



Ad Standards Overhauls Dispute Procedure

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Ad Standards is a national not-for-profit advertising self-regulatory body. The cornerstone of self-regulation is the Canadian Code of Advertising Standards (the “Code”), which consists of 14 clauses including such clauses that address issues in advertising such as “Accuracy and Clarity”, “Price Claims”, “Comparative Advertising” and “Testimonials”. Ad Standards enforces the Code, in part, through the “Advertising Dispute Procedure” (the “Procedure”), a process through which advertisers can challenge competitors’ advertising as being contrary to the Code.

The fee-based and time-limited Procedure is intended to provide advertisers with a quick and cost-effective means of resolving an advertising dispute as an alternative to a court action. Until recently, the Procedure was initiated with a written complaint. The first stage of the Procedure was a mandatory resolution meeting convened by Ad Standards. If unresolved, the parties would simultaneously exchange their evidence and an oral hearing would be held before a five member panel convened by Ad Standards and drawn from the following industry sectors: advertisers, advertising agencies, media and legal professionals experienced in advertising, and the public. There was a right to request leave to appeal from the panel’s decision. The entire Procedure was confidential including the existence of a dispute and the findings.

Over the past year, to see how the Procedure could be improved, Ad Standards consulted with its own members and reviewed the dispute procedures of other agencies like the National Advertising Division in the U.S. and the Advertising Standards Authority in the U.K. The result is that the Procedure has undergone a significant overhaul. The changes will come into effect on **February 11, 2019**.

The following are some of the features of the new procedure:

One of the new preconditions to receiving a complaint by Ad Standards: good faith efforts by the parties to resolve the dispute themselves. The Procedure is initiated with a written complaint, which must be accompanied by all evidence, including where applicable, technical or consumer test results and methodologies relied upon by the complainant. In addition to the required fees, the written complaint must also be accompanied by a written confirmation, satisfactory to Ad Standards, that complainant has made good faith efforts to resolve the dispute with the defendant advertiser.

No mandatory resolution. A resolution meeting is no longer mandatory. However, either party can request a resolution meeting and, if both parties consent, one (or more) resolution meetings will be convened and moderated by Ad Standards.

Written submissions only. If no resolution meeting is called, or a resolution meeting is held but no resolution is reached, the defendant advertiser will be asked to provide a written reply to the complaint within a set time. The complainant then has a right to reply, and then the defendant advertiser has a right to reply to the complainant’s reply.

Three member “Adjudication Panel”. The dispute will be decided by a three member panel called an Adjudication Panel, which will be chaired by a lawyer experienced in advertising and marketing law. The other two members will be drawn from the following industry sectors: advertisers, communication/advertising agencies, media and industry sectors, including in-house lawyers employed in these industry sectors.

No oral hearings. The Adjudication Panel will decide the dispute by a majority vote on the basis of the written complaint and the parties’ written submissions.

Timing of Remedial Action. The old Procedure set a timeline for compliance by the defendant advertiser if the complaint was upheld, without regard to the nature of the media. The new Procedure expressly states that the media and the ease or



difficulty (as determined by the Adjudication Panel or Ad Standards) of the requisite amendment or withdrawal will be considered in setting the time. The time to amend or withdraw the advertising will be expressed in the decision or at the discretion of the Adjudication Panel.

No appeal. The decisions of Ad Standards (e.g. whether to accept a complaint at first instance) and the Adjudication Panel will be final.

Start to finish estimate. Ad Standards estimates that the entire Procedure could take 32 to 37 business days.

Lower fees. The fees payable to Ad Standards for the Procedure have been significantly reduced.

Still confidential with a new twist – “Case Summaries”. The Procedure is still confidential. The two advertisers and members of the Adjudication Panel cannot disclose or discuss publicly the existence of a dispute, the findings or the identity of the Adjudication Panellists. However, Ad Standards will now publish summaries of the decision including the facts and issues at issue without naming or identifying the advertisers (“Case Summaries”). The Case Summaries are intended to “provide clarity about the kinds of advertising activity that have been found by an Adjudication Panel to contravene the Code in some respect or other”. If a defendant advertiser fails to comply with a decision of the Adjudication Panel, Ad Standards may publish the decision, which will include the identity of the advertisers involved in the dispute.

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