Competition Tribunal Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Premier Career Management Group Corp. and Minto Roy*, 2010 Comp. Trib. 17
File No.: CT-2007-006
Registry Document No.: 0208

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER of an inquiry pursuant to subparagraph 10(1)(b)(ii) of the *Competition Act* relating to certain marketing practices of Premier Career Management Group Corp. and Minto Roy;

AND IN THE MATTER of an application by the Commissioner of Competition for an order under section 74.1 of the *Competition Act*.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Premier Career Management Group Corp. and Minto Roy
(respondents)

Decided on the basis of the written record.
Before Judicial Member: Simpson J. (Chairperson)
Date of Reasons for Order and Order : December 9, 2010
Reasons for Order and Order signed by: Justice Sandra J. Simpson

ORDER AND REASONS REGARDING ADMINISTRATIVE MONETARY PENALTIES AND NOTICE UNDER SECTION 74.1 OF THE COMPETITION ACT

I. Background

[1] Premier Career Management Group Corp. ("PCMG") operated a career counselling service in the Greater Vancouver area. Minto Roy ("Roy") was PCMG's President, sole director and sole shareholder.

[2] In the 2 ½ year period from October 2004 to March 2007, Roy and other PCMG personnel invited approximately 3,000 prospective customers to meet privately in PCMG's office. Of that group, 501 prospective customers signed contracts for counselling services and paid fees of approximately $5,500.00 each.

[3] A significant number of the prospective clients signed contracts because of misrepresentations made by Roy and senior career counsellors at PCMG to the effect that:

(a) PCMG and Roy had an extensive network of personal contacts with senior executives at companies that were hiring. PCMG clients could use the contacts to arrange interviews or PCMG would arrange interviews on the clients' behalf (the "Contacts Misrepresentations"); and

(b) Prospective PCMG clients would almost certainly find work quickly with its help, typically within 90 days, and their new positions would have salaries and benefits equal to or better than those associated with their previous positions (the "90-day/Good Job Misrepresentations").

These will be referred to collectively as the "Misrepresentations".

[4] On May 8, 2007, the Commissioner of Competition (the "Commissioner") applied to the Competition Tribunal (the "Application") under section 74.1 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"). She alleged that Roy and PCMG had misrepresented PCMG's services. On July 15, 2008, after a hearing in Vancouver, Reasons and an Order were issued by the Tribunal dismissing the Application (the "Decision").

[5] In the Decision, the Tribunal concluded that the Misrepresentations had been made but determined that they had not been made to the public as required by section 74.01 of the Act because they were made in private meetings in PCMG's offices which had been arranged by personal invitation. A full description of the facts and the evidence appears in the Decision (see *The Commissioner of Competition v. Premier Career Management Group et al.*, 2008 Comp. Trib. 18).

[6] The Commissioner appealed the Decision to the Federal Court of Appeal and the appeal was allowed. In its judgement of October 15, 2009, the Court of Appeal held that the Misrepresentations had been made to the public. It therefore granted the Commissioner's application under section 74.1 of the Act. However, the question of remedies was remitted back to the Tribunal.

[7] At the Tribunal's request, a conference call was held on October 21, 2009 to discuss the terms of a proposed order. Later that day, the Tribunal issued an Order Requiring PCMG and Roy to Cease-and-Desist (the "Cease-and-Desist Order") and reserving its decision about other remedies (see *The Commissioner of Competition v. Premier Career Management Group and Minto Roy*, 2009 Comp. Trib. 17). This decision deals with other remedies sought by the Commissioner.

II. The Issues

[8] The issues are:

(a) whether the respondents should be ordered to pay administrative monetary penalties ("AMPs") under subparagraphs 74.1(1)(*c*) (i) and (ii) of the Act*;*
(b) whether the respondents should be required to give notice pursuant to paragraph 74.1(1)(*b*) of the Act.

Issue (i) AMPs

[9] The Commissioner seeks the maximum AMPs which can be levied in this case i.e. $50,000.00 against Roy and $100,000.00 against PCMG.

[10] The respondents, on the other hand, submit that no AMPs should be imposed.

Discussion

[11] The starting point on this issue is subsection 74.1(5) of the Act as it read when the Application was filed. It provided that:

(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c): (a) the reach of the conduct within the relevant geographic market; (b) the frequency and duration of the conduct; (c) the vulnerability of the class of persons likely to be adversely affected by the conduct; (d) the materiality of any representation; (e) the likelihood of self-correction in the relevant geographic market; (f) injury to competition in the relevant geographic market; (g) the history of compliance with this Act by the person who engaged in the	(5) Pour la détermination du montant de la sanction administrative pécuniaire prévue à l'alinéa (1)c), il est tenu compte des éléments suivants : a) la portée du comportement sur le marché géographique pertinent; b) la fréquence et la durée du comportement; c) la vulnérabilité des catégories de personnes susceptibles de souffrir du comportement; d) l'importance des indications; e) la possibilité d'un redressement de la situation sur le marché géographique pertinent; f) le tort causé à la concurrence sur le marché géographique pertinent; g) le comportement antérieur, dans le cadre

reviewable conduct; and (h) any other relevant factor.	de la présente loi, de la personne qui a eu un comportement susceptible d'examen; h) toute autre circonstance pertinente.

[12] I will deal with each factor in turn.

(a) The Reach of the Conduct in the Relevant Geographic Market

[13] The respondents submit that the reach of the conduct was minimal. They estimate that the Misrepresentations reached approximately 4.45% of the individuals looking for work in Greater Vancouver. The Commissioner disputes the respondents' assertions and submits that the respondents marketed their services to relatively well educated individuals and that the reach of their conduct was substantial when one considers that the Misrepresentations were made to 3,000 individuals who were in the market for the respondents' "high-end" counselling services.

[14] At the hearing, the evidence of Mr. Wills, a former career counsellor at PCMG, indicated that the Misrepresentations were routinely made by Roy. He testified that Roy more frequently made the Contacts Misrepresentations during interviews with senior prospective customers. He also said that the 90-day/Good Job Misrepresentations were regularly made by him and by others at PCMG.

[15] According to Mr. Wills, the Misrepresentations were discussed in PCMG's sales meetings and Roy made it clear in his statements and by example that he expected the Misrepresentations to be made whenever they were needed to secure contracts.

[16] Roy denied making the Misrepresentations. Although I did not believe his broad denial, I accepted the evidence of the four witnesses who testified that they had not heard the Misrepresentations during their interviews with PCMG.

[17] There is no clear evidence about the number of prospective clients who may have heard the Misrepresentations. In these circumstances, I think it reasonable to conclude that a significant number but, contrary to the Commissioner's submission, not virtually all of the 3,000 prospective clients heard the Misrepresentations during their interviews at PCMG's offices.

[18] Of that number only 501 signed contracts and I am prepared to conclude most of them, but not all, were induced to sign by one or more of the Misrepresentations.

[19] The Misrepresentations were never included in any media in the Greater Vancouver geographic market. In other words, they did not appear in flyers, or in newspapers, or on television, or on the internet. They were heard in private in PCMG's offices by less than 3,000 people and persuaded less than 501 prospective clients to sign contracts. In my view, these facts do not suggest that the reach of the conduct or, put another way, the extent to which the Misrepresentations were disseminated, should be treated as an aggravating factor.

(b) The Frequency and Duration of the Conduct

[20] The Commissioner alleges that the respondents made the Misrepresentations continuously as part of a deliberately dishonest plan.

[21] The evidence shows that the Misrepresentations formed an integral part of a consistent business strategy to exploit prospective customers. They were used whenever necessary to induce prospective customers to sign contracts. This behaviour lasted for 2 ½ years and continued even after the Commissioner began her investigation. Accordingly, I have treated this as an aggravating factor.

(c) The Vulnerability of the Persons Likely to be Adversely Affected

[22] According to the Commissioner, the people to whom the Misrepresentations were made were highly vulnerable. She notes that many of the prospective clients were relative newcomers to Canada and that Roy tailored PCMG's advertisements to target new immigrants. She refers to the testimony of Mr. Wills and, in particular, his statement that he "typically met with 20 to 25 potential clients a week with many of them being young people recently graduated from some private college or new immigrants with poor English language skills." The Commissioner adds that Roy and PCMG encouraged their prospective clients to borrow money from friends or family, or to pay with credit cards.

[23] In the Decision, I concluded that the majority of those who were interested in career counselling were likely to be needy in the sense that they required employment on an urgent basis. In my view, such people were vulnerable and the Misrepresentations were calculated to exploit that vulnerability. Accordingly, I have treated this as an aggravating factor.

(d) The Materiality of Any Misrepresentation

[24] The Commissioner asserts that the Misrepresentations were material to the decisions made by the prospective clients. She adds that the materiality of the Misrepresentations is confirmed by the fact that, once the respondents could no longer make them, PCMG's business ceased to be viable.

[25] In my view, the Misrepresentations were material because they suggested that a job search would be easy, swift and lucrative and because they induced prospective clients to retain PCMG to provide career counselling services. Accordingly, I have treated materiality as an aggravating factor.

(e) The Likelihood of Self-Correction in the Relevant Geographic Market

[26] The Commissioner takes the position that self-correction refers to Roy's conduct and she stresses the fact that Roy has never acknowledged that he did anything wrong. She also notes that, had the Application not been brought, the respondents would, in all likelihood, still be making the Misrepresentations.

[27] The respondents focus on the geographic market and submit that self-correction has already occurred because the Misrepresentations have been eliminated from the Greater Vancouver area. In an affidavit sworn on November 5, 2009, Roy swears that he has not made the Misrepresentations since November 1, 2008. The respondents further submit that at least five of the nine clients who testified before the Tribunal had a portion of their career counselling fees refunded or repaid in settlements out of court. Finally, the respondents note that Roy no longer works as a career counsellor. The Commissioner does not dispute that the Misrepresentations no longer influence the market.

[28] In her reply submissions, the Commissioner again focuses on Roy and asserts that he operates a website which is devoted to providing career and recruitment advice to the public. She states that the most recent entry on the website is entitled "Career Tips" and that the link provided leads to an audio file in which the announcer states "Move your career forward or hire that next great employee with a career tip from Minto Roy, President from Premier Career Management Group." The Commissioner submits that while Roy is free to re-enter the career counselling field, the respondents cannot rely on the fact that Roy is not presently employed as a career counsellor to assuage any concerns the Tribunal may have regarding his future conduct.

[29] The Commissioner also submits that the substantial revenues the respondents were able to generate by conducting PCMG's business in a deceptive manner create an enormous incentive for the respondents to use deceptive marketing techniques in the future to promote their business interests.

[30] The respondents, in their further submissions, maintain their denial and repeat that Roy does not currently provide career counselling services. Roy, in an affidavit sworn on February 25, 2010, acknowledges that he operates three blogs and a twitter page but swears that they "exist only to provide general tips on securing employment" and that they also provide an outlet for his thoughts on other business issues.

[31] In my view, the word "likelihood" in the subsection suggests a forward-looking assessment. Accordingly, the question to be answered in the circumstances of this case in which the Misrepresentations have ceased is whether there is reason to suppose that Roy will return to career counselling and, if he does, whether he will use misrepresentations to induce clients to sign contracts.

[32] Roy is no longer a career counsellor although he gives advice over the internet about the job market and job search techniques. However, his full time job is in sales as a Vice President and Partner of Snaptech Technologies. Further, PCMG is inactive and there is no evidence showing PCMG's net income and the salaries it paid. In these circumstances, I am not able to find that Roy or PCMG face an overwhelming incentive to return to career counselling and deceptive marketing practices.

[33] In view of Roy's current employment and the fact that, to date, he has respected the Cease-and-Desist Order, I have concluded self-correction is not an aggravating factor.

(f) The Effect on Competition

[34] The Commissioner asserts that the conduct at issue hurt competition in the career counselling market in Greater Vancouver in two ways. First, by creating distortions in the market for career counselling services; and second, by creating doubts in the minds of consumers with respect to services offered by career counselling services generally. With respect to the first category of injury, the Commissioner says that while the harm is difficult to quantify, it is substantial since the respondents siphoned-off approximately $2,755,500 (501 clients x $5,500.00) from the career counselling market.

[35] The respondents submit that this paragraph of the Act focuses on actual harm to competition and not the notional harm that occurs whenever the deceptive marketing provisions of the Act are breached. The respondents argue that the Misrepresentations had no competitive effect in this instance because the Tribunal found that the Misrepresentations were not accessible in the marketplace.

[36] The Commissioner, in her reply submissions, submits that since the Federal Court of Appeal found that competition was "necessarily harmed", it is not open to the respondents to argue otherwise.

[37] In my view, there was automatic injury to competition in the market for career counselling services in the Greater Vancouver Area when most of the 501 clients who engaged PCMG's services, did so based on the Misrepresentations. However, in the circumstances of this case in which the dissemination of the Misrepresentations was limited, I am not prepared to conclude that the harm to competition is an aggravating factor.

(g) History of Compliance

[38] The respondents submit that Roy and PCMG are first time offenders with no prior history of deceptive marketing or any other competition offences. This is not disputed. Accordingly, their history of compliance is not an aggravating factor.

(h) Other Factors – Roy's and PCMG's Financial Positions

[39] The respondents note that Roy is in significant debt with little or no assets and that his monthly financial obligations are approximately equal to his income. The respondents therefore submit that any AMP would be punitive because it would burden Roy with debts he cannot afford to pay. They note that subsection 74.1(4) of the Act expressly states that an AMP should not be ordered with a view to punishment.

[40] On the other hand, the Commissioner submits that Roy's financial status should be given no weight in reducing the amount of the AMP and, if relevant, his financial status only bears on a possible payment schedule. Relying on the British Columbia Court of Appeal's decision in *Hogan v. British Columbia Securities Commission*, 2005 BCCA 53, the Commissioner submits that if the Tribunal accepts the respondents' arguments, it would send a signal to corporations

that they can engage in reviewable conduct under section 74.01 of the Act without fearing the imposition of an AMP as long as they dispose of their ill-gotten gains in a timely manner.

[41] In my view, the uncontested evidence is that PCMG has not carried on any business since September 30, 2008 and that its shares have no value. Further, Roy has significant debts and obligations and reasonable expenses which consume his monthly salary. I have therefore treated this as a mitigating factor but I have not assigned it much weight for the reason suggested by the Commissioner.

Conclusion

[42] A review of the factors described above has led me to conclude that the maximum AMPs requested by the Commissioner are not justified. However, the need for deterrence and the presence of several serious aggravating factors justify the imposition of AMPs.

[43] Accordingly, an AMP will be imposed on Roy in the amount of $20,000.00 and on PCMG in the amount of $10,000.00.

[44] The Commissioner says that she has no objection to a Tribunal order which would provide Roy and/or PCMG with the ability to pay AMPs over some reasonable period of time. However, she has made no specific submissions because she did not know the amounts of the AMPs and the respondents have not addressed this topic. In these circumstances, the Tribunal will not order a payment plan but will give the parties time to negotiate such a plan.

Issue (ii) Notice

[45] The Commissioner has decided not to ask the respondents to publish a notice pursuant to paragraph 74.1(1)(*b*) of the Act. However, she has asked that this order include the following statement:

> Whereas in view of the fact that the Commissioner is satisfied that since September 30, 2008, neither of the Respondents, nor anyone acting for their benefit or on their behalf, has made, by any means whatsoever, false or misleading representations to the public for the purpose of promoting any career coaching or counselling services or any other service which assist individuals to find employment, the Commissioner does not seek the publication of a notice pursuant to paragraph 74.1(1)(b) of the Act.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[46] (i) The corporate respondent Premier Career Management Group Corp. shall pay an administrative monetary penalty of $10,000.00, to be paid by certified cheque payable to the Receiver General of Canada. It is to be received by the Commissioner on or before Friday, February 11, 2011. In the alternative, if a payment plan is negotiated, a signed copy of the plan together with all the post-dated cheques necessary to implement the plan shall be delivered to the

Commissioner on or before Friday, February 11, 2011. If a plan is negotiated, and if at any time a post-dated cheque fails to clear the bank, the full balance then due shall immediately become payable.

(ii) The respondent Minto Roy shall pay an administrative monetary penalty of $20,000.00, to be paid by certified cheque payable to the Receiver General of Canada. It is to be received by the Commissioner on or before Friday, February 11, 2011. In the alternative, if a payment plan is negotiated, a signed copy of the plan together with the post-dated cheques necessary to implement the plan shall be delivered to the Commissioner on or before Friday, February 11, 2011. If a plan is negotiated, and if at any time a post-dated cheque fails to clear the bank, the full balance then due shall immediately become payable.

DATED at Ottawa, this 9th day of December 2010.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Sandra J. Simpson

COUNSEL:

For the applicant:

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