Discount Deception: Demystifying Ordinary Selling Price Claims under the Canadian Competition Act

May 09, 2025

In the current economic environment, many businesses may feel pressured to get creative with their marketing and pricing strategies to remain competitive. For example, promotional terms such as "**Sale**", "**Marked Down**" or "**End of Line**" are frequently used in marketing campaigns to attract consumer attention and boost sales. While these representations may offer short term commercial advantages, businesses must exercise caution, as the Competition Bureau (the Bureau) is increasingly cracking down on potentially misleading pricing practices, particularly where claims may misrepresent the nature and duration of promotions and ordinary selling prices.

The compliance risk in this area extends across all sectors, including apparel, consumer electronics, automotive, food, health and medical devices industries. Any business that makes price comparison claims must ensure strict adherence to the ordinary selling price (OSP) provisions of the *Competition Act*.[1] Failing to do so may result in hefty penalties, including civil penalties of up to $10 million or 3 per cent of a corporation's worldwide gross revenue.

Ordinary selling price claims

Imagine this: a retailer advertises a product with an artificially inflated "ordinary" or "regular" price, then subsequently crosses it off and marks it down, claiming it is on "sale". While a consumer who purchases the product may believe they are securing a bargain, they may, in fact, be paying the product's true regular price. This type of deceptive price comparison representation is specifically prohibited by the OSP provisions in the *Competition Act*.

The OSP provisions specifically prohibit businesses from making—or allowing others to make—any materially false or misleading statements to the public regarding a product's ordinary selling price. Businesses can make a price comparison claim only where the reference price, i.e. the seller's own regular price or a prevailing market price, can be validated by satisfying one of two tests:

- **Volume Test**: this test requires that a **substantial volume** of the product was sold at that price or higher, within a **reasonable period of time** before or after the claim. According to the Bureau's *Enforcement Guidelines on Ordinary Price Claims*, this test will be met if 50 per cent or more of that product was sold at that price (or higher) in the **past year**.
- **Time Test**: this test requires that the product has been offered for sale in **good faith** at that price or higher for a **substantial period of time**. According to the Bureau's *Enforcement Guidelines on Ordinary Price Claims*, a "substantial period of time" means more than **50 per cent** of the preceding **six months** from making the claim.

The Bureau's *Enforcement Guidelines* also state that a price comparison representation that fails to meet both the volume test and the time test may not raise an issue under the OSP provisions if a business can establish that the representation was not otherwise false or misleading in a material respect. For example, a "clearance sale" may fail both tests, but if a business can demonstrate that: i) the sale was clearly marked as a clearance, ii) the representation refers to the original price (and any subsequent interim prices), and iii) the original price was offered in good faith, then in such instance, the price comparison representation may not be considered misleading.[2]

Price comparison representations are also subject to the general civil and criminal deceptive marketing provisions of the *Competition Act*, which prohibit false or misleading claims made to promote the supply or use of a product or any business interest.[3]

It is not simply the "what" but also the "how" that matters when it comes to advertising. The *Competition Act*[4] requires consideration of both the relevant representation's general impression and its literal meaning when determining whether the ordinary selling price is false or misleading in a material respect. Therefore, a representation may be considered misleading even if it is technically correct. Significantly, it is not necessary to prove that any person was actually deceived or misled under the *Competition Act*.

Why should you care?

While price comparison strategies and promotional pricing can offer short term commercial gains, businesses must ensure that both the literal meaning and general impressions of such representations are not materially false or misleading. Failure to do so could expose a business to significant legal and reputational risks.

Non-compliance with the *Competition Act*, including breaches of the OSP provisions or the civil deceptive marketing practices provisions can result in significant consequences for a business, including being ordered to pay an administrative monetary penalty of the greater of $10 million or 3 per cent of a corporations annual worldwide gross revenue. Further, in more egregious cases, the breaches may attract criminal liability under the criminal deceptive marketing provisions, including, upon conviction for an indictable offence, imposition of a fine (with no caps), imprisonment for up to 14 years, or both.

How we can help

Navigating compliance with ordinary selling price claims can be tricky and requires careful legal and operational oversight. In today's competitive and fast-paced retail landscape, it is essential for businesses to establish a dynamic and flexible pricing compliance program that is consistent with the *Competition Act*.

For more guidance and information on dealing with these issues, please reach out to any member of our experience Advertising & Marketing team.

Footnotes

[1] Subsections 74.01(2) and 74.01(3) of the *Competition Act*.

[2] Such a sale may occur where a supplier offers for sale products not intended to be sold again at the original price, the products did not sell or were no longer selling at the original price or at a lower price, or the supplier wants to take a firm mark down on the products and sell them to make room for new merchandise. Generally, a clearance sale should only be used on product which the supplier already has in stock.

[3] Section 52 and Section 74.01 of the *Competition Act*.

[4] Subsection 74.03(5) of the *Competition Act*.

By

Candice Kloes, Joshua Abaki

Expertise

Competition/Antitrust and Foreign Investment, Advertising & Marketing

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.