

Legal update

Ensuring the price is right: Amazon pays \$1.1 million to settle Canadian Competition Bureau ordinary price advertising investigation

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Antitrust and competition

Online retailer Amazon.com.ca Inc. recently [agreed to pay](#) a \$1 million administrative monetary penalty as well as \$100,000 towards the Competition Bureau's legal costs as part of a settlement following the bureau's investigation into pricing representations on Amazon's website and mobile app and in emails sent to consumers.

Most Canadians, as we look over our holiday bills, are very familiar with Amazon's business. One key feature is a comparison of Amazon's prices to regular or "list prices." These list prices often showed customers that they would pay less than the prevailing market price if they made their purchases through Amazon.

After a two-year investigation by the bureau, specifically targeting the list prices of 12 Blu-ray movies, Amazon entered into a consent agreement with the Commissioner of Competition.

The law

Deceptive marketing practices are reviewable under Part VII.1 of the *Competition Act*. Specifically, false or misleading representations to the public are reviewable under subsection 74.01(1) and subsection 74.01(2), which place certain obligations on those making representations about the ordinary or market price of a product. A business advertising a sale price, whether discounted from its own prices or discounted from prevailing market price, must comply with subsections 74.01(2) and 74.01(3) of the *Act*, respectively.

The bureau's Enforcement Guidelines on [Ordinary Price Claims](#) set out both a "volume test" and a "time test" in respect of subsection 74.01(2). According to these two tests, persons must refrain from making representations about the prevailing market price of a product unless suppliers generally in the market have sold a substantial volume of that product at the represented price and have offered the product for sale in good faith for a substantial period of time at the represented price.

In addition to these provisions, the bureau also investigated whether electronic messages sent by Amazon with similar pricing advertisements and links to its website contravened subsection 74.011(2) of the *Act*, introduced as a result of Canada's Anti-spam Legislation, which prohibits promoting business interests by sending false or misleading representations in electronic messages.

The investigation and settlement agreement

In 2015, the bureau began an inquiry under subsections 74.01(2) and 74.011(2) of the *Act* to determine whether the list prices of 12 Blu-ray movies, posted by Amazon based on information provided by its suppliers, accurately reflected prevailing market prices of those products.

As set out in the consent agreement settling the dispute, the evidence collected by the bureau led the commissioner to conclude that Amazon's suppliers generally in the market had not sold the 12 Blu-ray movies in a substantial volume at or above Amazon's list price for a reasonable period of time, contrary to the volume and time tests used in subsection 74.01(2). Amazon has not admitted any wrongdoing but, for the purpose of the consent agreement only, has agreed not to contest the commissioner's conclusions.

The bureau concluded that Amazon had relied honestly on the pricing information provided by its corporate suppliers to establish the list price of products on www.amazon.ca. The bureau also noted that Amazon undertook a number of voluntary and proactive steps, including: changing its pricing practices before becoming aware of the bureau's concerns, suppressing certain of its list pricing processes, and adopting policies and procedures to ensure compliance with the *Act's* requirements pertaining to deceptive marketing practices.

Under the consent agreement, Amazon voluntarily implemented specific policies and procedures to ensure its practices did not contravene the *Act* and agreed to pay a \$1 million penalty and \$100,000 towards the bureau's costs.

Conclusion

Amazon's settlement with the bureau, despite the \$1.1 million price tag, will be seen by many as a significant victory for the Internet retail giant. Amazon not only avoided the risk of a hefty monetary penalty, which can run as high as \$10 million for corporations found to have contravened subsection 74.01(2) of the *Act*, but also the risk of harming its strong reputation with Canadian consumers. The bureau noted the penalty was lower than it would have been had Amazon not cooperated with the investigation and taken the proactive steps that it did.

The case reminds retailers of the importance of monitoring the volume of sales made at regular prices and the time periods during which those prices were charged, not only for their own sales, but also for claims of list or ordinary sale price made by their suppliers. This information is critical in substantiating sale price claims. It also is an important reminder that the bureau is actively enforcing the *Act's* anti-spam provisions, and companies engaged in digital marketing should prepare for changes coming in July 2017 that will provide a private right of action for persons "affected" by a misleading representation in an electronic message.

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