Bereskin & Parr LLP

Common rules, different effect

In Canada, there is no express prohibition against direct comparative advertising. However, the prevalence of this practice differs greatly from sector to sector

In Canada, comparisons may be drawn by advertisers between products, services or businesses, whether directly or indirectly, provided that they are truthful and substantiated. Comparative advertising is fairly commonplace today for general consumer products; however, the rules around the level of substantiation required for comparative claims for regulated products, such as over-the-counter drugs, have made such advertisements non-existent.

Competition Act regulation

The Competition Act is the principal federal statute regulating all advertising practices in Canada. The advertising of regulated products is specially governed by statutes that complement the act. Representations (including comparative representations) that are false or misleading in a material respect and other specific deceptive marketing practices are subject to enforcement by the Competition Bureau. This can take the form of civil proceedings, in which a court or the Competition Tribunal considers 'reviewable conduct' under the act, or criminal prosecution. Both processes are initiated by a complaint to, or an investigation by, the bureau, which chooses the enforcement track.

Criminal track – offences made knowingly or recklessly

The act makes it a criminal offence knowingly or recklessly to make representations that are false or misleading in a material respect. This requires proof beyond reasonable doubt of a number of elements, including a *mens rea* element (ie, proof that representations were made knowingly or recklessly). If an advertiser is convicted, its directors or officers face either significant fines or imprisonment.

Civil track – reviewable conduct

Representations that are false or misleading in a material respect are considered 'reviewable conduct' under the act.

Additionally, an advertiser engages in reviewable conduct if it makes a representation on the performance, efficacy or lifespan of a product that is not based on an adequate and proper test. The phrase 'adequate and proper test' is not defined in the act. Rather, a determination is made on a case-by-case basis, considering such factors as the scope and nature of the claim and any relevant industry guidance on testing a particular product. However, the act makes two things clear: testing must be completed before the representation is made, and the advertiser bears the burden of proving that the substantiation is adequate and proper.

The bureau has stated that most performance claims which raise issues under the act fall into two broad categories:

- performance claims that are inappropriate in the context of the actual tests that were conducted – for example, issues may arise if an advertiser makes a quantitative claim based on a qualitative test, such as "Our dryer sheets leave clothes three times softer than the leading brand"; and
- performance claims that are based on poorly designed test methodologies – for example, issues may arise with a national consumer preference claim that is based on an inadequate sample size or was not conducted with the appropriate controls.

Administrative remedies for reviewable conduct

Intent need not be proven for a positive finding, and the elements of the conduct must be proven only on the balance of probabilities. Where the tribunal finds that an advertiser has engaged in reviewable conduct, it may order a number of remedies, including an order that the advertiser refrain from such conduct, publish a corrective notice or pay an administrative fine. Individuals are subject to penalties of up to C$750,000 for a first occurrence and up to C$1 million for subsequent orders. Corporations are subject to penalties of up to C$10 million for a first occurrence and up to C$15 million for subsequent orders.

In November 2010 the bureau launched legal proceedings against Canadian telecommunications company Rogers Communications Inc before the Ontario Superior Court of Justice for misleading advertising under the act. The bureau sought an order that would include Rogers paying C$10 million – the maximum administrative penalty available against a corporation.

Wind Mobile, a new discount wireless carrier, filed a formal complaint with the bureau over claims in a nationwide advertising campaign that Rogers' discount mobile service, Chatr, had fewer dropped calls than the new wireless carriers. Wind publicly stated that this could not be substantiated, as its network statistics were inaccessible to Rogers, making any meaningful comparison of dropped calls between networks impossible.

The bureau conducted a two-month investigation and found no discernible difference in dropped call rates between Chatr and the other discount providers involved. Court proceedings were then initiated, but the matter has yet to be heard in court.

Regulated products

Other federal statutes contain prohibitions and restrictions on advertising regulated products. For example, the Food and Drugs Act prohibits false or misleading representations regarding the character, value, quantity, composition, merit or safety of foods, drugs, cosmetics,

natural health products and medical devices. These federal statutes can place additional restrictions on the comparative advertising of regulated products. This is well illustrated by the comparative advertising of over-the-counter drugs.

From March 1996 to April 2006 there was a voluntary moratorium on comparative advertising of over-the-counter drugs pending a resolution between Health Canada and the pharmaceutical industry on the standard of evidence required to support, for example, claims of efficacy, onset of action and side-effect profiles. In October 2005 Health Canada released its final document on evidence and finally, in April 2006 Advertising Standards Canada, the agency delegated by Health Canada to review comparative advertisements, finalised its procedures for pre-clearing comparative advertisements. Since then, there have been no comparative advertisements of therapeutic attributes because the standard of evidence is too high. Comparisons of therapeutic attributes between non-prescription drugs must be supported by at least two large, independent, controlled, blind, randomised clinical trials. These studies must have been specifically designed beforehand to clearly demonstrate product superiority.

Civil causes of action for misleading comparative advertising

Besides the regulatory regimes, a number of other civil remedies exist for challenging comparative advertising. For example, the Competition Act provides a civil remedy for any person who has suffered loss or damage from criminal conduct under the act or from non-compliance with a court or tribunal order. For a claim to succeed, it must be demonstrated that representations were made knowingly or recklessly. Although proof beyond reasonable doubt is not required, the degree of proof required on the balance of probabilities is higher.

Similarly, the Trademarks Act gives the courts the authority to grant any order that they deem appropriate – including an order for an injunction, damages or loss of profits – to a party that applies for relief in respect of conduct that is contrary to the act. This includes making a false or misleading statement that tends to discredit the business, wares or services of a competitor. This is broader than the civil remedy in the Competition Act, as plaintiffs need not demonstrate that the representations were made knowingly or recklessly, or that such representations were false or misleading "in a material respect". However, plaintiffs should be aware that there are longstanding concerns as to the provision's constitutional validity.

Jennifer McKenzie
Partner
jmckenzie@bereskinparr.com

Jennifer McKenzie is a partner, barrister, solicitor and registered trademark agent with Bereskin & Parr LLP. She is head of the firm's regulatory, advertising and marketing group. She specialises in marketing, advertising, consumer protection law, privacy law and trademark prosecution and enforcement.

Tamarah Luk
Associate
tluk@bereskinparr.com

Tamarah Luk is an associate, barrister and solicitor with Bereskin & Parr LLP. Her practice focuses on marketing, advertising, and packaging and labelling law; privacy law; and patent and trademark prosecution and enforcement.

It is also contrary to the Trademarks Act to use a registered trademark in a manner that is likely to have the effect of depreciating the value of the goodwill attached to it. If an advertiser wants to use a competitor's trademark in comparative advertising, it should conduct a search to see what the trademark registration covers. Owing to the definition of 'use' in the act, if a competitor's trademark is registered for goods, there is a risk attached to making comparative claims when using it on packaging or wrappers. If a competitor's trademark is registered for services, there is a risk attached to making comparative claims when using it in advertising.

Apart from statutory regimes, a plaintiff may also rely on the common law torts of injurious falsehood and unlawful interference with economic relations.

Although there was a flurry of misleading comparative advertising cases in the 1990s, by the 2000s the Canadian courts seemed reluctant to get involved in advertising disputes. In one misleading advertising case brought by Boehringer Ingelheim against Pharmacia, involving statements made by pharmaceutical sales representatives to physicians about the gastrointestinal safety of a product, the judge declined to award an injunction, stating that "courts should generally be averse to entering into the competitive fray unless it is clear that a false statement is being made which has the prospect of causing irreparable harm or which may impact on the health and welfare of members of the public".

Self-regulation

Advertising Standards Canada (ASC) is the self-regulatory body for the Canadian advertising industry. Its mission is to ensure integrity in Canadian advertising through self-regulation by administering the Canadian Code of Advertising Standards. The code contains 14 clauses, which address issues such as safety in advertising, price claims, testimonials and advertising to children. A number of clauses in the code are available to challenge comparative advertising. For example, Clause 6 states that advertisements must not unfairly discredit, disparage or attack other products, services, advertisements or companies, or exaggerate the nature or importance of competitive differences.

ASC administers a trade dispute procedure, whereby advertisers can challenge each other's adverts as being contrary to the code. A trade dispute is initiated by a written complaint and, if the complaint cannot be settled, is resolved in a hearing before a five-member panel constituted by the ASC. A complaint will not be accepted if it is also the subject of ongoing litigation or a Canadian court order, or if the advertisement in question was pre-cleared by an agency of the Canadian government. WTR