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Canada

ADVERTISING & MARKETING

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This country-specific Q&A provides an overview of advertising & marketing laws and regulations applicable in Canada.

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CANADA
ADVERTISING & MARKETING

1. How is harmful and offensive advertising regulated? [For example, advertising content that may be obscene, blasphemous, offensive to public morals or decency, or offensive to protected minorities or characteristics?]

Canada prohibits certain acts of advertising that are so egregious so as to be considered criminal in nature under the framework of the *Criminal Code*. Prohibitions in respect of the advertising of illegal lotteries and sex-related services are addressed in Questions 3(e) and (f) below. Other examples of criminal prohibitions include advertising which relates to counterfeit money, the use of intimate images in advertising to which the subject did not consent, and the advertising of child pornography. There have also been recent amendments to the Criminal Code which prohibit the advertising of conversion therapy as a means to change or otherwise repress a person's sexuality and/or gender.

While the federal Competition Bureau (the "**Bureau**") administers Canada's Competition Act (the "**Act**"), which generally contemplates misleading advertising in Canada, and provincial consumer protection legislation addresses certain marketing misrepresentations, product claims and guarantees, outside the context of criminal offences, harmful and offensive advertising is principally addressed in the Canadian Code of Advertising Standards (the "**Code**"). The Code is the Canadian advertising industry's primary instrument setting out criteria for acceptable advertising, supplemented by Interpretation Guidelines. It is administered by Ad Standards Canada ("**ASC**"), which is the advertising industry's non-profit self-regulating body. Given that ASC is an industry-led, self-regulating body, the Code itself does not have the force of law. However, it is considered to represent an authoritative codification of widely-accepted industry standards for advertisers.

The Code sets the standards for acceptable advertising in Canada and forms the basis for the review and evaluation of complaints from the public, and disputes between advertisers, about advertising. The Code contains 14 provisions, the last of which specifically addresses harmful and offensive advertising. It is specifically prohibited for advertising to:

- condone any form of personal discrimination, including discrimination based upon race, national or ethnic origin, religion, gender identity, sex or sexual orientation, age or disability;
- appear in a realistic manner to exploit, condone or incite violence; nor appear to condone, or directly encourage, bullying; nor directly encourage, or exhibit obvious indifference to, unlawful behaviour;
- demean, denigrate or disparage one or more identifiable persons, group of persons, firms, organizations, industrial or commercial activities, professions, entities, products or services, or attempt to bring it or them into public contempt or ridicule;
- undermine human dignity; or display obvious indifference to, or encourage, gratuitously and without merit, conduct or attitudes that offend the standards of public decency prevailing among a significant segment of the population.

Complaints can be filed with the ASC where advertising content is alleged to contain such harmful material/content.

2. How is unfair and misleading advertising regulated? [Briefly describe the law and regulation applying to unfair and misleading advertising in your jurisdiction. Cover any specific unfair or misleading practices that are prohibited, as well as the general category of misleading advertising]

Unfair and misleading advertising is regulated federally in Canada by the Bureau, which administers the Act. The Act regulates both false or misleading representations

and deceptive marketing practices in the context of promoting the sale, distribution, or use of a product, for any business interest. All false and misleading representations that are considered "material", are subject to the Act, regardless of form. Where a representation could influence a consumer's purchasing decision-making through advertisement, it is considered to be material. Generally speaking, the "general impression" test is used to determine whether a representation is false or misleading. The Act targets several categories of regulated advertising, including bait and switch selling, deceptive prize notices, deceptive telemarketing, double ticketing, drip pricing, specific types of electronic advertising, multi-level marketing and pyramid selling schemes, ordinary selling price and sales claims, performance claims, promotional contests (including sweepstakes), selling products above advertised prices, and testimonials and endorsements.

There are two regimes under the Act that address false or misleading representations and deceptive marketing practices: criminal and civil.

Unfair and misleading advertising is also regulated through provincial consumer protection legislation. While consumer protection rules differ by province, they typically contemplate misleading advertising prohibitions (particularly those dealing with representations concerning products and services), along with marketing and guarantee rules specific to certain industry sectors including loans, fitness clubs, auto repairs, certain memberships and direct selling.

3. Do any specific rules restrict advertising for the following product sectors? If so, how? a. Alcohol b. Tobacco and related products, such as vapes and nicotine pouches c. Medicines, medical devices and surgical or medical procedures d. High fat, salt and sugar foods e. Gaming and gambling services f. Adult and sex-related services

a. Alcohol

Alcohol advertising is regulated at the provincial and federal levels. Federal rules are triggered if the advertiser publishes the alcohol advertisement in broadcast media (i.e. TV or radio). The federal rules are known as the Code for broadcast advertising of alcoholic beverages (the "**Broadcasting Code**") which is administered by the Canadian Radio-television and Telecommunications Commission. Among other rules, the Broadcasting Code prohibits the portrayal of alcohol in a manner that appeals to minors, promotes financial or social success, athletic prowess, enjoyment of activity or fulfilment of any goals. The Broadcasting Code also prohibits the depiction of consumption of alcohol visually or in sound. Moreover, alcohol advertisements broadcast on TV or radio must be precleared by the ASC.

Provincial rules apply to liquor licence holders, suppliers, alcohol manufacturers or any person that promotes or advertises alcohol in any province in Canada, regardless of the form of media. Each province has enacted legislation that regulates the promotion and content of alcohol advertisements in their jurisdiction. Some variations exist in each province; however, most jurisdictions prohibit the advertising of alcohol in a manner that appeals to minors or promises financial or social success. Furthermore, the provincial liquor regulators in certain provinces (e.g. Quebec, Nova Scotia, etc.) must pre-approve the alcohol advertisement before it is published (in any medium).

b. Tobacco and related products, such as vapes and nicotine pouches

There are federal and provincial rules that apply to the advertising of tobacco, vaping and nicotine products. At the federal level, the Tobacco and Vaping Products Act (the "**TVPA**") is administered and enforced by Health Canada. The TVPA generally prohibits public tobacco/vaping advertisements. The TVPA also prohibits false or misleading representations concerning tobacco or vaping products, the use of testimonials or endorsements (and note that a depiction of a fictional or real person, character or animal is considered an endorsement), contests, rebates, or other similar promotions. The TVPA provides for very limited exceptions to the general prohibition against tobacco advertising for brand-preference and information advertising. "Brand-preference" means advertising that promotes a tobacco product by means of its brand characteristics and "information advertising"; that is, advertising that provides factual information to the consumer concerning a product and its characteristics, or the availability or price of a product or brand of product. To rely on this exception, the brand-preference or information advertising must be contained in (a) a publication that is addressed and sent to an adult identified by name; or (b) contained within signs in a place where young persons are not permitted by law.

In addition to the federal TVPA, advertisers must ensure that their advertisements align with the provincial tobacco/vaping regulations, which may also vary by province. In general, the provincial statutes govern the content and display of advertisements in provincially licenced tobacco stores.

c. Medicines, medical devices and surgical or medical procedures

Generally speaking, the promotion and advertising of health products is regulated by Health Canada, according to the parameters set out in the Food and Drugs Act ("**FDA**"), regulations, and various policy directives. The term "health products" encompasses the following product categories:

- medical devices;
- prescription drugs;
- natural health products;
- biologics and biosimilars;
- veterinary health products; and
- opioids and other controlled substances.

As a baseline, the FDA imposes fundamental prohibitions against advertising that is false, misleading or deceptive, or is likely to create an erroneous impression regarding a product's character, value, quantity, composition, merit, design, construction, performance, intended use or safety. Complementing this basic framework is Health Canada's recently-published Guidance on distinction between advertising and other activities for health products, which provides an overview of the factors Health Canada will take into account in determining whether messaging, materials and activities are "promotional" in nature and therefore subject to the marketing and advertising restrictions in the FDA.

Certain health products, including opioids and some veterinary health products, require marketing pre-clearance by the authorized agency at Health Canada.

Finally, the terms of a given health product's regulatory approval (whether it be a notice of compliance, medical device licence, drug identification number, market authorization, etc.) will also dictate the claims, statements and representations that are permitted to be made. Consequently, these documents should be leveraged as a primary reference point at the early stages of planning a product's marketing strategy.

d. High fat, salt and sugar foods

The Food and Drug Regulations (the "**FDR**") under the FDA contemplate specific requirements for making nutrient content claims for many nutrients, as well as for vitamins and minerals. Fat claim such as "free of fat", "low in fat", "fat free", and "reduced in fat" are restricted to those specific claim statements permitted in the FDR, and the product in question must satisfy the prescribed standards imposed for the proposed claim. The FDR impose separate standards and rules applicable to saturated fatty acids, trans fatty acids, and omega 3 and omega 6 polyunsaturated fatty acids. Similarly, carbohydrate and sugar claims such as "free of sugar", "lower in sugar", and "no added sugar" are restricted to those permitted in the FDR. Claims such as "source of complex carbohydrates", "low carbohydrate", and "light" claims referring to the carbohydrate or sugar content of a food are generally not permitted. Finally, sodium/salt claims are also specifically regulated, such as "free of sodium", "low in sodium", "sodium/salt reduced". The claim "very low sodium" and equivalent claims are not permitted for foods sold in Canada.

In response to growing concerns regarding children's vulnerability to advertising, and the potential adverse impacts of advertising foods and beverages to children that are high in sugar, sodium or fats, Canadian regulators have recently taken steps to place parameters around these practices. These are twofold:

- As of June 2023, the ASC began to administer the Code for the Responsible Advertising of Food and Beverage Products to Children (the "**ASC Food Code**"). The ASC Food Code, together with its companion document, the Guide for the Responsible Advertising of Food and Beverage Products to Children (the "**Guide**"), establish a national industry standard for the advertisement of food and beverage products to children. It generally provides that only food and beverage products which meet specified nutritional criteria may be advertised in a manner that is primarily directed to children under the age of 13.
- In April of 2023, Health Canada published a policy update (the "Health Canada Policy") announcing its proposal to amend the Food and Drug Regulations to restrict advertising to children under the age of 13 for foods that contribute to excess intakes of sodium, sugars and saturated fat. This follows the introduction of Bill C-252 into the House of Commons, which would prohibit advertising "foods and beverages that contribute to excess sugar, saturated fats or sodium in children's diets in a manner that is directed primarily at persons who are under 13 years of age".

Both developments employ a similar model: prohibiting targeted advertising to children of food products which do not satisfy prescribed nutritional criteria. However, while the Health Canada Policy and (when it is eventually brought into force) Bill C-252 constitute legal directives enforced by the Canadian Food Inspection Agency, the ASC Food Code and Guide do not constitute law in Canada.

e. Gaming and gambling services

The advertisement of gaming and gambling services is governed by Canada's federal Criminal Code. Under the Criminal Code, it is a criminal offence to advertise an illegal lottery. However, an exception exists for lotteries (i.e. gambling) conducted and managed by a provincial government or lotteries run by charitable organizations under a provincial or municipal licence. If the gambling activity is licenced by a provincial government or municipality, as the case may be, then it is considered legal – it follows that the advertisement of such activity is also legal provided that it meets the advertising conditions set by the provincial or municipal regulators.

Ontario is the only province in Canada that has allowed private gambling operators to provide internet gaming services (e.g. online casino games and sports betting) to people physically located in the province of Ontario. For private operators to run internet gaming in Ontario they must have obtained an operator licence from the Alcohol and Gaming Commission of Ontario (the "**AGCO**"), which licenses and regulates private internet gaming operators. Further, the operators must accept and comply with the AGCO's Registrar Standards for Internet Gaming, which, among other things, sets the rules and regulations for advertising of internet gambling services in Ontario. For example, any advertisement that can be viewed by the general public that includes an offer, bonus, promotion or other gambling inducement is prohibited unless the advertisement is shown on the operator's licensed gaming site or it is included in a SMS, email or other direct communication that the recipient has consented to receive. Moreover, the AGCO also prohibits the advertising of gaming services in a manner that is appealing to minors, false or misleading, designed to make false promises or present winning as the probable outcome.

f. Adult and sex-related services

Section 286.4 of the Criminal Code criminalizes advertising the sale of sexual services. This provision states that:

286.4 Everyone who knowingly advertises an offer to provide sexual services for consideration is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

These Criminal Code provisions are currently the subject of numerous constitutional challenges as the breadth and scope of the criminal provisions are unclear. Until those are resolved, the breadth, scope and constitutionality of these provisions is in flux, open to debate, and yet to be finally determined.

4. Do any specific rules apply to advertising featuring prices?

In Canada, misleading advertising related to the ordinary sale price of a product has a dedicated statutory test under the Act's civil enforcement regime (specifically, subsections 74.04(2)-(3)). Civil misleading advertising claims may only be brought by the Bureau. The Bureau can potentially seek fines of up to 3% of the impugned corporation's gross worldwide revenues.

Whether businesses reference their own regular price (e.g., "Our regular price $100, Now $50"), or a market price (e.g., "List price $100, Our price $50"), the Act requires that they validate the regular price by satisfying one of two tests:

1) Volume test: A substantial volume of the product was sold at that price or a higher price within a reasonable period of time before or after the making of the representation; or the

2) Time test: The product was offered for sale, in good faith, for a substantial period of time, at that price or a higher price recently before or immediately after the making of the representation.

Consumer protection legislation in most provinces contains restrictions on how the price of goods/services is advertised. For instance, in Quebec, the price advertised must be the "all-in" price – in other words, the price that the consumer must pay to receive the goods (excluding taxes). Furthermore, advertisers cannot place greater emphasis on an instalment payment as opposed to the total price of the product; more emphasis must be placed on the total price of the good or service.

5. Do any specific rules apply to the use of testimonials and endorsements in advertising?

Section 74.02 of the Act enumerates a civil enforcement power relating to the misleading use of endorsements. It requires that, if one publishes a testimonial with respect to a product, one must be able to establish either that (a) the testimonial was previously made or published by the person who is now giving it, or (b) the party seeking to use the testimonial obtained prior written consent to publish the testimonial from the person who gave it. Otherwise, the Bureau may be able to bring civil enforcement action and potentially seek fines of up to

3% of the impugned corporation's gross worldwide revenues.

The Bureau, however, maintains that it has a broader authority with respect to endorsements under its guidelines on influencer marketing and the Act. The Bureau's position is that Canada's misleading advertising regime also requires a social-media influencer to prominently disclose all material connections they have with the business whose products they are advertising.

6. Do any specific rules apply to environmental or "green" advertising claims?

Pursuant to the Act's civil provisions, a person may engage in reviewable conduct for among other things: (a) making a representation to the public that is false or misleading in a material respect (a "materially misleading" claim), or (b) making a representation to the public "in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation" (a "performance claim") (s. 74.01). According to the Courts, an assessment of whether a test is "adequate and proper" is "flexible and contextual", as what is "proper" is that which is "fit, apt, suitable or as required by the circumstances". Where the Bureau believes an advertiser made a materially misleading claim or an unsupported performance claim, the Bureau may be able to bring civil enforcement action and potentially seek fines of up to 3% of the impugned corporation's gross worldwide revenues.

Relevant guidance from the Bureau (specifically, administrative guidance entitled Environmental claims and greenwashing) suggests that the agency will tend to view environmental claims as a species of performance claims, though it reserves the right to review such claims under either framework. In general, the Bureau will consider whether environmental claims:

- are truthful and are not misleading;
- are specific; precise about the environmental benefits of the product;
- are substantiated and verifiable; claims must be tested and all tests must be adequate and proper;
- do not result in misinterpretations;
- do not exaggerate the environmental benefits of the product; and
- do not imply that the product is endorsed by a third-party organization if it is not.

7. What rules apply to the identification of advertising content – for example, distinguishing advertorial from editorial?

Generally speaking, sponsored content (including testimonials, reviews, endorsements or other representations of opinion or preference) is subject to the basic prohibition against false, misleading or otherwise deceptive marketing practices set out in the Act.

In practice, advertisers are required to adequately disclose material connections with sponsored content, including in particular the relationship with the brand, products or services promoted in digital and other sponsored content. The Bureau has taken enforcement action in relation to "flogging" (fake blogging) and "astroturfing", in instances where reviews and feedback appeared to have been provided by independent, impartial customers, but were in fact submitted by individuals with close ties to the companies whose products were being promoted.

Significant civil and criminal penalties may be imposed where there has been a failure to adequately disclose the relationship between sponsored content and the business, product or service being promoted (whether through an influencer relationship or other modality), that masks the paid or compensated nature of the promotion.

8. How is influencer/brand ambassador advertising regulated?

Although the provisions of the Act do not expressly refer to digital marketing, the Bureau considers that the Act applies to all forms of marketing, including influencer advertising. In fact, as explained in the Bureau's administrative guidance, advertisers, marketing agencies, and individual influencers share responsibility for the representations made on social media. Consequently, the Bureau considers that material connections between advertisers and influencers should be disclosed, given the degree to which they may impact the way viewers assess the advertised products.

In addition to the Act, the Code requires advertisements to be clear and accurate and prohibits deceptive testimonials and endorsements. According to ASC's Interpretation Guideline on testimonials, endorsements and reviews, this includes the obligation for advertisers and influencers to disclose all their material connections. If an advertiser refuses to participate in a complaint procedure or neglects to comply with a decision, the ASC will advise the media exhibiting the advertisement. It

may also make a public declaration and notify the Bureau and other regulatory authorities.

The ASC has also published Disclosure Guidelines for influencer marketing, which outline best practices to ensure clear, conspicuous disclosure of material connections. These include the following principles:

- In a post, widely accepted disclosure hashtags to disclose a material connection should be used, such as #ad or #sponsored, but influencers should avoid ambiguous acronyms or mentions like #brand or #collab.
- Disclosure hashtags should appear at the beginning of a post and should not be buried in a long list of other hashtags.
- A disclosure should catch the viewer's attention and be located where it will not be missed.
- A disclosure should be in as close proximity as possible to every advertised message, and should not be available only via a link to another page or section of a website.
- For videos, the disclosure should be mentioned at the beginning, in text and in audio, and should also appear in the video's description.
- Disclosure should be in the language of the endorsement and should specifically identify which products or brands are being promoted.

9. Are any advertising methods prohibited or restricted? [For example, product placement and subliminal advertising]

See question 11 relating to email, SMS and direct mail anti-spam.

In addition, the Code prohibits what is known as "disguised advertising". This is commercial advertising that simulates editorial content.

To the extent advertisements include product placement, claims, and/or subliminal messaging, these could all be considered as context in a misleading advertising challenge.

10. Are there different rules for different advertising media, such as online, broadcast, non-broadcast etc?

Aside from the provincial and federal statutes that apply to certain regulated products, there are also advertising codes to consider as well. These include:

1) The Canadian Code of Advertising Standards: The Code is administered by the ASC and applies to all forms of advertising regardless of media except for product packaging and political and election advertising. The Code sets out the basic principles of acceptable advertising in Canada. Consumers and competitors can submit complaints to the ASC should the advertisement violate any clause of the Code. In general, the Code sets out principles for truthful advertising; it has clauses on accuracy and clarity, price claims, disguised advertising techniques, bait and switch, advertising to minors, unacceptable depictions and portrayals, etc. Most consumer complaints stem from violations of Clause 1 (Accuracy and Clarity) which, in sum, states that all advertisements must be truthful, must not omit relevant information and include all pertinent details.

2) The Broadcast Code for Advertising to Children (the "**Children's Code**"): The Children's Code specifically regulates child-directed broadcast advertising. A "child" for the purposes of this Code is anyone who is under the age of 12. In sum, advertisers cannot lead a child to covet a product through exaggerated demos, endorsements by characters (fictional or real) that appeal to children, calls to action and implicit social pressure (e.g "You need to have this toy. All your friends have it and, so, you need it too."). Further, advertisers cannot pressure their parents to buy a product.

See question 3 (a) for details on the Code for Broadcast advertising of alcoholic beverages.

11. Are there specific rules for direct marketing such as email, SMS and direct mail?

Canada's Anti-Spam Legislation ("**CASL**") governs email and SMS marketing in Canada. CASL is known as the strictest anti-spam legislation in the world. To comply with CASL, the sender must have the recipient's consent to send commercial electronic messages (email or text). The consent must either be express (i.e. opt-in) or implied (e.g. a business relationship between the sender and the recipient). CASL also requires that the messages contain certain prescribed information:

- the sender's name,
- the sender's business mailing address,
- sender's telephone number or web address or email address; and
- an unsubscribe function.

If a corporation violates CASL, it could lead to an administrative monetary penalty in the amount of $10M.

The content of direct marketing is regulated by the Act,

which generally prohibits all false or misleading representations (including within the sender and subject line of the email). Of course, other provincial or federal statutes and regulatory regimes may also apply depending on the nature of the product advertised in the email or SMS (e.g. food, alcohol, gambling, etc.).

12. Is advertising to children and young people restricted beyond general law and regulation? If so, how?

See section 3 (d) above, in relation to new restrictions in the advertisement of certain foods to children under the age of 13.

Further, Quebec's consumer protection legislation prohibits, subject to certain exceptions, advertising directed at children under the age of 13. Note that this prohibition applies to all product categories; it is not limited to foods.

13. How is comparative advertising regulated?

Under the Act, comparative advertising is principally regulated as a form of performance claim (paragraph 74.01). Specifically, where a comparative claim is made "in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product" (a "performance claim") the Act requires "an adequate and proper test thereof". The maker of the statement should document the sources of the information that inform the comparative statement and their methodology in making the comparison. Importantly, the tests need to have been conducted before the comparative claim is made. Even if the claim is ultimately proven to be true, if inadequate testing has taken place before the performance claim is made, the advertiser can be sanctioned. Where the Bureau believes an advertiser made an unsupported performance claim, the Bureau may bring civil enforcement action and potentially seek fines of up to 3% of the impugned corporation's gross worldwide revenues.

14. Are consumer promotions specifically regulated as advertising (as distinct from contract law)? If so, how?

Consumer promotions, including promotions that involve a partial refund or discount upon purchase of a product, are subject to two principal provisions in the Act:

- Subsection 52(1), which is a criminal provision prohibiting anyone from knowingly or recklessly making a materially false or misleading representation to promote the supply or use of a product or business interest; and
- Paragraph 74.01(1)(a), which is a civil provision that prohibits materially false or misleading representations to the public to promote the supply or use of a product or business interest.

Representations relating to rebates or pricing discounts (which are often the distinguishing feature of consumer promotions) are generally understood to be material to consumer behaviour, and liability is typically attributed to the person who caused the representation to be made.

When determining whether a representation is false or misleading in a material respect, the Bureau will consider the general impression conveyed by the representation underlying the promotion, taken as a whole.

Further, the consumer protection legislation in certain provinces (e.g. Quebec) considers advertisements as offers to contract if the advertisements include certain material information such as the product description and price.

15. Are there specific rules on promotional prize draws and skill competitions? If incorrectly executed, can these be classed as illegal lotteries? If so, what are the possible consequences?

Promotional draws (commonly referred to as contests or sweepstakes) need to be structured in a specific manner to ensure they are not captured by the illegal lottery provisions of the Criminal Code.

In general, contests must include (1) an alternate method of entry that does not involve a purchase, and (2) a mathematical skill-testing question. Otherwise, the contest risks being classified as an illegal lottery, which could lead to imprisonment of up to two years, or a fine.

Pure skill competitions which require a purchase to enter are generally exempt from the illegal lottery provisions of the Criminal Code. To be considered a contest of pure skill, the winner must be determined solely based on the winner's skill (e.g. photography or writing contest). In other words, the competition should not involve chance. That said, if there is any question as to whether the contest is one of pure skill, sponsors most commonly

continue to rely on the mathematical "skill-testing" question to mitigate risk.

The Act requires that contest advertisements include specific details: the prize description, prize value, regional distribution (i.e. 5 prizes in BC and 3 prizes in Ontario), the odds of winning, and any other information that could materially affect an entrant's chances of winning the prize.

16. Must promotional prize competitions be registered with a state agency or authority? [If so, briefly explain the process, typical time from application to approval, and any costs]

Pursuant to the Act respecting lotteries, publicity contests and amusement machines (the "**Quebec Act**"), Quebec is the only province in Canada that requires contest registration, subject to certain exceptions. This law applies to publicity contests offering prizes worth $100 or more. The contest regulator in Quebec is known as the Régie des alcools, des courses et des jeux (the "**Régie**"). To run a compliant contest in Quebec, contest sponsors must complete the following:

- 5 or 30 days before contests launch, complete a contest registration form and pay duties. The deadline for submission will depend on the prize value. The duties payable to the Régie are 3% or 10% of the prize value. The percentage will depend on where the participants are from. For instance, 10% if the contest is open exclusively to Quebec residents and 3% if the contest is open to residents of Quebec and the rest of Canada.
- If the prize value is more than $2000, submit the contest rules and sample advertisement to the Régie 10 days before contest launch.
- If the prize value is more than $2000, submit a winners report to the Régie 60 days after the winners have been determined.

17. What is the relationship between IP law and advertising law? [For example, can IP law provide an alternative enforcement mechanism in addition or alternatively to advertising-specific law and regulation?]

The intersection of intellectual property ("**IP**") law and marketing and advertising law underscores distinct legal issues, especially in the context of comparative advertising. For example, the Trademarks Act essentially prohibits a trader from misrepresenting its own wares and/or services or those of a competitor, to the public. More specifically, section 7 generally prohibits:

- false and misleading statements tending to discredit the business, wares or services of a competitor;
- directing public attention to wares/services/businesses in a manner that is likely to confuse the public;
- passing off of wares/services for those ordered or requested; and
- materially misrepresenting the public as it relates to the character, origin, mode of manufacture, or similar compositional qualitative description of the wares/services.

Section 22 of the Trademarks Act contemplates depreciation of a registered trademark's goodwill as a remedy for addressing damaging comparative advertising effected by a competitive brand. The Courts have underscored the contextual assessment that is to be made in connection with the depreciation of goodwill and the uses of the subject mark, including the placement and size of the mark.

Furthermore, the cause of action of trade libel supplements the Act in respect of the use of a trademark in association with misrepresentation of a good, service, or a business.

18. What is the relationship between contract law and advertising law? [For example, if an "offer" made in advertising content is accepted by a third party, can this form a binding contract?]

Advertisements are considered offers to contract in most provinces, particularly if the advertisement includes certain material information such as product description and price. As such, the terms of the sale contract between merchants and consumers must also align with the terms of the advertisement. Otherwise, the consumer could initiate a civil action to challenge the advertisement as a false or misleading representation. For example, Quebec's Consumer Protection Act states that all goods and services must conform to their advertisements and that the terms of the advertisement bind a merchant and manufacturer.

19. What is the relationship between human rights law and advertising law? [For example, can advertisers rely on a right to freedom of speech to justify otherwise

prohibited advertising?]

Advertising falls into the category of “commercial speech”, which has been conclusively settled by the Supreme Court of Canada as protected under section 2(b) of the Canadian Charter of Rights and Freedoms as freedom of thought, belief, opinion and expression. The Court has determined that commercial speech is critical for providing consumers with information necessary “to make informed economic choices, an important aspect of individual self-fulfilment and personal autonomy”.

That said, the Supreme Court has also acknowledged that advertising content going beyond information required for consumers to make informed decisions along the marketing “continuum” could be subject to justifiable restrictions under the “reasonable limits clause” of the Charter. The Court determined that reasonable restrictions on commercial speech could be legislated in Canada, such as those involving commercial speech not meant to inform but to induce consumers into purchasing (including false and misleading advertising), and commercial speech targeted to specific vulnerable groups. Accordingly, legislated restrictions and prohibitions on certain types, manner, and subjects of advertising that are supported by acceptable public policy are generally acceptable under constitutional law in Canada, reducing the invocation of a human rights defence by advertisers.

20. How are breaches of advertising law and regulation enforced? [Briefly outline the process, including significant stages of the dispute, time to resolution and likely penalties]

As set out in question 2 above, there is a criminal regime under the Act that addresses intentional misleading advertising, and a civil/administrative regime for deceptive marketing that does not rise to the level of criminal behaviour.

The criminal violations may be prosecuted in Provincial Superior Courts or before the Federal Court, and are subject to the full range of criminal procedure. Any person who is found guilty of the offence may be liable to a fine in the discretion of the Court or to imprisonment for a term not exceeding 14 years, or to both; or on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both. Moreover, this behaviour can result in class actions being commenced under section 36 of the Act, which allows parties who have suffered losses as a result of misleading advertising to recover those losses.

More commonly, deceptive marketing is enforced under the civil/administrative part of the Act, where cases may be brought before the Competition Tribunal, the Provincial Superior Courts or the Federal Court. Typically, the Bureau investigates allegations over the course of 1-2 years, and can make use of subpoena powers to obtain information from the target about the representations and associated volume of commerce. Often, these cases are resolved by way of a consent agreement registered with the Competition Tribunal, whereby the target of the review commits to modifying their claims, and typically pays an administrative monetary penalty and commits to a compliance program. The scale of the remedies was significantly increased in 2022. The maximum penalty that is now available is the greater of $10M CAD, or three times the value derived from the deceptive marketing, or, where that cannot be determined, 3% of the target’s global turnover.

As Canada’s self-regulatory organization dedicated to marketing and advertising policy, complaints, and Code development, the ASC implements a dispute mechanism system for both consumer complaints and advertiser disputes. Both dispute processes involve written arguments from parties, and overall decision-making on Code application and compliance by the ASC. While there are no legal obligations to abide by the ASC’s decision in respect of breaches of the Code, there is a relatively high level of compliance with its recommended corrective actions.

Consumer complaints are handled administratively or sent to ASC’s Standards Council for adjudication. The administrative procedure can be relied on if there is a contravention of the Code’s Accuracy, Clarity and Price Claims provisions. Note that this process is only available to the advertiser if it has permanently removed or amended the disputed advertisement before or immediately after being informed that a complaint was made (and before the Council meets for a decision). As noted earlier, the Standards Council’s decision is not legally binding. However, if an advertiser fails to comply with Council‘s decision, it can, among other things, notify the Bureau or other regulatory authorities of the advertiser’s non-compliance. As a result, most advertisers comply with these decisions.

There are no published turnaround times for the consumer complaint process. In general, it can take anywhere from 3 weeks to 2 months to resolve a complaint, depending on the nature of the complaint and the responsiveness of each party. As for the advertiser dispute process, the ASC currently estimates the timeline from receipt of a complaint to a written decision to take approximately 37 working days, with the timeline

often extended due to extension requests.

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