

NEW AD STANDARDS ADVERTISING DISPUTE PROCEDURE

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Advertising Standards Canada, an industry body commonly known as Ad Standards, has, for many decades, run both consumer complaint and competitor dispute processes with respect to advertising that may run afoul of its Canadian Code of Advertising Conduct. Pursuant to the Advertising Dispute Procedure, advertisers who believe that their competitor is running improper advertising may challenge such advertising. This is an alternative to making a complaint to the government, or a lawsuit seeking an injunction.

The competitor dispute procedure was suspended in mid-2018 and Ad Standards conducted an extensive consultation with its membership (which includes advertisers, agencies, media and suppliers to the industry, such as law firms). After this consultation, a new advertising dispute procedure was launched in February 2019. The key difference between the prior system and the new procedure is that the new procedure takes place entirely on a written record generated by the complainant and defendant advertisers. In contrast, the prior system culminated in a half day hearing in front of a five-member panel. The fees payable by the complainant are significantly less than in the prior system. A complaint filing fee of \$1,500 and an adjudication fee of 7,000 applies (for members of Ad Standards). These amounts represent a significant discount compared to the fees required under the old procedure. Further, it should be noted that the fees payable for a similar process in the United States, that being the National Advertising Division (NAD), are more than US \$20,000.

1. Timing

From the perspective of the complainant the timing of the new procedure is significantly improved. While the old dispute procedure produced results in a very respectable time frame, the new procedure allows for a noticeably faster result. This increased speed is attributable to the fact that a live hearing required longer notice for purposes of preparation as well as the scheduling of clients, counsel and witnesses, as well as the availability of the five person panel. The new procedure typically reaches its result in eight or nine weeks. The old procedure could produce a result in about the same time frame but more often required ten to twelve weeks, or longer. The typical time to reach a result in NAD complaint has been four to six months over the last number of years.

2. Process

The key change under the new procedure is the elimination of a live hearing in front of a panel. A panel of three (chaired by a lawyer and with two other members drawn from industry segments: advertisers, media, agencies, law firms). The prior process involved a similar scope but with five panel members instead of three.

The panel meets on its own, without the parties present, after the written record has been compiled. That records consists of: (1) the complainant's letter of complaint; (2) the advertiser's response; (3) the complainant's reply, and (4) the advertiser's final reply.

Under the prior procedure the rules called for a summary of evidence and whatever written materials the party was going to rely on. The package of evidence and summaries were exchanged simultaneously which created issues with respect to the parties' anticipation of the other side's detailed argument and evidence. The new procedure, with its back and forth nature, will limit the ability to ambush one's opponent.

The new process, conducted entirely in writing, naturally puts much greater emphasis on the preparation of the written materials. The live hearing that occurred under the old procedure allowed (but did not require) a party to deliver substantially all of their message to the panel through its witnesses. While the panel can ask the parties for further information, it will be important to anticipate and satisfy the panel's desire for information in the initial filings as the parties should not assume that the panel will ask any follow-up questions.

3. Confidentiality

The new dispute procedure, like the previous one, calls for confidentiality. The parties and panel members are required to sign Non-Disclosure Agreements. This is a key difference between the Ad Standards dispute procedure in Canada versus that run by the NAD in the United States. The membership of Ad Standards has maintained the rule on confidentiality. The confidentiality obligations make it easier for advertisers to participate and adhere to the results. A loss in a dispute under this procedure does not result in negative publicity, as does a negative NAD decision or a negative court decision.

A natural consequence of this confidentiality is that prior decisions of advertising dispute panels are not publically available for reference in future disputes. Under the new procedure (and in a change from the policy under the old procedure) Ad Standards will produce summaries of decisions that are anonymized, in order to protect the confidentiality of the parties but give guidance to the industry and future participants in advertising disputes procedure.

4. Consequences

In the event that the advertising dispute panel sustains a complaint^[1], the procedure calls for the advertiser to withdraw the advertising in questions, or to amend it, in order to comply with the panel's decision.

In the event that an advertiser fails to fully comply with a panel decision than Ad Standards will advise the exhibiting media of the fact of the decision and also notify the Competition Bureau of the matter. Ad Standards may publish a summary of the decision in such cases, with the parties and the advertising in question identified.

Advertisers in the United States who fail to comply with NAD decisions regularly face inquiries from the Federal Trade Commission (FTC) with respect to the matters. It remains to be seen under the new advertising dispute procedure here whether the Competition Bureau will prioritize such matters.

5. Conclusions

The revised advertising dispute procedure offered by Ad Standards is faster, cheaper and in some respects procedurally fairer than the procedure it replaced, although it does take away the advertiser's 'day in court'. It represents a useful tool for businesses when analysing their options for how to respond to false or misleading claims by their competitors.

by Dan Edmondstone

[1] In the event that the advertiser declines to participate in the procedure the panel will still proceed with the adjudication and its decision will be made on the basis of submissions made by the complainant only.[ps2id id="1" target=""]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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