






# Advertising in the Virtual World

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### EXPERTISE

Competition

Marketing & Advertising



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## Welcome and Introductions

James Musgrove  
Partner, Toronto

# Agenda



- Advertising Issues au Québec
- Digital Enforcement in a Virtual World
- Under the Influencer
- Comparative Performance Claims
- Ad Standards Disputes - How to Win
- Q&A





# Sidney Elbaz

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## Advertising Issues au Québec

Sidney Elbaz  
Partner, Montreal

# Prohibited Practices Under the Title II of the Quebec *Consumer Protection Act (CPA)*

- **Art. 215 CPA**

Any practice contemplated in sections 219 to 251.2 or, in case of the sale, lease or construction of an immovable, in sections 219 to 222, 224 to 230, 232, 235, 236 and 238 to 243 constitutes a **prohibited practice** for the purposes of this title.

- 220-falsely ascribe special advantages of goods;
- 221-falsely describe the quality of goods;
- 224-displaying of price description and accuracy of price;
- 228-failure to mention an important fact;
- 231-assuring sufficient quantity;
- 244, 246, 247 applying for credit or offering credit

## **Richard v. Time Inc., 2012 SCC 8**

- **Art. 218 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.

- The Supreme Court of Canada (SCC) expressly rejected the argument that the “**average consumer**” can be defined as having “an average level of intelligence, skepticism and curiosity” and, instead, held the following:
  - *“To be consistent with the legislature’s objective of protecting vulnerable persons from the dangers of certain advertising techniques, **the general impression test** must be applied from the perspective of the **average consumer**, who is credulous and inexperienced and takes no more than ordinary care to observe that which is staring him or her in the face upon first entering into contact with an entire advertisement. Considerable importance must be attached not only to the text, but also to the entire context, including the way the text is displayed to the consumer.”*  
(Richard v. Time Inc., 2012 SCC 8)



# When Does an Advertisement Constitute a False and Misleading Representation under article 219 CPA?

- **Art. 219 CPA**

No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.

- **Two-step analysis**

- In *Richard v. Time*, the SCC established a **two-step analysis** to determine the veracity of a commercial representation that consists of:
  - Describing the general impression that the representation is likely to convey to a credulous and inexperienced consumer; and
  - Determining whether that general impression is true to reality

- **Recent Class Action Examples:**

- Durand c. Subway Franchise Systems of Canada 2020 QCCA 1647
- Abicidan c. Bell Canada 2017 QCCS 1198
- Meubles Leon Ltee v. Option Consommateurs 2020 QCCA

## | Advertised Price – Article 224 (c) CPA

- **Art. 224 CPA**

No merchant, manufacturer or advertiser may, by any means whatever,

(c) charge, for goods or services, a higher price than that advertised.

- *Union des consommateurs inc v. Air Canada*, 2014 QCCA 523, para 53

- **Pricing Errors (Good Faith!!!)**

- *Binnette v. 9378-9980 Quebec Inc.* 2021 QCCQ 3881 (Small Claims Court)


# French Language Requirements in Advertising

- *Charter of the French Language* (RSQ, c. C-11) (the “**French Charter**”)
- **General rule:** pursuant to art. 52 *French Charter*, all “commercial publications” (including websites and social media pages) must be written in French, to the extent that they are aimed at entering into a “commercial act” in the territory of Quebec.
  - *Reid v. Court of Québec*, 2003 CanLII 17980 (QC CS)
  - *Les médias sociaux et la Charte de la langue française – Guide pratique à l’intention des entreprises* [Montreal] : Office québécois de la langue française, 2016.
- Proposed Amendments (Bill 96): Trademark Exemption/Markedly Predominant
- **Art. 54.2 CPA**  
A distance contract is deemed to be entered into at the address of the consumer.



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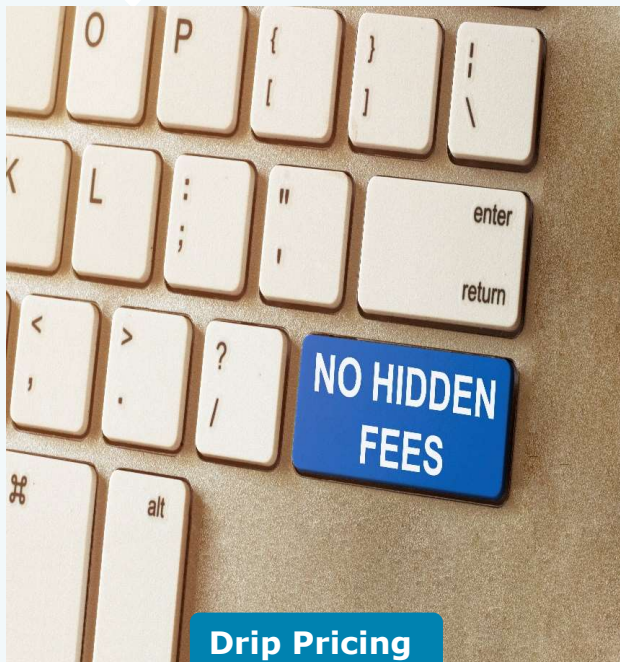


## Digital Enforcement in a Virtual World

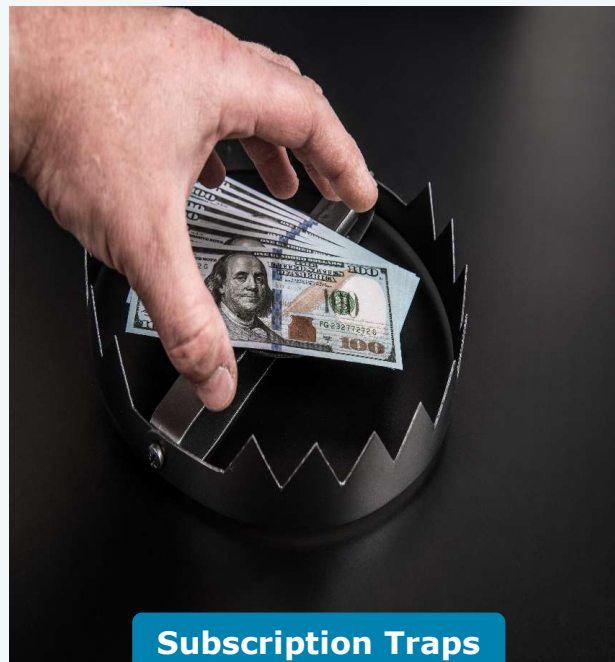
Joshua Krane  
Partner, Toronto



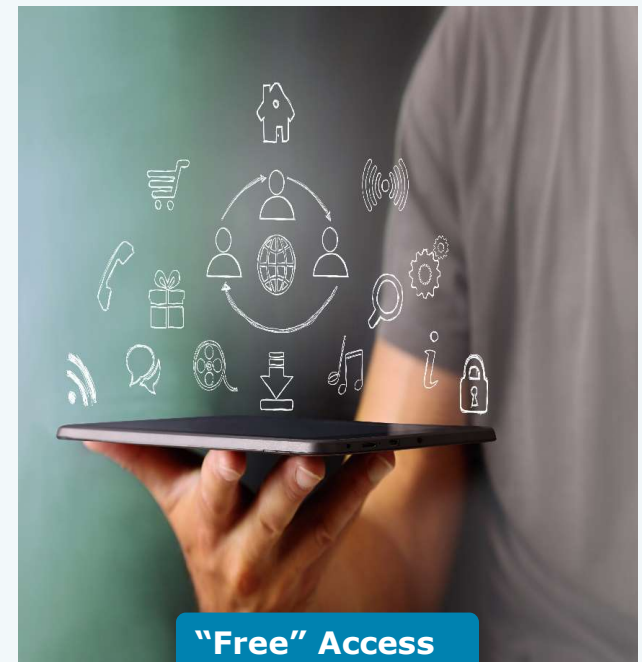
# **Digital Enforcement in a Virtual World**



**Drip Pricing**



**Subscription Traps**



**"Free" Access**

Bureau focused on upfront fee disclosure but scope of law still untested

# Sarah Stirling-Moffet

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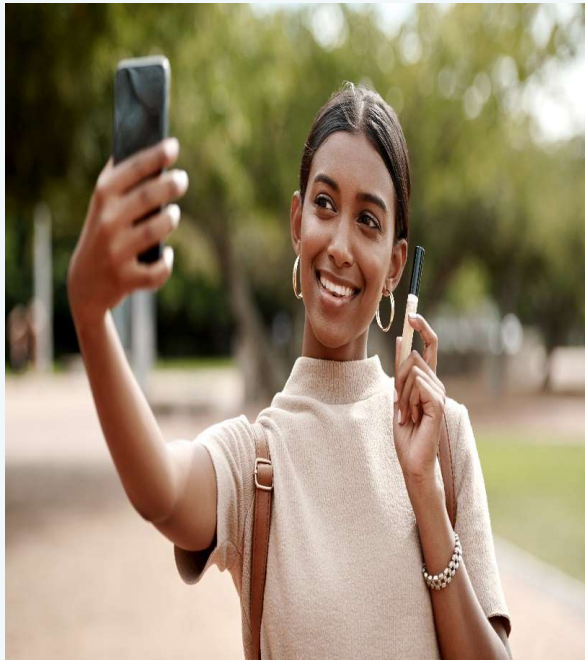


## Under the Influencer

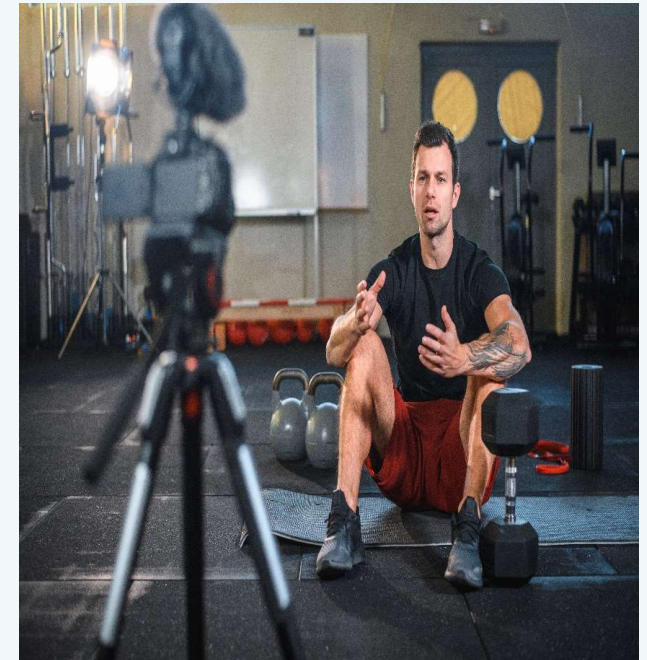
Sarah Stirling-Moffett  
Associate, Toronto



# **| DISCLOSE, DISCLOSE, DISCLOSE!**



**#Ad**



**#PaidPartnership**



# Janine MacNeil

Partner



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The logo for mcmillan, featuring the word in a lowercase, sans-serif font. The 'm' and 'c' are joined, as are the 'i' and 'l'. The background of the logo area is a dark grey triangle that points towards the bottom right corner of the image. To the right of the triangle is a blue and white geometric pattern resembling a modern building's glass facade.





## Comparative Performance Claims

Janine MacNeil  
Partner, Toronto

## Comparative Advertising and the Ad Standards Guidelines: Substantiating Comparative Performance Claims

- Claims that relate to performance – particularly superiority claims and including comparative claims – must be proven through a combination of testing, consumer research before publication
- Under the *Competition Act*, claims about the performance and attributes of your product, particularly comparative claims, require “adequate and proper” testing
- Failure to do so can cause the claim to be challenged by a competitor, or a regulator
- So, how do we substantiate? Look to:
  - Industry practice
  - Court decisions on claim substantiation
  - Recognized scientific, survey procedures

## Comparative Advertising and the Ad Standards Guidelines: Substantiating Comparative Performance Claims

- Ad Standards is a self-regulatory body of the Canadian advertising industry that administers the Canadian Code of Advertising Standards, including the adjudication of consumer complaints and competitor disputes, and provides certain advertising review and preclearance services
- Ad Standards' *Guidelines for the Use of Comparative Advertising* and *Guidelines for the Use of Research and Survey Data to Support Comparative Advertising Claims* serve as guiding principles
  - **6. Comparative Advertising:** Advertisements must not, unfairly, discredit, disparage or attack one or more products, services, advertisements, companies or entities, or exaggerate the nature or importance of competitive differences

# Assessing Advertising Risk: Claim, Scope, Media

Risk depends on the type of claim, scope of the campaign, and type of media

	<u>'Type of claim'</u>	<u>'Campaign Scope'</u>	<u>'Unfixability'</u>
Higher	Comparative claims	Online/Social Media	Catalogue
		Television	Online/Social Media
	Price/sale claims	Catalogue	Television
		National Print	FSI/glossy
	Product claims	Radio	Radio
		Local Print media	Print (magazine)
Lower	Brand awareness	In store	Print (newspaper)

## Comparative Advertising and the Ad Standards Guidelines: Top 10 Tips for Substantiating Comparative Performance Claims

1. **DO** have appropriate support for all comparative claims
2. **DO** follow published market research industry standards or generally accepted industry practices to support comparative claims
3. **DO** ensure that comparative advertising research is valid and reliable
4. **DO** keep comparisons fair and factual
5. **DO** use testimonials, but be clear about scope



## Comparative Advertising and the Ad Standards Guidelines: Top 10 Tips for Substantiating Comparative Performance Claims

6. **DO** follow Ad Standards' *Guidelines for the Use of Research and Survey Data to Support Comparative Advertising Claims* if relying on research or survey data to support a comparative claim
7. **DO** be prepared to provide support for comparative claims
8. **DON'T** unfairly discredit or disparage
9. **DON'T** stretch the comparison
10. **DON'T** selectively compare without support

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## Ad Standards Disputes - How to Win

Dan Edmondstone  
Partner, Toronto

# Ad Standards

- What it is
- What it Does
- Advertiser Disputes
- Consumer Complaints
- Code of Advertising Conduct

# The Canadian Code of Advertising Conduct

1. Accuracy and Clarity
2. Disguised Advertising Techniques
3. Price Claims
4. Bait and Switch
5. Guarantees
6. Comparative Advertising
7. Testimonials
8. Professional or Scientific Claims
9. Imitation
10. Safety
11. Superstitions and Fears
12. Advertising to Children
13. Advertising to Minors
14. Unacceptable Depictions and Portrayals



## Scope/Exclusions from Code

The *Code* applies to "advertising" by (or for):

- advertisers promoting the use of goods and services;
- entities seeking to improve their public image or advance a point of view, whether or not the advertising is for a commercial purpose; and
- governments, government departments and crown corporations.

# | Scope/Exclusions from Code

## Exclusions

- **Political and Election Advertising**
- **Excluded from Definition of “Advertising” and “Advertisement(s)”**
  1. messages from an “entity” that/who has no “material connection” with the entity that makes, distributes, markets or advertises the product or service featured in the advertising.
  2. foreign media (namely media that originate outside Canada and contain the advertising in question) unless the advertiser is a Canadian person or entity; and
  3. packaging, wrappers and labels.

## 1. Accuracy and Clarity

In assessing the truthfulness and accuracy of a message, advertising claim or representation under Clause 1 of the *Code* the concern is not with the intent of the sender or precise legality of the presentation. Rather the focus is on the message, claim or representation as received or perceived, i.e. the **general impression** conveyed by the advertisement.

(a) Advertisements must not contain, or directly or by implication make, **inaccurate, deceptive or otherwise misleading claims**, statements, illustrations or representations.

## 1. Accuracy and Clarity

(b) Advertisements **must not omit relevant information** if the omission results in an advertisement that is deceptive or misleading.

(c) **All pertinent details** of an advertisement must be clearly and understandably stated.

(d) **Disclaimers** and asterisked or footnoted information **must not contradict** more prominent aspects of the message and should be located and presented in such a manner as to be clearly legible and/or audible.

## 1. Accuracy and Clarity

(e) **All advertising claims and representations must be supported by competent and reliable evidence**, which the advertiser will disclose to Ad Standards upon its request. If the support on which an advertised claim or representation depends is test or survey data, such data must be reasonably competent and reliable, reflecting accepted principles of research design and execution that characterize the current state of the art. At the same time, however, such research should be **economically and technically feasible**, with regard to the various costs of doing business.

(f) The advertiser must be clearly identified in the advertisement, excepting the advertiser of a “teaser advertisement” as that term is defined in the *Code*.

## 10. Safety

- Advertisements must not without reason, justifiable on educational or social grounds, display a disregard for safety by depicting situations that might reasonably be interpreted as **encouraging unsafe or dangerous practices, or acts**.

## **11. Superstitions and Fears**

- Advertisements must not exploit superstitions or play upon fears to mislead the consumer.



## 14. Unacceptable Depictions and Portrayals

- This provision allows for distasteful ads; as well as for products or services may be offensive to some people.
- Advertisements shall not:
  - (a) condone ... **discrimination** based upon race, national or ethnic origin, religion, gender identity, sex or sexual orientation, age or disability;\_\_\_\_
  - (b) ...exploit, condone or incite violence; nor appear to condone, or directly encourage, bullying; nor directly encourage, or exhibit obvious indifference to, **unlawful** behaviour;
  - (c) **demean, denigrate or disparage** one or more identifiable persons, group of persons, firms, organizations, industrial or commercial activities, professions, entities, products or services, or attempt to bring it or them into public contempt or ridicule;
  - (d) **undermine human dignity**; or ...**offend the standards of public decency** prevailing among a significant segment of the population.

# | Advertiser Disputes

- Scope/Exclusions
- Fees/Cost
- Process
- Timing

## Exclusions from Advertiser Dispute Process

- The Advertiser Dispute Procedure excludes advertising that is:
  - The **subject of litigation** in which the defendant advertiser identified in the Complaint is also named and identified as a party defendant in the litigation, that was, or is then, actively undertaken and pursued by the complainant advertiser in Canada; or
  - the **subject of a complaint** formally submitted by the complainant advertiser to another competent Canadian authority or tribunal such as the Competition Bureau or Health Canada;
  - advertising (or other advertising that is substantially similar to the advertising), which was in the past or concurrently is the **subject of a review or proceeding by a Canadian court** or Canadian authority or tribunal;

## Exclusions from Advertiser Dispute Process

- advertising that has been, specifically, **approved by an agency** (or some other comparable entity) of the Canadian government or a provincial government;
- generally meets, or exceeds, or is not inconsistent with applicable advertising standards articulated in regulations, guidelines, or otherwise by an agency (or some comparable entity) of the Canadian government or a provincial government;
- has been otherwise submitted as a complaint by the complainant advertiser to Ad Standards under another process administered by Ad Standards such as the Consumer Drug Complaint Procedure.

## Further Exclusions

- where the Complaint relates to one or more advertisements (for food, drug, natural health products, cosmetic, alcoholic beverage or children's products or services) that were **reviewed and approved by Ad Standards Clearance Services, except to the extent the Complaint relates to alleged offences under the Code;**
- where the Complaint includes as a material element of the Complaint any matter which, in Ad Standards' opinion, Ad Standards is unable to resolve effectively or reasonably under this Procedure because the Complaint, in whole or part, ...: I. is **outside the purview** or intended scope of the Code; or II. **may result in the improper application of the Code** or Procedure; or III. requires an assessment, ...of issues, or data associated with the issues, that,..., are technical or otherwise complicated and **beyond Ad Standards' resources or the Ad Dispute Panel's ability to resolve effectively** or reasonably; or IV. has been identified by a competent authority, ... as being outside the purview of Ad Standards.

## Further Exclusions

- where the defendant advertiser or complainant advertiser identified as such in the Complaint failed or **declined to participate** in a previous Advertising Dispute case or **did not fully comply** with the decision of an Ad Dispute Panel in a previous Advertising Dispute case in respect of which such advertiser was identified as being one of the parties in such previous Advertising Dispute case.

## Fees

- Complaint Fee \$1500 paid by the complainant
- Adjudication Fee \$7000 paid by the complainant
- Resolution Meeting (if any) \$2000, split 50/50



## Process

- All in writing/No oral presentation
- Takes about 6 weeks
- Confidential
- National Advertising Division (NAD) runs a similar process in US

<b>Advertiser Disputes</b>	<b>Day</b>
Complaint	0
Review by Ad Standards Possible resolution meeting	
Advertiser Response	Maximum 10 business days
Reply	Maximum 5 business days
Sur-Reply	Maximum 5 business days
Ad Standards may also ask for more information	
Decision by Panel	Maximum 10 business days

## **Consequences and Concluding Thoughts**

- Voluntary, but real
- Keep it simple

# Consumer Complaints

- Scope/Exclusions
- Fees/Cost
- Process
- Timing

## Scope/Exclusions

- Exclusions from the Code apply here, too
- Ad must be current

## Fees

- There is no fee to submit a complaint
- No fee to defend a complaint
- Are consumer complaints by businesses allowed?



## Process

- Initial vetting
- Administrative resolution
- Making your case
- 'hearing'

## | Timing

- Deadlines less defined
- Council meets once per month, typically

## **Consequences and Concluding Thoughts**

- Voluntary, But Real
- The risk of a consumer complaint is often underestimated

**Thank You**

Q&A



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If you have any questions about McMillan, or how we may help you with your legal needs, please get in touch with us.