HOUSE OF COMMONS
CANADA

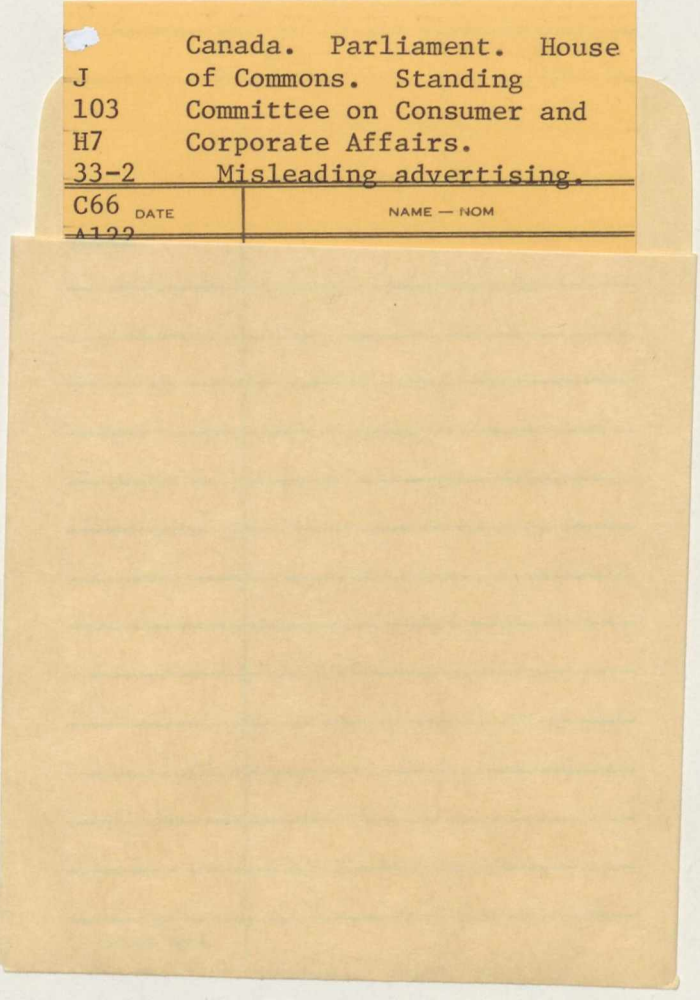
# MISLEADING ADVERTISING

REPORT OF THE STANDING COMMITTEE ON
CONSUMER AND CORPORATE AFFAIRS ON THE
SUBJECT OF MISLEADING ADVERTISING

MARY COLLINS, M.P., CAPILANO
CHAIRPERSON



June 1988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**Chairperson: Mary Collins**

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*Minutes of Proceedings and Evidence of the Standing Committee on*

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*Procès-verbaux et témoignages du Comité permanent de la*

# Consommation et des Corporations

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RESPECTING:

In accordance with its mandate under Standing Order 96(2), an examination of the subject of misleading advertising

INCLUDING:

Third Report to the House (Misleading Advertising)

CONCERNANT:

En conformité avec son mandat en vertu de l'article 96(2) du Règlement, un examen de la question de la publicité trompeuse

Y COMPRIS:

Troisième Rapport à la Chambre (Publicité trompeuse)

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Second Session of the Thirty-third Parliament, 1986-87-88

Deuxième session de la trente-troisième législature, 1986-1987-1988

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THE STANDING COMMITTEE ON CONSUMER AND CORPORATE AFFAIRS

has the honour to present its

**THIRD REPORT**

In accordance with its mandate under Standing Order 96(2), your Committee has examined the subject of misleading advertising, and reports its findings and recommendations.

## ACKNOWLEDGEMENTS

The Committee could not have completed its study on misleading advertising without the cooperation and support of several people. The witnesses who accepted to appear before the Committee deserve our gratitude.

We express our sincere appreciation to all the people the Committee met in Washington D.C. on March 29 and 30, 1988 for having accepted to share their views on misleading advertising and for providing the Committee with a different perspective. Very special thanks to the people from the Canadian Embassy in Washington D.C. who have largely contributed to the success of this visit.

The task undertaken by the Committee since September 1987 could not have been completed without the contribution of Margaret Smith, Research Branch, Library of Parliament. Her expertise and the quality of her numerous research papers and briefing notes have been very valuable to the Committee.

The Committee also wishes to express its appreciation for the logistic, administrative and procedural support provided by Richard Chevrier, Clerk of the Committee.

Finally, the Committee would like to recognize the important cooperation of the staff from the Committees Directorate, the Translation Bureau of the Secretary of State, the Centralized Support and Publications Service of the House of Commons, as well as the other services of the House and the Library of Parliament.

# TABLE OF CONTENTS

## CHAPTER 1 - INTRODUCTION AND APPROACH

The principal federal statute which proscribes false or misleading advertising in Canada is the *Competition Act* (the "Act"). Other federal laws, such as the *Consumer Packaging and Labelling Act*, the *Food and Drugs Act* and the *Textile Labelling Act*, regulate the content and form of advertising for certain products, but only the *Competition Act* provides a general prohibition against false or misleading advertising in all communications media.

The first significant step in the development of misleading advertising law in Canada was taken in 1960 when, in response to pressure from the business community, a prohibition against misleading price comparisons was enacted. Further provisions, which codified some of the jurisprudence on misleading advertising and created a number of new offences, were enacted in the mid-1970s. With the exception of an amendment made in 1985, there have been no substantative changes to the misleading advertising provisions of the *Competition Act* in this decade.

The Act contains a general prohibition against promoting the supply or use of a product or any business interest by making a representation to the public which is false or misleading in a material respect (paragraph 36(1)(a)). It also contains a number of specific prohibitions with respect to: (a) product claims based on inadequate and improper tests, (b) misleading warranties or guarantees, (c) misleading representations as to ordinary selling price, (d) the use of testimonials, (e) double ticketing, (f) "bait and switch" selling, (g) selling at a price higher than the advertised price, (h) conducting promotional contests contrary to stipulated disclosure requirements, and (i) pyramid and referral selling schemes (see Appendix I for the full text of the provisions).

The misleading advertising provisions of the *Competition Act* are not regulatory in nature. They do not direct an advertiser how to formulate a representation for a product nor do they provide remedies which would require an advertiser to withdraw, amend or correct an advertisement found to be false or misleading.

Under the *Competition Act*, misleading advertising is an offence punishable by fine and/or imprisonment. Although the penalties for such an offence are limited in scope, the purview of the misleading advertising provisions themselves is quite broad. Most notably, they apply to anyone

promoting the supply or use of a product or any business interest by any means. In general, all methods by which representations can be made, including print, radio, television, oral representations, illustrations and audio-visual presentations are covered, although certain provisions (sections 37 and 37.1) are limited to advertisements.

Advertising is a big business in Canada. In its brief to the Committee, the Canadian Council of Better Business Bureaus noted that over $6 billion a year is spent on advertising in this country. Last year, members of the Grocery Products Manufacturers of Canada spent some $400 million on television advertising alone. For many companies, advertising is a continuing long-term business investment whose purposes are to convey information to the consumer and to promote product sales.

The Committee's decision to study misleading advertising arose out of concerns expressed by its members in response to complaints and questions from their constituents. As the study progressed, the Committee came to realize that there are over 100 laws, guidelines and codes governing advertising in Canada. In addition to the *Competition Act* and other federal statutes, a number of provincial laws and industry self-regulatory codes prohibit certain misleading practices.

Given that advertising is regulated by this complex mass of provisions, the Committee felt that it must focus on a particular aspect of misleading advertising. It therefore chose to concentrate on the *Competition Act*'s approach to the subject, thus ensuring that the resulting report and recommendations would have a broad national focus.

The Committee held public hearings in Ottawa from October 1987 to March 1988; during these, 16 groups, government institutions and individuals were heard (see Appendix II for a list of witnesses). In addition, the Committee travelled to Washington, D.C. in March 1988 to examine the regulation of misleading advertising at the federal level in the United States.

In the course of the study, it became clear to the Committee that, while misleading advertising may not be a matter of pressing public concern, a steady stream of it continues. This is evidenced by the number of complaints (some 10,000-12,000 each year) received by the Marketing Practices Branch of the Department of Consumer and Corporate Affairs and by the related activities of many industry self-regulatory bodies and provincial governments. It also became evident that misleading advertising is generally

a crime of minor injustices which may result in relatively small losses to individual victims but in large collective losses to consumers as a whole.

The fact that individual losses may be small does not, in the Committee's view, lessen the severity of the offence or provide grounds for ignoring the impact of such wrong-doings on the victims. As Mr. Edward Belobaba, an expert in consumer protection and constitutional law, noted, these "little injustices" need to be remedied because they form a large part of everyday living. Furthermore, the method by which society is seen to deal with them will contribute to the development of people's attitudes toward all aspects of the justice system.

Early on, the Committee came to recognize that penal sanctions may not be the most effective method of dealing with most misleading advertising offences. Several witnesses suggested that the criminal law is too blunt an instrument for this purpose, its processes being too slow, cumbersome and costly. Others questioned the deterrent value of the fines levied by the courts. Above all, witnesses emphasized that the current system gives the victims of misleading advertising little opportunity to obtain redress for their losses.

While the Committee believes that penal sanctions are appropriate in certain misleading advertising cases, especially for intentional, fraudulent or repeated violations, it also believes that such sanctions may not be suitable in all situations. For this reason, the report focuses on an approach to misleading advertising regulation that is designed to compensate consumers for their losses and to provide a range of remedies and procedures that can be adapted to meet the exigencies of each case. In addition, by proposing that consumers have adequate tools to deal with misleading advertising, the Committee seeks to achieve a balance between public and private initiative that may ultimately produce better informed consumers and enhance law enforcement.

In short, the Committee hopes that its recommendations will achieve three objectives: first, redress for the victims of misleading advertising; second, deterrence of violations; and finally, the creation of a more flexible, cost-effective system for handling misleading advertising offences.

## CHAPTER 2 - ENFORCEMENT AND EDUCATION

### A. The Marketing Practices Branch

The Director of Investigation and Research (the "Director") is charged with responsibility for the misleading advertising and deceptive marketing practices provisions of the *Competition Act*. Under his direction, the Marketing Practices Branch (the "Branch" or the "MPB") of the Department of Consumer and Corporate Affairs carries out the administration and enforcement of these provisions. The Branch maintains investigating officers and regional managers in offices throughout the country.

The number of complaints received annually by the MPB has increased steadily over the past few years to 12,382 for the year ended March 31, 1987. Most of these fall under the general misleading advertising provision of the Act (paragraph 36(1)(a)), although a significant number relate to potential violations of the price comparison provision (paragraph 36(1)(d)). Complaints come from a number of sources, with approximately 90% from consumers and 6%-8% from the business community.

The most recent annual report of the Director notes that the Branch's limited resources require it to concentrate on cases that are "most likely to bring about an overall improvement in the quality of market information directed to the public...".[1] Factors considered when assigning priority to complaints are "the degree of coverage of the representation, its impact on the public and the deterrent effect of a successful prosecution."[2]

Not all complaints received by the MPB warrant a full investigation. Some are found to be groundless; others are referred to provincial consumer affairs departments or industry self-regulatory bodies; still others lead to an information visit where a possible violation is brought to the attention of an advertiser with a view to achieving voluntary compliance.

The Branch must choose among competing goals and decide how its limited human and financial resources can be best used. While enforcement is an obvious priority, prevention and education must also be considered. The Branch seeks to attain the latter goals through publishing the *Misleading Advertising Bulletin*, responding to inquiries for information, and participating in educational seminars and discussions with the business community. In an effort to improve compliance through prevention, the Director gives non-binding advice to advertisers who request it. During the

1986-1987 fiscal year, 343 written advisory opinions were provided and a considerable number of informal discussions conducted with persons wishing clarification of the misleading advertising and deceptive marketing practices provisions of the Act.[3] Synopses of various opinions are published in the *Misleading Advertising Bulletin*.

The Committee believes that providing such advice is an effective way to prevent offences and that efforts should be made to broaden the awareness, scope and availability of the program. The Director is said to be currently examining such an expansion within the context of a new enforcement and compliance policy and the Committee urges that this examination be completed expeditiously.

A number of witnesses made favourable comments on the work of the Marketing Practices Branch. Generally, the evidence reveals that the Branch is doing a good job, given the available resources. One witness, however, the Canadian Council of Better Business Bureaus (CCBBB), was of the view that by relying almost totally on complaints received from the public, the Branch is too reactive in its approach. In its opinion, the MPB should promote compliance through systematically monitoring advertising. Although the CCBBB recognizes that this would require more resources, it nevertheless felt that the mere existence of such an activity would increase the general level of compliance by the business community.[4]

The Committee commends the Marketing Practices Branch for its work in enforcing the misleading advertising provisions of the *Competition Act*, but recognizes that the Branch's limited financial and human resources mean that important choices have to be made.

The Committee believes that prevention is an essential goal; making advertisers and consumers aware of the law and achieving compliance through prevention should cost less in the long term than undertaking lengthy investigations and trials. Enforcement, however, is equally important. In the Committee's opinion, it is imperative that federal regulators demonstrate a willingness to enforce the law. It is also vital that resources be available to accomplish this task. In its discussions with consumer representatives in the United States, the Committee noted with concern what was described as a lack of willingness by the U.S. Federal Trade Commission to enforce federal deceptive advertising law in all but the most flagrant cases. It would not want to see a similar situation in Canada.

In the Committee's view, the goals of prevention and enforcement are complementary. Programs designed to prevent misleading advertising will not have their desired impact if enforcement is weak. On the other hand, prevention and education should reduce the number of violations and so make available more resources to investigate and resolve the cases which do arise. While the Committee does not believe that at this time available funding is so low as to hinder enforcement, it would caution against future budget reductions which might limit the scope or availability of current programs.

**B. Information and Education**

The Committee heard a considerable amount of evidence on the need to educate consumers and the business community about our laws on misleading advertising. Several witnesses commented on the lack of information available to consumers and the fact that they do not appear to be well-informed about what constitutes misleading advertising or how to deal with related problems. For example, Mr. Edward Belobaba suggested that consumers do not know what the Department of Consumer and Corporate Affairs does and are virtually unaware of any consumer protection rights.[5]

The Consumers' Association of Canada (CAC) is of the view that consumers have few places to go for unbiased information.[6] With the reduction in government information services, the public, when making purchasing decisions, must rely increasingly on information from product manufacturers. Officials of the Department of Consumer and Corporate Affairs noted that reliance on advertising and manufacturers' information increases when products are technologically complex, or do not lend themselves to thorough examination prior to purchase.[7]

Although the CAC acknowledges that consumers are becoming more sophisticated, it also suggested that they are still significantly less so than members of the business community. In the CAC's view, the government should place greater emphasis on correcting this imbalance through consumer education programs.[8]

While a number of witnesses referred to the need to educate consumers, the Institute of Canadian Advertising (ICA) suggested that there was a corresponding obligation on government to educate the business

community about misleading advertising. Noting that there are approximately 13,000 subscribers to the *Misleading Advertising Bulletin*, and as many as 800,000 small businesses in Canada, the ICA felt that there was ample room for the government to do more in this regard.[9]

Departmental officials indicated that education was a major thrust of the program of the Marketing Practices Branch. Activities in this area include conducting seminars for the business community, responding to requests for information, and publishing the *Misleading Advertising Bulletin*. The Director of the Branch noted that achieving compliance with the law through education is a cost-effective method of serving the public interest.[10]

The Committee places great emphasis on the need to educate and inform both consumers and the business community. In the Committee's opinion, education is essential to ensure that consumers are aware of their rights and are better able to determine whether a representation is misleading. Education is also vital for increasing compliance with the law by the business community and for reducing confusion in the marketplace. Although the MPB claims that it plays a pro-active role in the information and education area, the Committee believes that more could be done and that additional resources should be devoted to this task.

*Recommendation:*

**2.1 The Committee recommends that the Director of Investigation and Research through the Marketing Practices Branch adopt a more pro-active role in establishing programs for educating consumers and the business community about misleading advertising and deceptive marketing practices and that the Department of Consumer and Corporate Affairs direct additional financial and human resources to such programs.**

The Committee is aware of some of the education and information work of the United States Federal Trade Commission (FTC), including its use of radio and television to disseminate information and its publication of pamphlets and brochures on particular problems in the marketplace or on specific misleading advertising issues. In addition, information programs have been directed to distinct segments of the public. The Committee also notes that the FTC has entered into joint information and education programs with a number of organizations.

The Committee believes that the Marketing Practices Branch should place greater emphasis on attacking specific misleading advertising problems and on focusing its efforts on the segments of industry in which misleading advertising is or appears to be a concern. The Branch should consider a multi-media approach to communicating with consumers and industry, as well as entering into joint information and education programs with the business community, consumer groups and other organizations.

*Recommendations:*

**2.2 The Committee recommends that the Director of Investigation and Research consider a multi-media approach to informing consumers and the business community about misleading advertising and deceptive marketing practices. In particular, the effective use of film, television and radio should be examined.**

**2.3 The Committee further recommends that, where appropriate, the Director of Investigation and Research undertake information and education programs as joint ventures with the business community, consumer groups and other organizations.**

While the Committee wishes to see an expanded role for consumer and business education at the federal level, it recognizes that the provinces also have an important part to play. For this reason, efforts should be made to coordinate federal education activities with those carried on by the provinces.

If education programs directed to consumers are successful, increased demands may be placed on already scarce enforcement resources. To combat the possible overtaxing of these resources, greater coordination of enforcement activities between the two levels of government should also be considered.

*Recommendation:*

**2.4 The Committee recommends that the Minister of Consumer and Corporate Affairs work with his provincial counterparts (a) to coordinate and enhance information and education programs on misleading advertising and deceptive marketing practices, (b) to develop effective complaint-handling procedures, and (c) to coordinate enforcement activities.**

**End Notes**

(1) Consumer and Corporate Affairs Canada, *Annual Report*, Director of Investigation and Research, Competition Act, for the year ended March 31, 1987, p. 84.

(2) *Ibid.*

(3) *Ibid.*, p. 87.

(4) *Brief*, Canadian Council of Better Business Bureaus, January 21, 1988, p. 12.

(5) Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs, Issue No. 25 (December 10, 1987) 25:10 (hereafter referred to as "Hearings").

(6) *Hearings*, Issue No. 29 (February 23, 1988) 29:15.

(7) *Hearings*, Issue No. 21 (October 1, 1987) 21:4.

(8) *Supra*, note 6, 29:15.

(9) *Hearings*, Issue No. 27 (January 21, 1988) 27:29.

(10) *Supra*, note 7, 21:15.

## CHAPTER 3 - INDUSTRY SELF-REGULATION OF ADVERTISING

Self-regulation by industry is an important component of the regulation of advertising in Canada whose impetus has come from both industry and government. One notable example of government influence was the creation in 1975 of the Pharmaceutical Advertising Advisory Board in response to the federal government's concern about misleading advertising in the pharmaceutical industry. Witnesses from another self-regulatory body, the Canadian Advertising Foundation (CAF), stressed that, although it develops and administers a number of self-regulatory codes that deal with misleading advertising, it does not initiate them. It acts as a regulator for the segments of industry that require it.[1]

Perhaps the most important self-regulatory code is the Canadian Code of Advertising Standards (the "Code"), which is administered by the Advertising Standards Council (ASC), an arm of the CAF. Among other things, this Code is concerned with the accuracy and fairness of the impression created by an advertisement. It stipulates that "advertisements may not contain inaccurate or deceptive claims or statements, either direct or implied, with regard to price, availability or performance of a product or service."[2] Representatives of the CAF noted that the Code is supported by all segments of the advertising industry and is widely recognized by government. The Association of Canadian Advertisers, an organization representing corporations responsible for some 80% of the total volume of national advertising, told the Committee that it endorses this Code and requires its members to adhere to it.[3]

The ASC is composed of representatives of the media, advertisers and advertising agencies, consumer groups and other members of the public. It regularly adjudicates upon complaints dealing with misleading advertising. In response to a valid complaint, the ASC can request that an advertisement be amended or withdrawn by an advertiser. If the advertiser refuses to comply, the ASC can ask the media not to carry the advertisement. According to the CAF, the media, by acting as the ultimate enforcers of the Code, give the CAF's regulatory scheme credibility and clout.[4]

Other organizations also administer codes of ethics that touch upon misleading advertising. The CCBBB's Code of Advertising prohibits the use of advertisements that are "untrue, misleading, deceptive, fraudulent, untruthfully disparaging of competitors, or insincere offers to sell."[5] The Canadian Direct Marketing Association (CDMA) has formulated a Code of

Ethics and Standards of Practice for its members and operates the "Operation Integrity" program, under which it reviews consumers' complaints, including those relating to misleading advertising. The CDMA noted that it has a 99% solution rate for complaints about its member companies and a 95% success rate for complaints about non-members.[6] The CDMA claims that the primary reason for the absence of government regulation of direct marketing is the Association's ability to police itself effectively.[7] The ultimate sanction employed by the CDMA and the CCBBB for repeated violations of their respective codes is expulsion from the organization.

Virtually all witnesses supported the concept of self-regulation in the advertising field. The CCBBB believes that self-regulation provides an outlet for complaints and gives advertisers the assurance that they will be judged fairly and accurately.[8] In the opinion of Ms Marilyn Anderson, a journalist who regularly deals with consumer issues, self-regulation by industry is essential. She contends that consumers will benefit if "the industry is organized, has a professional association, and has a membership that constitutes the majority of players in that field."[9] The Retail Council of Canada pointed out that voluntary codes are useful since misleading advertising is a criminal offence. In its view, the criminal law is ill-suited to deal with borderline cases where misleading language amounts to no more than exaggeration.[10]

The Committee recognizes that self-regulation is an important adjunct to the statutory regulation of misleading advertising. Indeed, because of its ability to deal promptly with both complaints and changes in the marketplace, self-regulation, in some circumstances, may have decided advantages over regulation by government. However, the Committee recognizes that the self-regulatory system has limits on the types of sanctions that can be imposed and that conflicts may arise when a self-regulatory body attempts to discipline those upon whom it must rely for support. Both the Consumers' Association of Canada and Mr. Robert Bertrand, a former Director of Investigation and Research, recognized enforcement as leading to a possible conflict of interest for self-regulatory bodies.

The Retail Council of Canada suggested that self-regulation is most effective when the entity responsible for administering a self-regulatory code is at arm's length from the advertising industry.[11] The Committee concurs with this view. A system supported by the media, whose ultimate sanction is the withdrawal of an offending advertisement from the public domain, is, in the Committee's opinion, likely to be more effective than one whose final

sanction is expulsion from an industry organization. Peer pressure from members of an association to abide by prescribed standards may be strong, but the effectiveness of expulsion as a deterrent will depend upon how much the individual advertiser values membership in the organization.

Although most witnesses supported the concept of advertising self-regulation, some noted that it was unlikely to be effective in dealing with all facets of advertising. The Grocery Products Manufacturers of Canada felt that self-regulation plays its most important role in controlling advertising where matters of "taste, public opinion and public decency are at issue."[12] The Retail Council of Canada expressed the view that voluntary guidelines are unlikely to deter deliberate misrepresentation or fraud.[13]

The Committee acknowledges that the effectiveness of self-regulation is contingent upon many factors, including the extent of membership in a self-regulatory body, the types of sanctions available, and the willingness of advertisers to adhere to a code of conduct and abide by the decisions made. It can also depend upon the level of public awareness of and access to the self-regulatory system. The Institute of Canadian Advertising suggested to the Committee that the biggest problem with self-regulation is that few people know about it.[14] Indeed, the CAF attributes a drop in the number of complaints it has received in the past two years to a decrease in its advertising. Both the CAF and the CDMA informed the Committee that they intend to launch programs to increase public awareness of their activities.

The Committee believes that advertising self-regulatory bodies should do more to inform the public about their programs. In the Committee's view, the level of consumer awareness about misleading advertising must be increased and public use of and input into the self-regulatory system must be facilitated. Furthermore, consumers should know where and how to make complaints, and the methods employed for dealing with these. Complainants should be kept informed of the progress being made in dealing with their complaints. The Committee also believes that consumer organizations and members of the public should have representation on advertising self-regulatory bodies. This would allow for their input into policy development and complaint adjudication and provide opportunities for the expression of views from outside the industry.

In the Committee's view, self-regulation should never completely replace government regulation of advertising, some of which is necessary to ensure that consumers are provided with accurate information and to further

market competition. This is not to deny the importance of self-regulation, which at a minimum tends to increase the general level of compliance with misleading advertising laws.

The Committee applauds the efforts of government in encouraging industry to regulate advertising and believes these efforts should continue. Fostering self-regulation will benefit both consumers and business. If it increases compliance with the law, it may also ease the strain on the limited government resources available to prevent misleading advertising.

*Recommendations:*

**3.1 The Committee recommends that the Director of Investigation and Research continue to encourage both industry and individual businesses to develop standards of practice and guidelines for accurate advertising.**

**3.2 The Committee further recommends that, where appropriate, the Director of Investigation and Research refer to the relevant self-regulatory body complaints about matters within the ambit of the various advertising self-regulatory codes and not within that of the misleading advertising provisions of the *Competition Act*.**

In the Committee's view, uniformity of standards and consistency in their application should be goals throughout the advertising self-regulatory system. What is classified as misleading under one code should also be classified as misleading under another so as to avoid conflicts between the standards of various self-regulatory bodies. Industry should strive to achieve uniform content and enforcement of its self-regulatory codes, and government should assist in this task. The Marketing Practices Branch, as the enforcer of the misleading advertising provisions of the *Competition Act*, has particular expertise to contribute to the development of such codes. It could play a coordinating role in this regard, and indeed, already reviews many of the codes of advertising standards before they are put in place by industry.

*Recommendation:*

**3.3 The Committee recommends that the Director of Investigation and Research through the Marketing Practices Branch promote uniform definitions, criteria and standards among various**

**advertising self-regulatory codes and act as a coordinator to ensure that this goal is achieved.**

Accountability is an essential component of any self-regulatory system. Even though self-regulatory bodies are responsible to their members, the Committee believes that they also have a duty to those who use the system and to the public. The Consumers' Association of Canada suggested that a regime which would require the review and approval of self-regulatory body decisions by some external authority might be advisable.[15] While the Committee acknowledges that such a proposal might have merit, it would not want to impose a degree of regulation on the advertising self-regulatory system which might destroy its benefits or make it unworkable. The Committee, however, also believes that self-regulatory bodies should demonstrate that they are performing their mandated functions. In this regard, a public reporting of their activities, including the publication of the names of persons against whom complaints have been sustained, would be appropriate.

At present, various self-regulatory bodies maintain records of the number, type and disposition of complaints received. As an example, the CAF informed the Committee that of the 293 complaints regarding advertising received by the Advertising Standards Council in 1986, 35 were sustained as being deceptive.[16] In the Committee's view, such numbers suggest that it would not be a great burden for these bodies to report such data to the Director of Investigation and Research nor for the Director to manage the reported information.

*Recommendations:*

**3.4 The Committee recommends that the Director of Investigation and Research request organizations charged with administering codes and guidelines on advertising standards and practices to report to him relevant information and data with regard to the administration of those codes and guidelines.**

**3.5 The Committee further recommends that any report made to the Director include information as to the number and type of complaints received, the action taken with respect to them, the names of persons against whom complaints have been sustained and whether decisions have been complied with.**

**End Notes**

(1) *Hearings*, Issue No. 24 (December 8, 1987) 24:8.

(2) Advertising Standards Council, The Canadian Code of Advertising Standards, May 1986, p. 7.

(3) *Hearings*, Issue No. 22 (November 17, 1987) 22:14.

(4) *Supra*, note 1, 24:8.

(5) Canadian Council of Better Business Bureaus, *Code of Advertising*, (1984) p. 3.

(6) *Brief*, Canadian Direct Marketing Association, February 18, 1988, p. 9.

(7) *Ibid.*, p. 8.

(8) *Brief*, Canadian Council of Better Business Bureaus, January 21, 1988, p. 15.

(9) *Hearings*, Issue No. 30 (February 25, 1988) 30:31.

(10) *Brief*, Retail Council of Canada, December 1987, p. 6.

(11) *Hearings*, Issue No. 26 (December 15, 1987) 26:5.

(12) *Brief*, Grocery Products Manufacturers of Canada, p. 4.

(13) *Supra*, note 10, p. 7.

(14) *Hearings*, Issue No. 27 (January 21, 1988) 27:34.

(15) *Hearings*, Issue No. 29 (February 23, 1988) 29:29.

(16) *Supra*, note 1, 24:12.

## CHAPTER 4 - ADMINISTRATIVE APPROACHES TO CONSUMER REDRESS

### A. Threshold Issues

As mentioned in the introduction to this report, the misleading advertising provisions of the *Competition Act* are not regulatory in nature. They do not prescribe the form and content of an advertisement nor do they allow for its correction or withdrawal. The statute adopts a criminal law approach by providing that misleading advertising is an offence punishable by fine and/or imprisonment.

Several witnesses felt that there were significant problems with the present approach. The criminal process was viewed as cumbersome, costly and slow, ill-suited to matters of this nature. One witness described it as a ridiculous misuse of society's resources, another said it was too blunt an instrument, while yet another questioned its deterrent effect.

Contending that the Director of Investigation and Research must have more effective tools for dealing with misleading advertising, some witnesses called for a system of administrative remedies that would be more responsive to the needs of both consumers and the business community. Among the remedies suggested were cease and desist powers, consent orders, and the ability to order corrective advertising and disclosure of information. In addition, the Committee heard claims that enforcement would be enhanced if advertisers were required by law to substantiate advertising claims prior to their dissemination and if appropriate rules and regulations could be promulgated.

The Committee feels that each of these suggestions warrants consideration. Before examining them in detail, however, the report will briefly outline two threshold issues in this area: constitutional concerns and the comparative advantages of penal and administrative remedies.

#### *1. Constitutional Constraints on the Regulation of Advertising*

Constitutional considerations are of utmost importance in the regulation of misleading advertising. In particular, they are relevant to any discussion of reforms which might include the use of administrative remedies and procedures in conjunction with or as an alternative to penal sanctions

and to any proposal which calls for class actions within the context of the *Competition Act.*

The federal government has so far relied on its jurisdiction over criminal law to legislate on competition law matters and the courts have found that federal authority in this area rests on the criminal law power. Another head of power, however, — trade and commerce — may also support federal authority in this field. While an early case (1881)[1] found that the general regulation of trade affecting the entire country was a component of the trade and commerce power, subsequent decisions were not generous in their interpretation of the meaning and scope of this component. Recent cases, however, may be opening the door to its revitalization. In the *Canadian National Transportation* case (1983),[2] Mr. Justice Dickson (now Chief Justice) of the Supreme Court of Canada drew upon a previous judgment of then Chief Justice Laskin[3] to enumerate the following list of possible criteria for the valid exercise of the general trade and commerce power:

(a) the presence of a national regulatory scheme,

(b) the oversight of a regulatory agency,

(c) a concern with trade in general rather than with an aspect of a particular business,

(d) the constitutional incapability of the provinces to act, and

(e) the jeopardizing of the successful operation of the scheme in some parts of the country because of the failure to include one or more provinces.[4]

He concluded that the presence of these factors would increase the probability that the statute in question was of genuine national economic concern.[5]

These criteria were applied by the Federal Court of Appeal in the *Rocois Construction* case (1985)[6] in which that Court upheld the constitutionality of paragraph 31.1(1)(a) (the civil damages provision) of the then *Combines Investigation Act* on the basis of the trade and commerce power. This provision was found to have a "rational functional connection with the overall federal economic plan manifested in the Act in relation to

competition...''.[7] This decision is now under appeal to the Supreme Court of Canada.

In his testimony to the Committee, Mr. Edward Belobaba noted that a major hurdle for federal parliamentarians and regulators is the "constitutional mindset'' which stresses that the control of misleading advertising must be based on the criminal law power. In his opinion, the immediate need is to rediscover and resuscitate the trade and commerce power and to create a national trade practices policy beginning with the broadening of the techniques available to the federal government to deal with misleading advertising.[8]

The Committee agrees that it is time for the constitutional mindset to change. In concurring in the view that it is inappropriate to treat most cases of misleading advertising as a criminal offence, the Committee, while recognizing the attendant constitutional issues, supports an approach which would broaden the scope and the nature of the available remedies. In this regard, the *Rocois* decision has significant implications for the Committee's view of the manner in which misleading advertising should be regulated. The conclusion that the federal government may create civil remedies that are genuinely integral to an overall federal economic plan, along with the determination that the trade and commerce power is the appropriate jurisdictional foundation for these remedies, bodes well for the creation of administrative procedures and class actions to deal with misleading advertising.

### 2. *Penal and Administrative Sanctions*

Misleading advertising may be the result of an intentional fraudulent mis-statement, negligence on the part of an advertiser or simple inadvertence. The *Competition Act* does not distinguish among the various causes and applies penal sanctions in all situations.

Before discussing any system of administrative remedies, an initial question arises: should such remedies supplant penal sanctions under the *Competition Act* or complement them? In the Committee's view, the latter should be the case. Administrative remedies should be available both in the course of a criminal proceeding and as part of a separate system of remedies which the Director of Investigation and Research can draw upon when penal sanctions are deemed to be inappropriate. Administrative remedies are better suited to situations where a misleading representation occurs through

inadvertence or negligence. They may have little impact on an unscrupulous or repeat offender, and the Committee believes that penal sanctions should therefore continue to be an enforcement option.

## B. Remedies and Procedures

The remedies and procedures mentioned most often in connection with misleading advertising are injunctive relief (cease and desist) powers, the ability to require corrective advertising and affirmative disclosure of previously undisclosed facts and consent procedures. Each of these has been used with varying degrees of success in some Canadian provinces and in the United States by the Federal Trade Commission. This section of the report will examine these procedures and remedies in the context of the misleading advertising provisions of the *Competition Act.*

### *1. Injunctive Relief*

The trade practices statutes of the provinces of Alberta, British Columbia, Quebec, Prince Edward Island, Newfoundland and Ontario, provide for the issuance of interim or permanent injunctions or cease and desist orders to restrain a person from carrying on an unfair trade practice. In the United States, the Federal Trade Commission, where it has reason to believe that a person is engaged in an unfair or deceptive act or practice in commerce, and where it appears in the public interest to do so, has authority to issue a complaint, and conduct a hearing with a view to obtaining a cease and desist order.[9]

At present, the *Competition Act* provides for both injunction and prohibition orders for misleading advertising offences. Section 29.1 of the Act, gives a court, on the application of the Attorney General, the authority to issue an interim injunction forbidding a person from "doing any act or thing that ... may constitute ... an offence, pending the commencement or completion of a prosecution or proceedings under subsection 30(2)...".[10] In order for a court to issue an injunction under section 29.1, the prosecution must prove beyond a reasonable doubt that:

(a) there will be injury to competition that cannot be adequately remedied under any other section of the Act, or

(b) that a person is likely to suffer damage for which he cannot be adequately compensated under any other section of the Act and

that will be substantially greater than any damage likely to ensue to the alleged offender from an injunction, should it be subsequently determined that an offence has not been committed.[11]

Where a person has done, is about to do or is likely to do any act or thing that would constitute an offence, subsection 30(2) of the Act allows the court to issue an order prohibiting that act. The Committee was not made aware of any misleading advertising cases in which section 29.1 has been used.

A number of witnesses felt that a cease and desist power or a more workable injunctive relief provision in the *Competition Act* would be appropriate for misleading advertising cases. The Canadian Council of Better Business Bureaus suggested that injunctions to stop a deceptive practice may be a more suitable remedy than the recovery of damages.[12] Ms Marilyn Anderson noted that an effective cease and desist power at the federal level would be particularly valuable in situations where a blatantly misleading activity affects large portions of the population.[13] Both Mr. Robert Bertrand and Mr. Edward Belobaba were of the view that cease and desist or injunctive relief powers should be essential components of any package of administrative techniques and remedies.[14]

It is worth noting that a study conducted for the Department of Consumer and Corporate Affairs in 1976 (hereafter referred to as the "CCAC Study") suggested that the criteria for obtaining an injunction as set out in section 29.1 may be too stringent in misleading advertising cases,[15] and recommended that they be modified to make injunctions easier to obtain. In addition, the study would have made available a host of other remedies such as corrective advertising, compensation for victims, recission of contract, and divestment of profits.[16]

The Committee is of the view that there are significant shortcomings in the injunction and prohibition provisions of the *Competition Act* as they apply to misleading advertising offences and recognizes that the ability to stop a patently misleading practice pending a hearing or trial would minimize the damage to the public at large, and thus serve the public interest. The primary concern of the Committee in this regard is the need to make injunctive relief readily available. This would, among other things, involve a modification of the criteria currently set out in section 29.1 of the Act, as well as the burden of proof requirement. It would also require a provision

which would allow the Director of Investigation and Research, as well as the Attorney General, to apply for an injunction. In the Committee's view, such a provision would likely expedite proceedings.

*Recommendations:*

**4.1 The Committee recommends that the criteria established in the *Competition Act* for obtaining an interim injunction be modified to allow such injunctions to be more readily available in misleading advertising cases. Consideration should be given to lowering the burden of proof, and establishing threat to the public interest or the creation of a *prima facie* case as grounds for obtaining an injunction.**

**4.2 The Committee further recommends that the Director of Investigation and Research be empowered to apply direct to a court for an injunction under the *Competition Act*.**

*2. Affirmative Disclosure and Corrective Advertising*

In the United States, the Federal Trade Commission (FTC) employs a number of administrative remedies in connection with misleading advertising in addition to its basic sanction, the cease and desist power. Among those used are affirmative disclosure and corrective advertising orders.

The affirmative disclosure remedy developed by the FTC is designed to deal with misrepresentation resulting from an advertisement's failure to disclose material information. Essentially it requires the disclosure of previously omitted facts about a product.[17] The CCAC Study noted that affirmative disclosure orders have been used to (a) safeguard consumer preferences, (b) warn of dangers associated with particular products, and (c) counteract pervasive consumer beliefs about the use and effect of advertised products.[18] The thrust of the remedy is to counter past deception by requiring an advertiser to provide full information in future advertisements.

The Committee believes that considerable benefit could be derived from including in the *Competition Act* an affirmative disclosure remedy for situations where essential facts had been omitted from an advertisement. Since the Act clearly contemplates that a representation may be misleading through a failure to disclose, it would seem appropriate that it also provide a remedy specific to that non-disclosure. In the Committee's view, being

ordered to revise a national advertising campaign might have a greater deterrent effect on an advertiser than being fined. Moreover, it would ensure that consumers had more information upon which to base their purchasing decisions.

*Recommendations:*

**4.3 The Committee recommends that the *Competition Act* be amended to allow a court, in proceedings connected with misleading advertising, to order an offender to disclose essential facts previously omitted from a representation concerning a product or business interest.**

**4.4 The Committee further recommends that the affirmative disclosure remedy referred to in recommendation 4.3 be available in connection with both consent agreements (see recommendation 4.7) and criminal proceedings.**

Another remedy employed by the FTC in conjunction with its cease and desist powers is corrective advertising. This requires an advertiser to state that certain claims in previous advertisements were false. Corrective advertising orders can be tailor-made to a particular case. In some situations the FTC merely indicates to an advertiser the facts to be disclosed in a corrective advertisement; in others, it dictates the contents of the correction. Moreover, both the duration of and the amount of money to be spent on a corrective advertising program can be stipulated.

It is worth noting that section 17 of the Alberta *Unfair Trade Practices Act* provides a remedy similar to corrective advertising: the court can order a person to advertise the "particulars of any order ..." and in so doing can prescribe the "methods of making the advertisement," and its content, form and frequency. A similar provision can be found in the British Columbia *Trade Practice Act.*[19]

Corrective advertising is a powerful tool. In the Committee's view, requiring an advertiser to declare publicly that past information was erroneous and to devote a certain portion of future advertising to correcting the false impression given could have a significant economic impact on him, not only because of the additional cost incurred but also because of possible lost sales.

*Recommendations:*

**4.5 The Committee recommends that the *Competition Act* be amended to allow a court, in proceedings connected with misleading advertising, to order an offender to issue a corrective advertisement. The court should have authority to prescribe the methods of making a corrective advertisement, as well as its content, form, frequency and duration.**

**4.6 The Committee further recommends that the corrective advertising remedy referred to in recommendation 4.5 be available in connection with both consent agreements (see recommendation 4.7) and criminal proceedings.**

*3. Consent Procedures*

As mentioned earlier, many witnesses consider the criminal process to be a slow, inefficient means of dealing with most misleading advertising cases. They would like to see less formal, more cost-effective processes in place. One suggestion to the Committee was the "assurance of voluntary compliance" (AVC) or a consent order, whereby alleged offenders would agree to stop a misleading practice and to engage in remedial action, if necessary. This procedure would bypass criminal prosecution by authorizing the Director of Investigation and Research to accept a written undertaking instead.

In the United States, the use of consent orders is widespread. In fact, the vast majority of deceptive advertising cases at the federal level in the U.S. are resolved through this means. Pursuant to the Federal Trade Commission's consent order procedure, an advertiser enters into an agreement with the FTC whereby, among other things, he agrees to cease advertising in a certain manner, admits certain facts and conclusions of law and waives further procedural steps and all rights to judicial review. Consent orders are often combined with orders for affirmative disclosure or corrective advertising.

The various provincial trade practices statutes provide for informal procedures whereby a person can undertake to refrain from engaging in a particular activity by submitting a written assurance of voluntary compliance. Some statutes also allow remedies such as corrective advertising to be included in an AVC.

Although the *Competition Act* does not specifically provide for a consent procedure, officials of the Department of Consumer and Corporate Affairs informed the Committee that, on occasion, the Director has negotiated a prohibition order with an advertiser and has had the order approved by a court under subsection 30(2) of the Act.[20] In this way, the Director can avoid initiating a criminal prosecution.

The Committee believes that there are distinct advantages to the use of consent orders and assurances of voluntary compliance. Among these are flexibility and the avoidance of litigation. In the Committee's view, use of such informal procedures would constitute a cost-effective approach to enforcement and should be formalized in the *Competition Act*.

*Recommendation:*

**4.7 The Committee recommends that the *Competition Act* be amended to empower the Director of Investigation and Research to enter into consent agreements or assurances of voluntary compliance with advertisers whereby the latter agree to cease and desist from engaging in misleading advertising or deceptive marketing practices.**

Because consent agreements would likely become a commonly used enforcement technique, the Committee strongly urges that they be part of the public record. The numbers of agreements entered into, a summary of their contents and the names of the parties involved should be reported in the *Misleading Advertising Bulletin* and in the Annual Report of the Director of Investigation and Research. This would allow for some form of public oversight of the use of the procedure. In addition, the Director should require advertisers who have signed consent agreements or voluntary undertakings to provide written evidence of compliance.

*Recommendation:*

**4.8 The Committee recommends that the Director of Investigation and Research be required to maintain a publicly available record of all consent agreements or assurances of voluntary compliance and that this record should show the numbers of such agreements, a summary of their contents, the names of the parties involved and whether compliance has occurred.**

The Committee recognizes that problems can arise with the use of consent procedures. AVCs might be employed in inappropriate situations, merely to suggest a strong enforcement record. Indeed, in the United States the FTC's tendency to inflate enforcement statistics through the use of AVCs was one of the principal reasons why in the late 1970s it abandoned them in favour of a more stringent procedure. It is also feared that regulators might adopt a "heavy-handed" approach to use of consent procedures by coercing advertisers into voluntary compliance with threats of prosecution.

The Committee is of the view that these problems can be minimized if not avoided through the development and publication of an enforcement and compliance policy which would include guidelines for the use of consent procedures.

*Recommendation:*

**4.9 The Committee recommends that the Director of Investigation and Research develop and publish guidelines for the use of consent procedures in connection with misleading advertising and deceptive marketing practices offences.**

## C. Other Administrative Techniques

Some witnesses suggested other administrative techniques for improving compliance with our misleading advertising laws. The most frequently mentioned were advertising substantiation and the promulgation of rules and regulations on various aspects of advertising. During its visit to Washington, D.C., the Committee gained some insight into the operation of these procedures in the United States and concluded that they might be of some value in the Canadian context. Accordingly, this portion of the report will be devoted to a discussion of these techniques.

### *1. Advertising Substantiation*

Testimony before the Committee indicated that the adoption of a formal advertising substantiation policy by the Director of Investigation and Research would markedly enhance the ability of the Marketing Practices Branch to ensure compliance with the law.

In studying the regulation of deceptive advertising in the United States, the Committee learned that advertising substantiation is an important component of Federal Trade Commission policy. The FTC requires that advertisers must have a reasonable basis for advertising claims before disseminating them to the public. Thus, information in support of express or implied claims in an advertisement can be requested informally by the FTC or during a formal civil investigation.[21]

The Committee's discussions with Mr. Ralph Nader and with the Consumers Union revealed that there is much support for the advertising substantiation policy among U.S. consumers. The Consumers Union also claimed that the policy is popular with the business community, primarily because it reduces opportunities for competitors to acquire an unfair advantage over each other. The program therefore imposes a form of discipline on industry practices.

Paragraph 36(1)(b) of the *Competition Act* requires representations respecting the performance, efficacy or length of life of a product to be based on adequate and proper tests. The Department's publication, *How to avoid Misleading Advertising-Guidelines*, (hereafter referred to as the *Misleading Advertising Guidelines*) indicates that the test must be completed before the representation is made. Thus, an advertiser who makes a representation respecting a product without substantiating test data runs a risk of prosecution. The Committee notes that under the Program of Compliance initiated by the Director of Investigation and Research, advertisers may voluntarily submit claims substantiation data to the Marketing Practices Branch for review prior to publishing an advertisement. This procedure, albeit informal and voluntary, is already operating as a kind of advertising substantiation.

Recognizing that there is no statutory requirement in Canada that advertisers should have a reasonable basis for advertising claims before disseminating them, and acknowledging that the Director will give advisory opinions on substantiating data at the request of an advertiser, the Committee must ask whether more should be done in this regard.

The Committee believes that it is justifiable and practical that advertisers be required to have a reasonable basis for express or implied claims prior to disseminating an advertisement. A formal advertising substantiation program would enhance compliance with and enforcement of

the law and at the same time would discourage unsubstantiated claims made in order to achieve a competitive advantage. A formal policy in this area, based upon clear statutory authority would create prescribed-by-law rules according to which advertisers would have to operate and would provide some assurance to consumers that advertising claims were true.

The Committee is not, however, suggesting that all advertising be pre-cleared by the MPB. Moreover, it does not envisage a system whereby whole industries would be selected for claims analysis by the Director. The intention is rather to ensure, where necessary, that the Director will have authority to request substantiating data and information on a case-by-case basis without having to initiate formal trial proceedings.

*Recommendations:*

**4.10 The Committee recommends that the *Competition Act* be amended to require advertisers to have a factual basis for advertising claims prior to their dissemination.**

**4.11 The Committee further recommends that, pursuant to the legal requirement referred to in recommendation 4.10, the Director of Investigation and Research establish an advertising substantiation program together with appropriate enforcement practices and procedures.**

Substantiation information could be of assistance to consumers making purchasing decisions as it would add to product information and aid in the evaluation of product claims. Disclosure of this information might also benefit advertisers, by fostering competition, encouraging them to ensure that tests are adequate, and by enhancing their public image.

The Committee recognizes that some substantiation data may be highly technical and complex, and therefore difficult for the majority of consumers to comprehend. For this reason, summaries written in plain language may be of value.

*Recommendation:*

**4.12 The Committee recommends that the Director of Investigation and Research encourage advertisers to provide consumers with**

**advertising claims substantiation data or, where appropriate, plain language summaries thereof.**

*2. Rules and Regulations*

Witnesses noted that a move away from the criminal law power to the trade and commerce power as the jurisdictional basis for misleading advertising law would allow for the creation of rules and regulations concerning advertising practices.

In the United States, the FTC issues both industry guides and trade regulation rules pursuant to its authority to regulate deceptive advertising. Industry guides are non-binding and are issued when it appears that "guidance as to the legal requirements applicable to particular practices would be beneficial in the public interest and would serve to bring about more widespread and equitable observance of laws administered by the Commission."[22]

The *Federal Trade Commission Act* also gives the FTC authority to prescribe "rules which define with specificity acts or practices which are unfair or deceptive ..."[23] These so-called trade regulation rules are legally enforceable. Elaborate procedures for their creation, which include formal hearings and public comment, are prescribed by law.

After examining the FTC's rule-making authority, the 1976 CCAC Study concluded that it possessed the following benefits: first, rule-making creates an "even-handed" approach to enforcement — a rule applies in the same manner to all persons engaged in a particular conduct; second, rules are the result of a public process which deals with a number of issues and ensures input from all interested persons; and finally, rules benefit industry by elaborating upon and clarifying the law.[24]

In discussions with the Committee, Federal Trade Commissioner Mary Azcuenaga noted a number of advantages and disadvantages of the FTC's rule-making procedure. Among the advantages are the assurance of a broad range of evidence and the ability to deal with widespread practices in the marketplace. On the negative side, the Commissioner described the rule-making procedure as cumbersome and too demanding of resources.

In the U.S., trade regulation rules can deal with practices common to several industries, or specific to one industry. The Committee recognizes that

constitutional law concerns may limit the ambit of similar rules in Canada. For example, the jurisdictional issue would require trade regulation rules to be based upon the federal power to regulate trade and commerce. Another concern arises with respect to the scope of such rules. The Supreme Court of Canada in the *Labatt Breweries* (1979) case[25] struck down federal light beer regulations principally because they attempted to regulate a particular industry. The Committee acknowledges that this decision may have serious implications for rules aiming to deal with the practices of a specific industry. Nevertheless, in the Committee's view, federal regulators should not for this reason be deterred from developing rules which purport to cover practices common to several industries.

It is evident to the Committee that the Director has attempted to make known his approach to various misleading advertising issues through statements of Marketing Practices Branch policy, the publication of his position on certain industry practices, and the publication of the *Misleading Advertising Guidelines*. Indeed, the preface to the *Guidelines* states that they are designed to assist the business community in interpreting and applying the law.

Since the *Competition Act* is not a regulatory statute, the Director is not empowered to define misleading practices or to establish standards of conduct. The Committee, however, agrees with the conclusions of the CCAC Study on the benefits of rule-making and is of the view that the creation of rules for advertising practices would clarify the law and increase compliance. The Committee also believes that procedures can be created which include public input yet are not cumbersome and unmanageable.

***Recommendation:***

**4.13 The Committee recommends that the *Competition Act* be amended to include specific authority for the Governor in Council to make rules and regulations which would define or specify acts or marketing practices which are misleading or deceptive.**

## D. The Impact of the Canada-U.S. Free Trade Agreement

Several witnesses before the Committee commented on the possible impact of the Canada-U.S. Free Trade Agreement on Canadian misleading advertising law. Noting that Canada and the United States have different

approaches to the regulation of misleading advertising, the Association of Canadian Advertisers expected that these differences would be exacerbated by free trade. Others felt that the increased flow of goods and services resulting from the implementation of the Free Trade Agreement would necessitate closer cooperation on misleading advertising issues and ultimately require Canada and the United States to harmonize their laws.

Although many of the administrative remedies and procedures recommended in this report are currently in use in the United States, the Committee has not made its recommendations in anticipation of the implementation of the Free Trade Agreement. The hope is rather that a responsive, cost-effective system will be developed for dealing with misleading advertising; one that would enable regulators to overcome some of the problems in the present system which treats misleading advertising as a criminal offence.

**End Notes**

(1) *Citizens' Insurance Co. of Canada* v. *Parsons* , (1881), 7 App. Cas. 96 (P.C.).

(2) *Attorney-General of Canada* v. *Canadian National Transportation, Ltd. et al.*, (1983), 3 D.L.R. (4th) 16 (S.C.C.).

(3) *MacDonald et al.* v. *Vapour Canada Ltd. et al.* , (1976), 66 D.L.R. (3d) 1 (S.C.C.).

(4) *Supra*, note 2, p. 62.

(5) *Ibid.*, p. 63.

(6) *Attorney-General of Canada* v. *Quebec Ready Mix Inc. et al.*, [1985] 2 F.C. 40 (FCA). Subsequent to this decision, the Ontario Court of Appeal, in the *City National Leasing* case [(1986) 28 D.L.R. (4th) 158], found section 31.1 of the *Competition Act* to be constitutionally valid.

(7) *Ibid.*, p. 79 (MacGuigan J.).

(8) *Hearings*, Issue No. 25 (December 10, 1987) 25:11.

(9) 15 U.S.C. s. 45(b).

(10) *Competition Act*, R.S.C. 1970, C. C-23 as amended, s. 29.1(1).

(11) *Ibid.*

(12) *Brief*, Canadian Council of Better Business Bureaus, January 21, 1988, p. 9.

(13) *Hearings*, Issue No. 30 (February 25, 1988) 30:28.

(14) *Hearings*, Issue No. 25 (December 10, 1987) 25:16. *Hearings*, Issue No. 33 (March 16, 1988) 33:9.

(15) M. J. Trebilcock, *et al.*, *A Study on Consumer Misleading and Unfair Trade Practices*, Vol. 1, prepared for the Department of Consumer and Corporate Affairs (1976), p. 328.

(16) *Ibid.*, p. 330-331.

(17) *Ibid.*, p. 116.

(18) *Ibid.*, p. 116-117.

(19) *Unfair Trade Practices Act*, R.S.A. 1980, C. U-3, as amended. *Trade Practice Act*, R.S.B.C. 1979, c. 406, as amended, s. 18.

(20) *Hearings*, Issue No. 34 (March 22, 1988) 34:28.

(21) United States, Federal Trade Commission, Advertising Substantiation Policy Statement, (1984).

(22) 16 *Code of Federal Regulations* s. 1.6.

(23) 15 U.S.C. s. 57a (a)(1)(B).

(24) *Supra*, note 15, p. 161-163.

(25) *Labatt Breweries of Canada Ltd.* v. *Attorney-General of Canada et al.*, (1979) 110 D.L.R. (3d) 594 (S.C.C.).

## CHAPTER 5 - CLASS ACTIONS AND OTHER FORMS OF CONSUMER REDRESS

### A. Section 31.1 of the *Competition Act*

Section 31.1 of the *Competition Act* creates a civil cause of action for misleading advertising and other offences enumerated in Part V of the Act. Specifically, it allows any person who has suffered loss or damage as a result of misleading advertising to seek financial restitution in the courts. This provision was expected to constitute a major deterrent to violations of the Act and to prevent unjust enrichment.

More than 10 years have passed since the enactment of section 31.1, yet it has been used rarely in cases of misleading advertising. Why is this so? The answer is relatively simple. In situations where consumers are victims of misleading advertising, small amounts of money are usually at stake. It is neither practical nor cost-efficient for a consumer to pursue a $10, $50 or even a $200 claim in the courts. The time and effort involved in seeing a case through the judicial system, even through Small Claims Court, deter civil action.

The Committee is of the view that consumers who have suffered financial loss as a result of misleading representations or deceptive marketing practices should have practical and effective methods for obtaining redress. The Committee heard a number of suggestions from witnesses as to how redress could be achieved. Among these are class actions, substitute actions by the Director of Investigation and Research, and restitution orders. Each of these proposals will be explored in this chapter.

### B. Class Actions

#### *1. History and Description*

A class action has been described as an action which "brings together for a single determination the claims of a number of persons against the same defendant that essentially raise an identical question."[1] A judgment in a class action binds not only the defendant and the plaintiff who represents the class, but also all those whom the plaintiff represents. Basically, a class action is a substitute for what might be numerous individual actions involving the same issues against one defendant.

The creation of a class action remedy within the context of Canadian competition law is not a novel concept. In 1976, a study completed for the Department of Consumer and Corporate Affairs endorsed the class action as an effective consumer redress mechanism and deterrent to deceptive trade practices (hereafter referred to as the "Class Action Study"). The study concluded that class actions would "advance the underlying competition objectives of the legislation"[2] and recommended that a class action procedure be incorporated into the then *Combines Investigation Act*. Following this study, two bills introduced in the House of Commons in 1977 to amend the *Combines Investigation Act* (Bills C-42 and C-13) called for class actions.[3]

The class action provisions in Bill C-42 and Bill C-13 were based upon the premise that section 31.1 of the Act would not be a suitable remedy for those whose damages were small.[4] Each bill provided that a class action could be commenced where there were numerous members of a class and where common questions of law and fact arose. Also, the court would have been required to determine whether, on the basis of certain factors, a class action could be maintained. The bills then went on to detail the procedural aspects of such actions.

Bill C-42 was examined by committees of both the House of Commons and the Senate. The House committee supported class actions in principle but was "vitally interested in assuring ... that class actions in Canada avoid some of the more negative aspects perceived in the American experience while at the same time allowing such actions to function as instruments of relief for a number of persons who, by reason of the small size of their claims, could not have sued by themselves."[5] The Senate committee totally rejected class actions, citing section 31.1 of the Act and the "more active enforcement of competition legislation" as "a sufficient deterrent against violation of the Act."[6]

Bill C-42 died on the Order Paper at the end of the Parliamentary session and Bill C-13 met a similar fate. The most recent competition law amendments did not include provisions for class actions.

### *2. Class Action Reform*

In testimony before the Committee, consumer advocates called for the inclusion of a class action procedure in the *Competition Act*. The Public Interest Research Centre (PIRC) was of the view that the civil remedy

currently available under section 31.1 of the Act is ineffective. The Consumers' Association of Canada, the Canadian Council of Better Business Bureaus and the Automobile Protection Association also favoured a class action remedy.

The PIRC noted that "since the individual damages flowing from misleading advertising offences are likely to be extremely low but profits flowing to the deceptive advertiser are likely to be high in the aggregate, there ought to be an effective way for aggrieved consumers to recover their damages collectively."[7] The Centre went on to state that "... to the extent that collective recovery of these ill-gotten gains prevents the unjust enrichment of the deceptive advertiser, it also complements the deterrent effect of the penal offence."[8]

At present, the ability of the Marketing Practices Branch to systematically and effectively investigate the many complaints it receives about misleading advertising is limited by fiscal and other constraints. Where enforcement resources are limited, the deterrent effect of existing penalties may be compromised.

The Committee believes that consumers should have tools to obtain redress for the financial loss or damage that may result from misleading advertising. One such tool is the class action. The Committee acknowledges that difficulties have arisen with the use of class actions in provinces where no detailed legislative scheme respecting their commencement and conduct exists. In 1983, in a proceeding brought under the Ontario class action rule by the owners of faulty Firenza cars (*Naken* v. *General Motors of Canada Ltd.*), the Supreme Court of Canada concluded that the Ontario rule could not support such a complex action and acknowledged that a "comprehensive legislative scheme for the institution and conduct of class actions"[9] was needed. It is clear that any provision for class actions in the context of the *Competition Act* must, at a minimum, specify how such actions are to be commenced and conducted.

The Committee recognizes that there are advantages and disadvantages to class actions. Among the advantages are a decrease in the total amount of litigation, increased access to the courts, and deterrence. The disadvantages include overloading the court system, bankruptcy due to large damage awards, possible frivolous litigation, and adverse publicity. Some have called class actions a form of legalized blackmail which forces defendants to settle claims to avoid expenses, regardless of the merits of the case.

Critics often cite the United States experience with class actions. The Committee notes, however, that in a 1982 report on class actions, the Ontario Law Reform Commission, after reviewing in some detail their advantages and possible adverse effects, concluded that "many of the alleged costs of class actions are not inevitable features of such a procedure, but can be reduced or eliminated through the adoption of appropriate safeguards."[10] After analyzing United States data on class actions, the Commission found that "the empirical evidence casts considerable doubt upon the accuracy of many of the criticisms directed toward class actions."[11] Even with criticisms of some substance, the Commission concluded that "any adverse consequences cannot fairly be attributed to every class action."[12]

The Committee does not believe that the inclusion of a class action procedure in the *Competition Act* would result in a flood of litigation, noting that this has not been the case in the United States, notwithstanding some widely publicized class action suits, nor in the province of Quebec, which has the most far-reaching class action law in Canada. In the Committee's view, the benefits of including a class action procedure in the *Competition Act* would far outweigh any potential costs. Moreover, class actions, by allowing those who have been directly harmed by misleading advertising to help themselves collectively, would further the objectives of the Act and allow consumers to obtain compensation for their losses. Combining public and private initiative would be likely to produce more effective enforcement.

The Committee recognizes that section 31.1 of the *Competition Act* can be used with existing provincial class action rules to allow consumers who have suffered loss or damage from misleading advertising to sue as a class. But because of the *Naken* decision, it is likely that a class action based upon section 31.1 would be viable only in the few provinces that at present have detailed procedural rules governing such actions.

In the Committee's view, the fact that class action remedies are theoretically but not practically available throughout the country creates a dilemma for consumers and ultimately an inequitable situation. In cases of misleading advertising, a solution could be achieved by either the federal or the provincial governments: the provinces could pass laws detailing their class action rules, or the federal government could amend the *Competition Act* to allow for class actions.

Although having the provinces amend their respective class action rules would allow for class actions in a broader context than that of the *Competition Act*, this may be more difficult to achieve than amending only one statute. In the Committee's opinion, amending the *Competition Act* to allow for class actions, even with its recognized limitations, would be the more practical option; at least, it would ensure that a class action remedy was available throughout Canada for victims of misleading advertising and deceptive marketing practices.

*Recommendation:*

**5.1 The Committee recommends that the *Competition Act* be amended to allow persons who have suffered loss or damage as a result of misleading advertising or deceptive marketing practices to sue collectively as a class.**

The *Naken* decision would seem to require that the rules governing the institution and conduct of class actions be clearly spelled out. These rules might include details regarding costs, the commencement and maintenance of such actions, and notice to class members.

*Recommendation:*

**5.2 The Committee recommends that the *Competition Act* include a code of procedure for regulating the commencement, maintenance and conduct of class actions.**

In this study, the recommendations concerning class actions are related to misleading advertising and deceptive marketing practices; however, because the *Competition Act* covers a wide range of offences, the government may wish to consider the availability of class actions in respect of all offences under Part V of the Act.

### C. Substitute Actions by the Director of Investigation and Research

Like the concept of class action, that of a substitute action by the Director of Investigation and Research on behalf of consumers is not new. In 1976, the Class Action Study recommended that the Director be given authority to commence a civil action on behalf of a class of persons where a class action was considered to be unmanageable.[13] Following this proposal,

Bill C-42 would have given an official, the Competition Policy Advocate, the power to initiate a substitute action in certain circumstances where the court had refused to maintain a class action. The bill required that any amount recovered pursuant to a substitute action would have to be paid into the Consolidated Revenue Fund.

A House of Commons committee examining Bill C-42 noted that, while the principle of substitute actions was sound, the bill's proposal that any award be paid into the Consolidated Revenue Fund, would fail to provide redress to consumers.[14] The committee therefore recommended that the Competition Policy Advocate not be able to commence a substitute action unless the court was satisfied that a mechanism was available to distribute the sum awarded to some or all of the members of the class.[15]

The Committee believes that a substitute action provision within the context of the *Competition Act* would benefit consumers, especially where the amount claimed was relatively small and the costs involved in pursuing an action exceeded the amount claimed. Moreover, it would enable the Director to pursue, on behalf of consumers, cases which might have important implications for the development of the law or might be of significant deterrent value. The Director could thus combine the goals of enforcement and consumer redress.

In view of the findings of the committee that reviewed the Bill C-42 substitute action proposal, the Committee wishes to emphasize that any such proposal must be a vehicle for consumer redress. It is the Committee's opinion that a substitute action can be an effective instrument only where consumers are entitled to be compensated from the judgment awarded by the court.

***Recommendations:***

**5.3 The Committee recommends that the Director of Investigation and Research be given statutory authority to initiate a substitute action on behalf of a class of consumers where it is in the public interest to do so.**

**5.4 The Committee further recommends that any substitute action procedure provide that consumers be compensated from the judgment awarded by the court.**

## D. Restitution

Much of the testimony before the Committee dealt with the need to make the *Competition Act* more responsive to the needs of consumers by providing some practical means for victims of misleading advertising or deceptive marketing practices to obtain compensation for their losses. A number of witnesses felt that this might be best accomplished through class actions. Others suggested amending section 31.1 of the Act to provide for double or treble damages in a civil action.

In its brief to the Committee, the Public Interest Research Centre noted that in limited circumstances the *Criminal Code* allows for restitution to aggrieved persons as part of the sentencing process. In particular, section 653 of the Code allows a court, on the application of an aggrieved person, to order the accused to pay that person, at the time sentence is imposed, compensation for loss or damage to property. Recently, amendments to broaden the scope of this section were passed by the House of Commons.

While the Committee believes that enhancing the civil remedy approach to compensation through class and substitute actions is necessary, it also believes that the *Competition Act* should specifically allow for restitution in cases of misleading advertising or deceptive marketing practices. In addition, restitution to consumers should be a remedy available to the Director of Investigation and Research in conjunction with consent procedures. Broadening the circumstances in which restitution was available through the inclusion of such a remedy in the *Competition Act*, would make it clear that the Act was intended to protect consumers as well as the business community.

*Recommendations:*

**5.5 The Committee recommends that with respect to misleading advertising or deceptive marketing practices offences, the *Competition Act* be amended to allow a court in criminal proceedings to order an offender to compensate persons who have suffered financial loss or damage as a result of the offender's conduct.**

**5.6 The Committee further recommends that the Director of Investigation and Research be empowered to require restitution to consumers as a term and condition of a consent agreement.**

**End Notes**

(1) Neil J. Williams, "Damages Class Action under the Combines Investigation Act" in *A Proposal for Class Actions under Competition Policy Legislation*, prepared for the Department of Consumer and Corporate Affairs, (1976) p. 21.

(2) *Ibid.*, p. 1.

(3) Bill C-42, An Act to amend the *Combines Investigation Act*, First Reading, March 16, 1977. Bill C-13, An Act to amend the *Combines Investigation Act*, First Reading, November 18, 1977.

(4) Consumer and Corporate Affairs Canada, *Proposals for a New Competition Policy for Canada, Second Stage, Combines Investigation Act Amendments, March 1977*, p. 69.

(5) House of Commons, Fourteenth Report of the Standing Committee on Finance, Trade and Economic Affairs, Respecting Stage II Competition Policy, *Proposals for Change*, August 5, 1977, p. 86.

(6) Senate of Canada, Standing Senate Committee on Banking, Trade and Commerce, *Interim Report on the Subject Matter of Bill C-42*, July 13, 1977, p. 10.

(7) *Brief*, The Public Interest Research Centre, January 1988, p. 4.

(8) *Ibid.*

(9) *Naken et al.* v. *General Motors of Canada Ltd. et al.*, (1983) 144 D.L.R. (3d) 385 (S.C.C.) at p. 410.

(10) Ontario Law Reform Commission. *Report on Class Actions* (1982), Vol. 1, p. 117.

(11) *Ibid.*, p. 211.

(12) *Ibid.*, p. 212.

(13) *Supra*, note 1, page 142.

(14) *Supra*, note 5, page 90.

(15) *Ibid.*

## CHAPTER 6 - PARTICULAR ISSUES UNDER THE *COMPETITION ACT*

### A. Regular Price

A number of witnesses commented on the provision of the *Competition Act* dealing with the price at which a product is ordinarily or regularly sold. Paragraph 36(1)(d) proscribes the making of "a materially misleading representation to the public concerning the price at which a product or like products have been, are or will be ordinarily sold...". A representation as to price means the price at which the product ordinarily sells in a market area, unless specified to be the advertiser's own selling price.

The Director of Investigation and Research takes the position that a regular price should reflect a substantial sales volume. In its guidelines, the Department states that where the price of a product has been increased for a relatively short period of time, during which few sales have occurred, and then reduced, the retailer should not use the inflated price as the regular price.[1] In addition, price comparisons with the manufacturer's suggested list price are not considered to be reliable, since many products are often ordinarily sold at prices that are significantly below that price.

Both the Retail Council of Canada (RCC) and the Institute of Canadian Advertising (ICA) contended before the Committee that there is considerable confusion in the business community as to the meaning of "regular price." Noting that sales and special product promotions have increased so dramatically that consumers now wait to purchase items on sale rather than at the regular price, the ICA felt that the Director's approach to the concept of regular price needs to be reconsidered.[2] The RCC was uncertain as to what percentage of goods must be sold at the regular price in order to meet the current criterion. In its view, it might be more appropriate to establish a regular price by reference to the period of time during which products were sold at a certain price rather than the number of products sold at that price.[3]

The Consumers' Association of Canada (CAC) told the Committee that there is a great deal of consumer confusion about sale prices. To emphasize this point, the CAC quoted the following advertisement, which was placed in an Ottawa newspaper:

> A horned toad is not a toad at all ... it's a lizard. A peanut isn't even a nut ... it's a legume! And sales, no matter what they call them, are not sales unless they offer

customers a legitimate discount on regular selling prices. It's really quite a simple premise ... but it's becoming more and more rare.[4]

The CAC also considers a comparison between a special price and a manufacturer's suggested list price to be misleading.

The Committee acknowledges that there appears to be uncertainty among consumers and the business community as to what constitutes a legitimate sale price. Moreover, with the proliferation of sales it is becoming increasingly difficult for consumers to determine when they are obtaining a bargain. An examination of the statistics on misleading advertising offences reveals that the number of prosecutions for violations of paragraph 36(1)(d) are second only to the number brought under the general misleading advertising provision, paragraph 36(1)(a). Although the relatively large number of cases arising under paragraph 36(1)(d) does not necessarily indicate confusion in the marketplace about the concept of regular price, the Committee believes that the concerns expressed by consumers and the business community on this matter warrant attention by the Director.

*Recommendations:*

**6.1 The Committee recommends that the Director of Investigation and Research review paragraph 36(1)(d) of the *Competition Act* in order to dispel the confusion about pricing that appears to exist in the marketplace and, if necessary, seek appropriate amendments to the Act.**

**6.2 The Committee further recommends that in the course of his review of paragraph 36(1)(d) the Director consult with all interested parties.**

The Committee notes with interest that consumer protection legislation recently passed in the United Kingdom (1987) provides for the creation of a code of practice to give practical guidelines for avoiding misleading price indications and promoting good pricing practices. In addition, regulations which, among other things, prescribe how prices should be indicated, can be issued. It would seem to the Committee that matters coming within the purview of paragraph 36(1)(d) of the *Competition Act* would be prime candidates for regulatory initiatives under the type of rulemaking authority referred to in Chapter 4 of this report.

## B. Variation in Penalties

The *Competition Act* sets out the penalties for misleading advertising offences and deceptive marketing practices. Persons convicted under sections 36 (misleading advertising), 36.1 (testimonials), 36.3 (pyramid selling), 36.4 (referral selling) and 37.2 (promotional contests) are liable: (1) where the conviction is on indictment, to a fine established in the discretion of the court or to imprisonment for five years, or both; or (2) where the Crown proceeds by way of summary conviction, to a fine of up to $25,000 or to imprisonment for one year, or both. Offences under sections 37 (bait and switch selling), and 37.1 (sale above advertised price) are summary conviction offences subject to a fine not exceeding $25,000 and/or imprisonment for one year. Double ticketing (section 36.2) is a summary conviction offence subject to either a fine not exceeding $10,000, or to imprisonment for one year, or both.

Imprisonment has been imposed rarely by the courts, but fines have been used extensively. For the 1986-87 fiscal year, the *Misleading Advertising Bulletin* reported the total fines levied under all misleading advertising and deceptive marketing practices cases at $747,670. The average fine per conviction under the general misleading advertising provision, paragraph 36(1)(a), was $6,732. The highest fine levied against a corporation was $90,000, while the highest fine imposed on an individual was $35,000.[5]

A number of organizations appearing before the Committee expressed concern over the amount of the fines imposed by the courts in misleading advertising cases. The Canadian Council of Better Business Bureaus, though considering the statutory maximums set out in the *Competition Act* to be sufficiently high to deter offenders, questioned whether the actual penalties levied by the courts have been sufficiently effective.[6] The Consumers' Association of Canada echoed this view, describing the fines as a licence fee for doing business.[7] With respect to economic crimes, such as misleading advertising, the Public Interest Research Centre questioned the effectiveness of penal sanctions which neither off-set nor recover the gains illegally made.[8]

Other witnesses proposed that more precise instructions be given to prosecutors on the amounts of fines or that sentencing guidelines be developed for judges. It was also suggested that the Act itself be more specific as to the fines to be levied for certain offences.[9] In its brief to the Committee, the Institute of Canadian Advertising cited examples of "wide discrepancies" in the fines imposed for similar offences. In its opinion,

guidelines are essential to ensure that the penalty bears a reasonable relationship to the infraction.[10]

Officials of the Department of Consumer and Corporate Affairs agreed that fines are inconsistent across Canada, but felt that the courts were increasingly giving due consideration to the damage to the public interest by misleading advertising and deceptive marketing practices.[11] Noting statistics which show an increase in the average fine for cases under paragraph 36(1)(a), a recent issue of the *Misleading Advertising Bulletin* suggests that the courts are taking a more serious view of "flagrant and fraudulent attempts to mislead the public."[12] The Committee was further informed by the officials that it is common departmental practice to prepare for the Attorney General an "impact statement and fines memorandum" which outlines factors relevant to a particular case and makes suggestions as to sentence.[13]

The Committee believes that it is important that fines imposed for misleading advertising offences be consistent. At present fines may not be high enough to constitute an effective deterrent. Indeed, an evaluation of the marketing practices program conducted by the Department of Consumer and Corporate Affairs in 1986 confirmed that members of the business community believe that the fines are small in comparison to the profits to be made by through misleading advertising.[14] At this stage, the Committee is uncertain whether increasing the maximum fines provided in the *Competition Act* would result in an overall increase in the amount of the fines actually levied. An increase in the statutory levels would, however, signal the government's intention to view misleading advertising seriously and encourage the courts to take a tougher approach to such economic crimes.

***Recommendation:***

**6.3 The Committee recommends that the *Competition Act* be amended to increase the maximum fine that can be imposed in a summary conviction proceeding: (a) under sections 36, 36.1, 36.3, 36.4, 37, 37.1 and 37.2 of the Act to $100,000, and (b) under section 36.2 of the Act to $25,000.**

On a practical level, the preparation by the Marketing Practices Branch of an impact statement and fines memorandum for use by prosecutors is essential to attaining better results in individual cases. However, the Committee would like to see the Branch develop a more

comprehensive approach to sentencing. In this regard, the Committee supports the formulation of general sentencing guidelines which would include factors and principles relevant to sentencing, and could be disseminated by the Director to prosecutors and judges and, where appropriate, to the public.

*Recommendation:*

**6.4 The Committee recommends that the Director of Investigation and Research develop general sentencing guidelines relevant to misleading advertising and deceptive marketing practices offences.**

## C. Correction Notices

Subsection 37.3(2) of the *Competition Act* provides a defence to misleading advertising charges under section 36 or 36.1. An advertiser will not be convicted of an offence under those sections if: (a) the misleading act resulted from an error, (b) due diligence was exercised to prevent the error, and (c) reasonable measures were taken forthwith after the representation to bring the error to the attention of persons likely to have been reached by the original representation. In addition, paragraph 37.1(3)(b) provides that the prohibition against the sale of a product at a price that is higher than the advertised price does not apply when an erroneous advertisement is immediately followed by another that corrects the price.

The *Competition Act* does not prescribe the form, content or manner in which a correction notice or corrective advertisement is to be made. The *Misleading Advertising Guidelines*, however, suggest that in addition to publishing a correction notice in the appropriate media, an advertiser should take the following measures where relevant: (a) where newspaper advertisements containing an error are displayed in the store, a correction should be displayed as prominently as the original advertisement, (b) correction notices should be placed at point of sale immediately, (c) sale flyers should, where possible, have the correction notice on the front, (d) correction notices should appear in the same media as the original inaccuracy, (e) errors in catalogues should be brought to the attention of the purchaser at the time of order, not on delivery.[15]

In testimony before the Committee, the Retail Council of Canada suggested that it is very unlikely that someone who saw an original retail advertisement would also see its correction. It felt that correction notices

disciplined an advertiser rather than benefited the public and noted that in-store notification of errors might be more effective.[16] A number of witnesses, however, felt that correction notices, which should be at least the same size as the original advertisement, were useful.

The Committee is concerned that consumers are not being adequately informed about advertising errors. Recognizing that it is not usually possible for a corrective advertisement to appear in the same location in a newpaper or within 24 hours of the original advertisement, it urges advertisers to take immediate corrective measures at the point-of-sale and to ensure that correction notices are adequate to bring an error to the attention of the purchasing public. In this regard, the Committee supports the measures in the *Misleading Advertising Guidelines*, but would also suggest a more formalized regulatory approach.

***Recommendation:***

**6.5 The Committee recommends that the *Competition Act* be amended to include specific authority for the Governor in Council to make regulations, prescribing, among other things, the location, size, content, duration and form of correction notices.**

**End Notes**

(1) Consumer and Corporate Affairs Canada, *How to avoid Misleading Advertising-Guidelines*, (1983) paragraph 4-7.

(2) *Brief*, Institute of Canadian Advertising, p. 9.

(3) *Brief*, Retail Council of Canada, December 1987, p. 13.

(4) *Hearings*, Issue No. 29 (February 23, 1988) 29:12.

(5) Consumer and Corporate Affairs Canada, *Misleading Advertising Bulletin*, Issue No. 1, 1988, p. 1-4.

(6) *Brief*, Canadian Council of Better Business Bureaus, January 21, 1988, p. 10.

(7) *Supra*, note 4, 29:26.

(8) *Brief*, Public Interest Research Centre, January 1988, p. 5.

(9) *Supra*, note 3, p. 11.

(10) *Supra*, note 2, p. 10.

(11) *Hearings*, Issue No. 34 (March 22, 1988) 34:17.

(12) *Supra*, note 5, p. 1.

(13) *Supra*, note 11, 34:17.

(14) Consumer and Corporate Affairs Canada, Evaluation of the Marketing Practices Program, December 1986, p. 9.

(15) *Supra*, note 1, paragraph 8-10.

(16) *Hearings*, Issue No. 26 (December 15, 1987) 26:11.

# LIST OF RECOMMENDATIONS

## Enforcement and Education

2.1 The Committee recommends that the Director of Investigation and Research through the Marketing Practices Branch adopt a more pro-active role in establishing programs for educating consumers and the business community about misleading advertising and deceptive marketing practices and that the Department of Consumer and Corporate Affairs direct additional financial and human resources to such programs.

2.2 The Committee recommends that the Director of Investigation and Research consider a multi-media approach to informing consumers and the business community about misleading advertising and deceptive marketing practices. In particular, the effective use of film, television and radio should be examined.

2.3 The Committee further recommends that, where appropriate, the Director of Investigation and Research undertake information and education programs as joint ventures with the business community, consumer groups and other organizations.

2.4 The Committee recommends that the Minister of Consumer and Corporate Affairs work with his provincial counterparts (a) to coordinate and enhance information and education programs on misleading advertising and deceptive marketing practices, (b) to develop effective complaint-handling procedures, and (c) to coordinate enforcement activities.

## Industry Self-regulation of Advertising

3.1 The Committee recommends that the Director of Investigation and Research continue to encourage both industry and individual businesses to develop standards of practice and guidelines for accurate advertising.

3.2 The Committee further recommends that, where appropriate, the Director of Investigation and Research refer to the relevant self-regulatory body complaints about matters within the ambit of the various advertising self-regulatory codes and not within that of the misleading advertising provisions of the *Competition Act*.

3.3 The Committee recommends that the Director of Investigation and Research through the Marketing Practices Branch promote uniform definitions, criteria and standards among various advertising self-regulatory codes and act as a coordinator to ensure that this goal is achieved.

3.4 The Committee recommends that the Director of Investigation and Research request organizations charged with administering codes and guidelines on advertising standards and practices to report to him relevant information and data with regard to the administration of those codes and guidelines.

3.5 The Committee further recommends that any report made to the Director include information as to the number and type of complaints received, the action taken with respect to them, the names of persons against whom complaints have been sustained and whether decisions have been complied with.

**Administrative Approaches to Consumer Redress**

4.1 The Committee recommends that the criteria established in the *Competition Act* for obtaining an interim injunction be modified to allow such injunctions to be more readily available in misleading advertising cases. Consideration should be given to lowering the burden of proof, and establishing threat to the public interest or the creation of a *prima facie* case as grounds for obtaining an injunction.

4.2 The Committee further recommends that the Director of Investigation and Research be empowered to apply direct to a court for an injunction under the *Competition Act.*

4.3 The Committee recommends that the *Competition Act* be amended to allow a court, in proceedings connected with misleading advertising, to order an offender to disclose essential facts previously omitted from a representation concerning a product or business interest.

4.4 The Committee further recommends that the affirmative disclosure remedy referred to in recommendation 4.3 be available in connection with both consent agreements (see recommendation 4.7) and criminal proceedings.

4.5 The Committee recommends that the *Competition Act* be amended to allow a court, in proceedings connected with misleading advertising, to order an offender to issue a corrective advertisement. The court should have authority to prescribe the methods of making a corrective advertisement, as well as its content, form, frequency and duration.

4.6 The Committee further recommends that the corrective advertising remedy referred to in recommendation 4.5 be available in connection with both consent agreements (see recommendation 4.7) and criminal proceedings.

4.7 The Committee recommends that the *Competition Act* be amended to empower the Director of Investigation and Research to enter into consent agreements or assurances of voluntary compliance with advertisers whereby the latter agree to cease and desist from engaging in misleading advertising or deceptive marketing practices.

4.8 The Committee recommends that the Director of Investigation and Research be required to maintain a publicly available record of all consent agreements or assurances of voluntary compliance and that this record should show the numbers of such agreements, a summary of their contents, the names of the parties involved and whether compliance has occurred.

4.9 The Committee recommends that the Director of Investigation and Research develop and publish guidelines for the use of consent procedures in connection with misleading advertising and deceptive marketing practices offences.

4.10 The Committee recommends that the *Competition Act* be amended to require advertisers to have a factual basis for advertising claims prior to their dissemination.

4.11 The Committee further recommends that, pursuant to the legal requirement referred to in recommendation 4.10, the Director of Investigation and Research establish an advertising substantiation program together with appropriate enforcement practices and procedures.

4.12 The Committee recommends that the Director of Investigation and Research encourage advertisers to provide consumers with advertising claims substantiation data or, where appropriate, plain language summaries thereof.

4.13 The Committee recommends that the *Competition Act* be amended to include specific authority for the Governor in Council to make rules and regulations which would define or specify acts or marketing practices which are misleading or deceptive.

**Class Actions and Other Forms of Consumer Redress**

5.1 The Committee recommends that the *Competition Act* be amended to allow persons who have suffered loss or damage as a result of misleading advertising or deceptive marketing practices to sue collectively as a class.

5.2 The Committee recommends that the *Competition Act* include a code of procedure for regulating the commencement, maintenance and conduct of class actions.

5.3 The Committee recommends that the Director of Investigation and Research be given statutory authority to initiate a substitute action on behalf of a class of consumers where it is in the public interest to do so.

5.4 The Committee further recommends that any substitute action procedure provide that consumers be compensated from the judgment awarded by the court.

5.5 The Committee recommends that with respect to misleading advertising or deceptive marketing practices offences, the *Competition Act* be amended to allow a court in criminal proceedings to order an offender to compensate persons who have suffered financial loss or damage as a result of the offender's conduct.

5.6 The Committee further recommends that the Director of Investigation and Research be empowered to require restitution to consumers as a term and condition of a consent agreement.

**Particular Issues under the *Competition Act***

6.1 The Committee recommends that the Director of Investigation and Research review paragraph 36(1)(d) of the *Competition Act* in order to dispel the confusion about pricing that appears to exist in the marketplace and, if necessary, seek appropriate amendments to the Act.

6.2 The Committee further recommends that in the course of his review of paragraph 36(1)(d) the Director consult with all interested parties.

6.3 The Committee recommends that the *Competition Act* be amended to increase the maximum fine that can be imposed in a summary conviction proceeding: (a) under sections 36, 36.1, 36.3, 36.4, 37, 37.1 and 37.2 of the Act to $100,000, and (b) under section 36.2 of the Act to $25,000.

6.4 The Committee recommends that the Director of Investigation and Research develop general sentencing guidelines relevant to misleading advertising and deceptive marketing practices offences.

6.5 The Committee recommends that the *Competition Act* be amended to include specific authority for the Governor in Council to make regulations, prescribing, among other things, the location, size, content, duration and form of correction notices.

# APPENDIX I

## *Competition Act*

Misleading advertising

**36.** (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(*a*) make a representation to the public that is false or misleading in a material respect;

(*b*) make 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 thereof, the proof of which lies upon the person making the representation;

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

(i) a warranty or guarantee of a product, or

(ii) a promise to replace, maintain or repair an article 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 materially misleading or if there is no reasonable prospect that it will be carried out; or

(*d*) make a materially misleading representation to the public concerning the price at which a product or like products have been, are or will be ordinarily sold; and for the purposes of this paragraph a representation as to price is deemed to refer to the price at which the product has been sold by sellers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold by the person by whom or on whose behalf the representation is made.

Publicité trompeuse

**36.** (1) Nul ne doit, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques

*a*) donner au public des indications fausses ou trompeuses sur un point important;

*b*) donner au public sous la forme d'une déclaration ou d'une garantie visant le rendement, l'efficacité ou la durée utile d'un produit, des indications qui ne se fondent pas sur une épreuve suffisante et appropriée, dont la preuve incombe à la personne qui donne les indications;

*c*) donner des indications au public sous une forme qui fait croire qu'il s'agit

(i) d'une garantie de produit, ou

(ii) d'une promesse de remplacer, entretenir ou réparer tout ou partie d'un article ou de fournir de nouveau ou continuer à fournir un service jusqu'à l'obtention du résultat spécifié

si cette forme de prétendue garantie ou promesse est notablement trompeuse ou s'il n'y a aucun espoir raisonnable qu'elle sera respectée; ou

*d*) donner au public des indications notablement trompeuses sur le prix auquel un produit ou des produits similaires ont été, sont ou seront habituellement vendus; aux fins du présent alinéa, les indications relatives au prix sont censées se référer au prix que les vendeurs ont généralement obtenu sur le marché correspondant, à moins qu'il ne soit nettement précisé qu'il s'agit du prix obtenu par la personne qui donne les indications ou au nom de laquelle elles sont données.

Deemed representation to public

(2) For the purposes of this section and section 36.1, a representation that is

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

(*b*) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article 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 a person as ultimate user, or

(*e*) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatever made available to a member of the public,

shall be deemed to be made to the public by and only by the person who caused the representation to be so expressed, made or contained and, where that person is outside Canada, by

(*f*) the person who imported the article into Canada, in a case described in paragraph (*a*), (*b*) or (*e*), and

(*g*) the person who imported the display into Canada, in a case described in paragraph (*c*).

Idem

(3) Subject to subsection (2), every one who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product 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.

General impression to be considered

(4) In any prosecution for a violation of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

Indications censées être données au public

(2) Aux fins du présent article et de l'article 36.1, des indications

*a*) qui apparaissent sur un article mis en vente ou exposé pour la vente, ou sur son emballage,

*b*) qui apparaissent soit sur quelque chose qui est fixé à un article mis en vente ou exposé pour la vente ou à son emballage ou qui y est inséré ou joint, soit sur quelque chose qui sert de support à l'article pour l'étalage ou la vente,

*c*) qui apparaissent à un étalage d'un magasin ou d'un autre point de vente,

*d*) qui sont données, au cours d'opérations de vente en magasin, par démarchage ou par téléphone, à un utilisateur éventuel, ou

*e*) qui se trouvent dans ou sur quelque chose qui est vendu, envoyé, livré ou transmis au public ou mis à sa disposition de quelque manière que ce soit,

sont réputées être données au public par la seule personne qui est à l'origine de leur divulgation et, lorsque cette personne se trouve à l'extérieur du Canada, par

*f*) la personne qui a importé l'article au Canada, dans les cas visés par les alinéas *a*), *b*) ou *e*), et

*g*) la personne qui a importé au Canada l'instrument d'étalage, dans les cas visés par l'alinéa *c*).

Idem

(3) Sous réserve du paragraphe (2), quiconque, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, fournit à un grossiste, détaillant ou autre distributeur d'un produit de la documentation ou autre chose contenant des indications du genre mentionné au paragraphe (1) est censé avoir donné ces indications au public.

Il faut tenir compte de l'impression générale

(4) Dans toute poursuite pour violation du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important il faut tenir compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

Punishment

(5) Any person who violates subsection (1) is guilty of an offence and is liable

(*a*) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years or to both; or

(*b*) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both. R.S., c. C-23, s. 36; 1974-75-76, c. 76, s. 18.

Peine

(5) Quiconque contrevient au paragraphe (1) est coupable d'une infraction et passible,

*a*) après déclaration de culpabilité à la suite d'une mise en accusation, d'une amende à la discrétion du tribunal ou d'un emprisonnement de cinq ans, ou de l'une et l'autre peine; ou

*b*) après déclaration sommaire de culpabilité, d'une amende de vingt-cinq mille dollars ou d'un emprisonnement d'un an, ou de l'une et l'autre peine. S.R., c. C-23, art. 36; 1974-75-76, c. 76, art. 18.

Representation as to reasonable test and publication of testimonials

**36.1** (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of any product, or for the purpose of promoting, directly or indirectly, any business interest

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

(*b*) publish a testimonial with respect to the product,

except where he can establish that

(*c*) the representation or testimonial was previously made or published by the person by whom the test was made or the testimonial was given, as the case may be, or

(*d*) the representation or testimonial was, before being made or published, approved and permission to make or publish it was given in writing by the person by whom the test was made or the testimonial was given, as the case may be,

and the representation or testimonial accords with the representation or testimonial previously made, published or approved.

Indications relatives à l'épreuve acceptable et publication d'attestations

**36.1** (1) Nul ne doit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques,

*a*) donner au public des indications selon lesquelles une épreuve de rendement, d'efficacité ou de durée utile d'un produit a été effectuée par une personne, ni

*b*) publier une attestation relative à ce produit,

sauf lorsqu'il peut établir

*c*) que la personne qui a effectué l'épreuve ou donné l'attestation, selon le cas, avait antérieurement donné ces indications ou publié cette attestation, ou,

*d*) que la personne qui a effectué l'épreuve ou donné l'attestation, selon le cas, avait préalablement approuvé les indications ou l'attestation et donné par écrit la permission de les donner ou de la publier,

et qu'il s'agit des indications approuvées et données ou de l'attestation approuvée et publiée auparavant.

Punishment

(2) Any person who violates subsection (1) is guilty of an offence and is liable

(*a*) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years, or to both; or

(*b*) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both. 1974-75-76, c. 76, s. 18.

Peine

(2) Quiconque contrevient au paragraphe (1) est coupable d'une infraction et passible,

*a*) après déclaration de culpabilité à la suite d'une mise en accusation, d'une amende à la discrétion du tribunal ou d'un emprisonnement de cinq ans, ou de l'une et l'autre peine; ou

*b*) après déclaration sommaire de culpabilité d'une amende de vingt-cinq mille dollars, ou d'un emprisonnement d'un an, ou de l'une et l'autre peine. 1974-75-76, c. 76, art. 18; 1986, c. 26, art. 35.

Double ticketing

**36.2** (1) No person shall supply a product at a price that exceeds the lowest of two or more

Double étiquetage

**36.2** (1) Il est interdit à qui que ce soit de fournir un produit à un prix qui dépasse le plus

prices clearly expressed by him or on his behalf, in respect of the product in the quantity in which it is so supplied and at the time at which it is so supplied,

(*a*) on the product, its wrapper or container;

(*b*) 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; or

(*c*) on an in-store or other point-of-purchase display or advertisement.

bas de deux ou plusieurs prix clairement exprimés, par lui ou pour lui, pour ce produit, pour la quantité dans laquelle celui-ci est ainsi fourni et au moment où il l'est,

*a*) sur le produit ou sur son emballage;

*b*) sur quelque chose qui est fixée au produit, à son emballage ou à quelque chose qui sert de support au produit pour l'étalage ou la vente, ou sur quelque chose y est insérée ou jointe; ou

*c*) dans un étalage ou de la réclame d'un magasin ou d'un autre point de vente.

Punishment

(2) Any person who violates subsection (1) is guilty of an offence and is liable on summary conviction to a fine not exceeding ten thousand dollars or to imprisonment for one year or to both. 1974-75-76, c. 76, s. 18.

(2) Quiconque contrevient au paragraphe (1) est coupable d'une infraction et passible, sur déclaration sommaire de culpabilité, d'une amende n'excédant pas dix mille dollars ou d'un emprisonnement d'un an, ou de l'une et l'autre peine. 1974-75-76, c. 76, art. 18.

Peine

Definition of "scheme of pyramid selling"

**36.3** (1) For the purposes of this section, "scheme of pyramid selling" means

(*a*) a scheme for the sale or lease of a product whereby one person (the "first" person) pays a fee to participate in the scheme and receives the right to receive a fee, commission or other benefit

(i) in respect of the recruitment into the scheme of other persons either by the first person or any other person, or

(ii) in respect of sales or leases made, other than by the first person, to other persons recruited into the scheme by the first person or any other person; and

(*b*) a scheme for the sale or lease of a product whereby one person sells or leases a product to another person (the "second" person) who receives the right to receive a rebate, commission or other benefit in respect of sales or leases of the same or another product that are not

(i) sales or leases made to the second person,

(ii) sales or leases made by the second person, or

(iii) sales or leases, made to ultimate consumers or users of the same or other product, to which no right of further participation in the scheme, immediate or contingent, is attached.

Définition de «système de vente pyramidale»

**36.3** (1) Aux fins du présent article, «système de vente pyramidale» désigne

*a*) un système de vente ou de location d'un produit suivant lequel une personne (la «première» personne) paie un droit de participation au système et se voit conférer le droit de toucher un droit, une commission ou de recevoir un autre avantage

(i) relativement au recrutement d'autres participants au système par la première personne ou toute autre personne, ou

(ii) relativement à des ventes ou des locations effectuées, autrement que par la première personne, à d'autres participants au système recrutés par la première personne ou par toute autre personne; et

*b*) un système de vente ou de location d'un produit suivant lequel une personne vend ou loue un produit à une autre personne (la «seconde» personne) qui se voit conférer le droit de recevoir un rabais, une commission ou un autre avantage relativement à des ventes ou des locations du même produit ou d'un autre produit, qui ne sont pas

(i) des ventes ou des locations à la seconde personne,

(ii) des ventes ou des locations effectuées par la seconde personne, ni

(iii) des ventes ou des locations aux consommateurs ou utilisateurs ultimes du même produit ou de l'autre produit auxquelles ne s'attache aucun droit actuel ou

éventuel de participation ultérieure au système.

Pyramid selling

(2) No person shall induce or invite another person to participate in a scheme of pyramid selling.

(2) Nul ne doit inciter ou inviter une autre personne à participer à un système de vente pyramidale.

Vente pyramidale

Punishment

(3) Any person who violates subsection (2) is guilty of an offence and is liable

(*a*) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years or to both; or

(*b*) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both.

(3) Quiconque contrevient au paragraphe (2) est coupable d'une infraction et passible,

*a*) après déclaration de culpabilité à la suite d'une mise en accusation, d'une amende à la discrétion du tribunal ou d'un emprisonnement de cinq ans, ou de l'une et de l'autre peine; ou

*b*) après déclaration sommaire de culpabilité, d'une amende de vingt-cinq mille dollars ou d'un emprisonnement d'un an, ou de l'une et l'autre peine.

Peine

Where pyramid selling permitted by province

(4) This section does not apply in respect of a scheme of pyramid selling that is licensed or otherwise permitted by or pursuant to an Act of the legislature of a province. 1974-75-76, c. 76, s. 18.

(4) Le présent article ne s'applique pas aux systèmes de vente pyramidale autorisés, notamment par un permis, conformément à une loi provinciale. 1974-75-76, c. 76, art. 18.

Cas où les ventes pyramidales sont permises par la province

Definition of "scheme of referral selling"

**36.4** (1) For the purposes of this section, "scheme of referral selling" means a scheme for the sale or lease of a product whereby one person induces another person (the "second" person) to purchase or lease a product and represents that the second person will or may receive a rebate, commission or other benefit based in whole or in part on sales or leases of the same or another product made, other than by the second person, to other persons whose names are supplied by the second person.

**36.4** (1) Aux fins du présent article, «système de vente par recommandation» désigne un système de vente ou de location d'un produit suivant lequel une personne incite une autre personne (la «seconde» personne) à acheter ou à louer un produit et fait valoir que la seconde personne recevra ou pourra recevoir un rabais, une commission ou un autre avantage basés en totalité ou en partie sur des ventes ou des locations du même produit ou d'un autre produit faites à d'autres personnes dont les noms sont fournis par la seconde personne, sans l'intervention de cette dernière.

Définition de «système de vente par recommandation»

Referral selling

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

(2) Nul ne doit ni inciter ni inviter une autre personne à participer à un système de vente par recommandation.

Vente par recommandation

Punishment

(3) Any person who violates subsection (2) is guilty of an offence and is liable

(*a*) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years or to both; or

(*b*) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both.

(3) Quiconque contrevient au paragraphe (2) est coupable d'une infraction et passible,

*a*) après déclaration de culpabilité à la suite d'une mise en accusation, d'une amende à la discrétion du tribunal ou d'un emprisonnement de cinq ans, ou de l'une et de l'autre peine; ou

*b*) après déclaration sommaire de culpabilité, d'une amende de vingt-cinq mille dollars ou d'un emprisonnement d'un an, ou de l'une et l'autre peine.

Peine

Where referral selling permitted by a province

(4) This section does not apply in respect of a scheme of referral selling that is licensed or

(4) Le présent article ne s'applique pas aux systèmes de vente par recommandation autori-

Cas où les ventes par recommandation sont permises par la province

otherwise permitted by or pursuant to an Act of the legislature of a province. 1974-75-76, c. 76, s. 18.

sés, notamment par un permis, conformément à une loi provinciale. 1974-75-76, c. 76, art. 18.

Definition of "bargain price"

**37.** (1) 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 product advertised or like products are ordinarily sold.

Définition de «prix d'occasion»

**37.** (1) Aux fins du présent article, «prix d'occasion» désigne

*a*) le prix présenté dans une publicité comme étant un prix d'occasion par rapport à un prix habituel ou autrement; ou

*b*) un prix qu'une personne qui lit, entend ou voit la publicité prendrait raisonnablement pour un prix d'occasion étant donné les prix auxquels le produit annoncé ou des produits similaires sont habituellement vendus.

Bait and switch selling

(2) No person shall advertise at a bargain price a product that he does not supply in reasonable quantities having regard to the nature of the market in which he carries on business, the nature and size of the business carried on by him and the nature of the advertisement.

Vente à prix d'appel

(2) Nul ne doit faire de la publicité portant qu'il offre à un prix d'occasion un produit qu'il ne fournit pas en quantité raisonnable, eu égard à la nature du marché où il exploite son entreprise, à la nature et à la dimension de l'entreprise qu'il exploite et à la nature de la publicité.

Defence

(3) Subsection (2) does not apply to a person who establishes that

(*a*) he took reasonable steps to obtain in adequate time a quantity of the product that would have been reasonable having regard to the nature of the advertisement, but was unable to obtain such a quantity by reason of events beyond his control that he could not reasonably have anticipated;

(*b*) he obtained a quantity of the product that was reasonable having regard to the nature of the advertisement, but was unable to meet the demand therefor because that demand surpassed his reasonable expectations; or

(*c*) after he became unable to supply the product in accordance with the advertisement, he undertook to supply the same product or an equivalent product of equal or better quality at the bargain price and within a reasonable time to all persons who requested the product and who were not supplied therewith during the time when the bargain price applied and that he fulfilled the undertaking.

Moyen de défense

(3) Le paragraphe (2) ne s'applique pas à la personne qui établit

*a*) que, tout en ayant pris des mesures raisonnables pour obtenir en temps voulu le produit en quantités raisonnables eu égard à la nature de la publicité, elle n'a pu obtenir ces quantités par suite d'événements indépendants de sa volonté et qu'elle ne pouvait raisonnablement prévoir;

*b*) que, tout en ayant obtenu le produit en quantités raisonnables eu égard à la nature de la publicité, elle n'a pu satisfaire la demande de ce produit, celle-ci dépassant ses prévisions raisonnables; ou

*c*) qu'elle a pris, après s'être trouvée dans l'impossibilité de fournir le produit conformément à la publicité, l'engagement de fournir le même produit, ou un produit équivalent de qualité égale ou supérieure, au prix d'occasion et dans un délai raisonnable à toutes les personnes qui en avaient fait la demande et qui ne l'avaient pas reçu au cours de la période d'application du prix d'occasion et qu'elle a rempli son engagement.

Punishment

(4) Any person who violates subsection (2) is guilty of an offence and is liable on summary conviction to a fine not exceeding twenty-five thousand dollars or to imprisonment for one year or to both. R.S., c. C-23, s. 37; 1974-75-76, c. 76, s. 18.

Peine

(4) Quiconque contrevient au paragraphe (2) est coupable d'une infraction et passible sur déclaration sommaire de culpabilité, d'une amende d'au plus vingt-cinq mille dollars ou d'un emprisonnement d'un an, ou de l'une et

Sale above advertised price

**37.1** (1) No person who advertises a product for sale or rent in a market shall, during the period and in the market to which the advertisement relates, supply the product at a price that is higher than the price advertised.

Punishment

(2) Any person who violates subsection (1) is guilty of an offence and is liable on summary conviction to a fine not exceeding twenty-five thousand dollars or to imprisonment for one year or to both.

Saving

(3) This section does not apply

(*a*) in respect of an advertisement that appears in a catalogue in which it is prominently stated that the prices contained therein are subject to error if the person establishes that the price advertised is in error;

(*b*) in respect of an advertisement that is immediately followed by another advertisement correcting the price mentioned in the first advertisement;

(*c*) in respect of the sale of a security obtained on the open market during a period when the prospectus relating to that security is still current; or

(*d*) in respect of the sale of a product by or on behalf of a person who is not engaged in the business of dealing in that product.

Application

(4) For the purpose of this section, the market to which an advertisement relates shall be deemed to be the market to which the advertisement could reasonably be expected to reach, unless the advertisement defines the market more narrowly by reference to a geographical area, store, department of a store, sale by catalogue or otherwise. 1974-75-76, c. 76, s. 18; 1985, c. 19, s. 189.

Promotional contests

***37.2** (1) No person shall, for the purpose of promoting, directly or indirectly, the sale of a product, or for the purpose of promoting, directly or indirectly, any business interest, conduct any contest, lottery, game of chance or skill, or mixed chance and skill, or otherwise dispose of any product or other benefit by any

*[NOTE: Section 37.2 is not applicable to any contest, lottery, game of chance or skill, or of mixed chance and skill, that commenced before January 1, 1976. (1974-75-76, c. 76, s. 18(2)).]

l'autre peine. S.R., c. C-23, art. 37; 1974-75-76, c. 76, art. 18; 1986, c. 26, art. 36.

Vente au-dessus du prix annoncé

**37.1** (1) Il est interdit à quiconque fait de la publicité pour la vente ou la location d'un produit sur un marché de le fournir pendant la période et sur le marché que concerne la publicité, à un prix supérieur au prix annoncé.

Peine

(2) Quiconque contrevient au paragraphe (1) est coupable d'une infraction et passible, sur déclaration sommaire de culpabilité, d'une amende d'au plus vingt-cinq mille dollars ou d'un emprisonnement d'un an, ou de l'une et l'autre peine.

Réserve

(3) Le présent article ne s'applique pas

*a*) à la publicité figurant dans un catalogue qui prévoit clairement que le prix indiqué peut être inexact, si la personne établit cette inexactitude;

*b*) à la publicité indiquant un prix corrigé par celle qui suit;

*c*) à la vente d'une valeur mobilière obtenue sur le marché libre alors que le prospectus concernant cette valeur n'est pas encore périmé; ou

*d*) à la vente d'un produit par une personne ou au nom d'une personne qui n'exploite pas une entreprise portant sur ce produit.

Application

(4) Pour l'application du présent article, la publicité n'est réputée viser que le marché, qu'elle peut raisonnablement atteindre; toutefois, elle peut le limiter notamment à un secteur géographique, un magasin, le rayon d'un magasin, ou la vente par catalogue. 1974-75-76, c. 76, art. 18; 1985, c. 19, art. 189.

Concours publicitaire

***37.2** (1) Nul ne doit, aux fins de promouvoir, directement ou indirectement, soit la vente d'un produit, soit des intérêts commerciaux quelconques, organiser un concours, une loterie, un jeu de hasard, un jeu d'adresse ou un jeu où se mêlent le hasard et l'adresse, ni autrement attribuer un produit ou autre avantage par un

*[NOTA : L'article 37.2 ne s'applique en aucun cas à un concours, une loterie, un jeu de hasard, un jeu d'adresse ou un jeu où se mêlent le hasard et l'adresse, commencés avant le 1er janvier 1976. (1974-75-76, c. 76, art. 18(2)).]

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 unless

(*a*) there is adequate and fair disclosure of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the knowledge of the advertiser that affects materially the chances of winning;

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

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

jeu faisant intervenir le hasard, le talent ou un mélange des deux sous quelque forme que ce soit, à moins que ce concours, cette loterie, ce jeu ou cette attribution ne soit légal en l'absence du présent article et sauf si

*a*) le nombre et la valeur approximative du prix, les régions auxquelles ils s'appliquent et tout fait connu de l'annonceur modifiant sensiblement les chances de gain sont convenablement et loyalement divulgués;

*b*) la distribution des prix n'est pas indûment retardée; et

*c*) le choix des participants ou la distribution des prix sont déterminés en fonction de l'adresse des participants ou au hasard dans toute région à laquelle des prix ont été affectés.

Punishment

(2) Any person who violates subsection (1) is guilty of an offence and is liable

(*a*) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years or to both; or

(*b*) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both. 1974-75-76, c. 76, s. 18.

Peine

(2) Quiconque contrevient au paragraphe (1) est coupable d'une infraction et passible,

*a*) après déclaration de culpabilité à la suite d'une mise en accusation, d'une amende à la discrétion du tribunal ou d'un emprisonnement de cinq ans, ou de l'une et l'autre peine; ou

*b*) après déclaration sommaire de culpabilité, d'une amende de vingt-cinq mille dollars ou d'un emprisonnement d'un an, ou l'une et l'autre peine. 1974-75-76, c. 76, art. 18; 1986, c. 26, art. 37.

Defence

**37.3** (1) Sections 36 to 37.2 do not apply to a person who prints or publishes or otherwise distributes a representation or an advertisement on behalf of another person in Canada, where he establishes that he obtained and recorded the name and address of that other person and that he accepted the representation or advertisement in good faith for printing, publishing or other distribution in the ordinary course of his business.

Moyen de défense

**37.3** (1) Les articles 36 à 37.2 ne s'appliquent pas à la personne qui diffuse, notamment en les imprimant ou en les publiant, des indications ou de la publicité pour le compte d'une autre personne se trouvant au Canada, lorsqu'elle établit qu'elle a obtenu et consigné le nom et l'adresse de cette autre personne et qu'elle a accepté de bonne foi d'imprimer, de publier ou de diffuser de quelque autre façon ces indications ou cette publicité dans le cadre habituel de son entreprise.

Limitation

(2) No person shall be convicted of an offence under section 36 or 36.1, if he establishes that,

(*a*) the act or omission giving rise to the offence with which he is charged was the result of error;

(*b*) he took reasonable precautions and exercised due diligence to prevent the occurrence of such error;

(*c*) he, or another person, took reasonable measures to bring the error to the attention of the class of persons likely to have been

Restriction

(2) La personne accusée d'avoir commis une infraction tombant sous le coup des articles 36 ou 36.1 ne peut en être déclarée coupable si elle prouve que

*a*) l'infraction résulte d'une erreur;

*b*) elle a pris les précautions raisonnables et fait preuve de diligence pour prévenir cette erreur;

*c*) elle a pris ou fait prendre des mesures raisonnables pour porter l'erreur à l'attention des personnes susceptibles d'être concernées par les indications ou l'attestation; et

reached by the representation or testimonial; and

(*d*) the measures referred to in paragraph (*c*), except where the representation or testimonial related to a security, were taken forthwith after the representation was made or the testimonial was published.

*d*) les mesures mentionnées à l'alinéa *c*) ont été prises sans délai après la publication des indications ou de l'attestation, sauf lorsque celles-ci concernent des valeurs mobilières.

Exception

(3) Subsection (2) does not apply in respect of a person who, in Canada, on behalf of a person outside Canada, makes a representation to the public or publishes a testimonial. 1974-75-76, c. 76, s. 18.

(3) Le paragraphe (2) ne s'applique pas à la personne qui, au Canada, donne des indications au public ou publie une attestation pour le compte d'une personne se trouvant à l'étranger. 1974-75-76, c. 76, art. 18.

Exception

# APPENDIX II

**Witnesses and Submissions**

| Issue No. | Date | Organization and Witnesses |
|---|---|---|
| 21 | Thursday, October 1, 1987 | **Department of Consumer and Corporate Affairs:**<br>Ian D. Clark,<br>Deputy Minister;<br>Klaus Decker,<br>Director, Marketing Practices Branch (Misleading Advertising);<br>Carol Knapp,<br>Chief, Merchandise Standards Division, Consumer Products Branch. |
| 22 | Tuesday, November 17, 1987 | **Association of Canadian Advertisers Incorporated:**<br>John Foss,<br>President;<br>Brenda Andrachuk,<br>Chairman of the Board of Directors. |
| 23 | Thursday, November 19, 1987 | **Pharmaceutical Advertising Advisory Board:**<br>Michael J. Farley,<br>Vice-Chairman;<br>Murray D. Shantz,<br>Commissioner; |

| Issue No. | Date | Organization and Witnesses |
|---|---|---|
| | | Arnold V. Raison,<br>Senior Consultant; |
| | | Raymond Chepesiuk,<br>Assistant Commissioner. |
| 24 | Tuesday, December 8, 1987 | **Canadian Advertising Foundation:** |
| | | Alan Rae,<br>President; |
| | | Suzanne Keeler,<br>Director, Advisory Division; |
| | | Niquette Delage,<br>Director General,<br>Conseil des normes<br>de publicité. |
| | | **Corporation professionnelle des diététistes du Québec:** |
| | | Lise Bertrand,<br>President,<br>Public Affairs Committee; |
| | | Janine Desrosiers Choquette,<br>Secretary and Director<br>General; |
| | | Hélène Tremblay,<br>Dietician. |
| 25 | Thursday, December 10, 1987 | **Belobaba, Edward P.**<br>Partner with Gowling and Henderson. |
| 26 | Tuesday, December 15, 1987 | **Retail Council of Canada:** |
| | | Alasdair McKichan,<br>President; |

| Issue No. | Date | Organization and Witnesses |
|---|---|---|
| | | James H. Farrell,<br>Chairman of the Legislation Committee and Vice-President General Counsel & Secretary,<br>Loblaw Companies Ltd.; |
| | | Michael Butler,<br>Member of the Legislation Committee and Assistant Secretary and Counsel,<br>Sears Limited. |
| 27 | Thursday, January 21, 1988 | **Canadian Council of Better Business Bureaus:** |
| | | Julien Guernon,<br>President; |
| | | Jean Bédard,<br>Chairman. |
| 27 | Thursday, January 21, 1988 | **Institute of Canadian Advertising:** |
| | | Keith McKerracher,<br>President; |
| | | Claude R. Thomson,<br>Legal Counsel. |
| 28 | Thursday, January 28, 1988 | **Public Interest Research Centre:** |
| | | Andrew Roman,<br>Executive Director and General Counsel; |
| | | Rob Horwood,<br>Counsel. |

| Issue No. | Date | Organization and Witnesses |
|---|---|---|
| 29 | Tuesday, February 23, 1988 | **Consumers' Association of Canada:**<br><br>Andrew Cohen,<br>Director General;<br><br>Marilyn Lister,<br>Member of the Board of Directors and Chairperson of the Policy Advisory Council.<br><br>Kathleen Stephenson,<br>Director,<br>Association Policy. |
| 30 | Thursday, February 25, 1988 | **Canadian Direct Marketing Association:**<br><br>Terence Belgue,<br>President.<br><br>**Toronto Star:**<br><br>Marilyn Anderson,<br>Consumer Affairs Journalist. |
| 31 | Thursday, February 25, 1988 | **Grocery Products Manufacturers of Canada (G.P.M.C.):**<br><br>Marilyn Knox,<br>Vice-President;<br><br>Bob Millar,<br>Vice-President, Marketing,<br>Nabisco Brands Limited,<br>Member G.P.M.C.<br>Marketing Council; |

| Issue No. | Date | Organization and Witnesses |
|---|---|---|
| | | Ed Marra,<br>Group Vice-President,<br>Frozen Food Division,<br>Nestlé Enterprises Limited,<br>Member G.P.M.C. Marketing Council. |
| 32 | Thursday, March 3, 1988 | **Automobile Protection Association:**<br><br>John Terauds,<br>Director of Research. |
| 33 | Wednesday, March 16, 1988 | **Bertrand, Robert**<br>Former Assistant Deputy Minister, Bureau of Competition Policy, Department of Consumer and Corporate Affairs. |
| 34 | March 22, 1988 | **Department of Consumer and Corporate Affairs:**<br><br>Ian D. Clark,<br>Deputy Minister;<br><br>Klaus Decker,<br>Director, Marketing Practices Branch (Misleading Advertising);<br><br>Mel Cappe,<br>Assistant Deputy Minister,<br>Bureau of Policy Coordination. |

**Visit of the Standing Committee on Consumer and Corporate Affairs to Washington D.C. on March 29 and 30, 1988**

**Individuals met by the Committee**

On March 29, 1988

The Honourable Mary Azcuenaga,
Commissioner,
Federal Trade Commission;

Congressman Bob Whittaker,
House of Representatives;

Richard Huberman,
Senior Counsel,
House Sub-Committee on Commerce,
Consumer Protection and Competitiveness;

Ralph Nader,
Consumer Advocate.

On March 30, 1988

William MacLeod,
Director, Bureau of Consumer Protection
Federal Trade Commission;

Lee Peeler,
Associate Director, Advertising Practices,
Bureau of Consumer Protection,
Federal Trade Commission;

Mark Silvergeld,
Director,
Consumers Union.

## REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 99(2), the Committee requests that the Government table a comprehensive response to the Report within one hundred and fifty (150) days.

A copy of the relevant Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs (*Issues 20 to 34 of the Second Session, Thirty-Third Parliament and Issue 36 which includes this Report*) is tabled.

Respectfully submitted,

Mary Collins,
Chairperson

## MINUTES OF PROCEEDINGS

[*Text*]

THURSDAY, MAY 5, 1988
(50)

The Standing Committee on Consumer and Corporate Affairs met *in camera* at 9:42 o'clock a.m., this day, in room 208, West Block, the Chairperson, Mary Collins, presiding.

*Members of the Committee present*: Mary Collins, Dave Dingwall, Lorne McCuish, Joe Reid.

*Acting Member present*: John Rodriguez for David Orlikow.

*In attendance*: *From the Research Branch, Library of Parliament*: Margaret Smith, Research Officer.

In accordance with its mandate under Standing Order 96(2), the Committee resumed consideration of the subject of misleading advertising.

The Committee proceeded to consider the document entitled "Summary of submissions made to the Standing Committee on Consumer and Corporate Affairs on the subject of Misleading Advertising", and the proposed outline of the Report.

It was agreed,—That the Committee authorize one member from each party to attend the Conference on Consumer Protection that will be held in Toronto, Ontario on June 15, 1988, and that the Committee pay the expenses that will be incurred by the members for transportation, registration fees and meals.

At 11:00 o'clock a.m., the Committee adjourned to the call of the Chair.

WEDNESDAY, MAY 11, 1988
(51)

The Standing Committee on Consumer and Corporate Affairs met *in camera* at 3:59 o'clock p.m., this day, in room 705, 151 Sparks Street, the Chairperson, Mary Collins, presiding.

*Members of the Committee present*: Mary Collins, Dave Dingwall, Lorne McCuish.

*Acting Member present*: John Rodriguez for David Orlikow.

*In attendance*: *From the Research Branch, Library of Parliament*: Margaret Smith, Research Officer.

In accordance with its mandate under Standing Order 96(2), the Committee resumed consideration of the subject of misleading advertising.

The Committee proceeded to consider the document entitled "Summary of Submissions made to the Standing Committee on Consumer and Corporate Affairs on the subject of misleading advertising", and the proposed outline of the Report.

It was agreed,—That the Committee seek permission from the House to travel to Toronto, Ontario on June 15, 1988 for the purpose of attending a Conference on Consumer Protection, and that the Committe pay the expenses incurred by one member of each party for transportation, registration fees, hotel accommodation and meals.

At 4:43 o'clock p.m., the Committee adjourned to the call of the Chair.

WEDNESDAY, MAY 25, 1988
(52)

The Standing Committee on Consumer and Corporate Affairs met *in camera* at 3:40 o'clock p.m., this day, in room 208, West Block, the Chairperson, Mary Collins, presiding.

*Members of the Committee present*: Mary Collins, Dave Dingwall, Ricardo Lopez, Peter Peterson, Joe Reid, John Rodriguez.

*In attendance*: *From the Research Branch, Library of Parliament*: Margaret Smith, Research Officer.

In accordance with its mandate under Standing Order 96(2), the Committee resumed consideration of the subject of misleading advertising.

The Committee commenced consideration of the Draft Report on Misleading Advertising.

At 3:50 o'clock p.m., the Committee adjourned to the call of the Chair.

TUESDAY, MAY 31, 1988
(53)

The Standing Committee on Consumer and Corporate Affairs met *in camera* at 3:46 o'clock p.m., this day, in room 208, West Block, the Chairperson, Mary Collins, presiding.

*Members of the Committee present*: Mary Collins, Dave Dingwall, Ricardo Lopez, Peter Peterson, Joe Reid.

*Acting Member present*: John Rodriguez for David Orlikow.

*In attendance*: *From the Research Branch, Library of Parliament*: Margaret Smith, Research Officer.

In accordance with its mandate under Standing Order 96(2), the Committee resumed consideration of the subject of misleading advertising.

The Committee resumed consideration of the Draft Report on Misleading Advertising.

At 5:12 o'clock p.m., the Committee adjourned to the call of the Chair.

TUESDAY, JUNE 7, 1988
(54)

The Standing Committee on Consumer and Corporate Affairs met *in camera* at 4:01 o'clock p.m., this day, in room 306, West Block, the Chairperson, Mary Collins, presiding.

*Members of the Committee present*: Mary Collins, Dave Dingwall, Peter Peterson, Joe Reid.

*Acting Member present*: John Rodriguez for David Orlikow.

*In attendance*: *From the Research Branch, Library of Parliament*: Margaret Smith, Research Officer.

In accordance with its mandate under Standing Order 96(2), the Committee resumed consideration of the subject of misleading advertising.

The Committee resumed consideration of the Draft Report on Misleading Advertising.

At 5:53 o'clock p.m., the Committee adjourned to the call of the Chair.

WEDNESDAY, JUNE 8, 1988
(55)

The Standing Committee on Consumer and Corporate Affairs met *in camera* at 3:42 o'clock p.m., this day, in room 208, West Block, the Chairperson, Mary Collins, presiding.

*Members of the Committee present*: Mary Collins, Dave Dingwall, Ricardo Lopez, Lorne McCuish.

*Acting Member present*: John Rodriguez for David Orlikow.

*In attendance*: *From the Research Branch, Library of Parliament*: Margaret Smith, Research Officer.

In accordance with its mandate under Standing Order 96(2), the Committee resumed consideration of the subject of misleading advertising.

The Committee resumed consideration of the Draft Report on Misleading Advertising.

At 4:35 o'clock p.m., the Committee adjourned to the call of the Chair.

TUESDAY, JUNE 21, 1988
(56)

The Standing Committee on Consumer and Corporate Affairs met *in camera* at 3:39 o'clock p.m., this day, in room 306, West Block, the Chairperson, Mary Collins, presiding.

*Members of the Committee present*: Mary Collins, Dave Dingwall, Lorne McCuish.

*Acting Members present*: Allan McKinnon for Joe Reid; John Rodriguez for David Orlikow.

*In attendance*: *From the Research Branch, Library of Parliament*: Margaret Smith, Research Officer.

In accordance with its mandate under Standing Order 96(2), the Committee resumed consideration of the subject of misleading advertising.

The Committee resumed consideration of the Draft Report on Misleading Advertising.

It was agreed,—That the draft Report, as amended, be adopted as the Committee's Third Report to the House and that the Chairperson be authorized to make such typographical and editorial changes as may be necessary without changing the substance of the draft Report and that the Chairperson be instructed to present the said Report to the House.

It was agreed,—That pursuant to Standing Order 99(2), the Committee request that the government table, within 150 days, a comprehensive response to its Third Report.

It was agreed,—That the Committee print 2,000 copies of its Third Report to the House in tumble bilingual format with a distinctive cover.

It was agreed,—That the Committee hold a press conference following the tabling of its Report to the House.

At 4:00 o'clock p.m., the Committee adjourned to the call of the Chair.

Richard Chevrier
*Clerk of the Committee*