

Paternalistic or Protective? Freedom of Expression and Direct- to-Consumer Drug Advertising Policy in Canada

Jennifer L. Gold

I. Background: What is Direct-to-Consumer Advertising?

Introduction

Direct-to-consumer advertising (DTCA) of prescription drugs is an increasingly contentious issue in Canada. Under the *Food and Drugs Act*¹, the pharmaceutical industry is limited to advertising prescription medications to medical intermediaries such as doctors and pharmacists. Straightforward advertising directly to the public is proscribed, with such advertisements limited to describing either the name, quantity, and price of a drug *or* what it is used for – but not both. Proponents of DTCA contend that Canadians have a right of access to health information that is denied under the current ban. In this paper, I will argue that the prohibition on DTCA could be successfully challenged under the *Charter of Rights and Freedoms*², on the grounds that it represents a violation of the guaranteed right to freedom of expression under s. 2(b). I will further suggest that the relevant jurisprudence indicates that this limitation on expression would likely fail an attempt at justification under s. 1.

What is the status of DTCA under Canadian law?

Direct-to-consumer advertising of prescription drugs involves the promotion of medications by the pharmaceutical industry to the public via the media. Any advertising related to food or drugs is regulated in Canada by the *FDA*, which was enacted in 1953. In s. 3(1), it is stipulated that “No person shall advertise any food, drug, cosmetic or device to the general public as a treatment, preventative or cure for any of the diseases, disorders or abnormal physical states referred to in Schedule A”. Advertising is defined broadly in s. 2 of the *FDA* as “any

representation by any means whatever for the purposes of promoting directly or indirectly the sale or disposal of any food, drug cosmetic, or device”. Health Canada, the government body responsible for the enforcement of *FDA* regulations, therefore restricts any prescription drug advertising to two types of advertisements: “Branded” or “Reminder” advertisements, which mention the name, price, or quantity of the drug but not what it does; and “Help-seeking” advertisements, which describe the condition it treats, but not the name, price, or quantity³. Such advertisements must be first approved by Health Canada, and are also subject to review by the Advertising Standards Board.⁴

The effect of the American stance on DTCA on Canada

The only countries that currently permit DTCA of prescription drugs are New Zealand and the United States.⁵ In the United States, television commercials for prescription medications may name both the product and the disease, so long as viewers are provided with information concerning the major risks of the drug, and directed to other sources of information such as websites or toll-free numbers.⁶ Canadians who watch American television, however, frequently see these ads.⁷ A recent survey indicates that approximately 53% of Canadians believe that prescription drug advertising is legal, even though it is not—a fact that is likely due to the media spill over from the United States.⁸ Moreover, commercials coming from the United States are largely unregulated—the American Food and Drug Administration does not require the pre-clearance of such ads before they are released.⁹ Canadian advocate groups such as the Alliance for Access to Medical Information thus argue that a Canadian solution that gives consumers access to “balanced, accurate, and regulated information” is critical.¹⁰



DTCA: Critics vs. Advocates

There are numerous arguments advanced by both sides of the DTCA debate. Opponents of DTCA maintain that it benefits pharmaceutical companies more than patients by creating demand for particular drugs.¹¹ They argue that drug advertising may lead people to believe they are suffering from a certain condition when, in fact, they are not.¹² These critics also fear that patients will be prescribed drugs inappropriately because of pressure on the physician.¹³ Finally, they express concern that this increased self-diagnosis of disease and demand for particular medications will inevitably lead to increased physician visits and drug expenditure—both of which would burden the Canadian health care system.¹⁴

Proponents of DTCA, however, contend that promoting drugs to the public will empower patients; that it will help them identify their conditions and play a more active role in their own health care.¹⁵ Further, they assert that DTCA can provide people with medication alternatives to current treatment regimes that may be insufficiently effective or have unpleasant side effects. It is also suggested that individuals who would otherwise be unlikely to seek medical care might be persuaded to do so by such ads.¹⁶ These enthusiasts dismiss the arguments of DTCA critics, underscoring the fact that physicians are the ultimate gatekeepers with respect to prescription medication, and are not required to prescribe any drug they feel to be unwarranted.¹⁷

II Charter of Rights and Freedoms: Analysis

Establishing a violation of freedom of expression under s. 2(b)

The *Charter* guarantees the right to freedom of expression under s. 2(b). Expression has been defined broadly by the Supreme Court of Canada to include any activity that attempts to convey meaning.¹⁸ All forms of expression receive *Charter* protection, with the exception of those communicated through violence. Advertising, which is a form of commercial expression—expression that is intended to promote the sale of a product or service—is also protected under s. 2(b). Direct-to-consumer drug advertising would therefore qualify as a form of commercial expression, as it is intended to communicate information to the public for the purpose of profit.

The Supreme Court has deemed commercial expression to be protected under s. 2(b). In *Ford v. Quebec (A.G.)*¹⁹, a law permitting signs in Quebec to be in French only was held to be unconstitutional. It was decided that by forbidding signs in English, the law violated the right to freedom of expression.

This decision was followed in *Irwin Toy*, wherein the Supreme Court of Canada determined that a “broad, inclusive approach” should be used when deciding whether the right to freedom of expression as guaranteed under s. 2(b) has been violated.²⁰ Accordingly, it determined that advertising is constitutionally protected under the *Charter*. Since the decision in *Ford* in 1988, the Supreme Court has granted protection to commercial speech concerning numerous issues, including public opinion polls in *Thomson Newspapers v. Canada (A.G.)*²¹, dental advertising in *Rocket v. Royal College of Dental Surgeons*²², and tobacco advertising in *RJR-MacDonald Inc. v. Canada (A.G.)*²³. It is therefore clear that the relevant jurisprudence, as well as the Court’s broad interpretation of freedom of expression, indicate that DTCA would be considered to be a form of commercial expression. As such, it would easily be found to be covered by the guarantee to freedom of expression under s. 2(b) of the *Charter*.

Analysis under s. 1

Is the limitation justifiable?

Once the Court has determined that a challenged law is indeed in violation of a guaranteed right, it must then decide whether the limit is justifiable according to s. 1, which stipulates that the rights and freedoms in the *Charter* are guaranteed “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.²⁴ In *R. v. Oakes*²⁵, the Supreme Court described the requirements that must be met in order to establish that a limitation is justified under s. 1. The “Oakes Test”, as it is referred to, is two-pronged. The government, as the party invoking s. 1, must first demonstrate that the objective of the legislation must be sufficiently “pressing and substantial” to warrant the override of a constitutional right. Second, the means used to override the right must satisfy three proportionality criteria. First, there must be a rational connection between the reason for the *Charter* override and the objective of the legislation. Second, the means must minimally impair the right in question. Finally, the effects of the limiting measure must be proportional to their objective; the more deleterious the effects, the more important the objective must be.

Such advertisements must be first approved by Health Canada, and are also subject to review by the Advertising Standards Board.

Applying the Oakes Test

i) Objective of Restrictions

There are three objectives that would likely be acknowledged in legislation banning DTCA, or advanced by the government should the case go to court. The first objective is that the ban is in the interests of public health. Since prescription drugs may be harmful or even fatal if misused, it is logical for the government to deny the public access to them without a medical intermediary. The ban on direct-to-consumer advertising is therefore tied into the government's more general role of protecting public health.

However, as indicated by Rhonda Schirref in her article on the direct-to-consumer advertising of contraceptives²⁶, the public health objective is likely to fail in that it is stated too broadly. In *RJR-MacDonald*, which challenged the constitutionality of a total ban on tobacco advertising, McLachlin J. (as she then was) underscored the importance of not exaggerating the objective and importance of the impugned legislation. She stipulated that the purpose of the law must be "accurately and precisely defined" so that it is possible to properly evaluate its importance and determine the "precision with which the means have been crafted to fulfill that objective".²⁷ Essentially, a piece of legislation must be demonstrated to have a specific and precise objective. Overstating the purpose of a law compromises the constitutional analysis, and, ultimately, may result in its being declared unconstitutional.

A second objective for the governmental prohibition of DTCA is the protection of the public from misleading or confusing information.²⁸ In *Thomson Newspapers*, provisions in the *Canada Elections Act* preventing the publication or broadcasting of opinion survey results on the day of an election itself or the weekend beforehand were challenged under s. 2(b).²⁹ As the opinion poll results were determined by the Court to "convey meaning", they were therefore deemed to be protected under the right to freedom of expression. The Court further indicated that this violation of s. 2(b) could not be justified under s. 1. While the purported objective of protecting voters against undue influence was of sufficient importance to meet the first step of the analysis, the Court decided that using the most "uninformed and naïve" voter as the standard by which to determine constitutionality was inappropriate. In this case, it was concluded that the harmful effects of the ban outweighed the benefits.³⁰

This decision could certainly be applied to the question of DTCA. While it is true that some individuals may be misled or confused by information presented in an advertisement for prescription medication, the government should not, as indicated above, use the most uninformed consumer as the

standard by which to set the rule. Today, with access to the internet, almost anyone can obtain information on matters of health and illness. Moreover, even if a person *were* confused about a particular medication due to advertising tactics, it would be of no real consequence as it is impossible for her to acquire the drug on her own. Since prescription drugs are available only from a physician, any potential consumer would first have to speak with a doctor who would likely be able to clear up any misunderstanding concerning the medication.

The third objective with respect to a legislative ban on DTCA is the desire to minimize health care costs. The American experience with DTCA has provided some evidence that those drugs that are advertised are requested more often from physicians than their non-advertised equivalents.³¹ Researchers warn that if Canada allows DTCA, health costs will rise substantially due to an increase in people visiting doctors to seek prescriptions, and by persuading people to ask for a brand name drug rather than its less expensive generic counterpart.³² The government of Canada is wary of a potential increase in expenditure, and critics have advanced this as a reason to prohibit any direct advertising of prescription medications to the public.

The objective of saving money, however, may not be an appropriate one with respect to limiting a *Charter*-guaranteed right. In *Singh v. Minister of Employment and Immigration*³³, the issue in question was whether every person arriving in Canada who claimed refugee status was entitled to an oral hearing by a board with decision-making power. The attorney general contended that this would inflict an "unreasonable burden" on governmental resources.³⁴ While this case was not ultimately decided using the *Charter*, the Court nonetheless held that all refugees, were, in fact, entitled to the said hearing. Wilson J., in her judgment, indicated that she had "considerable doubt that the type of utilitarian consideration brought forward...can constitute a justification for a limitation on the rights set out in the *Charter*. Certainly the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient".³⁵

It is important to note, however, that the case law also suggests that cost-saving may indeed be a justifiable means of limiting a *Charter* right. In *New Brunswick (Minister of Health and Community Services) v. G.(J.)*³⁶, the failure to provide legal aid to the parents of children being removed from their custody was determined to be a breach of s. 7. Nevertheless, the Court justified this failure by articulating the importance of restricting government spending.

Peter Hogg, in a discussion of this matter, intimates that it is generally unacceptable for the Court to justify overriding

guaranteed *Charter* rights on the basis of controlling government expenditure.³⁷ However, he does suggest that in some circumstances, the cost could be so high that the violation of a right could in fact be justified. When the cost is prohibitive, it is suggested, the limitation of a *Charter* right may be permissible.³⁸

Whether or not a ban on DTCA could be justified on the basis of cost-saving is debatable. There is very little data on the monetary impact of DTCA, and the data which does exist is American and assesses effects only in the short term. It is therefore questionable as to whether the government could adequately prove that the impact of drug advertising would be so prohibitively expensive as to endanger the health care system. It is entirely possible, for instance, that DTCA may actually *reduce* health care spending over the long term. Many advertisements list the symptoms of the conditions their drugs purport to treat, thereby providing an individual with the opportunity to quickly and generally assess her own health status. A subsequent visit to the doctor could mean an early diagnosis of a disease that would be much more expensive to treat at a later stage. Conditions which could fall into this category include depression, obesity, diabetes, high blood pressure, and high cholesterol, among others. Therefore, while it is possible that the violation of s. 2(b) resulting from the DTCA ban could be justified under an objective of expenditure control, it is unlikely that the “prohibitive expenses” in question could be adequately demonstrated.

ii) The Proportionality Test *Rational Connection*

If DTCA is, however, found to have a sufficiently important objective so as to justify the override of a *Charter* right, the government is then required to demonstrate that there is a rational connection between the law and its objective. The law must be “carefully designed to achieve the objective in question”.³⁹ It should not be irrational, arbitrary, or unfair in any way. Therefore, the regulations imposed by the FDA must be shown to be connected in a rational manner to the established objective.

While only two cases have seen laws struck down on the basis of failing the rational connection test⁴⁰, Hogg maintains that it is indeed possible to envision a case where the requirement of rational connection would be inadequately met.⁴¹ He suggests that a law “could be so poorly designed to meet its (important) objective that [it] would fail the s. 1 justification”.⁴² The *FDA*, therefore, must be rationally connected to its objective. If this “important objective” is deemed to be the protection of public health, it might be difficult to demonstrate that the advertising regulations of the *FDA* are connected rationally to this

objective. While it is easy to see how the objective of protecting the public from potentially dangerous medications is met by restricting access to the drugs *themselves*, it is difficult to understand how prohibiting access to the *information* about these drugs would achieve this result. Since the medications in question are available *only* by prescription, the connection between advertising them and endangering public health (and, conversely, prohibiting advertising and protecting public health) is dubious.

If the objective identified, however, is to protect the public from misleading or confusing information, then it would most likely be seen as rationally connected to the impugned law. Protecting people from deceptive or ambiguous advertising is one of the central purposes of the *FDA*. This strong and obvious link between the objective of preventing the deception of the public through advertising and the nature of the legislation in question would therefore enable the said legislation to pass the test of rational connection.

Finally, if the objective is established as the desire to control health care costs, it is unlikely that the law could survive the rational connection test. In order to demonstrate that a particular practice will increase government spending, it is necessary to be capable of providing empirical evidence of this fact. As the only studies conducted on this matter thus far are American, the fundamental differences in structure between the American and Canadian health care systems preclude any certain conclusions. These studies indicate that patient pressure on physicians to prescribe certain drugs as a result of DTCA has resulted in a dramatic increase in the number of prescriptions issued for advertised drugs.⁴³ However, in the United States, health care is treated as a commodity; physicians compete for patients in the health provider marketplace.⁴⁴ Because physicians are interested in keeping their “clients” and ensuring their own continued income, some may feel forced to give into the demands of their patients concerning prescriptions for certain medications. In Canada, where health care is nationally funded, physicians may be less inclined to give into such pressure. Therefore, the same significant increase in prescriptions and, subsequently, drug spending, is by no means assured by DTCA in this country.

Minimal Impairment

If a law has passed the rational connection requirement of the *Oakes* test, it is next asked whether it impairs “as little as possible” the right or freedom in question. Therefore, should the advertising regulations of the *FDA* survive the rational connection test, the government will have to demonstrate that the objective of the legislation is achieved through the least drastic means possible.

In *RJR-MacDonald*⁴⁵, the dissenting judgment indicated that a total prohibition on tobacco advertising was, in fact, constitutional. The rationale provided was that this complete ban was justified in light of the fact that twenty years of experimentation with less drastic measures had failed to achieve the desired objective. Since, according to the dissenting judges, there did not exist any less intrusive means by which to achieve the desired public health objective, the ban was held to pass the minimal impairment test and therefore would have been upheld.⁴⁶ In the case of DTCA, however, it is unlikely that similar arguments could be put forth in a convincing manner. To date, the names of drugs and what they do have never been advertised together in Canada. It is therefore impossible to justify the prohibitive regulations on the grounds that they are a result of years of less restrictive legislation that failed to achieve an established objective.

In *Ford*, however, the minimal impairment test was successfully used to strike down a law as unconstitutional.⁴⁷ The Court decided that the English-language restrictions imposed by the provincial government with respect to commercial signs could not be justified under s. 1. Even though the law pursued the important objective of protecting the French language and culture, it failed to do so in the least restrictive manner possible.⁴⁸ The same objective could have been achieved, for example, by requiring messages in French to be larger or more prominent than their English translations. A total ban on the use of English, however, constituted a clear violation of the requirement of minimal impairment.⁴⁹

Similarly, in *Rocket*, overly restrictive requirements regarding dental advertising were also deemed to be unconstitutional.⁵⁰ In accordance with the Ontario *Health Disciplines Act*, dentists were not permitted to advertise their services in any form other than exterior signs or business cards.⁵¹ This provision was challenged on the grounds that the ban on direct-to-consumer promotion represented a violation of the right to freedom of expression under s. 2(b). The Supreme Court, having held that this did, indeed, constitute such a violation, failed to justify the breach under s. 1. It was decided by the Court that professional standards could be maintained under much less prohibitive regulations.⁵²

Both *Ford* and *Rocket* can be applied to the issue of DTCA. It has been demonstrated in these cases that the Court is unwilling to uphold legislation that is unnecessarily restrictive. The current rules under the *FDA* governing the regulation of DTCA would therefore likely be found unconstitutional on the basis of their excessive severity. The current “reminder” and “help-seeking” advertisements permitted under the Act can hardly be viewed as minimally

impairing the right to freedom of expression. Neither truly constitutes advertising, in the sense that a traditional advertisement includes both the name of a product, and well as its indication. Help-seeking advertisements, wherein facts about a condition are presented followed by instructions as to how to obtain further information, do not provide any inclination of what, exactly, is being advertised, and by whom. Consequently, it is difficult to imagine how this could be classified as an advertisement at all.

With respect to reminder (or “branded”) advertisements, these, too, are problematic. Since describing the indications for the advertised drug is forbidden, advertisements of this kind are usually ambiguous and confusing unless the product is a market leader or well-known to the general public. For instance, most viewers will understand suggestive commercials for Viagra or Prozac, whereas few, if any, will comprehend similar advertisements for drugs such as Remeron⁵³ or Pravachol⁵⁴. Further, it is possible to imagine DTCA regulations that achieve the desired end in a less drastic manner. The Alliance for Access to Medical Information has proposed a “Made in Canada” solution to this effect.⁵⁵ Their recommendations include:

- Advertising will be pre-screened and will show (in the body of the ad) that it has been reviewed and approved by an independent regulatory authority appointed by the federal government;
- Advertising for new drugs will not begin until after a 6-month waiting period following Health Canada approval, to allow practicing physicians and pharmacists time to learn about the new medication;
- Ads will point consumers to further sources of reliable and unbiased information on treatment options and medical conditions such as Health Canada or association websites like The Heart and Stroke Foundation, etc.;
- Ads will be in clear, plain language and clearly state who the product is for, and who should not consider the product, as well as the side effects;
- Ads will be branded Canadian to highlight the fact that the treatment is approved in Canada and to distinguish them from U.S. ads;
- Ads will suggest that physicians should be consulted on the next visit and provide questions in plain language to ask them.⁵⁶

These recommendations illustrate the fact that DTCA can be effectively regulated in a considerably less restrictive manner than the current legislation provides, rendering the current prohibition unreasonably severe. It is therefore unlikely that current DTCA regulations would be able to pass the minimal impairment test.



iii) Deleterious Effects

Should restrictive DTCA legislation, however, survive the minimal impairment test, the Court must then proceed to balance the “sufficiently important” objective of the impugned legislation against the potential deleterious effects of the measures used to limit the right in question. The objectives of prohibiting DTCA, described above as the potential to endanger public health, confuse or mislead the public, or increase health care spending, could likely not be demonstrated to outweigh the deleterious effects of prohibiting the advertising of prescription drugs to the public.

First, by banning DTCA, the Canadian public is denied the right to make their own choices concerning an aspect of their health care. Assuming that the average Canadian is incapable of viewing prescription drug advertisements in a critical manner, and must therefore be “protected” by the government, is paternalistic. Indeed, public opinion polls have demonstrated that a majority of Canadians actually support DTCA.⁵⁷ The combination of both denying corporations’ right to expression, as well as preventing Canadians from being given the opportunity to make informed choices about health matters, is a dangerous one. Consequently, it is difficult to see how the importance of any of the three objectives—already indicated above as questionable in themselves—could be demonstrated as outweighing this deleterious effect of the DTCA prohibition.

In relevant jurisprudence, the Court has indicated that the degree of constitutional protection granted to expression is dependant on the nature of the specific form of expression in question, and its potential consequences. In *Thomson Newspapers*, the nature of expression in contention—the publication of election opinion polls—was political, and it therefore infringed upon the “very core of the expression guarantee”.⁵⁸ Similarly, in *RJR-MacDonald*, the dissenting judges deemed that the nature of tobacco advertising was profit oriented, its motive being to increase the sale of cigarettes scientifically demonstrated to be harmful and potentially fatal. They therefore decided that the harmful effects of tobacco advertising and the corresponding objective of protecting public health outweighed the negative effects of violating the companies’ constitutional right to freedom of expression.

Thomson Newspapers and *RJR-MacDonald* may both be applied to the case of DTCA. With respect to the former, the fact that the right infringed upon was political entitled it to

greater constitutional protection. The negative consequences of prohibiting the dissemination of political information of interest to the public were deemed to outweigh the objective of potentially confusing some individuals. In the matter of DTCA, there also exists an objective of providing the public with information that is of interest and value

Individuals are capable of viewing advertisements with a critical and skeptical eye, and do not require unnecessarily prohibitive regulations to “protect” them from the pressures of advertising.

to them. In that sense, as indicated above, the potential deleterious effects resulting from the ban on advertising prescription drugs are proportionately greater than the importance of its objectives. With respect to *RJR-MacDonald*, the dissenting judges decided that the importance of the objective of protecting public health outweighed the negative effects of banning tobacco advertising. However, this finding would likely not be applicable to the ban on DTCA. In the case of tobacco advertising, the product being promoted to the public is scientifically proven to be harmful to a person’s health. With DTCA, however, the products being advertised are drugs that have gone through the necessary clinical trials and government approval processes and have the potential to benefit people’s health. As a result, it once again becomes difficult to demonstrate that the value of the objective of prohibiting DTCA outweighs the potential detrimental effects of such a ban.

A final case of interest here is that of *Irwin Toy*.⁵⁹ In that case, the impugned legislation prohibited advertising aimed at children under the age of thirteen. The Court decided that the objective of protecting a vulnerable group from the influence of advertising was of sufficient importance to justify the ban. The deleterious effects of violating the right to freedom of expression, therefore, were disproportionate to the important objective of safeguarding young children from manipulation by the media.⁶⁰ At first glance, this decision could be seen to apply to DTCA, as one objective of banning such advertising is to protect the public from being misled. However, the decision in *Irwin Toy* provided only for the protection of vulnerable groups from advertising. To apply this holding to support the ban on DTCA, one would have to demonstrate that the Canadian public can be characterized as a “vulnerable group” that is deserving of protection from advertising. It would likely be difficult to prove that the average Canadian adult is not capable of resisting the pressures of prescription drug advertising. Such a patronizing position would likely fail to hold up in court.

A second deleterious effect of banning DTCA is the potential for Canadians to be misled or confused by US

advertisements. As indicated above, there is a large spillover of prescription drug television commercials and print media advertisements into Canada from the US. Since these ads are largely unregulated⁶¹, there is the chance that the Canadian public will be misinformed about the drugs in question. Canadian DTCA, regulated in a manner similar to the “Made in Canada” solution described above, would prevent this possibility of harmful misinformation.

A third deleterious effect of a DTCA ban is the possibility that Canadians with certain treatable conditions may not seek treatment due to lack of information about possible alternatives, or erroneous beliefs about certain medications and their effects. For example, it is estimated that approximately 5-10% of the Canadian population suffers from depression.⁶² However, many individuals with depressive symptoms fail to consult a physician or seek treatment.⁶³ Perhaps some people do not bother to seek treatment because they have heard that antidepressants cause certain undesirable side effects. For example, selective serotonin reuptake inhibitors (SSRIs) such as Prozac are widely known to cause sexual dysfunction in a large proportion of users.⁶⁴ However, these depressed individuals may be unaware that different anti-depressants, such as buspirone (Wellbutrinä), are significantly less likely to cause such a side effect.⁶⁵ This is the sort of information that is imparted by DTCA, and could encourage these individuals to talk to their doctors about different treatment alternatives. The social and economic costs for depression are, after all, very high.⁶⁶ In 2000, the total indirect costs of depression (including days of work lost, reduced productivity, and premature mortality due to suicide) totalled \$ 3,260,887,072.⁶⁷ The total cost of antidepressant medication, however, was \$751,349,360.⁶⁸ A ban on advertisements which prompt people to seek treatment, therefore, may not only have the effect of preventing individuals who are sick from accessing treatment, but may represent an economic burden as well.

III Conclusion: Reflections and Future Directives

The advertising of prescription medications directly to the public has been prohibited in Canada for nearly 50 years. Since the enactment of the *FDA* in 1953, however, the nature of both advertising and health care has undergone dramatic changes. In 1953, it could hardly have been predicted that in 2002, the average Canadian would, through a variety of media, be bombarded with dozens if not hundreds of commercial messages every day. The reality, however, is that most people today are quite media-savvy; media literacy is now taught even at the elementary school level. Individuals are capable of viewing advertisements with a critical and skeptical eye, and do not require unnecessarily

prohibitive regulations to “protect” them from the pressures of advertising. Similarly, the average Canadian has access today to a variety of information sources concerning health and illness that his or her counterpart in the 1950s would not have been privileged to. The World Wide Web, CD-ROM medical encyclopaedias, and home versions of physician handbook staples such as the Merck Manual of Diagnosis and Therapy or the Compendium of Pharmaceuticals and Specialties (CPS) in plain language are but a few of the many ways modern Canadians can seek out information concerning specific diseases or treatments. Since the 1970s, the patient-rights movement has paved the way for informed choice in health care, and patient participation in the doctor-patient relationship.

It therefore seems absurd to speak of protecting the public as a reason for justifying the continued ban on DTCA under s. 1 of the *Charter*. As demonstrated above, the prohibition on direct-to-consumer advertising of prescription drugs would most likely fail to withstand a *Charter* challenge. Health Canada seems aware of this fact; in the section on DTCA in the *Interim Report* it is acknowledged that companies have a right to communicate with consumers under the *Charter*, and also that consumers have a right to know what prescription drugs are available.⁶⁹ The *FDA* is currently being opened up for legislative renewal, and one of the most controversial areas is DTCA. The Canadian government and the pharmaceutical industry should use this opportunity to work together to establish new laws that are reflective of the modern Canadian existence: a system in which the direct-to-consumer advertising of prescription medications is legally permitted, but with mandatory pre-clearance and monitoring by Health Canada. In the words of Anne Kothawla, President of the Canadian Newspaper Association and a member of the Alliance for Access to Medical Information:

The existing rules prohibiting pharmaceutical advertising date back to the *Food and Drugs Act* adopted in 1953. Times have changed, and Canadians are rightly demanding clear and accurate information about prescription medicines so that we can participate as full partners in our own treatment decisions...Canadians feel they have a right to this kind of information.⁷⁰

Jennifer L. Gold, is a second-year Law student at McGill University, Montréal, Quebec.

1. R.S.C. 1985, c. F-27 [*FDA*].
2. Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11 [*Charter*].



3. Ann Silversides, "Direct-to-consumer prescription drugs ads getting bolder" (2001) 165 C.M.A.J. 452.
4. William G. Castagnoli, "Canada DTC Dilemma: Follow or Resist U.S. Model?" (2000) 4 Medical Marketing & Media 45 at 46.
5. Barbara Mintzes *et al.*, "Influence of direct to consumer pharmaceutical advertising and patients' request on prescribing decisions: two site cross sectional survey" (2002) 324 B.M.J. 278.
6. Castagnoli, *supra* note 4 at 4.
7. "Ipsos-Reid Survey Shows Strong Public Support for Direct-to-Consumer Advertising of Prescription Medications" *Canada NewsWire* (31 January 2002) online: Canada NewsWire <<http://www1.newswire.ca/releases/January2002/31/c7481.html>> (date accessed 27 February 2002) [Ipsos-Reid].
8. *Ibid.*
9. *Ibid.*
10. *Ibid.*
11. Helen Branswell, "Drug ads affecting prescription practices, a new study shows" *Canadian Press* (2 February 2002), online: Canadian Press <<http://ca.news.yahoo.com/020202/6/iaoh.html>> (date accessed: 27 February 2002).
12. *Ibid.*
13. Mintzes, *supra* note 5 at 278.
14. Health Canada, *The Health of Canadians—The Federal Role (Interim Report, 2001)*, vol. 4 at 8.8.3, online: Parliament of Canada <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/Com-e/SOCI-E/rep-e/repintsep01part3-e.htm#_Toc524692170> (date accessed 27 February 2002) [Interim Report].
15. Ipsos-Reid, *supra* note 7.
16. Alan F. Holmer, "Direct-to-consumer advertising: education or anathema?(letter)" (1999) 282 J.A.M.A., online: Journal of the American Medical Association <<http://jama.ama-assn.org/>> (date accessed: 27 February 2002).
17. *Ibid.*
18. *Irwin Toy v. Quebec(A.G.)*, [1989] 1 S.C.R. 927 [Irwin Toy].
19. [1988] 2 S.C.R. 712 [Ford].
20. *Irwin Toy*, *supra* note 18 at 970.
21. [1998] 1 S.C.R. 877 [Thomson Newspapers].
22. [1990] 2 S.C.R. 232 [Rocket].
23. [1995] 3 S.C.R. 199 [RJR-MacDonald].
24. *Charter*, *supra* note 2 at s 1.
25. *R. v. Oakes*, [1986] 1 S.C.R. 103 [Oakes].
26. Rhonda R. Schirreff, "For Them to Know and You to Find Out: Challenging Restrictions on Direct-to-Consumer Advertising of Contraceptive Drugs and Devices" (2000) 58 U.T. Fac. L. Rev 121, online: LEXIS (Canada, CANJNL).
27. *RJR-MacDonald*, *supra* note 23 at 348.
28. Schirreff, *supra* note 26.
29. *Thomson Newspapers*, *supra* note 21.
30. *Ibid.*
31. *Mintzes*, *supra* note 5.
32. *Ibid.*
33. [1985] 1 S.C.R. 177 [Singh].
34. Peter W. Hogg, *Constitutional Law of Canada, 2001 Student Edition* (Toronto: Carswell, 2001) at 752.
35. *Singh*, *supra* note 33 at 218.
36. [1999] 3 S.C.R. 46.
37. Hogg, *supra* note 34 at 755.
38. *Ibid.*
39. *Oakes*, *supra* note 25 at 139.
40. *Ibid.* See also *Benner v. Canada*, [1997] 1 S.C.R. 358.
41. Hogg, *supra* note 34 at 757.
42. *Ibid.*
43. *Mintzes*, *supra* note 5.
44. Marcia Angell, "Placebo Politics" (2000) 11(23) *The American Prospect*, online: The American Prospect <<http://www.prospect.org/print/V11/23/angell-m.html>> (date accessed: 17 December 2002).
45. *RJR-MacDonald*, *supra* note 23.
46. *Ibid.*
47. *Ford*, *supra* note 19.
48. *Ibid.*
49. *Ibid.*
50. *Rocket*, *supra* note 22.
51. *Ibid.*
52. *Ibid.*
53. Remeron (Mirtazipine) is an antidepressant manufactured by Organon.
54. Pravachol (Pravastatin Sodium) is a cholesterol-lowering drug manufactured by Bristol-Myers Squibb.
55. Alliance for Access to Medical Information, "Letter to Commissioner Romanow" (27 June 2002), online Alliance for Access to Medical Information: <<http://www.aami.ca/inc/content/pdf/romanow.pdf>>.
56. *Ibid.*
57. Ipsos-Reid, *supra* note 7.
58. *Thomson Newspapers*, *supra* note 21.
59. *Irwin Toy*, *supra* note 18.
60. *Ibid.*
61. Ipsos-Reid, *supra* note 7.
62. Brigitte Desjardins & Claudine Laurier. "The Burden of Depression in Canada". IPSOR 7th International Meeting , Arlington, VA, USA, May 19-22, 2002, online International Society for Pharmacoeconomics and Outcomes Research: <www.ispor.org/meetings/va0502/presentations/session2/P MH10.pdf>.
63. National Mental Health Association Website, 2002. Online: <<http://www.nmha.org/index.cfm>>.
64. J. Rothschild, "New directions in the treatment of antidepressant-induced sexual dysfunction". (2000) 22 Supplement A Clinical Therapeutics A42.
65. *Ibid.*
66. Desjardins & Laurier, *supra* note 62.
67. *Ibid.*
68. *Ibid.*
69. *Interim Report*, *supra* note 13 at 8.8.3.
70. Ipsos-Reid, *supra* note 6.