

**Submission on the  
Draft Competition Bureau  
Fee and Service  
Standards Handbook  
as it Relates to  
Marketing Practices**

**NATIONAL COMPETITION LAW SECTION  
CANADIAN BAR ASSOCIATION**



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## **PREFACE**

The Canadian Bar Association is a national association representing over 38,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Competition Law Section of the Canadian Bar Association.



# **Submission on the Draft Competition Bureau Fee and Service Standards Handbook as it Relates to Marketing Practices**

## **I. Introduction**

The National Competition Law Section (the CBA Section) commends the Competition Bureau (the Bureau) for seeking to provide guidance related to advisory opinions and other services offered by the Bureau. This submission relates to the marketing practices portion of the Bureau's revised draft *Competition Bureau Fee and Service Standards Handbook* of November 2002 (the Handbook).

The CBA Section appreciates the obvious effort and desire to improve service that underlies the recent re-draft of the Handbook. The Handbook will be of significant assistance to the Bar.

However, we do offer some comments and suggestions as follows.

## **II. General**

We recommend that the Handbook indicate that the specific information stated to be required respecting particular sections of the *Competition Act* represents only a general indication of what is required. The Handbook should note that there may be exceptions.

### **III. French and English Versions**

The Handbook states that a request for an opinion involving both French and English material will be treated as two requests, requiring two fees to be paid. While this may be appropriate where the content of the proposed advertisement differs between the two languages, if the matter is truly the same promotional item created in both languages, the CBA Section believes that it is inappropriate for the Competition Bureau to effectively punish bilingual advertising by requiring the payment of a second fee. This may inappropriately discourage the review of advertising in the advertiser's second language, in order to save the fee. Canada is an officially bilingual country, and it is particularly inappropriate that federal policy should provide such a disincentive to seek government services in a second official language.

### **IV. Approximate Time Frame**

It is not clear to the CBA Section how the length of time an advertisement will likely be exhibited will have a bearing on whether or not it may run afoul of the relevant provisions of the *Competition Act*. While the length of time an advertisement is run may properly form part of the analysis in some cases, such as sale pricing advertisements, it does not appear to be something that is relevant in the general course. Consequently, this information should not be required of all requests for advisory opinions in this area.

### **V. Telemarketing**

Under the Handbook heading "Section 52.1: Deceptive Telemarketing", we would recommend the removal of the word "deceptive" from the first sentence after the heading. Thus, the reworded sentence would read: "Written opinion requests relating to telemarketing should include the following additional information ...". Similarly, many of the other paragraphs in the marketing practices section of the Handbook use the wording from the *Competition Act* that implies that advertisers might ask about only (or, perhaps, carry out only) "misleading" or



“deceptive” activities. The Handbook should invite inquiries with respect to “advertising” or “notices”, as the case may be, and not “misleading advertising” or “deceptive notices”.

## **VI. Applicability to Certain Industries or Products**

Footnote 14 of the Handbook states that the Competition Bureau will not issue opinions under the multi-level marketing and pyramid selling provisions (Sections 55 and 55.1) where they involve gold or silver coins, the travel industry or discount or debit cards. This is on the stated basis that there is too much difficulty in establishing the value of these products. Given that section 124 permits “any person” to apply for a written opinion, we suggest that this be reworded to indicate it is unlikely that an affirmative opinion can be given with respect to certain types of product advertising, rather than making an unequivocal statement that opinions will not be issued to advertisers of certain products.

## **VII. Technical Testing**

Subparagraph (c) under the heading “Section 74.01 (1) (b) - Representations not based on Adequate and Proper Test” states “the Bureau will seek independent certification to fully substantiate the proposed claim at the requester’s expense. The requestor will also provide an undertaking that payment will be made directly to a party providing certification. The party will invoice the requester directly.” We recommend revising the draft language to make it clearer that the only required information relates to the product itself, and any independent review of testing submitted will be solely in the requester’s discretion.

## **VIII. Regular Price Comparisons – Other Advertisers**

Under the headings subsection “74.01 (2) - Misleading price representations – Suppliers Generally”, the CBA Section has the following comments:

- With respect to subparagraph (h), the names and addresses of **all** suppliers in a relevant geographic market are unlikely to ever be known by the advertiser.
- Subparagraph (i) requests that the approximate total volume of products sold or to be sold by each supplier in the relevant market in the year preceding the proposed advertisement, or in the year following, be provided. It is difficult to know how an advertiser would ever have such information.
- Subparagraph (j) requests that the total volume of products sold or planned to be sold at the reference price by each of the suppliers in a market, for the year prior or the year following, be given. Again, it is difficult to imagine an advertiser that would have such level of knowledge.
- Subparagraph (k) asks for information about the plans of other suppliers with respect to pricing. There is no legitimate means by which an advertiser could be expected to have such knowledge.
- In subparagraph (1) (ii) there is reference to the advertiser discussing whether a reference price offered by suppliers generally in the market is based on “sound pricing principles and/or was reasonable in light of competition.” This seems like an unreasonable task given the knowledge most advertisers could reasonably be expected to have about their competitor’s businesses.

If the advisory opinion program is to be useful, it must not demand a level of detailed knowledge by the advertiser which is not realistic. It would seem to be a rare case where the advertiser could have the level of detailed knowledge anticipated by these various provisions in the Handbook. The Bureau (and hence the Handbook) should recognize that an advertiser should be able to use a comparison price without having perfect knowledge of the entire relevant market. The type or detail of information may or may not be sufficient in a particular case, but the Handbook should not foreclose the possibility of successfully using such a price comparison, by requiring more information than most advertisers will have.

## **IX. Regular Price Comparisons – Own Price**

Under the heading Subsection “74.01 (3) - Misleading price representation – Suppliers Own”, subparagraph (h) asks the advertiser to provide the approximate total volume of the product to be sold in the twelve months after the proposed representation. This is rarely going to be known with any degree of precision.

## **X. Conclusion**

As a general matter, we believe the Handbook provides helpful guidance to advertisers seeking advertising opinions. However, it would be more useful still if it expressly recognized the need for flexibility in dealing with the particular product advertisement and if it recognized the reality of imperfect market information in the hands of advertisers. We hope that these brief comments will be helpful to the Bureau. We welcome the opportunity to provide the Bureau with the perspective of the practicing bar.