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Advertising and Marketing



With a well-educated population, a vibrant media industry and relatively clear regulations related to advertising and promotions, Canadians produce some of the best advertising creative in the world.

However, foreign advertisers should be aware of the unique aspects of Canadian law and culture that govern advertising in Canada. For example, in the province of Québec, language laws mandate equal prominence of French on all packaging, product warnings and instructions, and greater prominence

of French at point-of-sale and, in many circumstances, in advertising and promotions. This requirement reduces the amount of space available to advertisers, especially in the case of packaging for national products.

1. Packaging and Labelling

All prepackaged products sold in Canada are governed by a series of federal packaging and labelling regulations. Primarily designed to protect consumers from false claims and harmful products, certain items, including food and beverage, health, tobacco and cosmetic products, are subject to more stringent labelling requirements. Federal packaging laws also stipulate that basic information on all products be provided in both French and English, although outside of Québec, prominence of any particular language is not mandated. Certain foreign-made products sold in Canada also require country-of-origin identification under the Marking of Imported Goods Order.

2. “Product of Canada” and “Made in Canada” Claims

Where a product is represented as a “Product of Canada,” its last substantial transformation must have occurred in Canada and at least 98 per cent of the total direct costs of production must have been incurred in Canada.

For a “Made in Canada” claim, in addition to ensuring that the last substantial transformation of the product occurred in Canada, at least 51 per cent of the total direct costs of production must have been incurred in Canada. A “Made in Canada” claim must also be accompanied by a qualifying statement disclosing the presence of foreign content (e.g., “Made in Canada with Imported Parts” or “Made in Canada with Domestic and Imported Parts”).

3. IP and Copyright

Under the federal *Copyright Act*, songs, logos and even slogans used in Canadian advertisements are protected by certain statutory rights. Unlike the special provisions set out in the U.S. *Lanham Act*, use of competitors’ logos or packaging in comparative advertising is largely prohibited in Canada. And while proposed amendments will address some of these issues, there are currently no “parody,” “fair use” or “fair dealing” defences in commercial advertising. Canada also differs from the U.S. in that the use of service trade-marks in comparative advertising or the use of wares or service trade-marks at point-of-sale also runs the risk of infringement action.

Canada adheres to the Paris Convention but has not yet signed the Madrid Protocol, meaning that while many trade-mark rights are guaranteed, all trade-marks must be individually registered in Canada, except under a limited number of circumstances. The Canadian Intellectual Property Office maintains a database of registered and pending trade-marks and does not allow confusing or similar marks. In order for a trade-mark to avoid French translation on packaging or advertising, it must be “recognized,” which is generally understood to be either registered as a trade-mark or at least filed as a trade-mark, with no French version registered.

4. Environmental Claims

The Competition Bureau has published guidelines intended to provide assistance to industry and advertisers regarding compliance with legislation enforced by the Bureau that prohibits false and misleading advertising. These guidelines discourage the use of unsubstantiated and vague environmental claims such as “eco-friendly” and “environmentally friendly,” stating that such claims may only be used if they detail the exact environmental benefit in such a way that it can be verified in relation to the specific product. Through the use of commentary and practical examples, the guidelines provide instruction on the proper use of certain common environmental claims and symbols. Overall, green marketers in Canada must ensure that all environmental claims are true — not only in relation to the final product, but also in relation to all relevant aspects of the product’s life cycle (i.e., there must be an overall net positive impact on the environment).

5. Contests and Promotions

The legal rules that govern contests and promotions in Canada contain a number of unique provisions. Lotteries, considered as any scheme that awards a prize based on chance and/or where money (or other valuable “consideration”) has been paid to participate, are illegal under the *Criminal Code*. To avoid being considered an illegal lottery, contests must include a skill-testing element (commonly a mathematical question) and generally require a no-purchase option. There are also provisions under the *Competition Act* that mandate disclosure of certain contest information including regional allocation, odds of winning and prize values.

6. “Sale” Claims

In order to advertise a “sale” price in Canada, you must have established a “regular” price at which either (i) a substantial number (i.e., more than 50 per cent) of the items have been sold during the relevant time frame (known as a “volume test”), or (ii) the item has

been (or will be) offered for sale in good faith for a substantial period of time [i.e., more than 50 per cent of the relevant period (known as a “time test”)].

Even if the term “regular price” is not used, a higher price referenced directly or indirectly will be considered a “regular” price claim. Realistically, most retailers in Canada cannot meet the volume test. As such, they typically use the time test, in which they keep track of the length of time that each item is offered at a price lower than the ordinary selling price and ensure that it’s less than half of the relevant period. The relevant period can be a six-month period, 12-month period or even a quarterly period, provided that the items are not seasonal and the time period is followed consistently.

7. Puffery and Hyperbole

While many Canadians might believe it to be true, Canada cannot claim to be the best country in the world for advertising. That is because in Canada, the scope for arguing that an advertising claim is just “puffery” (a purely self-congratulatory statement of opinion) is narrower than in certain other jurisdictions. If the claim can be seen as relating to the performance, efficacy or length of life of the product, it cannot be made without substantive evidence to support it. However, a claim that is exaggerated to the point where it cannot be reasonably relied on is generally permitted, unless it relates to the performance or superiority of a product.

8. Canadiana Issues

Canadian regulations also extend legal protection to certain symbols and icons of Canada. For example the use of real or costumed RCMP officers or the words “Royal Canadian Mounted Police,” “RCMP” or “Mountie” requires consent from the RCMP. By the same token, Canadian flags, the 11-point maple leaf symbol, coins and bank bills are all restricted in terms of their use in advertising. However, the national anthem, *O Canada*, is in the public domain and is therefore fair game.



9. Advertising in Québec

Beyond the aforementioned language issues, Québec has a unique culture and heritage within Canada and has enacted a number of regulations to protect both. Likely the most important to foreign advertisers is Québec's *Consumer Protection Act*, which applies to anyone who advertises or sells products or services to consumers in Québec and imposes strict requirements on the quality and accuracy of advertising.

Many Canadian advertisers choose not to open contests to Québec residents due to the myriad of additional rules enforced by the province's alcohol and gaming authority, the *Régie des alcools, des courses et des jeux*. In many cases, national advertisers are forced to make a choice: create parallel advertising campaigns for English and French Canada or miss out on advertising to the second-most populous Canadian province.

10. Penalties for False and Misleading Advertising

The Competition Bureau is empowered under the federal *Competition Act* to pursue administrative remedies in relation to misleading advertising and other deceptive marketing practices. The Bureau has the ability to prosecute misleading advertising as a criminal offence where misrepresentations are made knowingly and recklessly.

In most cases, the Bureau will deal with misleading advertising as a civil offence. This route offers a wide range of enforcement mechanisms, including cease-and-desist orders, the publication of information notices directed to affected parties and/or administrative monetary penalties. For a first offence, such penalties may be up to \$10,000,000 (an increase from \$100,000 prior to March 2009). For subsequent offences, corporations face up to \$15,000,000 in

penalties (an increase from \$200,000 previously). Under the civil route, the Bureau does not need to prove that the false or misleading advertising was deliberate. The potential penalties under the criminal provisions include fines and jail.

11. Private Remedies for False and Misleading Advertising

In addition to certain common law remedies (e.g., trade libel) or an action for copyright/trade-mark infringement, the *Competition Act* provides a statutory right of civil action for damages suffered as a result of misleading advertising. However, proof is required that the advertiser acted “knowingly or recklessly.” The relevant provision of the *Competition Act* has also been used as the basis for obtaining injunctions in misleading advertising cases. The basic test for obtaining an interlocutory injunction in Canada is that: (i) there is a serious issue to be tried, (ii) the plaintiff will suffer irreparable harm if the injunction isn’t granted, and (iii) the “balance of convenience” favours the plaintiff.

Advertising Standards Canada, the main self-regulatory body for the advertising industry in Canada, also administers a confidential trade-dispute procedure for comparative advertising disputes, which is not unlike the NAD process in the U.S. In the right circumstances, it can be a lower-cost and relatively expeditious alternative to litigation.

12. Canada’s Anti-Spam Legislation

The federal government has recently passed *Canada’s Anti-Spam Legislation* (CASL), which will impose substantial new requirements on persons who send commercial electronic messages to electronic addresses, including email accounts, instant-messaging accounts and other analogous technologies. When it comes into force, the legislation will prohibit sending a commercial electronic message to a recipient unless the sender has either their express or implied consent.

CASL places specific requirements on both express and implied consent. When seeking express consent, it is necessary to identify the purposes for which you are seeking consent and to provide information that identifies the person seeking consent (or on whose behalf consent is sought). Implied consent will be considered to exist in a limited number of circumstances, including the presence of an existing business relationship between the sender and the recipient, such as a purchase of goods or services within the two years prior to the message or an inquiry by the recipient regarding the sender’s business, products or services.

In addition to these requirements, the new legislation will require commercial electronic messages to comply with specific content requirements. In particular, such messages must identify the person who sent them and, if different, the person on whose behalf the message was sent. They must also provide contact information for one of those persons. Commercial electronic messages will be required to include an “unsubscribe” mechanism that permits recipients to indicate, at no cost, that they no longer wish to receive electronic messages from the sender.

Much of the implementation of the legislation will occur through the eventual publication of regulations that have not been released as of the date of writing. As such, the precise requirements for commercial electronic messages in Canada are in a rather fluid state pending the release of these regulations, which is expected to occur in 2012.

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