

Competition Law: The Need for Compliance Programs

By Serge Bourque, Patrick Buchholz and Larry Markowitz

Penalties for Violations of The *Competition Act*

The penalties for violating competition laws can be severe. In fact, even the accusation or appearance of having violated competition laws can carry high costs. Competition law investigations and litigation can be enormously expensive and time-consuming.

Criminal Prosecutions

The *Competition Act* contains a number of provisions of a criminal nature (including conspiracy to lessen competition, price-fixing and bid rigging, among others). Companies found to have violated the *Act*, as well as employees, officers, and directors involved in the violation, may be indicted and criminally prosecuted. Violations of the criminal provisions of the *Competition Act* are punishable by fines for corporations, and by jail sentences or fines, or both, for individuals. Fines of as much as \$50 million have been imposed in the past. For instance, in 1999, the Federal Court of Canada imposed fines totalling \$88.4 million for multiple conspiracies to fix prices and allocate market shares for vitamin and food additive products sold in Canada. In another case, in 1998, Archer Daniels Midland Company was fined \$16 million for price-fixing and market sharing conspiracies in the lysine and citric acid markets. A further example is the \$12.5 million fine imposed on SGL Carbon AG for price-fixing and allocation of markets for graphite electrodes.



Moreover, fines as high as \$550,000 have been imposed on individuals for illegal activities such as conspiracy, misleading representation and misleading advertising.

The *Competition Act* also provides for prison terms of up to five years. For example, in 1996, the manager of a driving school was sentenced to one year in prison for a variety of offences under the *Competition Act*, including conspiracy, regional discrimination and price maintenance. Another manager of the same driving school was sentenced to 100 hours of community service for related offences.

Civil Actions

Any person or business injured by a breach of one of the criminal provisions contained in the *Competition Act* (including the federal government, or any provincial or local government) may sue in a court of competent jurisdiction and, if successful, recover monetary damages. Loss of a civil damages suit can pose a significant financial burden on a company.

Suits for Injunctive Relief

Canada's Department of Justice may sue to enjoin a violation of the *Competition Act*. If a company were to be the defendant in a successful injunction action, it could be required to refrain from engaging in otherwise lawful actions, possibly putting the company at a competitive disadvantage and severely restricting its freedom of operation.

Serge Bourque has been a member of the Quebec Bar since 1962 and specializes in Business Law, with a focus on Competition Law



Directors' Liability and Competition Law Policies

The *Competition Act* is one of many statutes in Canada that impose liability on the directors of a company. The theory behind directors' liability is that the risk of being found liable will make the board of directors more attentive to its legal obligations to properly manage the company.

Directors of a company may defend themselves against accusations of civil or criminal misconduct through a due diligence defence under which a director can escape liability by proving that he exercised the degree of care, diligence and skill to prevent the occurrence of the misconduct that a reasonably prudent person would have exercised in comparable circumstances.

What constitutes due diligence will, of course, depend upon the nature of the company and the situation. Generally, though, due diligence involves the institution of a system for preventing non-compliance and providing training to employees with respect to competition law matters. Documents should be distributed to management and employees describing how to prevent anti-competitive conduct. Adequate authority should be given to the appropriate employees to monitor and adjust the system.

It makes good business sense to implement an effective program that addresses both the criminal and civil provisions of the *Competition Act*. By identifying areas of potential risk in advance, a company can save time and money and preserve goodwill. By informing employees of the limits of illegal conduct, a company and its employees are thereby freed to pursue legitimate profitable business practices. Often, informal policies and corporate customs already exist. In such a case, voluntarily instituting a competition law compliance program simply formalizes or supplements what already exists.

Ideally, a corporate compliance program should include certain essential elements such as the participation and support of senior management, the implementation of proper policies and procedures and a continuing education component through which management and employees are trained to avoid anti-competitive conduct. A proper compliance program should include mechanisms for monitoring the behaviour of management and employees, as well as reporting mechanisms and disciplinary procedures.

Normally, in an effective compliance program, the company prepares a document in which it describes the program and tailors procedures for its particular business and corporate culture. Typically, a compliance manual includes:

- a statement by the chief executive officer stressing the company's commitment to the policies and procedures contained therein, and its uncompromising adherence to the *Competition Act*;

- a reference to the purpose of the *Competition Act*;
- a general description of the *Competition Act* and its enforcement, penalty and remedy provisions, with emphasis on those provisions of the *Competition Act* that are most relevant to the company;
- clear examples to illustrate the specific practices that are prohibited, so that managers and staff at all levels can easily understand the potential application of the *Competition Act* to their own duties;
- a practical code of conduct that identifies activities that are illegal or open to question;
- a statement outlining the consequences of breaching corporate policies;
- procedures that detail exactly what an employee should do when certain situations give rise to concerns or when possible violations of the *Competition Act* are suspected; and
- an acknowledgement, signed by each employee, indicating that the employee has read and understood the policy and will adhere thereto.

The compliance manual should contain a minimum amount of technical language or legal jargon and be written for the layperson.

In addition, the company's code of ethics should contain an obligation for employees to comply with the *Competition Act* and to refrain from any violation of its provisions.



Patrick Buchholz has been a member of the Quebec Bar since 1992 and specializes in Business Law, with a focus on Competition Law



Larry Markowitz has been a member of the Quebec Bar since 1996 and specializes in Business Law, with a focus on Competition Law

Compliance Program Benefits

An effective compliance program will:

- educate employees, directors and officers about the requirements of the *Competition Act* and the current enforcement policies of the Competition Bureau and reduce uncertainty about what is or is not legal conduct;
- give early warnings of potentially illegal conduct;
- reduce the exposure of corporate officers, directors and employees, and the company itself, to criminal and civil liability;
- reduce costs related to litigation, fines, negative publicity, and the disruption to operations resulting from investigations and prosecutions before the courts or hearings before the Competition Tribunal;
- encourage innovative and pro-competitive behaviour in order to effectively respond to changing market conditions;
- increase the awareness of possible anti-competitive conduct by competitors, suppliers, or customers and thereby increase the likelihood of obtaining an appropriate remedy, either in the market or by appropriate legal recourse; and
- assist a company in its dealings with the Competition Bureau, for example, by identifying violations of the *Competition Act* early enough to allow the company the opportunity to make a request for immunity in a criminal matter.

Companies should remember that an effective competition law compliance program may place them in a more favourable position in the event that they are found to have violated the *Competition Act*. The Competition Bureau's position regarding alternate case resolution, immunity and sentencing recommendations may be influenced by the existence of an effective corporate compliance program. Of course, ideally, such a program should prevent the occurrence of anti-competitive behaviours in the first place.

Conclusion

This bulletin is merely intended to provide general guidance with respect to competition law compliance programs. For an analysis of your company's particular situation or the formulation of a compliance program, including the preparation of an employee compliance manual, please contact Serge Bourque at (514) 877-2997, Patrick Buchholz at (514) 877-2931 or Larry Markowitz at (514) 877-3048.

The Competition Law team at *Lavery, de Billy* institutes competition law compliance programs for our clients and also conducts seminars for their employees to inform and guide them with respect to competition law compliance.

Serge Bourque
Patrick Buchholz
Larry Markowitz

Mtres. Bourque, Buchholz and Markowitz are the co-authors of the *Loi sur la concurrence annotée* (Les Éditions Yvon Blais inc., 2000), an annotated version of the *Competition Act*.

You may contact any of the following members of the Competition Law group with regard to this bulletin.

at our Montréal office

Serge Bourque
Patrick Buchholz
Marc Cigana
David Eramian
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

www.laverydebilly.com

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