

# Update

## Advertising & Marketing

April 1, 2009

### A clarified standard of proof and increased penalties for deceptive marketing and misleading advertising

Amendments to the *Competition Act* (the “Act”) have recently come into force which include significant changes regarding deceptive marketing and misleading advertising.

#### Q. Have the amendments changed the nature of the marketing and advertising practices prohibited by the Act?

**A.** No. The Act still prohibits the making of any representation to the public that is false or misleading in a material respect for the purpose of promoting the supply or use of a product (knowingly or recklessly doing so, in the case of a criminal offence). However, the amendments have made it clear that in order to establish a deceptive marketing or misleading advertising offence it is not necessary to show that:

- any person was deceived or misled by a representation;
- any member of the public to whom the representation was made was within Canada; or
- the representation was made in a place to which the public has access.

The amendments have codified the case law that a representation can be misleading or deceptive if

someone was *likely* to be misled or deceived (as opposed to actually misled or deceived). In addition, the amendments appear to extend considerably the notion of “public” both beyond Canadian borders (such that Canadian businesses that advertise outside of Canada must now ensure that their international advertising and marketing practices comply with Canadian law in this regard) and what are conventionally considered to be “public” places (e.g. capturing misleading representations made in an office, not just those displayed on a billboard).

#### Q. Have the amendments changed the penalties for deceptive marketing and/or misleading advertising?

**A.** Yes. Penalties for these offences have increased significantly. For example, the penalty for a corporation engaging in a first time non-criminal offence has increased by 100 times, to a maximum of \$10,000,000, while repeat corporate offenders can be fined up to \$15,000,000. For indictable offences, the prison term has increased from 5 to 14 years.

#### Q. Do the amendments give the Competition Tribunal any additional powers with respect to deceptive marketing and/or misleading advertising?

**A.** Yes. Offending advertisers can be required to pay restitution to victims of non-criminal deceptive marketing practices and, in order to ensure funds are available for restitution, an advertiser’s assets can be frozen and disposal of property prevented, in advance of a finding that it has engaged in offending conduct.

# Goodmans<sup>LLP</sup> Update

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If you have any questions about these changes, or deceptive marketing and misleading advertising generally, please contact one of the Goodmans lawyers listed below:

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