

ADVERTISING &

MARKETING

BULLETIN

*A Report on Recent
Developments in Advertising
& Marketing Law*

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DIRECT-TO-CONSUMER PRESCRIPTION DRUG ADS: THE TREATMENT OPTIONS

The pharmaceutical industry is currently ranked the most profitable industry in the US by *Fortune* magazine. Billions of dollars are spent there every year marketing and advertising prescription drugs directly to consumers, where direct-to-consumer (DTC) advertising is allowed. It is not surprising, then, that DTC advertising of prescription drugs has become a hot topic in the Canadian pharmaceutical industry, where it is generally *not* allowed.

A CANADIAN SUCCESS STORY

Some of the most heralded ads on Canadian television in recent years are for the prescription drug Viagra. Indeed, last year's amusingly sunny spot earned Pfizer Canada *Marketing Magazines'* Marketer of the Year for 2002. In the ad, a middle-aged man bursts out of his house to the tune, "Good Morning, Good Morning", a giddy grin on his face as he dances his way to work. The ad ends with the Viagra brand name across the screen, and the line "talk to your doctor". This year's version of the ad features riotously happy middle-aged couples dancing and cheering in the streets, shown in slow motion to the Queen song "We Are The Champions".

The cleverness of these ads lies in their ability to raise viewers' awareness of the drug they promote, while managing not to violate Federal drug advertising laws. The average viewer may appreciate the ads' subtlety, but the lack of directness regarding Viagra's purpose is not simply the artistic vision of Pfizer Canada (the manufacturer) or the ad agency. It is the *Food and Drug Act* (the *Act*) and the corresponding *Food and Drug Regulations* (the *Regulations*) which force pharmaceutical companies to be so discreet.

"NAME, QUANTITY, PRICE" ADS: TREATMENT 1

The *Act* includes an outright prohibition on the advertising of any drug to the general public as a cure or treatment for certain diseases or disorders such as cancer, diabetes or heart disease. Moreover, the *Regulations* prohibit any advertising of prescription drugs to the general public that makes a representation "other than with respect to the brand name, proper name, common name, price and quantity of the drug". This is the reason why many prescription drug ads seen on Canadian television programs give so little information about the products they pitch.

"INFO" ADS: TREATMENT 2

Canadian drug companies can also stay within the limits of the law by airing purely "informational" pieces that inform viewers about particular health conditions or illnesses. The catch is that companies cannot in any way link the messages to their products. These pieces also must not imply that a drug is the only treatment for a condition. When done correctly, these non-promotional activities are not caught by the definition of "advertising" under the *Act*. Pfizer aired such an informational piece in 2001, called "Doctor's Office". It depicted a man who was reluctant to speak to his doctor about erectile dysfunction. A poll¹ indicated that eight out of ten men in the target audience reported having seen the ad, whereas the norm is four and a half. Clearly this type of advertising can grab consumers' attention. It also helped Pfizer's

¹I.D. Kucharsky, "Pfizer finds its Ad Groove" *Marketing Magazine* (February, 2003) 11 at 16.

overall campaign to have first educated viewers with the “Doctor’s Office” segments prior to airing the flashier Viagra ads.

Another Canadian pharmaceutical company that is enjoying DTC advertising success is Organon Canada. The campaign for its birth control pill, Marvelon 28, uses both treatments: the brand type and the information type. The branded ad is currently featured on transit posters and consists of a picture of a birth control package, with the word “Duh” overhead, along with the brand name Marvelon 28. The information piece is appearing on washroom posters and doorknob hangers on university campuses across Canada, and features a young man and woman embracing in one picture followed by the young woman cradling a baby in the next. The piece reads, “for every action, there is an equal and opposite reaction. Be prepared”, followed by the phrase, “talk to your doctor”.

MIX DTC AD TREATMENTS WITH CARE

Pharmaceutical marketers must still beware. According to a Health Canada Policy Statement issued in November 2002, it is possible to run afoul of the law even if you advertise your products using either the “name, quantity, price” method or the purely “informational” method. An entire campaign is reviewable as a whole, so that if you air one of each type, the two taken as a whole may overstep the limits.

WHAT DO CANADIANS THINK ABOUT DTC ADS?

A recent poll indicates that many Canadians are not aware of the restrictions on pharmaceutical advertising.

According to the poll, 57% of Canadians are under the impression that “prescription medication can be advertised directly to Canadian consumers at present.”²

The misconception likely stems from the unlimited flow of American ads to which Canadians are exposed when watching US television programs. Add to this phenomenon the internet, another medium through which consumers view unfettered DTC advertising. Such an

inability to uniformly enforce drug advertising laws leads many proponents of DTC advertising to ask why we attempt to prohibit it in Canada at all. But prohibition is the rule, not the exception: New Zealand is the only country other than the US that currently allows DTC ads. An interesting point is that 62% of Canadians surveyed in the same poll believe that advertising about prescription drugs directly to Canadian consumers should be allowed.

A FUTURE FOR DTC ADS IN CANADA?

Various interested organizations, as well as Health Canada, are currently studying the pros and cons of DTC advertising in Canada. Some of the arguments in support of it are that it educates and empowers consumers, and lowers hospital costs due to earlier medication. Some of the arguments against it are that it artificially stimulates the need or desire for prescription drugs, increases drug costs due to over-spending on marketing and advertising, and pressures doctors to unnecessarily prescribe drugs that their patients request.

Some of these fears appear to be well-grounded. Studies also reveal that more American patients request and receive prescription drugs since DTC advertising has been allowed in the US.³

The Therapeutic Products Programme of Health Canada issued a Discussion Document on April 6, 1999. Entitled “Direct-to-Consumer Advertising of Prescription Drugs”, the paper outlines considerations and objectives that were to be discussed at a multi-stakeholder workshop that year. This paper and the corresponding workshop are evidence that Health Canada is seriously considering the viability of DTC advertising in Canada.

There is much heated debate on whether such advertising should become an accepted form of marketing for pharmaceutical companies in Canada. Until this issue is resolved, be aware of the heavy restrictions, and take the lesson from the Viagra campaign: try to use the laws to your marketing advantage.

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² Ipsos-Reid conducted the survey on behalf of the Alliance for Access to Medical Information (“AAMI”) and released it in October of 2003.

³ Ipsos Pharm Trends, News Release, “DTC Ads for Prescription Drugs Are Proving Their Worth”, May 21, 2003.

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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