

Franchisors Affected by Competition Act Amendments

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Last February there was a showdown in the House of Commons regarding the Budget, which ended with the Liberals eventually supporting the Conservative Budget. What was less noticed was that a package of amendments to the Competition Act had been added to the Budget Bill on short notice, and when the Budget was approved they were approved also, on March 23, 2009.

Although franchise agreements are specifically mentioned in the draft Guidelines for the amendments with respect to the provisions on conspiracy, overall the amendments will only have a peripheral effect on franchising. The issues that franchisors should be aware of are:

Resale Price Maintenance: Previously resale price maintenance was a criminal offence under the Competition Act. These provisions were repealed and replaced by a civil review provision. The civil provision requires that there be an adverse effect on competition before the Competition Tribunal can issue an order. However private litigants (including franchisees) can still bring an action under the Competition Act in this area, but now under the lower civil burden of proof. While franchisors now have more freedom to establish uniform prices in their system, there are also associated risks.

Price Discrimination: The criminal provisions with respect to price discrimination, predatory pricing and promotional allowances were also repealed and will now be dealt with under a civil provision. This adds a requirement that there be a substantial anti-competitive effect. For most franchisors these provisions are no longer a concern.

Deceptive Marketing: The essential element here is that fines (known as administrative money penalties or “AMP”) have been significantly increased. For example for individuals the maximum fine on a first offence was previously \$50,000.00. Now it is \$750,000.00. For corporations the equivalent fine has increased from \$100,000.00 to \$10 million. False or misleading representations made in a non-public setting or made outside Canada are now also actionable. Courts can now also order restitution. Franchisors should accordingly monitor their advertising programs more closely.

Collaboration with Competitors (also known as “Conspiracy”): The Competition Bureau felt that the previous criminal provisions against cartels had a burden of proof that was too high. But as they loosened the definition of a “conspiracy” in the existing criminal provisions of Section 45 and added a civil remedy the risk arose that traditionally acceptable agreements between competitors (such as those between franchisees and franchisors) would be caught by the new criminal or civil provisions. In this

regard on May 8, 2009 the Bureau published for consultation its draft “Competitor Collaboration Guidelines.”¹

The amended Competition Act provides a civil remedy in a new Section 90.1 (which comes into effect on March 12, 2010). An agreement between competitors that prevents or lessens competition substantially in a market may be the subject of a prohibition order. Franchisors with company owned stores will have to assess whether their franchise agreements substantially lessen competition in a market.

The Guidelines clarify that in most cases the Bureau will not consider a supplier (such as a franchisor) of a customer (such as a franchisee) to be a competitor of a customer. Specifically “the Bureau will examine agreements between franchisors and franchisees that allocate markets or customers for the operations of the franchisee – such as where the franchise agreement provides franchisees with an authorized sales territory” under the civil provision and not under the criminal provision.

The draft Guidelines contain two examples of problems relating to territorial restrictions and minimum prices in franchise agreements. Franchisors and their counsel should now become familiar with these examples and the Competition Act amendments. While action by the Bureau against a franchisor is unlikely, both civil and criminal actions are possible. And franchisees still have the right to bring a private action alleging a breach of the criminal provision.

¹ Available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02987.html> .