

Role of External Precedents in Ad Standards Adjudications

From time to time, Standards Councils (Councils) and Dispute Panels (Panels) may be presented with external precedents, specifically with cases, decisions, or guidance from courts, regulators, self-regulatory bodies, or authorities other than Ad Standards. These may be part of submissions in support of, or challenging, an advertisement. Our procedures currently do not prohibit this information from being shared with Ad Standards. In fact, we acknowledge that there is not a great deal of publicly-available precedents that specifically consider the interpretation and application of the *Canadian Code of Advertising Standards (Code)* upon which industry and the public may rely. That said, it is important that the *Code* be applied consistently and in accordance with the Canadian self-regulatory framework set out in the *Code*.

Questions arise from Councils and Panels from time to time when adjudicating complaints or disputes under the *Code* about how to treat precedents from various authorities. This bulletin is intended to be a resource for Council and Panel members when they receive such information, in particular in those matters addressing Clauses 1 through 9 of the *Code*.

1. The Role of the *Code* and Ad Standards' Precedents

The primary function of the Council and Panel members is to apply the *Code* to the matters brought before them. Accordingly, the primary resource upon which members may rely (other than the facts of the matter at issue) are past decisions of previous Councils or Panels. To the extent that these may be confidential in nature, or not otherwise publicly available, Ad Standards staff serve as a resource during Council meetings and deliberations of Panels. Staff is available to answer questions and to provide examples of past decisions (whether through summaries or anonymized findings) when and as appropriate. This is intended to help promote consistency between cases, and where there is a deviation from past findings, to help to ensure it is done intentionally and for principled reasons.

2. Canadian Legal and Regulatory Precedents

While the *Code* is a self-regulatory document, it sits within the context of Canadian advertising laws and norms. Indeed, self-regulation is intended to support the legal and regulatory framework in which it operates. The same principles that underlie decisions of Canadian courts, and guidance of the Competition Bureau, will therefore usually be relevant to the application of the *Code*. To this extent, it is generally helpful for the Council or Panel members to consider precedents that arise in the context of Canadian advertising law.

Both the Chief Legal and Policy Officer and Legal Counsel can support the Council and Panel in framing the legal parameters applicable to a given case. It is the role of the Council and Panel to

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determine whether that framework is the appropriate approach in the self-regulatory context. While the findings of Canadian legal and regulatory authorities may be persuasive, they are not binding upon Council and Panels. In fact, there may be instances in which a Council or Panel may find that the *Code* or its application differs in some material way. This is likely to be the exception, however, and not the rule, since the application of the *Code* will generally be in keeping with Canadian legal precedents.

3. Foreign Precedents

Guidance and decisions from authorities in other countries, including the United States, are of limited use to Council and Panels when applying the *Code*. While there may be instances in which similar principles underlie the legal and regulatory systems across jurisdictions, cases under the *Code* are to be considered only in the Canadian context. The guidance and decisions of other jurisdictions are not necessarily reflective of the principles or application of Canadian law or self-regulation.

Consequently, foreign cases and guidance have no precedential value for Council or Panels. They are not to be treated as binding or persuasive in any adjudication under the *Code*. If submissions include information about another jurisdiction, those portions of the submission are to be treated as informational only. Any argument to uphold an advertisement, or to challenge one, must be framed and considered within the context of the *Code* itself, as this is the full extent of the scope of the Canadian advertising self-regulatory system.

To the extent that foreign precedents are referenced by or on behalf of an advertiser in a proceeding, Ad Standards staff will direct the Council or Panel to this bulletin. Staff will further support the Council and Panel in its assessment of what elements in the submission are to be given weight as relevant to the application of the *Code*.

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