

May, 2018

Ad Standards Complaints

Ad Standards is Canada's national, independent, advertising self-regulatory body. Its *Canadian Code of Advertising Standards* (the "Code")¹ is the code of conduct governing advertising in Canada, establishing criteria for advertising that is truthful, fair and accurate. In contrast to the *Competition Act's* misleading representation provisions, contraventions of the Code cannot result in fines or in criminal sanctions.² The Code applies to advertising by businesses for goods and services, and by organizations (including governments and government departments) to promote a public image or advance a point of view. The Code does not apply to political and election advertising. The Code applies to advertising in all media, but does not apply to media that originate outside of Canada (unless the advertiser is a Canadian entity) or to the contents of product packaging and labelling.

Where advertising appears to contravene the Code, consumers may file complaints that are adjudicated by independent Standards Councils that are comprised of senior industry and public representative volunteers. Competitor complaints are addressed under the Advertising Dispute Procedure (formerly the "Trade Dispute Procedure"). Ad Standards also administers specialized regimes, including the *Broadcast Code for Advertising to Children* and the *Special Interest Group Complaint Procedure*.

Ad Standards' reports provide useful guidance to advertisers, through examples of advertising that can lead to complaints and information about how certain complaints have been resolved.³ A review of the 2017 Year in Review and of Complaint Case

¹ The Code is posted on the Ad Standards web site:
<http://www.adstandards.com/en/Standards/canCodeOfAdStandards.aspx>

² The *Competition Act* is administered by the federal Competition Bureau. Provisions that relate to "false or misleading representations" are s. 52.(1) (criminal conduct) and s. 74.01 (reviewable conduct).

³ "Ad Complaints Report 2017 Year in Review" is posted at:
<http://www.adstandards.com/en/ConsumerComplaints/2017adComplaintsReport.pdf>

Summaries⁴ can help advertisers to avoid advertising that would contravene the Code, and the reputational damage, and time and cost of responding to Code-based complaints.

“Administratively Resolved” Complaints

As noted in the 2017 Year in Review, Ad Standards uses a streamlined procedure to address non-complex complaints, based on price errors and other inaccuracies in retail advertising, where allegations relate to contraventions of the Code’s Clause 1 (Accuracy and Clarity) and/or Clause 3 (Price Claims). Where the advertiser agrees to withdraw the ad in question promptly, and to take corrective action, such as publishing a corrected advertisement or notice, the complaint is “administratively resolved” by Ad Standards staff and will not be forwarded to a Council for adjudication. In 2017, Ad Standards received 1,808 complaints about 1,322 advertisements, of which 1,172 of them met the Code’s criteria for acceptance. Of those, 224 complaints, involving 164 advertisements were administratively resolved, and were not sent to a Council for adjudication.

Among the 218 complaints about 72 advertisements that were referred to Councils, 173 of them, about 46 advertisements, were upheld. Those cases are divided into two categories: non-identified cases and identified cases.

“Non-Identified” Cases

It is possible for an advertiser to avoid being identified in Ad Standards’ public reports by withdrawing or amending the advertisement before a Council meets to adjudicate the complaint. This is often done even if the advertiser disagrees with the basis of the complaint and prepares submissions to be considered by the Council. In such cases the complaint and the advertiser are described with summary information only. Examples, from 2017 include:

- Clause 1 (Accuracy and Clarity): A radio commercial by an acupuncture clinic in Alberta which included claims that acupuncture “is proven effective in the treatment of many conditions including: sciatica, headaches, and neck or lower back pain”. In upholding the complaint, the Council found that the advertised claims were not supported by scientific evidence. However, the advertiser

⁴ The Complaint Case Summaries for 2017 are at: <http://www.adstandards.com/en/Standards/adComplaintsReports.aspx?periodyear=2017>

avoided being identified by permanently withdrawing the ad before the Council met to adjudicate the complaint.

- **Clause 1 (Accuracy and Clarity):** A newspaper health and beauty services advertisement invited consumers to participate in a research project. The complaint alleged that the real purpose of the ad was to market the advertiser's device which would be used during the "test period". Both the Council and an Appeal Panel found that the ad contravened the Code. However, as above, the advertiser avoided being identified by withdrawing the ad prior to the adjudication of the complaint.
- **Clause 1 (Accuracy and Clarity):** An online streaming platform advertised unlimited audiobook access at \$13.50/month, when the price being charged was \$26.99/month when an IOS device was used. The advertiser acknowledged that relevant information had been omitted from the ad, and for that reason the Council upheld the complaint. However, by amending the complaint prior to that adjudication, the advertiser avoided being identified in the Ad Standards report.

"Identified Cases"

In cases where an advertiser does not amend or withdraw the ad before the Council's consideration of a complaint, it will be identified. Examples from 2017 which highlight problematic advertising and identify the advertisers are:

- **Clause 1 (Accuracy and Clarity) and Clause 4 (Bait and Switch):** Flight Network advertised flights from Calgary to Hayden, Colorado for the all-inclusive price of \$745 (Cdn) on its websites. The complainant booked a flight, receiving a confirmation number, but then received an e-mail notice indicating that there were no flights available at the sale price, but that the flight was available at \$893. Flight Centre did not respond to requests for comment. The Council noted that the lower-priced flights were still being advertised after the complainant had been advised that they were not available, and found that the ad was misleading.
- **Clause 3 (Price Claims):** A Sears Canada direct mail ad in Alberta featured a Kenmore blender at the price of \$149.97 accompanied by the statement "Compare at \$579.99". Sears did not respond to requests for comments on the complaint, and the Council was unable to find any evidence that Sears had ever

sold the product at the higher price. As a result, the Council determined that the advertisement contained an “unrealistic and deceptive price comparison.”

- Clause 7 (Testimonials): Clearview Antenna, a telecommunications company, distributed digital display ads on its website and social media pages featuring testimonials identified as customers from Montreal, Toronto and Vancouver. The complaint noted that the company’s American website featured the identical testimonials from the same individuals, but identified them as living in U.S. cities. The Council concluded that the testimonials contravened the Code since they were not genuine and not based on real customer experiences.

When responding to complaints filed with Ad Standards, advertisers should consider whether they might be able to have the complaint “administratively resolved” by Ad Standards staff. This would avoid having the complaint forwarded to a Council for adjudication. No summary of the case would be prepared. If an administrative resolution is not possible, either because the complaint is based on an alleged infraction of a clause other than Clauses 1 or 3, or because the complaint is considered by Ad Standards staff to be more serious than a simple error or mistake in the ad, the advertiser should then consider amending or withdrawing the complaint before a Council meets to adjudicate the complaint. This will have the effect of ensuring that even if the complaint is upheld, the advertiser will not be identified in the summary. At the same time, the advertiser can prepare submissions to defend the ad and explain why it believes that the ad does not contravene the Code. While being identified publicly in association with the complaint may not be of as much concern to an advertiser as the prospect of being ordered to pay administrative monetary penalties under the *Competition Act*, this can have a reputational cost which advertisers will seek to avoid.

Please address any questions about the Code, or about other legal requirements for advertising and marketing, to Carol Anne O’Brien at caob@caobrienlaw.com, or (416) 640-7270.

Carol Anne O’Brien’s law practice is focused on regulatory matters including communications law (broadcasting and telecommunications), competition law, advertising and marketing, Internet domain names and privacy.