

Kluwer Competition Law Blog

Canada Tackles Misleading Advertising and Business Promotions

Mark Katz (Davies Ward Phillips & Vineberg LLP, Canada) · Friday, March 13th, 2015

Three recently announced enforcement proceedings underscore the importance of complying with the rules governing advertising and business promotions in Canada. These rules are contained in the Competition Act as well as legislation and policies governing, for example, (i) telemarketing and (ii) the use of “commercial electronic messages” to promote a business’s products and services.

1. Competition Bureau Takes on Alleged False or Misleading Car Rental Advertising

The Competition Bureau (“Bureau”) filed an application with the Competition Tribunal on March 11, 2015 against two of Canada’s largest rental car companies, Aviscar and Budgetcar, and their parent company, Avis Budget Group Inc., for alleged false or misleading price representations (<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03885.html>).

The Bureau alleges that Avis and Budget have advertised prices for vehicle rentals and other associated products that are not attainable due to additional fees imposed during the rental process. As a result, consumers end up paying higher prices (by up to approximately 35 percent) or receiving lower discounts than advertised. The Bureau also alleges that Avis and Budget have characterized these fees as mandatory government taxes and surcharges when, according to the Bureau, Avis and Budget simply impose these charges to recoup part of their own costs of doing business.

The Bureau is seeking orders (i) prohibiting the companies from continuing with these allegedly false and misleading representations, (ii) imposing administrative monetary penalties totalling C\$30 million, and (iii) requiring refunds for customers. The Bureau notes in this regard that Avis and Budget have collected more than \$35 million in such fees and surcharges since March 2009.

The Avis/Budget application is the latest Bureau proceeding alleging that companies have improperly hidden the full cost to consumers of buying their products/services. In 2013, the Bureau initiated proceedings against two large furniture retailers in Canada for allegedly burying the details of additional fees in fine print, which led the final prices of products being higher than the advertised prices (<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03582.html>). The Bureau has also made it clear in recent speeches that investigating incidents of “hidden costs” or “drip pricing” remains an enforcement priority (<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03856.html>).

Finally, it is noteworthy that the Bureau has brought its proceedings under both the Competition Act's general misleading advertising prohibition and the new provisions that came into force as part of Canada's Anti-Spam Legislation ("CASL") in July 2014. The basis for the latter claim is that Avis and Budget also use electronic messages to disseminate their alleged false or misleading representations.

2. CRTC Imposes First Fine Under Canadian Anti-Spam Law

Speaking of CASL, Canada's broadcasting and telecom regulator, the Canadian Radio-television and Telecommunications Commission ("CRTC"), issued its first Notice of Violation under this legislation on March 5, 2015 (<http://news.gc.ca/web/article-en.do?nid=944159>).

Despite its name, CASL is not limited to what one might normally consider spam or junk email. Rather, the law applies to any electronic message sent in connection with a commercial activity (referred to in the legislation as a "commercial electronic message," or "CEM"). CASL's broad definition of CEM includes any emails, texts, instant messages, Facebook or other social media messages sent to the electronic addresses of customers or prospective customers promoting a business or its products.

The basic premise of CASL is that, subject to certain exemptions, (i) senders of CEMs must have the prior consent of recipients (express or implied), and (ii) CEMs must comply with certain form and content requirements, including specifying the purpose for which consent is sought and providing an "unsubscribe" mechanism for recipients who no longer wish to receive a sender's CEMs.

The consequences of violating CASL can be severe, including up to \$10 million in fines for corporations, personal liability for individual officers and directors, vicarious liability for companies for non-compliant acts of their employees and, after July 1, 2017, possible civil actions.

The CRTC's Notice of Violation was issued against Compu-Finder Inc., a Québec-based company that offers various training and development solutions for business executives and management. The CEMs sent by Compu-Finder (in this case emails) promoted training courses to businesses on topics such as management, social media and professional development. The CRTC alleges that Compu-Finder sent emails between July 2, 2014 and September 16, 2014 without the consent of recipients and without a properly functioning unsubscribe mechanism. The CRTC has ordered Compu-Finder to pay a penalty of \$1.1 million, subject to Compu-Finder's right to submit written representations in its defence to the CRTC.

Significantly, the CRTC's announcement also states that it has a number of other CASL investigations underway and that it is working with its partners, both within Canada (such as the Competition Bureau and the Privacy Commissioner) and internationally, to "protect Canadians from online threats and contribute to a more secure online environment".

3. Company Fined for Violating Rules Against "Unsolicited Telecommunications"

The CRTC also announced on March 11, 2015 that Consolidated Travel Holdings Group Inc. has been fined \$200,000 for violating the CRTC's "Unsolicited Telecommunications Rules" (<http://www.crtc.gc.ca/eng/archive/2015/vt150311.htm>). The Unsolicited Telecommunications Rules are a set of rules that individuals, companies and organizations must follow when making telemarketing calls.

Consolidated Travel Holdings is a holding company based in Florida. It owns and operates Caribbean Cruise Line Inc. Acting on complaints, the CRTC launched an investigation and found that Caribbean Cruise Line had made unsolicited telemarketing calls via an automatic dialing-announcing device to offer free cruises to the Bahamas in exchange for answering a survey. Many of the call recipients had their phone numbers registered on Canada's National Do Not Call List ("DNCL"). The DNCL was launched in 2008 to protect Canadians from unsolicited telecommunications. Over 12.7 million numbers are currently registered on the DNCL.

In addition to paying the \$200,000 penalty, Consolidated Travel has agreed to voluntarily cease making unsolicited telemarketing calls to Canadian consumers. The CRTC also continues to follow up on alleged violations of the Rules by other operators offering cruises.

Of final note, the CRTC states in its announcement that it worked closely with the U.S. Federal Trade Commission in its investigation of Consolidated Travel Holdings and Caribbean Cruise Line. This is a helpful reminder that cross-border cooperation with U.S. authorities is now a commonplace feature of Canadian investigations into alleged misleading advertising conduct.

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