

COMPETITION BUREAU'S ROLE IN DIGITAL ADVERTISING: IMPLICATIONS FOR CHARITIES AND NOT-FOR-PROFITS

*By Terrance S. Carter and Luis R. Chacin**

A. INTRODUCTION

On February 11, 2020, the Competition Bureau released its strategic vision for 2020-2024 in the document titled “Competition in the Digital Age” (the “Plan”),¹ highlighting the leadership role that the Competition Bureau intends to take in the digital economy, including enforcement action with regard to fraud and deceptive marketing practices. The Plan follows the speech, “Honest Advertising in the Digital Age”,² delivered by the Deputy Commissioner of the Competition Bureau’s Deceptive Marketing Practices Directorate at the Canadian Institute 26th Annual Advertising and Marketing Law Conference on January 22, 2020. The Deputy Commissioner provided insight into the Competition Bureau’s role and enforcement priorities with regard to marketing and advertising in the digital economy. This *Charity & NFP Law Bulletin* provides a brief overview of the Plan and the speech by the Deputy Commissioner, both of which are relevant to charities and not-for-profits in their digital fundraising campaigns.

* Terrance S. Carter, B.A., LL.B., TEP, Trademark Agent, is the managing partner of Carters Professional Corporation and counsel to Fasken on charitable matters. Luis R. Chacin, LL.B., M.B.A., LL.M., is an associate at Carters Professional Corporation.

¹ Competition Bureau of Canada, “Competition in the Digital Age: The Competition Bureau’s Strategic Vision for 2020-2024” (11 February 2020), online: Government of Canada <[https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Strategic-Vision-2020-24-En.pdf/\\$file/Strategic-Vision-2020-24-En.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Strategic-Vision-2020-24-En.pdf/$file/Strategic-Vision-2020-24-En.pdf)>.

² Josephine Palumbo, “Honest Advertising in the Digital Age” (delivered at the Canadian Institute 26th Annual Advertising and Marketing Law Conference, Toronto, 22 January 2020), online: Government of Canada <<https://www.canada.ca/en/competition-bureau/news/2020/01/honest-advertising-in-the-digital-age.html>>.

B. BACKGROUND

Charities and not-for-profits promoting a digital fundraising campaign must review not only each online platform's terms of use or guidelines for advertising, contests and promotion,³ but also ensure that all representations and claims made in the campaign comply with the requirements of the *Competition Act*.⁴

The *Competition Act* is a federal act, the stated purpose of which is to maintain and encourage competition in Canada for the benefit of businesses and consumers.⁵ Of interest, the *Competition Act* contains various provisions regarding deceptive marketing practices, and prohibits the making of materially false or misleading representations to the public for the purpose of promoting a product, service or business interest, regardless of the means by which the representations are made.⁶

Since the *Competition Act* defines the term "business" to include "the raising of funds for charitable or other non-profit purposes,"⁷ the provisions of the *Competition Act* with regard to false or misleading representations and deceptive marketing practices also apply to anyone promoting, directly or indirectly, a fundraising campaign for a charity or not-for-profit, regardless of whether the representations are made through digital or other means.

The Competition Bureau, headed by the Commissioner of Competition,⁸ is a federal agency responsible for the administration and enforcement of the *Competition Act*. The Competition Bureau may investigate and take action, where appropriate, against any person or entity, including a charity or not-for-profit, engaged in false or misleading representations and deceptive marketing practices, including representations made by digital means. Of note, directors, officers and agents of a corporation may also be personally liable if found to have directed, authorized, assented to, acquiesced in, or participated in the commission of an offence under the *Competition Act*.

³ See Terrance S. Carter, "Legal Issues in Social Media for Charities and Not-for-Profits" (27 February 2019), *Charity & NFP Law Bulletin* No. 441, Carters Professional Corporation, online: <<http://www.carters.ca/pub/bulletin/charity/2019/chylb441.pdf>>.

⁴ RSC 1985, c C-34.

⁵ *Ibid*, s 1.1.

⁶ *Ibid*, ss 52-53 and 74.01-74.19.

⁷ *Ibid*, s 2(1).

⁸ *Ibid*, s 7.

C. “COMPETITION IN THE DIGITAL AGE”

In line with Canada’s Digital Charter released in May 2019,⁹ as well as the letter from the Minister of Innovation, Science and Economic Development to the Commissioner of Competition shortly after the latter’s appointment last year for a 5-year term,¹⁰ the Competition Bureau’s strategic vision for 2020-2024 recognizes the significant challenges being raised by the digital economy and the important role of the Competition Bureau. The Plan describes the Competition Bureau’s need to adapt to the digital age by improving its ability to take timely enforcement action, which is its main focus, by investing in new tools and training, as well as cooperating with competition authorities around the world that are also facing the challenges that come with the borderless digital marketplace.

The Plan also states that there are new and more sophisticated methods being used for anti-competitive and deceptive conduct in the digital economy and, as such, the Competition Bureau must become a leader in gathering, processing, and analyzing data and digital evidence, and quickly adopt new digital tools, such as advanced analytics and artificial intelligence, to address exponentially growing data sets and increasing complexity of competition issues.

According to the Plan, the Competition Bureau will continue to work collaboratively with regulators, policymakers and stakeholders, both domestically and internationally, to provide Canadians with the information they need to protect themselves from fraud and deceptive marketing in the online marketplace, and increase awareness of competition issues by improving communication and providing guidance to help businesses understand their obligations and recognize and report potentially anti-competitive or deceptive conduct by market participants.

Finally, the Plan refers to the Competition Bureau’s plans to host an annual Digital Enforcement Summit Series, as well as the creation of a Digital Enforcement Office and internal communities of practice within the Competition Bureau to share and advance knowledge on data governance, digital evidence, and

⁹ Government of Canada, “Canada’s Digital Charter in Action: a Plan by Canadians, for Canadians” (21 May 2019), online: <https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00109.html>. See also Esther Shainblum, “Canada Introduces Digital Charter and Proposes Reforms to PIPEDA” (30 May 2019), *Charity & NFP Law Bulletin* No. 449, Carters Professional Corporation, online: <<http://www.carters.ca/pub/bulletin/charity/2019/chylb449.pdf>>.

¹⁰ The Honourable Navdeep Bains, PC, MP, “Letter from Minister of Innovation, Science and Economic Development to the Commissioner of Competition” (21 May 2019), online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04464.html>>. Government of Canada, Competition Bureau (5 March 2019), online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00109.html>.

advanced analytics. The Plan also states the importance of recruiting and retaining staff with diverse educational and professional backgrounds, who can provide the optimal mix of talent required for enforcement action in the digital economy.

D. “HONEST ADVERTISING IN THE DIGITAL AGE”

In her speech of January 22, 2020, the Deputy Commissioner of the Competition Bureau’s Deceptive Marketing Practices Directorate referred to the Competition Bureau’s new focus on enforcement action in the “ever-expanding” digital economy, specifically with regard to, among other things, (1) influencer marketing; (2) fake online reviews; (3) consumer privacy and big data; and (4) domestic and international cooperation.

1. Influencer Marketing

Influencer marketing is a social media marketing strategy which relies on individuals or organizations, referred to as “influencers”, for the promotion of goods, services or businesses, leveraging on their perceived credibility or popularity among large segments of social media users who “follow” these influencers on one or more social media platforms. A social media influencer’s potential ability to influence any number of followers or viewers is typically segmented by categories of interests.¹¹

In this regard, and stating that truth in advertising is important, the Deputy Commissioner commented on the Competition Bureau’s role in reminding businesses and marketing agencies that “the *Competition Act* applies to influencer marketing just as it does to traditional advertising.” In doing so, the Deputy Commissioner stated that consumers have a right to know when an influencer is receiving any payment or benefit in connection with the business, product or service that the influencer is advertising, and referred to the resources available on the Competition Bureau’s website for further reference.¹²

¹¹ The Deputy Commissioner stated that: “An *Ad Standards* study revealed that a full 35 percent of Canadians aged 18-35 say they have made a purchase based on the recommendation of an Internet influencer and 41 percent said that they find the practice of influencer marketing to be acceptable.”

¹² See Government of Canada, Competition Bureau, “Influencer marketing and the *Competition Act*” (last updated: 13 January 2020), online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04512.html>>. See also, Competition Bureau, “News Release: Influencer marketing: businesses and influencers must be transparent when advertising on social media” (19 December 2019), online: <<https://www.canada.ca/en/competition-bureau/news/2019/12/influencer-marketing-businesses-and-influencers-must-be-transparent-when-advertising-on-social-media.html>>.

This approach by the Competition Bureau is consistent with the recommendations of *Ad Standards* in its Disclosure Guidelines, last updated in January 2019,¹³ which require that influencers clearly disclose any material connection with a business and ensure that consumers are adequately informed when the influencer content is, in reality, an advertisement. Influencers should ensure that their disclosures are clearly visible and appropriate to the type of content, including the use of disclosure hashtags such as #ad or #sponsored, and the nature of the material connection, such as a benefit or monetary compensation, are also adequately disclosed. A charity or not-for-profit relying on an influencer needs to ensure that these guidelines are followed so that potential donors are adequately informed.

2. Fake Online Reviews

The Deputy Commissioner also referred to the increased efforts by certain businesses to boost their own ratings or lower the ratings of their competitors with fake online reviews, which unfairly prejudice consumers' ability to make informed decisions and hinder healthy competition in the marketplace. Examples of this include fake online reviews posted by employees pretending to be real customers, or by real customers who would have not otherwise left a positive review in consideration for a benefit or incentive.

The Deputy Commissioner also commented on the efforts of the Competition Bureau to educate consumers and help them recognize, reject and report deceptive marketing practices, misleading advertisements and scams.

3. Consumer Privacy and Big Data

The Deputy Commissioner also touched upon how deceptive marketing practices intersect with issues of consumer privacy when consumers are misled into providing their personal information to online businesses. For example, with advances in information technology, social media platforms are able to collect large amounts of data from their users and various online services. Some businesses make false or misleading statements about the type of data they collect, and why or how

¹³ Ad Standards, "Influencer Marketing Steering Committee: Disclosure Guidelines" (January 2019), online: <<http://adstandards.ca/wp-content/uploads/2019/02/Influencer-Marketing-Steering-Committee-Disclosure-Guidelines-Jan-2019.pdf>>.

they collect, use or maintain it. These issues have also been previously considered by the Competition Bureau.¹⁴

Although the Competition Bureau has raised these concerns before, this is an important development because the vast enforcement powers of the Competition Bureau, complementing the limited tools available to the Office of the Privacy Commissioner, may help address false or misleading claims about consumer privacy more effectively.

4. Domestic and International Cooperation

Acknowledging the multinational nature of the digital economy, the Deputy Commissioner also commented on the Competition Bureau's collaboration with domestic and international partners, considering topics such as consumer protection, privacy and artificial intelligence, and how new technologies are used to influence consumers online.

E. CONCLUSION

The Competition Bureau's new focus on the digital economy highlights the impact that information technology has had and is expected to have on the economy. With a growing number of goods, services and businesses being promoted online, charities and not-for-profits often rely on social media and other online platforms for their fundraising endeavours. However, relevant legislation must not be overlooked and adequate steps must be taken to ensure that all representations made by the charity or not-for-profit, as well as any agent or intermediary such as an influencer, remain compliant with the provisions of the *Competition Act*.

¹⁴ See Government of Canada, Competition Bureau, "Big data and innovation: key themes for competition policy in Canada" (19 February 2018), online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html#sec04>>.