

## **Ticketmaster Causes Ticket Price Inflation, Class Action Claims**

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A recently-certified class action in British Columbia alleges that Ticketmaster, the online ticket seller, inflates prices paid by people who buy event tickets in the secondary market. According to the plaintiff in that case, Ticketmaster does this by operating a ticket reselling platform that facilitates ticket scalping by turning a blind eye to practices that breach Ticketmaster's own Terms of Use.

The certification of this case as a class proceeding is an example of the liberal approach to the certification of class proceedings taken by most Canadian courts. Despite describing some of the plaintiff's theories as "tenuous" and "implausible," the Court still saw fit to certify the action. So long as the case is not doomed to fail and the plaintiffs adduce some evidence to establish that there are common issues, courts often lean towards certifying the class proceedings, as the British Columbia Supreme Court did here.

This certification decision also serves as a warning to businesses: plaintiffs will comb through everything on the business' website, including terms of use, privacy policies, and the like, in order to find fodder for class actions.

### **Media Coverage of Ticketmaster's Involvement with Ticket Scalpers**

In addition to selling tickets to eventgoers (acting as an agent for event venues), Ticketmaster operates a platform called Tradedesk POS, that enables ticket resellers (also called "scalpers") to offer tickets through Ticketmaster's website and other platforms. Many ticket resellers use multiple accounts, to circumvent limits on ticket purchases, and ticket bots, to buy tickets for events much faster than any human could. Ticketmaster's Terms of Use forbid the use of multiple accounts and bots. However, Ticketmaster employees told undercover reporters from the Toronto Star and the CBC posing as ticket resellers that Ticketmaster is not concerned about either practice, and even acknowledged that no reseller could make a living with only one account.

The resulting media exposé triggered class actions in British Columbia, Saskatchewan, Ontario, and Quebec.

### **The BC Class Action**

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The British Columbia action alleges that Ticketmaster misrepresented to the ticket-buying public in its Terms and Conditions that all users would be afforded a fair opportunity to buy tickets in the primary market for face price, when in fact it was facilitating the use of multiple accounts and ticket bots through its Tradedesk platform. The action asserts claims under BC's consumer protection statute, the *Business Practice and Consumer Protection Act* (BCPA) and the misleading advertising provisions of the *Competition Act*, as well as for negligent misrepresentation and unjust enrichment.

The plaintiff offered two theories for calculating damages. The first theory was that because all purchasers should have been able to buy tickets at face price, the damages are simply the difference between the face price and the price actually paid by class members for their tickets. The second theory was that Ticketmaster caused a general inflationary effect in the secondary market.

Ultimately, the British Columbia court only certified the BCPA claims. It struck the claims under the *Competition Act*, as well as the negligent misrepresentation and unjust enrichment claims.

## Claims Based on Reliance Were Doomed to Fail

The *Competition Act* contains a statutory cause of action (section 36) that is available where the plaintiffs suffered damages as a result of a breach of certain provisions of the Act, including false and misleading representations (section 52). To succeed, plaintiffs must show causation, including that they relied on the misrepresentations to their detriment. The same is true of the negligence claim. Since the claim did not plead any facts to show reliance, the *Competition Act* and negligence claims were struck.

The unjust enrichment claim failed because the plaintiff failed to plead facts that could establish two key elements, that is, an enrichment to the defendant and a corresponding deprivation to the plaintiff. On the plaintiff's theory, Ticketmaster caused the inflation of resale prices for tickets. But those inflated prices went to ticket resellers, not Ticketmaster. As a result, Ticketmaster was not unjustly enriched.

## Consumer Protection Claims Certified

This left the two BCPA claims advanced by the plaintiff. The first was that the representations in Ticketmaster's Terms of Use were constituted a "deceptive act" under section 4 of the BCPA. In response, Ticketmaster argued that its Terms of Use do not contain representations, but the Court held that this point was not plain and obvious, and needed to be determined at trial.

Ticketmaster also argued that BCPA did not apply because the transaction was not a "consumer transaction" because the plaintiff is not a "consumer" and Ticketmaster is not a "supplier." Indeed, the representative plaintiff did not buy his tickets from Ticketmaster at all, but from Stubhub, a competitor of

Ticketmaster. Again, however, the Court held that this was an issue that could not be resolved at the certification stage. Indeed, the Court suggested that class members who did not buy their tickets from Ticketmaster might still have a cause of action against Ticketmaster. The rationale for including people who bought through other platforms is that Tradedesk could support transactions on other platforms. The Court also noted that reliance is not necessary for a claim under the BCPA.

The second BCPA claim was that the representations in Ticketmaster's Terms of Reference were "unconscionable," breaching section 8 of the BCPA. The plaintiff claims that the price of event tickets sold through the secondary market on Ticketmaster's website grossly exceeded the price at which similar goods were readily available. The Court agreed with Ticketmaster that the link between the alleged misrepresentations and the unconscionability claim "appears tenuous," but could not conclude that the claim was doomed to fail.

The Court also noted that the BCPA reversed the burden of proof, requiring Ticketmaster to prove that it did not make misrepresentations and that the transaction was not unconscionable.

The Court also addressed the plaintiff's two damages theories. The theory that damages would equal the difference between the face price of the ticket and the amount paid for the ticket on the secondary market was "implausible," the Court found. There was, however, "some evidence" that Ticketmaster's practices have a "general inflationary effect" on resale ticket prices.

The Court found that a class action was the preferable procedure for resolving the common issues and that there was no other way of resolving the claims because the Competition Bureau had "apparently declined to act." This finding seems inconsistent with the Court's earlier determination that the plaintiff had no cause of action under the *Competition Act*, albeit because the plaintiff failed to plead reliance.

## **Compliance Programs and Careful Review of Publicly Available Material Can Mitigate Risks**

This decision provides an illustration of the potential liabilities Canadian businesses face from consumer class actions. But businesses can take steps to mitigate these risks.

A robust compliance program to ensure that the business complies with the *Competition Act* and provincial consumer protection statutes is essential, but only the beginning.

As Ticketmaster and other recent cases make clear, anything published by a business can be used by class action plaintiffs to ground class actions, including, as Ticketmaster discovered, a website Terms of Use. It can also include privacy policies: in another recent case, Facebook agreed to pay a fine for alleged

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misrepresentations in its privacy policy and now faces class actions for privacy breaches (see Facebook's Multi-million Dollar Settlement and Lack of Evidence Dooms Facebook Class Action). Pricing practices, particularly relating to additional fees, can also attract class action plaintiffs, as WestJet and Airbnb have found (see Double Ticketing Class Actions Take Off).

Thus, in order to reduce the risks of facing similar class actions, businesses need to review and stress-test everything on their website, and make sure that their products and business practices align with what is on their website.

A copy of the British Columbia Supreme Court's certification decision can be found [here](#). If you have any questions about consumer class proceedings, please feel free to reach out to Michael Osborne.

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