

Consumer Protection

Some Important Recent Developments Pertinent to Ontario Business Lawyers



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My Focus

- What will be covered by “consumer protection” (CP) in this presentation?
 - Ontario’s *Consumer Protection Act* and some important recent actions of the Ontario Ministry of Government and Consumer Services (MGCS) and proposed legislation
 - the consumer protection provisions of the federal *Competition Act* and some important recent actions of the Competition Bureau

My Focus

- What won't be covered – the consumer protection provisions in
 - Many other Ontario laws (many sector specific) – e.g., *Energy Consumer Protection Act, Private Career Colleges Act, Travel Industry Act, Motor Vehicle Dealers Act, Real Estate and Business Brokers Act* and *Wireless Services Agreement Act*
 - Many other sector-specific federal laws – e.g., *Food and Drugs Act* and *Bank Act*

My Focus

- What also won't be covered – the consumer protection provisions in many other federal laws of general application – such as
 - the anti-spam and computer program installation provisions of *CASL* and the *Unsolicited Telecommunication Rules* - as enforced by the Canadian Radio-television and Telecommunications Commission (CRTC)
 - the privacy protection provisions and address harvesting prohibition in the *Personal Information Protection and Electronic Documents Act* (PIPEDA) - as enforced by the Office of the Privacy Commissioner of Canada (OPC)

My Focus

- Why should you care about consumer protection?
 - As a business lawyer, chances are at least some of your clients are “suppliers” that advertise, market and sell to consumers
 - that is, they are in the business of selling, leasing or trading in goods or services
 - Even if all of your clients are B2B companies, you, your family and friends are “consumers”
 - that is, they are individuals acting for personal, family or household purposes, not for business purposes

Consumers' Perspective

- Canadian consumers and suppliers have embraced the online world
- Online advertising, marketing and selling occupies an increasingly significant percentage of suppliers' interaction with consumers
- The online marketplace is becoming more sophisticated and innovative

CP Regulators' Perspective

- Innovation in this marketplace must respect the rights of consumers not to be deceived
- Continuing trend towards international and domestic cooperation amongst consumer protection regulators
- Two areas of important recent enforcement action:
 - where **key terms** were inadequately disclosed
 - where the **true cost** was hidden

International Cooperation of CP Regulators

- There is a continuing trend towards more regular, formal efforts of international cooperation between Canadian consumer protection regulators (such as the Competition Bureau and the OPC) and their counterparts in other countries
- This trend reflects the inherently global monitoring and enforcement challenges that the online marketplace poses
- For several years now, the federal Competition Bureau has participated in internet sweeps under the auspices of the International Consumer Protection and Enforcement Network (ICPEN) – a group of over 50 consumer protection agencies around the world

International Cooperation of CP Regulators

- In late 2015, ICPEN swept a range of websites and mobile apps for conduct known as ‘drip pricing’ in the online booking process
 - Drip pricing is where a headline price is advertised at the beginning of an online purchasing process and additional fees and charges (which may be unavoidable or applied in most transactions) are then incrementally disclosed (or ‘dripped’)
 - This can result in consumers paying a higher price than the advertised price, spending more than they realize and making it more difficult to compare offers

Domestic Cooperation of CP Regulators

- In March 2015, the Competition Bureau and MGCS signed their first ever memorandum of understanding
 - to work together to combat deceptive advertising and marketing to consumers in both online and traditional (e.g., door-to-door) marketplaces and to make these marketplaces safer, fairer and better informed
 - with the objective of enhancing consumer protection in the marketplace and strengthening compliance with, and enforcement of, the federal *Competition Act* and Ontario's *Consumer Protection Act*

Domestic Cooperation of CP Regulators

- To achieve the MOU's objective, each jurisdiction committed to:
 - notify each other about enforcement activities
 - advise on strategic priorities, trends and policies
 - coordinate communications to the public on consumer protection and competition matters

Case Study - Ontario Water Heater Industry

- For years, the Bureau has been active with several enforcement actions in the Ontario water heater industry – for instance
 - In December 2012, the Bureau filed applications with the Competition Tribunal against Reliance and Direct Energy alleging that both companies had implemented anti-competitive water heater return policies and procedures aimed at preventing consumers from switching to competitors

Case Study - Ontario Water Heater Industry

- In November 2014, Bureau obtained commitments from Enercare Inc., the company that acquired Direct Energy's water heater rental business in Ontario, that it would not continue DE's alleged anti-competitive and deceptive practices

Case Study - Ontario Water Heater Industry

- In October, 2015 – Bureau reached consent agreement with Direct Energy (despite DE having exited in 2014 Ontario's residential water heater industry market)
 - to pay \$1 million penalty to resolve concerns that DE restricted competition and limited consumer choice in that market
 - to maintain a corporate compliance program in the event DE re-enters that market in the next 10 years

Case Study - Ontario Water Heater Industry

- Two other Bureau actions pertinent to Ontario water heater industry
 - In November 2014, Bureau reached consent agreement with National Home Services to pay \$7 million for alleged deceptive door-to-door water heater promotions, composed of a \$5 million penalty, \$1.5 million in restitution to consumers (in Ontario and Quebec) and \$500K towards Bureau's investigative costs
 - In April 2016, Bureau warned Canadian consumers to check the fine print when buying a home because water heater rental contracts may be bundled into the purchase contract ... and the exit fees for these contracts can be expensive (i.e., \$1,000 or more)

Case Study - Ontario Water Heater Industry

- Likewise, for years, MGCS has been active with several enforcement actions, including most recently
 - April 15, 2016 – MGCS announced that it had laid over 100 charges under the Ontario *Consumer Protection Act* against Ontario Energy Group (OEG) and its director, Eugene Farber
 - OEG sells water heaters, furnaces and air conditioners door-to-door throughout Ontario
 - The charges laid include using deceptive practices, failure to deliver a valid contract and failure to refund

Case Study - Ontario Water Heater Industry

- The charges against OEG and Mr. Farber are before the court and have not been proven
- For each offence, the Act provides
 - for corporations, fines of up to \$250,000
 - for individuals, fines of up to \$50,000, jail terms of up to two years less a day, or both

Proposed Ontario Ban on Door-to-Door Sales – Bill 193

- May 2, 2016 – Liberal MP, Yvan Baker, introduced a private member's bill to ban door-to-door sales and leases of water heaters, water treatment devices, air conditioners and furnaces
- Any sale or rental in contravention of the Act would be deemed void
- May not be strong support for Bill 193 (as it is not government legislation, even though the sponsor is a member of the governing party)

Ads Where Key Terms Hidden

Commissioner's *Premium Text Messaging Case*, May 27, 2016

- In September 2012, following a five-month Bureau investigation, the Commissioner began legal proceedings in the Ontario Superior Court of Justice against Bell, Rogers, Telus and the Canadian Wireless Telecommunications Association (CWTA) alleging deceptive advertising relating to premium text message and rich content services (such as trivia questions and ringtones) for mobile phones
- The Bureau's investigation determined that the three telecom companies, in conjunction with the CWTA, facilitated the sale to their own customers of premium-rate digital content provided by third parties – in this way, the Bureau tackled the “point of diffusion” for the allegedly deceptive advertising

Ads Where Key Terms Hidden

Commissioner's *Premium Text Messaging Case*, May 27, 2016

- The Commissioner alleged that customers were led by third party advertisers into believing this content was free, when it was not
- In fact, the premium-rate digital content could cost up to \$10 per transaction and up to \$40 for a monthly subscription – these costs were over and above standard text messaging plans
- Furthermore, the Commissioner alleged that the telecom companies led their customers to believe that measures were in place to prevent unauthorized charges on their mobile phone bills

Ads Where Key Terms Hidden

Commissioner's *Premium Text Messaging Case*, May 27, 2016

- In September 2012, the Commissioner sought full customer refunds and administrative monetary penalties totalling \$31 million – that is, \$10 million each from Bell, Rogers and Telus and \$1 million from the CWTA
- In March 2015, the Bureau announced that, in settlement, Rogers had agreed to pay up to \$5.42 million in refunds to its customers in connection with premium charges that were allegedly “unauthorized” and “crammed” onto their mobile phone bills

Ads Where Key Terms Hidden

Commissioner's *Premium Text Messaging Case*, May 27, 2016

- Similarly, in December 2015, the Bureau announced that, in settlement, Telus had agreed to pay up to \$7.34 million in customer refunds and to donate \$250,000 to consumer advocacy and research groups whose work advances the public interest in areas related to the digital economy

Ads Where Key Terms Hidden

Commissioner's *Premium Text Messaging Case*, May 27, 2016

- Likewise, on May 27, 2016, the Bureau announced that, in settlement,
 - Bell had agreed to pay up to \$11.82 million in customer rebates and to donate roughly \$800,000 to public interest advocacy groups to support digital media research and awareness
 - the CWTA had agreed to develop a consumer awareness campaign and implement a corporate compliance program focusing on “billing on behalf of” practices

Ads Where Key Terms Hidden

Commissioner's *Premium Text Messaging Case*, May 27, 2016

- Rogers, Telus and Bell also each agreed to issue a public notice to affected customers, implement an enhanced corporate compliance program, and develop a consumer awareness campaign to educate consumers about how charges can be incurred on wireless devices and how to avoid unwanted charges
- Bureau's May 27th press release states that "the resolution of this matter brings total refunds to consumers to over \$24 million while over \$1 million in donations will go to leading consumer advocacy and research groups dedicated to supporting public interest in the digital economy."

Ads Where True Cost Hidden

Commissioner's *Vehicle Rental Pricing Case*, June 2, 2016

- In March 2015, the Commissioner of Competition filed an application with the Competition Tribunal against Aviscar, Budgetcar and their parent Avis Budget Group Inc. alleging deceptive vehicle rental price advertising
- Commissioner sought a total of \$30 million in administrative monetary penalties and \$35 million in refunds for consumers

Ads Where True Cost Hidden

Commissioner's *Vehicle Rental Pricing Case*, June 2, 2016

- Following the Bureau's investigation, the Commissioner alleged that:
 - Avis and Budget advertise prices for vehicle rentals that are not attainable due to additional fees imposed during the rental process
 - These fees are characterized as taxes, surcharges and fees that governments and agencies require Avis and Budget to collect from consumers when, in fact, Avis and Budget impose these fees to recoup their costs of doing business
 - The additional fees could increase the cost of a rental by up to roughly 35%, depending on rental location and type of vehicle

Ads Where True Cost Hidden

Commissioner's *Vehicle Rental Pricing Case*, June 2, 2016

- The litigation was also the first proceeding under new provisions for “deceptive electronic messages” under the *Competition Act* that came into force in July 1, 2014 as part of CASL
 - Commissioner alleged that Avis and Budget used electronic messages to disseminate the alleged deceptive advertisements – i.e., the prices were advertised on websites and in mobile apps and emails (as well as in traditional newspaper ads, TV commercials and flyers)

Ads Where True Cost Hidden

Commissioner's *Vehicle Rental Pricing Case*, June 2, 2016

- On June 2, 2016, the Bureau announced that Avis and Budget had agreed to:
 - not advertise car rentals at prices that are not attainable due to additional mandatory fees
 - revise the description of the additional fees to ensure that they do not give the deceptive impression that governments or agencies require them
 - pay a \$3 million administrative monetary penalty
 - pay \$250K towards the Bureau's investigative costs
 - implement a corporate compliance program

Some Concluding Thoughts

- Consumer protection law can often be reduced to simple “rules of thumb” - e.g., be honest, fair and transparent ... “tell the truth”
- But in highly competitive and innovative markets where technology changes rapidly the compliance challenges (especially for complex consumer offers) may be more nuanced – e.g., the question may be when and how far can the truth be stretched

Some Concluding Thoughts

- Regulators are actively enforcing consumer protection laws
- Costs of non-compliance are significant – big penalties, jail time, class action damages for restitution, reputational harm
- By comparison, costs of compliance are generally not significant – that is, corporate compliance programs and due diligence are prudent and cost-effective

Thank You

This presentation contains general information only and does not constitute legal advice.
Qualified legal counsel should be consulted to assess the application of laws to specific facts.

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