

05-CV-303001PD2

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

CANWEST MEDIAWORKS INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF GARY F. McCARRON

I, **GARY FRANCIS McCARRON**, of the City of Burnaby, in the Province of British Columbia, **AFFIRM**:

1. I am an Assistant Professor in the School of Communication at Simon Fraser University, Burnaby, British Columbia, Canada. I hold a PhD. in Social and Political Thought from York University, in Toronto. I received an M.A. in Interdisciplinary Studies from York University, Toronto. I received my B.A. in English (Communication minor) from Simon Fraser University.

2. Presently, I am the Chair of Graduate Studies in the School of Communication at Simon Fraser University. From September of 2001 until May of 2006 I held the position of Undergraduate Chair and Honours Program Coordinator. I have served, or am serving, on a variety of University wide committees, including the Senate Undergraduate Awards Adjudication

Committee, the Faculty of Applied Sciences Undergraduate Curriculum Committee. I currently chair Simon Fraser University's Quantitative and Breadth Certification Committee. In these capacities I supervise and examine doctoral and masters theses in a number of disciplines including Sociology, Anthropology, and English.

3. Since coming to the School of Communication at Simon Fraser University I have taught principally in the area of cultural and media studies, though I have also taught courses in the School's Science and Society stream. I teach at both the undergraduate and graduate levels. My courses consist chiefly of the critical, historical and theoretical analysis of contemporary debates in communication studies mainly as these arise in relation to mediated technologies of information exchange.

4. Consequently, my work focuses on a number of problematics in the general fields of persuasion and rhetoric; discourse analysis; and philosophy and language ideologies. I also have done research in the field of persuasion tactics in the field of medical discourse and pharmaceutical marketing. I am actively involved in researching and studying the history and social analysis of marketing and advertising practices as these apply in a broad range of cultural arenas, including health. I am particularly interested in the analysis of persuasive tactics on potential consumers in a range of contexts and settings. I have given many interviews on radio and television and in print dealing with questions concerning the sociological dimensions of persuasion.

5. My publications have been mainly in refereed journals in the area of cultural studies. Book chapters have also dealt with cultural analysis, including work in the social determinants of health. I have given a number of public lectures in the areas of capitalism and medicine; medical knowledge as a monopolistic system; health care and radical politics. My research looks at the

intersection of cultural studies and health issues, especially as these relate to the analysis of the social determinants of health.

6. My full curriculum vitae is attached to this affidavit as “**Exhibit 1**”.

7. I was asked by counsel for the Attorney General of Canada to provide an opinion detailing the sociological impact of direct-to-consumer advertising (DTCA) on people as social beings and this affidavit contains my opinion in this regard. I understand that this opinion will be tendered as part of the evidence on behalf of the Attorney General of Canada in defence of the constitutional challenge to Canada’s laws in respect of DTCA brought by CanWest Mediaworks Inc.

8. I refer in this affidavit to numerous source materials, which I am familiar with through my work and study in the areas described above. Where I rely on these materials in forming my opinion, I believe the materials or the authors of those materials are generally acknowledged as authoritative in their fields and that the information provided is reliable.

Introduction

9. American scholar Jib Fowles defines advertising as “paid-for-messages that attempt to transfer symbols onto commodities to increase the likelihood that the commodities will be found appealing and be purchased; because of this motive, advertising may be consumed warily.”¹ In the current era, as Fowles points out, the process of symbolic association is particularly widespread, especially in relation to the proliferation of brand marketing. Using this technique of symbol transfer, marketers and advertisers sift through the

¹ Fowles, Jib. **Advertising and Popular Culture** (1996). Thousand Oaks and London: Sage Publications, p. 13.

available stockpile of potent symbolic capital (religious images, mythic ideals, cultural values) and incorporate those symbols in the advertisement or marketing campaign in order to promote an association between the symbol and the product with which it is aligned. The intended goal, naturally, is to provoke positive emotional sensations on the part of the consumer who will then transfer those sentiments to the product and thus increase the likelihood of the consumer actually purchasing the product. The process outlined by Fowles is simple, but we should attend to some of the less obvious points in his definition.

10. For instance, Fowles's definition establishes advertising as important in the context of persuading rather than informing people; it further suggests that owing to the primary motive of advertisers (making commodities appealing in order to increase the likelihood of sales) consumers should proceed cautiously when gleaning information about products from advertisements. Note also that Fowles is not concerned with whether or not advertising messages are true; he is concerned only with the notion of how advertisers try to promote sales. The idea that would-be consumers should be vigilant in their decisions about products suggests something of the general suspicion with which scholars of advertising and marketing practices often approach their subject. It is with this sense of vigilance that I will approach the subject of this report.

11. This affidavit will consider the role of marketing in the context of for-profit corporations with a specific emphasis on pharmaceutical companies. It will examine some of the sociological effects of health-related marketing that have been currently identified with a particular focus on the societal implications of direct-to-consumer advertising (DTCA) of prescription pharmaceuticals. Finally, this affidavit will inquire into the potential risks for consumers that might follow the adoption of federal policy permitting DTCA of pharmaceuticals as these risks have been identified and discussed in the academic literature.

A. MARKETING AND ADVERTISING IN SOCIAL CONTEXT

12. Historically, the fundamental goals and purposes of marketing and advertising have been twofold: (1) to bring information concerning products and services to the attention of the general public, and (2) to increase sales of these goods and services through various techniques of consumer persuasion. These goals are frequently realized in the context of marketing campaigns where multiple media are enlisted in the delivery of the advertising message (radio spots, television ads, newspaper copy, magazine displays, billboards, and so on). However, as Vivian and Maurin point out, “a challenge for advertising people is the modern-day reality that mass-produced products aimed at large markets are virtually alike: Toothpaste is toothpaste is toothpaste. When a product is virtually identical to the competition, how can one toothpaste-maker move more tubes?”² As Vivian and Maruin indicate, one of the problems faced by advertisers is to distinguish their products from the competition in ways that will resonate with consumers.³ The increasingly crowded advertising arena blurs product distinctions, confuses consumers, and undermines efforts to establish brand loyalty. Even with multiple media delivery each advertising message must compete against countless other such messages, a fact that is often summarized in the common adage that advertisers must concentrate on “selling the sizzle, not the steak.”

13. Indeed, in an age characterized by “ad clutter” the simple delivery of a marketing message is frequently thought to be insufficient to reach a target audience.⁴ This is due in part to the fact that the proliferation of both advertising messages and marketing campaigns has accustomed many people to the rhetorical strategies that conventionally defined advertising techniques. Once

² Vivian, John and Peter J. Maurin. **The Media of Mass Communication** (2nd Canadian edition, 2000). Scarborough, Ontario: Allyn and Bacon, p. 266.

³ Schwartz, Tony. **The Responsive Chord** (1973). Garden City, New York: Anchor Press.

⁴ On the subject of “ad clutter,” see John Vivian and Peter Maurin, **The Media of Mass Communication** (2000, 2nd edition). Scarborough, Ontario: Allyn and Bacon Canada.

inured against these strategies consumers become increasingly difficult to reach. Hence in more recent decades the methods of persuasion employed in the world of marketing have expanded to include a variety of techniques that rely on a deeper understanding of human psychology than was the case in the years preceding the First World War.

14. For example, psychoanalysis and behaviorism were both widely studied by advertisers in the inter-war years. Marketers believed that by plumbing the depths of human motivation they would be able to identify the instinctual urges that were assumed to underlie our everyday behavior. Armed with such information, the belief was that advertisers and marketers would then be able to produce advertising and marketing messages that people would be unable to resist.⁵ As social psychologists and behaviorists became more involved in the business of advertising, the process of audience manipulation shifted from a mainly “informational” format to a “transformational” approach. In other words, rather than merely provide audiences with basic information in the hope that considerations like price, color, style, and location would be sufficient to entice consumers, marketers began to rely on the use of jingles, visuals, alliteration, formulas, and so on. Advertisements were seen as transformational in the sense that their focus was less on product promotion than it was on the transformation of consumer attitudes. As Leiss, Kline and Jhally have summarized these developments:

Motivation research was really the logical outcome of the pursuit of the marketing concept, for it started the selling activity with the consumer and the consumer’s personal situation. Motivation research, unlike the earlier applications of scientific methodology or

⁵ See for example, Philip Cushman, **Constructing the Self, Constructing America: A Cultural History of Psychotherapy** (1995). Reading, Massachusetts: Addison-Wesley Publishing Company. John B. Watson, psychologist from Johns Hopkins University, encouraged colleagues to apply their psychological skills in the area of market research. In 1915 Watson was elected president of the American Psychological Association, and by 1920 was working for an advertising agency (four years later he was vice president of J. Walter Thompson, a prestigious advertising firm). For a slightly different historical overview of Watson’s contributions to advertising see Peggy J. Kreshel, “John B. Watson at J. Walter Thompson: The Legitimation of ‘Science’ in Advertising.” **Journal of Advertising**, vol. 19 (2), pages 49 – 59.

distribution statistics, rooted the selling act within the human personality by directly applying psychological constructs to advertising. Human psychology was to be the basis of commercial strategies. The advertiser started with the general theory that the consumer's psyche was ruled by an irrational insecurity and a strong erotic undertone and proceeded from there.⁶

15. The move in advertising practices from a focus on the product to a focus on the consumer was a decisive development in the evolution of marketing strategies. By shifting from a focus on product attributes to a focus on consumer attitudes, advertising became a basic component of the cultural landscape insofar as the world of goods and services were reconfigured as the central arena for the satisfaction of material needs and social aspirations.⁷ The world of goods became the repository of artifacts required for self-actualization, and advertising was the portal.⁸

16. Though persuasion is still mainly considered an art, there is little doubt that the influence of social psychology encouraged many in the advertising world to regard their work as a form of science that was informed by cutting edge research in behavioral psychology. Indeed, following the Second World War the advertising industry developed into an enormous business that was emblematic of capitalism, progress, and the American dream. Although the essential goals of marketers and advertisers may have remained largely unchanged (the promotion and sale of commodities and services), the mechanisms by which those goals are today being realized have advanced considerably from the simple "informational" messages of previous decades.

⁶ Leiss, William, Stephen Kline and Sut Jhally. **Social Communication in Advertising** (1990). Ontario: Nelson, p. 144.

⁷ On the theme of advertising as it plays a decisive role in the expression of personal identity, see Robert Goldman and Stephen Papson, **Sign Wars: The Cluttered Landscape of Advertising** (1996). New York: The Guilford Press.

⁸ See, for instance, Mary Douglas and Baron Isherwood, *The World of Goods: Towards an Anthropology of Consumption* (1979). London: Lane. Also, Grant McCracken, *Culture and*

17. While advertisements and marketing campaigns have always used colorful and sometimes provocative language and images, the dominant frames that structure advertisements have changed throughout the twentieth century.⁹ Consequently, in order to understand the significance of marketing pharmaceutical drugs directly to consumers it is important to understand something of the history of marketing and advertising in the broader cultural context of modern society. Canadian scholars Susie O'Brien and Imre Szeman have commented that, "over the last fifty years or so, advertising has come to occupy a position of unparalleled dominance, reflecting both the intensification of consumerism and the growth of the information economy."¹⁰ It is important to have some understanding of the way in which advertising has become this force of "unparalleled dominance" in modern society in order to fully grasp the potential impact of DTCA of prescription drugs on consumers as social beings.

1) Sociological Issues in Marketing

18. Canadian media theorist Marshall McLuhan famously claimed:

Ads [sic] seem to work on the very advanced principle that a small pellet or pattern in a noisy, redundant barrage of repetition will gradually assert itself. Ads push the principle of noise all the way to the plateau of persuasion. They are quite in accord with the procedures of brain-washing.¹¹

19. McLuhan saw advertising as implicated in the increasing homogenization of social life, a position that was especially common to cultural

Consumption: New Approaches to the Symbolic Character of Consumer Goods and Activities (1990). Bloomington and Indianapolis: Indiana University Press.

⁹ Leiss, William, Stephen Kline and Sut Jhally. **Social Communication in Advertising** (1990). Ontario: Nelson.

¹⁰ O'Brien, Susie and Imre Szeman. **Popular Culture: A User's Guide** (2004). Scarborough, Ontario: Thomson Nelson publishing, p. 143.

¹¹ McLuhan, Marshall. **Understanding Media: The Extensions of Man** (1964). Cambridge, Massachusetts, and London England: The MIT Press, 2002), p. 227.

commentators in the early nineteen-sixties who had followed closely the rise of corporate culture in the preceding decade. Though it may strike people today as alarmist, the idea that brainwashing was a familiar corporate strategy for consumer loyalty was widespread in the nineteen-sixties and continued far into the next decade. Researchers like Vance Packard, for example, achieved a near celebrity status with the claim that advertisers were applying insights gleaned from mass psychology research that had begun during the First World War to the manipulation of everyday consumers.¹² Among the techniques about which Packard warned was subliminal persuasion, the theory that advertising worked by influencing viewers and readers at a sub-conscious (or subliminal) level.¹³ The theory of subliminal persuasion was based on the assumption that images processed below the threshold of conscious awareness would influence viewers by provoking a positive emotional response that would subsequently be transferred to the product being marketed in the advertisement based on the theory of mental association. The crucial consideration, of course, was that all of this occurred without the consumer's awareness.

20. Drawing a connection between marketing and brainwashing strikes us today as a rather extreme position, but Canadians were not immune to these arguments and public concern about the supposedly manipulative powers of product marketers shaped both public debate and public policy. For instance,

¹² See in particular Packard's **The Hidden Persuaders** (1957), **The Waste Makers** (1960) and **The People Shapers** (1977).

¹³ The most well known expositor of the theory of subliminal persuasion was Wilson B. Key whose works include *Subliminal Seduction: Ad Media's Manipulation of a Not So Innocent America* (1973), *Media Sexploitation* (1977), *The Clam-Plate Orgy and Other Subliminal Techniques for Manipulating Your Behavior* (1981), and *The Age of Manipulation: The Con in Confidence, the Sin in Sincere* (1989). Key is best remembered for encouraging consumers to seek out images and words that were allegedly hidden in advertising images. For instance, he claimed that the word "sex" was imprinted (subliminally) in advertising pictures of Ritz crackers. Drawn to the positive associations one might derive from the idea of sex, Key hypothesized that consumers would transfer those positive associations to the product without being aware that they were being influenced. The theory of subliminal seduction, however, is largely now rejected in its more extreme forms. A good critique of subliminal manipulation is *The Subliminal Persuasion Controversy: Reality, Enduring Fable, and Polonius's Weasel*, by Laura Brannon and Timothy Brock in *Persuasion: Psychological Insights and Perspectives* (1994) edited by Sharon Shavit and Timothy Brock, Massachusetts: Allyn and Bacon, pp. 279 – 293.

the Canadian Radio-Television and Telecommunications Commission added to its regulatory provisions in 1975 the stipulation that “no station or network operator shall knowingly broadcast any advertising material that makes use of any subliminal device.”¹⁴ A certain amount of hysteria was admittedly encouraged by the popularization of Packard’s ideas, perhaps indicating that consumers were as predisposed to distrust the activities of big business as they were to believe in the mysterious and seductive powers of hidden words and images. In any event, the legacy of the myth of subliminal advertising continues to shape public perceptions of advertisers and to fuel concern for the implementation of adequate regulatory safeguards against marketing techniques.

21. Indeed, advertising in Canada (and elsewhere) has always been subject to a range of regulatory provisions concerning material presented in advertising copy and marketing campaigns. These provisions are intended to serve the interests of the community by protecting individuals from images and ideas promoting products that are, for example, regarded as potentially dangerous. Obvious illustrations include regulatory limitations on the advertising of tobacco and alcohol; restrictions of particular forms of advertising directed at children; and the unregulated advertising of prescription medications.¹⁵ Considerable flexibility is still permitted advertisers, however, especially in relation to what is conventionally known as advertising “puffery.” This is defined as the practice of “exaggerating a product’s qualities or benefits so that it appears in a favorable light.”¹⁶ Exaggeration is a notoriously vague concept,

¹⁴ **CRTC** (1975). Advertising Regulation No. 15, Ottawa.

¹⁵ In Canada the Office of Consumer Affairs (under the auspices of Industry Canada) continues the role of advertising regulation in respect of deceptive or misleading advertisements. (<http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca01497e.html>)

¹⁶ A recent example of how the application of puffery can lead to both ethical and legal difficulties occurred in the United States when New World Pasta Company sued rival firm American Italian Pasta Company over the latter’s use of the slogan “*America’s favorite pasta*.” New World Pasta complained that the phrase was false; American Italian defended their use of the slogan on the basis that the phrase was mere puffery; that is, that no rational adult could misconstrue the phrase as a literal statement supported by empirical verification. The Eighth Circuit Court of Appeals sided with the defendant, ruling that the phrase ‘*America’s Favorite Pasta*’ “is not a specific, measurable claim and cannot be reasonably interpreted as an objective fact. “Well liked”

however, and it is sometimes difficult to precisely mark out the line separating innocent exaggeration from outright deception. A commonplace illustration of puffery is the use of words like “new” and “improved.” When found in advertising copy to what specifically are the words meant to refer? Does a change in packaging justify calling a product new and improved? A change in manufacturing methods? Whether deserved or not, advertisers continue to struggle with the popular perception that they practice a form of legalized deception and are, therefore, often suspected of questionable ethical conduct.

22. The view that contemporary advertising continues to be characterized by the use of marginally ethical techniques such as subliminal persuasion has diminished but is by no means extinguished.¹⁷ Hence one of the more persistent issues sociologists of mass mediated marketing practices continue to face is whether advertising serves consumers in a productive and useful capacity. However, it is important to note that while advertising is still regarded by many observers as beholden to deceptive and questionable techniques, it is far less common to hear complaints relating to unethical conduct being perpetrated by underhanded practices such as subliminal influence. Quite the contrary, today many critics of modern advertising and marketing are more

and “admired” [part of the definition of “favorite”] are entirely subjective and vague. Neither the words “well liked” nor “admired” provide an empirical benchmark by which the claim can be measured. “Well liked” and “admired” do not convey a quantifiable threshold in sheer number, percentage, or place in a series. A product may be well liked or admired, but the product may not dominate in sales or market share.” In other words, the slogan was mere puffery despite its being impossible to verify empirically. (Details of this case, including the text cited in this footnote, are available from the Eight Circuit Court of Appeals web site at <http://www.ca8.uscourts.gov/opndir/04/06/032065P.pdf>.)

¹⁷ Considerable research on influence and persuasion related to the notion that persuasive discourse and influential images are generally processed in mainly subconscious ways is still being conducted (impulse buying, for instance). See in particular, Robert Cialdini, **Influence: The Psychology of Persuasion** (1993, revised edition). New York: William Morrow & Company. An additional important resource in this field is **The Persuasion Handbook: Developments in Theory and Practice** (2002), edited by James Price Dilliard and Michael Pfau. Thousand Oaks: SAGE Publications. As Dilliard and Pfau argue, “the practice of persuasion is of immense social consequences” (p. x), but as the various contributions to their voluminous book (nearly 900 pages) indicate, the study of persuasion is characterized by a substantial range of views dealing with issues of technique and effectiveness.

likely to argue that even when carried out in the most above board fashion, advertising's influence on susceptible consumers continues to present important sociological problems, especially as we have entered into an era frequently characterized as the age of the consumer society.¹⁸ In other words, McLuhan's concerns about brainwashing may have abated, but his belief that advertising messages exert an undue influence on the social lives of citizens through a process of persistent bombardment across the range of popular media (television, newspapers, magazines, radio, the Internet) remains an influential argument.

23. Historians of advertising frequently point out that one of the main effects of psychological research on marketing campaigns was to shift the primary focus from strictly rational, informational styles of message delivery to non-rational, transformational modalities.¹⁹ Perhaps the most thorough examination of this transformation is Leiss, Kline, and Jhally's volume, **Social Communication in Advertising** (1990). Excerpts from this book are attached to this affidavit as "**Exhibit 2.**" Their analysis of the evolution of advertising in the twentieth-century revealed a four-stage development of advertising strategies:²⁰

¹⁸ See, for instance, **The Consumer Society Reader** (2000), edited by Juliet Schor and Douglas Holt. New York: The New Press. See also Steven Miles, **Consumerism as a Way of Life** (1998). Thousand Oaks: SAGE Publications.

¹⁹ Marchand, Roland. **Advertising the American Dream: Making Way for Modernity, 1920 – 1940** (1985). Berkeley: University of California Press.

²⁰ It is useful to cite in full the definition of advertising that informed Leiss, Kline, and Jhally's work: Advertising is not just a business expenditure undertaken in the hope of moving some merchandise off the store shelves, but is rather an integral part of modern culture. Its creations appropriate and transform a vast range of symbols and idea; its unsurpassed communicative powers recycle cultural models and references back through the networks of social interactions. This venture is unified by the discourse through and about objects, which bonds together images of persons, products, and well-being. (p. 5)

- (1) Utility format
- (2) Product Symbol format
- (3) Personification format
- (4) Lifestyle format

(1) In the first stage, according to Leiss, Kline, and Jhally, the utility phase, advertisements followed a *product-information format*. Here the product itself took center stage in the advertising and marketing with the product's usefulness – or utility – highlighted in the advertising copy as the principal reason for its acquisition. Advertisements employing this strategy were mainly textual in character and those images or visuals that were used tended to be illustrative of the product's features and advantages. Today we see an example of the utility format in classified advertisements.

(2) In the second stage, identified by Leiss, Kline and Jhally with the *product symbol format*, the product is not shown in actual use in order to emphasize its convenience, ease of application, and so on (a utility strategy); rather the product is displayed in relation to a symbolic setting or context that "imparts meaning to the product beyond its constituent elements or benefits."²¹ Thus, in this format, for instance, cigarettes are less likely to be displayed in advertisements actually showing people in the act of smoking than the advertisement is to feature an image of the cigarette carton against images of mountain streams, forest lakes, or sunny skies. These settings (or contexts) were more symbolic than integral to the product, and the aim of the marketer was to rely on an associative transfer between the positive sentiments the consumer was presumed to experience in relation to the setting, and then to transfer these feelings to the product. From a sociological point of view this approach represented an effort to enlist socio-psychological practices directly in the sale of consumer goods.

²¹ Leiss, Kline, and Jhally, p. 244.

(3) In the so-called Personification period, images of people became important to the contextual setting in which the product was displayed with the intention of using the consumer's natural tendency to identify with others toward whom he or she was likely to be positively disposed, and then to seek out the product in question so as to actually affirm that identity.²² This is a more complex form of marketing strategy, but at its heart the basic structure is simple and yet persuasive: Providing images of desirable role models (prototypes) whom, it is believed, the typical consumer desires to emulate. Thus, for instance, one variant of the personalized format is the testimonial, which relies heavily on a narrative structure in order to enhance the sense of credibility the advertiser wishes to see the consumer experience in hearing of other people's views of the product. Though the personalized format has other articulations, its fundamental goal is to insert the product into the sphere of human relations as an essential part of our cultural and social lives. A good contemporary example that is frequently seen in drug advertising is the use of a celebrity spokesperson.

(4) Finally, the Lifestyle format focuses explicitly on images of people in particular lifestyle settings (for example, leisure activities, romantic encounters, or social gatherings) and then presents the product as integral to that lifestyle. Here, then we see the previous three formats brought together as product, symbol, and personification all play subsidiary roles in the lifestyle format. The effectiveness of the lifestyle format (for instance, showing people enjoying an evening out in brand name clothing, or behind the wheel of a particular car) derives not from the way people are shown consuming the product – for often the product figures in the activity only tangentially – but in the way the product is featured as an important part of the social world to which the individuals in the advertisement are supposed to belong. Hence products running the gamut from liquor to automobiles are often featured in advertisements in which the product is used as an emblem of class, economic standing, or lifestyle.

²² Leiss, Kline, and Jhally, pp. 246 – 258.

24. Lifestyle advertising has emerged as one of the more potent marketing strategies in the past several years mainly because it incorporates social psychological research from motivation research and combines those insights with marketing research on the effectiveness of branding. As O’Sullivan et. al. point out, “appeals to particular kinds of ‘lifestyle’ have become increasingly central in advertising and the rise of consumer culture.”²³ The centrality of this advertising format is explained also by the fact that the marketing techniques used in the presentation can be subtle and extremely indirect. In other words, the advertising messages in the lifestyle format are often merely representations rather than claims. By showing financially successful people enjoying a particular product, for instance, the advertiser avoids the sometimes clumsy proposition of needing to state in explicit terms that the product is useful, that it is beneficial, or that it will be of any advantage to the consumer in specific ways. The representation of the product and the featured individuals as necessarily connected – and the representation, therefore, of the product as integral to the perceived and envied lifestyle on display in the advertisement – encourage the consumer to draw the lines of inference in his or her mind. Though such indirectness may seem problematic at first look, it actually permits the marketer considerable latitude in advancing relations between products and lifestyles that would likely seem tenuous if organized in more direct, straightforward, propositional language.²⁴

25. In order to capitalize on the effectiveness of lifestyle advertising, marketers also sought to develop identifiable brands and brand names, and then to use the indicators of a brand in an enormous range of promotional strategies. Sociologists have sometimes referred to this practice as *dematerialization*: the process by which the product (the material object) becomes secondary or

²³ O’Sullivan, Tim, John Hartley, Danny Saunders, Martin Montgomery, and John Fiske. **Key Concepts in Communication and Cultural Studies** (1994). London and New York: Routledge, p. 167.

²⁴ Some of these ideas are explored in detail in Paul Messaris, **Visual Persuasion: The Role of Images in Advertising** (1997). Thousand Oaks: SAGE Publications.

subsidiary to the sign (brand, logo) with which the consumer is meant to respond.

Indeed, companies learned that marketing a brand was more important than marketing a product, and with drugs we see a version of this strategy insofar as the product is marketed by trade names. This theme was famously explored by Naomi Klein (among others) in her book, **No Logo: Taking Aim at the Brand Bullies** (2000). As Klein wrote:

The astronomical growth in the wealth and cultural influence of multinational corporations over the last fifteen years can arguably be traced back to a single, seemingly innocuous idea developed by management theorists in the mid-1980s: that successful corporations must primarily produce brands, as opposed to products.²⁵

26. Klein's influence as a critic of modern advertising is undeniable, though some commentators have criticized her arguments.²⁶ Her view concerning the centrality of branding in the contemporary marketplace, however, is widely regarded as important and insightful and has been taken up in a variety of discussions, including the anti-globalization movement. Attached to this affidavit as "**Exhibit 3**" is chapter 1 of Klein's book, which sets out the framework for her current ideas about branding. For our purposes, however, it is important to note that Klein's work, combined with the research of Leiss, Kline, and Jhally, suggests that as modern advertising has developed, its principal transformations have occurred in three important ways:

(1) In the shift from an emphasis on product to an emphasis on lifestyle;

²⁵ Klein, Naomi. **No Logo: Taking Aim at the Brand Bullies** (2000). Toronto: Random House, p. 3.

²⁶ For instance, Heath, Joseph and Andrew Potter, **The Rebel Sell: Why the Culture Can't be Jammed** (2004). Toronto: HarperCollins Publishers.

- (2) In the process of dematerialization whereby signs and symbols begin to exceed product (and product quality) as determinative of consumer loyalty;
- (3) And with the development of branding as the major practice of marketers in bringing their goods to the public.

2) **Ubiquity and Identity**

27. For many contemporary critics, then, the sociological critique of advertising has less to do with the techniques of advertising than with its ubiquity. Their concern is that the advertising ethos has penetrated into all spheres of life, touching areas of human activity and social relations formerly considered too personal or too important to be subject to the logic of the market. As David Hawkes explains:

In domestic affairs, Western governments rule by opinion poll and focus group, which are devices for the alienation of thought, turning rational cognition into statistics by subjecting it to the empirical methods of the natural sciences. These techniques originate in commercial marketing and, with their migration into politics, the citizen becomes a consumer... all [political] parties agree that people are to be regarded as consumers, whose choices are determined by non-rational factors such as images and soundbites. Consumer choice, which is driven by desire and not by reason, is the truly sovereign power.²⁷

28. Hawkes's point is simple: the mechanisms of marketing are so pervasive that they have been absorbed into political discourse so as to transform politicians into products and citizens into consumers. Because modern advertisers rely heavily on social psychological theories claiming that people are

²⁷ Hawkes, David. **Ideology** (second edition, 2003). London and New York: Routledge, p. 180.

more persuadable at the emotional rather than the cognitive level, so-called non-rational factors (images, jingles, sound bites) come to dominate political life.²⁸

29. The transformation of citizens into consumers is perhaps the most persistent criticism of modern marketing and advertising.²⁹ As Peter Corrigan has written, “a central aim of advertising is the creation of efficient consumers.”³⁰ This is ultimately the key issue in the sociological treatment of advertising and marketing, namely the manner in which advertising has reached into the furthest enclaves of social life in order to persuade consumers by promoting lifestyle changes rather than by promoting products. As advertising penetrates deeper into social life, cultural institutions are increasingly likely to be shaped by marketing imperatives. So too is social life powerfully transformed by the impact of the consumerist ethos promoted in marketing campaigns. Advertising is such a major contributor to our everyday lives that a 1991 study of American six-year olds discovered that children were as likely to be able to connect ‘Joe Camel’ to cigarettes, as they were to connect ‘Mickey Mouse’ to Disneyland.³¹ As Douglas Holt and Juliet Schor point out, one of the major societal consequences of advertising has been

the relentless commodification of all areas of social life, and the rise of market values. Perhaps the most striking aspect of this trend is the marketization of a wide variety of goods and services that had

²⁸ The most famous account of this process remains Joe McGinnis’s analysis of Richard Nixon’s 1968 presidential election campaign. See McGinnis, Joe, **The Selling of the President** (1970). London: Penguin Books.

²⁹ This argument is delineated in many texts, including Stuart Ewen, **Captains of Consciousness: Advertising and the Social Roots of the Consumer Culture** (1976). New York: McGraw-Hill. Stuart and Elizabeth Ewen, **Channels of Desire: Mass Images and the Shaping of American Consciousness** (1982). New York: McGraw-Hill. Stuart Ewen, “Advertising and the Development of Consumer Society”, in **Cultural Politics in Contemporary America** (1989), edited by Ian Angus and Sut Jhally. New York and London: Routledge. William Leiss, Stephen Kline, and Sut Jhally, **Social Communication in Advertising** (1990). Ontario: Nelson.

³⁰ Corrigan, Peter. **The Sociology of Consumption** (1997). Thousand Oaks: SAGE Publications, p. 67.

³¹ Fischer, P. M., M. P. Schwartz, J. W. Richards Jr., A. O. Goldstein, and T. H. Rojas. (1991). “Brand Log Recognition by Children Aged 3 to 6 Years: Mickey Mouse and Old Joe the Camel.” **Journal of the American Medical Association**, 266 (22), 3145 – 3148.

hitherto been outside the profit nexus.... Health care and education, which were previously provided as public goods to citizens, are given over to private corporations who produce them for profit, as if they were ordinary consumer goods.³²

30. Whereas advertising and marketing executives regard the changes to the social landscape that have followed the expansion of advertising, marketing and consumerism as indicating a furthering of consumer choice and freedom, social critics remain wary of surrendering cultural spheres like education and health care entirely to for-profit institutions. To take drug promotion as one example, Joel Bakan points out that while no one denies corporations the right to make profits, social problems can arise when profit is the sole motivating interest a corporation embraces. And this is especially the case, he claims, when our attention is turned to health care issues and pharmaceutical development and promotion in particular.

31. To illustrate his position, Bakan explains that “Pfizer and its shareholders make more money from drugs that treat baldness and impotence than they would from drugs to treat diseases, such as malaria and tuberculosis, that are leading causes of death in the developing world.”³³ His point is not to disparage Pfizer, nor to suggest that alopecia and impotence are inconsequential. Rather, Bakan wants to alert readers to the fact that once profit making becomes the *raison d’être* of a company’s mandate, then its research agenda is at risk of being shaped according to the demands of the market. And in the case Bakan outlines here, the market is a well-defined one:

Though such drugs [drugs to combat malaria, for example] would do immense good for the world and could save millions of lives every year, the costs to any company that developed them would almost certainly outweigh the benefits. That’s because... the 80

³² Holt, Douglas, and Juliet Schor. “Introduction.” **The Consumer Society Reader** (2000). New York: The New Press, p. viii.

³³ Bakan, Joel. *The Corporation: The Pathological Pursuit of Profit and Power* (2004). Toronto: Viking Canada, p. 49.

percent of the world's population that lives in developing countries represents only 20 percent of the global market for drugs.... Conversely, the 20 percent of the world's population who live in North America, Europe, and Japan constitute 80 percent of the drug market. Predictably, of the 1,400 new drugs developed between 1975 and 1999, only 13 were designed to treat or prevent tropical diseases and 3 to treat tuberculosis. In the year 2000, no drugs were being developed to treat tuberculosis, compared to 8 for impotence or erectile dysfunction and 7 for baldness.³⁴

32. Bakan's point is simple but provocative: if companies are ruled by profit making then their social agenda will be set by the fiduciary interests of their stockholders. This then translates into a search for appropriate markets (i.e., consumers), which are defined as those economically able to afford the cost of the products. Finally, this means that pharmaceutical research and development will be led by specific diseases, syndromes, and conditions found to exist in the designated market population at levels sufficient to make the research, manufacture, and promotion of the product financially worthwhile. And while none of this is illogical in the context of standard corporate practice, Bakan suggests that social responsibility is often incompatible with the corporation's "unblinking commitment to its own self-interest."³⁵

B. DIRECT-TO-CONSUMER ADVERTISING OF PRESCRIPTION DRUGS

33. In relation to direct-to-consumer advertising of drugs, the key points to bear in mind in relation to the preceding are as follows:

- Advertising has followed a specific developmental trajectory in which brand names are promoted in place of actual products. Drugs are promoted according the same principles that are used in conventional

³⁴ Bakan, p. 49.

³⁵ Bakan, p. 50.

brand advertising, but there may be problems in treating drugs like any other commodity since health issues have conventionally warranted a separate form of public discussion than is encouraged by advertising. I do not intend this claim as a medical argument, but as a sociological consideration. Specifically, direct-to-consumer advertising of prescription pharmaceuticals might have, as one of its social consequences, a furthering of the extension of market imperatives into areas, which, as Holt and Schor describe above, have traditionally been associated with the common good. In any event, counsel for the Attorney General has advised me that other experts will address this issue as it relates more directly to medical concerns in their briefs.

- Self-diagnosis is a problem directly associated with DTCA of pharmaceuticals. Moreover, self-reliance is surrendered to the technological expertise of drug companies, leading to changed public conceptions of health and well-being. Again, my concern here is not to make a specific medical claim, for I am speaking of the social harms that might follow from self-diagnosis rather than referring to any particular health-related concern. For instance, concern has been expressed by Mintzes et. al. that self-diagnosis can drive up health care costs overall.³⁶ This is just one of the many possible social harms that could result from DTCA of prescription drugs.
- The effects on consumers of DTCA of drugs would be the furthering of a pharmaceutical culture, the extension of a ‘disease-mongering’ approach, and the shaping of corporate R & D to the interests of specific (and usually chronic) disease clusters

³⁶ Mintzes, Barbara, Morris L. Barer, Richard L. Kravitz, Ken Bassett, Joel Lexchin, Arminée Kazanjian, Robert G. Evans, Richard Pan, and Stephen A. Marion. (2003). How Does Direct-to-Consumer Advertising (DTCA) Affect Prescribing? A Survey in Primary Care Environments with and without Legal DTCA. **Canadian Medical Association Journal**, vol. 169 (5), pp. 405 – 412.

34. Let me examine each of these issues separately.

35. The move to DTCA of pharmaceuticals can entail a corresponding move in the development of a brand identity. For instance, following the release of its ulcer medication Zantac, GlaxoSmithKline decided that to expand sales of the new drug the company would have to increase the target population of potential consumers by enlarging the number of conditions for which Zantac might be deemed helpful.³⁷ The obvious choice was heartburn, but GlaxoSmithKline worried, perhaps understandably, that heartburn is a condition that would be regarded as undeserving of a prescription drug. Consequently, GlaxoSmithKline decided to “reinterpret” heartburn as *gastroesophageal reflux disease*, or GERD. To ensure that GERD would be taken seriously, GlaxoSmithKline created the Glaxo Institute for Digestive Health which “sponsored research awards in the area of gastroesophageal health, discussed GERD in the context of other, more serious gastrointestinal (GI) diseases, involved powerful third-party advocates such as the American College of Gastroenterology and fielded a public relations effort called Heartburn Across America.”³⁸ The results were impressive. GlaxoSmithKline doubled the percentage of physicians who saw the company as the leader in GI health and enjoyed annual sales of Zantac in excess of \$2 billion, 65 percent of which came from prescriptions for GERD.³⁹

36. What this information suggests is that the marketing of pharmaceuticals has developed in tandem with the rise of branding as a central corporate strategy. The GlaxoSmithKline example of Zantac also points to the way that the conception of health can be influenced by the availability of a product (i.e., heartburn was ‘redefined’ as GERD) in order to increase sales of

³⁷ Parry, Vince. *The Art of Branding a Condition* (May, 2003). **Medical Marketing and Media**, pp. 43 – 49.

³⁸ Parry, p. 44.

³⁹ Parry, p. 44.

the medication. These are potentially controversial approaches that have troubled a number of researchers.⁴⁰

37. It has been noted by several commentators that the marketing of medications has a lengthy history, and that in many ways modern advertising has developed its major approaches (including the move to branding) in tandem with changes in techniques for the promotion of drugs. As David Healy has argued in his book, **The Anti-Depressant Era** (1997) “many of the principles of modern advertising were created around efforts to market [patent medicine] compounds.”⁴¹ Indeed, many of the more “modern” elements of advertising actually first appeared in the process of marketing rather dubious medicinal products. Historian of advertising, Gillian Dyer, explains how the outbreak of plague in the sixteen-sixties prompted the advertising of an extraordinary range of medicines with such florid prose as “infallible preventative pills,’ ‘never failing Preservatives against Infection,’ ‘Sovereign cordials again the Corruption of the air,’ ‘Anti-pestilencial pills,’ and ‘The Only True Plague-water.’”⁴² Note that such promotions were focused on public fear of a lethal disease, and that the principal persuasive force of the promotions came from the marketer’s effort to channel that fear into a product promising salvation. In many ways, this suggests that the offer that patent medicine creators held out was really a promise of hope, and in

⁴⁰ See, for example, the report, *Branding the Cure: A Consumer Perspective on Corporate Responsibility, Drug Promotion and the Pharmaceutical Industry in Europe*, **Consumer International**, London: June 2006. Consumers International is a federation of consumer organizations headquartered in London. The report mentioned here, *Branding the Cure*, argues that “the case of drug promotion highlights an emerging crisis of legitimacy for the concept of CSR [Corporate Social Responsibility]” (p. 6). Focusing in particular on pharmaceutical giant Merck’s September 2004 decision to voluntarily withdraw their drug Vioxx from the market after a series of revelations that Vioxx users might be at risk of cardiovascular problems, the authors of *Branding the Cure* argue that such cases indicate the continued presence of “unethical drug promotion.” They further claim that the new marketing tactics that have been adopted by the pharmaceutical industry “do not favour rational drug use by consumers” (p. 25). The entire report is available online at: <http://www.consumersinternational.org>

⁴¹ Healy, David. **The Anti-Depressant Era** (1997). Cambridge, Massachusetts: Harvard University Press, p. 16.

⁴² Dyer, Gillian. **Advertising as Communication** (1982). London and New York: Methuen Books, p. 17.

this sense, the promotion was chiefly transformational rather than informational. Charles Revson, founder of Revlon cosmetics, is reported to have once said “in the factory we make cosmetics; in the store we sell hope.” This is the sort of claim makers of patent medicine would have endorsed.

38. From the first decades of industrialism, then, the advertising of drugs has been a significant part of the marketing world. But one of the consequences of this form of marketing is that it reduces medications to a status equivalent to other market commodities, and this practice raises serious questions about the way that consumers will approach and understand medical products they see advertised in the same marketplace as products like clothing, cosmetics, or computers. More significantly, perhaps, is the fact that as prescription pharmaceuticals are positioned for mass advertising campaigns, only a select group of drugs make it into print ads or to the public airwaves. When the Federal Drug Administration moved in 1997 to permit the advertising of prescription drugs in the United States, the response by pharmaceutical manufacturers was immediate and overwhelming. Spending on drug advertisements rose steeply, increasing to \$100 million a month – an increase of 500% in just three years.⁴³ And the drugs that were marketed were, as mentioned above, targeted to specific conditions and a limited range of potential users. As Jeffrey Robinson puts it,

The industry quickly realized that certain categories of drugs lend themselves more easily to ads, at least they sell better when advertised. Lifestyle drugs – such as Viagra, for sexual dysfunction, and Rogaine, which promises to grow hair – were among the first. Non-smoking aids were also heavily advertised. Then came instant gratification drugs, especially allergy treatments, analgesics for pain, and cures for stomach problems. So too “fear of the future” antidotes, medications that reduce high blood pressure or high cholesterol and therefore comfort consumers into thinking they are reducing the risk of heart attacks.... Within just six months of the FDA ruling, and counting only the seven most heavily advertised health problems – cholesterol, smoking, osteoporosis,

⁴³ Robinson, Jeffrey. Prescription Games: Money, Ego, and Power Inside the Global Pharmaceutical Industry (2001). Toronto: McClelland & Stewart, p. 176.

hair loss, ulcers, menopause, and depression – 3.2 million more Americans had gone to see their doctor than in the six months prior to the FDA ruling, which was an increase of 22 per cent.⁴⁴

39. Robinson’s revelations are unsurprising to those who have examined the way that the pharmaceutical industry responded to the opportunity to market prescription drugs directly to consumers.⁴⁵ An important question, then, is whether treating drugs as everyday commodities serves public health interests in a constructive fashion, whether the promotion of prescription pharmaceuticals by the same marketing practices inclines consumers to think about health strictly as a commodity and thereby encourage social attitudes towards health that may, for instance, undermine the authority of physicians. For his part, Robinson points out that while pharmaceutical companies respond to criticisms of DTC advertising of prescription drugs by suggesting that they are engaged only in “educational” practices – that is, strictly informational marketing – the evidence doesn’t support this argument. “It seems apparent that drug companies only spend the vast sums of money they do on advertising when ads result in more prescriptions being written,” he argues, adding, “The patient is not being turned into an educated consumer but rather a foot soldier in Big Pharma’s battle to get doctors to prescribe.”⁴⁶

40. I am not unmindful of the fact that Robinson’s language borders on the hyperbolic. Nonetheless, his point about the tension that exists between pharmaceutical promotion as education versus pharmaceutical promotion as

⁴⁴ Jeffrey Robinson, p. 177.

⁴⁵ In its October, 2002 report, *Prescription Drugs: FDA Oversight of Direct-to-Consumer Advertising Has Limitations*, the General Accounting Office (GAO) in the United States noted, “DTC advertising appears to increase prescription drug spending and utilization. Drugs that are promoted directly to consumers often are among the best-selling drugs, and sales for DTC-advertised drugs have increased faster than sales for drugs that not heavily advertised to consumers.” (GAO-03-177, p. 3).

⁴⁶ Jeffrey Robinson, page 180.

profit-driven should not be ignored.⁴⁷ As Cohen et. al. have observed, “it remains an open question whether the pharmaceutical industry serves health care systems or whether health care systems serve the pharmaceutical industry.”⁴⁸ As they point out:

Direct-to-consumer advertising, via openly persuasive publicity slogans – mostly on television – or industry-funded ‘educational’ campaigns on the identification and lifelong drug treatment of various troubles, is a harbinger for a major transformation in the significations and roles of medications in society – moving them even further out of the domain of medical mystique and into the mass market as lifestyle products. The transformation of a prescription drug from strictly a tool of medical practice to a product that may be sought or declined on the basis not only ‘lay knowledge’ but, more precisely, consumer product knowledge, could have profound implications given the ways in which such knowledge is obtained, perceived, and applied. Direct-to-consumer advertising may also be expected to transform the doctor-patient relationship as increasing numbers of patients arrive at the consultation with not only explanatory frameworks regarding their troubles, but also the proposed solution: a prescription for a drug named by the consumer.⁴⁹

41. These are the sorts of concerns raised by other investigators in the context of commodifying health via commodification of both the health care system and the relation between patients and physicians.⁵⁰ Cohen et. al. also highlight the problem that consumers will self-diagnosis based on their exposure to marketing campaigns and advertising messages; that is, consumers may regard advertisements as equally authoritative as their doctor’s expertise. These

⁴⁷ An informed and complex discussion of this and related questions about the social and cultural consequences of the commodification of pharmaceuticals can be found in Cohen, David, Michael McCubbin, Johanne Collin, and Guilhème Pérodeau. (2001). *Medications as Social Phenomena*, **Health**, vol. 5 (4): 441 – 469.

⁴⁸ Cohen et. al., (2001), p. 454.

⁴⁹ Cohen et. al., (2001), p. 453 – 54.

⁵⁰ The literature here is extensive and I will mention only a couple of sources. Joel Lexchin. (1992). *Interactions Between Physicians and the Pharmaceutical Industry*. **Canadian Medical Association Journal**, 149, 1401 – 1407. Lexchin, Joel. (1999). *Direct-to-Consumer Advertising: Impact on Patient Expectations Regarding Disease Management*. **Disease Management and Health Outcomes**, 5, 273 – 282.

campaigns and messages, as noted, are far less educative than promotional; hence health care consumers risk being influenced less by scientific and medical information than by the rhetorical strategies utilized in the marketing message. A recent print advertisement for the anti-depressant Zoloft is indicative of the way in which medical information is made secondary to the rhetorical presentation insofar as the advertisement features cartoon drawings to represent a fictional character (Cynthia, aged 57, from Portland, Washington) whose emotional problems have brought her to see her doctor.⁵¹ Notwithstanding the prospect that cartoon figures undermine the seriousness of depression so severe as to require medication, the ad further illustrates both in practice and in advice the position that consumers should regard traditional social and interpersonal problems (Cynthia is depressed because of her divorce) not as challenges but as bona fide medical problems. This is not to say that divorce is without stress, but that the recourse to medicines for alleviating rather than coping with stress suggests the prospect of significant changes in the realm of social relations. As Cohen, et. al. describe above, “Direct-to-consumer advertising... is a harbinger for a major transformation in the significations and roles of medications in society – moving them even further out of the domain of medical mystique and into the mass market as lifestyle products.”⁵² The societal transformation about which they worry is one shared by a number of social commentators.

42. For instance, professor of medicine Howard Waitzkin noted in 1989, “as medical management of social problems has increased, the societal roots of personal troubles become mystified and depoliticized.”⁵³ The increasing medicalization⁵⁴ of everyday distresses is a social issue of considerable concern

⁵¹ This advertisement is contained in Appendix A of the Application Record filed by CanWest Global.

⁵² Cohen, et. al., p. 453.

⁵³ Waitzkin, Howard. (1989).

⁵⁴ *Medicalization* is a concept derived from sociology that has been particularly important in a number of sociological accounts of the role that medicine plays in modern society. As Peter Conrad has recently described it, “The essence of medicalization became the definitional issue:

in that it raises questions about personal agency; the role of the state in providing alternative health resources [alternatives to pills and other medications]; and the general problem of making pharmaceutical options a first rather than a last option. Waitzkin is concerned in particular with the fact that the societal roots of personal difficulties are ignored when pharmaceutical treatments become the solution. For instance, a patient complaining of stress in the work place might be offered counselling or have their work place investigated to determine why stress levels are so high. The most expedient solution, however, might be to prescribe a pill to calm the client, and to leave the source of the problem unchanged. This is an illustration of Waitzkin means in referring to the process by which “personal troubles become mystified and depoliticized.” Ultimately, the sociological issue here is whether DTC advertising of prescription drugs will further advance this process of mystification and depoliticization, or whether the social determinants of health will be given a more prominent role in understanding traditional health issues.⁵⁵

43. These concerns are widespread. Even in the **Journal of Popular Culture** we read of the success of “the advertising and media industries at

defining a problem in medical terms, usually as an illness or disorder, or using a medical intervention to treat it.” *The Shifting Engines of Medicalization*, **Journal of Health and Social Behavior** (2005), vol. 46 (March): 3 – 14, p. 3. Conrad’s point is that medicalization, which was formerly driven by the medical profession itself – doctors, scientists, researchers – is now driven by corporate forces connected directly to the pharmaceutical industries. As he puts it, “medicalization is now more driven by commercial and market interests than by professional claims-makers. The definitional center of medicalization remains constant, but the availability of new pharmaceutical and potential genetic treatments are increasingly drivers for new medical categories. This requires a shift in the sociological focus examining medicalization for the twenty-first century.” (p. 3)

⁵⁵ The phrase “social determinants of health” refers to the fact that many health issues are related directly to determinant factors that derive from our social lives. It is a crucial field of study in both the sociology and political economy of health (see, for example, my article, *Communication, Belonging and Health*, in **The Determinants of Population Health: A Critical Assessment** (1994). Michael V. Hayes, Leslie T. Foster, and Harold D. Foster, eds. Victoria: University of Victoria, pp. 57 – 72. There are other extremely valuable resources in this field, notably, **Social Determinants of Health** (1999), edited by Michael Marmot and Richard G. Wilkinson. Oxford and New York: Oxford University Press; **Social determinants of health: Canadian perspectives** (2004). Edited by Dennis Raphael. Toronto : Canadian Scholar’s Press.

reinstitutionalizing our society into a modern-day psychotropic drug culture.”⁵⁶

Drawing a connection between sociologist Erving Goffman’s analysis of psychiatric institutions (or asylums) and the current situation in North America, the author argues “eye-catching print ads, dramatic television enactments, and a profusion of Internet sites and evocative slogans draw consumers across the divide that separates (mental) health and illness.”⁵⁷ The result, he suggests is that “we have empowered the pharmaceutical, medical, and media industries to create and interpret [reality] for us.”⁵⁸ Hence we live in a ‘psychotropia,’ a virtual asylum managed by the pharmaceutical industries.

44. As Peter Conrad has explained, “individuals’ self-medicalization is becoming increasingly common, with patients taking their troubles to physicians and often asking directly for a specific medical solution.”⁵⁹ Working hand-in-hand with the consumer’s increased reliance on advertising for medical information – and capitalizing on the “public’s decreased tolerance for mild symptoms and benign problems”⁶⁰ – the pharmaceutical industry has been accused most recently of engaging in a practice commonly referred to as “disease mongering.”⁶¹

⁵⁶ Rubin, Lawrence C. (2006). *Psychotropia: Medicine, Media, and the Virtual Asylum*. **Journal of Popular Culture**, Vol. 39, (2): 260 – 271.

⁵⁷ Lawrence Rubin, p. 263.

⁵⁸ Lawrence Rubin, p. 269.

⁵⁹ Conrad, Peter. *The Shifting Engines of Medicalization*, **Journal of Health and Social Behavior** (2005), vol. 46 (March): 3 – 14, p. 9. Empirical support for this argument as it pertains to Canada can be found in The University of British Columbia’s Centre for Health Services and Policy Research documents, notably *An Assessment of the Health System Impacts of Direct-to-Consumer Advertising of Prescription Medicines* (DTCA), 5 volumes, B. Mintzes, J. L. Barer, A. Kazanjian, K. Bassett, R. G. Evans, S. Morgan, August 2001. A more recent paper is Mintze’s *Direct-to-Consumer Advertising of Prescription Drugs in Canada*. (2006). These and related publications are available from the Centre for Health Services and Policy Research at <http://www.chspr.ubc.ca/publications>.

⁶⁰ Peter Conrad, p. 9.

⁶¹ Ray Moynihan and David Henry, while acknowledging that consensus on the precise meaning of disease mongering has yet to be achieved, offer the following definition: “the selling of sickness that widens the boundaries of illness and grows the markets for those who sell and deliver treatments. It is exemplified most explicitly by many pharmaceutical industry-funded disease-awareness campaigns – more often designed to sell drugs than to illuminate or to inform or educate about the prevention of illness or the maintenance of health.” *The Fight Against Disease Mongering: Generating Knowledge for Action*. (April, 2006). Accessed at

45. Disease mongering is an increasingly common expression in the literature discussing the rise of the pharmaceutical culture, but the expression itself is not always clearly defined. As Ray Moynihan and David Henry have recently written, “the problem of disease mongering is attracting increasing attention... though an adequate working definition remains elusive.”⁶² The simplest definition, however, and the one Moynihan has helped popularize in his book with Alan Cassels⁶³, is the selling of sickness. Excerpts from that book, entitled “Selling Sickness,” are attached as “**Exhibit 4**”

46. Specifically, disease mongering refers to a coordinated strategy of identifying a condition or set of symptoms for which a pharmaceutical treatment can be prescribed as treatment. This may seem initially to be little more than a statement regarding conventional marketing practices – and in some respects this is true. What is different in the case of disease mongering that concerns social scientists is that the process appears to work contrary to the traditional mechanisms of objective, disinterested science. In simple terms, its critics often see disease mongering as a means of procuring profit by exploiting peoples’ concerns about their well being, and doing so by allegedly *creating the condition for which the drug company claims to provide the treatment*.⁶⁴ As Howard

<http://www.plosmedicine.org>. Vol. 3 (4): e191. See also, Moynihan, Ray and Alan Cassels. (2005). *Selling Sickness: How the World’s Biggest Pharmaceutical Companies are Turning us all into Patients*. Vancouver: Greystone Books.

⁶² Moynihan, Ray and David Henry. (2006). *The Fight against Disease Mongering: Generating Knowledge for Action*. **PLoS Medicine**, vol. 3 (Issue 4, April): 0425 – 0428. Page 0425. (This open access journal is online at www.plosmedicine.org).

⁶³ Moynihan, Ray and Alan Cassels. (2005). *Selling Sickness: How the World’s Biggest Pharmaceutical Companies are Turning us all into Patients*. Vancouver: Greystone Books.

⁶⁴ In October 2003, **Reuters Business Insight** published a report entitled *The Lifestyle Drugs Outlook to 2008: Unlocking New Value in Well-Being*. Promotional text for the report – which sells online for U.S. \$2875.00 – includes the following extract from the work: The lifestyle drugs market is currently worth a phenomenal \$23bn; to boost its value, pharmaceutical companies are actively searching for new lifestyle products and conditions. The Lifestyle Drugs Outlook to 2008: Unlocking new value in well-being, provides a timely market update, examining leading products and pipeline prospects in seven key lifestyle drug sectors, and is supported by forecasts to 2008. Today’s R&D is influenced as much by commercial unmet needs as it is by clinical opportunities and chance. Pharmaceutical companies must react quickly to these needs if they are to reap greater financial returns. This report can help you to assess the premium associated with different

Wolinsky has written in the pages of **the European Molecular Biology**

Organization Reports:

critics note that not every new disease for which the pharmaceutical business provides a drug is necessarily a major public health problem, but rather a venue for drug companies to increase revenues. Pharmaceutical companies research, develop and exploit drugs to prevent, control and cure diseases and treat symptoms. Companies then market these medications to recoup their investments and reward shareholders. It would seem to serve the interests of society, but some critics characterize it as a vicious circle in which businesses invent new diseases to match their existing drugs.⁶⁵

47. The story of the drug Neurodex is instructive on this point. As reported in the 2005 May 9th edition of **The New York Times**⁶⁶, Avanir Pharmaceuticals of San Diego, California has embarked on a campaign to market Neurodex as “a treatment for the uncontrollable laughing or crying that can be caused by various neurological diseases or injuries.” The condition is rare, and many doctors are critical of Avanir’s efforts to promote a medication for a condition that some say generally occurs alongside other medical problems that are more serious and in greater need of treatment. But whatever the medical issues, the social question is whether a drug company can “manufacture” a condition for which it has discovered a “cure.” Clearly the meaning of key terms like “condition” or “syndrome” becomes highly contested in

lifestyle drug markets and identify the potential for higher volume sales. Armed with this information your company can formulate winning lifestyle drug development and marketing strategies, and secure a strong competitive position within this market. (Available online at http://www.researchandmarkets.com/reportinfo.asp?report_id=38102)

Note that the report states clearly “today’s R&D is influenced as much by commercial unmet needs as it is by clinical opportunities and chance.” In other words, pharmaceutical companies, if they are to succeed financially in an increasingly competitive world, must be prepared to conduct their research and development in response to commercial interests at least as much as clinical needs. Admissions of this sort indicate that economic considerations play a much larger role in shaping the scientific practices of drug companies than citizens might realize.

⁶⁵ Wolinsky, Howard. (2005). *Disease Mongering and Drug Marketing*. **European Molecular Biology Reports (EMBO reports)**, vol. 6, no. 7, pp. 612 – 614, p. 612.

⁶⁶ Pollack, Andrew. *Marketing a Disease, and Also a Drug to Treat It*. **The New York Times**, May 9th, 2005.

such cases. As Pollack writes, “critics have accused pharmaceutical companies of hyping dysfunctions into diseases to sell drugs. And some skeptics of Avanir’s drug say that inappropriate laughing or crying is the least of the problems for people with life-threatening diseases.” The key issue, however, is that Neurodex offers the prospect of a solid financial return. For that reason Avanir has embarked on an ambitious campaign to convince health care practitioners and members of the public that there is a genuine condition (Avanir calls it pseudobulbar affect, or PBA) for which the company can offer effective pharmaceutical treatment. From a sociological point of view, then, the fundamental question is whether the promotion of Neurodex represents a legitimate response to a pressing medical concern, or whether it is principally a marketing strategy in which both sides of the nexus – the medical condition and its treatment – are being socially constructed.

48. Similar arguments have been made in the case of shyness. In the March, 2006 issue of the journal **Sociology of Health & Illness**, sociologist Susie Scott chronicles the progressive medicalization of shyness.⁶⁷ Citing Simon Williams’s notion of “cosmetic psychopharmacology,” Scott argues that drugs for treating shyness – what she calls “the production of ‘chemically assisted selves”” – “reveals an important feature of medicalisation in the 21st century... The biomedical approach to treating shyness, as with many other conditions, focuses on the alleviation of symptoms at a rather superficial level... This neglect of [the] social dimensions of the shy self reinforces the belief that this is a problem of individual minds rather than a reflection of social norms and values.”⁶⁸ Citing media in particular, Scott argues “the mass media propagate the idea that being shy is a barrier not only to personal relationships but also to career advancement and civil interaction with strangers, acquaintances and friends. As a neglect of social responsibilities, therefore, shyness is presented as a cause for public

⁶⁷ Scott, Susie. (2006). *The Medicalisation of Shyness: From Social Misfits to Social Fitness*. **Sociology of Health and Illness**, vol. 28, no. 2, pp. 133 – 153.

⁶⁸ Scott, p. 138 – 139.

concern, fuelling the assumption that ‘something must be done’.⁶⁹ Hence the recourse to medications.⁷⁰

C. CONCLUSION

49. The marketing of drugs directly to consumers clearly raises a number of important social questions. As I have noted above, these questions deal with societal matters that focus on public conceptions of wellness; the usefulness of direct-to-consumer advertising of prescription drugs in relation to the potential drawbacks of this practice; the prospect that consumers will actually be less well informed about health issues when relying on advertising messages; the reciprocal influence of DTC advertising of drugs and the R & D initiatives pharmaceutical companies pursue under such conditions; the medicalization of everyday experiences; and so on.

50. It is my opinion that these concerns are well founded; it is my further opinion that the reach of medical science has continued to extend considerably, and that the expansion of this medical logic, which is often rooted in the ‘pill for any ill’ philosophy, can become socially harmful. Leaving aside economic considerations and medical concerns for the moment, I believe the social question we face is whether society is better served by an increasing

⁶⁹ Scott, p. 134.

⁷⁰ This position is connected to the more radical sociological view that drugs sometimes serve as tools of social control; that is, medications are used to ensure that clients are socially disciplined to conform to societal expectations as to what is socially permitted. As sociologist Kevin White has written,

What gets defined as a disease and how it is treated is not simply a product of biological imperative but is an aspect of wider social expectations about what is appropriate social behavior. Our failure to conform to those expectations may lead to us being labeled diseased and sick. And this may easily lead to legally sanctioned chemical, surgical or electrical treatments to enforce our conformity with social roles. (White, Kevin. **An Introduction to the Sociology of Health and Illness**, 2002. Thousand Oaks: SAGE, p. 41.)

reliance on drugs for an expanding range of conditions and syndromes – many of which are challenged by medical experts as industry fabrications.

51. Primary social concerns about the direct-to-consumer advertising of prescription pharmaceuticals largely focus on the furthering of the pharmaceutical culture and the attendant consequences of promoting a social environment in which drugs are made more available, where everyday conditions (i.e., shyness) are medicalized, and where market principles are accepted as standards for health care. This is not to suggest that the drugs pharmaceutical companies seek to promote through advertising are ineffective or unsafe. As Joel Lexchin points out in the case of Viagra, “there is no doubt that Viagra is an effective and quite safe drug,” but “in order to grow the market, Pfizer had to make Viagra the treatment of choice for a much wider population of men.” Consequently,

The perceived prevalence of ED [erectile dysfunction] needed to be expanded. The impression had to be created that ED was of significant concern to many, perhaps even most, men or at least those over 40 years of age. The criterion of success for treating ED had to be redefined. And finally, Viagra had to be seen as an important treatment option for men with any degree of ED, including rate or transitory failures to achieve or maintain erections.⁷¹

52. In short, both Viagra and ED had to be marketed.

53. The Viagra story is a microcosm of the societal changes that have been initiated by direct-to-consumer advertising of prescription medicines. Though Pfizer (and other pharmaceutical companies) simply followed a well known marketing formula in promoting Viagra to the general public there are, nevertheless, questions to be asked regarding the social legitimacy of allowing marketing principles into every aspect of social life – especially those aspects we

⁷¹ Lexchin, Joe. Bigger and Better: How Pfizer Redefined Erectile Dysfunction. **PLoS Medicine**, vol. 3, Issue 4, pp. 0429- 0430.

associate with our health. As Lexchin says, “ultimately, there must be a debate make those decisions.”⁷² It is a timely question that desperately needs addressing.

**Sworn before me at the City of
in the Province of British Columbia
on the day of , 2006.**

**A Commissioner for Taking Affidavits
within British Columbia**

Gary F. McCarron

⁷² Lexchin, pp. 0432 – 0432.

CANWEST MEDIAWORKS INC.

AND

ATTORNEY GENERAL OF CANADA

Applicant

Respondent

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding Commenced at Toronto

**AFFIDAVIT OF GARY F. MCCARRON
(Sworn , 2006)**

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