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ELECTRONIC COMMERCE: A PRACTITIONER'S GUIDE

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Written with the practitioner in mind, this work is organized in an accessible format and offers a comprehensive guide to all aspects of Electronic Commerce.

This release features updates to the Quantum Table — Copyright Infringement in Chapter 1 (Copyright and E-Commerce). This release also features updates to the Quantum Table — Trade-Mark Infringement and Passing Off in Chapter 2 (Trade-Marks and the Internet). This release also features updates to the Sentencing and Resolutions Tables — Offences under the Competition Act in Chapter 8 (Advertising in Cyberspace). This release also features updates to the Sentencing Table — Canada's Anti-Spam Law (CASL) in Appendix F (Electronic Communication). This release also includes updates to the Sentencing Table — Violation of Unsolicited Telecommunications Rules in Appendix L (Regulations of Telecommunications and Broadcasting on the Internet).

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Highlights

- **Quantum Table — Trade-Mark Infringement and Passing Off — General Damages for Infringement** — Justice McHaffie observed that most of what the plaintiffs relied on to establish personal liability

was simply the fact that as owner, director, and officer, Racioppo was responsible for the business and inextricably linked to its success. However, merely being the directing mind of a company is not sufficient to establish personal liability. While Racioppo incorporated Hostess Bread to sell bread under the HOSTESS trademark, there was no evidence that it was incorporated to avoid personal liability for infringement or other tortious conduct. In Justice McHaffie's view, the plaintiffs had not established that Racioppo's conduct met the Mentmore standard. While Racioppo made the decision to sell HOSTESS bread, simply being the person who made the decision that a company would undertake acts that infringe is not enough to create personal liability. While Racioppo may have been misguided, he believed the companies were entitled to sell HOSTESS branded bread in light of the absence of bread from Vachon Bakery's registrations. The defendants' sales of bread products were in the range of \$70,000. Racioppo gave evidence of various costs associated with those sales, and of overall losses of Natural Stuff and Hostess Bread, but the plaintiffs did not seek an accounting of profits. Nor had the plaintiffs attempted to show any actual damages in the form of lost sales arising from the defendants' sales. Rather, they sought nominal damages for loss of goodwill arising from the defendants' conduct. The plaintiffs requested damages in the amount of \$10,000 on that basis. The defendants accepted that this amount was not unreasonable, although they argued that the defendants' profits were closer to \$5,000. Justice McHaffie was satisfied that \$10,000 was a reasonable amount given the sales at issue, the nature of the infringement, and the potential impact on the plaintiffs' goodwill: *Boulangerie Vachon Inc. v. Racioppo*, 2021 CarswellNat 1106, 2021 FC 308, 2021 CF 308, 184 C.P.R. (4th) 183, 334 A.C.W.S. (3d) 171, EYB 2021-391420 (F.C.).

- **Remedies Table — Violation of Unsolicited Telecommunications Rules** — The Commission noted that the purpose of any penalty is to promote compliance with the Rules and not to punish. The amount of the penalty must therefore reflect the nature of the non-compliance, and must serve as both a deterrent to future non-compliance and an incentive to comply with the Rules. For this reason, penalties must not be set so low as to make it financially advantageous for a telemarketer or a client of a telemarketer to pay the penalty as a cost of doing business. The Commission considered that Smart Choice gained a financial benefit from its non-compliance with the Rules by avoiding the costs associated with the subscriptions it was required to purchase prior to making telemarketing calls. Those costs, for the 13-month period covered by the notice of violation would have been \$9,396 (or \$447.43 per violation). In light of the fact that this was the second notice of violation issued to the company in seven years, the Commission concluded that imposing a higher penalty per violation than that imposed in Compliance and Enforcement Decision 2014-92, where the penalty was \$1,000 per violation, would serve as an appropriate disincentive in the circumstances of this case. The Commission concluded that a penalty of \$2,000 per violation, for a total penalty of \$42,000, would place the penalty in excess of the cost of doing business, without making the amount so large as to prevent Smart Choice from using telemarketing strategies in a manner that complied with the Rules: *2260948 Ontario Inc., Re*, 2021 CarswellNat 5636, 2021 CarswellNat 5637 (C.R.T.C.).

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