

To: Dan Campbell
From: Heather Oke
Date: November 15, 2010
Re: Advertising Memorandum for Nova Scotia Automobile Dealers Association
File No. 1177/16

1. Introduction

This memorandum provides an outline of legal issues relevant to those who advertise in Nova Scotia. The outline is not exhaustive, but is intended to provide information to assist advertisers in identifying issues and recognizing when further advice or assistance should be sought. Unfortunately, there are few hard and fast rules, because each advertisement and its context are different from the next. However, advertisers who take precautions to ensure that their specific advertisements comply with the applicable legislation, regulations, codes and guidelines can minimize the risk of becoming subject to criminal or civil legal proceedings or the target of complaints to the Competition Bureau, Advertising Standards Canada or other entities. Generally speaking, the issues outlined below apply to advertising in all mediums, including print, radio, television and websites.

2. Misrepresentations to the public

Advertisements must not contain false or materially misleading representations. Representations may be made through written statements, verbal statements, such as in television or radio advertisements, auditory effects, visual effects or other means of communication. Representations include price claims, claims regarding performance, and statements about warranties or guarantees, among others. It is important to note that representations in automotive ads may be subjected to a higher level of scrutiny than ads in other sectors given that Canadian courts have found that average persons feel disadvantaged when purchasing a car and an ad that is “borderline” truthful or that makes a misleading claim places them at an even greater disadvantage.

A false representation is one that is not correct. Representations that are misleading in a “material” way are ones that are likely to influence a consumer’s purchasing decisions, and include statements that would motivate a consumer to avoid a competitor’s products. Regardless of medium or vehicle of delivery to the public, a representation in an advertisement must be clear, unambiguous and both contextually and technically accurate.

All relevant details regarding price, warranties and guarantees, and all other pertinent details of a representation should be clearly and understandably stated.

The general impression created by the advertisement as a whole must also be true. Further, relevant information must not be omitted from advertisements in a manner that is deceptive. Even ads containing ambiguous representations may give a general impression that will be false or misleading. For example, an advertisement offering a special financing rate and including pictures of five different car models may be found to be false or misleading if the special rate only applies to one of these models. Advertisers must also ensure that the visual impression of their ads and the wording of the texts are not contradictory. For example, an ad showing a base model price underneath a picture of a fully-loaded model may be considered deceptive.

Certain categories of representations, such as those that may be classified as environmental claims, claims of Canadian origin, and consumer rebate promotions, are subject to highly detailed and specific guidelines. Special consideration must therefore be given to advertisements that contain representations within these areas and care taken to ensure that they comply with those guidelines.

3. Substantiating claims and the use of testimonials and tests

Representation to the public in the form of statements, warranties or guarantees regarding the performance, efficacy or length of life of product must be based on the results of adequate and proper testing. Consumer opinion or preference claims must also be substantiated. The adequate and proper testing of claims must be completed prior to publication to when the claim is made and the type and degree of testing that is necessary to support a claim will vary on a case by case basis. Generally speaking, testing must be done in a manner consistent with the standards suggested by industry practices, court decisions and recognized scientific and/or survey procedures in the relevant field.

Also, specific requirements must be met for the use of testimonials, endorsements, or test results. For example, advertisers must be able to prove that a testimonial or test result used in an advertisement has been either previously published or that prior to publication, he or she obtained written approval of the testimonial or the results of the test from the appropriate person, as well as their permission to publish it. Advertisers must be aware that advertisements are not to be presented in a format or style that conceals their commercial intent.

4. Ordinary price and sale claims

Advertisers are prohibited under the *Competition Act* to claim a price savings if the savings does not actually exist. Therefore, prior to offering a sale price in advertising, advertisers must first ensure that they have properly identified the "ordinary price" of that product against which the saving can be authenticated.

Generally speaking, the identification of ordinary price must be done though either an analysis of the volume of sales of that product over a reasonable period relative to the sale

period, or through an analysis of the length of time the product has been offered in good faith to the public at the price that is claimed as the ordinary price. As the relevant factors for the calculation of a product's "ordinary price" may change in each circumstance, the "ordinary price" should be calculated on a case by case basis for each sale prior to its advertisement.

Advertisers should be aware that a continuous sale may have the effect of causing the long-advertised sale price to become the ordinary regular price of the product. For this reason, continuous sales in excess of 90 days should be avoided.

In the case of clearance price claims, such claims are generally only acceptable in relation to supply in stock and advertisers should be sure to explicitly identify clearance prices as such and not make savings or percentage off claims in relation to them. Also, words such as "free", "no extra charge" or as a "bonus" should not be used carelessly. When such words are used, it is important to ensure that the price of the product has not been increased to cover the cost of the free, no charge or bonus features and that the normal selling price after negotiations (and any other discounts that may be available) has not been adjusted to reflect the added bonus. In relation to sale price and price claims in general, advertisers must disclose any hidden charges, such as shipping and handling charges. If tax is payable on the item before the deduction of a free-value coupon, this must be fully explained.

5. Bait and switch

Suppliers are prohibited from advertising a bargain price for a product that the supplier does not supply in reasonable quantities. Generally speaking, a bargain price is one that is identified as such in an advertisement or one that a person would reasonably understand to be a bargain price in relation to the prices at which the product is normally advertised or like products are normally supplied. If the supply of a sale item is limited, or the advertiser can fulfill only limited demand, this must be stated clearly in the advertisement.

6. Sale above advertised price

Advertisers are not permitted to supply the advertised product at a price that is higher than the advertised price within the market that the advertisement could reasonably be expected to reach during the period to which the advertisement relates. If the advertiser wishes to limit the market in which the sale price is offered, the advertisement should define the market more narrowly by reference to geographical area, store, department of a store, sale by catalogue or otherwise. In cases where an advertisement has provided a price in error, the advertiser must take immediate steps to correct the error and catalogues should contain a prominent statement that prices contained in it are subject to error.

7. Contests and promotions

The rules governing contests and promotions are complex and this area is highly regulated. Contests and promotions include sweepstakes, scratch and win games and other contests involving chance. Legal issues arising from contests or promotions should be addressed on a case by case basis in consultation with legal counsel to minimize the advertiser's risk of

running an illegal lottery or contravening the *Competition Act* or other laws or codes. In addition, specific legal issues may arise in relation to automatic entries, what happens if the contest requires cancellation, incentive programs, loyalty programs and rebates/mail-in offers.

8. Credit advertising

The *Consumer Protection Act* in Nova Scotia prohibits false, misleading or deceptive statements in any advertisement, circular, pamphlet or similar material by lenders regarding the extension of credit.

Also, advertisers making representations about the charge of credit must first meet a number of specific requirements. For example, any representation of a charge for credit, for example, an annual interest rate, must disclose the full cost of borrowing, stated as an annual percentage rate and as one sum expressed in dollars and cents. In cases where the advertisement represents terms of the credit transaction over and above the charge for credit, the advertisement must also include the following: the cash price of the goods; the amount of any down payment; the amount of each installation; the number of instalments; and the total amount to be repaid.

The provincial disclosure requirements apply to all types of advertising and this may create difficulties for those advertising through radio or on billboards as there may be insufficient time or visual methods to make the full disclosure required. The *Consumer Protection Act* outlines media-specific requirements related to print and television advertising.

9. Comparative advertising

Advertisers are not permitted to unfairly discredit, disparage or attack other products, services, advertisements or companies, or exaggerate the nature or importance of competitive differences. Comparative claims need to be approached with special care, as they have a great potential to mislead consumers. Most comparative advertisements will require explicit explanatory statements. In addition, advertisers may run into trouble under intellectual property and other laws if a competitor's packaging, logos or mascots are used in advertising. Also, unnamed competitors can complain about advertising if they are readily identifiable.

10. Disclaimers

A disclaimer and asterisked or footnoted information cannot be used to save false or misleading advertising and fine print must not include critical information that "contradicts" the main message. "Critical information" will differ from ad to ad. However, a disclaimer can be used to clarify ambiguous or incomplete language. There is a fine line to be walked with disclaimers and even more problematic than print ads are the same ads in televised form.

11. Intellectual property and privacy considerations

Intellectual property laws are implicated in advertisements and advertisers must take care in the use of trade-marks and address copyright issues in the creation and use of advertising materials.

Further, where the advertiser is involved in contests, promotions or any other activity that requires the collection of personal information, issues arising under the *Personal Information Protection and Electronic Documents Act* must be addressed.

12. Misappropriation of personality

An advertiser may find him or herself subject to a legal action for misappropriation of personality if he or she uses a person's name, voice or likeness for the purpose of trade in a way that clearly identifies that person. "Personality" is a legal term, which includes a person's name, voice, likeness and any other elements which easily identify a particular person – for example, Groucho Marx's moustache, glasses and cigar. It is a mistake to assume that famous persons are unaware of the advertising in Nova Scotia.

Further, potential liability may arise from the use of suggested connections with individuals, both living and dead, and from the use of a person's image under the *Personal Information Protection and Electronic Documents Act*. Also, if an advertiser wishes to use the image of a deceased person, a lookalike or caricature, a portrait or signature of any person, or a fictional character, special legal concerns arising from these uses must be addressed.

13. Other Considerations

An additional area of concern for advertisers in the automotive sector are guidelines that govern automobile advertising specifically, such as those governing the depiction of situations that might reasonably be interpreted as encouraging unsafe or dangerous driving practices or acts. Further, advertisers must not exploit superstitions or play upon fears to mislead the consumer and must ensure that all advertisements avoid the detailed and specific prohibitions regarding unacceptable depictions and portrayals. Advertisers must ensure that the overall impressions of their ads do not violate the spirit of gender equality, or condone any form of personal discrimination.

14. Conclusion

From the requirement to avoid making false or material misrepresentations to the public to establishing a product's ordinary price and complying with the complex rules governing contests, advertisers face a formidable challenge in ensuring that each their ads complies with all of the applicable legislation, regulations, codes and guidelines that govern advertising in Nova Scotia. The information provided above generally outlines some of the principle areas of concern in this regard and we trust that this information will assist you in determining when further advice should be sought.