

What you need to know about Canadian sweepstakes and contest regulations

Clients occasionally ask me to create official rules for a sweepstakes or contest that will be conducted in the U.S. and Canada, or in Canada alone. That's when I contact counsel in Canada who I know have up-to-date experience with Canadian sweepstakes and contest laws. One such firm is [Bereskin & Parr LLP](#) in Toronto, where [Jennifer McKenzie](#) is the head of the firm's Regulatory, Advertising and Marketing practice group. Earlier this month, I asked Jennifer if she would write a guest post that describes some of the differences between U.S. and Canadian sweepstakes regulations, with the caveat that we cannot provide legal advice to our readers.

Here is the article that Jennifer and her colleague [Tamarah Luk](#) put together. It is a very useful description of the top five things that U.S. companies should know about Canadian regulations pertaining to these types of promotions. (One of the first differences: Canadians refer to sweepstakes as "contests of chance.")

Top 5 Things To Know Before Running a Contest in Canada

Promotional contests are a great way to attract consumers' attention to your brand and your products. For U.S. marketers and companies, allowing Canadian residents to participate in promotional contests is a savvy way to increase their brand's exposure. However, despite our countries' many commonalities, Canadian contest law has unique differences to U.S. contest law.

Canadian contests must comply with provisions of the [Criminal Code](#), [Competition Act](#), and, if Québec residents may enter, Quebec's [Act Respecting Lotteries, Publicity Contests and Amusement Machines](#). Also, if sponsors are using personal information collected during the contest for any secondary purpose, then the contest must also comply with Canada's federal privacy law called the [Personal Information Protection and Electronic Documents Act](#). Here are the top five things to keep in mind when planning to run a contest in Canada. Depending on the mechanics of your contest (for example, if minors may enter), further legal considerations may apply.

The information in this article is for information only. It is not, and should not be taken as, legal advice. You should not rely on, or take or not take any action, based upon this information. Professional legal advice should be promptly obtained.

- 1. Include a Skill-Testing Question** In Canada, games of pure chance are prohibited as illegal lotteries under our Criminal Code. This includes contests where prizes are given away through random draws, as well as those where prizes are randomly distributed through game cards or on packages (e.g. "scratch-and-win" games). For contests of chance, making prize redemption conditional on answering a skill-testing question turns a game of pure chance into a (legal) game of mixed chance and skill. Generally, a time-limited, multi-step and multi-operational mathematical skill testing question, answered without assistance, is sufficient. It should be noted that contests of pure skill, such as writing contests judged by a jury, do not require a skill-testing question, although many include one anyway as a precaution. Skill contests do require other disclosures, such as clear communication of the judging criteria and the weight amounted to each criterion.
- 2. "No Purchase Necessary"** Under our Criminal Code, it is also an illegal lottery to award prizes by any game of chance, or mixed skill and chance, where the entrant must pay money or other valuable consideration to play. What constitutes "consideration" can be a difficult analysis. Although a contest may not require an entrant to purchase a product to enter, it may require the contestant to take some other action that has value, such as watching a lengthy video (i.e. time) or requiring the entrant to complete an extensive survey (i.e. personal information). Generally speaking, where an entrant has to give up something of value or do something onerous to enter a contest, there is a risk that this will be construed as "consideration." The simplest way to avoid the consideration prohibition is to include a "no purchase necessary" mode of entry, such as including an address allowing consumers to mail-in for an entry without the need to watch a video or complete a survey. However, participants who choose the "no purchase necessary" route must not be unfairly disadvantaged compared to those entering through the other route.

(e.g. those who purchase the product have an opportunity to obtain additional entries, while those who mail-in do not).

3. Don't Forget About Québec! International clients often exclude Québec residents from their contests. However, Québec makes up about 25 percent of Canada's population. Although there are additional steps to running a contest in Québec, they are not onerous. It means dealing with the [Régie des alcools, des cours et des jeux](#) ("Régie"), having the rules and advertising translated, and paying a duty to the Régie. Thus, for a few minor extra steps, your brand could gain exposure to a significant portion of Canada's population by including Québec residents.

4. Get a Waiver of Moral Rights and an Assignment of Copyright for User Generated Content
Contests Contests encouraging entrants to produce user generated content (UGC), such as submitting their favourite photo with your product, are an exciting way to engage your consumers in your brand. However, there are a number of legal issues that need to be considered for these contests and careful involvement from your Canadian legal team in planning the contest is necessary. Since entrants will be creating content to be submitted and used in the contest, one issue that should be discussed are the copyright issues. Unlike in the U.S., Canada more broadly recognizes the moral rights held by creators of copyrighted works. Moral rights are automatically created when a work is created, and they cannot be assigned – they can only be waived. A creator of a copyrighted work may sue for infringement upon his/her moral rights when, for example, a work is modified in a way s/he does not approve of or if it is given a negative association. Thus, you should ensure your contest rules include a waiver of moral rights. Also, under Canada's [Copyright Act](#), an assignment of rights in a copyrighted work is only valid if it is made in writing and signed by the owner of the copyright. Thus, at a minimum, you should ensure contest rules include a non-exclusive license to publish, display, reproduce, modify, etc. entrants' UGC submissions. Once a winner is selected and confirmed, you can then have winners sign a written assignment of their rights in the UGC submission to you.

5. Anti-Spam Considerations

Canada's has a new [Anti-Spam Act](#), which has been passed but not yet entered into force. In addition, not all of the regulations under this Act have been finalized yet. The Act and its associated regulations include a number of provisions which will affect how businesses send marketing communications electronically to the public. Generally speaking, the Act prohibits sending of commercial electronic messages to a recipient without the recipient's permission. "Commercial electronic messages" include marketing and promotional e-mails. One aspect of promotional contest mechanics that may be affected by Canada's new Anti-Spam Act is those contests that include a "[refer-a-friend](#)" element. For example, contests where the original entrant has the opportunity to gain more entries if she or he refers a friend to the contest. While the last set of draft regulations for the Act included provisions addressing "refer-a-friend" scenarios, these regulations are not finalized and still subject to change. Thus, it remains to be seen exactly how the Canadian government will treat friend referral marketing. Although the U.S. has its own anti-spam legislation that addresses referral marketing, marketers cannot assume the Canadian regime will be the same. Thus, once Canada's Act comes into force, you should consult Canadian legal counsel to ensure that your contest complies with the Act.

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This post was written by retired Thompson Coburn partner Dale Joerling. If you have any questions about the topics discussed in this post, please contact Thompson Coburn partner [Hap Burke](#).

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