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Product advertising in the time of COVID-19: Health Canada and the Competition Bureau are on the lookout for misleading claims

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Authors

James Duffy

Patent Agent and Senior Associate

Chantal Desjardins

Partner, Lawyer Partner, and Trademark Agent

It's been more than a year since the COVID-19 pandemic began, and many companies are attempting to market products intended to help consumers deal with the risks associated with COVID-19. Some of the most common examples of such products include face masks, testing devices, hand sanitizers, and hard-surface disinfectants. However, while many of these products can be useful (such as by helping reduce the risk of infection), there remains the question of what COVID-19 related claims, if any, can be attributed to the product (e.g. on the product's packaging or in an advertisement).

An inaccurate or inappropriate statement can garner the attention of both Health Canada and the Competition Bureau. In fact, since the start of the pandemic, the Competition Bureau has been issuing compliance warnings to businesses across Canada regarding potentially false or misleading claims that their products and services can prevent the disease and/or protect against the virus.[1]

Accordingly, we have written this newsletter to summarize what Health Canada and the Competition Bureau are looking for when assessing COVID-19-related claims. We also provide examples of the types of statements that have been considered "unacceptable," as well as a brief description of the consequences of utilizing such unacceptable statements.

Please note that the following does not address which licenses are necessary to sell specific products in Canada, nor does it address which legal requirements apply. For example, hand sanitizers, in order to be sold in Canada, must meet the requirements of the Natural Health Products Regulations (NHPR).

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The general principles of the *Competition Act* and the rules of the Canadian Competition Bureau

With respect to both COVID-19-related claims and product claims in general, the *Competition Act* prohibits false or misleading claims about any product, service, or business interest. This applies to both the literal meaning of a statement and the general impression it creates. Furthermore, the *Competition Act* prohibits performance claims that are not backed up by adequate and proper testing. First, such testing must be performed prior to the claim being made and on the actual product being sold, as opposed to a comparable or similar product. Second, they must reflect the product's real-world usage—such as in-home use. Third, the results of the tests must support the general impression created by the claims.

Since as early as May 2020, the Competition Bureau has enforced the above guidelines by issuing direct compliance warnings to a variety of businesses across Canada to stop potentially deceptive claims, including warnings against:

> Making claims that certain products (including herbal remedies, bee-related products, vitamins, and vegetables) can prevent COVID-19 infections; and
> Making claims—without first conducting the testing required by law—that certain UV and ozone air sterilization systems, as well as certain air filters or air purifiers, will effectively kill or filter out the virus.

Accordingly, the above rules should always be followed when making any COVID-19-related claim about a product.

Examples of advertising incidents addressed by Health Canada

Health Canada has provided a list of more than 400 advertising incidents related to COVID-19.[2]

The table provided in footnote 2 lists products and corresponding companies or advertising media found to engage in non-compliant marketing, which are currently under review or have been resolved. While many of these incidents have been resolved, it is unclear what resolution occurred. Was the claim modified or removed entirely? Did the company have to pay a fine? Did the company manage to convince Health Canada that their claim was acceptable as is? Nonetheless, it is clear that the statements were questionable enough that Health Canada found it necessary to intervene. The COVID-19-related claims found therein can thus serve as an effective guide of what claims not to use when advertising products. Along with many unauthorized general claims of “preventing” or “treating” coronavirus and/or COVID-19, some interesting examples of statements flagged by Health Canada include the following:

> “To protect against Coronavirus” – with respect to a “bandana and protection mask set.”
> “Flatten the curve with these on trend Fashion Masks” – with respect to a face mask.
> “Anti-Microbial Micropoly Fabric” – with respect to a face mask.
> “Ideal for Covid-19” – with respect to a face mask.
> “Anti-coronavirus, blocks pollution like: exhaust fume, smog, flu virus” – with respect to a face mask.
> “Effectively isolates saliva carrying coronavirus” – with respect to an “Anti-Dust And Anti-Fog Hat Anti Coronavirus Hat.”
> “The importance of boosting the immune system during the threat of COVID-19” – with respect to various natural health products.
> “Suitable in bathroom, living room, bedroom hotel, flu Covid-19” – with respect to a “UV Disinfection Lamp Steriliser.”
> “labeled ‘COVID-19’ under tab” – with respect to a face mask.

As can be seen, some of the statements do not even directly mention COVID-19 or coronavirus, and instead reference concepts such as “flattening the curve” or make general representations about having “anti-microbial” properties. Moreover, many of the claims simply reference COVID-19, without making any representations about treating and/or preventing it.

In addition to consulting the above guidelines and examples, it may be wise to seek out products

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that have been approved by Health Canada for use against COVID-19. Some examples of such products include the following:

Disinfectants with evidence for use against COVID-19.
Authorized medical testing devices for uses related to COVID-19.
Authorized medical devices other than testing devices for uses related to COVID-19.

Based on the above, products should only bear COVID-19-related claims if they have been approved for use against COVID-19 by Health Canada, and, even then, such claims should be limited to said use and to what the supporting evidence demonstrates.

Some of the links above also contain information on how to obtain the aforementioned approval from Health Canada.

Please note that, as of the date of this newsletter, no hand sanitizers have been approved in Canada with COVID-19-related claims.[3] Consequently, although hand sanitizers can help reduce the risk of infection by, or spread of, microorganisms, COVID-19-related claims should not be used with such products. Even so, Health Canada has provided a list of hand sanitizers that they have authorized for sale in Canada.

In general, a sound policy is to thoroughly review your marketing materials to identify any claims related to the prevention or treatment of COVID-19 that may be false, misleading, or unsubstantiated, and immediately modify or remove such claims accordingly.

Penalties for false representations and misleading marketing practices

The penalties for using COVID-19-related claims that do not comply with the law can be quite severe and can include fines and jail time.[4] In fact, false or misleading representations and deceptive marketing practices, regardless of whether they involve COVID-19-related claims, can be prosecuted under civil law and/or criminal law. As an example, under civil law, the court may order a person to cease an activity, publish a notice and/or pay an administrative monetary penalty. On first occurrence, individuals are liable to penalties of up to $750,000, and corporations, up to $10,000,000. For subsequent occurrences, the penalties increase to a maximum of $1,000,000 for individuals and $15,000,000 for corporations. Under criminal law, a person is liable to a fine of up to $200,000 and/or imprisonment for up to one year. We thus strongly recommend avoiding making false or misleading COVID-19-related claims at all times.

We hope that our newsletter serves as a useful guide regarding what Health Canada and the Competition Bureau consider an “inaccurate” or “false” COVID-19-related claim, and that it has clearly laid out what the consequences of making such a claim in association with a given product can be. However, whether a COVID-19-related claim is appropriate will depend on many factors, such as the exact wording of the claim and the exact nature of the product.

Our intellectual property team would be happy to help you with any questions you may have regarding what COVID-19-related claims, if any, you should use on your products, as well as any other legal requirements that must be met before a specific product can be sold in Canada.

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1. https://www.canada.ca/en/competition-bureau/news/2020/05/competition-bureau-cracking-down-on-deceptive-marketing-claims-about-covid-19-prevention-or-treatment.html
2. https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/health-product-advertising-incidents.html
3. https://www.canada.ca/en/health-canada/services/drugs-health-products/disinfectants/covid-19.html
4. https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03133.html

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