COMBINES INVESTIGATION ACT – MISLEADING ADVERTISING AND DECEPTIVE PRACTICES

*J. J. Quinlan, Q.C.**

I. SECTION 36 [1]

Prior to 1960 the Combines Investigation Act prohibitied conspiracies in restraint of trade, anti-competitive mergers and monopolies, discriminatory and predatory pricing practices, and resale price maintenance. In that year, however, along with amendments to the existing substantive provisions, a provision prohibiting materially misleading representations as to the ordinary price of an article was enacted and came into force on August 10. The purpose of this provision was explained in some detail as both a consumer and business protection measure by the then Minister of Justice, the Honourable E. D. Fulton, when the bill was before the Committee of the House:

> It was our intention here to go a little further than the Criminal Code goes but in one particular field only, the field of misrepresentation by misleading advertising with respect to pricing. We wanted to cover that as a special and separate field, as one of those provisions which we are now introducing to improve the situation of the independent merchant because this is one of the respects in which he is particularly vulnerable to unscrupulous practices especially by those who use the power of the purse as one of the main devices against their weaker competitors.
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> Thus it is frequently alleged in advertisements that if you come to my store you can get an article at such and such a price, and that the ordinary retail price is, let us say, a sum two or three times as much. It has been found on investigation — I have not had the opportunity to put this on record before — that in many of these cases the price advertised as the ordinary or average price bears not the slightest relation to reality, or is a grossly inflated statement of what is the ordinary or average retail price at which those articles are sold. Such advertisements, blown up as they are, usually have articles in them for which there would be a tremendous consumer demand if the impression was created that you could get them at one-third of the ordinary retail price. So, you see, they have an attractive effect and on that basis the volume of sales of the merchant who makes use of this misleading and dishonest device is increased at the expense of those who do not resort to such misleading and dishonest practices.

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[1] CAN. REV. STAT. c. C-23, § 36 (1970) (formerly § 33C).

> It will be appreciated, I think, that this is a special type of misleading advertising; it is misleading advertising related to price alone; and so we have felt it was proper to have a provision in the combines legislation dealing with the matter, because of its relation to other subjects with which this legislation now deals, namely the provision designed to protect and improve the position of the independent merchant.
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> Another reason for having it in here in this form is that we do not police the Criminal Code; that is the ordinary provisions of the Criminal Code are not normally the responsibility of thee combines branch to supervise or to enforce, and I think that it would be the subject of criticism if we took the ordinary provisions of the Criminal Code and put our officers in charge of supervision and enforcement. There would be a change in the normal division of responsibility for enforcement of the ordinary Criminal Code provisions. [2]

The debate on the provision was quite brief and as enacted it provided:

> 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.
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> (2) Subsection (1) does not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.[3]

While the section is commonly described as a misleading price advertising provision, it will be noted that it is not that restricted, it has been held to cover a materially misleading oral representation. [4]

It is not proposed to review all the jurisprudence as much already has been carefully reviewed by Professor Ronald I. Cohen in his comprehensive article, *Misleading Advertising and the Combines Investigation Act.* [5] Reference therefore will be made to decisions handed down since that article was written in which the law has been further developed as well as to brief remarks on the question of *mens rea* and the question of duplicity in charges.

In *Regina v. Allied Towers Merchants Ltd.,* [6] Mr. Justice Jessup, of the Supreme Court of Ontario (as he then was) held that the offence under section 33C(1) was one of strict liability not requiring *mens rea.* As Professor Cohen points out, this decision has been followed almost universally and it was approved of by Mr. Justice Kane and Mr. Justice Clement, of the Appellate Division of the Supreme Court of Alberta in the recent decision in *Regina v. Imperial Tobacco Products Ltd.* [7] which involved charges under

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[2] 7 H.C. DEB. 6984 (July 26, 1960).

[3] Can. Stat. 1960 c. 45, § 13.

[4] R. v. Ameublement Dumouchel Furniture Ltd., Ottawa-Carl. Prov. Ct., Feb. 6, 1970 (unreported).

[5] 15 MCGILL L.J. 622 (1969).*See also* DIRECTOR OF INVES. & RES., COMBINES INVESTIGATION ACT, REPORT FOR THE YEAR ENDED MARCH 31, 1967, at 61 (1967).

[6] Regina v. Allied Towers Merchants Ltd., [1965] 2 Ont. 628, [1966] 1 Can. Crim. Cas. (n.s.) 220, 46 Can. Pat. R. 239 (High Ct. 1965).

[7] [1971] 5 W.W.R. 409, 4 Can. Crim. Cas.2d 423 (Alta. Sup. Ct.).

section 33D(1). This decision will be discussed at more length in the consideration of section 33D which follows.

In *Regina v. Morse Jewellers (Sudbury) Ltd.* [8] it was held that a charge using the words "have been, are, or will be, ordinarily sold" is not void for duplicity and charges in this form have not since been challenged.

The delineation of the trade area to which an advertisement or representation applies has been substantially clarified in recent decisions. In *Regina v. F. W. Woolworth Co.*, [9] which concerned an advertisement in the Regina Leader-Post, the court was of the view that the prosecution must satisfy it that the article in question was not available in the trade area of the newspaper advertisement which of course extended beyond the city of Regina and apparently through much of southern Saskatchewan. Although this case was not specifically referred to in the later case of *Regina v. McKay's Television & Appliances Ltd.*, [10] it is clear that Judge Macdonald clearly disagreed with this approach in saying: "Similarly, I think it was conceded that the trading area to which the representation was made, was that in reasonably close proximity to the City of Windsor, although the circulation of The Windsor Star extended throughout the County of Essex and beyond. I find as a matter of common geographical knowledge for example that the Town of Amherstburg, 17 miles from Windsor, would be within such area." [11]

The difficulty in using the circulation area of a newspaper advertisement as its trade area becomes apparent when it is appreciated that the Toronto daily newspapers circulate over a wide area far beyond the confines of metropolitan Toronto and it would seem that on such an approach the section would become for all practical purposes unenforceable if an advertisement was placed in particular publications. Much the same problem arises in some types of catalogues. In *Regina v. Simpsons-Sears Ltd.* [12] the product in issue was an under-the-counter refrigerator advertised in part in a summer sale catalogue at "$149.95 Value $129.95 Cash" and also "SAVE $20.00." The price was applicable in Zone 2 (not defined in the catalogue) which extended over all Northern Ontario, Eastern Ontario (including the Ottawa area), Quebec and the Maritime provinces. The evidence was that the refrigerator never sold ordinarily at a price of $149.95 in the Ottawa area. At the trial the court was of the view that there were two types of consumer: the retail store consumer and the catalogue operations consumer and that the advertisement was directed to the latter. Since the Crown had chosen to limit its evidence to the Ottawa area, the court concluded that in the light of the foregoing this evidence was not sufficient to establish the offence beyond a reasonable doubt. On appeal by way of trial de novo the

[8] [1963] 2 Ont. 107, 42 CAN. PAT. R. 130 (Mag. Ct.), *rev'd*, [1964] 1 Ont. 103, [1963] 3 Can. Crim. Cas. (n.s.) 304, 41 Can. Crim. 21, 42 Can. Pat. R. 130 (High Ct.), *aff'd*, [1964] 1 Ont. 466.

[9] 58 Can. Pat. R. 223 (Sask. Mag. Ct. 1969).

[10] 65 Can. Pat. R. 126 (Ont. County Ct. 1970).

[11] *Id.* at 128.

[12] 58 Can. Pat. R. 56 (Ont. Prov. Ct. 1969).

appeal was allowed and the company convicted. [13] In his judgment, Judge Doyle dealt with this aspect of the matter as follows:

> Admittedly, the catalogue is designed to reach prospective consumers in all of Zone 2. The advertisement is directed to the consumer in Chicoutimi as well as to the consumer in Ottawa. The Chicoutimi consumer is not misled by the advertisement as it would appear to be true that the article in question sold in his area for a price of $149.95 or higher. The same advertisement, however, would mislead an Ottawa consumer as the article did not ordinarily sell for $149.95 or higher in the Ottawa area.
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> Section 33C(1) is designed to provide consumer protection as well as to prevent unfair trade practice. To allow the accused to extend the word "public" to include consumers in all of Zone 2 would be tantamount to allowing him to use a statement in his advertisement which would be misleading in some parts of the area covered by his advertisement and to be able to answer a charge by saying that the advertisement was not misleading in other parts of the area covered. The protection of the consumer as envisaged by Section 33C(1) would then be non-existent in some areas and in addition the seller would gain an unfair advantage over his competitors. It is highly improbable that the same price would apply throughout all of Zone 2. What does it matter to a consumer whether an item had sold in more distant parts of Canada at a price in excess of the price it is now being sold in the area where the consumer resides. The basic test remains the same: Does the consumer really save $20, and if not, is he led to believe by the advertisement in question that he is saving $20 by buying at the accused's store rather than at some other establishment in the Ottawa area? The gist of the offence by the accused is not in advertising the sale of its merchandise but in using words which are misleading. I am unable to agree with the definition of "public" used by the learned Provincial Judge. The extent of the "public" in each case must be limited to each area where the goods are sold and the area would be extended to include an area in which price competition would exist as between the business establishments of a particular area. A store in Chicoutimi does not normally compete with a store in the Ottawa area. [14]

The company has appealed this decision to the Ontario Court of Appeal and judgment has been reserved. The appeal should substantially settle not only the question of the trading area in advertisements but also the corollary point whether the "public" can be divided into the compartments suggested in the trial judgment.

In *Regina v. Allied Towers Merchants Ltd.*, [15] Judge Sweet expressed the view that the price at which an article is ordinarily sold within the meaning of section 33C is "not the price at which the person making the representation ordinarily sells it but what is meant is the price at which it is ordinarily sold in general in the area in which the representation is made". In *Regina v. McKay's Television & Appliances Ltd.* [16] the trial court followed this decision and held *inter alia* that the Crown had not discharged the onus of establishing the price at which the article in question had ordi-

[13] 65 Can. Pat. R. 92 (Ont. County Ct. 1971).

[14] *Id.* at 98.

[15] Mar. 17, 1965 (unreported).

[16] 62 Can. Pat. R. 236 (Ont. Prov. Ct. 1970).

narily been sold in the area because the quantity sold by other dealers was not sufficient for their prices to have significant probative value. On appeal by the Crown by way of trial de novo, Judge Macdonald in allowing the appeal said that no such limitation was expressed or implied in the section and went on to say:

> I am not in agreement with the opinion of the learned trial Judge that the Court is not entitled to consider the prices at which the article in question has been sold by the accused, but is limited in effect to a consideration of the prices at which they have been sold only by its competitors in the trading area. In expressing that opinion he apparently relied upon and felt bound by an unreported decision of Sweet, Co. Ct. J., in *R. v. Allied Towers Merchants Ltd.*, March 17, 1965: I am inclined to think that what the learned County Judge said to the effect "that it is not the price at which the person making the representation ordinarily sells it but what is meant is the price at which it is ordinarily sold generally in the area in which the representation is made", does not exclude a consideration of the prices of the accused as a part of the determination of the price generally in the area. If he did intend to exclude such consideration, I must respectfully disagree, particularly in this case. Nothing could be more misleading and intentionally so, if a merchant invited comparisons to a purported selling price of RCA Models HH831C at $1,695 when he, himself, had never sold such a model at that price or for any price more than from $888 to $1,355 and he himself had sold most of the said combinations in the area. And that is what the evidence shows in this case. [17]

Finally, further reference might also be made to *Regina v. Allied Towers Merchants Limited* in regard to the use of the manufacturer's suggested list price in an advertisement. The issue in this case was whether or not the words "list price" used to describe a comparative price was a misleading representation. The Crown alleged that the advertised list price was higher than the ordinary selling price in the area for the articles in question. In his reasons for dismissing the Crown's appeal, the learned judge was of the view that although the phrase "list price," being the manufacturer's suggested retail price, had a relationship to retail price, in the circumstances this did not amount to a representation that the list prices were the prices at which the articles were ordinarily sold. In *Regina v. R. A. Beamish Stores Co.*, [18] one of the advertisements which was the subject of a charge was as follows:

1 Westinghouse 19" Colour TV Manufacturer's List Price	679.95
Plus, bonus offer Portable TV Stand valued at	19.95
Total Value	699.90
You can get all this tomorrow at Beamish for only	499.00

At the trial the company was acquitted, the court following and adopting the language of Sweet, as follows:

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[17] *Supra* note 10, at 129.

[18] 62 Can. Pat. R. 97 (Ont. Prov. Ct. 1970).

In one part, he says:

"I find the manufacturer of the three articles, the camera, the projector and the film, suggested a price a which these articles respectively might be sold at retail. They were accordingly, the manufacturer's suggested retail price in respect of all of them."

In another part of his judgment he says:

"I do not think that 'list prace' is an unfamiliar term to retail buyers in general. It must, I think be taken that in a considerable range of products the term is known generally to the retail buying public as one indicating the amount which a manufacturer suggests as the retail selling price of an article it produces. Furthermore I do not think it can reasonably be inferred that potential buyers in general do not know that a retailer sometimes sells below that price.

To find that 'list price' as used here is a material misrepresentation would, I think, be tantamount to finding that words which are factually true in a well recognized context are misleading in the manner in which they are used.

There may indeed be circumstances in which that would be so, but I do not think it has been established that it is so in this case."

He goes on:

"Furthermore, I think that the basic general principle of the accused being entitled to the benefit of a reasonable doubt on charges under punitive legislation is applicable also in this case where the guilt or innocence of the accused may, at least in some degree, be dependent upon semantics." With regard to the first count, the words "manufacturer's list price" was a proper term to use. It was, in fact, the price which, as is evidenced by the documents, Westinghouse had indicated as their manufacturer's suggested list price at that time. [19]

On appeal by way of trial de novo, however, the appeal on this charge was allowed, Judge Matheson, expressing his reasons very briefly and succinctly as follows: "The representation that the total value of the package offer was $699.90 was primarily based upon a Canadian Westinghouse Company Limited retailer price list effective September 12, 1968 showing a suggested retail price for colour television model CP 1939 of $679.95. This price however was entirely unrealistic, indeed unsupported by any sales in the Ottawa and valley area. In the circumstances I find that there was a materially misleading representation as to price at which this television model was ordinarily sold. There will be a conviction." [20]

As a matter of general information there have been one hundred and sixteen cases under section 33C from the time it came into force in 1960 up to September 30, 1971. Of these, one hundred and one resulted in conviction and fifteen in acquittals. Of the convictions, approximately sixty-three per cent were on guilty pleas and orders of prohibition were granted in forty-nine cases. In addition, there are five cases under appeal.

[19] *Id.* at 99-100.

[20] 63 Can. Pat. R. 152.

II. SECTION 37 [21]

This provision was contained in the Criminal Code for more than half a century and there is very little record of enforcement. Indeed, as Cohen points out in his article, [22] there was only one reported case under it. As the reader is aware, the section was amended over the years and finally on July 31, 1969, was transferred without change to the Combines Investigation Act as section 33D.

The section was renumbered as section 37 by the Revised Statutes of Canada of 1970 which came into force on July 15, 1971, and provides as follows:

> 37. (1) Every one who publishes or causes to be published an advertisement containing a statement that purports to be a statement of fact but that is untrue, deceptive or misleading or is intentionally so worded or arranged that it is deceptive or misleading, is guilty of an indictable offence and is liable to imprisonment for five years, if the advertisement is published
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> (a) to promote, directly or indirectly, the sale or disposal of property or any interest therein, or
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> (b) to promote a business or commercial interest.
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> (2) Every one who publishes or causes to be published in an advertisement a statement or guarantee of the performance, efficacy or length of life of anything that is not based upon an adequate and proper test of that thing, the proof of which lies upon the accused, is, if the advertisement is published to promote, directly or indirectly, the sale or disposal of that thing, guilty of an offence punishable on summary conviction.
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> (3) Subsections (1) and (2) do not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.
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> (4) For the purposes of subsection (2), a test that is made by the National Research Council of Canada or by any other public department is an adequate and proper test, but no reference shall be made in an advertisement to indicate that a test has been made by the National Research Council or other public department unless the advertisement has, before publication, been approved and permission to publish it has been given in writing by the President of the National Research Council or by the deputy head of the public department, as the case may be.
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> (5) Nothing in subsection (4) shall be deemed to exclude, for the purposes of this section, any other adequate or proper test. 1968-69, c. 38, s. 116. [23]

Since its transfer to the Combines Investigation Act, up to the end of September 1971 there have been decisions in some fifty-three cases. In forty-one of these, convictions were registered, of which two-thirds were on pleas of guilty, and in eight cases there were acquittals. One conviction and one acquittal are presently under appeal. In three cases the accused was not committed for trial but in one of these the Crown subsequently

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[21] CAN. REV. STAT. c. C-23, § 37 (1970) (formerly § 33 D).

[22] Cohen, *Misleading Advertising and the Combines Investigation Act*, 15 McGILL L.J. 622, at 631 (1970).

[23] CAN. REV. STAT. c. C-23 (1970).

obtained a true bill from the grand jury. Fines imposed have ranged from twenty-five to three thousand dollars and in twenty-one cases orders prohibiting continuation or repetition of the offences were granted. Those in which convictions have been registered have covered a wide diversity of products or promotions including clothing, tires, housing projects, used cars, furniture, detergent, sewing machines and holiday promotions, to name only a few, and have concerned a wide variety of representations. [24]

The leading case on the interpretation of section 37 which offers an extremely useful guide to potential advertisers, is *Regina v. Imperial Tobacco Products Ltd.* [25] The charges arose out of an advertising campaign by the accused company involving a new brand of cigarettes. The charges on which convictions were registered related to the use of signs containing the statement "$5 in Every Pack of New Casino." There was neither five dollars in each pack nor anything else that could be exchanged for that amount or its equivalent. Each pack contained a game in which the purchaser had one chance in four hundred to select a winning combination and thus obtain five dollars after answering a skill-testing question.

The trial court stated that the phrase complained of, literally taken, amounted to a statement of fact that was untrue. So far as the question of *mens rea* was concerned, the court was of the opinion that it was not an essential ingredient of the offence of causing to be published an untrue statement of fact (apart from the protection afforded to publishers by subsection (3)) and, in so doing, followed the reasons of Mr. Justice Jessup in *Regina v. Allied Towers Merchants Ltd.* [26] which it found equally applicable to section 37.

Apart from the question of *mens rea*, the company defended on the basis that the entire advertising program for this brand showed there was a game to be played before any money could be won and that the average person or, as the court said, the "reasonable man," would not have been so credulous as to believe that the company was going to give five dollars in exchange for the purchase price of a package of the cigarettes. Mr. Justice Sinclair of the Alberta Supreme Court, in disposing of this argument, adopted the so-called "credulous man" test: "In my view, that is not the test to be applied. Section 33D makes no reference to standards such as those. It seems to me the protection afforded by the section is for 'the public—that vast multitude which includes the ignorant, the unthinking and the credulous', to use an expression that appears in Federal Trade Commission Prosecution cases in the United States, and of which *Charles of the Ritz Distributors Corp. v. Federal Trade Com'n.* (1944), 143 F. 2d 676, is an example." [27]

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[24] *See* DIRECTOR OF INVES. & RES., COMBINES INVESTIGATION ACT, REPORT FOR THE YEAR ENDED MARCH 31, 1970, at 63, 95 (1970).

[25] 64 Can. Pat. R. 3, 2 Can. Crim. Cas.2d 533, 16 D.L.R.3d 470 (Alta. Sup. Ct. 1970).

[26] [1965] 2 Ont. 628, 46 Can. Pat. R. 239, [1966] 1 Can. Crim. Cas. (n.s.) 220 (High Ct. 1965).

[27] Regina v. Imperial Tobacco Products Ltd., 64 CAN. CRIM. CAS.2d 533, at 534, 16 D.L.R.3d 470, at 472 (Alta. Sup. Ct. 1970).

The court convicted the company on two charges based on two different signs, both aimed at making what purported to be a statement of fact that was untrue. Two charges relating to the same signs and alleging that the words purported to be a statement of fact that was intentionally so worded or arranged as to be deceptive or misleading were dismissed since they related to the same words and signs. A fifth charge involving the words "Every Pack Can Win. It's Up to you!" was also dismissed without reasons being given. A fine totalling three thousand dollars was imposed and the court also granted an order prohibiting continuation or repetition of the offences and in addition prohibiting the company, its directors, officers, etc., from publishing or causing to be published an advertisement to promote the sale of cigarettes containing a statement purporting to be a statement of fact that is untrue.

On appeal, [28] the convictions and fines were upheld but the order was amended by striking out all but the paragraph containing simply a prohibition against continuation or repetition of the offences by the company. The grounds of appeal from conviction were summarized by Clement, as follows: 1) Mens rea is an essential ingredient and there was no finding of guilty intent; 2) The statement must be considered in the context of the entire advertisement which amounted only to an invitation to participate in a contest; 3) The trial judge erred in using as his criterion "the ignorant, the unthinking and the credulous" rather than that of the reasonable man.

With respect to the first ground, the members of the court agreed that the advertisement contained a statement of fact that was untrue. Kane, approving the views expressed by Jessup in the *Allied Towers* case went on to say: "Accordingly, in my opinion, the published advertisement in the case before us having contained a statement that was untrue, mens rea was not an essential element of the offence." [29] Clement also agreed with Jessup, and expressed the opinion "that the offence here charged is one of strict liability." In dealing with this he also stated that the section creates two offences and *mens rea* is required in respect of the offence of an advertisement containing words purporting to be a statement of fact intentionally so worded or arranged as to be deceptive or misleading: "In my opinion, section 33D (1) creates two offences. One of these specifically requires guilty intent. In contrast is the offence with which we are here dealing and which is absolute in its terms; and also the offence created by subsection (2) which is not only absolute in its terms but puts a burden of proof on the accused. In both of these also, the absolute nature of the offence is emphasized by the exception in subsection (3) in favor of a publisher who acts in good faith in the course of his business." [30]

Kane also expressed the view that intention to deceive or mislead would be requisite to a conviction under the second part of the section.

[28] *Supra* note 7.

[29] *Id.*

[30] *Id.* In Regina v. Firestone Stores Ltd., [1971] 3 Ont. 6, the court agreed that § 33(d)(1) creates two offences, one requiring proof of *mens rea* and one which does not. It also held that the latter creates a single offence which may be committed in three different ways, *i.e.*, by publication of a statement which is either untrue, deceptive or misleading.

Mr. Justice Johnson, however, disagreed with the idea that the first part of the section imposed strict liability but affirmed the convictions since in effect he found that publication of the false statement constituted *mens rea*. In his reasons for judgment he stated:

> It is not necessary in this case for the Crown to prove *mens rea* any more than it would be where a thief is caught removing money from a till. The Crown's case was complete when it produced the advertisement containing a false statement of fact and established that it had been displayed by the appellant.
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> The defence of the appellant is that it did not intend to deceive. The essence of the offence is the publishing of the false statement. In this case, the fact that no deception was intended is not a defence if in fact the statewas untrue.
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> It does not follow from this that the section is one imposing strict liability on everyone who contravenes its provisions. There could be circumstances where *mens rea* might still be a defence to this type of charge. If they arise there is nothing in the Act or in the evil that the section seeks to prevent that would warrant the court in imposing strict liability. [31]

This question is undoubtedly an arguable one and its final resolution will have to await decision by the Supreme Court of Canada. Unfortunately in the present case the time for application for leave to appeal has long since expired.

Kane dealt quite succinctly with the second ground of appeal. "The appellant is not assisted by a consideration of the other words and pictures in the advertisement. The lead statement promises $5 in every pack. Then it goes on to tell that in many packs there is $100. This is also a false statement. If the whole of the advertisement is looked at then, in my opinion, what is promised to a purchaser is that on buying a pack the buyer will find in that pack $5 and will have the opportunity to win $100." [32]

Clement was of the opinion that the advertisement must be considered alone without reference to extraneous matters and that other advertisements in the same campaign could not be resorted to in determining whether there was an offence. Also, he said that the question of whether an advertisement contains a statement which purports to be true is a question of fact for the trial court and not one that can be answered by a witness. On the issue of whether in the context of the whole advertisement the statement purports to be true, after stating that the question revolved around the standard to be used in such determination (that is the third ground of appeal) he went on to say that:

> 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? Does the impugned statement stand out so that in fact it does not appear to be modified by the context in which it appears unless the whole is examined with care? Having these considerations in mind, I

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[31] *Id.*
[32] *Id.*

> am not prepared to disagree with the conclusion reached by the learned trial judge. [33]

It will be noted that the third ground of appeal related to the reasonable man versus the credulous man test. While Clement does not appear to be accepting either as a specific test, he nonetheless stated that he was not prepared to disagree with the trial judge who adopted the credulous man test.

Kane, dealt with the third ground of appeal as follows:

> The appellant further contended that the proper standard to apply to section 33D (1) is whether a reasonable man would be misled or fooled by the advertisement. I do not agree. In my opinion once the statement is shown to be untrue that is sufficient.
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> Nor do I agree that it was incumbent upon the Crown to show that some person was misled. The case against the appellant, in my opinion, was complete, as I have indicated above, upon proof of the publication of the advertisement containing the untrue statement. [34]

While Kane and Clement used somewhat different language in dealing with the third ground of appeal, it seems reasonably clear that both were of the view that if a statement in an advertisement is untrue that alone is sufficient for conviction unless it is immediately apparent from the remainder of the advertisement that this statement is subject to modification.

In concluding the discussion of the jurisprudence, reference should also be made to *Regina v. Murray Viger* [35] in which the trial judge commented on subsection 3 relating to the "good faith" defence to the media. The accused who was in the business of selling furniture was convicted on six counts of misrepresenting it as the contents of his own residence, a so-called "stuffed flat" operation. In commenting on the necessity for the media, in this case a newspaper, to act circumspectly, he said:

> The accused says that his business range is between six to eight thousand dollars per year, and while the advertising apparently would cost at least four hundred, $400.00 a year, the accused said that he had the assistance of the Advertising Manager of the Spectator in the preparation of the advertisement. But we do not know what was in the mind of the Classified Ad Manager at the time he was preparing those, or what was intended so far as he was concerned to convey. It may be that he tried to give an impression which was in fact not correct and, it may be that he too, or his company, might be subject to an action under this particular Act.

III. Bill C-256—The Competition Act

At the time section 306 of the Criminal Code was transferred to the Combines Investigation Act, the Honourable Ron Basford, Minister of Consumer and Corporate Affairs, stated that in the event the section proved to be deficient he would have no hesitation in amending it. Over the two years

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[33] *Id.*

[34] *Id.*

[35] Ont. Prov. Ct., June 19, 1970 (unreported). Appeal to Ontario Court of Appeal dismissed. Leave to appeal to the Supreme Court of Canada refused.

in which the Office of the Director of Investigation and Research has been responsible for enforcement of the section, some problems in enforcement have arisen and a number of the provisions of Bill C-256 [36] are intended to remedy these problems.

Bill C-256 substantially strengthens the present provisions, contained in sections 36 and 37, and prohibits a number of additional practices which cannot be dealt with under existing legislation. These provisions are contained in sections 20 to 26 and it is proposed to discuss the effect of each of these provisions. In understanding their rationale, the following points might be borne in mind: 1) In his efforts to obtain the most for the dollars he has to spend, the consumer needs a substantial amount of information about the properties of merchandise and services and about the prices prevailing in the market. There is so much of this information that he cannot possibly rely entirely on his own resources and to a substantial degree he must rely on the sellers. 2) When the consumer sees or hears a representation from a seller he is entitled to believe it. The advantage in knowledge is all on the side of the seller and unless the consumer can safely make this assumption, he cannot be expected to make the best purchasing decision. 3) If the seller is going to make representations to the public about comparative value, performance, efficiency or other characteristics of his product or service, he is expected to do so responsibly. While these provisions are basically consumer oriented and might be called the "consumer protection" sections, it would be incorrect to conclude that they reflect only questions of consumer concern. As with the present provisions, contained in sections 36 and 37 of the Combines Investigation Act, they are also designed to protect businessmen from dishonest competition.

It will have been observed that section 37 of the present act is narrow in its scope in that it applies only to advertisements. Subsection 20(1) remedies this deficiency by making any misleading representation to the public an offence if made for the purpose of promoting directly or indirectly the supply or use of a commodity or service or promoting a commercial interest. In addition, its scope is also broadened by making it applicable to representations to the public in a form that purports to be a warranty or guarantee or a promise to replace, maintain or repair a commodity or a part thereof or to continue or repeat a service until it has achieved a specified result if the form of the warranty, guarantee or promise is misleading or there is no reasonable chance that it will be carried out.

Subsection 20(2) makes it clear what representations are deemed to be made to the public. These include representations expressed on a commodity displayed for sale or on its wrapper, container or attachment or insert, on in-store or other point-of-purchase displays, made in in-store, door-to-door or telephone selling to persons as ultimate users or contained in or on anything sent or delivered to members of the public.

Some of these would be covered under existing legislation as amounting to advertisements. However, it is questionable whether an insert in a

[36] Bill C-256 to enact the Competition Act was introduced by the Minister and received first reading on June 29, 1971.

package would be deemed to be an advertisement. Also, representations made to a consumer after he responds to an advertisement may go beyond the advertisement itself. In such a situation it is unlikely that under present legislation a court would consider the oral representation an advertisement so as to bring it within the purview of the section, and similarly with respect to representations made in door-to-door and telephone selling. Representations in these situations, while generally following a set piece, cannot be shown to be advertisements within the meaning of that term and hence would not be subject to section 37.

Subsection 20(2) also provides that a representation expressed on a commodity displayed for sale or on its wrapper or container, or in any attachment or insert or on in-store or point-of-purchase display is deemed to have been made by a person who offers or displays the commodity for sale or exhibits the display in addition to any person otherwise responsible for it. Thus the section makes it clear that not only the supplier who was initially responsible for the representation but also the retailer who displays or offers the commodity for sale are liable under the section if the representation is misleading.

Subsection 20(3) provides that every one who for the purpose of promoting directly or indirectly the supply or use of a commodity or service or any business interest supplies to any distributor of the product or service any material containing a representation of the type referred to in subsection (1) is deemed to have made the representation to the public. This is designed to deal with the situation where a wholesaler or retailer bases a representation or advertisement on material supplied by, for example, a manufacturer. If the material contains a representation which is misleading or untrue, there is no way under the existing provision whereby he can be fixed with liability unless the information to the wholesaler or retailer was supplied in an advertisement which is rarely, if ever, the case. In other words, it will no longer be possible for someone higher in the chain of distribution to supply a person in the next level of distribution with misleading information upon which the latter may make a representation which would fix the latter with liability under the section and leave the former with no liability.

Subsection 20(4) continues the good faith protection for the media in which an advertisement is published. In addition to the good faith requirement, however, the publisher is also required to establish that the name and address of the advertiser were obtained and recorded. This requirement has been added because of impossibility in a number of cases of establishing who was responsible for an advertisement. This situation arises particularly in the case of businesses which are not corporations operating under a firm name. In such situations the firm is of course not a legal entity and while the firm name may have been recorded, this is not sufficient to establish who was in fact the person responsible and therefore nobody can be charged.

Subsection 20(5) imports the credulous man test by providing that in any prosecution for a violation of the section proof that a credulous man would be misled by the representation is sufficient proof that it was misleading. Experience has shown that there are many cases where it is diffi-

cult to comprehend that people would "fall" for particular misrepresentations. In this respect one needs only to consider the first prosecution under section 33D relating to a jet ignition set which allegedly had no effect on gasoline consumption or mileage to realize the number that will accept untrue or misleading statements in such circumstances. In that case there was a plea of guilty, but considering the problem as a whole in the light of experience, it was considered that it was necessary to provide this protection in the statute.

With respect to representations based upon the performance, efficacy or length of life of a commodity, the standard has been changed from an adequate and proper test to a reasonable test, and a test by any agency or department of the Government of Canada is deemed to be a reasonable test. However, section 21 prohibits such representations based upon a test or the publication of a testimonial unless the representation or testimonial has first been approved by the person who made the test or gave the testimonial and permission has also been given in writing to use it. This should prevent omission of material facts based upon tests or testimonials by using a statement out of context which could completely mislead prospective purchasers.

Bait and switch or "nailed down" model type of selling is very difficult if not impossible to establish under existing legislation. In this type of operation an advertisement is placed for an article at a substantially reduced price, the quantity of the article held by the advertiser being minimal or none. The object is to get customers into the advertiser's establishment with the object of selling them a similar type of article at a higher price and better profit to the advertiser. If there is any possibility of the advertiser obtaining the goods advertised, the court will unquestionably give him the benefit of a reasonable doubt. It will also be recalled that bait and switch selling by a retailer is one of the defences available under section 38(5) of the Combines Investigation Act to a supplier in a charge of refusal to supply because the retailer has not maintained, or refuses to maintain, the supplier's resale price. In its 1969 Interim Report on Competition Policy [37] the Economic Council of Canada recommended that this defence, *inter alia*, be eliminated and that if the particular practice was bad, it should be prohibited rather than leaving it up to suppliers to deal with the situation.

Section 24 is designed to deal with bait and switch selling by prohibiting the advertising of a commodity for sale at a bargain price if the advertiser does not have it for sale in reasonable quantities, having regard to the nature of the market where he carries on business and the nature of the advertisement.

A frequent source of complaint relates to failure to have shelf prices marked with the prices advertised; in other words, they bear the higher pre-advertised prices. Unless the customer has the advertisement handy, which can be difficult, particularly in grocery items which have been the subject of the complaints, he does not obtain the advertised price. While the cashier may have a list of the advertised prices, it is too time-consuming to expect her to check the list unless necessary and also she is unlikely to check this list with the price clearly marked on the item unless the customer specifically

draws it to her attention. A variation of this practice is the marking of goods to the pre-advertised price well before the close of business on the last day to which the advertisement applies. To establish a violation of section 37(1) in these circumstances, it would be necessary to establish that there was an intention not to mark the reduced prices on the items or shelves when the advertisement is published or to mark pre-advertised prices on the goods prior to expiration of the advertisement. In the absence of an admission, which is not likely to be made, this would be an extremely difficult and, generally speaking, hopeless task.

Section 24 is designed to deal with this type of practice. It not only prohibits displaying the commodity for sale during the period to which the advertisement relates at a price higher than advertised but also failing to offer the commodity for sale at the advertised or a lower price in reasonable quantities having regard to the nature of the market in which the advertiser carries on business and the nature of the advertisement.

The practices of pyramid selling and referral selling are for all practical purposes not amenable to the legislation since in any schemes where there is deception, the deception is more in the system itself than in advertising pertaining to them. Special provisions, therefore, were necessary to deal with these situations. Section 23 prohibits referral selling outright. Section 22 prohibits pyramid selling only where there is an inducement or invitation to participate therein and there is misrepresentation as to the gain which a participant might reasonably expect to receive.

While there are some cases under present section 37 before the courts relating to promotional contests, these have not yet been decided so that it cannot be said how effective the section is in dealing with a lack of disclosure in contests. It seems reasonably certain, however, that only a positive misrepresentation can be dealt with under it. Therefore, section 26 of the bill prohibits the use of contests which would otherwise be lawful for the purpose of promoting directly or indirectly any business interest or the sale of a commodity or service unless there is full disclosure of the number and value of the prizes and the odds of winning in any area where prizes have been allocated, the distribution of prizes is not unduly delayed and the prize distribution is made on a random basis in any area where prizes have been allocated. In other words, the section requires full disclosure and no undue holding back on distribution which could be misleading since, for example, if only one or a few prizes were left, this likely would substantially reduce the individual chances of winning any of the remainder.

It will have been noted that the present section 36 prohibiting misleading representations as to ordinary price is narrower than section 37 in that it does not apply to services. Hence a misleading representation as to the ordinary price of a service cannot be dealt with under the section, although it could be brought within the purview of section 37 if a representation to this effect in an advertisement was untrue. Paragraph 20(1)(*d*) of the bill remedies this by applying the prohibition against misleading representations to services as well as commodities. It should also be noted that a mis-

representation alone is sufficient and it no longer need be established to have been materially misleading.

Cents-off promotions are recognized as a competitive device and are frequently a useful form of price competition. Problems arise, however, when one is operated for an extended period as a result of which the reduced price may in fact become the ordinary price so that consumers in course of time are not in fact obtaining a reduction from the ordinary price. While some cases have been dealt with under present sections 36 and 37, in many cases there is no certainty as to the length of time such a promotion may be run before offending against the legislation. Subsection 20(7) of the bill is designed to deal with the situation and provide certainty. Thus, where a commodity wrapper, or advertisement of a service or commodity carries a representation that it is being sold at a reduced price, any person who advertises or displays it, is deemed to have made a representation to the public that the commodity or service has been ordinarily sold at a price calculated by adding the apparent reduction to the present selling price. There is an onus on the person making the representation to establish that the commodity or service ordinarily was sold in the vicinity in which he carries on business or by him at or above the calculated price within the preceding sixty days; otherwise, the calculated price is conclusively deemed to be higher than the price at which the commodity or service ordinarily was sold.

Finally, reference should be made to section 73 of the bill which creates the offences and provides the penalties. Under existing section 36 the offence is punishable only on summary conviction while under section 37 the offence is only indictable and the penalty is a maximum of five years' imprisonment and/or a fine in the discretion of the court. (The only exception is contained in subsection 2 which makes the offence relating to advertisements not based on an adequate and proper test a summary conviction one). Also, the penalty for false advertising is greater than for any of the other substantive provisions of the Combines Investigation Act such as conspiracies, mergers and monopolies. There is obviously a wide variation in the seriousness of misleading advertising offences and subsection 73(2) of the bill, therefore, makes the offence under subsection 20(1) punishable on indictment or summary conviction and the penalty in the former is a maximum of two years' imprisonment and/or a fine in the discretion of the court while under the latter the maximum penalty is two thousand dollars or one year's imprisonment or both which is obviously a more realistic approach. So far as the remaining provisions, sections 21 to 26 are concerned, the offences are all summary conviction and the penalty is a maximum of ten thousand dollars or one year's imprisonment or both.

It should be emphasized that the provisions contained in sections 20 to 26 of the bill are not necessarily in the form in which they finally will be presented to Parliament. In introducing the legislation on June 29, 1971, the Minister stated that it was the government's intention that every opportunity be given to interested parties to study the bill and have their views considered before it passes into law. He also made a commitment not to

proceed to final reading at the present session of Parliament and has expressed the hope that at the next session the bill can be re-introduced in a revised version "to reflect any changes we have been persuaded would improve the legislation." At this time it is of course not possible to state what amendments may be made to the foregoing provisions when the bill is re-introduced. It should also be borne in mind that when the bill is before a committee of Parliament, interested parties likely will also have further opportunities to express views which also could produce amendments.

APPENDIX

BILL C-256—THE COMPETITION ACT

Misleading advertising

20. (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a commodity or service or for the purpose of promoting, directly or indirectly any business interest, by any means whatsoever,

(*a*) make a misleading representation to the public;

(*b*) make a representation to the public as to the performance, efficacy or length of life of a commodity or service that is not based upon a reasonable test;

(*c*) make a representation to the public in a form that purports to be

(i) a warranty or guarantee of a commodity or service, or

(ii) a promise to replace, maintain or repair a commodity or any part thereof or to repeat or continue a service until it has achieved a specified result

if such form of purported warranty or guarantee or promise is misleading or if there is no reasonable prospect that it will be carried out; or

(*d*) make a representation to the public concerning the price at which a commodity or service or like commodities or services have been, are, or will be ordinarily supplied where such representation is misleading.

Deemed representation to public

(2) For the purposes of this section and section 21, a representation that is

(*a*) expressed on a commodity offered or displayed for sale, its wrapper or container,

(*b*) expressed on anything attached to, inserted in or accompanying a commodity offered or displayed for sale, its wrapper or container, or anything on which the commodity is mounted for display or sale,

(*c*) expressed on an in-store or other point-of-purchase display,

(*d*) made in the course of in-store, door-to-door or telephone selling to persons as ultimate users, or

(*e*) contained in or on anything that is sent or delivered to members of the public,

shall be deemed to be made to the public and, in the case described in paragraph (*a*), (*b*) or (*c*) to have been been made by, in addition to any person otherwise responsible therefor, any person who offers or displays the commodity for sale or exhibits the display.

Idem

(3) Every one who, for the purpose of promoting, directly or indirectly, the supply or use of a commodity or service or any business interest, supplies to a wholesaler, retailer or other distributor of a commodity or service any material or thing that contains a representation of a nature referred to in subsection (1) shall be deemed to have made that representation to the public.

Persons to whom subsection (1) does not apply

(4) Subsection (1) does not apply in respect of a person who publishes an advertisement where that person establishes that he obtained and recorded the name and address of the advertiser and that he accepted the advertisement in good faith for publication in the ordinary course of his business.

Test of credulous man

(5) In any prosecution for a violation of this section, proof that a credulous man would be misled by the representation alleged to have been made by the accused is sufficient proof that the representation was misleading.

Reasonable test

(6) For the purposes of paragraph (1) (*b*), a test made by any department or agency of the Government of Canada is a reasonable test but nothing in this subsection precludes reliance upon a reasonable test performed by any other person.

Ordinary price

(7) Where

(*a*) a commodity,

(*b*) a wrapper or container of a commodity,

(*c*) anything attached attached to, inserted in or accompanying a commodity or its wrapper or container,

(*d*) anything on which a commodity is mounted for display or sale,

(*e*) any in-store or point-of-purchase display of a commodity, or

(*f*) any advertisement relating to a commodity or service,

carries a representation to the effect that the commodity or service is being offered at a reduction from the ordinary price thereof, any person who displays the commodity or offers or advertises the commodity or service for sale shall be deemed, for the purpose of paragraph (1) (*d*), to have made a representation to the public that the commodity or service has been ordinarily sold at a price calculated by adding to the price at which the commodity or service is actually being sold, offered or advertised for sale the amount of the apparent reduction, and unless such person establishes that the commodity or service was ordinarily sold in the vicinity in which he carries on business or in which he published the advertisement or by him at or above the price so calculated within sixty days preceding the date upon which he is deemed to have made the representation, the price so calculated shall be conclusively deemed to be higher than the price at which the commodity or service was ordinarily sold.

Representation as to reasonable test and publication of testimonials

21. No. person shall, for the purpose of promoting, directly or indirectly, the supply or use of any commodity,

(*a*) make a representation to the public that a test as to the performance, efficacy or length of life of the commodity has been made by any person, or

(*b*) publish a testimonial with respect thereto,

unless the representation or testimonial has, before being made or published, been approved and permission to make or publish it has been given in writing by the person who made the test or gave the testimonial, as the case may be.

Pyramid selling

22. (1) No person shall

(*a*) induce or invite another person to participate in a scheme of pyramid selling, and

(*b*) misrepresent to that person the gain that a participant in the scheme may reasonably expect to receive by reason of the participation of other persons in the scheme.

Definition of "pyramid selling"

(2) For the purposes of this section, "pyramid selling" means the practice whereby one person (the "first" person) induces another person (the "second" person) to purchase commodities for resale by the second person

by promising the second person that he will receive payments related to the proceeds of sales made by persons (the "third" persons) to whom the second person sells and sales made in turn by persons (the "fourth" persons) to whom the third persons sell.

Referral selling

23. (1) No person shall induce or invite another person to participate in a scheme of referral selling.

Definition of "referral selling"

(2) For the purposes of this section, "referral selling" means the practice whereby one person (the "first" person) induces another person (the "second" person) to purchase a commodity upon the consideration, in whole or in part, that the second person will receive rebates, commissions or other benefits based on sales or demonstrations of the commodity to other persons (the "third" persons) by the first or some other person.

Bait and switch selling

24. (1) No merchant shall advertise for sale, at a bargain price, a commodity that he does not have for sale in reasonable quantities having regard to the nature of the market in which he carries on business and the nature of the advertisement.

Definition of "bargain price"

(2) For the purposes of this section, "bargain price" means

(*a*) a price that is represented in an advertisement to be a bargain price, by reference to an ordinary price or otherwise, or

(*b*) a price that a person who reads, hears or sees the advertisement would reasonably understand to be a bargain price by reason of the prices at which the commodity advertised or like commodities are ordinarily sold.

Display and sale at advertised price

25. No merchant who advertises a commodity for sale shall, during the period to which the advertisement relates,

(*a*) display the commodity for sale at a price that is higher than the advertised price; or

(*b*) fail to offer the commodity for sale at the advertised price or at a lower price in reasonable quantities having regard to the nature of the market in which he carries on business and the nature of the advertisement.

Promotional contests

26. No person shall, for the purpose of promoting directly or indirectly the sale of a commodity or service, or for the purpose of promoting, directly or indirectly, any business interest, conduct any contest, lottery, game of chance or of skill or of mixed chance and skill, or otherwise dispose of any commodity, service, or other benefit by any mode of chance, skill or mixed chance and skill whatever unless such contest, lottery, game or disposal would be lawful except for this section and

(*a*) there is full disclosure of the number and value of the prizes and the odds of winning in any area to which prizes have been allocated;

(*b*) distribution of the prizes is not unduly delayed; and

(*c*) distribution of prizes is made on a random basis in any area to which prizes have been allocated.