

## Is Your Business Protected Against Prosecutions Under the *Competition Act*? Are You Protected Personally?

By Raphaël Schachter, Q.C., Corinne Lemire and Marc Cigana

### Introduction

In a single case, various pharmaceutical companies were fined an aggregate of \$91,495,000 in Canada. In another case, an officer of three telemarketing companies was fined \$300,000 after pleading guilty to three counts of misleading advertising. Finally, a director was convicted of conspiracy for the purpose of engaging in a policy of predatory pricing and price maintenance and was sentenced to one year imprisonment. And it's only the beginning!

Prosecutions under the *Competition Act* seem to proliferate and the ensuing sanctions are becoming more and more severe. Obviously, the Competition Tribunal wants to issue a clear message: offences under the *Competition Act* are serious and have to be taken as such. It is imperative that business directors or officers measure up to expectations of the Competition Bureau and, ideally, implement a business compliance program.

This brief synopsis of the *Competition Act* will help you to better understand the need to seek counsel and to consider implementing a business compliance program.



### Principal Penal Offences in Competition Law

The *Competition Act* (Part VI) includes various penal provisions that prohibit, under sanction, certain trade practices.

It is the duty of the Deputy Commissioner of Competition, criminal division, to launch an investigation regarding offences under the *Competition Act*. However, all penal prosecutions under the *Competition Act* are the responsibility of the Attorney General.

The following is a brief description of some of the penal offences under the *Competition Act*:

- **Conspiracy (Section 45)**

Under the terms of Section 45 of the *Competition Act*, may be convicted of conspiracy anyone who conspires, combines, agrees or arranges with another person

- to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
- to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,



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Raphaël Schachter, Q.C. has been a member of the Quebec Bar since 1968 and specializes in Criminal and Penal Law

- to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
- to otherwise restrain or injure competition unduly.

Anyone who contravenes Section 45 is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

Penalties for an offence under Section 45 are rather high. In 1999, Hoechst AG, a German corporation, pleaded guilty of having been party to an international conspiracy for the purpose of fixing prices and the market share of sorbic acid and potassium sorbate. It was sentenced to pay a fine of 2.5 million dollars.

- **Foreign directives (Section 46)**

The purpose of Section 46 is to ensure that a conspiracy contrived outside Canada does not go unpunished if it is committed, in whole or in part, in Canada.

Therefore, any corporation that carries on business in Canada and implements, in whole or in part, a directive emanating from a person situated abroad but who is in a position to direct or influence the policies of the corporation, which directive is for the purpose of giving effect to a conspiracy entered into outside Canada that, if entered into in Canada, would have been in contravention of Section 45, is guilty of an indictable offence.

On conviction, the Canadian corporation is liable to a fine in the discretion of the court.

- **Bid-rigging (Section 47)**

Section 47 of the *Competition Act* forbids anyone from taking part in a bid-rigging, under penalty of a fine in the discretion of the court or of imprisonment not exceeding five years or of both.

However, it is noteworthy that simple discussions on prices between two bidders who have fixed their final bid separately are not considered to be bid-rigging.

- **Price discrimination (Section 50)**

Section 50 of the *Competition Act* prohibits trade practices that discriminate against competitors, by way of a rebate or low pricing policy, or by fixing prices unreasonably low.

Every one who contravenes Section 50 is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

- **Misleading advertising (Section 52)**

Section 52 of the *Competition Act* prohibits any misleading advertising for the purpose of promoting the supply or use of a product or any business interest, under penalty, on conviction on indictment, of a fine in the discretion of the court or of imprisonment for a term not exceeding five years or of both ; the stipulated penalty on summary conviction is a fine not exceeding \$200,000 or imprisonment for a term not exceeding one year, or both.

In 1998, the Hudson Bay Company pleaded guilty to an indictment of misleading advertising for having advertised bicycles at a rebate for a limited time, but which were in fact at a rebate for a much longer period of time. The Bay had to pay a \$600,000 fine.

- **Price maintenance (Section 61)**

Section 61 of the *Competition Act* prohibits any attempt made by agreement, threat or promise to discourage price reduction.



Corinne Lemire has been a member of the Quebec Bar since 2001 and specializes in Business Law



Marc Cigana has been a member of the Quebec Bar since 1991 and specializes in Criminal and Penal Law

Every one who contravenes Section 61 is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

For having maintained prices on its computer games, Beamscope Canada Inc. was sentenced to a fine of \$210,000 in 1992.

### **Immunity program**

The main purpose of the immunity program under the *Competition Act* is to detect infractions with the assistance of anyone who has been a party engaging in a practice that may constitute a contravention of the *Competition Act*.

The Attorney General is vested with the exclusive power of granting immunity. His decision is based on the Bureau's recommendations and on the public interest.

The immunity program encourages competitors having engaged in an anti-competitive practice to contact the Competition Bureau without delay, since only the first party to provide information on an offence to the Competition Bureau is eligible to a recommendation for immunity, subject to a set of requirements that must be met.

### **Our services**

This bulletin gives a broad outline of the penal provisions contained in the *Competition Act* and of the possible sanctions for non-compliance.

Our team of experts in competition law can provide you with further information and solutions in order to respond to your needs whether preventive or curative. With its vast experience and the wide array of matters that are regularly entrusted to it, our team of experts offers you comprehensive and diverse legal services, including implementation of compliance programs that help businesses reduce the risks of contravention to the *Competition Act*.

We invite you to read the bulletin entitled "Competition Law: The Need for Compliance Programs" on our Web site. Even though compliance programs do not constitute a defence, prevention is always better than treatment.

Our lawyers specialising in competition law (penal division) have dealt with the Competition Bureau on many occasions and their valuable experience enures to the benefit of our clientele in the negotiation of a penalty or throughout the investigation. For more information on penal matters, please contact Mr. Raphaël Schachter, Q.C., at (514) 877-2934, Mr. Marc Cigana, at (514) 877-3037 or Ms. Corinne Lemire, at (514) 877-2998.

Raphaël Schachter, Q.C.  
Marc Cigana  
Corinne Lemire

You can contact any of the following members of the Criminal and Penal Law group in relation with this bulletin.

**at our Montréal office**

Marc Cigana  
Raphaël Schachter, Q.C.

You can contact any of the following members of the Competition Law group in relation with this bulletin.

**at our Montréal office**

Serge Bourque  
Patrick Buchholz  
Marc Cigana  
Benjamin Gross

Guy Lemay  
Corinne Lemire  
Larry Markowitz  
Jean Saint-Onge  
Raphaël Schachter, Q.C.

**Montréal**

Suite 4000  
1 Place Ville Marie  
Montréal, Quebec  
H3B 4M4

Telephone:  
(514) 871-1522  
Fax:  
(514) 871-8977

**Québec City**

Suite 500  
925 chemin Saint-Louis  
Québec, Quebec  
G1S 1C1

Telephone:  
(418) 688-5000  
Fax:  
(418) 688-3458

**Laval**

Suite 500  
3080 boul. Le Carrefour  
Laval, Quebec  
H7T 2R5

Telephone:  
(450) 978-8100  
Fax:  
(450) 978-8111

**Ottawa**

Suite 1810  
360, Albert Street  
Ottawa, Ontario  
K1R 7X7

Telephone:  
(613) 594-4936  
Fax:  
(613) 594-8783

**Web Site**

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