Canada

Bill Hearn, Chris Bennett and Dave Spratley
DLA Piper (Canada) LLP

Legislation and regulation

1 What are the principal statutes regulating advertising generally?

The principal federal statute regulating advertising in Canada is the Competition Act, which is a law of general application and applies to both business and consumer advertising. It includes both civil and criminal provisions prohibiting representations to the public promoting the supply or use of a good or service or any business interest that are false or misleading in a material respect.

Generally speaking, the 10 Canadian provinces and three Canadian territories regulate advertising to consumers (but not to businesses) through their respective consumer protection statutes that include provisions relating to unfair practices (ie, deceptive or unconscionable representations that include false advertising). While there are many similarities between these statutes, there are important differences (especially, although not exclusively, respecting the laws of Quebec).

2 Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

There are federal and provincial or territorial governmental bodies with primary responsibility for regulating advertising as well as self-regulatory bodies.

The Commissioner of Competition (the Commissioner) is vested with primary authority for enforcing the Competition Act and heads the Competition Bureau (the Bureau), an independent law enforcement agency. The Commissioner, supported by the Bureau, investigates both criminal and civilly reviewable matters under the Competition Act. In terms of enforcing the civil provisions, the Commissioner has the power to refer matters either to the Competition Tribunal (the Tribunal) or to the Federal Court or superior courts of the provinces (collectively, the Courts, each a Court). The Tribunal and the Courts have concurrent jurisdiction in respect of 'deceptive marketing practices'. Criminal matters under the Competition Act are prosecuted in the courts of criminal jurisdiction (as defined in the Criminal Code of Canada) by the Director of Public Prosecutions (DPP). The initiation and conduct of all criminal prosecutions are the responsibility of the DPP which has decision-making power independent of the Commissioner.

The administration and enforcement of provincial or territorial consumer protection laws is the primary responsibility of the applicable provincial or territorial ministry.

Advertising Standards Canada (ASC), the advertising industry's self-regulatory body, maintains the Canadian Code of Advertising Standards (the ASC Code), by which advertisers must abide. The ASC Code is the advertising industry's principal instrument of advertising self-regulation. Advertisers' violations of the ASC Code may be reported by consumers or advertisers by filing a complaint with ASC, each with its own distinct complaint resolution process. ASC will not accept a complaint (whether from a consumer or an advertiser) if it is already before the Commissioner, the Tribunal, or the Courts.

The Canadian Marketing Association (CMA) is a national non-profit corporation that embraces Canada's major business sectors and all marketing disciplines, channels and technologies. Compliance with the CMA's Code of Ethics and Standards of Practice (the CMA Code) is compulsory for its members. The CMA Code is enforced through the process described in question 3.

With respect to the handling of concurrent jurisdiction, there are a couple of general rules. First, as in the case of ASC, a self-regulatory body will generally not get involved in a complaint when the complaint is already before the Commissioner, the Tribunal or the Courts. And second, as between government regulatory bodies, in the case of a complaint where both a federal body and a provincial or territorial body have appropriate constitutional and jurisdictional authority, there is no impediment to both dealing with it (although in practice this is rare); and in the case of two bodies within one level of government, there is often a memorandum of understanding (MOU) that helps determine which body will take charge. In March 2015, the Bureau announced an MOU with Ontario's Ministry of Government and Consumer Service to notify each other about enforcement activities, advise on strategic priorities, trends and policies, and coordinate communications to the public on consumer protection and competition matters.

3 What powers do the regulators have?

The powers (including the remedies and penalties that may be imposed) vary by regulator.

The investigative process open to the Commissioner is broad and need not involve the exercise of formal powers. However, the Commissioner has significant formal powers of investigation including statutory mechanisms to gather evidence, compel testimony and execute formal search and seizure actions. The exercise of formal powers of investigation under the Competition Act must be commenced by initiating an inquiry.

If, in the course of an inquiry, the Commissioner proceeds by way of the civil track, and if, in turn, the Tribunal or Court determines that a person has engaged in conduct contrary to any of the civil deceptive marketing practices provisions of the Competition Act, the Tribunal or Court may order the person not to engage in such conduct, to publish a corrective notice, to pay an administrative monetary penalty (AMP), or to pay restitution to purchasers, or any combination of these remedies. When the Tribunal or Court orders the payment of an AMP, on first occurrence, individuals are subject to penalties of up to C$750,000 and corporations, to penalties of up to C$10 million. For subsequent orders, the penalties increase to a maximum of C$1 million in the case of an individual and C$15 million in the case of a corporation. The Tribunal or Court also has the power to order interim injunctions to freeze assets in certain cases.

In practice, the majority of civil track matters are resolved before they ever reach the stage of a Tribunal or Court hearing. The Competition Act provides for consent agreements between the Commissioner and the party alleged to have violated the civil misleading advertising provisions.

With respect to the criminal track, any person who contravenes the criminal false or misleading advertising provision of the Competition Act is guilty of an offence and liable to a fine of up to C$200,000 or imprisonment for up to one year or both, on summary conviction, or to fines without upper limits at the discretion of the criminal court or imprisonment for up to 14 years or both, upon indictment.

In Ontario, as in some other provinces, the Director under the Consumer Protection Act has the power to order a person engaging in misleading advertising to cease and to retract the advertisement or publish a correction. In addition, an individual who is convicted of an offence under the Consumer Protection Act is liable to a fine of not more than C$50,000 or to imprisonment for a term of not more than two years less a day or both,

and a corporation that is convicted of an offence is liable to a fine of not more than C$250,000.

With respect to the ASC Code, in the case of the consumer complaints procedure, if an advertiser fails to voluntarily comply with a Standards Council decision, ASC has the power to advise exhibiting media of the advertiser's failure to cooperate and request the media's support in no longer exhibiting the advertising in question. ASC also has the discretion to publicly declare that the advertising and the advertiser in question have been found to have violated the ASC Code.

If a consumer complains to the CMA that a member has violated the CMA Code, the CMA has internal mediation procedures that involve working with the member to resolve the complaint in a manner consistent with the CMA Code.

4 What are the current major concerns of regulators?

The current major concerns of regulators vary by level of government and whether or not the body is self-regulatory.

From recent public announcements and enforcement actions, the Bureau is chiefly concerned with deceptive pricing (such as deceptive ordinary selling price claims, all-in pricing and drip pricing), deceptive billing practices (like 'mobile cramming'), deceptive online endorsements (commonly called 'astroturfing'), unsubstantiated product performance claims and deceptive electronic messages. For instance, in March 2015, the Bureau announced that Rogers Communications had agreed to pay C$5.42 million in refunds to consumers in connection with charges for premium text messages and rich content services that allegedly were 'unauthorised' and 'crammed' onto their customers' wireless phone bills. Under the settlement, the Commissioner agreed to discontinue the legal proceedings against Rogers in a lawsuit the Commissioner started in September 2012 against Rogers, Bell Canada, Telus Corporation and the Canadian Wireless Telecommunications Association (CWTA). The proceedings against Bell, Telus and the CWTA remain ongoing. The remedies sought by the Commissioner in these proceedings include both full customer refunds and AMPs of C$10 million each from Bell and Telus, and C$1 million from the CWTA.

With the coming into force under Canada's Anti-Spam Legislation (CASL) of the anti-spam rules relating to commercial electronic messages (CEMs) on 1 July 2014 and of the software installation rules on 15 January 2015, Industry Canada and the three regulators responsible for enforcing CASL (namely, the Canadian Radio-television and Telecommunications Commission (CRTC), the Office of the Privacy Commissioner of Canada (OPC) and the Commissioner) have given priority to rolling out guidance documents and presentations to help CEM senders, advertisers and software installers get ready for, and comply with, CASL. In March 2015, the CRTC issued a C$1.1 million AMP notice against a Quebec-based company for alleged violations of CASL's anti-spam rules regarding valid consents and functional unsubscribe mechanisms. Shortly thereafter, in its second decision under CASL, the CRTC issued a C$48,000 AMP against the operator of the Plenty of Fish dating site for sending CEMs where the unsubscribe mechanism was not clearly and prominently set out and could not be readily performed. Also in March 2015, the Commissioner commenced an application with the Tribunal against two national car rental companies under the new deceptive electronic messages provisions of the Competition Act that came into force as part of CASL in July 2014 as well as under the deceptive pricing provisions of the Competition Act. In this application, the Commissioner is seeking a total of C$30 million in AMPs and more than C$35 million in refunds for consumers.

One of the OPC's main enduring concerns over the past few years is that online behavioural advertising (OBA), which involves tracking consumers' online activities across sites and over time in order to deliver advertisements targeted to their inferred interests, comply with Canadian privacy law. The persistence of this concern is evidenced by the OPC's issuance in 2012 of specific guidelines on OBA, its investigation of Google in 2013 and subsequent findings and settlement to address personal information protection concerns regarding Google's use of sensitive health information for targeting of Google ads, and by the OPC's 7 April 2015 finding in its investigation into Bell's relevant ads programme (RAP). It its RAP finding, the OPC found that Bell was not, via its opt-out model, obtaining adequate consent for the RAP given the sensitivity of the information Bell used and the reasonable expectations of Bell customers. Finally, the OPC's concern with OBA was the impetus for the OPC's research in late 2014 and early 2015 into how businesses are complying with the 2012 OBA guidelines. The OPC will be issuing its report on the findings of this research in June 2015.

From recent ASC reports, ASC's main concerns in advertising are with accuracy and clarity, omission of important terms of an offer (ie, fees or conditions), price claims, exaggerated health claims, illegibility of disclaimers, disguised advertising techniques, safety, and unacceptable depictions and portrayals.

5 Give brief details of any issued industry codes of practice. What are the consequences for non-compliance?

There are two principal industry codes of practice of general application in Canada: the ASC Code and the CMA Code. Each code has different consequences for non-compliance (see question 3). The ASC Code is designed to ensure that advertisements in Canada maintain standards of honesty, truth, accuracy, fairness and propriety. The CMA Code provides helpful guidance to Canadian advertisers regarding the law, ethics and best practices of advertising.

6 Must advertisers register or obtain a licence?

No, as a general rule, for most goods and services, anyone can advertise. That said, if the advertisement is for a good or service that requires a special registration or licence to offer for sale, the advertiser must be so registered or licensed. For instance, under the Ontario Private Career Colleges Act, only a registered private career college may advertise vocational programmes to prospective students.

7 May advertisers seek advisory opinions from the regulator? Must certain advertising receive clearance before publication or broadcast?

Yes, the Commissioner has the discretion, on request, to provide a written opinion on the applicability of the Competition Act to a proposed practice or conduct. These written opinions are binding on the Commissioner if all the material facts that have been submitted are accurate and remain substantially unchanged.

Broadcast advertisements directed at children must be reviewed and approved by ASC's Children's Clearance Committee to ensure compliance with the provisions of the Broadcast Code for Advertising to Children (the Broadcast Code).

Private enforcement (litigation and administrative procedures)

8 What avenues are available for competitors to challenge advertising? What are the advantages and disadvantages of the different avenues for challenging competitor's advertising?

Competitors may file complaints to the Commissioner, ASC, or the Tribunal or Courts to challenge advertising.

A complaint to the Commissioner may be advantageous because the process is inexpensive for the complainant. Further, the financial consequences for an advertiser found to be in violation of the Competition Act may be significant, with potential AMPs in the millions of dollars. However, on the downside, the process can be slow and the complainant cannot significantly influence the timing of the process.

The advantages of filing a complaint with ASC are that the initial process is confidential and the ultimate result may be the public shaming of the advertiser (if the defendant advertiser is intransigent and does not comply with ASC's determination). ASC's process is also quick as a typical procedure would last only eight to 10 weeks. The disadvantages are that there are substantial ASC filing fees involved and there may be no public relations victory for the complainant if the advertiser simply complies with ASC's determination.

The Competition Act grants a private right of action allowing private parties (both businesses and consumers) to sue in court for recovery of damages for violation of the criminal sections of the Competition Act, including the criminal misleading advertising provisions.

9 How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?

Consumers may file complaints to the Commissioner, ASC, or the Tribunal or Courts to challenge advertising.

A consumer can make a complaint about advertising to the Commissioner with little preparation or expense. However, the consumer has no control over whether and how that complaint will be pursued. ASC has a well-established mechanism for consumers to submit written concerns about advertisements currently running in Canadian media. In 2013, ASC introduced a streamlined process to address the increasing number of complaints related to the accuracy and clarity of, and price claims in, advertisements. Under this process, ASC staff have the discretion to resolve complaints administratively in such cases where the advertiser has taken prompt steps to fix the advertising that gave rise to the complaint. Those complaints that are not administratively resolved, and that raise a potential issue under the ASC Code are reviewed by a Standards Council.

With respect to complaints to the Court, as with complaints by competitors, a consumer (which may include a class of consumers under applicable class proceedings laws) has a private right of action under the Competition Act allowing them to sue in court for damages.

10 Which party bears the burden of proof?

With respect to Tribunal or Court proceedings, the burden of proof lies generally with the plaintiff to prove that the defendant advertiser engaged in conduct contrary to the Competition Act or failed to comply with an order of the Tribunal or Court. There are, however, some exceptions. For example, the burden of proof shifts to the defendant when it comes to proving adequate and proper testing for a claim requiring substantiation prior to the claim being made in an advertisement.

11 What remedies may the courts or other adjudicators grant?

See question 3.

12 How long do proceedings normally take from start to conclusion?

The normal length of proceedings depends on the forum and may vary widely depending on the complexity of the complaint. Generally speaking, however, from start to finish (excluding appeals), the proceedings normally take: for ASC, eight to 10 weeks; for the Commissioner, four to six months; and for the Tribunal or Court, 24 to 48 months.

13 How much do such proceedings typically cost? Are costs and legal fees recoverable?

The cost of proceedings vary by form and may vary widely depending on the complexity of the complaint.

There is no filing fee for a member of the public to submit a complaint to ASC under the consumer complaints procedure. For disputes between competitors and other businesses under ASC's advertising dispute procedure, the filing fees are substantial. To file the complaint, ASC's fee is C$8,000 for members or C$12,000 for non-members. For the hearing, ASC's fee is C$10,500 for members or C$15,750 for non-members.

There is no filing fee for either a consumer or a competitor to make a complaint to the Commissioner.

In the case of complaints to ASC and the Commissioner, the amount of the legal fees and other costs of external counsel and experts depends on the complexity of the complaint and the effort the consumer or competitor makes in preparing and pursuing the complaint. In both cases, legal fees and other costs are not recoverable.

The cost of civil proceedings before the Tribunal or Court is difficult to estimate and depends on many factors. That said, the legal fees for civil misleading advertising proceedings for even a garden variety three-day trial, with some pretrial skirmishes regarding pleadings and productions, may easily exceed C$250,000 over a typical three-year period. Generally speaking, costs for litigation are awarded on a partial indemnity, 'loser pays' basis, which results in the winner recouping approximately one-quarter to one-third of their actual lawyers' fees from the loser.

14 What appeals are available from the decision of a court or other adjudicating body?

The appeal that is available from a particular decision varies depending on whether the decision is one made by a court or a self-regulatory body.

A decision, order or refusal to make an order under the Competition Act by the Federal Court or the Tribunal may be appealed to the Federal Court of Appeal. A decision, order and refusal to make an order by the Superior Court of a province may be brought before the Court of Appeal of that province.

A decision from one of ASC's Standards Councils may be appealed either by the complainant or the advertiser. Appeals are heard by a five-person appeal panel. A decision from one of ASC's advertising dispute panels may also be appealed by either the complainant or the advertiser. The request for appeal must be accompanied by the applicable request for appeal fee (ie, C$3,800 for members or C$5,700 for non-members). Requests for leave to appeal are heard by a three-member review panel. Upon recommendation of the review panel, and after receiving the applicable appeal hearing fee (ie, C$10,500 for members or C$15,750 for non-members), ASC will draw a five-member appeal panel.

Misleading advertising

15 How is editorial content differentiated from advertising?

The main concern with advertising through editorial content (often called 'native advertising') is that consumers may be misled and influenced to purchase a product as a result of reading a supposedly unbiased review. While there are no laws in Canada that specifically address this type of advertising, the general rules under the Competition Act relating to 'testimonials' apply (see question 23). Furthermore, the ASC Code provides that, 'No advertisement shall be presented in a format or style that conceals its commercial intent'. Unfortunately, given the limited number of complaints that have been publicly dealt with by ASC with respect to this prohibition, there is little self-regulatory guidance with respect to how an advertiser should avoid 'concealing its commercial intent'.

Industry guidance, however, suggests that best practice is to separate editorial content and advertising messages in a manner transparent to the reader. For example, Magazines Canada's Code of Reader and Advertiser Engagement provides that, not only must native advertising be labelled as an advertisement, such advertisements should have a different design from the publication's usual design.

Likewise, in the United States, the Federal Trade Commission has been pushing industry to adopt practices to make sure consumers do not mistake editorial content for advertising. In response, advertisers and publishers are increasingly writing their own internal policies. For example, the Interactive Advertising Bureau has released a report on editorial content. In addition, the American Society of Magazine Editors has released editorial guidelines that discuss the relationship between editorial content and advertising content.

16 How does your law distinguish between 'puffery' and advertising claims that require support?

It is well established at common law in Canada that 'puffery' (which does not require support) is only permissible where the statement (or 'puff') is so boastful an opinion, so vague a statement, or so hyperbolic or outrageous that no reasonable consumer would rely on it. Under the Competition Act, however, where the claim relates to the performance, efficacy, or length of life of a good or service, it must be substantiated by an 'adequate and proper test' conducted before the claim is made. The case law demonstrates that, in practice, the line between a mere puff and a claim requiring substantiation is often difficult to draw.

17 What are the general rules regarding misleading advertising? Must all material information be disclosed? Are disclaimers and footnotes permissible?

General rules

The general rules regarding misleading advertising under the Competition Act are as follows:

- it is prohibited to make a representation to the public that is deceptive in a material respect for the purpose of promoting a good or service or a business interest;
- all representations, in any form whatsoever, are subject to the prohibition;
- if a representation could influence a person to buy or use the good or service advertised, it is material;
- the representation need not be material if it is made in certain areas of an electronic message. In particular, with the coming into force in July 2014 of CASL's anti-spam provisions, the Competition Act has been amended to create, without a materiality requirement, new criminal offences and new civil reviewable practices where there is a deceptive representation in an electronic message's locator (ie, the name or other information used to identify the source of data in a computer system such as a URL), sender information or subject matter line. In

an application to the Tribunal commenced in March 2015 (discussed above in question 4 and below in the 'all-in pricing' section of question 26), the Commissioner also brought its first proceeding under this new deceptive electronic messages provision of the Competition Act;
- the criminal provision requires 'intent' (ie, that the advertiser knowingly or recklessly engaged in deceptive advertising). The civil provision does not;
- it is not necessary to demonstrate that any person was actually deceived or misled, that any member of the public to whom the representation was made was within Canada, or that the representation was made in a place to which the public had access; and
- the general impression conveyed by a representation, as well as its literal meaning, will be taken into account when determining whether or not the representation is false or misleading in a material respect.

Sophistication of average consumer when interpreting advertisements for deception

The appropriate level of sophistication to be attributed to the average consumer when interpreting the general impression of an advertisement for deception has been in flux over the past couple of years and may continue to be a source of uncertainty for some time yet, namely whether the average consumer, for advertising interpretation purposes, can be taken to be a 'reasonable' person or merely a 'credulous' one.

Inclusion of material information

There is no general rule under the Competition Act requiring that all material information be included in an advertisement. Rather, as upheld by the Ontario Court of Appeal in the 2013 case of *Arora v Whirlpool Canada LP*, an alleged 'misrepresentation by omission', where there is no positive misrepresentation, is not a violation of the misleading advertising provisions of the Competition Act.

Disclaimers

Disclaimers and footnotes are permissible in advertising but must be used with caution. Reflecting common law and best practices, the Commissioner has issued requirements and guidelines over the years to assist advertisers, which include the following:
- a disclaimer may properly clarify ambiguity or provide qualification. A disclaimer cannot, however, contradict the main claim in the body of the advertisement;
- if you must use a disclaimer, it should be prominent, clear and close to the main claim being clarified;
- the main claim in the advertisement, apart from the disclaimer, should be capable of standing alone;
- it is not sufficient for the disclaimer to be present. The disclaimer must be likely to be read and likely to alter the general impression of the advertisement;
- when determining the appropriate size of text for a disclaimer, the advertiser should take the context of the advertisement and nature of its target audience into account. The print must be large enough to be clearly visible and readable without resort to unusual means;
- greater leeway may be allowed in cases where it is reasonable to assume that consumers will carefully consider all available information - namely, where the class of persons likely to be reached by the representation is a more sophisticated target audience: for example, purchasers of homes, international vacations and luxury automobiles;
- likewise, where a 'specific target audience' may be expected to have difficulty reading small print, this should be taken into account in the size of the disclaimer; and
- attention-grabbing tools should not distract a consumer's attention away from the disclaimer.

Lastly, digital advertising presents unique challenges for advertisers to make their disclaimers fair and not deceptive (and thus effective and enforceable). These challenges are especially acute in digital advertising on mobile platforms (such as smart phones and tablets with space-constrained screens) and in social media (such as tweets and other space-constrained digital adverts).

While the Commissioner has not issued recent and specific guidance on the digital advertising space, Canadian advertisers may find general (albeit dated) guidance in the Commissioner's Application of the Competition Act to Representations on the Internet, Enforcement Guidelines 2009. Canadian advertisers concerned with making their disclaimers in digital advertising effective should also consult the US FTC's '.com Disclosures – How to Make Effective Disclosures in Digital Advertising' published in March 2013. These FTC guidelines contain practical guidance illustrated by examples of digital advertising in the marketplace.

18 Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?

Whether an advertiser must have proof of the claims it makes in advertising before publishing depends on the claims or statements in the advertising. As discussed in question 16, substantiation is not required for statements that constitute mere puffery. Generally speaking, the substantiation requirement applies to provable advertising claims that might reasonably be taken as true. Such claims usually fall into three categories: performance claims, comparative claims, and preference or perception claims.

Under the Competition Act an advertiser must have proof (in the form of 'adequate and proper' testing) of the claims it makes in advertising before publishing the advertisement if those claims relate to the performance, efficacy or length of life of a good or service. 'Adequate and proper test' is not defined in the Competition Act in order to preserve flexibility in an increasingly complex and technical field of expertise. Commissioner Guidelines over the years have stated that the test results must be significant and reproducible, and samples and comparisons must be representative.

In the 2013 decision in the Chatr case, the court held that, with respect to tests being 'adequate and proper':
- industry-standard testing is a good basis on which to conduct tests; and
- while the Competition Act permits a flexible and contextual analysis when assessing whether a claim has been properly tested, there must still be a test – that is to say the advertiser must have actually conducted some sort of test (and not just reached a logical conclusion or inference based on certain technological facts).

In the 2014 decision in the Chatr case regarding the appropriate penalty, the court ordered the advertiser to pay an AMP of $C500,000 for not having conducted adequate and proper tests to support its performance claims prior to making them.

In practice, the two problems that most often arise with claim substantiation are: the test results do not actually support the specific claims; and the claims are based on poorly designed test methodologies. While there is no requirement for scientific certainty, testing must be appropriate in the circumstances and the claims must actually flow from the test results without leaving a gap in logic.

19 Are there specific requirements for advertising claims based on the results of surveys?

Yes, the specific requirements are set forth in ASC's Guidelines for Use of Research and Survey Data to Support Comparative Advertising Claims (ASC Survey Guidelines). They are, however, only self-regulatory guidelines for interpreting the ASC Code, not laws or regulations binding on the Commissioner, the Tribunal or the Courts. That said, the ASC Survey Guidelines (first published in 1982, last updated in 2012) provide a plain language, pertinent and persuasive summary of current industry best practices and applicable law that advertisers would be wise to follow. The specific requirements include that survey research must be valid, reliable and relevant.

20 What are the rules for comparisons with competitors? Is it permissible to identify a competitor by name?

The rules for comparisons with competitors are derived from statutes, common law and industry codes. Yes, it is permissible to identify a competitor by name but care must be taken to mitigate the main legal risks described below.

In Canada, the use of a competitor's name, product, slogan or other intellectual property in advertising, even in a fair and accurate comparative advertisement, may raise legal risks for the advertiser under the Copyright Act, the Trade-marks Act or at common law under the tort of passing off, either separately or in combination.

No deceptive advertising
The main requirements under the Competition Act for comparative advertising are that the claims must not be deceptive and must be substantiated (see questions 17 and 18). But the statutory rules by no means stop there.

No copyright infringement
The federal Copyright Act prohibits advertisers from using a copyrighted work (such as the slogan, jingle or product packaging of a competitor) without authorisation. Unauthorised use puts the advertiser at risk of liability for an injunction or damages for copyright infringement, or both. There is a defence of fair dealing for the purpose of parody or satire. However, it is unclear to what extent this defence applies in a comparative advertising context.

No trademark infringement or depreciation of goodwill
Likewise, the federal Trade-marks Act prohibits advertisers from using a registered trademark (which may include the company and product names and logos of a competitor) without permission or licence. Unauthorised use puts the advertiser at risk of legal proceedings and possible liability for trademark infringement or depreciation of goodwill, or both. That said, the relevant statutory provisions and case law interpreting them are complex and nuanced, with the result that the guidance for advertisers is not intuitive. For instance, the risks of unauthorised use of a competitor's trademark in advertising are:

- increased when the competitor's trademark is registered for services as opposed to only wares or the advertisement is on the product packaging or at a point of sale; and
- decreased when the advertisement focuses on the differences between the two products as opposed to their similarities.

No passing off
Owners of unregistered trademarks must rely on the common law or the Trade-marks Act's unfair competition provisions to prevent competitors from using the trademark in advertising. One avenue is a passing-off action that requires the owner to show the existence of goodwill, the deception of the public due to the advertiser's misrepresentation and damages.

ASC Guidelines
With respect to self-regulatory regimes, the ASC Code provides that advertisements must not unfairly discredit, disparage or attack other products, services, advertisements or companies, or exaggerate the nature and importance of competitive differences. The use of the word 'unfairly' means that some form of comparison is acceptable. ASC's Guidelines for the Use of Comparative Advertising provide rules that blend the legal requirements under the statutory regime and common law discussed above with current best practices of advertisers under the ASC Code.

21 Do claims suggesting tests and studies prove a product's superiority require higher or special degrees or types of proof?

No, there are no higher or special degrees or types of proof required other than those mandated by the Competition Act. For details, see questions 16, 18, 19 and 20.

22 Are there special rules for advertising depicting or demonstrating product performance?

No, there are no special rules for advertising depicting or demonstrating product performance other than those under the Competition Act already discussed in question 21.

23 Are there special rules for endorsements or testimonials by third parties, including statements of opinions, belief, or experience?

Yes, there are many special rules for endorsements and testimonials, some of which are discussed below. Before using an endorsement or testimonial in advertising, the advertiser should acquire the necessary permissions from the endorser. These include permissions regarding use of the endorser's personality rights and any of the endorser's copyrighted material. The advertiser should also get the endorser to waive their moral rights.

The Competition Act prohibits the unauthorised use of tests and testimonials, or the distortion of authorised tests and testimonials. The provision also prohibits a person from allowing such representations to be made to the public. To document compliance with the Competition Act, advertisers should ask endorsers to swear an affidavit or provide some other confirmation in writing that the endorser has in fact used the product and that they have provided the opinion set out in the advertisement.

Through recent investigations and announcements, the Bureau has taken action to respond to consumer complaints regarding the deception inherent in 'astroturfing' – that is, fake online reviews written to look like they come from regular consumers, but that are actually written by someone affiliated with the product or service being reviewed. Astroturfing is more common than many consumers realise and some companies offer to write positive fake customer reviews for brands for a fee. BCE Inc, for example, recently sent letters to its employees instructing them not to write online reviews about Bell's app 'MyBell' after it was pointed out on a blog post that the reviews which most highly rated the application came primarily from Bell employees.

The general rule in Canada, as summarised in the ASC Code, is that testimonials or endorsements by third parties must reflect the genuine, current opinions of the organisation or individuals giving them. They must be based on adequate information or experience and must not be deceptive.

24 Are there special rules for advertising guarantees?

Yes, there are special rules with respect to advertising guarantees and warranties under the Competition Act and provincial or territorial consumer protection legislation. The Competition Act prohibits advertisers from making materially misleading product warranties or guarantees, or misleading promises to replace, maintain, or repair an article. This prohibition also applies to circumstances where there is no reasonable prospect that the warranty, guarantee or promise will be carried out.

25 Are there special rules for claims about a product's impact on the environment?

Yes, there are special rules for claims about a product's impact on the environment. Environmental claims in advertising are regulated under the general deceptive advertising provisions of the Competition Act. To assist industry and advertisers in making environmental claims that are not deceptive under the Competition Act (and other statutes that the Commissioner administers), the Commissioner and the Canadian Standards Association published a guidance document in 2008 (updating a earlier document published in 2000) entitled Environmental Claims: A Guide for Industry and Advertisers (the Environmental Claims Guide).

The Environmental Claims Guide is not a regulation and does not have the force of law. That said, it contains practical guidance on many areas, including that:

- an environmental claim that is vague or non-specific or that broadly implies that a product is environmentally beneficial or environmentally benign shall not be used; and
- self-declared environmental claims must meet 18 specific requirements including that they shall be accurate and not misleading, substantiated and verified, relevant, specific and accompanied by an explanatory statement if the claim alone is likely to result in misunderstanding.

The Environmental Claims Guide is based primarily on ISO 14021 Environmental labels and declarations – Self-declared environmental claims (Type II environmental labelling) (ISO 14021), and replaced the Principles and Guidelines for Environmental Labelling and Advertising published by Industry and Science Canada in 1993. ISO 14021 was first published in 1999 and was amended in 2011 to address new and emerging issues in environmental claims such as those relating to 'carbon neutral/offset' claims and 'qualified sustainability' claims.

26 Are there special rules for describing something as free and for pricing or savings claims?

Yes, there are special rules set out in the Competition Act and in Commissioner guidance for describing items as free and for pricing or savings claims.

'Free' claims
The Commissioner guidance includes:
- if a 'free' offer is made, the item must in fact be free and available to the consumer at no cost; and
- if a second item is bundled with the first item at no extra cost to the consumer, it is permissible for the advertiser to claim the second item is 'free with purchase' of the first item provided there is no attempt to recover the cost of the free item.

Also regarding 'free' claims advertised in Quebec, advertisers must take care to comply with a unique requirement under Quebec's Consumer Protection Act that prohibits placing more emphasis in an advertisement on a premium than on the good or service associated with the premium.

'Up to' claims
In Canada, 'up to' claims are not addressed specifically in any advertising statute or regulation. That said, at least in respect of price advertising, the CMA Code provides general guidance for advertisers which includes:
- where price discounts are offered, a qualifier such as 'up to' must be presented in easily readable form and in proximity to the prices quoted; and
- reasonable quantities of items or services on promotion should be available at discount levels across and up to the range quoted.

Ordinary selling price claims
The deceptive ordinary selling price (OSP) provisions of the Competition Act are designed to ensure that when products are promoted at sale prices, consumers are not misled by reference to inflated regular prices. In other words, when an OSP is advertised in relation to a savings claim, there must really be a bargain.

The Competition Act prohibits false or misleading representations to the public as to the OSP of a product, in any form whatsoever. The OSP is validated in one of two ways: either a substantial volume of the product was sold at that price or higher, within a reasonable period of time (the 'volume test'); or the product was offered for sale, in good faith, for a substantial period of time at that price or a higher price (the 'time test'). In the Ordinary Price Enforcement Guidelines 2009, the Commissioner clarifies the approach taken in enforcing the OSP provisions of the Competition Act as follows:
- with respect to the volume test, 'substantial volume' means more than 50 per cent of sales at (or above) the reference price and 'reasonable period of time' means 12 months before (or after) the claim;
- with respect to the time test, 'substantial period of time' means more than 50 per cent of the six months before (or after) the claim is made and 'in good faith' depends on a number of factors including that the product was openly available in appropriate volumes and the price was based on sound pricing principles, a price the advertiser fully expected the market to validate (whether or not this happened) and a price at which genuine sales had occurred; and
- with respect to both the 12 month period for the volume test and the six month period for the time test, these periods may be shortened depending on the nature of the product – namely, a shorter period if the product is seasonal, novel, new or frequently purchased.

In 2014, the Bureau confirmed that the OSP provisions of the Competition Act remain a consumer protection concern and enforcement priority by commencing inquiries into alleged violations of them by two leading Canadian retailers (ie, Sear Canada and Hudson's Bay Company) in connection with their promotions of the sale of mattress sleep sets. These inquiries are ongoing and have resulted in the Commissioner bringing court applications in January 2015 for the disclosure or certain documents from the advertisers.

Sale above advertised price
The Competition Act prohibits the sale of a product at a price higher than its advertised price. The provision does not apply if the advertised price was a mistake and the error was corrected immediately upon the advertiser being made aware of the mistake.

Double ticketing
The Competition Act prohibits, as a criminal offence, the practice of 'double ticketing', in which two prices are affixed to an item and the higher of the two prices is charged to the purchaser. The prohibition also applies to the display of multiple prices at point of purchase displays or other in-store advertising.

Bait-and-switch
The Competition Act prohibits advertising a product at a bargain price when it is not available for sale in reasonable quantities – 'bait-and-switch selling'. The provision does not apply if the advertiser can establish that the non-availability of the product was due to circumstances beyond the advertiser's control, the quantity of the product obtained was reasonable, or the customer was offered a rain check when supplies were exhausted.

All-in pricing
Recently, in certain sectors prone to consumer confusion and frustration as to the total price of a product (eg, where the constituent elements of the total price of a good or service may be varied and complex), and to allow consumers to more easily compare prices and make informed choices, sector-specific all-in, transparent pricing laws have been enacted both federally and provincially. This includes advertising the sale of automobiles, wireless services in Ontario, all consumer goods and services in Quebec and air travel federally.

In March 2015, following the Bureau's investigation of price advertising in Canada by car rental companies Avis and Budget, the Commissioner commenced an application with the Tribunal alleging deceptive advertising and seeking a total of $C30 million in AMPs and C$35 million in refunds for consumers. In the application, the Commissioner alleges that each company advertises prices for vehicle rentals that are not attainable due to additional charges imposed during the rental process. In addition, the Commissioner alleges that these fees are mischaracterised in each company's advertisements as 'government' taxes, surcharges and fees when, in fact, the companies impose these charges to recoup part of their cost of doing business. The application is an example of yet another action by the Commissioner for 'all-in' pricing and against the practice of drip pricing (ie, where a consumer is presented with a price in the advert but not the full price until later – discussed in more detail, below).

Drip pricing
In July 2013, the Commissioner commenced proceedings in the Ontario Superior Court of Justice against two national furniture retailers (Leon's and The Brick) alleging, among other things, deceptive 'drip pricing' – that is, a pricing technique in which firms advertise only a portion of a price and reveal other charges to the customer as they go through the purchasing process. In the Statement of Claim, the Commissioner alleges that

> *Drip pricing triggers a number of common behavioural biases, including:*
> *(a) price anchoring – consumers "anchor" to the piece of information they think is most important (i.e., the advertised price). They then fail to adjust their perception of the value of the offer sufficiently as more costs are revealed;*
> *(b) loss aversion – consumers see a low price and make the decision to buy the good, which shifts their reference point because they imagine already possessing the good. Later, when they realize that there are additional costs and charges, it is more difficult for them to give up the good that they already view as theirs; and*
> *(c) commitment and consistency – consumers have a desire to be consistent with their previous actions so once they've started the purchasing process they are less likely to walk away.*

The Commissioner then pleads that the advertisers exploited these consumer behaviours and asks the court to order the advertisers, for their alleged reviewable conduct, to pay full restitution to customers.

27 Are there special rules for claiming a product is new or improved?

Yes, there are special rules for claiming a product is new or improved. In Canada, the general rule, as expressed in various guidelines and codes (such as in the Broadcast Code – see question 30), is that an advertiser may claim a product is new or improved for up to one year.

Prohibited and controlled advertising

28 What products and services may not be advertised?

Gambling without government sanction is illegal in Canada, and those who advertise gambling activities may be committing a criminal offence or violating a provincial consumer protection statute, or both (see question 36). While not prohibited, advertising tobacco products or prescription drugs is highly restricted (see questions 32 and 35).

29 Are certain advertising methods prohibited?

The ASC Code prohibits advertising in a format that conceals its commercial intent. Consumers must understand that someone is trying to sell them something. For example, dressing up a commercial as a documentary without indicating its true nature would not be allowed under the ASC Code.

The ASC Code prohibits advertisements that, without justifiable educational or social grounds, encourage unsafe or dangerous behaviour. A dangerous promotional stunt would likely be outside this requirement.

Advertising that shocks and offends public decency is not permitted by the ASC Code.

CASL prohibits the sending of CEMs (which are not limited to e-mails and may include text messages, instant messaging and some social media messages) without the recipient's prior express opt-in consent, although there are exemptions for certain types of messages and scenarios, and consent may be implied in defined circumstances.

30 What are the rules for advertising as regards minors and their protection?

The rules for advertising to minors are detailed and complex and vary by province, regulator and media. Minors generally include children under 12 years of age (13 in Quebec) and teenagers under the age of majority (which varies between 18 and 19 depending on the province or territory). Generally speaking, these rules recognise that minors are a vulnerable segment of society that require considerable protection from high-pressure advertising techniques.

There are no federal statutes or regulations that specifically regulate advertising to minors. Rather, the laws of general application, such as the Competition Act, apply. However, there are several self-regulatory industry codes and there are specific laws in Quebec.

The ASC Code addresses advertising to both children and teenagers who are still minors. Advertising directed at children must not exploit their credulity, lack of experience or their sense of loyalty, and must not present information that might result in their physical, emotional or moral harm.

Broadcast advertisements directed at children must be reviewed and approved by ASC's Children's Clearance Committee to ensure compliance with the provisions of the Broadcast Code.

The CMA Code recognises that marketers have a special responsibility to be sensitive to the different issues surrounding marketing to children and teenagers (especially those relating to protecting their privacy) and thus provides many rules and guidelines.

With only limited exceptions, Quebec's Consumer Protection Act bans commercial advertising directed at children under the age of 13. The Quebec ban is complex and nuanced. For instance, excepted from the ban are advertisements constituted by a store window, display, container, wrapping or label, provided the advertisements meet certain prescribed requirements, which include not directly inciting the child to buy or to urge another person to buy the advertised goods or services or even to seek information about them.

Lastly, in response to increasing public pressure to promote healthy dietary choices and lifestyles to children and to combat childhood obesity, many of Canada's leading food and beverage companies have established the Children's Advertising Initiative, administered by ASC.

31 Are there special rules for advertising credit or financial products?

Yes, there are special rules that vary depending on whether the advertiser is, in terms of cost of credit and other disclosures, regulated federally, provincially or territorially.

The special rules for advertising credit or financial products (such as credit cards, lines of credit and mortgages) supplied by federally regulated financial entities (such as banks) stem from federal statutes and regulations (such as the Bank Act, the Cost of Borrowing and the Credit Business Practices Regulations under the Bank Act). Such rules are also derived from certain voluntary codes of conduct including the Canadian Code of Practice for Consumer Debit Card Services 2004 and the Code of Conduct for the Debit and Credit Card Industry in Canada 2010.

The special rules for advertising credit or lease products (such as in the automotive sector) stem mainly from provincial or territorial consumer protection laws. Despite efforts at harmonisation, there are still variations of these rules across Canada. The rules in Ontario, however, are essentially the same as those in the majority of Canadian provinces and include with respect to both credit agreements and lease agreements that the advertisements must prominently include the annual percentage rate (APR), a prescribed 'effective' interest rate that takes into account the consumer's foregone cash-purchase-only incentives (and when taken into account is higher than the 'nominal' interest rate).

Federally regulated banks also need to pay attention to provincial and territorial consumer protection legislation. In the recent Marcotte decision, the Supreme Court of Canada made it clear that there is no sweeping immunity for banks from provincial laws of general application. In this case, the court found that the disclosure of credit charges and net capital amounts must comply with both federal and Quebec law requirements.

32 Are there special rules for claims made about therapeutic goods and services?

Yes, the special rules for claims made about therapeutic goods (such as prescription drugs, non-prescription drugs, natural health products and medical devices) arise from the federal Food and Drugs Act and the following regulations made under it: the Food and Drugs Regulations, the Natural Health Products Regulations and the Medical Devices Regulations.

Health Canada is responsible for enforcing the Food and Drugs Act and its associated Regulations and retains ultimate regulatory authority with respect to compliance with federal rules governing the advertising of therapeutic products. To assist advertisers, Health Canada has published several policies and directives, including the Distinction between Advertising and Other Activities 2005 and the Consumer Advertising Guidelines for Marketed Health Products (for Non-prescription Drugs including Natural Health Products) 2006.

The Food and Drugs Act prohibits advertising any drug or medical device in a false, misleading or deceptive manner, or in a manner that is likely to give consumers a false impression regarding the character, value, quantity, composition, merit or safety of the device or drug and, in the case of a device, also its design, construction, performance and intended use. The Food and Drug Regulations also provide that prescription drug advertising to the general public must not exceed mention of the name, price and quantity of the drug.

ASC provides advertisers with pre-clearance services for consumer advertising relating to non-prescription drugs and natural health products. ASC also provides 'advisory opinions' on consumer-directed messages for prescription drugs (DTCA) and consumer-directed messages or materials discussing a medical condition or disease (DTCI).

The Pharmaceutical Advertising Advisory Board (PAAB) maintains the Code of Advertising Acceptance, last revised in 2013 (the PAAB Code), which sets out detailed rules that advertisers in this sector must follow to mitigate the risks of not complying with the strict and specialised requirements under the Food and Drugs Act for prescription drug advertising. The PAAB also provides voluntary pre-clearance reviews for compliance with the PAAB Code and an advisory opinion service on DTCA and on DTCI.

The Food and Drugs Act and its associated Regulations do not apply to advertising of services. The special rules relating to advertising therapeutic services (such as those provided by physicians) arise from provincial or territorial statutes and regulations, and guidelines and codes of conduct published by self-regulating colleges relating to the specific health-care profession in question. In Ontario, for instance, the Regulations under the Medicine Act include specific requirements for the advertising of a physician's services.

33 Are there special rules for claims about foodstuffs regarding health and nutrition, and weight control?

Yes, the special rules for advertising claims about food arise mainly from the federal Food and Drugs Act and its associated Regulations. Generally speaking, the Food and Drugs Act:

- prohibits advertising food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding the food's character, value, quantity, composition, merit or safety; and
- permits only certain limited 'disease risk reduction' claims (ie, a statement that links a food or a constituent of a food to reducing the risk of developing a diet-related disease or condition), the precise wording of which is mandated by Health Canada.

The Canadian Food Inspection Agency (CFIA), a federal agency, shares responsibility with Health Canada for monitoring and enforcing the food-related provisions of the Food and Drugs Act and its associated Regulations. The CFIA has published the Guide to Food Labelling and Advertising, a lengthy and detailed document that includes provisions establishing guidelines for the use of certain common descriptive terms (such as 'fresh', 'natural' and 'new'); and nutrient content claims, including those relating to vitamins and minerals, fat, energy and carbohydrates (such as 'low/high in', 'light' and 'a source of').

The CFIA has also issued guidelines on 'product of Canada' and 'made in Canada' claims. The advertising of 'organic' claims is governed by the Organic Products Regulations made under the Canada Agricultural Products Act. Lastly, ASC provides advertisers with pre-clearance services for food and non-alcoholic beverage broadcast advertising consistent with the above-noted rules.

34 What are the rules for advertising alcoholic beverages?

The advertising of alcoholic beverages is strictly and extensively regulated in Canada by many provincial or territorial and federal rules that include:

- each province or territory's regulations and guidelines regarding advertising content – for example, in Ontario, these include the Alcohol and Gaming Commission of Ontario (AGCO) Liquor Advertising Guidelines: Liquor Sales Licensees and Manufacturers 2011; and
- the federal CRTC Code for Broadcast Advertising of Alcoholic Beverages 1996.

While there are differences in the details of the various provincial or territorial rules, generally speaking, alcoholic beverage advertising across Canada:

- must be targeted at persons who have reached the legal drinking age;
- must promote safe and responsible consumption, and not depict excessive or prolonged drinking; and
- must not depict a person with alcohol while engaged in an activity that involves care, skill or danger.

Also, if a contest is used as a promotional device in alcohol advertising, the contest must: not require purchase or consumption of alcohol to enter; limit entrants to those who have reached the legal drinking age in their province or territory of residence; and not award alcohol as the contest prize.

That said, there are also many variations in specific requirements and rules across jurisdictions.

35 What are the rules for advertising tobacco products?

Tobacco advertising is highly restricted in several respects. First, the Tobacco Act imposes a general prohibition on the promotion of tobacco products and tobacco product-related brand elements. Second, the Tobacco Act imposes specific prohibitions including that there may be no:

- false, deceptive, or misleading tobacco advertising, which includes advertising that is likely to create an erroneous impression about the health effects of using tobacco;
- testimonials or endorsements by a person, character or animal, even if only fictional, with some limited exceptions relating to older tobacco company or product trademarks; and
- sponsorships of any kind (be it of persons, entities, events, activities or permanent facilities).

In a narrow exception, the Tobacco Act allows informational and brand preference tobacco advertisements (but not 'lifestyle advertising') in publications sent by mail to an adult identified by name or as signs in places where young persons are not legally permitted.

36 Are there special rules for advertising gambling?

Yes, there are special rules for advertising gambling. The Criminal Code prohibits a broad range of gaming and betting schemes, including lotteries. Advertising a scheme for disposing of property by 'lots, cards, tickets or any mode of chance whatsoever' is an indictable offence punishable by up to two years in prison. Furthermore, under Ontario's Consumer Protection Act, no person shall advertise an internet gaming site that is operated contrary to the Criminal Code.

The Criminal Code provides for several exemptions to this general prohibition and allows provincial governments to establish provincial lottery corporations. Provincial lottery corporations must advertise their lottery schemes under special rules whose overarching goal is 'to promote responsible gaming'.

Second, the Criminal Code also allows provinces to license and regulate gaming (such as bingos, raffles and the sale of break-open tickets) conducted by charitable organisations to raise funds to support charitable purposes. In Ontario, such licences are granted by the AGCO. Charitable gaming operators are also subject to advertising rules designed to promote responsible gaming.

37 What are the rules for advertising lotteries?

See question 36.

38 What are the requirements for advertising and offering promotional contests?

The Competition Act prohibits any promotional contest that does not adequately and fairly disclose the number and approximate value of prizes, the area or areas to which they relate and any important information relating to the chances of winning, such as the odds of winning. As to adequate and fair disclosure in contest advertising, the Commissioner in the Promotional Contests, Enforcement Guidelines 2009 states that all contest advertisements in every media should disclose the following information (this disclosure is commonly called the 'mini-rules', as distinct from the contest's 'full rules'):

- the number and approximate retail value of prizes;
- any regional or other allocation of prizes;
- the chances of winning;
- the fact that no purchase is necessary;
- the skill-testing question requirement;
- any other fact known to the advertiser that materially affects the entrant's chances of winning;
- the contest's closing date; and
- where and how the full rules may be obtained.

In addition to the requirements set out in the Competition Act, the federal Criminal Code prohibits the offering of a promotional contest which forces the entrant to purchase a product or give other valuable consideration. Using a free alternative mode of entry, such as a postal entry, is one way to ensure compliance with the Criminal Code. The Criminal Code also requires that selected entrants in a contest draw correctly answer a skill-testing question to qualify as winners. A simple four-function mathematical question is usually sufficient to meet this requirement.

Quebec is the only province in Canada with its own special contest laws (including provisions relating to contest advertising) supplementing those in the federal Criminal Code and Competition Act.

39 Are there any restrictions on indirect marketing, such as commercial sponsorship of programmes and product placement?

There are currently no restrictions on product placement in Canada. The CMA Code states that product placement within entertainment programming is acceptable.

Update and trends

There is a continuing trend towards more regular, formal efforts of international cooperation between Canadian government regulators and their counterparts in other countries. This trend reflects the inherently global monitoring and enforcement challenges that online and mobile advertising pose for consumer protection and privacy regulators around the world. Following the second annual privacy sweep of the Global Privacy Enforcement Network, in early 2015, the OPC and 22 other privacy regulators worldwide issued an open letter to the operators of the seven leading app marketplaces urging them to make links to privacy policies mandatory for apps that collect personal information. This initiative is intended to ensure that users are adequately informed about the collection and use of their personal information before deciding to download an app.

With data more deeply woven into business strategies than ever before, the main vulnerabilities and best practices in data protection, privacy and security (especially in a world of Big Data and the Internet of Things) has emerged as a hot topic particularly with the OPC which released a report in December 2014 entitled 'Privacy and Cyber Security'. In January 2015, the US FTC issued a detailed report on the Internet of Things which discusses privacy and data security in consumer devices connected to the internet. Furthermore, the Australian-based Association for Data-driven Marketing & Advertising has recently published its Best Practice Guideline, 'Big Data', which aims to provide a guide to maximising customer engagement opportunities through the development of responsible Big Data strategies.

Lastly, another emerging topic is so-called 'programmatic advertising' which involves a system of buying and selling online advertising through automated billing on virtual trading desks. This system allows for real-time monitoring of consumers' movements on the Internet, allowing advertisers to target consumers with specific target characteristics in real time. With more intermediaries handling advertising buys, the main legal concerns from the advertiser's standpoint relate to transparency and fraud prevention.

40 Briefly give details of any other notable special advertising regimes.

Other notable special advertising regimes not already discussed in this chapter include those relating to election advertising, protecting the French language in Quebec, offence to public morals, cosmetics and telemarketing.

Election advertising

The ASC Code expressly does not apply to political or election advertising. That is governed by federal and provincial legislation – for instance, with respect to federal election advertising, the Canada Elections Act.

Protecting French in Quebec

The Charter of the French Language seeks to protect the French language in Quebec with special rules including that:

- outdoor signs (such as billboards and bus shelter adverts) must be exclusively in French, or in French and another language, provided that the French is 'markedly predominant', which requires that the French text has a much greater visual impact than the text in the other language; and
- websites for companies that operate in Quebec or that sell in Quebec must be in French, or in French and another language, provided that the French website is given 'equal prominence'.

Offence to public morals

Publishing obscenity is a crime in Canada. Obscene material is defined as 'any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence'.

Cosmetics

There are special rules for advertising cosmetics that also stem mainly from the federal Food and Drugs Act, the Cosmetic Regulations, and the Guidelines for Cosmetic Advertising and Labelling Claims 2006, as amended in 2010 via an ASC interim summary document. Broadcast advertising copy for cosmetics may be pre-cleared by ASC.

Telemarketing

Since 2007, the CRTC has been responsible for maintaining and enforcing the Unsolicited Telecommunications Rules (UTRs), which, following a comprehensive review, have recently been amended effective 30 June 2014. The UTRs include the National Do Not Call List Rules, the Telemarketing Rules and the Automatic Dialing-Announcing Device Rules, with which all telemarketers must comply. In a precedent-setting ruling in March 2015, the CRTC issued, as part of a settlement, its first penalty (C$200,000) to a foreign-based telemarketer for violating the UTRs.

Social media

41 Are there any rules particular to your jurisdiction pertaining using social media for advertising?

Advertising on social media is generally subject to the same Canadian laws, regulations, guidelines and codes of practice that apply to more traditional forms of media, albeit with a heightened sensitivity to, and increased focus on, the protection of personal information.

A challenge for advertisers on social media sites (even established ones such as Facebook, Twitter and Pinterest) is that these sites have detailed and frequently revised terms of use, guidelines for advertising, contests and other promotions, and developer and platform policies with which advertisers must comply.

The Word of Mouth Marketing Association Guide to Best Practices for Transparency and Disclosure in Digital, Social and Mobile Marketing 2013 sets out certain 'fundamental principles' to help advertisers communicate with audiences ethically and responsibly and to mitigate potential legal and other risks.

42 Have there been notable instances of advertisers' being criticised for their use of social media?

Advertising on social media, even if well planned, managed and moderated, is inherently riskier than advertising in traditional media (such as print, outdoor and broadcast), given the significant platform and power social media gives the advertiser's target market of consumers, as well as its competitors and critics.

Accordingly, even if falling well short of failure, there are notable instances of social media advertising involving iconic Canadian companies going 'not entirely as planned' or leading to 'unexpected' results and thus criticism. Even running a charitable initiative can be subjected to harsh public criticism. For example, in 2014, Bell Canada, a telecommunications company, continued its annual campaign where Bell donates five cents to mental health causes for every tweet containing the hashtag #BellLetsTalk. While many have lauded the campaign's goal of diminishing the stigma associated with mental health issues, others have criticised it as a marketing ploy masquerading as social responsibility.

In another 2014 case, a Ryerson University news media student, as part of a class assignment, asked people to use social media to post photos of themselves as they donated pizza to a homeless person with the hashtag #passthepizza. The campaign spread worldwide. Toronto pizzeria The Big Slice Pizza donated slices for the student and her classmates to give to the homeless. The American clothing company Arabeezy promised to donate to the homeless the same number of pizza slices as 'likes' to the post with the most likes on Instagram before Christmas. The campaign has been criticised for pressuring those who desperately need food to sacrifice their identity and sometimes dignity to accept donations.

43 Are there regulations governing privacy concerns when using social media?

While not specific to social media, the federal Personal Information Protection and Electronic Documents Act and substantially similar provincial privacy legislation regulate how social media platforms collect, use and disclose users' personal information. As noted in question 4, in response to privacy concerns about OBA, the OPC has published guidelines on privacy and online behavioural advertising and is expected to issue a report in 2015 on its research into companies' use of OBA.

On the self-regulatory front, in 2013, the Digital Advertising Alliance of Canada (DAAC), a consortium of eight leading Canadian advertising and marketing associations, launched the AdChoices Icon Program and the Canadian Self-Regulatory Principles for Online Behavioural Advertising, which set out a consumer-friendly framework for the collection and use of online data in order to facilitate the delivery of advertising based on the preferences or interests of web users. The Icon Program allows users to opt out from receiving OBA from participating companies. As of March 2015, 54 companies directly involved in OBA had registered for the programme. In early 2015, the US Digital Advertising Alliance (DAA) launched two new mobile tools for consumers to supplement the already-existing US AdChoices programme for desktop browsers – called 'AppChoices' and the 'DAA Consumer Choice Page for Mobile Web'. It is anticipated that these new tools will be rolled out in Canada over the next year.

Bill Hearn **bill.hearn@dlapiper.com**
Chris Bennett **chris.bennett@dlapiper.com**
Dave Spratley **david.spratley@dlapiper.com**

Suite 6000, 1 First Canadian Place
PO Box 367, 100 King Street West
Toronto
Ontario M5X 1E2 Canada

Tel: +1 416 365 3500
Fax: +1 416 365 7886
www.dlapiper.com