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**Recent Developments of Importance in Advertising & Marketing Law**

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# ADVERTISING & MARKETING

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## PRACTICE AREA DEFINITION

The practice of advertising and marketing law is generally understood to include the review of promotional materials relating to contests, coupon and premium promotions and other such offers; advertising copy review including television, radio and print ads to ensure claims will be properly supported and all required agreements/documents prepared; advising on direct mail and telemarketing issues; advising with respect to the marketing, advertising, packaging and labelling of all types of products including food, drugs, cosmetics and medical devices; ensuring compliance with federal and provincial laws respecting children's advertising; the pursuit or defence of challenges related to alleged misleading advertising; book, film and photograph rights negotiation; preparation of marketing and advertising related agreements such as sponsorship, distributorship, merchandising and licensing agreements (including negotiation of personality rights, copyright and trademark rights); importation of foreign source advertising; arbitrations and representation of clients at Advertising Standards Canada proceedings such as trade dispute panels and consumer complaint councils.

## RECENT DEVELOPMENTS OF IMPORTANCE

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The landscape of laws, regulations and codes governing advertising and marketing is complex and multijurisdictional. This past year has brought about significant change for advertisers and marketers in the following areas:

- privacy
- telemarketing
- consumer protection regulations
- labelling
- ordinary price claims

- predatory pricing
- misleading advertising
- advertising to children
- cash ads

## PRIVACY GENERAL

On January 1, 2004, the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA") came into force. It applies in seven provinces as well as when personal information is transferred across provincial or international borders. British Columbia, Alberta and Quebec have opted to pass their own legislation that is substantially similar to PIPEDA, thus making PIPEDA applicable in these jurisdictions only in situations where personal information is transferred across provincial or international borders. PIPEDA requires organizations to obtain consent for the collection, use and disclosure of personal information in the course of commercial activity. Although there is a limited exemption for the collection, use and disclosure of business contact information (name, title, business address and business telephone of an employee of an organization) without the consent of the individual, this does not extend into client data other than business contact information. In a finding dated December 1, 2004, the Privacy Commissioner of Canada (the "Commissioner") defined a business e-mail address as "personal information" where it applies to marketing offers. As such, business e-mail addresses are covered by PIPEDA.

PIPEDA does not "grandfather" data previously collected, used and disclosed prior to PIPEDA coming into force. Therefore, in order to continue to use and disclose pre-PIPEDA information, organizations should obtain consent by notifying all of their customers and explaining what they do with their information, to whom it is disclosed and give customers the option to opt out of these ongoing uses and disclosures.

In March 2004, the Commissioner clarified whether PIPEDA applies to charitable and non-profit organizations. Although the non-profit status of charities and other related organizations does not automatically exempt these organizations from the application of PIPEDA, most nonprofits are not subject to PIPEDA because they are not engaged in commercial activities. However, if the non-profit organization sells, assigns or licenses its membership list, for example, this likely would be considered commercial activity and thus consent would be required from those listed individuals.

The Canadian Marketing Association ("CMA") has taken the lead in developing specific privacy guidelines focused on the needs of advertisers. These are being widely deployed beyond the association's membership. Indeed, it is likely that if a marketer were the subject of a privacy complaint, these standards would be used as an objective measure of what was considered reasonable in the marketplace.

## FORM OF CONSENTS

On September 28, 2004, the Commissioner released a fact sheet to clarify and unify several important findings issued in late 2003 and early 2004 regarding the appropriate form of consent (positive, negative or implied) under PIPEDA. The fact sheet incorporates references to the *Model Code for the Protection of Personal Information* (the "Model Code"), published by the Canadian Standards Association, which is incorporated into PIPEDA by reference as a schedule.

Positive, opt-in or express consent requires that the individual provide an express positive agreement to the stated use and/or disclosure of his or her personal information.

Principle 4.3.6 of the Model Code states that an organization "should generally seek express consent when the information is likely to be considered sensitive." This is the strongest form of consent, and organizations are encouraged to use this form of consent, as it minimizes the likelihood of complaints and misunderstandings.

With negative or opt-out consent, the organization allows the individual to express his or her non-agreement to a proposed use of his or her personal information. However, unless the individual takes positive action to "opt out" of this proposed use, the organization shall take this inaction to be negative consent and proceed using the personal information as described. The Commissioner stated that an organization must satisfy the following requirements when using negative consent:

- The personal information must be demonstrably non-sensitive in nature and context.
- It must be clear to the individual what personal information will be used and the extent of the intended use/disclosure.
- The organization's purpose must be limited, well-defined and stated in a clear and understandable manner.
- As a general rule, organizations should obtain consent for the use or disclosure at the time of collection and at least at the earliest opportunity before the information has been used or disclosed.
- The organization must establish a convenient procedure for opting out of, or withdrawing consent to, secondary purposes.

Implied consent arises where consent may reasonably be inferred from the action or inaction of the individual. This occurs in situations where the individual supplies personal information in a context where he or she knows or should know that this information will be used or disclosed for a particular purpose. The Commissioner has identified the following factors when determining the appropriateness of relying on implied consent:

- whether the individual would reasonably have known the proposed use or disclosure purposes of the organization;
- whether the information is sensitive in nature; and
- whether the context in which the individual provides the personal information makes evident the use and/or purpose of the information.

Collecting personal information without the consent of the individual is only allowed in very limited situations under PIPEDA, such as collection for journalistic, artistic or literary purposes.

## TELEMARKETING

In a decision issued on May 21, 2004, the Canadian Radio-television and Telecommunications Commission (the "CRTC") strengthened its current requirements with respect to telemarketing in several respects, including:

- When placing voice calls, telemarketers must tell consumers right up front why they are calling and who is sponsoring the call.
- Telemarketers must volunteer a toll-free number through which "do not call" requests can be processed and which is staffed during business hours, with an after-hours interactive voice-mail backup.
- If, during the call, the consumer asks to be put on a "do not call" list, the request must be processed without requiring the consumer to do anything further.
- Starting October 1, 2004, telemarketers must provide

consumers who want to opt out of telemarketing with a unique registration number to confirm the request.

- It will also be easier to opt out of an entire list of organizations for which a telemarketer is providing services, rather than on a business-by-business basis.

Telemarketers using fax machines must identify the person or organization on behalf of whom the fax is being sent, including a toll-free fax and telephone number at which "do not call" requests can be processed, and the name and address of a responsible person to whom the called party can write, all at the top of the first page of the fax in font size 12 or larger. The same rules that apply to voice calls regarding request registration numbers and staffing of toll-free numbers also apply to fax telemarketing.

Finally, the CRTC is placing additional obligations on telephone companies to produce guidelines that will be published at the front of telephone directories, informing consumers of their rights concerning telemarketing.

Interestingly, on September 28, 2004, the CRTC temporarily stayed virtually all of these new rules as a result of the CMA's application to review and stay the new rules. Although the future application of these rules is uncertain, the rules applicable prior to the May decision will apply in the interim.

On September 24, 2004, the CRTC held a hearing on whether to ban so-called junk voice mail, where telemarketers leave messages directly on answering services without the phone ringing. On October 5, 2004, the CRTC determined that such junk voice mail was not intrusive and that the practice should be allowed to continue.

## CONSUMER PROTECTION REGULATIONS COST OF CREDIT DISCLOSURE

Although the *Consumer Protection Act, 2002* (the "CPA 2002") was passed by the Ontario Legislature in December 2002, the CPA 2002 remains unproclaimed, and the regulations necessary to give effect to the CPA 2002 have only been issued in draft by the Ministry of Consumer and Business Services (the "Ministry"). Among other things, these draft regulations will affect the manner in which businesses advertise offers of consumer credit and lease arrangements (including automotive leases).

The draft regulation on credit agreements contains detailed provisions regarding the calculation of the cost of credit under a consumer loan stated as a yearly rate, called the annual percentage rate ("APR"). The APR is an interest figure that estimates what a comparable rate would be under a loan that has both non-interest fees and interest costs if the consumer made all of these payments only as interest.

Advertisements that offer fixed credit and disclose the interest rate or payment amounts must disclose the APR and the length of the term of agreement. The APR must be disclosed as prominently as the interest rate or the payment amount, whichever is displayed more prominently. Advertisements for open credit that disclose any amount of the cost of borrowing must also disclose the annual interest rate and further details regarding the cost of borrowing. In addition, any advertisement stating or implying that no interest is payable for a certain period must disclose further details.

The CPA 2002 applies to consumer leases that are four months or more, that are indefinite in term or renewed automatically, and those under which a consumer can be required to make certain lease-end payments (residual obligation consumer leases). As such, the draft regulation on consumer

leasing would apply to many automotive leases as well as indefinite term "rent-to-own" leases for consumer goods.

An advertisement that makes a representation about the cost of a lease must disclose that the agreement is a lease, the length of the lease term, the amount of each payment to be made other than periodic payments, the timing and amount of each periodic payment, and the APR for the lease. The APR must be disclosed as prominently as the most prominently disclosed amount of a payment that forms part of the total lease cost.

## LABELLING NUTRITION LABELLING

Although the *Food and Drug Regulations* were last significantly amended in 2002, certain programs were deferred for three years to allow compliance by the food and beverage industry. Beginning December 12, 2005, most Canadian food companies will be required to introduce significantly more nutrition labelling on their products. Until the new regulations apply, companies are permitted to comply with either the former regulations or the new ones, but they cannot use a blend of the two.

With the popularity of low-carbohydrate diets and the resulting proliferation of "low-carb" foods in the marketplace, the Canadian Food Inspection Agency ("CFIA") has felt compelled to issue some guidance to those companies who are making carbohydrate-related claims in advertising for their products. On September 1, 2004, the CFIA issued an information letter explaining that claims such as "low carbohydrate" or "reduced carbohydrate" could be made under the former *Food and Drug Regulations* (which still apply to most companies until December 2005) as long as the food met certain nutritional tests, such as containing at least 50% less carbohydrates than the regular product. However, these claims, with limited exceptions, will not be permitted under the new regulations. This prohibition applies also to brand names or trademarks that contain reference to carbohydrates, or claims made in any type of advertising for the product, be it broadcast, point of sale, print or over the Internet. Therefore, companies should be aware that if they include labelling information required under the new regulations, such as a nutrition facts table, then they cannot make any carbohydrate-related claims that would not be permitted under the new regulations.

## NATURAL FOODS

On January 1, 2004, the *Natural Health Products Regulations* (the "NHP Regulations"), under the *Food and Drugs Act*, came into force. The new NHP Regulations require product and site licensing, good manufacturing practices and improved labelling for all natural health products in Canada. They apply to all manufacturers, importers, distributors, labellers and packagers of natural health products in Canada and will be implemented over the next six years.

The natural health products that will be affected include any products that contain substances set out in the NHP Regulations. For example, products containing amino acids, essential fatty acids, vitamins, folate, niacin and minerals are all affected. Products containing such substances are required to be labelled with information such as the product name, quantity of product in the bottle, specific directions for usage, recommended dosage, recommended use or purpose, medicinal and non-medicinal ingredients, warnings or any contraindications or known adverse reactions associated with the product and any special storage conditions required.

Manufacturers of these products will need to acquire a product licence number by submitting detailed information on

the product to Health Canada for assessment purposes. The presence of a product licence number on a label will signal to consumers that Health Canada has approved the product for safety and efficacy.

## COSMETICS

On March 27, 2004, the Department of Health published draft amendments to the Regulations under the *Food and Drugs Act* relating to cosmetics (the "Cosmetics Regulations") in an attempt to help Canadian consumers understand what makes up their cosmetic products. The proposed amendments to the Cosmetic Regulations would require that cosmetic manufacturers declare ingredients (in descending order of predominance) on a label or exterior wrapping of all cosmetics; other amendments would clarify existing requirements or administrative processes. This proposed regulatory amendment would come into force two years after its registration, providing retailers and manufacturers sufficient time to incorporate ingredient lists onto their labels.

## MARKETING PRACTICES UNDER THE *COMPETITION ACT* ORDINARY PRICE CLAIMS

On July 6, 2004, the Competition Bureau (the "Bureau") announced that the Forzani Group Ltd. ("FGL"), Canada's largest sporting goods retailer with 391 retail outlets, had agreed in a consent agreement with the Competition Tribunal (the "Tribunal") to pay a record \$1.7 million penalty (consisting of an administrative monetary penalty of \$1.2 million and \$500,000 to cover the Bureau's costs related to the inquiry). After conducting an investigation, the Bureau concluded that FGL had inflated the "regular" prices of certain products in order to exaggerate the "savings" available to the consumer at its Sport Chek and Sport Mart stores. This agreement represents the largest penalty ever applied under the deceptive marketing provisions of the *Competition Act*.

The legal landscape could change again, as the Bureau is pursuing Tribunal proceedings against Sears Canada for ordinary price claims Sears made in relation to advertisements of automobile tires. A decision of the Tribunal is expected later this year, and we expect it will further clarify this area of the law.

## PREDATORY PRICING

In light of the Federal Court of Canada's decision in *Culhane v. ATP Aero Training Products* ("Culhane"), issued on April 6, 2004, advertisers may want to think twice before enticing potential customers with offers of free products or services.

In *Culhane*, the principal issue was whether the defendant's giving away products for no charge constituted an unreasonably low price for the purpose of section 50(1)(c) of the *Competition Act*. Because costs were associated with maintaining the online guides and the products were originally sold for a price, the judge found that this suggested an unreasonably low price. The indefinite period of time that the guides were being offered, the offensive price-cutting scheme and the lack of evidence that the free exams and guides would provide a long-term economic benefit were additional considerations that led the judge to conclude that the price for the guides was unreasonably low.

However, the judge was not satisfied that the defendant's conduct had the effect or tendency of lessening competition, or that the defendant had such a design. This conclusion was reached without a detailed assessment of relevant product and geographic markets—the emphasis was on the conduct's effect

on the plaintiff. The judge found that various causal factors contributed to the decrease in the plaintiff's sales, not simply the defendant's unreasonably low prices. Accordingly, the plaintiff did not establish conduct contrary to s. 50(1)(c) of the *Competition Act*, and the private action based on predatory pricing failed.

The *Culhane* decision could have far-reaching effects for businesses that promote their products by giving away products for free. Offering free products could be construed as selling at unreasonably low prices, especially if customers were previously charged for the products. If that offering is coupled with evidence that the free products were given with the intention of reducing or eliminating competition, the promoter could be susceptible for a claim that it has engaged in unlawful predatory pricing.

## MISLEADING ADVERTISING

### Electronic Muscle Stimulation Device

On July 22, 2004, the Bureau registered a consent agreement with the Tribunal involving the AB Energizer, an electronic muscle stimulation device from Urus Industrial Corp. ("Urus"), doing business as Koolatron. The Bureau believed that Urus's representations regarding the weight loss, the effect on users' physiques and in particular on their abdominal muscles, and the claim that use of the device would be as beneficial as the use of a gymnasium were all misleading. Under the consent agreement, Urus has agreed, among other things, to:

- discontinue the sale of the AB Energizer;
- pay an administrative monetary penalty of \$75,000;
- implement a formal company policy regarding the use of advertisements and other promotions; and
- provide a full refund to customers who purchased the device.

### Phoney Invoices

On October 1, 2004, after a lengthy Bureau investigation, the Ontario Superior Court convicted four Canadians for their involvement in a "phoney invoice" scam. The defendants had distributed roughly 900,000 invoices to businesses and non-profit organizations in Canada that falsely appeared to be bills or invoices from Bell Canada or the Yellow Pages. The scam generated over \$1 million for the defendants.

The two brother masterminds of the fraud each received sentences of three years in a federal penitentiary and were fined \$400,000 each for violating the false or misleading representations provisions of the *Competition Act*.

This decision highlights the seriousness with which the Bureau has started to enforce the false or misleading provisions of the *Competition Act*.

## ADVERTISING TO CHILDREN

In April 2004, Advertising Standards Canada ("ASC") introduced a new guideline to: (i) ensure that food advertising is consistent with the *Food and Drugs Act* and associated regulations and the *Guide to Food Advertising & Labelling*; and (ii) assist its members and the advertising community at large to advertise and market to children in a responsible fashion. The guideline will be used for: (i) preclearance of children's broadcast advertising by ASC's Children's Clearance Committee; and (ii) evaluation and adjudication of consumers' complaints about child-directed food advertising in non-broadcast media. This guideline is intended, among other purposes, to ensure that advertisements representing mealtime clearly and adequately depict the role of the product within the framework of a balanced diet, and that snack foods are clearly

presented as such, not as substitutes for meals. The guideline will apply nationally, except for Quebec, where advertising to children, aside from some limited exceptions, is prohibited.

## CASH ADS

The Bank of Canada (the "Bank") published a policy regarding the reproduction of Canadian bank note images on January 12, 2004. Under the present legal framework, the reproduction of Canadian bank notes is protected by criminal and public laws.

In order to obtain the Bank's written permission to use the likeness of Canadian currency, the prospective user must follow an application procedure. The application must be submitted in writing to the Bank and must include:

- a brief statement of the purpose for copying a bank note image;
- a sketch of the proposed bank note image;
- a description of the proposed placement and distribution of the material featuring the bank note image; and
- the date by which the Bank's approval is requested. (Note: The Bank states that it will make every effort to meet reasonable deadlines.)

It is not necessary to request the Bank's permission to use bank note images for film or video purposes, provided that the images are intended to show a general indication of currency, and that there is no danger that the images could be misused.

## CONCLUSION

As expected, 2004 was an exciting and challenging year for advertisers and marketers. Not only have new laws, rules and guidelines been introduced, but existing laws, rules and guidelines continue to be interpreted in unexpected ways, a result of regulators trying to keep up with an industry determined to push the advertising envelope. We expect 2005 to provide much of the same. ■

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