

Consumer protection and online advertising

The Competition Bureau (the Bureau), the Office of the Privacy Commissioner (OPC) and other regulators have identified the protection of consumers in the online marketplace as a key enforcement priority. In the past two years, the Bureau has settled 13 misleading advertising cases by way of consent agreement and has another key enforcement proceeding pending before the Competition Tribunal.

Latest enforcement priorities:



Drip pricing: Advertising a low headline price, but only disclosing the existence of non-optional fees at a later stage of the sales process



“Made in Canada” claims: Making false or misleading claims about a product’s country of origin or location of manufacture



Astroturfing: Facilitating favourable online reviews for a product in a way that makes it appear as though they originate from grassroots participants



Performance claims: Making claims about the performance, efficacy or life of a product without conducting adequate or proper testing



Ordinary selling & list price claims: Advertising a product on “sale” or at a “discount” when the product was never actually sold or offered for sale at the “regular” price



Text and email promotions: Making false and misleading claims in commercial text or email messages, as well as the act of sending unsolicited promotions by commercial text or email messages without the recipient’s consent and/or without the ability to unsubscribe, contrary to Canada’s anti-spam legislation (CASL)



Behavioural/targeted advertising

Behavioural/targeted advertising is the improper use of a range of technologies aimed at increasing the effectiveness of advertising by collecting and using information about customers. These include:

IP addresses

Webpages visited

Advertisements viewed

Articles read

Purchases made

Search terms used

User preferences such as language and web browser type

Operating system

Geographical location



Enforcement actions lead to parallel class actions

- An increasing number of follow-on class actions have been filed on the heels of enforcement actions in the advertising space. For example, the OPC's investigation of the Bell Relevant Ads program was quickly followed by a \$750-million dollar class action claim alleging breach of contractual obligations, privacy laws and the *Telecommunications Act*. These cases also present unique challenges for the plaintiff in establishing commonality.
- In misrepresentation claims, plaintiffs must present an objective method for identifying class members who relied on the alleged misrepresentation. The "identifiable class" requirement continues to play a gate-keeping role for access to the class action regime. This was the case in a recent B.C. Supreme Court decision, which denied certification of a proposed class action related to alleged misrepresentations in the labelling and packaging of Cold-FX.

Update on latest investigation proceedings and settlements

Bell Canada

Following a Bureau investigation into "premium text messaging" charges on customers' wireless phone bills, Bell entered into a consent agreement whereby it agreed to issue rebates to customers totalling up to \$11.82 million and to donate approximately \$800,000 to public interest advocacy groups. The Bell settlement follows prior and lower settlements with TELUS and Rogers.

Leon's Furniture

Leon's Furniture Limited, Canada's largest discount furniture and appliance retailer, was ordered to pay \$2.36 million, including \$1 million in punitive damages, to thousands of consumers after the Québec Superior Court found that it had engaged in deceptive marketing through its popular "buy now, pay later" promotions.

Amazon

Following an investigation by the Bureau into Amazon's practices in advertising "list prices," Amazon entered into a consent agreement with the Bureau that included an administrative monetary penalty of \$1 million plus costs.

Moose Knuckles

High-end winter jacket maker Moose Knuckles and the Bureau reached a deal over concerns about "Made in Canada" claims in the company's advertising and labelling of some of its parkas. Moose Knuckles agreed to donate \$750,000 over five years to Canadian charities, such as those that provide winter jackets to children in need.

Avis and Budget

The Bureau brought an enforcement action against Avis and Budget rental car companies for misleading consumers by advertising prices that excluded non-optional fees. Avis and Budget subsequently entered into a consent agreement that included an administrative monetary penalty of \$3 million plus costs.

Hudson's Bay Company

In February, the Bureau commenced an enforcement action against the Hudson's Bay Company on the basis that the company had made deceptive price claims relating to the ordinary sales prices of mattress and box spring sets. The enforcement proceeding is ongoing.