



# Canadian Marketing, Advertising & Regulatory Law Update

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**FOR GREEN NEWS, SEE OUR [GREEN MARKETING & ADVERTISING LAW UPDATE](#).**

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## ASC'S YEAR AND DECADE IN REVIEW - AND CASE HIGHLIGHTS YOU'LL LOVE

We love advertising. The good, the bad and the ugly. Some ads get played over and over again, emailed and tweeted about. Others, however, simply get ignored or lost in cyberspace via the fast forward button on our remotes.

While each of us has our own personal views on what advertising should and shouldn't be out there, Advertising Standards Canada's [ASC] self-regulatory process helps put away ads that, knowingly or not, breach its *Canadian Code of Advertising Standards* [Code].

In Part I below, we present some highlights from ASC's analysis of the last decade's Consumer Response Council cases as well as some statistics for 2009.

Part II is our favourite section to prepare, containing summaries of a few interesting cases heard from mid-2009 to mid-2010. Yes, more sex, danger, irreverence towards religion and over-statements. See what's not going over so well these days.

### PART I: ASC'S DECADE AND 2009 IN REVIEW

#### Looking Back: A Decade of Consumer Complaints

Whether advertisers are taking more risks or consumers are becoming more vocal, ASC reports that more complaints were submitted to ASC in the past ten years than in any other decade since the inception of the Code in 1963. (See ASC's "Looking Back: A Decade of Consumer Complaints"). Over the past ten years, ASC says, it has received an average of almost 1,300 complaints each year dealing with approximately 800 advertisements per year.



Over the past ten years, ASC says, it has received an average of almost 1,300 complaints each year dealing with approximately 800 advertisements per year.

During this time, advertising by **retailers** generated the highest number of complaints, followed by **food** advertising and advertising by **service providers**. Complaints about **alcoholic beverage** ads significantly declined in the second half of the decade. Complaints about this category peaked in 2004 when consumers submitted 230 complaints (the highest ever) relating to several commercials that consumers contended depicted highly inappropriate behaviour and derogatory depictions of women. Since 2004, this category has generated no more than 45 complaints in any given year.

#### 2009 - Year in Review

In ASC's "2009 Year in Review" report, ASC indicates that consumers submitted considerably more complaints than in 2008 – a total of 1,228. That's up by 109 complaints, or 9.7 per cent more than 2008. Interestingly, though, *fewer ads* were found to contravene the code – only 56 ads in 2009 versus 66 in 2008. (Sometimes certain ads encourage a lot of complaints, which can raise the complaint numbers even though fewer ads are under attack.)

### TOP THREE GROUNDS FOR COMPLAINTS IN 2009

1. **Unacceptable Depictions and Portrayals** (Clause 14) - 541 complaints; 13 upheld

As usual, more than half of the complaints related to unacceptable depictions and portrayals. While often dealing with matters of personal taste or preference, the offenders in this category were found to denigrate women and/or offend general standards of public decency.

2. **Accuracy and Clarity** (Clause 1) and **Price Claims** (Clause 3) - 434 complaints; 63 upheld, involving 47 ads that sunk like the Titanic

Primarily, violations under this clause involved ads for products that were unavailable during the promotional period and ads that contained pricing errors, omitted relevant information or did not clearly state all pertinent details of an offer.

3. **Safety** (Clause 10) - 30 complaints; 2 upheld, re 2 ads received

The concerns in this category related to depictions of unsafe conduct, such as aggressive driving and violent behaviour.

### COMPLAINTS BY MEDIA & INDUSTRY

Despite the ability of consumers to fast-forward through commercials, ASC reports that advertising on TV generated the most complaints: 44%. Out-of-home (15%) and the Internet (14%) rounded out the top three media containing the highest number of complaints. By industry, food advertising generated the most complaints (163), followed by retail advertising (156) and 115 complaints pertained to advertising by media organizations.

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### PART II: CASE HIGHLIGHTS FROM JULY 1, 2009 - JUNE 30, 2010

We always like to feature some ads that illustrate where lines have been drawn in less than black and white situations. Many of these relate to the “unacceptable depictions and portrayals” and “safety” categories, as it’s not always crystal clear in advance what will be found to cross the line.

#### Unacceptable Depictions and Portrayals

##### A. AMERICAN APPAREL’S X-RATED ADS Q2 2010

American Apparel, no stranger to controversial ad strategies, landed itself in hot water for some rather racy photos on the advertiser’s website. The website depicted images of young women shown in various poses wearing the advertised product – a nylon spandex stretch lace unitard.

The complaint alleged that the images were “highly offensive and inappropriate.” The Council agreed. Council noted that it’s generally understood that when advertising undergarments, models are often featured in suggestive poses (i.e., for the record, we didn’t just fall off the turnip truck). It found, however, that in certain of the images on the advertiser’s website, referring to a slideshow entitled “Faye,” the young model appeared to be posed less to demonstrate the unitard’s selling features than for the stimulation and gratification of the viewer. The Council found that “the images displayed obvious indifference to conduct or attitudes that offended the standards of public decency prevailing among a significant segment of the population.”



**B. ANGELS TOO NAUGHTY IN VIRGIN CAMPAIGN**

Q1 2010

Virgin Mobile launched a campaign in which three similar out-of-home advertisements featured different couples with angel wings apparently engaging in sexually-suggestive behaviour accompanied by the tag line “Hook-up Fearlessly.”



The complaints alleged that the advertising of these images in public spaces depicted provocative sexual images, and/or offensively depicted homosexual images, and/or unacceptably depicted sexualized images of angels. The Council felt that the images in connection with the phrase “hook-up fearlessly” in public space offended prevailing standards of public decency. The Council did suggest, however, that the ads could have been acceptable had they appeared in adult targeted media where depictions of “casual sex” are more commonly found.



The Council did suggest, however, that the ads could have been acceptable had they appeared in adult targeted media where depictions of “casual sex” are more commonly found.

What do those real estate folks say - location, location, location? It’s also sometimes critical in the ad world.

**C. ANOTHER “JESUS AD” BITES THE DUST – WELL THERE’S A SURPRISE**

Q3 2009

OK – if any of you have done ads making light of religious figures and *haven’t* had your ads taken down, please let us know. In our 2008 Update we told you about a slew of ads that had to be pulled when using religious characters and connotations in advertising. Despite this, Joe Rockhead’s Climbing Gym decided to give it a go. A national magazine ad for an indoor climbing wall depicted a doll that parodied Jesus, together with the words “Bigger than Jesus” (referring to the climbing wall). The complaint alleged that the advertising was demeaning to Christians. The Council agreed, finding that the ad demeaned Jesus and denigrated the Christian religion and adherents of that faith.



**D. VIOLENCE IN ADS TAKES A HIT**

Q2 2010

In the hilarious series of Cadbury’s Stride gum ads, one apparently rubbed the Council the wrong way.

As a man exits a grocery store he is accosted by a large wrestler, who picks him up and crunches him against a

vending machine until his chewing gum is spit out. While the young man lays on the ground, other men in business suits arrive on the scene and run away with the piece of gum. The super at the end of commercial says: "SPIT OUT YOUR STRIDE GUM AND CHEW ANOTHER PIECE ALREADY! OR WE WILL FIND YOU." (Finishing with, "The ridiculously long lasting gum.")

The complaint alleged that the commercial encouraged violence. The Council agreed, stating that the overall impression was that the ad condoned violence. The victim had no idea why he was being attacked and appeared stunned by what had happened.

*But it Was Funny!*

Council considered the elements of humour and fantasy in the commercial but concluded that they did not negate the impression of gratuitous violence. Cadbury, the maker of Stride gum, pulled the ad but "believed the Stride gum Eternal Melon Wrestler ad was in full compliance with the Canadian Code of Advertising Standards, given our view that the scenario was intended to be seen as ridiculous and was, in our opinion, unrealistic."



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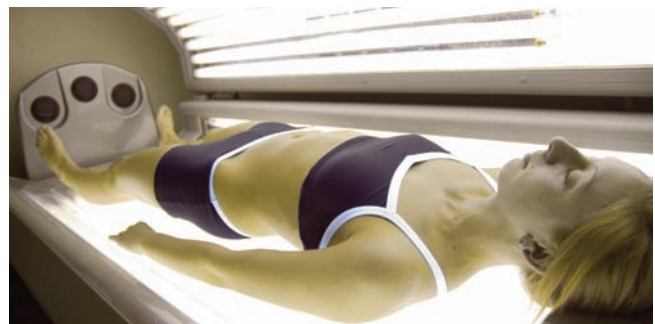
**Accuracy and Clarity**

**A. WHAT EXACTLY IS "ARTIFICIAL TANNING"? OVERLY BROAD AD GOES DOWN**

*Q2 2010*

The GTA Cancer Screening Network got burned by the Council for its transit shelter ad showing seven arms, each one progressively darker in colour with a hospital ID bracelet on the darkest arm, coupled with the words: **"Every time you tan your odds increase. Artificial tanning can cause cancer. Is it worth it?"**

A special interest group alleged the advertisement was misleading because it implied that all types of artificial tanning can cause cancer. The Council agreed, finding that "artificial tanning" would include not only tanning beds, but also sunless tanning products and spray-on tans about which no cause and effect was adduced by the advertiser in relation to cancer.



The advertiser stated that the intent of the ad was to increase awareness, particularly among young people, that exposure to UV radiation from indoor tanning equipment can increase the risk of melanoma.

Council agreed with the complainant, concluding that the broad all-inclusive claim made in this ad was inaccurate and omitted relevant information. The advertiser maintained, despite the decision, that the term “artificial tanning” was being used by several health organizations to describe tanning from tanning beds and that, as such, the term was appropriate for this awareness-raising campaign. The ads “certainly did not mean to imply sunless tanning products, such as spray-on tans and other cosmetic products, cause cancer.”

**“EMISSION-FREE” CLAIM GOES DOWN**

In a matter brought forward by a special interest group, Advertising Standards Canada’s Consumer Response Council found that an “emission-free” claim in an ad published by the Power Workers’ Union should have only been used if there were no emissions whatsoever, not simply no greenhouse gas emissions.

**Note:** See our *Green Marketing & Advertising Law Update* for more “green” cases in Canada and other countries.

**B. CAN YOU SAY THERE’S “NO CONTRACT” FOR SATELLITE TV IF THERE’S A 30-DAY CANCELLATION CLAUSE ... AND TERMS OF SERVICE?**

Q4 2009

Shaw Direct had its advertising strategy re-wired when ASC held that Shaw’s claim “no contracts” for satellite TV service was untrue. When the complainant attempted to cancel his subscription, he was told that under Shaw Direct’s “Terms of Service – Residential Customer Agreement”, 30 days’ notice was required. The Council was unable to conclude that the contract was anything other than a contract, and that the clear impression conveyed by the ad was that the service was cancellable at any time without notice. Accordingly, the unqualified “no contract” claims were found to be inaccurate and misleading.

Shaw argued, unsuccessfully, that despite its literal meaning, consumers did not perceive “no contract” to mean “no contract”; rather, they understood it to mean no fixed term commitment or no longer “Term Contract.”

Shaw argued, unsuccessfully, that despite its literal meaning, consumers did not perceive “no contract” to mean “no contract”; rather, they understood it to mean no fixed term commitment or no longer “Term Contract.” In its statement responding to the Council decision, after it was made, Shaw said:

**“Any service offering to the public has associated with it terms of service, either express or implied, which govern the relationship between the service provider and the consumer. Such terms are not commonly understood to be a “Contract.” The Code provides that “the focus is on the ... general impression conveyed by the advertisement.” The “No Contracts” claim does not leave the average consumer with the general impression that there are no terms of service governing the relationship, such as a requirement on the part of the consumer to provide reasonable advance notice to deactivate the service. The general impression conveyed by the advertisement is that Shaw Direct does not commit the customer to receive its DTH satellite television service for a fixed term, a distinguishing feature compared to the one other DTH satellite television service provider that has “Term Contracts” over and above its terms of service.”**

**LITERALLY FALSE BUT NOT MISLEADING?**

An interesting pattern emerges from the above three cases. “No contract” is found to mean “no contract,” “no emissions” is found to mean “no emissions” and “artificial tanning” is found to mean “artificial tanning.” The lesson being? It’s not easy to argue that a claim, though literally false, has a *non-misleading* general impression or that a claim is *understood* to carry a qualification that isn’t stated in the ad itself.

**C. ALL YOUR PROBLEMS WILL BE SOLVED – GUARANTEED!**

Q4 2009

An ad in a Punjabi language newspaper offered the advertiser’s services to remove, forever, all personal worries and problems, including problems relating to marriage, infertility, and business. The advertiser promised 100% Guaranteed Results in “less than a week.” We were very excited and were just about to sign up when someone complained to ASC that the ad offended the Code. Council agreed, concluding that the ad was misleading in failing to

explain any details about the conditions and limitations applicable to the guarantee (there were limitations???), contrary to clause 1 (Accuracy) and 5 (Guarantees) and exploited superstitions and played upon fears to mislead consumers (clause 11).

**Bottom line for consumers:** If it sounds too good to be true, it usually is. **Bottom line for advertisers:** The latter doesn't mean you don't still have to be careful with qualifications.

**Safety**

**A. "TO THE VICTOR GO THE SPOILS": TOO AGGRESSIVE A POSITIONING FOR A CAR AD?**

Q3 2009

Complaints about car manufacturers depicting unsafe driving are commonplace at ASC and, in 2009, a Mazda Canada Inc. commercial got its share of attention.

The commercial depicted a Mazda vehicle overtaking four cars travelling in tight formation on what appeared to be a public roadway. The voiceover stated: *"In the war between fun and practicality, there are victims and there are victors. To the victor, go the spoils."*

The complaint alleged that the commercial promoted unsafe driving. The Council held that the depictions and the voiceover conveyed the undeniable impression of "speed and racing," that it was not clear that the driving scenes occurred on a closed track and that the commercial accordingly displayed a disregard for safety by depicting situations that might reasonably be regarded as encouraging unsafe or dangerous practices or acts. And what about the super that specifically stated, "Dramatization. Professional Drivers. Closed Course"? No help. Council said it couldn't read the super (oh, oh) because it was so small and on the screen for a very limited time. (Well, if *that's* the test ...)

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**B. BEAR SAFETY: SURVIVING AN ASC ATTACK**

Q1 2010

People, and especially Canadians, love to vacation in the great outdoors. But what happens when such vacationers are visited by local residents of the big and furry kind?

Well, one advertiser ran a television commercial depicting just that scene. Upon finding themselves in an unexpectedly dangerous encounter with a wild animal, the vacationers ran away. The complaint alleged that the commercial depicted a potentially unsafe and dangerous response, in direct contrast to the action that experts recommend in similar situations. Despite the advertiser's lack of intention to send wrong advice to viewers, the Council found that the commercial did, in fact, depict a situation that "might reasonably be interpreted as encouraging unsafe practices."

Advice for the future: Like a bear in the woods, when confronted by ASC, experts recommend that you do not try to outrun it. Walk away slowly and increase the distance between you and the predator. If it continues to follow you, swing your arms above your head making yourself seem large and threatening. If all else fails and the predator begins to run at you, the best response is to lay down on the ground, cover your head and face with your hands, and play dead. Ok, maybe that won't work with ASC, but you should survive the bear attack.



## MISLEADING ADVERTISING INJUNCTIONS RESURRECTED - TELECOM WARS BACK WITH A VENGEANCE

**Bottom Line:** In the past year, there has been a flurry of activity in courts across Canada regarding claims made by wireless, Internet and digital TV providers that their services are the “best,” the “fastest,” the most powerful or the “most reliable.” Bell, TELUS and Rogers have all had their boxing gloves on over this dizzying array of superiority claims.

The decisions broke a long dry spell for misleading advertising interlocutory injunctions [injunctions] in Canada. Let’s see how the wars unfolded.

### 1. ONTARIO: BELL THROWS THE FIRST PUNCH – NO INJUNCTION BUT ROGERS CHANGES INTERNET SERVICES AD

This wasn’t a foundation-shaking dispute but one might liken it to Archduke Ferdinand’s assassination in Sarajevo. Another telecom world war was about to be set off.

In July 2009, Bell sued Rogers in the Ontario Superior Court of Justice, claiming that a Rogers’s ad campaign was false and misleading, contrary to the *Competition Act*. Bell sought damages and an injunction. The Rogers advertising consisted of a direct mail and Internet campaign called “Check Your Speed,” through which customers were warned that the Internet service “you are paying for may not be what you’re getting.” Rogers encouraged customers to test their connection with an independent third party, which was located in Seattle, Washington, and then to “sign up” or “switch” to Rogers where they would “get reliable speed every time you connect.”

Two days after receiving Bell’s notice of motion for an injunction, Rogers removed the independent third party testing feature from its ads, likely in an attempt to correct its representation. As well, during the court proceedings Rogers promised to end the direct mailing portion of the campaign. The Court found that the distance between users in Ontario and the speed test server in Washington might have explained the slower speeds experienced. The Court ultimately did not grant an injunction, in large part because the potentially most harmful aspect of Rogers’ campaign, (i.e., the third party



impartial test), had since ended. Rogers also undertook to preserve the necessary records that would allow for expert opinion evidence as to any increase in market share derived from the campaign.

### 2. B.C.: TELUS ENTERS THE RING – INJUNCTION GRANTED AGAINST ROGERS’ “MOST RELIABLE” WIRELESS SERVICE CLAIMS

In November 2009, TELUS filed a claim against Rogers in British Columbia, this time for ads promoting Rogers’ wireless phone services. Rogers’ ads claimed that its wireless network was the “fastest” and the “most reliable” in Canada.

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Some of the Rogers ads included a fine print disclaimer stating that “*most reliable network refers to call clarity and dropped calls (voice)...as measured within Rogers’ HPSA footprint and comparing with competitors’ voice and data 1xEVDO networks.*” (The *understandability* of the disclaimer is another thing, as referenced below.)

Rogers had been running ads of this nature since 2007 and had never been taken to court over them. What had changed, however, was that TELUS had launched a new HSPA (high-speed packet access) network in early November 2009. TELUS argued that its new network technology was expected to be as reliable as Rogers’ network. Accordingly, TELUS asserted that Rogers’ claim that it had the most reliable network in Canada was now false or misleading. TELUS had asked Rogers to stop running the ads, Rogers declined, and seven days later TELUS filed its suit seeking an injunction.



At the hearing for the injunction, Rogers indicated that it would drop its claim to Canada's "fastest network." Accordingly, the hearing dealt solely with Rogers' claim that it had Canada's "most reliable network." The British Columbia Supreme Court determined that Rogers' claim to have Canada's "most reliable" wireless network was based on a comparison that was no longer valid, and that Rogers could not continue to make the claim without qualification. Further, the disclaimer that Rogers included in some of its ads did not suffice to change the general impression created by the "most reliable network" claim, as most consumers would not appreciate the significance of the technical terminology. [An important warning](#): your techno jargon may not count when you need to show you've communicated important qualifications to consumers.

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The Court granted the injunction, with tiered timing as to when it would apply to various kinds of advertising and promotional materials. Rogers has since changed its slogan to "Canada's Reliable Network," dropping the word "most."

The British Columbia Court of Appeal upheld the lower court's decision. It followed earlier authority finding that although the *Competition Act* only provided for injunctions that were sought by the Attorney General, the Act did not exclude the court's inherent jurisdiction to grant injunctions.

### 3. B.C.: ROGERS COUNTER-ATTACKS – GETS INJUNCTION AGAINST BELL'S "MOST RELIABLE" WIRELESS CLAIM

Despite Rogers having been taken to court for claims that its wireless network was the "fastest" and the "most reliable" in Canada, Bell began a campaign in November 2009, similarly claiming to own the "largest, fastest and most-reliable" and "best and most powerful" wireless phone network in Canada. The ads cited the company's new HSPA network (the same network as TELUS used) as a reason why "Being with Bell just got better."

Despite Rogers having been taken to court for claims that its wireless network was the "fastest" and the "most reliable" in Canada, Bell began a campaign in November 2009, similarly claiming to own the "largest, fastest and most-reliable" and "best and most powerful" wireless phone network in Canada.

Rogers sued Bell in British Columbia, and sought an injunction to halt the campaign. Rogers claimed that the advertising was misleading because the network testing upon which Bell based its claim to the "largest, fastest and most-reliable" network was completed on a virtually empty network without any customers. Reliability, it argued, was something that needed to be built and tested over time with many customers.

The B.C. Supreme Court enjoined Bell's "most reliable" claim but allowed Bell to continue the "largest and fastest" as well as the "best and most powerful" claims. The Court explained its distinction between the claims as follows:

**[Re "largest" and "fastest"]:** There is at least an argument that, in its claim to have larger coverage than Rogers, it is the general impression that Bell was comparing apples to apples, that is, the new HSPA+ to the equivalent Rogers network coverage. In relation to the speed, it cannot be said that the tests conducted, tending to show that the new network facilitates faster upload and download, will not hold true as the network moves into material use.

...

**[Re "most reliable"]:** I find the likely general impression left by Bell's claim to be the most reliable network is that it has demonstrably met a higher standard of dependability than the Rogers network under similar or equivalent conditions of use. That is manifestly not the case; and hence, in relation to Bell's claim to be the most or even the more reliable network, I conclude Rogers has a case roughly equal to the *Telus v. Rogers* case in strength.

**[Re "best" and "most powerful"]:** Insofar as Rogers' assertion that Bell's claim to have the superlative network is concerned, while I agree the general impression left is that Bell is comparing itself to Rogers [and](#) Telus, I am not satisfied that, if misleading, it is necessarily a material representation in the context of Rogers' cause of action.

### Bell Strikes Back

Bell proceeded to seek injunctions against its competitors' advertising campaigns in three separate suits, this time with regards to Internet and digital TV services.

#### 4. NEW BRUNSWICK: BELL GETS INJUNCTION; ROGERS CAN'T SAY "FASTEST" OR "MOST RELIABLE" FOR INTERNET

In the first suit, which was filed in New Brunswick, Bell sought to enjoin Rogers' claim that its *Internet service* is the "fastest" and/or "most reliable", and offers the "fastest and most reliable speed." When Bell filed its suit, Rogers' claim was that its service was the "Fastest and Most Reliable. Period." Rogers then changed its campaign to say that it offers the "fastest and most reliable *speed*" (emphasis added; to avoid asserting that the service itself was the most reliable).

Bell sought to enjoin Rogers' claim that its *Internet service* is the "fastest" and/or "most reliable"

The facts are similar to those in the suit launched by TELUS against Rogers, except this time in the context of *Internet rather than wireless services*. Namely, Bell had begun offering a new fibre-optic high-speed Internet service in New Brunswick and believed that Rogers' superiority claim was false and misleading. Bell was awarded the injunction and Rogers could no longer advertise any of the claims – i.e., that it had the "fastest and most reliable speed," "the fastest speed" or the "most reliable speed."

#### 5. QUEBEC: BELL SUES FOR INJUNCTION AGAINST VIDÉOTRON – IS ITS DIGITAL TV THE "FASTEST" AND "MOST RELIABLE"?

In the second suit, which was filed in Quebec, Bell sought to enjoin Vidéotron Ltée's claim that its *digital TV* was "**the fastest and most reliable. Period.**" Another campaign claimed that Vidéotron's digital TV was "**the most reliable, in good weather and in bad,**" which was viewed as a slight against Bell's service, which allegedly tended to go fuzzy in rain and snow storms. As of the time of writing this article, a decision has not yet been reported.

Bell sought to enjoin Vidéotron Ltée's claim that its *digital TV* was "the fastest and most reliable."

#### 6. ONTARIO: NO INJUNCTION GRANTED – BELL UNABLE TO STOP ROGERS' CLAIM OF "FASTEST AND MOST RELIABLE" INTERNET SERVICE

Finally, in the third case of Bell's sweep, which was filed in Ontario, Bell sought an injunction against Rogers' claim to have the "fastest and most reliable" *Internet service*. In contrast to the New Brunswick suit, Bell had not introduced a new Internet service in the province. The Court refused to grant the injunction on the basis that Bell had not proven that it would suffer irreparable harm (a necessary element to grant an injunction) if the Rogers advertisements continued. The Court held that Bell would have brought the motion much earlier if it believed that the advertisements, which had been in the marketplace since 2008, harmed the company, and determined that "*there is no justification for the court to interfere in the advertising war between these two large corporations.*"

"there is no justification for the court to interfere in the advertising war between these two large corporations."

### CONCLUSION

In the above decisions, the courts have described Rogers, Bell and TELUS as aggressive advertisers and acknowledged that "the competition among them is intense." (Do ya think?!) However, the courts have made clear that aggressive competition has its limits. The cases reiterate basic advertising cautions: 1) claims may fall if the testing on which they are based is not solid in its methodology, current and meaningful in the real world; 2) disclaimers (or qualifications wherever they appear) may fall if they are not stated in language that consumers can readily understand; and 3) applications for injunctions may fail if you don't make haste in bringing them. Delay in itself can annihilate your chances. Mainly, though, consumers will have the last word. (Which in this case may simply be, "We're confused!")

## CLASS ACTION ATTEMPT BOMBS OUT AGAINST SUNSCREEN MANUFACTURERS

**Bottom Line:** Copycat U.S. actions can be expensive for plaintiff’s counsel. The Court also shut out consumers’ claims of breach of warranty, breach of the Ontario *Consumer Protection Act* and unjust enrichment in this action against manufacturers.



On January 7, 2010, the Ontario Superior Court denied a motion for certification of two class actions based on the advertising and labelling of two major sunscreen manufacturers - Playtex (“**Banana Boat**”) and Schering-Plough Canada Inc. (“**Coppertone**” and “**Bain de Soleil**”).<sup>1</sup> [*Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113 (Ont. S.C.J.)]

The decision provides important guidance on the types of claims that can and cannot be successfully brought against manufacturers for misrepresentation. It also outlines the types of evidence that must be included in pleadings and evidence submitted to the court in support of a certification motion. Finally, it makes clear that certification motions cannot be brought simply based on a copycat of a US action, without risking a hefty cost order being made against plaintiff’s counsel.

The decision was appealed on April 15, 2010, and an appeal decision has yet to be released.

### MISLEADING CLAIM RE: PROTECTIVE SCOPE OF PRODUCTS?

The plaintiff, who sought to be appointed as a representative on behalf of two classes, alleged that the two sunscreen manufacturers had misrepresented the effectiveness of their products; specifically, by implicitly representing that the products provided equal protection against UVA and UVB rays, when in fact they protected primarily against UVB rays. How was this implicitly represented? The SPF factor, the plaintiffs pointed out, only measures protection against UVB rays. The labelling and ads, however, indicated protection against both UVA and UVB rays (alongside the SPF number on labels and by claiming “Broad-Spectrum UVA/UVB Protection”), thus suggesting that both types of rays were covered off to the same extent.

This issue isn’t a new one. The plaintiff referenced the U.S. Federal Trade Commission’s 2003 statement that “... no sunscreen product screens out all UVA rays. Some may advertise UVA Protection, but there is no system to rate UVA protection yet.” The plaintiff also indicated that the EU recently required a separate UVA seal on sun-protection products to show the level of UVA protection, and they cited a 2000 quotation from the UN’s International Agency for Research on Cancer, which found that the “... protective effects of sunscreens can be outweighed by overexposure based on the false assumption that sunscreens completely abolish the adverse effects of UV-light.” Missing was any discussion of Health Canada’s position on the issue. Going for the gusto, the plaintiff also claimed that the products were not in fact “waterproof,” “sweat-proof” or truly “sunblock” as represented.

*“... no sunscreen product screens out all UVA rays. Some may advertise UVA Protection, but there is no system to rate UVA protection yet.”*

### SIX CAUSES OF ACTION, NO BITES

The plaintiff pools weren’t small. Each class contained more than three million consumers. As for the causes of actions, the claims alleged negligence, breach of warranty, breaches of various statutes, and unjust enrichment. Ultimately, Justice Strathy denied the motion for certification for the following reasons:

1. **Negligence? Didn’t Plead Reliance and Damages.** The plaintiff made a claim in negligence. In actuality, this was a claim in negligent misrepresentation, which was not properly pleaded because there was no allegation that the

class members relied on the representations and suffered damages as a result.

2. **Breach of Warranty? Not Without Contractual Relationship.** The plaintiff made a claim of breach of warranty that the products had certain qualities. However, because the sunscreen manufacturers did not sell directly to consumers, there was not the requisite contractual relationship.
3. **CPA? Not When Manufacturers Weren't "Suppliers."** The plaintiff claimed various breaches of Ontario's *Consumer Protection Act*, including false representations. The Court found, however, that the sunscreen manufacturers weren't "suppliers" as defined in the Act and didn't enter into an agreement with consumers.
4. **Food and Drugs Act? No Independent Cause of Action.** The plaintiff claimed breach of the *Food and Drugs Act's* provision regarding false, misleading and/or deceptive representations. The plaintiff acknowledged that there is no independent cause of action for breach of the *Food and Drugs Act*, but that the breach resulted in unjust enrichment, which is considered below.
5. **Unjust Enrichment? Insufficient Nexus.** The plaintiff claimed unjust enrichment. However, such a claim requires a direct connection between the defendants' enrichment and the plaintiff's deprivation. Here, consumers paid retailers rather than the manufacturers. Accordingly, it was the retailers who were enriched, not the manufacturers. Any benefit to the manufacturer from the payment was indirect and only incidentally conferred on the manufacturer. Unjust enrichment does not extend to permit such a recovery as it would allow a plaintiff to possibly recover twice – once from the person who is the immediate beneficiary of the payment and again from the person who benefitted incidentally.
6. **Competition Act? Didn't Link Damages to Misrepresentation.** The plaintiff claimed breach of the misleading advertising provisions of the *Competition Act*. However, an action under the *Competition Act* requires proof of both the breach and the damages suffered. The plaintiff could not show that its damages were caused by the sunscreen manufacturers' representation; accordingly, damages suffered could not be demonstrated. The court held that the causal connection between the breach of statute and a plaintiff's damages can only be demonstrated by pleading that the misrepresentation caused the plaintiff to do something – i.e. that he relied on it to his detriment.

The plaintiff could not show that its damages were caused by the sunscreen manufacturers' representation; accordingly, damages suffered could not be demonstrated.

### WHO'S REALLY COMPLAINING – THE LAWYERS OR CONSUMERS?

To certify a class, the court must be satisfied that the proposed plaintiff will vigorously and capably prosecute the claim on behalf of the class, that the proposed plaintiff has a suitable plan for advancing the proceeding on behalf of the class, and that the counsel chosen is qualified to advance the proceeding on behalf of the class. It was not clear to the Court whether a class existed that wanted to pursue the claim. Mr. Singer, the potential representative plaintiff, had no apparent complaints about the defendants' products until he was told by his lawyer about U.S. litigation on the same point. As well, he continued to purchase and use the defendants' products, even after commencing litigation. The judge also noted his surprise that Mr. Singer was not aware of the regulatory system in Canada. Together, these points made the judge concerned whether the representative plaintiff had a real interest in the dispute and would provide fair representation to the class. In addition, the court noted that the litigation plan and affidavit evidence submitted to the court did not contain information regarding the experience, capability or resources available to plaintiff's counsel, which was necessary for the court to determine if the conditions for certification were satisfied.

Mr. Singer, the potential representative plaintiff, had no apparent complaints about the defendants' products until he was told by his lawyer about U.S. litigation on the same point.

### OUCH: ISSUES TOO BROAD AND NO BASIS IN FACT

Finally, the proposed common issues were too broad and had no basis in fact. The plaintiff's factum had identified the following as core common issues: 1) misrepresentation; and 2) whether the alleged misrepresentation affected the value of the products or resulted in a disparity between what the products were worth and what consumers paid for them. The Court found that there were two problems with this common issue. First, there was no evidence to establish a basis in fact for the common issues. In other words, there was no evidence

to establish misrepresentation of facts and there was no evidence to establish that the alleged misrepresentation affected the value of the products. Second, the claim of misrepresentation did not refer to any specific product, label, representation or advertising. This “masked” the individual inquiries that were necessary to determine whether the claim would be successful. Common issues cannot be framed in overly broad terms, as such issues risk causing the class proceeding to break down into individual proceedings to deal with the more narrow individual issues.

### THE REALLY INTERESTING PART OF THIS CASE – PLAINTIFF’S COUNSEL END UP PAYING \$400,000 IN COSTS

The court found that the case was really just a copycat suit of an action that a California court had refused to certify. Moreover, the lawyers had not adequately researched the Canadian regulatory regime before bringing the copycat suit. In making the cost order, the court stated that it was

appropriate to take into consideration the fact that the proposed representative plaintiff had an indemnity agreement with his lawyers and would not be personally paying the cost award. The amount of the award is in stark contrast to the minimal costs awards that have previously been made on certification motions against plaintiffs or plaintiffs’ counsel.

The Really Interesting Part of this Case – Plaintiff’s Counsel End Up Paying \$400,000 in Costs.

### CONCLUSION

That was one plaintiff’s Counsel who’d be needing a stiff drink after court.

<sup>1</sup> *Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113 (Ont. S.C.J.).

## FROM THE BUREAU:

### “MADE IN CANADA” OR “PRODUCT OF CANADA”?

**Bottom Line:** *Made in Canada* and *Product of Canada* claims are voluntary, but if you choose to make them, you need to make sure that they are neither false nor misleading. Under Canada’s new guidelines will help you make sure.

On July 1, 2010, new guidelines for “Made in Canada” / “Product of Canada” came into effect for non-food products – mainly to ensure harmonization with the earlier guidelines developed for food products by the Canadian Food and Inspection Agency. These Competition Bureau [Bureau] guidelines aren’t law in themselves but they do help you avoid contravening the deceptive practices provisions of the *Food and Drugs Act* or, for non-food products, the *Consumer Packaging and Labelling Act*, the *Competition Act* and/or the *Textile Labelling Act*.<sup>1</sup>

The fundamental rule for both food and non-food is that “Product of Canada” claims require virtually all Canadian



content (98% - 100%). “Made in Canada” has a lower standard for Canadian content but the last substantial transformation of the product must have occurred in Canada. As well, “Made in Canada” – on its own – is no longer to be used for either food or non-food. It should be qualified – e.g. by saying “Made in Canada, etc., from imported ingredients” or “with imported parts,” as the case may be.

The fundamental rule for both food and non-food is that “Product of Canada” claims require virtually all Canadian content (98% - 100%).

The specific requirements are set out below for Food and Non-Food products, respectively.

## Food

### “PRODUCT OF CANADA”

A food product may claim to be a “Product of Canada” if: All or virtually all (98% or more) of the main ingredients, processing, and labour are from Canada; and Only a negligible quantity of ingredients are non-Canadian (less than 2% of the product).

For example, if an apple pie is made in Canada from apples, flour, butter, sugar and milk from Canada with a special ingredient such as nutmeg from Indonesia (when present at less than 2%), the pie can be described as a “Product of Canada.”

### “MADE IN CANADA”

A “Made in Canada” claim may appear on a label when the last substantial transformation of the good occurred in Canada, even though the ingredients are imported, Canadian, or a mix of both. A substantial transformation is a process that will change the nature of the product and transform it into a new product (often with a new name).

Also, “Made in Canada” must always be accompanied by a qualifier. When a food product contains both domestic and imported ingredients, the label could state “Made in Canada *from domestic and imported ingredients.*” When the food contains products from outside of Canada, the label would need to state “Made in Canada *from imported ingredients.*” If appropriately qualified and the last substantial transformation occurred in Canada, the product need not contain any Canadian ingredients at all and may still be labelled “Made in Canada...” Overall, “Made in Canada” is meant to show that a food is manufactured or processed in Canada, not to specify the amount of Canadian ingredients.

### MORE SPECIFIC CLAIMS

Other more specific claims may continue to be used as long as these are not false or misleading; for example:

- Roasted in Canada
- Refined in Canada
- Distilled in Canada

## Non-Food Products

### “PRODUCT OF CANADA”

“Product of Canada” involves two conditions:

- a. All or virtually all (at least 98%) of the total direct costs of producing or manufacturing the good were incurred in Canada; and
- b. The last substantial transformation of the good occurred in Canada.

### 2. “MADE IN CANADA”

“Made in Canada” requirements are that:

- At least 51% of the total direct costs of producing the good were incurred in Canada;
- The last substantial transformation of the good occurred in Canada; and
- The “Made in Canada” representation is accompanied by an appropriate qualifying statement, such as “Made in Canada *with imported parts*” or “Made in Canada *with domestic and imported parts.*” This could also include more specific information such as “Made in Canada *with 60% Canadian content and 40% imported content.*”

The Bureau advises businesses to avoid general terms such as “produced in” or “manufactured in” as consumers could interpret these as the equivalent to “made in” and the Bureau is trying to keep the field clear and limited.

### MORE SPECIFIC CLAIMS

As indicated above regarding food, the Bureau supports use of more specific terms for non-food products when appropriate. For example, you can say “Designed in Canada” or “Sewn in Canada with imported fabric.”

### When in Effect

The Bureau wanted all products in stores to comply with the guidelines as of July 1, 2010. If they didn’t, the Bureau was recommending that existing country of origin labels as well as Made in Canada or Product of Canada statements be concealed or removed.

## Enforcement

The Bureau acknowledges that a mere deviation to the guidelines does not, in and of itself, constitute a breach of the law. The Bureau will examine each situation on its facts. Factors such as the nature of the product and whether plans and steps have been taken to comply with the guidelines will be considered.

One recent matter the Bureau did pursue, however (announced on September 1, 2010), involved a U.S. paint products company. The company was putting the maple leaf on the product's label, implying that it was made in Canada when only one of the four pieces in the paint kit was made in Canada. (The product also contained an objectionable "biodegradable" claim, discussed in our *Green Marketing &*

*Advertising Law Update*.) The company is now having its product removed from store shelves and replacing it with a new kit – minus the objectionable claims.

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<sup>1</sup> The *Textile Labelling and Advertising Regulations* require that labels on textile fibre products include a representation that the product, or any fibre in it, is imported, and the label on the product must name the country of origin.

## \$170,000 PENALTY IN CONTEST CASE

**Bottom Line:** Yes the Competition Bureau can be serious, in a big penalty sort of way, about contest disclosures. November 2009 saw one contest sponsor paying \$170,000 in penalties and costs when it left out material disclosures and mis-described the grand prize.

November 2009 saw one contest sponsor paying \$170,000 in penalties and costs when it left out material disclosures and mis-described the grand prize.

We'd all like to win the lottery. It's probably even fair to say that most of us have bought a lottery ticket at some point, hoping that we'd be the lucky ones to hit the jackpot, be able to buy a house, retire from law ...

But - we probably wouldn't have bought that ticket had we thought that the winning numbers weren't selected on a truly random basis, or that the jackpot might be something less than advertised.



This was the scenario faced by consumers who entered a contest sponsored by Elkhorn Ranch & Resort Ltd. [Elkhorn]. Elkhorn sells timeshares for properties in B.C., Alberta and Manitoba. As is not unusual with timeshares, it runs promotions to sell memberships. In the contests at issue here (run in 2006 and 2007 respectively), contestants were told that they could fill out a ballot for a chance to win a grand prize. The grand prize was advertised (in the large print) as an SUV or \$15,000 cash. BUT - the small print said that the "SUV" was actually a one-year lease (2006 contest) or a two-year lease (2007 contest) of an SUV. As well, given that this was a lease, there were some conditions attached. The winner would have to pay a security deposit and, to get it back,

would have to return the SUV in "immaculate condition." First problem, then: a lease of an SUV isn't an SUV, the Bureau said. The materials were thus considered to be materially misleading in that respect.

As to how the contest worked, it was a little convoluted. Certain contestants were phoned by Elkhorn and told that they'd won a prize. To see whether they would win the grand prize (or just a bonus prize); the contestants were told that they'd be given a key which they could turn in a lock – but only if and when they attended a sales presentation. The bonus prize (home electronics, trips or gift certificates) would be revealed by a code that accompanied the key. The flyer, meanwhile, indicated that there was no obligation to do anything to claim a prize.

## WHERE ELKHORN WENT WRONG

### I. Missing Disclosures

Missing disclosures included practically the whole shooting match – i.e. the: (a) number of prizes, entry ballots and keys and bonus codes distributed; (b) odds of winning by entering a ballot and by obtaining a winning key or bonus code; (c) value of the prizes; and (d) closing date and draw date.

### II. Winner Selection Not Solely Random

The Bureau also focused on a provision that doesn't come up all that often – s.74.06(c) of the *Competition Act*. Section 74.06(c) makes it reviewable conduct where "the selection of participants or distribution of prizes is not made on the basis of skill or on a random basis in any area to which prizes have been allocated." That means that winner selection has to be done either by a truly random method or by skill. If the advertiser interjects additional undisclosed steps or fiddles with the process, it is a problem under this provision. Here, the Bureau found that the winners weren't decided on a strictly random basis. Those who were given a key and attended a presentation were actually able to enter twice, which wasn't disclosed. Turning their key in the lock gave them the second chance (in addition to the draw). The Bureau said that the process to win the final prize had a number of steps, any one of which might have been manipulated.

## THE CONSENT AGREEMENT

The Consent Agreement (November 23, 2009) requires Elkhorn to pay an administrative monetary penalty of \$150,000 as well as the Bureau's investigation costs to the tune of \$20,000. Also required, not unusually, a corrective notice in various media and the implementation of a Corporate Compliance Program.

## MISLEADING GIFT CARD PROMOTIONS

**Bottom Line: The Competition Bureau is always on the lookout for promotions that fail to clearly disclose material terms adequately before purchase.**

The waters heated up this year and consumers boiled over when Mexx, Zellers and Smart Set all offered promotions that fell short in the disclosure department. Please see the Retail Department Section of this Update for details.



## BUREAU FOCUSING ON FALSE ENERGY EFFICIENCY CLAIMS

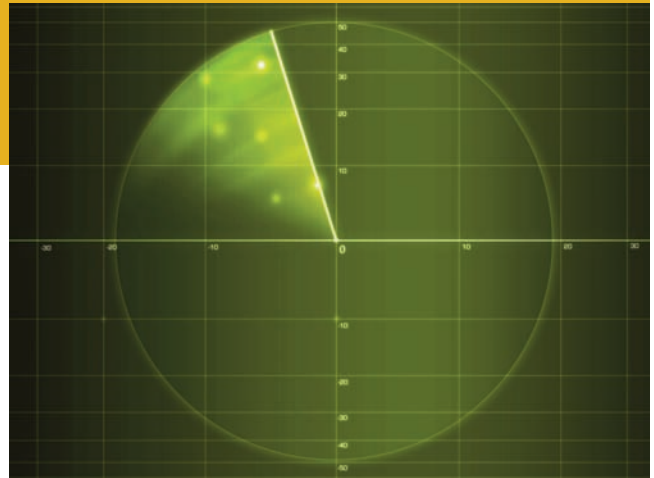
**Bottom Line:** Green is on the Bureau's radar screen.

Since introducing its "Green Guide," *Environmental Claims: A Guide for Industry and Advertisers* in 2008 (effective June 2009), the Bureau has been busy pursuing a raft of companies for green-related claims and issues.

On September 1, 2010, the Bureau announced an agreement with a U.S. paint products company under which it will cease allegedly misleading "**biodegradable**" claims on its painting kit sold in Canada.

On the misleading **energy efficiency** front, the Bureau has now entered into nine consent agreements with businesses in various parts of Canada for falsely claiming that their products are associated with the ENERGY STAR Program and it filed applications with the Competition Tribunal against two further companies in July 2010.

In January 2010, the Bureau announced that more than 450,000 "**bamboo**" (but not really) textile articles have been relabelled and over 250 websites corrected as a result of the Bureau's efforts. to tackle misleading bamboo-related claims.



For more "green" news, please see our *Green Marketing & Advertising Law Update*.

## RECORD FINE AND JAIL TIME FOR TELEMARKETER

**Bottom Line:** 2009 wrapped up with a record \$15 million fine imposed under s.52.1 of the *Competition Act* on a telemarketer running a misleading business directory scheme. (Ontario Superior Court, December 18, 2009).

This mega cross-border and multi-authority investigation was part of “Operation Mirage,” in which the Competition Bureau [Bureau] focused on 50 locations in the greater Montreal area.

### WHAT EARNED THIS RECORD HONOUR?

With deceptive scripts and aggressive collection tactics, DataCom Marketing, Inc. [DataCom] was duping Canadian and U.S. businesses into believing that they’d already ordered a business directory listing when they hadn’t. Yes, this old saw again. But what a run – this scam went on for 10 years, between 1994 and 2005.

The take? DataCom generated \$158 million in revenue over the decade, netting \$12.9 million in profits.

### PRESIDENT GOES TO JAIL – OTHERS CHARGED INDIVIDUALLY

By the time the \$15 million fine was imposed on the company itself, DataCom’s former president had already been sentenced to two years in jail, three years probation and a 10-year ban on telemarketing. Another senior manager, who cooperated in the investigation, got a two-year conditional sentence. A number of other individuals were charged in connection with the scheme in Toronto and Quebec.

### DATAKOM NOT THE FIRST AND MAY NOT BE THE LAST

Operation Mirage has also uncovered four other companies conducting similar business directory schemes, all operated by Bianca Rosa Pazzano and Darren Johnston. They pled guilty to deceptive telemarketing, resulting in a \$725,000 fine, among other terms. This activity is still one of the Bureau’s priorities.



### FEELING LIKE EVERYONE’S AFTER YOU? YOU MIGHT BE RIGHT

These cases are also great illustrations of how authorities work together now – in both the U.S. and Canada and across all sorts of other jurisdictional boundaries. Involved in the DataCom case, for example, were the Bureau, the U.S. Federal Trade Commission, the U.S. Postal Inspection Service, the U.K. Office of Fair Trading and a bevy of police forces from Toronto, Montreal, the Province of Ontario, and the RCMP as well as the Ontario provincial misleading advertising authorities.

Feeling Like Everyone’s After You? You Might be Right

## ASC'S NEW CLEARANCE GUIDE FOR TV ADS TO KIDS

If you advertise to kids in Canada, you'll know that all TV ads directed to kids under 12 must comply with the *Broadcast Code for Advertising to Children* [Children's Code].

In March 2010, Advertising Standards Canada [ASC] introduced a new *Guide to Children's Broadcast Advertising* [Guide], which helps you apply the provisions of the *Children's Code*. In addition to outlining which commercials need clearance and the process they must go through to be aired, the *Guide* also reviews the key elements of the *Children's Code*.

In March 2010, Advertising Standards Canada [ASC] introduced a new *Guide to Children's Broadcast Advertising* [Guide], which helps you apply the provisions of the *Children's Code*.

Here are some examples of the types of information you will find in the *Guide*:

### CLAUSE 5 - AVOIDING UNDUE PRESSURE

Clause 5(a) of the *Children's Code* states:

*"Children's advertising must not directly urge children to purchase or urge them to ask their parents to make inquiries or purchases."*

Use of imperative language that directs a child to buy a product is not permitted. For example, phrases such as "buy it," "get it now" and "bring it home" to name a few, are prohibited.

The *Guide* provides the following samples of terms that are "not acceptable" and offers "acceptable" alternatives:



#### Not Acceptable

- Come see Snax the Dog this Sunday
- Ask your mommy for this doll
- Own the video today
- Buy [x] and get a free [y]

#### Acceptable

- You can come see Snax the Dog this Sunday
- This doll can be found at the doll store
- On video today
- You'll get a free [y] if/when you buy [x]

### CLAUSE 8 - PRICE AND PURCHASE TERMS

Clause 8(c) of the *Children's Code* states:

*"The statement in audio, "it has to be put together" or a similar phrase in language easily understood by children must be included when it might normally be assumed that the article would be delivered assembled."*

The *Guide* provides the following examples of acceptable language that can be used to communicate that assembly of the product is required:

**Example 1:** You put it together.

**Example 2:** Parents put it together.

**Example 3:** Has to be put together.

## CLAUSE 9 - COMPARISON CLAIMS

Clause 9(a) of the *Children's Code* states:

“Commercial messages shall not make comparisons with a competitor’s product or service when the effect is to diminish the value of other products or services.”

The purpose of this clause is to prevent ads from creating the feeling among child viewers that the product they own is substandard to the one featured, or from instilling a desire for the featured product because the child believes that it is in some way better than others.

It is acceptable to focus on the benefits of a product so long as it does not compromise the value of a competitor’s product. As a result, superlatives and direct comparisons are not permitted. In some instances, nonsensical or fanciful superlatives may be accepted if they relate to a title or story-line of a movie. Here are some “not acceptable” examples outlined in the *Guide* together with “acceptable” alternatives.

### Not Acceptable

- The fastest ever
- It’s THE pool party of the year!
- The year’s funniest movie
- The biggest/best karate movie of the year
- The best movie
- The greatest movie
- #1 movie in Canada
- The award-winning movie

### Acceptable

- It’s a speed machine!
- Pool party? Cool party
- One of the funniest movies of the year
- The karate-est movie of the year
- One of the best movies
- One really great movie
- Audiences are flocking to...
- One of the best movies of the year

The *Guide* is available on ASC’s website at <http://www.adstandards.com/clearance>.

## PAMELA ANDERSON'S BODY AD TOO SEXIST FOR MONTREAL

**Bottom Line:** Benjamin Franklin said that the only things certain in life are death and taxes. That was in the 18th century, however. Were he alive today, he would have added the principle that a really sexy ad will always get a lot of attention; even more so when the ad is challenged or vetoed and someone famous is involved.

Taking centre stage in this controversy was the Montreal Film and TV Commission, which coordinates all filming on its territory, when it denied PETA (People for the Ethical Treatment of Animals) a permit to stage an event where Pamela Anderson would unveil a poster in which she appears in a bikini. But it wasn't just any bikini shot. The advertisement shows the body of the Canadian-born actress displayed as in a butcher's diagram, with words like "breast," "ribs," and "rump," etc. and the headline, "All animals have the same parts. Have a Heart - Go Vegetarian."

Prior to the event, which was to take place in a busy plaza in Place Jacques-Cartier, PETA requested a permit to stage the event.

The city's film commissioner provided its reasons for refusing to grant the permit by email, where it described the ad as sexist, and explained that the City of Montreal, as a municipal government, could not endorse this image of the actress. The email added that *"it is not so much controversial as it goes against all principles public organizations are fighting for in the everlasting battle of equality between men and women."* The media also reported that the film commissioner feared that some passerby might be offended by Pam Anderson's photograph.



Does this ad make you think of Pamela Anderson as a piece of meat, or a person of conscience inviting you to join the higher moral ground? Now that's food for thought.

This made big news across the country (hey, Pamela Anderson's "Grade A" body is a product of Canada), and the poster below accordingly appeared in news media everywhere. However, given the strong reaction to its refusal, the Commission backtracked from its original position and announced that it would *"turn a blind eye if the activists decide to hold their event in Place Jacques-Cartier without a permit."* In the end, the actress revealed her poster inside a restaurant, before dozens of journalists – and, surprise, surprise, the campaign ended up getting exponential exposure.

## CMA RELEASES GUIDE TO PROMOTIONAL CONTESTS

A contest gone wrong can cause more headaches than the nasty flu bugs now going around. To help you avoid some of the pitfalls and problems, the Canadian Marketing Association issued a new publication for its members – the Guide to Promotional Contests [Guide] – in May, 2010. The Guide is intended to be used as a reference tool, providing its readers with a brief overview of relevant laws and regulatory guidance as well as encouraging its members to act responsibly and ethically when running a contest. The Guide itself is not intended to replace legal advice, but for those looking for a handy, high-level reference, this may be a useful tool for you.



## THE RETAIL DEPARTMENT:

### BUREAU COMES DOWN ON MEXX, ZELLERS & SMART SET PROMOTIONS

**Bottom Line:** The Competition Bureau [Bureau] is always on the lookout for promotions that fail to clearly disclose material terms adequately before purchase. The waters heated up this year and consumers boiled over when Mexx, Zellers and Smart Set all offered promotions that fell short in the disclosure department.

#### MEXX

When major clothing retailers, Mexx Canada [Mexx] and parent Liz Claiborne Canada Inc. didn't adequately disclose that a minimum purchase was required to redeem Mexx gift cards in a particular promotion, they were visited by the Bureau. The retailers corrected the situation right away by displaying the material terms and conditions prominently in their representations to customers. They also agreed to:

- ensure that the terms and conditions of ALL their promotions are clearly and prominently displayed in all of their representations to the public, not only in their advertising and promotional materials and in-store signage but also in their oral representations to customers; and
- develop a corporate compliance program to ensure that future promotions do not violate the false or misleading advertising provisions of the *Competition Act*.

#### ZELLERS

Similarly, Zellers Inc. [Zellers], owned by the Hudson Bay Company, had a promotion giving a \$10 savings card with the purchase of the movie *Avatar* on DVD or Blu-Ray. Not disclosed at the time of purchase: to redeem the savings card consumers would be required to make a \$50 minimum purchase. The Bureau felt the omission was clearly material and violated the *Competition Act*. Zellers agreed to take immediate steps to correct the promotion. It:

- gave customers with the savings card (or a receipt for the movie purchased during the promotional period) a \$10 credit with no minimum purchase requirement; and
- extended the redemption period. Zellers also agreed to advertise the changes through in-store signage, company flyers, a notice posted on the retailer's website and two corrective notices published in major Canadian newspapers.



#### SMART SET

Smart Set, a division of Reitmans (Canada) Limited [Reitmans], ran a promotion giving consumers a \$25 "savings pass" with every \$50 purchase made between March 18 – April 14, 2010. To use the pass, the consumer not only had to make an additional purchase of \$50 but the purchase had to be between the relatively brief period of May 2 and May 19, 2010. This wasn't disclosed on Smart Set's website or on in-store signage, contrary to the false and misleading representations provisions of the *Competition Act*.

*But All Conditions Were On the Passes Themselves!*

True, the information was stated on the passes themselves but the Bureau said that was insufficient as the information might not have come to the attention of consumers before they made their purchase decisions.

Reitmans took immediate action to resolve the Bureau's concerns:

- it didn't require an additional purchase for redemption;
- it extended the expiry date to the end of the year; and
- it communicated the changes through corrective notices posted in Smart Set stores and its website, and by informing members of the Smart Set email distribution list.

Further, as part of its undertaking, Reitmans agreed to ensure that material conditions, limitations and exclusions are disclosed clearly and prominently in future promotions, and to amend its existing corporate compliance program to ensure that future promotions will not run afoul of the false and misleading advertising provisions of the *Competition Act*.

**Moral of the Trilogy:** Make sure ALL material terms and conditions are fully disclosed *before the time of purchase*.

## THE RETAIL DEPARTMENT:

### GIFT CARD LEGISLATION SPREE – QUEBEC AND PEI NOW IN THE MIX

Back in 2007, several provinces jumped on the gift card regulation bandwagon. The key issues being addressed in legislation included:

- Prohibiting gift card expiry dates, fees and any other reductions to a card's balance; and
- Requiring all conditions and limitations to be adequately explained.

Ontario and Manitoba paved the way with this type of regulation, and Alberta, Nova Scotia, New Brunswick, British Columbia and Saskatchewan soon came on board. Of course, being a provincial consumer protection matter, each province has approached the issue differently, with slightly different definitions and exemptions, creating a patchwork of requirements to keep track of for any national programs.

Most recently, Quebec and Prince Edward Island have caught up to this legislative trend. Now, the only province remaining to deal with this issue is Newfoundland (although word on the street is that preliminary discussions about gift card regulation there is currently underway).

There is nothing too surprising about the recent requirements coming out of Quebec and Prince Edward Island, although each province has its own little quirks.

There is nothing too surprising about the recent requirements coming out of Quebec and Prince Edward Island, although each province has its own little quirks. Quebec, for example, is the only province to require businesses to reimburse the balance of gift cards that have a balance of \$5 or less remaining. Here's a quick overview of the newest rules.



#### Prince Edward Island

The PEI legislation is very similar to that of other provinces, in that it generally prohibits expiry dates and administrative fees. Exceptions to those rules, as in many other provinces, are allowed if the card is issued for marketing, promotional or charitable purposes. If the card is for an earmarked service or good (e.g. One Manicure, instead of \$20 towards your manicure), it is also allowed to expire. PEI also unremarkably requires the issuer to tell customers about the conditions associated with the card, and how consumers can find out how much money remains on the card.

The real kicker in the PEI legislation is the fines associated with non-compliance. Anyone who contravenes any of the above requirements could be fined up to \$10,000, put in jail for 90 days, or both. Guilty corporations could be fined up to \$500,000, and officers of corporations can also be held responsible for the corporation's actions. So be careful when selling a gift card in PEI!



## Quebec

In Quebec, gift card regulation came into being as part of the overhaul of the *Consumer Protection Act* (discussed separately in this edition of the Update). Unsurprisingly, Quebec now regulates gift cards in a way similar to the other provinces, but with a few “distinct” provisions of its own. Expiry dates are generally prohibited – but not in the case of cards for mobile phones. Like other provinces, Quebec has cracked down on merchants that charge activation fees when gift cards are issued or re-activated. However, cards that are valid at multiple businesses, such as “mall cards,” are allowed to charge up to \$3.50 for activation and \$2.50/month after 15 or more months of non-use after the card expires (a distinction shared in only select other provinces).

Quebec is also very serious about ensuring that the merchant disclosure requirements reach consumers. Before purchase, consumers now must be informed of how to find out the remaining balance on the gift card, as well as the conditions attached to using it. If these conditions are not stated on the card, then in Quebec the merchant must give them to the consumer in writing.

Sometimes gift cards are not redeemable for a dollar amount but instead for an earmarked service. If this is the case, and the price of the service has increased since the gift card was purchased, Quebec allows merchants to charge a top-up amount to the consumer redeeming the gift card. However, if the merchant simply doesn’t provide the service anymore, the consumer is entitled to an equivalent sort of redemption. That’s unique to Quebec, as is the following - the biggest news - consumers can cash in gift cards that have less than \$5 on them. No other province allows for this, so it will be interesting to see if Quebec’s signature individuality sparks amendments in other provinces.

## HEALTH CLAIMS OVERHAUL FROM HEALTH CANADA?

**Bottom Line:** While not much has changed in law with respect to health claims that can or can't be used for food, there has been movement in the terminology used and the actual claims being allowed by Health Canada over the past year or so. We thought it was time to stop and take stock of how 'Chapter 8' of the Canadian Food Inspection Agency's *Guide to Food Labelling and Advertising* [CFIA Guide] has changed, and what this means for how we are to read the *Food and Drug Regulations* [Regs]. And, the BIG news for those who haven't been following these developments religiously is that some claims once thought to be prohibited (including reference to antioxidants) are now – within limits – on the table. And, a formal process is now in place to seek approval from Health Canada on certain kinds of claims to have new language approved.

The BIG news for those who haven't been following these developments religiously is that some claims once thought to be prohibited (including reference to antioxidants) are now – within limits – on the table.

Looking back for a moment, in 2003, the CFIA Guide spoke about diet-related health claims and biological role claims. Now, to follow the terminology of the Guide, we should properly be speaking of three classifications of health claims: a) disease risk reduction and therapeutic claims; b) function claims; and c) general health claims.

### A) DISEASE RISK REDUCTION AND THERAPEUTIC CLAIMS

Apart from some changes in terminology, there is not much new in relation to these claims. These are both types of drug claims, only allowed in association with food where expressly prescribed in the Regs. **Disease Risk Reduction** claims used to be known as Diet-Related Health Claims back in 2003. These are the claims, prescribed under the Regs, relating to the connection between a food or constituent of a food and the reduction of risk of developing a *diet-related* disease or condition. The wording of the specific claims is prescribed in the table following section B.01.603 of the Regs, and relate strictly to the ties between:



- a diet **low in sodium and high in potassium**, and the reduction of **risk of hypertension**;
- a diet adequate in **calcium and vitamin D**, and the reduction of **risk of osteoporosis**;
- a diet **low in saturated fat and trans fat**, and the reduction of **risk of heart disease**;
- a diet rich in **vegetables and fruits**, and the reduction of **risk of some types of cancer**; and
- maximal fermentable carbohydrates in **gum, hard candy or breath-freshening products**, and the reduced **risk of dental caries**.

It's a closed list, with prescribed language, so no room for creative copywriting here.

The close cousins to Disease Risk Reduction claims are **Therapeutic Claims** which, according to the CFIA Guide, are "claims about treatment or mitigation of a health-related disease or condition, or about restoring, correcting or modifying body functions." So, whereas Disease Risk Reduction claims speak about reducing the risk of developing a condition, therapeutic claims speak to a disease or other condition's treatment. No therapeutic claims are permitted in association with food in Canada.

We haven't seen much development in this area over the past seven years – not a big surprise since the structure of the Regs requires an amendment to the legislation to introduce a new claim of this kind. But, this is not the case for other types of health claims, discussed below.

No therapeutic claims are permitted in association with food in Canada.

## B) FUNCTION CLAIMS

Function claims relate to the benefits of a food, or constituent of a food, on the normal function of the body. Again, to keep the players straight, this differs from the drug claims discussed above, which talk about food that may reduce the risk of a disease or condition. Function claims are restricted to keeping things in working order, without resort to discussing the consequences of not doing so.

And now, function claims can relate not only to a nutrient, but to a food. To date, function claims about three foods or food constituents have been approved (subject to conditions set out in the CFIA Guide:

- Claims about **coarse wheat bran**, in respect of products containing seven grams or more of fibre, promoting **laxation**.
- Claims about **green tea** helping to protect blood lipids from oxidation, or increasing the **antioxidant** capacity of the blood; and
- Claims of 3.5 grams or more of **psyllium** promoting **regularity**.

To date, function claims about three foods or food constituents have been approved.

This is not a closed list, but if looking to make a unique function claim, you need to have evidence on hand to prove its acceptability to CFIA. Manufacturers are encouraged (but not required) to go to CFIA for clearance in advance, and approved claims will be added to the CFIA Guide. Of course, if you don't seek advance permission, compliance with the applicable legislation (including having adequate support to substantiate that the claim is not false or misleading) will be on your shoulders.

This is in addition to good old-fashioned nutrient function claims (nutrient function claims used to be known as biological role claims, for those keeping track), which discuss the benefit of a nutrient to the function of the body. Just as always, though, the nutrient function claim needs to be about the nutrient, and not the food. For example, it's permissible to say that milk is a source of calcium which helps build strong bones

and teeth. It's not permissible to say that milk helps build strong bones and teeth. Again, not a closed list, here are the nutrient function claims that have been accepted and published in the CFIA Guide to date.

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## NUTRIENTS AND ACCEPTABLE NUTRIENT FUNCTION CLAIMS

### PROTEIN

- helps build and repair body tissues
- helps build antibodies

### FAT

- supplies energy
- aids in the absorption of fat-soluble vitamins

### DHA

- DHA, an omega-3 fatty acid, supports the normal physical development of the brain, eyes and nerves primarily in children under two year of age

### ARA

- ARA, an omega-6 fatty acid, supports the normal physical development of the brain, eyes and nerves primarily in children under two year of age

### CARBOHYDRATE

- supplies energy
- assists in the utilization of fats

### VITAMIN A

- aids normal bone and tooth development
- aids in the development and maintenance of night vision
- aids in maintaining the health of the skin and membranes

### VITAMIN D

- factor in the formation and maintenance of bones and teeth
- enhances calcium and phosphorus absorption and utilization

### VITAMIN E

- a dietary antioxidant

- a dietary antioxidant that protects the fat in body tissues from oxidation

#### VITAMIN C

- a factor in the development and maintenance of bones, cartilage, teeth and gums
- a dietary antioxidant
- a dietary antioxidant that significantly decreases the adverse effects of free radicals on normal physiological functions
- a dietary antioxidant that helps to reduce free radicals and lipid oxidation in body tissues

#### THIAMINE (VITAMIN B1)

- releases energy from carbohydrate
- aids normal growth

#### RIBOFLAVIN (VITAMIN B2)

- factor in energy metabolism and tissue formation

#### NIACIN

- aids in normal growth and development
- factor in energy metabolism and tissue formation

#### VITAMIN B6

- factor in energy metabolism and tissue formation

#### FOLATE

- aids in red blood cell formation
- a factor in normal early fetal development
- a factor in the normal early development of the fetal brain and spinal cord

#### VITAMIN B12

- aids in red blood cell formation

#### PANTOTHENIC ACID

- factor in energy metabolism and tissue formation

#### CALCIUM

- aids in the formation and maintenance of bones and teeth

#### PHOSPHORUS

- factor in the formation and maintenance of bones and teeth

#### MAGNESIUM

- factor in energy metabolism, tissue formation and bone development

#### IRON

- factor in red blood cell formation

#### ZINC

- factor in energy metabolism and tissue formation

#### IODINE

- factor in the normal function of the thyroid gland

#### SELENIUM

- a dietary antioxidant involved in the formation of a protein that defends against oxidative stress

If looking to make a new nutrient function claim for nutrients for which a Recommended Dietary Allowance [RDA], Adequate Intake [AI], or Acceptable Macronutrient Distribution Ranges [AMDR] have been established, you're encouraged to go first to the Food Directorate for approval.

### C) GENERAL HEALTH CLAIMS – “HEALTHY CHOICE”, ETC.

Finally, we come to general health claims – statements about a food being a **‘healthy’ choice, ‘good for you’, or endorsed by a particular organization**. Not much new here, as the legislative framework surrounding such claims remains the same – it is the prohibition against false or misleading claims. Box: Of particular note, though, is that trade-marks, brand names, and the like are subject to all of the restrictions and guidance we have discussed above. In other words, an impermissible claim cannot be defended because it happens to be a trade-mark. Also, advertisers should be aware of the guidance available from Health Canada for how to reference, refer to and use the *Canada’s Food Guide* in such communications.

Of particular note, though, is that trade-marks, brand names, and the like are subject to all of the restrictions and guidance we have discussed above.

## UNFORTIFIED FLOUR - ENFORCEMENT HEATS UP

**Bottom Line:** If you import, manufacture or distribute foods with flour, you'd better double-check that the flour is fortified. Spot checks and enforcement is increasing, so don't risk costly and lengthy delays at the border.

The Food and Drugs Regulations require all foods that contain white flour and are sold in Canada (including bread, confectionary, and baked goods) to be made with enriched flour. Thus, with few exceptions, the sale of unenriched white flour or foods containing unenriched white flour is not permitted in Canada.

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In 2009 and 2010, the Canadian Food and Inspection Agency [CFIA] and Health Canada have increased their enforcement program relating to mandatory flour fortification. They've also asked Canada Border Services Agency [CBSA] to increase its spot checks at the border.

The enrichment of white flour with thiamine, riboflavin, niacin, folic acid and iron (with optional vitamin B6, pantothenic acid, magnesium and calcium), is designed to help improve the nutritional value of the Canadian food supply and help prevent nutrient deficiencies.



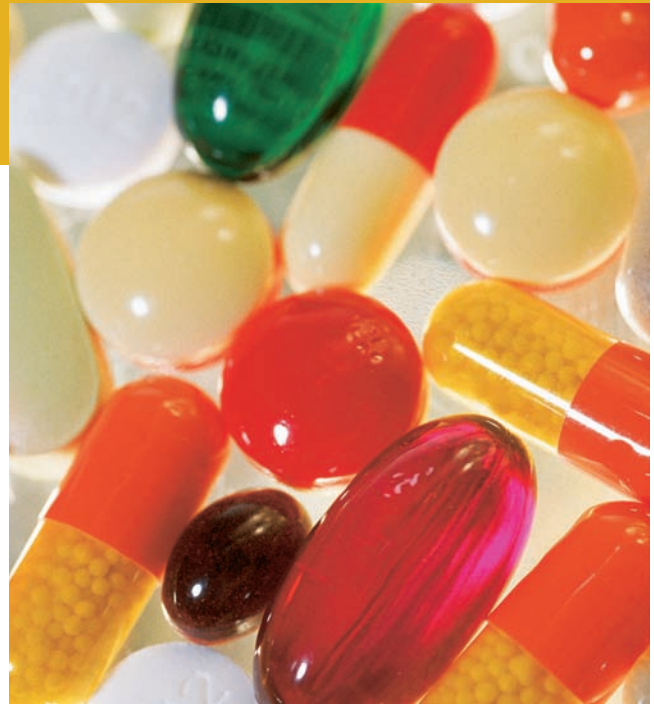
## TIRED OF WAITING FOR YOUR NHP PRODUCT LICENCE? – THE NHP EXEMPTION REGS BRING GREAT NEWS

**Bottom Line:** Effective August 3, 2010, regulations came into effect to allow for the sale of certain unlicensed Natural Health Products [NHPs] in Canada. *The Natural Health Products (Unprocessed Product Licence Application) Regulations* [Exemption Regs] will create a temporary regime of Exemption Numbers [ENs], allowing products for which applications have been filed, but not yet approved, to nonetheless get to market and be sold (and advertised) in Canada. It's a welcome fix, albeit temporary, to a long-standing problem.

### BURIED WITH BACKLOG

Now, you may be asking, wasn't the whole point of creating a regulatory regime for NHPs to require that these products be screened through a licensing process before being allowed for sale? In short, yes. But, the practical reality is that the NHP Directorate, the body charged with working through those licence applications, has been facing a tremendous backlog since Day 1. In 2004, when the *Natural Health Product Regulations* [NHP Regs] came into force, it was estimated that there were some 40,000 products on the market that would need to be licensed. According to Health Canada, as of mid-June 2010, there are still over 11,000 NHPs for which a product licence has been filed but is not yet fully processed. That means 11,000 NHPs in limbo, waiting for the green light from the Directorate – or, more likely the case, being sold in contravention of the law. To address the problem of this backlog, Health Canada has proposed a temporary solution that would enable NHPs to be sold legally while awaiting their product licences - provided that they meet certain safety criteria.

That means 11,000 NHPs in limbo, waiting for the green light from the Directorate – or, more likely the case, being sold in contravention of the law.



### TIMING TO GET THE EXEMPTION

The process to assign an EN must be initiated by the NHPD no later than 180 days from filing the application, if within that time no decision has been made on whether to issue or refuse a licence, and certain safety criteria are met. What about product licence applications that were already in the queue when the Exemption Regs came into force? You should shortly have your EN, if you don't already – as soon as 15 days of the law coming into force, or 180 days from the date the application was submitted. Within 60 days of the EN being assigned, you must give consent to a Health Canada posting on its website and confirm certain safety information, including that the product:

- is not a sterile product for ophthalmic use;
- does not contain an ingredient that is prohibited from being sold in a drug under the *Food and Drug Regulations* (e.g. arsenic, mercury);
- is not, to the best of the applicant's knowledge, a product containing an ingredient that is likely to result in injury to the health of a consumer or purchaser, and whose presence in an NHP or other drug has led to a recall or stop sale under the NHP Regs or the *Food and Drug Regulations*;
- is not recommended for use to treat, prevent or cure a serious disease (as listed in Schedule A of the *Food and Drugs Act*); or
- is not recommended for use in children under 12 years of age, or pregnant or breastfeeding women.

### WHAT DOES THE EXEMPTION DO FOR YOU?

Once the EN is posted on the Health Canada website, you're good to go. You will be deemed to hold a product licence, and the prohibitions against sale of an unlicensed product in the NHP Regs will not apply. The EN is then to be used on product packaging within a reasonable time while still waiting for the NPN to be issued.

If you don't confirm the posting and safety information, however, then no exemption will apply. So, only where the EN has made it to Health Canada's website, can you count on impunity while waiting for it all to be official. It is also important to note that an exemption is not a 'get out of jail free' card for all aspects of the NHP Regs. Site licences must still be obtained, and all the other requirements, such as having to file safety information upon request, adverse reaction reporting, proper labelling, record keeping, and obeying any stop sale orders, etc., are all still applicable. But, if you're just one of those still waiting for your product application to make it to the top of the pile, your legal and regulatory departments may be breathing a little easier very soon that continued sales need not be in contravention of the law. The EN would be valid until the product's application is approved, withdrawn, rejected or until the Exemption Regs are repealed - which is scheduled to happen 30 months after coming into force.

It is also important to note that an exemption is not a 'get out of jail free' card for all aspects of the NHP Regs.

### YOU CAN START ADVERTISING!

And, what does this mean for advertising? Of course, the official position had been that while the sale of unlicensed NHPS was contrary to law, it would not be permissible to advertise them. Advertising Standards Canada, for example, would not accept scripts for review until an NPN was issued. Now, though, for products that have been issued an EN, NHPS can be advertising and claims assessed in reference to the Product Licence Application [PLA] instead of the Terms of Market Authorization [TMA].



## NEW GMPS FOR COSMETICS – ISO STANDARD ENDORSED

**Bottom Line:** A new Good Manufacturing Practices [GMP] recommendation for cosmetics was recently released by the Cosmetics and Personal Care Division of Health Canada. Prior to its release, Health Canada would refer manufacturers to the U.S. Food and Drug Administration Cosmetic Good Manufacturing Practices Guidelines, as well as those issued by organizations such as Canadian Cosmetic, Toiletry and Fragrance Association.

A new Good Manufacturing Practices [GMP] recommendation for cosmetics was recently released by the Cosmetics and Personal Care Division of Health Canada.

The *Food and Drugs Act* prohibits the sale of cosmetics that are manufactured or packaged under unsanitary conditions. As such, Health Canada is inviting cosmetics manufacturers to review their GMPs to ensure they contemplate the proposed benchmark standards.

In partnership with the International Cooperation on Cosmetic Regulation (to which the United States, the European Union and Japan are party), Health Canada has endorsed the International Organization for Standardization's [ISO] Standard 22716 Guidelines on Good Manufacturing Practices for Cosmetics.

The ISO Standard 22716 does not instruct *how* products should be manufactured; rather, it contemplates certain *outcomes* and attributes of the manufacturing processes. The following GMP considerations are taken from the Health Canada new GMP program release:

### Building and Facilities

- building is adequate for the manufacture and storage of cosmetics
- walls, floors, fixtures, ducts, pipes, lighting, ventilation, water supply, drainage, toilet facilities are adequate for the work and in good repair
- building has adequate air supply quality
- building has adequate pest control program to prevent attracting or harbouring pests



### Equipment

- equipment used in processing is adequate, well maintained, and free from contamination

### Personnel

- personnel have adequate education, training, experience and personal cleanliness

### Raw Materials

- raw materials are stored and handled to prevent contamination or alteration
- materials are tested or examined to assure quality

### Production

- manufacturing and control procedures are established and written instructions for procedures are maintained

### Laboratory Controls

- raw materials, samples and finished products are tested or examined to ensure they meet the defined standard
- water supply is free from contamination

### Records

- records are maintained for raw materials, manufacturing, finished products and distribution

### Labelling

- labels on finished product contain the required information (including lot numbers)

### Complaints

- establishment maintains a consumer complaint file

### Other

- products adhere to all regulatory requirements
- products do not contain prohibited ingredients or substances

The cosmetics GMP responsibility does not begin and end with the manufacturer – importers and distributors are encouraged to connect with their suppliers abroad (including in the United States) to ensure that their GMPs are sound and reflect Health Canada's expectations.



## CANADA'S NEW CONSUMER PRODUCT SAFETY LEGISLATION – THE SAGA CONTINUES

**Bottom Line:** We admit it. We expected the new *Canada Consumer Product Safety Act* ["CCPSA"] to be passed by the end of 2009, but the Senate surprised us with amendments last October. Then, when Parliament was prorogued in December without those amendments coming to a vote, the legislation was left hanging and died on the Order Paper. Now, we're literally right back to square one.

### SENATE AMENDMENTS INTRODUCED IN FALL 2009

Regular readers of the Update will recall that the *CCPSA* promises an extensive modernization of Canada's product safety regime. When the Senate got hold of the Bill last fall, it introduced numerous amendments - primarily to restrict the authority of inspectors, and to increase notice requirements should the government need to disclose personal, business or confidential information to protect health and safety. The Senate also created a system of voluntary recall, under which inspectors were required to ask manufacturers/importers/sellers to voluntarily recall a product before they would be ordered to do so.

Regular readers of the Update will recall that the *CCPSA* promises an extensive modernization of Canada's product safety regime.



### SENATE AMENDMENTS SCRAPPED IN JUNE 2010

The Bill was re-introduced in the House of Commons on June 9, 2010 (Bill C-36, An Act Respecting the Safety of Consumer Products). This version scraps almost all of the Senate amendments, and so we're almost right back where we started. One of the few amendments kept would allow inspectors to be held liable for any damage they caused while on private property.

### WHAT WILL HAPPEN NOW?

There have been changes in the composition of the Senate since 2009, so it is hard to say whether there will be push back from the Upper House once the Bill is passed by the House, or whether it will sail through without a fuss. That is, if it makes it that far. As we write this, the new Bill has had its Second Reading (October 7, 2010) and been referred to the Standing Committee on Health. If there is an election call or no political will to move the legislation forward, then it could continue to languish. Eventually, though, we think this thing will become law. Really.

## BIG CHANGES TO QUEBEC'S CONSUMER PROTECTION ACT ARE NOW IN FORCE

### MORE PROTECTION FOR THE CONSUMER MEANS IMPORTANT NEW RESTRICTIONS ON YOUR MARKETING PRACTICES AND CONTRACTS

On June 30, 2010, Bill 60, an *Act to Amend the Consumer Protection Act and Other Legislative Provisions* and the *Regulation to Amend the Regulation respecting the Application of the Consumer Protection Act* came into force. The amendments affect many business practices and elements, with:

- new rules for contracts involving sequential performance for services provided at a distance (e.g. cell phones, internet);
- new regulation of Prepaid (Gift) Cards;
- new restrictions on unilateral modification of certain types of contracts;
- new provisions for extended warranties;
- new requirements to advertise total price.

We summarize below some of the significant changes.

#### STRICT NEW RULES FOR CELL PHONES, INTERNET, CABLE CONTRACTS, ETC. (CONTRACTS INVOLVING SEQUENTIAL PERFORMANCE FOR SERVICES PROVIDED AT A DISTANCE)

The *Consumer Protection Act* [CPA] prescribes the content of contracts for services such as the provision of cell phones, cable or Internet. Of importance, the new provisions include the following:

- automatic renewal for a contract with a term that exceeds 60 days is prohibited, unless it is renewed for an indeterminate term;
- as a merchant, you must send a written termination notice 60-90 days before the end of the contract;
- at any time and for any reason, consumers will be entitled to cancel their contracts by sending a written notice - and termination fees are restricted or curtailed;
- you must clearly disclose monthly rates, the total amount of monthly payments, the restrictions on the use of the services as well as any geographic limitations on use, any service offered as a premium and the economic inducements offered (including their total value) and the manner by which the consumer can cancel the contract and the related costs.



The new provisions limit the penalties that you may impose on a consumer for cancelling a contract. In addition, they provide that a consumer will not have to pay an indemnity to you if he/she decides to cancel the contract following your unilateral modification of the terms and conditions.

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#### PREPAID CARDS – NO MORE EXPIRY DATES

Expiry dates are now prohibited on prepaid gift certificates, gift cards, or similar media of exchange that are paid for in advance [Prepaid Cards], **unless** the contract provides for unlimited use of a service.

As a merchant, you will need to **disclose all the conditions** applicable to the use of Prepaid Cards, including how the consumer can check the balance on the Prepaid Cards, **before selling them**. This information must either appear on the card or be otherwise provided to the consumer in writing. Also, if the consumer requests a refund of the balance of the Prepaid Card, you will have to **reimburse any balance that is \$5 or less**.

Furthermore, fees charged to the consumer for the issuance or use of the Prepaid Card are prohibited, unless the contract provides for unlimited use of a service (subject to regulations).

The regulation provides for exemptions. For example, Prepaid Cards for mobile telephone services can continue to indicate an expiry date and merchants do not have to refund their balance.

### **RESTRICTED MODIFICATION OF PRICE, DURATION, OBJECT OF CONTRACT OR NATURE OF GOODS/SERVICES**

If you want to be able to unilaterally amend a contract, you will need a stipulation in the contract which, among other things, specifies the elements that can be amended and that you must send a notice. You will therefore need to send a written notice to your consumers, at least 30 days before the amendment comes into force, during which consumers will be entitled to cancel the contract without being penalized and without cost.

In a fixed-term contract, you won't be able to unilaterally modify the price, the duration of the contract, the object of the contract or the nature of the goods or services. If the modification is for anything else, you will need to send a 60-day written advance notice to consumers specifying what is to be amended (the old and the new clauses) and the date of effect.

In addition, you won't be entitled to unilaterally cancel a fixed-term contract involving sequential performance of a service. Only indeterminate term contracts will be subject to cancellation by merchants upon a 60-day written notification to the consumer who has not defaulted on his obligations.

### **EXTENDED WARRANTIES**

Before selling an extended warranty, you will need to inform consumers, verbally and in writing (with specific format), of the legal guarantee as well as the content and duration of any guarantee offered for free, including that of the manufacturer. You are required to read to the consumer the following text: "The law provides a warranty on the goods you purchase or lease: they must be usable for normal use for a reasonable length of time."

However, if the sale of an extended warranty takes place on the Internet, for example, you are not required to inform the consumer orally of the existence and nature of the legal warranty. You can forward a notice concerning the legal warranty to the consumer by email, SMS or another format that is not paper-based. Also, you are not required to comply

with the formatting criteria (size of font, page layout) for the notice. Instead, the notice you give the consumer must be:

- specifically brought to the consumer's attention (this requirement is met by placing a prescribed excerpt on a page which contains only such notice);
- set out legibly; and
- such that the consumer may easily store and print it.

You are not required to inform consumers of the existence and duration of a manufacturer's warranty if this information is specifically brought to the consumer's attention and it is set out legibly.

However, you must inform the consumer if she asks you for information on all the other elements of the manufacturer's warranty (for instance, during a chat session).

### **ADVERTISING THE TOTAL PRICE**

You must now advertise the total amount that consumers will need to pay for a good or service. The total amount includes all administrative fees or fees related to the environment. Taxes are excluded from the advertised price, such as HST, the QST and other fees payable under a provincial or federal statute that must be collected directly from the consumer and paid to a public authority (for example, the \$3 per tire when purchasing new tires).

Nothing prevents a merchant from specifying that the price advertised includes environmental fees, as long as the price advertised:

- is the price that the consumer is invoiced;
- includes the total of the amounts to be paid; and
- is given more emphasis than the amounts that make up the price.

If you sell goods on instalments, you will now have to also show the total price in your ads, and it will need to be given more emphasis than the instalment amounts.

## OTHER MODIFICATIONS

### No More Automatic Contract After Promo Period Finished

It has been increasingly common for merchants to provide that, when a promotional period finishes, a contract will automatically result if the consumer doesn't notify the merchant that he/she doesn't want the good or service. That practice will now be prohibited.

No More Automatic Contract After Promo Period Finished

### Clearly Show Clauses Inapplicable to Quebec

If your contract includes any clauses that are inapplicable in Quebec, you will be required to clearly indicate that by a notation before such clauses. The following are examples of clauses that are prohibited:

- a stipulation intended to exclude or restrict the legal warranty provided for in the CPA (that a good be fit for its intended purpose or be durable for a reasonable length of time, given its nature);
- a stipulation intended to exclude or limit the obligation of a merchant or manufacturer to be bound by a written or verbal statement made by its representative concerning goods or services; and
- a stipulation having the effect of obliging a consumer to submit a dispute to a court other than a court in Québec.

Clauses by which fees, damages or penalties are determined in advance in case of breach by consumers (except for interest accrued) are prohibited. A merchant can still claim damages from a consumer, but he will have to prove them.

Consumer Advocacy Groups Can Now Apply For Injunctions!

### Consumer Advocacy Groups Can Now Apply For Injunctions!

With the new provisions, it is not only the *Office de la protection du consommateur* [Office] who can apply for an injunction ordering a person or company to stop prohibited practices, or ordering the merchant to cease including a stipulation to a contract that's inapplicable in Quebec. This power has now been extended to any consumer advocacy group that has been constituted as a legal person for at least one year.

This will require merchants, retailers and advertisers to exercise more care and ensure compliance with the CPA.

La Belle Province.

## CANADA INTRODUCES BROAD NEW ANTI-SPAM BILL

**Bottom Line:** On May 25, 2010, the Government of Canada introduced anti-spam legislation titled Bill C-28, the *Fighting Internet and Wireless Spam Act (FISA)*.

### FISA'S BROAD COVERAGE

FISA regulates the sending of commercial “electronic messages” (defined to include text, sound, voice and image messages sent to an email, instant messaging, telephone or similar account). It goes further, however, to effect prohibitions of other problematic internet practices. These include:

- **Spyware** - The unauthorized installation of computer programs without express consent (for example, spyware and other surreptitiously installed software);
- **Alteration of Data** - The alteration of transmission data in an electronic message so that a message is delivered to a destination other than or in addition to that specified by the sender without express consent;
- **False or Misleading Information** - Sending false sender or subject matter information or false or misleading content in an electronic message (accomplished by amending the *Competition Act*); and
- **Harvesting** – Collecting personal information or electronic addresses by unauthorized access to computer systems (accomplished through amending Canada’s federal privacy law for the private sector, the *Personal Information Protection and Electronic Documents Act* or “PIPEDA”).

FISA therefore goes beyond anti-spam legislation in the U.S., which focuses only on e-mail spam.

FISA therefore goes beyond anti-spam legislation in the U.S., which focuses only on e-mail spam.

### EXCEPTIONS

Generally, FISA requires express consent to the delivery of electronic messages. This rule is subject to limited exceptions, however:



- a. **When Implied Consent Allowed** – Consent may be implied in a limited set of circumstances, most notably in the case of an existing business relationship. Businesses, charities and political parties who have an established relationship with a recipient may generally rely on implied consent for the delivery of electronic messages for a period of two years after a purchase, donation or termination of the relationship. After the two years, express consent must be sought.
- b. **When No Consent Required** – There are limited circumstances in which consent is not required to send a commercial electronic message, such as:
  - commercial inquiries and applications;
  - quotes or estimates;
  - confirmations of transactions;
  - warranty or product recall information;
  - messages between those who have personal or family relationships; and
  - messages that provide notification of factual information about an existing product, goods or a service.

### FORM AND CONTENT REQUIREMENTS

Under FISA, electronic messages will need to:

- identify the sender as prescribed;
- provide accurate contact information for the sender; and
- provide a working unsubscribe mechanism.

## PENALTIES AND PRIVATE RIGHT OF ACTION

The penalties for FISA violators would be significant. The Act would allow the Canadian Radio-television and Telecommunications Commission [CRTC] to impose administrative monetary penalties of up to \$1 million per violation for individuals and up to \$10 million per violation for businesses.

A private right of action would allow consumers and businesses to take civil action against anyone who violates FISA. Statutory damages are provided as well, of \$200 for each violation of the unsolicited electronic message provision of the Act, up to a maximum of \$1 million each day.

### GET READY TO COMPLY ...

FISA, once passed, would impose new compliance requirements, so if you send out electronic messages, you should consider planning for these changes now.

Here's a preliminary To-Do List:

- a. consider whether and when express consent will be required, implied consent will be permissible, or you won't need any form of consent;
- b. review your current electronic messages to see if they meet FISA's form and content requirements;
- c. review your privacy policies and related consent procedures; and
- d. if you install computer programs on another person's computer-based device (in the course of your commercial activities), review your consent and disclosure practices to confirm compliance with the Act.

## TIMING

This isn't the first time around for this legislation. Similar legislation had made it to Third (and Final) Reading in the House of Commons last year - i.e. Bill C-27 or the *Electronic Commerce Protection Act* [ECPA] - but it died in the Senate when Parliament was prorogued in December 2009. For the most part, FISA mirrors the ECPA as it had been tabled in the Senate before, so one wouldn't expect it to be too contentious.

As for when this might become law, it could happen this year if the legislation is fast-tracked (i.e., returned to the Senate committee for consideration where it had left off in December). This appears increasingly unlikely, and the Bill may well have to start the legislative process anew. In that case, it will not pass into law in 2010 - and then its fate may depend on the timing of the next federal election.

For a detailed briefing on FISA, please see the overview available at Heenan Blaikie's AccessPrivacy website: [http://www.accessprivacy.com/docs/FISA\\_brief.pdf](http://www.accessprivacy.com/docs/FISA_brief.pdf).

## NEW DATA BREACH REQUIREMENTS

**Bottom Line:** In light of a number of high-profile data breaches involving personal information of consumers, new mandatory data breach notification requirements have been passed in Alberta, requiring organizations to notify the Privacy Commissioner in the case of such a breach. In addition, amendments have been introduced (not yet passed) at the federal level that include a data breach notification reporting regime.

### REQUIREMENTS UNDER PIPA ALBERTA

Amendments to Alberta's *Personal Information Protection Act*, which came into force in May 2010, make it an offence for an organization to fail to provide notice to the Office of the Information and Privacy Commissioner [OIPC] of a breach where there is a real risk of significant harm to an individual.

Specifically, organizations are required to, "without unreasonable delay, provide notice to the Commissioner of any incident involving the loss of or unauthorized access to or disclosure of the personal information where a reasonable person would consider that there exists a real risk of significant harm to an individual as a result of the loss or unauthorized access or disclosure."

Notice to the Commissioner must be in writing and include the following:

- a description of the circumstances of the loss or unauthorized access or disclosure;
- the date on which or time period during which the loss or unauthorized access or disclosure occurred;
- a description of the personal information involved in the loss or unauthorized access or disclosure;
- an assessment of the risk of harm to individuals as a result of the loss or unauthorized access or disclosure;
- an estimate of the number of individuals to whom there is a real risk of significant harm as a result of the loss or unauthorized access or disclosure;
- a description of any steps the organization has taken to reduce the risk of harm to individuals;



- a description of any steps the organization has taken to notify individuals of the loss or unauthorized access or disclosure; and
- the name of and contact information for a person who can answer, on behalf of the organization, the Commissioner's questions about the loss or unauthorized access or disclosure.

The OIPC may subsequently require organizations to notify affected individuals of the breach. The notice must be given directly, although it may be given to the individual indirectly if the Commissioner determines "that direct notification would be unreasonable in the circumstances."

Notification to affected individuals must include:

- a description of the circumstances of the loss or unauthorized access or disclosure;
- the date on which or time period during which the loss or unauthorized access or disclosure occurred;
- a description of the personal information involved in the loss or unauthorized access or disclosure;
- a description of any steps the organization has taken to reduce the risk of harm; and
- contact information for a person who can answer, on behalf of the organization, questions about the loss or unauthorized access or disclosure.

### PROPOSED AMENDMENTS TO PIPEDA

Similar amendments have been proposed at the federal level. Bill C-29, *An Act to amend the Personal Information Protection and Electronic Documents Act* [PIPEDA], includes a requirement to report "any material breach of security safeguards involving personal information under its control" but these amendments are not yet in force.

## UPDATE ON SOCIAL NETWORKING/PRIVACY INVESTIGATIONS

Canadian privacy regulators have been key drivers in the development of the law relating to privacy and social networking websites. The Office of the Privacy Commissioner of Canada [OPC] is currently investigating multiple complaints launched by individuals and advocacy groups against both Canadian and international social networking websites – including Facebook, Nexopia and Google.

### FACEBOOK

In May 2008, the Canadian Internet Policy and Public Interest Clinic [CIPPIC] filed the first social networking complaint. CIPPIC made a series of allegations about Facebook’s privacy practices, which fell into the following categories:

- The collection of date of birth
- Facebook advertising
- Default privacy settings
- Third-party applications
- New uses of personal information
- Collection of personal information from sources other than Facebook
- Account de-activation and deletion
- Accounts of deceased users
- Personal information of non-users
- Facebook mobile safeguards
- Monitoring anomalous activity
- Deception and misrepresentation

The OPC released a detailed Report of Findings in July 2009 [Finding], which includes some key findings and recommendations of particular relevance to marketers.

Although accepting that Facebook’s business model requires revenues from advertising, the Assistant Commissioner recommended that Facebook be more transparent with users about its advertising practices. Specifically, “Facebook was asked to more fully explain advertising and inform users that their profile information is used for targeted advertising.”

The Finding also included a recommendation regarding the site’s refer-a-friend feature. The Assistant Commissioner found that Facebook could rely on users to obtain the consent of



their “friends” (non-users) whose email addresses are made available to Facebook, provided that the company exercises reasonable due diligence. In the circumstances, the OPC held that “reasonable due diligence... would consist in taking appropriate steps to ensure that users are well aware that they must obtain non-users’ consent before disclosing their e-mail addresses to Facebook.” This issue was resolved when Facebook agreed to add appropriate language to its Statement of Rights and Responsibilities informing users of their obligations to obtain the consent of non-users before providing their email addresses.

The OPC indicated in late September that the issues raised in the complaint had been resolved to its satisfaction.

### OUTSTANDING INVESTIGATIONS – FACEBOOK, NEXOPIA, GOOGLE

Following the original Facebook complaint, the OPC has remained active in the realm of privacy and social networking. However, we still await the OPC’s findings on a number of important decisions in 2011.

Facebook is not the only social networking website that has been under investigation by the OPC. The Public Interest Advocacy Centre launched a complaint against **Nexopia**, a Canadian website that describes itself as “Canada’s largest youth-oriented social networking site.” In addition to investigating the alleged six violations of PIPEDA, the OPC was also encouraged by the Centre to examine the treatment of the personal information of minors.



Lastly, **Google** came to the attention of the OPC last winter when it rolled out its new “Buzz” application. The OPC asked Google to explain how the new social networking application had addressed privacy since its launch. “Buzz” had been added to the accounts of existing Gmail users without their knowledge and consent and a friend list of followers was

created for each user based on those with whom they corresponded most often on Gmail. In addition, and by default, this list of followers was included in an online profile.

We still await a formal letter of finding from each of the above investigations.

## PROFESSIONAL NEWS



**Wendy Reed** was again listed in “*Best Lawyers in Canada*” (2011) for Marketing & Advertising Law (Woodward/White). Continuing her work in Green Marketing & Advertising, Wendy spoke on *Green Marketing Law Around the World* at a conference sponsored by the Global Advertising Lawyers Alliance [GALA] in **Boston** in May, 2010, and is speaking on the same topic at the annual Law Conference of the Promotion Marketing Association [PMA] in **Chicago** on November 18, 2010. She also assisted in compiling **GALA’s 2010 Green Marketing Law Survey** of GALA members in 46 countries, released in May, 2010, as an update to the 2009 survey. She organized and chaired Heenan Blaikie’s second annual Earth Week Event on April 21, 2010, which presented *Four Perspectives of What Lies Ahead*. Our eminent speakers included Andrew Pelletier, VP Corporate Affairs & Sustainability of Walmart Canada, the Hon. Ministry of Energy & Infrastructure, Brad Duguid, the Hon. Donald Johnston, former head of the OECD (1996-2006) and Dr. John McDonald, CEO of Day4 Energy. See Video trailer and individual speeches at [http://heenanblaikie.com/images/newsletter/events/green\\_event\\_site/home.htm](http://heenanblaikie.com/images/newsletter/events/green_event_site/home.htm)

and *Ensuring Your Legal Protections are in-Step with Highly Innovative Viral Advertising and Marketing Campaigns*, Canadian Institute, Toronto, January 22, 2010.

**John Salloum** presented on “*Going Global: Running a Worldwide Sweepstakes Campaign that Complies With Varying Country’s Laws*” in **New York** at the American Conference Institute’s 4th Annual Focus on Sweepstakes, Contest, & Promotions in September 2010. He spoke on “*The Internet of Things*” at the PIPA Conference 2010, hosted by the Office of the Information and Privacy Commissioner of Alberta and the Office of the Information and Privacy Commissioner of British Columbia on November 3, 2010, and was a Guest Lecturer on *Marketing Practices under the Competition Act* at **Dalhousie Law School** on October 7, 2010. John will also be speaking on, “*The Fundamentals of Advertising and Marketing Law Applied to Social Media*” at the Canadian Institute’s 17th Annual Advertising and Marketing Law conference in **Toronto** on January 19, 2011.

**Catherine Bate** was recognized in the “*Canadian Lexpert Directory*” as “Repeatedly Recommended” in the field of Advertising and Marketing Law, and on LawDay.ca as a leading lawyer in the field. On the speaking circuit, Cathy spoke on “*Sustainable Green Marketing: An Update on Best Practices in Environmental Advertising Claims*” at the Osgoode Professional Development Teleseminar, York University, May 27, 2010, on *Legal Issues in Online Marketing: Social Networks, Viral Marketing and User Generated Content*, Université de Montréal, Montreal, March 10 and 11, 2010,

**Adam Kardash** was a panelist at the Office of the Privacy Commissioner of Canada, 2010 Consumer Privacy Consultations on the “*Privacy Implications of Cloud Computing*,” in **Calgary** in June, 2010; moderated a panel on “*Religious Perspectives on Privacy*” at the International Association of Privacy Professionals’s Canada Privacy Symposium 2010 in **Toronto** in May, 2010; chaired the AccessPrivacy<sup>HB</sup> 2010 Privacy Conference, in **Toronto** in

May, 2010; presented on "Social Media and its Collision with Global Privacy and Data Protection" at the 2010 ANA Advertising Law and Public Policy Conference, in **Washington, DC** in March, 2010; presented "Privacy Case Law: A Year in Review" at the Ontario Bar Association's Annual Institute, in **Toronto** in February, 2010; provided an "Update on Canadian Privacy Law" at the New York Privacy Officers' Forum in **New York**, in February, 2010; moderated a panel entitled "Employee Privacy Related Issues" at the Northwind Privacy Invitational Forum, in **Cambridge, Ontario** in November, 2009; and moderated the "Chief Privacy Officer Roundtable" at the Thirteenth Annual IT.CAN Conference, in **Toronto** in October, 2009.

**Subrata Bhattacharjee** was appointed Chair of the Competition Law and Policy Committee of the Canadian Chamber of Commerce in 2010, and continues to be recognized as one of Canada's leading competition/antitrust lawyers in the most recent editions of **Chambers Global, International Who's Who of Competition Lawyers and Economists**, and other peer rated surveys. Since the last Update, Subrata chaired the Canadian Bar Association – Competition Law Section 5<sup>th</sup> Annual Competition Law Spring Forum held in Toronto, and was a panellist in numerous programs, including the Canadian Institute Advertising & Marketing Law Conference on January 21, 2010, speaking on, "Catching up with Regulators about the Latest *Competition Act* Amendments," the 58<sup>th</sup> Annual Antitrust Spring Meeting organized by the American Bar Association Section of Antitrust Law, the Asia-Pacific Economic Co-operation Council 2010 Senior Officials Meeting, and other domestic and international meetings.

**Martha Harrison** is listed in the **Expert Guide Legal Media Guide to the World's Best Lawyers** for international trade, and was recently honoured as an inaugural recipient of the "Best of the Best Women in Corporate Law, International Trade, Canada Expert Guide 2010." Martha has been active on the speaking circuit in 2010 on both international trade and regulatory fields. She presented on Canadian food and product regulation in Canada at various venues, including Importers and Exporters Association of Canada, the Brazilian Consulate in Canada, Forum for International Trade Training and other industry associations.

## OUR GROWING TEAM

As our practice continues to grow, we were delighted to welcome five new members to the group in 2010 - in Toronto, Montreal and Calgary:

**Julie Larouche** joined us on September 13, 2010, having previously practised for a number of years at an intellectual property firm in Montreal and as inhouse counsel at a well-known entertainment company. With law degrees in both civil and common law, Julie will be practising marketing & advertising law out of our Montreal office.

**Sara Perry** joined our marketing and advertising law practice on April 19, 2010. Sara began her career in the Canadian advertising and public relations industry, being honoured in 2003 as one of 12 market leaders in *Marketing Magazine's* "Ones to watch: Marketing's Next Generation" featuring Canada's top industry achievers under age 30. She obtained her law degree in British Columbia and then ventured south and east, getting called to the Bar of New York and practising at a major U.S. corporate/commercial law firm and an eminent New York advertising and entertainment law firm. Sara is currently a foreign legal consultant with our firm and is scheduled to be called to the Ontario Bar in January, 2011, practising only Canadian law.

**Rachel St. John** recently joined Heenan Blaikie, also from a major U.S. law firm. She regularly advises clients on the legal and regulatory compliance considerations associated with online and mobile marketing, social networking and behavioural advertising and will be invaluable in assisting with privacy, data security and information management issues. Rachel will be working primarily out of our Calgary office.

**Bridget McIlveen** returned to Heenan Blaikie' marketing, advertising and privacy practices as an associate in 2010 after summering and articling with the firm. She graduated from University of Ottawa's Faculty of Law where she completed a Law & Technology option.

**Monique Gagné** is our new dedicated marketing and advertising law clerk. Monique was previously Legal Affairs Manager at a multinational confectionery company from 2006 to 2010, a paralegal at a technology company from 2005 to 2006, and a law clerk at a major loyalty program company from 1994 to 2005.

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Heenan Blaikie is a full-service firm with more than 525 lawyers and professionals in nine offices across Canada. Our Marketing and Advertising Law Practice advises clients on a full range of issues including packaging and labelling; misleading and comparative advertising; advertising disputes; contests, games, sweepstakes and other promotional programs; marketing and promotion-related agreements; the marketing of regulated products (foods, drugs, natural health products, cosmetics and medical devices); and the laws relating to direct selling, direct mail and telemarketing. The group draws strong support from our practices in entertainment and communications law, intellectual property, business law and litigation.

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