



**Bait and switch selling: the regulatory framework in
Canada and the United Kingdom and data collection in
the retail sector**

RESEARCH REPORT

Report produced by Option consommateurs
presented to Industry Canada's Office of Consumer Affairs
May 2012

OPTION CONSOMMATEURS

MISSION

Option consommateurs is a not-for-profit association whose mission is to defend the rights and interests of consumers and to ensure that they are respected.

HISTORY

Option consommateurs has been in existence since 1983, when it arose from the Associations coopératives d'économie familial movement, more specifically, the Montreal ACEF. In 1999 it joined forces with the Association des consommateurs du Québec (ACQ), which had already pursued a similar mission for over 50 years.

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Options consommateurs has a team of some 30 employees working in five departments: Budgeting, Energy Efficiency, Legal Affairs, Press Room, and Research and Representation. Over the years, Option consommateurs has developed special expertise in the areas of financial services, health, agrifood, energy, travel, access to justice, trade practices, indebtedness, and the protection of privacy. The organization has conducted several major investigations including one on deceptive marketing practices in the retail furniture sector and another showing that despite currency parity, Canadians paid more than Americans for the same products. Every year, we reach 7,000–10,000 consumers directly, conduct numerous interviews in the media, participate in working groups, sit on boards of directors, carry out large-scale projects with key partners, and produce research reports, policy papers and buyers' guides, including the annual *Toy Guide* in *Protégez-vous* magazine

MEMBERSHIP

In its quest to bring about change, Option consommateurs is active on many fronts: conducting research, organizing class action suits, and applying pressure on companies and government

authorities. You can help us do more for you by becoming a member of Option consommateurs at www.option-consommateurs.org.

SUMMARY

Consumers are generally attracted by low prices. Merchants know this and, to generate in-store traffic, often advertise very attractive discounts on certain items (loss leaders)¹ - on certain articles. This practice is completely legal and testifies to the effectiveness of the market economy.

However, there are other merchants who, while appearing to be using the same tactic, have no intention of selling the products advertised at the bargain price. Once in the store, consumers are directed to other products whose sale is more profitable for the merchant. This deceptive commercial practice, known as bait and switch, is illegal in Canada and in the UK.

There are laws in Canada governing certain aspects of bargain price sales. For example, if a merchant does not have an advertised item in stock, Canada's *Competition Act (CA)* and Quebec's *Consumer Protection Act (CPA)* have provisions for compensating consumers. Our research suggests, however, that some of the provisions of these laws are contradictory and that a standardization effort seems necessary in order to better protect consumers.

By means of a data collection², we tested whether merchants actually had items in their store or warehouse that were advertised in their flyers. We wanted to find out whether these merchants were using a form of the bait and switch technique. As it happens, the products chosen were generally available in the store or within a reasonable time from the retailer's warehouse at the time of the data collection.

We then focused on the merchants' policies to find out what recourse is available when an advertised product is temporarily out of stock. A review of flyers, websites and magazines disclosed that these policies are rarely displayed. To ensure that consumers are better informed of their rights, we believe that the the display of these policies should be regulated by the public authorities.

¹

The website Business.dictionary.com defines a loss leader as "a product sold at an artificially low price that usually does not realize a profit on the sale of the product but is used to generate traffic in retail outlets."

² This collection was carried out four times at fifteen retailers in Montreal and Ottawa

RECOMMENDATIONS

Our research leads us to make the following recommendations.

To federal and provincial legislators

Given that Quebec's *Consumer Protection Act* and Canada's *Competition Act* contain divergent, even contradictory, elements, Option recommends that Parliament harmonize the *Competition Act* with the *Consumer Protection Act* in order to avoid confusion over the means of defence available to merchants.

At the Canada-wide level, we also recommend that Parliament harmonize the *Competition Act* with all provincial consumer protection legislation in order to ensure the highest standards of protection for Canadian consumers.

Finally, Option consommateurs recommends that Quebec and federal legislators amend section 231 *CPA* and section 74 *CA* to permit consumers to demand either an equivalent product or a raincheck. In addition, legislators should allow consumers to choose between these two means.

To the Competition Bureau

Option consommateurs recommends that the Competition Bureau review the practices of merchants with regard to bargain price sales to see if these practices have an effect on competition and, if so, in what way. Option consommateurs thinks that the Competition Bureau should also examine the practices of merchants who sell products online.

To Advertising Standards Canada

Option consommateurs recommends that Advertising Standards Canada publish links on its website to direct consumers to the federal and provincial agencies responsible for the application of the various laws respecting consumer protection

To public consumer advocacy agencies

Option consommateurs recommends that public bodies mandated to protect Canadian consumers provide information to merchants to ensure that they employ pro-consumer practices when they are out of stock.

Option consommateurs recommends public bodies mandated to protect Canadian consumers publish information about bait and switch selling. When doing so, they should describe the

phenomenon and inform consumers of the remedies that are available to them when an advertised product is out of stock.

To the Office de la protection du consommateur

Option consommateur recommends that the Office, in collaboration with consumer organizations, explore ways of better informing merchants of the rules to be followed when an advertised product is out of stock.

To the Ontario legislator

Option consumers recommends that the Ontario legislature introduce specific legislation to regulate bait and switch selling under the province's *Consumer Protection Act 2002* to the effect that it is clearly established that announcing a bargain price sale on an item knowing that there is not a sufficient quantity constitutes an unfair practice.

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The data collection methodology was reviewed and approved by Mr. Jean-Pierre Beaud, professor in statistics and methodology in the Political Science Department at l'Université du Québec à Montreal.

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1 - Introduction

Many consumers are attracted by low prices. Merchants know this and, to generate in-store traffic, often advertise very attractive discounts (loss leaders)³ on certain items. This practice is completely legal⁴ and testifies to the effectiveness of the market economy.

However, there are other merchants who, while appearing to be using the same tactic, have no intention of selling the products advertised at the bargain price. Once in the store, consumers are directed to other products whose sale is more profitable for the merchant. This deceptive commercial practice, known as bait and switch, is illegal in Canada and in the UK.

There are two chapters in this research report. In the first, we examine the regulatory framework in Canada and the United Kingdom with regard to bait and switch. The aim here is to see if we can improve the current framework in Canada in light of the various laws, jurisprudence and industry standards of practice.

The second chapter presents the results of a data collection, the aims of which were as follows:

- to determine whether merchants actually do have certain items that they advertise in their flyers. The aim is to compile evidence as to whether merchants are using the bait and switch technique;
- to examine the steps merchants take when an advertised product is temporarily out of stock.

The purpose of this research is to determine whether consumers are adequately protected with regard to bait and switch and to take a closer look at merchants' practices in this regard. If it

³

The website Business.dictionary.com defines a loss leader as "a product sold at an artificially low price that usually does not realize a profit on the sale of the product but is used to generate traffic in retail outlets."

⁴ Unless the merchant's goal is to force a competitor out of the market.

proves necessary, recommendations will be made to the relevant authorities in order to afford consumers greater protection against bait and switch selling.

2 - The legislative framework in Canada and in the United Kingdom

In Canada and in the United Kingdom⁵, in order to foster healthy competition and to protect consumers, bargain price promotional sales are not allowed in cases where the merchant has no real intention of selling the advertised product or if the loss leader price is used to oust a competitor from the market.

In this chapter we shall mainly discuss the rules and standards governing bait and switch in both countries.⁶ In the light of this information, we will attempt to see if it is possible to improve the regulatory framework in Canada

2.1 Canada

In Canada, the business practices of loss leader sales promotions are governed by the federal *Competition Act* and several provincial laws. Two voluntary codes adopted by the industry serve as guidelines for the advertising practices of advertisers and merchants with regard to bait and switch selling: the *Canadian Code of Advertising Standards* and the *BBB Code of Practice*.

In this report, we shall analyze and compare the *Competition Act*, the provincial laws of Quebec and Ontario, the *Canadian Code of Advertising Standards* and the *BBB Code of Practice*. We also take a look at the case law as it relates to bait and switch and will comment on analyses of complaints made public by self-regulatory organizations (SROs).

⁵

We chose to examine the regulatory framework in the United Kingdom, since its system of law (Common Law) is similar to that in Canada.

⁶ We contacted resource people in the following organizations: the Competition Bureau, the Canadian Better Business Bureau Council, Advertising Standards Canada and Ontario's Ministry of Consumer Services. Unfortunately, the data gathered did not contribute to enriching our research. As a general rule, the people contacted had little information on bait and switch practices.

2.1.1 Canada's Competition Act

Federally, bargain price sales are governed by Section 74.04 of the *Competition Act*⁷ (CA). In short, under this law, no person may advertise for sale at a bargain price⁸ a product that cannot be supplied in reasonable quantities by the merchant.⁹

On the other hand, if the merchant cannot comply with the law, it provides three means of defence:

- the merchant could not obtain that quantity because of events beyond his control;
- the merchant could not meet demand because it was beyond his reasonable expectations;
- the merchant has undertaken to provide the same or an equivalent product at the same price to all who have requested it.¹⁰

⁷ *Competition Act (R.S.C., 1985, c. C-34).*

⁸ 74.04 (1) For the purposes of this section, "bargain price" means

(a) a price that is represented in an advertisement to be a bargain price by reference to an ordinary price or otherwise; or

(b) a price that a person who reads, hears or sees the advertisement would reasonably understand to be a bargain price by reason of the prices at which the product advertised or like products are ordinarily supplied.

⁹ 74.04 [...] Bait and switch selling:

(2) A person engages in reviewable conduct who advertises at a bargain price a product that the person does not supply in reasonable quantities having regard to the nature of the market in which the person carries on business, the nature and size of the person's business and the nature of the advertisement.

¹⁰ 74.04. Saving (3) Subsection (2) does not apply to a person who establishes that:

(a) the person took reasonable steps to obtain in adequate time a quantity of the product that would have been reasonable having regard to the nature of the advertisement, but was unable to obtain such a quantity by reason of events beyond the person's control that could not reasonably have been anticipated;

2.1.1 - A) Jurisprudence

There seems to be only one case related to bait and switch in which the judgment was based on the *Competition Act*. This is the Salomon Canada judgment rendered by the Quebec Court of Appeal in 1986. In that case, the judges decided to acquit the company, which had refused to provide ski bindings to a retailer who used them as a lure.

2.1.1 - B) Salomon Canada¹¹

In 1986, the Court of Appeal overturned a first judgment in which the company Salomon was found guilty of criminal offenses under the *Act to Provide for the Investigation of Combines, Monopolies, Trusts and Mergers* (the forerunner of the *Competition Act*).

The ski binding manufacturer Salomon criticized the retailer Andre Lalonde Sports Inc. for using its products to attract customers to the store, then selling them competitors' bindings. For this reason, Salomon refused to continue selling its bindings to Andre Lalonde Sports.

In the trial, the Court maintained that Salomon had committed a criminal act by refusing to supply the retailer with bindings because of its low pricing. The Court of Appeal, however, observing in particular that Lalonde Sports, while advertising eye-catching savings on Salomon bindings, actually sold more bindings by Salomon's competitors (the sale of which gave it a better profit margin) found that Salomon was justified in ceasing to supply its products to Andre Lalonde Sports.

(b) the person obtained a quantity of the product that was reasonable having regard to the nature of the advertisement, but was unable to meet the demand therefor because that demand surpassed the person's reasonable expectations; or

(c) after becoming unable to supply the product in accordance with the advertisement, the person undertook to supply the same product or an equivalent product of equal or better quality at the bargain price and within a reasonable time to all persons who requested the product and who were not supplied with it during the time when the bargain price applied, and the person fulfilled the undertaking.

¹¹ *R. v. Salomon Can. Sports Ltée* (1986), 28 C.C.C. (3d) 240.

2.1.2 The Consumer Protection Act¹²

Under Section 231¹³ of Québec's *Consumer Protection Act (CPA)*¹⁴, no merchant shall advertise a property of which there is an insufficient quantity to meet public demand.

However, the law provides three defences in the event that a merchant is unable to respect the law. He must:

- state in his advertisement that he has only a limited amount of the goods or service and indicate the quantity thereof;
- have reasonable grounds to believe that he is able to meet the public demand; or
- offer the consumer, at the same price, another property of like kind of equal or greater cost.
- These defences differ materially from those stipulated the *Competition Act*. It is for this reason that we have decided to analyze them more carefully.

¹² *Consumer Protection Act*, RSQ, c P-40.

¹³ S. 231. *CPA*. No merchant, manufacturer or advertiser may, by any means whatever, advertise goods or services of which he has an insufficient quantity to meet public demand unless mention is made in his advertisement that only a limited quantity of the goods or services is available and such quantity is indicated..

The merchant, manufacturer or advertiser who establishes to the satisfaction of the court that he had reasonable cause to believe that he could meet public demand or who offered the consumer, for the same price, other goods of the same nature and of an equal or greater cost price is not guilty of any infraction of this section.

¹⁴ The *CPA* is published at: http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/P_40_1/P_40_1_A.html, > Current version as of October 1, 2011. At the present time, according to the book entitled *Loi sur la protection du consommateur et règlement d'application* by Sylvie-Angelina Bourrasse, (Éditions Yvon Blais, 2011) there is no regulation corresponding to this section.

2.1.3 Comparison between the CA and the CPA

2.1.3 – A) Factors beyond the merchant's control

We shall begin by noting the common elements in the CA and the CPA. First of all, both laws require that merchants have a reasonable amount of the advertised product in stock.¹⁵ Also, both laws specify that in the event of strong, unpredictable or unreasonable demand, the merchant is released from this obligation.

The federal and provincial legislation both provide that the merchant will be released from his obligation if an event beyond his control prevents him from providing a reasonable amount of the product advertised on sale. This would be the case, for example, if his suppliers' employees were on strike.

2.1.3 - B) Available quantities

The CPA allows merchants to advertise a "limited quantity" of a product if the advertisement specifies how much is available at that price. But this defence does not exist in the CA¹⁶, which states that the merchant may advertise a limited quantity if the advertisement includes the words "limited quantity" or "while supplies last."

We find that CPA is more stern than the *Competition Act* in controlling the behaviour of merchants who advertise a sale on a product when they know that they have only a limited quantity. In fact, the merchant has to demonstrate that he has included, in his advertisement, the quantity of the good that will be offered on sale. Armed with this information, consumers will be able to assess whether it is worthwhile making the trip to benefit from the discount. This requirement reduces the risk that a large number of consumers will be attracted to the store of a merchant, only to leave empty-handed because the latter has only limited quantities of a certain product. Unless of course, once in the store, these same consumers are tempted to buy another good at a higher

¹⁵ In both cases, the product does not have to be advertised "on sale" or at a reduced price, but the consumer must have the impression that the article is being sold at an advantageous price.

¹⁶ In this regard, the *Competition Act* is stricter on merchants, because they cannot be released from their obligation to supply a reasonable quantity of the advertised product even if the advertisement states that the quantities offered at this price are limited.

price than the one that attracted them in the first place. If this happens, the “bait and switch” tactic will have worked.

2.1.3 - C) Out-of-stock

When the advertised product is out-of-stock and it is not due to strong, unpredictable or unreasonable demand, the means of defence provided by the *CA* and the *CPA* differ.

In the case of the *CA*, the merchant may offer the consumer a raincheck. Armed with the latter, the consumer will be allowed extra time to purchase the desired product at the same price as when it was sold at a discount. The *CPA* allows the merchant to discharge his obligation by offering consumers, for the same price as the product on sale, another product of the same nature of equal or higher price. We thus find ourselves with two statutes with divergent means of defence in the event of an advertised product being out of stock.

However, both of these solutions are found in the section on the defences available to the merchant in the laws under study. We submit that these are not about the consumer’s right to demand a raincheck or equivalent.¹⁷ Rather, they are a means by which the merchant can extricate himself from a potentially litigious situation. Moreover, in both the federal and the provincial law, if the merchant can demonstrate that he met one or another of the defences available to him, this would be sufficient to discharge his obligation.¹⁸

On the other hand, according to Nicole L’Heureux and Marc Lacoursière, when a consumer goes into a store having seen an ad promising a discount on the product he wants, and it is no longer available, the merchant is breaking the law¹⁹. Clearly, the merchant need not have been acting in bad faith, but the consumer has been wronged in some measure. Here is what these authors have to say on the matter:

¹⁷ Transcribed from an interview with Mtre. Pierre-Claude Lafond.

¹⁸ Note that, since the second means of defense is the same in both laws, the merchant has in fact only one means available to him.

¹⁹ Nicole L’Heureux, and Marc Lacoursière, *Droit de la consommation*, 6th ed., Cowansville, Les Éditions Yvon Blais, p.535.

[TRANSLATION] ... the effect of the prohibited practice has been achieved, since the consumer, who has been attracted to the store, yet whose request was not immediately granted, will be on hand ready to buy other goods to the detriment of a more honest competitor²⁰.

An appropriate remedy would be to permit him to acquire a raincheck or a product of equal or greater value.

2.1.4 Recourse available to the consumer under the CA and the CPA

2.1.4 – A) Under the CA

If a merchant engages in the business practice of bait and switch, his behaviour will be subject to review and he will be open to civil penalties.²¹ The courts of first instance²² will have jurisdiction to render a decision or issue an order. The merchant may be charged a penalty for a criminal offense, under section 52.²³ Evidence must be produced showing that the merchant intended to commit this offence.

On the other hand, the merchant cannot be prosecuted under both section 74.1 and Section 52 for an offense involving the same facts.²⁴

²⁰ Ibid., p.535

²¹ See ss. 74.09 and following of the *Competition Act* for further details on administrative resources and their consequences.

²² 74.09 CA. In ss. 74.1 to 74.14 and 74.18, “court” means the Tribunal, the Federal Court or the superior court of a province.

²³ False or misleading representations

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.

²⁴ Duplication of proceedings

According to Nicole L'Heureux and Marc Lacoursière, a consumer who suffers harm has recourse to damages and interest, regardless of whether the behaviour of the merchant is subject to review by the court (s. 74.09 CA) or is an act of a criminal nature (s. 52 CA)²⁵.

2.1.4 - B) Under the CPA

Section 272²⁶ gives the consumer recourse to civil remedies. Under section 277²⁷, the Office may initiate criminal proceedings. If the merchant is convicted under section 277, he will be liable to a fine²⁸ ranging from \$600 to \$15,000 (for an individual) and \$2000 to \$ 100,000 (for a corporation).

52. (7) No proceedings may be commenced under this section against a person against whom an order is sought under Part VII.1 on the basis of the same or substantially the same facts as would be alleged in proceedings under this section.

²⁵ Nicole L'Heureux and Marc Lacoursière, *Droit de la consommation*, 6th ed., Cowansville, Les Éditions Yvon Blais, p.535.

²⁶ 272. If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the other recourses provided by this Act,

- (a) the specific performance of the obligation;
- (b) the authorization to execute it at the merchant's or manufacturer's expense;
- (c) that his obligations be reduced;
- (d) that the contract be rescinded;
- (e) that the contract be set aside; or
- (f) that the contract be annulled,

without prejudice to his claim in damages, in all cases. He may also claim punitive damages

²⁷ Every person who

- (a) contravenes this Act or any regulation;
- (b) gives false information to the Minister, the president or any person empowered to make an investigation under this Act;
- (c) hinders the application of this Act or of any regulation;
- (d) does not comply with a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1;
- (e) disobeys a decision of the president;

In conclusion

Finally, the consumer may decide to sue the offending merchant under both the *CA* and the *CPA*. Seeking a remedy under the federal law does not preclude prosecution under the *CPA* and vice versa.

2.1.4 - C) Merchants who appear to be in contravention of the CPA.

Under the *CPA*, merchants who wish to advertise a product for which they have limited stock should indicate in their representations the quantities available at this price. However, a small additional investigation brought to light the fact that some merchants appear to violate the law.

For example, in the image below from its flyer²⁹, Centre Hi-Fi advertises a TV on sale in “quantité limitée” (sic). Beyond informing consumers that quantities are limited, however, the retailer does not specify how many TVs are available at this price.



We found similar omissions in flyers issued by other retailers. Here are some examples³⁰:

(f) being subject to an order of the court under section 288, omits or refuses to comply with such order,

is guilty of an offence.

²⁸ Section 278 of the *Consumer Protection Act*.

²⁹ Our observations were made during the first three months of 2012.

-
- The Source, Sony Sound Systems “Ltd. Qty, while supplies last.”
 - Centre Hi-Fi, “Tax holiday [...] hurry, quantities are limited.”
 - Brault & Martineau: “Quantities limited on certain items.”
 - Future Shop advertised an iPad at \$519.99, stating: “Limited quantities. No rainchecks.”

Note, however, that some retailers’ business practices do appear to comply with the law. For example, Staples sometimes provides more accurate details, no doubt because they fear not having enough merchandise to meet the demand created by one of their promotions. For example, one of its flyers advertising a laptop on sale reads: “While supplies last, Minimum 4 per store.”

2.1.4 - D) Jurisprudence

We have found several judgments³¹ related to s. 231 CPA. Here are summaries of these:

2.1.4 - D. a) Sony du Canada³²

Sony Canada filed a motion for interlocutory injunction against a Quebec merchant that was unauthorized to sell its products. Sony accused the retailer of engaging in bait and switch selling, using its products to stimulate the sale of other products. The Court deliberated over this notion in this particular case. In the opinion of the Court:

³⁰ Our observations were made during the first three months of 2012. N.B. We have reproduced the text in the advertisements without corrections.

³¹ We conducted this research in 2011, using the CanLII et Quicklaw legal search engines.

³² *Sony Canada Ltée v. Multitech Warehouse Direct Inc.*, J.E. 93-1095 (C.S.). Taken from the book by Claude Masse entitled *Loi sur la protection du consommateur, Analyse et commentaires*, Les éditions Yvon Blais, 1999, p.880.

[TRANSLATION] In the case of “Bait and Switch,” the product advertised is genuine and is available in the store. The trick is to attract the consumer by announcing a known product that has a good reputation at an attractive price, and then denigrate it compared to a product manufactured by a competitor at an obviously higher price.

The definition offered by the Court is particularly interesting since it has the effect of including the behaviour of the sales staff in the store within the concept of bait and switch. Therefore, even if an advertised product is stocked in sufficient quantity, this does not preclude a merchant from employing the bait and switch tactic with the product. In its current form, section 231 of the *CPA* makes no such distinction.

2.1.4 - D. b) Simpsons

In this case, the merchant could not supply a consumer with the advertised product (a credit card holder) due to the item being poorly distributed among its five branches³³. The Court found that the merchant was within the law, because the consumer could probably have obtained the product by asking the manager to check if the item was available at another branch, but did not do so. In short, since the out-of-stock situation was not generalized to every branch in the retail chain, the case was dismissed.

2.1.4 – D. c) DaimlerChrysler Canada Inc.

In 2002, the Court ordered DaimlerChrysler³⁴ Canada to apply a \$500 rebate on the sale of a vehicle other than the one advertised on sale, because the vehicle advertised on sale was not available at several dealerships in Quebec during the promotional period, and the advertised offer did not include a statement on vehicle availability.

2.1.4 – D. d) Insight Canada Inc.

In 2001, this company was found guilty of contravening section 231 of the *CPA*, because it no longer had the computers advertised on its website in stock.³⁵ While the advertisement stated that

³³ *Québec (Procureur général) v. Simpsons Limited*, J.E. 83-668 (C.S.P). Taken from the book by Claude Masse, quoted above, pp. 881-882.

³⁴ *Paré v. DaimlerChrysler Canada Inc.*, 2002 CanLII 6865 (QC CQ).

³⁵ *Bédard v. Insight Canada Inc.*, 2002 CanLII 29700 (QC CQ).

the quantities offered were limited, the company failed to state specifically how many were available.

2.1.4 D. e) Stéréo Plus

In 2009, the company was unable to supply a Blu-Ray that it had advertised on sale.³⁶ The company claimed to be the victim of a stock out due to insufficient production by its suppliers. For this reason, the court found the company not guilty of contravening section 231 of the CPA.

2.1.4 D. f) Toyota St-Jérôme

In 2003, the dealer was found not guilty of contravening section 231 of the CPA. It was accused of not having stock at each of its Quebec dealerships, in the colour that a consumer interested in purchasing a vehicle advertised at a favourable interest rate wanted to have. The judge said the company “did possess the item represented in the advertisement.”

2.1.4 D. g) Québec Loisirs

In 2009, the company was found guilty of contravening section 231 of the CPA, because it failed to deliver a gift coupon promised in a promotion.³⁷

2.1.5 Ontario Consumer Protection Act 2002

Ontario’s Consumer Protection Act 2002³⁸ states in Section 14 (2) (8) and (9):

False, misleading or deceptive representation

³⁶ *Lambert v. 9202-5402 Québec Inc.*, 2009 QCCQ 9493.

³⁷ *Lépine v. Québec Loisirs*, 2009 QCCQ 4687.

³⁸ This law is published at:

http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_02c30_e.htm

14. (1) It is an unfair practice for a person to make a false, misleading or deceptive representation,

Examples of false, misleading or deceptive representations

(2) Without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations:

[...]

8. A representation that the goods or services or any part of them are available or can be delivered or performed when the person making the representation knows or ought to know they are not available or cannot be delivered or performed.

9. A representation that the goods or services or any part of them will be available or can be delivered or performed by a specified time when the person making the representation knows or ought to know they will not be available or cannot be delivered or performed by the specified time.

Reading these sections, we can see that the merchant who advertises a product (whether on sale or not) through an advertisement, knowing that this product will not be available to customers, is engaging in an unfair trade practice and is liable to prosecution under section 109 of the Act. The only exception to the application of this section can be found in section 17 (3):

Unfair practices prohibited

17. (1) No person shall engage in an unfair practice.³⁹

An act that is deemed an unfair practice

(2) A person who performs an act referred to in section 14, 15 or 16 shall be deemed to be engaging in an unfair practice.⁴⁰

Advertising excepted

(3) It is not an unfair practice for a person, on behalf of another person, to print, publish, distribute, broadcast or telecast a representation that the person accepted in

³⁹ 2002, c. 30, Schedule A, para. 17 (1).

⁴⁰ 2002, c. 30, Schedule A, para. 17 (2).

good faith for printing, publishing, distributing, broadcasting or telecasting in the ordinary course of business.⁴¹

The merchant cannot therefore use this means of defence.

In our analysis of the Ontario provincial legislation respecting consumer protection, we did not find any defences such as those included in section 74.04 *CA* or section 231 *CPA*. In this legislation, the merchant must have the goods he advertises in stock.

Section 14 of the Ontario Act regulates unfair practices. Under this section, the mere fact that the merchant advertises a good when he knows that he will not have sufficient quantities is an unfair practice. This practice is the essence of “bait and switch.” On the other hand, this section is less strict than section 231 of the *CPA*, since the ban applies only to advertising a good while it is known that this good is in short supply. In addition, the *Consumer Protection Act 2002* contains no provisions respecting the replacement of a good that the consumer has come to the store to buy. Under this law, the consumer may file a complaint against a merchant for false, misleading or deceptive representation.

Ontario’s *Consumer Protection Act 2002* prohibits deceptive business practices, but contrary to Quebec’s *Consumer Protection Act* and the federal *Competition Act*, the Ontario Act does not specifically regulate bait and switch selling.

2.1.5 - A) Jurisprudence

Using the CanLII, Westlaw and LexisNexis search engines, we found no judgment related to bait and switch selling in Ontario. The judgment *Metropolitan Toronto Condominium Corp. No. 620 v. Barcres Wholesale Hardware Ltd*⁴² refers to the existence of the “bait and switch” practice but in this judgment, Ontario’s Superior Court of Justice analyzed the facts from the standpoint of misrepresentation.

⁴¹ 2002, c. 30, Schedule A, para. 17 (3).

⁴² 2004 CanLII 2571 (ON S.C.).

In several rulings⁴³ in Ontario and other provinces, there are general references to the existence of the “bait and switch” practice without addressing the topic directly.

2.1.6 The Canadian Code of Advertising Standards

The *Canadian Code of Advertising Standards* (hereinafter “the *Code*”) is operated by a not-for-profit advertising self-regulatory body called Advertising Standards Canada⁴⁴ (ASC). ASC was created by the advertising industry in 1957 with the mission of ensuring the integrity and viability of advertising in Canada and promoting public confidence in advertising. This confidence is maintained by responsible self-regulation by the advertising industry.

The *Code* sets the criteria for acceptable advertising and provides the basis for the review and evaluation of consumer complaints and advertising disputes. The *Code* dates from 1963.

ASC administers the process for handling consumer complaints about advertising in Canadian media. Complaints about matters likely to be in violation of the *Code* are considered by independent advertising standards councils – national and regional⁴⁵ – made up of volunteer members. A report of complaints handled during the year is published annually.

The organization monitors advertising⁴⁶, not the marketing practices of merchants towards consumers. It is important to make this distinction, because the measures imposed will not have

⁴³ For example: *MacDonald et al v. U.B.C.*, 2005 BCCA 366, para. 34-36 (CanLII); *Douse v. Clean-Rite Sewer Services*, 2003 CanLII 43828, para. 6 (ON L.R.B.); *Bruckall v. Miller*, 1992 CanLII 1238, para. 6 (BC S.C.).

⁴⁴ This organization’s website is at: www.adstandards.com/fr/index.aspx.

⁴⁵ ASC Standards Councils ensure an objective, balanced and fair process for adjudicating consumer complaints about advertising. Composed of representatives from the advertising industry and the public who volunteer their time to support the consumer complaint process. See <http://www.adstandards.com/>

⁴⁶ As stated on the ASC website, the *Code* applies and has authority in the following circumstances:

The *Code* applies to “advertising” by (or for):

advertisers promoting the use of goods and services;

corporations, organizations or institutions seeking to improve their public image or advance a point of view; and

the same impact on consumers. Moreover, because they are issued by a self-regulatory organization, the measures imposed by ASC may not be either criminal or civil, but are intended as corrective measures.⁴⁷

If the Council⁴⁸ concludes that an advertisement violates the *Code*, the advertiser is notified, and the complainant receives a copy of the decision sent to the advertiser.⁴⁹

The advertiser is requested to modify its advertising or to withdraw it. In the majority of cases, this will be done as soon as reasonably possible.

Hence, if an advertiser fails to voluntarily comply with the decision of the Council, ASC may:

governments, government departments and crown corporations

The Scope of the *Code*

“The authority of the *Code* applies only to the content of advertisements and does not prohibit the promotion of legal products or services or their portrayal in circumstances of normal use. The context and content of the advertisement and the audience actually, or likely to be, or intended to be, reached by the advertisement, and the medium/media used to deliver the advertisement, are relevant factors in assessing its conformity with the *Code*.”

<http://www.adstandards.com/Standards/canCodeOfAdStandards.aspx#councilHearing>

Comments taken from the Advertising Standards Canada website:

<<http://www.normespub.com/Standards/canCodeOfAdStandards.aspx>>

For more detailed information concerning the ASC complaint process, consult the following link:

<http://www.normespub.com/consumercomplaints/theConsumerComplaintProcedure.aspx#councilHearing>

⁴⁷ <http://www.adstandards.com/Standards/canCodeOfAdStandards.aspx#councilHearing>.

⁴⁸ Comments taken from the Advertising Standards Canada website: <http://www.normespub.com/en/Standards/canCodeOfAdStandards.aspx>

⁴⁹ For more complete information on the ASC complaint process, consult the following link:

<http://www.normespub.com/consumercomplaints/theConsumerComplaintProcedure.aspx#councilHearing>

- advise exhibiting media of the advertiser’s failure to co-operate and request media’s support in no longer exhibiting the advertising in question; and
- publicly declare, in such manner as Council deems appropriate, that the advertising in question, and the advertiser who will be identified, have been found to violate the *Code*.

Bait and switch

Under Clause 4 of the *Code*, entitled “Bait and Switch,” a merchant may not lead consumers to believe it is possible for them to purchase a product when this is not the case. Moreover, the *Code* stipulates that if the available quantity is limited, this fact should be stated in the advertisement.

4. Bait and Switch

Advertisements must not misrepresent the consumer’s opportunity to purchase the goods and services at the terms presented. If supply of the sale item is limited, or the seller can fulfil only limited demand, this must be clearly stated in the advertisement.

Since the *Code* only applies to advertisers, it does not propose solutions for out-of-stock situations. It is focused solely on the content of the advertising.

In Quebec, under the *CPA*, if a merchant states in his advertisement that he has only a limited amount of a good or service, he must also state that amount precisely. As can be seen above, the *Canadian Code of Advertising Standards* has no such stipulation.

2.1.6 - A) Complaints studied by the organization

On the Advertising Standards Canada website⁵⁰ we found three complaint reports in which merchants had used the bait and switch technique. We present these in the “Description -

⁵⁰ The research was conducted using the ASC complaint report search engine. The only search criterion was the name of the article in question. We do not know the year in which the complaint reports were put online.

Complaint - Decision” format used by the organization. Note that the organization does not make public the sanctions, if any, that were administered to these companies.

2.1.6 – A. a) Embassy Suites Hotel

Description: In a print ad [newspaper, 2004], “grand opening rates” for a two room suite were advertised “from \$99.95.” Two-night packages were offered “from \$199.95.”

Complaint: When the complainant tried to book a two-night package, she was told by representatives of the advertiser that they had sold out and none was available. She was quoted alternative two-night prices ranging from \$279.95 to \$799.95 per room.

Decision: Nothing in the ad alerted consumers to the fact that there was only a very limited number of rooms available at the grand opening rate, and that consumers had to act quickly to take advantage of the special prices. The *Code* provides that if an item is in limited supply, or if the seller can fulfil only limited demand, this must be clearly stated in the advertisement. Because it was not, Council concluded the advertisement misrepresented the consumer’s opportunity to purchase the product at the advertised price, omitted relevant information, and did not disclose all details of an offer in a clear and understandable manner.⁵¹

2.1.6 – A. b) Dealfind.com

Description: A banner advertisement for “70% off Best Burgers” appeared on various websites. [2011].

Complaint: The complainant alleged the advertisement was misleading because the discount was not available when he saw the advertisement.

Decision: According to the advertiser, such advertisements were intended to entice users about deals that either existed or ran with (the advertiser) in the past, or were in the pipeline to run in the near future. However, the advertiser could not provide any assurance that such a deal actually

⁵¹ Taken from the organization’s website at: www.adstandards.com/standards/adComplaintsReportsSearch.asp, consulted October 17, 2011.

existed at the time the advertisement appeared. The Council, therefore, found that the advertisement was false and deceptive, and misrepresented the consumer's opportunity to purchase the product.⁵²

2.1.6 – A. c) Dealfind.com (second case)

“Description: A coupon for an \$11 steak and lobster dinner was advertised on a social media site.

Complaint: The advertisement was misleading because the discount was not available when the complainant saw the advertisement.

Decision: According to the advertiser, although a steak and lobster discount may not have been available on the day the consumer saw the advertisement, there would likely be one in the near future. However, the advertiser could not provide any assurance that such a deal existed at the time the advertisement appeared. Council, therefore, found that the advertisement was false and deceptive. Council also found that the advertisement misrepresented the consumers' opportunity to purchase the product.⁵³

2.1.7 The BBB Code of Advertising

The *BBB Code* of Advertising (hereinafter the “*BBB Code*”) is administered by the Better Business Bureau, an advertising self-regulatory organization. Merchants apply for accreditation by the BBB, which affords them a degree of credibility. In return, the merchants make a commitment to respect the standards of the BBB, of which the *BBB Code* forms a part.⁵⁴

Section 7 of the code defines bait and switch selling.⁵⁵ This is the original version:

7. Bait Advertising and Selling

⁵² Ibid.

⁵³ Ibid.

⁵⁴ “If a business has been accredited by the BBB, it means the BBB has determined that the business meets accreditation standards which include a commitment to make a good faith effort to resolve any consumer complaints. BBB accredited businesses pay a fee for accreditation review/monitoring and for support of BBB services to the public.”

⁵⁵ The complaints studied by the organization are apparently not published on its website.

A. 'Bait' offer is an alluring but insincere offer to sell a product or service which the advertiser does not intend to sell. Its purpose is to switch consumers from buying the advertised merchandise or service, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser.

B. No advertisement should be published unless it is a bona fide offer to sell the advertised merchandise or service.

C. The advertising should not create a false impression about the product or service being offered in order to lay the foundation for a later "switch" to other, more expensive products or services, or products of a lesser quality at the same price.

D. Subsequent full disclosure by the advertiser of all other facts about the advertised article does not preclude the existence of a bait scheme.

E. An advertiser should not use nor permit the use of the following bait scheme practices:

- * refusing to show or demonstrate the advertised merchandise or service;

- * disparaging the advertised merchandise or service, its warranty, availability, services and parts, credit terms, etc.;

- * selling the advertised merchandise or service and thereafter "un-selling" the customer to make a switch to other merchandise or service; refusing to take orders for the advertised merchandise or service or to deliver it within a reasonable time; demonstrating or showing a defective sample of the advertised merchandise; or, having a sales compensation plan designed to penalize salespersons who sell the advertised merchandise or service.

F. An advertiser should have on hand a sufficient quantity of advertised merchandise to meet reasonably anticipated demands, unless the advertisement discloses the number of items available or states "while supplies last." If items are available only at certain branches, their specific locations should be disclosed. The use of "rainchecks" is no justification for inadequate estimates of reasonably anticipated demand.

G. Actual sales of the advertised merchandise or service may not preclude the existence of a bait scheme since this may be merely an attempt to create an aura of legitimacy. A key factor in determining the existence of "bait" is the number of times

the merchandise or service was advertised compared to the number of actual sales of the merchandise or service.

The *Competition Act* [section 74.04] prohibits “bait and switch” selling which occurs when a product is advertised at a bargain price, but is not available for sale in reasonable quantities. The provision does not apply if the advertiser can establish that the non-availability of the product was due to circumstances beyond its control, the quantity of the product obtained was reasonable, or the customer was offered a raincheck when supplies were exhausted.⁵⁶

In this section, there are three points especially worth noting:

First, Section 7 E) refers to variants of the baiting practice. For example, it is forbidden to:

- refuse to show an advertised item;
- disparage the goods or service advertised (the guarantee, its availability, credit terms, etc.);
- refuse to order an advertised item or to refuse to deliver it within a reasonable time;
- show a defective sample of the advertised item.

In section 7 F, we noted that the use of “rainchecks” is no justification for inadequate estimates of reasonably anticipated demand. We find this wording interesting.

In fact, merchants who respect the *BBB Code* do so voluntarily. They have decided to apply it in their business practices in order to be accredited by the BBB. Merchants wish to preserve their customer base and for this reason, they are ready to meet the standards of conduct imposed by section 7 of the *BBB Code*.

⁵⁶ Taken from the organization’s website at: www.bbb.org/canada/SitePage.aspx?id=7de726b1-bd23-4368-ba94-f84702b0fae9, Consulted on October 17, 2011

The fact that they they adhere to these standards on a voluntary basis only reinforces our recommendation regarding the possibility of federal and provincial legislatures removing defences against issuing a raincheck or replacing the missing product with another of equal or greater value.

Option consommateurs considers that consumers should be better informed about the various forms of bait and switch prohibited by the *BBB Code*, thereby permitting them to better protect themselves against these practices. It would be helpful to publish a guide for the general public on the different variants of the bait and switch technique. This guide could be developed in collaboration with the Competition Bureau and provincial agencies responsible for overseeing the enforcement of consumer protection laws as well as with various consumer advocacy groups. The Competition Bureau already has an informative section on its website devoted to bait and switch selling as prohibited by section 74.04 of the *Competition Act*.⁵⁷ While this is helpful, we consider that a leaflet should be published containing all the necessary details (not just those related to the provisions of the *Competition Act*).

2.2 The United Kingdom

In the UK, deceptive trade practices are regulated by the *Consumer Protection from Unfair Trading Regulations 2008*. This law is administered by the Office of Fair Trading (OFT)⁵⁸.

2.2.1 The Consumer Protection from Unfair Trading Regulations 2008

Under section 3 (4) d) of the *Consumer Protection from Unfair Trading Regulations 2008*, retailers must be able to meet the demand created by the advertisement for a product at the specified price.⁵⁹

⁵⁷ < <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00522.html>>

⁵⁸ The organization's website is at: www.oft.gov.uk

⁵⁹ This law is published on the website of the United Kingdom Nation Archives at: <http://www.legislation.gov.uk/uksi/2008/1277/regulation/5/made#regulation-5-made.%20Contre%20Markco%20M%C3%A9dias>. The OFT specifies the prohibited practices in ss. 3(3), 3(4)a) et 3(4)d). For more complete details, consult the OFT website at:

According to the text of the law:

Commercial practices which are in all circumstances considered unfair

[...] 5. Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the merchant may have for believing that he will not be able to offer for supply, or to procure another merchant to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising).

In short, as with the *Competition Act*, the *Consumer Protection from Unfair Trading Regulations 2008* provide that a merchant must have in stock a reasonable quantity of the items advertised. The *Consumer Protection from Unfair Trading Regulations 2008* also limit the merchant's practices after advertising a product:

6. Making an invitation to purchase products at a specified price and then

- (a) refusing to show the advertised item to consumers;
- (b) refusing to take orders for it or deliver it within a reasonable time or;
- (c) demonstrating a defective sample of it, with the intention of promoting a different product (bait and switch).

A merchant who engages in such business practices may be guilty under section 12 of the *Regulations*. However, section 17 offers due diligence as a means of defence:

Due diligence defence

17.—(1) In any proceedings against a person for an offence under regulation 9, 10, 11 or 12 it is a defence for that person to prove—

(a) that the commission of the offence was due to— .

-
- (i) a mistake; .
 - (ii) reliance on information supplied to him by another person; .
 - (iii) the act or default of another person; .
 - (iv) an accident; or .
 - (v) another cause beyond his control; and .
- (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

We can see, in paragraph 17 (1) V), that merchants may be declared not guilty if they are able to demonstrate, for example, that the offense under section 5 or 6 was due to circumstances beyond their control. They also cannot be accused of the offense if it was caused by the action or fault of another person.

2.2.2 Results of an Investigation Conducted by the Office of Fair Trading

In March 2011, the OFT took enforcement action against Markco Media⁶⁰-- the company behind group-buying website Groupola — after it heavily promoted a sale of Apple iPhones 4s when it only had eight handsets available.

The OFT's investigation found that Markco Media used “bait pricing” to promote a sale of iPhone 4s at £99 (normal retail price was £499) to entice consumers to join Groupola and sign up to receive daily email alerts from the company.

Following extensive promotion of the iPhone sale, including via a press release, a national newspaper interview and marketing on Facebook and Twitter, almost 15,000 people signed up and registered with Groupola for the sale.

⁶⁰ For more complete details on this investigation, consult the OFT website at: www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/bait-advertising.

During the promotion, a sale progress bar indicated that over half of the iPhone 4s were still available. At the time, the company itself claimed that over 5 million users attempted to visit the website during the sale.

The OFT was also concerned about misleading comments made by one Groupola employee on the company's Facebook page at the time of the sale. The employee represented himself as an ordinary consumer and made positive comments about the company.

As a result of the OFT investigation, the company and its director signed undertakings that prevent them from:

- offering products for sale in circumstances where there is a disproportionately inadequate supply of those products when compared with the scale of advertising and marketing;
- making statements (including comments on social networking and blogging websites) without clearly and prominently disclosing when the author is an employee or has another relevant relationship with the company.

Conclusion

In this chapter, we have examined the rules governing bait and switch selling in the federal *Competition Act*, Québec's *Consumer Protection Act*, Ontario's *Consumer Protection Act 2002*, two codes of practice in the industry and the *Consumer Protection from Unfair Trading Regulations 2008* in the UK.

All these normative frameworks have one thing in common: merchants must have reasonable quantities of the products they advertise in stock.

However, we also noted that there may be discrepancies, even contradictions between one regulatory framework and another. In particular, certain defences provided for in the *Competition Act* and certain defences provided for in the *Consumer Protection Act* stand in need of

standardization. To better protect consumers in the event of stock shortages, it is also important to mandate the issue of rainchecks or replacements for the out-of-stock product by another equivalent product of similar or higher cost. In addition, consumers should be permitted to choose their preferred means of replacing the out-of-stock item.

3 - Methodological choices, methodology and data collection

Our data collection had two objectives. The first was to verify whether certain merchants actually had the items they advertised in their flyers in stock. The second was to discover the policies merchants followed when the advertised item was temporarily out of stock.

For each of these objectives, we developed a methodology for collecting information; this is described below. Next, we present the significant results of the data collection.

3.1 Choice of market

We chose to conduct our data collection mainly in the electronics sector, because:

- consumers have reported difficulties in obtaining items advertised by merchants in this market;
- many contributors to forums and blogs⁶¹ claim to have been victims of the practice of bait and switch at Best Buy, one of the largest electronics retailers in North America;
- In 2007, the State of Connecticut filed a lawsuit against the electronics retailer Best Buy, alleging that it resorts to bait and switch selling.⁶²

⁶¹

We found such allegations at the following electronic addresses: www.megatechnews.com/best-buy-bait-and-switch, <http://best-buy.pissedconsumer.com/bait-and-switch-scam-canon-t3i-camera-20111003265818.html> et au <http://onemansblog.com/2008/05/27/best-buy-bait-and-switched-me>.

⁶² ABC News, *Lawsuit Claims Best Buy Isn't Living Up to Its Name*, <http://abcnews.go.com/Business/IndustryInfo/story?id=3209776#.TupHFVbnulw>, 2007.

3.2 Choice of stores

Considering our budgetary resources, we chose the stores where the data collection was to take place based on the following criteria:

- geographical access (selection of convenience). Since our office is located in Montreal and since we often work in Ottawa, we chose to visit stores located in one or both of these two regions;
- regular publication of flyers. The selected retailers publish flyers advertising electronics products.

Below is the list of the retailers chosen for the data collection:

Table 2: List of retailers

Retailers	Region where the data collection was conducted	
	Montreal	Ottawa
Best Buy	X	X
Brault & Martineau	X	
The Brick	X	X
Bureau en Gros/Staples	X	X
Centre Hi-Fi	X	
Future Shop	X	X
Léon	X	X
La Source	X	X
United Furniture Warehouse		X

3.3 Articles chosen

The investigator checked (by phone) whether five items (ideally, electronic products) advertised on the first page of the flyer were available in the store. If the first page of the flyer contained more than five items, the investigator chose five of these. If there were fewer than five, the investigator made up the number by selecting items advertised on the last page of the flyer. If electronic products offered by a merchant were only advertised elsewhere in the flyer (e.g. on page 8), the investigator could choose the items advertised there.

For budgetary reasons, our survey covered only five articles per week per store. Although retailers may advertise weekly sales on over a hundred articles,⁶³ we believe that this represented a satisfactory sample for the purposes of the data collection.

⁶³ For example, Best Buy's weekly flyer for January 6 to 12, 2012 has over 20 pages. There are approximately 5 to 10 articles advertised on every page.

3.4 Duration, frequency and time of data collection

Our data collection was conducted during the first three months of 2012. There were two phases. The aim of the first was to verify whether merchants actually had the items advertised in their flyers. To check whether this was the case, we phoned four times to see whether five of the items advertised on the front page of the flyer were available in the store during the promotional period. The staff did not know that the data collection was taking place.

The aim of the second phase was to examine the procedure followed by retailers when the advertised item was temporarily out of stock.⁶⁴ To do so, we collected what information the sales staff were willing to give us.⁶⁵ The investigator attempted to obtain a raincheck or a purchase order that would provide us with a written version of the conditions set by the retailer.

In this phase, the investigator was also asked to consider the representations regarding this policy made in stores, on the retailer's website or in the flyer. Below is a table showing the progress of the data collection.

Progress of the data collection		
	Means employed	Goal
Week 1	Phone call	To check if the retailer has certain advertised articles in stock
Week2	Phone call	To check if the retailer has

⁶⁴ Discontinued products were not covered by this collection. Moreover, retailers (understandably) do not usually issue rainchecks if the advertised items are no longer available in stores. However, the retailers do not seem to be in the habit of offering consumers a product of equal or greater value to replace an advertised product that is no longer in stock, as prescribed by Quebec's *Consumer Protection Act*.

⁶⁵ N.B. Our investigator told sales staff he was conducting a study aimed at comparing the different policies of the stores in the area.

		certain advertised articles in stock
Week 3	Phone call	To check if the retailer has certain advertised articles in stock
Week 4	Phone call	To check if the retailer has certain advertised articles in stock
Week 5	In store	To check the procedure followed in the event of temporary stock-out

Wherever possible, we conducted our data collection in two branches of the same retail chain in the Montreal and Ottawa regions. The aim of this “double” inspection was to check whether the same business practices were employed in different branches of the same chain.

During the in-store data collection, we decided to review the temporary stock shortage policies of three other retailers with stores in the vicinity. These retailers were Canadian Tire, Toys “R” Us and Zellers. This was the only verification we carried out in these three stores.

3.5 Limits of the research

The results of this research may provide us with indications as to whether merchants are likely to order a sufficient quantity of the products advertised in their flyers. The research may also help us better understand the measures adopted by retailers when faced with temporary stock-out situations.

However, since the status of the data collection is exploratory, the data collected is not meant to be representative of the business practices used in stores or branches.⁶⁶ Nor is it representative of the business practices used by a particular retail store chain. Nor, finally, is it representative of the business practices used by retailers in the consumer electronics market in Canada or by any other industry.

The value of the results of this exploratory data collection resides primarily in our ability to identify sufficiently significant indications of the practice of bait and switch selling to justify alerting the authorities.

Subsequently, if the data collected is judged to be significant, it may contribute toward formulating recommendations for better protecting consumer against such practices.

⁶⁶ Also, since some employees provided information orally and since policies in the event of temporary stock shortages are not usually displayed in stores, online or in the merchant's flyer, it is possible that our investigator did not obtain the store's official policy from the employee.

3.6 The results

Below, we present the results of our data collection.

3.6.1 Best Buy (Montreal)

8871 Boulevard de l'Acadie

Montreal (Quebec) H4N 3K1

Tel.: (514) 905-4269

Description of retailer

A retail chain specializing in the sale of electronic products with 65 branches across Canada. In 2001, the company acquired the electronics retail chain Future Shop.

Availability of items advertised in flyer

The data collection for this store was carried out via the website (www.bestbuy.ca). Following are the significant results of this collection.

First data collection: two of the five items selected were available in the store. For the other three products, we found no information on the quantities offered on the company's website.

Second data collection: three of the five items selected were available in the store. For the other products, there was no information online about quantities available in store, or the hyperlink containing this information was not working.

Third data collection: the website stated that information on in-store quantities of the five selected products was not available. An employee we contacted by telephone told us that all these products were available in the store.

Fourth data collection: according to the website, the five selected items were available in the store.

Temporary out-of-stock policy

If temporarily out of stock, the merchant gives customers a raincheck (see image below) valid for a period of 30 days after the date of issue. According to the employee, this period may be extended if the article is not received within 30 days and if the consumer makes the request to a manager. The merchant makes no undertaking to contact raincheck holders upon receiving the product.



Display of policy

We checked whether this policy was displayed in the store, on the website and in the retailer's flyer.

The policy was not displayed at the customer service counter located near the store entrance or on the retailer's website⁶⁷. However, some of the retailer's other policies, such as the "Lowest Price Guarantee" and the "Exchange and Return Policy" were posted in these places.

We called the company's customer service department to find out about the policy for online purchases. Customers could not obtain rainchecks online.

⁶⁷ Refer to the bottom of the Webpage under the heading "Legal" at: <http://www.bestbuy.ca/en-CA/home.aspx?path=f9af28b84da40a62feed69e743160ef6en9>.

3.6.2 Best Buy (Ottawa)

1701 Merivale Road

Nepean (Ontario) K2G 3K2

Tel.: (613) 212-0146

Description of retailer

A retail chain specializing in the sale of electronic products with 65 branches across Canada. In 2001, the company acquired the electronics retail chain Future Shop.

Availability of items advertised in flyer

The data collection for this store was carried out via the website (www.bestbuy.ca). Following are the significant results of this collection:

First data collection: three of the five items selected were available in the store. For the other three products, we found no information on the available quantities on the company's website, and one article was not available.

Second data collection: four of the five items selected were in the store. For the other product, there was no information online about quantities available in the store.

Third data collection: the website stated that information on in-store quantities of four of the five selected products was not available. The website displayed an error for the other product.

Fourth data collection: the five selected items were available in the store.

Temporary out-of-stock policy

If temporarily out of stock, the store issued consumers a raincheck (see image below). The coupon was valid for a period of 30 days from the date of issue



Display of policy

We verified whether this policy was displayed in the store, on the website and in the retailer's flyer.

From what we could see, this policy was not displayed at the customer service counter located near the store entrance, nor on the retailer's website.⁶⁸

One of the flyers we analyzed⁶⁹ did not state the temporary out-of-stock policy . On the other hand, this statement appeared at the bottom of page 19 of the same flyer: "Not

⁶⁸ Refer to the bottom of the webpage under the heading "Legal" at: <http://www.bestbuy.ca/enCA/home.aspx?path=f9af28b84da40a62feed69e743160ef6en9>.

⁶⁹ This flyer was valid during the first months of 2012.

all products are available in all stores. Best Buy is committed to accurate pricing. [...].
We reserve the right to limit quantities.”

3.6.3 Brault & Martineau (Montréal)

6700 rue Jean-Talon Est
St-Léonard (Quebec) H1S 1N1
Tel.: (514) 254-9455

Description of retailer

Brault & Martineau is a leading retailer of furniture, mattresses, appliances and electronics in Quebec. The retail chain has ten stores and six “sleep galleries.”

Availability of items advertised in flyer

Data collection in this store was conducted by phone. Following are the significant results of this collection.

First data collection: the five items selected could be delivered from the warehouse in a few days. Two of the five items were available in the store. Others had to be ordered.

Second data collection: four of the five items were available in the store. The other was available in the warehouse and could be delivered within days.

Third data collection: the five items were not available in the store, but they could be ordered. Delivery time was 4 to 13 days depending on the article⁷⁰.

Fourth data collection: the five items selected were available in the stores.

Temporary out-of-stock policy

As far as we were able to discover, in a temporary out-of-stock situation the merchant would issue a raincheck permitting consumers to buy the item at the advertised price as soon as it was received, in exchange for a refundable deposit.⁷¹

Display of policy

⁷⁰ These times varied depending on when the goods were received in the warehouse.

⁷¹ The minimum amount of this deposit was equivalent to the applicable tax on the purchase.

We checked whether this policy was displayed in the store, on the website and in the retailer's flyer.

From what we could see, the policy was not displayed at the customer service counter or on the the retailer's website.⁷²

The temporary out-of-stock policy was not included in one of the flyers studied.⁷³ On the last page of the flyer, it stated: "Offer available as of [...]. Quantities limited on certain articles. Valid only on articles in stock [...]"

3.6.4 The Brick (Montréal)

8701 Boulevard L'Acadie

Montreal (Quebec), H4N 3K1

Tel.: (514) 381-1313

Description of retailer

The retail chain The Brick has 200 stores⁷⁴ in Canada. Its large surface stores sell primarily furniture, appliances, electronics and mattresses.

Availability of items advertised in flyer

Data collection in this store was conducted by phone. Following are the significant results of this collection.

First data collection: the five items selected were available in the store.

⁷² Other policies were, however, displayed on the website at: www.braultetmartineau.com/fr/page/faq/.

⁷³ This flyer was valid during the first months of 2012.

⁷⁴ More precisely, The Brick is composed of 100 The Brick stores , 32 franchises, 23 mattress stores, 3 Super Stores, 10 liquidation centres and 43 United Furniture Warehouse stores (acquired in 2004). For more complete details, consult the Brick Website at: www1.thebrick.com/brickb2c/jsp/ancillary/bodyOnlyTemplate.jsp?pageName=company_info_about_brick&_requestid=1548556.

Second data collection: two of the five items were available in the store. The other three had to be ordered from the warehouse and were delivered within days.

Third data collection: we obtained information on only three products because the employee claimed to be very busy. Of these three items, one was available in the store and the other two were not available in the store or in the warehouse. The employee said that these two items would probably be available within a few weeks.

Fourth data collection: the five items selected were available, but only one of them was available in the store. Two of the five products were available in the warehouse and could be delivered in two days. The other two products were supposed to arrive in the warehouse in two days and would take two more days to deliver.

Temporary out-of-stock policy

In a temporary out-of-stock situation, and in exchange for a refundable deposit, the merchant promised to issue a raincheck permitting consumers to purchase the item at the advertised price as soon as it was received.⁷⁵

Display of policy

We checked whether this policy was displayed in the store, on the website and in the retailer's flyer.

This policy did not appear to be displayed at store's customer service counter. On the other hand, the retailer's website indicated that the deposits were refundable:

The deposits (excluding deposits of Special Control) are redeemable at any time before delivery or collection section at no cost and reimbursement must be made on the same credit card or debit card that is used to make the deposit. Deposits made by cash or debit card if the cardholder is not present, will be refunded by check and will be mailed

⁷⁵ The minimum amount of this deposit was equivalent to the applicable tax on the purchase.

within 14 days. Deposits on special orders are not refundable after the item has been shipped by the manufacturer.⁷⁶

In one of the flyers⁷⁷, studied, at the bottom of the last page, was the statement:

The items may vary from store to store and differ from illustrations. We reserve the right to limit quantities per store and per purchase.

However, the temporary out-of-stock policy did not appear in the flyer.

⁷⁶ Taken from the Brick website at: www1.thebrick.com/brickb2c/jsp/ancillary/bodyOnlyTemplate.jsp?pageName=customer_service_returns_deposits_refunds&_requestid=69726.

⁷⁷ This flyer was valid during the first months of 2012.

3.6.5 The Brick (Ottawa)

350 West Hunt Club Road

Nepean (Ontario) K2E 1A5

Tel.: (613) 224-7555

Description of retailer

The retail chain The Brick has 200 stores in Canada.⁷⁸ Its large surface stores primarily sell furniture, appliances, electronics and mattresses.

Availability of items advertised in flyer

Data collection in this store was conducted by phone. Following are the significant results of this collection.

First data collection: only one of the five articles selected was available in the store, but all the others were available in the warehouse and could be delivered to consumers within a few days.

Second data collection: all the items were available, but they had to be delivered from another store or warehouse. Delivery time was 4 to 9 days if the item came from the warehouse.

Third data collection: all the items were available, but they had to be delivered from another store or warehouse. Delivery time was two to three days.

Temporary out-of-stock policy

If the article was temporarily out of stock, the merchant would issue a raincheck permitting consumers to buy the item at the advertised price when it was received, in exchange for a refundable deposit.⁷⁹

Display of policy

⁷⁸ More precisely, The Brick is composed of 100 The Brick stores, 32 franchises, 23 mattress stores, 3 Super Stores, 10 liquidation centres and 43 United Furniture Warehouse stores (acquired in 2004). For more complete details, consult the Brick Website at: www1.thebrick.com/brickb2c/jsp/ancillary/bodyOnlyTemplate.jsp?pageName=company_info_about_brick&_requestid=1548556.

⁷⁹ The minimum amount of this deposit was equivalent to the applicable tax on the purchase.

We checked whether this policy was displayed in the store, on the website and in the retailer's flyer.

The policy was not displayed at the retailer's customer service counter. On the other hand, on the back of a raincheck issued in stores, and on the retailer's website, was a statement that the deposits were refundable:

Deposits (excluding Special Order deposits) are refundable at any time prior to delivery or pick-up of the product without any fees or charges, and must be issued to the same credit card or debit card that the deposit was made on. Deposits made by cash, or by debit card if the debit card holder is not present, will be refunded by cheque and mailed to you within 14 days. Deposits on Special Orders are not refundable after product is shipped from the manufacturer.⁸⁰

⁸⁰ Taken from the Brick website at:
www1.thebrick.com/brickb2c/jsp/ancillary/bodyOnlyTemplate.jsp?pageName=customer_service_returns_deposits_refunds&_requestid=69726&_requestid=70434.

3.6.6 Bureau en gros (Montréal)

845 Rue Ste-Catherine E, local M24B

Montreal (Quebec), H2L 2E4

Tel.: 514-843-8647

Description of retailer

The Bureau en gros retail chain, as its name suggests, specializes in the sale of office products. The company is a major supplier of electronic products and has 296 stores in Canada.

Availability of items advertised in flyer

Data collection in this store was conducted by phone. Following are the significant results of this data collection.

First data collection: three of the five items selected were not available in the store. These were three Apple-brand tablet computers.

Second data collection: four of the five items selected were available in the store.

Third data collection: four of the five items selected were available in the store. The other product was discontinued.

Fourth data collection: we were unable to contact an employee.

Temporary out-of-stock policy

In a temporary out-of-stock situation, consumers could get the item at the same price if they paid in advance.

Display of policy

We checked whether this policy was displayed in the store, on the website and in the retailer's flyer.

The policy was not displayed in the store or on the company's website.⁸¹ On the last page of one of the flyers studied⁸² was the following statement: "General conditions: We reserve the right to limit quantities. No rainchecks."

⁸¹ Other policies are, however, displayed on the website at:
www.staples.ca/Static/static_pages.asp?pagename=help_policy

⁸² This flyer was valid during the first months of 2012.

3.6.7 Bureau en gros/Staples (Ottawa)

1595 Merivale Road

Nepean (Ontario) K2G 3J4

Tel.: (613) 226-7989

Description of retailer

Bureau en gros (English: Staples), as its name suggests, is a retail chain specializing in the sale of office products. The company sells a variety of electronics products and has 296 stores in Canada.

Availability of items advertised in flyer

Data collection in this store was conducted by phone. Following are the significant results of this data collection.

First data collection: three of the five items selected were available in the store.

Second data collection: four of the five items selected were available in the store.

Third data collection: we were unable, twice on two consecutive days, to get in touch with an employee.

Fourth data collection: all the articles were available in the store.

Temporary out-of-stock policy

In a temporary out-of-stock situation, consumers could get the item at the same price if they paid in advance.

Display of policy

We checked whether this policy was displayed in the store, on the website and in the retailer's flyer.

The policy was not displayed, either in the store or on the company's website.⁸³

On the last page of one of the flyers studied⁸⁴ was the following statement: "General conditions: We reserve the right to limit quantities. No rainchecks."

⁸³ Other policies are, however, displayed on the website at: www.staples.ca/Static/static_pages.asp?pagename=help_policy.

⁸⁴ This flyer was valid during the first months of 2012.

3.6.8 Canadian Tire

1820 Merivale Road

Nepean (Ontario) K2G 1E6

Tel.: (613) 224-9330

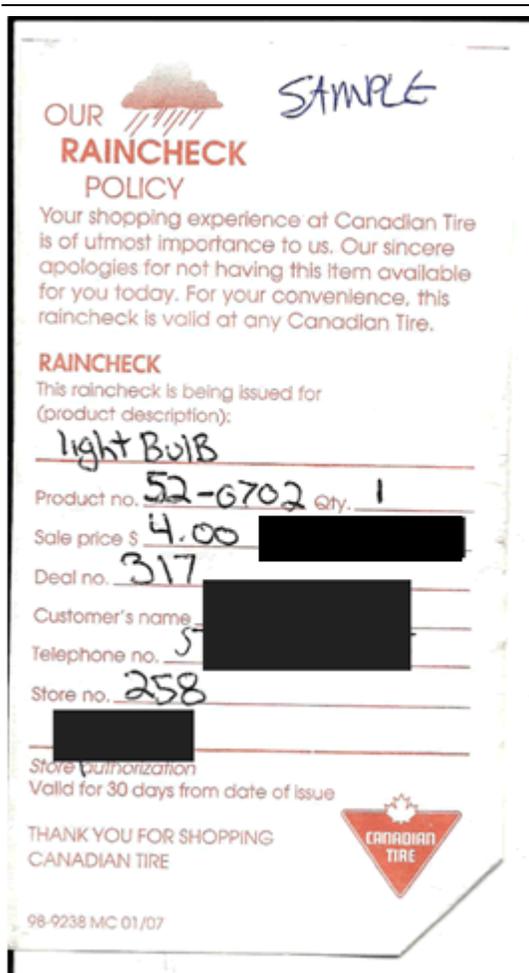
Description of retailer

Canadian Tire is a retail chain of large surface stores that sells a range of items, including electronic products . In 2009, the retailer operated 496⁸⁵ stores in Canada.

Temporary out-of-stock policy

If temporarily out of stock, the store issued consumers a raincheck (see image below). The coupon was valid for a period of 30 days from the date of issue.

⁸⁵ According to Argent Site Web, a website devoted to economics. Consulted at: <http://argent.canoe.ca/lca/affaires/quebec/archives/2009/06/20090617-080251.html>. We have not found any more recent data.



Display of policy

We checked whether this policy was displayed in the store, on the website and in the retailer's flyer.

The investigator could not find any information on this policy in the store (at the customer service counter or the cash) or on the retailer's website.⁸⁶

At the bottom of page 31 of one of the flyers studied⁸⁷ was the following statement:

⁸⁶ Other of the retailer's policies are, however, displayed on the website at: www.canadiantire.ca/AST/NavigationAssortments/WebStore/Navigation/FooterNavigation/BusinessLinks/Section1/76ReturnRefunds_Exchanges.jsp?bmLocale=fr_CA.

For hot buys, special buys, clearance items and seasonal items and bonus with purchase items, shop early for best selection as no rainchecks or substitute will be given. We reserve the right to limit quantities [...] and unless otherwise indicated, to offer rainchecks or substitute equivalent products where advertised products are unavailable.

⁸⁷ This flyer was valid during the first months of 2012.

3.6.9 Centre Hi-Fi

385 Rue Ste-Catherine Ouest
Montreal (Quebec), H3B 1A4
Tel.: (514) 288-1300

Description of retailer

The Centre Hi-Fi retail chain specializes in the sale of electronics products. It has 65 branches in Quebec and Ontario.

Availability of items advertised in flyer

For this store, data collection was conducted by phone. Following are the significant results of this collection.

First data collection: the five items selected were available in the store.

Second data collection: four of the five items selected were available in the store. The other was available, but it had to be ordered from the warehouse.

Third data collection: four of the five items selected were available in the store. The other was available, but it had to be ordered from the warehouse.

Fourth data collection: the five items selected were available in the store, but one was a demonstration model.

Temporary out-of-stock policy

In a temporary out-of-stock situation, the merchant would reserve the item to enable consumers to purchase it at the advertised price as soon as it was received, in exchange for a non-refundable deposit⁸⁸ of a minimum amount equivalent to 10% of the price of the item.

Display of policy

We checked whether this policy was displayed in the store, on the website or in the retailer's flyer.

⁸⁸ Except under certain conditions, such as when the retailer was unable to obtain the article.

The policy was not displayed in the store or on the retailer's website⁸⁹, or in a flyer valid in 2012. However, at the bottom of the last page of this flyer was the statement: "These offers are time limited or subject to availability. [...] Not all our products are available in all stores or franchises."

⁸⁹ Other policies are displayed there, however. See: www.centrehifi.com/index.php?content=garanties.

3.6.10 Future Shop (Montréal)

460 rue Ste-Catherine Ouest

Montréal (Québec) H3B 1A7

Tel.: (514) 393-2600

Description of retailer

Future Shop is one of the largest electronics retailers in Canada. It has over 145 stores nationwide. In 2001, Future Shop was purchased by the U.S. retailer Best Buy, which still operates both retail chains in Canada.

Availability of items advertised in flyer

For this store, data collection was carried out on the retailer's website. Following are the significant results of this data collection.

First data collection: two of the five items selected were available in the store and no information was available online for one product.

Second data collection: three of the five items selected were available in the store and no information was available online for one product.

Third data collection: two of the five items selected were available in the store and no information was available online for two products. According to the site, one article was no longer in stock.

Temporary out-of-stock policy

In a temporary out-of-stock situation, the merchant issued a raincheck (see image below) valid for a period of 30 days after the date of issue.



Display of policy

We checked whether this policy was displayed in the store, on the website and in the retailer's flyer.

The policy does not seem to be displayed at the customer service counter, on the store's website⁹⁰ or in the flyers studied.⁹¹

⁹⁰ Other of the retailer's policies are, however, displayed on the website at: www.futureshop.ca/CA/help/politiques/policies.aspx.

⁹¹ This flyer was valid during the first months of 2012.

On the other hand, on the first page of this flyer, there was a reference to rainchecks in relation to the ad for new Apple-brand tablet computers: “Selection may vary by store. Limit one iPad per customer. Limited quantities. No rainchecks.”

3.6.11 Future Shop (Ottawa)

1695 Merivale Road

Nepean (Ontario) K2G 3K2

Tel.: (613) 688-1045

Description of retailer

Future Shop is one of the largest electronics retailers in Canada. It has over 145 stores nationwide. In 2001, Future Shop was purchased by the U.S. retailer Best Buy, which still operates both retail chains in Canada.

Availability of items advertised in flyer

For this store, data collection was carried out on the retailer's website. Following are the significant results of this data collection.

First data collection: two of the five items selected were available in the store and no information was available for one of the products.

Second data collection: four out of five selected articles were available in the store.

Third data collection: three of the five items selected were available in the store . No information was available for one product.

Fourth data collection: one of the five items selected was available in the store. One item was on pre-order (a Blu-ray with a delayed release date). No information was available for two products.

Temporary out-of-stock policy

In a temporary out-of-stock situation, the merchant issued a raincheck (see image below) valid for a period of 30 days after the date of issue.



Display of policy

We checked whether this policy was displayed in the store, on the website and the retailer's flyer.

As far as our investigator was able to ascertain, no policy was posted at the customer service counter, on the website,⁹² or in the flyers that we studied.⁹³

⁹² Other of the retailer's policies are, however, displayed: www.futureshop.ca/en-CA/help/policies/policies.aspx?path=e169c1d73e5cba143a05c1669ee89683en07&Lang=fr-CA&HelpTitleId=policies.

⁹³ This flyer was valid during the first months of 2012.

3.6.12 Léon (Montreal)

11201 Rue Renaude-Lapointe

Anjou (Quebec) H1J 2T4

Tel.: (514) 353-7506

Description of retailer

Founded in 1909, Leon's Furniture Limited is a chain of large surface stores specializing in the sale of furniture, appliances and home electronics. Leon has 66 stores in Canada.

Availability of items advertised in flyer

Data collection in this store was conducted by phone. Following are the significant results of this data collection.

First data collection: according to the receptionist, no representatives were available to answer the phone.

Second data collection: we had difficulty identifying the items advertised in the flyer from the retailer's website. The only two products found were furniture sets. One set was no longer in stock and the other was incomplete.

Third data collection: we were unable to contact a representative of the store.

Fourth data collection: the five items selected were available in the store.

Temporary out-of-stock policy

If temporarily out of stock, the merchant issued a discount coupon permitting consumers to buy the item at the advertised price when it was received, in exchange for a refundable deposit of a minimum amount equivalent to applicable taxes on the purchase.

Display of policy

We checked whether this policy was displayed in the store, on the website and in the retailer's flyer.⁹⁴

The policy was not displayed at the store's customer service counter, on the website⁹⁵, or in the retailer's flyer.

Note that at the bottom of the last page of one of the flyers we studied,⁹⁶ the retailer stated that: "All items are available while supplies last." This was apparently the only place in this 20-page flyer where the retailer provided this information.

⁹⁴ Other of the retailer's policies are displayed there:
www.leons.ca/shared/customerservice/policy.aspx.

⁹⁵ However, the retailer does explain its "Integrated Price" policy on the next-to-last page.

⁹⁶ This flyer was valid during the first months of 2012.

3.6.13 Leon (Ottawa)

2600 Queensview Drive

Ottawa (Ontario) K2B 8H6

Tel.: (613) 820-6446

Description of retailer

Founded in 1909, Leon's Furniture Limited is a chain of large surface stores specializing in the sale of furniture, appliances and home electronics. Leon has 66 stores in Canada.

Availability of items advertised in flyer

For this store, data collection was conducted by phone. Following are the significant results of this data collection.

First data collection: four of the five items advertised were available in the store.

Second data collection: we were able to identify three items advertised in the flyer. All the items were available in the store, but one set of furniture was incomplete.

Third data collection: we were unable to contact a store employee.

Fourth data collection: all five items selected were available in the store.

Temporary out-of-stock policy

If temporarily out of stock, the merchant issued a discount coupon permitting consumers to buy the item at the advertised price when it was received, in exchange for a refundable deposit of a minimum amount equivalent to the applicable taxes on the purchase.

Display of policy

We checked whether this policy was displayed in the store, on the website and the retailer's flyer.

The policy was not displayed at the customer service counter, on the store's website⁹⁷, or in its flyers.⁹⁸

⁹⁷ Other of the store's policies are displayed at:
www.leons.ca/shared/customerservice/policy.aspx.

⁹⁸ Here, the retailer states: “All items available while quantities last.” This seems to be the only place in the 20-page flyer where the retailer supplies this information.

3.6.14 La Source (Montréal)

5 Complexe Desjardins

Niveau Place C.P.258 Local 272

Montreal (Quebec) H5B 1B4

Tel.: (514) 288-4325

Description of retailer

The Source is a chain of electronics stores. In 2009,⁹⁹ the Company operated 750 stores in Canada.

Availability of items advertised in flyer

For this store, data collection was performed via the retailer's website. Following are the significant results of this data collection.

First data collection: four of the five items selected were available in the store.

Second data collection: the five items selected were available in the store.

Third data collection: the five items selected were available in the store.

Fourth data collection: four of the five items selected were available in the store.

Temporary out-of-stock policy

If temporarily out of stock, the sale ended and the consumer could not get the product at the advertised price. This store did not seem to distribute discount coupons or rainchecks, nor did it appear to offer consumers another article of equal or higher cost.

Display of policy

⁹⁹ We were unable to find any more recent data. Source: *Le Devoir* website, March 3, 2009 at: www.ledevoir.com/economie/actualites-economiques/237020/bell-achete-les-magasins-la-source-du-canada.

We checked whether this policy was displayed in the store, on the website and in the retailer's flyers.

The policy was not posted at the customer service counter, or on the website.¹⁰⁰

However, at the bottom of the page before last of the flyer we studied,¹⁰¹ was the statement:

If an item is temporarily out of stock, we will issue you a raincheck so that you can obtain the product in question at the sale price when it becomes available.

By phone, as we mentioned previously, an employee told us that he did not distribute these coupons.

¹⁰⁰ Some of the store's other policies are displayed at:
www.leons.ca/shared/customerservice/policy.aspx.

¹⁰¹ This flyer was valid during the first months of 2012.

3.6.15 La Source (Ottawa)

100 Bayshore Drive

Nepean (Ontario) K2B 8C1

Tel.: (613) 820-6194

Description of retailer

The Source is a chain of electronics stores. In 2009¹⁰², the Company operated 750 stores in Canada.

Availability of items advertised in flyer

Data collection in this store was conducted via the retailer's website. Following are the significant results of this data collection.

First data collection: four of the five items selected were available in the store.

Second data collection: three of the five items selected were available in the store.

Third data collection: four of the five items selected were available in the store.

Fourth data collection: the five items selected were available in the store.

Temporary out-of-stock policy

If temporarily out of stock, the sale ended and the consumer could not get the product at the advertised price. This store did not seem to distribute rainchecks, nor did it offer consumers another article of equal or higher price.

¹⁰² We were unable to find any more recent data. Source: *Le Devoir* website, March 3, 2009 at: www.ledevoir.com/economie/actualites-economiques/237020/bell-achete-les-magasins-la-source-du-canada.

3.6.16 Toys “R” Us (Ottawa)

1683 Merivale Road
Nepean (Ontario) K2G 3K2
Tel.: (613) 228-8697

Description of retailer

Toys “R” Us is the largest retailer in the world specializing in toys and baby products. In Canada, Toys “R” Us operates 70 stores.

Temporary out-of-stock policy

If temporarily out of stock, this Toys “R” Us store issued a raincheck to consumers (see image below). The coupon was valid for a period of 90 days, but there was no indication on the coupon of whether this was calculated as of the date of issue or as of the time the store received the merchandise.



Flyer: 2012 [REDACTED]

Status Active [REDACTED] Control # 697416

Customer Information

Store	3527-OTTAWA
Customer	jean
Address	
Home #	514-735-4585
Work	
Best Time to Call	anyime
Comments	good for 90 days

SKU	Description	MFR #	MFR Name	QTY	Retail
718947	SHERIDAN PLAY CENTRE	23150	BIG BACKYARD.	1	999.97

Display of policy

We checked whether this policy was displayed in the store, on the website or in the retailer's flyer.

The policy was not displayed in the store or on the retailer's website.¹⁰³ At the bottom of page 3 of one of the flyers we studied,¹⁰⁴ the retailer indicated that if the advertised item was not offered in limited quantities only, the consumer would be offered a comparable item or a raincheck.

We reserve the right to limit quantities. Unless otherwise indicated, it is our intention to have a reasonable quantity of each advertised item. Unless otherwise indicated, if an item is unavailable, we will offer you a comparable item at the advertised price or a raincheck. Rainchecks are not available for Bonus, Close-Outs, Clearance or Special Purchase items because quantities are limited and only available while supplies last.

¹⁰³ The Toys "R" Us website is at: www.toysrus.ca.

¹⁰⁴ This flyer was valid during the first months of 2012.

3.6.17 United Furniture Warehouse

350 West Hunt Club Road
Nepean (Ontario) K2E 1A5
Tel.: 613-224-4544

Description of retailer

The retail chain United Furniture Warehouse (UFW) specializes in the sale of goods including electronics. UFW operates 36 branches across Canada. In 2004 the chain was acquired by the retailer The Brick.

Availability of items advertised in flyer

The results of this data collection are unsatisfactory because the retailer's website was down several times during the investigation, which made it difficult to access the flyers.

Temporary out-of-stock policy

If temporarily out of stock, the merchant issued a discount coupon permitting consumers to buy the item at the advertised price when it was received, in exchange for a refundable deposit.¹⁰⁵

Display of policy

We checked whether this policy was displayed in the store, on the website and in the retailer's flyer.

The policy was not displayed at the customer service counter, or on the website.¹⁰⁶ On the other hand, the website indicated that deposits were refundable before delivery:

Deposits and Refunds

Deposits (excluding Special Order deposits) are refundable at any time prior to delivery or pick up of the product without any fees or charges, and must be issued to the same

¹⁰⁵ The minimum amount of this deposit was equivalent to the applicable tax on the purchase.

¹⁰⁶ Other of the store's policies are displayed at: www.leons.ca/shared/customerservice/policy.aspx.

credit or debit card that the deposit was made on. Deposits made by cash, or by Debit Card if the Debit Card holder is not present, will be refunded by cheque and mailed to you within 14 days. Deposits on Special Orders are not refundable after product is shipped from the manufacturer.¹⁰⁷

In one of the flyers we studied, we could find no information on this policy.

¹⁰⁷

See: www.ufw.com/customerService.html.

3.6.18 Zellers (Ottawa)

1585 Merivale Road
Ottawa (Ontario) K2G 3K2
Tel.: (613) 224-5249

Description of retailer

Zellers is a chain of large surface stores offering a wide range of items, including electronic products. The company operates some 350 stores in Canada.¹⁰⁸

Temporary out-of-stock policy

If temporarily out of stock, the store issues customers a raincheck (see image below), which expires 60 days after the issue date. According to the cashier at the customer service counter, the store did not give rainchecks for seasonal items on sale and on articles advertised as part of three-day sales (Friday to Sunday).

Zellers RAINCHECK / BON D'ACHAT DIFFÉRÉ

This raincheck entitles you to purchase the item below at sale price upon receipt. Ce bon d'achat différé vous permet d'acheter cet article au prix de solde dès réception.

Customer Name: [Redacted]
Address: [Redacted]

Item No. / N° d'article	Dept. / Rayon	Quantity / Quantité	Description/Colour/Size - Description/Couleur/Grandeur
266	3	3	Tide 2x liquid laundry Detergent
Reg. Price / Prix courant \$ 6.99 - 7.99	Sale Price / Prix de solde \$ 5.99		
Store No. / N° magasin	Store Phone No. / N° de téléphone du magasin		
266	613-224-5249		

This raincheck expires 60 days after the date of issuance. / Le bon d'achat différé expire 60 jours après la date d'émission.

White Copy - Customer / Copie blanche - client Yellow Copy - Customer Service / Copie jaune - service à la clientèle

05779EF (10 11 24) 99030397

¹⁰⁸ From the Quebecplus website at: www.quebecplus.ca/quebec/venues/zellers-galeries-de-la-capitale-fr.

Display of policy

We checked whether this policy was displayed in the store, on the website and the retailer's flyer.

The policy was not posted in the store, or on the website¹⁰⁹, or in two flyers that we studied.¹¹⁰

Conclusion

This data gathering had two objectives. The first was to verify, using an exploratory methodology, whether certain retailers actually did have some of the products they advertised in their flyers. The second was to review the policies used by retailers when an advertised item was temporarily out of stock.

Our data collection revealed that the five articles¹¹¹ chosen from the flyer were generally available in the store when we performed the data gathering. Admittedly, on a few occasions, an advertised item might have been out of stock in one store, but our survey did not lead us to conclude that this practice is current in any particular store or is widespread in the stores where the data gathering took place.

Based on our examination of the policies of retailers when out of stock of an advertised item, we have noticed several things. First, practices vary widely from store to store. Some stores hand out rainchecks while others do not. Some stores allow consumers to purchase the item at the advertised price on condition of paying a deposit, which is sometimes refundable, and sometimes not, or only under certain conditions. Some stores require the consumers to pay the full cost of the advertised item in advance if they wish to get the item at that price when the store receives it again.

¹⁰⁹ Its policies on the exchange of coupons and "Guaranteed Unbeatable Prices" do appear there, however. See: www.zellers.com/Content/EN/misc/coupon/couponPolicy.aspx.

¹¹⁰ This flyer was valid during the first months of 2012.

¹¹¹ Primarily electronic products.

We have to acknowledge, however, after due consideration of the federal *Competition Act* and Quebec's *Consumer Protection Act*, that the differences or even contradictions between the laws in this area undermine their effectiveness. What law should the merchant follow if he is temporarily out of stock of an advertised item, given that these laws prescribe different procedures? Faced with such a situation, we feel obliged to admit that even some merchants must have difficulty knowing where to turn.

Another observation: the validity period of the rainchecks varies from one store to the next. Some coupons are valid for a period of 30 days after their issue date, others for up to 90 days. In addition, on some articles, it is not specified whether this period begins on the date of issue or from the time the merchant receives the goods. Finally, the coupons generally do not indicate what happens if the store does not receive the goods during the period of validity of the voucher.

Moreover, the retailers' policy when an advertised item is temporarily out of stock is generally not displayed in the store, on the website or in the retailer's flyer. For now, it seems that the most common way of obtaining this information is to ask an employee about the store's policy in this regard.

At our data collection, we also noticed that several retailers allow consumers to purchase products online. Some of the items advertised are only on sale if purchased online. What happens if such an item is no longer in stock? Is the consumer able to get a raincheck (or an equivalent item for the same price) online? Does the consumer have to go to the store to get one? Since we found no information on this topic on the websites we visited, it is difficult to answer this question.

Finally, in Quebec, as we mentioned earlier, in accordance with the *Consumer Protection Act*, a merchant who is out of stock of an advertised item must offer

consumers a product of equal or higher quality at the same price. Given the deficiencies we noted during our investigation, we may well ask whether this reflects the general practice in the Quebec retail market.

4 - General conclusion

The original aim of our study was to examine the rules governing bait and switch selling in the federal *Competition Act*, Quebec's *Consumer Protection Act*, Ontario's *Consumer Protection Act 2002*, the two codes of practice in the industry and the UK's *Consumer Protection from Unfair Trading Regulations 2008*.

Our study shows that these normative frameworks are in agreement on the following: merchants must have reasonable quantities of the products they advertise.

However, we note that there may be discrepancies, even contradictions between these normative frameworks. This is particularly the case of Quebec law and Canadian law. For this reason, work on standardization is needed if the merchants' practices are to be consistent with these laws when an advertised item is temporarily out of stock.

In the context of this research, we carried out a data collection to determine whether retailers actually do stock the products they advertise in their flyers and what their policies are when they are temporarily out of stock an an advertised item.

The data collection revealed that the five items advertised in the flyers that we selected were generally available in the stores when we carried out the data collection. There were admittedly a few occasions when an advertised item was out of stock in one store or another, but our survey does not allow us to conclude that the practice is current in any particular store or is widespread in the locations where the data collection was done.

In light of our policy review of retailers' policies when temporarily out of stock of an advertised item, we note that:

- practices vary widely from store to store. For example, some stores issue rainchecks, while others do not;
- the validity period of the raincheck varies from store to store. For example, some coupons are valid for a period of 30 days after they are issued; others are valid for up to 90 days;

- the retailers' policy when temporarily out of stock of an advertised item is not usually displayed in stores, on its website or in its flyer.

To improve matters in this regard, public agencies whose mission is to protect and promote the interests of consumers could provide information to merchants to ensure that they have pro-consumer practices in stock shortage situations. Moreover, given the divergent, even contradictory provisions of the various laws studied, Parliament should harmonize the *Competition Act* with the *Consumer Protection Act* and other provincial statutes.

In Quebec, in accordance with the *Consumer Protection Act*, a merchant who is out of stock of an advertised item must offer consumers a product of equal or higher quality at the same price. Given the deficiencies we noted during our investigation, we may well ask whether this reflects the general practice in the Quebec retail market. Quebec consumers ought to be made more aware of this option.

Finally, we note that e-commerce poses new challenges for consumers, merchants and legislators in the event of an advertised item being out of stock. Further studies are needed to discover how to protect consumers who wish to purchase an article online that is no longer in stock. Should not the consumer be able to receive compensation without having to go into the store? This is one of many questions that our research has enabled us to raise.

5 - Bibliography

- Advertising Standards Canada: <http://www.adstandards.com/en/>
- Better Business Bureau: www.bbb.org/canada.
- Better Business Bureau Code of Business Practices: www.bbb.org/canada/bbb-accreditation-standards.
- Competition Bureau Canada, www.bureaudelaconurrence.gc.ca
- Bureau de la concurrence du Canada, Bait and switch selling:
<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00258.html>
- *Consumer Protection from Unfair Trading Regulations 2008*:
www.legislation.gov.uk/uksi/2008/1277/regulation/5/made.
- *Consumer Protection Act (Québec)*: www.publicationsduquebec.gouv.qc.ca.
- *Loi sur la protection du consommateur et règlement d'application*, Sylvie-Angelina Bourrasse, Éditions Yvon Blais, 2011.
- *Loi sur la protection du consommateur: Analyse et commentaires*, Claude Masse, les Éditions Yvon Blais, 1999.
- Office of Fair Trading (UK): www.oft.gov.uk