

COMPETITION BUREAU SETTLES INVESTIGATION INTO DECEPTIVE MARKETING PRACTICES

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On September 27, 2023, the Commissioner of Competition (Commissioner) announced he had entered into a 10-year consent agreement with The Dufresne Group Inc. and its affiliates (Dufresne) to settle concerns that Dufresne had engaged in deceptive marketing practices in connection with the sale of home furnishings under the brands Dufresne Furniture and Appliances and Ashley HomeStores.

This settlement follows a formal investigation by the Competition Bureau (Bureau), which included a court order in November 2022 to compelling Dufresne to provide information to the Bureau to assist with its investigation.

Commissioner's Conclusions: Deceptive Marketing Practices

Competition Act prohibits businesses from making false or misleading representations to the public.

The Commissioner concluded that Dufresne had engaged in the following deceptive marketing practices:

- [False or misleading representations about "ordinary price" of products.](#)^[1] The Commissioner concluded that Dufresne made materially false representations of substantial discounts to inflated "regular prices" (ordinary prices), falsely creating a general impression of significant savings for consumers. The *Competition Act* requires suppliers to have either (i) sold a substantial volume of a product at a price (i.e., the volume test), or (ii) offered a product for sale in good faith at a price (i.e., the time test) to be able to characterize a price as a "regular price" or "ordinary price". However, the Commissioner concluded that these tests were not satisfied by Dufresne, and found that the "regular prices" referenced by Dufresne were inflated, and that the prices of such products were reduced below such referenced "regular prices" more than half the time.
- [False or misleading representations about the timing of the substantial price discounts.](#)^[2] The Commissioner concluded that Dufresne made certain "urgency cues" representations, which were false in a material respect, falsely creating a general impression certain price discounts would not be available after a certain time, e.g., "40% OFF (Sale ends Sep 19 2022)". False "urgency cues" or "scarcity cues" may mislead consumers into making purchases they might not have otherwise made, or rushing them into

purchases without considering competitive offers.^[3]

Remedial Action

Deceptive marketing practices may be assessed under the criminal regime or the civil regime of the *Competition Act*, with materially false or misleading representations made knowingly or recklessly potentially subject to the criminal regime. The potential penalties under the civil regime are significant, including orders requiring the person cease the activity, publish a notice describing the conduct, and/or pay an administrative penalty in an amount equal to the greater of \$10 million or three times the value of the benefit derived from the deceptive conduct, or, if that amount cannot be reasonably determined, up to 3% of the corporation's annual worldwide gross revenues.^[4]

The consent agreement requires Dufresne take the following actions:

- Administrative Monetary Penalty. Pay an administrative monetary penalty in the amount of \$3.25 million and \$100,000 for the Commissioner's costs.
- Compliance with the *Competition Act*. Comply with the deceptive marketing provisions of the *Competition Act* and enter into agreements with its franchisees to require franchisees to comply with the *Competition Act*.
- Corporate Compliance Program. Establish and maintain a corporate compliance program to promote compliance with the *Competition Act*, as contemplated by the Commissioner's "Corporate Compliance Programs" bulletin, and ensure that all senior management commit to successful implementation of the corporate compliance program.
- Reporting & Monitoring. Comply with ongoing monitoring and reporting obligations to demonstrate compliance with the Consent Agreement.

Final Thoughts & Guidance

Given changing economic, social and political circumstances, there is an increasing focus on the protection of competition – and in particular, consumers - in Canada. Consistent with this shift, the Bureau recently announced as part of its 2023-2024 Annual Plan the priority to protect consumers through heightened vigilance and enforcement of the *Competition Act*.^[5] The Commissioner reaffirmed this policy in the press release announcing Dufresne settlement, stating that "taking action against deceptive marketing practices remains one of our highest priorities"^[6] in light of the recognition that consumers do not make the "best decisions" when they have incomplete information or are under pressure or time constraints.^[7]

The Competition Bureau receives many complaints from consumer, businesses and advocacy groups each year. Of all the areas of responsibility the Commissioner has, deceptive marketing practices make up the bulk

of matters investigated and cases pursued. The Ordinary Sale Price rule is the most pursued aspect of the Commissioner's enforcement activity. The false urgency cues issue was regularly prosecuted in the 1970s and 1980s; we are seeing a renewed emphasis on this issue in the context of on-line sales.

Accordingly, we expect an increase in investigations by the Bureau into allegations of deceptive marketing practices, in addition to private class actions seeking damages for such practices.

Businesses should take note of Dufrense settlement. To mitigate the risk of inadvertently engaging in deceptive marketing practices or appearing to be engaged in deceptive marketing practices, in addition to mitigating the reputational harm and costs associated with an investigation and prosecution into such practices, advertisers should consider the following guidance:

- Ensure management fosters a culture of compliance within the organization, including establishing a compliance program to promote compliance with the *Competition Act*.^[8]
- Be aware the courts have taken an expansive view of what type of statements are material (i.e., any statement that could influence a consumer to buy or use a product or service advertised is considered to be material) and the interpretation of "general impression" created by such statements.^[9]
- Take care when referencing price discounts to ordinary or regular prices charged, to ensure that referenced regular prices are indeed the ordinary prices for such products (i.e., these prices meet the meet the volume test and time test), and that businesses track sales data to empirically support references to ordinary prices.
- Take care when including scarcity or urgency cues or other statements (or design structures) intended to push consumers to buy products and buy such products quickly, to ensure these statements are accurate and clear and not misleading.
- Contact legal counsel for advise if you have any questions or are uncertain as to whether proposed action may raise concerns under the deceptive marketing practices of the *Competition Act*.

If you have any questions or would like to discuss deceptive marketing practices under the *Competition Act* or the applicability of such provisions to proposed actions, the McMillan Competition Antitrust and Foreign Investment Group would be pleased to assist.

[1] Section 74.01(3) provides that a person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market, (a) has not sold a substantial volume of the product at that price or a higher price

within a reasonable period of time before or after the making of the representation, as the case may be; and (b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

[2] Section 74.01(1) provides that a person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, (a) makes a representation to the public that is false or misleading in a material respect.

[3] “Urgency cues” or “scarcity cues” can provide important information to consumers about the availability of a product. Examples of scarcity cues include statements that only a small amount of stock is remaining, or that certain prices are available for only a limited time or that a certain percentage of stock has already been purchased.

[4] See section 74.1(1) of the *Competition Act*.

[5] See Competition Bureau’s [“2023-2024 Annual Plan: Driving competition forward for all Canadians”](#).

[6] See Competition Bureau’s press release dated September 27, 2023 announcing the settlement, [“The Dufresne Group to pay \\$3.25 million penalty to settle Competition Bureau concerns over marketing claims”](#).

[7] See the Competition Bureau’s [“Deceptive Marketing Practices Digest – Volume 6”](#).

[8] See the Bureau’s [“Corporate Compliance Programs”](#).

[9] See the Bureau’s guidance in the [“False or Misleading Representations and Deceptive Marketing Practices”](#).

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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