



Rx IP - Regulatory

## Canada cracks down on COVID-19 related product advertising claims.

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COVID-19 has resulted in the launch of numerous new products, as well as numerous new claims about existing products. Products can be classified as drugs (including natural health products and hard surface disinfectants) or medical devices as a result of the very nature of the product or because of the claims made. Industry must be careful not to make claims that transform an unregulated product into one that requires authorization by Health Canada; care must also be taken to ensure that even if a product already has Health Canada authorization, no claims are made which exceed what is lawful.

Both Health Canada and the Competition Bureau are actively taking action against manufacturers and retailers making impermissible claims, including claims that certain drugs, vitamins, food and drink can prevent COVID-19 infections, or claims that certain UV and ozone air sterilization systems or air filters or purifiers will effectively kill or filter out the virus, despite the necessary testing not having been conducted. Regulators often perceive offences that target or take unfair advantage of vulnerable groups as particularly serious and take action accordingly. Industry should be particularly careful when considering making any implied or express COVID-19 claim because, in the current unprecedented climate, regulators consider the entire population to be vulnerable. As noted in the Bureau's May 6, 2020 release, Competition Bureau cracking down on deceptive marketing claims about COVID-19 prevention or treatment. Which states that "due to the extreme public health concern associated with COVID-19, consumers are highly receptive to claims about a product's ability to prevent, treat or cure COVID-19".

In addition to Health Canada's regular summary of Advertising Incidents (involving pharmaceuticals, medical devices and natural health products), Health Canada now also publishes an additional summary which focuses only on "Health product advertising incidents related to COVID-19". This summary provides information such as the name of the product, the company / retailer, the claim and whether the matter has been resolved or is ongoing.

### Examples of the more than 140 claims Health Canada has taken action against:

- Coronavirus protection.
- Do not expect common duct cleaning services to decontaminate to the degree required for peace-of-mind during this COVID-19 (coronavirus) quarantine.
- Boost your family's immune system with this natural health anti-viral protocol.
- Our Cleaning Products are unique. They are used to kill COVID-19.
- Washable face mask, ideal for COVID-19.

- Let's Fight Co-vid 19 Together (for a Washable Reusable Mask).
- A made in Canada solution to the coronavirus outbreak. Read the full *Macleans* article on some interesting clinical studies currently being conducted using the product.

## Some principles to keep in mind when marketing COVID-19 related products and services:

- False or misleading claims are prohibited, and both the literal and general impression may be considered in determining whether a claim is false or misleading. In determining whether a claim may be false, misleading or otherwise prohibited, various laws and guidances need to be considered including the *Food and Drugs Act* and the *Competition Act* and their regulations, as well as Health Canada's *Guidelines for Consumer Advertising of Health Products* and Ad Standards' *The Canadian Code of Advertising Standards*. Additionally, Ad Standards' Coronavirus disease 2019 (COVID-19) Claims and a Reminder About Substantiating Advertising Claims provides helpful information regarding the type of "competent and reliable evidence" required to support a claim as well as (discussed further below) what constitutes "adequate and proper testing".
- Performance, efficacy and length of life claims must be substantiated by "adequate and proper testing" *prior* to the claim being made. The Bureau's press release notes, "Such testing must be conducted on the product being sold (not a "similar" or "comparable" product), must reflect its real world usage (such as in-home use), and the results of the tests must support the general impression created by the claims".
- As noted earlier, certain claims (whether express or implied) may transform a product into one regulated as a drug (including natural health product or hard surface disinfectant) or medical device and subject to approval and other regulatory requirements.
- For products which have already received approval from Health Canada, claims must be consistent with the product's Terms of Marketing Authorization (TMA). It is important to remember that making a claim which is arguably consistent with, but more specific or narrow than, the TMA can sometimes be off-side regulatory requirements.
- If Health Canada views a claim as impermissible, it may take the position that such claim is not only prohibited on the product's label or advertising, but is likewise prohibited from appearing in metatags for the product, and that information in the form of scientific data can likewise be considered an impermissible claim.

Though health products have always been subject to more regulatory restrictions than most other consumer products, given the particularly high level of scrutiny by consumers and regulators alike of COVID-19 related products and claims, industry will want to be even more careful with marketing such products.

For more information on this, please contact a member of our Life Sciences Regulatory & Compliance team.

*The preceding is intended as a timely update on Canadian intellectual property and technology law. The content is informational only and does not constitute legal or professional advice. To obtain such advice, please communicate with our offices directly.*

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