules. Some of the more interesting and noteworthy developments in 2010 and 2011 are discussed in this issue.

TIPS FOR A SUCCESSFUL CONTEST

Promotional contests in Canada are governed by the *Competition Act*, the *Criminal Code*, privacy legislation and the common law of contract. In addition, Quebec has a separate regulatory regime governing contests.

As such, given that the improper operation of a contest can lead to civil or criminal liability, it is important to review proposed promotional contests for compliance with federal and (if applicable) provincial laws. The following are some key tips for operating a successful contest:

- Take care to avoid the *Criminal Code* provisions governing illegal lotteries (e.g., provide a “no purchase necessary” entry option and skill element);
- “Short rules” should include all *Competition Act* disclosure requirements for point-of-purchase materials;

- Ensure that precise “long rules” are prepared, particularly anticipating potential contingencies (e.g., technical problems, etc);
- Ensure that advertising materials are generally not false or misleading;
- Consider developing a checklist to ensure that all key legal requirements are met;
- Ensure that important contest elements are as clear and precise as possible – e.g., eligibility, how to enter and descriptions of the prize and odds of winning;
- Ensure that Quebec legal requirements are met or take care to exclude the contest from Quebec; and
- Obtain U.S. legal advice if the contest will be open to U.S. residents.

For more about Canadian advertising and contest law visit: Canadianadvertisinglaw.com

HAKEMI & COMPANY LAW CORPORATION

1500 – 885 West Georgia Street, Vancouver, BC, Canada V6C 3E8 • Main: (604) 601-2020 • Fax: (604) 648-9170
Hakemi.com • Competitionlawcanada.com • Canadianadvertisinglaw.com • Litigationbrief.ca

CANADIAN ADVERTISING LAW: YEAR IN REVIEW

Bell Canada pays \$10 million AMP. On June 28, 2011, the Competition Bureau (the “**Bureau**”) announced that Bell Canada agreed to stop making allegedly misleading claims regarding the prices of some of its services and pay an administrative monetary penalty (“**AMP**” – essentially a civil fine) of \$10 million, the maximum penalty for misleading advertising under the *Competition Act* (the “**Act**”). The Bureau challenged the accuracy of price claims made by Bell, as well as alleged hidden fees and fine-print disclaimers. The Bureau’s concerns were based, among other things, on services that were not available at the advertised prices, including for Bell’s home phone, Internet, satellite TV and wireless services. Advertising claims can violate the misleading advertising provisions of the Act where they are either false or misleading (e.g., material information, such as additional fees or important conditions, are not adequately disclosed).

New federal anti-spam legislation (Bill C-28). In late 2010, the federal government introduced new federal anti-spam legislation (Bill C-28, the *Fighting Internet and Wireless Spam Act* – “**FISA**”). Unlike similar U.S. legislation, FISA creates an “opt-in” regime for commercial electronic marketing, imposing both consent and form requirements, and also amends the Act to prohibit false or misleading commercial representations made electronically (e.g., in website headers, web links or website content). In particular, the criminal and civil misleading advertising provisions of the Act, and related penalty provisions, have been broadened to expressly include misleading representations in the electronic and online environment. Once FISA is in force, maximum penalties will be \$1 million (for individuals) and \$10 million (for corporations).

Bureau challenges Rogers’ performance claims. The Bureau is currently challenging Rogers Communications for allegedly making false performance claims in relation to its “Chatr” cell phone brand (in particular, claims that Rogers’ brand had fewer dropped calls than competing new entrants). The Bureau is seeking a court order for Rogers to cease the conduct, a \$10 million AMP, restitution for consumers and publication of a corrective notice.

Privacy Commissioner issues new online behavioural advertising (tracking) guidelines. On December 6, 2011, the federal Privacy Commissioner issued new online tracking guidelines for advertisers which, among other things, restrict the tracking of children and tracking technologies without an opt-out mechanism.

New international do-not-call network. In October, 2011, the federal CRTC announced that, together with the Australian Communications and Media Authority, it has assembled 12 enforcement agencies to form an international do-not-call network (Australia, Canada, France, Hong Kong, Ireland, Israel, Korea, Mexico, New Zealand, Spain, the UK and the United States). Telemarketing in Canada is already subject to competition law rules, the national Do Not Call List and provincial licensing requirements.

Recent speech by the Commissioner highlights enhanced Bureau enforcement. On October 25, 2011, the Bureau published the Commissioner of Competition’s (the “**Commissioner**”) speech given at the 2011 Canadian Bar Association Annual Competition Law Conference. It is fair to say the Commissioner’s speech presented a singular tone across the civil and criminal competition law areas: continued enforcement. Some highlights of her speech regarding advertising include comments that misleading advertising “continues to be an area of concern”, and that companies should not “mislead the public by hiding charges or conditions in fine print” or by “making claims you can’t back up” (i.e., false performance claims). The Commissioner also said the Bureau continues to look for “tangible results for Canadians”, including restitution for false advertising claims and settlements to stop false marketing claims.

Misleading advertising continues to be an enforcement priority. Enforcement continued to be a theme for the Commissioner during two talks in Vancouver in the fall of 2011, where she confirmed that misleading advertising and deceptive marketing remain enforcement priorities – or, as the Commissioner put it, “an area of concern.” In general, the Commissioner indicated that the Bureau did not have the resources to pursue all misleading and deceptive marketing and, with respect to fraudulent marketing, that enforcement was akin

to the “whack a mole” game in which once a deceptive marketer was “hit” in one jurisdiction, they frequently “popped up” in another. The Commissioner also highlighted some of the Bureau’s initiatives with other major enforcement agencies – for example, the U.K., Australia and the United States – that have proven effective in fighting cross-border deceptive marketing.

Canadian telemarketer receives a two-year prison sentence. On October 3, 2011, the Bureau announced that a deceptive telemarketer was sentenced to two years in prison for a deceptive telemarketing scheme relating to the sale of business directories. This is the most recently announced telemarketing case by the Bureau, which shows that the criminal deceptive telemarketing and misleading advertising provisions of the Act remain enforcement priorities. The case also illustrates that the Bureau is increasingly seeking penalties against individuals. The Bureau has brought proceedings and sought penalties in a number of deceptive telemarketing cases in the past several years, many of which have involved cross-border marketing of business directories to U.S. and other international companies. The Act prohibits false or misleading telemarketing representations and also prohibits telemarketers from engaging in other activities including: (i) requiring advance payments to receive a prize, (ii) offering gifts as inducements to purchase other products without fairly disclosing the value of the gifts, (iii) failing to provide adequate and fair disclosure of the number and value of prizes and (iv) requiring advance payments for products offered at inflated prices. Telemarketers are also required to disclose certain information at the beginning of a call and other information at some point during a call.

Bureau negotiates settlement with Canadian Nivea distributor over performance claims. On September 7, 2011, the Bureau announced a settlement with Nivea’s Canadian distributor, Beiersdorf Canada Inc., relating to allegedly false or misleading performance claims. The Bureau took issue in this case with claims suggesting that the use of skin cream could lead to weight loss. Under the consent agreement negotiated with the Bureau, Beiersdorf agreed to pay a \$300,000 AMP, refund Canadian customers and remove its products from Canadian shelves. False or misleading product performance claims can violate both the “general” criminal or civil misleading advertising provisions of the Act (sections 52 and 74.01) and a specific performance claim provision,

which prohibits representations to the public regarding the performance of products that are not based on “adequate and proper testing”. This section can be particularly relevant to advertising and marketing where the speed, efficiency or other product performance is a key marketing component. While performance claims themselves are not prohibited, (i) any product testing or verification must be conducted before a claim is made and (ii) the onus, if challenged, is on the person making the claim to verify the performance. The Competition Tribunal (the “Tribunal”) has also established a non-exhaustive list of factors relevant to determining whether product testing is “adequate and proper”.

Albertans sentenced to jail time for cross-border deceptive telemarketing. On August 30, 2011, the Bureau announced that five Alberta individuals were convicted and sentenced for deceptive telemarketing under the Act.

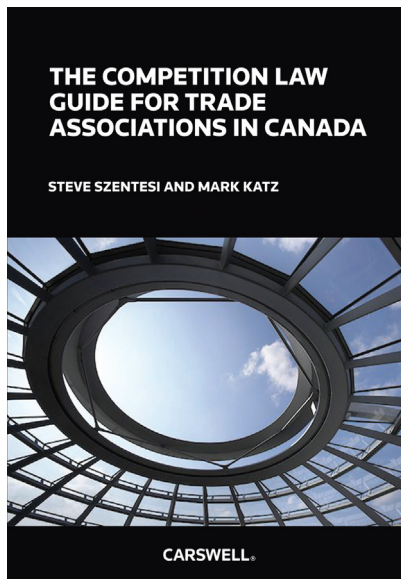
International sweep of social media sites. In late 2010, the Bureau participated in an international sweep of social media sites to detect fraudulent and deceptive advertising on social networking sites.

AMPs imposed in job search service case. In late 2010, the Tribunal imposed AMPs of \$20,000 and \$10,000 against parties in *Canada (Commissioner of Competition) v. Premier Career Management Group Corp.* for making misleading claims in relation to a job search service (following a Federal Court of Appeal decision reversing an earlier Tribunal decision finding the claims were not made “to the public”).

Bureau settles with two Canadian spa retailers. In 2010, the Bureau announced it had reached settlements with two spa retailers in relation to allegedly false energy savings claims. According to the Bureau, the retailers made misleading representations incorrectly conveying the impression that their hot tubs or insulation met the criteria of the ENERGY STAR Program. This case is the most recent example of the Bureau’s action in the spa retailing sector. The Bureau and the Canadian Standards Association have jointly published enforcement guidelines addressed specifically to environmental marketing – *Environmental Claims: A Guide for Industry and Advertisers* – intended to provide companies with more guidance for environmental marketing and “consumers with greater assurance about the accuracy of environmental claims.”

CANADIAN ADVERTISING & MARKETING LAW

NEW PUBLICATIONS



The Competition Law Guide for Trade Associations in Canada

We are pleased to announce the publication by Carswell of *The Competition Law Guide for Trade Associations in Canada*. The *Guide*, the most detailed book of its kind in Canada, is a practical and concise summary of Canadian competition law as it applies to trade, professional and other associations. Included are overviews of the major areas of Canadian competition law that apply to associations, including the conspiracy, bid-rigging, abuse of dominance and misleading advertising provisions of the *Competition Act*.

The *Guide* also includes discussions of some of the specific association activities that can raise competition law concerns including membership criteria and discipline, codes of conduct and standard setting, meetings and information exchanges and joint association activities (e.g., joint negotiation and marketing, joint purchasing activities and lobbying). A compendium of “best practices” is also included with sample guidelines for the conduct of association meetings, document creation and responding to government investigations (search and seizures).

For more information see: Carswell.com/whatsnew/newlypublished

ABOUT US

Hakemi & Company Law Corporation is a Vancouver-based law firm with a focus on civil litigation and regulatory proceedings, particularly in the areas of securities and competition/antitrust law.

Our clients contact us when they need to pursue or defend a claim or address regulatory issues; or they seek our advice on how to comply with their legal obligations. They want objective, experienced and candid advice on their options.

We provide Canadian federal and British Columbia advertising and marketing law advice to Canadian and international clients.

ADVERTISING LAW SERVICES

Complying with Canadian advertising and marketing laws is an increasing challenge. Hurdles for companies include increased enforcement, including cross-border enforcement

and cooperation, new legislation, private litigation and new technology.

We offer a full range of advertising law services to Canadian and international clients for print, online and new media marketing and telemarketing including:

- Federal anti-spam legislation (Bill C-28)
- Competition law litigation and Bureau complaints
- Consumer packaging and labeling legislation
- “General” misleading advertising provisions
- Internet, online and new media advertising
- Multi-level marketing and direct marketing
- Promotional contests and sweepstakes
- Sales and promotions
- Telemarketing

CONTACT

For more about our firm and practices please contact



Steve Szentesi
604.601.2047
sszentesi@hakemi.com



Tom Hakemi
604.601.2021
thakemi@hakemi.com

HAKEMI & COMPANY LAW CORPORATION

1500 – 885 West Georgia St,
Vancouver, BC, CAN V6C 3E8
Main: (604) 601-2020
Fax: (604) 648-9170

Hakemi.com
Competitionlawcanada.com
Canadianadvertisinglaw.com
Litigationbrief.ca

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