



Dare to Compare: The Landmines of Comparative Advertising PART 1

Comparative advertising – promotion of an advertiser’s product or service as being superior to that of a competitor – is perfectly legal, frequently desirable, and often effective. But there are rules of the game and a number of serious pitfalls to be avoided.

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Advertisers beware. The Competition Bureau recently levied a fine of \$10 million against Bell Canada for misleading advertising. The object of its displeasure was Bell’s competitive pricing ads.¹ The Bureau imposed on Bell the further indignity of another \$100,000 to pay the costs of the investigation. The current Commissioner of Competition is perceived to be more determined than any of her predecessors to pursue unsupportable comparative advertising claims. The most egregious cases of misleading advertising can result in jail terms of up to five years. Comparative advertising escalates the risks of a complaint by, essentially, waving a red flag in front of a displeased competitor.

In comparative advertising, the advertiser promotes the benefits of its own product or service over that of one or more competitors – think Coke and Pepsi wars, or cool Mac dude in jeans versus stodgy PC guy in an ill-fitting suit.

Comparative advertising is perfectly legal, frequently desirable, and often effective. But there are rules of the game. Having reliable, valid and relevant evidence is one of those rules. Market data are essential; their importance is never clearer than when a dispute arises – between competitors, or between the advertiser and a representative of the public interest – over whether a claim is justified.

Complaints can be launched through one of many forums. The advertising industry has a self-regulatory body

in Advertising Standards Canada, an organization that offers a confidential trade dispute procedure.² Action can also be taken by an offended competitor in a provincial court pursuant to provincial consumer protection legislation, or in the Federal Court under the auspices of the *Trade-marks Act*³ or the *Competition Act*.⁴ Or the Commissioner of Competition can initiate her own action, if she believes that free and fair competition is under threat.

Prepare to Compare

Committed to a comparative campaign? Seasoned advertisers will almost certainly give you this advice: Don’t wait for trouble to find you. Plan to collect supporting evidence in advance of making a comparative claim, rather than waiting till the claim is made and someone complains. Research should be contemplated as early as possible.⁵

Courts and regulators have been more kindly disposed to defendants who have relied, in good faith, on research conducted in advance, to a reasonable standard. In *Rust Check Canada Inc. v. Young* (the latter representing Krown),⁶ Krown Rust Control System engaged the Institute for Material Research at McMaster University to conduct a study of the relative effectiveness of its rust prevention system, before launching a comparative advertising campaign. Backed by favourable results, Krown created advertisements asserting its product’s superiority. Competitor Rust Check Canada Inc. subsequently applied for an injunction barring Krown from continuing its advertising program, arguing that the research

was invalid and that the campaign amounted to a “slander of goods” (a tort under provincial law disallowing “malicious publication disparaging of the goods of another, thereby causing special damage”).⁷ The Ontario Supreme Court denied the injunction. While the testing process had been strongly criticized by Krown’s opponent, the court found insufficient basis to stop Krown’s advertising because (a) the testing had been done in good faith, (b) the court was not in a position to explore its merits, and (c) the opponent had provided no direct evidence of the falsity of the research conclusions. Today, the website for one of Krown’s franchises (www.trentonontario.com/krownrustproofing.html) continues to assert that “only Krown outperforms all of its competitors. (Ask to see the test results when you visit).”

Once committed to this sort of strategy, advertisers should start by envisioning their ideal claim, based on a position they believe the facts will support.

Step 1: Envision the Claim

Advertisers may be tempted to approach their trusted research experts with a request like this: “We know our apple pie is better than our competitors’, and we want to say so in our next ad campaign. Can you do a survey to confirm that we’re number one?”

If you are the research expert, you may have a dozen questions to ask your client before you get started. But ask this one first: “What is the specific wording of the claim you hope to make?” Claim-testing enjoys most precision when it is focused on a particular hypothesis, relevant to a particular claim.

Look again at the client’s request in our illustration. The first part of the request anticipates making a claim of being “better than the competitors.” Exactly what would one test? The claim to being “better” could mean that the client’s apple pie tastes better, sells better, looks better, is better value for money, or uses better ingredients. The word *competitor* could refer to all competitors or only to competitors with some sizable market share; these two possible interpretations present quite a difference with respect to the number of apple pie brands that would have to be tested. When it comes to surveying consumers, should only national competitors be considered, or all the different local competitors in each market being tested?

The client’s request further suggests that being “better than competitors” can be substantiated by testing whether or not his company’s apple pie is considered “number one.” But “we’re number one” might mean number one in market share, number one in preference, or number one in a *Maclean’s* experts ranking of Canada’s best apple pies. Do each of those translate into “better”?

Clearly a specific claim needs to be envisioned, followed by a confirmation of unambiguous facts to support it.

Change a word in the claim and the survey test may also need a matching change. In advertising for “Body on Tap” shampoo, Bristol-Myers Co. had undertaken an aggressive advertising campaign featuring the high-fashion model Cristina Ferrare. In one of the ads, a turbaned Cristina, fresh from shampooing her hair, holds a bottle of Body on Tap, and says, “In shampoo tests with over 900 women like me, Body on Tap got higher ratings than Prell for body, higher than Flex for conditioning, higher than Sassoon for strong, healthy-looking hair.” Evidence emerged at trial that a third of the women interviewed were teenagers as young as thirteen, not plausibly described as “women like” Ferrare. For this and other reasons, the court found the wording of the claim to be untenable.⁸

The risk of a few little wording discrepancies between the claim as advertised and the claim as researched may not seem like a big deal, but it can end up being the very basis on which a challenge succeeds. In considering the possible interpretations of each word, one needs to be as cautious as a past American president, who famously said, “It depends on what the meaning of the word *is* is.”

Not only wording but also visual messages and implied facts must be supported. In the case of *BC Tel Mobility Cellular Inc. v. Rogers Cantel Inc.* [Cantel],⁹ Cantel ran an advertising campaign featuring a telephone caller in Stanley Park, Vancouver, praising the quality of Cantel’s sound quality compared to that of BC Tel’s. “If you’re not on the Cantel network, maybe you’re hearing things,” the ad proclaimed. Among specific claims asserted in the campaign were Cantel’s “clearer calls; calls with less static, less interference.”

BC Tel commenced a lawsuit, complaining that the ads were false and misleading. It argued that Cantel’s technical research did not support the specific content of the campaign. The research had evaluated the strength of the signal sent by a mobile phone to a landline, whereas the print ad depicted the results of the signal sent in the other direction. The research had been based on the use of a single brand of phone, the Ericsson brand, which was technically more compatible with the Cantel network configuration. The conclusion of being “clearer” was based on surrogate measures such as signal strength, which were not necessarily, said BC Tel, what the public would infer from the word *clearer*.

Convinced of BC Tel’s basis of concern, including potential irreparable harm to its business, the British Columbia Supreme Court imposed the extraordinary remedy of an injunction against Cantel, requiring the ad campaign to stop immediately.

The take-away from these and other expensive lessons is that there must be an unambiguous, demonstrable link between what the research proves and what the ad conveys.

Step 2: Anticipate Standards of Review If Litigation Ensues

The criteria for evaluating surveys when tendered as expert evidence were clearly stated in the Supreme Court of Canada case involving Mattel's Barbie Doll brand¹⁰: Surveys must be reliable, valid and relevant. "Reliability" entails the ability to generalize from a well-chosen sample to an overall population; "validity" refers to whether the right things are being measured in the right way; and "relevance" refers to the connection between the research mandate and the issues in dispute.

In theory, courts are willing to use prevailing business norms in gauging whether research evidence meets an accepted standard.¹¹ In practice, the standards required by litigation are not at the level of the "everyday average," but at the level of the "exemplary." What pushes the bar higher is the hostile scrutiny to which survey evidence is subjected. Opposing expert witnesses sometimes enter the fray and act out the role of hired gun, trolling for every imperfection that might be ammunition for criticism.

Further to the framework of reliability, validity and relevance, the Supreme Court of Canada took the initiative, in May of 2011,¹² to recommend a fourth criterion to purveyors of expert evidence: common sense. The court expressed a wish that the legal system not be dragged through the costs of research evidence and the acrimony of opposing criticism, if a particular marketplace perception could be considered "obvious."

One is reminded of an advertising dispute, several years ago, between two milk companies over the tiny amount of bacteria removed from pasteurized milk through an innovative filtration process. One of the surveys in that case purported to find consumer support for removing whatever bacteria were available to be removed, particularly, the survey witness said, in light of the leg amputation of a high-profile politician due to a bacterial disease. The judge found that interpretation of the survey data simply implausible: "[The survey witness] in his study commented on the high degree of public concern regarding the bacteria that resulted in Lucien Bouchard contracting necrotizing fasciitis. It is difficult for me to understand how the learned national sociologist could analogize this horror to a glass of pasteurized milk."¹³ The judge confidently overrode the expert evidence on both sides with his own common sense assessment.

It may be hard to predict when common sense can be counted upon to win the day, in lieu of survey evidence by either party – particularly when two competitors may have opposite versions of what makes common sense.

Conclusions and Next Steps

The high potential payoff of comparative advertising comes at high risk. The foundation for a comparison must be in place before an ad is run. Two basic principles for planning a comparative claim have been explained with examples. Future instalments in *Vue* will deal with the practical and specific details of

- testing the general impression of an ad, not just the truth of its contents
- deciding on the pertinent population
- approximating statistical reliability for claims of different types
- questionnaire wording
- minimum statistical results for different types of claims
- rules for disclaimers
- proactive and reactive troubleshooting.

Competitors targeted by comparative ads may count on these same guidelines as ammunition for challenging advertising that offends their sense of fairness or truth.

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Endnotes

1. As reported on June 28, 2011, by LuAnn LaSalle, *The Canadian Press*, and the *Financial Post*.
2. For a thorough foundation on principles that guide the trade dispute procedure, see "Guidelines for the Use of Comparative Advertising and Guidelines for the Use of Research and Survey Data to Support Comparative Advertising Claims," available from Advertising Standards Canada at <http://adstandards.com/en/ASCLibrary/guidelinesCompAdvertising-en.pdf>.
3. R.S.C. , 1985, c. T-13.
4. R.S.C. , 1985, c. C-34.
5. *ASC Guidelines*, R.S.C., 1985, c. T-13.
6. (1988) 47 C.C.L.T. 279, 22 C.P.R. (3d) 512 (Ont. S.C.) [*Rust Check v. Young*].
7. *Rust Check v. Young*, *ibid*.
8. *Vidal Sassoon, Inc. v. Bristol-Myers Company*, 661 F.2d 272 (2d Cir. 1981).
9. *BC Tel Mobility Cellular Inc. v. Rogers Cantel Inc.* (1995), 66 B.C.A.C. 62, 108 W.A.C. 62 [In Chambers], aff'g (1995), 63 C.P.R. (3d) 464, [1995] B.C.W.L.D. 2631 (B.C. S.C. [In Chambers]).
10. *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, at para. 45.
11. There are decisions in a wide range of practice areas in which triers of fact take the ordinary trade practices of an industry into account, such as *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, [2009] BCCA 129, 307 D.L.R. (4th) 460; *J.K. Expressions Jewelry Inc. v. Gerling Global General Insurance Co.*, [2002] BCCA 86, 164 B.C.A.C. 135, aff'g (1999), 13 C.C.L.I. (3d) (B.C. S.C.); *Procter & Gamble Inc. v. Colgate-Palmolive Canada Inc.*, 2010 FC 231; *National Football League Properties, Inc. v. New Jersey Giants, Inc.*, 637 F.Supp. 507 (D. N.J. 1986).
12. *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27.
13. (1995), 59 C.P.R. (3d) 374, 17 B.L.R. (2d) 172 (Ont. Gen. Div.), additional reasons at (1995), 60 C.P.R. (3d) 462, 17 B.L.R. (2d) 172n (Ont. Gen. Div.) (Toronto: Carswell Thomson Professional Publishing, 2000) at 107.

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