

**ADVERTISING &
MARKETING
BULLETIN**

*A Report on Recent
Developments in Advertising
& Marketing Law*

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CONTESTS: CHILD’S PLAY AND WHEN EQUAL IS FAIR

Last month’s Bulletin gave you the basics of contest law. This month, we will focus on two special issues: (1) privacy protection in contests for kids and (2) the so-called “equal integrity” principle.

CONTESTS FOR KIDS

In the US, since April 2000, the *Children’s Online Privacy Protection Act* (COPPA) has required the operator of a website to obtain a “verifiable parental consent” from a child’s parent before collecting, using or disclosing personal information from a child.¹

There is no equivalent to COPPA in Canada...yet. However, if your contest is open to persons under the age of majority, it should comply with the guidelines prepared by the Canadian Marketing Association. Endorsed by the federal Privacy Commissioner, the CMA’s *Code of Ethics & Standards of Practice* sets out a number of important rules to live by when marketing to children and teens.

Under the Code, marketers may collect personal information from children (defined as persons under 13) for the purposes of contests, games or sweepstakes without obtaining the parent or guardian’s express consent, only if the marketer:

- collects a minimal amount of personal information, sufficient only to determine the winner;
- deals only with the winner’s parent or guardian and does not contact the winner;
- does not retain the personal information following the conclusion of the contest or sweepstakes;
- makes no use of the personal information other than to determine the contest or sweepstakes winner; and
- does not transfer or make available the personal information to any other individual or organization.

For children over thirteen, the Code divides information collected into two categories: (a) contact information, consisting of the person’s name, address, e-mail, and home and cell phone numbers, and (b) personal information, consisting of all other information which identifies the individual. The Code’s position is summarized in the following table:

<i>Age</i>	<i>Personal Information</i>	<i>Contact Information</i>
Over 13, Under 16	Collection, use or disclosure to third party with express consent of the parent or guardian	Collection and use with teenager’s express consent. Disclosure to third party with express consent of the parent or guardian
Over 16, Under Age of Majority	Collection, use or disclosure to third party with teenager’s express consent	Collection, use or disclosure to third party with teenager’s express consent

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¹ In February, 2003, the Federal Trade Commission fined Mrs. Field’s Cookies and Hershey’s Food Corporation \$85K and \$100K, respectively, for violating this requirement.

As with all contests, it is necessary to accurately describe the intended use of the personal information at the time of collection, and to obtain the appropriate form of consent from the entrant.

EQUAL INTEGRITY PRINCIPLE²

Many marketers (and contestants) are perplexed by the phrase “no purchase necessary.” The main purpose of a contest, after all, is to promote a purchase. Nevertheless, as we saw in last month’s Bulletin, the *Criminal Code* prohibits contests that force a purchase or otherwise require “consideration” as a condition of entry.

“Equal integrity” refers to the notion that all entrants should be treated equally. In a typical contest, the total pool of players will include paying and non-paying entrants. If the contest contains an online method of entry, the pool of players may further be subdivided into online and off-line entrants. To what extent are contest organizers entitled to privilege entrants who select one method of entry over another?

The term “equal integrity” appears in no reported Canadian contest decision. Aside from an occasional footnote reference, the issue is usually given short shrift in articles on Canadian contest law. In the United States, by contrast, the advent of internet sweepstakes, where online participants can enjoy a distinct advantage over their off-line counterparts, has brought the concept into prominence.

Problems may arise when an advantage - in the form of a superior method of entry, or better odds - is associated with a purchase. “Equal integrity” is shorthand for requiring contest sponsors to avoid discrimination against non-paying participants. Among other things, this may mean identical prize pools and chances to win, and may involve adjusting ending dates for mail-in or facsimile entries to allow equal participation by off-line participants.

In Canada, this mode of thinking was applied by the Alberta Provincial Court in *R. v. Brennan*³, a case that considered the legality of a contest promoting the sale of a book. While tickets for the contest were available without purchase upon request, the judge found that there was “reluctance” to give free tickets. In the Court’s view, everything appeared geared to the giving of tickets on purchase of the book. As a result, the “no purchase” method of entry provided no assistance to the defence. While the Alberta Court of Appeal set aside the conviction, the lower court’s reasoning might be seen as a shot across the bow for Canadian contest sponsors. The decision suggests that a free alternative mode of entry (AMOE) may lose its efficacy if disparities in treatment become too glaring.

Canadian courts are likely to take a common sense approach to the “equal integrity” principle. The illegal lottery provisions of the Criminal Code were mainly drafted to curb illegal gambling and protect against “loss”, not to burden modern commercial marketing activities. In most cases, the provision of a free AMOE will satisfy the basic purpose of the statute. However, contest sponsors should still attempt, where possible, to minimize disparities in treatment between paying and non-paying entrants. If the odds of winning become too heavily tilted in favour of the paying entrant, then the non-purchase option may cease to represent an equivalent method of entry. The greater the discrepancy in treatment, the greater the risk of raising the ire of the regulators.

OTHER CONSIDERATIONS

The two special legal concerns highlighted in this Bulletin are not the end of the story. Other considerations include: protecting the contest sponsor with declarations of eligibility, indemnities and releases, contest rules and proper use of trade-marks.

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

For further information, please contact your McMillan Binch LLP lawyer or one of the Practice Leaders of our Advertising & Marketing Group listed below:

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² Also known as the “equal dignity” principle.

³ 59 C.P.R. (3d) 200, rev’d [1995] A.J. No. 698.