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The Shifting Policy Perspective: Transparency

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In recent years, a policy shift towards increased transparency and openness has taken place at Health Canada. The most evident manifestation of this policy shift came under the prior government's enactment of Bill C-17, *Protecting Canadians from Unsafe Drugs Act* (Vanessa's Law). Vanessa's Law was enacted to provide Health Canada with increased powers to protect Canadians from unsafe medications and adverse reactions. The law honors the late daughter of MP Terence Young who died after suffering a heart attack while on medication for a stomach ailment. While the legislation and the general policy shift have important public policy objectives, the changes at Health Canada mean that pharmaceutical manufacturers need to be acutely aware of additional disclosure obligations that may be imposed on them.

This article details the policy shift that appears to have occurred and the important take-aways for manufacturers.

The Framework of Vanessa's Law: Increased Ministerial Empowerment

Vanessa's Law is the most recent change to the legislative framework in which market authorization of pharmaceutical products is regulated. The law introduces new changes to the *Food and Drugs Act* (FDA), representing the most substantial FDA amendments in over 50 years. These amendments have significant implications for the health industry, particularly drug and medical device manufacturers.

Vanessa's Law is purported to provide the Minister of Health with the necessary teeth to monitor the pharmaceutical regulatory landscape in a more meaningful way, through several new powers. Importantly, the Minister now has the power to order disclosure of third party Confidential Business Information (CBI) where the documents relate to a "serious risk of injury to human health." The statute is silent as to the permitted scope of disclosure in these circumstances. Health Canada published a guide to the Amendments, which is similarly silent on the permitted scope of disclosure where the serious risk threshold required by the legislation is met.[1] Instead, the guide provides: "CBI disclosed under this provision should only be that which is necessary to mitigate the serious risk of injury to human health." The absence of clear guidance on this issue creates the potential for a very broad disclosure power. Such a wide disclosure power creates the risk that pharmaceutical manufacturers' otherwise legitimate

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business interests in protecting confidential information related to products and manufacturing processes will be disregarded.

In addition, the Canadian government has emphasized a need to ensure that drug side effects are clearly indicated, and that unsafe drugs are recalled quickly.[2] Thus Vanessa's Law also provides the Minister with the postmarket authorities it needs to better understand the harms and benefits associated with a product. These powers are intended to improve Health Canada's ability to both collect postmarket safety information, and take appropriate action when a serious health risk is identified.

Vanessa's Law also has the capacity to impact postmarket regulation of therapeutic products indirectly. Health care institutions are now required to report adverse events to Health Canada. The federal government has noted a regulatory gap in that drug manufacturers and clinical trial sponsors must report adverse drug reactions, whereas hospitals, which admit a significant number of people due to adverse events, do not have the same obligation. These new requirements will impact regulatory approval since Health Canada has stated that it intends to use this information, which includes critical safety information, to make appropriate decisions on the safety of pharmaceutical products.[3]

The FDA amendments seek to achieve three goals: (1) strengthen safety oversight of therapeutic products throughout their life cycle, (2) improve reporting by certain health care institutions of serious adverse drug reactions and medical device incidents that involve therapeutic products, and (3) promote greater confidence in the oversight of therapeutic products by increasing transparency. The amendments include:

- empowering Health Canada to require manufacturers to compile information and conduct tests for the purpose of obtaining additional information;
- empowering Health Canada to require a label change to include new harm information;
- empowering Health Canada to place conditions on a market authorization;
- empowering Health Canada to recall unsafe therapeutic products and take them off the market;
- empowering Health Canada to compel a person to provide the Minister with any information in the person's control regarding a therapeutic product the Minister believes "may present a serious risk of injury to human health";
- authorizing Health Canada to disclose a person's CBI about a therapeutic product without notifying the person if the Minister believes the product presents "a serious risk of injury to human health";
- requiring the Minister to make all regulatory decisions with reasons publicly available. Both positive and negative decisions about drug authorizations will be disclosed and explained on a public website. Clinical trial information must be disclosed on a public registry; and
- increasing fines and penalties. On conviction by indictment, a party may face fines of up to C$5 million per day and/or two years imprisonment. The courts retain discretion to impose stronger fines if violations involve intentional conduct.

Vanessa's Law also works in conjunction with, and thereby allows Health Canada to strengthen, its *Regulatory Transparency and Openness Framework*. This framework was announced in April 2014 and is aimed at "making more data and information available to Canadians than ever before." Part of the government's listed action is to develop more health and safety information which can be proactively shared "[t]o ensure that Canadians have access to the information they need and are interested in."[4]

There are a few examples that illustrate how this initiative is being carried out in terms of increasing the public availability of data and information related to drug products.

Drug Safety Reviews & Consolidated Drug Databases

The Minister has indicated that Health Canada will be publishing drug summaries and making full reports available upon request. This plan has been implemented by Health Canada through the publication of Safety Reviews.[5] These reviews contain information from Health Canada's postmarket monitoring of approved drugs, which is done to identify and assess potential harms. Multiple sources of information are consulted in this surveillance process, including adverse reaction reports, new safety information from foreign regulators, and medical and scientific literature. The reviews summarize the drug product at issue, the potential safety issue associated with that product, and findings by Health Canada, including what action, if any, was taken in response to the concern.[6] They are

intended to provide public information to consumers for the purpose of promoting a good understanding of the implications of using a given drug.[7]

Health Canada has further indicated that it will be establishing a "drug product register" that will consolidate all of the information regarding adverse effects and risks of therapeutic products.[8] Thus, it is possible that the new Safety Reviews will either be consolidated with, or linked to, Health Canada's Adverse Reaction Database,[9] as well as its current Drug Product Database[10] and Drug and Health Product Register,[11] thereby creating a more comprehensive source of information on safety issues associated with approved pharmaceutical products.

Inspection Summary Reports

Health Canada has also stated that it will be making available annual reports that summarize the results of inspections it has undertaken. A summary report includes statistics on risk observations and compliance ratings.[12] This project is quickly being executed. On April 13, 2015, Health Canada officially launched the Drug and Health Product Inspections Database (DHPID),[13] a new online resource designed to provide "ready access to information on inspections of companies that manufacture and sell drug products for the Canadian market."[14]

As part of this database, Health Canada will be publicly posting summaries of all Good Manufacturing Practices (GMP) inspections. GMP forms part of a quality assurance system that monitors the testing, storage and distribution of drugs. It comprises a set of statutory standards that drug manufacturers must meet, as it is a component of the FDA.[15] Any company selling a health product in the Canadian market must comply with GMP before it makes or imports the product into Canada. Under this regime, companies must investigate and correct safety and quality problems, and maintain detailed records in order for unsafe products to be traced to where they have been sold and removed from the market on a global basis.[16]

GMP inspections involve detailed onsite inspections of manufacturers' operations. These are conducted by Health Canada inspectors as part of the regulatory compliance process. The inspections are not limited to local operations, as they may occur both domestically and abroad. They are conducted on a predetermined cycle or "as required" to assess compliance.[17]

The frequency of inspections (both planned and unplanned), in addition to unplanned site visits to verify compliance are also expected to increase.[18] Through this monitoring process, Health Canada has introduced an Inspection Tracker,[19] which provides a summary of the specific health and safety issues that are currently being monitored by the government. The Tracker will eventually be expanded to include details about affected products.[20]

The decision to release GMP inspection summaries aligns with Health Canada's recent release of the 2012-2014 GMP Inspection Lists.[21] The Inspection Lists provide a publicly available summary of drug establishments that have received an inspection by Health Canada in relation to the issuance of a Drug Establishment License within the last three years.

These developments may be a somewhat alarming change for drug manufacturers selling products in Canada. GMP inspections have generally been considered confidential as between Health Canada and manufacturers, with related information made available to the public only through a formal request under the *Access to Information Act* (ATIA),[22] which provides certain rights of access to information under the control of the Canadian federal government. This measure of confidentiality has now been completely extinguished, and the increase in the extent and accessibility of public information related to GMP compliance represents a significant change in perspective by Health Canada.[23]

These initiatives, together with the new investigative powers established by Vanessa's Law, mark a substantial shift in the federal government's approach to pharmaceutical regulatory compliance and enforcement. Health Canada's position is that the daily business of industry will be minimally impacted, as companies are already responsible for meeting similar requirements in other countries.[24] Vanessa's Law intends to close a gap that has existed in drug regulation in Canada, to bring it in line with the regulatory environment of other jurisdictions. This intention has manifested in increased transparency between the public and the market authorization process. However, these changes represent a marked departure from Canada's previous regulatory perspective, one that can and is expected to have serious implications for manufacturers when it comes to protecting their legitimate business

interests. Therefore, companies will have to be more vigilant in both the monitoring of their operations and understanding their disclosure obligations.

What Does This Really Mean? A Life-Cycle Approach to Regulation

Health Canada's policy shift is especially concerning for industry stakeholders with respect to the treatment of manufacturers' relatedness statements in adverse event reports under the ATIA.

Manufacturers, who obtain Health Canada's approval to bring a pharmaceutical to market, have certain responsibilities under the FDA when marketing their drug in Canada. These responsibilities include monitoring and submitting adverse event reports to Health Canada. Adverse event reports describe adverse reactions to the manufacturer's product in order to assist in the identification of previously unrecognized rare or serious adverse reactions and to identify changes in the product safety information. Health Canada regulates the content of the adverse event reports and requires that certain information be included, such as information on the patient, the drugs the patient was taking, the dosage and manner in which the drugs were being taken, and the nature of the event experienced by the patient. The manufacturer is also required, in some circumstances, to assume a causal relationship between the event experienced by the patient and their product. However, the manufacturer *may* also comment on the adverse event, including by providing their own opinion on relatedness. These opinions, where provided, are referred to as the manufacturer's relatedness statements.

The inclusion of the manufacturer's relatedness statement in an adverse event report is not mandatory. Instead, they are provided at the manufacturer's discretion. They are submitted in a non-clinical trial context when making regulatory approval submissions to Health Canada as part of a given manufacturer's standard practice. However, in recent practice, the Minister has decided to disclose these statements following ATIA requests by third parties. In response, several judicial review applications challenging the Minister's disclosure decision of the relatedness statement were commenced by manufacturers seeking to protect their confidential information. Eventually, all the manufacturers discontinued their applications for judicial review without obtaining a determination on the issue from the court. This suggests that the Minister is more than prepared to implement the transparency initiative in a context that may be unrelated to public health and safety, and that manufacturers are recognizing a limited ability to dispute these decisions in court.

A common and recognized concern for manufacturers is that third party applications under the ATIA are often commenced by competitors seeking information about a specific company. Anyone can bring an application for such disclosure, and the reason does not have to be related to health and safety. Health Canada appears to have used the transparency and openness framework to justify a discretionary decision to publicly disclose pharmaceutical manufacturers' CBI, which was voluntarily provided, in a context where requests for information are not necessarily linked to public safety. In light of the Minister's powers under the ATIA, and now Vanessa's Law, a manufacturer may face serious obstacles on a judicial review application in these circumstances. As a result, manufacturers may decline to include the voluntary relatedness statements in disclosures to Health Canada in the future, rather than pursue the issue subsequently through litigation.

Companies now have to carefully evaluate, and likely change, their practices in order to limit their newfound exposure and protect their legitimate business interests. The significance of taking these steps is underscored by Health Canada's new perspective on GMP inspections, as well as the increased potential of CBI disclosure. These new regulatory changes illustrate the importance of ensuring that information provided to Health Canada is both accurately and carefully worded to reduce the risk of documents being interpreted out of context.

Manufacturers should consider introducing the following measures as part of their best practices moving forward in the post-Vanessa's Law regulatory environment:

- Carefully review all information provided to the government, particularly all statements that comment or speculate on causality associated with adverse events. This information is no longer confidential and will be disclosed.
- Review compliance programs to ensure any applicable postmarket requirements are met.
- Consider communications protocols that specify when, how, and what

type of information will be available to external entities.

- Monitor the regulatory landscape for new developments. Portions of Vanessa's Law require further substantive delineation, which are to be defined by the Minister via regulations.
- Make note of and take appropriate steps with respect to cross-border relations. It is important to remember that these changes will affect American business since U.S. companies that manufacture and market drugs in Canada will have to consider the ambit of their disclosure in light of Health Canada's new transparency initiative.

This new shift in policy is expected to "revolutionize" the FDA and "allow Health Canada to finally institute a life-cycle approach to drug management." The safety and efficacy of therapeutic products sold in the Canadian market will therefore be determined on an ongoing basis. The Minister will oversee the publication of a modernized regulatory framework for drugs that includes long-term studies of drug safety.[25]

But, what is the cost of this plan to increase the protection of public safety? The price paid appears to be manufacturers' recognized and valid confidentiality expectations.

It is not suggested that Vanessa's Law is bad legislation. In fact, the industry supports the movement towards increased public protection for therapeutic products. The law has the potential to be a useful tool for protecting consumers and giving Health Canada an enforcement power that is accepted as necessary. How that power is implemented, however, may result in unintended effects that tread upon the pharmaceutical industry's legitimate interests. Information that has long been accepted as confidential is now being disclosed, even before a request is made. Such a drastic change in position may have inadvertent negative effects. The new initiative of transparency and openness may actually generate hostility between the public and industry, rather than foster a framework of open communication. This has the potential to create a regulatory environment that aggravates the exact problems that Vanessa's Law seeks to remedy or avoid.

Notwithstanding Health Canada's assurances that these changes will affect the business of industry in a limited manner, the state of the regulatory environment in Canada remains unclear. It will only crystalize with time as this new mandate continues to be implemented. As it stands, the level of detail that Health Canada will include in the new GMP inspection summaries, including the extent to which the Minister will exercise its new power to disclose CBI under Vanessa's Law, has not been delineated by the government. This will come to light as the DHPID and other databases further develop. Health Canada has stated that as part of its initiative, more plain language information will be made publicly available "detailing how and why a [regulatory] decision was made *while protecting* confidential business information and respecting legislative responsibility, including privacy and official languages."[26] However, this is arguably inconsistent with the Minister's recent actions. Regardless, it is clear that Health Canada has shifted its policy perspective on the postmarket regulation of therapeutic products, and that it is ready to stand by its decisions, which include the public release of related (and potentially confidential) business information.

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2. Government of Canada, *Speech from the Throne*, 2nd Session, 41st Parliament (16 October 2013).
3. *Debates of the House of Commons Standing Committee on Health (Hansard)*, No. 32, 2nd Session, 41st Parliament (5 June 5 2014) at 4-5.
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5. Health Canada, Safety Reviews, http://www.hc-sc.gc.ca/dhp-mps/medeff/reviews-examens/index-eng.php.
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7. *Supra* note 2, at 13-14.
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11. Health Canada, Drug and Health Product Register, https://hpr-rps.hres.ca/hpr-rps/templates/search-recherche-eng.php.
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20. *Supra* note 17.
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22. *Access to Information Act*, R.S.C., 1985, c. A-1.
23. *Supra* note 17.
24. Health Canada, Protecting Canadians from Unsafe Drugs Act (Vanessa's Law): Questions/Answers, http://www.hc-sc.gc.ca/dhp-mps/legislation/unsafedrugs-droguesdangereuses-faq-eng.php.
25. *Debates of the Senate (Hansard)*, Vol. No. 149, Issue 76 (16 September 2014) at 2073 (Hon. Judith Seidman).
26. *Supra* note 3.