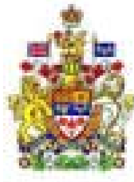
Federal Court of Appeal



Cour d'appel fédérale

Date: 20091015

Docket: A-476-08

Citation: 2009 FCA 295

CORAM: LÉTOURNEAU J.A.
SEXTON J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Appellant

and

PREMIER CAREER MANAGEMENT GROUP CORP. AND MINTO ROY

Respondents

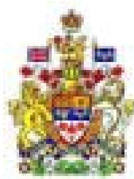
Heard at Toronto, Ontario, on September 16, 2009.

Judgment delivered at Ottawa, Ontario, on October 15, 2009.

REASONS FOR JUDGMENT BY: SEXTON J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
LAYDEN-STEVENSON J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT

SEXTON J.A.

I. Introduction

[1] The respondents operated a career consulting business in the Vancouver area. In their attempts to stimulate business, the respondents made a number of allegedly misleading representations to potential clients regarding their prospects for success in the job market should they use the respondents' services. The representations were made individually and in private to a number of potential clients. The appellant alleges these representations violate paragraph 74.01(1)(*a*) of the *Competition Act*, R.S.C. 1985, c. C-34 ("the Act"), which prohibits false or misleading advertisements made to the public. The respondents contend that they were not

misleading and were not made to the clients as members of the public, but rather as individuals. The Tribunal held that, although the representations were misleading, they were not made "to the public" because they were made in the privacy of the respondents' office on a one-to-one basis. The main issue in this appeal is whether the representations to certain individuals, though made individually and in private, were nevertheless made "to the public" within the meaning of the Act. The appeal also puts in question the character of these representations. I believe that the focus of the analysis should be on all the circumstances under which the representations were made. In particular it is important that the respondents solicited, by means of advertising, members of the public to utilize their services in order to obtain employment. Once members of the public sought help from the respondents, similar misleading representations were made to each of such members of the public. For the reasons that follow, I find that the representations in this case were misleading and were indeed made "to the public."

II. Facts

[2] The respondent Premier Career Management Group Corp. (PCMG) was an employment consulting business in the Vancouver area. The respondent Minto Roy was the sole director and sole shareholder of PCMG.

[3] PCMG had three divisions:

A. "Careers Today" was a head-hunting and job posting website;

B. "PCMG Executive" was a human resources consulting and leadership management training service;

C. "PCMG Canada" is the focus of this appeal. It provided career coaching services to clients and accounted for 60 to 70 percent of overall PCMG revenue. It offered help with skills analysis and résumé preparation, among other services.

[4] PCMG Canada generally solicited clients through the Careers Today website, Mr. Roy's radio show, and newspaper and magazine advertising. When a prospective customer was identified, he or she would be offered a first meeting (the "first meeting") with a Senior Career Consultant. In the first meeting, the customer would explain his or her employment history and current job status. The Consultant would then give an overview of PCMG Canada's services.

[5] Customers were almost always invited for a second meeting (the "second meeting"). The second meeting would include a discussion of PCMG services, as well as a discussion of fees and financing options. A PCMG employee would then present the customer with a contract for signature.

[6] The Tribunal found that the respondents made three types of representations to prospective customers: the "screening representation," the "contacts representation" and the "90 day/good job representation."

A. *The Screening Representation*

[7] In the screening representation, clients were told at the first meeting that only qualified applicants would be invited for a second meeting, and that the purpose of the first meeting was to ensure that prospective clients were qualified for PCMG's services.

[8] At the hearing before the Tribunal, the appellant introduced testimony from Mr. Steve Wills, a former PCMG Senior Career Consultant. Mr. Wills testified that it was exceptionally rare for any prospective client to be denied a second meeting. Mr. Wills stated that, according to Mr. Roy, one of the key objectives of the first meeting was to determine the prospective customer's ability to pay and, if the customer did not have enough money, to find alternative sources of funding. Mr. Wills also testified that consultants were instructed to stress that the prospective customer should bring his or her spouse to the second meeting. He explained that if the spouse of a prospective customer had not listened to the PCMG sales pitch, the likelihood of the prospective customer signing the contract was reduced. Finally, Mr. Wills testified that consultants were instructed to follow a script, and that the script was intended to instil a sense of urgency in the prospective customer.

B. *The Contacts Representation*

[9] In the contacts representation, prospective clients were informed at the first and/or second meetings that the respondents had a wide network of personal contacts with leaders and business executives at companies that were hiring. Clients testified that they had been told, among other things, that PCMG had thousands of positions, that the jobs advertised on the internet and in print

represented only a fraction of the total number of jobs available, and that PCMG, through its contacts, had access to a "hidden job market" of otherwise unadvertised jobs.

C. *The 90 Day/Good Job Representation*

[10] In the 90 day/good job representation, the respondents advised prospective customers at the first and/or second meetings that they would very likely find good jobs within 90 days should they engage PCMG's services. Prospective customers were further advised that these new positions would be at least as remunerative as their previous positions.

[11] One former client testified that she was advised by Mr. Roy that "there would be no problem" finding her a position paying $20,000 to $30,000 more than her previous position within 90 days. Another former client testified that Mr. Roy guaranteed that he would find a job with a minimum salary of $75,000 within 90 days. The client was then presented with a contract including a provision that PCMG had not induced him to sign the contract "by implication, representation or [guarantee of] . . . (b) any verbal promises that are not part of the written agreement."

III. Decision Below

[12] A judge of the Federal Court sitting alone presided over the case for the Competition Tribunal and divided the analysis into five questions:

A. Were the representations made?

B. For what purpose were the representations made?

C. Were the representations false or misleading?

D. Were the representations material in nature?

E. Were the representations made to the public?

[13] The Tribunal found that the screening representation, the contacts representation, and the 90 day/good job representation were all misleading. It further found that the contacts representation and the 90 day/good job representation were misleading in a material respect. It did not find that the screening representation was materially misleading. In the end, however, the Tribunal dismissed the application, holding that the representations, though materially misleading, were not made "to the public" within the meaning of section 74.01.

A. *Were the representations made?*

[14] In the proceedings before the Tribunal, the appellant introduced testimony from nine former clients of the respondents, all of whom claimed to have abandoned the respondents' programme because of unsatisfactory results, and all of whom claimed that they were misled by representations made by the respondents.

[15] The Tribunal accepted the evidence of the appellant's witnesses and found that representations were made to a number of prospective clients.

[16] The Tribunal dismissed the respondents' argument that no representations had been made. With respect to the contacts and 90 day/good job representations, it ruled that, while the respondents

may not have made any representations regarding specific interviews or companies, they nevertheless made misleading representations regarding jobs and contracts generally. Furthermore, the respondents misrepresented themselves through flattery during the screening representation. Finally, the Tribunal found that testimony from the respondents denying the misrepresentation was not credible.

B. *For what purpose were the representations made?*

[17] There was little debate as to the purpose of the representations. The Tribunal found that the purpose was "to persuad[e] prospective clients to purchase PCMG's services."

C. *Were the representations false or misleading?*

[18] In determining whether the representations were misleading, the Tribunal asked "what could reasonably have been understood by the average prospective PCMG client who heard the Representations during the First and Second Meetings." Based on the facts before it, the Tribunal concluded that "although average members of the intended audience . . . were not normally gullible they were likely to accept what was reasonably implied without critical analysis because, to varying degrees, they were needy."

[19] Based on this standard, the Tribunal found that all three sets of representations were misleading. The screening representation would have led the average prospective client to conclude he or she had been measured against high standards when, in reality, no such standards existed. The contacts representation would have led the average prospective client to believe that the respondents

had and would use significant business contacts to help find jobs when this was not the case. The 90 day/good job representation was misleading as the average prospective client would have been led to believe that typical clients found a job within 90 days and that he or she would have a similar experience.

D. *Were the representations material in nature?*

[20] To assess materiality, the Tribunal used the test from *Apotex Inc.* v. *Hoffman La-Roche Ltd.*, (2000) 195 D.L.R. (4th) 244 (Ont. C.A.) at paragraph 16: "A representation is material . . . if it is so pertinent, germane or essential that it could affect the decision to purchase." On the evidence, the Tribunal found that both the contacts representation and the 90 day/good job representation would have affected the average prospective customer's decision to purchase PCMG's services. Thus, they were material. With respect to the screening representation, the Tribunal found it was not material because there was no evidence that it had motivated any of the appellant's witnesses to procure the respondents' services.

E. *Were the representations made to the public?*

[21] This was the most contentious issue of the decision. The Tribunal concluded that the phrase "to the public" was intended by Parliament to be interpreted in the plural sense. It found that the legislative history of the previous criminal provisions tended to show that Parliament had sometimes, but not always, chosen to use the phrase "a member of the public" instead of "to the public." Therefore, when Parliament retained the phrase "to the public" in paragraph 74.01(1)(*a*), it must have intended it to be interpreted in the plural sense.

[22] The Tribunal then addressed whether the representations were indeed made “to the public.” It noted that the facts of this case were unlike previous cases under the *Copyright Act*, R.S.C. 1985, c. C-42 where the phrase “to the public” was interpreted as not necessarily excluding “one to one” communication. It focussed on the fact that in this case prospective customers conveyed personal details to the respondents at the meetings. Citing a 1976 background paper from the Department of Consumer and Corporate Affairs, and section 1.1 of the Act, the Tribunal ruled that the phrase “to the public” must be understood not just as communication to individuals but rather “to the marketplace.”

[23] Finally, the Tribunal ruled that the deeming provision in. 74.03(1)(*d*) cannot be used to interpret paragraph 74.01(1)(*a*). First, it noted that paragraph 74.03(1)(*d*) does not contain any express language such as the word “includes” to indicate it should be given a broader reading. Second, the Tribunal reasoned that in-store, door-to-door and telephone selling, captured by paragraph 74.03(1)(*d*) are examples of mass marketing and therefore different from the sales style used in the case at bar.

[24] The Tribunal dismissed the application because of its finding that the misrepresentations were not made “to the public.”

IV. Issues on Appeal

[25] The appellant raises one issue on appeal: did the Tribunal err in interpreting the words "to the public"?

[26] The respondents raise a further issue: did the Tribunal err in holding that the contacts representation and the 90 day/good job representation were misleading?

V. Relevant Legislative Provisions

[27] The primary provision for the civil review of marketing practices is found in section 74.01(1) of the Act:

74.01 (1) A person engages in reviewable conduct who, 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,	74.01 (1) Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques :
(*a*) makes a representation to the public that is false or misleading in a material respect;	*a*) ou bien des indications fausses ou trompeuses sur un point important;
(*b*) 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; or	*b*) ou bien, sous la forme d'une déclaration ou d'une garantie visant le rendement, l'efficacité ou la durée utile d'un produit, des indications qui ne se fondent pas sur une épreuve suffisante et appropriée, dont la preuve incombe à la personne qui donne les indications;
(*c*) makes a representation to the public in a form that purports to be	*c*) ou bien des indications sous une forme qui fait croire qu'il s'agit :
(i) a warranty or guarantee of a product, or	(i) soit d'une garantie de produit,
	(ii) soit d'une promesse de

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,	remplacer, entretenir ou réparer tout ou partie d'un article ou de fournir de nouveau ou continuer à fournir un service jusqu'à l'obtention du résultat spécifié,
if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.	si cette forme de prétendue garantie ou promesse est trompeuse d'une façon importante ou s'il n'y a aucun espoir raisonnable qu'elle sera respectée.

[28] In turn, section 74.03 of the Act is a deeming provision, partially addressing the meaning of the phrase "to the public" in paragraphs 74.01(*a*), (*b*), and (*c*). The deeming provision has since been amended. At the time of the decision, the deeming provision read as follows:

74.03 (1) For the purposes of sections 74.01 and 74.02, a representation that is	74.03 (1) Pour l'application des articles 74.01 et 74.02, sous réserve du paragraphe (2), sont réputées n'être données au public que par la personne de qui elles proviennent les indications qui, selon le cas:
(*a*) expressed on an article offered or displayed for sale or its wrapper or container,	*a*) apparaissent sur un article mis en vente ou exposé pour la vente, ou sur son emballage;
(*b*) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,	*b*) apparaissent soit sur quelque chose qui est fixé à un article mis en vente ou exposé pour la vente ou à son emballage ou qui y est inséré ou joint, soit sur quelque chose qui sert de support à l'article pour l'étalage ou la vente;
(*c*) expressed on an in-store or other point-of-purchase display,	*c*) apparaissent à un étalage d'un magasin ou d'un autre point de vente;
(*d*) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or	*d*) sont données, au cours d'opérations de vente en magasin, par démarchage ou par
(*e*) contained in or on anything that is sold, sent, delivered, transmitted or made available in	

any other manner to a member of the public, is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2).	téléphone, à un usager éventuel; *e*) se trouvent dans ou sur quelque chose qui est vendu, envoyé, livré ou transmis au public ou mis à sa disposition de quelque manière que ce soit.
(2) Where a person referred to in subsection (1) is outside Canada, a representation described in paragraph (1)(a), (b), (c) or (e) is, for the purposes of sections 74.01 and 74.02, deemed to be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.	(2) Dans le cas où la personne visée au paragraphe (1) est à l'étranger, les indications visées aux alinéas (1)a), b), c) ou e) sont réputées, pour l'application des articles 74.01 et 74.02, être données au public par la personne qui a importé au Canada l'article, la chose ou l'instrument d'étalage visé à l'alinéa correspondant.
(3) Subject to subsection (1), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in section 74.01 is deemed to make that representation to the public.	(3) Sous réserve du paragraphe (1), quiconque, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, fournit à un grossiste, détaillant ou autre distributeur d'un produit de la documentation ou autre chose contenant des indications du genre mentionné à l'article 74.01 est réputé donner ces indications au public.

[29] On March 12, 2009, after the Tribunal had rendered its decision, the *Budget Implementation Act*, S.C. 2009, c. 2 received royal assent, thereby amending section 74.03 to add subsections 4 and 5. Paragraph (4)(*c*) is especially germane to this case:

(4) For greater certainty, in proceedings under sections 74.01 and 74.02, it is not necessary to establish that	4) Il est entendu qu'il n'est pas nécessaire, dans toute poursuite intentée en vertu des articles 74.01 et 74.02, d'établir :

(*a*) any person was deceived or misled;

(*b*) any member of the public to whom the representation was made was within Canada; or

(*c*) the representation was made in a place to which the public had access.

a) qu'une personne a été trompée ou induite en erreur;

b) qu'une personne faisant partie du public à qui les indications ont été données se trouvait au Canada;

c) que les indications ont été données à un endroit auquel le public avait accès.

(5) 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.

(5) Dans toute poursuite intentée en vertu des articles 74.01 et 74.02, pour déterminer si le comportement est susceptible d'examen, il est tenu compte de l'impression générale donnée par les indications ainsi que du sens littéral de celles-ci.

[30] The use to which this amendment may be put is governed, in part, by subsection 45(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21:

45. (2) The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.

45. (2) La modification d'un texte ne constitue pas ni n'implique une déclaration portant que les règles de droit du texte étaient différentes de celles de sa version modifiée ou que le Parlement, ou toute autre autorité qui l'a édicté, les considérait comme telles.

[31] Also of note, for the purpose of statutory interpretation, is section 1.1 of the Act:

1.1 The purpose of this Act is to maintain

1.1 La présente loi a pour objet de

and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.	préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

[32] The remedial provisions are found in section 74.1 of the Act:

74.1(1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person	74.1 (1) Le tribunal qui conclut, à la suite d'une demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen visé à la présente partie peut ordonner à celle-ci :
(*a*) not to engage in the conduct or substantially similar reviewable conduct;	a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;
(*b*) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including (i) a description of the reviewable conduct, (ii) the time period and geographical area to which the conduct relates, and (iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed;	b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment : (i) l'énoncé des éléments du comportement susceptible d'examen, (ii) la période et le secteur géographique auxquels le comportement est afférent, (iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias — notamment de la publication — utilisés;

(*c*) to pay an administrative monetary penalty, in any manner that the court specifies, in an amount not exceeding (i) in the case of an individual, $750,000 and, for each subsequent order, $1,000,000, or (ii) in the case of a corporation, $10,000,000 and, for each subsequent order, $15,000,000; and …	c) de payer, selon les modalités qu'il peut préciser, une sanction administrative pécuniaire maximale : (i) dans le cas d'une personne physique, de 750 000 $ pour la première ordonnance et de 1 000 000 $ pour toute ordonnance subséquente, (ii) dans le cas d'une personne morale, de 10 000 000 $ pour la première ordonnance et de 15 000 000 $ pour toute ordonnance subséquente; […]

[33] Finally, a determination of the appropriate standard of review engages, in part, the *Competition Tribunal Act*, R.S.C. 1985 c. 19 (2nd supp.):

13. (1) Subject to subsection (2), an appeal lies to the Federal Court of Appeal from any decision or order, whether final, interlocutory or interim, of the Tribunal as if it were a judgment of the Federal Court.	13. (1) Sous réserve du paragraphe (2), les décisions ou ordonnances du Tribunal, que celles-ci soient définitives, interlocutoires ou provisoires, sont susceptibles d'appel devant la Cour d'appel fédérale tout comme s'il s'agissait de jugements de la Cour fédérale.
(2) An appeal on a question of fact lies under subsection (1) only with the leave of the Federal Court of Appeal.	(2) Un appel sur une question de fait n'a lieu qu'avec l'autorisation de la Cour d'appel fédérale.

VI. Meaning of the Words "To the Public"

A. *Standard of Review*

[34] The parties are in agreement that the construction of the words “to the public” within the meaning of paragraph 74.01(1)(*a*) of the Act is a question of law subject to review on a standard of correctness (*Housen* v. *Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paragraph 9).

B. *Construction of the words “to the public”*

(1) APPELLANT’S SUBMISSIONS

[35] The appellant submits that the Tribunal committed three errors in its interpretation of “to the public.” First, the Tribunal incorrectly held that representations made *in private*—that is, where the potential clients had a reasonable expectation of privacy—could not have nevertheless been made *to the public*. Second, the appellant maintains that, contrary to the Tribunal’s ruling, the phrase “to the public” does not mean that the representation must be made to more than one member of the public at a time or as the Tribunal put it, “to the marketplace.” Finally, the appellant claims that the Tribunal should not have used the deeming provision to interpret paragraph 74.01(1)(*a*).

(2) RESPONDENTS’ SUBMISSIONS

[36] The respondents make four submissions regarding the construction of the phrase “to the public.”

(a) *Representations made in private are not made "to the public"*

[37] The respondents submit that by using the wording "to the public" and not "to a member of the public," Parliament intended to target publicly disseminated representations. They cite dictionary definitions in English and French, which state that the word "public" is a plural collective noun. The respondents also refer to case law which they say stands for the proposition that the phrase "to the public" requires that representations be made to a significant group of people, not on an individual basis.

(b) *The deeming provision serves as a valid interpretive aid*

[38] While the respondents agree with the appellant that the section 74.03(1) deeming provision does not apply directly to paragraph 74.01(1)(*a*), the respondents nevertheless submit that the provision serves as a valuable interpretive aid. First, since section 74.03(1) begins with the phrase "for the purposes of sections 74.01 and 74.02," its purpose is to augment sections 74.01 and 74.02. The specific purpose of paragraphs 74.03(1)(*d*) and (*e*) is in turn to deem "to the public" certain representations that would otherwise not have been so considered. Second, the respondents argue that ignoring the deeming provision, as is suggested by the appellants, would violate the rule against surplussage: if private communications could be considered "to the public," then Parliament would not have had to insert the deeming provision with respect to the communications outlined in paragraphs 74.03(1)(*d*) and (*e*). Further, the respondents submit that their interpretation is in accordance with the maxim of statutory interpretation *expressio unius exclusio alterius*. Finally, they highlight the recent amendment to the deeming provision. They submit that this amendment

was intended to overrule the Tribunal's decision in this case, leading to the conclusion that the provision, prior to its amendment, did not apply.

(c) *Legislative history supports the Tribunal's interpretation*

[39] The respondents endorse the Tribunal's conclusions regarding the 1974 amendments, which inserted the deeming provision. The Tribunal noted that the amendment as passed changed language from the draft bill: in paragraphs (*d*) and (*e*). The amendment as passed used the singular phrase "a person as ultimate user" instead of the plural "persons as ultimate users," which was contained in the draft bill. The draft bill similarly contained the plural phrase "members of the public" and not the language in the amendment "a member of the public." However, these changes from plural to singular were not mirrored in paragraph 36(1)(*a*), analogous to the current civil provisions in paragraph 74.01(1)(*a*). Parliament can be understood therefore to have intended that the phrase "to the public" require a group of people for the purposes of paragraph 74.01(1)(*a*).

(d) *The purpose of the Act*

[40] Finally, the respondents agree with the Tribunal that the purpose of the Act is the protection of consumers and competitors in the marketplace. Based on this purpose, in order for paragraph 74.01(1)(*a*) to be triggered, misleading information must be fed into the marketplace through communication to other businesses and not just to consumers. Indeed, notes the respondent, the Act largely emphasizes competitors; the only mention of consumers in the purpose clause, section 1.1, is in relation to "competitive prices and product choices."

(3) ANALYSIS OF THE TRIBUNAL'S DECISION AND THE PARTIES' SUBMISSIONS

(a) *Representations in the present case, although made in private were made "to the public"*

[41] In this case, the respondents addressed their advertisements to members of the public at large. The public was accordingly invited to seek the services of the respondents. Members of the public then accepted the invitation and made appointments with the respondents.

[42] The respondents, in oral argument, admitted that if these representations had been made to a group of prospective clients together, the representations would have been made "to the public." I cannot accept that because the representations were made to individuals of the public in a private place, this means that they were not made to the public.

[43] The Tribunal stressed that personal matters were discussed at the first and second meetings. However, the personal matters discussed at these meetings were raised by the clients. The communications made by the prospective clients were not the subject of the false or misleading representations. These were made by the respondents. The Tribunal also ruled that the communications between the clients and the respondents at the first and second meetings were made with a reasonable expectation of privacy. Again, this expectation relates to the communications made by the clients, not to the representations made by the respondents. At issue in this case are the representations made *by* the respondents *to* the customers. Anything said by customers—however personal in nature—is irrelevant to a determination of whether the respondents' representations

were misleading. The content of these representations was not at all private and was substantially the same for the members of the public who sought the services of the respondents.

[44] The respondents submit that the representations were not made "to the public" because they were made individually to clients and that there was therefore no public access. I disagree. The public did have access; it just accessed the representations one-at-a-time rather than collectively. The important question to ask in determining whether a representation was made to the public is "to whom were the representations made?" Here, they were made to various members of the public seeking the services of the respondents.

[45] There is ample support for this interpretation in the jurisprudence of this Court and the Supreme Court. In *University of British Columbia* v. *Berg*, [1993] 2 S.C.R. 353, the Supreme Court addressed the meaning of "public" within the context of the British Columbia *Human Rights Act*, S.B.C. 1984, c. 22, s.3. In that case, a student at the University of British Columbia alleged that the school violated her section 3 right against discrimination "with respect to any accommodation, service or facility customarily available to the public" when it refused to fill out a rating sheet for her. In a decision later affirmed by the British Columbia Court of Appeal, the British Columbia Supreme Court held that filling out a rating sheet was not a service "customarily available to the public." The Supreme Court concluded otherwise. Writing for the majority, Chief Justice Lamer explicitly rejected a quantitative approach to the definition of "public":

> It appears to me that attention in the prior cases to the quantitative characteristics of the group to whom the service or facility is available does not focus adequately on other relevant factors. If the focus is purely quantitative, it is indeed hard to see how anything less than all

> citizens can be said to be the "public" of a given municipality, province, or country (at paragraph 52).

[46] Indeed, the Chief Justice stated, "I would reject any definition of 'public' which refuses to recognize that any accommodation, service or facility will only ever be available to a subset of the public" (paragraph 55). Chief Justice Lamer instead advocated "a principled approach which looks to the relationship created between the service or facility provider and the service or facility user by the particular service or facility" (paragraph 59). As the appellant notes, nowhere in *Berg* did the Supreme Court address whether the services were of a personal nature, or whether they were provided one-on-one and in private.

[47] Other cases also stand for the proposition that communication to the public can take place in a private place. In *R. v. Kiefer*, [1976] 70 D.L.R. (3d) 352 (B.C. Prov. Ct.), aff'd [1976] 6 W.W.R. 541 (Vancouver Co. Ct.), the accused was charged with selling securities without a prospectus. The accused relied on an exemption, which stated that no prospectus was required for sales not made to the public. Despite the fact that the accused had only sold securities individually, over the course of two years, and to only five clients for whom he had acted as a broker, the Court deemed the sales to the public and the accused was convicted.

[48] In *CCH Canadian Ltd.* v. *Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, the appellant publishing company alleged that the respondent's custom photocopy service violated its copyright in reported court decisions. As part of its arguments, the appellant claimed that the respondent violated its copyright when the respondent faxed one copy to one of its members.

Chief Justice McLachlin ruled that "the fax transmission of a single copy to a single individual is not a communication to the public. This said, a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright" (at paragraph 78).

[49] This Court offered a similar definition in *Canadian Wireless Telecommunications Association et al.* v. *Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, 290 D.L.R. (4th) 753. In that case, the Copyright Board of Canada allowed the respondent, the Society of Composers, Authors and Music Publishers of Canada (SOCAN) to collect a tariff on ringtones downloaded by mobile phone users from their service providers. The Copyright Board based its ruling on paragraph 3(1)(*f*) of the *Copyright Act*, which accords a copyright holder the sole right "in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication . . . and to authorize any such acts." The respondent, which represented major telecommunications companies, argued that the transmission of a ringtone from a provider to a single customer did not constitute a transmission "to the public" and that SOCAN was therefore unable to collect a royalty on ringtone transmissions. Writing for the Court, Justice Sharlow held that the transmissions were made "to the public":

> [I]t is not enough to ask whether there is a one-to-one communication, or a one-to-one communication requested by the recipient. The answer to either of those questions would not necessarily be determinative because a series of transmissions of the same musical work to numerous different recipients may be a communication to the public if the recipients comprise the public, or a significant segment of the public (at paragraph 35).

[50] Explaining her conclusion, Justice Sharlow compared the act of downloading ringtones to watching television. While the act of watching television takes place in private in front of each viewer's television, the performance is nevertheless made to the public, since it is "made available to a sufficiently large and diverse group of people" (at paragraph 42). Justice Sharlow also addressed the absurdity that would result if a single transmission of a ringtone to a number of people were deemed to be made to the public, but the sequential transmission of the same ringtone were deemed not to be made to the public: "It would be illogical to reach a different result simply because the transmissions are done one by one, and thus at different times" (at paragraph 43). The same reasoning applies to the case at bar.

[51] In *Canadian Cable Television Association* v. *Canada (Copyright Board)*, [1993] 2 F.C. 138 (C.A.), this Court ruled that the transmission of musical works over television cable systems constituted dissemination within the meaning of paragraph 3(1)(*f*) of the *Copyright Act* even though the various subscribers might well be alone in the privacy of their home when receiving the transmission. There, Justice Létourneau surveyed English, Australian, and Indian authorities before defining "in public" as "openly, without concealment and to the knowledge of all" (at paragraph 27). Justice Létourneau concluded that the "transmission of non-broadcast services by the appellant to its numerous subscribers, when it relates to musical works, is a performance in public within the meaning of subsection 3(1) of the Copyright Act" (at paragraph 29).

[52] I therefore conclude that the fact that representations were made *in private* does not dictate that they were not made *to the public*. One must look at all the circumstances of the communication.

If, as in this case, the communications reach a significant portion of the public, they are made "to the public. As suggest in *Berg*, the "public" referred to can be a "subset of the public.""

(b) *The deeming provision*

[53] The respondents assert that the deeming provision addresses specific situations that would ordinarily not fall under paragraph 74.01(1)(*a*) but that Parliament has nevertheless chosen to deem public. Since Parliament chose to include practices such as door-to-door selling and in-store representations but did not include in-office representations, the maxim *expressio unis exclusio alterius* dictates that Parliament did not intend to include representations of the nature of those made in this case.

[54] This proposition does not assist the respondents in this case. The purpose of the deeming provision in section 74.03 is to bring specific representations made to only one person, such as when a salesman in a store speaks to a customer, within the meaning of "to the public." However, in our case, the representations were not made to only one person; rather, similar representations were made to a significant portion of the public. Accordingly, the deeming provision has no relevance to the present case.

[55] Furthermore, the focus of the deeming provision is on who is responsible for having made the representation to the public in situations such as envisioned by paragraph 74.03(2). Paragraph 74.03(2) identifies who is responsible when the person who made the representation is outside Canada. Specifically, the paragraph contemplates that where false or misleading representations

relate to a foreign product that is imported into Canada, the representations are deemed to have been made by the importer.

[56] Both parties also make submissions with respect to the recent amendment, which added subsections 74.03(4) and (5) to the deeming provision. The appellant submits that, since the amendment uses the phrase “for greater certainty,” it should be considered declaratory of the previous state of the law. The respondents, however, submit that the amendment was in fact intended to overrule the Tribunal decision, and therefore indicates that Parliament did not initially intend for paragraph 74.01(1)(*a*) to apply to the case at bar.

[57] I have come to the conclusion that the amendments are of no assistance to either side. To begin, the Interpretation Act states that no amendment shall be deemed declaratory. Pierre-André Côté notes that the effect of this statement is not to statutorily ban the use of subsequent legislative history as an interpretive aid, but rather only “to eliminate any automatic presumption of legislative intent in this respect” (Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough: Carswell, 2000) at 532). Nevertheless, there is good reason to exercise prudence in relying on subsequent legislative history. As Ruth Sullivan writes, “it is often difficult to distinguish amendments that are meant to clarify or confirm the law from amendments that are meant to change it” (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, LexisNexis Butterworths, 2008) at 592).

[58] The Supreme Court has also weighed in on the issue. In *United States of America* v. *Dynar*, [1997] 2 S.C.R. 462 Justices Iacobucci and Cory signalled strong disapproval of the use of subsequent legal history to interpret past legislation:

> What legal commentators call "subsequent legislative history" can cast no light on the intention of the enacting Parliament or Legislature. At most, subsequent enactments reveal the interpretation that the present Parliament places upon the work of a predecessor. And, in matters of legal interpretation, it is the judgment of the courts and not the lawmakers that matters. It is for judges to determine what the intention of the enacting Parliament was. (At paragraph 45).

[59] Of note, the amendment in *Dynar* was a change to the *mens rea* requirement for a money laundering offence, and was not framed as a clarification, as is the case before us. Nevertheless, as the ruling in *Dynar* implies, the mere insertion of the phrase "for greater certainty" cannot change the reality that any legislative amendment—however declaratory in nature—represents the imputation by the current Parliament of its own interpretation upon the legislation of the previous Parliament. Accordingly, the amendments to the deeming provision are not helpful in interpreting paragraph 74.01(1)(*a*) for the purposes of this case.

(c) *The purpose of the Act*

[60] The purpose of the Act is set out in section 1.1. As this purpose clause makes clear, the goal of the Act is not to foster competition for its own sake, but rather to promote derivative economic objectives, such as efficiency, global participation, high quality products, and competitive prices.

[61] With the purpose clause in mind, it becomes clear that the objective of the deceptive marketing provisions in section 74.01 is to incent firms to compete based on lower prices and higher quality, in order “to provide consumers with competitive prices and product choices.” Importantly, the deceptive marketing provisions—unlike many other provisions of the Act—do not list actual harm to competition as an element of the offence. Since harm to competition is not listed as an element of the offence in this case, but it is a truism that the Act always seeks to prevent harm to competition, it is presumed that whenever the elements of paragraph 74.01(1)(*a*) are made out, there is *per se* harm to competition.

[62] When a firm is permitted to make misleading representations to the public, putative consumers may be more likely to choose the inferior products of that firm over the superior products of an honest firm. When consumer information is distorted in this manner, firms are encouraged to be deceitful about their goods or services, rather than to produce or provide higher quality goods or services, at a lower price. Therefore, as the appellant contends, when a firm feeds misinformation to potential consumers, the proper functioning of the market is necessarily harmed, and the Act is rightly engaged, given its stated goals.

[63] As the appellant submits, the proper focus of analysis in deceptive marketing cases is the consumer. While the respondents correctly state that the Act is not a consumer protection statute, they are wrong to suggest that this interpretation of the deceptive marketing provisions is tantamount to interpreting the Act as a consumer protection statute. On the contrary, as the foregoing analysis indicates, a focus on the consumer is not indicative of the objective of the

scheme, but is a consideration antecedent to the ultimate objective: maintaining the proper functioning of the market in order to preserve product choice and quality.

[64] In this case, the evidence from ex-customers makes it clear that the respondents' clients were aware that the respondents operated in a competitive marketplace and that they indeed chose the respondents as a result of the misleading representations. For example:

(a) Christopher Graham stated that Mr. Roy told him "that PCMG was helping people get into high paying careers, and that was the reason why there was a fee associated with this. He [said] that the other free employment organizations were getting people low paying jobs and he downplayed the type of services they were rendering" (Evidence, Statement of Christopher Graham, undated, Exhibit A-13 at paragraph 19).

(b) Tanya Threatful stated that "Minto Roy said PCMG was unlike any other company in the career management business because of his personal ties and contacts in the corporate world" (Evidence, Statement of Tanya Threatful, September 10, 2007, Exhibit A-57 at paragraph 9).

(c) Johan de Vaal stated "I got the impression from PCMG's ad that the company was a head hunting company in the job recruitment industry. I assumed that, like those employment firms, PCMG already had a list of companies that were looking to have positions filled" (Evidence, Affidavit of Johan de Vaal, September 10, 2007, Exhibit A-1 at paragraph 6).

(d) Rafaelle Roca, also an ex-customer, expressed similar sentiment, reflecting on his interaction with PCMG employee Ravi Puri:

> Ravi Puri illustrated the following scenario on the whiteboard in his office. Even though PCMG charged more [than other firms], their contacts with decision makers coupled with the negotiating skills they would teach me would enable me to secure a higher salary. Would therefore end up paying less for PCMG's services, percentage wise, compared to what I would pay for other agencies' services (Evidence, Affidavit of Rafaelle Roca, October 25, 2007, Exhibit R-53 at paragraph 22).

[65] As these statements demonstrate, the respondents' misrepresentations played a key role in the decisions of at least some customers to choose PCMG over other agencies. This is exactly the type of market distortion that the deceptive marketing provisions seek to prevent. The behaviour targeted in this case therefore falls squarely within the ambit of the Act.

C. *Conclusions on the meaning of "to the public"*

[66] I conclude that the representations made by the respondents in this case were made "to the public" within the meaning of paragraph 74.01(1)(*a*) of the Act. In the circumstances, it does not matter that the representations were made in private, that the representations were made one at a time, or that clients conveyed personal information to the respondents. As I stated above, the question to ask in determining whether a representation was made to the public is "to whom were the representations made, and under what circumstances?" The answer is as follows: the representations were made to a significant section of the public who had been invited by advertising to attend at the offices of the respondent.

VII. Were the representations misleading?

A. *Standard of Review*

[67] The determination of standards of review for administrative tribunals is ordinarily governed by *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. In this case, however, the decision below was issued by a justice of the Federal Court, sitting alone as a judicial member of the Competition Tribunal. Furthermore, subsection 13(1) of the Competition Tribunal Act states that an appeal from the Tribunal to this Court is treated as if the original decision were a judgment of the Federal Court. As the respondents state in their factum, given the judicial nature of the proceedings and the fact that the case was heard before a justice of the Federal Court, it makes more sense to apply the standard used to review decisions of lower courts rather than those used to review administrative tribunals. With this in mind, the Supreme Court's decision in *Housen* is determinative of the standard of review.

[68] The respondents submit that the analysis of whether the representations were misleading should be split into two questions: (1) What did the representations mean? (i.e., the construction of the representations), and (2) Were the representations misleading? I agree.

(A) STANDARD OF REVIEW: CONSTRUCTION OF THE REPRESENTATIONS

[69] The respondents submit that the construction of a representation is a question of law, and cite a number of cases to support this principle (*R. v. Total Ford Sales Ltd.*, (1987) 18 C.P.R. (3d) 404 (Ont. Dist. Ct.); *R. v. Independent Order of Foresters*, (1989) 26 C.P.R. (3d) 229 (Ont. C.A.); *R. v. International Vacations Ltd.*, [1980] 33 O.R. (2d) 327 (Ont. C.A.)). The appellant attempts to

distinguish this line of cases, noting that *Total Ford* and *Foresters* both relied on *International Vacations*, and that in *International Vacations* the Court noted specifically that the representations in question were written newspaper advertisements. While this is factually correct, the appellant offers no principled basis for why this rule should not apply to verbal representations as well. Therefore, I accept the respondents' submission that the construction of representations is a question of law. According to *Housen*, questions of law are reviewed on a standard of correctness (at paragraph 8).

(B) <u>STANDARD OF REVIEW: ANALYSIS OF WHETHER THE REPRESENTATIONS WERE MISLEADING</u>

[70] The Tribunal found as fact that the alleged oral representations were made to the prospective clients. The Tribunal then proceeded to apply the law to this fact, in order to determine whether the oral representations were misleading and material. This involves a question of mixed fact and law.

[71] In *Housen*, a majority of the Court held that in cases of mixed fact and law, absent a readily extricable legal principle, the decision of the trier of fact should be overturned subject only to a palpable and overriding error (at paragraph 36). The question of whether the representations were misleading represents a direct application of paragraph 74.01(1)(*a*) of the Act to the facts of this case. As there is no extricable principle of law, the Tribunal's finding that the representations were misleading can only be overturned if the appellant demonstrates a palpable and overriding error in the Tribunal's decision.

B. *Construction of the representations*

[72] The respondents submit that the standard to be used in constructing representations is the perspective of an "ordinary citizen" possessing "ordinary reason and intelligence and common sense" (*R.* v. *Kenitex*, (1980) 51 C.P.R. (2d) 103 at paragraph 12). I agree.

[73] The respondents then allege that the Tribunal made two errors of law in constructing the representations. First, they allege that the Tribunal expressly found that the respondents made no specific promises and that vague representations cannot sustain a prosecution (*Maritime Travel Inc.* v. *Go Travel Direct.com Inc.*, 2008 NSSC 163, [2008] 265 N.S.R. (2d) 369 at paragraph 37). I reject this submission. The Tribunal indeed found that the respondents did not guarantee specific interviews with specific contacts. Equally, however, it found that the respondents did guarantee interviews generally with high ranking contacts. It does not matter that the respondents did not detail exactly which contacts prospective clients would meet.

[74] Second, the respondents submit that the *Kenitex* "ordinary person" would have understood that part of this representation depended on vague descriptions of "future contingent events" beyond the respondents' control, and that implicit in the representation were reservations that not every contact would be used for each client, and that the number of positions would vary from person to person and across time. I find this argument unconvincing. It is unclear that an ordinary person would not believe the representations despite their future and contingent nature. Indeed, many representations made to prospective customers are of future contingent events. If an airline advertises that a plane will arrive at 11:00AM but it regularly arrives at 5:00PM then the airline has

almost certainly misled its customers, even if other events (for example, weather or traffic congestion) interfere occasionally. If a cellular phone company tells prospective customers that it offers unparalleled reception but the reception is almost always poor, then that company too has likely misled its customers, even though other factors, such as interference from electrical wires or tall buildings, can also affect reception.

[75] Accordingly, I find that the Tribunal was correct in its construction of the representations .

C. *Were the representations misleading?*

[76] The respondents claim that the Tribunal erred in concluding that the contacts representation was misleading for two reasons. First, the respondent submits that the Tribunal made no finding of fact that the respondents had an extensive network of contacts. Second, the respondent submits that a reasonable person would have understood that it was implicit in any such representation that not all of PCMG's representations would be relevant to each client, that the existence of positions and interviews depends on factors outside the respondents' control, and that at any given time there may not be any relevant positions available.

[77] The respondents similarly claim that the Tribunal erred in concluding that the 90 day/good job representation was misleading because the Tribunal made no finding of fact that the typical PCMG client did not find a good job within 90 days, and because a reasonable person would have understood that, given that outcomes depend on third parties, not every client would achieve typical results.

[78] The appellant submits that the Tribunal's conclusions were reasonable and that the respondents' submissions in effect ask this Court to reweigh the evidence presented before the tribunal.

[79] As stated above, these findings can only be overturned if the Tribunal committed a palpable and overriding error in its analysis. I do not believe it committed any such error. There was no need for the Tribunal to make preliminary findings of fact regarding the respondents' network of contacts or the success rate of a typical PCMG customer, nor do the respondents cite any legal authority to that effect. Indeed, it is implicit from the Tribunal's decision that the respondents represented that they had a network of contacts and that the typical client did not find a job within 90 days as represented. Therefore, the representations were misleading. The Tribunal was under no obligation to state a premise so obviously implied in its conclusion.

[80] The respondents' contention that the representations contained obvious and implicit limits is equally not indicative of a palpable and overriding error. Indeed, this submission amounts to little more than an attempt to re-argue the point about "future contingent events," which I have already rejected with respect to the construction of representations. Accordingly, I find that it was open to the Tribunal to conclude on the facts before it that the contacts representations and the 90 day/good job representations were materially misleading.

VIII: Disposition

[81] The decision of the Tribunal that the representations were not made “to the public” constitutes an error of law. There was no palpable and overriding error in the decision of the Tribunal that the representations were materially misleading. I would therefore allow this appeal with costs and set aside the decision of the Tribunal. Rendering the judgment that should have been rendered, I would grant with costs the appellant’s application under section 74.1 of the Competition Act.

[82] The appellant seeks a number of specific remedies. However, the Tribunal is better positioned to determine the appropriate remedies than this Court. I therefore agree with the appellant’s alternative submission that the matter be remitted to the Tribunal for the appropriate order which should be made under section 74.1 of the Act, in accordance with the findings of this Court.

"J. Edgar Sexton"
J.A.

"I agree
Gilles Létourneau J.A."

"I agree
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-476-08

APPEAL FROM THE REASONS AND ORDER OF THE COMPETITION TRIBUNAL DATED JULY 15, 2008.

STYLE OF CAUSE:	The Commissioner of Competition v. Premier Career Management Group Corp.
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 16, 2009
REASONS FOR JUDGMENT BY:	Sexton J.A.
CONCURRED IN BY:	Létourneau J.A. Layden-Stevenson J.A.
DATED:	October 15, 2009

APPEARANCES:

John Syme	FOR THE APPELLANT
Michael Osborne Sonny Ingram Christian Farahat	FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy General of Canada	FOR THE APPELLANT
Affleck Greene McMurtry LLP Toronto, Ontario	FOR THE RESPONDENT