Trust me, I’m an influencer: An overview of influencer marketing in Canada

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In a world where social media stars reach millions of viewers, the power of a single post can rival traditional advertising campaigns. From A-list celebrities to niche online personalities, influencer marketing has revolutionized how brands connect with their audiences, transforming personal recommendations into highly effective sales tools. Yet behind the glitz and viral content lies a complex maze of legal regulations that advertisers must navigate with care. Ignoring these rules isn’t just risky; it can result in serious consequences for advertisers, even if the influencer is ultimately responsible for the breach.

What is influencer marketing?

Influencer marketing is a strategy where brands partner with and pay individuals who have a significant following on social media or other online platforms – these individuals are called influencers. The aim is to use the influencer’s trust and connection with their audience to promote an advertiser’s products, services or brands. In recent years, this approach has grown rapidly and is now widely used across various industries.

Overview of legal landscape on influencer marketing

The *Competition Act*

In Canada, influencer marketing is mainly governed by the *Competition Act*, which prohibits false or misleading advertising and deceptive marketing practices.

If an influencer fails to clearly disclose any material connection with a company whose products or services they promote, this may be considered false or misleading under the *Competition Act*. In the Deceptive Marketing Practices Digest — Volume 4, the Competition Bureau (Bureau) states that a “material connection” refers to any relationship between an influencer and a company that could influence how consumers perceive the influencer’s independence. This connection often involves something of value received by the influencer (such as payment, free products, discounts, or other benefits) but it can also include business or family ties.

The Bureau also provides guidance on best practices that influencers should follow when disclosing connections, including:

- **Influencers must ensure disclosures are as visible as possible**: Disclosures should be prominent and clearly visible, not hidden in long captions, group hashtags or a profile bio. Disclosures should also be visible on all devices without having to click, scroll or tap a button to expand the post.
- **Influencers must ensure disclosures are clear and contextually appropriate**: Plain and clear language must be used in disclosures. Ambiguous terms and abbreviations should be avoided.

Additionally, influencers expressing opinions online must ensure their statements are honest and based on real experiences to ensure that their content is not false or misleading. This applies to all online reviews, testimonials and endorsements.

The *Canadian Code of Advertising Standards*

Influencer marketing is also subject to the *Canadian Code of Advertising Standards* (Code), which is administered by the Ad Standards – Canada's advertising industry's self-regulating body**.**

The Code contains a several provisions that are particularly relevant to influencer marketing, including:

- **Clause 1, Accuracy and clarity**: Advertisements must not omit relevant information if the omission makes the advertisement deceptive or misleading. This means that if an influencer omits the disclosure of a material connection, this may be considered misleading advertising.
- **Clause 2, Disguised advertising techniques**: An advertisement cannot be presented in a way that conceals the fact that it is an advertisement.
- **Clause 7, Testimonials**: Testimonials, endorsements or other representations of opinion or preference must reflect genuine and current opinions and must be based on adequate information. This requirement applies equally to all media and formats, including the representations of influencers. Testimonials must disclose any material connection between the reviewer and the entity making the product or service available. Further, Ad Standards' Interpretation Guideline #5 provides guidance on the disclosure requirements under Clause 7 of the Code. It states that any testimonial, endorsement, or review must clearly and prominently disclose any material connection between the reviewer and the company behind the product or service.

Ad Standards has also created the Influencer Disclosure Guidelines, to help influencers and advertisers understand and meet the disclosure requirements in the Code and Interpretation Guideline #5. These Influencer Disclosure Guidelines provide a number of examples that illustrate sufficient and insufficient disclosure of a material connection within a variety of post types (*e.g*. static posts, character-limited posts, video posts, stories, blogs).

Legal considerations when working with influencers

It is important to note that both the advertiser and the influencer are accountable for violations of the *Competition Act*, the Code, and other applicable laws, even if the breach originates from the influencer. Below are some key legal considerations advertisers should keep in mind when collaborating with influencers:

- **Approval, monitoring and take down procedures:** Advertisers should ensure that agreements with influencers include clear approval and monitoring processes for all content created. Additionally, advertisers should secure adequate rights to remove any content that is not approved or that violates laws.
- **Termination:** For whatever reason, an advertiser might decide to part ways and stop working with an influencer. Advertisers should carefully consider the conditions and procedures for terminating an agreement with an influencer.
- **Employment considerations**: Advertisers should assess whether their relationship with an influencer classifies the influencer as an employee or an independent contractor, as this distinction can affect the advertiser's legal responsibilities toward the influencer.
- **Intellectual property (IP) concerns:** Agreements with influencers should clarify who holds ownership of the content produced by the influencer and outline any limitations or guidelines that should govern the use of the advertiser's IP in the content creation. Additionally, agreements with influencers should state that influencers may not incorporate third-party IP, without proper authorization.
- **Exclusivity:** Advertisers should evaluate whether it is appropriate for an influencer to promote a competitor's product or service at the same time and clearly document this in the influencer's agreement.
- **Other regulations**: Advertisers should keep in mind that depending on the industry the advertiser is operating in or the market the advertiser is targeting, the advertisement could be subject to further regulations.

Emerging enforcement trends and risks in influencer marketing

As the influencer landscape expands, new legal challenges are emerging in other jurisdictions that could impact the Canadian market. Notably, there has been a significant increase in consumer class action lawsuits in the United States (U.S.) targeting both brands and influencers for allegedly failing to disclose paid endorsements on social media. This trend highlights that consumers are attentive to and concerned about the potential harms of false or misleading influencer marketing.

#Sharenting and child influencers

"Sharenting" is the monetization of content featuring children on social media. While some may consider sharenting as a fun way to connect with family and friends or document their children's lives, there are growing legal and ethical concerns in this area.

Currently, Canada does not have influencer-specific laws governing minors, other than the *Protecting Child Performers Act*, which sets out certain requirements for employing child performers; however, in cases of sharenting, children are not employed by another entity, but arguably by their parents. Countries such as France and some states in the U.S. have introduced legislation to protect child influencers' earnings and rights. These

developments suggest that regulatory scrutiny is on the rise, and Canada may not be that far behind.

For Canadian advertisers, it may be helpful to consider additional provisions with respect to consent, scope of work, and privacy rights in influencer or talent agreements that involve a minor.

Concerned about working with an influencer?

If you have any questions, need help with drafting talent or influencer agreements, or want to ensure you're fully compliant, get in touch with our Advertising & Marketing team.

By

Candice Kloes, Annie C. Hu, Olivia Villani

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BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal
1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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