



PERSPECTIVE

Is the Price Right? Increased Regulatory Scrutiny and Class Actions for Representations Involving Price

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Businesses operating in Canada should be aware of a recent trend towards greater regulation and enforcement action surrounding pricing representations where additional costs are not clearly disclosed up front. Last week, the Minister of State for Transport announced that the Canada Transportation Agency is proceeding with regulations to require Canadian air carriers to include all fees, charges and taxes in advertised prices. This trend towards requiring up-front disclosure of all fees and charges in any advertised pricing is consistent with the enforcement initiatives recently undertaken by the Competition Bureau (the "Bureau") as well as the approach taken in recent class actions involving pricing representations brought in Québec and Ontario. The Bureau's aggressive enforcement approach combined with an increase in class actions concerning pricing representations suggests it may be prudent for businesses to consider disclosing all fees imposed by the seller and applicable to all customers up front in any advertising.

On December 16, the federal Minister of State for Transport, the Honourable Steven Fletcher announced that the Canada Transportation Agency will be developing regulations to require Canadian air carriers to include all charges in advertised prices. Mr. Fletcher explained that the regulations are intended to promote fair competition "by ensuring greater transparency of advertised airfares for Canadian travellers". The Canada Transportation Agency is empowered under the *Canada Transportation Act* to make regulations respecting the prices for air services within or originating in Canada advertised in all media, including the Internet. The drafting and consultation process for the regulations is expected to take approximately a year to complete. The planned regulations will require air carriers who advertise prices to include "all costs to the carrier" of providing the service and to indicate in the advertisement all fees, charges and taxes collected by the carrier on behalf of another person. The advertised price must enable consumers to "readily determine the total amount" to be paid. The plans for Canadian airfare pricing regulation follow similar increased regulation in both the European Union and the United States regarding the pricing of airfares.

The move to require up front disclosure of all fees and charges in advertised prices for airline carriers also follows enforcement action undertaken by the Competition Bureau in other

industries. Specifically, the Competition Bureau has taken the stance that "the popular trend" of advertising a price to consumers and then disclosing additional mandatory costs in accompanying fine print is misleading and may result in enforcement action. This stance is clearly evidenced in a recent settlement reached with Bell Canada regarding its approach to pricing representations as well as recent speeches by the Commissioner of Competition (the "Commissioner") regarding the Bureau's future enforcement activities.

On June 28, 2011, the Bureau announced that Bell Canada had agreed to modify certain advertisements which the Bureau alleged were contrary to the civil misleading advertising provisions in the *Competition Act* and to pay a penalty of \$10 million as well as a sum towards the Bureau's legal costs. According to the Bureau, Bell made false or misleading representations between December 2007 and June 2011 about the prices at which certain of its services were available. Specifically, the Bureau alleged that Bell's advertisements created the misleading "general impression" that consumers need only pay the monthly price advertised in the main body of the advertisements and that Bell had used a variety of "fine-print disclaimers" to "hide" additional mandatory fees from customers. According to the Bureau, the actual price paid by Bell's customers for the advertised products was higher than the price that was advertised in the main body of the advertisement. Although Bell did not accept the Bureau's allegations, it agreed not to contest these allegations for the purposes of the settlement, and to modify all advertising at issue within 60 days.

Since the Bell settlement was announced, the Commissioner has given various speeches regarding the Bureau's enforcement priorities for the coming year. In particular, the Commissioner has recently stated that "misleading representations continue to be an area of concern for the Bureau" and, with respect to pricing representations, the Commissioner has stated that the Bureau is "investigating several industries where we are concerned that Canadians have been taken advantage of, in this or related ways". The Bureau's focus on misleading advertising and consumer-oriented enforcement appears to be part of the Bureau's goal to "demonstrate the relevance of the Bureau's work to Canadians in their everyday lives".

Given that the Bureau clearly considers price representations to be an enforcement priority, it is somewhat surprising that the Bureau has not issued any new guidance in the form of revised guidelines or any specific guidance to the industries where the Bureau is concerned about the disclosure provided (as it has done in prior instances). Rather, the Bureau appears to be taking aggressive enforcement action (such as that against Bell) in the hopes that such enforcement activity will motivate compliance. The lack of further guidance on this point is particularly surprising given that the use of "mice print" and disclaimers is widespread in Canadian advertising and the Bureau's existing guidelines on point merely provide that "if a representation is made concerning the price of a product, any such additional required payment should be disclosed at the same time". In other words, under the Bureau's existing guidelines, it is certainly arguable that a customer has received adequate disclosure of the applicable price via the information contained in the smaller print.

In a similar vein, allegedly misleading advertising and charging consumers "undisclosed" costs has given rise to a number of class actions in Québec on the basis of Québec's *Consumer Protection Act* (the "Québec CPA"). Section 12 of the Québec CPA, which applies to advertisements in all forms, provides that "no costs may be claimed from a consumer unless the amount thereof is precisely indicated in the contract." While the word "costs" (or "frais" in French) is not defined in the Québec CPA, Québec courts have interpreted this term broadly as including, for example, commissions, administrative fees and surcharges. Québec's Consumer Protection Office has taken the position that the advertised price must be the total price that a

consumer has to pay and that the only amounts that can be excluded from this price are amounts payable pursuant to federal or provincial legislation that are levied directly on the consumer and that are remitted to a public authority such as, for example, the Québec Sales Tax (QST) or GST. The alleged failure to comply with section 12 of the Québec CPA has given rise, most recently, to a proposed class action against a Québec-based telecommunications company seeking restitution for amounts allegedly improperly charged, as well as \$5 million in punitive damages.

Class actions based on a lack of full disclosure of applicable fees and charges have been initiated in Ontario as well. For instance, a class action against United Parcel Service Canada Ltd. ("UPS") was brought on the basis that UPS failed to disclose mandatory brokerage fees to consumers, and thereby breached various provisions of Ontario's *Consumer Protection Act* ("Ontario CPA"). This class action was recently certified by the Ontario Superior Court of Justice. The brokerage fees were imposed on consumers for the delivery of items shipped from the United States, and as the judge pointed out, were not a government imposed duty or tax, but rather were levied by UPS for its customs clearing services. Further, the judge found that various standard form contracts used by UPS did not disclose the disputed fee. UPS has indicated it plans to appeal the Superior Court's decision.

The federal government's planned regulation of airline advertising, the Bureau's aggressive enforcement initiatives regarding price representations as well recent class actions should be taken as cautionary signals to Canadian businesses. In particular, when charges are imposed by the seller and applicable to all customers – in order to avoid enforcement action or litigation – businesses should consider disclosing such fees up front and including such fees in the prices featured in any advertising.

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