

TOP FIVE 2012

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

RICHARD v TIME, INC., 2012 SCC 8, [2010] 2 S.C.R. 310

Date Released: February 28, 2012

<http://scc.lexum.org/en/2012/2012scc8/2012scc8.htm>

Facts

Jean-Marc Richard received a letter from Time Magazine which announced in bold letters:

"OUR SWEEPSTAKES RESULTS ARE NOW FINAL: MR JEAN MARC RICHARD HAS WON A CASH PRIZE OF \$833, 337.00."

However, in lower case letters and smaller font, the text continued, *"If you have and return the Grand Prize winning entry in time."*

The prize announcement was made in four other places in the letter, each time qualified by conditions. Mr. Richard, believing that he had won the prize, returned the winning entry form, which had required him to take out a two-year subscription to the magazine. He received his first issue in the mail, but did not receive his cash prize. After speaking with a marketing representative of the magazine, he learned that the letter was merely an invitation to participate in a sweepstakes, and that his reply letter did not have the winning number. He would not be receiving the \$833,337.00. He was also informed that the letter was signed under a fictitious pen name.

Consumer Protection Act (Quebec)

218. 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.

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

238. No merchant, manufacturer or advertiser may, falsely, by any means whatever,

- (a) hold out that he is certified, recommended, sponsored or approved by a third person, or that he is affiliated or associated with the latter;
- (b) hold out that a third person recommends, approves, certifies or sponsors certain goods or services;
- (c) state that he has a particular status or identity.

272. If the merchant or the manufacturer fails to fulfill an obligation imposed on him by this Act, by the regulations or by a voluntary

undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the other recourses provided by this Act,

- (a) the specific performance of the obligation;
- (b) the authorization to execute it at the merchant's or manufacturer's expense;
- (c) that his obligations be reduced;
- (d) that the contract be rescinded;
- (e) that the contract be set aside; or
- (f) that the contract be annulled,

without prejudice to his claim in damages, in all cases. He may also claim punitive damages.

Mr. Richard filed a motion seeking a declaration that he was the winner of the prize, and that he was further entitled to both compensatory (to make up for his losses) and punitive (to punish Time, Inc. for wrongdoing) damages.

Procedural History

The trial judge allowed the action in part, setting the value of Mr. Richard's injuries at \$1000.00, and punitive damages at \$100,000.00. The Court of Appeal of Quebec reversed that judgment, finding in favour of Time, Inc. and setting aside the awards.

Issues

How should the courts decide whether an advertisement gives a false or misleading representation?

Did taking out a magazine subscription under misleading conditions constitute a contract?

How skeptical is the "average" consumer?

Decision

Appeal granted, in part.

Ratio

This decision sets out a process for considering claims of false advertising. In claims of false or misleading advertising, a court must perform a two-step test, which considers the general impression given by representations (statements) made in the ad. The Supreme Court of Canada (SCC) clarified the meaning of an advertisement's "general impression" under section 218 of the *Quebec Consumer Protection Act (CPA)* and held that the standard for assessing that impression is the perspective of a "credulous and inexperienced consumer".

Reasons

In a unanimous decision, the SCC set out a two-step process for assessing the truthfulness of a representation made in an advertisement under s. 218 of the *CPA*: original right under s. 35(1) are as follows:

1. Describe the general impression that the representation is likely to convey to the average consumer; and
2. Determine whether that general impression is true to reality.

If it is not, the merchant has committed a prohibited practice under the *CPA*.

The Court ruled that in the case of false advertising, the “general impression” is one a person has after an initial contact with the entire advertisement, and it relates to both the layout of the ad and the meaning of the text used. In other words, consideration must be given both to the literal meaning of the words and to features like the use of large, prominent print to make promises of rewards as compared to small fonts to qualify these promises.

The SCC also considered the question of whose perspective should be used to assess whether claims would appear seem believable to most people – to the “average consumer.” The Court ruled that the Court of Appeal of Quebec had erred in defining the average consumer as having “an average level of intelligence, skepticism and curiosity.”

Rather, it set the standard lower, describing the average consumer as someone who is “credulous, inexperienced and takes not more than ordinary care to observe that which is staring him or her in the face.”

Using these terms of reference, the Court found that an average consumer would have been under the impression that Mr. Richard won the grand prize, as there were misleading representations in the advertisement.

Under s. 272, a consumer can bring an action for a contractual remedy, but a contract must exist for the *Act* to operate. In this case, Mr. Richard established that there is a relationship between the prohibited practices and his magazine subscription contract. In other words, the advertisement deliberately misled him in order to encourage him to take out a subscription.

Mr. Richard received \$1000 for the personal suffering caused by Time Magazine, and a further \$15,000 in punitive damages to discourage and sanction the magazine’s misleading marketing practices.

Finally, the SCC ruled that Time Magazine’s use of a pen name did not amount to fraud under s. 238, as there were no false representations about the identity of the fabricated signor.

DISCUSSION

1. What is the most unrealistic or exaggerated claim you have seen in an advertisement? What do you think was the purpose of making this claim?
2. Have you ever seen a letter like the one Mr. Richard received? In what ways, if any, was it different from the one you described in Question 1?
3. What do you think Mr. Richard was trying to prove? Do you think he was entitled to any damages? Do you think he was honest in claiming he believed he won the grand prize?
4. What is another way to describe a consumer who is, as the SCC wrote, “credulous and inexperienced”? What are some strengths and weaknesses of using this definition of an average consumer?
5. Working in a group, create an advertisement that you think might border on being misleading. Trade your work with another group, and critique the ad you receive using some of the considerations used by the Supreme Court in this case.