

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** Maritime Travel Inc. v. Go Travel Direct.Com Inc., 2008 NSSC 163

**Date:** 20080530

**Docket:** SH No. 192257

**Registry:** Halifax

**Between:**

Maritime Travel Inc., a body corporate

Plaintiff

and

Go Travel Direct.Com Inc., a body corporate

Defendant

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**D E C I S I O N**

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**Judge:** Justice Suzanne M. Hood

**Heard:** January 28-31 and February 1, 2008, in Halifax, Nova Scotia

**Written  
Decision:** May 30, 2008

**Counsel:** David P.S. Farrar, Q.C. and John Shanks, for the plaintiff  
Peter Bryson M.S. Bryson, Q.C. and Dan Wallace, for the defendant

**By the Court:**

## **INTRODUCTION**

[1] Maritime Travel commenced action against Go Travel Direct with respect to advertisements Go Travel Direct ran referring to Maritime Travel. Maritime Travel says the ads are false or misleading under the *Federal Competition Act*, R.S.C. 1985, c. C-34 and seeks damages pursuant to that *Act*.

## **ISSUES**

1. Were the ads or any of them false or misleading in a material respect?
2. If so, damages:
  - a) from the entire advertising campaign by Go Travel Direct; or
  - b) from any false or misleading ads.

## **FACTS**

[2] Maritime Travel is a long established travel agency supplying, *inter alia*, travel packages to Southern destinations. It operates nationally out of its head

office in Halifax with eighty offices, sixty-one of which are in Atlantic Canada.

Many of its locations are in storefronts.

[3] Go Travel Direct is a direct sale tour operator established in 2000 with head office in Ottawa. In 2000, it entered the Halifax market and opened an office here. It continued to operate in Halifax offering tour packages directly from Halifax until 2006, after having closed its office the previous year. It left the Halifax market in the fall of 2006, taking down its local website. Go Travel Direct offered tour packages from Halifax only to Cuba, the Dominican Republic and Florida on airplanes owned by an affiliated company.

[4] For travel to Southern destinations, the peak travel period is February to April. Advertising for travel South begins in the fall of the previous year with January, February and March being the main selling period and January the peak period for sales. Maritime Travel does its own advertising and also advertises in conjunction with its suppliers. It runs a Travel Super Store annually around the second week of January at a large venue in Halifax, most recently the World Trade and Convention Centre. Maritime Travel earns its income from commissions from tour operators and a service or processing fee from airlines.

[5] Go Travel Direct began to advertise upon its arrival in the Halifax market.

Its focus was on it being a tour operator with whom customers could book directly without going through a travel agency. It published a brochure for the 2002-2003 season entitled “Why Go Through A Travel Agent? Go Direct and Go for Less.” (Exhibit 9) It took bookings on line and at its office when it was in operation.

[6] On January 9, 2003, Go Travel Direct ran an ad in The Chronicle Herald comparing its price for a trip to a specific property in Florida to Maritime Travel’s price for the same location. As soon as officials at Maritime Travel became aware of the ad, they contacted their lawyer who, on January 10, 2003, wrote to Hugh Boyle, the Chairman and CEO of Go Travel Direct, at his Ottawa address, advising him they believed Go Travel Direct was in violation of the *Competition Act*. The letter also demanded that Go Travel Direct “immediately cease and desist” from placing further such ads. The letter was sent by fax at 3:37 Halifax time on January 10.

[7] A similar ad ran in The Chronicle Herald on January 11, 2003. Hugh Boyle did not agree that he thought there was any reason for that ad to be stopped but said

it could not be stopped in any event by the time the faxed letter was received from Maritime Travel's lawyer.

[8] After the second ad ran, Maritime Travel commenced action against Go Travel Direct on January 13, 2003 and filed an injunction application on January 15 which was heard on January 17. The notice of application sought an order to restrain the publication of any ads comparing Go Travel Direct products to Maritime Travel products and from "making any other public statements referencing Maritime Travel Inc. in product comparison." The injunction application was denied on January 22.

[9] The following year on January 8, 2004, Go Travel Direct ran an ad in The Chronicle Herald comparing its price for a specific location in the Dominican Republic to Maritime Travel's price for the same property.

[10] In January 2005, Go Travel Direct ran a series of ads in The Chronicle Herald and one in the Halifax Daily News. Although each was slightly different in content, the key feature of these ads, for the purpose of this litigation, is the phrase

in each “Not Available from your Maritimes Travel Agent.” These ads ran between January 11 and January 29, 2005.

[11] It is not in dispute that Go Travel Direct ran other ads not referring to Maritime Travel directly. The ad which ran in the Halifax Daily News on January 20, 2003 was not specifically mentioned in Maritime Travel’s amended originating notice, although the amended statement of claim did refer to ads “in any other newspaper” which “cite or refer to Maritime Travel.” (para. 17(b)(3))

## **THE LAW**

[12] The *Federal Competition Act, supra*, provides in s. 52:

**52.** (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.

(1.2) For greater certainty, a reference to the making of a representation, in this section or in section 52.1, 74.01 or 74.02, includes permitting a representation to be made.

- (2) For the purposes of this section, a representation that is
- (a) expressed on an article offered or displayed for sale or its wrapper or container,
  - (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,
  - (c) expressed on an in-store or other point-of-purchase display,
  - (d) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or
  - (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 (2.1).

...

(4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

(5) Any person who contravenes subsection (1) is guilty of an offence and liable

- (a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both; or
- (b) on summary conviction, to a fine not exceeding \$200,000 or to imprisonment for a term not exceeding one year, or to both.

[13] A civil remedy is created in s. 36 (1):

- 36 (1) Any person who has suffered loss or damage as a result of
- (a) conduct that is contrary to any provision of Part VI, or
  - (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,
- may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount

that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

[14] A number of case authorities were cited to the court interpreting s. 36 and s. 52. Some care must be taken in referring to cases before s. 52 was amended in 1999 to eliminate the requirement for testing before representations are made and before the words “knowingly or recklessly” were added. Some case authorities also dealt with tort claims and some of the courts’ comments in those cases deal with claims of that nature not claims made pursuant to the *Competition Act*.

[15] Section 52 creates an offence and s. 52 (5) sets out the penalties. If the matter is dealt with by indictment, there is provision for a fine, a prison term of a maximum of five years or both. If proceeded with summarily, the penalty is a maximum fine of \$200,000.00 or imprisonment for a maximum of one year or both.

[16] No prosecution was undertaken in this case nor was there in *Janelle Pharmacy Ltd. et al v. Blue Cross of Canada*, 2003 NSSC 179. In that case, Nunn, J. considered the standard of proof where the civil remedy created by s. 36 of the *Act* requires proof of criminal conduct. He said in paras 95-97:



[95] The burden of proof in a civil action where criminal conduct is alleged or, as here, where criminal conduct forms the basis of the action, has been well established by the authorities. In *Continental Insurance Co. v. Dalton College* [1982] 1 SCR 164 the court held that in such a case the burden of proof remains on the balance of probabilities but that a trial judge is justified in scrutinizing the evidence with greater care if there are serious allegations to be established by the proof offered. The Nova Scotia Court of Appeal in *Pentagon Investments Ltd v. Canadian Surety Co* [1992] N.S.J. No. 402 stated the burden of proof in such a cast (*sic*) at p. 3, as:

Again the burden on the appellant is heavy. It alleges, in effect, criminal conduct. The appellant must prove the allegations of fraud with a higher degree of certainty than required in other civil actions. However, the burden remains proof on a balance of probabilities. In *B and G Groceries Ltd. v. Economical Mutual Insurance Co.* [1992] N.S.J. No. 374 the Court of Appeal, at p.1, the court stated:

The standard of proof, at the very least is a high preponderance of probability.

[96] Obviously the thrust of these cases is that the burden of proof is not the criminal burden of beyond a reasonable doubt but, since the basis of the allegation is criminal conduct, there must be established 'a degree of probability that is commensurate with the occasion' as Lord Denning said in *Bater v. Bater* [1950] 2 ALL E.R. 458 at 459.

[97] Since Section 36(1) is a remedial section providing a civil remedy for a very serious public crime which provides for a heavy penalty on conviction and where there has been no conviction of the defendant under Section 45(1) nor a prosecution commenced it is incumbent upon the plaintiff to offer substantial proof that the activity prohibited by Section 45(1) has, indeed, taken place.

[17] The test under s. 52 is set out in *Bell Mobility Inc. v. Telus Communications Company*, 2006 BCCA 578, 2006 CarswellBC 3230. In that case, Ryan, J.A. set out a two part test. She said in paras. 16-19:

16 The case law tracks the legislation in setting out the test to apply. In his factum, counsel for Bell, Mr. Deane, summarized the approach required of a trial judge in deciding whether an advertisement can be said to be false or misleading. First, the trial judge must determine the general impression conveyed to consumers, based only on the representations actually made in the advertisements. This is the impression formed by consumers upon seeing the advertising in its intended form. Once assessed in light of the information presented to the consumer in the body of the advertisement, the impression is fixed as the impression of the average consumer.

17 I agree with Mr. Deane. I would only add that s. 52(4) requires that the trial judge also examine the literal meaning of the representation in determining whether the advertisement is false or misleading.

18 Next, Mr. Deane says the giving of a particular impression is only unlawful if the impression is false or misleading in a material respect. The second step of the test requires the court, having regard to extraneous facts if necessary, to gauge whether the impression conveyed to consumers by the representations is false or, alternatively, misleading in a material respect. Only at this stage is extraneous evidence considered, not to alter the general impression, but to gauge whether the impression is false or misleading.

19 I agree and I do not take counsel for Telus to take issue with the iteration of the test.

[18] In *Purolator Courier Ltd. v. United Parcel Service Canada Ltd.*, [1995] O.J. 876, 1995 CarswellOnt 335 (Ont. Ct. Just., Gen. Div.), Lederman, J. said in para. 40 that the general impression an advertisement creates:

40 ... depends on a combination of factors: the understanding of those who have listened to the commercial, as presented through survey evidence; the use of the qualifiers, 'usually' and 'up to'; the nature of the consumers; and the nature of the medium.

[19] He considered the nature of the consumers. He said in para. 54:

54. The consumers in question are not totally naive. They are business individuals who make these kinds of decisions every day based on service and price ...

[20] He continued in para. 55:

55 Business purchasers, even those in what have been described as 'modified' or 'straight re-buy' situations, would not be sold on the service merely by being exposed to the UPS commercial. Most likely, they would make inquiries to determine if the opportunity for savings applied to their particular situation.

[21] In *R. v. R.M. Lowe Real Estate Ltd. and Pastoria Holdings Ltd.* (1978), 40

C.C.C. (2d) 529 (Ont. C.A.), Arnup, J.A. dealt with an advertisement in the

Toronto Star and the audience for which it was intended. He said (p. 2 Lexis Nexis version):

We are all of the opinion that since the meaning to be placed upon the advertisement is that meaning which would be discerned by the average reader who was interested in making a purchase of a house in that locality. ...

[22] That decision was cited in *R. v. International Vacations Ltd.* (1980), 33 O.R. (2d) 327, 124 D.L.R. (3d) 319 (Ont. C.A.), by Blair, J.A. (p. 4 Lexis Nexis version). He said at p. 5:

The average reader interested in making an overseas trip can be taken to be literate, intelligent and unlikely to make a relatively large monetary commitment without carefully reading the advertisement. It seems to me that the import of the advertisement would be absolutely clear to such a discerning reader.

[23] In *R. v. Multitech Warehouse Direct Inc.*, Gibson P.C.J. (as he then was) distinguished the sophistication level of consumers like those in *Lowe* and *International Vacations* from those buying consumer electronics like microwave ovens. However, he concluded that even such a consumer would not believe that Multitech would give away something worth more than the value of the purchase. He said in paras. 21 and 22:

21 In the case before me, the advertisement is not directed at a person intending to make an overseas trip or purchase a house. Rather, the advertisement is directed at any member of the public that might be inclined to purchase a wide range of electronic products. I think therefore, the advertisement was directed at an average consumer similar to the type of average consumer to whom the advertisement was directed in the case of *R. v. Rust-Oleum (Canada) Ltd.* (1978), 42 C.P.R. (2d) 193 (Ont. Prov. Ct.). I take the average consumer to be less sophisticated than the average reader who would be interested in making the purchase of a house or making an overseas trip.

22 It is my view that the average consumer or purchaser would not expect to receive as a result of purchasing a Toshiba microwave oven at a price of \$298,

free round-trip airfare for two to such locations, as far away as Hawaii without some limitation or satisfaction of other requirements. The average consumer in today's society, where air travel is a common and widely used form of travel, would understand that the cost of round-trip airfare for two from Halifax to places as far away as Hawaii would likely well exceed the cost of the Toshiba microwave oven and many of the other designated items advertised for sale in the Multitech advertisement. The average consumer, in today's society, would therefore not likely conclude that Multitech would, in essence, be willing to give away its products or in other words incur a cost to provide a free trip that was greater than the selling price of the product.

[24] Another factor to be considered in determining the general impression of the advertisement is any disclaimer it contains and the size of the print used for it.

[25] In *Purolator, supra*, Lederman, J. heard expert evidence about consumer behaviour. One of the comments he made after hearing that evidence was about the contrast between print and television or radio advertising. He said of the latter at para. 43:

43 ... In contrast to the print medium, there is no opportunity to go back and look more closely at the details of a message that may not have been fully appreciated when the commercial was first aired.

[26] He then made the following comment in para. 47 about qualifiers in advertisements:

47 The qualifiers 'usually' and 'up to' are akin to disclaimers which often appear somewhere in an ad to provide additional limiting information with respect to the main representation.

[27] He said in para. 54:

54 ... The qualifier 'up to' is commonly used in advertising parlance and it is difficult to accept that they would interpret that reference to mean that in all cases UPS is 40 per cent cheaper than PCL.

He concluded in para. 58:

58 The qualifiers here are an important part of UPS's message and I believe that the import of those words would be absolutely clear to the discerning business consumer.

[28] In *National Hockey League v. Pepsi-Cola Canada Ltd.*, 1992 CarswellBC

215, D.L.R. (4<sup>th</sup>) 349 (B.C.S.C.), Hardinge, J. considered the effect of the

disclaimer in the subject advertisements. He referred to the disclaimers in both the

print media and in television commercials. He said in paras. 52 and 54:

52 The manner in which the disclaimer was displayed during the television commercials left something to be desired. It was displayed during the commercials for about seven seconds against a background that made it difficult to read. On all the printed advertising relating to the contest the disclaimer was displayed prominently in quite bold print. It was easily read and hard to miss.

54 The prominence to be given to a disclaimer must, to some extent, depend on the likelihood of a false impression being conveyed to the public if there is no disclaimer. The greater the likelihood the more prominent must be the disclaimer.  
...

[29] In *International Vacations, supra*, Blair, J.A. said the disclaimer was “an integral part of the advertisement. (p. 5, Lexis Nexis). He said on that page:

... I am unable to conceive how the matter could be put more plainly.

He concluded the advertisements were not false or misleading.

[30] Groves, J. referred to *International Vacations in Tele-Mobile Co., a Partnership v. Bell Mobility Inc.* 2006 CarswellBC 430 (B.C.S.C.). He noted the difference between the type size in that case from that in the case before him. He said in para. 56:

56 I note in the *International Vacations Ltd.* case and I note not in the case here, that the disclaimer was of the same size type. That is clearly some difference between that case and this case.

He then said in para. 60:

60 ... I do note that the disclaimers are small but they are disclaimers nonetheless. They are readily apparent to inform the consumers who would be considering responding to the ad what the basis of the ad is.

[31] Lederman, J. concluded his decision in *Purolator* with the following comments about the nature of promotional advertising. He said in paras. 61 and 63:

61 There is nothing wrong with the aggressive promotion of one's own goods or services so long as there is no untruthful disparagement of a competitor's goods or services. ...

63 ... Advertising can be an effective tool in persuading the public to utilize a particular product or service. By its nature, it is one-sided and usually does not convey a full and balanced analysis. To do so, of course, might diminish its persuasive power. There must, however, be a reasonable basis for the representation that is made. So long as that is so, competitors may complain that the ad does not depict the whole picture, but they are just as equipped to tell their side of the story in the commercial marketplace of ideas with emphasis on those matters which they believe to be important. Courts should be reluctant to intervene in the competitive marketplace unless the advertisements are clearly unfair.

[32] In *Tele-Mobile, supra*, Groves, J. referred to the words of Lederman, J. He said in para. 63:

63 Additionally, as noted by Lederman J. in the *Purolator Courier* decision, I have concluded that these advertisements are not clearly unfair. They have a reasonable basis. They may push the bounds of what is fair, they may be close to the line, but they are not per se false nor in my view are they misleading in a material way when the whole picture of the ad is considered.



[33] In *Church & Dwight Ltd. v. Sifto Canada Inc.*, 1994 CarswellOnt 1033 (Ont.C.J., Gen. Div.), Jarvis, J. distinguished between advertising which is misleading and that which is “puffery.” He said in para. 5:

5 ... I do not consider the copy suggesting that Sifto’s product is 100% pure and 100% natural to be actionable. These are examples of the ‘puffery’ which is the staple of the advertising industry and of marketers everywhere.

[34] In *Apotex Inc. v. Hoffman LaRoche Ltd.*, 2000 CarswellOnt 4773, 195 D.L.R. (4<sup>th</sup>) 244 (Ont. C.A.), Rosenberg, J.A. defined materiality in the context of s. 52 of the *Act*. He said in para. 16:

16 ... A representation is material for the purposes of s. 52(1) if it is so pertinent, germane or essential that it could affect the decision to purchase. ...

[35] In *R. v. Stucky*, (2006), 53 C.P.R. (4<sup>th</sup>) 369 (Ont. S.C.), Gans, J. dealt with criminal charges against Robert Stucky for offering promotions which “offered consumers the opportunity to partake in syndicates that purchased, as a group, lottery tickets from Canada and/or four European Union countries ...” (para. 11). The charges generally were that the techniques used were deceptive or misleading because they created “an erroneous general impression that the recipients had won

or could win a substantial sum of money.” (para. 22) Charges were also laid with respect to a merchandise promotion (para. 24).

[36] Gans, J. considered the meanings of “misleading” and “material.” He said of the former in paras. 70 and 71:

[70] I was, however, unable to find a case that defined ‘misleading’ with any exactitude, although some cases seemed to use the words misleading and confusing almost interchangeably. *Black’s Law Dictionary* provides some insight into this issue, as it defines misrepresentation as ‘the act of making a false or misleading assertion about something, [usually] with the intent to deceive ...

[71] What is clear from the cases is that whether or not a representation is misleading will be determined from a consideration of the representation in context and from the perspective of the average person to whom it was directed. In this respect it is not accurate to say that the target of the promotion would simply be the ‘...ignorant, unthinking and credulous; nor ... the skeptical who have learned by bitter experience to beware ...’. Put otherwise, the facts of each case, which includes a consideration of the intended audience, must govern and the representation is to be considered from both a literal and general impression point of view.

[37] With respect to materiality, he quoted from *Apotex, supra*, and, in para. 75, from *R. v. Kenitex Canada Ltd.* as follows:

[75] ... (T)he representation will be false or misleading in a material respect if, in the context in which it is made, it readily conveys an impression to the ordinary citizen which is, in fact, false or misleading and if that ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered.

In para. 76, he contrasted that with “puffery,” referring to Church & Dwight, *supra*, saying:

[76] On the other hand, a statement which is vague or amounts to what might otherwise be classified as exaggerated praise may also not be sufficient or material to sustain a prosecution if it amounts to mere puffery, which, as one of my colleagues observed in other circumstances, is often ‘ ... the staple of the advertising industry and marketers everywhere.’

[38] He concluded in para. 77:

[77] In the final analysis, context will, in large measure, govern the element of materiality, as defined by the above referenced jurisprudence.

[39] I conclude that the principles applicable to a determination under s. 52 are as follows:

1. The general impression of the advertisement must be determined. In doing so, the nature of the particular portion of the public to whom it is directed must be considered.
2. The literal meaning of the advertisement is to be considered as well.
3. In determining if the advertisement is false or misleading in a material respect, extraneous evidence may be considered but not for the purpose of altering the general impression already arrived at.

4. Misleading advertising must be misleading in a material respect. Materiality is defined in terms of the effect it would have upon a consumer's buying decision. It must be "so pertinent, germane or essential" (quoting from *Apotex*) that it would have an effect upon that decision. Mere "puffery" is not sufficient to constitute misleading advertising.
5. Aggressive advertising is not circumscribed by the *Competition Act* unless it is an "untruthful disparagement" of the goods or services of a competitor (quoting from *Purolator*).
6. The court should not interfere with competition in the workplace unless the advertisements are "clearly unfair" (*Purolator*).
7. Even advertisements which "push the bounds of what is fair" are not misleading in a material way (*Tele-Mobile*).
8. In the civil context, the burden of proof on the plaintiff is still proof on the balance of probabilities but it is a heavier burden because of the seriousness of the allegations. There must be "substantial proof" of activity which is "a very serious public crime." (*Janelle*).

## ANALYSIS

### The 2003 Ads

[40] The January 9 and 11, 2003 ads compared Go Travel Direct's price for a week at the Fairfield Inn and Suites in Orlando, Florida to what it called Maritime Travel's price. Go Travel Direct's price was \$669 tax included for "One Week Air, Hotel & CAR" for travel from April 14-21. The Maritime Travel price was

\$1,175 tax included for “One Week Air & hotel only” for travel from April 12-19.

The price information was provided under the heading “Go Travel Direct’s

Florida” and “Maritime Travel’s Florida.” The largest print at the heading of the

January 9, 2003 ad stated:

**NO COMPARISON**

The January 11, 2003 ad repeated that large print phrase and under it in bold print,

but slightly smaller, were the words

**GO DIRECT & GO FOR UP TO 43% LESS!**

[41] After the location and price information, the ad continued:

If you’re going to Florida, why go through a travel agent? We’ll fly you direct, book you in the same hotel *and provide a rental car* for the week all for up to **43% less!** Compare and save, Go Travel Direct, and go for less.

The ad also referred to “Direct flights from Halifax.”

[42] The first step of the test under s. 52 is to determine the general impression of the ad. In doing so, I must consider the nature of the intended audience, the medium used and any disclaimers in the ad.

[43] Although the potential traveller is not spending the amount of money that someone buying a house would be spending or even the amount an overseas traveller would be spending, someone contemplating spending \$700.00 to \$1,000.00 per person for four people to go on a Southern vacation would, in my view, be a literate person of average intelligence. That person would read the ad carefully before committing to spend \$669.00 per person plus associated costs for meals, gas and other expenses. For a family of four the minimum trip costs in total could be no less than approximately \$3,000.00. That person would consider the dates of travel, the fact that it is a direct flight and that savings of “up to” 43 percent could be achieved. That person would realize the significance of the words “up to”, words which are commonly found in advertisements. Because the ad is a newspaper ad, the customer would have ample opportunity to consider it and its wording with care.

[44] The general impression such a person would take from the ad is that Go Travel Direct can provide him or her with a Florida vacation more cheaply than Maritime Travel, a travel agent, could and on a direct flight.

[45] The literal meaning of the ad is, in my view, the same: Go Travel Direct can provide a Florida package less expensively than Maritime Travel can and can fly you directly to Florida.

[46] The next step is to determine if the ad is false or misleading in a material way. For that purpose, I can consider extraneous material.

[47] The fine print disclosed that the Maritime Travel information was provided by Maritime Travel. At trial, Brianne Warwick, a Go Travel employee, testified that she was sent by her office manager to a Maritime Travel storefront to obtain a package price for a direct flight to Florida. She obtained the information in Tab 1, Exhibit 1 from a Maritime Travel employee at Park Lane. That is the information contained in the ad. Maritime Travel does not deny that; accordingly, the information about Maritime Travel is not false. No argument has been made that the Go Travel Direct information was false.

[48] Robert Dexter, Chairman and CEO of Maritime Travel testified that he believed the ad was misleading because of the price, because Maritime Travel does not provide the product itself and because the difference in travel dates is significant. Randolph de Gooyer, Vice-president, Corporate Development, Maritime Travel, testified that he did a price comparison for packages Maritime Travel sold against the prices Travel Direct had on its website. The package Maritime Travel could sell for Fairfield Inn and Suites for April 12-19 (Saturday to Saturday) was \$630.73, \$38.27 less than Go Travel Direct's package. However, he agreed on cross-examination that the package they could offer included a connecting flight through Montreal while Go Travel Direct's flight was direct non-stop from Halifax to Orlando. He said, in his view, price was more important to leisure travellers than direct flights.

[49] Rob Dexter said most people choose the dates they wish to travel and Maritime Travel finds them the cheapest way to go, even if it requires them to fly through Montreal or Toronto. He said a direct flight is not important if the traveller arrives at his or her destination on the same day.



[50] Looking at the other packages available from Maritime Travel and Go Travel Direct shown at Tab 4, it is apparent that, for all the Maritime Travel destinations except two, the cost for Go Travel Direct was lower. It was lower sometimes by a small amount (as little as \$1.64 but also \$14.12, \$16.82 and \$20.56 per person); however, in other cases, it was lower by a larger amount (\$52.53, \$62.60, \$59.57 and \$80.33 per person or as much as \$220.89) which, when multiplied by 4 (quad occupancy) becomes more substantial for a family of four.

[51] Applying the law to the facts of this ad, I conclude it was not misleading in a material respect. Maritime Travel says the overall impression is misleading and that it makes it appear as if Maritime Travel itself provides tour packages and that its prices are higher when Maritime Travel could sell a package at a lower price than that of Go Travel Direct and have the person travel on a weekend not a Monday.

[52] The difference in dates is quite prominently displayed. Anyone wishing to travel around that time could easily check to see the day of the week to which the ad referred. In my view, a person would do so to see if those dates were

convenient and to consider the necessity of taking an additional day's vacation to travel Monday to Monday rather than Saturday to Saturday.

[53] It is correct that the Go Travel Direct price includes a car, whereas the information obtained from Maritime Travel refers to transportation to the hotel, in other words, no car rental.

[54] One of Go Travel Direct's prominently advertised features was that it flew direct from Halifax. If a person wishes to fly directly to his or her destination, a comparison of Go Travel Direct's prices against those packages offered by Maritime Travel is not misleading. I do not accept that direct flights are not important to leisure travelers. Flights connecting through large airports like Montreal and Toronto can result in weather delays, missed connections and luggage not being transferred for the second leg of the person's travel. Hugh Boyle testified that not everyone likes a 6 a.m. departure which requires a 4 a.m. airport arrival time. He also said that, even if one arrives early in the day, normally the room is not available until 4 p.m. Go Travel Direct compared direct flight to direct flight, prominently displaying the difference in dates and the fact that a car was included in its price.

[55] Although Maritime Travel could offer a tour operator's package for less to the destination mentioned in the ad, it was not a direct flight. Furthermore, it is clear from Tab 4 that the package prices Maritime Travel could offer from tour operators for other Florida destinations were higher in most cases.

[56] I conclude that it is not misleading that Go Travel Direct's ads referred to "Maritime Travel's Florida." First, the tour operators whose packages Maritime Travel sold did not sell directly; therefore, there would be no point in comparing Go Travel Direct's prices to, for example, Air Canada Vacations because nobody could buy directly from them. Secondly, the ad did refer to going "through a travel agent." Thirdly, some of the prices in Tab 4 included costs of accommodation from Holiday Escapes (under the heading "Maritime Travel Hotel" and "Maritime Travel Car"). According to the testimony of Rob Dexter, Holiday Escapes is an affiliated business of Maritime Travel. Those prices are, to that extent, Maritime Travel prices. Fourthly, when Randolph de Gooyer testified about price matching Go Travel Direct's prices, he said part of the price reduction came from reducing Maritime Travel's commission. To some extent then, the price too is a Maritime Travel price.

[57] As Lederman, J. said in *Purolator, supra*, “advertising can be one-sided and not ‘convey a full and balanced analysis’.” This ad was one-sided but there was a reasonable basis for what it said. It is an aggressive ad but not an “untruthful disparagement” of the packages offered by Maritime Travel. I conclude it is not clearly unfair.

[58] As I have said above, where the conduct alleged is criminal conduct, the degree of proof required on the balance of probabilities is higher, commensurate with the nature of the offence alleged. Substantial fines and imprisonment are potential criminal sanctions for breach of s. 52.

[59] After considering all the circumstances of this advertisement, I conclude Maritime Travel has not satisfied to me to the requisite standard that the ad is false or misleading in a material respect.

[60] In any event, if I were to conclude that the ad was misleading in a material respect, Go Travel Direct did what it could to be truthful about the package to which it referred in the ad. It obtained the information from Maritime Travel on a

direct comparison basis. For that reason, I would have had difficulty concluding that Go Travel Direct made the representation it did in its ad “knowingly or recklessly.”

### **The 2004 Ad**

[61] The ad Go Travel Direct ran on January 8, 2004 compared its price to the Luperon Tropical Resort in Puerto Plata, Dominican Republic to that of Maritime Travel to the same location. Go Travel Direct’s package was for an April 3 departure and the package offered by Maritime Travel had an April 2 departure date.

[62] Julie Gagnon, formerly an employee of Go Travel Direct in Halifax, testified that she received the Maritime Travel information used in the ad from a Maritime Travel employee on January 6, 2004. At Tab 7 is the printout of the information she received from that employee and a copy of a receipt from Maritime Travel for the deposit she made on that package.

[63] Rob Dexter testified he was shocked when he saw the ad as they were checking Go Travel Direct's prices weekly and matching them. Randolph de Gooyer testified that, when he had done his weekly price check, Go Travel Direct's price on January 5 was \$1,099.00 plus tax and Maritime Travel matched that price. He testified that he checked and discovered that Go Travel Direct had changed its price a few days before the ad ran. He said he checked the Go Travel Direct website between 8:30 and 9:00 a.m. on the day the ad ran. The response was that the package was not available. At Tab 13 is the computer printout of the reservation inquiry that he made. He said he subsequently called Go Travel Direct's 1-800 number until approximately 10:00 a.m. that day and again was told it was sold out. When he checked on-line around 3:00 pm. that day, it was available but was sold out again the next morning.

[64] He said he later checked Go Travel Direct's prices as part of his normal weekly price check and found that on January 12 or 13 Go Travel Direct's price had gone up to \$1,129.00 plus tax which again they matched. He said the only other difference between the two packages was the date of departure.

[65] Hugh Boyle testified that he believed the information in the ad was true.

Brianne Warwick referred to Exhibit 13 which is a series of booking confirmations made for the package to the Luperon Resort at \$938.70, Go Travel Direct's advertised price. Four bookings were made for a total of fourteen people at that price.

[66] It is clear from the evidence that Go Travel Direct did sell packages at that price at that time. The fine print in the advertisement said the prices were those in effect on January 6. By January 12 or 13, Go Travel Direct had substantially increased its price. Maritime Travel admits it sold packages at the price listed in the ad but says it was misleading for Go Travel Direct to lower its price for the purposes of the ad and then raise it again.

[67] In applying the two part test from *Bell v. Telus, supra*, I must first consider the general impression given by the ad for the audience to which it was intended considering the medium of the message and any disclaimers.

[68] The intended audience would have the same characteristics as that for the 2003 ads. The medium was the same. The travel dates were in much smaller type

than in the 2003 ads. The words “No travel agent. No comission (*sic*)” were in larger type than in the 2003 ads. The ad also said “As Canada’s only direct sales tour operator, Go Travel Direct offers vacations for less by eliminating the travel agent middleman and passing the savings on to you.” In very small print at the bottom of the ad it said: “Price comparison based on Maritime Travel prices and Go Travel Direct prices available on Tuesday, January 6, 2004.”

[69] A person reading this ad would conclude that Go Travel Direct could offer substantial savings on a vacation to the Dominican Republic. That person would also conclude that Go Travel Direct Vacations would be less than those offered by Maritime Travel to other locations. That person would conclude there would be savings from not having a travel agent as middleman collecting a commission, resulting in Go Travel Direct being able to offer a lower price. The wording below the information in the box with respect to the Luperon Resort referred to “vacations” generally and “each of our quality resorts.” The impression clearly being left from these words was that, overall, Go Travel Direct offered vacation packages at lower prices than Maritime Travel.



[70] In my view, even on a careful reading by someone contemplating spending close to \$950.00 per person (without meals, etc.), the impression would be that Go Travel Direct was the less expensive choice. The disclaimer, referring to prices on January 6, 2004, in no way lessens this impression. There is no indication in the ad that Go Travel Direct's price is for a limited time or is a special or sale price. Nor is it in large enough type to bring the date to a reader's attention.

[71] The literal meaning of the ad is the same; that is, that Go Travel Direct can offer vacation packages for less than Maritime Travel without the middleman (travel agent) earning commissions. Although the ad specifically mentions one property in the Dominion Republic, the wording below it refers to other vacation destinations generally.

[72] The next part of the test is to determine if the ad is false or misleading in a material respect. The ad is not false in its specific reference to the Luperon Resort because Go Travel Direct had one of its employees check out Maritime Travel's price for that resort and received written confirmation of it. In its general wording about vacations for less to other locations, it may be false based upon the testimony of Rob Dexter and Randolph de Gooyer that they were price matching. Maritime

Travel gave its travel agents authority to lower its prices to match those found on the Go Travel Direct website.

[73] For the vacation package on which Julie Gagnon (then Livingstone) paid a deposit on January 6, 2004, the price quoted matched that of Go Travel Direct on the day Randolph de Gooyer last checked the Go Travel Direct website on January 5. That accounts for the hand-written change to the price shown on Tab 7. The evidence is not clear that the price was in fact matched for every destination to which Go Travel Direct offered packages. The testimony of Rob Dexter was that Maritime Travel authorized its agents to match Go Travel Direct's prices. Since Maritime Travel may not have always matched Go Travel Direct's prices, the ad may not be false in all cases. For that reason, I will then consider whether or not the ad is misleading in a material respect.

[74] There are, in my view, two perspectives on whether the ad is misleading in a material respect. First, Go Travel Direct was offering a package to Luperon Resort for a much higher price than \$938.70 before January 6 and after the ad ran on January 8, by January 12<sup>th</sup> or 13<sup>th</sup>. According to the testimony of Randolph de Gooyer, he checked Go Travel Direct's website on January 5 and found its price to

be \$1,298.70 which Maritime Travel matched. He checked again when the ad appeared, as I have said above. He also checked later on January 12 or 13 and found Go Travel Direct's price was even higher than on January 5. In my view, it is clear that Go Travel Direct dropped its price for the sole purpose of running the January 8, 2004 ad. It did sell fourteen packages in a total of four sales but both before January 6 and, after January 12 or 13, its price for the Luperon Resort with an April 3 departure date, was substantially more than \$938.70 per person.

[75] The other perspective is that of Maritime Travel. As noted, Rob Dexter and Randolph de Gooyer said Maritime Travel was matching Go Travel Direct's prices. That being the case, it was misleading to leave the impression that Maritime Travel was more expensive than Go Travel Direct and that it was because commissions increased the package price.

[76] Materiality, as mentioned above, refers to whether a representation would affect a person's buying decision. In my view, an ad that gives an example of a \$360.00 saving per person and goes on to imply that savings are available for all Go Travel Direct vacation packages, is one that would affect a person's buying

decision. It would not simply cause a potential consumer to inquire further, for example, by contacting Maritime Travel.

[77] The ad is more than merely one-sided. It does not have a reasonable basis for its representation. It is clearly unfair.

[78] Furthermore, it was done knowingly. Go Travel Direct sent an employee to get a price from Maritime Travel and then dropped its price for no more than four days so it could run the ad. Go Travel Direct knew when it ran the ad that Maritime Travel's price was the same as its price before January 6 because that was the price its employee obtained and which Randolph de Gooyer said matched Go Travel Direct's price. Exhibit 5 confirms that on January 5, 2004 Go Travel Direct's price for the Luperon Resort with an April 3 departure was \$1,298.70 (including taxes and transportation fees).

[79] The other price comparisons from Exhibit 5 show that Maritime Travel was matching Maritime Travel's prices. Dan Brennan, the Marketing Director for Go Travel Direct, said that Go Travel Direct knew that Maritime Travel was matching its prices after the 2002-2003 travel season. The claim in the ad by Go Travel

Direct that it offered “vacations for less” was misleading at best and, in cases where Maritime Travel sold packages for the same price, untruthful.

[80] I therefore conclude that Maritime Travel has satisfied me to the required standard that the January 8, 2004 ad was misleading in a material respect.

### **The 2005 Ads**

[81] Go Travel Direct ran a series of ads in January 2005 advertising vacation packages which it said were “not available at the Maritime Travel Vacation Superstore 2005” or “not available from your Maritimes Travel Agent.” These ads were of two kinds: one listed a series of destinations and prices for the Dominican Republic and Cuba (3 ads) and one advertisement said “5,000 January Vacations \$799 Each.” Neither type of ad explicitly said that these prices were lower than those of Maritime Travel. A fifth ad which was similar to the former ads was published in the Halifax Daily News on January 20, 2005.

[82] Using the two step test, I first consider what the general impression of these ads is, in particular, the words “not available from your Maritimes Travel agent.”

Go Travel Direct did not argue that the words “Maritimes Travel Agent” did not refer to Maritime Travel.

[83] The first ad, which ran on January 11, 2005 just before Maritime Travel’s Superstore, was headed with the words “Not Available At The Maritime Travel Vacation Superstore 2005.” It listed eight destinations in the Dominican Republic and eight in Cuba and prices per person for each. It then stated, “Not Available From Your Maritimes Travel Agent.”

[84] Two similar ads ran on January 22, 2005 and January 29, 2005 headed with the words “Wouldn’t You Rather Be Lying In Sand This Winter?” The former listed four destinations in each of Cuba and Dominican Republic with varying departure dates. The latter also featured four destinations in each of Cuba and the Dominican Republic again with varying departure dates. Each ad included the words “Not Available From Your Maritimes Travel Agent.”

[85] The other ad, referring to “5,000 January Vacations \$799 Each,” did not list specific destinations but simply mentioned Cuba and the Dominican Republic followed by the words “Not Available From Your Maritimes Travel Agent.”

[86] A person reading these ads would be a person of average intelligence contemplating spending \$800.00 to \$1,500.00 per person for a Southern vacation to Cuba or the Dominican Republic. That person would read the ads carefully before committing a fairly substantial sum on a winter vacation. In my view, that person would question whether a large travel agency such as Maritime Travel would not be able to offer vacations to such popular destinations at a comparable price. These ads would cause that person to make further inquiries. They would raise a person's awareness that there are price variations among those offering Southern vacation packages.

[87] These ads are capable of two meanings. First, that Maritime Travel cannot offer these locations and prices and, second, because Go Travel Direct sells its packages direct, one cannot purchase them through Maritime Travel, a travel agent. Dan Brennan agreed on cross-examination that the wording of the ads was strategic. In my view, the ads were very carefully worded so there would be an ambiguity in their meaning.

[88] The next step is to determine if the ads are false or misleading in a material respect. They are not false since these packages cannot in fact be purchased from Maritime Travel or any travel agent. Are they misleading in a material respect? Would they influence a person's buying decision?

[89] Rob Dexter and Randolph de Gooyer said that they did not in fact offer some of the locations referred to in the ads which specified particular destinations. To that extent, portions of each of those ads is true. For other destinations, Maritime Travel could offer packages from its suppliers and at the same prices because it was still price matching.

[90] Because of the wording of the ads, I conclude, to paraphrase Groves, J. in *Tele -Mobile, supra*, these ads may push the bounds of what is fair but do not cross them in my view.

[91] In *R. v. Lowe, supra*, Arnup, J.A. said the ad in question had two possible meanings. He said at pp. 2 and 3:



It is not good enough, in our opinion, to arrive at alternate constructions, one of which would put the appellants in jeopardy and the other would not. Accordingly, we do not think that that ground of conviction is sustainable.

[92] Although *Lowe* is a criminal case, in my view, the same principle applies in the civil context where criminal actions are alleged. If the ad has two possible meanings, one of which would attract criminal and heavy civil sanctions and the other which would not, I conclude the heavier burden of proof on the balance of probabilities has not been met.

## **CAUSATION**

[93] Maritime Travel relies on *Athey v. Leonati*, [1996] 3 S.C.R. 458, (S.C.C.) 1996 CarswellBC 2295, in support of its claim that all the losses which it alleges are attributable to Go Travel Direct's entry into the marketplace. It is only the losses which result from Go Travel Direct's misleading advertising for which there is to be compensation pursuant to s. 36 of the *Competition Act*. In my view, *Athey* does not support Maritime Travel's position.

[94] *Athey* was a personal injury case but subsequent cases have applied its principles to other causation issues. In *Athey*, Major, J. set out the general principles of causation in paras. 13 to 15 and 17 to 20:

13 Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).

14. The general, but not conclusive, test for causation is the ‘but for’ test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.

15. The ‘but for’ test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant’s negligence ‘materially contributed’ to the occurrence of the injury: *Myers v. Peel (County) Board of Education*, [1981] 2 S.C.R. 21, *Bonnington Castings Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.), *McGhee v. National Coal Board*, *supra*. A contributing factor is material if it falls outside the *de minimis* range: *Bonnington Castings Ltd. v. Wardlaw*, *supra*; see also *R. v. Pinsky* (1988), 30 B.C.L.R. (2d) 114 (C.A.), affirmed [1989] 2 S.C.R. 979.

...

17. It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant’s negligence was the *sole cause* of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (*The Law of Torts* (8<sup>th</sup> ed. 1992) at p. 193), a ‘fire ignited in a wastepaper basket is ... caused not only by dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth’. As long as a defendant is *part* of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a

reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

18. The proposition has long been established in the jurisprudence. Lord Reid stated in *McGhee v. National Coal Board*, *supra*, at 1010:

It has always been the law that a pursuer succeeds if he can shew that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury.

19. The law does not excuse a defendant from liability merely because other causal factors for which is is not responsible also helped produce the harm.

...

20. This position is entrenched in our law and there is no reason at present to depart from it. If the law permitted apportionment between tortious causes and non-tortious causes, a plaintiff could recover 100 per cent of his or her loss only when the defendant's negligence was the *sole* cause of the injuries. Since most events are the result of a complex set of causes, there will frequently be non-tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.

[95] In para. 24, Major, J. distinguished apportionment of liability from separating “distinct and divisible injuries”. He said that is:

24. ... not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule. The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes: Fleming, *supra*, at p. 202. Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.

[96] Major, J. noted that in *Athey* (para. 24):

... there is a single indivisible injury, the disc herniation, ...

[97] Major, J. also considered independent intervening events and their effects on damages. He said in para. 32:

32 ... The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the 'original position'). However, the plaintiff is not to be placed in a position *better* than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the 'original position' would have been. It is the difference between these positions, the 'original position' and the 'injured position', which is the plaintiff's loss. In the cases referred to above, the intervening event was unrelated to the tort and therefore affected the plaintiff's 'original position'. The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.

[98] He distinguished the disc herniation in that case from such an event saying in para. 33:

33. ... The disc herniation was not an independent intervening event. The disc herniation was a product of the accidents, ...

[99] In *Conversions By Vantasy Ltd. v. General Motors of Canada Ltd.*, [2006] MBCA 69, 2006 CarswellMan 194, the Manitoba Court of Appeal considered the *Athey* principles in an action for damages for unlawful interference with economic interests and negligent misrepresentation. The plaintiff was in the business of upgrading chassis on vans from General Motors. One of the upgrades it provided was air conditioning. However, in 1987, General Motors began to offer free air conditioning, an incentive worth \$950.00 per chassis.

[100] In *Conversions, supra*, M.A. Monnin, J.A., in para. 20, quoted from the trial judge's decision at paras. 70-76. In that case, the trial judge said *Athey* permitted an apportionment of loss in certain circumstances. Although it seems to me, based upon the comments of Justice Major in *Athey*, to be incorrect to call it an "apportionment" of loss, the examples given by Justice Major in *Athey* are instances where the defendant is not liable for a loss occasioned by such things as a divisible injury or an intervening event.

[101] The trial judge was not satisfied that the “no charge air policy” caused or contributed to the company’s receivership and the loss of the business. She said, as quoted in para. 20:

20. ... GM says there were a multitude of other factors affecting Vantasy’s situation which were independent intervening events ... .

She concluded Vantasy was entitled to damages because of the “no charge air policy” but she did not conclude that it went into receivership as a result. She said the “but for” test was applicable but that “Vantasy has failed to show that the receivership would not have occurred but for the no charge air policy.”

[102] In *Canada Post Corporation v. Nova Scotia (Workers’ Compensation Appeals Tribunal)*, 2004 NSCA 83, 2004 CarswellNS 249, Cromwell, J.A. said that the causation principle “has been applied by this Court in considering a claim for compensation under GECA [Government Employees Compensation Act]” (para. 24).

[103] Edwards, J. in *B.M.G. v. Nova Scotia (Attorney General)*, 2007 NSSC 27, 2007 CarswellNS 39, referred to *Athey* in a claim for compensation by a plaintiff

who had been sexually abused in a boys' school and claimed against the Crown for damages. He applied the "but for" test from *Athey*.

[104] In *McNaughton v. Ward*, 2007 NSCA 81, 2007 CarswellNS 301, Saunders, J.A. dealt with *Athey* at paras. 84ff. At paras. 102-3, he explained how a trier of fact must approach the issue of causation. He said:

102 While deciding the issue of causation may in some cases be difficult, it is not an especially complex exercise. At the end of the day the trier must decide on the evidence before it whether the plaintiff has proved that the defendant's tortious conduct caused or materially contributed to the plaintiff's injury. The causation test should not be applied too rigidly: *Snell v. Farrell*, [1990] 2 S.C.R. 311 (S.C.C.). Causation need not be resolved with scientific precision: *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475 (U.K. H.L.). Causation is essentially a practical question of fact which can best be answered by ordinary common sense (per Sopinka, J. in *Snell*, supra, at page 328). Causation is established where the defendant's negligence 'materially contributed' to the occurrence of the injury: *Myers v. Peel (County) Board of Education* [1981] CarswellOnt 579 (S.C.C.). A contributing factor is material if it falls outside the *de minimis* range: *Athey*, supra; *R. v. Pinsky* (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.) aff'd [1989] 2 S.C.R. 979 (S.C.C.).

103 Unlike the situation in *Athey*, there is here no chain of causation, and no injury that was 'aggravated' by the motor vehicle accident. The trial judge specifically rejected the appellant's theory that the workplace incident had somehow exacerbated or aggravated injuries sustained earlier from the collision. He said there was no evidence that persuaded him in that regard. In very clear and strong language the trial judge explained why in his opinion the collision did not cause or materially contribute to Ms. McNaughton's current complaints. Accordingly – and applying the principles from *Athey* – he awarded the appellant \$25,000.00 in general damages as compensation for the only loss caused or contributed to by the respondents' negligence.

[105] In *Culhane v. ATP Aero Training Products Inc.*, [2004] F.C.J. No. 669, 2004 FC 535, the claim was pursuant to s. 36 of the *Competition Act* for “predatory pricing” contrary to s. 50 of the *Act*. At trial, O’Keefe, J. said in para. 37.

**37** The plaintiff has presented evidence to show that his sales of his competing exam guides have decreased in the relevant time period but that is not the relevant issue under this factor. The issue is whether the defendants’ unreasonably low price of their exam guides actually caused the loss or drop in sales to the plaintiff.  
...

He then referred to evidence at trial and concluded in that para.:

This evidence suggests various causal factors at play that could explain the fluctuations in the plaintiff’s sales, aside from the defendants’ conduct.

He concluded he was not satisfied there had been a breach of s. 50. On appeal, his decision was upheld. ([2005] F.C.J. No. 591, 2005 FCA 129)

[106] One must be careful to distinguish the causation aspect of a claim from the claim for damages. The former determines liability or the source of the loss and the latter the amount of the damages arising from the defendant’s liability.



[107] In this case, I have concluded that Maritime Travel suffered damage as a result of Go Travel Direct's misleading advertising in January 2004. To calculate that loss, I must, using the *Athey* principles, determine what Maritime Travel's original position would have been without the misleading advertising and what its position was as a result of it. In that way, Go Travel Direct is made responsible for the losses arising from its conduct contrary to s. 52 of the *Act* but not for any losses which Maritime Travel would have suffered in any event. Go Travel Direct is not required to put Maritime Travel in a better position than its original position would have been, according to the *Athey* principles.

[108] In my opinion, the position put forward by Maritime Travel is at odds with the principles set out in *Athey*. According to Maritime Travel, once I find that Go Travel Direct's actions caused any losses to Maritime Travel, Go Travel Direct becomes liable for all Maritime Travel's losses even if Go Travel Direct's misleading advertising was not responsible for them. That, in my view, is not what *Athey* stands for. Major, J. gave examples of situations where a defendant would not be responsible for all the damages suffered. This is not a situation like that of a herniated disk where a number of things contributed to the disk herniation. Where the losses are stated in monetary terms, it may be more difficult to distinguish

divisible injuries than in a case where one party injures a foot and another a hand. However, it must be done; otherwise, Go Travel Direct would be putting Maritime Travel in a better position than its original position would have been.

[109] In my view, as in *Conversions*, there were a number of factors which led to Maritime Travel's losses. I consider them to be intervening events or divisible injuries. There was legitimate advertising done by Go Travel Direct coupled with its entry into the Halifax travel market place. Whenever a new business enters a market place, it is likely to take business away from its competitors. There were other pressures on travel agencies in 2004 as well as other years.

[110] Barbara Morton, CA, CBV was called as an expert witness for Maritime Travel. She is a Chartered Accountant and a Chartered Business Valuator. She obtained her accreditation from the Canadian Institute of Chartered Business Valuators in 2001. Her *curriculum vitae* (Tab 16) says:

The CBV designation is focused on valuation and pricing of private business or security interests, and also includes courses on financial litigation support and corporate finance.

[111] She attached as Appendix B to her report an overview of the travel industry. She based her information on a National Bank Financial Equity Research Travel and Tourism Industry Report dated May 3, 2006. She said in her report that:

The travel and tourism industry was impacted by several external factors from 2001 to 2006 including:

- 4) i) terrorism and related incidents (September 11, 2001 terrorist attacks, War on Iraq)
- (ii) weather related events (the Asian tsunami, Atlantic hurricanes)
- (iii) increasing Canadian dollar
- (iv) increasing energy prices

She concluded at para. 5:

5) Despite these positive and negative impacts, the travel and tourism industry, while volatile has experienced growth from 2001 and 2006 and is expected to continue growing.

...and that the “outbound market” has benefited from:

- i) strengthening Canadian dollar
- ii) strong employment levels

iii) resilient consumer spending and confidence.

[112] She also made note of a number of trends in the travel industry between 2001 and 2006 which she said are expected to continue. These are:

- i) shifting source countries - is occurring in the outbound markets as developed countries (North America, Europe and Japan) are experiencing population declines and developing countries (China, India, Russia) are experiencing rising incomes and decreasing restrictions on international travel.
- ii) changing demographics - as the 'baby boomers' reach retirement and have more time and larger disposable incomes for things such as travel.
- iii) increasing travel options - are resulting from the advent and continued development of low-cost carriers who have in part commoditized travel and tourism. The increase in available destinations has resulted in a decrease in trips to the U.S. from the Canadian outbound market.
- iv) changing purchase methods - is occurring as a result of the Internet allowing consumers to be more aware of options and prices and search for products through on-line organizations.
- v) growing of niche tourism - has been driven largely by changing demographics and the desire for products such as health and wellness or escorted expeditions.
- vi) shrinking commissions - are a result of the advent of the Internet and on-line bookings. Additionally, some tour operators have begun cutting commissions in an effort to control pricing.

- vii) shifting consumer preferences is resulting in a shift to more expensive packages as demographics change and disposable incomes increase.
  
- viii) increasing environmental concerns - have increased awareness of eco-tourism and will likely continue to be a consideration in the travel and tourism industry.

[113] The internet began to be used by consumers to book travel with airlines. Furthermore, tour operators began to allow consumers to book vacation packages directly with them on-line. Hugh Boyle testified that there were changes in consumers' buying patterns between 2002 and 2006. He said the internet has had an effect and the market has changed dramatically in the past five years. He mentioned Travelocity and Expedia in particular. Grant Thompson attached as a schedule to his report information about Expedia showing its growth in recent years. However, he agreed on cross-examination that these figures are not only from Canada.

[114] Rob Dexter testified that, since 2001, the airlines have been reducing what they pay to travel agencies and there has been an increase in on-line travel booking. He disagreed that the competitive pressure from those tour operators, such as Transat, who are selling directly is increasing. He also said package travel

to Florida dropped and consumers began to travel to other locations. Package prices to those destinations, such as Cuba and the Dominican Republic, were less and I conclude that resulted in a decrease in commissions.

[115] Maritime Travel began to price match Go Travel Direct's prices. It decreased its commissions as part of this effort. Before Maritime Travel began to price match, many of Maritime Travel's package prices were higher; accordingly, Go Travel Direct may have attracted consumers away from Maritime Travel beginning with its first year in the market place, that is, the year before the misleading advertising.

## **DAMAGES**

### **Generally**

[116] Maritime Travel says the overall effect of Go Travel Direct's entire advertising campaign was to give the impression that travel agents in general were more expensive because of commissions. It says the customer does not pay a commission directly and it was misleading for Go Travel Direct to suggest that in its ads. It says that, after an advertising campaign referring to travel agents

generally, the ads targeting it were misleading because they gave the impression that their prices were higher than Go Travel Direct's.

[117] Maritime Travel's amended statement of claim refers to specific ads run by Go Travel Direct and its claim is for an accounting of profits related specifically to the ads in 2003, 2004 and 2005 and from advertisements which "cite or refer to Maritime Travel, Maritime Travel's products, the Travel Vacation Superstore or which purport to offer for sale packages identified as not being available through Maritime Travel (para. 17 (b)(3) amended statement of claim). Maritime Travel also claims general damages.

[118] I cannot consider the other advertisements to which Maritime Travel has referred in its submissions since they do not refer to Maritime Travel and are not claimed in the amended statement of claim to be subject to s. 52 of the *Competition Act*. Even if I were to do so, I would not conclude that the overall advertising campaign referring generally to travel agents and the payment of commissions falls within s. 52 of the *Act*. Unlike the situation in *Purolator, supra*, this is not a case where there were only a few businesses to whom that general advertising could refer. Accordingly, Maritime Travel cannot say (and has not said in its Statement

of Claim) that it was specifically targeted by that advertising. The focus of this action must be on the ads referred to in the statement of claim as no ads naming Maritime Travel were published before January 2003 nor were there any after January 2005.

[119] This conclusion affects the manner in which I consider Maritime Travel's damage claim. It claims for all its alleged losses arising from Go Travel Direct's competition with it in the Halifax travel market between January 2003 and December 2006.

[120] The objective of s. 52 of the *Competition Act* is to prohibit false or misleading advertising. It is not designed to curtail or apply sanctions to legitimate competition and advertising which does not breach s. 52. As Lederman, J. said in *Purolator*, para. 63 (quoted above):

63 Courts should be reluctant to intervene in the competitive marketplace unless the advertisements are clearly unfair.

[121] To accept the position put forward by Maritime Travel would, in my view, be intervening in the competitive market place. If Maritime Travel lost business



and lost profits because of Go Travel Direct's entry into the Halifax travel market place and if it was because of competition and advertising which does not breach s. 52 of the *Act*, then those are losses which are not compensable pursuant to s. 36 of the *Act*. That section specifically refers to "loss or damage as a result of ... conduct that is contrary to" s. 52. Section 36 provides that a person who suffered such loss or damage may recover "... an amount equal to the loss or damage proved to have been suffered by him."

[122] In *Price v. Panasonic Canada Inc.*, [2000] O.J. No. 2362, (Ont. S.C.J.), the plaintiffs alleged Panasonic had maintained resale prices for its products resulting in an increase in the costs to consumers. The application for certification was dismissed because each individual in the proposed class would have to prove his or her actual loss. Shaughnessy, J. said in para. 27:

27 ... The Plaintiffs would then be required on an individual basis, to prove that she or he suffered loss caused by the acts of the Defendant. (*Hollick v. Toronto (City)* at paragraph 30 and *Chadha v. Bayer Inc.* (1999), 54 O.R. (3d) 520 (Ont. Div. Ct.) at paragraph 31.) The Competition Act and the Combines Investigation Act both provide that a Plaintiff must prove the amount of loss or damage suffered by her/him. Proof of actual loss or damage is necessary to establish liability under both statutes. ...

Maritime Travel must prove its loss pursuant to s. 36 of the *Act*.

[123] Maritime Travel, in its amended statement of claim, seeks an accounting from Go Travel Direct for its profits as well as general damages. In *Teledyne Industries Inc. v. Lido Industrial Products Ltd.* (1982), 68 C.P.R. (2d) 204 (Fed. Ct. Trial Div.), Addy, J. referred to Halsbury's Laws of England in defining the remedy of accounting for profits. He said (at p. 5 Lexis Nexis version):

As to the nature of an equitable accounting for profits improperly made in industrial property cases, one finds the following statement in 38 Hals., 3<sup>rd</sup> ed., pp. 647-8, para. 1059:

...

In taking an account, of profits, which is an equitable relief, the damage which the plaintiff has suffered is totally immaterial; the object of the account is to give the plaintiff the actual profits which the defendant has made and of which equity strips him as soon as it is established that the profits were improperly made.

[124] However, the statutory remedy created by the *Competition Act* does not provide for the remedy of accounting. Maritime Travel in its expert's report and evidence and its submissions, seeks an award of damages pursuant to the *Competition Act*.

[125] Section 36 limits recovery to losses suffered as a result of false or misleading advertisements, not losses from a combination of both legitimate competition and illegitimate advertising. As a result, the evidence in support of Maritime Travel's damage claim is compromised. It addresses the overall effects of Go Travel Direct's competition. The report of Barbara Morton says in one of its introductory paras.:

1.4 You have asked us, as independent and objective experts, to quantify Maritime Travel's economic loss (the "Loss") as a result of Go Travel competing in the Halifax, Nova Scotia market.

[126] It is not losses from competition that must be quantified. It is losses from false or misleading advertising. Even had I concluded all the advertising in question caused losses, the conclusions in the report would not be very helpful.

[127] Nor is the report of Go Travel Direct's expert, W. Grant Thompson, FCA very helpful. Grant Thompson was qualified as an expert able to give opinion evidence on business loss. He concluded Maritime Travel suffered no losses at all "as a result of Go Travel competing in the Halifax, Nova Scotia vacation packages

market during the period January 9, 2003 - December 31, 2006.” (p. 1 report, Tab 19).

### **Damages from January 2004 Advertisement**

[128] I have concluded that the January 2004 advertisement was misleading in a material respect. Damages are payable for the losses resulting from that ad and that ad only.

[129] The first matter to be determined is the period of the loss resulting from the January 2004 ad. The effects of the misleading ad are not short lived in my view. I conclude they are longer lasting than just a week or even the month in which the ad appeared. January is the peak period for winter holiday bookings and the time when Maritime Travel runs its Travel Superstore. The ad in question ran on the Thursday before the Superstore in January 2004. Furthermore, although it specifically referred to the Luperon Resort in the Dominican Republic, it implied to the average reader that all Go Travel Direct’s packages were less expensive than those offered through Maritime Travel. Although some bookings for winter

Southern vacations are made before January, Rob Dexter said that the majority are sold in January, February and March with January being the peak booking period.

[130] Because of the nature of the business and the wording of the ad, I conclude it had an adverse effect upon Maritime Travel for the January to March 2004 booking period for travel from January to April 2004 inclusive. As I have said above, I conclude any other losses which Maritime Travel may have suffered in other periods may have been related to Go Travel Direct's legitimate advertising and/or its legitimate competition. I will consider hereinafter other effects upon Maritime Travel's business as they affected Maritime Travel's alleged losses in 2004.

[131] Rob Dexter testified that Maritime Travel's market share was always in the twenty-five percent range. He said he knows that figure from Air Canada information and from negotiations with tour operators who consider Maritime Travel's market share in setting commission rates. He said there has been growth in the vacation package business generally and since 2001 for travel to Cuba, Dominican Republic and Mexico. The former two are destinations for which Go Travel Direct sold packages.

[132] Rob Dexter and Randolph de Gooyer testified they lowered their prices to match those of Go Travel Direct. That would have resulted in a loss of income had there been no misleading advertising. Price matching was done in 2004 in the same way it had been done in 2003 and continued in that fashion in 2005. It is the drop in market share resulting in lost commissions (not reduced commissions) for which Go Travel Direct must compensate Maritime Travel.

[133] Barbara Morton calculated the loss suffered by Maritime Travel from Go Travel Direct's competition. She concluded the loss was \$1,440,500.00. She calculated Maritime Travel's market share before Go Travel Direct's entry into the Halifax market place to be 24.4% compared to 19 percent during the period when Go Travel Direct was competing. She concluded the period for the latter was from the date the first ad naming Maritime Travel appeared, that is, January 9, 2003 until December 2006 when she said Go Travel Direct "exited the Halifax market." (report at p. 6, Tab 17)

[134] The Southern packages sold by Go Travel Direct are not to the same destinations as the Southern packages offered through Maritime Travel. Go Travel

Direct sold packages only to Florida, Cuba and Dominican Republic whereas Maritime Travel offered packages to Cuba and Dominican Republic as well as Mexico, Jamaica and Barbados and both package and non-package vacations to Florida.

[135] Because Barbara Morton did not have Go Travel Direct's actual sales figures, she estimated its sales in what she called her "Go Travel approach." This was based upon a figure for Go Travel Direct's planned capacity supplied by Maritime Travel. This in turn was based upon the number of flights and size of aircraft Go Travel Direct was expected to provide (p. 8 of Report). Applied to that figure is a utilization rate to arrive at an estimate of seats sold. Barbara Morton calculated the utilization rate to be 76% based on Ernst & Young "industry research, including Statistics Canada, Air Charter Statistics Reports for the years ended 2001 to 2004," "discussions with a representative of a national tour operator which provides Southern packages" and from "Management's representation that 76% is consistent with assumptions" it uses internally. (pp. 6-7, report at Tab 17)

[136] There are several noteworthy features with respect to that result. Statistics Canada figures for seats sold was compared to capacity for 2001, 2002 and 2003.

2002 was the winter season immediately following 9/11 and the utilization rate arrived at was 70%. That had risen to 75% in 2003 but was still below the 2001 figure of 83%. Although the three years were averaged, Barbara Morton said that gave a conservative figure because it included the effects of 9/11. She did not consider that there was a downward trend.

[137] Barbara Morton also obtained utilization rates from a national tour operator which said its utilization rate was 90%. She had told the tour operator the reason for her report. Hugh Boyle testified that Go Travel Direct had complained about that company to the Competition Bureau in 2003 and that company knew it was Go Travel Direct which complained. Because of the possibility that the 90% figure is inaccurate, I discount it.

[138] Barbara Morton testified that Rob Dexter told her their utilization rate was 75-80%. W. Grant Thompson referred to Appendix B to the Barbara Morton report and the factors affecting the travel industry between 2001 and 2006. His opinion was that “a fixed Utilization Rate cannot be conducive to accurately establishing the seats actually sold ...” (report at p. 4, Tab 19)



[139] In my view, the most reliable information with respect to utilization rates is that from Statistics Canada. I do not accept that there was a downward trend since the figures for 2002 were anomalous because of the effects of 9/11. Randolph de Gooyer said 2002 was an anomaly because of 9/11. Because 2003 was the first full year of travel after 9/11, I am not satisfied that it reflects a decreasing trend from 2001. In my view, it would have taken more than one full year after 9/11 for travel to return to previous levels. Furthermore, this is inconsistent with the evidence that Southern travel was increasing for the reasons set out in Appendix B to Barbara Morton's report and from the testimony of both Rob Dexter and Hugh Boyle. As Barbara Morton pointed out, Statistics Canada only tracks flights on a plane of a certain size and therefore could be low. As a result, I accept that 76% is a reasonable utilization rate to use for 2004.

[140] Barbara Morton multiplied the figure so obtained by her calculation of Maritime's market share of 24.4 percent on the assumption that had Go Travel Direct not been in the market, Maritime Travel would have obtained that percentage of that number of seats sold by Go Travel Direct. That assumption relates in part to the issue of whether Go Travel Direct's entry into the market place stimulated the market.

[141] Maritime Travel takes the position that it did not. Rob Dexter and Randolph de Gooyer said it is very difficult to “grow the market.” Hugh Boyle on the other hand said that, because their prices were lower, more people could afford to travel and did so. The evidence is clear that travel to Florida, Cuba and the Dominican Republic is less expensive than travel to certain other Southern locations like Jamaica, Barbados and Mexico. Hugh Boyle said that it costs twice as much to go to Barbados as to the Dominican Republic. Cuba and the Dominican Republic became popular destinations around this time. Go Travel Direct’s prices were, in many cases, lower than those offered through Maritime Travel, at least until Maritime Travel began price matching. As a result of price matching, lower prices became more generally available.

[142] Although I do not accept that all of Maritime Travel’s alleged losses are neutralized because they obtained a share of an increased market, I do however accept that lower prices would bring more consumers into the market for Southern vacations as Go Travel Direct submits. I conclude there is some element of additional seats having been sold as a result of Go Travel Direct’s entry into the Halifax market. Barbara Morton concluded 31,072 seats were sold by Go Travel

Direct over four years. No one put a percentage on the portion of those seats sold which arose from stimulation of the market as opposed to Go Travel Direct taking business from others. I accept that it is difficult to stimulate the market but I also accept that that is what Go Travel Direct's entry into the market did. I conclude the stimulation of the market was not significant and any benefit Maritime Travel may have received from it was even less significant. Any small benefit Maritime Travel obtained from Go Travel Direct stimulating the market would, in my view, only serve to limit somewhat the negative effects of other pressures on the business of travel agents.

[143] At Schedule B of Barbara Morton's report, she calculated Maritime Travel's market share during what she defined as "the loss period." As well, she calculated Maritime Travel's average net sales price per trip and its net commissions as a percentage of its net sales.

[144] However, since Maritime Travel did not break out its sales for Cuba and the Dominican Republic separately and did not trace package sales to Florida at all, the planned capacity figures used by Barbara Morton was for Southern vacations to Cuba, Dominican Republic and "other" locations. The other locations included

Jamaica, Barbados and Mexico which are more expensive destinations than Cuba, Dominican Republic and Florida. Because of that, I conclude that the net sales per trip figure of \$1,312.00 which Barbara Morton had arrived at for 2004 is higher because of the inclusion of the higher priced destinations (Mexico, Barbados and Jamaica) and the exclusion of lower priced Florida destinations. For the same reason, the commissions are higher on the higher priced destinations and lower on the Florida packages. In my view, this in turn inflates the net commission figure of 13.6%.

[145] One thing that is noteworthy in Schedule 4 is that, although actual sales to those destinations increased substantially between 2003 and 2004, Maritime Travel's percentage of those sales decreased to 17% from 19% the previous year and was less than its percentage of those sales in 2005 (20%) and in 2006 (21%), all years in which Go Travel Direct was in the Halifax market. In 2001, before Go Travel Direct entered the Halifax market and before 9/11, Maritime Travel had 21% of the Southern destinations market. I consider 2002 to be anomalous, as I have said, because of the aftereffects of 9/11. Maritime Travel weathered that period better, in my view, because it is an established well-managed company which took immediate steps to cut its expenses by laying off staff in the immediate

aftermath of 9/11 and rehiring them in the winter booking period in early 2002.

Taking 2002 out of the averaging period, Maritime Travel's percentage of the market varied from 19% to 21% except in the year in which I concluded it suffered the effects of the misleading advertising. Its sales that year were less than they should have been in my view. I attribute this to the misleading advertising.

[146] Barbara Morton included 2002 in her calculation of Maritime's percentage of the market. For the foregoing reason, I do not accept that as appropriate, especially since it is substantially more than the 2001 percentage. Because I have concluded there was no misleading advertising in 2003 and 2005 and there was no advertising specifically referring to Maritime Travel after January 2005, I conclude that Maritime Travel's market share dropped in 2003 to 2005 because of the legitimate competition from Go Travel Direct and the other factors to which I have referred above. However, I have also concluded that in 2004 Maritime Travel suffered a loss because of misleading advertising in January 2004. In 2006, Maritime Travel's market share to Southern destinations recovered to the 2001 level, the first year about which Barbara Morton testified and before Go Travel Direct entered that market. She said that the other factors which she mentioned

affected the travel industry in 2001. Her schedules show that, for 2001, some discounting of commissions was occurring.

[147] After the effects of 9/11 on the travel industry had largely dissipated after 2003, the number of seats sold grew substantially over 2001 levels (from 32,344 in 2001 to 52,780 in 2004) levelling out at around the 2004 numbers in 2005 and 2006. By 2006, Maritime Travel's market share had returned to 21%, the same as in 2001. The principal difference between 2001 and 2006 was Go Travel Direct's entry into the Halifax market. As I have said, it is only the losses from misleading advertising for which Maritime Travel is to be compensated. After Go Travel Direct entered the Halifax market, Maritime Travel's market share dropped from 21% in 2001 to 19% in 2003 and was 20% in 2005. The lowest market share was in 2004, the year of the misleading advertising. The trend in Maritime Travel's market share for Southern destinations in 2003, 2005 and 2006 was increasing. I therefore conclude that had Go Travel Direct not directed misleading advertising at Maritime Travel in 2004 its market share would have increased over that in 2003 (19%) tending towards its market share in 2005 (20%). I conclude Maritime Travel's market share in 2004 for Cuba, Dominican Republic and Florida destinations should have been 19.5%. In my view, that was Maritime Travel's

original position before the misleading advertising and after consideration of the other factors which had already caused the percentage to decrease to 19% in 2003.

[148] Because Barbara Morton's Schedule 4 figures include locations to which Go Travel Direct did not sell packages, and which locations were more expensive, the result, using the information in Schedule 4, must be adjusted.

[149] To adjust the result and to test its validity, I conclude I should do as Barbara Morton did and that is test it by using what she called "the Go Travel Direct approach." Using that approach, she concluded the average price per trip to Florida, Cuba and the Dominican Republic was \$1,155.00. She then calculated the net commissions as a percentage of sales and arrived at a figure of 13.4% for 2004. These two figures compare with \$1,312.00 and 13.6% in the "industry approach." Since these latter figures include more expensive destinations with higher commissions, I consider them to be less valid for my purposes. I therefore consider \$1,155.00 to be the average price per trip and the net commission to be 13.4% for the purposes of calculating Maritime Travel's loss.

[150] I am confirmed in this view by looking at the package prices shown in the exhibits. Tab 4 of Exhibit 1 shows Maritime Travel's package prices to Florida ranging from \$602.16 to \$869.89 with only three higher than \$900.00 (\$926.40, \$961.60 and \$1,148.71). Although these are 2003 prices, they give me an indication of the price of Florida packages. The average price per package is approximately \$728.00 excluding the higher priced three or \$789.00 including them.

[151] Similarly, Tab 8 is Go Travel Direct's ad in 2005 for packages to Cuba and the Dominican Republic. Although Rob Dexter and Randolph de Gooyer testified that Maritime Travel did not offer packages to all these locations, Maritime Travel was price matching in 2005. The package prices shown in Tab 8 vary from \$799.00 to \$1,249.00 for Cuba (excluding the destinations to which Maritime Travel did not offer packages) for an average price per package of \$1,007.00. For the Dominican Republic, the prices ranged from \$699.00 to \$1,439.00 for an average of \$1,099.00 approximately, excluding the destinations to which Maritime Travel did not offer packages.



[152] These are averages, not actuals, and are not weighted for destinations to which more people travelled, but they give an indication that a per trip price of \$1,155.00 is a better comparator to Maritime Travel's package destination prices than the higher figure of \$1,312.00. For the same reason, I accept the net commission percentage per trip from Schedule 5.

[153] Applying this figure and this percentage, I can calculate Maritime Travel's original position before the loss caused by Go Travel Direct's misleading advertising in 2004.

[154] In Schedule 4, Barbara Morton concluded that Maritime Travel had 17% of the market that year for packages to all Southern destinations except Florida. In Schedule 5, she used an actual number of trips Maritime Travel sold to Cuba, Dominican Republic and Florida. In the absence of any other market percentage, I can conclude that is a reasonable percentage to use for those trips. I concluded above that, had Go Travel Direct not caused Maritime Travel to suffer losses in 2004, it would have had 19.5% of that market.

[155] If a market share of 17% resulted in sales of 9,326 seats, then had Maritime Travel had 19.5%, it would have sold 10,697 seats. That figure is reasonably consistent with the seats Maritime Travel sold in 2005 (10,535) and in 2006 (10,642). At an average net sale price per seat of \$1,155.00, total sales should have been \$12,355,035.00. When multiplied by the net commission percentage of 13.4% that would have resulted in net commissions of \$1,655,574.00. Instead, Maritime Travel earned \$1,438,732.00 resulting in a loss caused by Go Travel Direct's misleading advertising of \$216,842.00.

[156] I am therefore satisfied that Maritime Travel has proven that it has suffered a loss of \$216,842.00 resulting from Go Travel Direct's misleading advertising in 2004. That is the amount I conclude is to be paid by Go Travel Direct pursuant to s. 36 of the *Competition Act*.

## **COSTS**

[157] Section 36 of the Competition Act allows the court to award costs. Maritime Travel has been successful in part and Go Travel Direct successfully defended part of the claim against it. Maritime Travel is entitled to its costs based upon the amount of the award in its favour. If the parties cannot agree upon costs, I will accept written submissions.

Hood, J.