CITATION: R. v. Stucky, 2009 ONCA 151
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COURT OF APPEAL FOR ONTARIO

Weiler, Gillese and Armstrong JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

David Stucky

Respondent

James D. Sutton and Nicola Pfeifer, for the appellant

David M. Porter and Christine Lonsdale, for the respondent

Heard: September 30, October 1 and 2, 2008

On appeal from the acquittals entered on November 17, 2006, by Justice Arthur M. Gans of the Superior Court of Justice, sitting without a jury and reported at 2006 CanLII 41523.

Weiler and Gillese JJ.A.:

I. Overview

[1] Mr. Stucky, a resident of Ontario, operated a direct mail business in Ontario that sold lottery tickets and merchandise only to persons outside of Canada. He was charged with sixteen counts of making false or misleading representations "to the public" between 1995 and 2002 in order to promote his business interests, contrary to s. 52(1) of the

Competition Act, R.S.C. 1985, c. C-34 (the "Act"). The charges pertained to four direct mail promotions sent primarily to people in the United States, Great Britain, Australia, and New Zealand. The promotions were not mailed to anyone in Canada.

[2] Section 52(1) of the Act currently reads as follows:

> No person shall, 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, knowingly or recklessly make a representation *to the public* that is false or misleading in a material respect. [Emphasis added.]

[3] The trial judge found Mr. Stucky not guilty of the charges because he held that the phrase "to the public" means "to the *Canadian* public" and none of the mailings were made to persons in Canada. The trial judge also determined that but for this interpretation of "to the public", he would have convicted Mr. Stucky of six of the counts in the indictment.

[4] The Crown appeals. It submits that the trial judge erred in interpreting the phrase "to the public" as limited to the Canadian public. If successful in its appeal, the Crown seeks to have convictions entered on the six counts on which Mr. Stucky would otherwise have been convicted.

[5] Mr. Stucky submits that if the Crown is successful on appeal, a new trial should be ordered, principally because the trial judge's interventions during the proceedings undermined the appearance of fairness of the trial and compromised Mr. Stucky's ability to present a full answer and defence to the charges.

[6] Four of the counts on which Mr. Stucky would otherwise have been convicted related to promotions that took place from 1995 to 1999 (the "pre-1999 counts"). In that period, s. 52(1) of the Act created a strict liability offence. For strict liability offences, the prosecution must prove beyond a reasonable doubt that the accused committed the prohibited act. The onus then shifts to the accused who can avoid liability by establishing, on a balance of probabilities, that he or she acted with due diligence. Prior to the 1999 amendments to the Act, s. 60(2) provided for a due diligence defence, as follows:

> No person shall be convicted of an offence under section 52…if he establishes that:
>
> …

> (b) he took reasonable precautions and exercised due diligence to prevent the occurrence of the error.

[7] In mounting his due diligence defence, Mr. Stucky placed heavy reliance on the fact that he had sought and acted on legal advice in respect of the promotions. He argues that the trial judge erred in finding that the due diligence defence had not been made out. The Crown submits that the trial judge reached the right conclusion but erred in treating reliance on legal advice as a mistake of fact.

[8] The remaining two counts at issue on appeal cover the time period from 1999 to 2002 (the "post-1999 counts"). After the 1999 amendments to the Act, s. 52 created an offence requiring proof of the accused's *mens rea*. Mr. Stucky argues that the trial judge erred in relation to these counts in finding that the Crown had proved beyond a reasonable doubt that he possessed the requisite mental element. Again, he maintains that he honestly believed the promotions were not false and misleading based on the legal advice he had received. In respect of these counts, the Crown and Mr. Stucky differ on what must be proved to satisfy the *mens rea* component of s. 52.

[9] Our conclusions on these issues can be briefly summarized. We would allow the Crown's appeal on the meaning of s. 52(1) of the Act and hold that the phrase "to the public" is not restricted to the Canadian public. We conclude that trial fairness requires that the matter be remitted for a new trial. In light of our conclusion that a new trial is warranted, we address only the strict legal issues that were raised in respect of the counts on which Mr. Stucky would otherwise have been convicted. In respect of the pre-1999 offences, we conclude that it was not open to Mr. Stucky to advance a mistake of fact defence based on the legal advice that he had received. In relation to the post-1999 offences, we conclude that the trial judge made no error in holding that to satisfy the *mens rea* component, the Crown was required to prove beyond a reasonable doubt that Mr. Stucky knew of the falsity or misleading nature of the representations, or had been reckless in that regard. In view of our conclusions, we find it unnecessary to deal with the other issues raised by Mr. Stucky.

II. The meaning of "to the public" in s. 52 of the Act

[10] In this section of the judgment, we will review the historical evolution of the misleading advertising legislation and the enforcement scheme of the Act. We then discuss why, contrary to the trial judge's decision, the phrase "to the public" should not be limited in its meaning to persons in Canada, with reference to relevant criminal law jurisprudence and the principles of statutory interpretation.

1) The history of false and misleading advertising legislation

[11] When the misleading advertising section was first enacted in the *Criminal Code* in 1914, the word "public" did not appear, as the provision was simply concerned with the publishing of an advertisement and not the making of a false or misleading representation generally: S.C. 1914, c. 24.

[12] In 1960, the *Combines Investigation Act* was amended to prohibit the making of a misleading representation "to the public" in relation to price: S.C. 1960, c. 45. At that time, the misleading advertising prohibition was still contained in the *Criminal Code*.

[13] In 1969, the misleading advertising section of the *Code* was repealed. The prohibition against misleading advertising became part of the *Combines Investigation Act*: S.C. 1969, c. 38. In 1975, the price misrepresentation and misleading advertising sections of the *Combines Investigation Act* were combined into one section, and the offence of misleading advertising was broadened. "To the public" became one of the constituent elements of the offence of misleading advertising, and the offence included not just published advertisements but "representations" to the public: S.C. 1974-75, c. 76. The regime for enforcement remained a criminal regime, and conviction could result in imprisonment.

[14] In 1986, the *Combines Investigation Act* was renamed the *Competition Act*: S.C. 1986, c. 19 (2nd Supp.).

[15] In 1999, a number of significant amendments respecting the false and misleading advertising provisions of the Act were made. Section 52 was changed from a strict liability offence to a full *mens rea* offence: S.C. 1999, c. 2.

[16] The 1999 amendments also created an administrative or regulatory regime in Part VII.1 of the Act, entitled "Deceptive Marketing Practices". Section 74.01(1)(a) in Part VII.1 provides that a person engages in "reviewable conduct" when that person makes a false or misleading material representation "to the public". The section mirrors s. 52 in making reference to misleading representations "to the public". Unlike s. 52, the making of a misleading representation in s. 74.01(1)(a) is a matter of strict liability for which the Competition Tribunal may order a monetary penalty or make another remedial order.

2) Enforcement of the Act

[17] As a result of the 1999 amendments, the Act is enforced in the following way. The Commissioner of Competition, an independent law enforcement official who is responsible for the Act's administration and enforcement under s. 7, may commence a preliminary examination, e.g. if a complaint is received, or may commence a formal examination under ss. 9 or 10 of the Act. If the Commissioner concludes that a

contravention of the Act has taken place, the Commissioner may either refer the matter to the federal Attorney General, who decides whether or not to prosecute, or take the administrative route and make an application to the Competition Tribunal: see s. 23 of the Act and Brian A. Facey and Dany H. Assaf, *Competition and Antitrust Law: Canada and the United States*, 3rd ed. (Toronto: Butterworths, 2006), at pp. 29, 37-39. Thus, in the case of an alleged misleading representation, the Commissioner may refer the matter to the Attorney General in which case a criminal prosecution may take place under s. 52, or the Commissioner may take the administrative route and apply to the Competition Tribunal for a decision that a contravention of s. 74.01(1)(a) has taken place. Once charges have been laid or an application has been filed before the Competition Tribunal, the Competition Bureau may not switch regimes: see Facey and Assef at p. 384.

[18] In proceedings before Parliament when the 1999 changes were made, the Minister of Industry stated that criminal sanctions for misleading advertising and deceptive marketing practices remained in place for the most serious cases, while less serious cases could be dealt with through the administrative regime: see *R. v. Benlolo* (2006), 81 O.R. (3d) 440 (C.A.), at para 14, referencing *House of Commons Debates*, 074 (March 16, 1998) at 1300 (Hon. John Manley).

3) *Criminal Code* jurisprudence is applicable to the interpretation of s. 52 and the trial judge erred in not applying it

[19] The trial judge, without expressly saying so, appears to have concluded that traditional principles of criminal law had limited application to the prosecution of a public welfare offence such as that under s. 52. In his decision, he referred to *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299. In that case, Dickson J., on behalf of a unanimous court, at pp. 1302-1303, recognized public welfare offences as a distinct class of offences that, "although enforced as penal laws through the machinery of the criminal law, are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application".

[20] Since the decision in *Sault Ste. Marie*, the distinction between criminal and regulatory offences has blurred. The label attached to the offence is no longer determinative. Rather, the penalties attached to the conduct, the values underlying the offence, and whether the offence is one for which *mens rea* is required must be considered.

[21] In *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, the Supreme Court was concerned with whether certain misleading advertising provisions then contained in the Act were inconsistent with ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*. The provisions created a strict liability offence and codified what was

essentially the common law defence of due diligence coupled with the requirement of a timely retraction. One of the arguments advanced by the Crown in seeking to have the legislation upheld was that the principles of fundamental justice in the *Charter* should be interpreted differently because the offence was a regulatory offence, as opposed to a criminal offence. Lamer C.J.C. rejected this argument, stating at p. 189 that the principles of fundamental justice did not take on a different meaning "simply because the offence can be labelled as 'regulatory'". He concluded that liability for imprisonment, as opposed to the label attached to the offence, was determinative of the analysis to be undertaken. La Forest J. agreed and observed at p. 209 that what is ultimately important are not the labels but the values at stake in the particular context. The fact that a five year term of imprisonment could be imposed if an individual was convicted required stricter conformity with the principles of fundamental justice than mere monetary penalties. As well, Cory J. was of the opinion that true crimes require *mens rea*.

[22] The penalty of imprisonment applies to all the counts with which Mr. Stucky was charged. The offence is designed for protection of the public through reinforcement of the value of honesty, a value emphasized in the *Criminal Code*. In addition, in relation to the post-1999 counts, the requirement that the false or misleading misrepresentation be made "knowingly or recklessly" means that *mens rea* is required to be proved by the Crown beyond a reasonable doubt.

[23] While the prohibition on false or misleading advertising is found in the *Competition Act,* and not the *Criminal Code,* it is our opinion that the *Criminal Code* jurisprudence, discussed below, applies to the interpretation of s. 52.

4) *Criminal Code* jurisprudence

[24] Based on *Criminal Code* jurisprudence, it is our view that the meaning of "the public" is not restricted to the Canadian public where there is a real and substantial link or connection between the offence and Canada. Two cases are particularly important in this regard: *R. v. Chapman*, [1970] 3 O.R. 344 (C.A.), leave to appeal refused, [1970] S.C.R. viii and *Libman v. The Queen*, [1985] 2 S.C.R. 178.

[25] *Chapman* is a case with facts similar to the instant case in which the court was required to interpret the meaning of "the public". The accused were charged with several *Criminal Code* offences, including conspiracy to defraud the public by deceit, falsehood or other fraudulent means, and using the mail to transmit letters for the purposes of defrauding the public and obtaining money under false pretences: S.C. 1953-54, c. 51, ss. 323(1) and 324.[1] The accused raised the question of jurisdiction and the meaning of the phrase "the public" in the provisions because, on the facts before the court, the only

[1] The fraud provision is now contained in s. 380 of the *Code*.

members of the public who were defrauded were residents of the United States. In relation to the conspiracy to defraud offence, the court held at p. 349:

> The completion of the offence under s. 323(1) lies in the obtaining of the fruits of the fraudulent means or inducement … If there is an initiation of a fraudulent scheme in Canada (as was the case here in the mailing out of the letters of solicitation) and a realization thereof in Canada through receipt of money or securities intended to be brought in through the scheme, the offence has been committed in Canada although the inducement has extended only to persons outside Canada. In short, "the public or any person" in s. 323(1) are not limited to the Canadian public or to persons in Canada. [Citations omitted].

[26] Similarly, in *Libman*, the accused was charged with seven counts of fraud and one count of conspiracy to commit fraud arising from a telephone solicitation sales scheme operated from Canada, whereby residents in the United States were induced to purchase shares in Central American companies. Purchasers sent money to the Central American countries and, eventually, some of the proceeds returned to Canada. La Forest J., on behalf of the court, began by noting that the presumption against extraterritoriality in criminal law was codified in s. 5(2) (now s. 6(2)) of the *Criminal Code*, R.S.C. 1970, c. C.34, which states that no person "shall be convicted in Canada for an offence committed outside of Canada". However, he concluded that the offences in question had taken place in Canada. The commission of the offences had a real and substantial connection to Canada, in that the scheme was devised in Canada, and the operation and directing minds were situated in Canada. In coming to this conclusion, La Forest J. discussed and approved the holding in the *Chapman* decision.

[27] The reasoning La Forest J. followed is equally applicable to this case and may be summarized along these lines: Canada has a legitimate interest in prosecuting persons for unlawful activities that take place abroad when the activities have a "real and substantial link" or connection to Canada. The fact that the only victims are outside of Canada does not make the activity any the less unlawful or mean that no crime has been committed in Canada when there exists "a real and substantial link" or connection to this country. The court must take into consideration all the facts that give Canada an interest in prosecuting the offence and then consider whether international comity would be offended in the circumstances. The principle of extraterritoriality has not prevented courts from taking jurisdiction over transnational offences whose impact is felt within the country. The purpose of criminal law is to protect the public from harm. That purpose is not achieved only by direct means, but also by underlining the fundamental values of our society and,

in so doing, reinforcing the law-abiding sentiments of our society. La Forest J. reflected at p. 212 that utilizing a "real and substantial link" approach is necessary in order to reinforce the fundamental values of society:

> It would be a sad commentary on our law if it was limited to underlining society's values by the prosecution of minor offenders while permitting more seasoned practitioners to operate on a world-wide scale from a Canadian base by the simple manipulation of a technicality of the law's own making. What would be underlined in the public's mind by allowing criminals to go free simply because their operations have grown to international proportions, I shall not attempt to expound.

[28] Although the *Chapman* and *Libman* decisions were submitted to the trial judge he declined to follow their reasoning. Instead, the trial judge's review of the historical evolution of the provisions dealing with false or misleading representations led him to conclude that when the concept of "materially misleading misrepresentation to the public" was introduced in relation to pricing, Canada had a limited role as a world exporter. He held that the "public" reference was domestically oriented, applying the "original meaning" rule of interpretation. An example of one piece of legislative history the trial judge relied on in support of his position comes from the comments made by the Minister of Justice in 1974 when introducing a predecessor section to s. 52. Referring to the prohibition on false or misleading advertising, the Minister stated that "all Canadians" can benefit from a competitive marketplace: *House of Commons Debates* (March 1, 1974) at 480-481 (Hon. Herb Gray).

[29] In our opinion, the trial judge took an overly restrictive approach in interpreting the scope of s. 52. As noted by Ruth Sullivan in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: LexisNexis, 2002), at p. 113:

> [L]egislation that is enacted to regulate an ongoing activity over an indefinite period of time invites a dynamic interpretation whereas legislation that is aimed at a particular set of circumstances or is otherwise tied to a specific time or place invites a fixed interpretation.

[30] Direct mailing is an ongoing activity over an indefinite period of time that the Act regulates. A dynamic approach to the interpretation of s. 52 is more appropriate. We elaborate further on the appropriateness of this approach in dealing with the statutory interpretation of s. 52.

[31] The trial judge also relied on the presumption against extraterritorial application of legislation and the principle that any ambiguity in legislation ought to be interpreted favourably to the accused to buttress his conclusion that the phrase “to the public” was restricted to the Canadian public.

[32] To interpret the phrase “to the public” as being broader than the Canadian public does not violate the presumption against extraterritoriality. In this case, the Act is being applied to the conduct of a person who is in Canada, whose alleged misrepresentations were initiated in Canada, and whose profits were received in Canada. There is a real and substantial connection between the offence alleged and Canada, notwithstanding the fact that the “public” to whom the representations were made was located outside Canada. Applying the real and substantial connection test supports an interpretation of “the public” which includes persons outside Canada while not violating the presumption against extraterritoriality.

5) In any event, the real and substantial link or connection test derived from *Criminal Code* jurisprudence has general application

[33] Significantly, the “real and substantial link” or connection test articulated in *Libman* has been applied outside the *Criminal Code* context and is part of our general law concerning jurisdiction. In *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, the Supreme Court held that a real and substantial connection to Canada allows for the application of our *Copyright Act*, R.S.C. 1985, c. c-42, to communications that originate in Canada but are received abroad, and vice versa. At para. 60, Binnie J., writing for the majority, stated that “[a] real and substantial connection to Canada is sufficient to support the application of our *Copyright Act* to international Internet transmissions in a way that will accord with international comity and be consistent with the objectives of order and fairness.”

[34] Had the trial judge followed the reasoning in *Chapman* and *Libman*, he would have concluded that the “public” in s. 52 was not limited to the Canadian public. The mere fact that s. 52 is found in the *Competition Act* instead of the *Criminal Code* does not make the prior “real and substantial link” or connection jurisprudence any less applicable.

6) The principles of statutory interpretation, particularly the purpose of the Act and the principle of harmonization, support a conclusion that the phrase "to the public" is not limited to persons in Canada

[35] In addition to the criminal law jurisprudence outlined above, the principles of statutory interpretation support an interpretation of "to the public" which is not restricted to the Canadian public.

[36] The trial judge purported to follow the "modern approach" to statutory interpretation as articulated by Sullivan at p. 1 of her text. This formulation has been accepted by the Supreme Court in numerous cases: see, for instance, *R. v. Bell ExpressVu Limited Partnership*, [2002] 2 S.C.R. 559, at para. 26 and *Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at para. 21. The modern approach states that:

> [T]he words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[37] As the trial judge noted, the modern approach to statutory interpretation serves as an appropriate analytical framework. What the trial judge did not appreciate, however, is that judges are required to interpret a statute by using that framework to achieve a result that promotes the purposes of the legislation and produces harmony both within the statute itself and legislation dealing with the same subject matter. Instead, his interpretation led to a result which is not in keeping with the purpose of the Act and is not in harmony with the *Criminal Code*, our international agreements, or other provisions within the statute itself. We will discuss each of these issues of interpretation in turn.

i) The purpose of the Act supports an interpretation of "to the public" which includes persons outside Canada

[38] The trial judge quoted the purpose statement as set out in s. 1.1 of the Act, which reads as follows:

> The purpose of this Act is to maintain 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.

[39] Both the Crown and Mr. Stucky agree that the primary object of the Act is to protect Canadian businesses. Indeed, one of the express purposes of the Act is to encourage competition "in order to expand opportunities for Canadian participation in world markets". Also, the Act is intended to discourage forms of commercial behaviour that are viewed as detrimental to Canada: see *General Motors of Canada Ltd.* v. *City National Leasing*, [1989] 1 S.C.R. 641, at p. 676. Law-abiding Canadian direct mail companies doing business abroad would suffer reputational damage and lose business opportunities if Canada did not punish Canadian companies who make misleading representations to persons outside Canada. As stated by Margaret F. Sanderson and William T. Standbury in *Competition Policy in Canada: The First Hundred Years* (Ottawa: Consumer and Corporate Affairs, 1989), at p. 48:

> Along with the obvious need to protect consumers from direct exploitation by semi-fraudulent types of representations, misrepresentation may also cause injury to honest competitors by distorting the functioning of the market. As noted earlier, the impetus toward effective misleading advertising laws in 1960 was due to pressure from business, not consumers.

[40] The trial judge's historical analysis led him to conclude that the Act was originally intended to protect only Canadian consumers and that he should implement the original intent of the legislation. However, in contrast to the trial judge's findings, there is evidence in the legislative debates that Parliament was, historically, concerned with the success of Canadian business abroad. For example, the Minister of Justice in 1960, the Hon. Davie Fulton, commented in the *House of Commons Debates*, May 30, 1960, at pp. 4342 that the Canadian economy was dependent on "successful competition in international as well as domestic markets", and that anti-combines legislation should take into account the "economic climate" in which Canada exists. As noted, Canadian businesses operating in foreign markets risk damage to their reputation when other Canadian businesses acting abroad engage in misleading representation. By using its prosecutorial powers to combat such conduct, the Canadian government promotes the Act's goal of encouraging Canadian business success worldwide. Section 52 should be interpreted in a manner which accords with this goal.

ii) The Act must be harmonized with other legislation dealing with the same type of conduct

[41] Statutory interpretation presumes a harmony, coherence, and consistency between statutes dealing with essentially the same subject matter: *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, at para 52 and *Bell ExpressVu* at para. 27. Section 380(1) of the *Code* and s. 52 of the Act are both intended to protect the public from similar misconduct. Section 380 of the *Code* makes it an offence to "defraud the public or any person" by "deceit, falsehood or other fraudulent means" whereas s. 52 of the Act makes it an offence to "knowingly or recklessly make a representation to the public that is false or misleading in a material respect". As already discussed, the prohibition in the *Code* extends to situations where representations emanating from Canada are made to persons outside Canada. The interests of justice encourage an interpretation of the phrase "to the public" in s. 52 which is in harmony with the *Code*.

iii) The Act must be harmonized with international agreements

[42] In *Libman*, La Forest J. noted at p. 214 that international agreements reflect a desire by states to act in concert in protecting the public welfare. He wrote:

> [W]e should not be indifferent to the protection of the public in other countries. In a shrinking world, we are all our brother's keepers. In the criminal arena this is underlined by the international cooperative schemes that have been developed among national law enforcement bodies.

[43] In this case, agreements between Canada and the United States reveal that the Canadian government is aware of the cross-border impact of deceptive mail and telemarketing practices, and has promised to cooperate and coordinate efforts to address this: see the *Agreement between the Government of Canada and the Government of the United States of America Regarding the Application of Their Competition and Deceptive Marketing Practices Law* (the 1995 Agreement) and the *US – Canadian Task Force on Cross-Border Deceptive Marketing Practices Agreement, September 10, 1996* (the 1996 Agreement). Article VII(1) of the 1995 Agreement includes ss. 52-60 of the Act in its definition of deceptive marketing practices laws, and Canada and the United States agree to coordinate their enforcement against deceptive marketing practices with a trans-border dimension in Article VII(3)(d). The approach adopted by the trial judge would undermine these agreements, as opposed to furthering a cooperative approach.

iv) Section 52 must be harmonized with other provisions within the Act

[44] The principle of statutory interpretation that requires coherent interpretation between statutes also applies within a statute: see Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 2000), at p. 343. According to this principle, the Act must be interpreted not only in a fashion which is consistent with the *Code*, but also with an eye to the internal coherence of its own scheme. Words take their meaning from the context in which they are found. In interpreting a statutory provision, courts must have regard to any adjacent and closely-related provisions as well as the act as a whole: see Sullivan at pp. 261-262.

[45] In looking at other provisions in the Act, the trial judge concluded that there was an important distinction between the representations described in s. 52 and those made by telemarketers (as captured in s. 52.1) and contained in prize promotions (as captured in s. 53). Sections 52.1 and 53 were added to the Act in 1999 and 2002, respectively, and the relevant portions are as follows:

> 52.1(1) In this section, "telemarketing" means the practice of using interactive telephone communications 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.
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> …
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> (3) No person who engages in telemarketing shall
>
> > (a) make a representation that is false or misleading in a material respect;
>
> . . .
>
> 53. (1) No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, send or cause to be sent by electronic or regular mail or by any other means a document or notice in any form, if the document or notice gives the general impression that the recipient has won, will win, or will on doing a particular act win, a prize or other benefit, and if the recipient is asked or given the option to pay money, incur a cost or do anything that will incur a cost.

> (2) Subsection (1) does not apply if the recipient actually wins the prize or other benefit and the person who sends or causes the notice or document to be sent
>
> > (a) makes adequate and fair disclosure of the number and approximate value of the prizes or benefits, of the area or areas to which they have been allocated and of any fact within the person's knowledge that materially affects the chances of winning;
> >
> > (b) distributes the prizes or benefits without unreasonable delay; and
> >
> > (c) selects participants or distributes the prizes or benefits randomly, or on the basis of the participants' skill, in any area to which the prizes or benefits have been allocated.
>
> . . .

[46] The trial judge concluded that the most important point in favour of Mr. Stucky's interpretation was the distinction between s. 52(1), which contains the phrase "to the public" and ss. 52.1 and 53, which do not. He held that ss. 52.1 and 53, which were enacted after s. 52(1), reflect Canada's "commitment to issues surrounding international commerce" (para. 55) and were not limited to representations to persons in Canada because they did not contain the "to the public" language.

[47] The trial judge concluded that, had Parliament intended to broaden the reach of s. 52(1) to put it on the same footing as ss. 52.1 and 53 and apply it to persons outside Canada, it would have amended s. 52 by deleting the words "to the public" to ensure that it mirrored ss. 52.1 and 53.

[48] We disagree. Where a possible interpretation of a section does not accord with the section's public welfare objective, the principle of harmonization suggests the court should reject that interpretation in favour of an interpretation that carries out Parliament's overall objective. In our opinion, Parliament's objective was to protect all those receiving or viewing various forms of communications from an overall impression that is misleading or deceptive in a material respect. The interpretation adopted by the trial judge fails to take into account the shared objectives of the other, closely-related misleading advertising provisions in the Act, which are not limited to persons in Canada.

[49] In choosing to give effect to what he perceived to be the original intent of the legislation, the trial judge ignored the evolution in competition law thinking which has led to an increased concern with international business practices. This concern is reflected not only in the enactment of further sections of the Act to deal with practices such as telemarketing and the Internet, but also cross-border agreements between Canada and the United States. Our understanding of legislation should take into account current circumstances. As Sullivan writes at p. 145 of the fifth edition of her text, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008):

> As a rule, the public Acts of a legislature are not meant to operate as historical documents. They are written with an eye to the indefinite future, on the assumption that they will be applied not only to the facts in existence at the time they come into force but also to conditions and circumstances as they evolve from time to time. This assumption is codified in s. 10 of the federal *Interpretation Act* [R.S.C. 1985, c. I-21]:
>
> > The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

[50] An example of the court adopting an interpretation that carries out Parliament's overall objective having regard to the existence of legislation enacted after the section in question can be found in *Libman*. The accused was charged with conspiracy to commit the criminal offence of fraud in Canada pursuant to what was then s. 423(1)(d) of the *Criminal Code*. By contrast, section 423(3) of the *Code*, which was enacted after some of the acts charged occurred, expressly dealt with conspiracies entered into in Canada to commit a crime outside Canada. Counsel argued that, as a result, s. 423(1)(d), under which the accused was charged, only applied to conspiracies to commit a crime in Canada but did not apply where the intended victims were outside Canada. As we have indicated, the Supreme Court rejected this argument, holding that an offence that had a real and substantial link to Canada took place in Canada. Without expressly saying that it was applying the principle of harmonization, the Supreme Court opted for an interpretation that carried out the overall objective of Parliament.[2]

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[2] For another recent example of the Supreme Court applying the principle of harmonization and rejecting a too-literal interpretation in favour of an interpretation that carried out the overall objective of Parliament, see *Bristol-Myers Squibb Co. v. Canada (Attorney General),* [2005] 1 S.C.R. 533.

[51] Furthermore, the trial judge's interpretation permits misleading representations from Canada to other countries by mail, but prohibits those representations when they are made by telephone or in regard to winning a prize. There is no juristic or practical reason for such a distinction. The trial judge's interpretation undermines, rather than promotes, the express objectives of the legislation and produces disharmony within the statute.

[52] In addition to the telemarketing and prize-winning provisions, the trial judge also focused on subsections within s. 52 in interpreting the meaning of "to the public". He concluded that ss. 52(2)(e) and (f) of the pre-1999 Act and s. 52(2.1) of the post-1999 Act, which impose liability on importers for bringing false misrepresentations in Canada, illustrate that Parliament was not concerned with a representation unless it was "imported" into Canada. They state:

> Pre-1999:
>
> 52(2) For the purpose of this section and section 53, a representation that is
>
> > (e) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatever made available to a member of the public,
>
> shall be deemed to be made to the public by and only by the person who caused the representation to be so expressed, made or contained and, where that person is outside Canada, by
>
> > (f) the person who imported the article into Canada, in a case described in paragraph (a), (b) or (e)
>
> Post-1999:
>
> 52(2.1) Where a person referred to in subsection (2) is outside Canada, a representation described in paragraph (2)(*a*), (*b*), (*c*) or (*e*) is, for the purposes of subsection (1), deemed to be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.

The trial judge's conclusion was underscored by the fact that s. 52(2)(d) of the Act (which did not change significantly after 1999) did not form part of the importation subsection. That subsection provides that a representation made in the course of "in-store, door-to-door or telephone selling to a person as ultimate user" 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. He found that including it was unnecessary, as "it spoke to [in store, door-to-door and telephone] representations which by their very nature could only be made on the ground and in Canada".

[53] Before us, Mr. Stucky argued that if the words "to the public" mean "a group of people", as opposed to the Canadian public, the word "public" could not be given a consistent interpretation through out the Act, as required: see *Thomson v. Canada (Minister of Agriculture)*, [1992] 1 S.C.R. 385, at p. 387. He argues that if "the public" were given a consistent meaning, the importer subsections would purport to criminalize representations made by a person outside Canada to any persons, including those outside Canada, resulting in legislation which applies wholly extraterritorially.

[54] We disagree. The importing provisions do not use the phrase "to the public" and have no bearing on the meaning of "to the public" that is, to a group of persons, with whom the accused has a real and substantial connection. The Act contains rules governing the competitive behaviour of Canadian businesses. Whereas some of its provisions have broad general application, others are directed at specific groups (see, for instance, the reference to suppliers in s. 52(3)). The importer subsections simply address one type of situation – namely, where misleading representations are imported into Canada. Parliament's decision to make importers responsible has no bearing on the accused's responsibility to the public.

[55] The trial judge also considered other sections in the Act. In particular, he referred to ss. 45, 46 and 49 as evidence of the Act's "Canadiancentric" nature. These sections are summarized below:

> s. 45(5): A conspiracy, combine, agreement or arrangement is not punishable if it relates only to the export of products from Canada. It should be noted that s. 45(6) specifies that an export conspiracy, combine, agreement or arrangement is punishable if it has prevented or lessened, or is likely to prevent or lessen, competition in the Canadian export business.
>
> s. 46: An offence in respect of a conspiracy which emanates from outside Canada is committed only if the directive that would infringe s. 45 affects a corporation in Canada.

> s. 49(1) and (2): Financial institutions are prohibited from entering into anti-competitive arrangements or agreements, unless they are aimed at customers outside Canada or are otherwise to be performed outside Canada or "unless the agreement or arrangement is with respect to a deposit or loan made or payable outside Canada".

[56] The Act as a whole reflects different purposes. Sections 45, 46 and 49, in particular, are concerned with market power and market delineation. In this case, we are concerned with combating false or misleading advertising practices. As Lamer C.J.C. observed in *Wholesale Travel* at pp. 190-191, while the overall objective of the Act, in general, may be to promote vigorous and fair competition, the objective of the provision in issue here is significantly narrower. That objective is two-fold: to protect consumers from the effects of false or misleading statements; and, to prevent those making such statements from reaping the benefits stemming from these statements. In interpreting the phrase "to the public", the trial judge did not consider this second objective.

[57] Our analysis of the words "to the public" would not limit "the public" exclusively to persons within Canada. We, therefore, reject the trial judge's interpretation of the phrase "to the public" in s. 52(1), and hold, instead, that it should be interpreted as meaning "a group of persons" with whom the accused has a real and substantial link or connection.

III. Did the interventions of the trial judge compromise the appearance of fairness?

[58] We must now consider whether the interventions of the trial judge should result in a new trial being ordered.

[59] As already indicated, Mr. Stucky asserts that, if the appellant's appeal is allowed in respect of the interpretation of s. 52 of the *Competition Act*, the judgment should be set aside and a new trial ordered pursuant to s. 686 of the *Code* on a number of grounds. The first of these is that the trial judge's excessive interventions at trial undermined the appearance of fairness of the trial and, accordingly, resulted in a miscarriage of justice.

[60] We agree that the trial judge's interventions at trial did undermine the appearance of fairness of the trial in that, at various times, the trial judge assumed the role of counsel for the Crown through his cross-examination of defence witnesses, including the accused, and appeared to pre-judge the credibility of the accused. Accordingly, for the reasons that follow, we would set aside the trial judgment, and order a new trial.

1) The role of a trial judge

[61] The role of a trial judge is often very demanding, owing not only to the inherent nature of the case, but also to the particular conduct of the litigants: *R. v. Brouillard*, [1985] 1 S.C.R. 39, at p. 42. In the case at bar, the trial lasted 69 days and involved the examination of multiple witnesses, including experts and the accused himself. Notwithstanding the length and complexity of a particular trial, a trial judge must exercise restraint and maintain impartiality so as to act within the scope of his or her neutral role. As cautioned by Lamer J. in *Brouillard*, at pp. 42-43:

> Like anyone, a judge may occasionally lose patience. He may then step down from his judge's bench and assume the role of counsel. When this happens, and, *a fortiori*, when this happens to the detriment of an accused, it is important that a new trial be ordered, even when the verdict of guilty is not unreasonable having regard to the evidence, and the judge has not erred with respect to the law applicable to the case and has not incorrectly assessed the facts.
>
> The reason for this is well-known. It is one of the most fundamental principles of our case law [citation omitted]
>
> > … that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

[62] The principles that limit the permitted interventions by trial judges during the course of a trial and, specifically, during the examination-in-chief and cross-examination of witnesses, are well established. We review them below.

2) Permitted interventions by a trial judge

[63] In *Brouillard*, at p. 44, Lamer J. acknowledged that a trial judge may intervene to ask questions, and, where necessary, he or she has a duty to ask questions where justice requires it. However, at the same time, he expressly warned that there are definite limits on this right: *Brouillard* at p. 46. A trial judge "should confine himself as much as possible to his own responsibilities and leave to counsel…[his or her] function": *R. v. Torbiak and Campbell* (1974), 18 C.C.C. (2d) 229 (Ont. C.A.), at pp. 230-231.

[64] In *R. v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.), at p. 230, leave to appeal refused, [1986] 1 S.C.R. xiii, Martin J.A. set out three situations in which questions put

by a trial judge to a witness may be justified, namely: to clear up ambiguities and call a witness to order; to explore some matter which the witnesses' answers have left vague; or, to put questions which should have been asked by counsel in order to bring out some relevant matter, but which were nonetheless omitted. He noted, however, that questions put by a trial judge to a witness should generally be put after counsel has completed his or her examination of the witness and, further, that the witness should not be cross-examined by the trial judge during examination-in-chief: *Valley* at p. 230. These comments provide guidance as to the timing and nature of interventions that a trial judge may make.

[65] The first two situations of permitted interventions by the trial judge set out in *Valley* are self-explanatory. The third situation in which a trial judge is permitted to intervene, namely, to ask questions that should have been asked by counsel, is not an open-ended invitation to the trial judge to usurp the role of Crown counsel. The judge cannot leave his or her position of neutrality as a fact-finder and become the cross-examiner: *R. v. W.(A.)* (1994), 94 C.C.C. (3d) 441 (Ont. C.A.) Brooke J.A. in dissent, reversed for the reasons given by Brooke J.A., [1995] 4 S.C.R. 51.

[66] Where the appearance of fairness is not maintained at trial, the verdict reached cannot stand and a new trial must be ordered. In deciding whether or not the appearance of fairness has been compromised, one factor that warrants consideration is whether the trial judge gave counsel an opportunity to ask questions that arise out of the trial judge's questioning of a witness, in particular, the accused. An additional factor is whether counsel objected to the trial judge's questioning of a witness. The absence of an objection, however, is not in itself determinative.

[67] We turn now to the test for determining when this unfairness threshold is met.

3) The test for determining whether the trial judge's interventions have compromised the appearance of trial fairness

[68] The test is an objective one. As stated by Martin J.A. in *Valley,* at p. 232:

> The ultimate question to be answered is not whether the accused was in fact prejudiced by the interventions but whether he might reasonably consider that he had not had a fair trial or *whether a reasonably minded person who had been present throughout the trial would consider that the accused had not had a fair trial.* [Emphasis added.]

[69] The appearance of fairness and the trial judge's corresponding duty to exercise restraint and remain neutral is especially critical in the criminal context where the

accused takes the stand: *Brouillard* at p. 48. Since a criminal trial is an adversarial process between the prosecution and defence, and not an investigation by the trial judge, the examination and cross-examination of witnesses is, for the most part, the responsibility of counsel: *Valley* at p. 231. Although the trial judge is justified in occasionally intervening for one of the legitimate purposes indicated above, the trial judge must be careful not to usurp the role of counsel because otherwise the overall impression created may be fatal to the appearance of trial fairness.

[70] The effect of interventions by the trial judge on the appearance of trial fairness in a given case must be assessed in relation to the unique facts and circumstances of the particular trial: *Valley* at p. 231, citing *Torbiak* at p. 231.

[71] In *Valley* at pp. 231-32, Martin J.A. listed types of interventions by trial judges which have resulted in the quashing of criminal convictions:

> 1. Questioning an accused or a defence witness to such an extent or in a manner which conveys the impression that the trial judge has placed the authority of his or her office on the side of the prosecution and conveys the impression that the trial judge disbelieves the accused or the witness;
>
> 2. Interventions which have effectively made it impossible for defence counsel to perform his or her duty in advancing the defence; and
>
> 3. Interventions which effectively preclude the accused from telling his or her story in his or her own way.

[72] Interventions by a trial judge which can reasonably be said to create the appearance of an unfair trial may be of more than one type, and trial fairness may be undermined by one or more types of interventions: *Valley* at p. 232. However, it is important to emphasize that no trial is perfect. Accordingly, the record must be assessed in its totality and the interventions complained of in a given case must be evaluated cumulatively, not as isolated occurrences, from the perspective of a reasonable observer present throughout the trial. As stated by Doherty J.A. in *R. v. Stewart* (1991), 62 C.C.C. (3d) 289 (Ont. C.A.), at p. 320:

> It is a question of degree. At some point, incidents which, considered in isolation, may be excused as regrettable but of no consequence, combine to create an overall appearance which is incompatible with our standards of fairness.

[73] We turn now to a description of the promotions and an assessment of the specific interventions complained of by Mr. Stucky in the case at bar.

4) The promotions

[74] In order to appreciate the interventions in the case at bar in context, we briefly describe the promotions in issue.

[75] The promotions were four direct mail promotions, of which three were lottery-reselling promotions (the lottery promotions) and one was an award incentive/ merchandise promotion.

[76] Each of the three lottery promotions – the Canadian Lottery Buyers Association (CLBA) promotion, the International Lottery Commission (ILC) promotion, and the International Monetary Funding (IMF) promotion – involved the direct mailing of promotional materials to persons located or resident in the United States, Great Britain, Australia, or New Zealand. The lottery promotions offered consumers the opportunity to participate in syndicates that purchased, as a group, lottery tickets from Canada and/or European countries.

[77] The fourth promotion, called Canadian Equity Funding (CEF), was a merchandise promotion which offered consumers an opportunity to receive, in exchange for a fixed fee, one of twenty-five "entitlement premiums" or items, depending on a pre-assigned registration number. These entitlement premiums ranged in size and value, from a significant amount of money payable (e.g. £3,000) down to a piece of costume jewellery of indeterminate and undisclosed value. Between these two extremes there was an array of household products of varying values. The CEF promotion was sent to English-speaking residents in over 200 countries, although primarily to individuals located in the United States, Great Britain, Australia, and New Zealand.

5) The trial judge's interventions

[78] In the case at bar, it is clear that the trial judge was aware of his right to intervene, particularly where he believed that Crown counsel had failed to ask questions which he felt arose from the evidence or had otherwise failed to pursue avenues of inquiry which the trial judge regarded as important. Cumulatively, over the duration of the trial, the trial judge interrupted the examination and cross-examination of defence witnesses, including Mr. Stucky, over twenty times. During these interventions, the trial judge conducted a vigorous cross-examination of the witness, often after Crown counsel had expressly indicated that he was finished dealing with the particular area in question.

[79] The trial judge also made sarcastic comments, some of which suggested that he had prematurely judged the witness' credibility.

[80] On occasion, defence counsel objected to the questioning of defence witnesses, including the accused, by the trial judge. The failure of defence counsel to object more frequently, however, must be considered in light of the fact that the prior defence counsel had withdrawn from the file due to acrimony with the trial judge and the trial judge made sarcastic and derogatory comments about prior counsel intermittently during the course of the trial.

[81] By way of illustrating the general situation, we have selected certain interventions by the trial judge which arose during the evidence of Mr. Stucky and a defence expert witness respecting whether the IMF promotion was intended to deliberately mislead the public into thinking the material received was connected with the government or the International Monetary Fund.

[82] Mr. Stucky testified at trial that he did not intend the content of the IMF promotion to be misleading to its recipients, but rather that the choice was a "play on words" to get the readers' attention. He testified further that his belief that the promotion was not misleading was supported by the legal opinions of his lawyer, who advised him that it complied with the *Competition Act*. The trial judge intervened during Mr. Stucky's examination-in-chief and used sarcasm to suggest that he thought Mr. Stucky's evidence preposterous. Thus, at an early stage, the trial judge's comments suggest that he had already discounted Mr. Stucky's credibility:

> Well, rather than asking him the specific question, what was your intention, maybe just elicit the evidence. I mean, you may feel it's necessary to elicit those self-serving comments: no, I didn't intend to mislead, no, I always intended to conform. I'm going to take that evidence as a given, that the evidence is there. Whether I conclude that evidence is there is another matter. That's clearly to be drawn from the surrounding facts. *I have no doubt that Mr. Stucky is going to come in here and tell me with respect to each of the promotions, gosh, I never intended to mislead, gosh, I never thought those people would think that I, International Monetary Funding would be IMF, even though I used the initials IMF 65 times in each of my documents.* [Emphasis added.]

[83] During the cross-examination of Mr. Stucky by Crown counsel, notably after Crown counsel expressly indicated that he was finished dealing with the IMF promotion and was ready to proceed to another area, the trial judge intervened to cross-examine Mr. Stucky as to the use of the acronym "IMF" in the IMF promotion. During the course of this questioning, the trial judge expressed disbelief respecting Mr. Stucky's evidence. In

addition, the trial judge cut off Mr. Stucky's responses and offered his own thoughts on the matter:

> **The Court:** Hold on a second. Are you staying with the IMF?
>
> **Mr. Sutton (Crown Counsel):** No, sir.
>
> **The Court:** You're going to move on?
>
> **Mr Sutton:** I was going to move on.
>
> **The Court:** Then I'm confused. The IMF was complaining about the fact that you were, from their perspective, trading on their name and goodwill, basically.
>
> **The Witness:** Trademark, yeah.
>
> **The Court:** You were using their mark.
>
> **The Witness:** Yeah.
>
> **The Court:** Say what you will, my take on it was that that was purposeful, that wasn't happenstance.
>
> **The Witness:** Well –
>
> **The Court:** I mean, anybody with more than a Grade 10 education knows that the IMF stands for International Monetary Fund.
>
> **The Witness:** There's no question that that familiarity was meant to –
>
> **The Court:** It wasn't just a play-on-words joke. It was done purposely, was it not?
>
> **The Witness:** It was done purposely, but there were multiple objectives to it.

> **The Court:** I'm not saying there wasn't, and I'm not saying it wasn't good business, and I'm not saying it's illegal. I'm just – simply put, it was done purposely.
>
> **The Witness:** Yes.

[84] In addition to cutting off Mr. Stucky in mid-sentence above, and thereby not giving him an opportunity to convey his evidence in his own way, the mere asking of these questions by the trial judge at the end of Crown counsel's cross-examination in respect of the IMF promotion could create the impression that the trial judge was endeavouring to buttress the Crown's case by eliciting additional incriminatory evidence in an area which Crown counsel clearly had not pressed in cross-examination.

[85] The trial judge's premature determination of Mr. Stucky's credibility is further reflected in the following exchange with defence counsel. The trial judge had, on his own initiative, used the Internet to research and find a website showing the flags of the G-7 countries which he mentioned to counsel. He was then placed in the position of having to rule on the submissions of defence counsel regarding the admissibility of the website image of the flags of the G-7 countries.

[86] Again, the trial judge used sarcasm to convey his disbelief of Mr. Stucky's evidence but this time he went further:

> **The Court:** …And rather than being cute, I mean, I did find the official website. The fact of the matter is he's using it to show the flags, the configuration of the flags, the use of the flags, which I said to Mr. Stucky was done purposefully. *And he gave me some malarkey about the fact that he couldn't recognize the flags. A Grade 6 student could recognize the flags…The point of the exercise is that he purposely flagged this in the same order that the G7 flags are out there.* He…used the IMF moniker, the fact that the matter is he had G-& Sector – Sector G-7 on his envelope. They weren't done coincidently and as a parody, they were done to create the – using Jacobs' terms – the official aspect.
>
> **Mr. Porter:** Well, Mr. Stucky's evidence was to give an international flavour.
>
> **The Court:** *That's his evidence, Mr. Porter. I don't accept his evidence.* [Emphasis added.]

[87] Prior to the end of trial, the trial judge indicated to the Crown that it did not need to vigorously pursue further the issue of the admissibility of the website of the G7 flags:

> **The Court:** …I've already got my own view of Mr. Stucky's recollection of the flags and his use of the flags. And I think that was embodied in my comment about Grade 6 yesterday. And it's your call.

[88] When the Crown led evidence that Mr. Stucky's use of the acronym IMF was challenged by the International Monetary Fund and legal action against him was threatened in September 1998, the trial judge further cross-examined Mr. Stucky and obtained admissions from him that, while he had ceased this promotion, he delayed in responding and that the longer the promotion continued the better it was for him.

[89] As well, the trial judge inappropriately cross-examined the defence witness Ronald Jacobs, an American expert on direct marketing, on his evidence that the recipient would know the IMF promotion was not from a government organization. Additionally, the trial judge attempted to make Jacobs change the thrust of his evidence.

[90] Early in the examination-in-chief of Mr. Jacobs, the trial judge made the following sarcastic remarks:

> **The Court:** So you buy your fireworks and your AK-47s at the same store?
>
> **The Witness:** I hope not.
>
> **The Court:** That's the American way, isn't it?

These inappropriate comments reflect a dismissive attitude by the trial judge towards the defence's witness.

[91] The Crown submits that on a consideration of the trial as a whole, no reasonable, informed observer who had been present throughout the trial could complain of the appearance of an unfair trial.

[92] We acknowledge that at various points during the trial, the trial judge indicated he maintained an open mind. He also generally asked counsel if they had any questions arising out of the interventions. Unfortunately, in our view, the above examples illustrate that a reasonable observer would conclude that the appearance of fairness of the trial was undermined.

[93] In support of its submission that the trial judge made significant efforts to maintain an open mind and demonstrated impartiality throughout the trial proceedings, the Crown relies on the following comment by the trial judge made during closing argument:

> **The Court:** I'm not saying I don't believe Mr. Stucky. And I want him to understand, *but for that flag incident*, Mr Stucky gave – and maybe one or two other things – Stucky was a very credible and indeed well-schooled witness. And I'm not saying that in a pejorative fashion. [Emphasis added.]

[94] Contrary to the Crown's submission, the extract relied upon illustrates that the trial judge never waivered with respect to his initial opinion of Mr. Stucky's credibility on an important aspect concerning the defence. The Crown could point to no authority where appearing to prejudge the credibility of an accused has been condoned by an appellate court.

[95] By taking one set of interventions and following them through the trial to the reasons for judgment, we have attempted to show how the trial judge's interventions were part of an overall pattern of conduct that indicated the trial judge, in effect, stepped down from the bench and improperly placed his authority on the side of the Crown.

[96] Moreover, it cannot be said that nothing came of the trial judge's interventions or that, in the end, his decision was not affected by his comments during the trial. The trial judge used the evidence and admissions he obtained to support his reasons for judgment in a number of instances.

[97] The Crown also drew our attention to passages where the trial judge intervened with respect to the Crown's witnesses and made acerbic comments to Crown counsel. The Crown submits that these interventions and comments indicate that the trial judge maintained the appearance of impartiality because he treated both sides in the same manner.

[98] The comments respecting the Crown and its witnesses do not excuse or offset the trial judge's conduct towards the defence. It is the accused who is in danger of losing his liberty or being sanctioned if found guilty at trial. As we have already emphasized, prudence and judicial restraint must be greater where the accused takes the stand: *Brouillard* at p. 48.

[99] The Crown is not an ordinary litigant: see *R. v. McNeil*, [2009] S.C.J. No. 3, at para. 49. In prosecuting those alleged to have committed a crime, the Crown represents the public interest. The Crown's role as representative of the public interest is part of the larger obligation it has to the due administration of justice. The Crown and the defence

are not adverse in interest insofar as the due administration of justice is concerned. Rather, both have an interest in ensuring that justice be done and be seen to be done.

[100] A reasonable observer present throughout the trial would conclude that the appearance of fairness of the trial was compromised by the trial judge's repeated interventions during the testimony of Mr. Stucky and key defence witnesses. When the record is considered in its entirety, we simply cannot accept the Crown's submission that the trial judge's repeated interventions, when assessed cumulatively, come within the ambit of permitted judicial conduct.

[101] For these reasons, we would order a new trial on counts 1, 5, 6, 7, 11, and 15 of the indictment.

IV. The mental culpability requirements of s. 52

1) The pre-1999 alleged offences

[102] Of the counts on which the trial judge indicated that he would have entered convictions had he decided the issue of "the public" differently, counts 1, 5, 6 and 7 related to the distribution of promotions prior to March 18, 1999, during which time the offence of misleading advertising was a strict liability offence.

[103] At para. 27 of the reasons, the trial judge summarised the applicable legal principles for pre-1999 offences, stating:

> There is no issue between the parties that the Crown is obliged to prove each and every element of the offence beyond a reasonable doubt. There is also no issue that before the 1999 Amendments, the charging section created a strict liability offence which gave rise to both a statutory (s. 60(2) of the *Competition Act*) and common law due diligence defence, which for the purposes of this prosecution, are essentially the same. In that respect, the defendant may demonstrate, on a balance of probabilities, that:
>
> (a) he took all reasonable steps to avoid the particular event complained of; or
>
> (b) reasonably believed in a mistaken set of facts, which if true, would render the act or omission innocent.[Citations omitted.]

[104] The lynchpin of Mr. Stucky's defence in respect to the pre-1999 alleged offences was that he had obtained legal advice about the promotions and, having followed that advice, he reasonably believed that they complied with the legislation. This, it was argued, brought Mr. Stucky within the second component of the due diligence defence, namely, that he had a reasonable belief in a mistaken set of facts that, if true, would render his conduct innocent.

[105] The trial judge held that Mr. Stucky's conduct met neither component of the due diligent defence. He concluded that Mr. Stucky's reliance on his lawyer's advice, in addition to the other steps he said he had taken, was not sufficient to amount to having taken all reasonable steps, nor did it amount to a mistaken set of facts.

[106] On appeal, Mr. Stucky submits that the trial judge made a number of errors in concluding that the due diligence defence had not been made out. The alleged errors are based on the trial judge's evidentiary determinations and the application of the law to facts as he found them.

[107] The Crown argues that the trial judge erred in holding that Mr. Stucky could advance a mistake of fact defence based on the legal advice he received. The Crown contends that such a mistake is a mistake of law and, consequently, the second arm of the due diligence defence based on mistake of fact was not available to Mr. Stucky.

[108] Given our conclusion that this matter must be retried, it is not necessary or appropriate to deal with the grounds raised by Mr. Stucky and we decline to so do. As the matter raised by the Crown is a question of law, however, there is utility in deciding it at this stage of the proceedings.

[109] In our view, there can be no doubt that reliance on a lawyer's advice is a mistake of law which affords no defence to the commission of an offence. Accordingly, we do not view Mr. Stucky's reliance on legal advice as a matter properly considered under the second branch of the due diligence defence.

[110] In *R. v. Latouche* (2000), 190 D.L.R. (4th) 73 (Can. Ct. Martial App. Ct.), at para. 35, Ewaschuk J.A., citing *R. v. Jones*, [1991] 3 S.C.R. 110, described the distinction between a mistake of fact and a mistake of law in this way:

> As a general rule, a mistake of fact, which includes ignorance of fact, exists when an accused is mistaken in his belief that certain facts exist when they do not, or that certain facts do not exist when they do. Ignorance of fact exists when an accused has no knowledge of a matter and no actual belief or suspicion as to the true state of the matter. By contrast, a

> mistake of law exists when the mistake relates not to the actual facts but rather to their legal effect.[3]

[111] Professor Don Stuart explains the distinction in a similar fashion in *Canadian Criminal Law: A Treatise*, 5th ed. (Toronto: Carswell, 2007), at p. 366:

> A mistake of fact is said to occur when the accused is mistaken in his belief that facts exist when they do not, or that they do not exist when they do. On the other hand, a mistake of law is said to occur when the mistake is not as to the actual facts but rather as to their legal relevance, consequence or significance.

[112] It is clear in this case that Mr. Stucky's actions were not undertaken based on any misapprehension of the facts, as he knew the content and make-up of each promotion, but, rather, in reliance on his lawyer's opinion of the publications and/or representations. That is a mistake as to the legal significance or consequences of his actions and, accordingly, is a mistake of law.

[113] There is a significant body of case law that establishes that an accused cannot rely on legal advice as a defence. In *R. v. Pontes*, [1995] 3 S.C.R. 44, at paras. 33-34, Cory J. writing for the majority, affirmed this principle:

> [I]t is important to remember the well-established principle, incorporated in s. 19 of the *Criminal Code*, R.S.C., 1985, c. C-46, that a mistake of law is no excuse…
>
> The application of this principle leads to the conclusion that an accused cannot put forward as a defence that he made diligent inquiries as to the legality of his actions or status. The submission of such a defence was specifically rejected in *Molis v. The Queen*, [1980] 2 S.C.R. 356.

[114] In *R. v. Whelan* (2002), 219 Nfld. & P.E.I.R. 52 (Nfld. C.A.), Roberts J.A. remarked that the most common argument of accused persons, in asserting that acting on their lawyer's advice should be a valid defence, is that they were unaware that the act they committed was unlawful. In rejecting this contention, Roberts J.A. stated, at para. 9:

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[3] *Latouche* is referred to solely for the distinction between a mistake of law and a mistake of fact. It is not helpful in terms of its facts, as it concerned a mistake of fact, namely, whether the accused knew that certain documents were "official".

> If a court were to accept this argument, however, a mistake of law would constitute a valid defence and accuseds would have to know that the act they were committing was unlawful in order for the Crown to obtain a conviction. This argument displaces the mental element of the offence, suggesting that it should relate to the legality of the act and not to the act itself.

[115] In *Whelan*, the accused had been charged with disobeying a court order. The accused asserted that he relied on his lawyer's opinion regarding the meaning of the order. Roberts J.A. found that the actions of the accused in disobeying the order were undertaken not based on any mistake as to the facts, but rather in reliance on his lawyer's incorrect advice. He held that the error was a mistake of law and could not constitute a valid defence.

[116] The decision of this court in *R. v. Dalley* (1957), 8 D.L.R. (2d) 179 is to the same effect. In *Dalley*, the accused was convicted at trial of trading in securities without being registered as a broker under the *Ontario Securities Act*, R.S.O. 1950, c. 351. The accused argued on appeal that his solicitor had advised him that his actions did not amount to an offence because he was not trading in "securities" within the meaning of the statute. He contended that, based on the advice he had received from his lawyer, he did not believe he was doing anything contrary to the law and thus he had to be acquitted. In rejecting this submission, this court stated, at p. 186:

> Here, the appellant knew, as his counsel conceded, that he was not registered under the Act and that he "traded" in his dealings with Johnson. These, of course, were questions of fact. To say that he did not know that what he dealt with or traded in was a security within the meaning of the Act, amounts to an assertion that he was mistaken about a question of law. If true, and I do not doubt it, it affords the appellant no defence, in my opinion.

[117] Similarly, in *R. v. Maunder*, [1966] 1 C.C.C. 328 (Ont. Mag. Ct.), conviction affirmed, [1966] 1 C.C.C. 328 (C.A.), the trial judge held, at p. 379, that "[a] mistake of law cannot afford a defence even where the accused sought a lawyer's opinion and acted on it."

[118] To conclude on this point, we echo the following comment of McClung J.A. in *R. v. Kotch* (1990), 114 A.R. 11 (C.A.), at p. 15, "[a]bsent 'officially-induced error,' mistaken legal advice does not shield the purposeful doing of an act which may prove contrary to the criminal law."

2) The post-1999 alleged offences

[119] For ease of reference, the post-1999 version of s. 52 is set out again. It reads as follows:

> (1) No person shall, 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, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.
>
> (1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that any person was deceived or misled.

[120] The trial judge explained the difference in the *mens rea* requirements pre- and post-1999 at para. 84 of the reasons:

> As indicated in Part I, s. 52 created a "strict liability" offence before the 1999 Amendments, and an offence requiring proof of the accused's *mens rea*, thereafter. The essence of the distinction between these two types of offences has long been established in the oft-quoted decision of Dickson J. in *R. v. Sault Ste. Marie (City)*:
>
> > I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:
> >
> > 1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
> >
> > 2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the

> accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of fact which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. [Citation omitted.]

[121] Based on other regulatory cases, such as *R. v. Mac's Liquid Disposal (1982) Ltd.*, [1987] O.J. No. 884 (C.A.), *Anderson v. Excel Collection Services Ltd*. (2005), 260 D.L.R. (4th) 367 (Ont. Div. Ct.), *R. v. Bhatty*, [1991] O.J. No. 1380 (Ct. J.) and *R. v. Laurier Office Mart Inc*., [1994] O.J. No. 2745 (Ct. J.), affirmed, [1995] O.J. No. 2063 (Gen. Div), the trial judge held that, in respect of the counts that were alleged to have occurred after the 1999 amendments, the Crown was required to prove beyond a reasonable doubt that Mr. Stucky knew of the falsity or misleading nature of the representations, or was reckless in that regard. As a result, the trial judge concluded that an honest belief on the part of Mr. Stucky that the representations were not misleading would be a defence.

[122] The Crown contends that the trial judge erred in concluding that, in order to satisfy the *mens rea* component of s. 52, the Crown had to show knowledge of, or recklessness with respect to, the false or misleading character of the promotions in fact. The Crown argues that all that is required is proof that Mr. Stucky knew (1) the content and make-up of the promotional pieces and (2) the truth regarding them, including how the promotions actually functioned. On this view, it is not necessary for the Crown to prove that Mr. Stucky knew or was reckless as to whether the promotional materials were misleading. The Crown says that requiring it to prove that Mr. Stucky knew or was reckless as to whether the representations were misleading imposes an unnecessary burden on the Crown.

[123] The Crown's position on *mens rea* effectively makes the post-1999 offence indistinguishable from the strict liability offence, as it requires only that Mr. Stucky knew the contents of the promotions and knew the truth regarding them, not that he also had to know or be reckless as to whether they were, in fact, misleading. We do not accept that submission. In our view, the trial judge's articulation of the *mens rea* requirement for post-1999 s. 52 offences is correct. That interpretation best accords with the change from a strict liability offence to one requiring *mens rea*. It is also consistent with the case law on the "knowingly" standard in other regulatory contexts, and the objectives of s. 52 as a criminal provision.

[124] Three examples of the case law will suffice. In *Mac's Liquid*, this court concluded that the phrase "knowingly give false information" in the *Environmental Protection Act*, R.S.O. 1980, c. 141, s. 145, required the accused to know a statement was false. An honest belief in the truth of the statement was held to be a defence.

[125] In *Anderson*, the Divisional Court considered s. 22 of the *Consumer Reporting Act*, R.S.O. 1990, c. C.33, which prohibits a person from "knowingly" supplying false or misleading information, and s. 28(10)(c) of the *Collections Agencies Act*, R.S.O. 1990, c. C.14, which makes it an offence for a person to "knowingly" contravene the Act and regulations. The court held that these provisions require that the person making a report know that the information is false.

[126] Finally, in *Bhatty*, the court found that the offence of "knowingly furnishing false information" under s. 97 of the *Insurance Act*, R.S.O. 1980, c. 218, required the Crown to prove that the accused had knowledge of the falsity of the information.

[127] The more stringent *mens rea* requirement is appropriate given that the post-1999 prohibition on false and misleading advertising is designed to catch serious criminal conduct. In *Benlolo*, Feldman J.A., writing for the court, emphasized this point at paras. 19 and 29:

> In deciding that a substantial sentence of incarceration was warranted and appropriate in this case, the trial judge distinguished the pre-1999 case law. She concluded that in making the amendments, Parliament intended that serious, egregious cases that had the hallmarks of fraud would be treated as criminal matters, while the cases that were more akin to sharp practice could be processed through the new civil stream. I agree with the trial judge that the 1999 amendments constitute a watershed in the treatment and approach to misleading advertising and that the pre-1999 case law must therefore be viewed with caution.
>
> …
>
> In 1999, Parliament amended the legislation to give the Competition Bureau more tools to use and more flexibility in its choice of enforcement mechanisms to combat new forms of misleading advertising including large-scale fraudulent schemes. It now had civil remedies that were more easily obtainable to deal with persons whose activities could be curbed and regulated through directives that would protect the

> public without the need to engage in the acrimonious, time-consuming and onerous criminal prosecution process. On the other hand, the criminal offence was changed from a strict liability offence to one of full *mens rea*, that is, where the deception is done knowingly or with reckless disregard of the consequences.

[128] We understand the concern which underpins the Crown's position on this matter, namely, that an accused's knowledge of whether a representation is misleading is not readily susceptible of proof. In response to that concern, we commend the commonsensical approach of the Federal Court of Appeal in *Canada (Attorney General) v. Gates* (1995), 125 D.L.R. (4th) 348. In *Gates*, the court applied *Mac's Liquid* at p. 350 in concluding that making a statement, representation, or furthering information that a claimant "knew to be false or misleading" under s. 33(1) of the *Unemployment Insurance Act*, R.S.C. 1985, c. U-1 required that a claimant knowingly "misrepresent" facts. At p. 350-51 of *Gates*, the court stated:

> In deciding whether there was subjective knowledge by a claimant, however, the commission or board may take into account common sense and objective factors. In other words, if a claimant claims to be ignorant of something that the whole world knows, the fact finder could rightly disbelieve that claimant and find that there was, in fact, subjective knowledge, despite the denial. Not to know the obvious, therefore, might properly lead to an inference that the claimant is lying. This does not make the test objective; it does, however, take into account objective matters in coming to a decision on subjective knowledge.

[129] In conclusion, in our view, to satisfy the *mens rea* component of s. 52 offences post-1999, the Crown must prove beyond a reasonable doubt that an accused had knowledge of the false or misleading character of the representations, or was reckless in that regard.

V. Disposition

[130] Accordingly, we would allow the appeal and order a new trial on counts 1, 5, 6, 7, 11 and 15 of the indictment.

RELEASED: February 17, 2009

“KMW”

“K.M. Weiler J.A.”
“E.E. Gillese J.A.”
“I agree Robert P. Armstrong J.A.”