



Marketing Your Business in Canada

Understanding the Laws and Risks Involved



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Traditional methods of marketing can still be an effective way to sell a product or service, however, newer online advertising tactics and technologies have now created opportunities to cast a wider net and build a truly global customer base. With trends shifting towards a more digitized marketing stream utilizing social media and influencer marketing, the potential for advertisement is vast – but so is the competition. Understanding new technology and the regulations that are associated with it is vital to getting your product recognized as a market leader.

These new methods of marketing have created legal and business risks. Depending on the nature of the marketing activity adopted, many areas of law may apply, including Canada's anti-spam legislation, competition, consumer protection, criminal, intellectual property, packaging and labelling, language and privacy laws.

Regulation of adult use cannabis in Canada results in an entirely new topic of consideration for promotional regulations. The evolution of product-specific marketing regulations is one that requires particular focus as legislation regulating promotion of cannabis and other regulated products progresses.

This publication serves as a guide and provides information for organizations who are currently marketing, or looking to market, their goods and/or services in Canada.

While we hope that you will find this publication valuable, the information in it is of a general nature and should not be regarded as exhaustive or as legal advice. The laws in this area are often complex and they must be considered in the circumstances in which they arise. We encourage you to seek proper legal and business advice to ensure you are compliant and prepared to mitigate potential risks.

Our Advertising & Marketing Group

Borden Ladner Gervais LLP's Advertising & Marketing Group is a multidisciplinary team of professionals that provides comprehensive, practical and timely advice. Members of the group practice in a range of specialized areas, including competition, litigation, intellectual property, privacy, and corporate commercial law. Together, we use our market knowledge to provide creative, insightful and efficient campaign solutions to players in various industries.

We help our clients establish strategic alliances with exclusive marketing and supply agreements, joint promotions, co-branding, merchandising and promotion agreements, to name a few. With a collaborative approach, we work with our clients to achieve the results they need.

To learn more about the Advertising & Marketing Group, please visit our webpage at [blg.com/en/services/practice-areas/corporate-commercial/advertising-marketing](https://www.blg.com/en/services/practice-areas/corporate-commercial/advertising-marketing).

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1

Misleading Advertising and Deceptive Marketing Practices

In Canada, false or misleading advertising is prohibited by a number of federal and provincial statutes and regulations. The primary federal legislation that prohibits false or misleading advertising is the *Competition Act* (Canada), which also has a number of provisions prohibiting particular deceptive marketing practices. The main provincial statutes are consumer protection and business practices statutes.

1.1 *Competition Act*

Engaging in misleading advertising or deceptive marketing practices can carry significant criminal or civil consequences under the *Competition Act* – provisions that apply to any person promoting, either directly or indirectly, the supply or use of a product or service or any business interest, by any means, including printed or broadcast advertisements, Internet advertisements, oral representations and illustrations.

False or Misleading Representations

The *Competition Act* prohibits representations to the public that are materially false or misleading, or are not based on adequate and proper tests. It also prohibits representations to the public that contain false testimonials or misstatements as to price, or contain representations in the form of warranties, guarantees or promises to replace, maintain or repair an article where the warranty, guarantee or promise is materially misleading or where there is no reasonable prospect that it will be carried out.

A false or misleading representation must be “false or misleading in a material respect” to contravene the *Competition Act*. “Material” does not refer to the value of the product to the purchaser, but the degree to which

the purchaser may be influenced by the representation in deciding whether to purchase the product. The general impression conveyed by a representation, as well as its literal meaning, will be considered when determining whether the representation is false or misleading in a material respect.

Disclaimers will not necessarily save a representation from being false or misleading. A disclaimer cannot contradict the main message of the representation. When using disclaimers, factors to consider include the disclaimer content, placement, format and font size.

False or misleading representations to the public for the purpose of promoting any business interests which are found by a court to have been made knowingly or recklessly, may result in a criminal conviction punishable by unlimited fines and/or up to 14 years in prison. The making of such representations at all, even if not knowingly or recklessly, can result in sanctions, including orders prohibiting the future making of the representations, requiring the party to publish a corrective notice and/or pay a significant administrative monetary penalty (AMP).

Because of the Supreme Court of Canada’s 2012 decision in *Richard v. Time*, misleading advertising claims brought under the *Competition Act* will generally be judged from



In 2018 alone,
Canadians lost
approximately
\$97 MILLION
to fraud, which only
accounts for the
estimated
5% OF CASES
that were reported
to the authorities.

the perspective of the “credulous and inexperienced consumer” and will be based on the general impression first created by the text and layout of an advertisement. As described by the Supreme Court, the credulous and inexperienced consumer is not particularly experienced at detecting the falsehoods or subtleties found in commercial representations, has less than average intelligence, skepticism and curiosity and is not particularly prudent, nor diligent, nor well informed. The Commissioner of Competition has expressed the view that *Richard v. Time* is directly relevant to the application of the *Competition Act*, with the result that companies looking to avoid a run-in with the Competition Bureau should exercise additional caution when preparing marketing material. This is especially the case given the Competition Bureau’s aggressive approach to enforcement — an approach that continues to include the pursuit of AMPs of up to \$10 million.

The risk of these penalties is real. In 2012, the Commissioner successfully obtained the highest AMP awarded to date in a contested misleading advertising proceeding, an award of over \$9 million, and in 2019, an AMP of \$4 million plus \$500,000 in investigative costs was awarded. The Competition Bureau has communicated its intent to continue to actively monitor and enforce the misleading advertising provisions of the *Competition Act*, with particular focus on e-commerce, as well as performance and pricing claims.

Ordinary Selling Price

The *Competition Act* specifically prohibits those engaged in the supply of products from making any false representation as to the ordinary selling price of a product. A supplier’s advertised ordinary selling price must satisfy

at least one of two tests in order to avoid contravening the *Competition Act*:

- (i) a substantial volume of the product must have been sold at that price or a higher price, within a reasonable time before or after the making of the representation (referred to as the *volume test*); or
- (ii) the product in question must have been offered for sale, in good faith, for a substantial period of time at that price or a higher price before or after the making of the representation (referred to as the *time test*).

For example, before making a price representation of “Our Regular Price \$100, Sale Price \$50,” a supplier should ensure that it can establish that either:

- (i) more than 50% of its recent volume of sales were made at \$100 or higher; or
- (ii) the product had recently been offered for sale in good faith at a price of \$100 and either genuine sales had been made at \$100 or, if no sales had been made at \$100, such price was nevertheless a reasonable price in light of prevailing market conditions.

While the relevant timeframe for review varies depending on a number of factors (such as the seasonal nature of the product), six to twelve months is generally considered a reasonable rule of thumb.

Where false representations are made deliberately or recklessly, competition authorities can pursue the matter as a criminal offence.

Strict Liability Criminal Misleading Practices

The *Competition Act* sets out certain specific criminal offences dealing with misleading advertising, including double ticketing of prices, multi-level marketing, deceptive telemarketing and pyramid selling. It is also a criminal offence to make a representation which suggests that the recipient has won or will win a prize or benefit and that seeks payment from or requires the recipient to incur any cost, unless the recipient actually wins the contest and prescribed disclosure requirements are met. These are strict liability offences for which the Crown does not have to prove the intention to mislead or defraud and can be penalized by fines and/or jail time. Only a due diligence defence is available to the accused.

1.2 Consumer Protection Legislation

Canadian provincial consumer protection or business practices legislation also prohibits false or misleading advertising. Like Canada’s *Competition Act*, this legislation applies to advertising in a broad range of media, including print, television broadcast and the Internet. The “deceptive” or “unfair” acts or practices prohibited under the aforementioned provincial legislation include, without limitation, making representations about price advantages that are not true or making representations that goods or services:

- (i) have ingredients, benefits or qualities that they do not have;
- (ii) are of a particular standard, quality, grade, style or model if they are not; or
- (iii) are sponsored or approved by a particular person or organization when they are not.

1.3 Other Considerations

Other relevant federal legislation that prohibits false, misleading or deceptive representations includes, without limitation, the *Trade-marks Act* (Canada), the *Consumer Packaging and Labelling Act* (Canada) and the *Canada Consumer Product Safety Act* (Canada).

In addition to the foregoing, Ad Standards, Canada's advertising self-regulatory body, administers the *Canadian Code of Advertising Standards* (Code). The Code sets out criteria for acceptable advertising and has provisions either prohibiting or restricting, among other things, the use of:

- (i) inaccurate, deceptive or otherwise misleading claims, statements, illustrations or representations;
- (ii) price claims;
- (iii) comparative advertising;
- (iv) testimonials; and
- (v) professional or scientific claims.

A consumer or a person in the trade industry may file a complaint with the Ad Standards, which reviews the complaint against the Code. Since a complaint may be commenced against both members and non-members of the Ad Standards, the Code should be kept in mind when developing advertisements and marketing campaigns, regardless of membership.



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Internet and New Media

Advertising and marketing on the Internet is generally subject to the same laws as advertising in print and other media. There are also laws and guidelines specifically aimed at online advertising and marketing. For example, the Canadian Competition Bureau has published guidelines on the application of the *Competition Act* to representations on the Internet and Industry Canada has published The Canadian Code of Practice for Consumer Protection in Electronic Commerce, which deals with online privacy and communications with children.

Some of the more recent regulatory initiatives include the introduction of legislation prohibiting the transmission of unsolicited commercial electronic messages (or spam) as well as court decisions involving defamation.

2.1 Anti-Spam

Canada's anti-spam law (commonly known as CASL) is designed to prohibit unsolicited or misleading commercial electronic messages (CEMs) and to deter other forms of online fraud. It generally applies if a computer system in Canada is used to send or access a CEM, regardless of the location of the sender or recipient. This section focuses on the provisions of CASL relating to CEMs, which generally came into force on July 1, 2014. Another important date is January 15, 2015, the date of coming into force of the prohibition on the installation of a computer program on another person's computer without express consent.

The Basic Prohibition

CASL prohibits the sending of a commercial electronic message or CEM unless: (i) the recipient has consented to receiving the CEM, and (ii) the CEM complies with certain form and content requirements.

CASL uses broad, open-ended definitions, so that it applies to electronic messages sent by any means of

telecommunication (including text, sound, voice or image) to an address for an email account, instant messaging account, telephone account or any similar account. There are limited exceptions, such as for interactive two-way voice communications, faxes and voice messages.

An electronic message is considered to be "commercial" if **one of its purposes** (not necessarily its main purpose) is to encourage participation in a "commercial activity". The term "commercial activity" is broadly defined as a transaction, act or conduct of a commercial character (regardless of expectation of profit), including the purchase, sale or lease of goods, services or land; or a business, investment or gaming opportunity. Examples of CEMs include marketing emails and text messages.

The prohibition on sending unsolicited CEMs also applies to an electronic message, in which the sender requests the recipient's consent to receive further CEMs. There are limited exceptions, including CEMs between friends or family (as defined in regulations) and inquiries or applications regarding the recipient's commercial activity.



137,000
complaints were
made by Canadians to
the Spam Reporting
Centre in 2018—more
than 5,000 per week.

Emails sent without
consent is often the top
reason for complaints
made by the public.

Consent

Generally, CASL establishes an opt-in consent regime, which requires that each recipient consent to receive a CEM. Consent must be expressed, except where implied consent is deemed acceptable. A person who alleges consent to send a CEM has the onus of proving it.

A request for express consent must “clearly and simply” specify the purpose of the consent and other prescribed information, including the identity of the person seeking consent and other persons on whose behalf consent is sought. The required consent is in addition to, and different from, consents required under other regulatory regimes (including privacy legislation).

Implied consent is acceptable in limited circumstances where the sender and recipient of the CEM have an existing business or non-business relationship (as defined in CASL) within the previous two years. Notably, an “existing business relationship” is defined as a relationship arising from certain commercial activities or a written contract between the parties. Consent may also be implied in other limited circumstances, including where the recipient conspicuously publishes his or her electronic address or discloses it to the sender, without indicating that he or she does not want to receive unsolicited CEMs and the message is relevant to the recipient’s business or official capacity.

There are certain kinds of CEMs for which consent is not required, including messages that provide a requested estimate or quote for a commercial transaction; messages that facilitate, complete or confirm a commercial transaction previously agreed to by the recipient; and

messages that provide warranty, recall, safety or security information for a product or service used or purchased by the recipient.

Formalities

A CEM caught by CASL must comply with certain formalities. The message must contain prescribed information about the identities of the actual and beneficial sender of the message and prescribed contact information. The message must also provide an effective, no-cost unsubscribe mechanism accessible by the recipient using the same electronic means by which the message was sent or, if not practicable, an alternative electronic means. The message must also provide an electronic address or link to a website that can be used by the message recipient to unsubscribe from receiving future messages. The contact information, unsubscribe mechanism and website link must remain valid for at least 60 days after the message is sent and an unsubscribe request must be implemented within ten business days.

Message Content

CASL amends the *Competition Act* to prohibit knowingly or recklessly sending a false or misleading representation in an electronic message that promotes a business interest or the supply or use of a product. CASL prohibits any false or misleading representation in sender information (*i.e.*, the part of an electronic message that identifies the sender), subject matter information (*i.e.*, the part of an electronic message that summarizes or indicates the content of the message) or locator information (*i.e.*, information, including a hyperlink/URL, in a message identifying a source of

data). CASL also prohibits a representation in the body of an electronic message that is false or misleading in a material respect.

2.2 Defamation

The law (or tort) of defamation in Canada protects against damage to a plaintiff’s reputation caused by words published by a defendant. It is filled with nuances and complexities and can only be briefly summarized here. Advertisers and marketers can find themselves on either side of the law – they can be victims of defamation (plaintiff) or accused of publishing defamatory comments and liable to the person whose reputation is harmed (defendant). In the latter case, it is important to note that the defamatory words do not need to originate with the advertiser or marketer for either one of them to be liable. Mere publication (spoken or written) of someone else’s defamatory words makes the publisher jointly liable. For example, an advertiser or marketer could potentially be liable in defamation for a comment posted to a social media space that it controls even though it has no relationship whatsoever with the third party who posted the defamatory comment.

Defamation encompasses both libel and slander. Slander is defamation without any permanent record. The typical slander is a spoken statement. Libel is defamation with a permanent record, such as a written note, an internet posting, an email, a newspaper article, a television broadcast, etc. Slander that gets repeated in a permanent record becomes libel.

To establish the essential elements of liability for defamation, a plaintiff only needs to prove:

- (i) The words about which the plaintiff is complaining are defamatory – *i.e.*, they would tend to lower a person’s reputation in the eyes of a reasonable person in that person’s community;
- (ii) The words refer to the plaintiff, as opposed to someone else or someone unidentifiable from the words used and the circumstances; and
- (iii) The words were “published” by the defendant.

With respect to the third element, “publication” in the defamation context requires two components: (i) an act that makes the defamatory information available to a third party in a comprehensible form; and (ii) the receipt of the information by a third party in such a way that it is understood. Publication is often easily established. Speaking words to a single third party is publication. Writing and sending a note or email to a third party is publication. The law appears to be in a state of flux with respect to mere hosts or conduits of comments posted online. It is uncertain whether or not such hosts or conduits will ultimately be considered “publishers” once the courts have the opportunity to more fully consider defamation in the Internet context. Such hosts and conduits would usually be considered “publishers” under the historic and traditional principles of defamation law. Therefore, unless and until the law evolves and changes, advertisers and marketers must be concerned about being considered “publishers” of defamatory comments posted by others to sites that they host online and thereby are jointly liable with the author for defamation.

Once a plaintiff proves the three essential elements mentioned above, liability is established. The onus then

shifts to the defendant to prove one of the available defences. Of the available established defamation defences, the following are those most often used by a defendant advertiser or marketer:

- (i) **Justification.** This is commonly understood as the “truth defence”. If a plaintiff establishes *prima facie* liability, the defamatory words are presumed by the court to be false, however, if the defendant can prove that the words are substantially true, it will have established the defence of justification and avoid liability.
- (ii) **Innocent Dissemination.** If a defendant can establish that it had no knowledge that it was publishing defamatory comments and had no reasonable ability to prevent that, it may be able to establish the defence of innocent dissemination and avoid liability. As noted above, the law with respect to this defence in the Internet context is currently in a state of flux.
- (iii) **Fair Comment.** This defence is established when the defendant proves that its defamatory statements were statements of opinion on a matter of public interest as opposed to statements of fact; that the opinions were based on fact; and, that a reasonable person could honestly hold those opinions based on the proven facts.
- (iv) **Responsible Communication on Matters of Public Interest.** This defence is established if the defendant proves that its statements concerned a matter of public interest and that it exercised due diligence in trying to verify the truth of the statements before publication.

2.3 Influencer Marketing

Guidelines

The Competition Bureau recently issued guidance to address deceptive marketing concerns arising from the use of influencers, notably online personalities who share their opinions and/or advice about products and/or services. The Competition Bureau explained the legal obligations and responsibilities of both influencers and advertisers who pay or otherwise compensate influencers to create and share content that features their products and/or services. Because advertisers may be liable for representations made through influencers, the Competition Bureau recommends that advertisers dealing with social media influencers: (a) ensure that influencers clearly disclose material connections with them in each post, (b) ensure that representations made by influencers are not false or misleading, and (c) verify that influencers do not make performance claims on advertisers’ behalf, unless based on adequate and proper testing.

Ad Standards has also issued guidelines in respect of testimonials, endorsements, reviews and other similar representations. Such guidelines provide that a testimonial, endorsement, review or other representation must disclose any “material connection” between the endorser, reviewer, influencer or person making the representation and the “entity” that makes the product or service available, except when that connection is one that consumers would reasonably expect to exist (*e.g.*, a celebrity endorsement). If such a material connection exists, the Ad Standards recommends that this fact and the nature of the material connection be clearly and prominently disclosed in close proximity to the representation about the product or service.

3

Privacy

A number of privacy laws exist in Canada. The application depends on the jurisdiction and scope of the matter.

3.1 Federal Legislation

The *Personal Information Protection and Electronic Documents Act* (Canada) (PIPEDA) governs how private-sector organizations collect, use and disclose personal information in the course of carrying on commercial activities, including marketing and promotional activities, such as when administering a contest or a loyalty program or sending specific customers or potential customers product samples or information regarding products and services.

Personal information is expansively defined in PIPEDA to be “information about an identifiable individual,” with the exception of the name, title, business address or telephone number of the organization’s employees when such information is used to contact the employees for purposes related to their business responsibilities.

With respect to personal information of employees, PIPEDA only applies to federal works, undertakings and businesses (such as banks, telecommunication companies, etc.).

3.2 Provincial Legislation

If a province has enacted provincial private-sector privacy legislation, which is deemed “substantially similar” to PIPEDA, the federal government may exempt from compliance with PIPEDA any organization that collects, uses or discloses personal information solely within that province. Notwithstanding the foregoing, federal works, undertakings and businesses remain solely by PIPEDA.

To date, British Columbia (*Personal Information Protection Act*), Alberta (*Personal Information Protection Act*) and Québec (*Act respecting the Protection of Personal Information in the Private Sector*) have enacted provincial legislation of general application that has been deemed substantially similar to PIPEDA. As such, the operation of PIPEDA has been supplanted in these provinces when the collection, use and disclosure takes place within the province, however, there are circumstances in which it is possible that both the federal and provincial legislation might apply. However, there are circumstances in which it is possible that both the federal and provincial legislation might apply. Ontario, New Brunswick, Nova Scotia and Newfoundland & Labrador have enacted provincial legislation applicable to personal health information that has been deemed substantially similar to PIPEDA. These statutes have been deemed to be “substantially similar” to PIPEDA with respect to “health information custodians”.

3.3 Basic Privacy Principles

When collecting, using or disclosing personal information as part of a marketing campaign, organizations must keep in mind certain privacy principles. PIPEDA and its provincial counterparts generally require compliance with the following basic principles:

- (i) **Accountability:** An organization is responsible for personal information under its control and must designate an individual or individuals who are accountable for its compliance with the legislation. When outsourcing the processing of personal information to third parties, organizations in control must



In 2018, **680** breach reports were received by the Canadian Privacy Commissioner **6x** more than the previous year.

+28 M
number of Canadians affected by a data breach.

require those third parties to provide a comparable level of protection than the one provided in PIPEDA. In a 2019 decision (PIPEDA Report of Findings #2019-003) the Office of the Privacy Commissioner provided guidance on the type of contractual provisions expected to be included in such contract and mentioned that the following requirements were adequate: implementing measures to protect against compromise of its systems, networks and data files; encryption of personal information in transit and at rest; maintaining technical safeguards through patches, etc.; logging and alerts to monitor systems access; limiting access to those who need it; training and supervision of employees to ensure compliance with security requirements; detailed incident response and notification requirements; pre-approval of any third parties to whom the service provider wishes to share personal information, as well as a requirement for the service provider to ensure contractual protections that are at a minimum equivalent to those provided for by the contract; and to submit to oversight, monitoring, and audit of the security measures in place.

- (ii) **Identifying Purposes:** The purpose(s) for which personal information is collected must be identified by the organization at or before the time the information is collected. For instance, an organization may collect personal information concerning individuals in order to communicate with them for the purposes of offering them products and services and/or information on products and services, which may be of interest to them.
- (iii) **Consent:** The knowledge and consent of the individual are required for the collection, use or disclosure of personal information, except where inappropriate. The type of consent (implied or express)

to be obtained by organizations depends on several factors, which were clarified in the Guidelines on Meaningful Consent, issued by the Office of the Privacy Commissioner of Canada and enforced since January 1, 2019.

- (iv) **Limiting Collection:** The collection of personal information must be limited to that which is necessary for the purpose(s) identified by the organization.
- (v) **Limiting Use, Disclosure and Retention:** Personal information must not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as permitted or required by law. Personal information shall be retained only as long as necessary for the fulfilment of those purposes.
- (vi) **Accuracy:** Personal information must be as accurate, complete and up-to-date as is necessary for the purpose(s) for which it is to be used.
- (vii) **Safeguards:** Personal information must be protected by security safeguards appropriate to the sensitivity of the information.
- (viii) **Openness:** An organization must make readily available to individuals specific information about its policies and practices relating to the management of personal information.
- (ix) **Individual Access:** On request, an individual must be informed of the existence, use and disclosure of his or her personal information and must be given access to that information. An individual must be able to challenge the accuracy and completeness of the information and have it amended as appropriate.

- (x) **Challenging Compliance:** Individuals must be able to address a challenge concerning compliance with the above principles to the designated individual or individuals accountable for the organization's compliance.

Organizations that transfer personal information to parent companies, affiliates and/or service providers outside Canada should be aware that they are required to disclose this fact to the individuals whose information is collected and to ensure that the transferred information will be protected. Organizations must inform concerned individuals of the fact that their personal information may be transferred to foreign entities, subject to foreign laws and accessible to foreign governments, courts, law enforcement and regulatory agencies. They must also be provided with appropriate contact information for obtaining details on the privacy obligations of the foreign entities. While the foregoing requirements have generally been held to exist pursuant to privacy legislation across Canada, both Alberta's *Personal Information Protection Act* and Québec's *Act respecting the Protection of Personal Information in the Private Sector* set out provisions that expressly govern the transfer of personal information across borders.

3.4 Other Privacy Obligations

In addition to PIPEDA and provincial legislation dealing specifically with the collection, use and disclosure of personal information in the private sector, organizations may have additional statutory privacy obligations. For example, several provinces have enacted legislation, such as the *Privacy Act* (British Columbia), which makes it an actionable wrong for one person, willfully and without claim of right, to violate another's privacy.

Under the British Columbia *Privacy Act*, the nature and degree of privacy to which a person is entitled in any situation will depend on what is reasonable in the circumstances, giving due regard to: the lawful interests of others; the nature, incidence and occasion of the act or conduct; and any relationship between the parties. Use of personal information without consent or breach of privacy by unauthorized access to personal information or loss of personal information would be breaches of privacy and could give rise to causes of action both pursuant to privacy legislation, such as PIPEDA, and either common law or these specific privacy protection statutes. Pursuant to the *Civil Code of Québec*, the image of an individual constitutes personal information. Accordingly, to lawfully use a picture or a video featuring an identifiable individual, such individual's consent must be obtained. Exceptions to this requirement are limited to cases where the public interest outweighs one's privacy rights.

Businesses dealing with Canadian governmental bodies should also be aware of the privacy aspects of federal and provincial access to information legislation, such as the provincial *Freedom of Information and Protection of Privacy Acts*, the federal *Access to Information Act* (Canada) and the federal *Privacy Act* (Canada). Subject to certain exceptions, these statutes generally restrict the ability of governmental bodies to disclose personal information to third parties and, in some provinces such as British Columbia, impose obligations on private-sector businesses that act as “service providers” to government bodies. These statutes also impose significant disclosure obligations on governmental bodies that do not exist in the private sector, which is something that private organizations should consider when disclosing information to them. This may be particularly relevant for organizations that enter into sponsorship and other agreements with government bodies or otherwise provide personal information to government bodies.

3.5 Online Behavioural Advertising

Guidelines

Online behavioural advertising refers to the tracking of online activities over time for the purpose of delivering advertisements that are targeted to inferred interests of consumers. In other words, this practice refers to using data about an individual's web activities in order for the individual to receive targeted ads based closely on his or her interests. The Office of the Privacy Commissioner of Canada (Privacy Commissioner) has published guidelines as well as a detailed policy position on online behavioural advertising to provide guidance on online tracking, profiling and targeting to the advertising industry, browser developers, website operators and those benefitting from it with a view to ensure individuals' privacy.

Among other things, the Privacy Commissioner reminds organizations that the purpose for which an individual's information is to be collected, used or disclosed must be explained in a clear and transparent manner. The Commissioner also acknowledges the challenges that exist with obtaining consent online and thus provides that opt-out consent for online behavioural advertising could be considered where certain factors are met (as described below). However, if an individual cannot decline the tracking or targeting using an opt-out mechanism, then the Commissioner considers that organizations should not use such technology for online behavioural advertising purposes. In particular, the Commissioner adds that, as a best practice, organizations should avoid tracking children and tracking on websites aimed at children.

Collection of Personal Information

The majority of the information collected for the purpose of online behavioural advertising is not per se personal information. However, when combined with other information, such information can become personal

information, and thus become subject to the PIPEDA and/or other privacy legislation. Given that information is collected to create detailed profiles of the user and given the personalized and targeted nature of online behavioural advertising, the Privacy Commissioner takes the position that information collected for such purposes should generally be considered personal information.

Opt-Out Consent

Since the Privacy Commissioner generally considers information collected for the purpose of online behavioural advertising to be personal information, individuals must give their consent to the use of such information.

The Privacy Commissioner provides some fairly specific guidance as to what would be considered reasonable steps to take when crafting an opt-out consent. In the Commissioner's “Policy Position on Online Behavioural Advertising”, the Commissioner cites the following as factors that must be looked at when assessing whether an opt-out is reasonable:

- “Individuals are made aware of the purposes for the practice in a manner that is clear and understandable – the purposes must be made obvious and cannot be buried in a privacy policy. Organizations should be transparent about their practices and consider how to effectively inform individuals of their online behavioural advertising practices, by using a variety of communication methods (such as online banners, layered approaches and interactive tools);
- Individuals are informed of these purposes at or before the time of collection and provided with information about the various parties involved in online behavioural advertising;
- Individuals are able to easily opt-out of the practice - ideally at or before the time the information is collected;

- Any opt-out takes effect immediately and is persistent;
- The information collected and used is limited, to the extent practicable, to non-sensitive information (avoiding sensitive information such as medical or health information); and
- Information collected and used is destroyed as soon as possible or effectively de-identified.”

According to the Privacy Commissioner, where an individual cannot easily and effectively opt out of a certain type of tracking (such as tracking through zombie cookies, supercookies and other similar techniques), such practices should not be employed. An individual should have control over the tracking of his or her web activities and should be able to stop it, if he or she so wishes.

Collection of Children’s Personal Information

According to the Privacy Commissioner, children’s personal information should not be tracked for the purposes of online behavioural advertising since it is difficult to obtain meaningful consent from young users of the Internet. The Commissioner takes the position that profiling children for the purposes of delivering behaviourally targeted ads is inappropriate and web sites directed at children should not permit the placement of any kind of tracking technology on the site.

Self-Regulatory Program

The Digital Advertising Alliance of Canada (DAAC) established Canada’s self-regulatory program for Online Behavioural Advertising (OBA Program). The OBA Program applies to online behavioural advertising data, regardless of whether the data is considered “personal information” and is based on a number of principles, which are set out below.

The *Canadian Self-Regulatory Principles for Online Behavioural Advertising* sets out six key principles. The obligations imposed pursuant to such principles vary based on whether an organization is a “First Party” (e.g.,

a website publisher), a “Third Party” (e.g., an advertising network) or a “Service Provider” (e.g., an internet access provider):

- (i) **Education:** Organizations should participate in efforts to educate individuals and businesses about online behavioural advertising, including how to opt out.
- (ii) **Transparency:** Clear, meaningful and prominent notices of data collection and use practices should be given. The DAAC has licensed the use of the AdChoices icon (which is a small blue triangular icon with the letter “i”) for the OBA Program. This icon is also used in the United States and in Europe.
- (iii) **Consumer Control:** Consumers must be provided with an opt-out mechanism.
- (iv) **Data Security:** Organizations should maintain appropriate physical, electronic and administrative safeguards to protect the data and only retain the data for as long as necessary to fulfill a legitimate business need or as required by law.
- (v) **Sensitive Data:** Consent is required for the collection of personal information, as required by and in accordance with applicable Canadian privacy legislation. Generally, organizations cannot collect or use children’s personal information for online behavioural advertising purposes, unless it is in accordance with applicable Canadian privacy legislation.
- (vi) **Accountability:** Ad Standards monitors and handles compliance with the principles of the OBA Program.

The OBA Program does not apply in certain circumstances, such as online advertising of organizations within a website that they own or control.

For an annual fee, organizations can join the OBA Program by visiting YourAdChoices.ca and following the registration process.



+54%
of impacted businesses
in Canada reported that
cyber security incidents
prevented employees
from carrying out
day-to-day work.

+30%
incurred repair or
recovery costs.

4

Intellectual Property

The primary areas of intellectual property considered regularly in advertising and marketing practices are copyright, trademarks and domain names. Preparing and having proper licences pertaining to intellectual property is also another important consideration. Comparative advertising and the use of certain Canadian images raise further intellectual property-related issues in Canada. The primary laws in Canada governing these areas are the *Copyright Act (Canada)* and the *Trademarks Act (Canada)*.

4.1 Copyright

Copyright issues arise in a number of ways in the advertising and marketing world, ranging from whether one has the right to use another's work (e.g., someone else's song) in one's own advertisement, to whether one can modify and re-use materials that were created by independent contractors (e.g., an advertising agency or volunteers) or consumers (e.g., a jingle created and submitted by someone as part of a jingle-writing contest). One will also need to keep in mind moral rights issues, such as determining whether one has the right to modify a work without prejudicing the reputation of the author of the work (e.g., the Ontario Court of Appeal held that a shopping mall's addition of red decorative ribbons to a sculpture located in the mall during the holiday season distorted and modified the artist's sculpture such that there was reasonable concern of prejudice to his reputation). Below is some general basic copyright information which explains some of the copyright concerns.

Basic Right

Copyright subsists in every original literary, dramatic, musical and artistic work, as well as in performances, sound recordings and broadcasts. There is no requirement that the work be novel or that its subject matter have merit. Copyright protects only the form of expression and not the underlying ideas or facts.

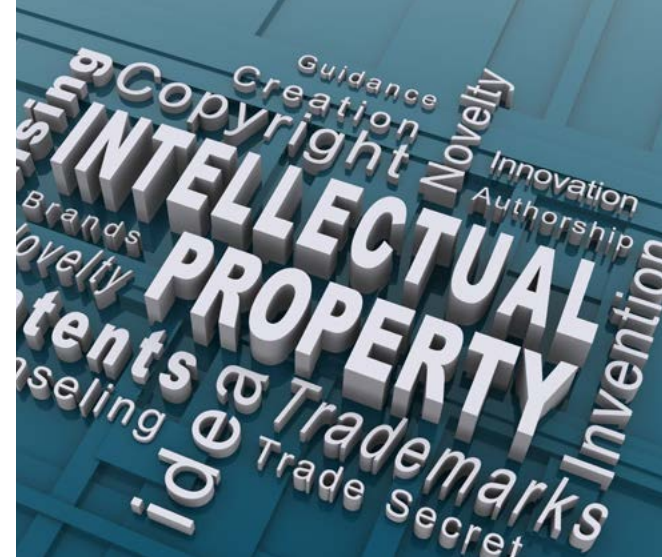
Copyright in a work refers to the exclusive right to produce, reproduce and perform the work or any substantial part of the work in any material form and the right to prevent others from doing so. In essence, the owner of copyright in a work has a time-limited, exclusive right to almost all commercially valuable uses of the work.

Copyright Infringement

Copyright infringement occurs when a person does something without the consent of the copyright owner, that only the copyright owner has the right to do, such as producing, performing, reproducing or publishing a work as well as authorizing another person to do so. The *Copyright Act* provides exceptions for the infringement of copyright, including the "fair dealing" exception, which applies under certain circumstances for the purpose of research, private study, education, parody, satire, criticism or review, and news reporting.

Copyright Ownership

Copyright arises automatically upon the creation of an original work. A work does not have to be registered nor does notice of copyright have to be given for a work to be protected by copyright in Canada. Nevertheless, registration and notification provide some advantages. For example, a certificate of copyright registration is evidence that copyright exists in the work and that the registrant is the owner of the copyright.



Generally, the creator of a work is considered to be the owner of the copyright in the work. The creator is the person who actually wrote, drew, composed or produced the work. When two or more creators collaborate to produce a work and they intend to jointly hold the copyright in the work, then each of the creators will have an equal share in the copyright.

In general, copyright ownership subsists in a work for the life of the author, including the remainder of the calendar year in which the author dies, plus fifty years. In certain circumstances, the term of copyright ownership varies from the general rule. Enumerated examples provided for under the *Copyright Act* include anonymous and pseudonymous works, anonymous and pseudonymous works of joint authorship, posthumous works, works of joint authorship, cinematographic works, Crown copyright, performer's performances, sound recordings and communication signals.

There are different rules for ownership of copyright in works created by employees and independent contractors. If a work is created by an employee in the course of his or her employment, then copyright in the work is owned by the employer unless there is an agreement to the contrary. If a work is created by an independent contractor, then copyright in the work is owned by the contractor and not the person who engaged and paid the contractor to create the work.

Anyone engaging an independent contractor to create a work should obtain an assignment of the copyright and waiver of moral rights. Failure to do so may limit the ability of the person who paid for the work to use the work in the future. Also, to avoid any uncertainty, employment

agreements should include copyright assignment provisions and be updated on a regular basis.

Assignment

Copyright in a work can be assigned either wholly or partly. Copyright also can generally be subject to limitations relating to territory, medium or sector of the market. The limitations can be for the whole term of the copyright or merely for part of it. The assignment must be in writing and signed by the copyright owner.

It is important to note that the assignment of copyright in a work does not also constitute an assignment of the moral rights attached to that work. In fact, moral rights cannot be assigned, but can only be waived.

Moral Rights

Moral rights are rights granted to authors under the *Copyright Act*, which give the author of a work the right not to have the work distorted, mutilated or otherwise modified in a way that is prejudicial to the author's honour or reputation. Where reasonable in the circumstances, the author has the right to be acknowledged by name (or pseudonym) as the author of the work.

Moral rights in a copyright work last for the same length of time as the copyright itself and they pass to the author's heirs even if the heirs do not inherit ownership of the copyright.

Moral rights cannot be assigned, but they can be waived, either in whole or in part. An assignment of copyright does not constitute a waiver of moral rights.

Moral rights in works created by employees or independent contractors are not automatically waived in favour of the employer or person for whom the work is created. Accordingly, it is prudent to obtain waivers of moral rights from all employees and independent contractors engaged to create works.

Neighbouring Rights

Neighbouring rights are rights granted under the *Copyright Act* to performers, makers of sound recordings and broadcasters with respect to their performances, sound recordings and broadcast signals. Neighbouring rights compensate performers and makers of sound recordings by providing them with remuneration rights when eligible published sound recordings are publicly performed and/or communicated to the public by telecommunication. Collective societies, which are commonly referred to as "collectives", are organizations authorized under the *Copyright Act* to administer certain rights, including remuneration rights on behalf of copyright holders. Authorization for the administration of rights by a collective may be through assignment, licence or appointment. For example, Re:Sound is a collective that obtains compensation for artists and record companies in respect of their neighbouring rights. Insofar as these rights are administered by a collective such as Re:Sound, the benefit of these rights to performers and makers of sound recordings is essentially the fees they will receive from the collective.

The other rights extended to a performer in respect of the performer's performance and to the maker of a sound recording are primarily the right of the performer to record the performance, and the right of the maker of the

sound recording to publish the recording, to reproduce a recording, to rent a recording and to authorize a third party to do those acts. Broadcasters have similar rights in respect of their communication signals.

Neighbouring rights expire at the end of the calendar year in which the subject performance was performed, fixed or broadcast – depending of the nature of the copyright object to which they pertain. The term of copyright protection is generally 50 years from fixation with some exceptions, such as in the case of sound recordings where the term may be longer depending on when the recording is published.

4.2 Trademarks

Generating and protecting a brand name or slogan – or using those of others – can lead to a number of trademark issues. For example, one needs to consider whether the logo developed by a marketing team is confusingly similar to a previously used or registered trademark in Canada. Also, one needs to consider what happens if a company does not have a formal licence agreement regarding the use of its trademark in promotional campaigns with other parties. Below is some general trademark information which explains some of the main trademark concerns.

Basic Right

The *Trademarks Act* defines a trademark as a mark used to distinguish one's goods or services from those of others. In Canada, a trademark may be a word, logo, a combination of words and logo, slogan or other distinctive identifiers (such as colour, shape, three dimensional marks,

holograms, taste, texture, scent, and sound – albeit with significant hurdles and affidavit evidence likely necessary to overcome objections concerning distinctiveness of these types of trademarks). The main purpose of a trademark is to provide the public with assurance as to the source of origin of the goods or services or that such goods and services meet a particular standard. It is also possible, however, to seek registration of “special marks”, including certification marks and official marks that are used and registered for a different purpose (*i.e.*, to certify a standard, or to protect the marks of governments, universities, crown corporations or public authorities).

Registration of a trademark is not mandatory in Canada. While rights in a trademark can be acquired through use of the trademark in the Canadian marketplace, there are significant benefits to obtaining a registration. Some of these benefits include:

- (i) exclusivity of the right to use the trademark across all of Canada in association with the goods or services covered by the registration;
- (ii) access to certain remedies that are only available to owners of registered trademarks such as trademark infringement and actions based on the depreciation of the value of goodwill;
- (iii) the basis for alerting others of your rights in the context of trademark availability searches (trademark applications and registrations are entered on the public Trademark Registry); and
- (iv) the basis for valuation of trademarks.

Trademark Registration Process

The current process to obtain a trademark registration in Canada is currently in excess of 24 months from filing, but can take longer or shorter depending on objections raised at examination. Within a single trademark application, one can apply to register a trademark in association with both goods and services. Goods and services must be classified using the Nice Classification system and international system of classification that is widely used throughout the world. It is not necessary to declare use or an intention to use a trademark at the time of filing and there is no requirement to declare or prove that a trademark has been used in order to achieve registration.

Canada is a Madrid Protocol country, which has essentially adopted an International trademark filing procedure. Canadian applicants can file an application in Canada and subsequently apply, through one application, to extend such protection to other international markets. This method can allow Canadian businesses to protect their Canadian brands abroad by utilizing one application and paying one filing fee, thereby streamlining the filing time and fees associated with individual national trademark filings. The Madrid Protocol may also be used by citizens of other Madrid countries to file into Canada by selecting Canada at the time of the international filing.

The Trademarks Office will not provide a monopoly to an owner of any confusingly identical or similar trademark, which already exists on the Trademarks Register. Further, the Trademarks Office database does not include reference to other issues that can prevent use and/or registration of a proposed trademark (*e.g.*, whether a trademark is considered generic/clearly descriptive of

the goods or services, whether a trademark is primarily merely a name or surname or is the name of the goods or services in another language, or if the mark is not inherently distinctive). As a result, a review and assessment of the availability and registrability of a proposed trademark should be undertaken as early as possible to prevent unnecessary delays, expenses or changes required to an advertising or marketing campaign and related promotional materials. As there is no requirement for a trademark to be in use at the time of registration, clearance searches should also include searches to determine if a mark is in use. Trademark registrations become vulnerable to cancellation proceedings by third parties if the marks have not been used during the three year period preceding the date of the notice.

Anti-counterfeiting measures in the *Trademarks Act* provide effective border measures and authority to customs officials to detain or seize counterfeit products with significant criminal offences and civil actions and remedies. Trademark owners may also use the recordation system for referral by customs officials of registered trademarks (similar to those in other countries). While these elements of the *Trademarks Act* provide protection to brand owners, there still remains issues with the efficient and/or effective means to deal with liability of brand owners/rights holders to pay for detention and destruction of counterfeit product, direction on the costs of detention/ destruction of counterfeit goods and efficient or effective means of dealing with the sale of online counterfeit goods.

Trademark Infringement

A registered trademark provides the owner with the exclusive right to use the trademark in association with the registered goods and/or services and to grant a

license for the use of such trademark in Canada. The *Trademarks Act* provides a registered owner with the ability to initiate actions for trademark infringement and depreciation of goodwill, to prevent the unauthorized use of such rights. Opposition proceedings initiated before the Trademarks Opposition Board can be used to prevent third parties from registering a trademark that is confusingly similar or identical to the trademark owned by an applicant or the owner of a trademark registration. However, these proceedings cannot be used to enforce the right of registered trademark owners against the use of a confusingly similar trademark by a third party. Such enforcement occurs through the Courts.

Passing Off

In the event a trademark owner does not have a registered trademark, it may still have the right to initiate a passing off action based on any prior common law (unregistered)

rights to a confusingly similar trademark in Canada by asserting that a third party is passing off its branded goods or services as those of another. In order to succeed in a passing off action, a plaintiff must demonstrate the existence of a protectable reputation in the plaintiff's a trademark in Canada at the time the defendant commenced use of the allegedly confusing mark..

4.3 Licensing

Licensing issues relating to trademarks are encompassed under Section 50 of the *Trade-marks Act*. These issues will also arise whenever one person (Licensor) who owns rights in any intellectual property (IP Rights) grants permission to another party (Licensee) to use those IP Rights in a particular fashion. Generally, all types of intellectual property can be licensed in Canada and no one statute will govern all such licensing. Rather, the general common law



governing contracts normally applies. Licences pertaining to trademarks must also comply with the quality control requirements applicable under Canada's *Trademarks Act* (as indicated below).

Further, the Licensor may grant to one or many Licensees a licence to exercise some or all of the Licensor's IP Rights. While the Licensor grants to the Licensee the right to use the Licensor's IP Rights, the Licensor must retain ownership of the IP Rights. For example, a Licensee of music for an advertisement will acquire the right to use the music in the advertisement, but the Licensor will retain ownership of the music and all IP Rights in the music.

Caution must be exercised when a trademark owner permits another to use its trademark (commonly seen in sponsorship agreements). Although the *Trademarks Act* does not require that the owner have a written licence, it is recommended that the parties have such an agreement in place and that it includes terms and conditions which define the rights licensed, the permitted uses of the trademark and the nature of the control exercised by the owner over the character or quality of the goods or services covered by the license. Further, it is essential that the owner exercises this control in a meaningful manner. It is insufficient for the owner/licensor to:

- (i) merely rely on a corporate relationship between the parties to confer control over the quality or character of the goods or services; or
- (ii) refer solely to public notice of the identity of the owner and licensee on packaging, labelling and/or advertisements.

Some of the details that should be set out in a license agreement include:

- (i) the role of the licensee in the production or distribution of goods or services;
- (ii) a requirement to provide labels or specimens for review and approval by the owner;
- (iii) reports on sales of goods or services bearing the mark or royalty payments resulting from the sale of goods or services bearing the mark;
- (iv) the right to inspect the goods and/or services at the Licensee's premises;
- (v) the specific standards which must be met by the Licensee; and
- (vi) the ability to terminate the license agreement for non-compliance.

The failure to stop unauthorized use of a trademark may result in a finding that the trademark has lost its distinctiveness and that as a result the registration is invalid. Absent a licence, the use of a trademark by another party – even if authorized – may not result in such rights accruing to the owner of the trademark. Even related parties, such as subsidiaries and affiliates should have licence agreements in place to ensure that the owner of the trademark maintains its rights in the mark.

Types of Licences

There are three primary types of licences: exclusive, sole and non-exclusive.

An exclusive licence provides the Licensee with the exclusive right to use the Licensor's IP Rights. In other

words, only the Licensee can use the licensed IP Rights and the Licensor cannot itself use the licensed IP Rights or allow any person to use the IP Rights during the term of the licence.

A sole licence prevents the Licensor from granting licences to any person other than the Licensee, but the Licensor will retain the right to use the IP Rights.

A non-exclusive licence is one that allows the Licensor to grant as many licences as the Licensor desires. None of the Licensees under a non-exclusive license agreement will have any right in the IP Rights other than the non-exclusive right to use the IP Rights – as licensed – in accordance with the terms and conditions specified in the licence (e.g., restrictions as to territory, goods and/or services and time limits).

4.4 Domain Names

Domain names, often incorporating key trademarks, are the alphanumeric addresses linked to websites on the Internet.

They consist of two main parts: the generic top-level domain (gTLD) or country-code top-level domain (ccTLD), which are the letters that appear after the "." (e.g., .com, .ca, .biz), and the second-level domain, the symbols that appear before the ".".

The Domain Name System, gTLD and ccTLD systems are managed by the Internet Corporation for Assigned Names and Numbers (ICANN). Domain name registration is administered by various approved registrars and domain names are generally issued on a first-come, first-served basis upon payment of a registration fee.

As the use of the Internet for advertising has grown, ICANN has launched numerous new gTLDs, such as .biz, .tv and .xxx. Continuing to recognize the growth of the Internet and its international nature, the domain name system is changing, including the launch of more ccTLDs and internationalized domains that incorporate different alphabets and languages. The ability to register domains in multiple languages creates a more accessible Internet and allows advertisers to target consumers in specific countries and communities. It may also entail more cost to advertisers as their need to secure more domain names as an advertising or defensive strategy increases.

In addition, ICANN has instigated a massive extension to the gTLD regime with the introduction of gTLDs that can incorporate brand and generic terms, such as .school, .apple, .golf or .google. Many advertisers have seen this expansion to the domain system as a great opportunity to draw consumers to specific websites in a way not previously possible and to create communities around their brands or areas of interest. Applicants for gTLDs must also act as registrars and may choose to open the gTLD to others and allow registration of second-level domains or keep the gTLD closed and use it only for their own marketing and communication purposes. With expansions come new legal issues, particularly in the area of trademark infringement. With the large number of potential gTLDs, second-level domains, potential cyber squatters and the rights protection mechanisms of multiple new registrars, companies will need to be more proactive with their Internet advertising strategies and domain name portfolio management to maximize the benefits of these opportunities and minimize their legal risks.

Canada's Top-Level Domain

The ccTLD in Canada is .ca. Domains at the .ca ccTLD may only be registered through registrars accredited by the Canadian Internet Registration Authority (CIRA). They must be no shorter than two characters, no longer than 63 characters, may be a combination of numbers and letters, and may include a hyphen. There are certain words that cannot be registered as domain names with the .ca ccTLD, including the names of municipalities, provinces and territories of Canada (unless specific permission is sought and certain requirements met). The following words cannot be registered as .ca domains: village, hamlet, town, city and ville.

To hold and maintain a .ca domain name, the registrant must be either be a Canadian citizen; permanent resident; legal representative of either a Canadian citizen or a permanent resident; Canadian or provincially-registered or established corporation, trust, partnership, association, trade union, political party; educational institution, hospital, library, archive, museum located in Canada; Aboriginal group or Indian band; a Canadian, provincial or territorial government; or the Queen.

If a registrant does not satisfy the Canadian residency, citizenship or presence requirements but are the owners of a trademark registered in Canada pursuant to the *Trademarks Act*; or persons intended to be protected by subsection 9(1) of the *Trademarks Act*, at whose request the Registrar of Trademarks has published a notice of adoption of any badge, crest, emblem, official mark or other mark pursuant to subsection 9 (an "Official Mark"), they may seek to register a .ca domain name consisting of or including the exact word component of that registered trademark or Official Mark.

Internationalized Domains in Canada

An internationalized domain name (IDN) is a second-level domain name (the words left of the dot or web address represented by local language characters outside of the American Standard Code for Information Interchange, A-Z alphabet, numbers [0-9] and hyphens [-]). IDNs can include characters from many languages and may contain accents and symbols.

There has been a trend internationally, both at the ICANN level and with various country code top-level domain authorities (such as .de), to expand the scope of second level domains to better reflect the wide variety of languages used by the international community that uses the Internet.

In Canada, CIRA allows the registration of IDNs in the French language on the .ca top-level domain. The following characters may be registered: e, é, è, a, á, â, o, oe, u, ú, ü, c, ç, i, î and y. As there may be many variants of a single domain name and to address concerns from trademark – rights holders and current domain registrants – the registrant of a particular domain name will have the exclusive right to register all of the variants of that domain name.

From an advertising and marketing perspective, an IDN can be a powerful tool to communicate a message to a particular population and to recognize the two official languages of Canada, something that can go a long way to garnering consumer support for a product or brand in a multilingual community.

4.5 Comparative Advertising

Any organization thinking of adopting a marketing strategy that compares its products or services to those of a competitor should recognize that the strategy is not without legal risk. Two common pitfalls include making claims that may be misleading (misleading advertising is discussed above in section 1, Misleading Advertising and Deceptive Marketing Practices) or inadvertently contravening the competitor's intellectual property rights.

For instance, when an organization makes a claim that incorporates a competitor's trademark, it is important to ensure that the use of the competitor's trademark does not contravene Canadian trademark laws. Using a competitor's registered or unregistered trademark on products, packaging, or advertising and marketing materials in a way that leads consumers to believe that an organization's products or services are associated with or endorsed by the trademark owner may constitute trademark infringement or passing off – both of which are prohibited by Canada's *Trademarks Act*. More often, comparative advertising does not confuse consumers in this way because it highlights the differences or similarities between competing products or services, and consumers would understand that there is no association with or endorsement by the competing organization.

Even so, if the competitor's trademark is registered in Canada, displaying that trademark on packaging or in advertisements may be actionable as depreciation of goodwill, contrary to the *Trademarks Act*. In essence,

non-confusing "use" of a registered trademark without authorization is actionable if such use "depreciates" the value of the goodwill in the registered mark.

It is also important to be aware of potential copyright claims and to consider whether the content of the comparative advertisement might infringe a competitor's copyright in a "work". The common example is when a competitor's logo is displayed in the advertisement. Logos often qualify as an artistic work in which copyright subsists and the exclusive rights granted to a copyright owner – including reproduction rights – arise automatically without the need for a formal registration. Copying a logo or a substantial part of it without the copyright owner's authorization may, therefore, contravene Canada's *Copyright Act*.

Ultimately, an organization must balance the need or desire to display a competitor's trademark or logo in marketing materials against the risk of objection and the risk of exposure to liability. Risk minimization strategies may include avoiding the reproduction of a competitor's logo and avoiding "use" of a competitor's trademark where possible. For example, if the competitor's organization name is not registered as a trademark, displaying the business name instead of a registered trademark may reduce the risk of contravening the *Trademarks Act*. Where a competitor's trademark is registered in relation to goods only, displaying the trademark in an advertisement that does not appear near the point of sale is another strategy that may reduce the risk of contravening the *Trademarks Act*.



4.6 Canadian Images

Some Canadian images commonly used in advertising and marketing materials include the Canadian flag and images found on Canadian bank notes and coins. Due to intellectual property protection afforded to these images, they need to be used with caution.

Canadian Flag

The Canadian flag is protected under the *Trademarks Act*. The use of the Canadian flag for a commercial purpose requires the consent of the Department of Canadian Heritage (Department). Consent needs to be obtained even if, for example, one simply uses the Canadian flag symbol to distinguish between a Canadian website and a foreign website.

The Department requires a sketch of the intended use to be submitted with the request.

Notwithstanding consent from the Department, the Canadian flag image should still be used with care. For example, when it is placed on a product, it could imply a “Made in Canada” claim. If the use of the Canadian flag implies that product is made in Canada, the conditions for making a “Made in Canada” claim must be met.

Maple Leaf

The Department permits the use of a design or a trademark incorporating the maple leaf that forms part of the Canadian flag under certain conditions:

(i) the use of the design or trademark conforms to good taste,

- (ii) the applicant for registration of such design or trademark disclaims, in its applications, the right to the exclusive use of the maple leaf; and
- (iii) the owner of such design or trademark will not attempt to prevent any person from using the maple leaf.

As indicated above, the Department requires that the use of a maple leaf on advertising and marketing materials must conform to good taste. Given this subjective condition, the Department recommends people take a cautious approach by submitting a sketch of the intended use for approval.

Notwithstanding approval from the Department, the Maple Leaf image should be used with care when placed on a product, as it could imply a “Made in Canada” claim. If the use of the Maple Leaf implies that product is made in Canada, the conditions for making a “Made in Canada” claim must be met.

Canadian Bank Notes

The Bank of Canada (Bank) is the copyright owner of the images found on Canadian bank notes. In addition to a potential copyright claim, it is an offence under the *Criminal Code* (Canada) to reproduce the likeness of a current bank note in circulation.

One can avoid being convicted under the *Criminal Code* if the likeness is

- (i) printed,
- (ii) less than $\frac{3}{4}$ or greater than $1\frac{1}{2}$ times the length or width of the bank note; and

- (iii) in black and white and/or only one-sided.

The Bank’s *Policy on the Reproduction of Bank Note Images* states that the Bank’s written consent must be obtained before a bank note image is reproduced to avoid the risk of potential criminal and civil consequences. The application procedure to obtain approval includes, among other things, submitting:

- (i) a statement of the purpose for copying a bank note image;
- (ii) a description of the proposed placement and distribution of the material featuring the bank note image; and
- (iii) a PDF of the proposed reproduction.

According to the aforementioned Policy, the Bank ordinarily will consent to such reproductions if there is no risk that the reproduced image could be mistaken for a genuine bank note or misused by counterfeiters, and if the proposed use does not tarnish the dignity and importance of currency to Canadians.

When granting consent, the Bank ordinarily will impose conditions on the reproduction of bank note images. Examples of possible conditions include that the reproduction be in black and white, that it be coloured in a manner that is distinctly different from the main colours used on any current bank note in circulation, and/or that it be shown on a slant and not flat to the camera or naked eye.

The Policy states that the Bank's consent to use bank note images for film or video purposes is not necessary provided that the images are intended to show a general indication of currency and there is no danger the images could be misused. If there is any doubt as to whether consent is needed, it is safer to seek consent.

Canadian Coins

The Royal Canadian Mint (Mint) is the copyright owner of the images on Canadian coins. To use an image of a Canadian coin, one must apply to the Mint for approval. The application procedure includes submitting a visual layout of how the coin images will be used even if some visual and copy elements are not final. In some cases an administration fee and royalties may be payable to the Mint. If consent is granted, the applicant will receive a letter outlining the terms and conditions of use of the coin images.



5

Contests, Promotions and Sponsorship

Even in a single marketing campaign, different laws and regulations may apply depending on multiple factors, including the marketing strategy or strategies adopted and the product, service or industry concerned. Each specific marketing activity should be reviewed on a case-by-case basis to determine the applicable legal issues and requirements. In this Section, we have provided a brief summary of the legal framework surrounding the offer of promotional contests, gift cards, loyalty programs, coupons, rebates and sponsorships in Canada.

5.1 Promotional Contests

In Canada, promotional contests are regulated at both the federal and provincial level. The *Criminal Code* (Canada) and the *Competition Act* (Canada) are the primary contest-related laws of general application in Canada. Special rules also apply where contests are open to the residents of the Province of Québec. In addition, certain industries must consider specific laws relevant to them (e.g., securities, tobacco and alcohol).

Criminal Code

The *Criminal Code* generally prohibits awarding a prize as part of a game of chance. It also prohibits awarding a prize as part of a game of chance or a game of mixed chance and skill, where the contestant needs to pay money or other valuable consideration. Therefore, in most circumstances, a contest offered in Canada should be designed so that entrants can participate free of charge and so that the contest includes both an element of chance and an element of skill. In light of the foregoing, contests in Canada often provide a “no purchase necessary” option to enter the contest and require a potential winner to correctly answer a skill-testing question before being awarded a prize. To ensure the question has a sufficient element of skill, a multi-step mathematical question typically is used.

Competition Act

The *Competition Act* imposes requirements relating to:

- (i) timely, adequate and fair disclosure;
- (ii) the distribution of prizes; and
- (iii) the selection of entrants,

for any contest in which prizes are awarded in an attempt to promote sales or for any other “business interest”.

The disclosure must be made in a reasonably conspicuous manner before an entry is made. The disclosure must include the number of prizes, their approximate value, any regional allocation of prizes and the chances of winning. The distribution of prizes must not be unduly delayed. In addition, the selection of entrants must be based on skill or by a genuinely random event.

The Competition Bureau has issued enforcement guidelines on promotional contests in order to assist contest sponsors and administrators with the interpretation and application of the contest requirements of both the *Criminal Code* and the *Competition Act*.



MISLEADING REPRESENTATIONS

"Canadians should be able to trust that the prices advertised are the ones they will pay. The Bureau will remain vigilant and will not tolerate misleading representations."

Commissioner of Competition Bureau
Matthew Boswell

Québec Legislation

Some contests exclude residents of the Province of Québec from entering. It is likely that this exclusion occurs because contest sponsors do not want to comply with applicable statutory requirements enforced by Québec's contest authority, known as the *Régie des alcools, des courses et des jeux*.

These requirements include:

- (i) the filing of a notice, contest rules, contest-related advertisements and/or winners' report;
- (ii) content requirements applicable to contest rules and advertisements;
- (iii) the payment of duties;
- (iv) posting of security; and
- (v) keeping certain records.

Depending on the total value of the prizes, some of these requirements may not need to be met.

In addition, the *Charter of the French Language* (Québec) requires all documentation related to the contest to be available in French to the extent the contest is offered to residents of Québec (see Section 9 below, Language Considerations, for information regarding Québec's *Charter of the French Language*).

Intellectual Property Issues

Contests may raise intellectual property issues, notably because of the use of trademarks and copyrighted material in contest-related materials. As such, it is prudent

to conduct a quick search of trademark and copyright databases, notably to make sure that the name of the contest is not the same or confusingly similar to that of a third party (trademarks and copyright are discussed above in Section 4, Intellectual Property).

Where a contest involves the creation of a musical, artistic, dramatic or literary work (e.g., a songwriting contest), careful consideration needs to be given to deal with copyright issues, including the waiver of moral rights (discussed in Section 4.1, Copyright).

Other Potential Legal Issues

As most contest sponsors collect personal information in contest entries and use such information for the administration of their contests, they must comply with applicable privacy legislation. The privacy analysis may go beyond reviewing the entry ballot, since contest sponsors often tie a marketing campaign to their contest; for instance, by asking entrants to refer a friend.

In addition, depending on the nature and administration of the contest, one may need to consider other issues, such as the participation of minors, ambush marketing (discussed in Section 5.5, Sponsorship) and whether there are regulatory rules (e.g., contests related to liquor) or rules of other third parties (e.g., a contest administered through Facebook or Twitter). These examples are not exhaustive of the potential legal issues that may arise.



5.2 Gift Cards

Gift cards are regulated in all Canadian provinces. Consistent in the legislation across Canada is that gift cards generally cannot have expiry dates and suppliers must disclose all terms and conditions that they impose in connection with their card. Some provinces have very specific rules – for example, in Québec, a merchant must refund the balance of \$5 or less remaining on a gift card.

Exceptions to Expiry Date Prohibition

Some provinces provide exceptions to the “expiry date” prohibition. For example, in certain provinces, one may be able to issue a gift card with an expiry date if:

- (i) the card will be applied towards a specific good or service;
- (ii) the card is sold at a discount; or
- (iii) the holder of the card did not provide anything of value in exchange for the card.

Therefore, it is important to check the exceptions, if any, found in the applicable legislation.

Fees

Whether a supplier may charge a fee in relation to a gift card varies across the provinces. Where fees are permitted, they generally include fees payable for the purpose of activating the card, replacing a lost or stolen card or customizing a card.

Multiple Seller Gift Cards

Some provinces have certain rules pertaining to gift cards that may be used at more than one unaffiliated seller, such as a shopping mall gift card. Such rules may, in some cases, permit a supplier to charge a dormancy fee under certain conditions and provided that certain information is indicated on the card.

Other Potential Legal Issues

Gift cards may raise issues concerning false and misleading advertising under the *Competition Act*, restricting the gift card from being used towards the purchase of certain products (such as tobacco) and the issuance of official donation receipts by registered charities in respect of the donation of gift cards.

5.3 Loyalty Programs

The legislation governing loyalty programs is varied and includes the *Competition Act*, privacy legislation and provincial consumer protection legislation.

There are currently only two provinces in Canada, which have adopted specific statutory provisions to address the offer of loyalty programs (or reward programs) to consumers in their consumer protection legislation: Ontario and Québec. These provisions generally prohibit the expiry of reward points, except under limited prescribed circumstances, and impose both disclosure requirements and restrictions on the modification of program terms and conditions. Many argue that provisions of the provincial unclaimed

property legislation may also apply to loyalty programs. Additional legislation may also apply depending on the industry. Notably, the legislation applicable to a number of specific industries (such as the tobacco, alcohol and pharmaceutical industries) prohibits the types of gifts and/or other benefits that can be offered to consumers and whether program members can accumulate points or miles through the purchase of certain products and/or services. Therefore, businesses that offer loyalty programs must be mindful to the restrictions set out in the legislation when establishing and running their programs.

5.4 Coupons and Rebates

A coupon is a discount or promotion provided at the time of purchase, whereas a rebate is a reimbursement of a portion of the purchase price that may be provided to a consumer at the time of purchase of a product or service (e.g., instant rebate) or following the purchase (e.g., mail-in rebate). Both coupons and rebates are subject to the laws concerning misleading advertising and deceptive marketing (see Section 1, Misleading Advertising and Deceptive Marketing Practices).

In addition, the consumer protection legislation in various provinces may also contain provisions that are relevant to coupons and rebates. For instance, in Québec, the *Consumer Protection Act* (Québec) provides that a merchant cannot put greater emphasis, in an advertisement, on a premium (such as a rebate or other benefit offered or given at the time of the sale of goods or the performance of a service) than on the goods or services offered.

The *Canadian Code of Advertising Standards* is a helpful guide when considering the text included on coupons and rebate offers, such as the clauses dealing with accuracy and clarity and price claims (see Section 1.3, Other Considerations, for information on the *Canadian Code of Advertising Standards*).

Coupons

A coupon, whether it is in paper or electronic form, must include (where applicable) the amount of the discount, any requirements to be met in order for the offer to be valid (e.g., the purchase of multiple items or specific brands) and the expiry date, if any. If the coupon applies to a product, of which there is only a limited number available such information should also be included on the coupon.

Rebates

Rebate offers should explicitly state the actual price before and after the rebate, the currency in which the rebate will be provided and contact information where consumers may direct inquiries. In the case of a mail-in rebate, the rebate offer should also set out the process for obtaining the rebate, including where the request for rebate should be sent, an approximate timeframe in which the rebate will be processed and what information or items must be included with the request in order for the rebate to be processed (e.g., proof of purchase, UPC code).

It is imperative that the rebate actually be available. Some retailers and manufacturers assume that the majority of consumers will not take advantage of rebate offers and may not be financially prepared to provide a rebate to all those who apply. While it may be the case that a certain

percentage of consumers who purchase the product to which the rebate applies will not seek a rebate, the retailer or manufacturer – or their third party rebate provider – must be prepared to provide the rebate to all consumers who apply in compliance with the requirements set out in the rebate materials.

5.5 Sponsorship

Sponsorship of arts, cultural, community or sporting events is a popular method of advertising and can be used to great effect to associate a brand with a particular cause or event and to reach specified groups of consumers. Sponsorship, for many organizations, also provides an opportunity to give back to the community or to support a particular cause.

Sponsorship Agreements

Depending on the relationship between the parties, the value and term of the sponsorship, the sponsorship agreement can be very complex. Typically, sponsorship agreements include provisions dealing with:

- (i) the value of the sponsorship;
- (ii) the trademarks, brands, and copyright materials that may be used in association with the sponsored event or activity, and the grant of license to use such intellectual property;
- (iii) the specifics of the event or events;
- (iv) any exclusivity provided (this may be territorial in nature or may exclude sponsorship by competitors of the sponsor or who sell goods or services that are similar);



- (v) the expectation of the sponsor as it relates to exposure, advertising or display of its brand by the sponsored party;
- (vi) the term of the sponsorship;
- (vii) how the sponsored party will protect the sponsor from ambush marketing; and
- (viii) restrictions placed by the sponsor to protect the sponsor's brand reputation when used by the sponsored party.

Due to the complexity of sponsorship agreements, it is advisable to have them reviewed and or negotiated by a professional with experience in sponsorship, advertising and intellectual property licensing.

General Considerations

In addition to the terms of the sponsorship agreement, misleading advertising and deceptive marketing laws may also apply to the sponsorship relationship and must be considered along with industry specific legislation, such as the federal *Tobacco Act* (Canada), provincial consumer protection legislation, provincial liquor and gaming legislation and the *Canadian Code of Advertising Standards*. This is further discussed in Section 1, Misleading Advertising and Deceptive Marketing Practices, and more specifically, Section 1.2, Consumer Protection Legislation, and Section 1.3, Other Considerations, for information on the *Canadian Code of Advertising Standards*.

Prior to entering into a sponsorship agreement or when considering whether a sponsorship is viable, it is beneficial to consider any internal policies of the organization

considered for the sponsorship. Many organizations and government departments have policies governing their acceptance of sponsorships. In addition, a thorough understanding of the reputation of the party or event being considered for sponsorship is necessary to ensure suitability and to address any potential issues.

Ambush Marketing

Ambush marketing can be generally described as a situation where advertisers associate themselves with an event or organization without becoming an official sponsor. It can be direct – creating a very clear association between the advertised product or organization and the event – or more subtle in nature such as alluding to support of the event or its participants. An example of ambush marketing is when a large sporting event is sponsored by one beverage manufacturer and its major competitor hands out free apparel bearing the competitor's trademark to all those attending the event to wear, ensuring that the competing brand is widely seen at the event, including by television audiences, without having paid a sponsorship fee.

Official sponsors and organizations hosting and organizing major events are very sensitive to ambush marketing because it can decrease the value of sponsorships and the willingness of sponsors to pay for official sponsorships. When considering advertisements related to a major event that is outside a sponsorship relationship, it is worthwhile to have such proposed advertisements reviewed to ensure that they are not likely to give rise a claim of ambush marketing, trademark infringement or passing off. (Trademark Infringement and Passing Off are discussed in Section 4.2, Trademarks).



6

Packaging and Labelling

The primary federal legislation regulating the packaging and labelling of prepackaged consumer goods in Canada is the *Consumer Packaging and Labelling Act (Canada) (CPLA)*. The CPLA covers consumer products, but excludes “food,” “devices” and “drugs” as defined under the *Food and Drugs Act (Canada)*.

The CPLA applies to “dealers” including retailers, manufacturers, processors and producers of consumer products, or any person who is engaged in the business of importing, packing or selling a consumer product. Notably, the CPLA prohibits dealers from selling, advertising or importing into Canada any prepackaged product unless a label containing certain information is attached to the product and it does not contain any false or misleading representations.

The administration and enforcement of the CPLA is the responsibility of the Competition Bureau, which issues helpful guidance to dealers on a variety of relevant subjects.

6.1 Mandatory Label Requirements for Prepackaged Consumer Products

Generally, the label of a prepackaged consumer product sold in Canada must set out the following information:

- (i) the common name of the product;
- (ii) the net quantity of the product; and
- (iii) the dealer’s name and principal place of business or manufacture.

The first two items above must be set out in both English and French, whereas the third item above can be set out in either language, subject to the requirements pertaining to French translation set out in the section below.

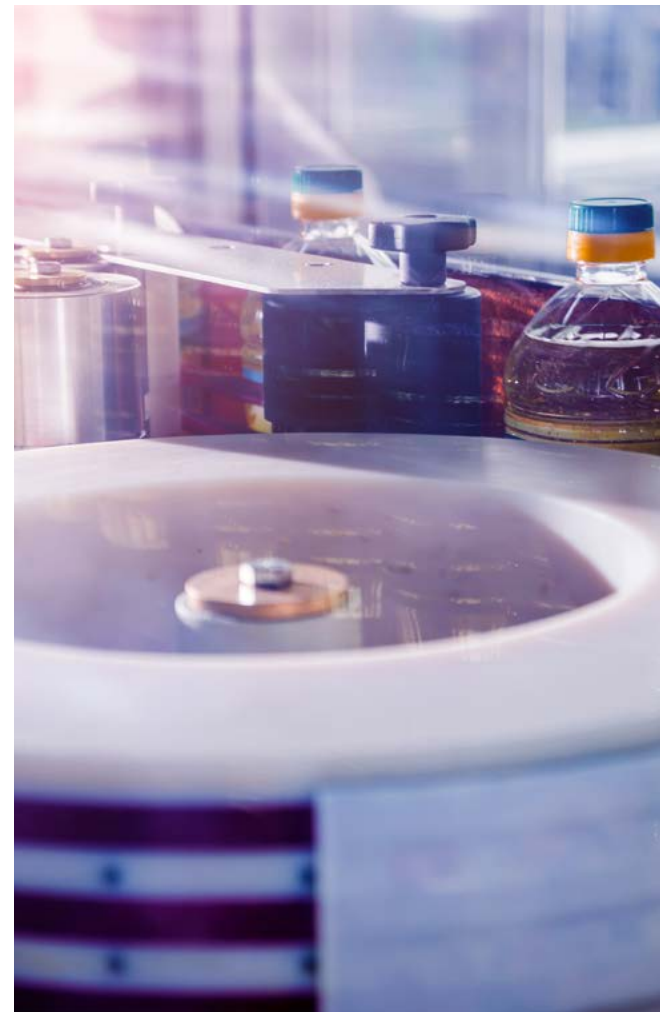
Additional information may be required by the CPLA or its regulations, for instance in the case of imported goods. Such information must also be set out in both English and French (e.g., a geographic origin claim on a label).

Regulations prescribe the manner in which information must be set out on a label, including the location of the information and the height size of the characters.

6.2 French Language Requirements

If one intends to distribute a product in the Province of Québec, the Québec’s *Charter of the French Language* requires that every inscription on the product, container, wrapping, or document or object supplied with the product be in French. The French inscription may be accompanied by an inscription in another language (such as English), but no inscription in that language may be given greater prominence than that in French. The *Charter of the French Language* also provides specific requirements in respect of specific products, such as toys and games, computer software, cultural and educational products.

	% Daily Value
Calories / Calories	120
Fat / Lipides	7 g
Saturated / saturés	4.5 g
+ Trans / trans	0 g
Cholesterol / Cholestérol	5 mg
Sodium / Sodium	20 mg
Carbohydrate / Glucides	13 g
Fibre / Fibres	1 g
Sugars / Sucres	10 g
Protein / Protéines	1 g
Vitamin A / Vitamine A	
Vitamin C / Vitamine C	



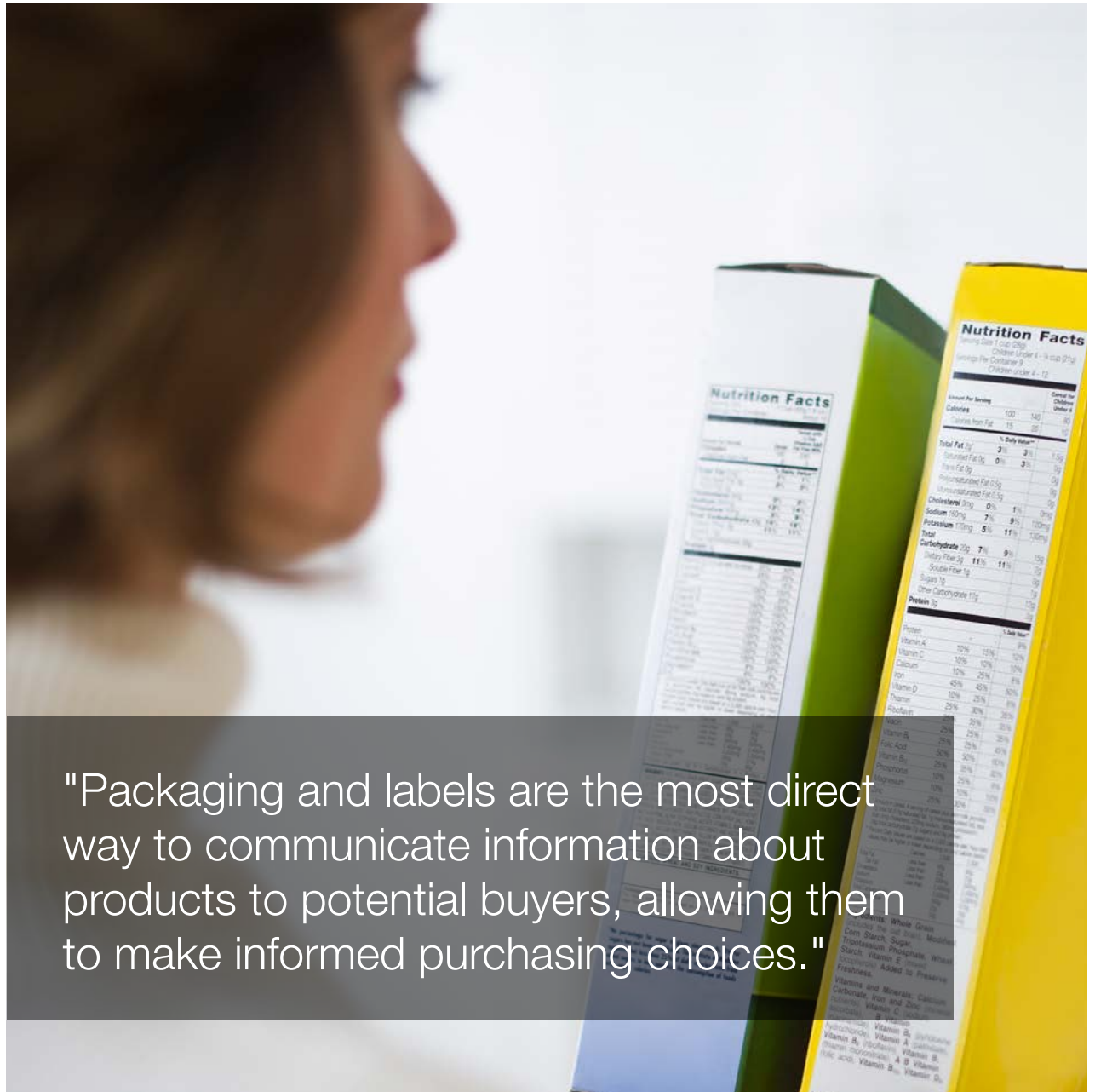
An inscription on a product may be exclusively in a language other than French (e.g., in English only) in a number of prescribed circumstances. For example, in the case of:

- (i) a product that is from outside Québec, that is intended for incorporation into a finished product or for use in a manufacturing, processing or repair operation and is not offered in Québec for retail sale;
- (ii) a product that is from outside Québec and that has an inscription that is engraved, baked or inlaid in the product itself, riveted or welded to it or embossed on it, in a permanent manner, provided that it does not concern safety; and
- (iii) a trademark that is registered in Canada, unless a French version of such trademark has also been registered.

6.3 Other Relevant Laws

There are also packaging and labelling requirements that apply to specific categories of goods. For example – at the federal level – the *Food and Drugs Act* (Canada) for food, drugs, medical devices, natural health products and cosmetics; the *Canada Consumer Product Safety Act* (Canada) for a broad range of consumer products, including carpets, cribs, strollers, toys and lighters; the *Textile Labelling Act* (Canada) for textile fibre products; and the *Tobacco Act* (Canada) for tobacco products. There are also a number of provincial statutory requirements that apply to specific categories of goods (see Section 10, Regulated Products).

Other laws to keep in mind in terms of packaging and labelling include the *Competition Act* (Canada) with respect to misleading advertising claims and deceptive marketing practices (e.g., making “Product of Canada” and “Made in Canada” representations, see Section 1, Misleading Advertising and Deceptive Marketing Practices) and the *Marking of Imported Goods Regulations* with respect to indicating the country of origin of goods.



"Packaging and labels are the most direct way to communicate information about products to potential buyers, allowing them to make informed purchasing choices."

7

Telemarketing

The *Unsolicited Telecommunications Rules* (UTR) and the *Competition Act* (Canada) primarily govern telemarketing to Canadians. The UTR defines the term “telemarketing” as “the use of telecommunications facilities to make unsolicited telecommunications for the purpose of solicitation”.

7.1 Unsolicited Telecommunications Rules

The UTR, which are enforced by the Canadian Radio-television and Telecommunications Commission (CRTC), govern the making of unsolicited calls and faxes to Canadian consumers for the purpose of solicitation. One part of the UTR pertains to the National Do Not Call List (DNCL), which is established pursuant to the *Telecommunications Act* (Canada). Generally, the UTR prohibits a telemarketer from making a telemarketing telecommunication to a consumer’s number that is on the National DNCL. The telemarketer (or, if applicable, the telemarketer’s client) must be a registered subscriber of the National DNCL and have paid all applicable fees to the National DNCL operator. The version of the DNCL, which is used, must not be more than 31 days prior to the date that any telemarketing telecommunication is made.

Although a particular situation may be exempt from the National DNCL rules (e.g., a call made for the sole purpose of collecting information for a survey of members of the public), “Part III: Telemarketing Rules” of the UTR may still apply. Among other things, these rules mandate when telemarketing telecommunications may be made and the information to be provided to the person receiving the telecommunication.

The UTR also set out rules pertaining to the use of the National DNCL, maintenance of internal do not call lists, use of automatic dialing-announcing devices and random dialing, acceptable forms of express consent and record keeping obligations.

7.2 Competition Act

The *Competition Act* has provisions requiring that certain disclosures be made by persons engaged in telemarketing, such as identifying the person for whom the call is made at the beginning of the call. It also has provisions prohibiting certain acts, which are considered deceptive telemarketing, such as making a representation that is false or misleading in a material respect.

7.3 Other Considerations

Other legal telemarketing-related aspects to keep in mind include the telemarketers licensing requirements in British Columbia and privacy and consumer protection legislation.



In 2019, the Canadian Anti-Fraud Centre received more than **20,000** reports of fraud involving more than **\$43M** in losses.

One of the largest cyberscams in Canadian history
At least **60,000** Canadians complained about being targeted by the same phone scam between 2014 and 2019. More than **\$10M** was stolen in that time period.

8

Advertising To Children

At the time of publication, there is no Canadian federal legislation in place that specifically prohibits or restricts commercial advertising or promotions directed at children. Québec is currently the only Canadian province to prohibit advertising directed at children.

8.1 Québec Legislation

The *Consumer Protection Act* (Québec) prohibits commercial advertising directed at persons under 13 years of age (children), subject to a number of exceptions. To determine whether an advertisement is directed at children, the *Consumer Protection Act* provides that one must take into account the context of its presentation, and in particular:

- (i) the nature and intended purpose of the goods advertised;
- (ii) the manner of presenting such advertisement; and
- (iii) the time and place it is shown.

The *Regulation respecting the Application of the Consumer Protection Act* provides that an advertisement directed at children is exempt from the prohibition under the following conditions:

- (i) it must appear in a magazine or insert directed at children;
- (ii) the magazine or insert must be for sale or inserted in a publication which is for sale;
- (iii) the magazine or insert must be published at intervals of not more than three months; and
- (iv) the advertisement must meet the requirements outlined below.

For the above-mentioned purposes, an advertisement directed at children, which is permitted pursuant to the Regulation, may not, among other things:

- (i) directly incite a child to buy or to urge another person – such as the child’s parent – to buy goods or services or to seek information about it;
- (ii) advertise goods or services that, because of their nature, quality or ordinary use, should not be used by children, such as a drug or a vitamin;
- (iii) portray a person acting in an imprudent manner;
- (iv) portray a person or character known to children to promote goods or services (as opposed to a character created expressly to advertise goods or services if it is used for advertising alone), except in certain limited circumstances;
- (v) use an animated cartoon process, except to advertise a cartoon show directed at children;
- (vi) use a comic strip, except to advertise a comic book directed at children; or
- (vii) suggest that owning or using a product will develop in a child a physical, social or psychological advantage over other children of his age, or that being without the product will have the opposite effect.

The Québec consumer protection office (known as the *Office de la protection du consommateur*) has issued useful guidance on the aforementioned prohibition in order to assist merchants and advertisers.



“Canada is acknowledged for its long-held exemplary self-regulatory practices as well as its proactive approach to educating children about media literacy and healthy lifestyles.”

Advertising to Children in Canada

8.2 Draft Federal Legislation

In September 2016, Bill S-228 was introduced to amend provisions of the *Food and Drugs Act* (Canada) to restrict the advertising of foods that meet certain nutrient criteria (notably foods that contribute to excess sodium, sugars and/or saturated fat in one's diet) to children under 13 years of age. Despite being extensively debated and studied, and having the seeming support of both the House of Commons and the Senate, Bill S-228 died on the Order Paper in June 2019 further to considerable industry lobbying.

8.3 Self-Regulatory or Industry Codes

Note that the advertising industry (including advertisers, advertising agencies and media organizations) has developed specific self-regulatory codes and guidelines to address specific advertising issues and concerns, including advertising to children. While compliance with the above-mentioned codes are voluntary, it is important to note that an advertiser's failure to comply with the applicable code may result in expulsion from a member organization or negative publicity for an advertiser, including public announcements that an advertiser is in breach of a particular code or of the advertiser's expulsion.

The *Canadian Code of Advertising Standards* issued by Ad Standards requires advertising that is directed to children not to exploit their credulity, lack of experience or their sense of loyalty. Moreover, the advertising must not present information or illustrations that might result in their physical, emotional or moral harm. Finally, products that are prohibited from sale to children (e.g., drugs (including vitamins), except fluoride toothpastes) must not be advertised in such a way as to appeal particularly to children and people featured in advertisements for such products must be – and clearly seen to be – adults.

The Ad Standards has also issued and administers the *Broadcast Code for Advertising to Children* for advertising in the broadcast media that is directed to children under 12 years of age. Broadcasters must comply with the Code and must obtain preclearance from the Ad Standards Children's Advertising Section before any paid commercial messages are aired.

In addition, special codes, standards, rules and guidelines may also apply for certain industries (such as in the motor vehicle, tobacco, food, drug and alcohol industries) or as a condition of membership to an association (such as the Canadian Marketing Association).



Nearly 1 in 3
Canadian children is overweight or obese.
Overweight children are more likely to
develop health problems later in life.

9

Language Considerations

The *Official Languages Act (Canada)* establishes English and French as Canada's two official languages and ensures equality of status in their use by all federal institutions (including federally regulated businesses, such as banks, airports and airlines). Both federal and provincial legislation imposes language requirements on private-sector businesses. For instance, at the federal level, Canada's *Consumer Packaging and Labelling Act (Canada)* requires that certain information set out on the labels and packaging of consumer products sold in Canada to be indicated in both English and French, regardless of where the products are distributed within the country.

9.1 Québec Requirements

Certain additional requirements must be taken into account when doing business in Québec. The *Charter of the French Language (Québec)* proclaims French as the official language of Québec.

Inscriptions on Products

Regarding most products sold on the Québec market – including imported goods – all inscriptions on the product, its container, its wrapping or on a document or object supplied with it (such as directions for use and warranty certificates) must be printed in French, subject to limited exceptions (see French Language Requirements in Section 6.2 (Packaging and Labelling) for further discussion).

Commercial Publications

All catalogues, brochures, folders and other similar commercial publications distributed in Québec must be offered in French. A non-French version of such publications may also be distributed, provided that the French version is the same as the non-French version and that it is available under no less favourable conditions of accessibility and quality as the non-French version. Multilingual versions are

also permitted, provided that the French text is displayed at least as prominently as the text in another language. A number of limited exceptions to the above rule also exist.

It is the position of Québec's French language authority (known as the *Office québécois de la langue française*) that websites are governed by the same rules as other forms of commercial publications. Thus, websites of businesses with establishments in Québec, selling products or offering services in Québec, must be in French. Multilingual versions of the websites are also permitted, provided the French version of the websites contain all of the information otherwise found on other versions.

Public Signs and Commercial Advertising

Public signs and commercial advertising must also be in French or in both French and another language, subject to limited exceptions, provided that French is markedly prominent. Note that the Charter sets out conditions for marked predominance on signs and advertising.

Businesses operating in Québec must also have a name in French. Whether or not the French name must be used and the emphasis put thereon will depend on the medium used.

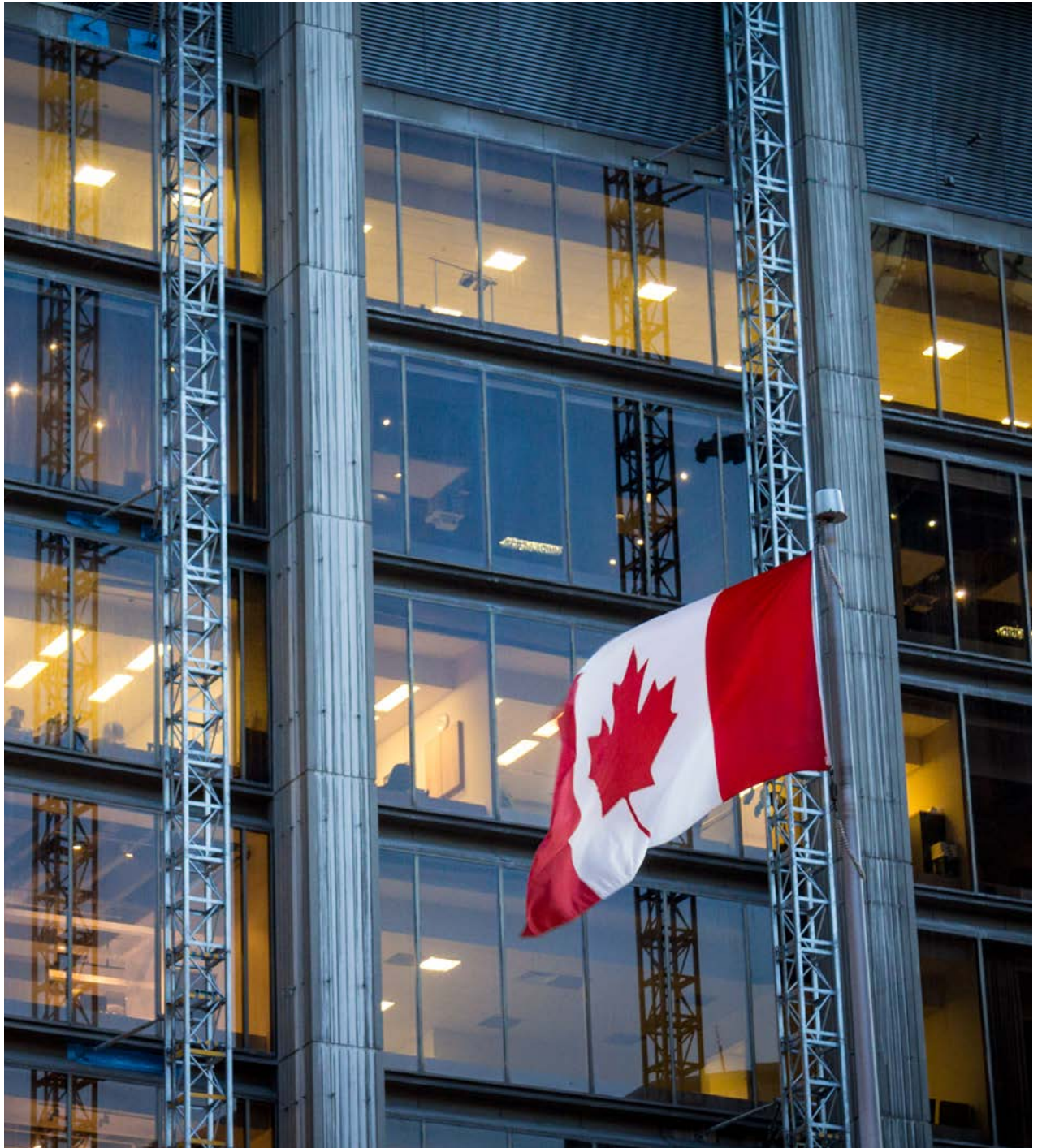


In 2019, the Federal Court ordered the Senate to pay a Montreal-area man **\$1,500** in compensation after he complained that his language rights were violated by the drinking fountains with English-language push-button labels he encountered on Parliament Hill.

Non-French trademarks are permissible in Québec, whether on product labelling and packaging, in commercial publications and/or on public signs and commercial advertising, provided certain requirements have been met. A business can use a non-French trademark to the extent that:

- (i) the non-French trademark is registered in Canada; and
- (ii) no French version of such trademark is registered in Canada.

There are special restrictions and requirements applicable to the use of a non-French trademark on outside public signs.



10

Regulated Products

10.1 Health Products

Drugs and natural health products are regulated under the *Food and Drugs Act* (Canada) and its regulations, which are administered and enforced by Health Canada. The *Food and Drugs Act* and its regulations include specific requirements related to the sale, importation, packaging and labelling, and advertising of drugs and natural health products (including vitamins and minerals, homeopathic medicines, traditional medicines and probiotics).

In addition to licensing requirements, manufacturers of drugs and natural health products must comply with packaging and labelling requirements, which may vary depending on the category of health product concerned (e.g., prescription drugs, non-prescriptions drugs and natural health products).

The advertising of prescription drugs is greatly restricted, whereas the advertising of non-prescription drugs and natural health products is subject to lesser restrictions. Notably, the latter two categories of health products are covered by the same Health Canada guidance in respect of advertising: the *Consumer Advertising Guidelines for Marketed Health Products*. These guidelines address concerns regarding therapeutic claims and non-therapeutic claims, including comparative claims. Ad Standards is one of the entities recognized by Health Canada which offers advertising pre-clearance services to advertisers of non-prescription drugs and natural health products. It is worthwhile to note that the Pharmaceutical Advertising Advisory Board (PAAB) offers advertising pre-clearance services for advertisements of health products to health care professionals.

10.2 Food

The safety, importation, exportation, and labelling and packaging of food products are regulated by a number of federal and provincial laws and regulations, including the *Food and Drugs Act*, the *Safe Food for Canadians Act* (Canada) and their respective regulations. Statutory requirements include licensing requirements, the imposition of food safety standards, the regulation of organic claims, and the mandatory disclosure of nutrients and allergens. The federal laws and regulations are administered and enforced by the Canadian Food Inspection Agency (CFIA), which has issued helpful tools and guidance to stakeholders that aim to facilitate compliance with the latter's legal obligations and to ensure food safety.

10.3 Alcohol

Both federal and provincial laws and regulations impose extensive restrictions on the production, distribution, labelling and advertising of alcoholic beverages. The *Food and Drugs Act* regulates labelling of alcoholic beverages at the federal level. In addition, each province and territory imposes its own specific laws and regulations to regulate the production, distribution and advertising of alcoholic beverages. Provincial liquor boards or commissions oversee the administration and enforcement of these laws and regulations within their jurisdiction. In several provinces and territories, prior approval from the board or commission is required to issue alcohol advertising.

Radio and television advertising for alcoholic beverages is specifically regulated by the Canadian Radio-television and Telecommunications Commission (CRTC) under the *Broadcasting Act* (Canada) and its regulations. Broadcasters



If a company is found flouting cannabis regulation (such as producing a product that could appeal to a child), it may be subject to fines up to **\$5M.**

must adhere to the *Code for Broadcast Advertising of Alcoholic Beverages* (CRTC Code) if they want to maintain their broadcasting licence.

Both federal and provincial legislation as well as the CRTC Code generally include prohibitions on advertisements that appeal to minors, which encourage the general consumption of alcohol and that associate alcohol with social or personal achievement.

Ad Standards provides advertising pre-clearance services to advertisers and broadcasters of alcoholic beverages to review for compliance with the CRTC Code, as well as the liquor advertising guidelines in Ontario and British Columbia.

10.4 Tobacco and Vaping Products

In Canada, the tobacco industry is highly regulated, at both the federal and provincial level. The *Tobacco and Vaping Products Act* (Canada) and provincial tobacco legislation regulate the production, distribution, labelling, sale, display, promotion and advertising of tobacco products, tobacco accessories and vaping products. As such, the manufacturers, distributors and retailers of such products must comply with all applicable federal and provincial legislation when offering their products within Canada.

The promotion of tobacco products, tobacco accessories and vaping products is highly restricted. There is a general prohibition on the promotion of tobacco products and tobacco product-related brand elements directed at consumers, with an exception for informational and brand-preference advertising (e.g., price and availability). The main purpose is to protect young persons. This means that consumer-targeted tobacco ads are generally not permitted in Canada, with the exception of certain

prescribed ads that are specifically targeted to adults (e.g., ads in bars and other places where young persons are not permitted by law, and ads in publications that are addressed and sent to adults identified by name).

The law prohibits advertising of tobacco products and accessories as well as advertising of vaping products that is appealing to young people, lifestyle advertising (which evokes images of glamour, excitement, and risk), false or misleading advertising, the promotion by means of a testimonial or endorsement, as well as sponsorship promotion.

10.5 Cannabis

Regulation of adult use cannabis in Canada results in an entirely new topic of consideration for promotional regulations. The evolution of product-specific marketing regulations is one that requires particular focus as legislation regulating promotion of cannabis and other regulated products progresses.

On October 17, 2018, Item 1 of Schedule 2 of the *Controlled Drugs and Substances Act* (Canada) was repealed. As a result, cannabis is no longer a controlled substance in Canada and commercial sale of cannabis in adult-use markets is now regulated rather than prohibited. Previously, cannabis was commercially regulated in Canada only for medical purposes and was otherwise prohibited as a controlled substance. Production and sale of cannabis is now regulated at the federal level under the *Cannabis Act* (Canada). The *Cannabis Act* restricts and regulates the production, distribution, packaging and labelling, and promotion of cannabis, cannabis products and cannabis accessories. Medical sale to individuals, currently entirely by mail order, is also regulated by the *Cannabis Act*.

Each province and territory in Canada has introduced legislation to regulate the retail sale of cannabis products in adult-use markets. Some provinces and territories have restricted promotional activity or cannabis products themselves, in either case beyond the federal restrictions of the *Cannabis Act* and the *Cannabis Regulations* (Canada). Similarly to manufacturers, distributors and retailers of tobacco products and tobacco accessories, the manufacturers, distributors and retailers of cannabis products and cannabis accessories must comply with all applicable federal and provincial legislation when communicating with the public about their products in Canada. In terms of promotional restrictions, Canadian tobacco legislation and Canadian cannabis legislation include common themes. The differences between the two regimes point to differences in legislative intent behind restrictions on tobacco and on cannabis – a significant topic and beyond the scope of this summary.


The federal *Cannabis Act* includes prohibitions on promotional activity to avoid such activity reaching or appealing to an audience of young persons (defined as persons under the age of 18, but this can be varied upwards by provincial legislation – only Alberta has kept the age of cannabis use at 18). As a starting point, promotional activity generally is prohibited, with specific prohibitions on content. Information about price or distribution, material that could be appealing to young persons, a testimonial or endorsement are all prohibited. Also prohibited are depiction of a person, character or animal (real or fictional), and any association with emotions such as glamour, recreation, excitement, vitality, risk or daring. Amendments to the *Cannabis Regulations* that took effect on October 17, 2019 accompanying product diversification to include edible cannabis (including beverages), cannabis extracts (including concentrate pens, pods and cartridges for vaping) introduced additional

specific restrictions. The amendments introduced additional prohibitions on content, including associations between a cannabis product and an alcoholic beverage product or a tobacco product, and also prohibiting any representations relating to cosmetic, dietary or health benefits.

Promotional activity aimed at bringing in new consumers is also prohibited. Only informational or brand preference promotion, intended to help current cannabis consumers make informed choices – is authorized. Informational or brand preference promotional activity must respect the above specific restrictions on content. Authorized promotional activity is subject to limitations on venue. Venue restrictions require that promotion be addressed and sent to an adult identified by name, in a place where young persons are not permitted by law (e.g. a bar, a cannabis store, etc.), or be in an age-gated “telecommunication” (e.g. social media, website, email, etc.). In some provinces, additional restrictions are placed on promotional activity.

Display or other use of a brand element in the sponsorship of a person, event, activity or facility, such that the display of a logo in association with the sponsorship of a music festival, sporting event or athlete is also prohibited.

The federal *Cannabis Act* allows promotions cannabis products, cannabis accessories or cannabis-related services by displaying a brand element of cannabis on an item that is not cannabis or a cannabis accessory, such as a key chain, poster, pamphlet, bag, cap, thermos, sealable glass jar, or other promotional item. The *Cannabis Regulations* limit such items to one brand element displayed one time, and the size of names and logos in the brand element is limited. The interplay between federal and provincial legislation highlights the need for manufacturers, distributors and retailers of cannabis products and cannabis accessories to audit their sales and marketing strategies for compliance with the laws in Canadian jurisdiction, into which they plan to sell.



In November 2019, 5,884,055 packaged units of cannabis were sold across Canada for medical and non-medical purposes.

Conclusion

In today's fiercely competitive market, companies need to be more innovative and creative when it comes to interacting with their target audience. Advertising and marketing are fundamental in generating revenue and driving growth. For this reason, companies are becoming much more aggressive when it comes to identifying and using various promotional tools to differentiate their products and services in the marketplace. After all, every year, more competition comes into the market, making a company's efforts much more challenging.

The success of your advertising and marketing efforts is critical—everything and everyone in the organization depends on it. When developing your advertising and marketing strategies, it is extremely important to understand all of the applicable laws and regulations as a lack of compliance could result in losing your customers' trust in your brand as well as facing costly legal challenges and government action.

We hope you find this guide both interesting and informative and encourage you to use it as a reference. If you have any questions about the information contained within the guide in regards to specific business or legal matters or concerns about your advertising and marketing approach, please feel free to reach out to any member of our team directly.



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