

ADVERTISING AND MARKETING PAYMENT CARDS WITHOUT BREAKING CANADIAN LAW

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Advertising and Marketing Payment Cards Without Breaking Canadian Law¹

1 INTRODUCTION

Payment cards are becoming increasingly popular and provide both consumers and businesses with considerable opportunities. However, the law governing the advertising and marketing of these cards is complex and evolving, with many applicable statutes, regulations, standards and codes.

This paper provides an overview of this law, discusses special marketing practices (such as contests, telemarketing and commercial email) and touches on some of the new legal implications of web-based campaigns. It also describes the legal and regulatory regimes regarding advertising and marketing credit cards, debit cards and gift cards.

2 GENERAL MARKETING LAW APPLIED TO PAYMENT CARDS

2.1 Misleading Advertising

It is an offence in Canada to make a false or misleading statement to the public for the purpose of promoting your business. The *Competition Act* contains the provisions that prohibit misleading and deceptive marketing practices. In addition to the general prohibition against misleading advertising, the *Competition Act* sets out prohibitions against certain types of marketing practices. Most activities prohibited by the *Competition Act* are civil matters which means that the advertiser does not need a subjective intent to mislead.

¹ This paper provides an overview of legal principles and is for informational purposes only. It is not intended as legal advice. A qualified lawyer should be consulted for specific matters.

The criminal and civil prohibitions against misleading advertising are found in section 52(1) and section 74.01(1) of the *Competition Act*, respectively. The seriousness of the offence will determine under which section a business is prosecuted.

Civil Standard: Turning first to the civil standard, section 74.01(1) states that:

A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public that is false or misleading ***in a material respect***.
[Emphasis added.]

“Representation” includes any representation made through various media, such as television, radio, newspapers, the internet, direct mail and telemarketing. Effectively, all advertising is caught.

The first element of this offence requires that the representation be for the purpose of promoting the supply of a product or any business interest. This is easily met in most instances.

The second element requires that the representation be made to the public. Subsections 74.03(1), (2) and (3) broaden this concept by deeming certain conduct to be a representation to the public. For example, a private communication between a salesperson and a consumer is deemed to be a representation to the public.² The courts have also taken a broad approach to defining the public. In *R. v. Shell Canada*,³ a letter

² Subsection 74.03(1)(d). That said, the Competition Tribunal’s decision in *Premier Career Management Group* (PCMG) released in July 2008 concluded that representations made during private meetings between career consultants and prospective clients were not made to the public. The Competition Bureau is appealing this decision to the court. With the coming into force on March 12, 2009 of the amendments to the misleading advertising provisions of the *Competition Act* (discussed below at pp 7-9), the Tribunal’s decision is moot as the legislation now makes it clear that to prove the offence it is not necessary that the representation was made in a place to which the public had access.

³ *R. v. Shell Canada Ltd.* [1972] O.J. No. 290.

written by Shell to holders of its credit card was considered to be a representation made to the public. Thus, the second element is also usually easily met.

The third element requires that the representation be false or misleading in a material respect. It is really this third element to which a card advertiser needs to pay attention when developing marketing campaigns. The test for determining whether a representation is false is an objective test – it is either correct or it is not. The test for determining whether a representation is misleading is subjective, and courts will consider all of the circumstances surrounding the representation including its actual meaning and any inferences to be drawn from the representation. Section 74.01(6) of the *Competition Act* states that both the literal meaning and the general impression conveyed by an advertisement must be considered when determining if a representation is materially false or misleading. Therefore, the general and implicit claims made in an advertisement are just as significant as the explicit ones and must be considered by advertisers to ensure the claims are compliant. This sets a high bar for advertisers. When developing campaigns, there can be considerable debate about whether something is “materially” misleading or not. Keeping in mind that whether something is misleading or not is a subjective test is important. The qualifier of materiality may not add a whole lot of additional wiggle room.

Criminal Standard: Section 52(1) contains the general criminal prohibition against misleading advertising. It provides that:

No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

This provision requires that the crown prove beyond a reasonable doubt that the defendant “knowingly” or “recklessly” made a misleading or false representation. While a mental element is required for a criminal prosecution, the *Competition Act* does not require proof that any person was actually deceived or misled. Advertisers are more likely to focus on the concept of “recklessness”. If an advertiser were knowingly intending to deceive, it wouldn’t be concerned about what the legal limits are in the *Competition Act*. By contrast, inadvertently being reckless is a risk to be managed. Keeping in mind that the *Competition Act* does not require that a person was, in fact, actually deceived or misled, helps focus marketing teams on just how high the standard is.

Recently the Federal Government passed sweeping amendments to the *Competition Act* which significantly increase the penalties associated with the misleading advertising provisions and expands their reach. Historically, individuals that violated the criminal provisions could be sentenced to five years in prison, the amendments increase this to a maximum of fourteen years of imprisonment. Additionally, there were noteworthy increases in the administrative monetary penalties under the civil provisions which increase the monetary consequences by 10-15 times for individuals and 75-100 times for businesses. Below is an overview of the changes.

Offence/Reviewable Practice	Maximum Penalty				
	Old		New		
Misleading Advertising (criminal)	Fine at the discretion of the court and/or five years imprisonment		Fine at the discretion of the court and/or 14 years imprisonment		
Deceptive Marketing	First Offence	Subsequent Offences	First Offence	Subsequent Offences	
	Individuals	50,000	100,000	750,000	1,000,000
	Businesses	100,000	200,000	10,000,000	15,000,000

As well, with respect to penalties, the Tribunal will now be empowered to require businesses to pay restitution to victims of deceptive marketing practices. The Tribunal is also now able to freeze a business’ assets and prevent the disposal of property before finding that a business has made misleading representations.

The second area of amendments made substantive changes to the *Competition Act* which make it easier to prove an offence. The following provision was added (with a similar provision being added to the criminal section):

74.03(4) For greater certainty, in proceedings under sections 74.01 and 74.02, it is not necessary to establish that (a) any person was deceived or misled; (b) any member of the public to whom the representation was made was within Canada; or (c) the representation was made in a place to which the public has access. Subsection 74.03 (4)(a) is a codification of existing case law. Courts have held that a representation can be misleading even if no one is actually misled. Subsection 74.03 (4)(b) was meant to remedy the Crown’s encounter on a recent case (which the Ontario Court of Appeal overturned on February 17, 2009). Based on the legislation (which was only proposed at that time), the Court of Appeal overturned the trial decision and clarified that the term “to

the public” is not restricted to the Canadian public. All that is required is a misrepresentation “to the public” that has a “real and substantial connection between the offence alleged and Canada”. This means that Canadian businesses advertising outside of Canada will now need to ensure that their advertisements do not violate the marketing provisions. Finally, subsection 74.03(4)(c) clarifies that a misleading representation can be made even if it is made in a place where the public does not have access. Advertisers should be cognizant of these sweeping changes and ensure that their practices are on the right side of the law so that they are not faced with these newly increased penalties.

(i) *Comparative Advertising*

Comparative advertising is one of the forms of advertising that requires the most up-front due diligence on the part of advertisers. This is because of the need to substantiate all marketing claims prior to them entering the public domain. The Competition Bureau has published guidance within its general “Misleading Advertising Guidelines” (1991) that is helpful, but for card issuers, the issue becomes drawing analogies from the Guidelines which largely use examples of tangible goods (like gas or a heater or an air conditioner) to a financial product like a credit or payment card. For example, when the Guidelines address the need for an “adequate and proper test” comparing comparable attributes of two or more tangible products that can be weighed, measured or otherwise quantified, a credit card issuer will need to modify that principle to ensure that comparable features of credit cards are adequately accounted for in the comparison it intends to make in its advertisement. For example, if a card issuer were to compare two credit cards on interest rate, that alone would be insufficient if one card had an annual fee and the second did not. An “adequate and proper test” would include comparing the credit cards on all relevant features, in this case, both the rate and the fee.

When broad superiority claims are made (which can be attractive to advertisers) such as the “lowest” rate, then all competitors’ products need to be researched and documented prior to finalizing an advertisement. This added step of diligence can extend time to market for advertisements and require bringing a person with another skill set than is typically found on a traditional marketing team, say, a researcher or, data-analyst, in developing comparative advertisements. For a summary of the Do’s and Don’ts in comparative advertising please see Appendix A.

2.2 Special Marketing Practices

(i) Testimonials

A common form of advertising is to use experts, celebrities or real consumers to endorse products. These endorsements can add objectivity to the advertisement and lend credibility to the product. Testimonials are a form of indirect claim substantiation regulated by section 74.02 of the *Competition Act*.

Section 74.02 requires one of the following two preconditions for the use of a testimonial: (i) the third party who gave the testimonial has previously published the testimonial; or (ii) the person, prior to publishing the testimonial, has secured in writing the third party’s approval of the testimonial or representation as well as permission to publish or make it. For card issuers, the second scenario is more likely than the first. As a practical matter, a card advertiser will engage in talks with a potential endorser and see if the endorser does in fact value its card and would like to commit to a marketing campaign, as opposed to the card issuer stumbling across a celebrity who has made a previous public statement, without talking to the card issuer in advance, about how great the card product was. To comply, the advertiser should ask the endorser to swear an

affidavit or otherwise attest in writing to having used the product and to having the specific opinion given in the advertisement.

The Competition Bureau has published a bulletin that discusses the use of testimonials (“Untrue, Misleading or Unauthorized Use of Tests and Testimonials”). It states that a letter from the third party does not amount to “previous publication” and unless the second condition is met its publication would violate this provision.

(ii) *Contests*

There are a patchwork of laws that apply to contests. The main federal laws governing contests are found in section 206 of the *Criminal Code*, and section 74.06 of the *Competition Act*. Advertising relating to contests must also comply with the misleading advertising provisions of the *Competition Act*. Contests open to Quebec residents must comply with Quebec’s special laws on contests.

Section 206 of the *Criminal Code* prohibits the conduct of contests where winners are determined solely by chance. However, subject to compliance with certain requirements, the *Criminal Code* allows for contests in which winners are determined by a mix of chance and skill or by skill alone. Please see Appendix B for a continuum of case law regarding games of skill and chance. If winners are to be determined based upon a game of mixed chance and skill, the contest is prohibited by the *Criminal Code* if the participants are required to pay money or give valuable consideration in order to participate. Contests need to be structured so that purchasing a card issuer’s product is not required to enter the contest. There needs to be a “free” way to enter a contest. Sometimes, in lieu of purchasing a product, entrants will be required to do something like write an essay to support their entry. The most common means of introducing an element

of skill into a contest is the “skill-testing question” – usually a time-limited arithmetical problem containing relatively simple addition, subtraction, multiplication and division.

Even if a contest is legal under the *Criminal Code*, the sponsor must also comply with the contest requirements under the *Competition Act*. Section 74.06 of the *Competition Act* provides that there should be adequate and fair disclosure of matters such as the number and approximate value of prizes, the areas to which they relate (i.e., any regional allocation of prizes) and any fact within the knowledge of the advertiser that materially affects the chances of winning (such as the mechanics of the contest and the odds of winning). Disclosure should be made in a reasonably conspicuous manner. It should also be made before the potential entrant is inconvenienced in some way or has committed to the contest or the product or service being promoted by the contest.

The Competition Bureau requires that sponsors provide adequate and fair disclosure by indicating a “short list” of rules, either through the media or on the outside of the package. Again, note that the Competition Bureau’s guidance is more geared toward tangible products that have packaging.⁴ For a card advertiser, a more likely place for a short list of rules will be at the point that a contest is advertised like a kiosk at a sporting event. This short list should, at a minimum, include: the number and approximate retail value of prizes; the regional allocation of prizes, if applicable; if within the knowledge of the advertiser, the chances of winning and any other fact that materially affects the chances of winning; the requirement to answer correctly a skill-testing question; the date on which the contest closes; the information that no purchase is necessary to enter the contest; and the place where the full contest rules are available.

⁴ That said, most gift cards are sold with point-of-sale hangtags on which contest and other required legal disclosures may be made.

For example, sometimes advertisers will set-up specific URLs that include the name of a contest for easy searching on the Internet and direct entrants to the site for full details of the rules. This can be particularly useful for channels like radio in which there is very limited air time to provide a lengthy list of detailed contest rules.

Among the possible sanctions that may be levied under the *Competition Act* are administrative monetary penalties (AMPs) of up to \$750,000 (first offence) and \$1,000,000 (subsequent offences) in the case of an individual, and \$10,000,000 (first offence) and \$15,000,000 (subsequent offences) in the case of a corporation. A sponsor who conducts promotions without regard to applicable contest laws also runs the risk of having to deal with the potential public relations issues if a regulator decides that the sponsor's promotion runs afoul such laws. Appendix C outlines some particularly disastrous contests which went horribly wrong and Appendix D provides an overview of litigation which has arisen from particular contests. Both of these should remind advertisers that while there is the possibility for considerable publicity related to contests, there is also a possibility of significant negative publicity if a contest is not properly designed or thought out. Appendix E outlines Contest Fundamentals for building a better contest.

Quebec is the only province that has passed laws that apply specifically to contests. If a contest is run in Quebec, it will need to satisfy the requirements of Quebec's legislation on "publicity contests" and other laws, including the Charter of the French Language. The contest laws are administered by the Régie des alcools, des courses et des jeux ("Régie"). There are additional legal requirements for a contest that is open to Quebec residents including that: all materials for Quebec residents must be in

French (pursuant to the Charter); notice of the contest, together with the applicable duties, a copy of the contest rules, and the text of any advertisement used in the contest must be filed in advance with the Régie; duties based on the value of prizes available to Quebec residents must be paid in advance; the contest rules must contain certain prescribed information; and in certain cases (such as when the prize exceeds \$5,000), a bond or other form of prize security with the Régie may be required.

(iii) *Telemarketing*

Telemarketing regulation in Canada has many facets. The two main statutes governing telemarketing are the *Competition Act* and the *Telecommunications Act*.

The *Competition Act* defines telemarketing as promoting any business interest through interactive telephone communications. Telemarketers must not make any false or misleading representations and must follow certain disclosure requirements. For instance, at the beginning of each call telemarketers are required to disclose the company they represent, the product or service they will promote and their purpose for calling. During the call, they must also disclose the price and conditions of any sale.

The *Telecommunications Act* authorizes the Canadian Radio Television and Telecommunications Commission (the “CRTC”) to regulate telemarketing in Canada. Activities falling under the CRTC’s definition of telemarketing include unsolicited telephone calls and faxes to sell or promote goods or services. Charitable organizations seeking donations and businesses calling on other parties’ behalf are also covered. On September 30, 2008 a national do not call list (the “National DNCL”) came into force. It provides consumers two different ways to get off of telemarketing lists, either by registering on the National DNCL or by registering with individual telemarketers on their internal do-not-call lists. Consumers may register up to three phone numbers on the

National DNCL if they do so at the CRTC's web site set-up for the National DNCL at <https://www.innate-dncl.gc.ca/index-eng> or for a specific number simply by calling 1-866-580-DNCL (1-866-580-3625). The registrations last for three years. Pursuant to the National DNCL Rules and the Telemarketing Rules (the "Rules") telemarketers are required to register with the National DNCL and must also purchase a subscription for the area codes in Canada in which they intend to call. Telemarketers are also required to download the numbers from the National DNCL and remove such numbers from their internal calling lists. If a consumer has registered on the National DNCL and continues to receive calls from organizations that are not exempt from the Rules, then the consumer may file a complaint. The CRTC has the authority to impose administrative penalties up to a maximum of \$15,000 in the case of corporations. It should be noted that the Rules provide certain exemptions including calls to customers with whom the caller has an "existing relationship" and calls made by or on behalf of a "registered charity" as defined by the *Income Tax Act*. Other important information for advertisers to know in relation to telemarketing is that the use of Automatic Dialing and Announcing Devices (ADADs) to promote goods or service is prohibited unless the consumer has given express consent to accept an ADAD telemarketing call. (Note that ADADs may still be used for service calls that don't include marketing, and therefore card marketers may continue to use them for issues like fraud alerts.) ADADs include automatic equipment that store telephone numbers to be called and are used to convey pre-recorded or synthesized voice messages. By contrast, Automatic Dialing Devices (ADDs) are permitted for live voice solicitations. Telemarketers who fail to comply with CRTC regulations risk having their phone service suspended or terminated.

The current CRTC rules governing telemarketing include the following:

- voice telemarketers must identify the name of the person or organization they represent and provide the name, address and telephone number of a contact person if requested;
- internal do-not-call lists are to be maintained by the telemarketer;
- the calling number must be displayed unless technically not possible;
- an individual's name and number must be removed from calling lists within 30 days (7 days for faxes) of request and do-not-call lists must be maintained for 3 years;
- telemarketing communications are restricted to the hours of 9:00 am to 9:30 pm from Monday to Friday and 10 am to 6 pm on weekends;
- random dialing and calls to unpublished numbers are allowed except to numbers registered on the National DNCL;
- calls to emergency lines and lines associated with healthcare facilities are prohibited; and
- sequential dialing is prohibited.

According to the Canadian Marketing Associations' (the "CMA") *Code of Ethics and Standards of Practice*, accepted telemarketing practices include: identification of the caller; calling only unpublished numbers if the number was furnished to the marketer; removing consumers from lists upon their request; respecting customers who have registered with the CMA's do-not-call service;⁵ employing lists that contain at least the

⁵ With the coming into effect of the CRTC's national DNCL on September 30, 2008, the CMA's do-not-call service is being phased out over a three-year period. This was done by the CMA to honour its commitment that consumer registrations would be good for 3 years and recognizing that the CMA could not assume that all of its registrants would immediately transfer to the CRTC's national DNCL.

surname and telephone number of the household called; restricting calling hours; and limiting the frequency of contact to once per month. Under this Code, marketers must limit the hours of outbound telemarketing or faxing to the hours of 9:00 a.m. to 9:30 p.m. weekdays and 10:00 a.m. to 6:00 p.m. Saturdays and Sundays. Restrictions refer to the time zone of the called party. Additionally, calling or faxing must not be undertaken on statutory holidays.

(iv) *Direct Mail*

Direct mail remains an important marketing tool for various companies. In fact with recent restrictions on other forms of marketing, including telemarketing, direct mail is going through a “re-birth”. Credit card issuers can do a direct mail campaign to prospective customers as a strategy for customer acquisition. Credit card issuers can also promote products to their existing customers using inserts for customers who receive their monthly statements by mail. Benefits associated with direct marketing include that it is generally perceived as less intrusive than either telemarketing or commercial e-mailing (telemarketing having recently faced increased regulation and proposed regulation for e-mail on the horizon; please see below.). Direct mail campaigns must not offend laws of general application such as provincial consumer protection laws, privacy laws, etc., however, it is not subject to any special rules or specific legislation.⁶

(v) *Commercial Email*

E-mail marketing can be highly effective given its speed-to-market and rapid response rate. Some consumer segments increasingly expect to use electronic means for communication and dislike paper on the basis that it is an unnecessary, environmentally

⁶ The Canadian Marketing Association does provide consumers with a Do-Not-Contact Program which has a do-not-mail component. CMA members must not use direct mail to market any consumer who has registered on the do-not-mail list.

wasteful and can create security concerns, for example, wrong-doers “dumpster diving” to get their sensitive information. However, because unsolicited e-mail and spam have received much attention in recent years, marketers should be cognizant that issues in relation to spam (particularly privacy issues) loom large. While some consumers see electronic communication as enhancing security of their information; there is an opposing concern that the Internet can be used to trick consumers into providing their personal information to wrong-doers, a practice also known as “phishing”. The United States has addressed spam-related issues through its *CAN SPAM Act*. Although the report of the Government of Canada's Task Force on Spam (released in May 2005) called for specific anti-spam legislation, Canada has yet to enact similar legislation. In addition to the report, which outlines best practices for e-mail marketing, the CMA has developed *Internet Marketing Guidelines* within its *Code of Ethics and Standards of Practice* to address e-marketing issues such as spam and opt-in consent. This code precludes CMA members from using unsolicited e-mail to obtain new customers, however, it is not legislation. On February 3, 2009, Senator Yoine Goldstein introduced a Private Member’s Bill (the “Anti-Spam Act”) to legislate against spam. It remains to be seen whether this bill will gain any traction or be a catalyst to government-sponsored legislation on the subject. Finally, marketers should also consult the *Canadian Code of Practice for Consumer Protection in Electronic Commerce*, which establishes benchmarks for good business practice for merchants conducting online commercial activities with consumers. Recently, there has been criticism over the lack of anti-spam legislation in Canada and it was noted that Canada is the only G-7 country without anti-spam legislation. Perhaps the recent criticism will bring this legislation back into the

House of Commons and mean it will move forward. In any event, advertisers should consult the best practices and be mindful that legislation may be forthcoming.

(vi) *Depiction of Money*

Money images are useful to marketers of different financial products generally, for the very reason that those products deal with money. However, many rules apply making the depiction of money a technical area which can come as a bit of a surprise to marketing teams. Reproducing money images is covered under both criminal law, under the *Criminal Code*, and civil law, under the *Copyright Act*. There are also different rules for bank notes and coins.

Bank Notes: The *Criminal Code* includes an offence for reproducing bank notes or anything that too closely resembles them (at s. 457). To avoid contravening this provision, card marketers have three options. The first option is to get permission from the Bank of Canada. At first blush, this seems like the most logical and straight forward option. Why would it not always be used? In the reality of the rush to market for new products, card issuers may find this too time-consuming and cumbersome.

The second option applies to print only (i.e., as opposed to television) and has some very specific requirements that aren't very intuitive and can be challenging. The bank note image must be printed and less than $\frac{3}{4}$ or greater than $1\frac{1}{2}$ times the length or width of a real bank note and reproduced in black and white or one-sided. These requirements are difficult to explain to internal art departments and external advertising agencies especially in a modern age in which these controls against counterfeiting seem archaic and inadequate. In any event, though, this option can give comfort that an advertiser is not offside the rules and so it's good to keep in mind. Restricting print advertisements to black and white is rarely an attractive option; however, using only one-

side of a bank note is often okay for marketing purposes in print advertisements and making the bank note image a little fatter or longer is also not typically a problem. When it is a problem, though, say because a marketer wants to display a messy pile of bills some face up and some face down, there is still option three.

The third option is to take the position that a bank note image used in marketing is sufficiently different from a current bank note that it is not “in the likeness” of a current bank note and therefore doesn’t trigger the *Criminal Code* rules. This option is tricky given that option two provides very specific guidelines, at least for print advertising, for ensuring that a likeness is not caught within the ambit of the *Criminal Code*. Strategies can include using bank note images that are different colours from real money, using unusual fonts for numbers and including images on the fake bills that aren’t on real bills. Knowing how far to go to ensure being inside isn’t always an easy call. Some comfort may come from the “Bank of Canada Policy on the Reproduction of Bank Note Images” which states that the Bank of Canada’s permission is not required for film or video purposes, which includes television advertising, if the images are intended to show only a general indication of currency and if there is no danger of the images being misused. (The policy is at <http://www.bankofcanada.ca/en/banknotes/legislation/repro.html>. Also see “Secure Paper Money: It’s in Your Hands” at http://www.bankofcanada.ca/en/banknotes/education/5-10-20-50-100_journey_pocket_guide.pdf). As a practical matter, a card marketer probably has better assurance of being in compliance for television as opposed to print and accordingly may want to follow the finicky rules in option two for print advertising – and consequently limit its

creativity to showing only one-side of a bill but still in colour - while being freer in television as to how the images are shown.

Coins: One option for using coin images is to get consent from the Canadian Mint which is the copyright holder of the coins (as opposed to the Bank of Canada for bank notes). As noted above, the realities of getting advertising to market in very short timeframes may make obtaining the Canadian Mint's consent challenging. Another option is to take measures to deflect the risk of coin images used in advertising resembling real coins that could be used as counterfeit money in contravention of the counterfeiting provisions of the *Criminal Code* (at sections 448 – 461). For television, this could mean using circular discs that just give a general impression of coins in a pile. For something much more detailed like a print advertisement with a close-up of a coin image, the longer process of getting consent from the Canadian Mint would likely be necessary.

(vii) *Sponsorships, Loyalty Programs, Joint Marketing & Co-Branding*

Sponsorships: Sponsorship arrangements aim to capitalize on the public's interest in activities related to sports, arts, culture, music, movies and charity to provide opportunities to communicate marketing messages to targeted groups. They can be a valuable way of increasing or reinforcing brand awareness among a company's target market. Before getting involved in a sponsorship deal, a sponsor should be confident that the sponsee will be successful, has a proven track record and good prospects and is generally aligned with the sponsor's brand and business objectives. Before entering into a sponsorship arrangement there are a myriad of legal issues which should be considered. The best way to deal with these is to enter into a written agreement. Some of the key legal issues which should be addressed in these agreements include: (i) identifying the

“rights holder” and ensuring that this entity has the capacity to grant the required rights in the product/event being sponsored; (ii) clearly defining what rights are being granted to each party (including, advertising, merchandising and broadcasting rights); (iii) identifying each sponsor’s class where there are different classes of sponsors and identifying whether the rights granted to the sponsor are granted on an exclusive or non-exclusive basis; (iv) specifying the consideration payable (whether it will be in the form of financial payments or goods and services); (v) provisions on who is liable when claims, losses, suits, actions and/or other liabilities are threatened or filed against one or both of the parties to a sponsorship agreement; (vi) identifying each party’s responsibility in relation to the sponsorship; (vii) addressing the various trade-mark/licensing issues which arise; and (viii) rights surrounding the termination of an agreement.

Due to the fragile nature of trade-marks, sponsorship arrangements raise a number of legal concerns. Trade-marks must be protected even more fiercely when they are being used by another company and when they are being used closely with another trade-mark. To assure the necessary trade-mark protection, the sponsorship agreement should at a minimum include a license granting the use of specified trade-marks and indicating that the licensor maintains control over the character and quality of them, the right to pre-approval of materials containing them, as well as the ownership of any new intellectual property that may be created through the sponsorship agreement.

Loyalty Programs: Loyalty programs in relation to payment cards are growing in popularity. However, marketers are often surprised to learn that the *Criminal Code* ban on issuing trading stamps – a concept that seems archaic – is relevant to and limits what they can legally do with loyalty programs. The *Criminal Code* provision prohibits

merchants from providing “trading stamps” to their customers. A “trading stamp” is defined very broadly as “any form of cash receipt...coupon, premium ticket or other device” which represents a discount on the price of goods or a “premium” to the buyer. In his 2002 article entitled, “The Legality of Frequent Buyer Plans”, Professor R.W. Bird suggests that modern frequent-buyer programs (i.e., loyalty plans) are simply a reincarnation of trading stamp plans that were commonly used by businesses in the 1900s, and that modern loyalty plans involving the sale of goods can fall within the purview of the *Criminal Code*. A frequent buyer point could be described as a “form” of cash receipt or “other device” and thus within the definition. Bird also contends that some issuers of frequent buyer points are not selling *goods* but *services*, and that the legislation is only directed to the selling of goods. However, because Part X of the *Criminal Code* defines “goods” as anything that is the subject matter of trade or commerce, in the absence of judicial consideration of the issue, the matter is not clear and poses a point of legal exposure for card marketers using loyalty programs.

While the ban has been around since 1905, its full range remains a mystery. The last round of reported prosecutions occurred in the mid 1960s. Still, the rarity of prosecution is not a sign of government approval and cannot be the test for the legality of this activity. In structuring loyalty programs, payment card issuers should design a scheme that falls outside the literal wording of the “trading stamp” definition.

(viii) *Tied Selling*

Tied selling occurs when a supplier requires or induces a customer, as a condition of supplying a product, to acquire another product, or to refrain from using or distributing another product. Tied selling is treated as a “reviewable practice” under section 77 of the *Competition Act*. A “reviewable practice” is a form of non-criminal conduct which, if

found to have anti-competitive effects, may result in a Competition Tribunal order prohibiting the impugned behaviour. The *Competition Act* does not prohibit tied selling outright; rather, it allows a prohibition or other remedial order (no penalties or damage awards) to be issued if three conditions are present: (i) the tying is engaged in by a “major supplier” of the product, or is widespread throughout the relevant market; (ii) it is likely to impede the entry or expansion of other products or firms in a market, or have any other “exclusionary effects” in a market; and (iii) it is likely to result in a “substantial” lessening of competition in the relevant market. Whether or not a company is a “major supplier” will generally involve an examination of its market share, financial strength and other similar factors. The analysis of exclusionary effects and substantial lessening of competition tend to be inter-related. While such determinations are based on a number of factors, the most important is the supplier’s market power as evidenced by high market share in a market with significant barriers to entry. The existence of remaining effective competition is also a significant factor.

The *Competition Act* contains two exceptions to the tied selling rules: (a) where tying is reasonable having regard to the technological relationship between or among the products and (b) where it is engaged in by a person in the business of lending money for the purpose of better securing loans made by that person and is reasonably necessary for that purpose.

In addition to the *Competition Act*, section 459.1 of the *Bank Act* prohibits banks from practicing coercive tied selling. More specifically, it is against the law for a bank to “impose undue pressure on, or coerce, a person to obtain a product or service from a particular person, including the bank and any of its affiliates, as a condition for obtaining

another product or service from the bank”. To provide an example of tied selling in the context of payment cards, a consumer requesting a credit card from a bank would be subject to tied selling if the consumer is informed that the credit card would be made available only if other products, such as RRSPs, were purchased from the bank. The tied selling provisions of the *Bank Act* do not prohibit banks from bundling their products and services in order to better market their offerings. Banks may offer bundled products at a lower combined price than if each product were purchased separately. For example, a bank may offer a prospective customer a package of services which includes a bank account, a credit card with no annual fee and a discount on purchasing traveler’s cheques, where the total price for the package is less than the regular price of each product. Bundling products in this way does not infringe the *Bank Act* since customers have the choice of buying the items individually or in a package.

Joint Marketing & Co-Branding: Joint marketing can be one-time and limited, as in the case of many sponsorships, or broad and enduring like a co-branded card. In terms of legal and regulatory issues for the advertising of these products, those mentioned above regarding intellectual property and in particular trade-mark protection are key. The specifics of individual marketing and service models can raise additional issues. For example, in completing a co-branded credit card application, appropriate privacy consents need to be drafted to permit any transfer of personal information between the company branding the card and the white-label financial institution offering the credit facility and doing all the back-end fulfillment. These situations can be varying and complex. For the purposes of this paper, we highlight the need to keep intellectual property concerns on top of the due diligence checklist for marketing campaigns, but

keep in mind other legal and regulatory issues will undoubtedly arise out of the specifics of any particular arrangement.

2.3 WEB 2.0⁷

Web 2.0 is “a perceived second generation of web-based communities and hosted services which aim to facilitate creativity, collaboration and sharing”⁸. Online advertising offers advertisers an array of opportunities to reach markets; however, it also raises unique legal considerations. There is not one comprehensive piece of legislation regulating web-based advertising. Nor do the legal rules governing advertising in traditional media (e.g., the rules on misleading advertising, privacy, intellectual property protection, etc.) apply without difficulty. For example, there is less space to make lengthy disclosures in an on-line banner ad, while the same advertising concept may easily accommodate lengthy disclosures in national print advertising or in direct mail. The Competition Bureau has provided some guidance as to how to apply existing rules in the context of the Internet. (See “Application of the *Competition Act* to Representations on the Internet”, Enforcement Guidelines, February 18, 2003 at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01213.html>).

There are various different forms of online marketing which are growing in popularity and presenting unique legal issues. These forms include online social networking sites like MySpace or Facebook, video options like YouTube, and decentralized advertising by way of consumer blogging or viral marketing.

⁷ For a fuller discussion of this area, see paper by Bill Hearn, David Grad and Kelly Zalec entitled *Law 2.0 – The New Legal Implications of Web-based Advertising and Marketing* published by the Canadian Institute on January 22, 2009.

⁸ Mark Hayes, “User-generated content: an uneasy fit with copyright law”, *The Lawyers Weekly* (May 2, 2008) (QL)

Another interesting new option is consumer-generated advertising (“CGA”) which is an advertising campaign developed around user-generated content (“UGC”). This could be, for example, a traditional television-style advertisement put on a card-marketer’s website for the general public to modify and re-post with their own creative twist. CGA raises several legal issues including: copyright and trade-mark, misleading advertising, privacy and defamation. A consumer holds copyright in the content that he or she creates and therefore the advertiser must obtain the consumer’s consent in order to use the UGC. In obtaining consent, a licence should be obtained and consideration should be provided to ensure the license is legally enforceable. Advertisers should also ask consumers to waive their moral rights in the content. In terms of trade-marks, steps should be taken to ensure that the CGA is not infringing a third-party’s content (this may include trade-mark searches and / or monitoring of content if feasible). Advertisers may be exposed to UGC that is false and misleading and accordingly may want to review CGA content prior to posting and / or direct consumers not to post inaccurate content on their website’s terms of use. Similarly, consumers may post comments which invade third party’s privacy rights or defame others, including the advertiser itself! Similar precautions should be taken to mitigate the risk of an advertiser being held liable or taking on regulatory exposure for consumer’s content. Appendix F provides a very basic overview of the legal implications which arise with web-based advertising and marketing.

One final note on Web 2.0 is that the online content created in Canada may be accessed around the world. While this has many advantages to marketers it also increases the legal risks. It is quite possible that while the content is legal in Canada it may infringe the laws of countries where it is being accessed. Advertisers hoping to

capitalize on this form of marketing should take the time to understand the risks involved in these campaigns before embarking on them and at a minimum take measures to limit the places that the marketing is intended to reach – for instance, if the CGA is to be posted on the advertiser’s website, using the website’s terms of service to stipulate in which markets and countries it operates and in which the advertising is intended to be accessed.

(i) *Different Channels Different Concerns*

Each marketing channel has its own opportunities and challenges. Accordingly, marketing campaigns are often developed to be integrated across many or all channels regardless of any opportunities or challenges individual channels may present. For example, radio is a very constrained channel for formalistic legal disclosure because, typically, there is so little air-time. Similarly, television has short air-time; however, there is the opportunity to include visual banners and supers that can help for providing additional information required for legal purposes. Below we discuss in more detail the legal rule for disclosing fees if credit card rates are advertised. For the purposes of an example here, we’ll simply state that if a card marketer advertises a low rate, a corresponding annual fee must also be disclosed in order to provide consumers with a balanced view of the card advertised. Channels like national newspapers and direct mail have lots of room to disclose a fee. By contrast, radio, as noted above, and newer mediums like Internet text banners have very limited time (in the case of radio) and space (in the case of text banners) to fit everything in. Anticipating early on which channels are key to an overall campaign is useful so that specific channel limitations do not arise at the last minute as an unpleasant surprise. Marketing teams can get caught in this situation

when they get a broad, early approval internally for marketing concepts and only later, once into the weeds of implementation, find that a certain marketing concept is not really suited to one of the channels planned and for which media space may have already been purchased.

2.4 Privacy

Canada's *Personal Information Protection and Electronic Documents Act* ("PIPEDA") has had a significant effect on direct marketing practices in Canada. *PIPEDA* applies to all commercial organizations within Canada (except to intra-provincial commercial activities of organizations in a province where the province has enacted substantially similar legislation to *PIPEDA*).⁹ *PIPEDA* is administered by the Privacy Commissioner of Canada. The purpose of *PIPEDA* is to protect personal information that is *collected, used or disclosed* by organizations in the course of commercial activities. Such collection, use or disclosure requires consent. Personal information is "information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization," provided it is used for the purpose that that information may appear in any sort of public directory. *PIPEDA* also ensures that individuals have access to their personal information and that such information is securely protected by the organization in possession of the information. Additionally, if the information is used for a purpose other than the purpose for which it was collected, consent must be obtained for such additional purpose. There is an overall concept of reasonableness in *PIPEDA* that must be kept in mind when considering all other provisions of that law. Another key concept for

⁹ Such as in British Columbia, Alberta and Quebec.

marketers to note is that personal information cannot be stored indefinitely; thought has to be given to what retention period is reasonable for the purposes for which personal information was obtained.

Marketers who use compilations of personal information such as telephone directories and professional registers must be aware of the *Regulations Specifying Publicly Available Information*. These regulations provide limited exceptions to *PIPEDA*'s consent requirement if the information falls within the specified classes of "publicly available information". There are five classes of "publicly available information", the two most relevant to payment card marketers are the "telephone book" and the "business directory" exceptions; each has its own important nuances. The telephone book exception includes the name, address and telephone number of a subscriber that appears in a telephone directory that is available to the public, where the subscriber can refuse to have his or her personal information appear in the directory. The "business directory" exception includes the name, title, address and telephone number of an individual that appears in a professional or business directory that is available to the public where the collection, use and disclosure of that information relates directly to the purposes for which it appears in the directory.

Under *PIPEDA*, the consent obtained must be *informed*. The consenting person must know the uses the company will make of the personal information provided. Consent may be either *express* or *implied* depending on the nature and sensitivity of the information involved. In the case of express consent, it may be either in an opt-out form, or may require some positive expression or action (i.e., opt-in). The Privacy Commissioner has approved the use of opt-out consent methods in a variety of

circumstances. The appropriate form of express consent (opt-in or opt-out) required in a particular situation will be determined by examining factors such as the nature of the personal information in question, the intended use, whether disclosure is intended and if so, to whom.

Marketers must be careful when using personal information for a purpose other than the purpose for which it was originally collected. This issue arises in the context of secondary marketing, and can be very relevant to payment card issuers. For instance, in *PIPEDA Case Summary #308*, the Assistant Commissioner examined the issue of including marketing inserts in credit card account statements issued by a financial institution. In this case, a bank denied a complainant's request to opt-out of receiving marketing materials included in monthly credit card account statements that advertised various products and services offered by the bank in connection with third parties. It was found that the use of these inserts for marketing purposes was secondary to the reasons for which the complainant had originally given their personal information (i.e., to receive a credit card). By failing to provide a means of withdrawing consent, the bank was requiring customers to consent to use of their personal information beyond that for which it had originally been collected. Thus, organizations with older customer databases should ensure that the proper and necessary consents have been obtained before using or disclosing the information for other purposes.

2.5 Self-Regulation

(i) Advertising Standards Canada ("ASC")

ASC is the Canadian advertising industry's principal self-regulatory body. ASC recently celebrated fifty years of advertising self-regulation. It was founded by members

of the advertising community on the belief that advertising self-regulation best serves the interests of the industry and the public. ASC members include leading Canadian media organizations, advertisers, advertising agencies and suppliers to the advertising sector.

ASC first published the *Canadian Code of Advertising Standards* (the “Code”, online at <http://www.adstandards.com/en/consumerSite/14CodeClauses.pdf>) in 1963 and regularly updates it. The *Code* sets the criteria for acceptable advertising and forms the basis upon which advertising is evaluated in response to complaints by consumers, trade members or special interest groups. The *Code* is also supplemented by Interpretation Guidelines which enhance industry’s and the public’s understanding of the interpretation and application of the *Code*. While the *Code* addresses the same key issues as the *Competition Act*, there are some differences. One of these differences is that ASC offers an alternative route to resort to government regulators or the courts by providing a dispute procedure for potential *Code* violations. This can be a helpful route for both consumers and competitors most notably because it is quicker and easier than the traditional government regulatory or judicial routes. For example, if a television advertisement is the subject of an ASC complaint the entire process may be concluded in a couple of months, and therefore possibly providing real results in having the effect of a commercial being altered or removed while still on air. A longer process, say, through the Competition Bureau, may bring results but after a commercial is finished airing and accordingly may not have as useful a remedial effect.

(1) *Consumer Complaint Procedure*

ASC accepts and responds to written complaints from consumers about current Canadian advertisements. Complaints that raise a potential *Code* issue are moved through the procedure, complaints that do not raise a *Code* issue are responded to with a

letter of explanation from ASC. Assuming a *Code* issue has been raised, the following is an overview of the consumer complaint procedure.¹⁰ After ASC has reviewed the complaint, the advertiser is asked to provide a written comment addressing the consumer's concerns (within ten business days). ASC reviews the advertiser's response and if a potential *Code* issue remains, the complaint is forwarded to Council for review. Council is composed of independent, volunteer bodies from the advertising industry and the public. If Council determines that the advertisement contravenes one or more clauses of the *Code*, Council will ask the advertiser to amend or withdraw the advertisement. ASC will inform the consumer and the advertiser, in writing, of Council's decision.

While ASC does not have authority to levy administrative monetary penalties, this is an effective remedy because media will not typically carry advertisements which are found to be in violation of the *Code* and advertisers have reputational exposure in having themselves identified in ASC's periodic summaries of cases which are accessible on-line (at <http://www.adstandards.com/en/standards/adComplaintsRecent.asp>). Similarly, if Council determines that there is no contravention of the *Code*, ASC will inform the consumer and the advertiser, in writing, of their decision. If the consumer or advertiser disagrees with Council's decision, the consumer or advertiser can request an appeal within seven days of receiving the decision.

As of 2000, there have been nine consumer complaints regarding payment cards that have been upheld by national and regional Councils. One complaint was received in 2000, two in 2001, three in 2005, one in 2006 and two in 2007. All such complaints related to advertisements which violated the "Accuracy and Clarity" *Code* provision.

¹⁰ This procedure does not apply where the issue relates to Clauses 10 or 14 of the *Code* which include an opportunity for an advertiser to respond directly to consumers to resolve the complaint.

Both of the complaints that were brought in 2005 related to gift cards. Copies of these complaints can be found on ASC's website at www.adstandards.com.

(2) *Trade Dispute Procedure*

Since 1976, ASC has offered the Trade Dispute Procedure. This valuable fee-based service provides industry with a mechanism to handle competitive disputes about advertising in a confidential, informal forum. It is widely viewed as an effective channel for advertisers to resolve their disputes.

Again, competitor's complaints against an advertiser must be based on provisions of the *Code*. The complainant submits a written and signed complaint to ASC. Initially, the complainant has the burden of convincing ASC that there are reasonable grounds to proceed with their complaint. Once ASC verifies and agrees that a *Code* violation may have occurred, a copy of the complaint is provided to the potentially offending advertiser. Next, ASC convenes and participates in one or more mandatory resolution meetings between the parties, at which ASC actively assists the parties in an effort to reach a mutually acceptable complaint resolution. ASC reports that these meetings result in 80% of the disputes being settled.¹¹ If no resolution is achieved, then a five-member Trade Dispute Panel (the "Panel") is established from a special resource group and a hearing date is set.

Both parties submit written arguments and evidence prior to the hearing. At the hearing each party presents an uninterrupted presentation of its position. Upon completion, the opposing party has the opportunity to question and challenge the presenting party's position. Within four days of the hearing the Panel decides whether,

¹¹ "Trade Disputes: An efficient process to resolve disputes between advertisers" *Advertising Standards Canada* (2007) at 21.

on a balance of probabilities, a breach of the *Code* has occurred. Following notice of the Panel's decision, either party may request a review of the decision if that party can demonstrate that a misinterpretation of evidence and/or a misapplication of a provision of the *Code* has occurred.

The above procedure offers advertisers several considerable potential advantages over litigation or a complaint to the regulators. Because the procedure is confidential, there is little to no negative publicity. The downside, though, is that because of this confidentiality there are no reported cases from the trade dispute procedure that can serve as useful precedents to card marketers. Because it is a non-judicial forum, disputes are handled quickly; the total estimated time from complaint to decision is 30-40 working days. Also, while there are fees associated with the filings involved they are generally considerably less costly than court proceedings. Finally, the remedy of withdrawal of the offending advertisement is often the critical remedy sought by the complainant. In the very rare instance of non-compliance with a trade dispute decision, ASC has the ability to publish a summary of the Panel's decision.

(ii) *Canadian Marketing Association ("CMA")*

CMA develops self-regulatory policies and standards on a variety of topics including business practices, ethics, privacy, e-mail and Internet marketing, marketing to children and teenagers and telemarketing. These guidelines are compulsory for CMA members. Although the guidelines do not mention payment cards specifically, the regulations are applicable to payment card providers. The CMA has also established a *Code of Ethics and Standards of Practice* (on-line at <http://www.the-cma.org/?WCE=C=47|K=225849>) that regulates its members and has

varying detail on specific marketing practices, including direct mail and online advertising. Marketers should keep these standards in mind in developing a campaign.

2.6 Unsolicited Cards

Unsolicited cards are a tempting strategy for payment card marketers. Although the *Bank Act* and *Bank Regulations* are silent on the issue of unsolicited cards, six major banks have agreed to an “Undertaking on Unsolicited Services” (available on-line at <http://www.cba.ca/en/viewdocument.asp?fl=3&sl=315&tl=135&docid=524&pg=1>). Under this undertaking, banks providing any unsolicited new service will obtain the express consent of consumers before providing the service or charging for it. If an existing service is modified and an additional charge applies, the consumer will be given advance notice as well as details on the modified service. Consumers will also be given alternatives to the modified service and a right to rescind within 90 days.

Provincial consumer protection laws also address the issue of unsolicited services. For example, section 13 of the Ontario *Consumer Protection Act, 2002* provides that a recipient of unsolicited goods or services has no legal obligation with respect to its use or disposal. However, under section 68, if a consumer uses the card, they are deemed to have agreed to the cardholder agreement. While these can be successful, marketers should be cognizant of the very real risks associated with this form of campaign, including privacy, fraud and negative publicity.

3 CREDIT CARDS

Cost of credit disclosure is regulated at both the federal and the provincial levels. This paper focuses on the federal rules under the *Bank Act*. Disclosure requirements for federally regulated financial institutions subject to the *Bank Act* are set for all types of

lending products, including consumer credit cards, by regulations under the *Bank Act* called the “Cost of Borrowing (Banks) Regulations” (the “Regulations”). The theory is that regulating disclosure creates a standardized reference for consumers that allows them to compare and contrast key product terms like interest rates and fees. Without standardization, assessing the cost of one loan against another could be challenging. Disclosure requirements for consumer credit cards arise in four key areas: applications; initial disclosure statements provided on account opening; monthly statements; and certain changes in terms. A chart setting out the requirements for each is attached as Appendix G. The federal government agency responsible for regulating compliance with these provisions is the Financial Consumer Agency of Canada (“FCAC”).

For provincially regulated card issuers, such as credit unions, there are cost of credit disclosure requirements in provincial law. Because the provincial legislation can be different in each jurisdiction (making compliance more complex for provincially regulated institutions) a committee of representatives responsible for consumer affairs at both the federal and provincial levels of government called the Consumer Measures Committee has developed a template for harmonization of the varying rules among the provinces. Provincial governments continue to move toward harmonization with the work product of this group which is called, “The Agreement for Harmonization of Cost of Credit Disclosure Laws in Canada – Drafting Template.” It is available online at [http://www.ic.gc.ca/eic/site/oca-bc.nsf/vwapj/cmcccdl.pdf/\\$FILE/cmcccdl.pdf](http://www.ic.gc.ca/eic/site/oca-bc.nsf/vwapj/cmcccdl.pdf/$FILE/cmcccdl.pdf).

3.1 Applications

Credit cards have unique application requirements not required for other lending products. A credit card application (or a document accompanying a credit card

application) must specify each of the following three items plus the date on which each takes effect: 1) the annual interest rate (either a fixed rate or, where variable, the public index and fixed percentage rate to be added or subtracted to it); 2) the day on or after which interest accrues and the grace period; and 3) the amount of any non-interest charges. Non-interest charges are fees like an annual fee or a returned cheque fee. Note that no grace period is required, but if there is a grace period, it must be disclosed. Invariably, credit card issuers provide grace periods.

An FCAC Commissioner's Decision from 2007 (File: 41641-375Q107) underscores the requirement for credit cards to specify the date on which each disclosure item takes effect at the point of soliciting an application and not later. In that decision, an annual fee for a credit card was at issue. Disclosure of the date that the annual fee was effective in the initial disclosure statement provided after the credit card application was taken was not sufficient. Credit cards have specific disclosure requirements that must be met at the point of application. Even though a recipient of a card could choose to cancel the card on receipt of it and never use the card, the disclosure requirements at the point of application, and not delivery of the card subsequently, must be met. In this decision, the FCAC was explicit about the policy behind the disclosure rules in the Regulations generally:

The disclosure requirements in the Regulations were created to make it easier to compare the cost of borrowing among financial institutions and to ensure that consumers have the information they need to make sound financial decisions.

3.2 Advertising Interest Rates, Payments and Fees

The Regulations contain specific provisions for credit card advertising. They provide that if a credit card advertisement makes a representation of an annual interest

rate, the amount of any payment, or the amount of any non-interest charge, then the advertisement must also disclose the annual rate of interest on the date of the advertisement and any initial or periodic non-interest charges (e.g., an annual fee), at least as prominently and in the same manner, whether visually or aurally or both. It is common for credit card advertisements to represent an interest rate. As a result, these advertisements must set out the annual interest rate as of the date of the advertisement and any annual or monthly fee (and any other initial or periodic non-interest charges) at least as prominently.

Some card issuers advertise a low annual fee of a certain amount. Consequently, the advertisements must also include disclosure of the annual rate at least as prominently.

These advertising rules are key in developing the creative pitch and choosing the best medium (e.g., television, newspaper) that will be used for the advertisement. For example, if the benefit a card issuer wants to draw to the attention of his or her audience is an interest rate, thought has to be given to the added disclosure of any corresponding annual or monthly fee.

It is significant that the requirement for disclosing non-interest charges is limited to “initial or periodic” non-interest charges. This requirement includes annual or monthly fees. However, it may be that some other fees commonly associated with credit cards are not initial or periodic, For example, would an additional transaction copy fee be considered periodic?

Arguably, statements that do not include specific amounts or numbers, like “low annual fee” or “low interest rate”, do not require the additional disclosures because they are not a representation of a rate or non-interest charge (i.e., they are too general). What

about a representation of “no annual fee”? Does it represent a non-interest charge at all triggering disclosure of the annual interest rate?

The concepts of “at least as prominently” and “in the same manner, whether visually or aurally or both” are not defined in the Regulations. From the Regulations, we know that if a rate or the amount of any payment or non-interest charge is disclosed in writing, then the rate on the date of the advertisement and any initial or periodic non-interest charges must also be disclosed, in the same manner, in writing. Similarly, if the representations were made aurally, then the corresponding, required disclosure also has to be made aurally. What is less clear is, what is required in more complex scenarios? A print advertisement may use multiple fonts throughout. A rate could be in one font while an annual fee may be in another. Additional copy may be in a third font or multiple fonts. How similar must the fonts be to be disclosed “at least as prominently” and “in the same manner”? A television advertisement may have a “voice-over” stating a rate, while a number also representing the rate flashes-up on the screen. Must an annual fee for the product be disclosed both in writing and aurally?

3.3 Advertising Interest-Free Periods

The Regulations also contain specific provisions for the advertising of interest-free periods. If credit cards are advertised as having a “pay ahead” or “skip a payment” feature in which a cardholder can avoid a scheduled payment, the advertisement must disclose equally prominently whether or not interest accrues during the period because the advertisement may imply that no interest accrues, without further qualification. If a period of a loan is expressly stated to be free of any interest, similarly, any accrual of interest during the “free” period must be disclosed. If interest does not accrue and there

are conditions, the advertisement must disclose the conditions that apply to the forgiving of interest as well as the annual interest rate for a period when those conditions are not met.

3.4 Late Fees

Late fees are typically a fixed fee charged for late payment. Late fees are not addressed directly by the Regulations. However, there are a limited set of consequences permitted on default; charging late fees is not one of them. The result is clear that late fees are prohibited.

3.5 Introductory Rates

Similarly, introductory rates are not addressed in the Regulations. Low introductory rate offers are common in the marketplace. The FCAC has stressed the importance of transparency and plain language for key disclosures and has highlighted promotional rates in this regard. This means that disclosure should be clear about when introductory rates begin and end (e.g., the expiry date), the long-term or regular rates that apply afterward and the balances to which each applies. For example, an introductory rate could apply just to balance transfers or to any balances created through purchases that remain unpaid (i.e., revolve). Any conditions the breach of which could result in loss of an introductory rate should be carefully disclosed. If an introductory rate affects the order of payment allocations, for example, with payments applied to low interest rate balances prior to higher-rate balances, this feature needs to be clearly stated.

3.6 “Rates As Low As” Marketing

The FCAC investigated five banks with respect to “rates as low as” marketing or what is sometimes referred to as “price-to-risk” marketing. The concept for these products was to offer consumers the opportunity for the lowest rate that the card issuer could offer. This low rate offer would be achieved by the consumers giving the card issuer permission to review their credit histories so that the card issuer could assess their credit worthiness (e.g., the likelihood of repaying the loan) and then for the card issuer to determine the rate the card issuer could offer them. This is matching the price to the risk. In this way, consumers with very good repayment histories could be offered lower price products. These consumers could get notice of the rate on delivery of a card and could decide then whether they liked the rate and to use it or to cut it up and never use the card. The FCAC has found this practice to be in violation of the Regulations.

The first of the five cases resulted in litigation in 2004. Subsequently, the Commissioner’s Decisions for the other four cases were posted on the FCAC’s website in 2006. They are Files 32369-58Q403, 56170-248Q206, 94835-398Q106 and 68235-422Q206. The FCAC has also published general guidance on its web site entitled, “Cost of Borrowing (Banks) Regulations: Examination of the Price-to-Risk Credit Card Offers”.

In the first case, the FCAC sanctioned a bank for advertising interest rates “as low as 9.9%”. The rate for which applicants were approved depended on a review of their full applications including their credit histories. The FCAC focused on the requirement in the Regulations for credit card applications to state “the” annual interest rate, the FCAC interpreting this requirement as meaning one, single rate as opposed to a range of possible rates. The FCAC initially proposed a fine of \$75,000 for the institution that was

subsequently reduced to \$50,000. The FCAC has authority to impose penalties up to \$100,000 for a financial institution. The bank appealed the decision to the courts for judicial review on procedural grounds. The bank contended that the FCAC had not followed its own process adequately, effectively pre-judging the issue too early. The bank was successful and the FCAC's decision was set aside. This appeal, though, did not deal with the substantive issue of the requirements for credit card applications.

As previously stated, the FCAC published the other four decisions on its website. The common thread among them is advertising interest "rates as low as" (with some variations in fee disclosure). The sanctions range from a finding of a violation with no penalty at the low end to a finding of five violations with a fine of \$30,000 at the high end.

The upshot is that it is now difficult for card issuers subject to the Regulations to market products to their best customers that are tailored to the lower risk that they pose to the card issuer. Card issuers are unable to assess cardholder's creditworthiness prior to offering them a precise rate and so the potential for very low rates to be matched with very low risk customers is minimized. For example, under this model, a card issuer now needs to market a higher standard rate to everyone and then after booking a customer and learning that he or she has a strong credit history, lower his or her rate. This is a cumbersome marketing practice that can be operationally complex, and accordingly, more expensive to bring to market.

3.7 Co-Borrowers

The issue of multiple disclosures for multiple borrowers on credit cards as well as other lending products like lines of credit and mortgages has been the subject of

significant consultation with the FCAC and significant changes in lender practices. The Regulations require disclosure to be provided to “the” borrower. This terminology has raised the issue of how disclosure should be provided to joint or co-borrowers. Does the reference to “the” borrower mean, for example, that both a husband and wife who jointly hold a personal use credit card should receive duplicate disclosures or would one set of disclosures addressed to both be sufficient? Traditionally, several card issuers took the view that providing disclosure only to a primary borrower, while fully disclosing this practice, conformed with the Regulations. Indeed, it was thought that many co-borrowers would be confused by two sets of disclosures like two monthly statements arriving in the mail each month. They might get confused and pay their account twice. The FCAC has clarified on its web site through one of its Tip Sheets entitled, “Know Your Responsibilities as a Joint Borrower” that all co-borrowers must have the opportunity to receive separate sets of disclosures. They can also change their option subsequently at any time. If co-borrowers prefer to receive a single set of disclosures, they can consent for a single statement, provided that it is addressed to all co-borrowers. After much consultation with the banking industry, on December 31, 2007 the FCAC provided for all federally regulated institutions subject to the Regulations to put in place enhanced disclosure practices in place for all new borrowers and existing borrowers renewing their credit agreements. All existing borrowers needed to be advised that they could contact their banks to make arrangements to receive individual disclosure statements if they so desired. This was a large departure for many card issuers involving significant costs. At Capital One approximately 50 customers have opted for this service. The cost of the initiative was in excess of \$350,000.00.

3.8 Third-Party Sales Force

The FCAC has highlighted its concern with the disclosure practices of institutions that use third-parties to solicit financial products subject to the FCAC's purview. The FCAC has stressed that the disclosure obligations remain the same for those institutions and appropriate diligence and oversight is required for the service provider. Using a third-party sales force is outsourcing. Outsourcing is also regulated for banks by the Office of the Superintendent of Financial Institutions under its Outsourcing Guideline (B-10).

3.9 Sample Application Form & Plain Language

Plain language is a driving force behind the FCAC's educational initiatives. In one FCAC Commissioner's Decision (File: 84493-39Q103), the FCAC articulated its views on plain language (which is helpful notwithstanding the decision related to mortgage disclosure as opposed to credit cards):

The use of plain language assists consumers in understanding the nature of the obligations that they are about to enter into. Informed consumers are in a better position to choose the financial institution and financial service or product that best suits their needs and banking habits. Facilitating comparison-shopping encourages healthy competition between financial institutions and promotes growth and innovation in the marketplace.

The FCAC has recently teamed up with MasterCard Worldwide to publish a sample plain language credit card application form for Canadian consumers. It is available at <http://www.fcac-acfc.gc.ca/eng/publications/SurveyStudy/Misc/PDFs/ModelCCA-eng.pdf>. This document is designed to help consumers interpret the variety of credit card applications available on the market.

4 DEBIT CARDS

Unlike the complex and detailed regulation of credit cards, there is little regulation of other types of payment cards such as debit cards, pre-paid and stored-value cards. The lack of regulation may be because there are relatively fewer complaints with respect to these cards and because such cards do not necessarily act as a means of identification.

The regulation of debit cards in Canada is accomplished through a voluntary code, the *Canadian Code of Practice for Consumer Debit Card Services* (the “*Debit Code*”). The *Debit Code* places various disclosure requirements on the personal identification number (“PIN”) issuer as well as the card issuer. For example, under section 2(2)(c), the PIN issuer must inform the applicant of any fees associated with holding and using the PIN; the purpose and functions of the PIN; the cardholder's responsibility for PIN security and the possible consequences of a breach of that responsibility; and how to contact the PIN issuer in the event of a problem. The card issuer has similar responsibilities under the *Debit Code*.

While the *Debit Code* is a voluntary code, under section 3(2)(c) of the *Financial Consumer Agency of Canada Act*, the FCAC has as part of its objects to “monitor the implementation of voluntary codes of conduct that are designed to protect the interests of customers of financial institutions, that have been adopted by financial institutions and that are publicly available and to monitor any public commitments made by financial institutions that are designed to protect the interests of their customers”. Furthermore, under section 5(3), if a financial institution has adopted a voluntary code the Commissioner of the FCAC may “make or cause to be made any review that he or she

considers necessary to monitor compliance with the code”. Thus, the FCAC may influence the appropriate interpretation of the *Debit Code*.

5 GIFT CARDS

Gift cards are subject to the many laws of general application discussed above (such as those relating to misleading advertising, special marketing practices, Web 2.0 and privacy). There are also a spate of applicable provincial laws. The main province-specific regulations for gift cards are in the areas of consumer protection and unclaimed property.

(i) *Consumer Protection*

The provinces that have consumer protection laws specifically regulating gift cards are British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and Nova Scotia. While there are some differences between provinces,¹² the main points common to all are that generally (with narrow exceptions) gift cards cannot have expiry dates or dormancy fees and the terms and conditions of the gift card must be clearly disclosed to consumers. In some provinces, there are exemptions from some of these requirements for single product, promotional or charitable gift cards.

(ii) *Unclaimed Property*

The provinces that have unclaimed property laws (or that have passed laws not yet in force) are Alberta, British Columbia, Ontario¹³, Quebec, Nova Scotia and Prince Edward Island. The main point of provincial unclaimed property legislation is that the issuer of property *to which these laws apply* must keep track of the unused/unclaimed

¹² Such as the apparent requirement for greater and more specific disclosure of gift card terms and conditions in Alberta.

¹³ Ontario’s law was passed in 1989 but has not yet been proclaimed in force.

value of such property and, after a prescribed period of time, that value is transferred (and ultimately escheats) to the Crown - i.e., the province.

6 CONCLUSION

The legal regime for advertising and marketing payment cards in Canada is both complex and evolving. Payment cards, especially credit cards, are often a very profitable part of the card issuer's business. Issuers should take care to comply not only with the variety of laws of general application but also the specific rules and regulations governing specific cards and marketing channels. Prudence dictates that payment card marketing programs be both creative and compliant.¹⁴

¹⁴ While beyond the scope of this paper, attached as Appendix H is an overview of the applicable legislation in Canada and the United States to facilitate discussion on this topic.

Appendix A: Comparative Advertising Do's & Don'ts

Do:

- Get legal input before you pursue a comparative marketing campaign – solicitor-client privilege will apply for legal discussions.
- Ensure your brand and marketing executives understand the basics.
- Substantiate early and often – tests should be reproducible and surveys should be based on representative samples.
- Exercise caution when using the name of a competitor – trade-mark and copyright rules may apply.
- Focus on the differences between the products rather than similarities.
- Compare relevant features between the products.
- Use caution when using humour in comparative advertising.
- Watch the competition closely – learn from what they do right and attack on what they do wrong.
- Establish and comply with a clear approval and “due diligence” policy for all comparative claims.
- Have a game plan ready to defend the claim, including careful record management and the establishment of a crisis management team.
- Consider every possible basis and forum for challenge – misleading advertising, failure to substantiate, injurious falsehood, unlawful interference, trade-mark or copyright violations, failure to meet regulatory standards, civil action, complaint to regulations, ASC trade dispute, etc.

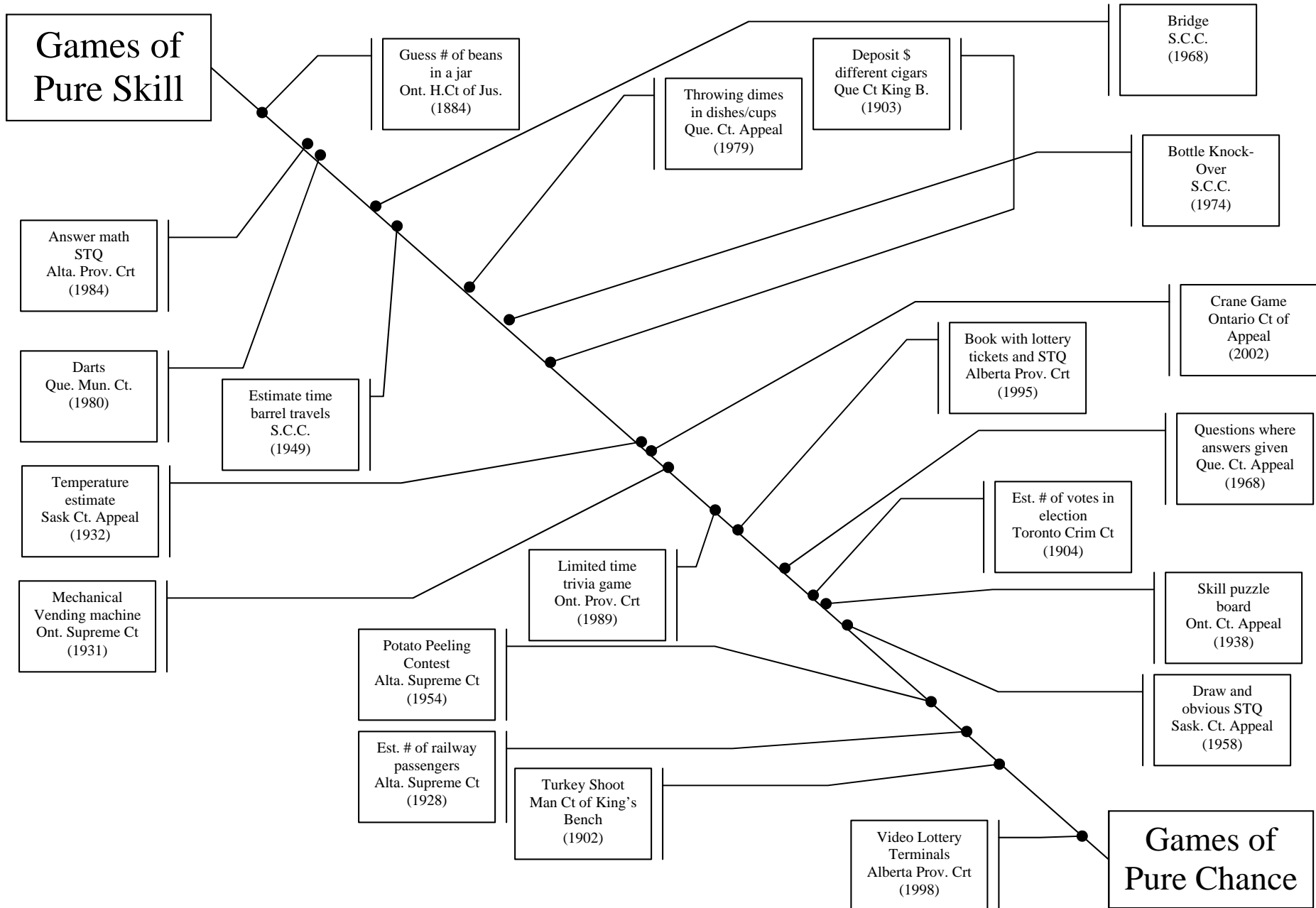
Don't:

- Underestimate the potential damage to your business if a comparative claim goes badly.
- Assume that American or foreign comparisons or research are valid in Canada.
- Rely on information that is out of date to substantiate claims.
- Use a claim that exceeds the limits of what can be substantiated with the tests that you performed.
- Rely on overly-broad or contradictory disclaimers.
- Exaggerate competitive differences or unfairly disparage the competition.
- Focus only on the similarities between the products.
- “Cherry Pick” – Claim general product superiority, while avoiding to address your own product's deficiencies.
- Reproduce competitor's logos or packaging materials in your advertisements.
- Assume that you can or should match claims with your competitors.

Appendix B: Skill-Chance Continuum

The following Skill-Chance Continuum illustrates the difficulty in reconciling court decisions regarding the question of whether a game is one of pure chance, pure skill or a mix of chance and skill. Generally, an increased level of difficulty does not convert a game from one of mixed chance and skill to one of pure skill. While a game of pure skill may contain “some unpredictable elements,” the average player must be able to exercise sufficient skill to compensate for the elements of chance.

Skill/Chance Continuum in Canada



Appendix C: Contest Disasters

COMPANY NAME /DATE	PROBLEM	EXPOSURE	RESOLUTION
BBC London 94.9 and Radio 2 – On-Air Competitions (UK), 2008	On-air shows were pre-recorded so that that listeners could not participate in the competition. Winners were selected from listeners who had contacted the show via the programme’s website or newsletter.	Negative publicity	Ofcom, the UK telecommunications regulator, fined Radio 2 £70,000 and BBC London 94.9 £25,000. Both broadcasters were also forced to provide on-air apologies.
Malibu Rum – Malibu Caribbean Rum Video contest (US), 2007	Malibu Rum conducted a video contest on YouTube. The public relations agency advertised the video contest as one where only YouTube viewers would narrow the field down to the top ten finalists. In contrast, the online rules indicated that viewers’ votes would only be a factor in determining the finalists. The finalists were never publicly announced and a winner was selected without any YouTube viewers voting. Contestants were upset because they believed the contest was rigged.	Negative publicity	Malibu says that it followed its posted rules and is in the process of contacting finalists. If they agree, their videos will be posted on the Malibu channel of YouTube.
KDND-FM’s – Hold your wee for a Wii (US), 2007	Radio station contest involved contestants consuming approximately 4 liters of water and withholding going to the bathroom. The contestant who could hold off going to the bathroom for the longest won a Nintendo Wii game console. A 28-year old mother of three who competed in the contest passed away due to water intoxication.	Negative publicity, police investigation and termination of radio station employees responsible for the contest	Police have not to pressed charges. The family of the victim has filed a lawsuit against the radio station and its employees.

COMPANY NAME /DATE	PROBLEM	EXPOSURE	RESOLUTION
Chubby Bunny contest (Canada), 2006	Rural fair contest involved stuffing as many marshmallows in the contestant's mouth as possible. One of the contestants, a 32-year old woman died of a cardiac arrest as a result of the marshmallows melting in her mouth and blocking her airways rendering her unable to breathe.	Negative publicity.	Family is considering a lawsuit. A similar incident that occurred in Illinois in 1999 which resulted in the death of a 12 year-old girl led to a US\$2-million settlement.
McDonald's (US and Canada), 2001	Game piece promotion involved placing instant win pieces on containers for drinks and french fries. Personnel with the marketing company responsible for the promotion stole valuable winning pieces and then, through various tactics, collected the prize money.	Negative publicity and an FBI investigation.	McDonald's published full-page apologies in national newspaper and awarded \$10 million in prizes at randomly selected outlets across North America.
Ultramar (Canada), 2001	Various coupons for gas were to be awarded, including three grand prizes of \$1500 worth of fuel. A printing error created hundreds of grand prize winners.	Prize claims totaled \$150 million.	The company relied upon a "Kraft clause" in its contest rules to cancel the original prize distribution and substitute an alternate method of allocating the grand prize.
General Motor Dealers / Ottawa Senators, 2000	Contest grand prize was a private suite at the Corel Centre for a Senators game during the second round of the NHL playoffs. Secondary prizes also included pairs of tickets to second round playoff games. Ottawa lost to Toronto in the first round of the playoffs.	Value of prizes and negative publicity.	Substitute prizes offered made up of tickets for games in the 2001/2002 season.

COMPANY NAME /DATE	PROBLEM	EXPOSURE	RESOLUTION
KBQI FM Albuquerque, 2000	Radio station promised to play 20,000 songs, commercial free, or to pay \$20,000 to the first caller who caught them playing a commercial. About one week into the promotion, the computer that controlled the on-air production, suffered a software glitch that caused it to play an advertisement for Geico Insurance. A listener called to claim the prize. The applicable rules stated that the ad had to be “a paid commercial”, which the Geico ad was not, since it was played in error.	The value of the promised prize of \$20,000.	The radio station chose not to rely on the rule and paid the prize money.
Childrens’ Hospital of Eastern Ontario (CHEO), 1998	CHEO conducted a fund raising lottery that sold tickets at \$100 each. Contestant purchased ticket with an NSF cheque. His name was drawn for the grand prize and he was given the opportunity to pay for the ticket with cash and claim the prize. Other entrants who had paid with an NSF cheque had been given the opportunity to make good on their payments.	Potential for negative publicity.	After the experience in 1998, CHEO changed its procedure to void any ticket that had not been paid at least 24 hours before the draw.
PepsiCo (Chile), 1992	Under-the-cap promotion involved cash prizes ranging from \$14 to \$30,000. The wrong number was announced in the media and far more “winners” came forward to claim prizes than planned.	The Pepsi bottling plant was besieged by an angry crowd of supposed winners who ultimately had to be removed by the police.	Pepsi garnered negative media exposure over the fiasco but was not charged or required to pay a monetary penalty.

COMPANY NAME /DATE	PROBLEM	EXPOSURE	RESOLUTION
PepsiCo (Philippines), 1992	Under-the-cap promotion with a grand prize of 1 million pesos (U.S. \$36,000). A computer glitch resulted in the wrong winning number being announced and 500,000 people believing they had won the grand prize.	Pepsi faced prize claims totalling U.S. \$18 billion. The disaster prompted anti-Pepsi rallies and sabotage attacks on Pepsi trucks and bottling plants. It was also reported that Pepsi's sales in the Pacific Rim plummeted and its market share dropped nine points just after the news broke.	Pepsi paid \$19 per piece for the "winning" caps totalling U.S. \$10 million. 7000 additional lawsuits were dismissed.
Hoover Europe, 1992	Contest promised consumers in Britain or Ireland a free airline ticket with the purchase of a vacuum. The airline tickets cost more than the revenue generated from the sale of the vacuum. Hoover was flooded with requests for vacuums by consumers seeking cheap airfares.	The value of the airline tickets claimed was in the tens of millions of dollars.	The fiasco cost Hoover tens of millions of dollars, years of litigation and immeasurable bad publicity.
Popsicle Industries Inc. (Canada), 1990-1991	"Points collection" promotion allowed collectors of Popsicle sticks to trade in "points" for Nintendo games. The number of requests generated by the promotion was unexpectedly high and eventually exceeded the supply of games. Popsicle Industries exercised a clause in its rules which allowed it to award substitute rewards. However, the latter were of inferior quality and desirability.	Popsicle Industries, along with some employees personally, were charged under the <i>Competition Act</i> .	To settle the case, Popsicle Industries gave Nintendo prizes to all the players who claimed them, which amounted to a cost of \$250,000. The company was also required to pay a \$200,000 fine under s. 59 (predecessor to the current s. 74.06) of the <i>Competition Act</i> for failing to distribute the awards in a timely manner.

COMPANY NAME /DATE	PROBLEM	EXPOSURE	RESOLUTION
Coca Cola (U.S.), 1991	Under-the-cap promotion wherein the player was supposed to collect circular game pieces for 5 Super Bowls – Super Bowl XXI, XXII, XXIII, XXIV and XXV. The rare game piece was supposed to be the Super Bowl XXII piece and the odds of winning the \$25,000 prize that came with collecting these five pieces were supposed to be 1 in over 72 million. A printing error resulted in some of the Super Bowl XXIII pieces being printing without the third “I”. As a result 17 people submitted what they thought were winning pieces and claimed the \$25,000 prize.	The total value of the prizes claimed was \$425,000.	Class actions were avoided due to clauses in the rules that stated that game pieces containing errors would be null and void. The rules also contained provisions for what would be done if there were more than one prize claimant.
Beatrice Foods (U.S.), 1990’s	Advertiser distributed millions of “scratch and win” cards in a probability game promotion. Every card could be a winner if the contestant uncovered the right combination of symbols. A contestant figured out that there were a limited number of variations in the configuration of the cards. This information could be used to make every card a winner. The contestant collected a large number of cards and demanded satisfaction from Beatrice. He also threatened to go public with his information. Beatrice refused and the contestant sued for \$20 million.	The potential exposure to Beatrice was massive.	The parties came to a confidential settlement.

COMPANY NAME /DATE	PROBLEM	EXPOSURE	RESOLUTION
Kraft (U.S.), 1980's	Matching game piece promotion. If two game pieces were collected that formed a picture of a prize, that prize was won. The odds of winning were supposed to be 1 in 15,000,000, but due to an error in distributing the game pieces, the odds of winning became 1 in 1.	Kraft tried to cancel the contest, which spawned class action suits as well as inquiries from certain regulatory authorities. In total, the company's exposure was \$270 million.	After extensive public relations efforts and negotiations, the matter was settled for \$10 million.

Appendix D: Contest Prosecutions

COMPANY NAME/DATE	PROBLEM	RESOLUTION
<p>Balance Group International Trading Ltd., 2002</p>	<p>For a \$1 fee, players would move a joystick to position an overhead crane above a toy or novelty item. By pressing a button on the joystick, the player would cause a claw to descend on the prize beneath. The player had no ability to control the outcome of the game after having activated the red button on the joystick. The claw would descend and, if the contestant was successful, pick up a prize and deposit it into a chute. An argument was made that there was fee being charged to participate in a game of pure chance., and the proprietor was charged under section 206(1)(f) of the <i>Criminal Code</i>.</p>	<p>Given the “overwhelming degree of chance” and mere “dash of skill” involved, the trial court convicted the game’s owner. The conviction was upheld on appeal, and the court emphasized that an increased level of difficulty does not convert a game from one of mixed skill and chance to one of skill. Key elements of the game were “wholly beyond the power of the player to influence” (including the ability of the claw to hold the prize). A game of pure skill may contain “some unpredictable elements,” but the average player must be able to exercise sufficient skill to compensate for the element of chance.</p>
<p>S.S. Viking Industries, S.C. Canadian Clearing Centre Inc. and Executive Premium Distribution Centre S.C. Corporation, 2000</p>	<p>Consumers were advised that they had been selected to receive valuable awards or premiums if they purchased a product. Misrepresentations were made regarding the nature, value and quality of the awards, and important additional conditions and restrictions required to collect the awards were not disclosed or were only partially disclosed to consumers at the time of the transaction.</p>	<p>Principal director of the company, Stephen Clark, convicted under s. 52(1)(a) of the <i>Competition Act</i> and fined \$300,000.</p>

COMPANY NAME/DATE	PROBLEM	RESOLUTION
3076784 Canada Inc. (carrying on business as National Clearing House, Nationwide Clearing House, National Clearing House), 1999	The Competition Bureau commenced a prosecution against the aforementioned company and its president, Jack Stroll, for a deceptive telemarketing scheme. Customers were mailed “official claim certificates”, indicating that they would win one of five valuable prizes. Customers were required to telephone within 72 hours to obtain the prize. When they telephoned, they were told that they had to buy overpriced promotional items to receive a prize. The prizes actually awarded had little actual value.	Corporation fined \$290,000; Jack Stroll fined \$10,000.
America Family Publishers, Vijay Sharma et al., 1999	Consumers asked via the telephone to buy thousands of dollars worth of promotional products (pens, jewellery, letter openers, etc.) at inflated prices in order to receive prizes. However no prizes were provided.	Company fined \$1 million; president, Sharma, fined \$100,000. Various telemarketers working for the company received jail sentences of between two and six months, or community service orders.
Cave Promotions Ltd., 1999	Promotion in which some twenty million “scratch and win” cards were mailed to Canadians. If the consumer scratched a “winning” card, they were to call a 1-900 number for prize claim instructions. These calls cost consumers between \$20 and \$40 each. They generally learned that they had in fact not won any prize, or that the prize they had won was not available.	Cave convicted under s. 52(1)(a) of the <i>Competition Act</i> , fined \$75,000 and made subject to a prohibition order.
Pepsi Cola Canada Ltd., 1991	Various Frito Lay brands of potato chips were labelled as having a “playing card inside.” Cards could be collected in certain combinations to win cash prizes. In fact, only 9 out of 10 packages contained cards. Wording on the package was alleged to be false and misleading in violation of s. 52 of the <i>Competition Act</i> . Rules on the back of the potato chip bags stated that all bags might not contain cards.	The Court held that there was no misrepresentation, given the small print wording on the back of the package. The producer’s <u>attempt</u> to place cards in all bags was a relevant consideration in a due diligence defence.

COMPANY NAME/DATE	PROBLEM	RESOLUTION
Simpsons Department Store, 1988	Promotion featured “mini casino” cards with four “pull-tabs”. Customers could win one of four discount amounts – 10%, 15%, 20% or 25%. A customer was meant to lift one of the tabs in the presence of a salesperson on the day of the promotion and the discount revealed would be applied to the customer’s purchase. The cards and advertising for the promotion stated that you could “save 10% to 25% on practically everything in the store”. In fact, however, 90% of the cards were printed with only one type of symbol (representing 10% off) under all four tabs.	Simpsons was convicted and fined \$100,000.00. The Court held that the non-disclosure of this fact constituted an omission to disclose material information affecting the chances of winning contrary to Section 59(1)(a) of the <i>Competition Act</i> [then Section 37.2(1)] as well as misleading advertising contrary to Section 52(1)(a) [then Section 36(1)(a)].
Pepsi Cola Can Ltd., 1986	Contest provided that the participating radio station would draw 150 entries from eligible entries received from which 1 winner would be drawn. Three hundred entries were in fact drawn. The decision to draw 300 was not made with the consent or knowledge of the head office of the accused. Only one customer complaint was received.	A fine of \$2,000 was imposed under s. 74.06 of the <i>Competition Act</i> .

Appendix E: Contest Fundamentals: Building a Better Contest

Please note that this checklist is simply a rough tool and should not be considered a substitute for legal advice regarding the planning, organization and execution of a contest.

- Conduct intellectual property searches to ensure that the proposed contest slogan is not trademark protected.
- Do not award a prize on the basis of chance alone; require a skill-testing question.
- Provide a reasonable alternative method of entry.
- Consider restricting the number of entries, as appropriate.
- Indemnification of the sponsor(s).
- Collect contestant information according to applicable provincial laws and/or the *Personal Information Protection and Electronic Documents Act* (PIPEDA).
- Specifically exclude Quebec, or comply with Quebec legislation:
 - Notice of the contest;
 - Payment of duties;
 - Reporting requirements; and
 - French language materials.
- Do not unduly delay the distribution of prizes.
- Disclose the following information in all contest rules and in all contest material:
 - The number and nature of the prizes to be won;
 - The approximate retail value of the prizes;
 - If applicable, the regional distribution of the prizes;
 - An explanation of how the entry form must be completed and submitted;
 - The odds of a contestant winning;
 - The mechanism and date for awarding the prizes;

- Whether delivery/entry by specific electronic communication is accepted, and, if so, the form of acceptable electronic communication;
 - Whether the winner may substitute the prize or choose its cash equivalent;
 - The cut-off date for entering the contest; and
 - Any other significant fact regarding when, how, or who could be eligible to win the prize(s) or otherwise affecting the chances of winning.
- Post the contest rules in all retail outlets and/or online for ease of reference.
 - Specify copyright ownership in all contest materials.
 - Include proactive risk management clauses, such as:
 - When and how the contest may be cancelled; and
 - Limitations on the sponsor's liability.
 - Describe how the winner will be selected, contacted, and awarded the prize.

Appendix F: Web 2.0 Tip Sheet

Law 2.0 – The New Legal Implications of Web-based Advertising and Marketing

The following items should be considered when attempting to exploit online marketing opportunities while minimizing legal risks.

1. ***Conduct a full legal review of your campaign*** - Remember, online advertising is not governed by one comprehensive piece of legislation.
2. ***Consult industry guidelines*** - Ensure your campaign follows the industry's best practices.
3. ***Don't assume users read the entire website*** - Policies, disclaimers and terms of use should be easy to find and read.
4. ***Establish and follow a published privacy policy*** - Include a link to the policy on every page where personal information is collected.
5. ***Get a license for the content submitted by users*** - This license should be broadly worded and require the user to waive their moral rights.
6. ***Publish the website's terms of use*** - The terms should prohibit users from posting content: (a) for which they do not hold the rights; and (b) that could be injurious to third parties.
7. ***Remember, minors are not bound by these terms*** – Get a consent and an indemnity from a parent or guardian before accepting content from a minor.
8. ***Establish and follow a published “take down” policy*** - The policy should reserve the right to remove material prohibited by the website's terms of use. Also, the website operator should consider monitoring the website for offensive submissions.
9. ***Disclose the company's role in the campaign*** - Don't turn your online marketing efforts into a public relations nightmare.
10. ***Remember, online campaigns can be accessed globally*** - Stay apprised of Internet law developments in foreign jurisdictions.

**Appendix G: Disclosure Requirements for Consumer Credit Cards
Cost of Borrowing (Banks) Regulations**

<p>Applications</p>	<p>Applications must contain the following information in the applications, themselves, or in a form accompanying the applications, and the date when each of the following takes effect:</p> <ul style="list-style-type: none"> • the annual interest rate (or if the interest rate is variable based on a fixed index, the public index and the percentage rate to be added or subtracted to it); • the day on and after which interest accrues and any grace period that applies; and • the amount of any non-interest charges. <p>The above requirements are not applicable if, on the application, the following are prominently disclosed:</p> <ul style="list-style-type: none"> • a local or toll-free number (or a telephone number with a prominent indication that collect calls are accepted) that an applicant can call during regular business hours and that the applicant can get the information required set out above with that number; and • the applicant can, in fact, get the information required at that phone number. <p>Where applications are obtained by phone or electronically, the required information must be disclosed at that time.</p> <p>If applications for credit cards are solicited by person, mail, telephone or electronically, the information required, above, must be disclosed at the time of the solicitation.</p>
<p>Initial Disclosure Statements</p>	<p>An initial disclosure statement must be provided to a cardholder on or before a customer agreement is entered into.</p> <p>An initial disclosure statement can either be a separate stand alone document, part of the credit agreement, or part of an application.</p> <p>The following items must be disclosed in an initial disclosure statement:</p> <ul style="list-style-type: none"> • the annual interest rate; • the grace period; • the nature and amount of any non-interest charges; • that a cardholder's maximum liability if a lost or stolen card is used in an unauthorized manner is the lesser of \$50 and the maximum set by the credit agreement except when a transaction is entered into an automated teller

	<p>machine using a personal identification number and then the maximum liability is the amount of the transaction.</p> <ul style="list-style-type: none"> • that a cardholder has no further liability after notifying the bank, either verbally or in writing, of a lost or stolen card; • the initial credit limit, if known at the time of the initial disclosure statement. If the credit limit is not known at the time of the initial disclosure statement, it must be disclosed in either a separate document that the cardholder receives on or before the date on which the cardholder receives the first monthly statement or in the first monthly statement; • the minimum payment during each payment period or the method for determining it; • each period for which a statement of account is to be provided; • the particulars of charges or penalties which may be imposed on cardholders (as under the <i>Bank Act</i> and the Cost of Borrowing (Banks) Regulations); Permitted default charges (in addition to interest) are limited to: <ul style="list-style-type: none"> - legal costs for collection; - costs to realize on security (including legal costs); and - not-sufficient-funds charges; • the funds over which there is a security interest for secured cards; • information about optional services, including charges and conditions for cancellation; and • a telephone number for cardholders to get information about the account (local, toll-free or collect, available during regular business hours).
<p>Monthly Statements (“Supplementary Disclosure Statements”)</p>	<p>Cardholders must be provided with a monthly statement which in law is called a “supplementary disclosure statement” on a regular periodic basis and at least once a month.</p> <p>The monthly statement must disclose:</p> <ul style="list-style-type: none"> • the period covered and the opening and closing balances in the period; • the annual interest rate that applied on each day in the period and the total of interest charged under those rates in the period; • the credit limit and the amount of credit available at the end of the period; • the minimum payment and its due date; • the cardholder’s rights and obligations regarding any billing error that may appear in the monthly statement ; • a local or toll-free number or telephone number with a prominent indication that collect calls are accepted, that a cardholder may use to get information about the account during the bank’s regular business hours; • an itemized description of each transaction that discloses each amount credited or charged, including interest, and the date when those amounts were posted to the account; • the amount that a cardholder must pay, on or before a specified due date, in order to have the benefit of a grace period; and • the sum for payments and the sum for purchases, credit advances, and interest/non-interest charges.

	<p>A monthly statement is not required to be provided in circumstances where there have been no advances or payments and either:</p> <ul style="list-style-type: none"> • there is no outstanding balance at the end of the period; or • the cardholder has notice that his or her credit agreement has been suspended or cancelled due to default and the bank has demanded payment of the outstanding balance.
<p>Changes in Terms</p>	<p>If any of the items required to be disclosed in an initial disclosure statement are to be amended, a notice must be provided in writing to the cardholder at least 30 days or more in advance before the change will be effective.</p> <p>Thirty days prior notice is not required to change:</p> <ul style="list-style-type: none"> • a credit limit; • an extension of the grace period; • a decrease in non-interest charges or default charges; • a change in information about optional services; or • a change in variable interest rates where tied to a public index because of a change in the underlying public index; <p>provided that disclosure of the change is made in the first monthly statement that is provided after the change is made.</p>
<p>Cancellation of Optional Services</p>	<p>A disclosure statement made in relation to a credit agreement under which optional services are provided on an on-going basis must specify that:</p> <ul style="list-style-type: none"> • the cardholder may cancel the optional service by notifying the bank that the service is to be cancelled effective as of the day that is the earlier of one month after the day that the disclosure statement was provided to the cardholder, determined in accordance with the rules for when a disclosure statement is deemed to be provided to a cardholder (see “Disclosure Statements Generally” below), and the last day of a notice period provided for in the credit agreement; and • the bank shall, without delay, refund or credit the cardholder with the proportional amount, calculated in accordance with the formula set out below, of any charges for the service paid for by the cardholder or added to the balance of the loan, but unused as of the cancellation day referred to in the notice. <p>The proportion of charges to be refunded or credited to a cardholder shall be determined in accordance with the formula:</p>

	<p>$R = A \times ((n - m) / n)$</p> <p>where</p> <p>R is the amount to be refunded or credited;</p> <p>A is the amount of the charges;</p> <p>n is the period between the imposition of the charge and the time when the services were, before the cancellation, scheduled to end; and</p> <p>m is the period between the imposition of the charge and the cancellation.</p> <p>Refunds are subject to any provincial laws that apply to the cancellation of services (e.g. provincial insurance laws and refund of premiums).</p>
<p>Disclosure Statements Generally</p>	<p>Information disclosed in a disclosure statement may be based on an assumption or estimate if the assumption or estimate is reasonable and the information disclosed by it:</p> <ul style="list-style-type: none"> • cannot be known by the bank when it makes the statement; and • is identified to the cardholder as an assumption or estimate. <p>A disclosure statement (or a consent in relation to a disclosure statement) must be in plain language that is clear and concise. It must be presented in a manner that is logical and likely to bring a cardholder's attention to the information required to be disclosed.</p> <p>If a cardholder consents, in writing, a disclosure statement may be provided by electronic means in an electronic form that the cardholder can retrieve and retain.</p> <p>A disclosure statement is deemed to be provided to a cardholder:</p> <ul style="list-style-type: none"> • on the day recorded as the time of sending by the bank's server, if provided by electronic means; • on the day recorded as the time of sending by a fax machine, if provided by fax and the borrower has consented to receive it by fax; • five days after the postmark date, if provided by mail; and • when it is received, in any other case.

<p>Advertising</p>	<p>A bank that advertises a credit card with a</p> <ul style="list-style-type: none"> • representation of the annual interest rate; • the amount of any payment; or • the amount of any non-interest charge; <p>must disclose the annual rate of interest on the date of the advertisement and any initial or periodic non-interest charges at least as prominently and in the same manner.</p> <p>A bank that advertises with a representation (express or implied) that a period of (variable) credit will be free of any interest charges must ensure that the advertisement discloses in a manner equally as prominently as the representation (if it is expressed, or in a prominent manner if it is implied) whether or not interest due after the “free” period, accrues during the “free” period.</p> <p>If interest does not accrue during the “free” period, the advertisement must also disclose any conditions that apply to the forgiving of the accrued interest and the annual interest rate for a period when those conditions are not met.</p>
<p>Waiver of Payments</p>	<p>If a bank offers to waive a payment for a credit card, it must disclose in the offer, in a prominent manner, whether interest will continue to accrue during any period covered by the offer if the offer is accepted.</p>
<p>Default Charges</p>	<p>Permitted default charges (in addition to interest) are limited to:</p> <ul style="list-style-type: none"> • legal costs for collection; • costs to realize on security (including legal costs); and • not-sufficient-funds charges.

**Appendix H: Marketing & Advertising Guidance: Federally
Regulated Financial Institutions Payment Cards**

Marketing & Advertising Guidance Federally Regulated Financial Institutions Payment Cards¹⁵		
Topic	United States	Canada
Contests	<p><i>Deceptive Mail Prevention Enforcement Act 39 USC s. 3001</i></p> <p>State sweepstakes laws</p>	<p><i>Competition Act, s. 74.06</i></p> <p><i>Criminal Code, s. 206</i></p> <p>“Section 74.06 of the <i>Competition Act</i> – Promotional Contests” Enforcement Guidelines (July 15, 1999)</p> <p>Quebec legislation on “publicity contests” regulated by the Régie des alcools, des courses et des jeux & <i>Charter of the French Language</i></p>
Cost of Credit Disclosure	<p><i>Truth in Lending Act</i></p> <p>Regulation Z under the <i>Truth</i></p>	<p>Cost of Borrowing (Banks) Regulations</p>

¹⁵ This chart sets out most but not all guidance to assist with the main benchmarks in regulation between the United States and Canada for marketing and advertising payment cards by federally regulated financial institutions.

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 Payment Cards¹⁵**

Topic	United States	Canada
	<p><i>in Lending Act</i></p> <p>Federal Financial Institutions Examinations Council’s guidance, “Account Management and Loss Allowance Guidance for Credit Card Lending” (January 8, 2003)</p> <p>Office of the Comptroller of the Currency’s Advisory Letter AL 2002-3 “Guidance on Unfair or Deceptive Acts or Practices” (March 22, 2002)</p> <p>Office of the Comptroller of the Currency’s Advisory Letter AL 2004-4 “Secured Credit Cards” (April 28, 2004)</p> <p>Office of the Comptroller of the Currency’s Advisory Letter AL 2004-10 “Credit Card Practices” (September 14, 2004)</p>	
Debit Cards		<i>Canadian Code of Practice for Consumer Debit Card</i>

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Topic	United States	Canada
	<p><i>Electronic Fund Transfer Act</i></p> <p>Regulation E under the <i>Electronic Fund Transfer Act</i></p> <p>State laws governing gift, payroll and other stored value cards</p> <p>States escheatment laws</p>	<p><i>Services</i></p> <p>Provincial laws regulating gift cards in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and Nova Scotia</p> <p>Provincial laws regulating unclaimed property in British Columbia, Alberta and Ontario</p>
<p>Depiction of Money</p>	<p><i>Counterfeit Detection Act</i> 1992</p>	<p><i>Criminal Code</i>, s. 457 & 448 – 461, generally</p> <p>“Bank of Canada Policy on the Reproduction of Bank Note Images” from Bank of Canada</p> <p><i>Copyright Act</i></p> <p>Canadian Mint (reproduction of coin images)</p>

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Topic	United States	Canada
<p>Industry Standards</p> <p>(Trade Associations & Self-Regulatory Organizations)</p>	<p>Direct Marketing Association</p> <p>National Advertising Division of the Council of Better Business Bureaus</p> <p>Association of National Advertisers</p>	<p>Advertising Standards Canada</p> <p><i>Canadian Code of Advertising Standards</i></p> <p>Canadian Marketing Association (CMA)</p> <p><i>Code of Ethics and Standards of Practice</i> from CMA</p>
<p>Misleading Advertising / Unfair and Deceptive Acts and Practices</p>	<p><i>Federal Trade Commission Act</i></p> <p>Regulation AA (Board of Governors of the Federal Reserve Systems' interpretation for financial institutions of the <i>Federal Trade Commission Act</i>)</p> <p>Federal Trade Commission guidance on substantiation, testimonials & endorsements</p>	<p><i>Competition Act</i>, s. 74.01(1) civil standard, s. 52(1) criminal standard</p> <p>“Misleading Advertising Guidelines” 1991 from Competition Bureau</p> <p>“Untrue, Misleading or Unauthorized Use of Tests and Testimonials” from Competition Bureau & <i>Competition Act</i>, s. 74.02</p>

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Topic	United States	Canada
	<p><i>Lanham Act</i> (unfair competition)</p> <p>Office of the Comptroller of the Currency's Advisory Letter AL 2002-3 "Guidance on Unfair or Deceptive Acts or Practices" (March 22, 2002)</p>	<p>"Application of the <i>Competition Act</i> to Representations on the Internet", Enforcement Guidelines, February 18, 2003</p>
Negative Option Marketing		<p>"Undertaking on Unsolicited Services"</p> <p><i>Ontario Protection Act</i> s. 13 and similar provincial laws</p>
Privacy	<p><i>Gramm-Leach Bliley Act</i></p> <p><i>Fair Credit Reporting Act</i></p> <p>State laws (e.g. data-sharing)</p>	<p><i>Personal Information Protection and Electronic Documents Act</i> (PIPEDA)</p> <p>Regulations Specifying Publicly Available Information under PIPEDA</p>

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Topic	United States	Canada
Telemarketing and Do-Not-Call	<p>Telemarketing Sales Rule</p> <p><i>Telephone Consumer Protection Act</i></p> <p>State laws</p>	<p><i>Competition Act</i>, s. 52.1</p> <p>“Information Bulletin, Telemarketing, Section 52.1 of the <i>Competition Act</i>”</p> <p><i>Telecommunications Act</i> and Telecom Decision 2004-63</p>
Television-Specific Rules	TV Networks Standards	<p>Television Bureau of Canada</p> <p>Telecaster Guidelines</p>
Unsolicited e-Mail	<i>Can Spam Act</i>	<p>Senator Yoine Goldstein’s Private Member’s Bill, <i>Anti-Spam Act</i> (Feb 3, 09)</p> <p>Government of Canada’s Task Force on Spam (May, 2005)</p> <p><i>Internet Marketing Guidelines</i> from Canadian</p>

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Topic	United States	Canada
		Marketing Association <i>Canadian Code of Practice for Consumer Protection in Electronic Commerce</i>