An Interview with Catherine Bate, Chief Legal and Policy Officer of Ad Standards – Her First Year and Advertising in the Age of COVID-19

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By Jennifer McKenzie

Ad Standards is Canada’s national, independent, not-for-profit advertising self-regulatory body. It administers the Canadian Code of Advertising Standards (Code), which is a 14 clause code that forms the basis for the review and adjudication of both consumer complaints and advertising disputes among competitors.

In addition, Ad Standards’ Clearance Services provides fee-based advertising review to ensure regulatory compliance for advertising in the following regulated categories: children’s advertising, food and non-alcoholic beverages, alcoholic beverages, consumer drugs, cosmetics and, since January 2018, medical devices.

Catherine joined Ad Standards in 2019 as the Chief Legal and Policy Officer, which is a new position at Ad Standards. Prior to joining Ad Standards, Catherine had an illustrious career in private practice. She headed up the Advertising & Marketing group at two national law firms and was ranked as one of Canada’s leading practitioners in the area of advertising and marketing.

On behalf of her clients, Catherine used Ad Standards’ services, whether it be assisting clients get preclearance or representing clients in advertising disputes. Catherine was well-positioned to take on this new role. We were excited when she agreed to do this interview and discuss her first year.

Thank you for agreeing to this interview. You’ve been at Ad Standards for just over a year. Prior to your joining, Ad Standards did not have a Chief Legal and Policy Officer. It must be exciting and daunting to carve out a position that did not exist before. How would you describe your first year at Ad Standards? What goals did you set for yourself during the first year?

I found the opportunity to create this position at Ad Standards too exciting to pass up. In my first year, as in any new job, there has been a lot of learning. I was fortunate to have worked with Ad Standards ‘from the outside’ for my whole legal career. But, I needed to learn the ‘hows’ and the ‘whys’ of the ways things have worked in the past.
Early in my first year, I set a goal to increase transparency about what Ad Standards does, and how we go about it. After a year now of speaking with industry, members, and other stakeholders through my new lens, I feel I have a better sense of what Ad Standards does now, and what we can do better going forward. I am very energized by the potential of my position in this small but mighty SRO (self-regulatory organization).

What surprises have you discovered since joining Ad Standards that you may not have been privy to as a private practitioner, either about Ad Standards itself, the advertising industry, the role of the private practitioner, etc.

The biggest surprise to me was to see the hard work of the Standards Councils in action. When a complaint comes in from the public, and it is found to raise a potential issue under the Canadian Code of Advertising Standards, the complaint and the advertiser’s response are sent to a body called a Standards Council for review. That Council is made up of members of both public and industry, and they are asked to adjudicate the merits of the complaint and the ad under the clauses of the Code. I knew that this happened, but I did not appreciate the level of commitment, time and attention that Council volunteers put into this work. Some of the debates and discussions around the Council table have been quite passionate, but always respectful, and in search the right determination. I support the Council members and its chairs through those meetings, providing insights as to what the law might say, or to inform about past decisions. But, the decisions of the Council reflect the views of the members of the Council, and are only arrived at after a very thorough vetting of the issues.

Your joining Ad Standards coincided with the launch of a completely overhauled Advertising Dispute Procedure. The changes were dramatic from the elimination of the mandatory settlement meeting, an oral hearing and a right of appeal, among numerous other changes. (We summarized some of those changes here.) How has industry responded to the changes to the Procedure? What is Ad Standards’ experience with the roll out of the Procedure? Is Ad Standards planning on tweaking any elements of the Procedure because of the feedback?

The changes appear to be well received. We had two cases move through the process last year, and two already resolved this year. Although no one could have predicted in 2019 what 2020 would bring, the changes mean that we are able to operate from a distance, and can still move disputes through the new Procedure should cases arise in the foreseeable future. An unforeseen bonus.

I have anecdotal reports of several other cases being resolved by the parties on the eve of filing with Ad Standards. This is another way in which the system is working, by helping to bring resolution to matters, even if the differences between the advertisers do not result in a formal decision through our Procedure.

While I do not anticipate any significant changes in the short term, we are in the process of reviewing what clarifications we can make to the documents, and refinements to the Procedure, for clarity.

Cannabis for recreational use has been legal in Canada for 18 months. There was some discussion that Ad Standards would provide clearance services to help companies assess what is an allowable promotion under the federal Cannabis Act. What is Ad Standards’ current position on providing those review services whether on an informal or formal basis?

Before I joined, Ad Standards worked with industry to develop some best practice guidelines for recreational cannabis advertising. Unfortunately, Health Canada did not support those guidelines at the time. In our role as a self-regulator, we want to ensure that we are helping industry to work within the appropriate legal framework. And, as a preclearance agency, we want to ensure that our clearance number can be relied upon as a sign of compliance with applicable laws. We do not want to take an interpretation of the regulations that could, ultimately, be overturned by Health Canada’s interpretation. For now, at Health Canada’s request, we send inquiries to their attention. We continue the dialogue with Health Canada in this area, and hope to be in a position in future to offer preclearance services in this sector.

Ad Standards administers a consumer complaint process whereby consumers can file written complaints to Ad Standards that an ad contravenes the Canadian Code of Advertising Standards. We have seen from past presentations and the Consumer Complaints Reports that most complaints arise under three clauses: Clause 1 (Accuracy and Clarity), Clause 10 (Safety) and Clause 14 (Unacceptable Depictions and Portrayals). Beyond those broad headings, can you tell us what really bothers consumers?

Looking at the complaints adjudicated during 2019, I would say that at a fundamental level, consumers want to be able to get what they were promised. The motto on our boardroom wall is “Truthful, Fair & Accurate” and this is what consumers...
are most interested in, as reflected by the number of complaints we receive under Clause 1. Sometimes, it may be that the terms of an offer are not complete, or not sufficiently clear, and are therefore reasonably misunderstood. In other instances, it may be that the general impression created by an ad was not intended by the advertiser but, nevertheless, it's what the consumer is entitled to expect.

Under Clause 10 (Safety), many consumers seem to be concerned about children: either how they are depicted, or whether an activity depicted might encourage them to engage in unsafe behavior.

Under Clause 14 (Acceptable Depictions & Portrayals), quite often the Council is asked to consider if an ad is clever and funny, or inappropriate and offensive. For some brands, skirting this line is effective advertising. For others, knowing that the question had to be asked may mean that it went a step too far. In either way, consumer feedback through our complaint process means that the consumer concerns are relayed to the brands for them to consider.

Consumer complaints are powerful: it takes only one upheld complaint to require an advertiser to amend or withdraw the advertising. Given the impact of a complaint, can you tell us what steps Ad Standards takes upon receipt of a complaint to determine whether an alleged violation of the Code has occurred? For example, I know that Ad Standards takes great care to ensure that the complainant is truly a “consumer” and not a special interest group.

We review each complaint to consider whether it might have been submitted by a competitor or special interest group, rather than a member of the general public. While not promising to be perfect, information publicly available online and through social media will often give us enough to judge whether a complainant is actually an employee of an interested advertiser or group, or just a follower or person with an interest in the advertising in question. In 2019 (just prior to my arrival), the prior “Special Interest Group Procedure” was discontinued, meaning that if a special interest group wishes to challenge an ad, they must follow the same procedure as any other advertiser.

We also review to ensure that the complaint truly raises an issue under the Code. If a complainant does not like the product or service being advertised, or has a beef with a particular advertiser rather than a concern that can be adjudicated under the Code, these complaints will not proceed beyond review at the staff level. Many advertisers (particularly those who are not members, and with whom we do not have a point of contact) may be surprised to know the work that Ad Standards does to resolve such complaints with consumers on their behalf. Even if no Code issue is raised by a consumer, each complaint reviewed is responded to by Ad Standards.

The Canadian Code of Advertising Standards has been a remarkably resilient document. There have been a few amendments over the years, most recently to address social influencers, but it has largely stayed unchanged and where necessary, Ad Standards has issued Interpretation Guidelines about the Code. Do you foresee the need for any amendments and/or Interpretation Guidelines in the future to respond to developments in advertising?

In 2019, we released a new Interpretation Guideline to help clarify the scope of “government advertising”, which is adjudicated under the Code, vs “political” or “election” advertising which are excluded. In 2020, we are not planning to open consultations on the Code itself, but we do have on our radar issues including clarifications related to treatment of packaging and labelling (which are currently excluded media under the Code), more guidance about influencers, and a review of the gender portrayal guidelines.

I am stating the obvious when I say that 2020 has turned out to be a surprising and stressful year for everyone. You have an unique vantage point to see how the global health and economic crisis as impacted the advertising industry in Canada. Can you provide some insight? For example, have you seen the number of preclearance submissions decline? Have you seen the tone of advertising change? Has the nature of consumer complaints in response to advertising changed?

My answer to this question might be different for each day that passes. At the outset, we did see an immediate decline in both preclearance submissions and complaints. Both consumers and industry needed to focus on the essential – health, economic stability/response, home, family, etc. We are gradually seeing the industry adapt. The tone of advertising seems to be shifting away from the purely emotive (generic messaging of support during unprecedented times), to find consumer-relevant messaging in the current state in which they find themselves.

Notably, consumer sensitivity has also pivoted and, in some cases, is heightened. As expected, we have seen an uptick of
complaints about COVID-19 related claims (unsubstantiated health claims, unauthorized products, etc.). Some of these about therapeutic claims and unauthorized products we forward to Health Canada, and others we address under the Code. We are also seeing continued sensitivity towards scenes showing crowds – old footage taken in malls or food courts, extended family gatherings, etc. Whether or not these rise to the level of a violation of the Code (encouraging unsafe or dangerous behaviour, encouraging unlawful behaviour, or offending standards of public decency) remains to be determined, and the assessment under the Code may change as social distancing requirements and norms vary over time.

If you are lucky enough to have a job that has not been impacted by the lockdown, many people are saying that they actually like the slower pace and comforts of working from home. Has this time given you and Jani an opportunity to really delve into projects that otherwise you may not have had the time to do? Can you tell us about those projects?

We and our staff are very fortunate that we can pick up and continue the work of Ad Standards from our homes. Like many other not-for-profits, we are dependent on our members and supporters, and are grateful to those who have continued to support the important work through their own challenges. I can’t say that many of our staff have seen a slower pace; at least not yet. While preclearance submissions are down in some sectors, our staff are busy developing online educational programs for members and the industry alike, and we’re making up for time lost in March and April. Between April and June, we are releasing the AdChoices Accountability Program Compliance Report, the 2019 Ad Complaints Report, and the 2019 Compliance Report for the Canadian Children’s Food and Beverage Advertising Initiative. We are also very proud to support the non-partisan advertising initiatives of both the federal government, and the government of British Columbia, and so our Standards staff has been very busy reviewing the advertising from these jurisdictions about COVID-19 for compliance. This is in addition to the ongoing work in review of the Advertising Dispute Procedure, and relevant Code guidelines. And all this, while learning about the CERB, the CEWS, and keeping the lights on, caring for children and parents and, like everyone, figuring out how to adjust to the new normal. I heard someone describe this new "now", not as working from home, but as being at home working during a crisis. We are working hard to ensure that the work of Ad Standards continues seamlessly, but I can’t say that I’ve found that slower pace quite yet.