

Under the Influence: The Canadian Competition Bureau's Stand on Misleading Product Endorsements

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For a number of years the Canadian Competition Bureau has expressed concern regarding misleading representations by "Influencers",² providing endorsements of products, typically in blogs, YouTube videos, Instagram posts and other types of social media.

The key concerns which the Bureau has articulated are, firstly, that unless told, consumers may not know that there is some sort of connection between the company and the Influencer,³ and consequently may give greater weight to the endorsement than they would if they knew the connection. The second concern is that Influencers may make claims about the product which are not accurate, or which have not been properly tested.

In the Bureau's view a material connection between an Influencer and the company, which should be disclosed, includes the Influencer receiving financial compensation such as discounts, free products or services, trips or tickets. It can also involve a business or family relationship between the Influencer and the company.

Concerns about misrepresentation related to product endorsements is not new. These concerns have been expressed by the Bureau since the 1970s in relation to endorsements in more traditional forms of advertising.⁴ In 2015 the Competition Bureau updated these concerns with respect to the new media environment. It published the first volume of its revised Deceptive Marketing Practices Digest⁵ which contained an section dealing with "astroturfing" – purported grassroots support for products which are in fact not organic, but rather paid for – hence "astroturf". The fourth volume of the Deceptive Marketing Practices Digest, in 2018, also contains an article on Influencer marketing.⁶

By way of cases, in 2015, the Bureau filed a Consent Agreement with the Competition Tribunal in respect of Bell Canada's promotion of the "My Bell" and "Virgin My Account" apps. In that case the concern was that the apps had received very positive online reviews but most of the reviews were being posted by Bell employees who were encouraged by their employer to do so. To

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² Typically individuals with a strong social media following in a particular area, such as fashion, gaming, automobiles or the like.

³ Whether or not consumers are likely to be misled in a particular case, given the fairly widespread understanding that product endorsements are generally the result of some sort of compensation, is a question which neither the Canadian courts nor the Competition Tribunal has yet had a chance to rule on.

⁴ Director of Investigation and Research, *Misleading Advertising Guidelines*, October 1987, p. 47.

⁵ Competition Bureau, "The Deceptive Marketing Practices Digest - Volume 1", Bulletin (10 June 2015).

⁶ Competition Bureau, "The Deceptive Marketing Practices Digest - Volume 4", Bulletin (June 2018).

alleviate the Bureau's concerns Bell agreed to enhance its compliance program with respect to that conduct and pay a monetary penalty of \$1.25 million.⁷

Most recently on December 19, 2019, the Bureau sent letters to approximately 100 advertisers and advertising agencies known to be involved in Influencer marketing, urging them to review their practices and, where appropriate, revise them to ensure they comply with the law. In particular, the Bureau's letters reminded advertisers and agencies that any content created and published by Influencers must not be misleading and that the connection between the Influencer and the advertiser must be clearly disclosed.⁸ Disclosure should be sufficiently prominent to be noticeable and should not require clicking through. A typical approach is to mark the material with a note such as "Sponsored Content" or #Sponsored.

Given this latest, fairly dramatic development, with letters sent to one hundred advertisers, there is no doubt that Influencer marketing is clearly a focus of current Bureau enforcement activity. It would be wise for any organization that is engaged in Influencer marketing to heed the warning. Practical steps to consider include:

1. Review any agreements with Influencers (or with agencies employing Influencers) to ensure that they require that the Influencer clearly discloses the connections between themselves and the advertiser in all of their relevant posts.
2. Make sure that the agreement provides that anything the Influencer posts should not make performance or comparative claims. It would be wise to ensure that those sorts of posts not be made without company review and sign off.
3. Ensure that Influencers make it clear that their comments about the product are based on their own experience – and are not general performance claims.
4. Review posts by Influencers to ensure that Influencers are in fact complying with these requirements.

Given this wake-up call from the Bureau, an important early New Year's resolution for advertisers should be a review of the advertisers' approaches to Influencer advertising.

⁷ James Musgrove, "Astroturfing: What's Real Online" (October 2015).

⁸ Competition Bureau, "Influencer marketing: businesses and influencers must be transparent when advertising on social media", News Release (December 19, 2019).

A cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

For more information on this topic, please contact:

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