

## 1 ADVERTISING FRAMEWORK

### 1.1 How is advertising regulated in Canada?

Advertising in Canada is regulated at both the federal and provincial levels, as well as through self-regulatory bodies:

- (a) **Federal laws** govern deceptive marketing practices, including a wide range of representations such as pricing, promotions, testimonials, telemarketing, and bait-and-switch tactics. Furthermore, the federal Criminal Code prohibits illegal lotteries and other conduct related to promotional contests and sweepstakes. Quebec was previously the only provincial jurisdiction in Canada to regulate promotional contests and sweepstakes in addition to federal law. However, as of October 27, 2023, these Quebec contest requirements have been repealed. Quebec also requires the use of French language in advertising, subject to limited exceptions.
- (b) **On the provincial level**, consumer protection legislation governs deceptive advertising and marketing practices. There are also sector- and product-specific legislation governing advertising for products such as alcohol, tobacco, cannabis, drugs, natural health products, food, cosmetics, and advertising directed to children. Additionally, consumer products are subject to federal and provincial labelling legislation, including bilingual requirements.
- (c) There are significant **industry self-regulation requirements** as well, administered by industry self-regulatory bodies such as Ad Standards and the Canadian Marketing Association.
- (d) Lastly, some **intellectual property laws** relating to copyright and trademarks are also relevant to advertising.

### 1.2 What types of communications are considered to be ‘advertising’? How is this determined?

Advertising includes virtually any representation made to the public (including any subset of the public), in any media, intended to influence choice, opinion or behavior or otherwise promote, directly or indirectly, a product, service, company, or interest.

### 1.3 What is the basic regulatory framework for advertising regulation?

The Competition Act governs misleading representations:

- (a) Anyone who makes a materially false or misleading representation to the public to promote the supply or use of a product or a business interest engages in ‘reviewable conduct’. When the Competition Tribunal (the federal adjudicative body in Canada responsible for cases regarding competition laws under the Competition Act) or a court, on application by the Commissioner, finds that a person has engaged in reviewable conduct, it may order the person to not engage in such conduct, to publish a corrective notice, to pay an administrative monetary penalty and/or to pay restitution to affected consumers.
- (b) It is a criminal offense for anyone to knowingly or recklessly make a materially false or misleading representation to the public to promote the supply or use of a product or business interest. Any person who contravenes this provision is guilty of an offense and liable to a fine and/or imprisonment.

Private sector privacy laws regulate the collection, use, and disclosure of information about an identifiable individual. These laws apply to activities in both online behavioral advertising and day-to-day consumer marketing practices. Canada's Anti-Spam Legislation ('CASL') oversees the transmission of commercial electronic communications, such as emails, text messages, and specific social media interactions.

### 1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Yes. Commercial electronic messages such as text messages, email and certain social media messages are regulated by CASL, which (subject to limited exceptions) requires that the recipient consent to receive the message (implied or express consent), as well as requiring certain disclosures in the message (including an unsubscribe function).

False or misleading representations as to the source, sender or subject matter of electronic messages are also specifically prohibited.

Canadian Wireless Telecommunications Association guidelines mandate disclosures related to text messaging, including disclosure of costs associated with short code campaigns and other material terms.

Certain advertising (eg, food, alcohol, cosmetics, ads directed to children) must be precleared in order to be accepted by most networks to go to air.

### 1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Yes. The following categories of products are examples of those that have specific advertising restrictions:

- (a) **Alcohol:** Alcohol advertising is regulated provincially, with federal restrictions regarding broadcast alcohol advertising. Example prohibitions include directing such advertising to minors, depicting consumption of alcohol, and using imperative language to urge people to purchase or consume the product.
- (b) **Tobacco:** Most forms of tobacco advertising to the public are prohibited, including advertising in broadcast media.
- (c) **Cannabis:** Cannabis advertising is also generally prohibited unless the advertiser and type of messaging meet specific exceptions available by law.
- (d) **Food:** Food advertising is heavily regulated. For example, claims about the nutritional content or characteristics of food, and comparative food claims, must comply with prescribed formats and restrictions on permissible claims. At the time of writing, new federal legislation is proposed that will either prohibit or restrict the advertising of foods deemed 'unhealthy' directed to children under 13 (this is already prohibited under the advertising self-regulatory regime).
- (e) **Cosmetics:** Cosmetics advertising is regulated, prohibiting drug-like claims about the performance or nature of cosmetic products.
- (f) **Health products:** The advertising of marketed health products, including medical devices, is restricted to claims that comply with the product license or monograph, as applicable.

- (g) **Medicines:** Prescription drugs are highly regulated. Branded prescription drug advertising is limited to the brand name, price and quantity of the product, and cannot state or imply the therapeutic indication of the drug or the affected disease state it seeks to remedy. It may be permissible to communicate, through advertising or otherwise, about a disease state; however, such a campaign must remain unbranded.
- (h) **Credit/leasing rates:** Where advertising includes references to credit or leasing rates, as is prevalent in advertising for cars etc, additional disclosures are required under provincial law, which vary by jurisdiction. For example, credit advertising may require disclosure of the applicable annual percentage rate (APR), and leasing advertising may require disclosures such as the lease APR, length of the lease term, and amount of each payment other than the monthly payments.
- (i) **Advertising to children:** Quebec prohibits advertising to children who are under 13 years of age. This applies to merchants that promote goods or services as well as those involved in the advertising process. It applies across all advertising media, including online, radio, television, mobile phones, printed materials such as newspapers, magazines and flyers, signage, promotional items, and new media. When determining whether the communication will be considered to be ‘directed at’ children, the following contextual factors must be considered:
  - (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.

### 1.6 Are any government pre-approvals required?

Canadian governmental regulators have largely delegated pre-approval to industry self-regulatory bodies. See below.

### 1.7 Does the media pre-clear advertising?

For broadcast, networks generally rely on approved agencies, including Ad Standards, which provide pre-clearance services for advertising in the following categories: alcohol, children’s advertising, cosmetics, food and non-alcoholic beverages, and consumer drugs. Additionally, the Pharmaceutical Advertising Advisory Board pre-clears advertising directed to healthcare professionals for prescription, non-prescription, biological and natural health products.

Broadcasters will also clear advertising in these categories, as well as all other categories of advertising, or otherwise will use the clearance services of *thinktv* to do so on their behalf.

### 1.8 How does the government enforce advertising laws? What are the potential remedies?

Enforcement is dependent on the type of advertising and the governing legislation.

For example, non-compliance with the civil prohibition against false or misleading advertising could result in a court order to:

- (a) no longer engage in the conduct (for up to 10 years);
- (b) publish a notice to the public;
- (c) pay retribution to consumers; and/or

- (d) pay an administrative monetary penalty up to the greater of C\$10,000,000 (C\$15,000,000 on a second order), or three times the value of the benefit derived from the deceptive conduct. If the benefit received cannot be determined, then the maximum penalty can rise to 3% of the corporation's annual worldwide gross revenues.

The penalties on a criminal conviction by indictment are a fine in the discretion of the court and/or imprisonment for up to 14 years. On a summary conviction, the maximum penalty is a fine up to C\$200,000 and/or imprisonment for up to one year.

### **1.9 When does a competitor have a right of action? What are the potential remedies?**

Remedies are dependent on the type of advertising and the governing legislation.

The Competition Act provides for a private right of action where the conduct meets the criminal standard for false or misleading advertising. The remedy is compensation for damages suffered, with no limit on the amount of an award to competitors that allege advertising is contrary to the Act.

Additionally, competitors can access a dispute procedure offered by Ad Standards to mediate competitive advertising disputes under the Canadian Code of Advertising Standards. This confidential process is offered on a fee basis as an alternative to court proceedings. The only remedy available is the amendment or withdrawal of the advertising, however, which may not be sufficient to compensate for damage suffered for false or misleading advertising.

Lastly, competitors can seek remedy through a complaint to the applicable industry sector regulator (eg, the Competition Bureau, Health Canada, the Ontario Motor Vehicle Industry Council) in an attempt to trigger a regulatory investigation and enforcement of the applicable requirements.

### **1.10 When do consumers have a right of action? What are the potential remedies?**

Remedies are dependent on the type of advertising and the governing legislation. Consumers can seek damages through the private right of action available under the Competition Act (see question 1.9 above) or under applicable provincial consumer protection legislation.

Ad Standards offers a consumer complaint process through which consumers can complain about advertising alleged to be non-compliant with the Canadian Code of Advertising Standards. The only remedy available is the amendment or withdrawal of the advertisement.

Consumers may also make complaints to the applicable industry sector regulators (see question 1.9 above).

## **2 SELF-REGULATORY FRAMEWORK**

### **2.1 Does Canada have a primary advertising self-regulation system?**

The primary self-regulatory system in Canada is Ad Standards. Ad Standards is a national, not-for-profit body that administers the Canadian Code of Advertising Standards ('Code'), including the determination of both consumer and trade complaints under the Code.

The Code is designed to help set and maintain standards of honesty, truth, accuracy, fairness and propriety in advertising. The Code sets the criteria for acceptable advertising and forms the basis upon which advertising is evaluated in response to consumer complaints and complaints between advertisers. The Code is not intended to replace the many laws and guidelines designed to regulate advertising in Canada. Nor are the Code's provisions intended to override any other aspect of Canada's preclearance and regulatory apparatus.

Complaints to Ad Standards submitted by the public about advertising that allegedly does not comply with the Code are reviewed and adjudicated by one of two Councils:

- (a) the Standards Council, which includes representatives from Western Canada, Central Canada, and Atlantic Canada; or
- (b) in Quebec, by *le Conseil des normes*.

Councils are independent bodies of senior industry and public representatives, that are supported and coordinated by, but are independent from, Ad Standards. Advertising complaints from advertisers and special interest groups, based on the Code, are administered under Ad Standards' Advertising Dispute Procedure.

If an ad is found to violate the Code, the advertiser can be instructed to remove or amend the non-compliant advertisement and may be publicly identified in a complaints report. Moreover, non-compliant ads will not be carried by newspapers, broadcasters and digital platforms that are members of Ad Standards.

The advertiser dispute process is discussed at question 2.3 below.

Ad Standards also offers advertising pre-clearance services for regulated products.

### 2.2 Is there a self-regulatory advertising code? What are the key principles?

The clauses of the Code are:

- (a) Accuracy and Clarity;
- (b) Disguised Advertising Techniques;
- (c) Price Claims;
- (d) Bait and Switch;
- (e) Guarantees;
- (f) Comparative Advertising;
- (g) Testimonials;
- (h) Professional or Scientific Claims;
- (i) Imitation;
- (j) Safety;
- (k) Superstition and Fears;
- (l) Advertising to Children;
- (m) Advertising to Minors; and
- (n) Unacceptable Depictions and Portrayals.

Alleged inaccurate or misleading advertising continues to be the most active subject of complaint. This encompasses:

- false or misleading representations,
- omitting relevant information,
- lack of clarity,
- adequacy of disclosures and disclaimers,
- that claims be adequately and properly substantiated, and
- that the advertiser be clearly identified.

**2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?**

The Advertising Dispute Procedure provides industry with an effective and responsive mechanism by which disputes between advertisers and from special interest groups can be handled in a confidential forum outside of the judicial system. (For consumer complaints, see question 2.1 above).

There are three pre-conditions for Ad Standards being able to accept a complaint from an advertiser:

- (a) Ad Standards must be satisfied by the complainant advertiser that it has not succeeded in its good faith attempt to resolve the disputed issues directly with the defendant advertiser.
- (b) Ad Standards must be of the opinion there are reasonable grounds to proceed with the complaint, ie, that one or more breaches of the Code are alleged and that the advertising in question has not been excluded under the provisions of the Code or the Advertising Dispute Procedure from adjudication by an Ad Dispute Panel.
- (c) The complaint must be accompanied by the applicable fee.

If Ad Standards accepts the complaint, either party may ask Ad Standards to convene a voluntary resolution meeting between the complainant advertiser and the defendant advertiser, which would be moderated by Ad Standards. The complainant and defendant advertiser must both agree to participate in such meeting.

If the matter is not resolved by such a meeting, either because no resolution meeting is requested or held, or a resolution meeting is held but does not result in a resolution, the defendant advertiser will have a time-limited opportunity to respond in writing to the complaint. Such response will be sent to Ad Standards and to the complainant, who, in turn, will have a time-limited opportunity to reply to the defendant advertiser's submission. The defendant advertiser may then file its reply to, or comment on, the complainant's last submission.

The complaint together with the formal written submissions made by the two parties collectively form the file on the basis of which a three-person panel will adjudicate the dispute (the 'Ad Dispute Panel'). Unlike Ad Standards' previous advertising dispute procedure, there are no live hearings before the Ad Dispute Panel for the parties to present their arguments in-person. The only materials the Ad Dispute Panel may consider in its deliberation are the written submissions from the complainant and the defendant advertiser.

If the defendant advertiser declines to participate in the Advertising Dispute Procedure, the Ad Dispute Panel will still proceed with its adjudication and the complaint will be decided by the Ad Dispute Panel on the basis of the submissions made in the complaint to Ad Standards by the complainant advertiser.

The Ad Dispute Panel is chaired by a lawyer who is experienced in advertising and marketing law. The other two members of the Ad Dispute Panel are drawn from a roster of people from the advertiser, communication/advertising agency, media and industry sectors.

The Ad Dispute Panel's decision is final and non-appealable.

Neither the complainant nor the defendant advertiser may disclose or discuss publicly the Ad Dispute Panel's decision, except within their respective organizations.

The identity of the parties involved in a dispute, and the identity of the members of the Ad Dispute Panel, will not be disclosed by Ad Standards in its case summaries, and may not be disclosed or implied by the parties.

The purpose of the Ad Standards case summaries is to inform the advertising community and the public of the outcome of complaints about advertising that allegedly contravenes the Code and to provide clarity about the kinds of advertising activity that have been found to conflict with the Code.

If the Ad Dispute Panel sustains a complaint, the defendant advertiser will be required to withdraw the advertising in question or amend the advertising in such a manner as to comply with the Ad Dispute Panel's decision and not contravene the provisions of the Code.

Failure by the defendant advertiser to fully comply with the Ad Dispute Panel's decision, whether or not it had chosen to participate in the Dispute Resolution Procedure:

- will result in Ad Standards advising the media of this fact and notifying the Competition Bureau; and
- may result in Ad Standards publishing its summary of the Ad Dispute Panel's decision of the case, including a summary of the facts and issues in dispute, an identification of both parties to the dispute; and a description of the advertising in question.

### **2.4 Is the self-regulation system effective? Is it widely used and followed?**

Consumers are increasingly becoming aware of, and turning to, Ad Standards to register complaints.

The confidential nature of the Advertising Dispute Procedure, as well as its potentially quick resolution, make it an appealing alternative to the courts for dispute resolution, and it is widely accepted.

The vast majority of advertisers do comply with the procedures and findings of Ad Standards.

### **2.5 Are the self-regulatory system's decisions reported?**

As noted at question 2.1 above, the findings of consumer complaints are reported where an ad is found to have violated the Code. If the ad is still in market when the Council meets to evaluate it, the advertiser and details of the ad are disclosed. If the ad has already been amended or withdrawn, the report is anonymous. Ad complaint reports are published on Ad Standards' website.

The decisions in advertiser/special interest group Ad Disputes (see question 2.3 above) remain confidential and are not reported, unless an advertiser does not comply with Ad Standards' finding.

### **2.6 Are there any key areas of focus, or key principles, that companies should be aware of?**

As consumer complaints about accuracy and clarity continue to increase, particular attention should be paid to disclosure of material terms. A disclaimer cannot be used to contradict the primary message, but only to add supplemental information. Advertising must also not omit information that is material to the offer in such a way as to be deceptive.

In evaluating the accuracy of the ad, Ad Standards will consider both the literal meaning of the ad and the general impression it creates.

### **2.7 Are there any other self-regulatory systems that govern advertising practices in Canada?**

There are various industry associations and self-regulatory bodies, including the Canadian Marketing Association, the Digital Advertising Alliance of Canada, the Canadian Beverage Association, that lead voluntary initiatives and self-regulatory programs in the advertising industry.

### **3 ADVERTISING LAW BASICS**

#### **3.1 What are the basic laws governing advertising claims in Canada (eg, consumer protection laws, IP laws, unfair competition laws)?**

The Competition Act is the primary federal statute governing false or misleading advertising and deceptive marketing practices. Under the Act, one must not make a representation to the public that is false or misleading in a material respect. In evaluating an ad, the court or regulator will consider both its literal meaning and the general impression it creates. To determine the general impression of a claim, the courts will consider what understanding a credulous and inexperienced consumer would have of the claim, which includes looking at the advertisement as a whole (ie, text, images, symbols, and other content).

Copyright, trade-mark and other intellectual property laws are also governed federally.

Provincial consumer protection laws also govern false representations or deceptive marketing practices. In particular, consumer protection law in the Province of Quebec addresses marketing and advertising practices in detail, including false or misleading representations, restrictions on the prominence of a premium in an offer, inclusive price advertising, and generally prohibits advertising to children under 13. The Charter of the French Language in Quebec also mandates that advertising be in French, and creates prominence requirements for French when it appears with other languages.

#### **3.2 Is substantiation required for advertising claims?**

Yes, substantiation is required for advertising claims prior to making the representation to the public. The Competition Act prohibits representations 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 onus is on the party making the representation to show that it is supported by adequate and proper tests. The phrase ‘adequate and proper’ is not defined in the Competition Act, and guidance must be drawn from caselaw and the context of the claim itself.

Similarly, Ad Standards’ Code requires that claims be supported by ‘competent and reliable’ evidence.

All product claims (performance, comparative, environmental or otherwise) must be truthful, accurate, fair and substantiated; and such support must exist before any statement is made publicly.

In certain provinces it is also a specific deceptive practice to advertise a performance characteristic of a product that the product does not have.

#### **3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?**

Puffery is not subject to substantiation in Canada. However, puffery has a narrow scope compared to some other jurisdictions, as advertising claims in Canada are much more likely to be interpreted in a literal way. The rules for false and misleading advertising apply to all representations made to the public, and so even advertising containing a puffery claim must not create an inaccurate or erroneous general impression. To qualify as puffery, the statement should be clearly nonsensical, or excessive to the point that it is clearly intended as fantasy or humor.



**3.4 What are the rules governing the use of disclosures in advertising?**

The use of disclaimers is subject to the general rules with respect to false or misleading advertising. To avoid being false or misleading, disclaimers should be clear and conspicuous and clearly attached and/or in reference to the claim being modified. In order to determine whether a disclosure/disclaimer is clear and conspicuous, the type size, crawl speed, contrast, layout, volume and tone will need to be examined. In any case, a disclosure/disclaimer should be easily legible (or audible) from a reasonable distance in a single viewing (or listen) of the ad.

The Competition Bureau takes the administrative position that disclaimers which expand upon and add information to the principal representation do not raise an issue under the Competition Act. All required disclosures must be displayed in such a way that they are likely to be read. Further a disclaimer can only qualify a representation; it cannot cure or retract a false or misleading representation.

Canada's Code of Advertising Standards states that disclaimers and asterisked or footnoted information must not contradict more prominent aspects of the message and should be located and presented in such a manner as to be clearly visible and/or audible.

**3.5 What are the rules governing the use of endorsements and testimonials in advertising?**

The general impression created by the advertisement using an endorsement or testimonial must not be false or misleading. The Competition Act requires that either a testimonial must have been previously published; or, prior to advertising, the advertiser must obtain consent to use it from the person making the testimonial.

Additionally, in its administrative guidance, the Competition Bureau has provided examples of how to avoid a false or misleading general impression:

- (a) The person providing the testimonial must have actually used the product. Their statement must be their honest opinion.
- (b) Continued use of a product or service must occur if the testimonial implies such continued use (use of testimonial must be discontinued if their views or experience changes).
- (c) The third party's experience must be relevant to the views expressed (use of the product should be akin to typical consumer use).
- (d) To avoid the impression of impartiality, a person giving a testimonial must disclose any financial or other interest/connection with the advertiser, product or service. (See question 3.4 above for additional details regarding disclosure requirements.)
- (e) Payment must be disclosed where such payment would not be expected by consumers.
- (f) Results/testimonials selected must be representative of a fair sampling of opinions expressed.
- (g) The claims made must not be false or misleading and must be substantiated.

**3.6 What are the rules governing the use of product demonstrations in advertising?**

Product demonstrations are not specifically regulated. The laws applicable to false or misleading advertising, including the general impression created by the ad, will apply. In this vein, the demonstration must not create an inaccurate impression as to the nature, performance or other attributes of the product. Tools such as time lapse, dramatizations, and the like should be disclosed. Under most provincial and territorial consumer protection legislation, a claim that goods or services are of a particular standard, quality, grade, style, or model, if they actually are not, would be considered false and misleading.

**3.7 Is comparative advertising permitted? If so, are there any special rules that apply?**

Comparative advertising is permitted, provided that it is not false or misleading, does not infringe on third party intellectual property rights and does not unfairly disparage the competitor or its products/services. Using a third-party trademark in advertising may constitute trademark infringement under the Trademarks Act. The Code requires that advertisements must not unfairly discredit, disparage or attack one or more products, services, advertisements, companies or entities, or exaggerate the nature or importance of competitive differences.

There are certain sector-specific restrictions on comparative advertising (for example, comparative advertising of pharmacists is prohibited). Comparative claims in drug advertising should be supported by direct head-to-head human clinical studies. Specific requirements must be met when using comparisons in food advertising.

In the Province of Quebec, it is forbidden to falsely discredit goods or services offered by others by any means whatsoever.

**3.8 Are there any special copyright or trademark rules that may impact comparative advertising (eg, whether a competitor's trademark or products may be used)?**

Canadian law distinguishes between marks used in association with goods, and marks used in association with services. A trademark registered in association with goods may appear in comparative advertising (off packaging, and away from the point of sale) without constituting an unauthorized use. In the case of marks registered in association with services, however, 'use' includes use in advertising. Use of such marks in advertising may therefore trigger claims of unauthorized use of the mark if it appears in comparative advertising in any media.

In addition, depicting a competitor's packaging or logo may constitute copyright infringement.

In the case of any comparative advertising, it is important to avoid disparaging the competing brand, or depreciating the goodwill of the competitor's mark.

**3.9 Are there any special rules that govern claims relating to geographic origin (eg, that the product is 'made in France')?**

Yes. Canadian regulators have developed guidelines addressing 'made in Canada' and 'product of Canada' claims for both food and consumer products. Generally, 'product of Canada' may be claimed when all or virtually all major ingredients/components, processing, and labor used to make the product are Canadian. 'Made in Canada' can be used with a qualifying statement (eg, 'with domestic and imported ingredients') when the last substantial transformation of the product was performed in Canada. When a 'product of Canada' claim is made about food, the Canadian Food Inspection Agency will expect that all of the significant ingredients in the product are of Canadian origin and non-Canadian material is negligible. Certain foods may be required to declare their country of origin. Origin markings on certain types of goods may also be required under international trade agreements.

Canadian trademark law also recognizes that marks may be deceptively misdescriptive if the trademark is, or includes, a geographic name and the associated goods or services do not come from that location.

**3.10 Are there any special rules governing product packaging?**

Yes. Packaging for most consumer products is regulated under the Consumer Packaging and Labelling Act. This legislation governs requirements for declaration of standard of identity, net quantity, dealer declaration and on-pack claims. The packaging for certain products is specially regulated. For example, tobacco and cannabis have plain packaging requirements. Permissible claims and presentation of nutrition and ingredient information on packaging is specially regulated for all food products.

**3.11 Are there any special rules or guidance on the use of ‘dark practices’?**

‘Dark practices’, also referred to as ‘dark patterns’, are a variety of manipulative tactics that use deceptive formatting or language to trick or trap a consumer into engaging in a behavior that is different from that which they originally intended. Dark practices are not specifically regulated, although aspects of it are addressed indirectly through the prohibitions against false or misleading advertising practices under the Competition Act, privacy laws, anti-spam legislation, and provincial/territorial consumer protection laws. Warning bulletins have been made available by the Competition Bureau to consumers related to the use of dark patterns in subscription-based services and free trial offers.

In the Province of Quebec, organizations are prohibited from giving any reason as a pretext for soliciting the sale of goods or the provision of services. For example, the Consumer Protection Office in Quebec has indicated that conducting an air quality survey for the purpose of selling an air purifier or dehumidifier to a consumer is prohibited.

**3.12 Are there any special rules or guidance on artificial intelligence as it relates to advertising?**

There are no laws in Canada which govern the use of artificial intelligence (‘AI’) in particular. Changes are expected relatively soon, as the Digital Charter Implementation Act 2022 has completed its second reading at the House of Commons. This aims to regulate the development and use of ‘high impact’ artificial intelligence systems by businesses in Canada.

This proposed Act does not include provisions related to copyright in content developed by generative AI. While Canadian law is not entirely clear at this time with regard to who owns the copyright in materials produced by generative AI, including advertising content, there is some support for the conclusion that content must be created by a human being in order for it to be protected by copyright. Until the law is more settled, advertisers relying on materials created by generative AI should consider that they may not have copyright protection over those materials.

**4 PRICE ADVERTISING**

**4.1 What are Canada’s rules regarding price advertising?**

The primary rules regarding price advertising related to ‘ordinary’ or ‘regular’ price claims, are discussed in question 4.3 below. An advertiser is also prohibited from charging more than the advertised price.

Where non-optional fees are not added to pricing representations, this ‘drip pricing’ is specifically prohibited federally as a false/misleading representation. All-inclusive price advertising is mandated in certain sectors, such as automotive and airline travel. At the provincial level, Quebec’s consumer

protection legislation also requires that no greater emphasis be put on the price of a part of a set, or instalment, than on the total price; and that no greater emphasis be put on a premium than on the primary offer.

#### 4.2 What are Canada's rules regarding advertising 'free' products?

Where a 'free' claim gives a general impression regarding the ordinary selling price of a product, the ordinary selling price requirements (set out in question 4.3 below) will apply.

The general prohibition against making false or misleading representations will also apply. As such, the context offer must truly be 'free'. For example, where a bonus item is provided 'free' on the purchase of a product, the cost of the product must not be inflated to account for the bonus item.

#### 4.3 What are Canada's rules regarding sales and special offers?

The ordinary selling price ('OSP') provisions of the Competition Act apply any time that reference is made to an 'ordinary' or 'regular' price in comparison to the sale price to represent some type of savings or bargain to the consumer. A seller cannot advertise that a product is on sale or discounted relative to an 'ordinary' or other price unless the regular price is substantiated using either a time or volume test:

- (a) **The time test** is met if the product in question is offered for sale in good faith at the ordinary price (or a higher price) for a substantial period of time prior to (or following) the representation. In its administrative guidance, the Competition Bureau has interpreted a 'substantial period of time' to mean more than 50% of a six-month period prior to (or, if specifically identified, after) the making of the representation. This period may be shorter depending on the nature of the product in question (eg, seasonal merchandise).
- (b) **The volume test** requires the supplier to have sold a substantial volume of the products at the represented ordinary price. The Competition Bureau has considered a 'substantial volume' to be more than 50% of products sold over 12 months.

If an ordinary price fails both tests, it may not raise issues under the Act if the seller can establish that the representation was not otherwise false or misleading in a material respect. An example of this are 'clearance' claims, which are not required to meet the time/volume tests provided that certain conditions are met.

#### 4.4 What are Canada's rules regarding rebates?

Rebates are not expressly regulated, and the general prohibition against making false or misleading representations will apply. The Competition Bureau has issued administrative guidance, however, regarding consumer rebate promotions and when they will be found to be false or misleading. There are two types of rebates common in the Canadian market:

- mail-in rebates that consumers apply for via mail or online, and receive after purchase of a product, and
- instant rebates that consumers receive at the time of purchase.

Any material restrictions on the redemption of a mail-in rebate must be clearly and conspicuously disclosed so that consumers are aware of the restriction prior to purchasing the product. The following conditions are likely to be material:

- (a) having to provide information beyond proof of purchase and contact information;
- (b) a deadline to submit a claim;

- (c) an obligation to purchase another product in order to qualify for the rebate;
- (d) geographic limitations within Canada restricting eligibility for the rebate;
- (e) restrictions as to the eligibility of certain mailing addresses, such as rural addresses;
- (f) having to forgo the right to confidentiality or allowing personal information to be shared with others in order to receive the rebate;
- (g) any limits on the number of rebates that can be claimed; and
- (h) a rebate that is only valid if the purchase is made at certain eligible retailers.

Additionally, where a rebate promotion representation creates the general impression that a product is on 'sale', it is likely to be found misleading in the case of mail-in rebates. A mail-in rebate should not give the impression that the rebate is instant, or otherwise that the rebated portion of the purchase price of the product will be received at the time of purchase.

#### **4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?**

The Competition Bureau has recently focused its enforcement on false/misleading pricing claims, including 'drip pricing'. Based on this recent enforcement, where the main message of an advertisement makes a pricing claim, it is likely insufficient to disclaim additional fees elsewhere in the ad. Where discounts are offered, or pricing claims are otherwise subject to conditions, statements identifying the discount must be easily readable and in close proximity to the prices quoted.

In Quebec, retail prices must be displayed on each item offered for sale, unless optical scanning technology is used, subject to an exception that allows the price to instead be displayed on the shelf next to the item. Minimum font size and label sizes apply.

Prices quoted in media are assumed to be in Canadian currency unless otherwise clearly identified.

## **5 PROHIBITED PRACTICES**

### **5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?**

As noted in question 1.5 above, advertising for tobacco, cannabis, and prescription drugs are significantly restricted by law. Under federal law, tobacco advertising must be limited to informational or brand-preference ads in publications mailed to identified adults, or publications with at least 85% adult readership, or signs in places where minors are not permitted by law. Branded prescription drug advertising is limited to the brand name, price and quantity of the product, and cannot state or imply the therapeutic indication of the drug or the affected disease state it seeks to remedy. It is prohibited to advertise a drug, natural health product or medical device that is not licensed for sale in Canada.

Advertising, in media that target minors, products which cannot be obtained by minors is also prohibited. For example, provincial alcoholic beverage legislation (or industry guidelines) restrict media placement for alcohol advertising.

Advertising to children under the age of 13 is generally prohibited in all media (subject to limited exceptions) in the province of Quebec. Advertising food to children that is high in sugar, salt or saturated fat is currently prohibited under self-regulatory guidance, and is likely to be prohibited by incoming federal regulatory changes.

**5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?**

While there are no advertising practices that are prohibited, several forms of marketing are regulated. Those engaged in direct selling may be subject to licensing obligations. Multi-level marketing plans may also require licensing in certain jurisdictions, and this may in turn require approval of the structure of the program by the Competition Bureau. Telemarketing is also regulated and, among other requirements, telemarketers must scrub their lists against Canada's Do Not Call registry (and pay for this subscription). As noted in question 1.4 above, it is also contrary to anti-spam legislation to send commercial electronic messages such as email or SMS without the consent of the recipient.

**5.3 Are there any laws or regulations governing indecency or obscenity that apply?**

While this area is not governed in law (except in the case of pornography), the Canadian Code of Advertising Standards governs standards of decency. Specifically, advertising must not:

- (a) condone discrimination based upon race, national origin, religion, sex or age,
- (b) appear in a realistic manner to condone or encourage violence,
- (c) demean, denigrate or disparage a person or group of persons, or
- (d) undermine human dignity, or offend standards of decency prevailing among a significant segment of the population.

**6 SPONSOR/ADVERTISER IDENTIFICATION**

**6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?**

There is no specific regulation governing advertiser/sponsor identification. The general rules against false or misleading advertising (including the general impression test) apply. The Code, however, provides that the advertiser must clearly be identified in any advocacy advertising, that no advertisement may be presented in a way so as to conceal its commercial intent, which may apply in the case of certain native advertising, and that no advertiser may imitate another advertiser so as to mislead the consumer.

If a company pays or compensates someone in-kind to promote its products on social media or other media, those online and other posts must clearly be identified as advertising or sponsored content.

The deceptive marketing practices provisions of the Competition Act apply to anyone promoting a product, service, or any business interest. It is misleading if influencers do not disclose all material connections with the business, product or service they are promoting. A connection may be 'material' if it has the potential to affect how consumers evaluate the independence of an influencer from a brand. There may be a material connection if the influencer:

- (a) received payment in money or commissions;
- (b) received free products or services;
- (c) received discounts;
- (d) received free trips or tickets to events; or
- (e) has a personal or family relationship.

If there is a material connection the influencer should clearly and prominently disclose the connection on all platforms.

Ad Standards Canada has also published guidelines to help ensure that influencer content is not deceptive. It requires representations to disclose any material connection between the influencer and the entity behind the brand, product or service being promoted. The guidelines further require that the disclosure be clear, prominent, and in close proximity to the representation being made.

## **7 BRANDED CONTENT**

### **7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?**

There are no specific regulations governing branded content in entertainment works, but the rules concerning general false or misleading advertising apply (including the general impression test). Note that certain tax incentives available for productions could be lost if the programming is deemed to be advertising, rather than entertainment.

### **7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?**

In accordance with the general laws governing false and misleading representations (and the general impression test), and the Code, the commercial intent of a communication should not be disguised. If incentives were offered for featuring the advertised item within the content, it may be necessary in some contexts for this to be disclosed.

## **8 SOCIAL MEDIA**

### **8.1 Are there any special rules governing the use of social media for advertising purposes?**

There are no laws which specifically govern social media in Canada, and so laws of general application will apply. Moreover, apart from the terms and conditions of each particular platform, there are no rules governing the use of social media for advertising.

The Competition Bureau and Ad Standards have also set out specific guidance related to format (eg, influencers must disclose any material connection they have with the advertiser whose product or brand they are promoting). There is a risk that the advertisement will be considered false or misleading to consumers if the advertiser and influencer fail to comply with these guidelines. See questions 3.4 (regarding disclosure), 3.5 (regarding endorsements/ testimonials) and 6.1 (regarding influencers) above.

CASL applies to commercial electronic messages sent through social media platforms. While general posts will be outside of the scope of this legislation, direct messages and, potentially, other forms of direct communication will be captured. This triggers the requirements for certain consent requirements, and disclosures within the message itself.

**8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?**

An advertiser may be held responsible for advertising claims made by users. To the extent that an advertiser either screens user generated content prior to posting, or monitors direct posts made by consumers, or solicited the content, it could be held responsible. The potential for liability may depend upon the jurisdiction, and the extent to which the advertiser may be found responsible, directly or indirectly, for the content.

**8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?**

In 2015, Bell Canada agreed, by way of a consent agreement with the Competition Bureau, to pay an administrative monetary penalty of C\$1.25M. The offending conduct consisted of posted reviews by Bell employees, giving positive comments and ratings, without disclosing their affiliation with the company.

Additionally, in 2019, the FlightHub case provides confirmation that fabricating customer reviews is contrary to the Competition Act’s prohibitions against making false or misleading representations. FlightHub had published positive online consumer reviews that were presented as independent and impartial, when in fact the reviews were made by FlightHub.

In 2021, Ad Standards Canada found that posts made by influencer Madison K, and advertiser The Perfect Hoop did not properly disclose the material connection between the two. In this case, the influencer tagged the advertiser but did not mention that the content was sponsored, and the advertiser subsequently posted the same content without any disclosures.

**9 RIGHTS OF PRIVACY/PUBLICITY**

**9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?**

There are both common law and statutory rights to personality in Canada. The common law tort of appropriation of personality prohibits the use of an individual’s personality—including name, picture, likeness, voice and identity—without permission, although is relatively nascent in development. Additionally, some provinces have enacted specific legislation providing a cause of action for appropriation of personality. The following elements make up the statutory cause of action across all jurisdictions:

- (a) only certain traits can be appropriated (voice, name, and likeness);
- (b) the defendant must be identifiable;
- (c) appropriation must be intentional;
- (d) the defendant must gain from the appropriation; and
- (e) the plaintiff must show that damages were suffered as a result of the appropriation.

Where the individual consented to the use of personality, it will constitute a defense in all jurisdictions where there is a statutory cause of action for appropriation of persona.



Concurrently, there are also statutory and developing common law rights to privacy, including the following developing torts:

- Intrusion upon seclusion,
- Public disclosure of private facts, and
- Publicity that places a person in a false light in the public eye.

These torts are typically only actionable if the intrusion was intentional/reckless, amounted to an unlawful invasion of the plaintiff's private affairs, and/or would be viewed as highly offensive to the reasonable person.

### **9.2 Are there situations when permission is not required?**

Most provincial legislation requires that the individual be identifiable. Additionally, some provinces extinguish persona rights on the death of the individual. In all jurisdictions, there is a defense to the appropriation (or it is not an appropriation) where it was in the public interest, or where the appropriation was fair comment on a matter of public interest. It is unlikely, however, for commercial advertising to be considered a matter of public interest.

## **10 SPECIAL CLEARANCE**

### **10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?**

There are no specific rules at law requiring preclearance of materials to be used in advertising, except for the general application of intellectual property laws. To use materials owned by a third party, one must secure the necessary rights. In some instances, owners of buildings or other landmarks may claim rights in and to the images of the buildings and require permission for commercial use of any photograph or other image.

### **10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?**

Depicting a competitor's packaging, logo, or mascot in advertising may constitute copyright infringement and, in the case of the use of a competitor's trademark, trademark infringement or passing off.

## **11 CULTURAL CONCERNS**

### **11.1 Are there any rules that are particular to the culture of Canada which affect advertising (eg, Swedish gender equality law)?**

While no cultural considerations are prescribed by law, the Code does mandate that advertising should not offend standards of decency prevailing among a significant segment of the population. Canada has a diverse ethnocultural, linguistic and religious population, with more than 450 ethnic or cultural origins reported in the 2012 federal census, and this cultural diversity is valued by most Canadians.

As noted above, Quebec language laws require that advertising be in French. Further, advertising may be viewed differently in French Canada than in English Canada, whether due to linguistic or cultural differences.

**11.2 Are there any other cultural norms that should be considered (eg religious concerns)?**

See question 11.1 above.

**12 MISCELLANEOUS**

**12.1 Is there any other general advice or cautions you would give to advertisers operating in Canada?**

CASL has a broad reach across the use of electronic communications to interact with consumers. CASL is in addition to private sector privacy legislation governing the collection, use and disclosure of personal information. In particular, the application of CASL to many social media platforms has yet to be resolved or expanded upon by the regulators.

When creating advertising for Canada, be aware that Canadians may view advertising more literally than in some other jurisdictions (ie, restricted scope for puffery), and that both the literal meaning and the general impression created by the advertising are to be considered. The Supreme Court of Canada ruled in 2012 that, under Quebec’s consumer protection legislation, the general impression of an ad should be considered from the perspective of the ‘credulous and inexperienced’ consumer. It is therefore important that the meaning of the advertisement be clear, and disclosures and disclaimers used appropriately.

There are certain areas where the Canadian government is placing increasing focus on enforcement. In particular, the Competition Bureau views environmental marketing claims as an area of interest. Although the Competition Bureau has archived its guidelines for advertisers and the industry on this topic, it has published a condensed list of key considerations when making such claims, including that they should be precise and substantiated. In 2022, it opened two inquiries regarding environmental marketing claims that remain under investigation, relating to climate change, reduced emissions, and sustainable energy.

Additionally, another area of attention is the advertising of food and beverage products high in sugars, sodium or saturated fat to children under the age of 13. Ad Standards began enforcing a new code in this regard in June 2023, while Health Canada released a proposed policy prohibiting such ads. There is also similar draft legislation that is currently proceeding through the federal legislature. Generally, the goal of these regulatory measures is to prohibit or restrict advertising these ‘unhealthy’ foods to kids.

Finally, Quebec’s French language laws have recently been subject to a major overhaul. In particular, consumer contracts must be presented in French to be enforceable, and, beginning in June 2025, all unregistered trademarks need to be translated into French, including those used in commercial advertising. Additionally, a ‘generic term or a description of the product’ included as part of a trademark registered in English must also appear in French.