ADDRESSING MISLEADING ADVERTISING IN THE CANADIAN TELECOMMUNICATIONS INDUSTRY: A COMPLEX, EVOLVING STORY

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The purpose of this article is to explore why marketing claims of Canadian telecommunications providers have sparked a comparatively large amount of litigation in recent years, to examine the nature of that litigation, and to review the strengths, weaknesses and distinctive characteristics of the various legal and extra-legal mechanisms available to address problematic advertising practices of the sector. This analysis forms the basis for a number of recommendations for reform. While the significant usage of certain existing Competition Act-based mechanisms to address misleading telecommunications advertising, together with the existence and use of options outside the Competition Act, might lead an observer to conclude that a properly functioning and comprehensive array of redress approaches are optimally provided at the present time, this article suggests that there are limitations associated with the current mechanisms, and opportunities for improvements that would be potentially beneficial to all parties concerned.

Le présent article vise à examiner les raisons pour lesquelles les indications publicitaires des fournisseurs canadiens de services de télécommunication ont suscité un nombre relativement important de litiges depuis quelques années. Il examine aussi la nature de ces litiges ainsi que les forces, les faiblesses et les caractéristiques particulières des divers mécanismes juridiques et extrajuridiques qui peuvent être mis en œuvre face aux pratiques publicitaires problématiques du secteur. Cette analyse jette les bases d'une série de recommandations de réforme. Vu l'utilisation fréquente de certains mécanismes actuels fondés sur la Loi sur la concurrence ainsi que le recours à d'autres options indépendantes de la Loi, un observateur pourrait conclure qu'il existe un éventail optimal de recours efficaces et diversifiés. L'article indique toutefois que les mécanismes actuels souffrent de certaines limites et qu'il y a des possibilités d'améliorations susceptibles d'être bénéfiques pour toutes les parties concernées.

Introduction

Canadian telecommunications providers[1] have been described as "fierce competitors with enormous budgets who aggressively market"[2] their services. Even a cursory review of Canadian court decisions[3] and media headlines[4] in recent years reveals that the marketing practices[5] of these providers have been the source of considerable controversy, leading among other things to a proliferation of misleading advertising-based[6] litigation initiated variously by the Competition Bureau,[7] by telecommunications providers against each other,[8] and by consumers.[9] Claims by Canadian telecommunications providers concerning which of them has "the fastest" or "most reliable" product, and the "least dropped calls" have all been the subject of legal actions,[10] as have been representations concerning the price of telecommunications services and the related benefits of particular telecommunications service packages,[11] and the effect of disclaimer clauses.[12] In contrast, misleading advertising issues in other major federally regulated sectors, such as the banking and airlines industries, have attracted comparatively little litigation.[13] Beyond the Canadian experience, evidence suggests that somewhat similar problematic marketing activity involving the telecommunications sector is taking place and attracting attention,[14] although it would not appear to have led to the large amount of litigation taking place in recent years in Canada.

The purpose of this article is to explore why marketing claims of Canadian telecommunications providers have sparked a comparatively large amount of litigation in recent years, to examine the nature of that litigation, and to review the strengths, weaknesses and distinctive characteristics of the various legal and extra-legal mechanisms available to address problematic advertising practices of the sector. This analysis forms the basis for a number of recommendations for reform. While the significant usage of certain existing *Competition Act*-based mechanisms to address misleading telecommunications advertising, together with the existence and use of options outside the *Competition Act*, might lead an observer to conclude that a properly functioning and comprehensive array of redress approaches are optimally provided at the present time, analysis undertaken here suggests limitations associated with the current mechanisms, and opportunities for improvements that would be potentially beneficial to all parties concerned.

In the first part of the article, a brief exploration is undertaken of possible factors explaining the comparatively high number of legal actions targeting marketing claims of Canadian telecommunications providers. Notable factors identified include the recent introduction of new competitors into the sector, the rapidly-evolving technologies associated with telecommunications that have the effect of stimulating ever-changing marketing campaigns reflective of the new technologies, and the evolving nature of the legal regime. Following this is a review of the existing legal and extra-legal mechanisms available to address such activity, including *Competition Act* criminal prosecutions, Competition Bureau-initiated civil track actions, competitor or consumer private legal actions under *Competition Act* s. 36, competitor tort-law based actions, consumer class actions based on a number of grounds, provincial strict liability offence-based actions, and self-regulatory approaches. While the focus in this article is on those options found in the *Competition Act* (since its provisions have to date been most frequently employed to address allegedly deceptive telecommunications practices), the available non-*Competition Act* options are also canvassed. The distinctive characteristics of each option are discussed, as revealed by actions undertaken to date. This is followed by a review and analysis of the strengths and limitations of each approach, and proposals for reform. Finally, a brief set of conclusions is provided.

Explanatory Factors Underlying Current Litigation

The suggestion made in this article is that the rise in litigation concerning the accuracy of telecommunications claims is the product of a number of factors, which are briefly reviewed in this section.

1. Introduction of new competitors into the Canadian telecommunications sector

Recent activity and decisions by the Canadian Radio-Television and Telecommunications Commission (CTRC) suggest a desire on its part to resist telecommunications industry concentration among a limited number of players, and to favour the opening of the sector to a more numerous and diverse set of competitors.[15] In 2007, the federal government decided to allow new wireless telecommunications providers to compete for the same population of consumers, putting pressure on all providers to identify unique advantages of their services when

compared with their competitors. The nature of the increasingly competitive environment is well captured by Marocco, J., in the 2011 Ontario Superior Court decision of *Commissioner of Competition v. Chatr Wireless Inc.*, concerning an application by the Bureau for a sealing order in respect of certain commercially sensitive information, where he summarized the situation underlying the litigation in question in that case as follows:

> The Canadian wireless telecommunications market was, until recently, composed primarily of three companies: Bell Canada, Telus Communications Co. and Rogers Communications Inc. These three companies controlled 95% of the wireless telecommunication market in 2007 when the Government of Canada announced the exclusive sale of wireless bandwidth to new service providers. The Government of Canada's intention was to increase competition and choice for Canadian consumers and businesses, and, at the same time, reduce Canadian wireless telecommunication rates which were among the highest in the world.[16]

As telecommunications providers seek to position their products and services as superior to those of their competitors, some have resorted to claims concerning their purported unique features and capabilities. Thus, for example, in *Telus Communications Co. v. Rogers Communications Inc.*, the litigation revolved around the attempt by Telus to obtain an interlocutory injunction to compel Rogers to refrain from making what Telus viewed as unsupportable claims that it had "Canada's most reliable network" and "Canada's fastest network." The financial stakes underlying telecommunications sector campaigns based on representations of this type are high. For instance, in the aforementioned *Telus v. Rogers* litigation, Telus claimed that "the pre-Christmas retailing period represents the busiest time of the year for the sale of mobile devices, and that it would suffer irreparable harm in the event that Rogers continued its advertising campaign."[17] The British Columbia Court of Appeal upheld the granting of the interlocutory injunction concerning the claim by Rogers that it was "Canada's most reliable network" (and on its own volition, Rogers ceased advertising itself as having "Canada's fastest network").

2. The fast evolving nature of the technologies involved in telecommunications

The technologies associated with consumer-oriented telecommunications are constantly changing. As they do, providers are continually improving and adjusting their consumer features, options, and marketing campaigns to reflect the new technological developments. Failure to refresh and adjust marketing campaigns can result in setbacks. Thus, for example, in the *Rogers v. Telus* litigation discussed immediately above, Rogers was compelled to withdraw its "fastest" and "most reliable" marketing campaign when Bell Canada and Telus adopted "GSM technology and the HSPA and HSPA+ protocols," thereby transitioning from less advanced EVDO technology[18] that they had previously been using. In effect, the change in technologies used by Bell Canada and Telus shifted the basis for the pre-existing marketing campaign of Rogers, leading to a successful competitor challenge concerning the empirical basis for the performance claims of Rogers.

A current enforcement action by the Competition Bureau against wireless competitors Rogers Telecommunications Inc., Bell Canada, Telus Communications Co,[19] and others revolves around premium texting services for mobile phones, and the adequacy of cost disclosures associated with such services.[20] The entire field of premium texting services for mobile phones represents a technological innovation and customer option that was not widely available ten years ago. This technological development opened the door for marketing activities that, as the ongoing enforcement action indicates, the Bureau considers to be potentially luring unsuspecting consumers into assuming unexpected costs:[21] in effect, the intricacies of payment for a new innovation in premium texting services, and the claims concerning the prices of such services, has become a source of litigation.

3. Evolving Regulatory Landscape

In addition to the introduction of new competitors in the telecommunications service provider sector, and evolving technologies underlying such services, the regulatory landscape itself is also in flux. For example, in 2009, the *Competition Act*[22] was amended, with the administrative penalties for engaging in the identified misleading practices substantially increased (e.g., for corporations, from a

previous maximum of $100,000 for a first offence to $10 million for a first offence); as well, for criminal deceptive marketing offences, the maximum term of imprisonment was increased to 14 years (previously 5 years).[23] In an apparent effort to build on these amendments, the Competition Bureau has indicated that enforcement is now an identified priority.[24]

Also in 2009, section 224 of the Quebec *Consumer Protection Act*[25] pertaining to misleading advertising was amended to clarify that "the price advertised must include the total amount the consumer must pay for the goods or services."[26] The potential application of this provision (together with related provisions such as ss. 12, 219 and 228 of the Act) to telecommunications providers is illustrated by the recent announcement of a consumer class action against a Quebec telecommunications provider for restitution on the amounts allegedly improperly charged for telecommunications services.[27]

There have also been developments in terms of court interpretations of certain relevant provisions. For example, in *Telus Communications Co. v. Rogers Communications Inc.*, the Court of Appeal concluded that s. 36 of the *Competition Act*, which provides a civil remedy for a person who alleges that he, she, or it has suffered damages by reason of a violation of Part VI of the *Act*, can lead to an interim injunction, even though s. 36 does not specifically indicate that private parties have the right to seek injunctive relief.[28] In 2012, in *Richard v. Time Inc*,[29] an action concerning the misleading representation provisions of the Quebec *Consumer Protection Act* (CPA), the Supreme Court of Canada provided new guidance concerning the level of sophistication (modest) expected of an average consumer when confronted with advertising "fine print,"[30] an interpretation that could have repercussions for telecommunications marketing under the Quebec legislation, the consumer protection legislation of other provinces, and potentially the *Competition Act* as well.[31]

4. Differing Perspectives Concerning the Legality of Enforcement Options

A review by the author of Canadian legal actions pertaining to misleading advertising representations of telecommunications providers suggests differing interpretations concerning the authority, benefits,

costs, and effects of using different regulatory tools. In some cases, this has led to markedly different litigation responses by competitors to government enforcement actions. For example, for two separate civil actions brought by the Commissioner against Bell Canada on the one hand, and against Rogers Communications on the other, the two companies responded in significantly different ways. Bell Canada agreed to a consent order involving payment of a $10 million administrative monetary penalty (AMP), with a Bell spokesman reported as noting that"[w]hile we totally disagree, we agreed to resolve the issue with the consent agreement and move forward rather than grinding through a lengthy and costly legal challenge."[32]

In contrast, facing a $10 million AMP, Rogers Communications has chosen to challenge the constitutionality of *Competition Act* provisions which authorize the imposition of administrative penalties of that magnitude through a civil process (alleging that this is contrary to the protections associated with penal processes, per *Charter* s. 7 and s. 11) and to challenge the constitutional authority under the *Act* to require companies to make "adequate and proper" tests of a proper performance before making advertising claims with the burden of proof being on the party making the representations (alleging that this provision is contrary to the *Charter* s. 2 protections for freedom of expression and not justifiable under s. 1).[33] The difference in litigation approaches of Bell Canada and Rogers Communications to the civil track proceedings they faced or are facing may suggest contrasting competitor conclusions concerning the legality of certain *Competition Act* enforcement actions, and concerning the appropriate strategies for responding to such actions. More is said concerning the distinctive attributes, advantages and disadvantages of the various enforcement options below.

Taken together, these evolving and interacting factors create uncertainty and volatility – if not a "perfect storm" for litigation concerning representations of telecommunications providers, then at least what could be more modestly described as "a fertile subject" for such litigation.

Examining the Mechanisms Available to Address Misleading Telecommunications Advertising

Although the lion's share of activity to address telecommunications representations has been undertaken pursuant to *Competition Act*

provisions, a number of other options are also available and some have been used as a basis for action. For the purposes of this article, seven mechanisms have been identified as currently applicable:

- criminal offence prosecutions brought by the Attorney General of Canada under the *Competition Act*;
- Bureau-initiated civil track actions under the *Competition Act*;
- competitor or consumer private actions brought under s. 36 of the *Competition Act*;
- competitor against competitor tort-based actions;
- consumer class actions (drawing on the *Competition Act* and otherwise);
- provincial strict liability offence-based enforcement actions; and
- self-regulatory approaches developed by Advertising Standards Canada.

Each of these options is reviewed below, drawing where possible on existing or current actions pertaining to telecommunications provider representations.

Federal Criminal Prosecutions Pursuant to ss. 52(1) of the *Competition Act*

At the federal level, the *Competition Act* has been the key legislation used to address deceptive representations of telecommunications providers, although other federal legislation could apply.[34] The Commissioner of Competition and the Department of Public Prosecutions can initiate actions[35] to address misleading claims using either of the criminal or civil tracks provided under the *Competition Act*. Looking first at the criminal provisions, sub-section 52(1) of the *Competition Act* is the key criminal provision potentially applicable to address misleading claims. Sub-section 52(1) stipulates that:

> [n]o 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, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

Under this provision, a representation could be characterized as false (i.e., incorrect), or it could be characterized as misleading (i.e., not necessarily factually incorrect, but nevertheless unacceptably deceptive). Because the promotional representation can be made "by any means whatever," it does not matter whether the promotion occurred in a newspaper, on television, on the internet, on a billboard, or otherwise. A successful prosecution under ss. 52(1) involves proof beyond a reasonable doubt that the representation was knowingly or recklessly made.[36] To attract liability, it must also be established that the false or misleading claim was material, meaning likely to influence a consumer into buying or using or otherwise altering their conduct: an inconsequential inaccuracy will not attract liability. Sub-section 52(4) provides further elaboration on the test for determining liability:

> [i]n a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

Pursuant to ss. 52(1.1), it is not necessary to prove that any person was actually deceived or misled.

In *Bell Mobility Inc. v. Telus Communications Co.*[37] the Court applied ss. 52(1) as follows:

> [f]irst, the trial judge must determine the general impression conveyed to consumers, based only on the representations actually made in the advertisements. This is the impression formed by consumers upon seeing the advertising in its intended form. Once assessed in light of the information presented to the consumer in the body of the advertisement, the impression is fixed as the impression of the average consumer. ... I would only add that s. 52(4) requires that the trial judge also examine the literal meaning of the representation in determining whether the advertisement is false or misleading.... The second step of the test requires the court, having regard to extraneous facts if necessary, to gauge whether the impression conveyed to consumers by the representation is false or, alternatively, misleading in a material respect. Only at this stage is extraneous evidence considered, not to alter the general impression, but to gauge whether the impression is false or misleading. [38]

The fact that actual deception as a result of an advertisement is not necessary, and that the impression of an envisaged fictional "average consumer" is relevant to determinations of guilt or innocence, has opened the door to judicial explorations of the characteristics of such average consumers.[39] The penalties following conviction under ss. 2(1) on summary conviction include fines of up to $200,000 and/or imprisonment for up to one year, or on indictment, unlimited fines (in the discretion of the court) and/or imprisonment for up to 14 years. [40]

While technically, a choice is available under the *Competition Act* concerning whether to pursue an allegedly false or misleading advertising claim through either a criminal enforcement action under ss. 52(1), or via the "civil track" provisions under Part VII.1 of the *Act*, a Competition Bureau Information Bulletin has indicated that the Bureau will pursue the civil track unless clear and compelling evidence shows that the misleading claims were intentional and that it would be in the public interest to bring a criminal prosecution. [41] The *Competition Act* stipulates that no proceedings may be commenced under ss. 52(1) against a person against whom an order is sought under Part VII.I on the basis of the same or substantially the same facts as would be alleged in proceedings under ss. 52(1).[42] To date, there have been no ss. 52(1) criminal prosecutions for misleading advertising claims made against telecommunications providers. This might reflect recognition by the Bureau of the challenges associated with proving beyond a reasonable doubt that the telecommunications representations they have reviewed are knowingly or recklessly made, and perhaps a conclusion by the Bureau that the representations in question are more easily and more appropriately addressed through other provisions, such as pursuant to the civil track provisions described below.

Federal Civil Track Enforcement Actions Pursuant to Part VII.1 of the *Competition Act*

Sections 74.01, 74.02, 74.03 and 74.1 of the *Competition Act* are the key Part VII.1 civil track provisions that could be used to address false or misleading representations of telecommunications providers. In substantive terms, the civil track false or misleading advertising provisions operate along somewhat similar lines to the *Competition Act* ss. 52(1) offence in terms of the *actus reus* of the alleged illegal representation. For example, as with the ss. 52(1) offence, a "general impression" test

applies under the civil track. Sub-section 74.03(5) expressly stipulates that in proceedings under sections 74.01 and 74.02, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the person who made the representation engaged in the reviewable conduct. In addition, in proceedings under sections 74.01 and 74.02, it is not necessary to establish that any person was deceived or misled (ss. 74.03(4)), as is the case with respect to ss. 52(1) prosecutions.

However, there are also significant differences between the criminal and civil tracks. One difference is that, under the civil track, there is no requirement of proof of intent or recklessness to establish liability, as there is for a criminal prosecution under ss. 52(1). Another is the fact that proof is on the civil standard of balance of probabilities, not the criminal standard of beyond a reasonable doubt. A specific civil track ground of action is provided to address persons who makes 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 on the person making the representation. There is no analogue to this for the ss. 52(1) criminal offence. Performance claims pertaining to reliability, speed, and other attributes have been made by Canadian telecommunications providers, and some of these claims have become the focal point of civil track legal actions.[43]

Another difference between the criminal and civil tracks revolves around the repercussions for those found to have engaged in unacceptable reviewable conduct. Pursuant to ss. 74.1(1), where, on application by the Commissioner, the Competition Tribunal or relevant court determines that a person is engaging in or has engaged in reviewable conduct such as misleading performance claims under paragraph 74.01(1)(b), the Tribunal or court may order the person: to not engage in the conduct; to publish a notice bringing to the attention of affected persons the determination made under the section; to pay "administrative monetary penalties" (AMPs) of up to $750,000 (for individuals) and up to $10 million (for corporations) for first time conduct; and to order compensation. In keeping with the non-criminal nature of the proceedings, there is no possibility of imprisonment for civil track offences. Pursuant to ss. 74.1(3), persons can escape liability for AMPs, notices or compensation orders if they can establish that they exercised due

diligence to prevent the reviewable conduct from occurring. The terms of an order made against a person are to be determined with a view to promoting conduct by that person that is in conformity with the purposes of Part VII.1 and not with a view to punishment (ss. 74.1(4)).

Even though jail is not a possibility, Rogers has made the argument in civil proceedings in progress at the time of writing that a $10 million AMP is unconstitutional under sections 7 and 11 of the *Charter* because penalties of that magnitude are essentially criminal in nature, yet subject to only the civil balance of probabilities standard of proof.[44]

Consent agreements are another option provided under the civil track, available for situations where a company that is under investigation decides not to contest an anticipated disposition. A consent agreement occurs when the Commissioner and the alleged offender agree on the terms of the disposition (ss. 74.12 (1)). The consent agreement is to be based on terms that could be the subject of an order of a court against that person, and may include other terms, whether or not all terms could be imposed by the court (ss. 74.12(2)). Upon registration of the consent agreement (ss. 74.12(3)), the proceedings, if any, are terminated and the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the court (ss. 74.12(4)).

As mentioned earlier, the consent agreement procedure was used in 2011[45] in proceedings against Bell Canada. Bell agreed to a $10 million AMP, and agreed to stop making what the Bureau had concluded were misleading representations about the prices offered for its services.[46] The Bureau had determined that, since December 2007, Bell had charged higher prices than advertised for many of its services, including home phone, Internet, satellite TV and wireless. [47] The advertised prices were not in fact available, as additional mandatory fees, such as those related to TouchTone, modem rental and digital television services, were hidden from consumers in fine-print disclaimers.[48] Bell Canada agreed to take immediate steps to cease any false or misleading representations regarding its services that are currently being published, disseminated or communicated to the public, to not make false or misleading representations in the future in respect of the prices of its services, and to not make any new representations that convey a general impression which is contradicted by an accompanying

disclaimer.[49] It has also been reported that Bell Canada agreed to pay $100,000 to defray the Commissioner's costs in the case, and agreed to report to the Commissioner (within 30 days of a request) with respect to its compliance with the agreement.[50]

In short, the civil track has a number of features that, in the author's view, make it particularly well suited to address alleged misleading advertising claims, including those pertaining to performance claims, and so it is perhaps not surprising that these provisions have been invoked by the Bureau in actions against telecommunications providers. That having been said, current constitutional challenges concerning these provisions raise questions about their future availability for application in the telecommunications context, at least in their present form, and until an authoritative ruling on the issues has been made.

Competitor or Consumer Private Legal Actions based on s. 36 of the *Competition Act*

Pursuant to s. 36(1) of the *Competition Act*, it is possible for private parties to draw on Part VI misleading criminal offences in the *Act* to sue any person who has suffered loss or damage. Sub-section 36(1) states that:

> [a]ny person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, or
>
> (b) the failure of any person to comply with an order of the Tribunal or another court under this *Act*,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

The ss. 52(1) false or misleading advertising offence is located in Part VI of the *Act*, and therefore could potentially become a basis for telecommunications "competitor to competitor" actions and actions by customers against telecommunications providers under paragraph

36(1)(a).[51] Where civil track proceedings have led to a court order resulting in AMPs and other corrective action, and this order has not been complied with, this could conceivably also become the basis for a private action, under paragraph 36(1)(b). To date, it would not appear that there have been any such paragraph 36(1)(b) actions in the telecommunications context or otherwise.

A review by the author of existing court decisions reveals that paragraph 36(1)(a) competitor against competitor ("peer to peer") actions are to date the most common type of litigation used to address telecommunications advertisements, with the main objective being pursuance by a competitor of an interim or interlocutory injunction to curtail a counterpart's marketing claims.[52] Although there is no mention of an injunction power in s. 36, judges in several decisions have concluded that the courts do have such an inherent power, and it has been successfully invoked in some telecommunications provider misleading advertising actions.[53]

In cases where there has not been a prior conviction under ss. 52(1),[54] then the plaintiffs bringing the paragraph 36(1)(a) injunction action must establish all of the elements of the ss. 52(1) offence discussed earlier. As a civil action, the burden of proof is on a balance of probabilities. One court has suggested that because the underlying offences that are the basis for a ss. 36(1) action are Part VI criminal offences, therefore the plaintiff must "offer substantial proof":

> Since s. 36(1) is a remedial section providing a civil remedy for a very serious public crime which provides for a heavy penalty on conviction and where there has been no conviction of the defendant....nor a prosecution commenced it is incumbent upon the plaintiff to offer substantial proof that the activity prohibited.....has, indeed, taken place.[55]

In Canada, a successful injunction action requires that the applicant establish that there is a serious issue to be tried, that the applicant would suffer irreparable harm if the application was refused, and that the balance of convenience favours the applicant.[56] Commentators have suggested that as long as the application is neither vexatious or frivolous, then meeting the "serious issue to be tried" criteria has not been a difficult threshold to overcome in misleading advertising injunction applications.[57]

A key issue in injunction actions is whether the plaintiff can establish that it suffered "irreparable harm," and on this point, in *Bell Canada v. Rogers Communications Inc. et al.*, Justice Grace of the Ontario Superior Court of Justice summarized the key factors considered by judges in their "irreparable harm" deliberations in the following manner:

> [a] review of those cases evidences the fact driven nature of motions of this kind. The identity of the parties, the scope of their businesses, the nature of the conduct, its frequency and duration, the nature of the complaint, the defendant's response, the ability to measure the effect of the conduct on the plaintiff's business and the procedural history are a non-exhaustive listing of factors which may be relevant in attempting to determine whether harm is irreparable.[58]

In the instant case, Justice Grace concluded that there was no irreparable harm flowing from a Rogers commercial that was the subject of a Bell interlocutory injunction application:

> To suggest irreparable harm will flow from the commercial seems to me an over-reaction. The parties are large corporations. The substantive issues are strongly contested. The commercial was thirty seconds long and it was shown for a limited period…..[59]

The third factor considered by the courts in injunction applications is the "balance of convenience" determination concerning which of the two parties will suffer the greater harm if the interlocutory injunction is or is not granted. While it is difficult to synthesize the various and diverse judgments on this point, it is probably fair to say that courts have not been overly eager to intervene on one side or the other when dealing with large sophisticated corporations engaging in extensive, ongoing, constantly changing marketing and advertising campaigns of the type that are common in the telecommunications sector. The somewhat prickly observations of Justice Grace on this point in *Bell Canada v. Rogers Communications Inc. et al.* are instructive in this regard:

> In this case, the commercial is off the air. Ultimate success is very much in doubt. The parties are aggressive advertisers. Complaints flow frequently in both directions. Undoubtedly, lines are tested and periodically, as evidenced by cases decided to date, they are crossed. However, none of those observations are cause for concern. The exercise of freedom of speech should

> be constrained only where there is good reason to believe it has been abused.... I agree with the statement of Silverman J. ....when he said: "The Court has no interest in micro-managing an advertising battle between two weighty competitors..."[60]

While as has been noted earlier, in some situations, interlocutory injunctions have been granted to address and curtail false or misleading telecommunications claims, reading between the lines of the many judgments in this area, the conclusion of this author is that courts are expressing some exasperation that the parties have not been able to resolve such issues by themselves, and some judges seem to be exhibiting a certain amount of reluctance to wade in to settle matters between the litigants unless there is strong evidence of irreparable harm. It is partially in light of this situation of judicial reluctance to intervene that the possibility of a new self-regulatory alternative is explored later in the article.

Competitor Against Competitor Tort Law-based Actions

When telecommunications providers make false or misleading claims, competitor against competitor actions can be launched in tort, in addition to actions based on the *Competition Act* s. 36 civil remedy. The two most immediately relevant tort law-based actions that could be used to address situations involving misleading claims would appear to be the tort of intentional interference with economic relations, and the tort of injurious falsehood.[61] With respect to the tort of intentional interference with economic relations, the plaintiff must establish an intention to injure the plaintiff; interference with another's method of gaining his or her living or business by illegal means; and economic loss caused thereby.[62] In order to bring a successful action based on the tort of injurious falsehood, the plaintiff must establish that the statements made were false; that the statements were made with the intent to harm the other person without lawful justification or for a dishonest or improper motive; that the impugned person has been identified in some way; and that the person has suffered, or will suffer, economic loss thereby.[63]

Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc.[64] is an example of a case in which the applicants made allegations concerning misleading advertising, seeking interlocutory injunctions based on the two torts and pursuant to ss. 36(1) of the *Competition Act*. In that case,

the Ontario Supreme Court concluded that the three causes of action could be dealt with together "since they all involve similar requirements, that is, a false or misleading statement intended to injure made through illegal, dishonest or reckless means which either has or will cause economic loss to the plaintiff."[65] In light of this conclusion, and bearing in mind the previous discussion of the factors underlying successful interlocutory injunctions in the context of a s. 36 action, no further exploration here of tort actions will be undertaken in this article.

Consumer Class Actions

The Supreme Court of Canada has affirmed the social value of class action lawsuits to address situations where many persons suffer similar harms as a result of a single act or decision.[66] Instances in Canada of groups of consumers bringing class actions to address alleged misleading advertising practices are reportedly becoming increasingly common.[67] The first step in bringing a successful class action in Canada is application by the representative plaintiff to the court for an order certifying the proceeding as a class proceeding and appointing the applicant as the representative plaintiff.[68] At the certification stage, the plaintiff must establish: that the pleadings or notice of application disclose a cause of action; there is an identifiable class of two or more persons; the claims of the class members raise common issues; a class proceeding is the preferable procedure for the resolution of these common issues; and there is a representative plaintiff who would fairly and adequately represent the class, has produced a workable plan for advancing the proceeding and does not, on the common issues, have interests which might conflict with those of the class.[69] As noted above, consumers could choose to draw on the ss. 36(1) remedy under the *Competition Act* as a basis for a class action, but the author is aware of no such actions in the telecommunications context.

Successful telecommunications claims enforcement actions initiated by the Bureau pursuant to s. 52 or the civil track provisions could potentially become the basis for consumer class actions. On June 29, 2011, a class action was launched in Quebec against Bell Canada for false and misleading advertising concerning the price offered for its services.[70] The class action is reported to have stemmed from the Competition Bureau's announcement of June 28, 2011 of the consent

agreement with Bell Canada, and the $10 million administrative monetary penalty imposed pursuant to that consent agreement.[71] Misleading representation telecommunications class actions have also been based on alleged violations of provincial legislation,[72] tort law[73] and contract law.[74] Key challenges associated with *Competition Act*-based class actions that have been identified include proving loss on a class-wide basis, and establishing that common issues are not overwhelmed by individual issues.[75]

Provincial strict liability offence actions

In addition to the array of *Competition Act* options available to address telecommunications marketing claims, provisions in provincial consumer protection legislation could address this activity. For example, pursuant to ss. 14(1) of the Ontario *Consumer Protection Act, 2002 (OCPA)*,[76] it is an unfair practice for a person to make a false, misleading or deceptive representation. Pursuant to ss. 14(2), representations concerning performance characteristics of a service that the service does not actually meet are specifically singled out as an example of a false, misleading or deceptive representation under ss. 14(1). While both ss. 52(1) of the *Competition Act* and ss. 14(1) of the *OCPA* are offences tried in the ordinary courts (i.e., not specialized tribunals), both require that proof beyond a reasonable doubt, and both have imprisonment available as a possible penalty, the *Competition Act*'s ss. 52(1) is an offence requiring proof of intent or recklessness while the *OCPA*'s ss. 14(1) is a strict liability offence, meaning that proof of the *actus reus* alone will lead to a conviction unless the accused can establish a due diligence defence. For strict liability offences, proof of intent or recklessness is not required in order to obtain a conviction.

The key Quebec CPA misleading advertising offences are also strict liability offences. Pursuant to s. 219 of the Quebec CPA, no merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer. Pursuant to s. 218 of the Quebec CPA, to determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account. By s. 228, no merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer, and by s. 221, no advertiser may, falsely, by any means whatever,

ascribe certain characteristics of performance to goods or services. Although the author could find no evidence of provincial prosecutions targeting marketing claims of telecommunications providers, there would appear to be no barriers to such actions in the future, and some indication of increased provincial interest in addressing the practices of telecommunication providers.[77]

The Supreme Court of Canada's decision in *Richard v. Time Inc.*,[78] and in particular, its interpretation of the "general impression" test as applied to the Quebec CPA provisions, could be relevant to deceptive telecommunications claims enforcement actions at both the federal level and in other provinces. In *Richard v. Time Inc.*, Mr. Richard received a letter in the mail indicating, in bold capital letters, that he had won a significant cash prize. In much smaller print was qualifying language. Mr. Richard filed a motion to institute proceedings in which he asked the Quebec Superior Court to declare him to be the winner of the cash prize mentioned in the document and to order payment of compensatory and punitive damages corresponding to the value of the prize. After reviewing a range of court decisions discussing the general impression test (including discussion of *Competition Act* decisions), the Supreme Court of Canada stated the following:

> The general impression test … must be applied from a perspective similar to that of 'ordinary hurried purchasers', that is, consumers who take no more than ordinary care to observe that which is staring them in the face upon their first contact with an advertisement. The courts must not conduct their analysis from the perspective of a careful and diligent consumer. … In sum, it is clear that … the 'general impression' test … is the impression of a commercial representation on a credulous and inexperienced consumer. … courts view the average consumer as someone who is not particularly experienced at detecting the falsehoods or subtleties found in commercial representations.[79]

The Court also indicated that in applying the general impression test, considerable importance will be given to the context of the advertising in question. Commentators have suggested that the Supreme Court of Canada's "ordinary hurried consumer" test as articulated in *Richard v. Time* might displace the "average consumer" test applied to this point in *Competition Act* cases,[80] making it more difficult for telecommunications sector firms and other advertisers to use fine print and

disclaimers -- or to put it another way, telecommunications providers will have to be particularly careful in use of such fine print and disclaimers to avoid attracting liability.

Existing Applicable Self-regulatory Mechanisms

A final regulatory tool potentially available in Canada to address misleading telecommunications claims is Advertising Standards Canada (ASC), a national not-for-profit advertising self-regulatory body.[81] The ASC administers the Canadian Code of Advertising Standards (Code), which sets criteria for acceptable advertising that forms the basis for the review and adjudication of consumer and advertising disputes. The Code includes provisions calling for truth, accuracy and fairness in advertising. The ASC provides a procedure to allow for consumers to complain about advertising, at which point the advertisements in question are reviewed and decisions are made concerning their compliance or non-compliance with the Code. In addition, the ASC provides a pre-clearance process that can be used by advertisers.[82] The ASC does not have the ability to prohibit any non-compliant advertisements, but negative press surrounding unfavourable decisions about identified marketing claims may stimulate some businesses to correct or change their claims, and approval of an advertisement through the ASC's pre-clearance process could potentially be used as part of a due diligence defence by firms that are subject to strict liability offence prosecutions.[83] Based on a review of the ASC website, to date, there do not appear to have been any ASC actions pertaining to telecommunications marketing claims, but the advertising practices of telecommunications providers in the United States and the United Kingdom have been the subject of negative rulings by self-regulatory bodies similar to the ASC that operate in those jurisdictions. [84]

Analysis of Existing Mechanisms and an Exploration of Reform Possibilities

While the foregoing discussion confirms the fact that currently in Canada there are a wide number of options available to address problematic telecommunications representations, the analysis undertaken in this part suggests that there are weaknesses associated with these options, as well as some opportunities for improvement that could lead to a reduction in misleading advertising practises by

telecommunications providers, and could result in more efficient and effective redress when problematic instances of deceptive claims do arise.

Taken individually, each of the existing mechanisms has its distinctive strengths and weaknesses. These are reviewed here while considering possible reform options. Prosecutions under ss. 52(1) of the *Competition Act* represent a potentially important response by the Bureau to problematic telecommunications marketing activity, providing the possibility of unlimited fines and imprisonment for up to 14 years, an option that might be particularly appropriate to invoke in situations where egregious misconduct has taken place. The deterrent effect associated with the penalties, as well as the attendant criminal record for those convicted, are significant features of successful ss. 52(1) prosecutions. That said, the requirement of proof beyond a reasonable doubt that the offence was knowingly or recklessly committed may represent a difficult threshold to meet for prosecutions to be successful. It may be partially because of the difficulties associated with meeting this *mens rea* requirement that to date no ss. 52(1) prosecutions have been undertaken to address misleading telecommunications claims.

The other enforcement option available to the Competition Bureau to address misleading claims by telecommunications providers is the "civil track" provided under Part VII.1. From a Bureau standpoint, there are a number of important features associated with such civil track actions, including: no requirement of proof of intent needed as a basis for a finding of liability; the fact that proof is based on the lower balance of probabilities standard rather than the criminal beyond a reasonable doubt standard; the existence of provisions specifically addressing the issue of performance claims; the availability of a due diligence defence and significant and varied remedies for those found to have engaged in unacceptable misconduct; and the possibility of a consent agreement for those situations where a determination is not contested. In apparent substantiation of the value of civil track actions to address telecommunications marketing activity, we know from previous discussion in this article that there have been several such civil track actions. That said, we have also seen that aspects of the current civil track regime are now the subject of *Charter* challenges, and if these challenges prove successful, aspects of the civil track option may not remain available, at least in their current form.

There are significant consequences available for civil track violations, including the potential for up to $10 million AMPs being levied for situations involving corporate malfeasance, the possibility of orders requiring corrective advertising, and restitution. While these are serious repercussions that are likely to discourage certain misconduct, paragraph 74.1(d) of the *Competition Act* specifically notes that the civil track remedies are not for the purposes of punishment. Moreover, imprisonment is not available pursuant to the civil track. In this regard, while the consequences for civil track malfeasance actions are serious, they may not have the same deterrent effect as penal offence prosecutions. For example, firms may view civil track actions and associated payments of AMPs as unfortunate costs of doing business, but not reprehensible in the same way as convictions for penal offences where imprisonment is a possible punishment.

From a government perspective, the availability at the provincial level of strict liability offences to address misleading advertising claims[85] — where no proof of intent is necessary, jail and potentially large fines are possible, and due diligence defences are available — seems to represent a promising avenue that may be drawn on by provincial consumer protection agencies to address deceptive telecommunication claims in the future. The existence of these provincial strict liability offences also leads this author to ask: why isn't a similar "general application"[86] misleading advertising strict liability offence available under the *Competition Act*? The fact is, there used to be such an offence, prior to 1999,[87] at which time it was replaced by a *mens rea* offence of general application. The constitutional acceptability of the pre-1999 *Competition Act* strict liability misleading advertising offence was explicitly confirmed by the Supreme Court of Canada in *R. v. Wholesale Travel Group Inc.*.[88] It is unclear to the author why this offence was withdrawn from the *Competition Act*. Perhaps the thinking at the federal level was that there was no need for a strict liability misleading advertising offence of general application, given the introduction of the new Part VII.1 civil track regime, which includes in paragraph 74.1(d) something that resembles a strict liability offence of general application (in the sense that no proof of intent or recklessness is necessary, and a due diligence defence is available). But as discussed above, the civil track remedies are not for the purposes of punishment and there is no possibility of imprisonment.

The current presence of strict liability offences under the *Competition Act* to address specific types of misleading advertising, such as deceptive telemarketing (ss. 52.1(3)) and deceptive notice of winning a prize (ss. 53(1)) – both with imprisonment available as a penalty -- is support for the proposition that the federal government is not adverse to use of strict liability offences with imprisonment in the *Competition Act* to address particularized types of deceptive claims. The suggestion made here is that a strict liability misleading advertising offence of general application should be added to the *Competition Act*, creating a credible middle ground option between the existing ss. 52(1) intentional offence of general application on the one hand, and the civil track option of general application on the other. If such an offence were introduced, the civil track remedies could perhaps be adjusted at the same time to reduce the size of administrative monetary penalties from the current upper limit of $10 million to something more modest and in keeping with the notion that the civil track remedies are not intended as punishment. This would render the civil track regime less susceptible to *Charter* challenges such as the current Rogers litigation discussed earlier. With the introduction of a general application strict liability misleading advertising offence in Part VI of the *Competition Act* as proposed here, a return to more modest maximum penalties under the Part VII.1 civil track regime would be feasible: a graduated triple track of general application misleading advertising offence options would be provided under the *Act*, ranging from a *mens rea* offence (with up to 14 years imprisonment available), to a strict liability offence (with up to 5 years of imprisonment), to a civil track offence (with no possibility of imprisonment), giving the Bureau flexibility to fit their enforcement responses to the circumstances at hand.

Sub-section 36(1) private actions by telecommunications competitors have emerged as a frequently used *Competition Act* option to address allegedly deceptive claims, and there are some self-evident reasons why the ss. 36(1) option has become popular. First among these is the clear motivation and resources of competitors to bring such actions. Second, in their operation, competitor against competitor actions involve private sector legal resources, instead of those of the Bureau. In these times of public sector budgetary restraint, it is perhaps considered by Bureau staff to be a welcome development to have the luxury of observing competitor against competitor *Competition Act* enforcement "from the sidelines," without any direct Bureau

involvement. If current trends continue, the increased levels of private enforcement of the *Competition Act* may rise to align the Canadian regime more closely with the American antitrust experience. Should this scenario of increased anti-trust private enforcement materialize here in Canada, it would mark a move away from a history of significant reliance on public enforcement of the *Competition Act*.[89] However, while ss. 36(1) private actions might be viewed positively by the Bureau (and the general public) for the reasons stated above, these competitor against competitor actions nevertheless still involve significant public sector expenditures in the form of utilization of court resources to review and decide on the merits of such claims – court resources that would be otherwise available for other litigation.

In spite of the apparent popularity of ss. 36(1) private actions by competitors, there are some evident limitations associated with such actions. Judges are not well versed in the many technological questions that underlie s. 36(1) telecommunications misleading advertising actions, and as noted earlier, there seems to be some evidence suggesting that judges would prefer to not intervene on such matters. Consider, for example, the comments of Silverman, J. in *Telus Communications v. Bell Mobility Inc.*:

> ...the public benefits by having information in the marketplace and not by having the court prevent information from getting into the marketplace. The *Competition Act* and similar guidelines always must be complied with even in those considerations. The court has no interest in micromanaging an advertising battle between two weighty competitors who have a lot of money to spend on this and do, apparently, wish to continue doing so, I presume, because they consider it in their financial interest to do so."[90]

We have seen indications earlier in this article that some telecommunications sector providers also seem to be expressing a certain amount of fatigue about using legal processes to address alleged problematic marketing practices. This having been said, litigation (peer to peer and otherwise) will continue to be an important problem-solving method for addressing improper marketing claims adopted in this sector, and there is an apparent strong appetite by telecommunication providers to engage in litigation on marketing claim issues.

However, for certain situations where one competitor wishes to challenge the accuracy of claims made by another, the suggestion is being made here that a new self-regulatory option should be explored. It is true that there currently exists the Advertising Standards Council, but its general application to all types of advertising -- not tailored to the particular needs of the telecommunications sector, nor operated by persons with significant telecommunications experience -- might diminish its attractiveness to the telecommunications sector. The experience with the Scanner Price Accuracy Code,[91] developed by the Canadian grocery and retail drug store sectors, in cooperation with and ultimately endorsed by the Bureau, might provide a basic template for development of a different, non-legislated way of addressing at least some marketing claims in the telecommunications sector. The Scanner Price Accuracy Code addresses a comparatively simple issue: mis-pricing of products on retail shelves when compared with the price at the checkout counter. The Scanner Code provides an example of competitors from particular sectors working together to solve an issue under the watchful eye of the Competition Bureau. Although the issue of accuracy of telecommunications claims is considerably more complex than simple mis-pricing of grocery and drug products, the scanner price accuracy code provides inspiration for a more elaborate and sophisticated, sector-customized and Bureau-approved self-regulatory program approach in the telecommunications context.

There may be value in bringing together telecommunications provider competitors, telecommunications provider industry associations, consumer organizations, and government agencies (e.g., the Competition Bureau and the CRTC) to explore the feasibility of a Competition Bureau- and CRTC-endorsed industry code on acceptable marketing claims, and associated with it, an industry-funded alternative dispute prevention and resolution mechanism.[92] The issues associated with telecommunications marketing are considerably more complex, variable, and dynamic than the simple issue of mis-pricing of a grocery or drug store consumer product that is the focal point of attention in the Scanner Price Accuracy Code. The experience of the Pharmaceutical Advertising Advisory Board (PAAB) is perhaps a relevant model to draw on as the inspiration for creation of a somewhat analogous "Telecommunications Advertising Advisory and Adjudication Board" (TAAAB).[93]

The PAAB is an independent industry-funded review agency whose primary role is to ensure that healthcare product communication for prescription and other health products is accurate, balanced and evidence-based, and reflects current and best practice. The PAAB also monitors trends in health product advertising and promotion and adjusts its code and practices as required to fulfill its mandate. The PAAB operates a self-financing preclearance program to ensure that proposed advertising meets Code standards for the promotion of pharmaceutical products. The envisaged TAAAB could provide a similar preclearance function for telecommunications providers, and could also provide a first order dispute resolution function in situations where differences in interpretation concerning representations arise.[94]

The proposed TAAAB is not viewed here as a replacement for conventional peer to peer legal actions, such as those undertaken by competitors pursuant to ss. 36(1) of the *Competition Act*, but it might allow for some constructive and cooperative action to take place outside of the courts, at least to address a subset of peer to peer marketing claim issues. It is likely that TAAAB adjudicators would have particular expertise concerning telecommunications technologies, and that the procedures could be streamlined, so that expedited responses would be possible. As we have seen, time is often of the essence with respect to injunction actions concerning telecommunications advertising claims. In keeping with the approach of the Scanner Price Accuracy Code and PAAB, the costs associated with undertaking TAAAB functions would be shared by telecommunications providers, and would not draw on the public purse.

Another option to address misleading telecommunication claims is direct federal regulation of this activity. The federal government has announced its intention to put in place regulations to require full price advertising by airlines, pursuant to *Canada Transportation Act*.[95] In a parallel manner, while to date the CRTC has chosen not to directly regulate false and misleading advertising in the telecommunications sector,[96] there would appear to be no obstacle to regulations on this issue being developed by the CRTC pursuant to the *Telecommunications Act*.[97] Such regulations could conceivably require that particular information be provided by telecommunications providers in their advertisements (e.g., full disclosure of price, accurate representations concerning speed, reliability and other performance claims that have

been subjected to government approved testing), that certain information is prohibited (e.g., concerning the imposition of "servicing fees" if those fees are not mandated by government) and that the information take a standardized form and use standardized language to allow for meaningful consumer comparisons.

Perhaps the mere spectre of such regulations being imposed would act as a stimulus for the telecommunications sector to address this issue directly, through the TAAAB model discussed above. If the CRTC were to simply indicate that they were exploring the idea of developing regulations of the sort described here, such an exploration might provide an extra impetus for private sector action to develop and put in place a TAAAB-like entity to address telecommunications claims.

The possibility of consumer class actions to address deceptive telecommunications addresses an issue (compensation) that is only indirectly handled through some of the existing government enforcement options, and is not addressed at all through peer to peer mechanisms. As we have seen, consumer compensation is an option available for civil track misconduct, and it is a sentencing option that is often made available with strict liability offence regimes.[98] In contrast, consumer class actions allow consumers to potentially move ahead with a court action for compensation whether or not a government agency felt the need to pursue compensation through its enforcement mechanisms. Therefore, in situations where improper telecommunications practices have taken place, the potential availability of consumer class actions to ensure compensation for affected end users of telecommunications products and services continues to represent a useful adjunct to the other mechanisms described here that do not directly target the consumer compensation dimension of deceptive advertising.

In the view of this author, the existing array of approaches available to address misleading advertising claims, coupled with the proposed new approaches discussed above (i.e., the inclusion of a general application misleading strict liability offence under Part VI of the *Competition Act*, the development of a self-regulatory TAAAB, and the possibility of government regulations prescribing the form and substance of telecommunications advertisements), would enhance the likelihood that advertisements were accurate, and that instances of problematic claims would be appropriately, effectively and efficiently addressed.

Conclusions

This article has reviewed current options to address potentially misleading advertising claims, including both those available under the *Competition Act* and those provided outside the *Competition Act*. Analysis undertaken in this article suggests that vigorously promoted, constantly evolving marketing campaigns are being employed by Canadian telecommunications providers, reflecting continually evolving advances in telecommunications technology, and that some of the claims have proven to be problematic in terms of their accuracy. Analysis also suggests that there are a wide range of mechanisms being used to address improper marketing claims, and that the mechanisms have undergone some adjustments and changes over time. Peer to peer litigation has been playing a particularly significant role, with the parties often seeking some form of interim or interlocutory injunction pursuant to ss. 36(1) of the *Competition Act*. We have also seen the Competition Bureau initiate actions pursuant to the civil track to address telecommunications marketing claims, and examples of consumer class actions seeking compensation in cases of misleading representations.

The suggestion made in this article is that while the existing legal options will likely continue to play the central role in addressing allegedly problematic telecommunication provider marketing activity, some refinements and additions might prove useful. It is proposed that a new "general misleading" *Competition Act* strict liability offence could be added and that it would be of value, providing a middle ground between the difficult-to-enforce ss. 52(1) *mens rea* offence on the one hand and a perhaps over-extended (in terms of the magnitude of financial penalties available) and hence *Charter*-vulnerable civil track option on the other. It is also proposed that a new form of Competition Bureau-endorsed industry self-regulatory solution be explored and put in place, drawing for inspiration on the existing Bureau-endorsed Scanner Pricy Accuracy Code and the self-regulatory Pharmaceutical Advertising Advisory Board, that would allow for the possibility of expedited, expert, non-court-based dispute resolution in situations where one competitor is alleging that another competitor is attempting to get the upper hand through misleading advertising claims. Finally, it is proposed that the CRTC explore the possibility of promulgating regulations that would prescribe the way in which

telecommunications advertising takes place. These proposed new mechanisms could address identified limitations and inadequacies with current options, and could complement the existing approaches. By doing so, incidents of deceptive telecommunications claims might decrease, and where they do arise, more expeditious, fair and effective redress options could be provided.

Endnotes

[1] An earlier version of this paper was presented at the Canadian Law and Economics Association Annual Meeting, September 28-29, 2012, at the University of Toronto Faculty of Law. The author wishes to express his appreciation for the research assistance for this article provided by Ryerson University students Lukas Parker and Natalie Grebinko, and the comments of participants at the CLEA meeting. The author also wishes to thank anonymous reviewers for helpful comments. All errors or omissions are those of the author. For the purposes of this article, "Canadian telecommunications providers" includes federally regulated Internet, telephone and wireless service providers.

[2] This quote comes from the revised brief of Rogers Communications Inc. See: *Bell Aliant v Rogers Communications*, 2010 NBQB 166.

[3] E.g., *Bell Mobility Inc v TELUS Communications*, 2006 BCSC 1954; *Bell Mobility Inc v Telus Communications Company*, 2006 BCCA 578; *Tele-Mobile Company, a Partnership v Bell Mobility Inc*, 2006 BCSC 161; *Telus Communications Company v Bell Mobility Inc*, 2007 BCSC 518; *Telus Communications Co v Rogers Communications Inc*, 2009 BCSC 1610; *TELUS Communications Co v Rogers Communications Inc*, 2009 BCCA 581; *Bell Aliant v Rogers Communications*, 2010 NBQB 166; *Commissioner of Competition v Chatr Wireless Inc*, 2011 ONSC 3387; *Commissioner of Competition v Rogers Communications Inc*, 2011 ONSC 7254.

[4] E.g., S. Houpt, "Rogers ditching 'most-reliable' claim," *Globe and Mail* (30 November 2009); S. Freeman, "Rogers loses ad injunction appeal," *Canadian Press* (4 December 2009); Canadian Press, "Cogeco clarifies claims about Internet speeds," *Toronto Star* (15 December 2009); S. Freeman, "Bell told to scrap 'most reliable' ads," *Canadian Press* (16 December 2009); B. Marotte and I. Marlow, "Bell takes Vidéotron to court over 'fastest' claim," *Globe and Mail* (30 April 2010); I. Marlow, "Mobilicity files complaint against Rogers," *Globe and Mail* (8 September 2010); J. Sturgeon, "Bell fined $10M for 'misleading advertising,'" *Financial Post* (28 June 2011); CNW, ``Class Action Against Bell Canada: False and Misleading Advertising as to the Price Offered for its Services," *CNW* (29 June 2011); D. Tencer, "Rogers Misleading Advertising Case: Truth-In-Advertising Laws Violate Our Rights, Telecom Giant Says" *Huffington Post Canada*, (27 January 2012); J. Sturgeon, "Canada's telecom giants face $18-billion class action suit over system access fees," *Financial*

Post, (28 June 2012); J. Sturgeon, "Competition Bureau sues Rogers, Bell, Telus $10M each over texting services," *Financial Post* (14 September 2012).

[5] In this article, the terms "advertising," "claims," "marketing," "representations" – as used in phrases such as "advertising practices," "marketing claims," and "marketing activity" – will be used interchangeably unless otherwise indicated.

[6] The use of the terms "false," "misleading" and "deceptive" as understood in the *Competition Act* is discussed *infra*.

[7] E.g., *Commissioner of Competition v Chatr Wireless Inc*, 2011 ONSC 3387; *Commissioner of Competition v Rogers Communications Inc*, 2011 ONSC 7254; *Commissioner of Competition v Rogers, Bell, TELUS and the Canadian Wireless Telecommunications Association*, 2012 ONSC (ongoing at the time of writing).

[8] E.g., *Bell Mobility Inc v TELUS Communications*, 2006 BCSC 1954; *Bell Mobility Inc v Telus Communications Company*, 2006 BCCA 578; *Tele-Mobile Company, a Partnership v Bell Mobility Inc*, 2006 BCSC 161; *Telus Communications Company v Bell Mobility Inc*, 2007 BCSC 518; *Telus Communications Co v Rogers Communications Inc*, 2009 BCSC 1610; *TELUS Communications Co v Rogers Communications Inc*, 2009 BCCA 581; *Bell Aliant v Rogers Communications*, 2010 NBQB 166.

[9] E.g., *Microcell Communications Inc et al v Mark Frey et al*, 2012 36260 (SCC); *Seidel v TELUS Communications Inc*, 2011 SCC 15, [2011] 1 SCR 531; *Bell Mobility Inc v Anderson*, 2009 NWTCA 3, 2009 NWTCA 3; CNW; "Class Action Against Bell Canada: False and Misleading Advertising as to the Price Offered for its Services," *CNW* (29 June 2011).

[10] *Op cit*., fn 3.

[11] E.g., Competition Bureau, "Competition Bureau Reaches Agreement with Bell Canada Requiring Bell to Pay $10 Million for Misleading Advertising" (29 June 2011) online Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03388.html>.

[12] *Ibid*, and see discussion of disclaimers in *TELUS Communications Co. v. Rogers Communications Inc. op cit*., fn 17.

[13] While the author could not locate examples of recent litigation re: misleading advertising claims in the Canadian banking and transportation sector, the Competition Bureau has periodically reviewed Air Canada's partnership ventures in terms of their potential anti-competitive effects, and there have been prosecutions concerning price fixing in the air cargo sector. (For a discussion of successful Competition Bureau prosecutions against Air France, KLM, Martinair, Qantas, Cargolux and British Airways, see: "Cargolux Pleads Guilty in Air Cargo Price-fixing Conspiracy" (28 October 2010) online Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03304.html >.) The issue of price representations in the transportation sector has not led to litigation but it has led to regulatory action by the Canadian Transportation Agency. On December 16, 2011, the Government of Canada announced that it would put in place *Canada Transportation Act* regulations to require full price advertising by airlines

(e.g., including all taxes), with the process of consultation and development estimated to take one year (see: "Government of Canada moves forward with changes to airfare advertising" (16 December 2011) online Transport Canada <http://www.tc.gc.ca/eng/mediaroom/releases-2011-h128e-6570.htm >). In February, 2012, several Canadian airlines were reported to having adopted "all-in" price advertising ahead of the regulation coming into force. See, e.g., S. Deveau, "Air Canada, Porter to advertise all-in price for airfares," *Financial Post* (8 February 2012) .

[14] E.g., Advertising Standards Authority (U.K.), *Adjudication on Everything Everywhere Ltd. (T-Mobile)*, A11-166250 (October 2011); A. Semuels, "AT&T changes cell ad mantra," *Los Angeles Times* (8 September 2007); *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (No 2) [2012] FCA 629; *Commerce Commission v Vodafone New Zealand Limited* 2011 District Court of Auckland CRN-0900450505728.

[15] See, e.g., Broadcasting Decision CRTC 2012-574, and discussion below concerning the opening up of the wireless sector to more competitors.

[16] *Commissioner of Competition v Chatr Wireless Inc*, 2011 ONSC 3387, para 34.

[17] *Telus Communications Co v Rogers Communications Inc,* (2009) BCCA 581, para 19.

[18] *Ibid.*

[19] In this article, in the interests of brevity, from time to time, the abbreviated forms "Bell," Rogers" and "Telus" are used in lieu of full company names unless otherwise indicated.

[20] Competition Bureau, "Competition Bureau Sues Bell, Rogers and Telus for Misleading Consumers: Bureau Seeks Customer Refunds and $31 Million in Penalties" (14 September 2012) online Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03498.html>.

[21] *Ibid.*

[22] RSC 1985, c C-34.

[23] Competition Bureau, "A Guide to Amendments to the *Competition Act*" (22 April 2009) online Compeition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03045.html >.

[24] E.g., Melanie Aitken, "Remarks by Melanie L. Aitken, Commissioner of Competition" (20 September 2012) online Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03508.html>.

[25] RSQ, chapter P-40.1.

[26] Per: *An Act to amend the Consumer Protection Act and other legislative provisions*, SQ 2009 c 51, s 12.

[27] Per: A. Banicevic, E. Douglas & D. Stolow, "Is the Price Right? Increased Regulatory Scrutiny and Class Actions for Representations Involving Price," online Davies Ward Phillips & Vineberg LLP (21 December 2011) <http://www.dwpv.com/~/media/Files/PDF/Perspective-Is-the-Price-Right.ashx>, p 3. [Banicevic].

[28] *Supra*, fn 17. See also more detailed discussion of s 36 below.

[29] 2012 SCC 8.

[30] Discussed in more detail below.
[31] This point is explored in greater detail later in the article.
[32] Per: J. Sturgeon, "Bell fined $10M for 'misleading advertising,'" *Financial Post* (28 June 2011).
[33] PS. Hutton & M. Berswick, "Rogers Communications Claims Misleading Advertising Case, AMPs violate Canadian Constitution" (9 March 2012) online The Competitor (Stikeman Elliott LLP) <http://www.thecompetitor.ca/2012/03/articles/competition/deceptive-marketing-practices/rogers-communications-claims-misleading-advertising-case-amps-violate-canadian-constitution/> [Hutton].
[34] E.g., pursuant to section 7 of the *Trade-marks Act,*RSC, 1985, c T-13, no person shall make a false or misleading statement tending to discredit the business, wares or services of a competition. In 2007, pursuant to the *Telecommunications Act,* SC 1993, c 38, the Canadian Radio-television and Telecommunications Commission created the Commissioner for Complaints for Telecommunications Services (CCTS) to arbitrate between aggrieved consumers and their telecom service providers about Internet, telephone and wireless service.
[35] The Department of Public Prosecutions prosecutes criminal offences that are initiated on the recommendation of the Commissioner, based on investigations undertaken by the Competition Bureau.
[36] This is in contrast with the civil track provided under the *Competition Act*, where no proof of intent is necessary, and the elements of the offence are established on a balance of probabilities. More is said about the civil track below.
[37] [2006] BCJ No 3333.
[38] Paras 16 – 18. Note that the Court was considering the wording of s. 52 in the context of a s. 36 action. Such actions are discussed in greater detail below.
[39] As noted earlier, in the 2012 Supreme Court of Canada decision *Richard v Time Inc*, *op cit*, the meaning of the "general impression" test in the context of a Quebec misleading representation provision was the focus of attention. The Court suggested a perspective similar to that of "ordinary hurried purchasers" is appropriate. As discussed below, the significance of this decision and the application of this guidance to the *Competition Act* provisions is not clear at this point. See also: J. Musgrove, & D. Edmondstone, "The Shifting General Impression of Disclaimers," *Canadian Bar Association 2012 Competition Law Spring Forum: Best Practices in a Time of Active Enforcement* (2 May 2012).
[40] *Competition Act, RSC 1985, c C-34, ss 52(5)* [*Competition Act*].
[41] Competition Bureau, "Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the *Competition Act*" (22 September 1999). online Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01223.html>.
[42] *Ibid, s*s. 52(7).

[43] For example, in November, 2010, the Competition Bureau commenced legal proceedings under paragraph 74.01(1)(b) against Rogers Communications Inc. to stop what the Bureau characterized as misleading advertising of Rogers' Chatr discount cell phone and text service. (See: Competition Bureau, "Competition Bureau Takes Action Against Rogers Over Misleading Advertising," (19 November 2010)online Competition Bureau: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03316.html>.) The advertising campaign in question included claims that Chatr had "fewer dropped calls than new wireless carriers" and that Chatr customers would have "no worries about dropped calls." In subsequent Ontario Superior Court proceedings that are in progress at the time of writing, Rogers Communications has challenged the constitutionality of the paragraph 74.01(1)(b) requirement that persons make "adequate and proper tests" with the burden of proof lying on the person making the representation, claiming it violates its *Charter* right to freedom of expression under ss. 2(b): per Hutton, *supra* fn 33. Hutton and Berswick note that in an earlier Competition Tribunal decision, *Commissioner of Competition v Gestion Lebski Inc et al* (CT-2005/007), the Tribunal found that the "adequate and proper test" provision constituted an infringement of the freedom of expression, and the infringement was considered not justifiable under s. 1, because no evidence had been led on which a finding could be based that the provision was an acceptable minimal impairment of the *Charter*-protected freedom. As Hutton and Berswick note, tribunal decisions are applicable only to the facts in the case at hand: only courts can rule definitively on constitutional issues.
[44] Hutton *ibid*, point out that in *Commissioner of Competition v Gestion Lebski Inc et al, ibid*, the Competition Tribunal had previously ruled on the constitutionality of AMPs, finding such dispositions to be not contrary to s. 7 or s. 11 of the *Charter of Rights and Freedoms*. However, at the time of the earlier Tribunal ruling, the maximum amount of an AMP was $200,000. In that earlier case, the Tribunal characterized AMPs of up to $200,000 as not being penal in nature, and concluded that the penalties were consistent with the stated aims of the civil track to encourage compliance and to deter prohibited conduct, noting that the AMPs were invoked through a civil process, with no possibility of jail as with a criminal offence.
[45] June, 2011.
[46] Competition Bureau, "Competition Bureau Reaches Agreement with Bell Canada Requiring Bell to Pay $10 Million for Misleading Advertising," (28 June 2011) online Competition Bureau: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03388.html>.
[47] *Ibid.*
[48] *Ibid.*
[49] Per: A. Weber & J. Rad, *op cit.*
[50] D. Edmondstone, J. Musgrove & B. Hearn, "Bell Canada agrees to $10 million penalty" (July 2011) online McMillan LLP < http://www.mcmillan.ca/Bell-Canada-agress-to-10-million-dollar-penalty> [Edmonstone].

[51] With respect to consumer private actions under ss. 36(1), courts have noted that while for the purposes of an ss. 52(1) prosecution it is not necessary to prove that any person was deceived or misled (ss. 52(1.1)), the wording of s. 52 does not address the elements that need to be established for a s. 36 action: It does not say that a claimant under s. 36 is entitled to an award of damages for misrepresentation even if they were not deceived and therefore suffered no loss as a result of the contravention of ss. 52(1). Per: *Toyota Canada Inc, et al v Michael Steele, et al* (2008) BCSC, para 70. See also *Olsen v Behr Process Corp* 2003 BCSC 429, para 36. Given the likely challenges associated with quantifying individual consumer damages as a result of a misleading telecommunications advertisement, it is perhaps not surprising that the author could find no examples of consumer-initiated s. 36-based consumer actions concerning allegedly misleading telecommunications claims.

[52] See, e.g., *Telus Communications Co v Rogers Communications Inc* [2009] BCJ No 2329 (SC); *Rogers Wireless Partnership v Bell Canada et al* (16 December 2009, Docket S098835)(BCSC); *Tele-Mobile Co v Bell Mobility Inc*, [2006] BCJ No 392 (SC); *Bell Mobility v Telus Communications Co*, [2006] BCJ No 3333 (CA); *Telus Communications Co v Bell Mobility Inc* 2007 Carswell BC 786 (SC); *Telus Communications Co v Rogers Wireless Inc* [2006] OJ No 1865 (Ont SCJ); *Bell Canada v Rogers Communications Inc*, 2009 CanLII 39481; (Ont SCJ); *Bell Canada v Rogers Communications Inc et al*, 2010 (Ont SJ) 2788; and *Bell Aliant v Rogers Communications*, 2010 NBQB 166. Although the author could find no s. 36(1)(a) competitor-against-competitor case from the telecommunications sector where damages were awarded, there has been at least one s. 36(1)(a) competitor-against-competitor action outside of the telecommunications context where damages have been awarded: see *Maritime Travel Inc v Go Travel Direct.Com Inc* (2008) 66 CPR (4th) 61 NSSC); affirmed (2009) NSJ No. 177.

[53] For example, injunctions were granted in *Telus Communications Co v Rogers Communications Inc.* [2009] BCJ No 2329 (SC); *Rogers Wireless Partnership v. Bell Canada et al.* (December, 16, 2009, Docket S098835)(BCSC); and, in part, in *Tele-Mobile Co v Bell Mobility Inc*, [2006] BCJ No 392 (SC). Injunctions were not granted in *Bell Mobility v Telus Communications Co*, [2006] BCJ No 3333 (CA); *Telus Communications Co v Bell Mobility Inc* 2007 Carswell BC 786 (SC) and *Telus Communications Co v Rogers Wireless Inc* [2006] OJ No 1865 (Ont SCJ).

[54] Pursuant to s. 36(2), evidence of a prior Part VI conviction creates a rebuttable presumption in civil litigation that an offence has been committed: "….the record of proceedings in any court in which that person was convicted of an offence under Part VI….is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI……and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in an action."

[55] *Janelle Pharmacy Ltd v Blue Cross of Atlantic Canada* (2003), 217 NSR (2d) 50 (SC) para 97.
[56] Per: *RJR-MacDonald Inc v Canada (Attorney General)* [1994] 1 SCR 311. In E. Babin, C. Spry & C. Jackman, "Injunctions in Misleading Advertising Cases" (2011) 24:1 *Canadian Competition Law Review* 69 at 70 [Babin]. The authors note that in British Columbia, the test is framed in a slightly different way.
[57] Babin, *ibid*, 71.
[58] 2010 ONSC 2788, para 29.
[59] *Ibid*, para 30.
[60] *Ibid*, para 33.
[61] Based on discussion of tort actions in court decisions such as *Bell Canada v Rogers Communications Inc* 2009 CanLll 398481 (Ont SCJ)at para 3; *Boehringer Ingelheim (Canada) Ltd v Pharmacia Canada Inc* 2001 CanLII 28351 (ON SC), paras 59 – 65, and comments of Babin, *supra* fn 56, 70. Another potentially relevant tort might be negligent misrepresentation, although the author could not find examples of such actions in the telecommunications context.
[62] *Boehringer Ingelheim (Canada) Ltd v Pharmacia Canada Inc,* 2001 CanLII 28351 (ON SC), para 60.
[63] *Ibid*, para 59.
[64] *Op cit*. See also *Bell Canada v Rogers Communications Inc*, 2009 CanLll 398481 (Ont SCJ), para 3.
[65] *Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc*, *op cit*, at para. 65.
[66] *Western Canadian Shopping Centres v Dutton*, 2001 SCC 46, [2001] 2 SCR 534.
[67] Per: Heenan Blaikie, "The Advertiser's Nightmare- Class Actions For Misleading Advertising Becoming More Common" (February 2005) online *Canadian Marketing & Advertising Law Update*: <http://www.heenanblaikie.com/en/publications/item?id=470>.
[68] E.g., see: *Ontario Class Proceedings Act*, SO 1992, c 6, s 2(1).
[69] E.g., see: *ibid*, s 5(1). Commentators have noted that in Quebec, the test for certification (called authorization in Quebec) is lower: per E. Kolers, "Recent Developments in Competition Class Actions," (12 May 2009) online Stikeman Elliott LLP: <http://www.cba.org/cba/cle/PDF/SpComp09_Kolers_paper.pdf>, 6.
[70] CNW, "Class action against Bell Canada…..," *op cit*, referring to an action in the Superior Court of Montreal (No 500—06-000572-111).
[71] *Ibid*. From available information, it is not clear whether the class action is specifically based on ss 36(1). If it is, then proof of all of the elements of the ss 52(1) criminal offence would need to be established by the plaintiffs.
[72] E.g., in *Seidel v TELUS Communications Inc*, 2011 SCC 15, [2011] 1 SCR 531, the representative plaintiff raised statutory causes of action under the *Business Practices and Consumer Protection Act* (BPCPA), alleging that TELUS falsely represented to her and other consumers how it calculated air

time for billing purposes. The plaintiff sought remedial relief under ss 171 and 172 of the BPCPA in respect of what were alleged to be deceptive and unconscionable practices contrary to ss 4, 5, 8(3)(b) and 9 of the BPCPA. Section 172 of the BPCPA contains a statutory remedy whereby a person other than a supplier may bring an action in the Supreme Court of British Columbia to enforce the statute's consumer protection standards whether or not the person bringing the action has a special interest or is affected by the consumer transaction that gives rise to the action. See also reference to a proposed class action against a Quebec-based telecommunications company alleging violation of s 12 of the Quebec *Consumer Protection Act* (failure to disclose all costs), seeking restitution for amounts allegedly improperly charged, as well as punitive damages: per Banicevic, *supra*, fn 27, 2 – 3.

[73] E.g., *Seidel v TELUS Communications Inc*, 2011 SCC 15, [2011] 1 SCR 531. The common law basis of the action was ultimately stayed due to the existence of a contractual arbitration clause which barred class actions.

[74] E.g., see *Bell Mobility Inc v Anderson*, 2009 NWTCA 3.

[75] Per: E. Kolers, *op cit*, 19. Kolers was specifically referring to *Competition Act*-based class actions, but it would appear that the comment has equal applicability to telecommunications misrepresentation-based consumer class actions generally.

[76] SO 2002, c 30, Sched A.

[77] For example, recently Ontario, Quebec, Manitoba and Newfoundland have taken steps to regulate wireless contracts. See discussion in R. Trichur, "How to hang up on your wireless provider," (12 April 2012) *Globe and Mail*.

[78] *Richard v Time Inc*, 2012 SCC 8, [2012] 1 SCR 265.

[79] *Ibid*, paras 67 – 72.

[80] E.g., see discussion in Edmonstone, *supra* fn 50.

[81] Unless otherwise stated, the following information concerning ASC is derived from the ASC website, <http://www.adstandards.com/en/>.

[82] For a recent discussion of ASC activities, and limitations associated with ASC, when compared with similar self regulatory entities in other jurisdictions, see: Heenan Blaikie (September 2011) 10 *Canadian Marketing, Advertising & Regulatory Law Update*.

[83] For provincial strict liability offences, and most reviewable conduct under Part VII.1 of the *Competition Act*. The due diligence defence is not available for intentional offences, where simple ignorance (but not wilful blindness) is a defence: see commentary to this effect in Edmonstone, *supra* fn 50, 14 – 15.

[84] See e.g., Advertising Standards Authority (UK), Adjudication on Everything Everywhere Ltd (T-Mobile), A11-166250; and NAD (US Better Business Bureau), "NAD Recommends Verizon Discontinue Certain Customer-Satisfaction Claims, following Cablevision Challenge," (21 September 2010).

[85] Such as s. 14(1) of the Ontario *Consumer Protection Act, 2002*, as discussed earlier in this article.

[86] The aforementioned offence is referred to in this article as a strict liability offence of "general applicability" because it is not limited in application to

only a particular set of circumstances, such as paragraph 51.1(3) (deceptive telemarketing), and ss. 53(1), deceptive notice of winning a prize. Subsection 52(1) is a *mens rea* misleading advertising offence of general applicability.
[87] Section 36 of the *Competition Act*, *supra* fn 40, with the due diligence defence provided pursuant to s 37.3(2).
[88] [1991] 3 SCR 154.
[89] Per: A. Levenstadt, "Instituting an Indirect Purchaser Checkpoint: A Case for Blocking Illinois Brick at the Canadian Border," *Canadian Competition Law Review* (2011) Vol 24, No 1, pp 1–17, at p 1.
[90] 2007 BCSC 518 (CanLII), paras 26-27.
[91] The Code is available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01262.html>.
[92] The CRTC has stated that it "…does not regulate false and misleading ads": per CRTC Frequently Asked Questions available at: <http://www.crtc.gc.ca/eng/faqs.htm>. However, the CRTC might be a supportive participant in a private sector-Bureau-led initiative in this area. The CRTC has indicated its intention to develop a code to improve the clarity of wireless phone contracts: per CRTC, "Proceeding to establish a mandatory code for mobile wireless services" (Telecom Notice of Consultation CRTC 2012-557).
[93] The following discussion of PAAB is based on information provided on the PAAB website, accessible at: <http://www.paab.ca>.
[94] While the focus in this article is on misleading claims in the telecommunications sector, and the role that fast-evolving technology is playing in this sector as a driver for problematic claims and for innovative solutions such as the proposed TAAAB, there is no doubt that technology is also playing a similar role with respect to other consumer products and services (e.g., the travel industry). The TAAAB model could be adopted for any number of different consumer sectors.
[95] SC 1996, c 10.
[96] Per CRTC Frequently Asked Questions: <http://www.crtc.gc.ca/eng/faqs.htm>.
[97] SC 1993, c 38.
[98] See, e.g., s 117 of the Ontario *Consumer Protection Act, 2002*, SO 2002, c 30.