



CASSELS BROCK
LAWYERS

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Competition Act
Misleading Advertising

September 13, 2006

Introduction

- **What is misleading advertising?**
- **What are the consequences?**
- **What can I do to avoid problems?**

What Is Misleading Advertising?

- **Misleading Advertising is:**
 - Representation to the public that is false or misleading in a material respect
- **No need to prove actual deception**

What Is Misleading Advertising?

- **“Representation” is broadly defined:**
 - Print
 - Visual/Graphic
 - Video
 - Electronic
 - Audio
 - Verbal (Including in-store sales pitch)
- **Anything made to public**

What Is Misleading Advertising?

- **“Public” includes:**
 - All prospective customers
- **Anything said to promote a business to a third party is deemed to have been made to the public**

What Is Misleading Advertising?

- **“False or Misleading”:**
 - Untrue
 - Unsubstantiated/improperly substantiated
 - Deliberately confusing
 - Omissions
- **“General Impression” test**
 - What would the average person think it means

What Is Misleading Advertising?

- **What is a “Material Respect”?**
 - Anything relevant to purchasing decision
 - Particularly if likely to encourage purchase
 - Performance
 - Warranty

What Is Misleading Advertising?

- **Use common sense**
 - Parent test – what would Mom/Dad think it means?
- **Don't try to be “cute”**
 - Shouldn't need to clarify, explain or go to dictionary
 - If need to do this, likely a problem

What Is Misleading Advertising?

- **Includes representations from abroad**
 - U.S. television/radio ads broadcast into Canada
 - Packaging printed out of Canada
 - Ads in magazines/papers sold in Canada
- **Deemed to be made by Canadian importer**

Hybrid Offence

- **Criminal and civil tracks**
- **Criminal prosecution likely where***
 - Knowledge that misleading
 - Recklessness as to truth/facts
- **Civil prosecution in all other cases**
 - Carelessness/mistake

Civil Misleading Advertising

- **Also includes:**
 - Ordinary Price Claims
 - Bargain Price Claims
 - Performance/Test Claims

Ordinary Price Claims

- Use of “Ordinary Price” as reference
- Must have sold at “Ordinary Price”
for:
 - Substantial volume of sales (50% of sales)
or
 - Substantial period of time (50% over past six mos.)

Ordinary Price Claims

- **Applies to own or other's pricing**
- **Where using other's pricing as reference**
 - Must be prices in same geographic area
 - Must be recent pricing

Bargain Price Claims

- **“Bargain Price” means:**
 - Represent that “Bargain” vs. regular price
 - Language having similar effect
 - Super Sale!
 - Huge Savings!

Performance/Test Claims

- **Performance/Test claims**
 - Must have been actual test
 - Test must be “adequate and proper”
 - Testing must be done before claim is made

Performance/Test Claims

- **Many cases involving improper test claims**
 - Cancer treatment (criminal charges)
 - Weight loss products
 - Gas-saving products

Criminal Penalties

- **Summary Conviction**
 - Jail for up to two years and/or up to \$200,000 in fines
- **Indictable Conviction**
 - Jail for up to five years and/or discretionary fine
- **Possible civil damages claims**

Civil Consequences

- **Individuals:**
 - First offence – fine of up to \$50,000
 - Subsequent offence – fine of up to \$100,000
- **Corporations:**
 - First offence – fine of up to \$100,000
 - Subsequent offence – fine of up to \$200,000

Civil Consequences

- **Prohibition Orders for up to 10 years**
 - Order not to engage in similar conduct
 - Possible contempt if breach order
- **Public notice obligation**
 - Newspaper articles
 - In-store displays

Consequences

- **Much higher fines on consent**
 - Three recent fines of \$1 million or more
 - Two of these were “civil” cases
- **Restitution made on consent**
 - Refunds to over 2,000 consumers
 - Refund was difference between the regular price claimed and the sale price

Recent Cases

- **Grafton-Frazer (June 2006)**
 - Ordinary Price case
 - Used sales tags with inflated “regular” price
- **Consent “civil” settlement**
 - \$1.2 million fine
 - 10-year Prohibition Order
 - Public notice
 - Implement compliance program

Recent Cases

- **Media Syndication (June 2006)**
 - Ordinary Price case
 - Mail offer overstating “ordinary” price
- **Consent “civil” settlement**
 - Rebates to 2,000 individuals
 - 10-year Prohibition Order
 - Public notice
 - Implement compliance program

Recent Cases

- **Sears (April 2005)**
 - Ordinary Price case
 - Misleading representations regarding savings
- **Tribunal found had violated civil provision**
 - \$100,000 administrative monetary penalty
 - \$387,000 in costs to Bureau
 - 10-year Prohibition Order
 - Public notice

Recent Cases

- **Forzani (July 2004)**
 - Ordinary Price case
 - Use of inflated “regular” prices in ads
- **Consent “civil” settlement**
 - \$1.7 million fine
 - Public notice
 - Implement compliance program

Recent Cases

- **Suzy Shier (June 2003)**
 - Ordinary Price case
 - Factory tags with “regular” and “sale” prices
- **Consent “civil” settlement**
 - \$1 million fine
 - 10-year Prohibition Order
 - Public notice
 - Implement compliance program

Non-Legal Consequences

- **Expensive, time consuming investigation**
 - Search warrants
 - Production orders
- **Negative publicity**
- **Increased Bureau scrutiny**

Responding to Bureau

- **Bureau may call if receives complaint**
- **If Bureau calls:**
 - Take Bureau concerns seriously
 - Attempt to resolve informally
 - If agree to do something – follow up!

Responding to Bureau

- **Failure to respond to informal contact may result in:**
 - Formal investigation/inquiry
 - Production orders
 - Search warrants
 - Criminal or civil enforcement action

Ensuring Compliance

- **Make sure all claims are accurate/verifiable**
 - Language and visuals must be clear
- **Disclose all relevant information in ads**
- **Avoid use of “mouse print”**
 - Often doesn’t change “general impression”

Ensuring Compliance

- **Understand the differences between:**
 - Ordinary Price
 - Regular Price
 - MSRP

Ensuring Compliance

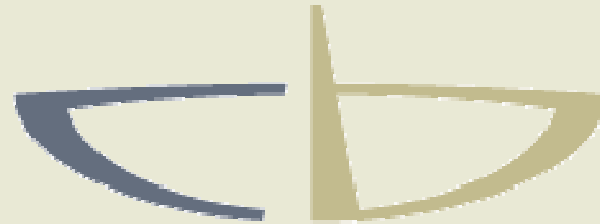
- **Track own and other's "Ordinary" price**
 - Time on sale and volume of sales
 - Other's recent pricing in same area
- **Don't run repeated/extended sales**
- **Only use "sale" or "special" if significant discount**

Ensuring Compliance

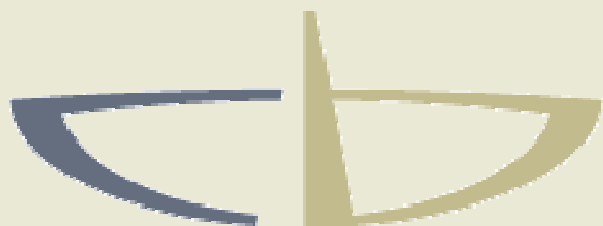
- **Develop compliance policy/program**
- **Implement internal review process**
 - Ad content
 - Frequency of sales/promotions
- **Provide staff training**
 - Company liable for actions of employees

Conclusion

An understanding of the law will help you ensure that your company's ads are both compliant and effective!



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