

A BRIEF WORD ABOUT ADVERTISING

Vaughan Black*

Compared with most parts of the *Competition Act*¹ the offence of false advertising² appears uncontroversial. It is well recognized for instance that the control of mergers and monopolies is a matter which entails contentious disputes over economic theories and has a potentially significant impact on our system of industrial organization. Legal provisions bearing on such matters represent political compromises between private right and various conceptions of the public good, and as such they will always be flags planted on disputed ground. In contrast, the prohibition of misleading advertising presents itself as a straightforward, apolitical embodiment of a community consensus. Unlike the behaviour involved in monopolizing a market, false advertising appears always to entail moral turpitude and to fall into the same category as other extensions of the offence of larceny, such as fraud, embezzlement and forgery. Even those who regard such issues from an economic rather than a moral point of view believe that there are insufficient market incentives to ensure that sellers will provide an optimum level of consumer information (that is, tell the truth) and not resort to strategic behaviour (that is, lie) and they consequently agree on the necessity for some state intervention to control deceptive commercial advertising.³ As a result the false advertising offence is not seen as a sensitive feature of the political economy of Canada and has rarely been the subject of political debate, nor have the administration and interpretation of the offence been accorded much legal analysis.⁴

* Dalhousie Law School. David Fraser, Susannah Worth Rowley and Lorenne Clark provided helpful comments on an earlier draft of this paper.

¹ R.S.C. 1985, c. C-34, as am. S.C. 1986, c. 26, s. 19 (formerly *Combines Investigation Act*). At times I shall refer to these statutes simply as the *Act*.

² Para. 52(1)(a).

³ See, e.g., R. Posner, *REGULATION OF ADVERTISING BY THE FTC* (Washington, D.C.: American Enterprise Institute for Policy Research, 1973). The economic argument against permitting false advertising maintains that it is inefficient to permit a situation in which sellers will have an incentive to provide incorrect data regarding their products, for that would divert consumers from superior products, destroying their faith in the market and induce sellers to allocate resources away from product development and toward effective deception.

⁴ The political debates surrounding the introduction of the present version of the false advertising offence are recounted in W.T. Stanbury, *BUSINESS INTERESTS AND THE REFORM OF CANADIAN COMPETITION POLICY, 1971-75* (Toronto: Methuen, 1977). That offence is discussed in a *Report of the Standing Committee on Consumer and Corporate Affairs on the Subject of Misleading Advertising* (Ottawa: H.C., June 1988) (Chair: M. Collins). Most legal studies of the offence are now somewhat out of date. The best analysis is contained in M.J. Trebilcock *et al.*, *A STUDY ON CONSUMER MISLEADING*

It is a premise of this paper that the offence is worthy of more attention than it has received. Like the law respecting the regulation of market concentration, the control of advertising has a potentially important economic impact — the reduction of corporate profits and the incarceration of executives — and raises distributional questions. Moreover, those questions are not as easily answered as one might assume. It is no simple matter to formulate an uncontroversial standard of deception, or to determine how advertising should be interpreted for the purpose of assessing criminal liability.⁵ Surprisingly, perhaps, an objective legal criterion for 'falsehood' is difficult to locate. Just as the concept of unconscionability in the private law of contract presents intractable issues of the control of market power, the question of what constitutes false advertising raises the same irresolvable clashes between fairness and private autonomy.

In addition to presenting the inevitable issues of demarcation, the question of advertising regulation raises broader questions of enforcement technique. It is by no means obvious that the method of governmental intervention in this area needs to be the criminal law. A number of possible alternatives are available. One example would be a regulatory agency administering some scheme of reporting, disclosure, inspection and licensing or tax requirements, and having in its remedial arsenal a variety of means of intervention and correction. The fact that a criminal law model has been chosen — due in part to constitutional constraints — has had definite effects on the type of advertising control we have developed.

Any inquiry which focuses on regulation of *false* advertising will ignore many of the complaints which have been levelled at modern mass marketing. Advertising has been accused of contributing to unnecessary product differentiation, raising prices, reinforcing racial and sexual stereotypes, debasing and trivializing language, offending good taste, preying on and exacerbating our insecurities, glorifying youth, commodifying art, commodifying women, contributing to the cynicism of the young and creating a society of over-consumption which is using vastly more than its fair share of the world's resources. This list — and it might

AND UNFAIR TRADE PRACTICES: PROPOSED POLICY DIRECTIONS FOR THE REFORM OF THE REGULATION OF UNFAIR TRADE PRACTICES IN CANADA (Ottawa: Information Canada, 1976) (prepared for the Department of Consumer and Corporate Affairs). For other general articles on false advertising in Canada, see R.I. Cohen, *Misleading Advertising and the Combines Investigation Act* (1969) 15 MCGILL L.J. 622; J.W. Swan, *Misleading Advertising: Its Control* (1972) 9 ALTA. L. REV. 310; K. Alyluia, *The Regulation of Commercial Advertising in Canada* (1972) 5 MAN. L.J. 97; G.D. Orr, *Misleading Advertising: Canadian Law* (1975) 10 GONZAGA L. REV. 353. It is somewhat ironic that the low profile, conspiratorial offences in Canadian competition legislation have received more attention than the highly-visible activity of false advertising.

⁵ See *infra*, notes 78-106 and accompanying text.

easily have been longer⁶ — suggests that the mere fact that misleading advertising might prompt us to purchase a product or service which is not in our best immediate interests may not be advertising's greatest evil. It may be that the most significant questions to be asked concerning the regulation of advertising relate to the law's failure to address the sort of issues just mentioned. Nevertheless this paper confines itself to an examination of the principal area in which Parliament has intervened to date: the *Competition Act's* general prohibition of false or misleading representations. That offence focuses on advertising's presumed capacity to mislead the public, not — at least not directly — on its role in creating and maintaining a concentrated, oligopolistic industrial structure.

It should be noted that there are other legal controls on false advertising apart from the general offence in the *Competition Act*. Other federal statutes, such as the *Textile Labelling Act*,⁷ the *Food and Drug Act*⁸ and the *Consumer Packaging and Labelling Act*,⁹ contain provisions with consequences for commercial advertising, and tobacco advertising has recently been comprehensively proscribed.¹⁰ As well a number of provinces have trade practice and consumer protection statutes which touch on the problem. In addition, legal control over false advertising need not be confined to direct state intervention. Michael Trebilcock has argued that if certain procedural reforms were implemented, the common law of contract might offer the optimal response to misleading advertising.¹¹ Yet despite the fact that there are legal controls on false advertising in addition to the offence in the *Competition Act*, that provision

⁶ Of course a list of the virtues and benefits of advertising could also be drawn up. A director of the Canadian Advertising Foundation has written that advertising leads to a "more benevolent society." See B. Philcox, "The Public Has a Right to Know What's For Sale", *The [Toronto] Globe and Mail* (16 January 1989) A7. Some elements of such a list would contradict the list of advertising's sins. For example, it could be argued that advertising lowers prices. These are matters about which there is no consensus and, fortunately, there is no need to resolve them here.

⁷ R.S.C. 1985, c. T-10.

⁸ R.S.C. 1985, c. F-27.

⁹ R.S.C. 1985, c. C-38.

¹⁰ *Tobacco Products Control Act*, S.C. 1988, c. 20. This statute came into force on January 1, 1989.

¹¹ M.J. Trebilcock, *Private Law Remedies for Misleading Advertising* (1972), 22 U.T.L.J. 1. For an American perspective on this same issue, see A. Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing and Private Litigation* (1985), 20 GA. L. REV. 1. In addition certain non-legal forms of control should be noted. There is a degree of self-regulation by the advertising industry. For example the Canadian Advertising Foundation publishes a *Code of Advertising Standards* and local Advertising Standards Councils review complaints of deviations from this Code. As well there are a number of more specific industry codes, such as the Pharmaceutical Advertising Advisory Board's *Code of Advertising Acceptance*. Though these schemes are not supported by legal sanction, relations between the governing associations and the media appear to confer on the former some ability to enforce their decisions. If a given advertiser refuses to cease violating the Code, the industry associations are often able to convince the media not to accept further business from that advertiser.

remains the central one. The other federal statutes are limited in scope. At the provincial level not all jurisdictions have enacted legislation dealing with the matter, and even in those which have, the statutes have not always been vigorously enforced. Moreover, those procedural reforms which might make private suits an attractive means of redress, such as broader class action provisions, have not yet been forthcoming. The false advertising offence in the *Competition Act* is the most important statute bearing on misleading commercial advertising in Canada and will be the focus of the present study.

This study will review the false advertising offence from the point of view of its effectiveness in achieving its proclaimed objectives and its impact — or lack of impact — on current marketing practices. Since this entails some inquiry into deviant behaviour by corporate actors, an effort will be made to relate the discussion to existing analyses of corporate economic crime in Canada.¹²

The study of organizational malfeasance has been an important field of research and debate for both criminologists and legal theorists for the past fifty years.¹³ In this country significant parts of that debate have centred on the failings of the *Competition Act*,¹⁴ though those have chiefly focused on the control of mergers and monopolies and offences such as bid rigging and price fixing, rather than on the false advertising offence. Given these relatively well-known discussions of economic crime, and their documentation of such features as watered-down and imprecise legislation, limited investigative resources, skewed prosecutorial priorities, light sentences, lack of media coverage of successful convictions and so on, it would be difficult to conduct a study of an offence like the prohibition against false advertising without reference to existing critiques of corporate crime in Canada.

¹² I trust there will be no quarrel with my labelling false advertising as “a crime”, despite the fact that the offence is (currently) found in the *Competition Act* and not in the *Criminal Code*. Refutations of a definition of “crime” which would limit it to *Criminal Code* offences are too well known to need repetition here. In addition, I trust that we are past the time when I need to distinguish corporate or organizational crime from occupational crime committed by individuals on their own behalf.

¹³ I date the modern study of corporate crime from the appearance of the work of E.H. Sutherland, *WHITE COLLAR CRIME* (New York: Dryden Press, 1949). Although his book did not appear until 1949, his paper *The White Collar Criminal* (1940) 5 AM. SOCIOLOGICAL REV. 1, (Address to the American Sociological Society Annual Meeting, 27 December 1939), gave birth to immediate and vigorous debate on the subject.

¹⁴ See generally C. Goff and C. Reasons, *CORPORATE CRIME IN CANADA: A CRITICAL ANALYSIS OF ANTI-COMBINES LEGISLATION* (Scarborough: Prentice-Hall, 1987); M. Bliss, *Another Anti-Trust Tradition: Canadian Anti-Combines Policy, 1889-1910*, in G. Porter and R. Cuff, eds, *ENTERPRISE AND NATIONAL DEVELOPMENT: ESSAYS IN CANADIAN BUSINESS AND ECONOMIC HISTORY* (Toronto: A.M. Hakkert, 1973) 39; B. Young, *Corporate Interests and the State* (Winter-Spring 1974) 10 *OUR GENERATION* 70; and D.L. Snider, *Revising the Combines Investigation Act: A Study in Corporate Power* in P.J. Brantingham and J.M. Kress, eds, *STRUCTURE, LAW AND POWER: ESSAYS IN THE SOCIOLOGY OF LAW* (Beverly Hills: Sage, 1979) 105; D.L. Snider, *Corporate Crime in Canada: A Preliminary Report* (1978), 20 *CAN. J. CRIM.* 142.

One of the central observations of these studies of corporate crime, namely, that the laws on the books are largely ineffective in practice, is reinforced by any passing familiarity with commercial advertising in the Canadian mass media. A brief exposure to current television programming raises at least a strong suspicion that large economic forces appear to be engaged in ongoing attempts to manipulate and deceive the public. Whether these attempts are successful is, of course, another matter. Doubtless many of us believe we are sufficiently circumspect about the claims of commercial advertisers and assume that if we can manage to inoculate our children with the same healthy mistrust of mass marketing they too will develop an immunity to commercial manipulation which will enable them to operate safely in the modern marketplace. Regardless of whether our cynicism about commercial claims justifies our feeling that we can keep one step ahead of the advertisers, I suspect it is still the case that few of us think that the government is doing a vigorous job of protecting us from Madison Avenue and Bay Street. All of this makes it difficult to write a study of the false advertising offence which does not adopt the tone of an *exposé*, and which does not appear to presuppose that the offence is little more than expressive, symbolic legislation intended only to convince some consumers that something is being done to protect their interests.

Several analyses of corporate crime in Canada have reached conclusions like those just suggested but they have not been uniform in either their theoretical approach or in their location of the primary source of 'the problem'. Theoretical approaches have ranged from liberal-reformist (which generally conclude by recommending legislative changes), through "Marxist-instrumentalist", to those which take a more sophisticated, structural view of the role of law as an ideological force mediating class conflict.¹⁵ Similarly, studies have ranged in focus, with some concentrating on the content of legislative provisions, others on prosecutorial resources, and still others on the rhetoric of judicial opinions. This study will attempt to examine each of the major features of the criminal justice system insofar as the offence of false advertising is concerned. Part I briefly outlines the legislative development of the offence, from its origins in the *Criminal Code* to its present formulation in the *Competition Act*. Part II examines judicial interpretations of the provision. Part III focuses on questions of administration: that is, on the approach of the government bodies charged with conducting investigations and prosecutions under the offence. The final section speculates on conclusions to be drawn from the first three parts.

¹⁵ This is the typology used in N. Sargent, "Law, Ideology and Corporate Crime: A Critique of Instrumentalism". (Address to the Canadian Law and Society Association Annual Meeting, June 1988) [unpublished].

I. LEGISLATIVE DEVELOPMENT

In this section I briefly trace the legislative genealogy of the false advertising offence in the *Competition Act*. In addition, though a more detailed analysis of the recent pattern of administration of the provision will follow in Part III, this section will also offer some general comments respecting the frequency of prosecution of earlier incarnations of the offence.

The predecessor to the general misleading advertising provision in the *Competition Act* originated as an addition to the *Criminal Code* by the Borden government in 1914:

406A Every person who knowingly publishes or causes to be published any advertisement for either directly or indirectly promoting the sale or disposal of any real or personal moveable or immoveable property, or any interest therein, containing any false statement or false representation which is of a character likely to or is intended to enhance the price or value of such property or any interest therein or to promote the sale or disposal thereof shall be liable upon summary conviction to a fine not exceeding two hundred dollars or to six months' imprisonment or to both fine and imprisonment.¹⁶

Parliamentary debates indicate the section was introduced in particular response to practices adopted during the western Canadian land rush, the victims being primarily eastern Canadian interests.¹⁷ In fact much of the debate on the bill was taken up by banter about whether it was central Canadians or westerners who were more honest in their business practice (or more intelligent). As well, there was some half-joking discussion about whether the new provision might apply to false election promises. (This same topic is one which would come up for discussion several times in later years when amendments to the offence were debated. Parliamentary discussion of the question of false political advertising was generally conducted in either a frivolous or a facetious vein.) The 1914 debates make no reference to protection of 'consumers', or even of 'the public', though there was mention of protection of "smaller investors".¹⁸ The bill was promoted by the western press, which appears to have been concerned that the reputation of its newspapers would suffer if they appeared complicitous in land swindles.¹⁹ It appears, however, that the legislation would not operate to make newspapers themselves liable for running a false advertisement; the word "knowingly" was

¹⁶ *An Act to Amend the Criminal Code*, S.C. 1914, c. 24, s. 1.

¹⁷ Canada, H.C., DEBATES, 3d Sess., 12th Parl., at 3466 ff (8 May 1914). For comment on these debates, see *R. v. Teixeira* (1986), 12 C.P.R. (3d) 263 at 267 (Que. Ct. Sess. P.).

¹⁸ DEBATES, *ibid.* at 3471.

¹⁹ This, at least, is the story of R.B. Bennett, who was not then a cabinet minister. *Idid.* at 3469.

evidently inserted for precisely this purpose.²⁰ Indeed the Minister of Justice, adopting the then current view of corporate criminal responsibility, did not believe the purpose of the legislation was to reach the activity of corporations at all.²¹

Essentially the government proffered the new legislation not as a departure from previous policy, but as a means to make the existing policy more effective. Its twofold purpose was comparable to that of the similarly-worded provision in the American *Federal Trade Commission Act*²² which was passed that same year. One goal was to place on the state an obligation to police certain market activity — activity which might theoretically be remedied at private law, but which typically victimized persons who were unable or unlikely to invoke the legal system to protect themselves. In this connection it was noted in debate that eastern Canadians would find it impractical to journey to western Canada to pursue civil suits. The second aspect was to supplement existing criminal offenses such as fraud and obtaining money under false pretences. This was one feature emphasized in the House of Commons Debates.²³ Though such existing offenses were potentially applicable to the practice of commercial advertising (and remain so today), they could be difficult to enforce due to the necessity of proving a connection between knowingly making a false statement, and actually obtaining money. More importantly, the offence of obtaining money by false pretences was not complete until money was obtained. The intended effect of the 1914 legislation was that acts which might previously have amounted to the offence of *attempting* to obtain money under false pretences would now constitute the completed offence of false advertising. As the Minister of Justice noted, even under the new offence “there would still be a wide field left of exaggeration of [sellers’] appreciation of the value or advantages of the goods or property they have to offer.”²⁴

The bill does not appear to have been a contentious one, although some opposition comments reflected a view that it did not go far enough. For instance, some Members of Parliament thought newspapers should be potentially liable for carrying false advertising. In addition, it was pointed out that in referring only to “false statements” the initial bill contained a large loophole in that pictorial representations would not be

²⁰ *Ibid.*

²¹ *Ibid.* at 3470. The Justice Minister, C.J. Doherty, had been a law professor and judge of the Quebec Superior Court, so it seems likely that his views as expressed in Parliament reflect a considered legal opinion. Not until 1941 was a Canadian corporation found guilty of an offence requiring proof of *mens rea*: *R. v. Fane Robinson Ltd.*, [1941] 3 D.L.R. 409, [1941] 2 W.W.R. 235 (Alta. C.A.).

²² *Federal Trade Commission Act of 1914*, 15 U.S.C. § 41-61 (1982) [hereinafter the *FTC Act*]. The section generally used to combat deceptive advertising is s. 45(a), which in its amended form provides that “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful”.

²³ DEBATES, *supra*, note 17 at 3471.

²⁴ *Ibid.* at 3472.

covered.²⁵ This prompted the inclusion of the words "false representation". Another member put forth the free market view that the legislation went too far in protecting those who speculated and lost, and that such persons should be expected to look out for themselves. Generally, however, debates on the bill do not betray any deep-seated ideological differences over deceptive commercial advertising. The government appears to have been mainly concerned with plugging a loophole in the administration of uncontroversial, existing criminal law offences so that western "swindlers" did not use newspapers to deceive eastern land speculators. Although the false advertising offence would eventually be transferred from the *Criminal Code* to the *Combines Investigation Act*, no reference to the *Combines Investigation Act* of 1910, to competition policy or to corporate behaviour was made at this initial stage. The false advertising offence was simply directed at evil-doers who were slipping through unfortunate gaps in existing criminal legislation.

Even if we look beyond *Hansard* it is not clear that the introduction of the false advertising offence was intended to quell any incipient political crisis. Russell Smandych has linked the introduction of Canadian anti-combines legislation to the growing labour militancy and class confrontation of the 1880's,²⁶ but I know of no comparable phenomenon which would account for the adoption of false advertising legislation in 1914. The legislation seems no more than the product of a minor intra-capitalist struggle, an uncontroversial adjustment to the *Criminal Code*, promoted by newspapers to help ensure their own credibility during the western Canadian land rush.

When in 1931 the offence was first amended, the issue that brought the matter back to Parliament was that of *mens rea*. In containing the word 'knowingly' section 406A appears to have required that before there could be a conviction the person publishing the advertisement must have had actual knowledge of the falsehood. This was certainly the Government's view when it first introduced the offence. As the Minister of Justice had said in 1914, "the man we want to get at is the man who deliberately lies".²⁷ Although there are no reported decisions under the 1914 version of the offence the government appears to have had information of some practical difficulties arising from the word 'knowingly', for in introducing the 1931 amendment to drop the word R.B. Bennett's Minister of Justice, Hugh Guthrie, said:

In the present section the word "knowingly" appears and the result is that prosecutions have failed because the crown has not been able to establish the fact a man has knowingly inserted a false advertisement, knowing it to

²⁵ *Ibid.* at 3468-69. See also *infra*, notes 171-191 and accompanying text.

²⁶ R. Smandych, *Marxism and the Creation of Law: Re-examining the Origins of Canadian Anti-Combines Legislation, 1890-1910*, in T. Fleming, ed., *THE NEW CRIMINOLOGIES IN CANADA: CRIME, STATE AND CONTROL* (Toronto: Oxford University Press, 1985).

²⁷ DEBATES, *supra*, note 17 at 3467.

be false. The amendment was originally asked for by many clubs, better business associations, boards of trade and the like in Canada.²⁸

However the prospect of removal of the *mens rea* requirement proved to be more than some people could bear. On second reading the Minister of Justice — in response, he said, to the concerns of “some very prominent business people in Canada”²⁹ — added a due diligence defence which read: “Provided further, that in any prosecution under this subsection the case may be dismissed if it be established to the satisfaction of the court upon proper evidence that the accused acted in good faith.”³⁰ A further proviso was appended which specifically excused newspapers which accepted advertisements in good faith. It is important to appreciate that these 1931 amendments were not prompted by the particular legal problems of proving the *mens rea* of corporate bodies. Indeed the language of the parliamentary debates appears to indicate that the concern was the individual offender. The issue was not the criminal responsibility of organizations, but rather, that of proving intent.

There were other amendments to the offence, though they elicited no debate. The 1914 version of the offence had referred to “false” statements, while the 1931 version used the words “untrue, deceptive or misleading”. The earlier offence had contained the word “representation”, added to make it applicable to pictorial advertisements. Without explanation Parliament dropped that word in 1931; the new version applied only to a “statement”.

In 1935 the good-faith proviso which had been added in 1931 was removed.³¹ This was in response to a recommendation by the Royal Commission on Price Spreads, which had taken a brief glance at the false advertising offence in its chapter on the consumer.³² It should not be assumed, however, that the disappearance of the good faith proviso combined with the 1931 elimination of the word ‘knowingly’ converted the statute to a regulatory, absolute liability offence. As the Royal Commission on Price Spreads noted, “deletion of [the proviso] does not preclude the exercise of judicial discretion where it is definitely established that the defendant had no intent to mislead and could not have been expected to know the full facts about the product advertised. This is the ordinary protection assured in our system of law. . . .”³³ In spite

²⁸ Canada, H.C., DEBATES, 2d Sess. 17th Parl., vol. 4 at 4137 (24 July 1931).

²⁹ *Ibid.*

³⁰ *An Act to Amend the Criminal Code*, S.C. 1930-31, c. 28 s. 5. Of course it is by no means certain that removal of “knowingly” would have caused the courts to hold that knowledge of the statement’s falsehood was not a required element of the offence.

³¹ *An Act to Amend the Criminal Code*, S.C. 1935, c.56, s.6. The same amendment added an ancillary offence which prohibited the publication of a statement of the performance, efficacy or life of a product not based on a proper test.

³² *Report of the Royal Commission on Price Spreads* (Ottawa: Queen’s Printer, 1935) at 246.

³³ *Ibid.*

of the fact that the purpose of the amendment was to broaden the scope of the offence it is quite possible that courts interpreting it would have held that full *mens rea* was required for all elements of the offence, thus effectively reconstituting it in its 1914 form. This, however is speculation, as there were still no reported decisions under the section.

In 1939 the offence was expanded so that it covered not only sales of goods and land, but also ads "promoting any business or commercial interests".³⁴ Again there was no debate on the amendment.

Four years later the provision was broadened again. As well as covering statements which were untrue, deceptive or misleading, it would thenceforth apply to ads "intentionally so worded or arranged as to be deceptive or misleading".³⁵ As then Minister of Justice Louis St. Laurent noted, the legislation was requested by the Better Business Bureau of Toronto. Although it would not have been important enough to bring before Parliament on its own, there was an omnibus bill coming before the House of Commons and he decided to add an amendment to that bill.³⁶ Again the *mens rea* issue was the one which preoccupied Parliament, but this time the policy was opposite to that pursued in 1931. Mr. St. Laurent pointed out that the word 'intentionally' was included in the legislation to ensure that no court could possibly hold that *mens rea* was not an element of the offence.³⁷ The debates reveal absolutely no acknowledgement that this constituted a reversal of the policy embodied in the 1931 amendment or that enunciated in the 1935 *Report of the Royal Commission on Price Spreads*. All parties seemed to agree that full *mens rea* should be an element of the offence, and the main debate concerned whether 'intentionally' was superfluous to that object. There was also a startlingly ingenuous question by John Diefenbaker:

Would the minister give an example of a case which would fall within the amendment. It is rather difficult to think of an advertisement arranged or so worded as to be deceptive or misleading.³⁸

In the 1953 revision to the *Criminal Code* the false advertising offence was made an indictable one carrying a maximum sentence of 5 years.³⁹ This amendment was not a response to any recommendation in the 1952 *MacQuarrie Report*⁴⁰ on combines legislation, for that had not

³⁴ *An Act to Amend the Criminal Code*, S.C. 1939, c. 30 s. 7.

³⁵ *An Act to Amend the Criminal Code*, S.C. 1943-44, c.23, s.11.

³⁶ Canada, H.C., DEBATES, 4th Sess., 19th Parl., vol. 5 at 5010-11 (2 July 1943).

³⁷ *Ibid.* at 5011.

³⁸ *Ibid.* at 5010.

³⁹ *Criminal Code*, S.C. 1953-54, c. 51, s. 306(1).

⁴⁰ *Report to the Minister of Justice, Committee to Study Combines Legislation* (Ottawa, 1952). Although the *Report* did examine some *Criminal Code* offences (price discrimination, restraint of trade) and recommend their transfer from the *Code* to the *Combines Investigation Act* (at 37), it did not touch on the false advertising offence except to note that false advertising was dealt with in American trade practice legislation (at 17).

touched on false advertising. It would appear that the conversion of false advertising from a summary conviction to an indictable offence was the product of a recommendation from the Department of Justice in an effort to "get tough" with deceptive advertising. As there had been no reported decisions under the section the tougher penalty seems an empty gesture, at least as far as the rational offender is concerned.

In the period between 1953 and 1969 (when it was finally transferred from the *Criminal Code* to the *Combines Investigation Act*) the offence remained unchanged, and there were still no reported prosecutions under it. The sole exception to this lack of enforcement was a 1951 case⁴¹ which was brought under a subsection appended to the general provision in 1935⁴² forbidding sellers from advertising that their goods had been tested by the National Research Council. Even this hardly qualifies as a prosecution of false advertising, for the provision in question forbade representing that goods had been tested by the N.R.C. even if this was in fact true, unless the N.R.C. had given its permission. Thus the subsection was more in the nature of a trademark protection than a protection for the consuming public. Its gravamen was not *deceptive* advertisements.

It seems likely that this lack of enforcement of a *Criminal Code* offence over a period of 55 years was not due to any shortage of instances of false advertising in the marketplace. As mentioned above, the American Federal Trade Commission (FTC) was founded in 1914. Between 1914 and 1969 — the same period during which there were no reported prosecutions under the general false advertising provision in Canadian federal law — the FTC had taken action against about 3200 instances of deceptive advertising.⁴³ The American legislation was substantively similar to its Canadian counterpart, and the types of advertising in use in the two countries were not dissimilar. The main difference between the two statutes was that the *FTC Act* had a different remedial scheme. Instead of making false advertising a criminal offence punishable by fine or imprisonment, it had a compliance regime which permitted the Commission to issue a cease and desist order against advertisements found to be deceptive. Criminal penalties could be incurred only when a seller persisted in publishing a prohibited advertisement. In addition Congress did not entrust enforcement of the *FTC Act* to the bodies charged with detecting violations of the general criminal law. It created a specialized and centralized bureaucratic research and enforcement agency. The Ca-

⁴¹ *R. v. Thermo-Seal Insulation Ltd.* (1951), 102 C.C.C. 68, 12 Fox. Pat. C. 45 (Ont. Mag. Ct.). (The accused was convicted, fined \$50 and ordered to pay costs of a further \$50).

⁴² *An Act to Amend the Criminal Code*, S.C. 1935, c. 56, s. 6(2).

⁴³ This figure is taken from a count carried out by Brant and Preston, *The Federal Trade Commission's Use of Evidence to Determine Deception* (1977), 41 J. MARKETING 54. It does not include cases in which the F.T.C. obtained a "consent order" — a voluntary agreement by an advertiser to discontinue an advertisement the F.T.C. has found objectionable.

nadian statute, on the other hand, left the matter to the general criminal investigative and prosecutorial process; that is, to the various provincial Attorneys-General. Perhaps the fact that the officer on patrol is not trained to keep an eye out for possible violations of the prohibition against false advertising goes some way towards explaining the dearth of false advertising prosecutions in this country.

The notion that the lack of enforcement is at least partly due to inherent difficulties in bringing the criminal law to bear on commercial activity — especially the activity of corporations — has become equally true regarding the Canadian law on monopolies and mergers. When we look at the law of false advertising, this same explanation is borne out by the considerable increase in enforcement activity which took place when the misleading advertising provision was placed in the *Combines Investigation Act* where it could receive the specific attention of the Director of Investigation and Research and a specialized investigative staff. The first misleading advertising provision to appear in the *Combines Investigation Act* was a specialized section enacted by the Diefenbaker Government in 1960:

33C(1) Every one who, for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public, by any means whatever, concerning the price at which such or like articles have been, are, or will be, ordinarily sold, is guilty of an offence punishable on summary conviction.⁴⁴

From its inception this provision against misrepresentation as to ordinary price was enforced. Between fiscal years 1960-61 and 1969-70 there were 76 prosecutions under it, with the more active period of enforcement coming after 1967 when Ministerial responsibility for the *Act* was transferred from the Department of Justice to the newly-created Department of Consumer and Corporate Affairs.⁴⁵

⁴⁴ *An Act to Amend the Combines Investigation Act and the Criminal Code*, S.C. 1960, c. 45, s. 13. The House of Commons debates on the section were brief. Justice Minister E. Davie Fulton stated that the main impetus for the section came, not from consumers, but from independent marketers who were being victimized by competitors who advertised goods for a given price and falsely represented that the normal selling price of such goods was a much greater price. See Canada, H.C. DEBATES, 3d Sess., 24th Parl., vol. 7 at 6984 (26 July 1960). This pro-business purpose behind the provision would have been in accordance with the other 1960 changes to the *Combines Investigation Act*, such as the dilution of the prohibition against resale price maintenance, which were billed as a clarification of the *Act* but were actually a concession to business interests.

⁴⁵ Responsibility for the *Act* was transferred from the Minister of Justice to the Registrar General by the *Government Organization Act*, S.C. 1966-67, c. 25, ss. 8 and 38 and then to the Minister of Consumer and Corporate Affairs by the *Department of Consumer and Corporate Affairs Act*, S.C. 1967-68, c. 16, ss. 5 and 10. Statistics regarding the number of prosecutions brought under the section are found in the relevant *Annual Report of the Director of Investigation and Research*. The Director is appointed under the *Combines Investigation Act*.

Similarly, prosecutions began to appear under the general misleading advertising provision once it was transferred from the *Criminal Code* to the *Combines Investigation Act* in 1969.⁴⁶ The Parliamentary rhetoric which accompanied this change reflected more concern for consumers than had been evident at any previous stage, with Justice Minister Turner proclaiming "that the consumer has a fundamental right to correct information and that truth in advertising is essential to any charter for the consumer."⁴⁷ Turner also promised that the offence would be subject to "vigorous enforcement . . . on a national basis".⁴⁸ Although the section was identical to the one which had slumbered in the *Criminal Code* since 1953, which in turn was substantially unchanged from the initial enactment of 1914, Turner's promise of vigorous enforcement was fulfilled, at least if the number of prosecutions is a valid measure. In the year ending March 31, 1970 there were 18 cases brought in respect of misleading advertising.⁴⁹ The figures for cases brought in the following five years were 21, 59, 55, 60 and 85 respectively.⁵⁰ This is certainly vigorous enforcement if the standard of comparison is the pre-1969 enforcement record of the false advertising offence in the *Criminal Code* or the enforcement record of other offences in the *Combines Investigation Act*. Nonetheless, compared with many street crimes, such as theft or breaking and entering, prosecutions for false advertising were still infrequent.

The next substantive change in the false advertising offence took place in 1976 with the passage of the so-called Stage I amendments to the *Combines Investigation Act*. This legislative initiative added a number of new provisions prohibiting certain misleading trade practices, some of which are species of false advertising. These will not be discussed here fully, but should be noted briefly. They include the offences of double ticketing, pyramid selling, misleading promotional contests, bait-and-switch advertising, sale above advertised price, misleading warranties

⁴⁶ *Criminal Law Amendment Act*, S.C. 1968-69, c. 38, s. 116. It became s. 33(D) of the *Combines Investigation Act*. In *Combines Investigation Act*, R.S.C. 1970, c. C-23, s. 33(D) was renumbered s. 37. One change which came about as a consequence of relocating the offence in the *Combines Investigation Act* was that an additional remedy became available. A 1960 amendment to the *Act* provided that, in addition to fines, orders of prohibition might be made against persons convicted of trade offences requiring such persons to refrain from any continuation or repetition of the offence. *An Act to Amend the Combines Investigation Act and the Criminal Code*, S.C. 1960, c. 45, s. 12.

⁴⁷ Canada, H.C., DEBATES, 1st Sess., 28th Parl., vol. 5 at 4724.

⁴⁸ *Ibid.*

⁴⁹ *Report of the Director of Investigation and Research, Combines Investigation Act, for the Year Ended March 31, 1970* (Ottawa, 1970) at 69.

⁵⁰ These figures are taken from the various *Annual Reports of the Director of Investigation and Research, Combines Investigation Act*.

of performance and misleading testimonials. At the same time the general section, which has remained the most important one⁵¹ and which will remain the focus of this paper, was altered to read:

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. . . .⁵²

This offence was broader than its predecessor in several ways. The pre-1976 offence had referred to "an advertisement containing a statement that purports to be a statement of fact", while the new section used the words "a representation". The term 'representation' was not defined but appears broader than 'statement of fact' in that it included pictorial advertisements. (It should be recalled that the word 'representation' was used in the initial version of the offence in 1914 but that it was changed to 'statement' in 1931.) As well as continuing to apply to sales of goods and land, new definitions of 'product', 'article' and 'service' ensured that the false advertising provision also covered the promotion of the supply of services, energy and money.⁵³ The newly-framed offence had also to be read in conjunction with an addition to the *Act* which stated:

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.⁵⁴

In addition the remedies for the reformulated offence were made more flexible. It could now be prosecuted either as an indictable offence, punishable by 5 years in prison and a fine in the discretion of the court, or as a summary conviction offence carrying a maximum of a year in prison and a fine of \$25,000.⁵⁵ There was a provision for the Crown to seek an interim injunction (*ex parte* if necessary) against the commission of trade offences even before charges were laid.⁵⁶ Also, there was the controversial section 31.1 which permitted anyone who had suffered loss

⁵¹ Though the new offences just described may all be regarded as species of false advertising most prosecutorial activity still takes place under the general provision. In 1985-86 the general offence accounted for 68 per cent of all convictions for deceptive trade practices.

⁵² *Combines Investigation Act*, S.C. 1974-75-76, c. 76, s. 18. (This was proclaimed in force Jan. 1, 1976.)

⁵³ S. 1.

⁵⁴ S. 18. The provision is now s. 53(4) of the *Competition Act*.

⁵⁵ S. 18.

⁵⁶ S. 10.

as a result of an offence in relation to competition to sue civilly and recover damages.⁵⁷

There was one respect in which the offence as reformulated in 1976 was weaker than its predecessor. It was tempered by a statutory due diligence defence, comparable to that which had been part of the offence from 1931 to 1935. This defence had not been a part of the original draft amendments but was added in response to pressure from the business lobby,⁵⁸ which appears to have been successful in thus reversing the recommendation of the 1935 *Report of the Royal Commission on Price Spreads*.

Again, if the number of successful prosecutions is an appropriate measure, there has been substantial enforcement of the amended prohibition on misleading advertising. Although the 1976 substantive amendments to the offence did not contribute to any boom in enforcement activity such as followed the 1969 legislation which transferred the offence from the *Criminal Code* to the *Combines Investigation Act*, there was some modest increase in prosecutorial activity. The number of cases brought under the false advertising section had been growing in the early 1970s and after the 1976 changes it rose again to approximately 90 per year where it has remained to this date. About 70% of these prosecutions have resulted in convictions,⁵⁹ with prosecutions for misleading advertising being several times more numerous than those for bid-rigging, price-fixing and illegal mergers combined.

The legislative activity surrounding the recasting of the *Combines Investigation Act* as the *Competition Act* in 1986 resulted in no changes to the provisions on advertising, although presumably their interpretation

⁵⁷ S. 12. This provision is currently found in s. 36 of the *Act*. There has been much litigation and discussion of the constitutionality of this provision. I will not take up that issue in this paper. The major authorities are discussed and reviewed in a recent decision which upheld para. 31.1(1)(a), the civil damages provision, as being within the federal legislative competence over Trade and Commerce: *Rocois Constr. Ltd. v. Québec Ready Mix Inc.* (1985), 25 D.L.R. (4th) 373, 64 N.R. 209 (Fed. C.A.), leave to appeal to S.C.C. granted 25 D.L.R., 64 N.R. 209. See also P.W. Hogg & W. Grover, *The Constitutionality of the Competition Bill* (1976) 1 CAN. BUS. L.J. 197 at 207-9.

⁵⁸ S. 18. The section (s. 60(2) of the current *Act*) provided that there should be no conviction for false advertising if it arose from an error which occurred despite the accused's due diligence, so long as the accused made prompt and reasonable efforts to bring the mistake to the attention of persons affected by it. For an account of the efforts of business interests to influence the amendments to the law on false advertising, see W.T. Stanbury, *supra*, note 4 at 159ff.

⁵⁹ In addition, over the same period prosecutions for misleading advertising with respect to ordinary price have remained at about 24 per year. These figures are taken from the various *Reports of the Director of Investigation and Research, Combines Investigation Act*. In addition to the criminal prosecutions there were a handful of civil prosecutions pursuant to s. 31.1.

is now subject to the new section setting out the purpose of the *Act*.⁶⁰ Another change in the new *Competition Act* with potential consequences for the enforcement of the false advertising offence was the enactment of revamped search powers⁶¹ to replace ones which had been struck down by the Supreme Court of Canada in *Southam Inc. v. Hunter*⁶² as being contrary to the *Canadian Charter of Rights and Freedoms*.

Finally it should be noted that the Commons Standing Committee on Consumer and Corporate Affairs came forth with a Report on misleading advertising in June of 1988. The main thrust of the Report is to acknowledge the limitations of a criminal law approach to false advertising and to recommend that existing provisions be supplemented by a broader range of remedies, including a consumer class action provision, a more readily available injunction power, a judicial power to order advertisers to engage in corrective advertising and affirmative disclosure of facts, and a capacity in the Director of Investigation and Research to enter into consent agreements or assurances of voluntary compliance with

⁶⁰ *Competition Act*, S.C. 1986, c. 26, s. 19:

S. 1.1. The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to insure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and prudent choices.

⁶¹ S. 24.

⁶² [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641. The effect of this decision on investigations of misleading advertising was not great as investigators were able to resort to the search provisions in the *Criminal Code*. Advertisers have reaped significant benefits from the *Charter*. In addition to striking down search and seizure provisions in *Hunter v. Southam* some courts have found the due diligence defence to the charge of false advertising to be inoperable advertising (*see infra*, note 71 and accompanying text). There was also a significant challenge to provisions of Québec's consumer protection law which prohibited advertising aimed at children. Sections 248 and 249 of the *Consumer Protection Act*, R.S.Q. c. P-40.1, which created the offence of directing commercial advertising at children under 13 years, were found to infringe the corporate defendant's right to freedom of speech in *Irwin Toy Ltd. v. A.-G. Québec* (1986), 14 C.P.R. (3) 60, 32 D.L.R. (4th) 641 (Que. C.A.). On April 27, 1989 the Supreme Court of Canada allowed the appeal of the Québec government, holding that although the impugned sections violated advertisers' freedom of expression they were justifiable under S.1 of the *Charter*.

It is conceivable that the offence of false advertising could itself be found inoperable due to its infringement on advertisers' freedom of expression, but this seems unlikely. R. Sharpe, *Commercial Expression and the Charter* (1987), 37 U.T.L.J. 229 at 259 was of the opinion that this type of market place regulation would withstand a *Charter* challenge because "regulation of commercial speech designed to ensure fair and truthful advertising is consistent with the very purpose of protecting commercial speech." In view of the recent decision of the Supreme Court of Canada on the *Irwin Toy* case, Sharpe's conclusion seems justified.

advertisers. Although the dissolution of Parliament for the 1988 federal election put an end to any immediate pressure for government action on this Report it will almost certainly be recommended to the new Minister for further action.

II JUDGING

The language of the general false advertising provision (which now appears as paragraph 52(1)(a) of the *Competition Act*) is spare, leaving important matters open to judicial construction. Although the Supreme Court of Canada has never addressed the offence at length⁶³ the considerable activity in lower courts in recent years has resulted in a solid *corpus* of decisional law. In this respect the false advertising offence is unlike others in the *Competition Act*, and provides an area of study not always available to those who would review the law on mergers and monopolies.

Although some criminologically-oriented studies of offences in the *Competition Act* have eschewed examination of the case law (apart from sentencing statistics) and elected to concentrate on such matters as the efforts of the business lobby in crafting the legislation and the limited budget of the enforcement officials, I propose to take the courts seriously. Significant choices regarding the content of the law have been made at that level. In addition the general attitude of courts to accused persons and victims, and the way in which that has been embodied in judicial rhetoric, is an important part of the ideology surrounding the offence. What follows is not a complete primer on the case law of false advertising. For instance I will not touch on the constitutionality of the civil damages provision, the interplay between paragraph 52(1)(a) and other advertising offences or questions of how indictments should be framed. Rather, I focus on those elements of the offence which seem most pertinent to compliance levels required of advertisers, and consequently to the amount of protection it offers consumers from deceptive mass marketing.

A. *The Mental Element*

The question of *mens rea* was the matter which arose most frequently throughout the statutory evolution of the offence, and it is of obvious importance. Although there are no reported decisions under early versions of the offence it is now settled that false advertising is a strict liability crime in that a conviction does not require that persons who publish misleading representations know or intend them to be deceptive. This

⁶³ The Supreme Court has entertained just two appeals on false advertising charges. The first concerned a minor point and contained no general remarks on the Act: *Alberta Giftwares Ltd. v. The Queen* (1973), [1974] S.C.R. 584, 11 C.C.C. (2d) 513 [hereinafter *Alberta Giftwares* cited to C.C.C.]. The second was dismissed without reasons: *R. v. Alexanian*, [1976] 2 S.C.R. v, 17 N.R. 42.

position was initially established in a decision under the specialized offence of misleading statements as to ordinary price⁶⁴ and has been consistently followed in decisions under the general provision, both in its pre-1976 and post-1976 incarnations.⁶⁵ Nevertheless the existence of an intent to deceive is not without effect. Studies have suggested that the presence of such an intent increases the likelihood of prosecution⁶⁶ and there are cases which state that the absence of an intent to mislead should operate to decrease sentence.⁶⁷ In this respect, although *mens rea* is not essential to the offence, there is still a greater focus on "evil-doers" than on other offenders, regardless of how harmful the actions of those other offenders might be.

It will be recalled that in 1976 a statutory due diligence defence was added to the *Act*.⁶⁸ This provided that persons should not be convicted for false advertising if they establish that the act giving rise to the charge was the result of an error which they took reasonable precautions to prevent, and that they forthwith took reasonable measures to bring the error to the attention of persons likely to be affected by it.⁶⁹ The requirement for prompt corrective advertising renders this defence stricter than the judge-made defence laid down in *R. v. Sault Ste. Marie (City of)*⁷⁰ (which requires only that the accused prove that reasonable care was exercised) and has been held to displace that judicially-crafted defence, rendering it unavailable and requiring accused persons to meet the more exacting legislative conditions.⁷¹ However two recent decisions in

⁶⁴ *R. v. Allied Tower Merchants Ltd.*, [1965] 2 O.R. 628, [1966] 1 C.C.C. 220.

⁶⁵ *R. v. T. Eaton Co.* (1973), 14 C.C.C. (2d) 124, 12 C.P.R. (2d) 276 (Man. Q.B.), *aff'd* (1974) 17 C.C.C. (2d) 501, 47 D.L.R. (2d) 746 (Man. C.A.); *R. v. Nat'l Upholstering Mfg. (1964) Ltd.* (1975), 27 C.C.C. (2d) 551, 23 C.P. (2d) 23 (Man. Co. Ct.); *R. v. Impala Agencies Ltd.* (1976), 28 C.P.R. (2d) 42 (Man. Prov. Ct.); *R. v. Colgate-Palmolive Ltd.* (1977), 20 O.R. (2d) 691, 41 C.C.C. (2d) 423 (Co. Ct.); *R. v. Parkside Ford Sales Ltd.*, [1979] 3 W.W.R. 367 (Man. Co. Ct.), *R. v. Birchcliff Lincoln Mercury Sales Ltd.* (1987), 68 O.R. (2d) 610, 36 C.C.C. (3d) 1 (C.A.), *leave to appeal to S.C.C. refused*, 60 O.R. (2d) 618.

⁶⁶ P. Fitzgerald, *Misleading Advertising: Prevent or Punish?* (1973) 1 DAL. L.J. 246 at 252ff. Fitzgerald examined files of the Trade Practices Branch and compared those that were fully investigated but not prosecuted with those in which a prosecution was launched. He found a high degree of correlation between existence of an advertiser's apparent "fault" and a decision to prosecute. A similar result was reached in a study by the Law Reform Commission of Canada, *STUDIES ON STRICT LIABILITY* (Ottawa: Information Canada, 1974) at 88ff. This study concluded that a prosecution was unlikely unless there was a perception that the advertiser had been dishonest. It should be noted that both of these papers were written at a time before the due diligence defence was added to the *Act* and at a time when negligence on the part of the advertiser was not a legal defence.

⁶⁷ *R. v. S. Wise Constr. Ltd.* (1978), 54 C.P.R. (2d) 112 at 114 (Ont. C.A.), *per* Dubin J.A.; *R. v. First Choice Can. Communications Corp.* (1986), 17 O.A.C. 370; *R. v. Canadian Tire Corp.* (1987), No. 335/86 (Man. C.A.).

⁶⁸ *Combines Investigation Act*, S.C. 1974-75-76, c. 76, s. 118.

⁶⁹ S. 60(2).

⁷⁰ [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161.

⁷¹ *R. v. Consumers Distributing Co.* (1980), 57 C.C.C. (2d) 317, 52 C.P.R. (2d) 214 (Ont. C.A.).

Manitoba and Saskatchewan have held that the defence in the *Act* violates the provisions of the *Charter* concerning fundamental justice and the right to be presumed innocent until proven guilty.⁷² The Ontario courts have rejected this conclusion, so the constitutionality of the statutory defence remains uncertain.⁷³ If the view in the western decisions prevails then the statutory defence will be of no force and effect, and persons accused of false advertising will have available the due diligence defence for strict liability offences in *R. v. Sault Ste. Marie*.

B. *Interpreting Advertising: What is Deception?*

In its pre-1976 formulation the general prohibition against false advertising referred to ads which were "untrue, deceptive or misleading".⁷⁴ The post-1976 version is somewhat simpler and prohibits representations which are "false or misleading". This appears on its face to create a variety of ways in which the offence may be committed. A representation might be false but not misleading, or it might be true (or at least not proven false) but nevertheless misleading. Obviously the section applies to ads which are both false and misleading. In practice there has been little decisional law developing the relationship between the terms 'false' and 'misleading' or clarifying what either of them means. In a great many cases the court simply concludes the representation was "false or misleading" (or "false *and* misleading") and convicts.⁷⁵ Alternatively it is common for courts simply to find an ad false and make no reference to whether it was misleading, or *vice versa*. Although a few cases have hinted at a distinction between 'false' and 'misleading' none have provided useful definitions. The most helpful case is *R. v. Foote, Cone & Belding Advertising Ltd.*⁷⁶ where the ad in question deceived by omission and oversimplification. There the court acknowledged that a "statement may be literally true and yet, viewed in the context in which it is made, may be misleading".⁷⁷

⁷² *R. v. Westfair Foods Ltd.* (1986), 41 Man. R. (2d) 205, 11 C.P.R. (3d) 345 (Q.B.) [hereinafter *Westfair* cited to C.P.R.] and *R. v. Westfair Foods Ltd.*, [1985] 3 W.W.R. 423 (Sask. Q.B.). Both decisions found that s. 60(2) violated s. 7 of the *Charter*. The Manitoba court also found a violation of s. 11(d).

⁷³ *R. v. Independent Order of Foresters (No. 1)* (1986), 13 C.P.R. (3d) 563 (Ont. Dist. Ct.); *Canadian Tire Corp. Ltd. v. The Queen* (1987), 16 C.P.R. (3d) 465 (Ont. Dist. Ct.); *R. v. Wholesale Travel Group Inc.* (1988), No. 921/88 (Ont.H.C.). *But see R. v. Total Ford Sales Ltd.* (1987), 18 C.P.R.(3d) 404 (Ont. Dist. Ct.) where the Court leaves the matter undecided.

⁷⁴ R.S.C. 1970, c. C-23, s. 37.

⁷⁵ For example, in the only false advertising case in which the Supreme Court of Canada has given reasons, it wrote that the appellant had "published an advertisement containing a statement that purported to be a statement of fact but which was untrue, deceptive and misleading". *Alberta Giftwares*, *supra*, note 63 at 518.

⁷⁶ (1977), 34 C.P.R. (2d) 26 (Ont. Co. Ct.).

⁷⁷ *Ibid.* at 32. In the end, however, the advertisement was found to be both untrue and misleading.

Although the possibility for policing ads which though not false are still misleading, appears to open up a broad area for regulation, that area has not been vigorously explored in practice. Courts have shown little willingness to permit the term 'misleading' to do what the term 'unfair' has been made to do under equivalent American legislation. There, where the *FTC Act* combats ads which are "unfair or deceptive", efforts to employ the concept of unfairness to combat advertising which exploits consumers' psychological weaknesses have met with some success.⁷⁸ By contrast the Canadian cases focus exclusively on falsehood. There is an assumption that there exists a core of truth about a given product, and that advertisements can either convey that truth (in which case they are acceptable) or convey falsehood (in which event they are prohibited). Thus the 'misleading' is construed to denote representations which, while literally true, convey a false impression. It is not construed to refer to statements which, while literally and perhaps contextually accurate, might manipulate or victimize consumers in some other fashion. The focus is on accuracy, with the assumption that those who tell the truth can never be leading their listeners astray.

The false advertising offence does not state that there shall be no deceived customers, merely that no one shall make a false or misleading representation to the public. One reading of this offence leads to the interpretation — somewhat questionable from a hermeneutic point of view — that it is the representation itself which must be false or misleading, quite apart from its effect on any imagined audience. While courts sometimes speak as though representations carry an identifiable meaning of their own, they more commonly see the question as being whether the representation in question will convey a false message to some objectified public. From this point of view the Crown does not have to prove that any individual was in fact misled.⁷⁹ Conversely, individual consumers have no absolute right to be protected against drawing false inferences from advertisements, and evidence of deceived customers, though admissible and sometimes persuasive, is not conclusive.⁸⁰ Similarly, evidence led by the accused to the effect that there were satisfied customers who were not deceived will not ensure acquittal. What is

⁷⁸ See, e.g., *ITT Continental Baking Co.*, 83 F.T.C. 865 (1973), *var'd* 83 F.T.C. 1105 (1973), *aff'd* 532 F. 2d 207 (2d Cir.). There, an advertisement for Wonder Bread which was found to exploit parents' concerns over their childrens' healthy development was held to be both unfair and deceptive. For a discussion of the concept of unfairness in s. 5 of the *FTC Act* see R. Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising* (1977), 90 HARV. L. REV. 661, at 680-87.

⁷⁹ *R. v. Alexanian & Sons* (1974), 23 C.C.C. (2d) 249, 22 C.P.R. (2d) 37 (Ont. C.A.). An appeal to the Supreme Court of Canada was dismissed without reasons, *supra*, note 63. This seems reasonable. As one court has noted, "[t]he fact that a person does not complain may also be consistent with a successful manipulation". *R. v. Parkside Ford Sales Ltd.*, [1979] 3 W.W.R. 367 at 371 (Man. Co. Ct.).

⁸⁰ *R. v. Anders* (1978), 43 C.P.R. 5 (Ont. Co. Ct.), *rev'd in part* 44 C.P.R. (2d) 152 (C.A.); *R. v. J. Clarke & Son* (1986), 71 N.B.R. (2d) 257, 182 A.P.R. 257 (Q.B.T.D.).

necessary is that the representation in question possess a tendency to mislead the public, a matter that Canadian judges are prepared to resolve by using their own intuition to determine what a given ad's impact on this assumed audience might be. Since with any given advertisement it is fairly easy to imagine some way in which a portion of the public might be misled, what is required to resolve this question is a judicial standard — some sort of benchmark which may be used to determine when an advertisement should be found false or misleading. Such a test will be at the core of the offence for it will determine the level of protection afforded the public.

The standards which judges have devised have most commonly been phrased in terms of the intelligence of the imagined consumer audience — a sort of gullibility quotient. If a court assumes that the public is intelligent and sophisticated, easily capable of seeing through the majority of deceptive advertisements, the resulting level of protection will be low, as few ads will be found likely to mislead such persons. On the other hand, if a court is prepared to assume that consumers are an ignorant lot, easily led astray, then it will be more disposed to find that a given representation has a tendency to deceive and thus more likely to convict. While many legal tests are pitched at the level of the hypothetical reasonable person, there is some danger in adopting such a standard as a part of a test for false advertising, especially for some of today's complex products. Mass advertising campaigns reach millions of persons, and ads which might fail to deceive intelligent and even average consumers could still generate large profits by fooling the foolish. You can build up a substantial business by victimizing only a small percentage of the total buying public. Even in classical private law fields, where there is often an assumption that the parties have consciously chosen to deal with one another, the reasonable-person standard is problematic. Such an approach may be particularly inappropriate where mass advertising is concerned. Ubiquitous and persistent mass marketing campaigns often seek us out when we are unaware or only partially attentive. When one considers the fact that much advertising is involuntarily experienced and reaches us when we are not on our guard it is easy to appreciate the dangers of adopting a reasonable-person standard.

For these reasons American courts interpreting the *FTC Act* have rejected a reasonable-person test for false advertising and formulated instead a test which postulates a public which is credulous and unthinking.⁸¹ Thus if an ad is found likely to deceive only the foolish the FTC may nevertheless issue a cease and desist order against it. This crucial test theoretically offers a high level of protection against false advertising. It has long been subjected to critical attack by portions of

⁸¹ *Aronberg v. FTC* 132 F. 2d 165 (2d Cir, 1943); *Charles of the Ritz Distributors Corp. v. FTC* 143 F. 2d 676 (2d Cir, 1944); *FTC v. Sterling Drug Inc.* 317 F. 2d 669 (2d Cir., 1963).

the American business community which argue that the public is not naive and does not need to be patronized.

The importance of the standard is demonstrated by the efforts of President Reagan's first appointee to the Chair of the FTC, James Miller III, to obtain a statutory amendment diluting it. Miller, whose tenure as Chair was characterized by the discontinuation of a number of consumer-oriented programs and a general deregulation of the control of advertising, requested Congress to replace the court-created credulous-person test with a reasonable-consumer test.⁸² It is interesting to note in passing that an early version of the Stage I amendments to the *Combines Investigation Act*, Bill C-256, which was introduced by Justice Minister Ron Basford on June 29, 1971, included a statutory adoption of the credulous-person test,⁸³ but pressure from the business lobby resulted in this being dropped from the 1976 amendments.

Lacking statutory guidance on this point, Canadian judges have reached no consensus on what the deception standard should be. In the first case to consider the question the Appellate Division of the Alberta Supreme Court quoted and relied on American decisions under the *FTC Act* and appeared to adopt the credulous-person test.⁸⁴ This view has been embraced by a number of other courts, some of which have made explicit

⁸² At a hearing before the Senate Committee on Commerce, Science and Transportation, 97th Cong. 2d Sess. 74 (1982) Miller advocated defining deceptive practices as those situations in which reasonable consumers are likely to be deceived. At another hearing he recommended that Congress define deception in the *FTC Act* as a "material representation that is likely to mislead consumers, acting reasonably in the circumstances, to their detriment; or a material representation that the representor knew or should have known would be misleading". (*FTC's Authority Over Deceptive Advertising: Hearing before the Subcomm. for Consumers of the Senate Subcomm. on Commerce, Science and Transportation*, 97th Cong. 2d Sess. 9-10 (1982) at 4.) Though Congress has not acted on these recommendations there is evidence the FTC may be attempting to revise the standard on its own. See the majority decision in *Cliffdale Associates, Inc.* 103 F.T.C. 110 (1984).

⁸³ S. 20(5).

⁸⁴ *R. v. Imperial Tobacco Prods. Ltd.* (1971), 4 C.C.C. (2d) 423, 22 D.L.R. (3d) 51 (Alta. S.C.A.D.). I use the qualifier "appeared" because, after quoting the American tests with apparent approval, Clement J.A. at 22 D.L.R. (3d) 68, appeared to distance himself from them to some degree:

As I have noted, an offence in respect of advertising under the *Federal Trade Commission Act*, has somewhat different characteristics from the offence with which we are here concerned, but nevertheless it appears to me that the foregoing observations (*i.e.*, the American tests) afford some sensible guidance. The law does not recognize a particular class of the public as ignorant, unthinking and credulous; nor should it measure these matters by the standards of the skeptical who have learned by bitter experience to beware of commercial advertisements. What is the immediate impression that the advertisement makes?

reference to American case law.⁸⁵ Our judges, however, have not consistently followed this approach. There have been a number of instances in which they have chosen to apply an average- or reasonable- (the two are generally equated) person test,⁸⁶ including two decisions by the Ontario Court of Appeal.⁸⁷ In a recent case considering the question, a New Brunswick court affirmed an acquittal in which the trial judge had formulated the test as being "what would a reasonably intelligent person who is interested in this type of offer take from the ad in question".⁸⁸ In another decision which used the average-person test to acquit, the court suggested that consumers these days had become more sophisticated than those of yore.⁸⁹ (The possibility of a commensurate increase in advertisers' sophistication was not considered.)

Some courts have even been prepared to pitch the consumer I.Q. above the average by employing the concept of the target audience. For instance in *R. v. International Vacations Ltd.*⁹⁰ the Ontario Court of Appeal considered an advertisement for overseas flights. In restoring the acquittals it stated:

The average reader interested in making an overseas trip can be taken to be literate, intelligent and unlikely to make a relatively large monetary commitment without carefully reading the advertisement. It seems to me that the import of the advertisement would be absolutely clear to such a discerning reader.⁹¹

⁸⁵ *R. v. Contour Slim Ltd.* (1972), 9 C.C.C. (2d) 482 (Ont. Prov. Ct.); *R. v. Colgate-Palmolive Ltd.* (1972), 9 C.P.R. (2d) 62 (Ont. Co. Ct.); *R. v. Tremco Mfg. Co.* (1973), 15 C.P.R. (2d) 232 (Ont. Co. Ct.); *R. v. Zehrs Markets Ltd.* (1974), 20 C.C.C. (2d) 107 (Ont. Co. Ct.); *R. v. Simpsons-Sears Ltd.* (1976), 28 C.P.R. (2d) 249 (Ont. Co. Ct.); *R. v. Whitehall Development Corp. Ltd.* (1977), 43 C.P.R. (2d) 64 (Ont. Co. Ct.); *R. v. Garibaldi Lifts Ltd.*, [1977] 35 C.C.C. (2d) 190, [1977] 3 W.W.R. 350 (B.C. Co. Ct.); *R. v. K-Mart Canada Ltd.* (1978), 50 C.P.R. (2d) 271 (N.S. Co. Ct.); *R. v. Saro's Ltd.* (1978), 43 C.C.C. (2d) 310, 40 C.P.R. (2d) 208 (Ont. Prov. Ct.); *R. v. Michaud* (1978), 41 C.C.C. (2d) 139 (Ont. Dist. Ct.); and *R. v. Marlo Homes Ltd.* (1980), 51 C.P.R. (2d) 73 (Alta. Prov. Ct.).

⁸⁶ *R. v. General Motors of Canada Ltd.* (1974), 26 C.P.R. (2d) 159 (Ont. Prov. Ct.); *R. v. T. Eaton Co.* (1975), 26 C.P.R. (2d) 118 (Alta. S.C.T.D.); *R. v. Bussin* (1977), 36 C.P.R. (2d) 111 (Ont. Co. Ct.); *R. v. Foote, Cone & Belding Advertising Ltd.*, *supra*, note 76; *R. v. Rust-Oleum (Can.) Ltd.* (1978), 42 C.P.R. (2d) 193 (Ont. Prov. Ct.); *R. v. Kenitex Can. Ltd.* (1980), 51 C.P.R. (2d) 103 (Ont. Dist. Ct.); *R. v. Dominion Stores Ltd.* (1985), 23 C.C.C. (3d) 448 (N.B.Q.B.); *R. v. Total Ford Sales Ltd.* (1987), *supra*, note 73.

⁸⁷ *R. v. R.M. Lowe Real Estate Ltd.* (1978), 40 C.C.C. (2d) 529, 39 C.P.R. (2d) 266 (Ont. C.A.) [hereinafter *Lowe* cited to C.C.C.]; *R. v. International Vacations Ltd.* (1980), 33 O.R. (2d) 327, 124 D.L.R. (3d) 319 (C.A.).

⁸⁸ *R. v. J. Clark & Son Ltd.*, *supra*, note 80.

⁸⁹ *R. v. Robin Hood Multifoods Ltd.* (1981), 59 C.P.R. (2d) 57 at 60 (Ont. Co. Ct.).

⁹⁰ *Supra*, note 87.

⁹¹ *Ibid.* at 332, *per* Blair J.A. Evidently those who travel by car are not expected to be quite as intelligent as those who fly, for in *R. v. Irving Oil Ltd.* (1978), 47 C.P.R. (2d) 179 (N.B. Prov. Ct.) the Court considered advertisements for gasoline and was content to apply the credulous-person test.

Clearly then there is no uniformity in the standard of deceptiveness, though the average-person test seems ascendant in recent years.

Allied with this issue of the gullibility quotient is the question of how to treat advertisements which give rise to alternative readings, one false or misleading and the other true. Indeed this matter is nearly identical to that posed by the standard of deception and represents little more than another, less quantitative, way of structuring the question. Of course courts faced with alternative interpretations of a given ad are quite capable of resolving the dilemma by the familiar definitional fiat of declaring that only one of the readings is reasonable, thus disposing of the 'unreasonable' reading and effectively converting the case into one in which there is only a single, uncontroversial representation.⁹² However judges who try to untangle this Gordian knot, rather than cut it, are left with the question of how to treat ads susceptible to various interpretations. The American answer has been clear and is consistent with their adoption of the credulous-person test for deception: under *FTC Act* case law, if any of an ad's plausible interpretations is false its publishers may be subject to a cease and desist order.⁹³ As with the question of the consumer I.Q., the response of Canadian judges to the alternative-meanings issue has been uncertain and equivocal. While some courts have followed the American route,⁹⁴ it appears that the stronger authority favours resolving alternative constructions in favour of the accused. The Ontario Court of Appeal has written that it "is not good enough, in our opinion, to arrive at alternative constructions, one of which would put the appellants in jeopardy and the other would not".⁹⁵ Such an approach reflects the criminal law heritage of the false advertising offence in that it gives the accused the benefit of every doubt. Yet, for the same reason that the reasonable-person standard is problematic, the 'alternative-meanings defence' makes the task of policing mass advertising difficult, for while it does not hinder a court's capacity to police blatant lies it does weaken the ability to attack subtle phrasings. Many, if not most (or, indeed all), statements are capable of being construed in multiple ways, and if all an advertiser needs to do to escape liability is to invest the ad with one non-objectionable reading then the sanction against false advertising is weak indeed.

This judicial resolution of the alternative meanings question flies in the face of the general-impression provision in section 52(4) of the *Act*, which requires that "the general impression conveyed by a representation

⁹² *E.g.*, *R. v. MacKay's Television and Appliances Ltd.* (1971), 65 C.P.R. 126 (Ont. Co. Ct.).

⁹³ *Chrysler Corp. v. FTC*, 561 F.2d 357 (D.C. Cir., 1977); *Giant Food, Inv. v. FTC*, 322 F.2d 977 (D.C. Cir., 1963), *cert. dismissed*, 376 U.S. 967 (1964).

⁹⁴ *E.g.*, *R. v. Impala Agencies Ltd.*, *supra*, note 65; *R. v. Marlo Homes Ltd.*, *supra*, note 85.

⁹⁵ *Lowe*, *supra*, note 87 at 531. This case was expressly followed in *R. v. Westfair Foods Ltd.* (1984), 3 C.P.R. (3d) 174 (Man. Prov. Ct.) and *R. v. Total Ford Sales Ltd.*, *supra*, note 73. A similar approach to this issue was adopted in *R. v. Sutson* (1972), 6 C.P.R. (2d) 246 (Ont. Co. Ct.).

as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading". Even before 1976 when this provision was added, some courts stressed the need, when interpreting an advertisement, to take into account its full context and general impression.⁹⁶ But instances of expansive and sensitive judicial readings of impugned advertisements were by no means the norm, so section 52(4) was enacted in an effort to preserve the false advertising provision against some of the literalism and narrow construction normally accorded criminal statutes. In proposing section 52(4) Minister André Ouellet described it as a broadening of the prohibition against misleading advertising.⁹⁷

Assuming that the purpose of section 52(4) was to broaden the prohibition against false advertising, it would seem to follow that it should be possible to reach a conviction when only one of an advertisement's meanings is misleading. For if a court is instructed to take into account both the literal meaning and the general impression, and if section 52(4) was meant to broaden the offence, it cannot be the section's proper purpose to mandate an acquittal if only one of those meanings is false. The purpose of the provision must have been to instruct judges to attend to the context of advertising messages, to search for subtle meanings and to be prepared to convict if even one of those subtle meanings is adjudged misleading.

Yet courts have proven capable of reconciling this general-impression provision with the alternative-meanings defence in a manner which excuses ambiguous ads. In *R. v. Westfair Foods Ltd.*⁹⁸ the court relied on section 52(4) as support for reaching alternative constructions of the impugned representation and then proceeded to acquit the accused, noting:

It is not necessary for me to decide which of the various alternative constructions to be placed on the advertisement is the correct or predominant one. Suffice it to say that there are alternative constructions which may be placed upon the advertisement, not all of which contravene [paragraph 52(1)(a)] of the *Combines Investigation Act*.⁹⁹

The effect of the general impression provision has thus been the opposite of its initial purpose. Courts can search for multiple readings of an advertisement and if any one of those readings is *not* misleading they acquit.

To be sure, section 52(4) has been relied on to support convictions. For example in *R. v. Parkland Village Heights Ltd.*¹⁰⁰ a real estate promoter advertised homes for sale in a new subdivision for \$24,900 and

⁹⁶ *R. v. Imperial Tobacco Prods. Ltd.*, *supra*, note 84.

⁹⁷ A. Ouellet, Speech to the Canadian Advertising Advisory Board, *quoted in Marketing* (2 December 1974) 1.

⁹⁸ *Supra*, note 95.

⁹⁹ *Ibid.* at 192.

¹⁰⁰ (1977), 37 C.P.R. (2d) 56 (Alta. Prov. Ct.). A similar case is *R. v. Marlo Homes Ltd.*, *supra*, note 85.

failed to mention that that did not include the price of the land. The court relied on s. 52(4) in finding the defendant guilty. Here then is a case where, despite the literal truth of the statement — “homes”, in the literal sense of structures, did cost only \$24,900 — and the existence of alternative meanings, there was a successful prosecution. Yet this is an instance where the misleading reading clearly predominates over any non-deceptive one. As an example of sanctioning contextual manipulation by advertisers¹⁰¹ the decision hardly seems adventurous.

Another issue of judicial interpretation focusses on the final words of paragraph 52(1)(a). The offence outlaws only those representations which are false or misleading *in a material respect*. The italicized words, part of the 1976 amendments, have only rarely been explicitly considered by courts. In the original version of the section on misleading advertising as to ordinary price, the offence dealt only with “materially misleading representations”,¹⁰² and the word ‘materially’ was construed to mean “the degree to which the purchaser is affected by these words in coming to a conclusion as to whether or not he should make a purchase”.¹⁰³ This reading has been followed by the courts’ interpretation of paragraph 52(1)(a) and thus ‘materiality’ has come to mean the extent to which a person would be influenced by a false or misleading representation in deciding whether or not to purchase the product being offered.¹⁰⁴ Consequently the requirement of materiality appears to be a sort of statutory *de minimis* defence, rendering legitimate those representations which, though false, are not apt to cause consumers to alter their behaviour. Courts do not make use of extrinsic evidence of any sort on the issue of materiality, even though the question of what actually motivates consumers to buy is complex and poorly understood.¹⁰⁵ For example, in a recent Manitoba case the accused argued that the misrepresentation in issue was trivial and unlikely to affect consumers in any way. In rejecting this defence the court responded that “it is self-evident that it would affect the ordinary man in his consideration as to what price he should consider paying for that item”.¹⁰⁶

C. Evidence

The subject of evidence, though as much a matter of lawyering as it is of judging, is worthy of more examination at this point. In addressing

¹⁰¹ See the discussion *infra*, at section II.B. *Contextual Manipulation*.

¹⁰² *An Act to amend the Combines Investigation Act and the Criminal Code*, S.C. 1960, c. 45, s. 13.

¹⁰³ *R. v. Kellys on Seymour Ltd.* (1969), 60 C.P.R. 24 at 26 (B.C. Mag. Ct.). To similar effect are *R. v. Patton's Place Ltd.* (1968), 57 C.P.R. 12 (Ont. Mag. Ct.) and *R. v. T. Eaton Co. Ltd.* (1973), 10 C.P.R. (2d) 36 at 39-40 (Ont. Co. Ct.).

¹⁰⁴ *R. v. Kenitex Canada Ltd.*, *supra*, note 86; *R. v. Westfair Foods Ltd.*, *supra*, note 72; *R. v. Irving Oil Ltd.*, *supra*, note 91.

¹⁰⁵ See, e.g., G. Hughes and M. Ray, eds, *BUYER/CONSUMER INFORMATION PROCESSING* (Chapel Hill: University of North Carolina Press, 1974).

¹⁰⁶ *Westfair*, *supra*, note 72 at 355.

the issues touched on above — the standard of deception, the alternative-meanings question, the scope to be accorded the general-impression provision and the meaning of ‘material’ — courts have rarely drawn on extrinsic evidence to assist them. From time to time one of the parties to a false advertising charge relies on the testimony of a few customers who had encountered the ad in question, but more extensive and systematic external evidence is not offered. Our judges have neither sought out nor welcomed such evidence. Instead they have preferred to rely on their intuition, and occasionally the ‘assistance’ of a dictionary, to discover what the general impression of a given ad might be and whether such an ad would deceive the average consumer. In a singular exception to this general practice, a defendant in a recent case hired the pollster Angus Reed to conduct a survey to test the effect of the impugned advertisement on the public.¹⁰⁷ The judge’s response was to prefer his intuitive reaction to the conclusion indicated by the survey:

To satisfy the court that all possible evidence was before it I allowed the presentation of the holding of the product survey and its results. Although there was some question as to its validity due to somewhat sloppy methods, on reflection and consideration, I am satisfied that in any event the evidence concerning the survey was irrelevant and of no assistance to the resolution of this charge.

I say it is irrelevant because when one looks at the advertisement as a whole, it is clear that the average person has little difficulty in understanding what it says.¹⁰⁸

This stance of judicial omniscience which proclaims sociological evidence “irrelevant” is in contrast to proceedings under the equivalent American legislation. The FTC was long criticized for failing to take account of scientific research on advertising and for relying solely on its common sense to determine deception.¹⁰⁹ During the 1970s the Commission mended its ways, with the result that the use of various types of extrinsic evidence — consumer surveys, the testimony of experts, and explanations of theories and principles derived from market research — greatly increased. This growth, which has been statistically documented,¹¹⁰ has been welcomed by American courts. In addition, there has been detailed analysis of precisely which type of consumer research methodology and test design provides the evidence which most properly

¹⁰⁷ *R. v. Canadian Tire Corp. Ltd.* (1986) 14 C.P.R. (3d) 372 (Man. Prov. Ct.).

¹⁰⁸ *Ibid.* at 383.

¹⁰⁹ See I.M. Millstein, *The Federal Trade Commission and False Advertising* (1964) 64 COL. L. REV. 439 at 470 and E. Gelhorn, *Proof of Consumer Deception Before the Federal Trade Commission* (1969) 17 KAN. L. REV. 559 at 564.

¹¹⁰ *Supra*, note 43. It should not be inferred that those who had excoriated the FTC for its failure to avail itself of scientific research are now content with the Commission’s performance in this area. For criticism of current practice see J.I. Richards & I.L. Preston, *Quantitative Research: A Dispute Resolution Process for FTC Advertising Regulation* (1987) 40 OKLA. L. REV. 593.

assists in determination of the legal issue of deception.¹¹¹ Although the FTC still insists it is not always required to consult extrinsic evidence on the issue of deceptiveness and can (like the Canadian courts) rely on its unaided induction, there are certain types of representations — notably those involving implied claims — where the Commission has virtually held itself bound to consult external evidence before determining the impact of an ad and judging its deceptiveness.¹¹² Use of consumer surveys to determine the actual impression created by an advertisement has permitted the FTC (and appellate courts reviewing the FTC's findings) to become more precise in the application of the standard of deceptiveness. Thus instead of merely deciding that an ad will be found deceptive even if it misleads only the gullible, the FTC has been able to turn to such surveys to discover what percentage of the consuming public was fooled by a given ad. The Commission has prohibited advertisements when the deception rate was as low as 9%.¹¹³ The appropriate level of permissible deceptiveness remains a matter of debate in the United States. The use of consumer surveys does not solve this question but it at least permits comparatively accurate implementations of whatever standard might be chosen. Such evidence has been declared irrelevant in Canada.

There is an additional consequence of survey evidence which is more important than the precision it brings to the questions of the standard of deceptiveness and materiality. Such evidence commonly has the effect of demonstrating more deceptiveness and materiality than will usually be found by triers of fact relying solely on intuition and conventional wisdom. There is evidence that, even when applying a credulous-person test, persons determining an ad's meaning and deceptiveness find it difficult to make sufficient allowance for the circumstances in which the public is actually confronted with commercial advertising. When surveys are used to gauge consumer perception of an advertisement, some attempt is usually made to replicate the conditions in which that advertisement would normally be encountered. Yet when judges are asked to use their intuition to determine a representation's impact, they generally do so in

¹¹¹ See, e.g., I.L. Preston, *Extrinsic Evidence in Federal Trade Commission Deceptiveness Cases*, (1987) COL. BUS. L. REV. 633.

¹¹² The law on this point is discussed in I.L. Preston, *Data Free at the FTC? How the Federal Trade Commission Decides Whether Extrinsic Evidence of Deceptiveness is Required* (1986) 24 AM. BUS. L.J. 359.

¹¹³ *Rhodes Pharmacal v. Federal Trade Comm'n*, 191 F.2d 744 (7th Cir., 1953), modified on other grounds, 208 F.2d 382 (7th Cir., 1953), var'd per curiam, 348 U.S. 940 (1955). Persons inimical to FTC interference in advertising often point to the case of *A.A. Friedman*, 74 F.T.C. 1056 (1968) as an instance of the Commission's prohibiting an advertisement with an even lower deception rate of five per cent. A closer reading of the case shows that although the Commission relied on a survey showing just five per cent deception, it thought the survey in question did not accurately gauge perception of the advertisement and that in practice a much higher percentage of the public would be deceived. Discussion of the question of the maximum permissible rate of deception is found in I.L. Preston and J.I. Richards, *Consumer Miscomprehension as a Challenge to FTC Prosecutions of Deceptive Advertising* (1986), 19 J. MAR. L. REV. 605.

an artificial setting which allows them to bring their undivided attention to bear on the ad and then to take time to reflect. As a result they overestimate the powers of rationality to see through deception, and consequently underestimate the actual deceptive power of advertising.¹¹⁴ Thus, although a requirement of considering extrinsic evidence on the issue of meaning and deception would initially appear to benefit advertisers by forcing prosecutors to adduce more evidence than they now do (a Brandeis Brief in every summary conviction charge) such a requirement might in the long run work in favour of consumers. The failure of Canadian courts to impose such a requirement has aided advertisers.

This decreed irrelevance of sociological evidence may also play a part in depoliticizing litigation over misleading advertising. It instructs courts to view consumers as intelligent individuals (getting smarter every year) rather than as a group or class, some of whom might be gullible. The rhetoric of false advertising cases constructs a world in which consumers are on equal terms with advertisers. It then declares that scientific evidence attempting to contradict this by describing actual consumer behaviour under market conditions is not to be credited. Even when this interpretive stance succeeds in declaring an advertisement misleading in some fashion, the logic of our criminal safeguards dictates that if some other interpretation of that same advertisement is not false or misleading the advertiser must be acquitted.

D. Sentencing

As with other offences under Canadian competition law, the fines which have been handed down for violations of the false advertising offence have not as a rule been large and appear to constitute little deterrence against persons or corporations contemplating a deceiving advertisement.¹¹⁵ The following table shows the average fine per charge for violation of paragraph 52(1)(a) over the past eight years.

1980-81	\$1,286
1981-82	\$1,210
1982-83	\$1,720
1983-84	\$5,290
1984-85	\$1,832
1985-86	\$2,574

¹¹⁴ See J.L. Preston, *Researchers at the Federal Trade Commission — Peril and Promise* (1980) CURRENT ISSUES IN RESEARCH AND ADVERTISING 1.

¹¹⁵ For a study of sentencing for competition offences generally see W.T. Stanbury, *Penalties and Remedies Under the Combines Investigation Act 1889-1976* (1976), 14 OSGOODE HALL L.J. 571. Stanbury's conclusion is that, in this area at least, crime pays. This same observation has been made of other areas of corporate crime. For example see H.J. Glasbeek, *Why Corporate Deviance is not Treated as Crime — The Need to Make Profits a Dirty Word* (1984), 22 OSGOODE HALL L.J. 393 at 419-20.

1986-87	\$2,448
1987-88	\$2,393 ¹¹⁶

Fines for corporate offenders exceed those for natural persons. For instance in 1984-85 the average fine per charge under paragraph 52(1)(a) for corporations was \$2,964 while for individuals it was \$782.

These figures are low indeed, at least when compared to the amounts spent in many advertising campaigns and, perhaps more to the point, when compared with the profits which might be reaped by a successful deception. An example related by William Stanbury in his study of sentencing for competition offences¹¹⁷ concerns a conviction of Benson and Hedges Tobacco Company which promised cigarette packages which might contain "instant cash certificates of \$2,500 to \$25,000 right out of the blue". It was shown that no \$25,000 certificates could have been found at the time of the promotion in question and as a consequence the court imposed the largest fine to that date, \$27,500. This is a small fine for failure to distribute the promised certificates of \$25,000, and Stanbury notes that since the total budget for the campaign during the relevant period was \$1,474,885 the fine increased the cost of the promotion by just 1.86%.¹¹⁸

In deciding matters of sentence it is unusual for courts to consider evidence of what the accused stood to gain by an undetected misrepresentation. In this respect their view of deterrence, like their interpretation of advertising, seems removed from the actual operation of the market. The result is that large corporate defendants, though they may not appreciate the publicity associated with a charge of false advertising, have little to fear from the sentence; they will likely pay more in defence lawyers' bills than they will by way of fines. There is some indication

¹¹⁶ Corporate and Consumer Affairs Canada, [1986] 4 *Misleading Advertising Bulletin* (July/September, 1986) at 4 and [1989] 1 *Misleading Advertising Bulletin* (January/March, 1989) at 5. The anomalous large average for 1983-84 is due to a \$1,000,000 fine given to Simpsons-Sears Ltd. for misleading representations concerning diamond rings. This is by far the largest fine ever given under this section.

¹¹⁷ Stanbury, *supra*, note 115 at 602.

¹¹⁸ *Ibid.* Another example is the case of *R. v. Gregory* (1973), 12 C.C.C. (2d) 137 (Que. Ct. Sess.). (There was a related prosecution under the general misleading advertising section: *R. v. Gregory (No. 2)* (1973), 15 C.C.C. 386 (Que. Ct. Sess.)). There the three accused ran a business called Figure Magic which advertised that its product could cause persons to shed excess fat while simply relaxing on a sofa. Convictions for publishing advertisements not based on a proper test brought the three accused fines totalling just \$1,300. Yet they were alleged to have bilked their customers of \$1,414,228: *Montreal Gazette* (16 February 16 1973), *Montreal Star* (2 February 1973) A-3, and *Montreal Gazette* (8 November 1972) 3. I encountered this example in W.T. Stanbury, *The 1975 Amendments to the Combines Investigation Act: Analysis of the Provisions Relating to Virtual Monopoly, Bid-Rigging and New Remedies*, in W.T. Stanbury, ed., *PAPERS ON THE 1975 AMENDMENTS TO THE COMBINES INVESTIGATION ACT* (Vancouver: Faculty of Commerce and Business Administration, U.B.C., 1976) 55 at 84.

in recent cases that this may be changing. In 1986¹¹⁹ the Ontario Court of Appeal increased a trial court's fine for a conviction under paragraph 52(1)(a) from \$15,000 to \$25,000. In so doing it explicitly took account of the cost of the advertisements (\$86,000), the accused's annual revenues (\$30 million) and of the necessity of imposing a fine which would act as a deterrent and not as a licence fee. It is difficult to get enthusiastic about the possible deterrent effect of such a development: the penalty is equivalent to a fine of \$25 on a person making \$30,000 per year.

Though *mens rea* is not an element of the offence there are cases which suggest that the absence of an intent to mislead should operate to decrease sentence.¹²⁰

The prohibition orders and injunctions which the *Act* authorizes could be used to fight against its becoming a mere licensing of illegality. These however have been limited by a decision of the Ontario Court of Appeal which holds that the fine is the normal remedy and the prohibition order is a special one, not to be resorted to unless there is both a calculated and flagrant disobedience of the *Act* and a likelihood of continuation in the absence of a prohibition.¹²¹ As a consequence, prosecutors rarely seek injunctions or prohibition orders. These remedies have not been an effective weapon in insuring compliance with the statute.

By way of a concluding observation to this section on judging, it seems fair to say that courts have not construed the false advertising offence expansively. At virtually every point at which there has been a clear choice to make, the *Act* has been interpreted in a way which benefits advertisers. This is true of the substantive elements of the offence: the gullibility quotient, the alternative meanings issue and the interpretation of the general-impression provision. (Even the *Charter* has been of assistance to advertisers here.) It is also true of evidentiary matters which affect determinations made under those substantive provisions. And for those advertisers who are convicted the fines and other remedies which the offence authorizes have not been administered so as to deter future offences.

III. DETECTION AND ENFORCEMENT

Certain aspects of the administration of paragraph 52(1)(a) have been noted already. The account of legislative history took note of the incidence of prosecutions at various stages of the development of the

¹¹⁹ *R. v. First Choice Can. Communications Corp.*, *supra*, note. 67.

¹²⁰ *Ibid.*

¹²¹ *R. v. F.W. Woolworth Co. Ltd.* (1974), 3 O.R. (2d) 629, 46 D.L.R. (3d) 345 (C.A.). This view is not always followed: see *R. v. S.S. Kresge Co.* (1975), 7 Nfld. & P.E.I.R. 305 (P.E.I.S.C.). The 1988 *Report of the Standing Committee on Consumer and Corporate Affairs on the Subject of Misleading Advertising*, *supra*, note 4 at 22, recommended that the statutory criteria for enjoining false advertising be amended to make such injunctions more readily available.

offence and the remarks on judging made reference to the type of evidence presented in false advertising cases. In this section I focus in greater depth on the activities of the administrative arm of government in enforcing the offence as those activities are revealed by the type of advertising behaviour which has prompted the laying of charges, and by the types which, though they appear to be prohibited by the words of the statute, have escaped prosecution.

Investigation for violations of paragraph 52(1)(a) falls to the Marketing Practices Branch of the Bureau of Competition Policy of the Department of Consumer and Corporate Affairs. Each year the Branch receives approximately 11,000 complaints respecting the commission of trade offences.¹²² As well as looking into these, it initiates its own investigations. For example, employees of the Branch read the daily newspapers in search of misleading advertising. Where the Branch's investigations disclose activity deemed worthy of prosecution, the Branch refers the file to the appropriate Attorney-General. In this respect the Marketing Practices Branch operates as a police force assigned to patrol a certain specialized beat. In addition to this investigative role the Branch has assumed a proactive stance, providing written advisory opinions to persons who request a review of proposed promotional material or marketing practices. It publishes many of these opinions in a quarterly periodical, the *Misleading Advertising Bulletin*. These advisory opinions, of which there are several hundred per year, are not binding on courts, but in practice the Branch's opinion that it would not find a given advertisement objectionable is a virtual guarantee of non-prosecution. As well, members of the Branch hold a large number of informal discussions with business persons in an effort to clarify questions concerning the application of the law. In these respects the Branch goes beyond the model of a police force and operates more like an administrative agency, interacting regularly with the subjects of its regulation.

Nevertheless, most of the Branch's efforts are consumed in investigation of marketing offences, and it is on the fruits of that activity that I will focus here. The enforcement policy of the Marketing Practices Branch has been selective in that investigations have tended to be concentrated in certain areas. There are several types of advertisements which have attracted no prosecutions and others which have invited many. The selectivity in enforcement is to be welcomed. We would expect a body charged with enforcing a national prohibition of false advertising to move beyond mere randomness and to focus its efforts in certain areas, a fact acknowledged by the Branch in its Annual Reports:

Since the number of complaints is large and the staff resources available to investigate them are limited, it is necessary to concentrate on those

¹²² Consumer and Corporate Affairs Canada, *Annual Report of the Director of Investigation and Research, Combines Investigation Act* (March 31, 1985) at 81. This figure represents complaints respecting all marketing offences, not just para. 52(1)(a).

cases most likely to bring about an overall improvement in the quality of market information directed to the public, thereby contributing to the objectives of the legislation. The principles followed in assessing the priority of complaints are the degree of coverage of the representation, its impact on the public and the deterrent effect of a successful prosecution. A high priority is also given to cases that will afford a court the opportunity of establishing new principles or of clarifying the law.¹²³

Since some criteria of selectivity exist we can examine the Branch's output critically to see whether it lives up to its professed goal of improving market information. In doing this it may be difficult to be more than merely impressionistic, but even so it is possible to group those cases which have been prosecuted according to certain common features, for instance, type of product or advertising medium. These groups can then be examined to see how well they correlate with achievement of the espoused goals.

Among the products which have precipitated a notable incidence of prosecutions are those where misrepresentations give rise to concerns over public health and safety. Prominent among these are promotions in which sellers may be able to appeal to the consumers' vanity. Thus we see numerous prosecutions of ads for baldness cures, weight-loss pills or devices, cellulite treatments, sun-tan studios, bust developers and the like. Other products, such as hypno-therapy treatments to aid in reduction of tobacco consumption and tap-water purifiers, have the potential to give rise to misrepresentations which prey not on consumers' vanity but on their fears or anxieties, and these too have been policed.¹²⁴ Quack medicine sellers and cure-your-ills promoters have been a concern of the law since at least the time of the *Carbolic Smoke Ball* case.¹²⁵ Physical harm has often been seen as more deserving of legal remedy than purely economic loss and it is not surprising that the Marketing Practices Branch should be especially vigilant in this area.

As well there have been a notable series of prosecutions of persons selling wonder-working devices, such as gizmos which purport to turn

¹²³ Consumer and Corporate Affairs Canada, *Annual Report of the Director of Investigation and Research, Combines Investigation Act* (March 31, 1987) at 84. This same statement has appeared in each *Annual Report* for a number of years.

¹²⁴ As well as attracting a large number of prosecutions, misrepresentations of health-related products have given rise to stiffer-than-average fines. Thus in *R. v. Tobe* (1978), 43 C.P.R. (2d) 51 (Ont. Co. Ct.), where the accused was convicted for making false claims in the promotion of a book which purported to demonstrate the prevention and cure of eye disease by "natural methods", he was given a sentence of \$7,500 or a year in jail.

¹²⁵ *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256 (C.A.). This concern is also revealed by the special attention we give to this problem in the *Food and Drug Act*.

ordinary tap water into "energized water" with special properties¹²⁶ or gadgets and additives which claim to deliver a significant improvement in automobile mileage, rust inhibition or home heating bills.¹²⁷

Akin to these vendors of miracles are sellers who purport to deliver something for nothing. Numerous charges have been brought against advertisers who abuse the word 'free' by offering such deals as free rolls of film, free delivery or 'buy-one-get-one-free' deals. If closer inspection of the transaction reveals that there is a hidden charge for the supposedly complementary item — as is the case when the 'free' roll of film is available only when an additional (and perhaps hidden) fee is paid for developing another roll — then the offence of false advertising is made out. Similarly the Marketing Practices Branch has been comparatively scrupulous in watching retailers who misuse the word 'sale'. This may be done by staging fire sales when there was no fire, going-out-of-business sales where there is no plan to go out of business, or simply endless sales, where the word 'sale' appears in a shop window for six months running.

A related practice which has prompted concentrated enforcement activity is the tactic of falsely advertising 'lowest prices in town', 'you can't beat our prices' or of explicitly misrepresenting the price at which a competitor retails a given product. It seems likely that the vigilant monitoring of such claims is at least partly due to prompt reporting of the activity by competitors of the misrepresenter. In addition, the focus on 'free offers' which are not free, on bogus sales and on misrepresentation of competitors' prices is likely partly attributable to the fact that such claims are easily proven false. Because such representations deal with price they are quantifiable in a way in which claims of product efficacy often are not.

There has also been an energetic policing of retailers who purport to offer goods for sale at some reduction from their ordinary selling price. Misrepresentation of this sort was the reason for the specialized 'ordinary price' section added in 1960 and which now finds its expression in paragraph 52(1)(d) of the *Act*,¹²⁸ but prosecutions for this practice are brought under the general section as well. Of particular concern to the Branch in this area are goods such as oriental rugs, jewelry, fur coats

¹²⁶ *R. v. Batt* (1980), 53 C.P.R. (2d) 152 (B.C. Prov. Ct.). The charge in *Batt* was under para. 36(1)(b) of the *Combines Investigation Act*, R.C.S. 1970, c. C-23 (representation without a proper test). The product in question was a Freeman Energy Disc which, among other things, if placed in ordinary tap water would purportedly convert that water into a multi-purpose cleaner, a hair conditioner, a tooth-cleaner and a plant cleaner. Other advertised properties of the disc included improving the taste of cheap wines. The device was a piece of cardboard wrapped in aluminum foil.

¹²⁷ In fact the first prosecution under the general misleading advertising provision concerned a seller at the Central Canada Exhibition in Ottawa hawking an inexpensive device which, he claimed, would greatly increase gas mileage: *R. v. Anthony* (1969), (Ont. Mag. Ct.) [unreported].

¹²⁸ See *supra*, notes 34-38 and accompanying text.

and commemorative coins. Such goods generally have no easily available model number which a prospective buyer could use to check the manufacturer's list price or to compare with competitors' goods. With products such as mink coats, gold chains, diamond rings and Persian carpets the costs of consumer investigation and verification of sellers' price claims are high, leaving buyers little choice but to trust a retailer who claims the item being offered for sale for \$2,000 normally retails for \$3,500.

There has been a significant series of charges brought against persons who make misrepresentations in the course of promoting employment opportunities such as modelling courses, mail franchise businesses and schemes to stuff envelopes at home for a fee. In the course of marketing such schemes, false representations are frequently made concerning the likelihood of employment upon graduation or the amount of money to be made by a person who embarks on such a business opportunity.

As the above instances of high investigative and prosecutorial activity reveal, there is a tendency for enforcers to concentrate their energy on marginal, huckster-type enterprises of a fly-by-night nature; that is, on scams which differ from mainstream business by not depending on goodwill built up over a long period of time and by having small investments of capital and skill, thus giving them minimal entry and exit costs to and from markets. Such enterprises may depend on a comparatively small number of transactions but, to the extent they engage in false advertising, may well count on victimizing individual consumers for a high dollar amount per transaction.

We can contrast such sellers with the type of enterprises which have not attracted as much attention from the administrators of false advertising law. Large manufacturing and distributing firms with established goodwill and extensive investments of capital and labour, such as the manufacturers of automobiles, gasoline, home appliances, clothing, food, alcohol, tobacco, soap, cosmetics and over-the-counter medicines, have been targeted for comparatively few false advertising charges. Of the 194 false advertising convictions registered between January, 1985 and December 1987 only 12, or 6.2%, were of companies found in the top 500 Canadian corporations, as ranked by total sales.¹²⁹ It may be inappropriate to use a list of the top 500 corporations, as not all of those companies are engaged in retail selling or advertising. If we confine our inquiry to those corporations who make representations to the public, as defined by the top 100 biggest spenders on advertising, we find they account for only 4 convictions in the relevant period.¹³⁰ In other words, the top 100

¹²⁹ My sources for the list of convictions are the *Misleading Advertising Bulletins* for the appropriate period. The list of the top 500 companies is drawn from 59:6 *Canadian Business* (June 1986) at 76. It is the top 500 corporations for 1985.

¹³⁰ The list of the top 100 advertisers for 1986, ranked by expenditure, is found in 91:13 *Marketing* (March 30, 1987) 13. Not all advertisers on the list are commercial enterprises. The Governments of Canada, Ontario, Quebec, Alberta and B.C. ranked 1st, 7th, 35th, 45th, and 56th respectively, and presumably their messages were primarily non-commercial.

advertisers, who account for about 17% of all money spent on advertising, account for only about 2% of all convictions. These statistics parallel the finding of Laureen Snider, who in her study of all offences in the *Combines Investigation Act* to 1973 found a tendency for enforcement efforts to concentrate on non-dominant as opposed to dominant corporations.¹³¹ The market which is policed so vigorously at the margins is ignored at the core. In addition, on those occasions when large corporations are charged there are no simultaneous charges brought against executives. In contrast it is frequently the case that when smaller corporations are prosecuted they are charged jointly with the chief operating officer.¹³²

In this connection it is interesting to focus for a moment on the question of which media appear to have been the most common sources for those representations which have drawn charges of false advertising. By far the most frequent source of allegedly misleading advertisements are daily newspapers, which account for over half of all charges laid under paragraph 52(1)(a). The next most common source is point-of-sale advertising such as product displays and signs in store windows. Surprisingly infrequent as sources for impugned ads are television and radio. This focus in enforcement is disproportionate. If we consider the relative economic importance of the various advertising media it is clear that television and radio, which together make up a source of advertising which is at least as important as daily newspapers, are significantly under-represented when compared with newspapers.¹³³

This tilt has been noticed in a previous study of false advertising in Canada and attributed mainly to the superior physical aspects of print (its tangibility) as compared with the difficulty in proving beyond a reasonable doubt that, for example, a certain camera angle or lighting

¹³¹ D.L. Snider, *Corporate Crime in Canada: A Preliminary Report* (1978) 20 CAN. J. CRIMINOLOGY 142 at 151-56.

¹³² This was a finding in a study of the *Combines Investigation Act* generally which was conducted by D. L. Snider and W. West, *A Critical Perspective on Law in the Canadian State: Delinquency and Corporate Crime*, in T. Fleming, ed., *THE NEW CRIMINOLOGIES IN CANADA: STATE, CRIME AND CONTROL* (Toronto: Oxford University Press, 1985). It is certainly confirmed by a reading of the false advertising cases.

¹³³ A study carried out by the MacLean Hunter Research Bureau estimates that the \$6.669 billion of Canadian advertising revenues in 1986 was spent as follows: catalogues and direct mail — \$1.583 billion; daily newspapers — \$1.513 billion; T.V. — \$1.109 billion; radio — \$610 million; outdoor — \$484 million; city and phone directories — \$418 million; community newspapers — \$374 million; general magazines — \$287 million; business publications — \$196 million; weekend supplements — \$44 million; religious and school publications — \$26 million; and farm publications — \$25 million. *Marketing* (5 January 1987) at 1. Note that this figure of \$6.669 billion is simply the advertising revenues of various media and does not represent the total amount expended on advertising. It does not, for instance, include the amount spent on producing advertisements. It is interesting to note that for the year ending March 31, 1986 the budget for the entire Bureau of Competition Policy, of which the Marketing Practices Branch is but one part, was \$13.8 million.

effect gave a misleading impression of a product.¹³⁴ Yet before it is assumed that this prosecutorial focus on newspapers can be wholly accounted for by the forensic requirement of tangible evidence, a requirement supposedly unsatisfied by the ephemeral nature of the electronic media, it should also be noted that there have been virtually no charges laid in respect of ads in nationally distributed magazines such as *Macleans*, *Chatelaine*, *Time* and *Good Housekeeping*, though these too represent an economically significant advertising medium. When this is taken into account it would appear that the heavy focus on newspaper advertising may be more consistent with a choice to concentrate on local markets and small, non-dominant advertisers than it is with a choice to ignore a certain advertising medium.

There are other possible explanations for this focus on local as opposed to national media. Perhaps investigators are simply unable to locate instances of deceptive marketing in the national media. More plausibly, the fact the Marketing Practices Branch has been dispersed into a dozen regional offices, none of whom may feel responsible for the national market, may have had some effect. Perhaps notions of privity of contract have also had some influence here, with prosecutors wishing to focus on local sellers who enter into contractual relations with their buyers rather than on large national concerns which make their representations to the public through the mass media but who sell only to wholesalers and retailers. Of course the offence does not require privity, or even a completed sale, but the fact that prosecutors have focussed almost exclusively on local markets and small firms is consistent with the judicial choice to ignore research which describes the working of the modern marketplace. Certainly those large concerns which have found themselves charged with false advertising — Steinberg's, Dominion, Canadian Tire Stores, Simpson-Sears, Eaton's — have mainly been retail establishments which advertise in daily newspapers and deal directly with consumers. In any event, the result has been that, overwhelmingly, those charged with false advertising have been firms on the economic margins. They have not been those large conglomerates whose advertisements have become part of popular culture, penetrate our consciousness, and echo around our brains as we march up and down the supermarket aisles.

In considering areas of high investigative and prosecutorial activity it may be instructive to shift our focus from product type and advertising medium to the question of advertising techniques. This can be done by examining a sample of techniques which have the following features in common: (a) they are in regular, wide-spread use in the Canadian media; (b) there is some reason to believe that they are effective or, in the language of the statute, "material", in that they influence our purchasing behaviour; (c) they are often misleading; and (d) they are never or only rarely the subject of charges of false advertising.

¹³⁴ M. Trebilcock, *et al.*, A STUDY OF CONSUMER MISLEADING AND UNFAIR TRADE PRACTICES (Ottawa: Information Canada, 1976), Vol. I, at 45-6.

In examining these common advertising techniques I will refer for comparative purposes to American cases decided under the *FTC Act*. I do not do this because I regard the record of the FTC as any sort of ideal model against which other systems of regulating misleading advertising should be measured. The Commission has been a controversial agency and its record on false advertising has been disparaged by critics from Richard Posner¹³⁵ to Ralph Nader.¹³⁶

If the Canadian record is exemplary of the difficulties in bringing the criminal law to bear on the activities of modern mass marketing, there are features of the FTC's activities which might be used as a case study of the problems of using regulatory agencies to intervene in markets. Most prominent among these is delay. One FTC false advertising case took 16 years to resolve.¹³⁷ Nevertheless FTC cases provide a useful point of comparison when examining Canadian legal responses to modern marketing techniques. This is so because the American regulators, charged with enforcing legislation which, apart from its administrative and remedial scheme, is similar to Canada's, have consistently appeared more responsive to modern developments in techniques of commercial advertising. Probably the American regulators have benefitted from economies of scale. The FTC's budget is many times that of the Marketing Practices Branch yet the field to be regulated — the ads on major television networks and in national magazines — is not correspondingly greater. Whatever the reason, false advertising cases decided pursuant to the *FTC Act* seem to be more in touch with some marketing techniques than do those under paragraph 52(1)(a).

A. *Puffery (Taking Hyperbole Seriously)*

Puffery is a quaint term most commonly associated with the private law of contract where it denotes representations made during the course of bargaining which, due to their hyperbolic nature or their character as

¹³⁵ R. Posner, *REGULATION OF ADVERTISING BY THE FTC* (Washington: American Enterprise Institute for Policy Research, 1973).

¹³⁶ *The Consumer and the Federal Trade Commission*, 115 CONGRESSIONAL RECORD, PART 2, (22 January 1969) 1539. This report is actually the work of a group of students brought together and sponsored by Ralph Nader. The report charged the FTC with cronyism, collusion with big business and general ineptness. For a conservative critique of the Nader study see B. Hasin, *CONSUMERS, COMMISSIONS, AND CONGRESS: LAW, THEORY, AND THE FEDERAL TRADE COMMISSION, 1968-1985* (New Brunswick, N.J.: Transaction Books, 1987) at 27-46.

¹³⁷ *Carter Products Inc.*, 47 F.T.C. 1137 (1951), *vacated* 201 F.2d 446 (U.S.C.A. 9th Cir., 1953), *var'd* 346 U.S. 327; *reh'g granted* 53 F.T.C. 307 (1956), *aff'd* 268 F.2d 461 (9th Cir., 1959). The original complaint in this case was filed in May, 1943. One problem with the FTC's system of advertising regulation is that advertisers often continue to run the impugned marketing campaign until the final cease and desist order is confirmed. By this time the campaign may have run its full course and had significant effect, and the only effect of a successful outcome for the FTC is that the advertiser must discontinue use of the (already tired) advertisement.

pure opinion, are deemed to lack contractual effect. In the context of sales for instance, puffery is a sort of seller's licence to exaggerate the attributes of the goods without concern for liability in the event of the failure of those goods to possess the claimed properties. "The 'puffing' rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific, on the theory that no reasonable man would believe him, or that no reasonable man would be influenced by such talk."¹³⁸ The word appears infrequently in cases decided under Canadian false advertising legislation, though when it does it generally receives a meaning parallel to that given it in private law. Thus in *R. v. Professional Technology of Canada Ltd.*,¹³⁹ the court refers to "harmless puffery" in a manner which indicates it thinks that is the only kind there is.

The role of the concept of puffery in direct governmental regulation of advertising can be more easily understood if we look at case law under the *FTC Act* where a puffery defence has been explicitly acknowledged. In *Kidder Oil Co. v. FTC*¹⁴⁰ the court considered representations that a lubricant delivered "perfect protection against burned out bearings" and would enable a car to travel an "amazing distance" without oil. Deciding against the FTC, a unanimous court wrote:

So far as we know there is nothing "perfect" in this world, but still it is a common term, which undoubtedly means nothing more than that the product is good or of high quality. We can conceive of situations where the use of such words might be deceptive and even fraudulent. As used by petitioner, however, we are of the opinion that they are nothing more than a form of "puffing" not calculated to deceive.¹⁴¹

A second example is the case of *Carlay Co. v. FTC*.¹⁴² There the court considered a claim that a diet candy presented an "easy, simple and safe way to lose weight". It held that the statement "was clearly justifiable, under the circumstances, under those cases recognizing that such words as 'easy', 'perfect,' 'amazing,' 'prime,' 'wonderful,' 'excellent,' are regarded in law as mere puffing or dealer's talk upon which no charge of misrepresentation can be based".¹⁴³

Thus the concept of puffery in state control of false advertising approximates the use of the concept in private law. It amounts to an exception to the notion that, at least as far as consumers are concerned, *caveat emptor* is dead and has been replaced by *caveat venditor*. Legally speaking, persons who are influenced by representations which are sub-

¹³⁸ W. Keeton, *et al.*, eds, PROSSER AND KEETON ON TORTS, 5th ed. (St. Paul, Minn.: West, 1984) at 757. It may be that in the original cases which established the defence of puffery it was based on the somewhat different ground that the buyer could examine the goods and so need not rely on the seller's opinion.

¹³⁹ (1986), 12 C.P.R. (3d) 218 at 237 (Alta. Prov. Ct.).

¹⁴⁰ 117 F. 2d 892 (Cir. C.A. 7th Cir., 1941).

¹⁴¹ *Ibid.* at 901.

¹⁴² 153 F. 2d 493 (Cir. C.A. 7th Cir., 1946).

¹⁴³ *Ibid.* at 496.

sequently held to be mere puff are victims of their own folly, undeserving of legal protection. From this point of view the puffery defence constitutes a limiting counter-principle to the notion that we should protect even the credulous from being misled. Of course the excuse has its limits. There are examples in the American cases where advertisers have gone too far and found the defence unavailable.¹⁴⁴ The point here is simply to note that in American case law on governmental regulation of advertising an exception for puffery exists, and that this exception explains why advertisers can with impunity claim that Minute Rice makes perfect rice every time.

I have noted that the term 'puffery' rarely appears in Canadian false advertising prosecutions. Does the concept of puffery nevertheless operate there despite the absence of the word? It appears so. The big, obvious lie is permitted. Advertisers are able to describe their products by various superlatives and by such words as "ideal", "perfect", "sensational", "amazing", "fantastic", and "miraculous" with little risk of being accused of lying. Commercial advertisements routinely make the following sorts of claims: "You meet the nicest people on a Honda." "Toshiba — in touch with tomorrow." "Bayer works wonders." "Coke adds life." "Ultra Brite gives your mouth sex appeal." Taken literally such claims are fallacious. You do not meet the nicest people on a Honda. At least the chances of your doing so are not especially good.¹⁴⁵ But Honda will not get prosecuted for asserting otherwise.

Yet this freedom to puff does not come from any judge-made defence. Indeed in Canadian prosecutions for false advertising there appears to be no precise judicially-acknowledged equivalent to the American puffery defence. It appears that the reason why no explicit puffery defence has been developed in this country is that there has been little attempt to prosecute it. It is one of the untouched areas. There is a dearth of reported instances of prosecutors bringing charges to test the limits of the relevant legislation to determine whether puffery is permitted. Consequently, Canadian courts have not needed to emulate their American counterparts by formulating an explicit puffery defence.

Prior to the 1976 amendments to the general section on false advertising, there was some explanation for this reluctance to prosecute instances of puffery. It was necessary for the Crown to show that the

¹⁴⁴ The case law is summarized in S.E. Grady and M.B. Feinman, *Advertising and the FTC: How Much Can You "Puff" Until You're Legally Out of Breath?* (1984) 36 ADMIN. L. REV. 399. Note that where puffery is concerned "going too far" is not going far enough; the defence becomes unavailable when the advertiser is insufficiently hyperbolic.

¹⁴⁵ I owe this example to I. Preston, *THE GREAT AMERICAN BLOW-UP: PUFFERY IN ADVERTISING AND SELLING* (Madison, Wisc.: University of Wisconsin Press, 1975) at 210-11, but I can confirm it by personal experience. As the owner of a Honda motorcycle I can attest that while I have met a number of pleasant people while driving on it the nicest person I have met in recent years was someone I encountered in a Chrysler.

accused had made "a statement which purports to be a statement of fact but that is untrue, deceptive or misleading". This permitted something comparable to a statutory puffing defence in that an accused could argue that the statement was not one of fact but of opinion.¹⁴⁶ Under the present section, however, it is not necessary for the Crown to show that the accused has made a statement of fact. It is sufficient that a representation be made to the public for the purpose of promoting a business interest. So although the previous incarnation of the false advertising offence may have provided some leeway for puffery, no such bar to prosecution appears to exist with the present offence, as opinion may be said to be representations.

Yet the plentiful examples of puffery in commercial advertising have not been the subject of false advertising charges. To illustrate this let me offer examples of the closest Canadian courts have come to convicting for puffery. In *R. v. Park Realty Ltd.*¹⁴⁷ a prosecution was brought in respect of words on a Multiple Listing Service card which said "this home is in top condition . . . four year old new wiring . . . upstairs carpet thru-out . . . new gas furnace with humid".¹⁴⁸ In finding that the phrase "in top condition" constituted misleading advertising Enns J. came out with what is probably our strongest judicial condemnation of puffery.

It is true that our world today frequently hears words of like meaning as "top condition" in many forms of advertising. "Fantastic", "super", "great" are all terms used all too frequently to describe the superlative qualities of many products offered for sale. One may then be tempted to say that the modern consumer has become immune to such hyperbole and that therefore it should be of no concern to the courts. In my view, however,

¹⁴⁶ A recent EEC Directive on Misleading Advertising follows this route and would apply only to factual claims. See O.J.L. 250/17 of Sept. 19, 1984, Art. 6.

There is little illuminating case law respecting the effect of the pre-1976 offence on hyperbolic advertising. In *R. v. Contour Slim Ltd.*, *supra*, note 85, a prosecution was brought against a corporation which claimed its product provided an effortless loss of weight in 90 minutes with "sensational results". The accused argued the ad was mere opinion but the court rejected the 'mere opinion' defence and convicted. However, in so doing, it concentrated on medical evidence which showed that the accused's product caused no fat loss whatsoever. Similarly, in *R. v. New York Shoe Store Ltd.* (1978), 43 C.P.R. (2d) 38 (Ont. Co. Ct.), there was a description of real estate which promised "a view of lakes and a magnificent vista" (at 39). These are the sort of words which one might normally take with a grain of salt, yet the court convicted. The charge was brought because "the so called lakes were mine-slag slimes and the property was scrub, bush and swamp" (at 39). In both *Contour Slim* and *New York Shoe Store* the accused were engaged in fraud, in the popular if not the legal sense of the term. Though charges were laid for representations which, taken out of context, might appear to be examples of puffery, the cases can be explained on other grounds. The problem in *New York Shoe* was not the lack of magnificence but rather the lack of lakes. The problem in *Contour Slim* was not the lack of sensational results but rather the lack of fat loss — the lack of any results whatsoever. Thus the cases show only that if you defraud and puff at the same time you may be charged.

¹⁴⁷ (1978), 2 C.R. (3d) 336 (Man. Prov. Ct.).

¹⁴⁸ *Ibid.* at 338.

the courts should not simply abandon the field by saying, "Well, consumers generally know there is frequently a certain amount of 'puffing up' or exaggeration in advertisements, and therefore the courts need not be on the watch particularly carefully." No, to the contrary. . . .¹⁴⁹

After going on to find that the purpose of the misleading advertising offence was to afford greater protection to consumers, the Court continued:

If then the purpose is to "establish more ethical trade practices" then again the courts have a duty to caution those resorting to phrases such as "top condition", "A-1", "excellent buy", that such phrases be applied carefully and only quite truthfully. In the case at bar, I find that, while again in the mind of the knowledgeable, the initiated, the house was in "top condition" relative to its age, to the uninitiated, to the average reader or viewer, that phrase conveyed the impression that more or less everything of substance was in excellent condition — from roof to basement. In my view that was not the actual case here, so again I find that to be a false or misleading statement.¹⁵⁰

These are strong words and might convey the impression that a prosecution had been brought against an instance of mere puffery and that the Court was prepared to convict. Yet the words just quoted do not represent the *ratio* of the case. The Court found that other factual statements in the M.L.S. card were not true: the house did not in fact have four-year-old wiring and the "new gas furnace" was nine years old. Coming on the heels of these findings of lies as to facts, the Court's determination that the phrase "top condition" was false and misleading was redundant. There was only a single charge in respect of what was viewed as a single representation, and before considering the phrase "top

¹⁴⁹ *Ibid.* at 341, *per* Enns J. Another case in which a court has explicitly claimed that the misleading advertising provision of the Act has turned puffery into a crime is *R. v. Cunningham Drug Stores Ltd.* (1973), 47 D.L.R. (3d) 47 at 48, 17 C.C.C. (2d) 279 at 282 (B.C.C.A.). There the accused claimed that its drug stores offered "the best possible dollar value and saving on every item, every day. Whether drugs, vitamins, prescriptions or toiletries. That's a fact." This was proven to be false. In spite of the fact that the accused's ad was headed "Let's Talk Facts", it argued that no one would be misled by the falsity. The court dismissed the accused's appeal from its conviction and condemned puffery. Nevertheless this case does not, in my view, prove that puffery is a crime in Canada. The claim did not purport to be an exaggerated Big Lie.

¹⁵⁰ *R. v. Park Realty Ltd.*, *ibid.* at 342.

condition" the court had already found substantial portions of that representation to be false.¹⁵¹

Perhaps the decision which, on its facts, comes closest to outlawing trade puffery is the case of *R. v. Tremco Mfg. Co.*¹⁵² where the accused was convicted for printing on the labels of cans of Tremclad rust paint the words "stops rust" and "prevents rust". In fact the product only retarded rust. It is doubtful whether most persons purchasing Tremclad paint would expect it to stop rust forever, and consequently the conviction appears to represent a vigorous attack on a claim which some might have classed as puffery. But *Tremco* is like the previous case in that the puffery which was condemned appeared in conjunction with much more gross product failure. There was evidence before the court that, at least in several instances, Tremclad failed to retard rust for even a year. In a similar prosecution against a competitor of Tremclad the court refused to convict in respect of the words "stops rust".

Even though the word "stop" indicates finality, one must consider the product involved. If the protective coating is effective in either stopping or preventing rust for 8 to 10, up to 30 years, as the evidence indicates, then it is my view that the claim cannot be said to be misleading or false in a material particular.¹⁵³

The cases just noted represent the closest Canadian approaches to the prosecution of puffery. An examination of the reported decisions reveals no genuine prosecutorial effort to confront the rampant commercial puffery in our national media. Unlike the FTC, the Marketing Practices Branch appears to have made only minimal efforts to challenge

¹⁵¹ It is interesting to speculate on what Enns J. might have done about the phrase "top condition" had the allied factual representations been true. Presumably it would be possible for the house to have lived up to the claims of new wiring, and furnace and carpeting throughout and still not have been in top condition. If the Court could convict in such a situation it might then be possible to assert that puffery is not allowed in Canada. Yet it is not the policy of the Marketing Practices Branch to promote such prosecutions. See *R. v. Giftwares Wholesale* (1979), 49 C.C.C. (2d) 322, 52 C.P.R. (2d) 239 (Man. Co. Ct.), *leave to appeal to Man. C.A. denied*, 53 C.C.C. (2d) 380, [1980] 3 W.W.R. 573 (C.A.). In this case, a charge was brought against a seller in respect of the representation, "50% Off Retail Prices". The accused was acquitted because the representation was not proven false. However, in the report of the case the entire advertisement is reproduced and another claim made that "our prices are absolutely the best". Yet no charge was brought in respect of this claim, even though there was evidence in the case that other sellers sold for less than the accused.

¹⁵² (1973), 15 C.P.R. (2d) 232 (Ont. Co. Ct.). This prosecution may well have been inspired by a well-known FTC case in which the Second Circuit upheld a cease and desist order which had stopped the advertisers of Clairol hair colouring from claiming that their product "coloured hair permanently": *Gelb v. FTC*, 144 F.2d 580 (2nd Cir., 1944). Since the product did not colour hair which had not yet grown the claim was judged deceptive. The percentage of persons who would likely be deceived by such an advertisement seems small and the case is often seen as a high-water mark in the protection of the credulous and ignorant consumer.

¹⁵³ *R. v. Rust-Oleum (Canada) Ltd.*, *supra*, note 86 at 195.

national advertisers in their use of this common advertising technique.¹⁵⁴ The *Tremco* case is a rare exception. Generally the objects of Canadian attacks on puffery have been local advertisers of a marginal nature. There simply seem to have been no efforts to see whether claims such as "You meet the nicest people in a Honda" amount to misleading advertising. In this respect the failure to challenge trade puffery stems from a different source than our failure to adopt a definition of deception which would offer a high degree of consumer protection. Our failure to adopt a standard of deception which would offer a greater level of protection to consumers has been mainly due to judges; they are the ones who have imposed the "reasonable person" standard of deception and allowed the "alternative meanings" defence. The failure to attack puffery seems essentially a matter of prosecutorial discretion.

Of course, it is far from obvious that we should want puffery policed in the same manner as subtler lies. As the court in *R. v. Professional Technology*¹⁵⁵ suggests, it may be harmless. The argument that it fools no one is appealing. This is certainly the view taken in a study of the subject prepared for the Department of Consumer and Corporate Affairs.¹⁵⁶ More appealing still is the argument that, while puffery may conceivably deceive a few people, such persons are rare fools and protecting them is not worth the costs which more rigid policing would create. Such costs include not only enforcement expenditures but also the loss of useful information to persons who were not deceived as well as the loss society experiences whenever freedom of expression is curtailed.¹⁵⁷ Of course there is an obvious response to that argument: if puffery is not believed and is therefore supposedly ineffective, why do advertisers use it? But advertisers have a plausible rejoinder. They reply that claims such as 'Coke adds life' are not really statements of fact at all, or even statements of opinion. From this point of view puffery is

¹⁵⁴ Though I would hardly hold the FTC up as a model of diligent consumer protection it has, from time to time made genuine efforts to police the national markets and challenge large corporate advertising campaigns. The *Clairol* case (*Gelb v. FTC*, *supra*, note 152) is one example. Other instances in which well-known firms were found to have puffed too much are *Gulf-Oil Corp. v. FTC*, 150 F.2d 106 (5th Cir., 1945), *Amway Corp.*, 93 F.T.C. 618 (1979), *Bristol-Meyers Co. v. FTC*, 185 F.2d 58 (4th Cir. 1950), *Steelco Stainless Steel Inc. v. FTC*, 187 F.2d 693 (7th Cir., 1951).

¹⁵⁵ *Supra*, note 139.

¹⁵⁶ M.J. Trebilcock *et al.*, A STUDY OF CONSUMER MISLEADING AND UNFAIR TRADE PRACTICES: 2ND STAGE REVISION, COMBINES INVESTIGATION ACT, 1976, vol. 1 (Ottawa: Queen's Printer, 1976) at 21: "Despite the advertising claims to the contrary, Ultra-brite is probably incapable, in the normal run of things, of having any perceptible impact on the love-life of the user. Yet, the claims can hardly be regarded as misleading. Most consumers have a sufficiently technical grasp of the facts of life not to be affected by the literal untruths propagated by the campaign."

¹⁵⁷ For economic analyses of these tradeoffs, see H. Beales, B. Craswell & S. Salop, *The Efficient Regulation of Consumer Information* (1981) 24 J.L. & ECON. 491 and E.T. Sullivan & B.A. Marks, *The FTC's Deceptive Advertising Policy: A Legal and Economic Analysis* (1986) 64 OREGON L. REV. 593.

incapable of being false or misleading because it is not a representation.¹⁵⁸ Advertisers claim such statements are merely used to gain the attention of an audience. The literal content of an advertisement is not its relevant message. 'Coke adds life' is just another way of grabbing our attention, comparable to displaying the word 'Coke' in red neon or shouting 'Coke' very loudly.

These two arguments — (a) that puffery fools none (or only a small number who are not worth the price of protecting) and (b) that puff-type claims are not really claims at all — are difficult to evaluate in a vacuum. Yet that appears to be what Canadian courts have attempted to do, and prosecutors have rarely attempted to persuade them to do otherwise. Our internal, intuitive, non-empirical method of interpreting advertising and evaluating deception offers little help here. It will not tell us whether puffery, which is rarely the subject of prosecution, is more or less deceptive than those representations which regularly give rise to charges. However, there is a growing body of scientific study available in advertising research journals which concludes that both of the above arguments in favour of permitting puffery are invalid; in other words, puffery is used because it works, and it works to do more than simply attract our attention to an advertisement. Instead of merely sitting back and speculating about whether grossly exaggerated product claims have any effect on the beliefs of an audience, researchers have begun to use sample audiences to attempt to answer that question. Empirical research has made a strong case for the claim that puff-type claims *are* perceived as factual claims and are believed by a significant portion of those perceiving them.¹⁵⁹ In fact, far from bearing out the assumption that the public is cynical and mistrustful of advertising, empirical research suggests that there is a tendency to over-credit the factual claims made by advertisements¹⁶⁰ and also that our beliefs and actions are influenced as much by evaluative, non-objective claims as by factual ones.¹⁶¹

¹⁵⁸ See F.A. Minter, *Misleading Advertising: The Standard of Deceptiveness* (1976) 1 CAN. BUS. L.J. 435 at 444.

¹⁵⁹ J.C. Olson & P.A. Dover, *Cognitive Effects of Deceptive Advertising* (1978) 15 J. MARKETING RESEARCH 29; B.G. Vanden Bergh and L.N. Reid, *Effects of Product Puffery in Response to Print Advertisements* [1980] CURRENT ISSUES IN ADVERTISING 123; H.J. Rotfeld & K.B. Rotzoll, *Is Advertising Puffery Believed?* (1980) 9:3 J. ADVERTISING 16; M.B. Holbrook, *Beyond Attitude Structure: Toward the Informational Determinants of Attitude* (1978) 15 J. MARKETING RESEARCH 545; H.J. Rotfeld, *Advertising Deception, Consumer Research and Puffery: An Inquiry into Puffery's Power and Potential to Mislead Consumers* (College of Communications, University of Illinois, 1978) [unpublished]; "Adebat: Believable", *Advertising Age* (24 October 1977) 94; R.H. Bruskin Associates, THE BRUSKIN REPORT, NO. 40 (New Brunswick, N.J.: 1971). For a useful summary of this research see H.J. Rotfeld & I.L. Preston *The Potential Impact of Research on Advertising Law* (1981) 21:2 J. ADVERTISING RESEARCH 9.

¹⁶⁰ I.L. Preston, *Logic and Illogic in the Advertising Process* (1967) 44 JOURNALISM Q. 231.

¹⁶¹ T.A. Shimp & I.L. Preston, *Deceptive and Nondeceptive Consequences of Evaluative Advertising* (1981) 45:1 J. MARKETING 22.

The fact that the FTC has made far greater use of extrinsic evidence than has its Canadian counterparts has been noted. In the context of puffery this evidence takes the form of surveys to see what the actual message of an advertisement is. For example, in *Sun Oil Co. v. FTC*,¹⁶² a cease and desist order was sought in respect of a series of television advertisements for Sunoco gasoline. In addition to the usual parade of experts claiming that Sunoco's advertisement was deceptive (or, in the case of Sunoco's experts, testifying that the advertisement was true and fair), the FTC put into evidence the results of a survey of 303 college students who were shown the advertisement in question and were then asked to complete a true/false questionnaire designed to determine what the advertiser appeared to be claiming.¹⁶³ The survey demonstrated a tendency on the part of those questioned to infer from Sunoco's advertisement facts which were found to be false with respect to the product in question. It thus supported the FTC's case and the cease and desist order was maintained.

There is no reason on the face of the legislation why Canadian prosecutors could not employ evidence of this nature in prosecuting charges under the misleading advertising offence. Section 52(4) expressly directs courts to consider the general impression conveyed by a representation, and if a court is in real doubt about what that general impression might be a survey would be a preferable method by which to resolve such doubt. Courts have not initially been receptive to such evidence but have certainly not rejected it in any conclusive fashion.

B. *Contextual Manipulation*

A second advertising technique capable of misleading consumers is contextual manipulation. The words 'contextual manipulation' are not a legal term of art in the way that 'puffery' is. What I mean to convey by them is a use of language which is, in a sense, the opposite of puffery — that is, a verbal representation which, although it may be literally true, carries a practical implication which is false or misleading. Despite the fact that section 52(4) requires courts to take into account the general impression conveyed by a representation as well as its literal meaning, it has been noted that judges have not been imaginative in doing so. Largely because prosecutors have rarely urged them to do otherwise, courts have generally remained well within the four corners of the advertisement, with the result that certain types of advertising ploy have not been the object of prosecution. The following examples of contextual manipulation are not intended as an encyclopedic catalogue of the phenomenon. They are simply examples of some varieties of deceptive manipulation of language which abound in Canadian advertising.

¹⁶² 82 F.T.C. 247 (1974).

¹⁶³ Note that the test was designed to determine what the advertiser was evidently claiming, not whether those claims were in fact believed.

One such species is the deceptive superlative. Certain products are chemically identical to others of the same type. Acetylsalicylic acid (aspirin), for instance, is chemically identical in all versions. The same is true of liquid chlorine bleach. Yet many of us are familiar with claims such as "Nothing bleaches whiter than X." This claim is true in that one liquid chlorine bleach will perform exactly as well (or as poorly) as all others. Thus "X is the best bleach" is not a false statement. Yet it is arguable that such statements are misleading. An empirical study carried out on this sort of claim indicated that 13.5% of persons hearing a claim that a certain product was the best of its kind believed that the product was better than its competitors.¹⁶⁴

A related technique is the incomplete comparison. The Marketing Practices Branch has exercised some vigilance over advertisements in which a seller compares its product with those of its competitors. This has already been noted with respect to price claims¹⁶⁵ but it is also true of claims as to product performance. A response of some advertisers is simply to claim that their product is softer, stronger, more effective or just generally better, without ever specifying to what the product is being compared. To my knowledge there have been no prosecutions of such claims. Yet again empirical study suggests that such statements are misleading. For example, a test of the phrase "Mennen E goes on warmer and dryer" demonstrated that 51% of persons reading it believed it claimed that Mennen E went on warmer and dryer than any other deodorant on the market.¹⁶⁶

A final type of contextual manipulation is the juxtaposition of two statements in such a way as to imply that one entails or is otherwise related to the other: "Get the cleanest wash in town. Use Tide." Read literally these two sentences are each imperatives and consequently make no claims, yet the practical implication of such a representation is that Tide will give the cleanest wash in town. A variant of this technique involves claims such as, "Our product contains the proven ingredient X." Even leaving aside the troublesome word 'proven' the message is still potentially misleading. We infer from such claims the message that competing products do not contain X, though of course that message is nowhere explicitly stated. The claim is still true even if all competing products also contain X, which may well be the case. Again, studies have offered persuasive evidence that significant numbers of readers of such messages receive not the literal message but the practically implied

¹⁶⁴ Cunningham & Cunningham, *Standards for Advertising Regulation* (1977) 41:4 J. MARKETING 92. An additional 17.1 per cent didn't know. The study was carried out on adults chosen at random.

¹⁶⁵ See *supra*, notes 127-28 and accompanying text.

¹⁶⁶ T.A. Shimp, *Do Incomplete Comparisons Mislead?* (1978) 18:6 J. ADVERTISING RESEARCH 21.

one.¹⁶⁷ Far from being uniformly cynical and skeptical about advertising claims, many persons in fact overcredit such claims, giving them an interpretation which is beyond that which is literally presented.

As with puffery, the FTC has been more adventurous than its Canadian counterpart in the area of contextual manipulation. Numerous examples could be offered but a few will be sufficient to give the flavour of the FTC's intervention. Perhaps the first instance of FTC action in this area is a 1942 decision of the 7th Circuit Court of Appeals concerning a product which promised "quick relief from the itching of eczema".¹⁶⁸ The statement was literally true but was found deceptive in that it implied the product was a cure for eczema, which it was not.¹⁶⁹ A cease and desist order was made against a claim that Carnation Instant Breakfast provided "as much mineral nourishment as two strips of bacon",¹⁷⁰ for while the claim was true, bacon is not, as one might have inferred from the ad, a good source of minerals. A cease and desist order was made against Proctor & Gamble Co. in respect of ads for Crisco oil which showed a housewife taking a cup of Crisco, frying chicken in it and then remeasuring the remaining oil to show that nearly all of it remained.¹⁷¹ The ad was found to be a type of implied-uniqueness ploy in that it conveyed the (false) message that food fried in Crisco absorbs less of it than do foods fried in other edible oils.

C. Pictures

The use of pictures in commercial advertisements — whether they be drawings, photographic reproductions (often retouched) or televised images — hardly appears to designate a practice which is presumptively misleading. Pictures, like the print and aural messages we have been

¹⁶⁷ See Preston, *supra*, note 160; R.J. Harris, *Comprehension of Pragmatic Implications in Advertising* (1977) 62 J. APPLIED PSYCH. 603; Shimp & Preston, *supra*, note 161.

¹⁶⁸ *D.D.D. Corp. v. F.T.C.*, 125 F.2d 679 (Cir. C.A. 7th Cir., 1942).

¹⁶⁹ The opinion is a good example of the application of the "ignorant person" standard. The Court wrote (*ibid.* at 681):

Petitioner argues this phrase can only refer to itching, and that there is no implication the product is a remedy or relief for such diseases. We think there is merit in petitioner's contention that this and similar statements, when carefully scrutinized, may be thus construed. The weakness of this position, however, lies in the fact that such representations are made to the public, who, we assume, are not, as a whole, experts in grammatical construction. Their education in parsing a sentence has either been neglected or forgotten. We agree with the Commission that this statement is deceptive . . . to a substantial portion of the public.

¹⁷⁰ *Carnation Co.*, 77 F.T.C. 1547 (1970).

¹⁷¹ *Proctor & Gamble Co.*, 80 F.T.C. 181 (1972). A similar example with respect to baby food claims is *Swift & Co.*, 79 F.T.C. 146 (1971).

dealing with thus far, can presumably be used either accurately or deceptively (if they can be said to possess a truth value at all), and the real question is how they are used.¹⁷² Yet pictures are given a heading of their own here because, like puffery and deceptive implications, they designate an area of advertising where the scope for deceptive practices seems broad but where the Marketing Practices Branch has rarely ventured.

That the pictorial aspects of advertising are significant seems uncontroversial. Numerous advertisements published in Canada today are predominantly pictorial. These range from billboards to rock-video style television commercials to the type of advertisements which appear on the back cover¹⁷³ of magazines such as *Maclean's*, which generally show someone enjoying a consumer product in an idyllic setting and are accompanied by only a few forgettable words. With many advertisements the pictorial component is the most striking and memorable aspect. For those who are illiterate pictures are especially important. Yet prosecutions of false advertising in Canada stick resolutely to verbal representations.

As with puffery and contextual subtlety, this limitation is not primarily attributable to any restrictions in the legislation. Rather it appears to be a matter of prosecutorial choice. Prior to the 1976 amendments this was not the case. All versions of the false advertising offence from 1931 to 1976 applied to 'statements', and it is not easy to see how that word could be interpreted so as to apply to pictures. It is therefore not surprising that under the pre-1976 section there are no reported prosecutions where the Crown attempted to argue that an illustration could constitute false advertising. The greatest role that pictures could play was for courts to take account of them as part of the context of the ad and to rely on them as a sort of evidentiary reinforcement of the alleged verbal falsehood.¹⁷⁴ This limitation disappeared in 1976 when the legislation was changed to delete the reference to statements of fact and substitute the phrase "representation to the public". The term "representation" was broader than "statement", a fact confirmed by other aspects of the 1976 revisions.¹⁷⁵ It therefore seems clear that in the present version of the offence 'representation' includes pictures, and that to the extent they can be found false or misleading in a material respect, pictures can give rise to pro-

¹⁷² However, this does not mean that broad remedies are not in order. The Danish Consumer Ombudsman has recommended the banning of all portrayals of the human person in advertising. See T. Vestergaard & K. Shroder, *THE LANGUAGE OF ADVERTISING* (Oxford: Basil Blackwell, 1985) at 174.

¹⁷³ The back outside cover is the most expensive advertising space in a magazine.

¹⁷⁴ E.g., *R. v. Viceroy Constr. Co.* (1975), 11 O.R. (2d) 485, 23 C.P.R. (2d) 281 (C.A.).

¹⁷⁵ In para. 52(1)(b) the phrase "representation to the public in the form of a statement" is used, but in para. 52(1)(a) the words "in the form of a statement" do not appear, thus leaving open the door for the regulation of various types of representation. Section 52(2), which defines when representations shall be deemed to be made to the public does not refer to such representations as having been "written"; rather it refers to them as being "expressed", "made", or "contained".

secutions. Yet overwhelmingly prosecutors have neglected this possibility. Although there have been a handful of prosecutions of television advertisements, they are brought in respect of words uttered by an announcer or written on a screen.¹⁷⁶ The visual images which constitute the bulk of the television message are ignored.

Of course there are exceptions and they merit mention here, principally because they illustrate how very circumscribed the control of pictorial deception is. In *R. v. Wonder Steel Building (Central) Ltd.*¹⁷⁷ a charge was brought against a salesman who used a picture to tell an obvious lie. He showed a potential buyer photographs purporting to illustrate an instance of a competitor's shoddy workmanship. In truth the shoddy, rusty goods in the photos were examples of the seller's own product. Although the accused was acquitted on other grounds there was no doubt that the photographs were considered to be part of the representation in question. There are also examples of prosecutions concerning newspaper advertisements where the product pictured does not correspond with the one referred to in print. This was the case in *R. v. R.M. Lowe Real Estate Ltd.*¹⁷⁸ where the verbal message referred to "variations of houses as shown below" and the houses pictured differed substantially from those that consumers were actually able to purchase at the advertised price. A similar case is *R. v. MacKay*,¹⁷⁹ where a television pictured in a newspaper advertisement was not the model referred to in the words of the same advertisement. Here the verbal portion of the ad did not expressly claim that the T.V. pictured was the one that was for sale, but the court appeared to have no trouble in drawing this inference and upholding the conviction.

A slightly more sophisticated attempt at pictorial bamboozlement was the object of prosecution in *R. v. 359286 Ontario Ltd.*¹⁸⁰ Although the product referred to in the verbal portion of the advertisement was in fact the one pictured, one of its attributes was visually misrepresented.

¹⁷⁶ E.g., *R. v. Bristol-Myers of Canada Ltd.* (1979), 48 C.C.C. (2d) 384, 45 C.P.R. (2d) 228 (Ont. Co. Ct.). But see *R. v. 359286 Ontario Ltd.*, *infra*, note 180.

¹⁷⁷ (1981), 59 C.C.C. (2d) 372 (Ont. Co. Ct.).

¹⁷⁸ *Supra*, note 87 at 530.

¹⁷⁹ (1979), 35 N.S.R. (2d) 553, 62 A.P.R. 553 (C.A.). It seems unfortunate that the advertisement was not reproduced in the case report. Even in cases where the impugned advertisement is entirely in print, a reproduction of the advertisement in the law report would be useful in conveying some sense of its layout and hence its general context. Yet though reports of trademark cases regularly contain reproductions of the competing trademarks, reports of advertising cases only very rarely reproduce the advertisements in question. American case reports are often better here, sometimes reproducing entire T.V. commercials by reproducing a series of freeze-frame shots. Since the advertising media appear to be abandoning the printed word in favour of pictures it might be of assistance if our law reports would try to follow them at least part of the way. See Kramer, *Marconian Problems, Gutenbergian Solutions: Evaluating the Multiple-Sensory Ad on the Double-Spaced Typewritten Page* (1977) 30 FED. COM. L.J. 35.

¹⁸⁰ (1981), 61 C.C.C. (2d) 383 (Nfld. Prov. Ct.).

The audio portion of a television advertisement had included the following words (supplying a French accent conduces to verisimilitude):

This is an ordinary nail file, yes. You run them across my panty hose and voila no runs. I dare you to try that on your panty hose. Look, here is a piece of newspaper. We put it here like so and we do like this. It is like confetti, yes, but my panty hose they do not run.¹⁸¹

Coinciding with this was a visual demonstration of a nail file being drawn across panty hose from the inside without causing perceptible damage; then the panty hose were placed on a flat surface, a newspaper inserted between them and the surface, and a nail file drawn across the sturdy garment, evidently shredding the newspaper, but leaving the indestructible panty hose unmarked. When it was proven in court that such feats could not be performed without the aid of certain tricks — tricks which had not been evident in the advertisement and which would likely permit the same result with other brands of panty hose — the accused was convicted. It was accepted by all sides that the visual portion of the ad was part of a representation and that the court's job was to interpret it, just as it would do with a verbal representation.

These cases represent the limits of the regulation of pictorial deception in Canadian advertising. Given the prominent role played by pictures in modern advertising campaigns, prosecutions of them are extremely limited in number. They are also unadventurous in their unwillingness to confront the subtleties of modern marketing. Only the grossest attempts at deception are challenged.¹⁸²

To a degree this tendency to ignore the non-print aspects of commercial advertising is understandable. Pictures are often vague, ambiguous or polysemous. They raise the "alternative-meaning" issue far more starkly than words do. The problem of interpreting pictures may well be particularly acute when lawyers are involved. Their training is in logical, sequential thinking — with a particular focus on words.¹⁸³ Marshall McLuhan had a perceptive view of the problem.

¹⁸¹ *Ibid.* at 385.

¹⁸² There are a few other cases in which the case report makes it clear that the advertisement in question had some pictorial content. For instance in *R. v. Bennett Stores Ltd.* (1977), 46 C.P.R. (2d) 136 (B.C. Prov. Ct.) the alleged misrepresentation occurred in a newspaper advertisement for Simmons mattresses. The report indicates that the advertisement was composed in part of a picture of a woman on a mattress, yet the alleged misrepresentation was confined to the words. Other examples are *R. v. Fell* (1981), 59 C.P.R. (2d) 34 (Ont.C.A.); *R. v. Kenitex Canada Ltd.*, *supra*, note 86; *R. v. Bristol-Myers of Canada Ltd.*, *supra*, note 176. In addition, it seems likely that, although we are not told of the fact, several of the other advertisements which were the object of prosecution had pictorial aspects.

¹⁸³ From the point of view of brain hemisphere theory, law appears as a quintessentially left-brain activity while pictures are the paradigm of right-brain thinking. Despite the fact that some doubt has been cast on theories which suggest the left side of the human brain is especially devoted to literal, analytical thinking while the right side is better at visual and spatial cognition, it is worth noting that the advertising industry is attuned to developments in this area. See S. Weinstein, *A Review of Brain Hemisphere Research* (1982) 22:3 J. AD. RESEARCH 59.

Since the advent of pictures, the job of ad copy is as incidental and latent as the "meaning" of a poem is to a poem, or the words of a song are to a song. Highly literate people cannot cope with the nonverbal art of the pictorial, so they dance impatiently up and down to express a pointless disapproval that renders them futile and gives new power and authority to the ads. The unconscious depth-messages of ads are never attacked by the literate, because of their incapacity to notice or discuss nonverbal forms of arrangement and meaning. They have not the art to argue with pictures.¹⁸⁴

Still, despite the fact that we might well disagree about what representation is to be found in a given picture, one gets the impression that advertisers can say things pictorially which they could not get away with verbally. A glance at the American response to pictorial deception shows that again the FTC has been more adventurous than the Marketing Practices Branch and that it is possible to challenge deceptive pictorial advertising. Not surprisingly, there are American cases similar to *MacKay* taking issue with advertising, in which the object pictured is simply not that referred to in the verbal portion of the ad.¹⁸⁵ As well, there is a considerable record of FTC action against parallels to *R. v. 359286 Ontario Ltd.* — cases where demonstrations or comparisons pictured, usually on television, are manipulated so as to convey a false notion of a product's characteristics. For instance, in *FTC v. Colgate-Palmolive Co.*¹⁸⁶ the Supreme Court upheld a cease and desist order in respect of a T.V. commercial for Rapid Shave. The advertisement in question consisted of a demonstration purporting to show that Rapid Shave moisturized so well it would enable someone so minded to shave sandpaper. In fact, what was used in the commercial was not sandpaper but sand-coated plexiglass. It was not simply the use of a mock-up that led to the advertiser's downfall; it was the fact that although Rapid Shave might well permit some one with an ordinary razor to shave very fine sandpaper, this feat could only be accomplished after the sandpaper had been soaked for about 80 hours, a fact not communicated in the advertisement.

A similar result was reached in a comparison commercial. In *Libbey-Owens-Ford Glass Co.*¹⁸⁷ a cease and desist order issued against a commercial which purported to compare the respondent's automobile glass

¹⁸⁴ M. McLuhan, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* (New York: Morris, 1964). The problem may be worse than McLuhan thought. The situation is exacerbated by the fact that pictures in advertisements are only rarely found on their own. They are generally accompanied by words and sometimes by music. If our sole job was to interpret pictures, we would at least have traditions to assist us. The disciplines of iconography and art history at least provide some starting point. But when it comes to studying the relationship between words and pictures we lack such traditions.

¹⁸⁵ For example, *Lifetime, Inc.*, 59 F.T.C. 1231 (1961).

¹⁸⁶ 380 U.S. 374 (1965). For more extended discussions of the control of this type of deception by the FTC, see Note, *Illusion or Deception: The Use of 'Props' or 'Mock-Ups' in Television Advertising* (1962) 72 *YALE L.J.* 145 and J.I. Richards & R.D. Zakia, *Pictures: An Advertiser's Expressway Through FTC Regulation* (1981) 16 *GA. L. REV.* 77 at 109-33.

¹⁸⁷ 63 F.T.C. 746 (1963), modified 69 F.T.C. 523 (1966).

with that in General Motors cars. Though it may well have been the case that the glass in Ford cars produced less distortion than that in their rivals', the difference between the two was not nearly so great as one would imagine after watching the commercial. In the advertisement in question, a scene that purported to represent the view through the respondent's glass was actually shot through an open window with no glass. The public was invited to compare that with a view purportedly photographed through G.M.'s windshield. It was indeed filmed through that product, but the glass was first smeared with petroleum jelly, and to further heighten the distortion, a severe camera angle was employed. Although the facts in this case are egregious there are other examples of successful FTC action against ads in which the only deceptive element was the camera angle.¹⁸⁸

A further type of FTC action against deceptive pictorial advertising concerns visual ads which employ some type of deceptive implication. A typical example here concerns an advertisement for Baggies plastic sandwich bags which showed food wrapped in a Baggie being dropped into a tank of water and remaining watertight while food wrapped in a competitor's product let the water in.¹⁸⁹ While it was true that the products both performed as pictured, the advertisement was found to imply that this had some connection with ability to keep sandwiches fresh, and no such connection existed. A similar case concerned a television advertisement which showed a Mars Bar metamorphosing into a glass of milk, which was said to imply some nutritional equivalence which did not exist.¹⁹⁰ A subtler type of deceptive visual implication — one that has never been challenged in Canada — was involved in *Loesch Hair Experts*.¹⁹¹ There, one element found to contribute to the deceptive nature of the ad was the fact that the product's spokesperson was pictured wearing a white laboratory coat, thus giving the false impression of some connection to the medical profession.

As was the case with puffery and contextual manipulation, a brief glance at the literature on advertising research confirms that in their use

¹⁸⁸ *Mattel*, 79 F.T.C. 653 (1971) and *Topper*, 79 F.T.C. 681 (1979). For other interesting examples of successful cases against faked demonstrations see *Standard Oil Co. of California v. FTC*, 577 F.2d 653 (U.S.C.A. 9th Cir., 1978) and *Campbell Soup*, 77 F.T.C. 664, *consent* (1970).

¹⁸⁹ *Colgate-Palmolive Co.*, 77 F.T.C. 150 (1970).

¹⁹⁰ *Mars, Inc.*, 77 F.T.C. 1435 (1970). It is interesting that a similar advertisement by Rowntree Mackintosh of Canada Ltd., which visually compared an Aero chocolate bar to a glass of milk, won the Quebec Corporation of Professional Dietitians' rotten apple award for the top misleading advertisement of 1986. See *Ottawa Citizen* (15 February 1987) F-6. It does not appear that charges were brought in respect of it.

¹⁹¹ 54 F.T.C. 575 (1957).

of pictures advertisers generally know precisely what they are doing.¹⁹² If prosecutors feel in need of explanations of how pictures are used to create false and misleading material misrepresentations, those explanations are available, complete with empirical documentation. The scientific literature on advertising is full of studies which conclude, in effect: "If you say (or illustrate) 'X' you can convey the message 'Y' to 'Z' % of your audience" (where 'Y' is a misleading message and 'Z' is a significant number). While the practice of the FTC in the United States has demonstrated that it is possible to bring these studies to bear in a forensic setting, Canadian prosecutors have not followed this path, and their reluctance cannot be attributed to limitations under the existing legislation.

In concluding this review of investigative and prosecutorial practices under the false advertising offence the preceding observation may be generalized. Although the statute itself may have been circumscribed through the efforts of the business lobby, and although the judges who have interpreted that statute have further limited its effectiveness by resolving most of the uncertain issues in ways which benefit advertisers, there still appears to be sufficient room within the prevailing interpretation of the legislation for a far more ambitious policing of current advertising than has in fact been carried out.

Advertising techniques in daily use constitute a high-visibility activity of major corporate actors which would appear to be in violation of existing interpretations of the criminal law. At the very least these activities would appear to be good grounds for the bringing of test cases to test their legality. It is understandable why the Marketing Practices Branch, which may well be concerned to generate a record which demonstrates a large number of successful prosecutions, might choose to deploy its resources by attacking large numbers of small, easily intimidated defendants who are in obvious violation of the law, rather than to tie itself up in a single protracted prosecution of, for example, say, Molsons. But this choice tends to contradict the Branch's claim that a "high priority is given to cases that will afford a court the opportunity of establishing new principles or of clarifying the law".¹⁹³ The reported

¹⁹² For example, for a study of the technique used in *Loesch Hair Experts* see Preston and Rotfeld, *The Potential Impact of Research on Advertising Law* (1981) 21:2 J. ADVERTISING RESEARCH 9. That study demonstrates convincingly that techniques such as the lab-coated spokesperson are effective. On this same point see Oshikawa *Learning Without Awareness* (1970) 4 CAL. MGMT. REV. 61, and McSweeney & Brierly, *Recent Developments in Classical Conditioning* (1984) 11:2 J. CONSUMER RESEARCH 619. An interesting "how-to" book on the use of pictures, written by a successful advertising executive, is S. Baker, *VISUAL PERSUASION: THE EFFECT OF PICTURES ON THE SUBCONSCIOUS* (New York: McGraw-Hill, 1961). For legal studies of pictorial advertising see Richards & Zakia, *supra*, note 186 and O.L. Reed, *The Psychological Impact of TV Advertising and the Need for FTC Regulation* (1975) 13 AM. BUS. L.J. 171.

¹⁹³ *Supra*, note 123.

cases simply do not reveal any record of bringing test cases to determine the true scope of the false advertising offence in Canada. Perhaps more significantly, the practice of concentrating on small-time offenders may not contribute to the Branch's avowed goal of improving the overall quality of market information directed to the public. If we search then for the source of "the problem" with the regulation of deceptive advertising — said problem being underenforcement resulting in lack of genuine consumer protection — we find that it exists not only at the legislative stage and in the choices made by judges but also in the decisions made by those who administer the law.

IV CONCLUSION

It would appear then that any underenforcement of the false advertising offence is not due to an accidental breakdown at some single point in the criminal justice system. The problem is more pervasive than that. To illustrate this, let us take as an example one of the issues that has appeared in each of the three areas we have examined: *mens rea*. Commercial advertising as practiced by today's large corporate marketers — that is, advertising of the sort discussed toward the end of the last section — is a perfect example of a 'mindless' organizational activity where it is nearly impossible to locate a corporate intent. An advertising campaign, particularly a campaign run by a large, national marketer, may be the collaborative effort of a large number of persons. These may include: the product manufacturer, market analysts, psychologists, art directors, set designers, music directors, actors, a celebrity spokesperson, graphic artists, photographers, retouchers and so on, all drawing on substantial economic and technical resources in an effort to sell a product which may be chemically indistinguishable from its competitors. It is little wonder that such a team could be 'over aggressive' and — quite without criminal intent — produce an advertisement which deceives a substantial portion of the public. In short, it is difficult to secure a false advertising conviction for such behaviour if the Crown must prove an intent to deceive, a point noted in the Parliamentary debates at several stages in the evolution of the offence. However, the business lobby had good reason to fear the creation of an absolute liability offence for false advertising and worked hard to include a due diligence offence which would allow advertisers to escape conviction if they could prove they acted 'reasonably'. As a result of their efforts a version of that defence is a part of the current legislation.

It could be argued that the legislation still leaves ample scope for the policing of current marketing practices. After all, the Crown must merely prove that the representation is false or misleading; the onus then shifts to the advertiser to demonstrate the reasonableness of its actions. We should not forget, however, what courts and prosecutors have done with the legislation. As noted above, some courts have used the *Charter* to strike down the statutory due diligence defence and permit advertisers

to utilize the broader, common law defence.¹⁹⁴ As well, courts have used the absence of *mens rea* as a factor in justifying lighter sentences.¹⁹⁵ We have also seen how the choices made by prosecutors have the effect of singling out the deliberate liar rather than the sophisticated, effective, 'unintentionally' misleading national marketing campaign, even though the latter may be the more harmful. In fact there are specific studies of prosecutorial policy which have found that lack of *mens rea* is a factor in a decision not to prosecute.¹⁹⁶ As a result of all of this — and remember that here we are only looking at the *mens rea* issue — national advertising campaigns are rarely prosecuted; if prosecuted, convictions are difficult to obtain; and, if a conviction is obtained, the resulting penalty is not an effective deterrent.

All of this leaves one inclined to lay the blame at the feet of the criminal process and to conclude that we have selected the wrong legal tool to deal with deceptive advertising. In a slightly different context this was substantially the response of Rosenbluth and Thorburn in CANADIAN ANTI-COMBINES ADMINISTRATION, 1952-1960.¹⁹⁷ Focussing on amendments to and administration of the *Combines Investigation Act* (at a time before it contained the false advertising offence) they found lack of significant controls on mergers, monopolies and resale price maintenance, and attributed this to a 'cops and robbers' approach to the problem.¹⁹⁸ By this they meant that persons responsible for enforcing the *Act* concentrated on conspiracy offences where the law was clear and where there was convincing evidence of *mens rea*. "Concentration on the goal of successful prosecution also meant that cases where the application of the law was doubtful were not developed."¹⁹⁹ Rosenbluth and Thorburn also documented neglect of the research function and a legalistic approach on the part of prosecutors who consistently failed to make use of economic analysis, with the result that monopolistic practices which "are widespread and constitute the typical business environment"²⁰⁰ went untouched.

These observations concerning the enforcement of competition offences are equally applicable to the crime of false advertising and I am

¹⁹⁴ *Supra*, notes 69-73 and accompanying text.

¹⁹⁵ *Supra* note 120 and accompanying text.

¹⁹⁶ P. Fitzgerald, *Misleading Advertising: Prevent or Punish?*, *supra*, note 66 at 252ff. Fitzgerald examined the files of the Trade Practices Branch and compared those that were fully investigated but not prosecuted with those in which a prosecution was launched. He found a high degree of correlation between existence of an advertiser's apparent "fault" and a decision to prosecute. A similar result was reached in a study by the Law Reform Commission of Canada, *Studies on Strict Liability* (Ottawa: Information Canada, 1974) at 88. This study concluded that a prosecution was unlikely unless there was a perception that the advertiser had been dishonest. It should be noted that both of these studies were conducted before the 1976 amendment to the offence.

¹⁹⁷ G. Rosenbluth & H. G. Thorburn, CANADIAN ANTI-COMBINES ADMINISTRATION, 1952-1960 (Toronto: 1963).

¹⁹⁸ *Ibid.* at 101-06.

¹⁹⁹ *Ibid.* at 102.

²⁰⁰ *Ibid.* at 103.

tempted to end with the sentence that concludes Rosenbluth's and Thornburn's book: "We must escape from the 'cops and robbers' concept."²⁰¹ My references to advertising regulation by the FTC, with its long record of intervention against major corporate advertisers and its use of current quantitative market research, would appear to point to a preferable enforcement model. Alas, there is a hitch here. The FTC has been no more successful at curbing false advertising than has the Marketing Practices Branch; the same advertisements flourish on both sides of the border. The American approach, with its lack of effective search and seizure provisions, its low visibility/low stigma administrative hearings and its lengthy delays has found its own way to leave the daily practices of corporate advertisers untouched. Indeed a more detailed comparative study of American and Canadian approaches to false advertising could be carried out, and a good title might be "Two Ways to Fail to Stop Misleading Advertising while Simultaneously Appearing to Do Something about It."

This need not drive us to the conclusion that the law is *incapable* of stopping false advertising, but it does suggest that no legal response to this phenomenon can be effective if the persons who draft, interpret and enforce the law do not have the will to make it so.

²⁰¹ *Ibid.* at 106.

