

KEEPING CURRENT

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Drip Pricing Case Between the Competition Bureau and Ticketmaster Settled

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In the first Canadian case on digital advertising and pricing, the Competition Bureau has settled with Ticketmaster via a Registered Consent Agreement (RCA) for an administrative monetary penalty of \$4 million and costs of \$500,000. As part of the RCA, Ticketmaster has also committed to establishing and adhering to an internal corporate compliance program.

Drip Pricing and Digital Advertising
Drip pricing is an advertising technique wherein a company advertises only part of a product's price initially, and later reveals additional fees as the consumer continues the purchasing process. The Competition Bureau takes the position that this technique is misleading, as the consumer expects to pay a certain price for a product only to be surprised with additional unexpected fees further down the transactional process.

Drip pricing is not newly on the Competition Bureau's radar. Beginning as early as 2015, the Competition Bureau brought two cases against car rental companies for drip pricing tactics. Both cases were settled via consent agreements.

The application against Ticketmaster in 2018 marks the first time the Competition Bureau has pursued a case against drip pricing in the digital advertising sphere.

New Developments

In their application, the Competition Bureau alleged that Ticketmaster engaged in "deceptive marketing practices by promoting the sale of tickets to the public at prices that are not in fact attainable and then supplying tickets at prices above the advertised price." The Competition Bureau also noted that the process to buy these tickets is online and digital. Drip pricing in the digital sphere can particularly encourage consumers to buy tickets because of pop-ups, countdown clocks, and the reveal of the higher price only after the interactive digital transaction has begun. The application suggests that drip pricing, while misleading across all mediums, may be a particularly nefarious technique on digital platforms.

It is important to note that the settlement between the Competition Bureau and Ticketmaster is a consent agreement. Consent agreements are not law, but they are persuasive and can be good indications of regulatory requirements. As such, the settlement between the Competition Bureau and Ticketmaster may affect the digital advertising practices of other vendors. The settlement underscores five major areas in terms of mitigating risk and ensuring compliance with the *Competition Act* in the digital advertising age:

1. Drip pricing should be avoided as an advertising technique, including in the digital sphere. The RCA specifies that Ticketmaster made representations about ticket prices which were unattainable, for the purpose of targeting the Canadian public. In this case, the Competition Bureau has now identified these practices as false or misleading in the digital sphere as well as in print or in-person advertising. Thus, online drip pricing is not compliant with the provisions regarding deceptive marketing practices in the *Competition Act*.
2. In the case of violations, the Competition Bureau will require that corporate compliance programs are established and maintained at the vendor's cost. The RCA notes that the Senior Management of the violating firm must express their commitment to the compliance program to the Competition Commissioner and be visible in establishing, maintaining, supporting, and enforcing the program. The firm must also provide copies of the RCA to their marketing personnel and report to the commissioner for monitoring purposes.
3. The Competition Bureau in the RCA recognized that Ticketmaster had voluntarily and fundamentally revised their platform so that many of the misleading representations were eradicated. The lesson here is that proactive voluntary actions taken after a complaint is filed will be a mitigating factor.
4. If a company does engage in drip pricing as a marketing technique, the risk of non-compliance with the Competition Act may rise with the increase in time between the beginning of the transaction and the reveal of the dripped price. *Bell Canada v. Cogeco Cable Canada GP Inc.* suggests that the first screen a consumer sees should be as transparent as possible. If the focus is on the first screen of the internet process, the advertisement of an initial price which does not include mandatory surcharges would appear to be on its face deceptive and misleading. However, *Cogeco* also stresses that each case must be evaluated on its own facts. While there are still risks

involved, it is less likely that a transaction will be considered misleading if the dripped price is discovered quickly by the consumer.

5. Another factor which may aggravate the misleading character of drip pricing is the physical latency between the dripped price and the internet transaction. For example, if the dripped final price is only revealed when the good is being physically acquired, the drip will likely be considered as more deceptive – because the consumer has little choice but to complete the transaction at this point.

Going forward

The outcome of the Ticketmaster case highlights that drip pricing as an advertising technique should be avoided, particularly on digital platforms. To completely minimize risk, the full price of a product should be disclosed to buyers upfront so as not to be misleading. If the full price of a product is not disclosed upfront, risk can be minimized by avoiding internet systems which have a great time distance between the advertised price and the drip, and by avoiding systems where the drip is only discovered once the good is being physically delivered or received. Due to these changes, firms will need to evaluate their digital advertising techniques, and should seek professional legal advice when doing so.

The Gardiner Roberts LLP Compliance Risk Solutions Group is able to advise on all matters of compliance and regulation. Given these new developments, we are able to help your organization develop an internal compliance program to help you successfully navigate complex regulatory regimes.

Please do not hesitate to reach out if you have any concerns regarding these new developments.

Written by Kenneth Jull and Nicole Spadotto of Gardiner Roberts LLP. Kenneth Jull is Counsel at Gardiner Roberts and was a member of the counsel team on this case as part of his interchange with the Competition Bureau Legal Services. Nicole is a student at the McGill Faculty of Law who is presently a summer student at Gardiner Roberts.