

## CANADA



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<b>1. Legislation</b>	
<b>Topic:</b>	Natural Health Products (“NHP”) Regulations
<b>Who:</b>	Federal Government NHP Directorate (“NHPD”)
<b>When:</b>	September, 2004
<b>Where:</b>	Ottawa
<b>What Happened:</b>	<p>The <i>Natural Health Products Regulations (“NHPR”) to the Food and Drugs Act</i> came into effect on January 1, 2004. The NHPR regulate the licensing, labelling, importing, sale, manufacturing and testing etc of NHPs (including herbal and homeopathic remedies, dietary supplements, mineral and vitamin supplements) in Canada.</p> <p>With NHP products that have gone through the NHP approval process, now entering the market, we can see how the process is working and the challenges it presents to marketers. One area that remains grey and continues to baffle industry is whether a given product is an NHP or a Food.</p>
<b>Comments:</b>	The Food Directorate and the NHP Directorate are not providing as much clarification in this respect as industry requires. Hopefully these 2 Directorates will quickly become more aligned and provide the required guidance on this important issue.

<b>2. Case Report</b>	
<b>Topic:</b>	Price Misrepresentation
<b>Who:</b>	Competition Tribunal
<b>When:</b>	July 2004
<b>Where:</b>	Ottawa
<b>What Happened:</b>	<p>The Competition Bureau (the Bureau) found that Forzani Group Ltd (“Forzani”), a publicly traded company operating 217 stores under several different store banners across Canada, had made price misrepresentations. Under a Consent Agreement, Forzani agreed that it and its personnel shall: Comply with the Ordinary Price provisions of the Competition Act with respect to suppliers generally and a supplier’s own prices; Pay immediately an administrative monetary penalty of \$1,200,000; Pay the Bureau’s investigation costs of \$500,000; Place corrective notices in 12 newspapers each Saturday for 3 weeks and on several of its corporate web sites for 12 weeks, and implement a corporate compliance program. with detailed training requirements. Additionally, the Commissioner of Competition may require Forzani to submit a written report on its annual review of the compliance program under the oath/affirmation of Forzani’s Corporate Secretary and submit its market price data/support for its ordinary price claims.</p> <p>The Bureau found that Forzani’s price claim, “compare at” with respect to the ordinary prices offered by suppliers generally in the relevant market area, was overstated. Forzani had made these claims in newspaper inserts, print and</p>

	<p>electronic flyers, its website, its in-store placards and price tags or price cards near the items. Forzani had failed to support the key requirements for making such price claims, namely that: suppliers generally in the relevant geographic market area had sold a substantial volume of products at or above the claimed prices within a reasonable time before making the representation <i>and</i> the suppliers offered products in the relevant geographic market area at or above the claimed prices in good faith for a substantial time period recently before making the price claims.. Forzani had also failed to exercise due diligence in ensuring compliance with these requirements in good faith even though management had made available corporate policies and internal mechanisms to achieve compliance.</p> <p>The Bureau also found that Forzani had failed to meet the above legal requirements when making price claims about its own ordinary prices with the wording, "Original Price". These claims appeared in the same media as the comparative price claims above. While Forzani had added a disclaimer that the Original Prices "did not represent the prices at which the products were ordinarily sold", the Bureau found the disclaimer was insufficient for this purpose. Additionally, the Bureau found that several products, whether represented as Forzani's own ordinary price or the ordinary prices offered by suppliers generally in the relevant geographic market area, were actually higher than even the Manufacturer's Suggested Retail Prices.</p>
<b>Comments:</b>	While the <i>Sears</i> price misrepresentation case makes its way throughout the courts, the Forzani case makes it clear that the Bureau will vigorously pursue ordinary price claims that it considers to be misleading and will pursue severe penalties.

<b>3. Case Report</b>	Government Enforcement
<b>Topic:</b>	Exercise Device Removed from the Market
<b>Who:</b>	Federal Competition Bureau
<b>When:</b>	July 2004
<b>Where:</b>	Canada
<b>What Happened:</b>	The Bureau reached a settlement via a Consent Agreement with Urus Industrial Corporation., in connection with the weight loss and muscle toning claims it made about its electronic muscle stimulation device, (the "AB Energizer") . The company's advertisements for the device which appeared on television infomercials and its web site, gave the impression that without performing any physical exercise, a person could lose weight, develop an athletic physique with well defined abdominal muscles and receive the benefits of a fully equipped gym.. Under the Consent Agreement, the company will pay a \$75,000 administrative monetary penalty, provide a refund to customers, discontinue the sale of the device, and implement a formal company policy regarding the use of advertisements and other promotions.
<b>Comments:</b>	This case follows an earlier case involving similar claims for a very similar device, ("the Abtronic") sold by another company, which was removed from the market in 2002. Again the old adage of those not learning from history being destined to repeat it appears to apply.

<b>4. Case Report</b>	
<b>Topic:</b>	Carbohydrate Claims for Foods Sold in Canada
<b>Who:</b>	Canadian Food Inspection Agency ("CFIA")

<b>When:</b>	2004
<b>Where:</b>	Canada
<b>What Happened:</b>	<p>The new Canadian food regulations to the <i>Food and Drugs Act</i> severely limit the use of the wildly popular carb claims: However, currently one may advertise under either the “old” food regulations until December 12, 2005 (at which time the new food regulations must be met) or under the “new” food regulations, but not under both. (Small companies with less than \$1 million revenue from food sales in Canada between December 12, 2001 and December 11, 2002 have until December 12, 2007 to meet the new food regulations.). A nutrition facts table on product label automatically brings the product under the new food regulations. While the “old” food regulations permit the use of some carb claims under certain conditions, the new food regulations prohibit the use of virtually all carb claims (with the exception of claims about the amount of carbohydrate in a food such as “8 g of carbohydrate per 30 g serving”)</p> <p>The CFIA published an information letter reminding advertisers of these requirements For example the letter states that the new food regulations do not permit the use of brand names/trade-marks regarding carbohydrates nor do they permit such terms as “net/ (impact/effective) carbohydrate, effective carbohydrate or digestible carbs” “Low glycemic index/non-glycemic/ and Glycemic index=X claims are not acceptable without support. Claims such as “rapid absorption/does not raise blood sugar/” and related claims are prohibited as they are considered to be drug claims. The letter also reminds advertisers that weight reduction claims are limited to specific products, namely a prepackaged meal, a meal replacement that meets compositional requirements and food sold by a weight reduction clinic to clients in a weight reduction program.</p>
<b>Comments:</b>	It appears from this letter that the CFIA has anticipated and is rejecting some of the ways that advertisers may try to make carb claims under the new “no carb claim” food regulations. Clearly industry will be challenged in having to stop making its beloved carb claims by December 2005 when the new food (no carb claims) regulations become mandatory.

<b>5. Self-Regulatory</b>	
<b>Topic:</b>	Disguised Advertising Techniques / Imitation
<b>Who:</b>	Advertising Standards Canada
<b>When:</b>	2004
<b>Where:</b>	National
<b>What Happened:</b>	<p>An unsolicited, direct-to-home advertisement for a fitness membership was mailed to consumers in an official-looking envelope imprinted with a Canadian flag and the words “Health and Wellness” on the upper left-hand corner and the words, “Important Information About Your Health” in large block letters.</p> <p>The complainant believed that the advertisement inside the envelope was deceptive because the envelope that contained the advertisement resembled official federal or provincial government printed material, both in style and marking.</p> <p>In the ASC’s view, the Canadian flag adjacent to the words, “Health and Wellness” was confusingly similar in style to Health Canada’s logo especially when coupled with the words, “Important Information About Your Health”.</p>

	<p>The ASC concluded that the envelope was a material element of the advertisement and imitated the illustrations of another advertiser in such a manner as to potentially mislead consumers. It also found that the envelope conveyed the impression that it contained important public service information that came from Heath Canada. Because the envelope contained no indication that the material inside was a commercial solicitation, ASC also concluded that the advertisement was presented in a style or format that concealed its commercial intent, contrary to ASC's <i>Canadian Code of Advertising Standards</i> ("the Code").</p>
<b>Comments:</b>	<p>The adoption of official-looking insignia, names and wording that is suggestive of a government or official body, while tending to appear largely in direct mail is also seen in other media such as print and on-line advertisements. While action taken often involves trade mark issues, this case reminds us that it also involves the broader deceptive practices of disguised advertising techniques and imitation that violate the Code.</p>

<b>6. ASC Advertising Guidelines</b>	<p>ASC is working with stakeholders to review the Comparative Food Advertising Guidelines and comparative claim data requirements for comparative food claims so as to extend comparative advertising and support guidelines beyond food to products and services in general. For example, among other matters, ASC considered the use of comparative "cherry-picking" claims. The question arose as to whether 2 competitors each having its own X and XX versions of a given product, should only make comparative claims against the most similar version of its competitor's product (i.e.: should Competitor A only compare its XX version of its product to Competitor B's XX version or may Competitor A compare its XX version to Competitor's X' version (even though Competitor B has an XX version too?). . While in this example ASC was leaning toward continuing to permit such claims, some further work will be done before the revised ASC comparative guidelines are finalized.</p>
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