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Advertising law in Canada encapsulates a multitude of legal issues and is governed by federal and provincial laws as well as self-regulatory codes, policies and bodies. This paper is a summary of the most relevant developments in Canadian advertising law in the last year.

Advertising and the Competition Act General Misleading Advertising

The *Competition Act* prohibits the making of a representation to the public that is false or misleading in a material respect for the purpose of promoting, directly or indirectly, any business interest. The Act provides two adjudicative regimes to address misleading advertising. Section 52 contains the criminal prohibition, which requires *mens rea* to be proved and false and misleading representations to be made knowingly or recklessly. Part VII.1, which includes section 74.01, addresses most instances of misleading representations and deceptive marketing practices under the Act's civil regime.

Recent Criminal Case: In March of 2006, the Competition Bureau announced that charges had been laid against four individuals and two companies, Merchant Supply International and International Merchant Supply, all of whom were allegedly involved in deceptive telemarketing practices in Quebec. The provisions pursuant to which the accused were charged are s. 52.1(3)(a) and s. 52.1(2)(b) of the *Competition Act*, which deal with the criminal aspect of deceptive telemarketing.

The charges allege that the accused orchestrated a scheme whereby telemarketers would contact both small and medium-size Canadian and U.S. businesses claiming to be their regular suppliers of rolls of paper, ink cartridges and cleaning cards for use in electronic payment and credit card services. Once connected, the telemarketers would inform the target companies that the price of the merchandise being offered was going to rise imminently. By doing so, the telemarketers induced the companies to make immediate purchases, which they would not otherwise have made. The rev-

enue derived from the fraudulent activity between January 2000 and February 2004 is estimated to be approximately \$7.8 million. This case is currently being heard in the Court of Quebec.

Recent Civil Decision: February 2006—In a consent agreement filed with the Competition Bureau, Fabutan and its president agreed to refrain from making claims concerning unproven health benefits of indoor tanning, including representations that it can provide a treatment for vitamin D deficiency and therefore reduce the risk of certain cancers, heart and cardiovascular conditions and osteoporosis. It also agreed to stop promoting indoor tanning as useful in treating seasonal affective disorder or stimulating the metabolism. Not only did Fabutan agree to stop promoting these unproven health benefits, it has undertaken that any statement concerning a relationship between UVB, vitamin D and possible health benefits must be accompanied by a nine-sentence paragraph warning against skin cancer, the truth behind exposure to UVB and the resultant production of vitamin D, as well as Fabutan's acknowledgment that UVB exposure does not stimulate the thyroid. Additionally, any promotions linking tanning to protection against sunburn must stipulate Health Canada's recommendation of SPF 15 sunscreen. Fabutan has agreed to pay an administrative monetary penalty of \$62,500, and its president has made a \$12,500 donation to the Direct MS Charity of Alberta.

Misleading Price Advertising

Part VII of the *Competition Act* prohibits misleading price claims. Basing a savings claim on the "ordinary selling price" of a product is deceptive, unless (1) the advertiser actually sold a substantial volume (i.e., at least 50% of the volume of stock) of the advertised product or service at this price within the six months preceding the advertisement or (2) the advertiser offered the product for sale in good faith at this price for a substantial period of time (i.e., at least 50% of the time) in the six months immediately preceding the advertisement. The Competition Bureau takes a strong approach toward enforcing proper pricing practices.

In July of 2006, the bureau announced that a settlement, in the form of a consent

agreement, had been reached with Grafton-Fraser Inc. ("G-F"), resolving the bureau's investigation of a certain number of that company's pricing practices. In its investigation, the bureau alleged that G-F, a retailer of men's clothing, had significantly inflated the regular price of select items sold in its stores, which resulted in an inflation of the savings claims made on these items when they were marked down at a sale price. The bureau concluded from its investigation that the items at issue had not in fact been sold in any significant quantity or for any reasonable period of time at the marked regular price.

As a part of the ten-year consent agreement, G-F was required to pay an administrative monetary penalty of \$1 million and to cover a portion of the bureau's inquiry costs, in the amount of \$200,000. G-F was also required to ensure that any current and future references to regular selling prices were fully compliant with the ordinary selling price provisions and the *Competition Act*. To further this end, G-F was required to implement a corporate compliance program to ensure conformity with respect to the provisions of the *Competition Act* dealing with false or misleading representations and deceptive marketing practices. Finally, pursuant to the consent agreement, G-F was required to prominently display corrective notices in its stores across Canada, on its websites as well as in certain newspapers.

CRTC To Establish A National Do-Not-Call List

On November 25, 2005, Parliament assented to Bill C-37, amendments to the *Telecommunications Act* that would allow the Canadian Radio-Television and Telecommunications Commission ("CRTC") to establish a national do-not-call list. The amendments came into force on June 30, 2006. The Bill C-37 amendments were initiated in part to follow in the footsteps of the U.S. Federal Trade Commission ("FTC"), which in 2003 amended its telemarketing sales rules to include a national do-not-call registry.

The CRTC has the authority to administer databases or operational systems for the establishment of the list and is permitted to delegate such powers. Exceptions to the do-not-call list are carved out

Advertising & Marketing

RECENT DEVELOPMENTS OF IMPORTANCE

in the legislation for calls made by or on behalf of registered charities, political parties or candidates, public opinion surveys, the soliciting of newspaper subscriptions and calls made pursuant to an "existing business relationship." "Existing business relationship" is defined as a business relationship formed by a voluntary two-way communication between caller and recipient, arising from the purchase, lease or rental of products or services so that a company may call a consumer with whom it has had a business relationship within the past 18 months, or has received an inquiry or application within the past six months. However, any "do not call" requests made by such consumers must be honored.

Violations of the do-not-call list are subject to hefty administrative monetary penalties including up to \$1,500 per offending call for individuals and up to \$15,000 per offending call for corporations. The operation of the do-not-call list will be funded on a cost-recovery basis from telemarketers themselves. There will be a mandatory review of the legislation by a parliamentary committee after three years to ensure its effective operation.

Advertising Standards Canada

Advertising Standards Canada ("ASC") announced that as of April 1, 2006, they are accepting therapeutic comparative advertising ("TCA") for non-prescription drugs and NHPs for review and approval. The TCA claims must meet the criteria and standards of evidence outlined by Health Canada. To assist advertisers with Health Canada standards the ASC has introduced three standard operating procedures that outline the process used in evaluating and ensuring compliance of a claim with respect to the following areas: (1) efficacy, (2) onset/duration of action, (3) side effects profile/safety information. For more information on ASC standard operating procedures, please contact the ASC.

The Canadian Marketing Association Code of Ethics

The Canadian Marketing Association ("CMA") is the largest marketing association in Canada, with over 800 members. The CMA is one of the marketing community's leading advocates on key public policy issues affecting both consumer and business-to-business marketers.

As part of fulfilling its mandate, the CMA has developed an extensive *Code of Ethics* ("Code"). This year, the Code has been revised, and the new version will come into force on January 1, 2007. Some of the key changes include a revised and streamlined section on the protection of personal privacy; the addition of specific sections covering undercover "word of mouth" initiatives that conceal or misrepresent the marketer's paid agents; the addition of a new section addressing marketing practices of specific subdisciplines, such as direct marketing, research and public relations; a new section addressing media-specific standards of practice, including Internet, direct-mail, wireless, out-of-home, telephone and fax advertising; a new section covering responsibilities in relation to service providers or suppliers to the marketing industry; the addition of a glossary of terms; and new enforcement procedures to establish a more arm's-length mediation and resolution of issues process relating to compliance with the Code.

Consumer Protection Law: Credit and Lease Advertising

The new Ontario *Consumer Protection Act, 2002, and Regulations*, which came into force on July 30, 2005, contain substantially revised cost-of-credit advertising provisions based on a national cost-of-credit harmonization template agreed to by most provinces in Canada. Alberta has already adopted the harmonized rules in its *Fair Trading Act and Regulations*, and B.C.'s new cost-of-credit disclosure rules came into force July 1, 2006, as part of the B.C. *Business Practices and Consumer Protection Act*. Saskatchewan has brought the harmonized rules into force, as of October 1, 2006, as part of the Saskatchewan *Cost of Credit Disclosure Act*. The new provisions regulate how providers of fixed credit, open credit and leases advertise and disclose credit to consumers. At the back end, the new cost-of-credit rules affect calculation of lease and financing interest rates ("APRs").

The new calculations require the inclusion of interest and non-interest charges, including any discount or rebate offered to cash purchasers that is not offered to finance or lease customers.

These statutes substantially change disclosure requirements for credit advertising.

An ad for open credit, such as a credit card, which discloses any element of the cost of borrowing, must disclose the annual interest rate payable at the time of the ad and the amount of each non-interest "financing" charge payable at the time the agreement is entered into, or on a periodic basis.

Ads for fixed credit must disclose the APR and the length of the term, as well as the cash price and the cost of borrowing of the goods in question. Advertisements for leases must disclose that the agreement is a lease; the lease APR; the length of the term; the amount of each pre-inception payment; and the amount of the monthly payments;

For fixed credit and lease advertisements, the APR must be disclosed in equal prominence to any other interest rate or monthly payments. Elements of the cost of borrowing must be disclosed in equal prominence to the annual interest rate for open credit advertisements.

When advertising interest-free periods, advertisers must disclose whether the credit agreement is unconditionally interest-free or whether interest accrues during the period but will be forgiven if certain conditions are met. In the latter case, the advertisement must state the conditions to be met and what the interest rate would be if the conditions were not met.

Advertising in Quebec French Language Laws

For the last year, there has been renewed vigor at the Office québécois de la langue française with respect to the enforcement of French language and advertising requirements found in the Charter of the French Language.

All commercial advertising, such as public signs, posters, billboards and displays may show another language in addition to French as long as the French is markedly predominant—meaning that the French must occupy twice the space of any other language (the 2/3–1/3 rule). Overall, French must have a bigger visual impact. Advertising in any public means of transportation, including bus shelters, must be exclusively in French. Other materials, such as coupons, brochures, catalogues, invoices and receipts, may show French with another language, provided that the other language is not more prominent than French (the 50/50 rule). Broadcast and print advertising must be in the language of the media.

Natural Health Products Advertising

The coming into force of the *Natural Health Product Regulations* to the *Food and Drugs Act*, on January 1, 2004, prompted the need to adopt an advertising preclearance system to review and preclear advertising to consumers for natural health products ("NHPs"). Health Canada has endorsed ASC as the body with primary responsibility to review and preclear both non-prescription drug and NHP advertising to consumers.

In December 2005, ASC began reviewing "no-claim" NHP advertising for those NHPs that have received a product license submission number, but have yet to receive their product license. "No-claim" advertising cannot include any express or implied therapeutic claims.

On October 18, 2006, the final version of the *Consumer Advertising Guidelines for Marketed Health Products* was released. The guidelines not only limit claims that can be made but also set out requirements for what must be included in ads. The guidelines apply to NHPs that have received product licenses.

Prescription and Nonprescription Drug Advertising

The current regulatory regime under the *Food and Drugs Act* and *Regulations* ("FDA") substantially restricts direct-to-consumer ("DTC") advertising of prescription drugs. At this time, the United States and New Zealand are the only major industrialized countries that permit direct-to-consumer prescription drug advertising. Given Canada's proximity to the U.S., Canadians are frequently exposed to spillover DTC advertising in both broadcasting and U.S. magazines. In recent years, there has been significant pressure on Health Canada to relax its restrictions and to allow Canadian broadcasters and publishers to benefit from DTC advertising.

The FDA only allows DTC advertisements of the name, price and quantity of prescription drugs for the ostensible purpose of permitting price comparisons. These ads cannot refer either directly or indirectly to the purpose of the medication. Health Canada has published guidelines clarifying the distinction between activities that are considered promotional (and regulated) and activities that are not considered primarily promotional. For example, "help-seeking announcements" are messages that ask members of the

general public experiencing a particular medical disorder or set of symptoms to consult a physician to discuss treatment options or to call a 1-800 telephone number for additional information. These messages are permitted so long as the drug or manufacturer is not identified and the ad does not imply that a drug is the sole treatment available for the disease.

New proposed guidelines have been released by Health Canada and ASC with respect to nonprescription drug advertising and are intended to supersede the 1990 Health Canada *Consumer Drug Advertising Guidelines* in 2006. In contrast to the 1990 guidelines, the new proposed guidelines place primary importance on claims adhering to the product's terms of market authorization ("TMA") as allowed by Health Canada. Under the proposed guidelines, ads must at a minimum provide one clear therapeutic indication for each medicinal ingredient. This represents an apparent departure from current practice and may have been added as a further measure to prevent the public from being misled as to the product category (i.e., drug, cosmetic, food or NHP) under which the TMA was obtained.

The new proposed guidelines also provide guidance as to how to structure claims to comply with section 9 of the FDA. Specific issues addressed in the proposed guidelines include clinical claims; endorsements/seals; exaggerations of product merit; use of "extra-" or "maximum-" strength claims; references to government/Health Canada approval; use of technical data; references to health; "natural" or "natural source" claims; "new" or "improved" claims; risk information communication; sampling; and testimonials/quotations.

Food Advertising

Food labeling and advertising is regulated by the *Food and Drugs Act* and *Regulations*. The amended regulations (amended in 2002) were mandatory for most prepackaged food products as of December 12, 2005. The amendments include significant revisions to the list of permitted nutrient content claims and include the mandatory addition of Canada's new and unique Nutrition Facts table for most products. It should be noted that use of the U.S. Nutrition Facts table is not permitted for food products sold in Canada.

Cosmetics Advertising

Cosmetics advertising is governed by the *Food and Drugs Act* and *Cosmetic Regulations*. On December 1, 2004, the *Regulations Amending the Cosmetic Regulations* were published in *Gazette* Part II and are officially in force November 16, 2006. The regulations require mandatory ingredient labeling on all cosmetic products, including samples. The amended regulations mandate the use of the International Nomenclature for Cosmetic Ingredients ("INCI") system as found in the *International Cosmetic Ingredient Dictionary and Handbook*. For some ingredients, trivial names have been assigned in the *Cosmetic Regulations*. Where a trivial name is assigned, manufacturers can opt to use the trivial name or the English and French equivalent of the name. For instance, where water is an ingredient, it can be declared as aqua or water/eau.

As of November 16, 2006, an amendment to the Charter of the French Language will come into effect with respect to INCI and will ensure that the Charter is harmonized with the ingredient-labeling requirements under the *Cosmetic Regulations*.

In February 2006, Health Canada, in collaboration with ASC published a revised version of the *Guidelines for Cosmetics Advertising and Labelling Claims* ("Guidelines"). The Guidelines apply to all cosmetic products marketed in Canada and list acceptable and unacceptable claims for specific products and specific claims and are used extensively by both industry and government officials to assess the acceptability of cosmetic claims.

Privacy

Canada has two federal privacy laws: (1) the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), which limits the private sector's collection, use and disclosure of personal information; and (2) the *Privacy Act*, which governs how the public sector manages personal information.

In June 2006, the federal Privacy Commissioner tabled a report calling for the urgent reform of Canada's *Privacy Act*. In the report she states that the *Privacy Act* is an outdated law that leaves the Office of the Privacy Commissioner of Canada virtually powerless to protect the privacy rights of Canadians related to information collected, used and disclosed by the feder-

Advertising & Marketing

RECENT DEVELOPMENTS OF IMPORTANCE

al government. The *Privacy Act*, which came into force in 1983, has never been amended or updated.

In the report, the commissioner calls for the scope of the *Privacy Act* to be expanded in a number of specific ways including the following: (1) All public sector bodies should be subject to the *Privacy Act*, unless Parliament specifically excludes them; (2) the federal government should be able to review not only claims of denial of access to personal information held by government, but also improper collection, use and disclosure of personal information, and should be able to assess damages against offending institutions; (3) the definition of personal information should be expanded to

include both recorded and unrecorded information, such as DNA samples; and (4) all individuals about whom the government holds personal information, not just those present in Canada, should have the right to access, correct and be informed of that information, including airline passengers, immigration applicants and foreign students.

The Commissioner noted that the *Privacy Act* could be substantially remedied by adopting many of the provisions of PIPEDA, which came into force in stages beginning in 2001.

Conclusion

The last year has been full of changes and challenges for advertising and market-

ing lawyers in Canada. While most basic principles governing advertising law are similar in Canada and the U.S., there are many important differences, and Quebec, with its *Civil Code* and French-language rules, adds layers that must be considered when embarking on a North American advertising campaign.

The information contained in this document provides a brief overview of recent developments in Canadian advertising law and should not be regarded or relied upon as legal advice or opinion. Please contact your current advertising lawyer at Gowlings regarding specific advertising questions that arise in relation to your business. Or you can visit our Web site at gowlings.com n



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