

TRENDWATCH



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Advertising Law: Some Uniquely Canadian Issues

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Shelley is a partner with Gowlings, practising in the area of intellectual property. She has assisted some of Canada's largest companies with matters relating to advertising and promotions; labeling and packaging; licensing, talent and sponsorship agreements; and the protection of IP.

As an advertising lawyer, I am frequently asked to explain how a campaign that ran easily in the U.S. must be modified to work in Canada. The fact is, Canadian regulations are very different and with so much product messaging moving north of the border, it is important that American advertisers are aware of these differences to ensure compliance.

One way in which Canadians differ from Americans is that we tend to be literal, and more likely to take claims at face value. We cannot rely on "puffery" as a defence for not having adequate claims substantiation. Claims such as "America's favourite coffee" are not permitted here unless evidence supports that the product is, in fact, the number one seller. Thankfully, as in the U.S., hyperbolic claims—i.e. those so exaggerated as to be incredible—do not require substantiation.

Comparative advertising in Canada is also treated differently. In addition to the requirement for proper testing to support claims, the key issues are copyright and trade-mark rights. Canada's *Copyright Act* prohibits the unauthorized reproduction of any copyrighted work.

As there is no defence of "fair use" or "fair dealing" in most forms of advertising, reproducing a competitor's label, logo or packaging in a comparative advertisement may amount to copyright infringement, even if no trade-mark laws are violated. Similarly, there is no "fair use" provision in our federal *Trade-marks Act* that allows the use of a competitor's trade-mark in comparative ads.

In the absence of the unequivocal guarantee of freedom of expression that Americans hold so dearly, certain Canadian icons one would expect to be fair game for use in advertising are, in fact, subject to restrictions:

1 - RCMP

The use of real or costumed RCMP officers, or use of the words "Royal Canadian Mounted Police" or "RCMP" or "Mountie" requires consent from the RCMP. Consent involves a licence fee and requires assurance of "appropriate" depiction of the force.

2 - Flag

Protected by the *Trade-marks Act*, use of the Canadian flag requires consent from Heritage Canada.

3 - Maple Leaf

The use of the Maple Leaf on products where there is an implication that the products are made in Canada is prohibited unless the products meet “made in Canada” requirements.

4 - Bank notes

Counterfeit provisions in the Criminal Code forbid the design, printing, distribution or use of any card, notice, circular, handbill or ad that looks like a current bank note or paper money. Due to Crown copyright and trademark rights, it is now necessary to obtain a licence from the Bank of Canada to use paper money in certain forms of advertising.

5 - Coins

As Crown copyright also applies to designs appearing on Canadian coins, they cannot be used in advertising without permission from the Royal Canadian Mint—along with the remittance of hefty licence fees.

In Canada, it is considered an illegal lottery to award prizes by chance alone. We generally don’t use the term “sweepstakes” but rather refer to draws and skill contests collectively as “contests,” since all must have an element of skill. To add skill to a chance contest, a potential winner must correctly answer a mathematical skill-testing question. It is also considered illegal to require a purchase to enter a contest in most circumstances.

Canada’s privacy laws are more protective of consumers than the current U.S. privacy regime. Generally, without an opt-in (preferable) or opt-out consent for additional uses, personal information collected for contest entry can be used only for the purposes of administering the contest.

Many Canadian contests are not open to Québec residents, a result of the myriad of rules enforced by the *Régie des alcools, des courses et des jeux*. Québec’s unique framework of advertising and consumer protection laws are beyond the scope of this article, but suffice it to say that an ad or contest that works in English Canada, won’t necessarily fly in Québec.

Canadian law is not always more restrictive than in the U.S. For instance, “new” or “introducing” or “improved” can be used for a full year from product launch or relaunch as opposed to only six months in the U.S. And at least one great Canadian symbol is available to advertisers without permission: our national anthem, “O Canada” (lyrics and music), is in the public domain.

While there are cross-border similarities in advertising and marketing law, there are significant anomalies that make it virtually impossible to simply import U.S. advertising into Canada. However, some minor tweaks from experienced Canadian counsel will help ensure successful and compliant campaigns north of 49.

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