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INFORMATION BULLETIN

ORDINARY PRICE CLAIMS

SUBSECTIONS 74.01(2) AND 74.01(3) OF THE *COMPETITION ACT*

Canada 



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INTRODUCTION

The purpose of the *Competition Act* is to maintain and encourage competition in the Canadian marketplace. Subsections 74.01(2) and 74.01(3) are part of the misleading representations and deceptive marketing practices provisions of the Act. These provisions aim to improve the quality and accuracy of marketplace information and discourage deceptive marketing practices. The Act applies to most businesses in Canada, regardless of size.

This Information Bulletin outlines the approach that the Commissioner of Competition is taking in enforcing the ordinary price claims provisions of the Act. The guidelines contained in this Bulletin are not law. However, they may be relied upon as reflecting the Commissioner's interpretation of how the law is applied on a consistent basis by Competition Bureau staff.

WHEN IS A BARGAIN REALLY A BARGAIN?

Whether they are after a lawnmower, or a refrigerator, or just a new pair of shoes, everyone likes a bargain. Consumers will often shop around, or wait for products to go on sale rather than buy at the "regular price". Where comparisons are made between two prices, consumers respond to the implied savings. Therefore, regular price representations and related savings claims can be powerful marketing tools.

When is a bargain really a bargain? If someone puts a phoney regular price on a product, merely to cross it out and claim that the item is marked down, the consumer might not be getting any saving at all. And, if the consumer is deceived, the market is not

operating fairly. Even if buyers never learn the truth, a deception has taken place, and competitors may have been adversely affected as well.

THE ORDINARY PRICE CLAIMS PROVISIONS OF THE *COMPETITION ACT*

Subsections 74.01(2) and 74.01(3) of the Act are civil provisions. They prohibit the making, or the permitting of the making, of any materially false or misleading representation, to the public, as to the ordinary selling price of a product, in any form whatever. The ordinary selling price is determined by using one of the two following tests: (1) either a substantial volume of the product was sold at that price or a higher price within a reasonable period of time before or after the making of the representation (*volume test*); or (2) the product was offered for sale, in good faith, at that price or a higher price for a substantial period of time recently before or immediately after the making of the representation (*time test*). Subsection 74.01(6) directs that the general impression conveyed by a representation, as well as its literal meaning, be taken into account when determining whether or not it is false or misleading in a material respect. Pursuant to subsection 74.1(1), if a court determines that a person has engaged in conduct contrary to subsections 74.01(2) or 74.01(3), it may order the person not to engage in such conduct, to publish a corrective notice and/or to pay an administrative monetary penalty.

Subsections 74.01(2), 74.01(3) and 74.1(1) of the Act read as follows:

Ordinary price: suppliers generally

74.01 (2) Subject to subsection (3), a person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a

product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied where suppliers generally in the relevant geographic market, having regard to the nature of the product,

(a) have not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and

(b) have not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

Ordinary price: supplier's own

74.01 (3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,

(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and

(b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

Determination of reviewable conduct and judicial order

74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

(a) not to engage in the conduct or substantially similar reviewable conduct;

(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person

carries on business and the determination made under this section, including

(i) a description of the reviewable conduct,

(ii) the time period and geographical area to which the conduct relates, and

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and

(c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding

(i) in the case of an individual, fifty thousand dollars and, for each subsequent order, one hundred thousand dollars, or

(ii) in the case of a corporation, one hundred thousand dollars and, for each subsequent order, two hundred thousand dollars.

GUIDELINES REGARDING ORDINARY PRICE CLAIMS

Under subsections 74.01(2) and 74.01(3) of the Act, materially false or misleading ordinary price claims are reviewable civil matters. However, where there is evidence of the requisite criminal intent, false or misleading ordinary price claims may also be subject to the general criminal prohibition against materially false or misleading representations under subsection 52(1) of the Act.

GENERAL PRINCIPLES

1. A person can make a price comparison about a product if the reference price reflects the price at which suppliers generally in the relevant market area have either:

- sold a **substantial volume** of the product within a **reasonable period of time** before or after making the representation (*volume test*); or

- offered the product for sale **in good faith** for a **substantial period of time** recently before or immediately after making the representation (*time test*).

(See Hypothetical Examples section - Example #1).

2. Where the comparison is made to the supplier's own prices, the tests described in paragraph 1 apply to those own prices (see Hypothetical Examples section - Example #2).
3. Price comparisons can be made to past prices ("was"), current prices ("regular") and future prices ("after sale price"). All three types of claims are judged by the volume test or the time test (see Hypothetical Examples section - Example #3).
4. The nature of the product (e.g. national vs. private brand; seasonal vs. non-seasonal; novelty vs. commonplace; new vs. established; frequently vs. infrequently purchased) will be considered in determining whether a violation under the Act has likely occurred. For example, a seasonal product may be sold or offered for sale for a shorter period of time than other products. In this instance, the volume or time test will apply in relation to this shorter period.
5. Depending upon the specific circumstances of each case, the relevant geographic market will be determined based on a number of factors. These could include, in no particular order, the market reach of the representation, the number and location of competitors, the likelihood of travel to purchase the product in question, the location of consumers reached by the representation and ease of price comparison. In the case of small to medium size suppliers, the relevant geographic market will typically be the municipality or

metropolitan area where a business is located. In the case of larger suppliers, the relevant geographic market may be the combined geographic areas of individual outlets. The relevant geographic market is usually captured by the area covered by the medium of communication that is employed.

6. Where price comparisons are made to like products, the tests described in paragraph 1 apply with reference to the prices of those like products.
7. Price comparison representations that fail the tests described in paragraph 1 may not raise an issue under the Act if the supplier can establish that they were not otherwise false or misleading in a material respect. For example, a "clearance sale" may fail both the time and volume tests. However, a supplier promoting this type of sale will likely be able to show that the price comparison representations were not otherwise misleading if the supplier can demonstrate that the sale was clearly marked as a clearance sale, the representations refer to the original price and any subsequent interim prices and the original price was offered in good faith (see Important Terms section - Term #3). Such a sale may occur where a supplier offers for sale products not intended to be sold again at the original price, the products did not sell or were no longer selling at the original price or at a lower price, or the supplier wants to take a firm mark down on the products and sell them to make room for new merchandise. Generally, a clearance sale should only be used on product which the supplier already has in stock (see Hypothetical Examples section - Example #4, for another example of this principle).

IMPORTANT TERMS

Ordinary price claims relating to actual sales (*volume test*)

1. *Substantial volume*

- The substantial volume of product requirement will be met if more than 50% of sales are at or above the reference price.
- Where no single price accounts for a substantial volume of sales, reference may be made to the lowest of two or more of the prices which make up a substantial volume of sales. In selecting the lowest price, one will take into account the volume of sales at the different prices (see Hypothetical Examples section - Example #5).

2. *Reasonable period of time*

- The time period to be considered will be the twelve months prior to (or following) the making of the representation. However, this period may be shorter having regard to the nature of the product.

Ordinary price claims relating to offered prices (*time test*)

3. *In good faith*

- In assessing if a product was offered for sale in good faith, some of the factors that the Bureau would likely consider include whether:
 - (a) the product was openly available in appropriate volumes;
 - (b) the reference price was based on sound pricing principles and/or was reasonable in light of competition in the relevant market

during the time period in question;

(c) the reference price was a price that the supplier fully expected the market to validate, whether or not the market did validate this price; and/or

(d) the reference price was a price at which genuine sales had occurred, or it was a price comparable to that offered by competitors.

4. *Substantial period of time*

- The substantial period of time requirement will be met if the product is offered at or above the reference price for more than 50% of the time period considered.
- The time period to be considered will be the six months prior to (or following) the making of the representation. However, this period may be shorter having regard to the nature of the product.
- Where the product is offered for sale at different prices for different periods of time, reference may be made to the lowest of two or more of the prices which make up the substantial period of time at which the product was offered for sale (see Hypothetical Examples section - Example #6).

HYPOTHETICAL EXAMPLES

1. **Regular Price \$100 - Sale Price \$50**

- In examining this type of case, the Bureau would assess the prices of suppliers generally in the relevant market area as it is not clearly specified to be the supplier's own advertised prices.
- The Commissioner would not likely initiate an

inquiry in the following circumstances:

- (a) a substantial volume of product had been recently sold at the \$100 price or higher (e.g. more than 50% would clearly constitute a substantial volume);
- (b) the product was offered for sale in good faith at or above \$100 for more than 50% of the time in the last six months and genuine sales were made at the \$100 price; or
- (c) no sales were made during the relevant time period at the \$100 price, but the supplier was prepared to meet the demand for the product and had made bona fide efforts to ensure that the \$100 price was a reasonable price in light of prevailing market conditions.

2. Our Regular \$100 - Now \$50

- The tests and principles laid out in hypothetical example #1 apply with respect to a comparison made by a supplier to that supplier's own prices.

3. After Sale Price \$100 - Now Available \$50

- The Commissioner would not likely initiate an inquiry in the following circumstances:
 - (a) the product is offered at \$100 immediately after the sale period:
 - (i) for a substantial period of time; or
 - (ii) for a substantial period of time taking into account several cumulative periods immediately after the sale period ends; or

(b) a substantial volume of sales occurred at or above \$100 within the one year immediately after the end of the sale.

- This representation would be taken as an undertaking by the supplier that the product would be offered at the higher price after the sale period ends. The Commissioner would likely initiate an inquiry if the product is not so offered for sale for a substantial period of time or if a substantial volume of the product was not sold at or above the after sale price within a reasonable period of time in the post-sale period.
- The Commissioner would not likely initiate an inquiry even if the price comparison fails to meet either the time test or the volume test if the supplier establishes that the representation is not otherwise false or misleading in a material respect.

4. MSRP \$15,000 - Manufacturer's Rebate \$1000 (Dealers may sell for less)

- With respect to the use of the term Manufacturer's Suggested Retail Price (MSRP), the Commissioner would not likely initiate an inquiry even if the price comparison fails to meet either the time test or the volume test if the supplier establishes that the representation is not otherwise false or misleading in a material respect.
- The Commissioner would not likely initiate an inquiry where the term MSRP is used where it is not compared to the actual selling price of the product and where it is prominently disclosed that it can be sold for less.

5. A product is sold at different prices during a 12-month period

- The product is sold at different prices in the following proportions: 5% of the total sales were at \$100; 20% at \$90; 30% at \$80; 5% at \$70; and 40% at \$60. The Commissioner would not likely initiate an inquiry if:
 - (a) \$60 was the quoted reference price as 100% of sales occurred at \$60 or higher during the 12 month period;
 - (b) \$70 was the quoted reference price as 60% of sales occurred at \$70 or higher during the 12 month period; or
 - (c) \$80 was the quoted reference price as 55% of sales occurred at \$80 or higher during the 12 month period.

6. A product is offered at different prices during a 6-month period.

- The product is offered for sale at different prices for different periods of time as follows: for 5% of the time, the product was offered at \$100; for 20% of the time, it was offered at \$90; for 30% of the time, it was offered at \$80; for 5% of the time, it was offered at \$70; and for 40% of the time, it was offered at \$60. The Commissioner would not likely initiate an inquiry if:
 - (a) \$60 was the quoted reference price as the product was offered at \$60 or higher for 100% of the time in the last 6 months;
 - (b) \$70 was the quoted reference price as the product was offered at \$70 or higher for 60% of the time in the last 6 months; or

(c) \$80 was the quoted reference price as the product was offered at \$80 or higher for 55% of the time in the last 6 months.

- The supplier should be aware however that this time period is a rolling period and has to take into account the prices at which the product is offered in the coming months and make adjustments (if needed) to the reference price.

ADVISORY OPINIONS

The Competition Bureau facilitates compliance with the law by providing various types of advisory opinions subject to fees. Company officials, lawyers and others are encouraged to request an opinion on whether the implementation of a proposed business plan or practice would raise an issue under the Act. A specific opinion will be based on information provided by the requestor and will take into account previous case law, prior opinions and the stated policies of the Bureau.

HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act* or file a complaint under the provisions of the Act should contact the Competition Bureau's Information Centre at:

Telephone

Toll free: 1-800-348-5358
National Capital Region: (819) 997-4282
TDD (for hearing impaired): 1-800-642-3844

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