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Retail sales and consumer law: Make sure your prices are accurate

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Lavery closely monitors new developments in consumer law and is committed to keeping the business community informed of the latest developments in this area of the law by regularly publishing newsletters dealing with new case law or legislative changes which may impact, influence, even transform practices in this area.

The issue of accuracy in the advertising of prices by merchants is one which has received considerable attention. Quebec courts have recently considered this issue, particularly with respect to the advertised price for the use of Interac services, and in cases where erroneous prices were advertised on transactional websites. In these cases, the courts:

> reasserted the strict requirements of the *Consumer Protection Act*[1] regarding the advertising of prices, holding that where a merchant intends to charge additional fees for the use of a method of payment, it must include these fees in the advertised price for the product or service being sold;
> sometimes allowed, sometimes barred the defence by which merchants pleaded their mistake in the advertising of erroneous prices on their websites. Interestingly, where the courts have found against merchants, it was not the first time an error was made by the merchant in the posting of the price of a product.

Debit Card User Fees Must Be Included in the Merchant's Advertised Price

On May 8, 2015, in *Stratos Pizzeria (1992) Inc.* v. *Galarneau*,[2] the Superior Court held that debit card user fees must be included in the merchants' advertised prices. The court favored a strict interpretation of subsection 224(c) C.P.A. stating that it prevents the merchant from adding any charges (at the time of payment) that were not included in the advertised sale price.

This case involved a franchisor and its franchisee which provided a pizza home delivery service. In February 2014, the franchisee received a notice of non-compliance from the Office de la protection du consommateur ("OPC") informing it that it was in breach of the C.P.A. because customers were being charged an extra $0.75 if they opted to pay for their order by using Interac. This extra charge appeared on the menu. The OPC was of the view that these charges had to be included in the advertised price in accordance with subsection 224(c) C.P.A.

Since the franchisor and franchisee were unable to agree with the OPC, they filed a motion for declaratory judgment asking the court to rule on this disputed interpretation of subsection 224(c). They alleged that Interac was a separate service that was provided by the merchant and was not part of its main obligation, which was to provide the food to the customer. The merchant also argued that since customers were informed of this fee before making their order, it could not be viewed as a

higher price than that advertised.

The judge rejected these arguments and, consequently, the motion for declaratory judgment. He found that the franchisee was not offering a separate service to its customers by providing them with the option to pay by Interac, but simply a method of payment. The judge quoted the ratio from the decision in *Union des consommateurs* c. *Air Canada*[3] and reiterated that the addition of subsection 224 (c) C.P.A. in 2010 evidences the legislator's wish to compel merchants to announce to consumers at the outset the total cost of goods and services so as to [translation] "allow them to adequately compare the prices of the goods they are purchasing".[4] It was therefore insufficient to merely state on the advertising menus and flyers that extra charges would be added to the total invoice when consumers pay by Interac.

COMMENTS

This decision confirms that the legislator's goal in adopting subsection 224(c) C.P.A. in 2010 was to strengthen consumer protection. Thus, it is important for merchants to clearly understand the strict requirements of price advertising. If the merchant wishes to add additional charges such as debit card fees, it is not enough to display them on flyers or on the front page of a menu to meet the requirements of subsection 224(c) C.P.A. Nor will these requirements be met if the consumer agrees to pay the additional fees before making his order.

Where a merchant intends to charge fees for the use of a specific method of payment, it may need to display two price columns in its menu — i.e. including and not including debit card fees — for each item. In practice, this may confuse consumers rather than better inform them, especially in situations where they are purchasing several items at once, since debit card fees only apply once to the total amount of the invoice and not as a function of each item ordered.

In the recent decision of *Marcotte* v. *Bank of Montreal*[5] dealing with conversion charges billed by credit card issuers, it seems that the Supreme Court favoured a more practical application of the C.P.A. to the disclosure of fees by agreeing that conversion charges should be viewed as a consideration for a separate service.[6]

The Stratos case clearly shows that one of the main purposes of the C.P.A. has always been to disclose to the fullest extent possible the charges applied in consumer contracts. This purpose is achieved through the application of several provisions requiring the full communication of all the fees that may be claimed from the consumer, including the credit charges, whether in the advertising material or in contracts. Thus, in the case of *Directeur des poursuites criminelles et pénales* v. *9170-2274 Québec Inc.*,[7] the Court of Québec advocated this strict approach in a case dealing with the disclosure of the terms of credit in advertisements. In that case, a car dealer was thought to have violated sections 247 C.P.A. and 84 of the *Regulation respecting the Application of the C.P.A.* by failing to state the total amount of the credit charges and the consumer's total obligation in the contract. In its defence, it argued that it relied on an ad posted on the vehicle manufacturer's website and pleaded section 287, para. 2, C.P.A., which provides that the merchant can be acquitted "if it is established that [it] had reasonable grounds to rely on information given by the [...] manufacturer."[8]

Although the dealer was in good faith, its defence was dismissed. Due diligence would have required that it carefully read the small print in the ad on the terms of credit and that it verify with a qualified person as to whether or not the disclosed information was compliant with the provisions of the C.P.A. The case against the director of the dealer was dismissed on the grounds that such director had no knowledge of the offence.

Errors in Advertised Prices in Contracts Concluded via the Internet

While the rules on accuracy in advertised prices are quite strict, there are still some situations in

which the courts will allow merchants to allege a mistake in the advertised price. The decision of the Court of Québec, small claims division, in *Faucher* c. *Costco Wholesale Canada Ltd*[9] is a good example. The defendant's website erroneously announced that the price of a laptop computer was $2.00. Having placed an order for 10 computers which was refused, the consumer claimed their true value as damages, alleging a breach of subsection 224(c) C.P.A. To justify its refusal to honour the plaintiff's order, the merchant relied on the following clause appearing on its website:

> [Translation] We reserve the right to cancel, terminate or not process an order (including an accepted order) if the price or any other material information on this website is inaccurate. If we do not process an order for this reason, we will advise you that the order has been canceled and undertake either not to charge you for the amount of the order, or to credit you for the order, depending on the payment method used […]

The defendant also alleged that the ridiculously low purchase price was clearly due to an advertising error.

The judge found that the aforementioned clause entitled [translation] "Amendments, Typos and Errors" which allowed the merchant to cancel or not process an order was accessible through hyperlinks on the merchant's website. Relying on the decision of the Supreme Court of Canada in *Dell Computer Corp* v. *Union des consommateurs*,[10] the judge held that this clause was not an external clause to the contract and was valid, thus enforceable against the plaintiff.

Given the merchant's intention not to be bound in the event of the consumer's acceptance of the terms advertised on its website, the ad was not an offer to contract under article 1388 of the *Civil Code of Québec*.[11] The plaintiff could thus not compel the conclusion of the contract by its acceptance of the terms advertised on the merchant's website. Furthermore, the judge found, in view of the unrealistic price of the computers, that the defendant had committed an obvious error which vitiated its consent within the meaning of article 1400, para. 1, C.C.Q. Therefore, this error could not be characterized as inexcusable.

The judge examined the effect of the second paragraph of section 54.1 C.P.A. in respect of a "distance contract", which reads as follows:

> A merchant is deemed to have made an offer to enter into a distance contract if the merchant's proposal comprises all the essential elements of the intended contract, regardless of whether there is an indication of the merchant's willingness to be bound in the event the proposal is accepted and even if there is an indication to the contrary.

The judge did not apply the second part of this paragraph, but found rather that the plaintiff-consumer had visited the defendant's website on his own without any solicitation by the merchant. Therefore, it was he who made the offer to contract, while the merchant had only made a proposal. Since the plaintiff's offer was rejected, no sale was concluded.

Regarding the prohibited commercial practices under the C.P.A., the judge, citing *Lelièvre* c. *Magasin La clé de sol Inc.*,[12] found that section 219 C.P.A. did not apply because the merchant had not intended to mislead consumers. The erroneous price had appeared inadvertently during the programming of the website. Moreover, the plaintiff-consumer knew or ought to have known that the price was wrong since it was evidently lower than actual prices advertised for other similar products sold by the merchant. The consumer had therefore not been misled and his action was dismissed. The court also held that subsection 224(c) did not apply in this case because the merchant had not intended to induce the consumer to purchase computers for a price of $2 each, since it would realistically never have offered these computers at that price.

In the case of *Lelièvre* referred to above, the facts were similar to those in the Costco case except

that the clause allowing for refusal to honour an order in case of errors or inaccuracies only appeared on the merchant's website after the contract was concluded. The judge, in the *Lelièvre* case therefore found that a contract had been concluded, but held that the merchant had committed an error and therefore set aside the contract.

In the case of *Néron* v. *Vacances Sunwing*, the court reached the same conclusion as in the Costco decision, namely that the advertised price was so ridiculously low that the consumer ought to have known that it was not the real price.[13] In the *Néron* case, the plaintiff had purchased a trip for two on the merchant's website which was advertised for a price that was about six times cheaper than the actual value of the trip. The merchant realized and contacted the consumer the same day to explain to him that the advertised price on the website was a mistake. The merchant gave the consumer two options, either to pay the difference between the actual cost of the trip and the deposit already paid, while also getting a travel credit of $300/person, or to cancel the reservation and obtain the reimbursement of the deposit. Since Ms. Néron accepted neither of these options, Sunwing unilaterally canceled the contract and reimbursed her.

Sued by Ms. Néron, who claimed damages for the cancellation of the contract, Sunwing alleged that it had made an error in good faith on the nature of the contract. Sunwing explained that its consent had been vitiated because it would never have agreed to sell the trip for the advertised price if it had known of technological error at the time the price was advertised. As in the Costco case, the judge found that the error [translation] "could not be characterized as inexcusable within the meaning of article 1400, para. 2, C.C.Q."[14] and thus that Sunwing did not have to offer Ms. Néron the trip for the advertised price. Considering the application of the C.P.A., the judge reiterated what was said in the Costco case, namely that the purpose of subsection 224(c) C.P.A. is to [translation] "prevent a merchant from deliberately advertising a price to generate consumer interest and, once interested, to try to get them to buy at a higher price."[15]

About one year after the decision in Néron, the courts considered substantially the same facts in the cases of *Comtois* v. *Vacances Sunwing Inc.*[16] and *Meyer* v. *Vacances Sunwing Inc.*[17] and issued relatively identical judgments in these two cases. However, in both these cases, while the court found that the merchant did in fact make a mistake, this time it characterized it as inexcusable. Indeed, the repetition of the mistake in the advertised price was found to demonstrate gross negligence on the part of the merchant, enabling the mistake to be characterized as inexcusable under article 1400, para. 2, C.C.Q. The court explained that [translation] "[the] consumer is justified in presuming that a product has gone through a serious price verification process before being offered for online sale to thousands of people."[18] The court therefore ordered the merchant and the agency through which the consumer purchased the trip, solidarily, to pay the difference between the advertised price and the actual price of the trip.

In *Rochefort* v. *Vacances Sunwing Inc.*,[19] a decision rendered exactly one month after those of *Comtois* and *Meyer*, and based on very similar facts, the court again found that the merchant had made an inexcusable error because of the inaccurate price advertised on its website. However, in contrast to the order rendered against the merchant and the agency in *Comtois* and *Meyer*, in this case, the court ordered the merchant to pay the amount of $1,000 per plaintiff in moral damages because the [translation] "Court cannot order the defendant to pay the plaintiffs for the cost of a trip which they will not be making."[20]

Finally, in the case of *Charest-Corriveau* v. *Sears Canada Inc.*,[21] the court refused to excuse the error of a merchant who had mistakenly posted a price of $12.99 on its website for a game module, whereas the actual price was $129.99. In a succinctly worded decision, the judge, considering the severity of the law, ordered Sears to pay the plaintiff damages equal to the difference between the advertised price and the price subsequently requested, which represented a lost value to the plaintiff. Acknowledging the merchant's good faith and the nature of the error which was due to a

misplaced decimal comma, the court refused to award any further damages.

COMMENTS

The decision in the Costco case clearly shows that a certain degree of knowledge must sometimes be imputed to consumers, even if they are generally deemed to be "credulous and inexperienced".[22] One can also conclude from this decision and the others rendered contemporaneously that the average consumer may easily notice some information while reading an advertisement or surfing the web, even if they "take no more than ordinary care to observe that which is staring them in the face."[23] These decisions also teach us that despite the strict requirements of the C.P.A., courts may not favour a literal application thereof where same would enable a consumer to profit from a merchant's obvious mistake. Indeed, section 54.1 C.P.A. expressly provides that the merchant is deemed to make an offer to enter into a contract where the offer comprises all the essential elements of the intended contract, even if there is an indication that the merchant is not willing to be bound in the event of the consumer's acceptance. Despite this, it still seems possible to plead that it is in fact the consumer that is making an offer to contract by visiting the merchant's website on his own initiative. Though, in the Sears decision, the court kept to the strict application of the C.P.A., not accepting the defence of an error made in good faith.

In *Lelièvre* and *Costco*, neither merchant was guilty of misrepresentation as neither had the intention to mislead consumers. Nevertheless, the Court of Appeal, citing Professor Nicole l'Heureux in the case of *9070-2945 Québec Inc.* v. *Patenaude*,[24] clearly stated that [translation] "the intention to mislead of the person making the representation is not a factor that the court should take into consideration."[25]

To clarify the confusion, it may be useful to recall the following words of Justice Marc Beauregard of the Court of Appeal which, although written in 1981, are still clearly relevant today:

> [Translation] The purpose of the *Consumer Protection Act* is to protect consumers from practices that are considered abusive and not to give consumers the means for getting out of their obligations by pleading technicalities.[26]

Finally, while the courts have sometimes strayed from their pro-consumer approach, such as in *Costco* and *Lelièvre*, merchants should still remain vigilant in the posting and advertising of prices. In many cases, the *Price Accuracy Policy* will enable the consumer to demand compensation from the merchant where a higher price than the advertised price is charged at the cash register. The law remains the law. As the *Sears* case reminds us: *dura lex, sed lex*. Furthermore, the Sunwing decisions commented on above remind us that there is no forgiveness for repeat offenders.

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[1] *Consumer Protection Act*, CQLR, c. P-40.1 ("C.P.A.").
[2] 2015 QCCS 2353 ("Stratos").
[3] *Union des consommateurs* c. *Air Canada*, 2014 QCCA 523.
[4] *Ibid*, para. 53.
[5] 2014 SCC 55, para. 52-55.
[6] *Ibid*, para. 56.
[7] 2015 QCCQ 6294.
[8] *Ibid*, para. 18 (our emphasis).
[9] 2015 QCCQ 3366 ("Costco").
[10] 2007 SCC 34.
[11] CQLR, c. C -1991 (C.C.Q.).
[12] 2011 QCCQ 5774 ("Lelièvre").
[13] 2014 QCCQ 1615 ("Néron").
[14] *Ibid*, para. 12.
[15] *Ibid*, para. 14 (our emphasis).
[16] 2015 QCCQ 2684 ("Comtois").
[17] 2015 QCCQ 3675 ("Meyer").

[18] *Supra*, note 16, par 66.
[19] 2015 QCCQ 3141 (“Rochefort”).
[20] *Ibid*, para. 23..
[21] 2015 QCCQ 6417 (“Sears”).
[22] *Richard* v. *Time*, [2012] S.C.R. 265, 298, para. 72 (SCC).
[23] *Mattel, Inc.* v. *3894207 Canada Inc.*, [2006] 1 S.C.R. 772, para. 58 (SCC).
[24] 2007 QCCA 447, para. 42-44 and references cited.
[25] *Ibid*, para. 43.
[26] *Crédit Ford du Canada ltée* c. *Gatien*, [1981] C.A. 638, 644.