I. INTRODUCTION

The *Competition Act* contains both criminal and civil provisions prohibiting misleading representations and deceptive marketing practices (in Parts VI and VII.1, respectively). Both parts prohibit the making of representations to the public which are false or misleading in a material respect.

This chapter will address the deceptive marketing practices and reviewable matters provisions of the *Competition Act*, including the dichotomy between its civil and criminal provisions. Selected offences in relation to competition will be discussed, including misleading advertising, telemarketing offences, deceptive prize notices, double ticketing, multi-level marketing plans and pyramid schemes. The unique considerations with respect to representations made online will also be addressed. The chapter will conclude with a discussion of the administration and enforcement of the *Competition Act*’s misleading advertising and marketing provisions.

II. CIVIL DECEPTIVE MARKETING PRACTICES

A. Misrepresentations to the Public

Subsection 74.01(1) deals with misleading representations in advertising to the public. The first part of subsection 74.01(1) contains a general prohibition against any representation to the public that is false or misleading
in a material respect. The second and third parts of subsection 74.01(1) deal with claim substantiation and warranties in advertising.

1. Misleading Advertising

The basic prohibition against misleading advertising in subsection 74.01(1) states that:

A person engages in reviewable conduct who, 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, makes a representation to the public that is false or misleading in a material respect.

The first element of this offence requires that the representation be for the purpose of promoting the supply of a product or any business interest. This broad wording is easily satisfied. For example, the primary purpose of a representation may be to disseminate information about the product in a non-marketing context, but arguably this also indirectly (if not directly) promotes the supply or sale of the product.

The second element requires that the representation be made to the public. Subsections 74.03(1), (2) and (3) broaden this concept by deeming certain conduct to be a representation to the public, such as private communication between a salesperson and consumer. The courts have also taken a broad approach to defining the public. For example, in *R. v. Shell Canada*, a letter written by Shell to holders of its credit card was considered to be a representation made to the public.

The third element requires that the representation be false or misleading. The test for determining whether the representation is false is an objective test—it is either correct or it is not. The test for determining whether a representation is misleading is subjective, with the court considering all the circumstances surrounding the representation including its actual meaning and any inferences to be drawn from the representation.

Subsection 74.01(6) states that both the literal meaning and the general impression conveyed by an advertisement must be considered in determining

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1 *Competition Act*, s. 52(1.2), specifies that making a representation includes “permitting a representation to be made”. This extension of the interpretation of making a representation applies to both the criminal and civil misleading advertising tracks.
3 *Competition Act*, s. 74.03(1)(d).
4 (1972), 5 C.P.R. (2d) 217 (Ont. Co. Ct.).
whether it is materially false or misleading. Therefore, the general impression created by an advertisement is just as important as any explicit claims. KFC’s U.S. “eating-our-chicken-is-healthy” campaign provides a good example of the pitfalls of misleading general impressions. KFC made explicit claims that were factually correct, including that a KFC skinless chicken breast has just 3 grams of fat and that two KFC chicken breasts have less fat than a Burger King Whopper. However, in the context of the overall commercial, KFC was making the implicit claim that eating its fried chicken was part of a healthy lifestyle (the ads failed to mention the levels of fat, trans fats, saturated fats and cholesterol in its chicken). KFC accepted a settlement with the United States Federal Trade Commission, agreeing to cease the advertising campaign and avoid making health claims in the future unless the claims were supported by competent and reliable scientific evidence.

Subsection 74.01(1) only prohibits representations to the extent that the false or misleading element causes or is capable of causing the consumer to act based on that representation. The relevant test is objective – are consumers likely to be misled, regardless of whether any consumers actually were misled. What type of consumer does the test contemplate? Unfortunately, the courts have not been consistent in articulating and applying a single standard. However, the most recent trend has been to assume that the advertisement is directed at the “average purchaser”. The average purchaser is that part of the public which possesses ordinary reason, intelligence and common sense but lacks any special expertise with respect to the subject matter of the advertisement.6

2. Claim Substantiation

Performance claims are often used in advertising as a way to distinguish a product from a competitor’s product. Paragraph 74.01(1)(b) prohibits:

a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test therefore, the proof of which lies on the person making the representation.

The first issue to determine is whether a claim requires substantiation. Claim substantiation is not required if the claims are clearly hyperbole or if they are so outlandish that a consumer would not reasonably rely upon them or

6 For further discussion on the standard of deceptiveness see B. Fraser & D. Young, *Canadian Advertising & Marketing Law*, vol. 1 (Toronto: Carswell, 2006) at 1-29 to 1-36.
believe them to be true. Likewise, if the claim is solely the opinion of the advertiser, then no substantiation will be required. The substantiation requirement, in other words, applies to provable advertising claims that might reasonably be taken as true.

Claims that do require substantiation typically fall into three categories: comparative claims, performance claims, and preference or perception claims.

Any testing done to substantiate a claim must be done before the claim is made. It is not permissible to wait and see if the claim is challenged, and only then conduct testing. In fact, even if such testing were to prove the claim accurate, the claim would not have met the prescribed requirements as no adequate and proper testing existed at the time the claim was made.

The Competition Act does not provide much guidance as to what constitutes adequate and proper testing. Therefore, the adequacy of the test will depend largely on the type of product and the nature of the claim itself. The two problems that most often arise are (i) the test results do not actually support the specific claim(s), and/or (ii) the claims are based on poorly designed test methodologies. While there is no requirement for scientific certainty, testing must be appropriate in the circumstances, and the claim(s) must actually flow from the test results without leaving a gap in logic. Some industries, such as the pharmaceutical industry, have developed standards for testing to ensure transparency in product claims.

3. Warranty and Serviceability Claims

Subsection 74.01(1) also prohibits claims involving a warranty or guarantee or a promise of repair or service if the claim is misleading or has no reasonable prospect of being carried out. This section encompasses statements made by manufacturers, retailers and other advertisers that promise a warranty or an undertaking to service the product. There are no reported cases under this provision.

7 For example, we do not expect an Energizer battery to “just keep going, and going and going”.
8 When John Sleeman says, “We brew good beer”, the consumer knows that this is simply Mr. Sleeman’s opinion.
10 See, for example, the Pharmaceutical Advertising Advisory Board, Code of Advertising Acceptance (available online: http://www.paab.ca), which requires clinical/therapeutic claims to be based on published, well-controlled and/or well-designed studies with clinical and statistical significance clearly indicated.
11 Warranty and guarantee provisions are covered more comprehensively under the various provincial and territorial consumer protection statutes which may explain the absence of jurisprudence under this section.
B. Ordinary Price Claims

Subsection 74.01(2) makes it a reviewable practice to mislead the public about the “ordinary” selling price of a product. For example, if the sales tag on a shirt says “Regularly $49.99, now $20.00” when the shirt was regularly sold for $25.00, then the retailer has misrepresented the ordinary selling price of the product. This is an obvious example; however, price claims can be misleading in a less obvious way. For example, would the price in the example be misleading if the retailer sold ten shirts for $49.00? Or five? Or fifty? Would it be misleading if the price had been set at $49.99 for a month but no shirts had been sold?

1. Statutory Tests

To deal with these grey areas, the ordinary selling price provisions outline two tests:

- **Volume Test**: An ordinary selling price claim will be legitimate if a “substantial volume” of the product was sold at that price or higher within a “reasonable” period of time prior to or following the representation.
- **Time Test**: An ordinary selling price claim will be legitimate if the product was offered for sale in good faith at that price or a higher price, for a “substantial” period of time prior to or following the making of the representation.

The language of these tests is difficult to interpret in isolation. What do “substantial volume” and “reasonable period” mean? To help advertisers interpret and hence comply with these provisions, the Bureau published guidelines explaining both tests. These guidelines were substantially adopted by the Tribunal in the only contested ordinary selling price case to date.

The “volume test” has two components: (1) a substantial volume and (2) a reasonable period of time. The substantial volume requirement will be met

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12 For further discussion on ordinary price claims, see W. Hearn et al., “Making Sure Your Price Claims are Legal” (Paper presented at The Canadian Institute’s 12th Annual Advertising & Marketing Law Conference, January 2006).
13 *Competition Act*, s. 74.01(2)(a).
14 Ibid., s. 74.01(2)(b).
15 Canada, Competition Bureau, *Information Bulletin — Ordinary Price Claims — Subsections 74.01(2) and 74.01(3) of the Competition Act* (1999), available on-line: <http://www.competitionbureau.gc.ca>.
16 See the discussion of Sears, below.
if more than 50\% of sales are at or above the reference price. Where no single price accounts for a substantial volume of sales, references may be made to the lowest of two or more of the prices which make up a substantial volume of the sales. The reasonable period of time is the twelve months prior to (or following) the representation. However, this period may be shorter having regard to the nature of the product.\(^7\)

The “time test” also has two components: (1) the price has to be offered in good faith, and (2) the offer must continue over a substantial period of time. Several factors will be considered in determining “good faith”, including:

- Whether the product was openly available in appropriate volumes;
- Whether the reference price was based on sound pricing principles and/or was reasonable in light of competition in the relevant market during the period in question;
- Whether the reference price was a price that the supplier expected the market to validate, whether or not the market did validate this price; and
- Whether the reference price was a price at which either genuine sales had occurred or that was comparable to competitors’ prices.

The substantial period of time requirement will be met if the product is offered at or above the reference price for more than 50\% of the time period considered. The time period to be considered is the six months prior to (or following) the making of the representation. However, this period may be shorter having regard to the nature of the product.\(^8\) Where the product is offered for sale at different prices for different periods of time, the reference price may be the lowest of the two or more prices that make up the substantial period of time at which the product was offered for sale.\(^9\)

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\(^7\) Canada, Competition Bureau, Information Bulletin – Ordinary Price Claims – Subsections 74.01(2) and 74.01(3) of the Competition Act (1999) at 4. For example, a seasonal product such as holiday cards would likely have a shorter reference period.

\(^8\) Canada, Competition Bureau, Information Bulletin – Ordinary Price Claims – Subsections 74.01(2) and 74.01(3) of the Competition Act (1999). Other factors which can affect the time period include: whether the item is frequently or infrequently purchased, whether the item is new or commonplace, and whether the item is a national or private brand.

\(^9\) Canada, Competition Bureau, Information Bulletin – Ordinary Price Claims – Subsections 74.01(2) and 74.01(3) of the Competition Act (1999).
2. Ordinary Selling Price Investigations

There have been several high-profile ordinary selling price investigations in recent years. In January 2001, the Bureau found that Suzy Shier Inc. had affixed price tags to products which overstated the products' "regular price".\(^\text{20}\) In July 2004, the Bureau’s investigation into the Forzani Group Ltd. concluded that the company made representations with respect to its Sport Check stores which included a price and the words "compare at", which were misleading in that they overstated the regular prices for products offered by other suppliers.\(^\text{21}\) Most recently, in July 2006 the Bureau’s investigation of Grafton-Fraser Inc., one of Canada’s largest retailers of men’s apparel, concluded that the company had tagged certain garments with both a regular and a sale price when, in fact, the garments were not sold in any significant quantity or for any reasonable period of time at the stated “regular” price.\(^\text{22}\)

To date there has only been one ordinary selling price case heard by the Tribunal. In January 2006, the Tribunal released its decision regarding the Commissioner’s application against Sears Canada Inc., which alleged that the company had overstated the regular price for five lines of automobile tires. Sears had a practice of referencing its non-discounted single-tire price as its “regular price” for tires, but in fact Sears typically offered a discount to purchasers of more than one tire and had numerous additional sales throughout the year. The parties agreed that none of the five lines of tires had more than 50% of sales at the stated “regular” price during the twelve months preceding the challenged advertisements, thus Sears conceded that it had not met the volume test. However, Sears argued that it had met the time test. The Tribunal disagreed, finding that only one of the five lines of tires was offered at the “regular” price

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\(^{20}\) Based on the results of the Bureau’s investigation, a 10-year consent agreement was negotiated whereby Suzy Shier Inc. committed to ensure future regular price representations complied with the ordinary sales price provisions of the Act, implemented a marketing and pricing corporate compliance program and policy to comply with the Act, published corrective notices on its website and in two editions of 16 different newspapers across Canada for a period of three consecutive weeks and paid a $1,000,000 administrative monetary penalty. See note 62.

\(^{21}\) Under the terms of a 10-year consent agreement, Forzani agreed to comply with the Act’s provisions, indemnify the Bureau for all costs and disbursements incurred during the course of its investigation, which amounted to $500,000, publish a series of corrective notices in newspapers, establish and maintain a corporate compliance program promoting compliance with the Act and specifically with the ordinary selling price provisions, and pay an AMP of $1.2 million. See note 62.

\(^{22}\) Pursuant to a 10-year consent agreement, Grafton-Fraser agreed to pay an administrative monetary penalty of $1,000,000, pay $200,000 of the Bureau’s inquiry costs, implement a comprehensive corporate compliance program, and display a corrective notice prominently in its retail stores across Canada, on all company web sites, and in designated newspapers across Canada. See note 62.
for more than 50% of the six months preceding the challenged advertisements, and none of the tires were offered for sale at the “regular” prices in good faith. The Tribunal noted that Sears made reference to its “2For” price as “every day pricing” in internal documents, and it expected to sell 90%-95% of tires as multiples, and therefore not at the stated “regular” prices, which the Tribunal also noted were not competitive with Sears’ identified competitors.

Sears argued that even if its representations regarding price did not meet the time test, they were not false or misleading in a material respect. The Tribunal again disagreed, noting that evidence regarding a lack of consumer harm was irrelevant, as consumer harm is not an element of the violation. While the representations regarding price were literally true (that is, all consumers could realize substantial savings, and on average 11% actually did) the general impression was that consumers would realize substantial savings, and this was not true for 89% of consumers (considering the number of tires actually sold at “regular” prices).

C. Tests and Testimonials

One of the most common techniques in advertising is to use experts, celebrities or real consumers to endorse products. Such endorsements add objectivity to the advertisement and gives the product credibility it might not otherwise have. The use of testimonials is regulated by section 74.02. This section also regulates the explicit use of test results by advertisers.

Section 74.02 requires one of the following two preconditions for the use of a test or a testimonial:

- the third party who gave the testimonial or made the test has previously published the testimonial or represented that he or she conducted the test; or
- the person, prior to publishing the testimonial or representation that a test has been conducted, has secured in writing the third party’s

23 Sears was issued a 10-year prohibition order against similar conduct and ordered to pay $387,000 towards the Bureau’s legal costs plus an administrative monetary penalty of $100,000, which is the maximum corporate penalty for reviewable conduct. It is interesting to note that the administrative monetary penalty was significantly less than the administrative monetary penalties that each of Suzy Shier, Forzani and Grafton-Fraser agreed to pay pursuant to their consent agreements. However, settlement by consent agreement offers a quick resolution and avoids some of the pitfalls that may be inherent in protracted litigation of ordinary selling price claims, including expensive legal fees, drawn-out negative publicity, and indefinite distractions for the company and its senior management, all for an uncertain outcome.
approval of the testimonial or representation as well as permission
to publish or make it.

To comply with section 74.02, the advertiser should ask the endorser to
swear an affidavit or otherwise attest in writing to having used the product and
to having the specific opinion given in the advertisement. If the endorser is an
expert who refers to test results, that person should create a similar document
stating that the advertising claims accord with the test results.

The Bureau has also published a bulletin about the use of tests and
testimonials. Among other things, the bulletin warns against taking test results
and testimonials out of context.

D. Bargain Prices/Bait and Switch Selling

Section 74.04 regulates the practice of bait and switch advertising. This
is the practice of advertising one or more products at bargain prices to lure in
customers, but failing to stock these bargain items at sufficient quantities. The
goal of this practice is to draw customers into a store with the promise of a
bargain that is really not available, in the hope that they will end up buying
other, full priced products instead. Section 74.04 defines a bargain price as a
price that a consumer would reasonably understand to be a bargain or a price
that is represented to be a bargain by reference to its ordinary price.

The provision makes three specific defences available:

- The seller tried to obtain an adequate supply of the product, given
  the nature of the advertisement, but was unable to obtain enough
  supply due to unanticipated events beyond the seller’s control;
- The seller obtained enough supply given the nature of the product
  but was unable to meet demand because it exceeded the seller’s
  reasonable expectations, and
- The seller supplied an equivalent product of the same quality at the
  same price within a reasonable time to consumers who were unable
  to purchase the original product at the bargain price.25

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24 Competition Bureau, Untrue, Misleading or Unauthorized Use of Tests and Testi-
monials, available online: <http://www.competitionbureau.gc.ca>.

25 Competition Act, s. 74.04(3).
E. Sale Above Advertised Price

Businesses are prohibited from selling or renting products at a higher price than advertised.26 A business can stipulate the period of time and the specific market to which an advertisement relates, but it must live up to the advertised offer. The prohibition does not apply to the following:

- Catalogue advertisements in which it is prominently stated that the prices contained therein are subject to error, provided the advertiser establishes that there really was an error;
- An advertisement that is immediately followed by another advertisement correcting the price mentioned in the first advertisement;
- Sales of public securities that have a valid prospectus, and
- Sales of products by people who are not in the business of dealing with such products (for example, the private sale of an automobile).

It is the responsibility of the seller to ensure that the prices charged correspond to the advertised prices. Thus a seller can violate this provision even if the purchaser does not point out or even know about the error.27 The Bureau has stated that this prohibition does not apply to oral representations of prices or representations of prices appearing on product labels.28 However, misleading oral representations as to price may contravene the general provisions dealing with misrepresentations. As well, selling a product for more than the price expressed on the label is a criminal offence, called “double ticketing”, discussed below.

F. Promotional Contests

Businesses must ensure that any promotional contests they run, in addition to complying with the Criminal Code of Canada provisions,29 comply with section 74.06.30 This section mandates adequate and fair disclosure of such matters as the number and approximate value of prizes. Often disclosure of the

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26 Ibid., s. 75.04(1).
29 R.S.C., 1985, c. C-46, s. 206-207. For Quebec contests, care must also be taken to comply with that province’s special laws on publicity contests.
30 For further discussion on promotional contests, see B. Hearn et al, “Taming the Contest Beast” (Paper presented at the CMA’s Regulatory Affairs Conference for Marketers, September 2005).
full contest rules is not practical where the contest is advertised as part of a radio or television commercial. To fulfill the requirements of this section, companies will often post the contest rules on a website and reference the website address in contest advertisements. Even when companies provide a link to contest rules, the Competition Bureau still requires the contest sponsor to provide a short list of disclosure. Finally, this section requires that the distribution of prizes must not be unduly delayed and that the selection of participants or distribution of prizes must be allocated either on the basis of skill or chance.

III. CRIMINAL MISLEADING ADVERTISING AND MARKETING PRACTICES OFFENCES

A. False or Misleading Representations

Subsection 52(1) of the Competition Act establishes the criminal offence of misleading advertising:

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 whatsoever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

The Commissioner may choose to proceed against an alleged misleading advertiser by way of this criminal route or the administrative route (paragraph 74.01(1)(a), discussed above).

Note that subsection 52(1) reads exactly the same as paragraph 74.01(1)(a) except that the criminal provision includes the concept of "knowingly or recklessly". Thus, the analysis of the individual components of the provision is similar to the analysis of its civil counterpart. For example, a representation will quite easily be found to promote a business interest. In one case, the court refused to strike a pleading alleging that an auditor misrepresented that a company was a legitimate business with purely legitimate income, because it was arguable that there would be reliance on this misrepresentation.

31 This short list of rules should include: the number and approximate retail value of prizes; the regional allocation of prizes; the chances of winning; the requirement to correctly answer a skill testing question; the date that the contest closes; the information that no purchase is necessary to enter the contest; and the place where full contest rules are available.

32 See further discussion on the Commissioner’s choice between the civil and criminal tracks in the Administration and Enforcement section of this chapter.
by potential investors, and in any event the auditors were promoting their own professional services by placing their name on the document.\(^{33}\)

In fact, several aspects of section 52 have a virtually identical counterpart in the civil provisions. A representation will be deemed made to the public even if it is simply made available to a single person, just as it will be under the civil provisions.\(^{34}\) Also, as is true under the civil provisions, anyone who "imports into Canada" a representation will be held responsible for the content,\(^{35}\) as will persons further down in the distribution chain even though they may not have direct contact with consumers.\(^{36}\) The criminal provisions also expressly state that the general impression of a representation must be considered in addition to its literal meaning.\(^{37}\)

For there to be a criminal offence under section 52, it is not necessary for anyone to have actually been misled. This concept is formalized in subsection 52(1.1). The Bureau's choice between a criminal charge for false and misleading advertising and the civil track therefore rests principally whether the false or misleading representation was made intentionally or recklessly, in which case the Bureau is more likely to choose the criminal track, or negligently, in which case, the Bureau will choose the civil track.

### B. Double Ticketing

The practice of "double ticketing" is also a criminal offence under the *Competition Act*. The *Competition Act* prohibits a person from supplying a product at a price that exceeds the lowest of two or more prices clearly expressed...
in respect of the product. For example, if a shirt has a ticket that contains two prices, $9.99 and $14.99, the business cannot sell the shirt at a price greater than $9.99. This section does not prohibit shelf stock revaluation as long as the old price is removed or is obscured so that it is no longer clearly expressed. Using the shirt example, the store can sell the shirt at either $9.99 or $14.99 so long as the “old price” is redacted. In placing a price on the product wrapper or ticket, consideration must be given to the other price offences and reviewable practices discussed in this chapter. Prosecutions under the double ticketing section are rare.

C. Telemarketing

Section 52.1 defines telemarketing as “interactive telephone communications” and makes it an offence to engage in telemarketing to make false or misleading representations in promoting the supply of a product or business interest. The significance of this provision – and the remainder of the criminal provisions discussed in this section – is that they are purely criminal offences. In other words, while a “simple” business-promoting misrepresentation may be dealt with under the civil or criminal provisions depending on the circumstances, a business-promoting misrepresentation made in the context of telemarketing is generally a criminal matter.40

In addition to being prohibited from making misleading representations, telemarketers:

- Must not require advance payments to receive a prize;
- Must provide adequate and fair disclosure of the number and value of prizes;
- Must not offer a “gift” as an inducement to buy another product without fairly disclosing the value of the gift, and,
- Must not require advance payments for a product offered at a grossly inflated price.41

38 Subsection 54(1). The double ticketing offence applies to prices expressed on the products its wrapper or container, on anything attached to, inserted in or accompanying the product, its wrapper or container or anything on which the product is mounted for display or sale, on an in-store or other point-of-purchase display or advertisement.


40 Representations made during a telephone conversation are “representations” for the purposes of sections 74.01 and 74.02: Competition Act, s. 74.03(1)(d).

41 Competition Act, s. 52.1(3).
Furthermore, section 52.1 requires telemarketers to provide up-front disclosure regarding the identity of the person on whose behalf the communication is being made, the nature of the product and the purpose of the call, and requires subsequent disclosure of price and other material terms and conditions. Where a company breaches the telemarketing provisions, its officers and directors may be charged as parties to the offence.

There is no mens rea component to the telemarketing provisions (that is, proof of the act, regardless of any guilty state of mind, is all that is required for a conviction). Nevertheless, subsection 52.1(6) provides a defence for those who exercise due diligence to prevent the commission of the offence. The offence is thus a strict liability offence.

Enforcement of the telemarketing provisions appears to be a priority for the Bureau, as shown by several recent prosecutions.42

D. Deceptive Notice of Winning a Prize

The Competition Act prohibits notices that give a general impression that a prize or any other benefit has been won if the notice also asks for or gives the option to pay money or incur a cost in order to obtain the prize or benefit. Subsection 53(1) provides:

No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, send or cause to be sent by electronic or regular mail or by any other means a document or notice in any form, if the document or notice gives the general impression that the recipient has won, will win, or will on doing a particular act win, a prize or other benefit, and if the recipient is asked or given the option to pay money, incur a cost or do anything that will incur a cost.

The Bureau has issued guidelines13 that outline its enforcement approach with respect to the deceptive notice of winning a prize provisions of the Competition Act. Key aspects of the guidelines include:

42 R. v. Alexis Corporation (3636135 Canada Inc.), 37587932 Canada Inc., Shelden Cutler, 3587932 Canada Inc, William Kenwood (6-month conditional sentence, 2-year probation, 100 hours community service) (unreported decision, additional information available online at <www.competitionbureau.gc.ca>, see Canada, Competition Bureau, News Release, January 21, 2003), and R. v. NSV Nutrinautes Inc. and Richard Arsenault (2-year conditional jail sentence, 10-year Prohibition Order) (unreported, additional information available online at <www.competitionbureau.gc.ca>, Canada, Competition Bureau, News Release, July 19, 2002).

• Delivery of the notice includes but is not limited to mail, electronic mail, facsimile transmissions or door-to-door delivery;
• “On doing a particular act” means any condition or requirement that the recipient actually do something prior to winning the prize or other benefit, and
• In determining whether a “cost has been incurred”, any cost other than the initial incidental cost of entering a contest or game, such as the cost of a postage stamp in order to send in an entry, is generally considered to be a cost incurred to win a prize or other benefit.

However, the promotion will not be deemed deceptive if the recipient of the notice actually wins the prize or other benefit, or if the person offering the prize:

1. Makes adequate and fair disclosure of the number and approximate value of the prizes or benefits, of the area or areas to which they have been allocated, and of any fact within the person’s knowledge that materially affects the chances of winning;
2. Distributes the prizes or benefits without unreasonable delay,\(^44\) and
3. Selects participants or distributes the prizes or benefits randomly, or on the basis of the participants’ skill, in any area to which the prizes or benefits have been allocated.\(^45\)

The Bureau considers whether disclosure has been made in a reasonably conspicuous manner, at a time before the potential entrant is inconvenienced in some way, incurs some cost, or is committed to the advertiser’s product or to the contest. Adequate and fair disclosure is evaluated in light of the actual and intended audiences of the contest. A payment to a third party that is genuinely at arm’s length from the person offering the prize, and that is nominal in relation to the fair market value of the prize or benefit won, will not generally be considered a cost incurred to obtain a prize or other benefit. For example, auto insurance premiums required to be paid prior to taking delivery of a free automobile would generally be a permissible required payment.

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\(^44\) The prize or other benefit should be provided to the winner within 60 days of the person being declared a winner or the closing date of the promotion, whichever comes first. According to the Bureau’s Guidelines, if the prize or other benefit can be redeemed at a later date, or redemption is at the discretion of the winner, such as a vacation, the certificate or voucher to redeem this prize or other benefit should be provided to the winner within 60 days after declaration of the winner or of the promotion closing date, whichever comes first.

\(^45\) *Competition Act*, s. 74.06(1)
There is a defence for persons who are charged under the deceptive notice of winning a prize provisions if the person exercised due diligence to prevent the commission of the offence. However, with respect to corporations, and in the absence of evidence that the corporation exercised due diligence, it is sufficient proof of the offence for the Crown to establish that an employee or agent of the corporation was responsible for committing the offence, whether or not the employee or agent is identified. Where a corporation commits an offence, any officer or director of the corporation who is in a position to direct or influence the policies of the corporation is a party to and guilty of the offence, whether or not the corporation has been prosecuted or convicted. However, the due diligence defence is also available to directors and officers.

Even though the deceptive prize notice offence seemingly attempts to address fraudulent conduct such as unscrupulous scam artists targeting naive elderly consumers, the provision is drafted broadly enough to concern all companies who engage in direct marketing involving free giveaways.

E. Multi-Level Marketing Plans and Pyramid Selling

Multi-level marketing is a legal business activity when it operates within the limits set by the Competition Act, while a “scheme of pyramid selling” as defined under the Competition Act is always prohibited. Multi-level marketing is a plan for the distribution of products whereby participants receive compensation by supplying products to other participants in the same plan. They, in turn, make their money by supplying the same products to other participants.

It is an offence for operators or participants in a multi-level marketing plan to make representations relating to compensation or earnings under the plan unless they include the amount of compensation actually or likely to be received by a typical participant of the plan. In determining compensation likely to be received by typical participants in the plan, the Bureau will likely consider factors such as the nature of the product, its price and availability, the nature of the relevant market for the product, the nature of the plan and similar plans, and whether the person who operates the plan is a corporation, partnership, sole proprietorship or other form of business organization.

An accused operator will not be convicted if he or she establishes that he or she took reasonable precautions and exercised due diligence to ensure

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46 *Competition Act*, s. 53(4). The exception to the vicarious liability rule is if the corporation exercised due diligence to prevent the commission of the offence.
47 *Competition Act*, s. 53(5).
50 *Ibid.*, s. 55(2), (2.1).
that either no representations relating to compensation were made to participants or that representations made by participants relating to compensation constituted or included fair, reasonable and timely disclosure of information. Thus, an operator will not be liable for the actions of rogue distributors if he or she can establish this due diligence defence.\footnote{When making representations relating to compensation, disclosure of information will likely be “fair, reasonable and timely” when; (i) the information includes a breakdown of the different levels of compensation received by all participants, as well as the proportion represented by each level; (ii) it outlines the amount of compensation received by a typical participant; (iii) it includes a realistic description of the amount of time and effort that would be necessary to attain various specified levels of compensation within the plan; (iv) the most recent figures are used regarding levels of compensation (and these are updated periodically); and (v) prospective participants are informed on a timely basis of changes to the levels of compensation received by typical participants in a plan (\textit{Competition Bureau Information Letter, Multi-level Marketing and Pyramid Selling Provisions of the Competition Act} (Industry Canada 1999), available on-line: <http://www.competitionbureau.gc.ca>).}

A scheme of pyramid selling is a multi-level marketing plan with any one of a number of prohibited features listed in subsection 55.1(1). Essentially, pyramid selling occurs where participants pay into the scheme for the right to be paid when new participants are recruited. Subsection 55.1(1) expressly bars such payments, as well as indirect ways of exacting such payments, such as forcing participants to buy commercially unreasonable amounts of product.

\section*{IV. ON-LINE ADVERTISING}

The \textit{Competition Act} does not specifically address on-line advertising, but its provisions address the substance of a representation rather than the means by which it is made, and the \textit{Competition Act} applies equally to false or misleading representations regardless of the medium used. The provisions dealing with misleading advertising and marketing practices are sufficiently broad to cover representations made on commercial websites, marketing campaigns deployed over email, and even communications within chat rooms, news groups or message boards on the internet.\footnote{Canada, \textit{Competition Bureau, Application of the Competition Act to Representations on the Internet} (2003), available online: <http://www.competitionbureau.gc.ca>.} The \textit{Competition Act} attributes liability to the person who makes the misleading representation or permits it to be made.\footnote{\textit{Competition Act}, s. 52(1.2).}

In both the on-line and off-line world, a determination of whether or not a party should bear responsibility for a representation will depend on the facts, and consideration will be given to the deeming provisions found in subsections 52(2) and 74.03(1) discussed above. For instance, paragraph 74.03(e) provides that a representation “\ldots anything that is \ldots transmitted or
made available in any other manner to a member of the public” is deemed to be a made to the public.

Nevertheless, there are certain unique considerations with respect to online representations. For example, online disclaimers and the representations to which they relate should be in close proximity on a web page. Consumers should not have to take an active step in order to obtain disclosure.\(^{55}\) The interplay between text, illustrations and audio must be considered to ensure that the overall message is not misleading. In addition, geographic limitations may need to be clarified given the internet’s global reach.

V. ADMINISTRATION AND ENFORCEMENT

The Fair Business Practices Branch of the Bureau administers and enforces the provisions of the \textit{Competition Act} dealing with misleading advertising and marketing practices. Since March 1999, advertising has been regulated under a “dual” regime which has both a civil and criminal track.\(^{56}\) Deceptive marketing matters will generally be pursued under the civil track, with the criminal track reserved for the most egregious cases and for repeat offenders.

A. Criminal Track

If a violation is sufficiently serious, the Commissioner will refer the matter to the Attorney General of Canada who may then pursue a criminal prosecution. Criminal track matters include materially false or misleading representations made knowingly or recklessly. This \textit{mens rea} element is the first of two prerequisites for a decision to proceed criminally. The second is that criminal prosecution must be in the public interest. The following factors will be considered when determining whether a criminal prosecution is “in the public interest”:

- The seriousness of the alleged offence;

\(^{55}\) For example, a contest notification should not require readers to take an active step, such as sending an email or placing a phone call, in order to obtain the required information. The Bureau does not consider clicking on a clearly labeled hyperlink as being “an active step”. However, in instances where the information is so critical that it is an integral part of the representation, it may not be appropriate to use a hyperlink to a separate page.

\(^{56}\) Canada, Competition Bureau, \textit{Information Bulletin – Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the Competition Act} (1999), available online: \(<\text{http://www.competitionbureau.gc.ca}>\).
Whether the deceptive practices were aimed at taking unfair advantage of vulnerable groups such as the elderly;
Whether there was a failure to make timely and effective attempts to remedy the adverse effects of the conduct;
Whether the conduct involved failure to comply with a previous undertaking, a promised voluntary corrective action or a prohibition order, and
Any mitigating factors such as whether the company or entity has in place an effective compliance program.

The Commissioner’s choice between civil and criminal tracks with respect to false or misleading representations is final and mutually exclusive.57 In addition, multi-level marketing, pyramid selling, double ticketing, deceptive telemarketing and use of deceptive notices of winning a prize are addressed only through the criminal courts.58

Prosecution under the criminal misleading advertising provisions of the Competition Act can be by way of indictment or by summary conviction. For a conviction on indictment, the penalty is a fine in the discretion of the court and/or up to five years imprisonment. A summary conviction carries a fine of up to $200,000 and/or imprisonment of up to one year.59

B. Civil Track

If the Commissioner proceeds by way of the civil track, she may seek an order from the Tribunal, the Federal Court or the superior court of a province directing that the alleged offender cease the offending conduct, publish a corrective notice and/or pay an administrative monetary penalty ("AMP").60 The maximum AMP for individuals is $50,000 for a first offence and $100,000 for subsequent offences, while for corporations the first offence and subsequent offence maximums are $100,000 and $200,000, respectively.61 The required publication of corrective notices can also be very expensive and can result in immeasurable harm to a company’s brand and reputation.

In reality, the majority of civil track matters are resolved before they ever reach the stage of a Tribunal hearing. Section 74.12 provides for consent

57 Competition Act, s. 52(7).
58 Ibid., s. 52, 52.1, 53, 54, 55, 55.1 and 74.07(2).
59 Ibid., s. 52(5).
60 Ibid., s. 74.1(1).
61 Legislative amendments for enhanced civil remedies were proposed in late 2004 as Bill C-19, including a dramatic increase to the maximum AMPs for both individual and corporate offenders, but the bill died on the order paper when Parliament was dissolved in 2005. This remains an area to watch for potential legislative reform.
agreements, which are a mechanism for settlement between the Commissioner and the party alleged to have violated the civil misleading advertising provisions. It is an understatement to say that the Commissioner has made frequent use of consent agreements. Since the dual track regime was introduced in 1999, the Commissioner has brought to the Tribunal and resolved 21 civil misleading advertising matters, and all but three of them have been settled by consent agreement.

Consent agreements may include any or all of the terms that could be imposed in an order of the Tribunal, but may also include any other terms to which the parties agree. Typically consent agreements include some combination of an AMP, the required publication of corrective notices and an undertak-

ing not to engage in similar conduct for a period of several years. Consent agreements often include AMPs that greatly exceed the $100,000 statutory maximum that could be imposed by the Tribunal. This may be acceptable to those who wish to bring an end to the matter without devoting substantial time and resources to protracted litigation. In addition, many consent agreements do not include any admission that there has been a violation of the Competition Act, and the company can negotiate the wording of any corrective notices.

VI. CONCLUSION

The Competition Act applies to both intentional and negligent deceptive marketing practices. From marking down a product in a retail store to designing a newspaper advertisement, businesses must take care to ensure that their marketing activities do not run afoul of the criminal or civil marketing provisions of the Competition Act. As noted in examples throughout this chapter, the implications for not doing so can be severe, including monetary costs in the form of AMPs and legal fees, reputational harm through negative publicity and loss of customer goodwill, and possible imprisonment. The Bureau has made it abundantly clear that enforcement of the Competition Act's marketing provisions is, and will continue to be, a top priority.

63 An undertaking not to repeat the conduct is significant, as any breach of an order can lead to elevated AMPs under 74.1(1) and, more significantly, opens the door to private rights of action under subsection 36(1).

64 For example, The Forzani Group agreed to an AMP of $1.2 million (in addition to $500,000 in legal costs) to resolve the investigation into an alleged violation of the ordinary price provisions under subsection 74.01(3): Consent Agreement in Commissioner of Competition v. The Forzani Group Ltd. (File No. CT-2004-010) available online: <www.ct-tc.gc.ca>.