

Advertisers and Marketers Beware!

Amendments to the *Competition Act* contained in the *Budget Implementation Act* (Bill C-10) — which received royal assent on March 12, 2009 — are now in force. These amendments significantly impact the business of advertising and marketing in the following ways:

Increased Civil Penalties: Under Section 74 of the Act, the administrative monetary penalties for non-criminal violations have been dramatically increased as follows:

	INDIVIDUAL		CORPORATION	
	First Incident	Repeat Conduct	First Incident	Repeat Conduct
OLD	\$50,000	\$100,000	\$100,000	\$200,000
NEW	\$750,000	\$1,000,000	\$10,000,000	\$15,000,000
% INCREASE	1400%	900%	9900%	7400%

Increased Criminal Penalties: Under Section 52 of the Act, the maximum term of imprisonment for criminal deceptive marketing has been increased to 14 years (from five years).

Burden of Proof: Regarding the criminal and reviewable practice provisions of the Act, it is no longer necessary to establish that:

- Any person was actually deceived or misled by the representation;
- Any recipient of the ad was in Canada; or
- The representation was made in a place to which the public had access.

New Powers of Competition Tribunal or Court:

The Competition Tribunal or court now has the ability to:

- Set and require businesses to pay restitution to victims of deceptive marketing practices; and
- Freeze assets to prevent the disposal of property before a finding against the advertiser in order to ensure that money is available for restitution to harmed consumers.

The amended Act also impacts many other areas of Canadian competition law. For further details please visit:

<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03045.html>



CHECK HERE BEFORE YOU MAKE THAT HEALTH CLAIM

The Bureau of Nutritional Sciences (Food Directorate, Health Canada) has released a guidance document for preparing health claim submissions entitled "*Guidance Document for Preparing a Submission for Food Health Claims*" (guide). The guide replaces the interim guidance document that was used as the basis for formulating submissions to the Food Directorate for evaluation of proposed health claims. The intention of the guide is to establish a systematic, comprehensive and transparent review system to ensure that health claims for foods are substantiated.

Applicants seeking approval for a health claim will need to comply with the concepts for evaluation as well as the format set out in the guide. The support for the health claim should be formatted and included in the appropriate tables provided in the guide. Information must be based on the totality of relevant evidence, and must address:

- Causality** – Consumption of the food affects a health outcome;
- Generalizability** – The claimed effect is physiologically meaningful and is applicable to the general population or a subgroup of the population; and
- Quality Assurance** – The food is produced according to quality standards and consistently meets predefined specifications.

The Guide must be used where an applicant wishes to make a health claim about a food which would bring the food under the definition of a drug. In order to make such a claim for a food, a regulatory amendment to the table following Section B.01.603 of the *Food and Drug Regulations* is required. The Regulations currently specify five recognized diet-related health claims for foods.

Health claims that do not bring the food under the definition of a drug do not require pre-market approval or a regulatory amendment. Manufacturers are, however, expected to produce on-hand evidence substantiating those health claims if requested by the Canadian Food Inspection Agency. The manufacturer may wish to use the guide for the collection of such information or to prepare and submit a voluntary submission for review by Health Canada.

ADVERTISING AUTOMOBILES IN ONTARIO NEXT YEAR?

The draft Ontario *Motor Vehicle Dealers Act, 2002* (and Ontario Regulation 333/08, GENERAL) — previously scheduled to be proclaimed in force on April 1, 2009 — is now scheduled to be proclaimed in force on January 1, 2010. The Regulations — which apply to automobiles, trucks or other vehicles propelled or driven otherwise than by muscular power — will impact Ontario automobile advertisements in several ways, including an “all-in” price requirement similar to that which exists in Alberta and British Columbia. In effect, dealer tagged ads in Ontario will be required to advertise the “total” price of the vehicle, which must include:

- The amount the buyer would be required to pay for the vehicle; and
- All other charges payable (e.g., freight and PDI, fees, levies and taxes other than GST/PST).

An ad placed jointly by two or more registered motor vehicle dealers will be required to indicate that the vehicle price may be less than the advertised price (e.g., “Dealers may sell for less.” It is interesting to note that this very phrase is arguably no longer required under the amended *Competition Act*). In addition, it will not be permissible to indicate the price of a vehicle in an ad unless the vehicle is available from the dealer (i) at that price; and (ii) during the time frame to which the advertisement applies. As in Québec, if an ad indicates the price of a vehicle which is available in a limited quantity, then the actual number of vehicles available will need to be disclosed. Presumably, when an ad runs for several days, it will be acceptable to state the number of vehicles available at the time that the advertisement is placed (as this number will diminish as vehicles are sold).

The new Act and Regulations also contain provisions regarding the sale of extended warranties and service plans. The Ontario Motor Vehicle Industry Council (OMVIC) has indicated that the Regulations pursuant to Section 2(21) do not apply to automobile manufacturers. According to this interpretation, the all-in pricing requirement noted above does not apply to national advertisements (with no dealer tags) placed by automobile manufacturers.

Anti Spam: Are We Witnessing the Death of Refer-a-Friend in Canada?

Among its other provisions, the controversial Bill C-27 (which underwent second reading and was referred to the Standing Committee on Industry, Science and Technology on May 8, 2009) states as follows:

“No person shall send or cause or permit to be sent to an electronic address a commercial message, unless: (a) the person to whom the message is sent has consented to receiving it, whether the consent is express or implied; and (b) the message complies with subsection (2)”

As such, Bill C-27 (if passed in its current form) would appear to create a general prohibition against the typical “refer-a-friend” mechanism commonly used in contests/promotions (i.e., where an entrant provides an e-mail address to the sponsor who in turn sends an e-mail — or makes it appear that an e-mail has been sent by the entrant — to the referred friend with a link to enter the contest). There are, however, several exceptions to this general prohibition. For instance, it does not apply where the commercial electronic message is “sent by an individual to another individual with whom they have a personal or family relationship.” As such, in its current form Bill C-27 appears to permit the “refer-a-friend” mechanism where the referral e-mail is sent directly by the entrant to another individual with whom he/she has a personal or family relationship. Given the specific wording of the exception, however, it would not be acceptable for the sponsor to use the e-mail address provided by the entrant to contact his/her friend (i.e., because it is the entrant and not the sponsor who has the “personal or family relationship”). In this scenario, only once the referred friend has actually entered the contest (via the link in the referral e-mail) would the entrant get “credit” and would the sponsor have permission (as per the typical privacy clause in the contest rules) to use the referred friend’s personal information for the purposes of administering the contest.

As previously summarized in a recent *AdBytes Privacy Briefing*, Bill C-27 will have wide-reaching implications if passed in its current form. The full text of the Bill is available at: <http://www.parl.gc.ca/>



Voluntary National Automobile Advertising Guidelines

The Canadian Code of Advertising Standards applies to all types of advertising. In recent years, Advertising Standards Canada (ASC) has received numerous complaints from consumers and other interested parties (e.g., insurance companies) regarding the depiction of “fast cars” in automobile

advertising. Most car advertisers use disclaimers such as “Professional Driver. Closed Track. Do Not Attempt” when showing scenes of fast-moving cars making speedy hairpin turns on picturesque mountain tracks. The new VNAA Guidelines signal the Canadian auto industry’s acceptance of the applicability of Sections 10 (re: safety), 14b (re: condoning unlawful behaviour) and 14d (re: encouraging conduct that offends the standards of public decency) of the ASC Code and embrace the interpretation guidelines issued by ASC in its 2006 “Advisory Re Automobile Advertising.” A copy of the Advisory (included in the 2006 Ad Complaints Report) is available at: <http://www.adstandards.com/en/standards/previousReports.asp>



Competition Bureau: Consumer Rebate Promotions

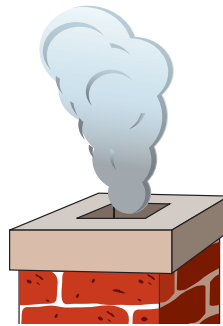
The Competition Bureau has released its draft bulletin, “*The Application of the Competition Act, the Consumer Packaging and Labelling Act and the Textile Labelling Act to Consumer Rebate Promotions.*”

In effect, the bulletin explains the Bureau’s approach to interpreting what is considered false and misleading in the area of consumer rebate promotions. It also gives several examples of how to avoid making false and misleading representations, including inadequate disclosure; rebates disguised as sale/regular price; mail-in rebates disguised as instant rebates; discounts on future pur-

chases disguised as rebates; and mail-in rebates that are not fulfilled. It also sets out best practices for businesses to follow when offering rebates, both to comply with the law and to help consumers make informed purchasing decisions. Businesses considering offering rebates may request a binding written opinion on whether their proposed approach will cause any concerns under the *Competition Act* or other statutes. A copy of the draft bulletin is available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03033.html#3>

Competition Bureau: Charter Argument Goes Up in Smoke!

The Competition Tribunal recently ordered Imperial Manufacturing Group (IMG) to cease making the claim, among others, that its chimney cleaning products reduce creosote and prevent chimney fires. IMG attempted to challenge the *Competition Act’s* adequate and proper testing provision on the basis that it infringes the Canadian *Charter of Rights and Freedoms*. The Tribunal rejected the argument that the provision — which is intended to protect consumers from the harm caused by unsubstantiated claims — is unconstitutional. The Tribunal ordered IMG to refrain from making performance claims that are not supported by adequate and proper tests. In addition, IMG was ordered to pay a \$25,000 administrative monetary penalty and \$40,000 in costs, and to publish a corrective notice in a national English and French newspaper. In order to avoid similar scrutiny, manufacturers must ensure that adequate and proper scientific testing is available to substantiate all claims relating to performance, efficacy or length of life.



Competition Bureau: Ordinary Selling Price (Again)

A Toronto-based art store was recently required to pay an administrative monetary penalty of \$60,000 and publish corrective notices in local media to resolve the Bureau’s concerns that the nine-store chain may have misled consumers as to the real value of discounts received. The Bureau’s investigation uncovered that the store had ticketed its items with a manufacturer’s suggested list price in addition to the lower

price. However, the stores had never actually sold the products at the suggested list price.

This is yet another reminder that the Bureau continues to actively enforce the ordinary selling price provisions of the *Competition Act*. These provisions require that when products are advertised using comparative prices, they must have been sold in a significant quantity offered for sale in good faith or for a reasonable period of time at the “regular” price. This requirement ensures that consumers are not misled on the value of “savings” they are receiving.

SOUTH OF THE BORDER: FTC REVISES BEHAVIORAL (SIC) ADVERTISING GUIDELINES

As part of its ongoing review of online behavioural advertising, the Federal Trade Commission (FTC) issued a report on the practice of tracking an individual’s online activities in order to deliver advertising targeted to his or her interests. The report outlines self-regulatory guidelines for the online advertising industry, calling on advertisers to self-regulate by:

- Providing clear and prominent notice advising consumers when their data is being collected for behavioural ad targeting and giving them the choice of opting out.
- Providing reasonable security for consumer data and retaining data only as long as it is needed to fulfill a legitimate business or law enforcement need.
- Keeping promises to consumers on how their data will be used and obtaining affirmative express consent before using any previously collected data in a manner that is materially different.
- Obtaining affirmative express consent from consumers before collecting sensitive data such as information relating to finances, health care or children.

TRADE MARK INFRINGEMENT ON FACEBOOK?

As of June 13, 2009, Facebook users are able to select usernames that will be displayed as part of their URLs (www.facebook.com/username). Usernames are awarded on a first-come, first-served basis, which of course gives rise to the serious issue of users applying for usernames that correspond to third-party trade marks. Parties may engage in the unauthorized registration of usernames (i.e., username squatting) in hopes of selling the username to the brand owner; for the purposes of misleading end users that a connection exists between the parties; or to prevent the brand owner from reflecting its username on Facebook. Fortunately, Facebook created a process whereby rights holders can apply to have their registered trade marks reserved so that they are unavailable as usernames for Facebook users. If you have not done so already, you may access the online form to register your brand at: http://www.facebook.com/help/contact.php?show_form=username_rights



CRTC "NEW MEDIA" EXEMPTION

In a recent decision, the Canadian Radio-Telecommunications Commission (CRTC) announced that new media broadcasting services will continue to be exempt from regulation. The Commission found that online media does not pose a threat to traditional broadcasting; rather, the two systems serve complimentary roles. The CRTC held that intervention at this time would unnecessarily thwart innovation. While applauded by Internet service providers, the decision was poorly received by artist groups concerned over the lack of Canadian content in "new media."

While limited by its mandate under the *Broadcasting Act*, the CRTC remains cognizant of the opportunities and challenges of the digital future. The Commission has therefore endorsed the National Film Board's call for a national digital strategy, affirming the need for Canada to maintain a competitive advantage in the rapidly changing digital environment.

Given the dynamic character of new media, the CRTC expects to revisit the ruling within five years.



ADVERTISING, MARKETING AND REGULATORY AFFAIRS

SUSAN H. ABRAMOVITCH
susan.abramovitch@gowlings.com
(416) 814-5673

MARK BANTEY
mark.bantey@gowlings.com
(514) 392-9501

SHELAGH CARNEGIE
shelagh.carnegie@gowlings.com
(416) 862-4682

DANIEL COLE, Editor
daniel.cole@gowlings.com
(416) 814-5666

MARINA DREL
marina.drel@gowlings.com
011-7-495-787-2070

JOHN R. FINLEY
john.finley@gowlings.com
(416) 369-7214

BRIAN FRASER
brian.fraser@gowlings.com
(416) 862-4293

ERIC GROSS
eric.gross@gowlings.com
(416) 862-5409

PAULE HAMELIN
paule.hamelin@gowlings.com
(514) 392-9411

JOHN G. LECKIE
john.leckie@gowlings.com
(604) 443-7603

FLORENCE LUCAS
florence.lucas@gowlings.com
(514) 392-9590

LIVIA MADURI
livia.maduri@gowlings.com
(416) 862-5715

LAURENT MASSAM
laurent.massam@gowlings.com
(416) 369-6674

FRANK MULOCK
frank.mulock@gowlings.com
(613) 786-0168

JOHN A. PENHALE
john.penhale@gowlings.com
(514) 392-9548

CHRISTOPHER J. PIBUS
chris.pibus@gowlings.com
(416) 862-5737

STEPHEN A. PIKE
stephen.pike@gowlings.com
(416) 369-7349

BRENDA L. PRITCHARD
Executive Editor
brenda.pritchard@gowlings.com
(416) 862-5716

LEWIS RETIK
lewis.retik@gowlings.com
(613) 783-8849

ANDRÉ RIVEST
andre.rivest@gowlings.com
(514) 392-9560

SHELLEY SAMEL
shelley.samel@gowlings.com
(416) 862-4494

JOEL B. TALLER
joel.taller@gowlings.com
(613) 786-0163

ROGER TAM
roger.tam@gowlings.com
(416) 862-4425

OLIVIER THERRIEN
olivier.therrien@gowlings.com
(514) 392-9412

ANNIE TURCOTTE
annie.turcotte@gowlings.com
(514) 392-9413

WILLIAM L. VANVEEN
william.vanveen@gowlings.com
(613) 786-0153

SUSAN E. VOGT
susan.vogt@gowlings.com
(416) 862-5439

DANIELLE WALDMAN
danielle.waldman@gowlings.com
(416) 369-6182