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CANADIAN Marketing, Advertising & Regulatory Law Update

Supreme Court of Canada: "Average Consumer" is "Credulous and Inexperienced"

Bottom Line: Determining whether the general impression of your advertising is false or misleading can be tricky. For one thing, whose "general impression" is it that counts – the suspicious consumer or the credulous consumer? The Supreme Court of Canada ("SCC") considered this exact issue in the context of the Quebec *Consumer Protection Act* ("CPA") in its February 28, 2012 decision of *Richard v. Time Inc., 2012 SCC 8.* Surprising many, the SCC went for the latter standard – i.e., the "credulous consumer."

THE SOLICITATION

In this case, Mr. Jean-Marc Richard received a personalized "Official Sweepstakes Notification" from Time Inc. ("Time") in the mail. It contained several sentences in bold upper case letters announcing that he had won a cash prize of $833,337. These statements, however, were conditioned, in smaller print, upon the recipient having the grand prize winning entry and returning it by the deadline provided. Mr. Richard, believing he had won the amount indicated, returned the reply card and subscribed to receive *Time Magazine* for a period of two years. While he began receiving his magazine, he did not receive the money he expected. The SCC considered whether, in this context, the solicitation Mr. Richard had received amounted to false and misleading advertising contrary to the CPA. ▶

FEATURING

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At issue were the following provisions of the CPA. Section 218 states that: **To determine whether or not a representation constitutes a prohibited practice, *the general impression it gives*, and, as the case may be, the literal meaning of the terms used therein *must be taken into account. (emphasis added)***

And section 219 states as follows:

No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representation to a consumer.

ROLLER COASTERING THROUGH THE COURTS

En route to the SCC, the **Quebec Superior Court** determined that Time had contravened these provisions, finding that the document **"was specifically designed to mislead the recipient"** and contained false and misleading representations contrary to the CPA. The Superior Court concluded that the general impression conveyed by the document was that Mr. Richard had won the grand prize. The Superior Court also noted that it was not necessary for anyone to have actually been misled, but rather it was sufficient to find that the "average consumer, that is, the one who is credulous and inexperienced, could be misled." The Superior Court set the value of the moral injuries suffered by Mr. Richard at $1,000 and imposed punitive damages of $100,000.

On appeal, the **Court of Appeal** disagreed and concluded that Time had not violated the CPA as there were no false or misleading representations in the notification. The Court of Appeal suggested that it **was up to the reader to be suspicious of advertisements that seem too good to be true** and, finally, that the **notification would not mislead a consumer "with an average level of intelligence, scepticism and curiosity."** The award of damages was set aside.

The **SCC** reversed the decision again, adopting the stricter, earlier view of the Superior Court. The SCC considered the approach for determining whether a representation is false or misleading in light of the legislative intent which, in this case, is to protect consumers from fraudulent advertising practices. The SCC provided several guidelines for evaluating the general impression of an advertisement:

- The **general impression must be analyzed from an objective standpoint** without regard to the level of intelligence, or lack thereof, of a specific consumer.
- Whether a representation actually misled someone is not relevant – **the issue is whether the advertisement could mislead**.
- The general impression test must take into account the entire context of the ad **including the layout (i.e., the images used, the placement, style and size of the text)**.
- Perhaps most importantly, **the general impression test must be applied from the perspective of the average consumer, who is "credulous and inexperienced" and "takes no more than ordinary care to observe that which is staring him or her in the face upon first contact with an advertisement."** To protect vulnerable persons from the dangers of certain advertising techniques, the average consumer must be someone who is not particularly experienced at detecting falsehoods or subtleties found in commercial representations.

WHAT THE AVERAGE CONSUMER WOULD THINK HERE

The SCC went on to outline a two-part test that involves: (i) describing the general impression that the representation is likely to convey to a credulous and inexperienced consumer; and (ii) determining whether that general impression is true to reality. A finding of "no" at the second stage would mean the ad is offside. In this case, the SCC determined that the average consumer (as they defined it) reading the notification **would have been under the general impression that he had the winning entry** and, in order to receive the funds advertised, **needed only to return the reply coupon within the time period provided**. The rest of the communication, in the view of the SCC, was not sufficient to dispel the general impression conveyed by the more prominent sentences. The SCC did, however, reduce the amount of punitive damages payable from $100,000 to $15,000.

THE LESSONS

Keep in mind the following takeaways when creating advertisements in the future:

- **Don't** rely upon smaller print text to clarify a potentially false or misleading general impression. Any explanatory text or conditional/clarifying language must be prominent, clear and connected to the representation being qualified.
- **Don't** rely on an assumption that consumers will read the fine print. Consider what leaps out at you when looking at the entire ad.
- **Don't** assume that your consumers are intelligent, skeptical or curious. You must view the ad from the point of view of the credulous and inexperienced consumer who takes "no more than ordinary care to observe that which is communicated by the advertisement upon a single viewing." ■

Perhaps most importantly, the general impression test must be applied from the perspective of the average consumer, who is "credulous and inexperienced" and "takes no more than ordinary care to observe that which is staring him or her in the face upon first contact with an advertisement."

ADVERTISING LAW NEWS

Two Copycat Misleading Advertising Class Actions Settle and One More Launched

REEBOK, GAIAM – AND SKECHERS BRINGS UP THE REAR (OR DOES IT?)

Bottom Line: If you're getting the feeling that class action counsel in Canada have become bosom buddies with their counterparts in the US and that getting hit in the south may well presage another blow in the north, you're not just being paranoid. That's exactly what's going on. While a number of copycat class actions have been filed, two recently settled in Canada, following settlements in the US: Reebok and Gaiam. Skechers is still in progress.

REEBOK SETTLEMENT: $2.2 MILLION

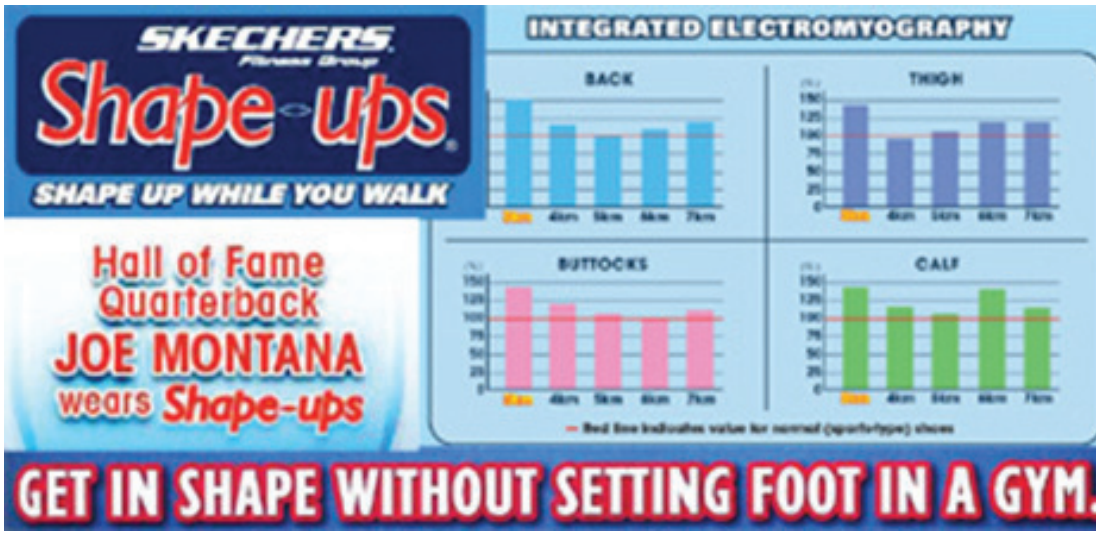
The Canadian **Reebok** class actions were filed in Ontario and Quebec, alleging, respectively, that Reebok Canada Inc., Reebok International Ltd. and Adidas Canada Limited (collectively, "Reebok") made false or misleading representations regarding the **toning and strengthening** benefits of Reebok's toning shoes and, in addition in Ontario, the health benefits of certain Reebok toning apparel. After reportedly intense negotiations, the settlement was approved by the *Superior Court of Quebec* and the Ontario Superior Court on July 10, 2012, in hearings held simultaneously via teleconference.

Reebok denies the allegations and any liability but, in the settlement agreement, has agreed to pay up to **$2.2 million to residents of Canada** who purchased the products from December 5, 2008 to July 10, 2012. This was significantly less than the US $25 million (inclusive of administrative expenses) payable under Reebok International Ltd.'s September 2011 **settlement with the US Federal Trade Commission** (which would also pay out US class action claimants) – although in line with the fact that we have roughly 10% of the US's population.

SKECHERS: IN PROGRESS

Just prior to a $40 million **Federal Trade Commission** settlement in the US on May 16, 2012 with Skechers USA Inc., a national class action was filed in the *Superior Court of Quebec* by the **Consumer Law Group** (April 21, 2012). The Canadian action alleged similar misleading claims at issue down south – i.e., that Skechers' Canadian advertising was misleading when claiming that SKECHERS Shape-ups® shoes and certain other footwear could, among other things, firm buttocks, thigh and calf muscles and tighten abs (*Angell v. Skechers U.S.A. Inc., Skechers U.S.A. Inc. II and Skechers U.S.A. Canada Inc.*: 12 April 2012, **Montreal 500-06-000608-121 (S.C.) (Motion for Authorization)**.

The settlement with the FTC was part of a broader agreement, resolving a multi-state investigation. As of the time of writing, the Canadian matter has not yet settled. Below is one of the ads shown on the FTC website relating to the US settlement.



GAIAM: $0 – BUT A BRAND NEW BOTTLE

As for Gaiam, Inc. ("Gaiam"), back in 2009, its spring catalogue **advertised its reusable aluminum water bottles as Bisphenol A-free ("BPA").** Mr. Rosen bought one. Apparently, however, the internal surface of the bottle was **lined with an epoxy resin, which allegedly contained BPA** that leached into the water. In the fall of 2009, Gaiam removed the BPA-free representation but, according to the lawsuit, the company **failed to inform consumers**, at any time, about the presence of BPA. ▶

ADVERTISING LAW NEWS

When Jeffrey Rosen, a resident of Quebec, heard of the BPA, he commenced a motion to authorize a class action in Quebec on behalf of all Canadians who purchased similar bottles. This was on January 28, 2010, approximately three months after two class actions were filed in the US.

Mr. Rosen wanted the Court to order Gaiam to cease its allegedly unfair and deceptive conduct and affirmatively notify class members of the presence of BPA in the bottles. He was also requesting that the class members be given the **opportunity to exchange or be reimbursed** for their water bottle purchases and be awarded **damages** for the prejudice suffered (purchase price, loss of use and enjoyment and trouble and inconvenience) as well as punitive damages.

The parties settled the case. *Rosen v. Gaiam, Inc.*, No. 500-06-000498-101 (Superior Court of Québec). On June 12, 2012 – about 2 ½ years after Mr. Rosen's motion was filed, the Court approved the parties' out-of-court settlement (in which Gaiam admits to no wrongdoing). While the decision does not disclose the full settlement, the Court mentions that Gaiam will create an exchange program according to which **consumers will be able to get Gaiam's new water bottle, although no monetary damages.** Gaiam will only pay the legal fees of the petitioner, amounting to $75,765. The two US class actions were also settled out-of-court (in April 2011) on reportedly similar terms. ■

SCC Allows Huge Class Action to Proceed Against Telcos for Allegedly Misleading Access Fees

Bottom Line: A class action involving nearly half the population of Canada (14 million cellphone subscribers) and a claim of, reportedly, $18 billion will be proceeding against six telephone companies – both large and small ("Telcos").

The issue? The plaintiffs contend that the Telcos misled consumers into thinking that the monthly system "access fee" charged (usually in the neighbourhood of $6.95 - $8.95 per month) was a **government fee when it was actually a fee imposed by, and with the revenue going to, the Telcos.**

The lawsuit has been involved in **procedural hearings for about eight years**, but will now be heard on its merits. Commenced in 2004, the class action was originally certified in Saskatchewan in 2007. That set off a round of appeals of the certification – first to the Court of Appeal for Saskatchewan, and then to the Supreme Court of Canada. On June 28 of this year, the Supreme Court said it would not hear the Telcos' appeal, meaning the **certification would stand and the action could proceed**.

What now? The case goes back to the Court of Queen's Bench for Saskatchewan, which will adjudicate the substance of the claim.

The plaintiffs are asking for the return of an **estimated $12 billion in access fees, plus interest, bringing the claim up to an earth-shaking $18 billion** – or approximately $600 to $700 per customer. ■

ADVERTISING LAW NEWS

PharmaPrix Optimum® Program: Sued for Reducing Point Values

Bottom Line: In March of this year, the *Quebec Superior Court* authorized a class action by Quebec members of the Pharmaprix Optimum® Rewards Program. One by one, loyalty programs are being challenged in court for changing their program benefits. (Please see the article on the Aeroplan program as well.)

The class action was filed by Option Consommateurs against Pharmaprix Inc., Shoppers Drug Mart Inc., Shoppers Drug Mart Corporation and 911979 Alberta Ltd. (collectively, "Shoppers Group"), for their decision to reduce the value of points accumulated in the Pharmaprix Optimum® Program ("Program"). The change, the plaintiffs contend, was made without prior notice and in a unilateral, illegal, abusive and retroactive manner.

It all goes back to July 1, 2010, when the Shoppers Group allegedly **retroactively reduced the value of points accumulated** by members when shopping at participating stores. By way of example, before the modification, it took only 7,000 points to receive a $10 discount on their purchases, while after the change, 8,000 points were needed.

THE ISSUES

Unless an agreement is reached between the parties, the proceedings before the *Superior Court of Quebec* in about two years will be quite interesting. Questions of fact and law, such as the following will have to be determined:

- Is the contract between the parties one of **adhesion and/or a consumer contract**?

  Among other things, if the contract is found to be a consumer contract within the *Consumer Protection Act* ("CPA"), the plaintiffs will enjoy the CPA's broader protection. If the CPA does not apply, article 1384 of the *Civil Code of Quebec* ("Civil Code"), which deals with consumer contracts, may be invoked. **The Civil Code offers more limited protection than the CPA**, as the Civil Code is rooted in the principle of freedom of contract where two parties have equal bargaining power, while the CPA addresses consumers who are sometimes on unequal footing in their relationships with merchants.

- Is the provision in the Program Terms and Conditions, which allows the Program managers to restrict, suspend or alter any aspect of the Program without notice (Clause 45), **unreasonable**?
- Does the Program managers' use of Clause 45 to change the points system constitute an **abuse of right or a breach of their duty of good faith**?
- Did the change made by the Program managers breach the **warranty of conformity** under the CPA?
- If the Court recognizes the application of the CPA, Option Consommateurs could benefit from the CPA's implied warranty that the goods or services provided will conform to their description in the contract. The Civil Code also contains this legal requirement in the context of the sale of goods, but that provided by the CPA is farther-reaching. **Under the CPA, a contractual agreement is not limited to the content of the written contract**; it includes all the representations which influenced the consumer's decision (i.e., verbal statements made by the merchant or his representative, as well as advertising).
- Are the plaintiffs entitled to seek punitive damages?

THE PARTIES' POSITIONS

Option Consommateurs argues that the contract between members and the Shoppers Group is both a consumer contract and a contract of adhesion with a fixed term ending December 31, 2016, allowing the exchange of points until March 31, 2017. ▶

It submits that Clause 45 of the Program Terms and Conditions is abusive and that its use would constitute an abuse of right or a breach of the duty of good faith. It also believes that by reducing the value of points retroactively, the Shoppers Group breached the implied warranty under the CPA. In addition to having Clause 45 declared void, Option Consommateurs is seeking **compensatory damages** for loss of the value of the points and **$50 as punitive damages for each member of the Program**.

It appears that the Shoppers Group's position is that **since the Program's points have no pecuniary value (they cannot be exchanged for money), the contract is not subject to the CPA** because there is **no provision for payment as essentially required by the definition of a consumer contract in the CPA**; and that there is therefore no foundation for the claim for compensatory damages.

LET ME OUT!

It is interesting to note, incidentally, that each of **Shoppers Drug Mart Inc., Shoppers Drug Mart Corporation and 911979 Alberta Ltd. attempted to remove themselves from the class action** by arguing that Option Consommateurs had no legal relationship with them – other than through Pharmaprix Inc. It is only the latter, they argued, that offers the Program in Quebec. The Court could not conclude that there was no legal relationship, however, since the Program allows a member resident in Quebec to use his or her Optimum card at Shoppers Drug Mart stores outside Quebec. Moreover, the Court considered that all the companies may have been involved in the decisions and actions that led to the change in the value of points. ■

It all goes back to July 1, 2010, when the Shoppers Group allegedly retroactively reduced the value of points accumulated by members when shopping at participating stores.

Another Conviction for Advertising to Kids in Quebec

In June 2012, Maple Leaf Foods ("Maple Leaf") pleaded guilty to having violated the prohibition under the Quebec *Consumer Protection Act* on commercial advertising to kids under the age of 13.

What did they do? They ran an ad on the Teletoon channel showing kids under 13 eating Top Dogs® hot-dogs, with the latter being called "a delight for kids." Maple Leaf pleaded guilty to five charges and paid $10,000 in fines.

Noteworthy fact: the complaint was filed by the Quebec Coalition on Weight-Related Problems (the "Weight Coalition") whose aim is to prevent obesity and weight-related problems. Over the years, the Weight Coalition has filed numerous complaints on similar grounds, mostly targeting the fast food industry.

ADVERTISING LAW NEWS

Class Action Against Aeroplan Over Expiring Points – Authorized to Proceed

Bottom Line: Once again we see upset consumers – and a class action – as a company tries to change key terms in its loyalty program.

On March 6, 2012, the *Quebec Superior Court* authorized a class action against Groupe Aeroplan Inc. ("Aeroplan") relating to its decision to implement expiry dates on its loyalty program points ("Aeroplan Miles"). *Neale c. Groupe Aéroplan Inc.*, 2012 QCCS 902 (CanLII).

Under the Aeroplan Terms and Conditions ("Aeroplan Terms"), in place since 2007, if there is no activity in a member's Aeroplan account within a 12-month period, Aeroplan Miles will expire. All accumulated Aeroplan Miles will also expire if they are not used within seven years of acquisition. To reinstate expired points, members have to pay a fee.

Mrs. Noëlla Neale, on behalf of Aeroplan members, is asking for the reinstatement of her expired Aeroplan Miles, the reimbursement of money spent to reinstate the Aeroplan Miles, $50 in compensatory damages, an undetermined amount of exemplary damages and a declaration that both changes in the Aeroplan Terms, which led to the current legal proceedings, are void.

Legally speaking, Mrs. Neale claims that Aeroplan is civilly liable for unilaterally, and without proper warning, modifying the standard form contract (i.e., the Aeroplan Terms) that governs Aeroplan membership. Aeroplan contends that these modifications were perfectly legitimate since the Aeroplan Terms specifically provide that Aeroplan may modify the terms at any time. In addition, Aeroplan argues the sufficiency of the warnings and of the deadline given to its members. ■

It will be particularly interesting to see whether Aeroplan will be found liable for its changes despite the specific language allowing changes in its program terms.

Bureau Goes Civil Route in Fraud Case: Gets $9 Million

Bottom Line: Earlier this year, the Ontario Superior Court of Justice imposed a healthy $9 million penalty and restitution package against the companies and individuals involved in the "Yellow Pages look-a-like" online directory scam. What was so interesting? That the case was brought under the civil, as opposed to the criminal, provisions of the *Competition Act* ("Act"). This shows that hefty new civil penalties may provide the Competition Bureau with a juicy alternative to going the harder criminal route.

THE INFAMOUS SCHEME

To recap, the respondents had been sending out solicitations in which they falsely associated themselves with the Yellow Pages Group, a company well known for its print and online directories. Believing they were communicating with the Yellow Pages Group, the targeted individuals, organizations and businesses consented to update existing profiles and obtain free advertising. The fine print revealed that the targets had actually signed up for a two-year contract for services, and were sent invoices from the respondents.

LAST TIME, THE BUREAU WENT CRIMINAL

Similar conduct was successfully prosecuted in 2004 under the criminal provisions of the Act and the convicted individuals were jailed and fined. Notably, all fines in these previous cases were under $100,000, making the leap to $9 million a pretty significant event.

Like the past directory cases, the respondents this time around deliberately misrepresented an affiliation with the Yellow Pages Group to defraud their targets. This type of intentional behavior is the main difference between the criminal and civil false advertising provisions in the Act. Nonetheless, in this round of enforcement, the Commissioner of Competition chose to file an application under the civil provisions, presumably feeling its ends would be achieved in landing a huge penalty and restitution. The bad guys don't end up in jail, but the Bureau still sends sending a hard-hitting message, freeing itself up more readily to continue its work. ■

ADVERTISING LAW NEWS

Rogers Misleading Advertising Case Gets More Interesting all the Time

Bottom Line: When Rogers Communications Inc. ("Rogers") said it was going to "vigorously" defend itself against allegations of misleading advertising by the Competition Bureau, it wasn't kidding. As proceedings in the Ontario Superior Court of Justice continue, Rogers has unleashed a major challenge to the constitutional validity of both the civil penalties (administrative monetary penalties or "AMPs") provided for under the *Competition Act* ("Act"), and the long-established principle that an advertiser needs to have 'adequate and proper tests' of its performance claims before making them to the public. If successful, this case could have significant ramifications for enforcement of misleading advertising under the Act, although it will likely be a while (and a few appeals later) until we have a final outcome.

THE BUREAU'S CHALLENGE

So, what is this all about? As a quick reminder, in November 2010, the Commissioner of Competition ("Commissioner") commenced proceedings against Rogers and its subsidiary, Chatr Wireless Inc. ("Chatr"). The allegations? That Chatr's advertising claim that it had "fewer dropped calls" than the competition was reviewable under two paragraphs of the Act: 74.01(1)(a) and (b). In brief, the first provision is the general prohibition against false or misleading advertising. The second – the one being challenged here – requires that performance claims be supported by "adequate and proper tests" prior to making the claim (For the nitty-gritty, see "The Legalese" sidebar). The Commissioner is seeking an Order against Rogers and Chatr for a $10 million AMP, $20 in restitution per customer per month that each was subscribed to the Chatr service, as well as corrective advertising.

It is worth noting that the AMPs in question came into force in 2009, upping what had been a mere $100,000 maximum for corporations to a maximum of $10 million for a first Order and $15 million for any subsequent Order. **As reported in our 2012 Canadian Marketing, Advertising & Regulatory Law Update,** Bell acceded through a consent agreement to pay a $10 million AMP in relation to its alleged misleading advertising, which was the first time we saw the maximum in play. So, this run by Rogers will be the first test of this new, more significant amount.

PULLING OUT THE CONSTITUTIONALITY GUNS

Rogers has been claiming the following:

a. AMPS So High They're Criminal?

Rogers has argued that the proceedings are criminal by nature and the quantum of the AMP is a true penal consequence, yet Rogers is denied the safeguards given otherwise by Section 11 of the *Canadian Charter of Rights and Freedoms* ("Charter"). Specifically, Rogers argues that it is denied the presumption of innocence, the right to a fair trial and to make a full defense (including receipt of all information in the Commissioner's possession that might be relevant), and the right against self-incrimination (since, under the Act, Rogers is obligated to disclose all relevant documents to the Commissioner, can be compelled to testify and can't 'plead the 5th' – here in Canada, we suppose, the 11th…).

b. Is the Requirement for Pre-Claim Tests Justifiable?

Further, Rogers argues that the 'adequate and proper tests' requirement under the Act is unconstitutional and infringes on freedom of speech as guaranteed by the Charter. This is not the first such challenge. Most recently, it had been tested by the Competition Tribunal and not the courts, although such findings are not binding in this case. In one such challenge (*Gestion Lebski,* CT-2005-007) the provision was found to violate the freedom of expression granted in the Charter, although no argument had been submitted by the Commissioner and that finding was revisited and reversed in a later case, which upheld the provision as constitutional (*Imperial Brush*, CT-2006-010).

In this case, Rogers submits that the provision is an unnecessary restriction on freedom of speech. In light of the general prohibition against false or misleading advertising in both Section 74.01(1)(a) and the criminal

prohibition in Section 52, tools are already in place to regulate such conduct. Market forces and the reputational risk if a company is caught in a misrepresentation further make the provision unnecessary, it says, as do consumers' ability in this day and age to research and report over the Internet and social media. It also notes the inherent ambiguity in what is 'adequate and proper', anyway. Rogers submits that the provision has the unintended consequence of harming competition and denying consumers information about products, chilling performance claims which could be entirely truthful, "made with a reasonable basis to believe that such a claim is entirely accurate, but … not subject to adequate and proper tests" prior to making the claim. In other words, Rogers questions the constitutionality of a provision which could impose a $10 million AMP against a claim that is neither false nor misleading, but which is simply found after-the-fact not to have been sufficiently substantiated prior to publication .

Rogers argues that the 'adequate and proper tests' requirement under the Act is unconstitutional and infringes on freedom of speech as guaranteed by the Charter.

c. Commissioner: It is so Justifiable – and s.11 of the Charter Doesn't Apply to Corporations

For its part, the Commissioner responds that consumers do not have the ability to assess the accuracy of performance claims of the nature contemplated by the provision, and so it is justified to put the onus on the advertiser to ensure its testing is adequate and proper. This, in her view, is a justifiable limit on commercial speech. The Commissioner contends that the proceedings are not, in fact, criminal, but civil and that the penalty, although potentially substantial, is necessary so as not to be seen as merely a "license fee" or "cost of doing business." She notes, in this instance, that Rogers has an operating revenue of almost $7 billion, and that the allegedly penal nature of the AMP must be considered in that context. Further, the Commissioner submits that Section 11 of the Charter simply doesn't apply in the case of corporations.

So, from these initial positions, we wait to see where the parties and the Court will land, what the implications will be on advertising performance claims and the amount of AMPs that may be imposed in the future. Stay tuned… ■

THE LEGALESE

Civil Misrepresentations to public

74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) makes a representation to the public that is false or misleading in a material respect; and

(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation…

The Criminal Prohibition

52. (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, **knowingly or recklessly** [emphasis added] make a representation to the public that is false or misleading in a material respect.

ADVERTISING LAW NEWS

Bureau Challenges Major Telcos Re Premium Text/ Rich Content Fee Disclosures: Seeks $31 Million Plus Refunds

Bottom Line: On September 14, 2012, the Commissioner of Competition ("Commissioner") filed yet another major misleading advertising action against major telcos in Canada, as well as the industry wireless teko association. If there were any doubt as to whether the new maximum civil penalty instituted under the *Competition Act* (increased in 2009 from $100,000 to $10 million) was going to be academic, those doubts would now be firmly laid to rest. This is at least the fourth matter where $10 million, or close to $10 million, has been pursued or obtained by the Competition Bureau ("Bureau") since 2009. This action is also interesting in that the Bureau is not only resting its challenge on representations made directly by the telcos, but also on their allegedly permitting and facilitating representations by content providers and aggregators (collectively, "Content Providers") in the latters' ads.

This action is also interesting in that the Commissioner is not only resting its challenge on representations made directly by the telcos, but also on their allegedly permitting and facilitating representations by content providers and aggregators in the latters' ads.

THE ESSENCE OF THE ACTION

This action against Rogers Communications Inc., Bell Canada and TELUS Corporation ("Telcos") and the Canadian Wireless Telecommunications Association ("CWTA") is based on their allegedly making – and permitting others to make – false and misleading representations (including inadequate cost disclosures) in connection with the costs of premium text messages and rich content services.

The Commissioner seeks not only a **$10 million** penalty against each of the three Telcos (or **$15 million** for each against whom an Order has already been made), but **$1 million** against the CWTA. She also seeks **refunds** by the Telcos to all current and former customers affected by the allegedly misleading representations (since at least December 1, 2010).

PREMIUM "WHAT" AND RICH "WHO?"

If you are not familiar with "premium text messaging" services, certain **("Content Providers")** will offer consumers various services or opportunities, such as a **chance to win in a contest or news, advice, alerts, trivia, quotations or horoscopes** where the consumer will have to pay a premium text charge (i.e., beyond the charge he/she would incur for a regular text message). Content Providers might also offer other goods and services designed for wireless devices – like **ringtones, electronic wallpaper or other content, programs or applications** – which will also be charged to consumers. Content Providers' **messages promoting such services** ("call-to-action representations") can be distributed through various means online and through wireless devices, including banner ads in free wireless applications (i.e., the popular "Angry Birds" game). When consumers select such an ad, it takes them to the Content Provider's website, where consumers are invited to download the digital content (i.e., a ringtone) being advertised. The Commissioner alleges that once the customer, confirms he or she wants the purportedly free digital content offered, the customer may be unknowingly subscribed and charged.

HOW DOES THAT INVOLVE THE TELCOS?

The Commissioner alleges that advertising for certain of such offerings **didn't adequately disclose the price** (among other terms) to consumers and/or conveyed the general impression that the opportunities or services were free when consumers were charged for them. The Telcos didn't create or publish ads for specific products or services (these were done by Content Providers). The Commissioner alleges, however, that the Telcos permitted the representations to be made by **providing content providers with access to their respective networks and billing apparatus** (charges are included on customers' phone bills). As well, the Commissioner says the Telcos had a **revenue sharing agreement** with the Content Providers, whereby the Telcos would retain a portion of the revenue (ranging, the Commissioners says, between 27% to 60%) before passing on the Content Providers' share. The Commissioner also alleges that the Telcos received **complaints about unexpected charges** and continued to permit the same or similar "call-to-action" representations to be made. In

addition to section 74.01 of the *Competition Act*, the Commissioner relies on section **52(1.2), which prohibits one from permitting** a false or misleading representations to be made.

More directly, the Commissioner alleges that the **section of each Telco's website that addresses spam** conveys the **general impression that the Telco safeguards or protects consumers** from having to pay for unauthorized premium text and rich content services when, the Commissioner alleges, that is not always true.

WHAT ABOUT THE INDUSTRY ASSOCIATION?

The Commissioner says that the **CWTA maintains the short code registry** on behalf of the industry (short codes are **four to six digit numbers** that permit delivery of the service) and **administers the mechanism by which short codes** are made available to Content Providers. The Commissioner says that by so establishing, facilitating and exercising control over the short code mechanism, the **CWTA has permitted the call-to-action representations.**

Again, more directly, the Commissioner says that the CWTA also established and **purports to administer guidelines** on behalf of its members for (among other things) advertising short codes. On the CWTA's website, the Commissioner says, the CWTA represents that its members subscribe to a code of conduct which, "ensures that our customers have the information they need to make informed purchasing decisions." The Commissioner contends that no such assurance results from the code.

WHY SUCH MASSIVE PENALTIES?

The Commissioner's list of **aggravating factors** provides insight into why and when massive penalties will be pursued. These include the national reach and number of consumers in the wireless/premium text messaging/rich content market, the **frequency and duration** of the representations, the fact that **self-correction in the market was unlikely** to adequately or at all remedy the conduct, the fact that **vulnerable consumers** were affected (including children, the disabled and those lacking linguistic ability), the amount of **revenue generated**, and the Telcos' **financial position**.

WHAT NOW?

The action is at a very early stage, with the defendants (as at the time of writing) not yet having filed their Statements of Defence. As you will see in our previous article, Rogers is already mounting an enormous defence to another misleading challenge brought by the Commissioner. No doubt, this will be a hard fought battle on all sides. ■

The Commissioner's list of aggravating factors provides insight into why and when massive penalties will be pursued.

ADVERTISING LAW NEWS

More Lessons from ASC's School of Hard Knocks

As our dedicated readers know, each year we review the consumer complaint cases that come before Advertising Standard Canada ("ASC") and its Consumer Response Council ("Council") under the *Canadian Code of Advertising Standards* ("Code") and pull a smattering out to show you the range of issues ASC adjudicates.

Over these past four quarters, disclaimer deficiencies continue to be a common basis for ads being pulled. Too small, too brief, too contradictory. Is that too bad for the consumer or the advertiser? More and more, it's the latter. **(See our article on this in last year's Update, when it was an even bigger issue.)** So, contrary to the belief that no one cares about all that legal mice type except lawyers, it seems that ain't so.

Telecoms had a pretty tough year, getting hammered on numerous ads. Consumers don't seem very willing to let Telcos' omissions slide anymore. Other major advertisers like Oreck Canada, Samsung, Wind Mobile, Sears Canada and others have been getting it wrong too, despite their corporate mass and muscle. You remember that movie where Peter Finch says he's mad as hell and he isn't going to take it anymore? It's sort of like that. With consumer complaints increasing, it seems they're just not in the mood to be ticked off.

Many advertisers, of course, either pull their ads or appropriately amend them before they go before Council, thus avoiding being identified by name in ASC's Ad Complaints Report.

Such as it is, however, let's take a look at some of the year's trials and tribulations – hopefully to see, and be reminded of, what we should watch out for ourselves. ("We" being you, of course.)

DISCLAIMER DEFICIENCIES

a. AWOL Qualifications

Looking to the skies, two separate airline ads got dinged when consumers searched for the tempting airfares advertised but couldn't find the flights. Running out of the cheap seats is common, of course, but the airlines got caught here as one of the ads failed to say "from" before its price or to indicate that seats were limited, and the other forgot to say that not all flights were available at the advertised price on all days during the promotional period.

b. Disclaimers Too Darn Small

When Council can't read a super even after numerous viewings, it's probably safe to assume you're going down. Such was the case with Comcast's TV ad promoting home phone plans. While the super was present and accounted for, it was found to be too small and not displayed long enough on screen to be clearly legible, violating Clause 1(d) of the Code.

From phone plans to investment opportunities, we knew it had to happen sooner or later. Indeed, this spring, someone final emerged who actually wanted to read (or at least to challenge?) the **lengthy disclaimer in a TV ad for a financial investment company**. You know – the kind that Evelyn Wood herself would have difficulty finishing before the ad was over. Unbearably thwarted, our consumer came forward to complain that the cautionary super was too small and not on-screen long enough to be read. Despite the advertiser's explaination that the very **detailed disclaimer was mandated by provincial legislation**, Council nonetheless found that it was not presented in a clearly visible manner. The advertiser permanently withdrew the ad prior to the Council hearing. If he were so inclined, the complainant could probably take down another truckload of ads, but we shall have to see whether the Financial Disclaimer Vigilante will strike again.

c. Just Misleading

Cosmetic surgery to enhance women's "most private places"… "a problem that most women have but are too embarrassed to talk about"? Well, this is what the Toronto Cosmetic Clinic claimed in a radio commercial aired in Ontario. One listener in particular felt that the ad was misleading (you mean most women *don't* secretly dream about surgically enhancing their private parts?) and that it was an unhealthy message for young women. Council agreed citing an infraction of Clause 1(a) (Accuracy & Clarity) and Clause 11 (Safety) of the Code.

TELECOM ONSLAUGHT

Seems like an increasing number of consumers are paying close attention to telecom ads these days, given the complaints ASC received on phone and Internet ads. As they say, though, **if you can't bark with the big dogs, get off the porch**. Some consumers are really taking that to heart!

…like the consumer who felt that a telecom advertiser incorrectly referred to geography, rather than to population, when claiming that its **network covered a certain percentage of Canada**. Even the advertiser agreed with the complainant on this one;

ADVERTISING LAW NEWS

…then there was the ad that offered savings of several hundred dollars on Internet service, nationally. A **small symbol**, which ASC indicated was virtually impossible to see, directed the consumer to a **disclaimer on the reverse side** which stated that the savings were **based on subscribing to a specific plan**. ASC found the ad contravened Clauses 1(a), (c) and (d) of the Code, being misleading, omitting relevant details and having a contradictory disclaimer;

…if that's not enough, an ad featuring a cell phone "*from $0 with a 3 year term*" was found misleading when **none of the featured phones could be purchased at the advertised rate**. The advertiser replaced the ad in question before Council met to adjudicate the complaint;

…finally, another telecom ad featured special rates for a home phone plan. One complainant felt misled because the ad **did not state that the service was a Voice Over Internet Protocol (VOIP)** requiring an Internet connection OR that the advertised rates were promotional and would not continue after the promotion ended. Both the advertiser and Council agreed with the complainant. The advertiser again withdrew the ad before Council met to adjudicate the complaint.

NOT-FOR-PROFIT NOT EXCUSED FROM RULES

In Atlantic Canada, a not-for-profit's newspaper ad was found misleading. It was an advocacy ad regarding government program expenditures that contained a chart comparing expenditures by various provinces. The complainant believed the chart exaggerated the difference amongst provincial expenditure levels. Council agreed. POINT: **Not-for profit's aren't exempt from the rules.**

WHERE'S THE BEEF?

A picture is worth a thousand words! Okay, maybe not a thousand in this case, but certainly a decision by Council that the picture contained an inaccurate claim. A restaurant in British Columbia advertised a meal on their daily deals website that the complainant alleged exaggerated the amount of meat included in the offer. After acknowledging that the **amount of meat was incorrectly described** (albeit correctly depicted in the photo), the advertiser amended the text to clarify the offer. POINT: Don't fool around with hungry restaurant-goers; they are grumpy and will get you back.

BEST TO LEAVE THE CANADIAN GOVERNMENT OUT OF YOUR ADS

In its flyer, an Alberta automotive dealer apparently gave the impression that its "**Auto Stimulus Program**" was endorsed by the Canadian Government. Next to the maple leaf on the Canadian flag in the ad, a headline read: "Canada Consumer Notification Consumer Alert", with a watermarked image of the **Canadian Coat of Arms** on both sides of the ad. The copy for the Auto Stimulus Program said that consumers could receive up to $2,000 off the purchase price of a vehicle when trading in their current vehicle. Council agreed that all the foregoing elements contributed to a misleading impression of governmental involvement. Council also found that the ad imitated the illustrations of another advertiser in such a manner as to mislead. Not surprisingly, the ad was permanently withdrawn.

TESTIMONIALS: OOPS – WHERE DID THOSE ENDORSERS COME FROM AGAIN?

Whom can one trust anymore? Clause 7 of the Code requires that testimonials in ads reflect the **genuine, reasonably current opinion** of the individuals making the representations and that they be based upon adequate information with the product or service being advertised. There should also be real people behind the statements and a lovely file that shows who they are and what they said. Someone might have mentioned this to Buytopia.ca, which advertised classes at a wellness facility using testimonials from apparent former attendees. One consumer didn't believe what he read and complained to ASC that the **testimonials weren't genuine**. As it turns out, Buytopia.ca was **unable to identify the source** of the testimonials and thus Council found that the ad contained false and misleading testimonials. ▶

ADVERTISING LAW NEWS

WOW – TRY TO BE NICE...

An automotive dealer in Alberta was accused of being discriminatory after it advertised a **special price promotion exclusively for an identified immigrant community**. Although the advertiser explained that the offer was intended to thank these immigrants for their support of the dealership, the advertiser withdrew the ad nonetheless before Council met to adjudicate the complaint. Council found that, by limiting the price offer in this way, the ad **condoned discrimination** based on national origin and thus violated Clause 14(a) of the Code.

YOU SHOULDN'T ILLUSTRATE UNSAFE ACTS EVEN WHEN YOU'RE TRYING TO ILLUSTRATE UNSAFE ACTS

We don't want you to forget about Clause 10 of the Code, dealing with safety. Although maybe not used quite as often as some of the others, we still see safety cases from time to time. For example, an automotive manufacturer ran a television ad in Quebec depicting two individuals, each driving a vehicle: one a careful driver and the other an impulsive one. Two complaints about the ad were filed with ASC alleging that the impulsive driver was shown executing an unsafe parking maneouvre. Council concluded that the commercial displayed a disregard for safety by depicting a situation that might reasonably be interpreted as encouraging unsafe practices or acts. The advertiser withdrew the ad before Council met to adjudicate the complaint.

NOTE TO ADVERTISER: FLIPPING THE BIRD MAY NOT BE AN APPROPRIATE DEPICTION FOR AN AD

Actually, we're not sure what the gesture was, but a "highly offensive and indecent" gesture was apparently made by an individual in an out-of-home ad in Quebec by a service provider in the recreation and entertainment industry. Council agreed that it was so and the advertiser withdrew the ad before Council met to adjudicate the complaint. . ..surprise, surprise!

d. Omissions

YOU CAN'T JUST DISCLOSE THE GOOD STUFF; YOU NEED TO DISCLOSE THE COSTS AND THE CATCHES, TOO

In a national television commercial, Quibids.com (an online auction company) claimed that savings of "*up to 95% off retail*" were possible with this exciting new online way to shop for products. The advertiser demonstrated this in the commercial with the display of various products at both "retail" price and a much lower "bid "or "sold" price. "**When someone places a bid, the prices increase by as little as one cent, resulting in insanely low prices**," or at least that is what the spokesperson in the ad claimed before inviting viewers to go to Quibids.com, enter promo codes, and receive a stated number of free bids. Two complainants alleged that the ad was missing key information and was misleading. Council agreed that the commercial was missing key information – such as how the auction actually worked, what it cost consumers to participate in Quibids' auction process and that the money bid by participants was not recoverable by the bidder if he or she did not ultimately "win" the auction. As a result, Council found that the commercial was misleading, omitted relevant information in a manner that was deceptive and did not clearly and understandably state all pertinent details of the offer pursuant to Clauses 1(a), (b) and (c) of the Code.

DOES "ALL" ACTUALLY MEAN "ALL"? LIKE REALLY?

50% off the price of ALL glasses, including prescription lenses. Sounds great, except when it's not true. In this case, **progressive lenses were excluded** from the sale. So when the advertiser would not honour the discount as advertised online, the complainant went to ASC. Council found that the advertisement was misleading and omitted relevant information – like what was excluded from the offer. Note to advertiser: In the absence of any exclusions, **"all" (sorry) means "all"**.

ADVERTISING LAW NEWS

"WE'LL MATCH ANY PRICE!" AND IF IT'S OUTSIDE CANADA?

Here's an interesting one. On its website, a **retailer offered to match the price of any competitor's price** for the identical items…BUT, it didn't say the price of any competitor "in Canada". The complainant alleged that the advertisement was not true because the retailer would not match the prices of a US online retailer. There was nothing in the advertiser's price match policy that excluded US online vendors so Council found that the advertisement contained an inaccurate claim, omitted relevant information, and did not clearly and understandably state all pertinent details of the offer. The ad was amended before the Council hearing.

e. Major Advertisers Going Down

ORECK CANADA. An air purifier was advertised on The Shopping Channel by Oreck Canada. Smoke matches were lit inside a closed, transparent chamber causing the entire chamber to fill with smoke. The air purifier was then turned on, resulting in the smoke disappearing. The complainant alleged that the **commercial inaccurately depicted the air purifier as being able to remove cigarette smoke and its harmful effects** from homes. By the way, according to statements by Health Canada, air purifiers cannot eliminate all the cancer-causing agents of cigarette smoke. The advertiser took the position that its commercial did NOT claim that the air purifier eliminated cigarette smoke and its harmful effects. After careful consideration, though (including repeated views of the commercial), Council felt that the visual depictions were very persuasive and thus the ad created the general impression that the product could and would eliminate cigarette smoke and its effect from homes. Moral of the story: Visual depictions can be just as powerful and persuasive as spelling out a claim in a super or voiceover.

SAMSUNG. A Samsung promotion claimed that purchasers of select Samsung products would receive ten free movie rentals. A consumer said he purchased one of the products, but Samsung would not honour the terms of the promotion. When asked by ASC to comment on the complaint, Samsung did not respond. Council accordingly accepted the complainant's statement as being factual and found the ad to be misleading and to omit relevant information about the offer.

WIND MOBILE. In a national print ad, Wind Mobile advertised a cellphone for $249 on WINDtab. When attempting to purchase the phone from a Wind Mobile retail outlet, however, **an existing consumer was not able to do so at the advertised price**. Why? Because the offer applied to new activations only (a condition that was not stated in the print ad). The advertiser DID have "conditions apply" stated in small print. Was that enough? Council thought not. It found that the ad omitted relevant information and did not state all pertinent details of the offer in a clear and understandable manner.

SEARS CANADA. Details, details. You can imagine the consumer's surpise when she believed that she was purchasing a fab TV for $199.99 (as advertised on Sears Canada's website) only to discover that the actual price was $1,999.99. Sears Canada acknowledged that an inadvertent pricing error had been made. Council found that the ad contained an inaccurate price claim. We assume the consumer is still watching her old TV.

f. And Weighing in With the Most Complaints…

A whopping 56 complaints were received by ASC for an internet ad in Alberta by Fluid Hair Salon. What could a hair salon possibly do to get so many people upset? The ad depicted a well-dressed woman with a black eye sitting on a couch. A man holding a necklace stood directly behind her together with the tagline: "Look good in all you do." The complainants were outraged by the ad that they said condoned violence against women. Despite the salon's response that the ad was intended to portray women as strong individuals in the face of adversity, ASC felt the ad had the effect of **trivializing violence against women** and exhibited **indifference to unlawful behaviour** and attitudes that offended standards of decency among a significant segment of the population (Clauses 14 (b) and (d) of the Code). ■

ADVERTISING LAW NEWS

Changes to Ad Code, Complaint Procedures and More at Advertising Standards Canada

The folks at Advertising Standards Canada ("ASC") have been busy these days. Among other things, they have been making minor changes to the ***Canadian Code of Advertising Standards*** ("Code"), minor changes and to each of ASC's complaint procedures, responding to ad complaints galore and publishing the annual summary of their activities in the **2011-2012 Annual Report**.

Below, we catch you up on this activity, as well as highlighting some of the intriguing findings of the **2011 Consumer Research Study** ASC commissioned, comparing certain Canadian and American views of advertising and looking in particular at Canadian attitudes on some basic advertising issues.

Changes to the *Canadian Code of Advertising Standards*: If you're an advertiser in Canada, you are likely familiar with the **Code**, which is the principal instrument of advertising self-regulation in Canada. In January 2012, ASC announced some minor amendments to the Code. It expanded the reference to "message" in Clause 1 (accuracy and clarity) to "message, **advertising claim or representation**" and confirmed that ads must not contain claims that are not only "inaccurate or deceptive" but also "**otherwise misleading**." ASC also tweaked Clause 6 (comparative advertising) by amending it to prohibit ads that "unfairly, discredit, disparage or attack **one or more** products, services, advertisements, companies or **entities**." In an effort to tighten up the language and provide further clarity, Clause 14 (unacceptable depictions and portrayals) was expanded to also prohibit ads that, "demean, denigrate or disparage **one or more** identifiable persons, group of persons, firms, organizations, industrial or commercial activities, professions, **entities**, products or services, or attempt to bring it or them into public contempt or ridicule."

Changes to ASC's Complaint Procedures: ASC also recently refreshed its complaints procedures. Most notably, the former Trade Dispute Procedure has been re-branded as the "**Advertising Dispute Procedure**", reflecting the fact that it is not limited to use by trade competitors, but can in fact be used by any legal entity either engaged in the use of advertising or that may be adversely affected by another's advertising. Similarly, the **Special Interest Group Complaint Procedure** was revised to clarify what sort of organizations are eligible under this cost-free complaint mechanism – i.e. organizations such as advocacy groups, common interest associations, or any collection of individuals or organizations, who may themselves be dissimilar, but who share a common point of view about a particular issue.

ASC's 2011 Ad Complaints Report Year in Review: The **2011 Ad Complaints Report** released in March 2012, showed that ASC received a record number of consumer complaints in 2011. A total of 1,809, which represents a 51% increase from 2010! The 2011 Ad Complaints Report shows that consumers are becoming increasingly concerned about inaccurate or misleading advertising, and for the first time ever, were more numerous than complaints that ads were offensive or otherwise unacceptable. Retailers should beware – this sector received the highest number of complaints, at 252 – more than any other industry sector. The ASC Councils upheld 146 of the complaints they reviewed on 83 advertisements.

Notably, the former Trade Dispute Procedure has been re-branded as the "Advertising Dispute Procedure."

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2011 ASC Consumer Research Study – Canadians v. Americans: Every so often, ASC will commission a study to take the pulse on Canadian and American perspectives on advertising and advertising standards. Some of the particularly interesting findings in ASC's **2011 Consumer Research Study** ("Study") were that:

a. The data showed major cultural differences between Canada and the US, with Canadians less willing to accept advertising that steps out of bounds, particularly when it comes to truth and accuracy;

b. Americans tend to look at advertising differently from Canadians, seeing it more as entertainment and less impactful on societal values; and

c. Americans are less likely than Canadians to think the ads they see or hear are truthful. (Are we more gullible or are Canadian ads more truthful in fact?)

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On the Canadian front – regarding political advertising:

a. *Shocker* – Most Canadians Don't Find Political Ads Very Believable: Apparently, few Canadians believe political ads meet expectations for truth and accuracy. Only 30% said the political advertising they see or hear is very or somewhat truthful. Contrast this with what they think of consumer advertising, which 72% of Canadians find very or somewhat truthful.

b. *A Big Chunk of Canadians Don't Like Attack Ads:* Almost half the Canadians surveyed (48%) said that, "political parties or candidates should never criticize their opponents in advertising and should only promote themselves." In other words, stick to your own candidacies and records. Apparently, Quebecers felt most strongly about this, with 60% agreeing, compared to the Canadian average of 48%.

We would have loved to see the American statistics on the political questions, but perhaps another time. The Study confirms that while we may pretty much look the same and pretty much talk the same, our differences appear to run deeper than beaver tails and maple syrup. The 49th parallel separates two distinct societies – something advertisers should bear in mind. ■

Only 30% of Canadians said the political advertising they see or hear is very or somewhat truthful. Contrast this with what they think of consumer advertising, which 72% of Canadians find very or somewhat truthful.

ADVERTISING LAW NEWS

SEX in Advertising... What Are the Limits?

Bottom Line: As one hears, there are only three certainties in life: Death, Taxes and the fact that SEX sells. Witness only the runaway success of the book "50 Shades of Grey", which reportedly constituted about 20% of all print adult fiction books sold in America in the spring and is Britain's bestseller – ever. So, what are the limits to using sex in ads so that the ads have a fair chance of staying up long enough for the adhesive to dry? While the line is inherently grey, cases generally suggest that the sexuality should be relevant to the product and not simply gratuitously employed, it should not be demeaning to a particular group or more graphic than necessary or reasonable (which may also depend on where it's being displayed), and it should NOT involve young people or religious figures. With those general guidelines, though, there are a million ways to Sunday to test the limits. We look at some of them below.

AMERICAN APPAREL AD FOUND TO BE OFFSIDE

HOW SEXY ADS ARE CHALLENGED

The main basis of challenging overly sexy ads are Clauses 14 (c) and (d) of the *Canadian Code of Advertising Standards* ("Code"), administered by our self-regulatory body, Advertising Standards Canada ("ASC"). Clause 14 applies to a range of "offensive" kinds of ads, from being racist to unduly ridiculing. As applied in "sex" cases, though, it essentially prohibits ads that demean any group (usually women, although sometimes men or, in one case, nurses!) or display obvious indifference to conduct or attitudes, "that offend the standards of public decency prevailing among a significant segment of the population as assessed by ASC's Advertising Standards Council ("Council")."

WHAT'S BEEN OVER THE LINE IN THE PAST?

Where lines are unclear, you often only know where the line is (was) once you go over it.

You'll recall over the past few updates, we've written about various ads that had sexual connotations, stirred up a rage of emotions and drove many complaints right to the doorstep of ASC.

What do Clothing, Cell Phones and Beer all Have in Common? They're all Integrally Related to Sex ..?

Prior ads have ranged from an ad for a blouse shown on the back of a free weekly publication in Quebec where a woman was shown **exposing her bottom** (which by the way triggered a total of nine complaints to the ASC); to more risqué ads, like the ad from American Apparel that depicted a young woman wearing a black lace unitard and ▶

CLAUSE 14 OF THE CODE IS USED TO CHALLENGE OFFENSIVE ADS:

14. Unacceptable Depictions and Portrayals

It is recognized that advertisements may be distasteful without necessarily conflicting with the provisions of this Clause 14; and the fact that a particular product or service may be offensive to some people is not sufficient grounds for objecting to an advertisement for that product or service.

Advertisements shall not:

(a) condone any form of personal discrimination, including that based upon race, national origin, religion, sex or age;

(b) appear in a realistic manner to exploit, condone or incite violence; nor appear to condone, or directly encourage, bullying; nor directly encourage, or exhibit obvious indifference to, unlawful behaviour;

(c) demean, denigrate or disparage one or more identifiable persons, group of persons, firms, organizations, industrial or commercial activities, professions, entities, products or services, or attempt to bring it or them into public contempt or ridicule;

(d) undermine human dignity; or display obvious indifference to, or encourage, gratuitously and without merit, conduct or attitudes that offend the standards of public decency prevailing among a significant segment of the population.

ADVERTISING LAW NEWS

bending over in front of a bed in a very provocative pose. That was found to be over the line (see visual on p. 18). Oh yes, and we must not forget the ad with the **two men kissing passionately on the desk** accompanied by the tagline "hook up fearlessly" by Virgin Mobile. That was found to be over the line too. And what about the one for Minhas Creek Beer that showed **two nurses wearing tight sexy mini dresses, helping to revive a can of flat beer** lying in a hospital bed. That ad caused a huge uproar in the nursing community as nurses felt it demeaned the nursing profession. Nonetheless, it was found to NOT offend the code (see visual below).

For an example of a gorgeous ad that was found NOT to go over the line, we wrote about the classic **A Marca Bavaria beer ad** a number of years ago, and it still stands as a beacon of an ad that hung just this side of the line.

Molson's *A Marca Bavaria* beer washed up onto Canadian shores in 2003 with the help of Pietra, a noted Brazilian model. In the ad that sparked the debate, two mid-twentyish men are sitting on a private Brazilian beach, looking out over the water. One reaches into an ice cooler and pulls out a bottle of *A Marca Bavaria* beer. As he pulls the bottle out of the bucket, Pietra rises out of the surf. As he twists and turns the bottle, she follows the movements of the bottle, spinning first to the right and then to the left, revealing all sides of her. . . person, then lying down on a beach blanket. At the climax of the ad, he begins to peel the label off the bottle. The look on his face is, well, about what you'd expect it to be for a guy in this situation. Joy. Wonder. Rapture. Not believing this dream. As he peels the soaked label from the bottleneck, Pietra begins, correspondingly, to undo the string on one side of her bikini. His mouth drops open, eyes widen and, although you can't hear the pounding of his heart, you can feel it.

But, all good things have to come to an end now, don't they? Just as the point of no return nears, Pietra stops untying her bikini, shakes her head "no" with a smile, and puts an end to the exchange. The men wince with anguish, but laugh at themselves. Undone, but what a way to go.

In terms of "sexual" depictions, there was the close-up of Pietra's back side in her thong bikini, which drew complaints that placed too much emphasis on her sexuality. Although she was, after all, on a beach in Brazil.

Then there were those who perceived the man to actually be controlling Pietra, which they found objectionable. We may not understand males very well, but we would have thought that if the man were controlling Pietra, there would probably have been a different end to the story?

What did the Council find? It ruled in Molson's favour. The Council commented that some of the body shots in the original ad had made some members feel uncomfortable, but not to the point of violating the Code. The Council also considered the relationship between the man and the woman in the ad. After viewing the ad, the Council saw the ad as Molson had intended – a scene of mutual play in which, ultimately, the woman was in control. The Council commented that had the woman not said "no" at the end of the ad, they would have reached a different conclusion. As filmed, though, the ad was not demeaning to women and therefore not a violation of the Code.

EVEN "NOT-FOR-PROFITS" USE SEX

But some sexy ads we told you about were not about selling their blouse, lingerie, mobile phones or their beer, but were about promoting a good cause! Like the ad for People for the Ethical Treatment of Animals ("PETA") showing the actress, **Pamela Anderson**, wearing nothing but a skimpy bikini and her body parts labelled (i.e., round, rump, ribs, as you might see at a butcher shop) together with the tagline, "All animals have the same parts. Have a heart. Go vegetarian." The Montreal Flim and TV Commission had trouble with this ad, denying PETA a permit to stage an event where the poster would be revealed. This controversy made big news across the country and ended up getting exponential exposure.

THIS YEAR'S RACY ENTRIES

Anyway, we think you get the picture – and, not surprisingly, there have been a lot more advertisers pushing the sexual envelope for attention over the past year. A warning though, some of these ads are not for the squeamish. Reader discretion is advised. ▶

ADVERTISING LAW NEWS

IS IT OK TO SHOW EJACULATION AND MASTURBATION IN ADS?

Bal en Blanc is a huge rave party that is hosted during the Easter holiday weekend every year in Montreal. It attracts over 15,000 attendees, both gay and straight, and usually lasts for more than 14 hours. In Q3 of 2011, Bal en Blanc advertised this event on the Internet in Quebec depicting highly sexualized images including masturbation and ejaculation. Surprisingly, ASC only received one complaint that the ads were vulgar, offensive and indecent (maybe not many people actually saw the ads?). Not surprisingly, ASC thought the campaign was degrading to men and women and offended standards of public decency prevailing among a significant segment of the population and thus contravened Clause 14(d) of the Code.

TIGHT T-SHIRTS AND RAIN: BIRDS OF A FEATHER, NO?

In Q4 of 2011, K-97 Classic Rock ran a national billboard ad for their morning radio show that received 10 complaints. The ad featured a close up of a **well-endowed woman wearing a tight white t-shirt**, her head cut off from the ad, showing only her chest. A tagline read: **PRAY FOR MORE RAIN**. Contrary to Clauses 14(c) and (d), ASC found the ad demeaned and denigrated women and encouraged, gratuitously and without merit, attitudes that offended standards of decency.

STOCKING ADS – JUST FOCUSING ON THE BARE ESSENTIALS

In Q2 of 2012, American Apparel ran an Internet ad in Quebec advertising stockings. What's wrong with advertising stockings? Well, as is typical for this advertiser, the ad showed the **back of a woman, wearing ONLY stockings and a garter, leaving her bare bottom exposed.** Again, ASC concluded that the advertisement displayed obvious indifference to conduct or attitudes that offended the standards of public decency prevailing among a significant segment of the population.

EXERCISE SAFE ADVERTISING

So there's no denying, SEX certainly gets a lot of attention. If you've read this article, you might be evidence of that. But you'll want to ask yourself… does the risk outweigh the reward in your particular circumstances?

Bottom line: When it comes to sex, marketers who want to keep their jobs should at least know how to exercise safe advertising! ■

"Turn it Down" CRTC Says No More to Loud Commercials

Bottom Line: Do you hate it when the program you're happily watching cuts to commercial and you are blown out of your chair by the sudden increase in volume? If so, you are no doubt giddy that new Canadian Radio-television and Telecommunications Commission ("CRTC") regulations require ads to now be transmitted at the SAME volume as the programs in which they appear.

Konrad von Finckenstein, CRTC Chairman when the proposed change was announced, was evidently as excited as any Canadian about the change to be introduced. With evident annoyance, he had curtly commented:

> "Broadcasters have allowed ear-splitting ads to disturb viewers and have left us little choice but to set out clear rules that will put an end to excessively loud ads. The technology exists, let's use it."

On a technical level, the new regulations require Canadian broadcasters and distributers, who are responsible for maintaining the volume of programs, to **adhere to audio fluctuation requirements** stipulated by the Advanced Television Systems Committee. The latter provides standards for measuring and controlling signals in digital TV.

The final regulations were published by the CRTC on May 8, 2012, and **came into force on September 1, 2012.**

As of September 1, 2012, more of your precious ads will be heard rather than muted by viewers leaping for the volume button to save their ears and their sanity. ■

CONSUMER PROTECTION NEWS

National Code Coming for Cell Phone Contracts

Bottom Line: Help is on its way for consumers who have difficulty with (read 'tear their hair out over') cell phone contracts. While some provinces had already started legislating in this area (each with its own approach), on October 8, 2012, the CRTC announced that it will hold a public hearing on January 28, 2013 to canvass what should be included in a national CRTC code for cell phone contracts. The discussion will no doubt cover what constraints, if any, there should be on penalties for cancelling wireless contracts, and what disclosures should be contained in ads and contracts, among other meaty issues. As for how provincial legislation and the CRTC code will co-exist, that will be a lovely issue for the lawyers .

A FLURRY OF PROVINCIAL LEGISLATION

To rewind a bit, the provinces were first onto this legislative scene, as several have been passing various pieces of consumer protection legislation setting out requirements and restrictions for cell phone contracts. **Quebec** led the charge back in 2010 with restrictions on automatic renewal of cell phone contracts, mandating written notice of when the contract will expire and requiring certain disclosures in ads.

Not to be outdone, both **Manitoba** and **Newfoundland** have passed similar legislation that came into effect September 2012. Among other things, Manitoba is requiring specific disclosures at the beginning of cell phone contracts, setting out cancellation fee caps, and mandating that notice be given of contract expiry or extension. Newfoundland similarly has prescribed disclosures for cell phone contracts and advertising and sets out cancellation fee rules.

Ontario is following suit with the *Wireless Services Agreement Act*, currently working its way through the Legislature. Unless the Committee makes amendments, the Ontario legislation will require specific disclosures, consumer cancellation rights, and parameters on the advertising of monthly fees.

SO WHO'S ON FIRST?

While the provinces have been busy crafting detailed, yet slightly divergent, consumer protection provisions, there may still be constitutional questions about whether and how they apply to cell phone companies, which fall under exclusive federal jurisdiction. When the CRTC forges ahead with a national code applicable to carriers operating in all provinces, these provincial consumer protection provisions may effectively become moot, to the extent that the CRTC-sanctioned Code mirrors provincial regulation, or be superseded altogether by contradictory federal rules. Great fodder for esoteric discussion, although the uncertainty has not been much fun for cell phone carriers, who have serious concerns about the outcome. We will be monitoring these developments with interest. ■

To rewind a bit, the provinces were first onto this legislative scene, as several have been passing various pieces of consumer protection legislation setting out requirements and restrictions for cell phone contracts.

SOCIAL MEDIA NEWS

Twitter Changes to Tweet About

Bottom Line: The folks at Twitter have been busy working on a number of changes that may affect you. Included are new features to inform you about your Twitter connectees, to better personalize content for you and to widen your language options. They have also made helpful changes to their Terms of Service and Privacy Policy. If you're an advertiser of alcohol (or any other product or service that may require an age restriction), Twitter is also working on a screening tool for minors you'll want to know about.

NEW FEATURES

In May 2012, Twitter emailed its members in an effort to keep everyone informed about some recent developments, including:

- a weekly email to members, keeping them 'in the loop' with what's going on with people to whom they're connected;
- the recent introduction of more language options, including Danish, Finnish, Norwegian, Polish and Swedish; and
- a "discover tab", intended to make the lives of Twitter users more meaningful. The tab uses personalization tools to connect users to content that matters to them and their followers, thereby eliminating the need to follow additional accounts. Users can simply reply, retweet, favourite a Tweet or Tweet a story to share their own perspective. That all makes it easier to join the conversation – largely what Twitter is all about.

However, it's not all fun and games. The discussion below outlines a few more relevant changes to Twitter's Privacy Policy, Terms of Use and age screening practices:

PRIVACY POLICY CHANGES

Twitter has provided more details about the information it collects from users and how it uses that information. For example, it explains how it tailors suggestions to users based on their recent website visits, which many find very helpful. For those who don't want to be tracked in that way, it explains how they can set the "do not track" privacy preferences in their web browsers to limit, modify or remove the information that Twitter collects. Further, it outlines the limited circumstances in which Twitter may share or disclose a user's information; for example, when the user authorizes a third party application to access his/her Twitter account, or when the information is not private or personal (i.e., public user profile information). For all the details, visit Twitter's updated Privacy Policy at **twitter.com/privacy**.

TERMS OF USE CHANGES

Twitter has also clarified the terms of the relationship between Twitter and its users in its Terms of Use. It has made clear that if a user accepts the terms on behalf of a company or other legal entity, the user represents that he/she is authorized to do so. Further, Twitter has added a new section dealing with ending the term of the relationship, including not only when users can end their legal agreement with Twitter, but also when Twitter can suspend or terminate a user's account. Please click here for the updated Twitter Terms of Use: **twitter.com/tos**.

NEW AGE SCREENING TOOL ON ITS WAY

Twitter is working on the development of an age screening tool in partnership with Buddy Media, a social media management company. This will require "new" Twitter followers to enter their date of birth before being permitted to follow a "restricted" account – for example, an alcohol advertiser. This will help ensure that users meet the minimum age requirement pursuant to relevant industry or legal guidelines. Users will only be required to enter their date of birth once, and this information will be available to all accounts that want to participate in age screening. Visit here for more information: **bit.ly/RGk4nv**.

TAKE A MINUTE TO LOOK

We encourage you to take some time to review the links provided above to familiarize yourself with these developments and how they may impact your business and/or your promotions. **Bottom line, the more informed you are, the better use you will be able to make of Twitter's social media benefits.** ■

SOCIAL MEDIA NEWS

Canada's New *Copyright Act* - What You Need to Know

Bottom Line: Bill C-11 ("*Copyright Modernization Act*") finally received Royal Assent on June 29, 2012, although there is not as yet an in-force date. With the new amendments to the *Copyright Act*, copyright owners will have added protection in some ways and diminished protection in others. For example, there is new latitude for others to use your logos in parody and satire and for your copyrighted material to be included in user-generated content (non-commercial). There are also new prohibitions on enabling infringement as well as new requirements for Internet service providers to address alleged infringement. We outline some of the details below.

PARODY AND SATIRE – NEW FAIR DEALING EXCEPTIONS TO INFRINGEMENT

Under the current law, if someone produces a satirical work using your logo, you can sue them for copyright infringement. That option will become severely limited under the amended *Copyright Act*, because of new parody and satire fair dealing exceptions to infringement. Under the new law, creating a satire or parody using logos owned by other parties may no longer be considered copyright infringement, if the dealing is "fair". These exceptions will likely provide new inspiration for creative directors and new angst for logo owners.

NEW USER-GENERATED CONTENT EXCEPTION TO INFRINGEMENT

The new user-generated content exception to copyright infringement has received a lot of attention. This allows one – subject to certain conditions – to create and publish "mash-up" videos and other user-generated content without infringing the copyright in the works used. Note! This does not mean that you can go ahead and encourage consumers to post user-generated content on your website without the threat of a copyright infringement lawsuit. The new exception does NOT apply where the user-generated content is used for a commercial purpose. The take-away? Advertisers still need to worry about vetting any user-submitted content for copyright infringement.

"NOTICE AND NOTICE" REQUIREMENT (V. THE US "NOTICE AND TAKE DOWN")

In contrast to the "notice and take down" system under US copyright law, Canada's "notice and notice" approach only requires service providers to pass on any notice alleging copyright infringement to the person identified as responsible for posting the content. If they don't, they may be subject to statutory damages of between $5,000-$10,000.

NO ENABLING INFRINGEMENT!

The new law prohibits online services that are primarily for the purpose of enabling copyright infringement. Now, copyright owners can sue the operators of sites like illegal peer-to-peer file sharing and "pirate" sites.

DIGITAL LOCKS AND RIGHTS MANAGEMENT INFORMATION

The amendments also make it an infringement to circumvent technological protection measures like digital locks, and prohibit one from removing or altering rights management information like digital watermarks that are used to identify copyrighted works. This provides copyright owners with additional tools to help protect and police their works. ■

FOCUS ON FOOD

New "*Safe Food for Canadians Act*" Coming Along

BOTTOM LINE: A new Bill to modernize the Canadian regulatory system for food is making its way through the legislative process. Introduced in the Senate in early June 2012 and now before a Senate Committee, the Bill's purpose is to enhance the safety of food in Canada, protect consumers by targeting unsafe practices, better control imports, institute a more consistent inspection regime across foods, strengthen food traceability and back it all up with whalloping big penalties.

REPLACING NUMEROUS ACTS – BUT NOT *FOOD AND DRUGS ACT*

The *Safe Food for Canadians Act* (Bill S-11) would repeal the *Fish Inspection Act*, the *Canada Agricultural Products Act*, the *Meat Inspection Act* and make related amendments to a host of other Acts, including the *Customs Act* and the *Consumer Packaging and Labelling Act*. The new Act wouldn't replace the *Food and Drugs Act*; rather, it would run parallel to it, focusing on food safety.

HIGHLIGHTS

Similar to the *Food and Drugs Act*, the Bill contains a **prohibition on false or misleading advertising** (and manufacturing, labeling, selling, etc.). Repeating the prohibition on representations that are likely to create an erroneous impression of a food's character, quality, value, quantity, composition, merit or safety, Bill S-11 adds "origin" and method of manufacture or preparation to the list.

It also includes a **mandatory licensing and registration regime** for anyone importing food products or transporting them across provincial borders (although those with licenses under existing regimes would not need to apply for new ones). The Bill contains **offences for tampering with food** or for making misleading representations that a food product was tampered with so as to be unsafe. The Bill also **ramps up fines** for non-compliance to the tune of **$5,000,000 and/or two years imprisonment** for the most egregious conduct.

IMPORTANT REGULATIONS TO COME

The devil may also prove to be in the details of the as-yet undrafted regulations. Regulations to come will, among other things, prescribe **standards for food preparation, quality and grading**, and require systems to **track food products** through the supply chain. ■

The new Act wouldn't replace the *Food and Drugs Act*; rather, it would run parallel to it, focusing on food safety.

FOCUS ON FOOD

Refined Regulations for "Gluten-Free" Claims

BOTTOM LINE: The *Food and Drug Regulations* ("Regulations") were amended on August 4, 2012, to include a definition for "gluten" as well as a new description of prohibited claims. Health Canada has also set out its position on the upper limits of gluten permissible (20 ppm), as well as acceptable testing methods for gluten detection.

As "gluten-free" food claims continue to proliferate wildly, Health Canada's new "Position on Gluten-Free Claims" was incorporated into legislation on August 4, 2012. Welcomed by many, it provides a more detailed approach to "gluten-free" regulation.

WHAT'S THE GLUTEN ISSUE?

Individuals with celiac disease experience a wide range of reactions from ingesting foods that contain gluten. Gluten is found in sources such as oat, rye, wheat or barley, but can also migrate into other foods through cross-contamination during manufacturing or distribution. For those with Celiac's Disease, **gluten can damage the small intestine, preventing the absorption of necessary nutrients**. Other serious conditions can be related to Celiac's Disease, such as certain cancers and infertility. There are also those who have Gluten "sensitivity." These people have many of the same symptoms as those with Celiac's Disease, but without the autoimmune response.

"Gluten-free" claims are therefore regulated as protecting the health and safety of individuals who require the use of foods for special dietary use.

SO WHAT'S NEW?

Previously, the *Regulations* did not define 'gluten' and simply restricted "gluten-free" claims to products that did not contain wheat, spelt, kamut, oats, barley, rye or triticale or any part thereof. **Given the realization that it is the protein portion of the cereal grains that is of concern**, the regulatory amendments now prohibit "gluten-free" claims (or creating the impression that a food is gluten-free) when the food contains any gluten protein or modified gluten protein, including any gluten protein fraction referred to in the definition of "gluten".

The new definition of "gluten" is: *(a) any gluten protein from the grain of any of the following cereals or the grain of a hybridized strain created from at least one of the following cereals: barley, oats, rye, triticale or wheat, kamut or spelt, or (b) any modified gluten protein, including any gluten protein fraction, that is derived from the grain of any of the cereals referred to in (a) or the grain of a hybridized strain referred to in (a).* Say that fast ten times!

IS THERE ANY TOLERANCE? AND HOW IS IT TESTED?

As a practical matter, there is a tiny bit of tolerance. Although the Regulations still don't speak to this. Health Canada's administrative position is that foods labelled "gluten-free" **may contain up to 20 parts per million of gluten**.

As for **test methodology**, while Health Canada has not specified a standard for gluten detection testing, it generally endorses ELISA-based methodologies such as the R5 (Mendez) ELISA. Health Canada will likely be codifying these administrative positions in the future, so keep your eyes peeled for new announcements. ■

FOCUS ON FOOD

"Highlighted Ingredients and Flavours" Guidelines – Closer, but Still Waiting

Bottom Line: The comment period recently closed (September 20, 2012) on the Canadian Food Inspection Agency's ("CFIA") second round of consideration for its proposed *Guidelines for Highlighted Ingredients and Flavours* ("Guidelines"). After a decade's delay, it is hoped that final Guidelines will follow soon.

'Highlighting', of course, refers to giving prominence on a product label to certain flavours and/or ingredient(s) – i.e., "made with fruit", or "strawberry flavoured ice cream".

Highlighting could take the form of written claims, the common name declaration and/or illustrated vignettes of the flavour or ingredient. While highlighting certain ingredients can help consumers know what a product will taste like, highlighting runs the risk of being misleading as to what is actually in the product, or how much of an ingredient is present.

Things to watch out for under the Guidelines include ingredients present in small quantities that are highlighted without more information, and formulations where the quantity of the highlighted ingredient is bolstered by ingredients that are similar in characteristic.

While they are certainly still subject to revision, the draft Guidelines seek to clarify compliance for foods that highlight ingredients viewed as beneficial or desirable. Things to watch out for under the Guidelines include ingredients present in small quantities that are highlighted without more information, and formulations where the quantity of the highlighted ingredient is bolstered by ingredients that are similar in characteristic.

If this all sounds familiar, it is because we were in the same boat about ten years ago, when CFIA put out a call for comments and consulted with the industry on this very same issue. Unfortunately, formal guidance was never published following that first round of consultation. With comments on round two now closed, CFIA will hopefully finalize formal guidance to nail this down. ■

"Natural" and "Naturally Raised" (et al) Guidelines: Almost There?

Now we're really getting curious, as it's been quite a while since the public comment period closed (November 26, 2011) on the proposed new guidelines for "Natural" and "Naturally Raised" (et al) claims for meat, poultry and fish products.

In our **2011 Green Marketing & Advertising Law Update,** we discussed the Canadian Food Inspection Agency's ("CFIA") proposed **guidelines** on increasingly popular claims such as (among others), **"natural", "naturally raised", "grain-fed", "fed no animal products and by-products", "raised without the use of hormones" and "raised without the use of antibiotics",** on meat, poultry and fish products ("Guidelines"). The Guidelines' purpose is to help you avoid challenges of misleading advertising under the *Food and Drugs Act* or the *Consumer Packaging and Labelling Act* when using these terms.

Currently, marketers **should be complying with the Guidelines anyway**, as industry has been on notice of the proposed rules since 2005 when they first arose out of a CFIA Discussion Paper. However, given the new consumer focus on "natural" foods the CFIA wanted to make sure the Guidelines met consumer expectations.

We have been advised by a representative of CFIA that, "…the issues raised through comments are under thorough consideration and evaluation. The finalized guidelines will be posted on the CFIA website soon."

We await the posting with baited breath and encourage you to watch out for an E-Blast from us (you can subscribe for E-Blasts here, if you wish; **marketinglawupdate.ca)**.

If you're hungry for yet more details, see **CFIA's Questions and Answers about the Guidelines**. ■

Court Allows Chobani® Greek Yogurt's Importation into Canada

Bottom Line: After a spirited fight, on June 21, 2012, the Federal Court of Canada ("Court") upheld import permits issued to Agro-Farma Inc. ("Agro"), the maker of the top-selling U.S. brand, Chobani® Greek yogurt. Although Canadian processors strongly protested the grant of the permit, arguing that they would be at a competitive disadvantage and the move would contravene the dairy industry's supply management system, the Court found differently, looking through a broader lens.

Greek yogurt has exploded in popularity over the past year, with Canadian sales increasing from 1% to 6% of the Canadian yogurt market. With sales growing at such a fast pace, it is no wonder that Agro, the maker of top-selling US brand Chobani® Greek yogurt, wanted a piece of the Canadian market. In 2011, Agro was granted a **one-year test market import permit** from Canada's Minister of International Trade whereby it could temporarily import and sell its Greek-style yogurt in the **Greater Toronto Area**. ▶

CANADIAN PROCESSORS SAY NO

Major Canadian yogurt processors opposed the granting of the permit to Agro on the basis that it contravened the supply management system regulating the Canadian dairy industry. The supply management system, through control mechanisms on domestic pricing, the volume of milk produced and the volume of imported dairy products, aims to **help milk and cream producers obtain a fair return for their labour and investment.**

With sales growing at such a fast pace, it is no wonder that Agro, the maker of top-selling US brand Chobani® Greek yogurt, wanted a piece of the Canadian market.

Canadian processers argued that their sales would be harmed by Agro's import permit and would result in a reduced demand for Canadian milk. Given that the **US government pays direct subsidies to dairy farmers**, the import permits would allow Agro to sell Chobani® made with much less expensive US milk. As the Canadian processors explained, this would mean that even accounting for the cost of importing the yogurt from the US, Agro's **Chobani® sales would be more profitable** than sales made by Canadian processors, who are required to use more expensive Canadian milk.

COURT SAW A ROSIER PICTURE

In deciding to dismiss the Canadian processors' application for judicial review, the Court considered whether the issuance of the import permit to Agro would harm the supply management system in the long term in light of the following factors: geographic scope and duration of the import permit and the market conditions for the relevant products.

The Court acknowledged that while the import permit **might mean greater competition for Canadian yogurt processors in the short term,** which could potentially impact their future market share gains, there was **no evidence that the permit would have a long term negative impact** on supply management. The Court noted, among other things, that sales of the Chobani® Greek yogurt would be limited to the Greater Toronto Area and imports were only possible for 15 months. Further, although the import permit might result in a short term reduction in domestic yogurt sales, the **Court anticipated an increase in demand for milk in the long run** which would have a positive impact on supply management.

Ultimately the Court found that the Minister of International Trade made a reasonable decision in extending the temporary permit to Agro, and therefore dismissed the challenge to block the Chobani® Greek yogurt importation.

For case details please see: ***Ultima Foods Inc. v. Canada*** **(Attorney General), 2012 FC 799**. ■

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FOCUS ON FOOD

Strict New Chilean Law for Foods High in Calories, Fat, Salt or Sugar

BOTTOM LINE: Chile just passed new marketing restrictions and labelling requirements for packaged foods qualifying as "high" in calories, fat, sugar or salt ("HFSS"). The new legislation not only requires a label warning for HFSS foods, it (among other things) prohibits their advertising to kids under 14 as well as "kids' meal" type marketing devices.

In a note kindly sent to us by Ariela Agosin W. of **Albagli Zaliasnik**, our Chilean colleague in the **Global Advertising Lawyers Alliance**, the *Law Bill Regarding The Nutritional Value of Foodstuffs and Their Advertising* was originally launched in 2007, and after much discussion, finally came into force on July 6, 2012.

The Ministry of Health was **given a year from July 6, 2012 to determine the thresholds** for what will be considered "high" in calories, fat, salt or sugar in various categories of food.

Ariela indicates that the most controversial points of the law are that HFSS products:

1. **must be identified as high in calories, fat, salt or sugar**, as applicable, on the product label;

2. may **not be advertised to children under 14** years of age;

3. may **not be advertised within school premises**, including elementary, middle and high school;

4. may not be sold through the use of promotional devices such as offering toys or prizes. Consequently, Ariela says, some marketing strategies that are common today such as **McDonald's® Happy Meals®** and **Kinder® chocolates** may no longer be permitted if they constitute HFSS foods; and

5. must, in any advertising, **include a message drafted by the Ministry of Health** to promote healthy habits.

We will watch with interest to see which foods will ultimately be affected once the threshold details are determined. ■

The new legislation not only requires a label warning for HFSS foods, it (among other things) prohibits their advertising to kids under 14 as well as "kids' meal" type marketing devices.

COSMETICS/DRUGS/PRODUCT SAFETY/REGULATORY

New Sunscreen Labelling Rules: Canada to Follow?

Bottom Line: New US Regulations now prohibit certain claims on sunscreen labels, including "sunblock", "waterproof", "sweat proof", references to immediate protection, over two hours' protection (unless FDA approved) and SPF claims of over 50 (without evidence). Health Canada is taking note.

We have watched with interest the new regulations implemented by the US Food and Drug Administration ("FDA") on sunscreen labels . Notably, now:

- **Effectiveness Test** - Sunscreens must pass a standard test showing their effectiveness against both UVA and UVB rays before they can be labelled "Broad Spectrum" and "SPF 15" or higher;
- **More Specific Water Resistance Claims** - Sunscreens that claim water resistance must tell consumers how long the protection will last while swimming or sweating, based on standard testing. The permitted times are either 40 or 80 minutes. "waterproof" and "sweat proof" claims are now prohibited;
- **No More "Sunblock"; Claimed Duration** - Products may not be labelled as "sunblocks" and cannot claim to offer immediate protection upon application. Furthermore, claims that a sunscreen offers more than two hours of sun protection are prohibited, unless backed by data and approved by the FDA; and
- **Max 50 SPF** - Lastly, a proposal was made by the FDA which would prevent sunscreens from being labelled with an SPF greater than 50 without evidence being provided of its higher value.

Initially, the compliance date was to be June 18, 2012. However, due to difficulties companies faced in making these changes before the deadline, the **FDA extended the date to December 17, 2012**.

CANADA'S PLANS?

With these changes happening south of the border, **Health Canada has acknowledged the need to update sunscreen labelling regulations** in Canada. It has said it will review sunscreen rules in light of the FDA's changes and will also move towards adopting an internationally accepted test for UVA and UVB protection. However, **Health Canada has not set any timelines** for revising sunscreen regulations in Canada to date. ■

New US Regulations now prohibit certain claims on sunscreen labels, including "sunblock", "waterproof", "sweat proof", references to immediate protection, over two hours' protection (unless FDA approved) and SPF claims of over 50 (without evidence).

COSMETICS/DRUGS/PRODUCT SAFETY/REGULATORY

Cosmetic Claims vs. Drug Claims: Common Pitfalls

Bottom Line: Advertising within the cosmetic and drug industries can be confusing as there are strict rules as to what may and may not be said for each category of products. Drugs must be advertised primarily for their therapeutic effects and cosmetics only for their superficial effects. However, as drugs increasingly compete on as many plains as possible and cosmetics strive to fulfill women's most fervent skin and hair dreams, marketers strain against the bounds and the regulators strain back. This discussion may serve as a helpful road maker if you're navigating the maze of rules.

COSMETIC CLAIM FAUX PAS

Cosmetics are defined in the *Food and Drugs Act*, essentially, to include any substance used to cleanse, improve or alter the complexion, skin, hair or teeth, including deodorants and perfumes. One of the common pitfalls associated with cosmetic advertising is making claims that tiptoe beyond cosmetic territory and land in drug terrain – most often **by implying a physiological effect**.

One of the common pitfalls associated with cosmetic advertising is making claims that tiptoe beyond cosmetic territory and land in drug terrain – most often by implying a physiological effect.

According to Health Canada, claims are cosmetic in nature if they describe the effects of the product in the context of appearance or their sensory benefits and do not attribute any therapeutic or organic effect to the product. (See **Guidelines for Cosmetic Advertising and Labelling Claims**.)

For example, a skin scrub can claim to make skin look younger and fresher, but cannot claim to actually make skin younger.

Similarly, for **vitamins, minerals or antioxidants found in cosmetics,** claims can be made regarding how the ingredient produces a *cosmetic benefit*; however, references to any therapeutic or medicinal effect of the ingredient are prohibited.

Drugs, by contrast, are defined to include, among other things, any substance used (or represented for use) in the diagnosis, treatment or prevention of disease OR restoring, correcting or modifying organic functions. It's the latter branch that serves as a big, enticing pool of quick sand for cosmetics, as talk of **fiddling with what is going on beneath the surface of the skin** or in the functions of the body or skin are considered to be "modifying organic functions" and therefore off limits for cosmetics – unless they want to go through the drug approval process.

DRUG CLAIM FAUX PAS

Common pitfalls of drug advertising include claims that **mislead consumers as to the character or effectiveness of the product**. In deciding what drug claims are acceptable, Health Canada aims to ensure that information provided to consumers helps them make informed and appropriate decisions about their purchases.

Based on this guiding principle, **advertisements must always include the drug's therapeutic effect**. Although cosmetic claims may be presented in some cases, Health Canada requires the emphasis to always be on the drug's therapeutic action. For instance, dandruff shampoo may claim to control dandruff flakes and have a moisture-rich formula for shiny hair, however it is unacceptable for the same product to simply claim it has a moisture-rich formula.

Furthermore, drug claims must not mislead consumers about the product's **duration of action or onset of action.** For example, a drug may claim to relieve headaches for up to eight hours, but cannot claim to relieve headaches all day long.

Lastly, with respect to the efficacy of a product, drug claims must not **exaggerate the degree of relief or benefit** that may be obtained from using the product. For example, a product may claim to help keep skin clear of new acne pimples, but cannot claim to cure acne. ■

QUEBEC NEWS

Demystifying Quebec Contest Registration

Bottom Line : Quebec contest registration isn't really so confusing. Once you have it in a nice chart.

We get so many questions about Quebec contest registrations that we thought we'd just lay out the timing for you in a simple chart. Most of you have contests that give away far more than $2,000 worth of prizes, so if that's the case, you can just look at the far right column.

As to the timing, yes, the Registration Form (Publicity Contest Notice), and duty (tax) payable are due at least 30 days before the contest is first advertised. But raise your hand if you ever manage to file on time. Not seeing a lot of hands.

While the *Régie des alcools des courses et des jeux* ("Régie") hasn't been looking to throw late filers in jail, you may be looking at interest charges in some cases.

As a refresher, then, here are the deadlines to keep in mind:

Total Prize Value	$0-100	$101-1,000	$1,001 – 2,000	$2,001 +
Documents to deposit and deadlines	Nothing to be done – just enjoy your contest	1. Registration Form must be filed 5 days before the contest is first advertised to the public 2. Pay duties with registration	1. Registration Form must be filed at least 30 days before the contest is first advertised to the public 2. Pay duties with registration	1. Registration Form must be filed at least 30 days before the contest is first advertised to the public 2. Pay duties with registration 3. Official Rules and advertising showing appropriate disclosures must be filed 10 days before the contest is first advertised to the public

For another tip on a changed Régie policy, we used to say in contest rules that a draw would occur "on or about" a certain date, just in case it didn't come off when planned for some reason. The *Régie* no longer feels that's specific enough to comply with the *Rules Respecting Publicity Contests*. So you'll need to go out on a limb and name an unqualified date. ■

PRIVACY NEWS

Update on Canada's Anti-Spam Legislation – Don't Wait to Get Ready

Bottom Line: Canada's Anti-Spam Legislation ("CASL") is a strict regime with severe penalties for non-compliance, including a private right of action. For example, as marketers, whether you're using electronic means to invite consumers to enter a contest, try a new product or participate in some other marketing program, you won't be able to do so without getting proper consent and observing specific form and content requirements in your subsequent e-messages.

BACKGROUND

CASL regulates the sending of "commercial electronic messages" ("CEMs"), including email, text, sound, voice and image messages. Notably, this definition goes beyond the reach of anti-spam legislation in the US and several other jurisdictions which focus on email spam. **CASL applies to CEMs sent to, through or from Canada, meaning that it applies to US or other international senders who send emails into Canada**.

In general, subject to limited exclusions and prescribed circumstances in which consent is not required (i.e., CEMs that provide a quote, facilitate, complete or confirm a commercial transaction or provide factual information), CASL prohibits the sending of CEMs unless the recipient has provided express or implied consent and the message complies with prescribed form and content requirements.

While an implied form of consent may be relied upon in certain circumstances (i.e., where there is an existing business relationship), such consent is time-limited under CASL (i.e., two years after a purchase or written agreement, six months after an inquiry). Organizations must therefore carefully consider the type of consent they obtain, and be prepared to keep track of various time restrictions (or else obtain express consent from the outset). Given that there is currently **no grandfathering of existing consents** that were obtained under existing privacy legislation, organizations will need to take stock of all of their CEMs and carefully consider the application of CASL to each type of communication **to determine if a re-consenting process is required**.

HEAVY-DUTY PENALTIES

The penalties for violations of CASL are significant. The Act allows the Canadian Radio-television 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**. The Act also provides for a **private right of action**, allowing consumers and businesses to take civil action against anyone who violates the Act. The court may order violators to pay compensation in an amount equal to the loss or damage suffered or expenses incurred, and statutory damages of up to $200 for each violation of the Act, up to a maximum of $1 million each day. For mass email campaigns over a period of time, then, the **potential damages and penalties could be enormous**.

EXPRESS CONSENT

The ***CRTC Regulations*** ("CRTC Regs"), finalized in March 2012, prescribe the requirements for obtaining express consent to send CEMs under CASL. Express consent may be obtained orally or in writing. In either case, **any request for express consent must set out the following information:**

- the **purpose** for which consent is being sought (meaning that if you get consent for one purpose, you won't be able to send CEMs for another);
- the **name** of the person requesting consent;
- if the consent is sought **on behalf of another person** (such as a marketing partner or sponsor), the name of that person;
- if consent is sought on behalf of another person, a statement indicating which person is seeking consent and which is the person on whose behalf consent is sought;
- the **mailing address**, and either a **telephone** number providing access to an agent or a voice messaging system, an **email address or a web address** of the person seeking consent or, if different, the person on whose behalf consent is sought; and
- a statement indicating that the person whose consent is sought **can withdraw** their consent. ▶

Note, though, that unlike in the US, under CASL you can't send a request for consent by email – or by any other electronic means covered by CASL. Requests for consent are considered to be CEMs and therefore you will need to have consent in order to send them.

FORM AND CONTENT REQUIREMENTS FOR CEMS

Under CASL, once you have consent to send CEMS, the CEMS themselves will need to comply with prescribed form and content requirements, including an **unsubscribe mechanism**. The CRTC Regs require the following information to be set out clearly and prominently in each CEM:

- The **name** by which the sender carries on business;
- A **mailing address** and one of either: (i) a **telephone** number with access to an agent or voice messaging system; (ii) an **email** address; **or** (iii) a **web** address; and
- When sending out a message **on behalf of another organization**, the message must include the same contact information listed above for the other organization and a statement indicating which organization is sending the message and which organization on whose behalf the message is sent.

In addition, the CRTC Regs provide that an **unsubscribe mechanism** (in a prescribed from) must be set out clearly and prominently and be able to be "readily performed." The unsubscribe mechanism must take effect within ten days of the unsubscribe request being sent.

TIMING

The CRTC Regs for CASL were finalized in March of this year. Industry Canada regulations are expected to be released this fall for a second comment period. The Act (and associated regulations) is expected to be **in force in the latter half of 2013**. ■

For mass email campaigns over a period of time, then, the potential damages and penalties could be enormous.

PRIVACY NEWS

Online Behavioural Advertising Guidelines Released

Over the last year, the Office of the Privacy Commissioner of Canada ("OPC") released a set of **Guidelines** and a **Policy Position** on online behavioural advertising ("OBA").

The OPC defines OBA as "tracking and targeting of individuals' web activities across sites and over time, in order to serve advertisements that are tailored to those individuals' inferred interests."

In the OPC's **Privacy and Online Behavioural Advertising Guidelines**, the OPC takes the position that information collected in the context of OBA will generally constitute personal information and will therefore be subject to the federal privacy legislation, the *Personal Information Protection and Electronic Documents Act* ("PIPEDA").

Under the OBA Guidelines, an opt-out form of consent for the collection, use and disclosure of personal information in OBA is permissible provided that:

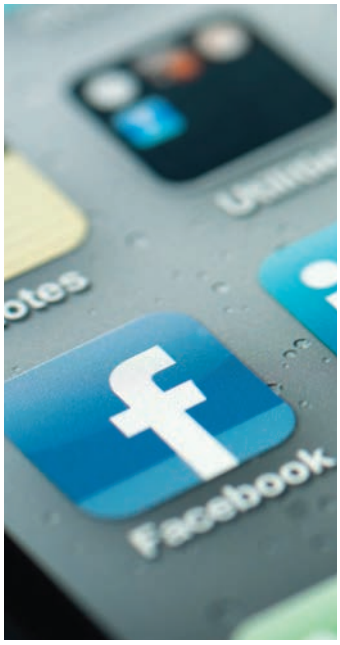
- Individuals are made aware of the **purposes** for the OBA, at or before the time of collection, in a manner that is clear and understandable.
- Individuals are informed of the **various parties involved** in the OBA at or before the time of collection.
- Individuals are able to **opt-out** of the practice and the opt-out takes effect immediately and is persistent.
- The information collected is **non-sensitive** in nature (i.e. not health or financial information).
- The information is **destroyed** or made de-identifiable as soon as possible.

The OBA Guidelines also provide that OBA cannot be made a condition of a service (i.e., if users cannot block or prevent OBA, it should not be used) and, as a best practice, OBA should not be used on websites designed for children. ■

The OPC takes the position that information collected in the context of OBA will generally constitute personal information and will therefore be subject to the federal privacy legislation.

PRIVACY NEWS

Social Networking/Privacy Investigations Continue in Canada – Social Plug-ins, Friend Suggestions and OBA



Bottom Line: Canadian privacy regulators continue to shape the law relating to privacy and social networking websites. Since our annual Update last September, multiple complaints have been investigated against social networking websites, including Facebook and Nexopia. Among other important findings: a) Facebook provided appropriate notice and obtained informed consent in the context of social plug-ins on third-party sites; b) Facebook's emailing of "friend suggestions" to non-Facebook users was found to require clear and adequate notice and a conspicuous opt-out which Facebook implemented; and c) among other things, improvements were recommended to Nexopia's explanation of how it used member profile information to serve ads, third-party cookies and opt-outs.

FACEBOOK

The Office of the Privacy Commissioner of Canada ("OPC") released three *Reports of Findings* on Facebook over the last year – two of which are particularly relevant to marketers.

PLUG-IN USE

In the first investigation, related to Facebook's use of social plug-ins (the "Like" button and "Recommends" or "Recent Activity" box) on third-party websites, the complaint was found to be "not well-founded." **The OPC okayed the social plug-ins on the basis that: (a) Facebook was not sharing its users' personal information with the third-party hosts**; and (b) Facebook was providing users with **clear, understandable explanations** of how the plug-ins employ users' personal information.

FRIEND SUGGESTIONS

The second complaint, relating to Facebook's **"Friend Suggestion"** feature, was found to be "well-founded and resolved". In this investigation, complainants had received an email invitation to join Facebook that included "friend suggestions" (i.e., a list of Facebook users that the non-user may know based on the non-user's email address and other information available on Facebook such as photo tags). In its *Report of Finding*, the OPC found that Facebook failed to obtain non-users' consent to use their personal information to generate friend suggestions. However, the OPC was satisfied with the solution Facebook implemented when it began to provide non-users with both **clear and adequate notice** and a **conspicuous opt-out mechanism** to enabel non-users to opt-out of having their personal information used for "friend suggestion". The matter was accordingly resolved.

NEXOPIA

Also in February 2012, the OPC responded to the Public Interest Advocacy Centre's complaint against Nexopia, a Canadian **social networking website for youth**.

The complaint involved six issues, including an allegation that Nexopia did not adequately explain its advertising practices, in particular, how personal information is shared for advertising purposes. The *Report of Finding* commented on the following two advertising practices:

- **Use of member profile information to serve targeted ads to users.** Consistent with a previous finding on this issue, the OPC found that Nexopia's own use of member profile information for advertising purposes and Nexopia's serving of targeted ads to users was **acceptable, as long as it provided adequate notification to users.** The OPC's conclusion was influenced by the facts that Nexopia is a free service and advertisers receive only aggregate information about Nexopia members.
- **Placement of cookies** by third parties, such as advertisers, in the browsers of users and site visitors to track web usage. Citing its December 2011 **Privacy and Online Behavioural Advertising Guidelines**, the OPC emphasized that individuals "should be able to opt-out of being tracked by third-parties" (which are typically unknown to them).

The OPC recommended that Nexopia update its Privacy Policy to ensure that users are **better informed** about the use of **Nexopia-served advertising**, the presence of **third-party cookies** and how users can **opt out** of third-party cookies. Further, the OPC recommended that Nexopia use "alternative methods on its website to **explain the implications of third party targeted advertising and tracking cookies** with respect to users' information, and how users can opt-out of such tracking, e.g. by adjusting their browser settings."

For additional information on Privacy and Online Behavioural Advertising, check out our previous article. ■

Professional News

RECOGNITIONS:

Wendy Reed and **Catherine Bate**, co-chairs of the Heenan Blaikie Marketing and Advertising Law Group, were both listed again in *The Lexpert®/American Lawyer Guide* to the *Leading 500 Lawyers in Canada* in the Advertising & Marketing Law category. **Wendy Reed**, **Catherine Bate**, **Adam Kardash** and **John Salloum** were among the 85 lawyers from Heenan Blaikie listed in *The Best Lawyers in Canada® 2013*. All four were listed in the Advertising & Marketing category.

Wendy Reed spoke in Toronto on **Green Advertising** at the Canadian Institute's Forum on **Commercializing Cleantech** on January 23-24 and at the Business Information Group's **Carbon Economy Summit** on June 6. Moving to **New York**, she spoke on **Canadian Promotion Law** at the American Conference Institute's conference on Digital Advertising Compliance: Sweepstakes, Promotions and Social Media on September 11-12. Moving on again to Chicago, she will speak on "**Successful Environmental Marketing with the New Rules**" at the Promotion Marketing Association's 34th Annual Law Conference on November 13-14. She also chaired Heenan Blaikie's **4th Annual Earth Week Event** on April 21.

On November 28, she will address Green Advertising at a Sustainability Boot Camp for C-Suite Executives, organized by Leapfrog Sustainability Inc. and hosted by Globe Foundation, HermanMiller and Southbrook Vineyards.

On a chilly February 29, **Catherine Bate** addressed, "**Hot Legal Issues in Social Media Marketing**" in an American Bar Association webinar on social media. On the food front, she was "**Addressing Food & Beverage Marketing Regulatory Changes in the EU & Canada**" at the Advanced Legal & Regulatory Summit on Food & Beverage, Marketing & Advertising Conference, American Conference Institute in Washington, D.C. on March 19-20. On June 19, Cathy was co-presenter on a "**Truth in Advertising 101**" teleconference of the **Canadian Bar Association's** ("CBA") National Competition Law Section Corporate Counsel Committee. Cathy chaired an **Ontario Bar Association** ("OBA") Consumer Law Essentials session on October 17 in her continuing role as chair of the Consumer Law Subcommittee of the OBA's Business Law section. This year, Cathy is also chairing the **Marketing Practices Committee** of the CBA's Competition Law Section.

Catherine Bate joined with **Sara Perry** to explain "**Everything You Need to Know for Lawyers Practising Today**" at the 18th Annual Advertising & Marketing Law Conference of the Canadian Institute in Toronto on January 24-26. Cathy and Sara have also co-authored the "Marketing & Advertising Law Update from Heenan Blaikie" in the **Ad Women of Toronto's Monthly Topics & Trends newsletter**.

PROFESSIONAL NEWS AND PRACTICE OVERVIEW

Erin O'Toole developed and writes for a new **legal column for *Marketing Magazine* called** "**Rules of Engagement**". This year, he's covered such topics as "Protecting the Sound of your Brand", "Everything's Gone Green" (green marketing) and "ZMOT" (Zero Moment of Truth). Erin also spoke at the Food & Consumer Products of Canada's "Art of Executive Leadership" on February 22 on "Legal & Strategic Considerations for Leaders".

Sara Perry spoke about "**Changes in Marketing & Advertising Law**" at Heenan Blaikie's "8 Minute Updates: Changes in the Law II", Continuing Professional Development Series, on September 27. She has also assisted Erin O'Toole in several articles for his "**Rules of Engagement**" column in *Marketing Magazine*. Additionally, Sara is a regular contributor to Heenan Blaikie's Entertainment Law Blog entitled the **Entertainment & Media Law Signal**.

John Salloum spoke about "**Online Advertising Guidelines**" at the 2012 Information Technology Law Spring Forum of the Canadian IT Law Association and Law Society of Upper Canada on June 18. He also presented "**A Complete Guide to Running Promotions on Facebook & Twitter**" in The Canadian Institute's conference on Managing Legal Risks in Running Online Contests on June 21-22.

Julie Larouche and **Cindy Belanger** lectured on the **Future of Comparative Advertising in Canada** on January 24 and **Online Contests** on March 27, both in Montreal.

Among other engagements, **Adam Kardash** presented on "**Best Practices in Global Privacy Compliance**" at the Canadian Corporate Counsel Association's 2012 World Summit, in **Montreal** on April 14. He spoke on "**Meaningful Privacy Governance without Consent? The Viability of the Statutory Consent Requirement**" at the International Association of Privacy Professionals Canada Privacy Symposium 2012 in Toronto on May 11. Travelling to **Paris**, Adam spoke on "**Global Trade Secret Protection and Drafting Global Policies**" at an ABA meeting on May 15. Back in Toronto, he covered "**Emerging Issues in Privacy, Anti-Spam and E-Commerce Law**" at the 2nd Annual Business Law Summit of the Law Society of Upper Canada on May 16, and co-chaired Heenan Blaikie's "**2012 AccessPrivacy Annual Privacy Conference**" on June 7. Adam appeared as an expert witness before the **House of Commons Standing Committee** on Access to Information, Privacy and Ethics in relation to its study on Privacy and Social Media in **Ottawa** on June 19. Adam also co-authored "**Social Networking and the Global Workforce in International Labor and Employment Laws**", Volume I, 2012 Cumulative Supplement, the Canadian chapters in both the ABA's ***Consumer Data Security Handbook*** and "**Data Protection & Privacy**" in *Getting The Deal Through*.

Bridget McIlveen wrote on "**The Safeguarding Canadians' Personal Information Act**" in the Canadian Privacy Law Review, Volume 9, No. 2, January 2012, as well as co-authored "**Social Networking and the Global Workforce in International Labor and Employment Laws**", Volume I, 2012 Cumulative Supplement. On the speaking circuit, Bridget helped the audience "**Understand How New Anti-Spam Legislation Could Impact You and Your Client**" at The Six-Minute Business Lawyer 2012 hosted by The Law Society of Upper Canada on June 7 and on "**Canada's Anti-Spam Legislation**" at Heenan Blaikie's 8 Minute Updates : Changes in the Law I, Continuing Professional Development Series, on June 13. ■

PRACTICE OVERVIEW

Marketing, Advertising & Regulatory Group

Heenan Blaikie has provided expert and practical service in Marketing, Advertising & Regulatory Law for over 20 years. We advise Canadian and international manufacturers, retailers, importers, exporters, marketers and their agencies on a full range of marketing, advertising, promotion, packaging and regulatory issues. These include:

- **Social and New Media Programs**
  One of our particular strengths, we act for major social media clients and multi-national marketers who use new media extensively – from social networking and viral campaigns to text messaging and everything in-between. In addition to navigating the privacy, intellectual property, advertising and other legal implications, we understand the technology formats and the practical issues that can arise.

- **General Advertising Review and Challenges**
  Misleading or puffery? Substantiated or not? Comparative ad just over the line? We help you assess risks and suggest ways to reduce them with minimal pain. If you find yourself in hot water, we help you defend advertising or promotional challenges – in self-regulatory forums, tribunals or court.

- **Contests, Games, Sweepstakes and other Promotions**
  We review innumerable rules, releases, associated ads and terms and conditions for a full array of promotions, including ontests, gift cards, reward programs and rebates.

- **Regulated Consumer Products and Consumer Product Safety**
  These are subject to a panoply of special rules for marketing, labelling, safety standards and importation. We cover hazardous products, electronics, food, alcoholic beverages, natural health products, cosmetics and others, including recall issues and safety-related litigation. Want to know how the *Canada Consumer Product Safety Act* will impact your business? We can help.

- **Consumer Protection**
  How does provincial consumer protection impact your consumer agreements, programs and warranties? We can assist you to figure it out.

- **Quebec's Unique Issues**
  We advise on French language issues, restrictions on advertising to children, Quebec contest registration requirements and consumer protection legislation, including the extensive recent amendments to Quebec's *Consumer Protection Act*.

- **Agreements**
  All kinds – including agency, talent, confidentiality, distribution, licensing, co-promotional, supply and sponsorship agreements.

- **Green**
  As a key part of our practice, we focus on evolving environmental claim guidelines and cases, not only in Canada, but around the world. We are an active part of the firm's Climate, Cleantech & Sustainability Group, which offers an integrated service for "green" issues and projects of all kinds, from eco-advertising to extended producer responsibilities, patenting new technologies and acquiring, financing or setting up renewable energy, recycling and other facilities.

- **Global Campaigns and Programs**
  We are the sole Canadian firm in the Global Advertising Lawyers Alliance (gala-marketlaw.com), a network of marketing and advertising lawyers in over 50 countries. As part of this group, we help coordinate and obtain advice abroad for multi-national promotional programs and ad campaigns.

- **Branded Entertainment**
  We help clients integrate marketing and advertising campaigns into various entertainment vehicles such as product placement and sponsorship agreements and corporately produced film, television, and Internet series.

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About Heenan Blaikie

Heenan Blaikie is recognized as one of Canada's leading law firms. We focus on six practice areas: business law, labour and employment, taxation, litigation, intellectual property and entertainment law. We deliver comprehensive legal advice and innovative business solutions to clients across Canada and abroad from our nine offices in Quebec, Ontario, Alberta and British Columbia, and our Paris office and Singapore representative office.

Today, the firm is over 575 lawyers and professionals strong and still growing. We strive to become partners in our clients' businesses, ensuring that our legal advice addresses their preoccupations and priorities. We seek to constantly adjust the scope of our services to better serve our clients' legal needs.

Our clients range in size and sophistication from start-ups to the largest public companies, as well as health care and social services institutions, schools and universities, and numerous government entities. We also represent international clients seeking to protect and expand their interests in Canada.

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