



When is the Price Right?
Recent Developments in Price Advertising Law

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Overview

- Pricing*, without triggering abuse of dominance concerns, given March 2009 amendments to *Competition Act* (Act) where:
 - price discrimination, promotional allowances and predatory pricing offences have been repealed and
 - price maintenance has been decriminalized
- Opportunities for minimum advertised price (MAP) and retail price maintenance (RPM) programs
- ***This presentation does not address the new “competitor agreements” provisions of the Act (to come into force March 12, 2010) – e.g., price-fixing under the new criminal conspiracy offence in s. 45 or agreements that prevent or lessen competition substantially under the new non-criminal reviewable practice in s. 90.1.**

Overview

- Keeping your ordinary sales price (OSP) and savings claims legal
- Telling the truth in consumer rebate promotions
- Making sure your “free” and “bonus” claims aren’t bogus

Not Covering

- Bait and switch selling – such as when a vendor advertises a product at a bargain price without having reasonable quantities on hand (or worse when a vendor is out to attract customers and then attempts to induce them to buy a different, more expensive product)
- Double ticketing (criminal)/Sale above advertised price (civil/reviewable)
- Provincial laws – such as Article 224 of Quebec *Consumer Protection Act* (which has specific rules on advertising pricing in context and periodic payments)

Pricing - Generally

- The amendments liberalized many of the pricing rules in Canada providing businesses with new flexibility in designing pricing and distribution policies
- However, the amendments also introduced significant monetary penalties for abuse of a dominant position which may cause firms with significant market presence to be more cautious in undertaking aggressive competitive activities

Pricing– Low Pricing Will Rarely Be a Concern

Provision	Old System	New System	Implications
Criminal Predation Offence (and Private Action)	Pricing “unreasonably low” with intent or likely effect of substantially lessening competition or eliminating a competitor	Repealed	Removes potential disincentive to aggressive pricing
Reviewable Practice of Abuse of Dominance	Can occur if a dominant firm prices at predatory levels and competition is “likely” to be lessened or prevented “substantially”	Same (but potential penalties up to C\$10 MM in addition to remedial orders)	Only dominant firms pricing below avoidable costs with likely ability to recoup losses will be pursued according to Bureau Guidelines

Pricing – Differential Pricing Will Rarely Be a Concern

Provision	Old System	New System	Implications
Criminal Price Discrimination Offence (and Private Action)	Must make price concessions “available“ to competing purchasers of “like quality and quantity”	Repealed	Opportunities for more flexible and innovative pricing programs
Criminal Promotional Allowances Offence (and Private Action)	Must “offer” any promotional allowance to all competing purchasers on proportionate terms	Repealed	U.S. companies will have to decide whether to use the greater flexibility available in Canada Less ability to resist pressure for reductions from individual buyers
Reviewable Practice of Abuse of Dominance	Can theoretically occur if dominant firm uses discriminatory pricing for exclusionary or predatory purposes and competition is “likely” to be prevented or lessened “substantially”	Same (but potential penalties up to C\$10 MM in addition to remedial orders)	Discriminatory pricing by a dominant firm generally will not be problematic unless it has exclusionary impact on competitors

Pricing – Price Maintenance Decriminalized and Will Be Possible In Some Situations

Element	Old System	New System	Implications
Potential Consequences	Criminal offence (fine in discretion of court) plus private action for damages	Reviewable practice subject to remedial orders (upon action by Commissioner or injured party) No fines/damages	Reduced chilling effects
Requirement to Establish Anti-Competitive Effects	None	“Likely” to have an “adverse effect on competition”	Suppliers may impose actual or minimum selling and/or advertised prices in many situations
Recipient	Any person (vertical or horizontal)	Direct or indirect customer (vertical)	Horizontal situations will be dealt under competitor agreement provisions
Attempts	Illegal	No longer prohibited	Actual price effects or punishment must occur

Pricing – Large Penalties for Abuses by Dominant Firms

	Current Remedies	Additional New Remedies
Competition Tribunal	Prohibition orders Other mandatory orders to the extent necessary to restore competition	Administrative Monetary Penalties (“AMPs”) of up to \$10 million for first occurrence and \$15 million per subsequent occurrence
Private Action	None	Possible indirect actions based on economic torts

■ Implications:

- Aggressive conduct is no longer “lawful unless and until prohibited”
- Historic “try-and-see” strategy is now risky
- Jurisprudence holding that abuse of dominance is not an “unlawful act” for purposes of conspiracy to injure, interference with economic relations or common law restraint of trade will be revisited

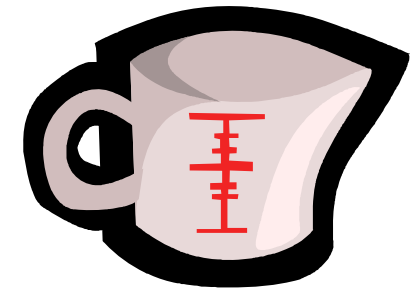
OSP Claims: Background

- s. 74.01(2) of the *Competition Act*
 - Misleading the public about an OSP is a reviewable practice

Two tests: (i) volume and (ii) time



OSP Claims: Volume Test



(1) Substantial volume

- > 50% of sales are at or above the reference price
- Exception: no single price

(2) Reasonable period of time

- 12 months prior or following
- Exception: nature of product may shorten

OSP Claims: Time Test

(1) Price offered in good faith

- Factors:
 - openly available
 - sound principles or reasonable in light of competition,
 - supplier expected the market to validate,
 - genuine sales occurred or comparable price

(2) Over a substantial period of time

- offered at or above the reference price > 50% of the time
- 6 months prior or following the claim
- Exceptions: both same as volume test



OSP Claims: General Principles

– Guide's wisdom:

- Comparison price is used in the tests
- Relevant geographic market factors
 - i.e. market reach, competitor location, likelihood of travel, and more.

– What to prove:

1. Meet one or both of the tests.
2. If not, then establish the OSP was not otherwise false or misleading in a **material respect** (weigh general impression)



OSP Claims: Sears Case

- January 2006
- The only litigated OSP case
- Bureau has more commonly obtained 10-Year Consent Agreements with AMPs and costs up to \$1.7 million for OSP violations: e.g., Fine Gold Jewellers (2002) and Gold Factory (2003), Suzy Shier (2003), Forzani (Sport Chek and Sport Mart) (2004), Grafton-Fraser Inc. (Stonehouse, Tip Top Tailors, The Suit Exchange and other banners) (2006), and **Curry's Art Store (2009)**
- Bureau alleges Sears misrepresented the OSP of tires in its 1999 advertisements.

OSP Claims: Sears Case

Tribunal Held:

- OSP for the ad was 2 tires (not 1)

Factors:

- sold in pairs,
- sales stable,
- little alternatives evaluation,
- hard to evaluate quality,
- passively received information

- Geographical area was Canada

- Reference period was 6 months prior

Factors:

- internal choice,
- little month-to-month and seasonable variation in sales

OSP Claims: Sears Case

– Tribunal Held (cont'd):

- Volume test:
 - Sears didn't believe the OSPs were genuine prices offered in good faith
- Failed to prove OSP not misleading/false in a material aspect
 - Consumer harm (or lack of) is not an element
 - General impression = consumers would realize substantial savings

Consumer Rebates



- Application of false/misleading advertising laws to consumer rebate promotions
- Competition Bureau: *Consumer Rebate Promotions – Enforcement Guidelines* dated September 21, 2009
- Bureau press release and pamphlet dated December 14, 2009: *Are you getting the real deal? Understand rebate promotions before you buy.*

Consumer Rebates - Best Practices



- **DO** clearly disclose important limitations, exclusions and conditions (e.g., deadlines, limits on number of rebate claims, restrictions on stores where promotion is offered)
- **DO** also disclose that customer must (1) purchase product (2) complete application and (3) provide proof of purchase and return address before they act on the representation
- **DON'T** disclose inside product packaging, on website to which consumers are directed to apply or on rebate application form

Consumer Rebates - Don't Disguise Rebates as a Sale Price

SALE
\$20 OFF



\$59⁹⁹

Original price: \$79.99

PRINT2000 X5 2RL | ALL-IN-ONE PRINTER
Print, scan & copy
Memory card slots

Consumer Rebates - Clearly Disclose Rebate Offer

MAIL-IN
REBATE OFFER



\$85 Regular price

\$15 Mail-in rebate available
(Deadline to submit December 31, 2015)

After rebate price: \$70, if redeemed

M400 PHONE:
5 megapixels camera | 5x optical zoom
GPS positioning

Consumer Rebates - Specify if it is a Mail-in/Online Rebate or an Instant/Point-of-Sale Rebate

- Disclose that it is a mail-in rebate (rather than no disclosure regarding type of rebate) as consumers may form impression that they'll receive the advertised rebate at the time of purchase

Consumer Rebates - Do not Disguise Discounts on Future Purchases as Rebates

- When making representations as to the price of a product, do not subtract the value of the gift card or credit from the original price of the product
- Avoid describing a promotion as a rebate if consumers may be misled into believing that they will receive a portion of the price of the product in a form of cash or a cheque

Consumer Rebates - Enforcement: The Brick Warehouse LP Art Promotion (March 2009)

- Advertised an \$80 mail-in rebate on the purchase of art, giving the impression consumers would receive a rebate in the form of cash or a cheque.
- Consumer in fact mailed a gift certificate to be used towards a future purchase at The Brick.
- The Brick cancelled all advertising and offered \$80 cheque as compensation to customers eligible for the rebate, posted notices in its stores and on its website and removed all in-store signage referring to the promotion.

Consumer Rebates - Keep Your Word: Fulfill Mail-in Rebates

- Take measures to ensure that fulfillment houses are performing their duties as part of the rebate process properly
- Rebates should be paid within a reasonable timeframe

“Free” and “Bonus” Claims

- Free installation, free cleaning, bonus pack...
- Free/Bonus means “free” or available at “no extra cost”
- Any attempt to recover the cost of the free/bonus contravenes the false/misleading advertising provisions of the Act

“Free” and “Bonus” Claims - False/Misleading Advertising under Act

- Act contains both criminal and civil prohibitions
 - Bureau will proceed criminally if the offence is serious and the advertiser made the misrepresentation “knowingly” or “recklessly”
 - In most instances, Bureau proceeds via civil route

“Free” and “Bonus” Claims - False/Misleading Advertising under Act: Main Elements of Offence

- 3 main elements
 - there is a “representation”
 - broadly construed - any media
 - the representation must be “made to the public”
 - also broadly construed - public at large
 - the representation must be “false or misleading in a material respect”

“Free” and “Bonus” Claims - False/Misleading Advertising under Act: Main Elements of Offence

- False or Misleading in Material Respect
 - test for “false” is objective
 - representation is either correct or not
 - test for “misleading” is subjective and more nuanced
 - (generally, claims re: price, warranty, performance, preference, superiority satisfy this test)

“Free” and “Bonus” Claims - False/Misleading Advertising under Act: Main Elements of Offence

- must consider all the circumstances around the representation including (1) its literal meaning; (2) any inferences that can be drawn from the representation; and (3) the general impression conveyed
- test for “material respect” is easy to meet
 - whether the representation could influence a consumer’s decision

“Free” and “Bonus” Claims - False/Misleading Advertising under Act: Disclaimers

- Serve a useful purpose and can be necessitated by space restrictions or financial constraints
- Can be used to expand on or clarify representations in main body of an ad
- Cannot cure or retract a false or misleading representation
- Cannot negate, contradict or otherwise limit the plain meaning of the larger text
- Must not merely be present; it must also be likely to be read

“Free” and “Bonus” Claims – Best Practices

- Do use “*FREE – Supplied to retailers at no extra cost*” for shrink-wrapped bonus packs (e.g., free conditioner with shampoo)
- Don’t run bonus pack offer continuously for over 90 days or else it runs risk of becoming the regular price for the two items
- Don’t increase price at wholesale or retail at time of offer (e.g., introducing bonus pack at same time as yearly price ordinarily increases may make free/bonus claim false)

“Free” and “Bonus” Claims – Best Practices

- Don't hide any charges – e.g., do fully disclose any shipping and handling charges if offer “free” by mail and such charges apply
- In Quebec, do ensure free/bonus offer takes up less than half the advertisement (as Article 232 of the Quebec *Consumer Protection Act* mandates that you can't advertise a “premium” that takes up more than one-half the space of an ad - the advertising regarding the underlying product must be given at least as great an emphasis)

Summary

- Recent amendments to Act affecting pricing create opportunities for suppliers to implement MAP and RPM programs and opportunities for distributors/retailers to insist on differential/preferential pricing
- OSP claims remain a Bureau priority
- Consumer rebates are coming under increased scrutiny
- Ensure “free” and “bonus” claims comply with false/misleading advertising provisions of Act and so aren’t bogus

QUESTIONS?

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Note: This document contains general information only and does not constitute legal advice. Qualified legal counsel should be consulted to assess the application of laws to specific facts.