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INFORMATION BULLETIN

MISLEADING REPRESENTATIONS AND DECEPTIVE MARKETING PRACTICES:

CHOICE OF CRIMINAL OR CIVIL TRACK UNDER THE *COMPETITION ACT*

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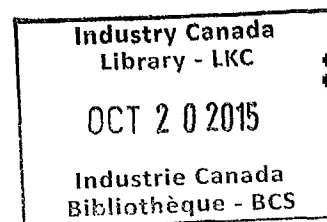
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INTRODUCTION

The purpose of the *Competition Act* is to maintain and encourage competition in the Canadian marketplace. The misleading representations and deceptive marketing practices provisions of the Act 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 choosing whether to pursue the criminal or civil track with respect to misleading representations and deceptive marketing practices. 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.

CHOICE OF CRIMINAL OR CIVIL TRACK

The Act provides two adjudicative regimes to address misleading representations and deceptive marketing practices. The relevant provisions of the Act read as follows:

PART VI- OFFENCES IN RELATION TO COMPETITION

Duplication of proceedings

52(7) No proceedings may be commenced under this section against a person against whom an order is sought under Part VII.1 on the basis of the same or substantially the same facts as would be alleged in proceedings under this section.

PART VII.1 - DECEPTIVE MARKETING PRACTICES

Proceedings commenced under Part IV

74.16 No application may be made by the Commissioner for an order under this Part against a person where proceedings have been commenced under section 52 against that person on the basis of the same or substantially the same facts as would be alleged in proceedings under this Part.

Section 52, the general criminal prohibition requiring mens rea, deals with the most egregious matters while Part VII.1, the civil regime, addresses most instances of misleading representations and deceptive marketing practices.

GENERAL PRINCIPLES

1. In most instances, the civil track will be pursued unless the criteria outlined below are satisfied.
2. The amendments do not specify any time period or other statutory requirement limiting the amount of time the Bureau may take to decide which adjudication route to follow. Every effort will be made to arrive at this decision as quickly as possible and to notify the parties concerned once a decision is taken.
3. The choice of proceeding along the civil track against a party will preclude the laying of criminal charges against the same party, based upon the same or substantially the same set of facts. New evidence that the representation was made knowingly or recklessly would constitute a substantial change in facts.
4. While the Bureau may initially choose to proceed under the criminal regime, the Bureau may subsequently decide to expedite the matter by pursuing the civil track.

5. The adjudication route may not be changed once charges have been laid or once an application has been filed with the Tribunal.
6. The Bureau will strive for consistency in the approach to enforcement, recognizing that the choice of approach in any particular case will be decided upon according to the facts of that case.

GUIDELINES

1. In order to proceed on a criminal track both of the following criteria must be satisfied:
 - (a) there must be clear and compelling evidence suggesting that the accused knowingly or recklessly made a false or misleading representation to the public. An example of such evidence is the continuation of a practice by the accused after complaints have been made by consumers directly to the accused; and
 - (b) if there is clear and compelling evidence that the accused knowingly or recklessly made a false or misleading representation to the public, and this evidence is available, the Bureau must also be satisfied that criminal prosecution would be in the public interest.
2. The factors to be taken into account in making this public interest determination will vary from case to case, and may include the seriousness of the alleged offence and mitigating factors.

3. The seriousness of the alleged offence will include a consideration of:
 - (a) whether there was substantial harm to consumers or competitors which could not be adequately dealt with by available civil remedies;
 - (b) whether the deceptive practices targeted or took unfair advantage of vulnerable groups (e.g., children and seniors);
 - (c) whether the persons involved failed to make timely and effective attempts to remedy the adverse effects of the conduct, or whether the conduct continued after corporate officials became aware of it;
 - (d) whether the conduct involved a failure to comply with a previous undertaking, a promised voluntary corrective action, or a prohibition order; and
 - (e) whether the persons had engaged in similar conduct in the past.
4. Mitigating factors will include a consideration of:
 - (a) whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive; and
 - (b) whether the company or entity has in place an effective compliance program.
5. If, on balance, the Bureau is satisfied that the circumstances of the case warrant criminal prosecution, a recommendation may be made to the Attorney General of Canada who will make the ultimate determination of whether to proceed.

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

Facsimile (819) 997-0324

Address

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