Canada’s Competition Act: Playing Fair and Square

Competition is alive and well in Canada. We know that typically most businesses already follow appropriate business practices to comply with Canadian competition laws. However, in attempts to increase sales, companies have been known, whether intentionally or unintentionally, to lead consumers astray. While offering deals that look too good to be true may attract new business, they may also be illegal and garner the wrong type of attention.

The Competition Bureau (the “Bureau”) is responsible for protecting Canadians from misleading representations and deceptive marketing practices. Among other things, it prohibits:

- making performance representations which are not based on adequate and proper tests;
- using misleading warranties; and
- making false or misleading representations concerning the ordinary selling price of its products.

The Competition Act (Canada) (the “Act”) is enforced by the Bureau. Its purpose is to maintain and encourage competition in the marketplace and applies to most businesses in Canada, regardless of their size.

So whether you are a private enterprise in a small town or a multi-national corporation, it is important to be aware of the Act and your corresponding business responsibilities.

What are False or Misleading Representations?

False or misleading representations include making, or permitting the making, of a representation to the public, in any form, that is false or misleading in a material respect.

False or misleading representations do not have to refer only to the products that your business is selling. In fact, a business can be held liable for making misleading representations about the nature, size and market position of its business, the reasons for a sale on its products and employment opportunities within its business.

Examples of potentially untrue representations include:

- “50% OFF Everything in Store” where some items are not reduced by that amount represented,
- “We work closely with ‘ABC’ Co.”, where no such affiliation exists; or
- “We are the only manufacturer of widgets in Ontario” where in fact several manufacturers of widgets operate in the Province.

Although misleading representations may be made about several aspects of a business, misleading statements in regards to pricing comes foremost to mind.

Recently, Bell Canada (“Bell”) was hit with the maximum penalty of $10 Million for misleading advertising. According to the Bureau, Bell had made representations about its prices for various products and used a variety of “fine-print disclaimers” to ‘hide’ additional mandatory fees. The Bureau stated that qualifying information must be noticeable and likely to be read by the intended audience to prevent a representation from being false or misleading when read on its own.
In similar cases, the Bureau will analyze the “general impression” of an advertisement, as well as its literal meaning, and determine how the average consumer interested in the product would interpret it.

**Ordinary Selling Price Representations**

You are not alone if you have ever walked by a sale and wondered if the sale price is really just the normal price of the product/service.

The Bureau has recently shown a renewed interest in the enforcement of ordinary price claims. Therefore, Canadian businesses should take time to ensure their pricing practices conform to the provisions of the Act.

There are two general tests to use to determine if your product is priced at the ordinary selling or reference price on which savings claims are based. These are the:

1. **Volume Test** – a substantial volume of the product was sold at the ordinary price or a higher price, within a reasonable period of time before or after the savings claim is made; and

2. **Time Test** – the product was offered for sale, in good faith, for a substantial period of time at that price or a higher price before or immediately after the savings claim.

The purpose behind the ordinary price claim is to ensure that sales are legitimate and that the opportunity for savings inherent in the term ‘sale’ is real and is not actually the regular price of the product.

It can be helpful to seek counsel for an analysis of whether your sale pricing practices conform to the Act.

**Other Prohibited Practices**

“**Bait and Switch Selling**” – This is the practice of advertising a product at a bargain price, when it is not available for sale in reasonable quantities.

This may not apply if the seller can prove that the non-availability of the product was beyond its control, the quantity of the product was reasonable, or the customer was offered a rain check when supplies were exhausted.

“**Double Ticketing**” – Prohibits selling the same product at two separate prices. When this occurs, the product must be sold at the lower price.

“**Misleading Warranties and Guarantees**” – Representations that purport to be a warranty or guarantee of a product, or a promise to replace or repair an article, that is materially misleading or where there is no reasonable prospect that it will be carried out, are prohibited.

**Doing Business in Canada? Ensure Compliance with the Act**

The Bureau is tasked with administering and enforcing the Act throughout Canada, and it sanctions any business, large or small, global or domestic, acting in contravention to the Act.

Most times, companies do not realise that they may be unknowingly violating the Act. This is particularly so for foreign entrants into Canada, where they are not familiar with the national laws.
Criminal and Civil Offences

The Act provides both criminal and civil regimes by which it can address false or misleading representations which contravene the Act.

For example, Section 52 of the Act makes it a criminal offence to knowingly or recklessly represent to the public a false or misleading representation in a material respect, whereas Section 74.01(1) (a) is the civil provision and applies the same test for false or misleading representations as the criminal test, except that such representations do not have to be made knowingly or recklessly in order to be guilty of an offence.

The following are not required to be shown in order for a business to be found guilty of either a criminal or civil offence under the Act:

- that a person is actually deceived or misled;
- that any member of the public to whom the representation was made was within Canada; or
- that the representation was made in a place to which the public had access.

The penalties for a contravention of the Act can be quite severe. Any person who contravenes Section 52 is guilty of an offence and liable to a fine of up to $200,000 and/or imprisonment up to one year on summary conviction, or to fines in the discretion of the court and/or imprisonment up to 14 years upon indictment.

However, the penalties may also be fair and proportionate to the offence. For example, if found guilty of an offence under Section 74.01(1) (a), the court may order the person not to engage in such conduct, to publish a corrective notice, to pay an administrative monetary penalty and/or to pay restitution to purchasers.

Conforming to the Act may require a review of your compliance programs and company practices. If you are a company currently doing business in Canada or are a foreign company thinking about entering Canada, and would like to discuss provisions of the Act and your company’s practices or policies with a member of our Firm, we encourage you to contact us.

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