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Your Widget is Better Than the Other Guy's? Prove It. Before You Say So in an Ad. Or Else...

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It's one thing to see a company falsely advertise its product with gross exaggerations – lose 10 pounds in two days with our supplement! Undo 40 years of wrinkles with one moisturizer!!

It would seem to be another matter entirely when a company asserts its product's superior performance in a commercial and only verifies the assertion after the commercial airs.

But in Canada, even if a company's claims about its product in its advertising turn out to be completely accurate, this can still land a business with a hefty *Competition Act* fine.

The problem? Violating the *Competition Act*'s stringent testing requirements for products *before* advertising how they perform.

Specifically Advertising how a product performs before you're finished testing – even if your claims are eventually substantiated.

In the case of *(Commissioner of Competition) v. Chatr Wireless Inc.*, 2014 ONSC 1146, the Ontario Superior Court of Justice made it clear that there will be financial consequences for any business that does not conduct "adequate and proper testing," as required under the *Competition Act*, *before* making claims about their products.

Chatr Wireless, a service owned by Rogers, claimed in its ads that it had "Fewer dropped calls than new wireless carriers." This claim turned out to be accurate – but the trouble was that Rogers and Chatr had to prove its claim in each market that the ad aired in, and against each

relevant new wireless carrier. But the claims were made in commercials *before* Rogers had completed the "adequate and proper" testing against all new carriers in every city, as required by the *Competition Act*. (For further details on the background of this case, see Todd Greenbloom's article for the December 2013 issue of *Blaneys on Business* at www.blaney.com/articles/competition-act-rules-comparative-advertising-clarified-recent-court-decision).

The Commissioner of Competition asked the Ontario Superior Court of Justice to charge Rogers a $5-7 million penalty for violating the Deceptive Marketing Practices provisions of the *Competition Act*. While the Court ultimately agreed that Rogers and Chatr had indeed run afoul of section 74.01 of the Act, the fact "that the false or misleading advertising portion of the application was not established and that subsequent testing substantiated the fewer dropped calls claim" helped Rogers' cause. The court noted that: "The fewer dropped calls claim may have been harmful to the new wireless carriers but, if that was the case, the harm was not inflicted in a manner which caused harm to consumers because the claim was substantiated. Equally, because the claim was substantiated, any harm inflicted on Wind Mobile and Public Mobile was appropriate." Roger's cause was also aided by the conduct of the other wireless carriers who tried to capitalize on the Competition Commissioner's actions.

On the other hand the fine may have been higher than Rogers would have liked because of its past conduct. TELUS obtained an injunction preventing Rogers' claim that it had "Canada's Most Reliable Network" before testing its network against Telus' HSPA/HSPA + network. The Court concluded that the injunction "is some evidence that Rogers has been willing to make aggressive representations prior to testing when it believes those untested representations are true."

The Court also did not issue a prohibition order against Rogers. A prohibition order would have had a significant impact on any future breaches by Rogers. The Court rejected the prohibition order in part because of the competitors' actions and because the publicity from the case itself resulted in reputational harm to Rogers.

The Court levied a $500,000 penalty against Rogers – chump change compared to the $5-7 million asked but certainly something that would shine a spotlight and encourage compliance with the *Competition Act*.

In addition, it was obviously important for the Court to reinforce the idea that just because a company's claims about the performance, efficacy or length of life of a product or service may be true, the company is still obliged to comply with the adequate and proper testing requirements of section 74.01 of the *Competition Act*.

So, even if a business is acting in good faith and is not attempting to be false or misleading in its advertiing, running ads prior to completing product testing will land that business in hot and expensive water, especially if they have a history.