

April, 2017

**Ordinary Selling Price Claims:**  
**Competition Bureau Enforcement Activity**

Advertisers making claims for “sale prices” compared to “ordinary selling prices” should take note of recent Competition Bureau enforcement against two major retailers. Amazon agreed to a settlement in January 2017, including payment of a \$1-million penalty. HBC is contesting a proceeding before the Competition Tribunal. These Competition Bureau challenges to high-profile businesses indicate the Bureau’s enforcement priorities that other businesses should consider as they develop their own advertising and marketing programs.

**Statutory Requirements, Competition Bureau Guidelines**

The “ordinary sale price” (“OSP”) provisions of the *Competition Act* are contained in the “Deceptive Marketing Practices” part of the statute (ss. 74.01), which imposes limitations on “misrepresentations to the public” made to promote the supply or use of a product or service, or any business interest. Where a business advertises a sale price by contrasting that sale price with an ordinary price (either by referring to a specific regular price, or to a discount, e.g. “20% off”) it must be able to support that claim. Ordinary prices can be supported through the “Volume Test” (sales for a substantial volume of the product within a reasonable period of time, either before or after making the representation) or the “Time Test” (sale offerings of the product in good faith for a recent substantial period of time before or immediately after making the representation). For each test, reference may be made to sales activities of suppliers generally in the relevant market (s. 74.01(2)) or to the advertiser’s own sales activities (s. 74.01(3)).

Under ss. 74.1(1), if a court or the Competition Tribunal determines that the specified “reviewable conduct” has occurred, it can impose various types of orders on the business. Orders can include prohibiting engaging in the same or substantially similar

reviewable conduct in the future and imposing an “administrative monetary penalty” (“AMP”) of up to \$10 million (against a corporation, for an initial order, or \$15 million for a subsequent order). Orders can have a term of up to ten years. The Act (ss. 74.1(5)) includes a series of aggravating or mitigating factors that a court or the Tribunal will consider before making an order for an AMP. Relevant factors include the reach of the conduct within a relevant geographic market, the frequency and duration of the conduct, the vulnerability of the class of persons likely to be adversely affected, and the effect on competition in the relevant market. Any amounts paid as refunds or restitution will also be considered in determining the amount of an AMP.

The Competition Bureau’s *Ordinary Price Claims Enforcement Guidelines* (the “Guidelines”)<sup>1</sup> provide detailed information on how advertisers can meet the Volume Test and the Time Test, for the advertiser’s own sales and for suppliers generally. For the Volume Test, the requirement to have sold a “substantial volume” of product at the regular price is met if more than 50% of sales are at or above the reference price. A “reasonable period of time” will generally be 12 months before or after making the representation, but this period of time may be shorter for seasonal products. The Guidelines include hypothetical examples, which help to illustrate how the tests may be met and the factors that the Bureau will consider in its analysis.

### **Amazon: Settlement Agreement, \$1 Million Penalty**

The Competition Bureau initiated an investigation of Amazon’s OSP claims in August, 2015. Amazon’s online advertisements compared its online sale prices for a range of products to the “list prices” charged by its competitors, often by showing a regular price crossed out and adjacent to the sale price, and with specific “You Save” claims shown both in dollar amounts and percentages.

The Bureau’s investigation focused on advertised prices for Blu-ray movies, as an example of Amazon’s advertising practices. Reviewing prices charged by Amazon and its competitors, the Bureau determined that Amazon’s OSP claims could not be supported under either the Volume Test or the Time Test. The Competition Bureau’s

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<sup>1</sup> [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/20100409\\_OrdinaryPriceClaims-e.pdf/\\$FILE/20100409\\_OrdinaryPriceClaims-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/20100409_OrdinaryPriceClaims-e.pdf/$FILE/20100409_OrdinaryPriceClaims-e.pdf)

statement,<sup>2</sup> reflected Amazon’s statement that it “relied honestly on the pricing information provided by its corporate suppliers to establish the list price of products”. Amazon did not independently validate those regular prices against suppliers in the market.

As noted in the Competition Bureau’s statement, Amazon took a number of voluntary, proactive steps to ensure compliance with the OSP requirements of the *Competition Act*. It made changes in its pricing practices, suppressed the list prices of certain products, and implemented policies and procedures to ensure compliance with the requirements. In January, 2017, Amazon.com Inc. entered into a consent agreement with the Competition Bureau, in which it agreed to pay a \$1-million AMP, to pay an additional \$100,000 toward the Competition Bureau’s costs, and to revise its pricing practices in order to comply with the OSP Provisions.

### **HBC: Misleading OSP Claims and Clearance Promotions**

On February 22, 2017, the Competition Bureau announced that it had completed an investigation and was initiating a proceeding before the Competition Tribunal<sup>3</sup> against Hudson’s Bay Company’s (“HBC’s”) advertising of mattresses and foundations sold together as sleep sets. Reviewing HBC’s advertising back to March, 2013, the Competition Bureau concluded that HBC had been making deceptive OSP claims and engaging in deceptive “clearance” or “end of line” promotions. The Bureau is seeking, among other things, an order prohibiting HBC from engaging in the reviewable conduct or similar conduct for 10 years, publication of corrective notices, and the payment of an AMP plus the Bureau’s costs (amounts unspecified).

The Bureau’s application discusses HBC’s “high-low” pricing strategy, in which merchandise is offered at a high regular price with frequent deep promotional discounts off that price. The Bureau argues that HBC’s advertised “deep discounts” are illusory, since sales at the claimed regular price are minimal or non-existent.

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<sup>2</sup> Issued January 11, 2017. Posted at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04187.html>

<sup>3</sup> The Competition Bureau’s Notice of Application and subsequent filings are posted on the Tribunal’s web site: <http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=415>.

In the Bureau's application, it reviewed advertising for a number of specific sleep sets, identifying the launch date of an advertising campaign (e.g. a flyer), the regular price, the sale price and savings claim. The Bureau also analyzed HBC's sales data, comparing the number of sleep sets sold at the sale price to the number of sales at the claimed regular price. Sales were measured using both the Volume Test and the Time Test. HBC could not meet the Volume Test<sup>4</sup> for the four models of sleep sets considered, HBC sold 99% or 100% at the sale price, with none or only one sold at the claimed regular price. A review of HBC's procedures confirmed that its planning and forecasting is based on sales at promotional prices.

For the Time Test,<sup>5</sup> the Bureau noted that it includes two elements: products must be offered at the regular price or a higher price, "in good faith", for "a substantial period of time recently before" the representation is made. If either element were not met, HBC would not comply with the Time Test. Following its investigation, the Bureau concluded that HBC did not offer the specified sleep sets in good faith. HBC used no systematic method to track competitor's products and prices, but reviewed competitor's pricing only when there was time to do so. Since the claimed regular prices were at least double the promotional prices, HBC could have had no expectation that the market would validate the regular prices. HBC's mattress buyers expected that regular priced products would make up only 5% or less of overall sleep sets annually. For the second element of the Time Test, the Bureau concluded that HBC did not offer the sleep sets for a "substantial period of time" at the regular price. For the models reviewed, HBC offered them at the regular price for less than 50% of the time or for just over 50% of the time (e.g. 46.4%, 52.9%, 41.6% and 53.9% for the Mount Royal model).

The Bureau also alleges that HBC's advertisements are false or misleading through promotions for "clearance" or "end of line" sales, even though the advertised sleep sets were new orders, brought into inventory specifically for the purposes of these sales. Based on the fact that HBC, like most mattress retailers, sells on an on-demand delivery model, the Bureau claimed that HBC made misleading "clearance" or "end of line" representations to promote sleep sets since at least March 1, 2013. Sleep sets are

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<sup>4</sup> The Bureau's analysis under the Volume Test is summarized at paragraphs 37 – 46 of its Application.

<sup>5</sup> The Bureau's analysis under the Time Test is summarized at paragraphs 47 – 72 of its Application.

manufactured after the consumer has purchased a sleep set promoted on “clearance”. Whereas a clearance promotion implies a scarcity of product, for the models of sleep sets reviewed by the Bureau, the manufacturers continued to supply HBC with new product throughout the promotions. Although HBC adopted a revised policy and stopped making “clearance” representations in December, 2014, it used similar “end of line” language, which is also both misleading and material to consumers’ purchase decisions, according to the Bureau.

The Bureau lists a number of aggravating factors: the national reach of HBC’s promotions; the fact that it has made the same or similar representations frequently, and over an extended period of time; the materiality of the representations to consumers, and that HBC had significant gross revenues from the specified sleep sets from March 1, 2013 to January 31, 2015.

Advertisers should consider the Bureau’s challenge to HBC’s “high-low” advertising in ensuring their own compliance with the *Competition Act’s* OSP requirements. The Tribunal decision, or any settlement, will also be instructive.

If you have questions about ordinary selling price claims or any other advertising and marketing matters, contact Carol Anne O’Brien at [caob@caobrienlaw.com](mailto:caob@caobrienlaw.com), or (416) 640-7270.

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| Carol Anne O’Brien’s law practice is focused on regulatory matters including communications law (broadcasting and telecommunications), competition law, advertising and marketing, Internet domain names and privacy. |
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