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My Kingdom for a Horse: Rules Against Price Gouging Come to Ontario

Laws against price-gouging have come to Ontario. On Saturday, March 28, 2020, the provincial government issued a press release announcing that it was enacting an Order to prohibit price-gouging. The press release announced that that Order “prohibits persons, including retailers, from selling necessary goods for unconscionable prices”. The press release also announced that the definition of unconscionable prices would be “consistent with well-established principles from the Consumer Protection Act.”

Yet the contours of the new rules against price gouging are not immediately clear. In times of crisis, the economic laws of supply and demand can lead to rapid changes in prices. That can lead to rapid changes in prices. Indeed, we have already seen a significant swing in prices: the price of gasoline has dropped precipitously, while the prices of hand sanitizer and masks have risen substantially. The federal *Competition Act* favours the operation of the free market to appropriately allocate resources. To the extent that changes in prices are in direct response to free market forces, they should not be objectionable. Yet to the extent they represent opportunistic behaviours that arise because of market inefficiencies, there is good justification for regulating them.

That poses a difficult question for businesses: when are they free to change prices in response to market demands? And when will such price changes amount to “unconscionable prices” that will be offside the provincial government’s new Order? This blog post will try to set out some of the contours of the Order.

The Provincial Government’s Order

By way of background, Ontario’s *Emergency Management and Civil Protection Act* permits the government to declare an emergency. In so doing, the government acquires broad emergency power to take various steps. Among other things, paragraph 11 of s 7.0.2(4) provides that in the case of an emergency, the Lieutenant Governor in Council may make orders in respect of “[f]ixing prices for necessary goods, services and resources and prohibiting charging

unconscionable prices in respect of necessary goods, services and resources.”

Under Ontario Regulation 98/20, that is precisely the Order that the Lieutenant Governor made. That Order is brief and is worth setting out here in its entirety:

1. (1) This Schedule applies to sales or offers to sell that are made by the following persons:

- Persons who own or operate a retail business.
- Persons who did not ordinarily deal in necessary goods before March 17, 2020.

(2) For greater certainty, this Schedule does not apply to sales or offers to sell that are made by a manufacturer, distributor or wholesaler.

2. (1) No person shall sell or offer to sell necessary goods at an unconscionable price.

(2) An unconscionable price includes a price that grossly exceeds the price at which similar goods are available to like consumers.

3. For greater certainty, “necessary goods” includes the following:

- Masks and gloves used as personal protective equipment in relation to infections.
- Non-prescription medications for the treatment of the symptoms of the coronavirus (COVID-19), as those symptoms are described by Public Health Ontario.
- Disinfecting agents intended for cleaning and disinfecting objects or humans.
- Personal hygiene products, including soap products and paper products.

The plain text of the Order makes some things clear, while others are left uncertain.

First, the prohibition against selling goods at an unconscionable price only applies to retail businesses and “[p]ersons who did not ordinarily deal in necessary goods before March 17, 2020.” (The latter of these provisions is presumably designed to catch individuals who are opportunistically buying up large quantities of goods from retail outlets at regular prices and reselling them at higher prices.) However, manufacturers, distributors, and wholesalers are expressly exempt from the scope of the Order. Consequently, businesses that fall into those categories remain

free to set their prices as they see fit subject to other laws to which they may be subject, including the federal *Competition Act*.

Second, the prohibition only applies to the sale of “necessary goods”. The definition of “necessary goods” in the regulation is inclusive but not exhaustive. It clearly includes the enumerated categories of goods set out in the Order. However, it is unclear from the text of the Order what other categories of goods, if any, the Order might apply to. For example, it seems likely that other goods directly related to prevention and treatment of COVID-19 would constitute necessary goods, though this is not explicit in the Order.

The Act provides only limited assistance. Section 7 of the *Emergency Management and Civil Protection Act* provides a broader definition of “necessary goods, services and resources” as including “food, water, electricity, fossil fuels, clothing, equipment, transportation and medical services and supplies”. This definition is also inclusive rather than exhaustive. However, it seems unlikely that government intended the Order would apply to any types of goods beyond those broad categories described in section 7. Whether it intended the Order to apply to all food, water, fossil fuels, clothing, and equipment, or just the four enumerated categories in the Order, remains unclear.

Third, the consequences of charging an unconscionable price can be significant. Violating the order can result in a ticket in the amount of \$750. More seriously, it could also result in a charge under the Act, with the possibility of a fine of up to \$100,000 and up to a year imprisonment for an individual. A director or officer of a corporation could face a fine of not more than \$500,000 and a term of imprisonment of up to one year. Finally, a corporation could face a fine of up to \$10 million.

What is an “Unconscionable Price”?

Perhaps the biggest uncertainty that retailers will face in complying with this Order is what constitutes an “unconscionable price”.

Neither the Order nor the Act provide a comprehensive definition of an unconscionable price. Section 2(2) of the Order provides that “[a]n unconscionable price includes a price that grossly exceeds the price at which similar goods are available to like consumers.” Once again, that definition is inclusive and not exhaustive. That means that unconscionability can be assessed by looking at the price differential between the prices charged by one retailer and the price at which similar goods are available to like consumers. However, whether a price is

unconscionable could be assessed with regard to other factors. In the absence of further guidance in the Act or the Order, it's useful to look at relevant case law. There is no case law interpreting "unconscionable price" under the Order or the Act. However, the government's press release announcing the Order stated as follows:

"Unconscionable prices" would be defined as a price that grossly exceeds the price at which similar goods are readily available to like consumers, which is consistent with well-established principles from the Consumer Protection Act.

Given that the government's press release refers to the *Consumer Protection Act*, it is helpful to consider the framework under that Act and its predecessor legislation. While the *Consumer Protection Act* uses similar language, the context is quite different.

The *Consumer Protection Act* prohibits unfair practices in consumer transactions. An "unconscionable representation" is one form of unfair practice created by the Act. Instead of positively identifying types of unconscionable representations in the statute, s. 15(2) of the Act allows the court to consider some circumstances which may render representations unconscionable. One of those, set out in s. 15(2)(b), is whether the price of goods or services grossly exceeds the price at which similar goods or services are readily available to consumers.

The *Consumer Protection Act* itself provides little guidance on what that provision means, and there is relatively little case law interpreting it. However, some helpful guidance is contained in cases decided under a similar provision in the former *Business Practices Act*, which was the predecessor to the *Consumer Protection Act*. The key principle is that the context of each transaction determines whether a given representation is unconscionable, in both private actions and provincial prosecutions.

In *Memorial Gardens Ontario v Ontario*, the Court of Appeal for Ontario confirmed that merely identifying a grossly excessive price was insufficient by itself to constitute an unfair practice. In that case, two professional estate executors entered into an agreement with the accused for the purchase and installation of a bronze memorial marker for the deceased for \$1,325. Upon reflection, the executors decided instead to have a similar marker purchased and installed for around \$300 less. The trial judge convicted the accused on the basis that it offered goods at a price that was grossly excessive to similar goods otherwise available to the consumers.

The Court of Appeal reversed this decision and entered an acquittal. It held that in order to convict the accused, a court needed to look at the circumstances of the transaction. The court could not merely accept that the price grossly exceeded the price at which similar goods and services were readily available to consumers. This was only one fact which may be considered by the court in assessing whether the representation was unconscionable within the meaning of the *Business Practices Act*. Justice Brooke, writing for the Court, held that the legislature could have chosen to make such a representation unconscionable without recourse to any other fact, and chose not to do so.

Moore v Capital Cyclonic Systems (1996), ACWS (3d) 1076 (Small Claims) is perhaps the clearest example of the important of context in determining whether an excessive price is an unconscionable representation. In that case, Mrs. Moore purchased a vacuum for \$1,855, financed at a rate in excess of 27.5%. Mrs. Moore was introduced to the defendant's salesperson when found a scratch ticket on her doorknob, and believed she won a prize after playing the ticket. She called the defendant to collect, and was advised she would receive it in person. Representatives of the defendant showed up to her home with a vacuum and a sales pitch in lieu of her prize. Unfortunately, Mrs. Moore capitulated to the defendant's high-pressure sales tactics, including assurances that their vacuum would help alleviate her asthma. After the salesperson took her to her bank to obtain her down payment (on credit), Mrs. Moore agreed to purchase the vacuum. Before he left, the salesperson decided to take Mrs. Moore's year-old vacuum for good measure, despite having no contractual entitlement to it.

The Court had no difficulty in setting out Capital Cyclonic Systems' many statutory breaches (under the CPA and otherwise) in its dealings with Mrs. Moore.

In analyzing the vacuum's grossly excessive price, the Court first determined that the vacuum cost Mrs. Moore at least

\$1,855 (and around \$2,350 accounting for the value of her stolen vacuum). The Court took judicial notice of the fact that there were many superior products available for a fraction of the price. The Court looked at the value of Mrs. Moore's perfectly good year-old vacuum in establishing the actual value of the defendant's product, and concluded it was valued totally out of proportion to its actual value, rendering the transaction unconscionable.

Similarly, a defendant may point to the overall context to demonstrate its practices and prices were not excessive. In *Renaud v Endurowe Enterprises Inc.*, 1997 CarswellOnt 5883 (Gen Div), the plaintiffs arranged for the defendants to do some construction on two properties they owned. When payment became due, the plaintiffs believed they had been swindled by the defendants. One of their many claims was that the price for the work grossly exceeded the price at which similar services were readily available to consumers. The principal of the defendant Endurowe testified as to the cost of labour and materials for the work, and gross profit. His evidence was that the profit Endurowe obtained was its normal profit. A salesperson employed by Endurowe gave evidence that the contract price was reasonable. The Court accepted this evidence, and found there was simply no evidence to support the plaintiffs' allegations.

Summary

What we can glean from all of this? The following are some basic principles to consider when applying the Order:

- Retailers and individuals selling products need to be careful that their prices for necessary goods aren't unconscionable.
- Necessary goods certainly include: masks and gloves used as personal protective equipment in relation to infections; non-prescription medications for the treatment of the symptoms of COVID-19; disinfecting agents; and personal hygiene products, including soap products and paper products. However, there is vagueness regarding what else might be caught by "necessary goods"; retailers considering substantial price changes to a good should consider whether that good might be a necessary one to which the Order applies.
- In determining whether a price is unconscionable, the retailer should keep the following in mind:
 - Whether a price is unconscionable will depend on all of the circumstances.

- Courts will certainly consider how the price charged compares to the prices for similar goods that are readily available to consumers.
- Other factors that the Court may consider include:
 - Whether there was a sudden increase in the price and, if so, the magnitude of the increase;
 - The costs and profit margin for the product at the price sold, including whether the profit margin has increased substantially. If the increase in price is being driven by an increase in costs for the product, a price will almost certainly not be unconscionable. However, if the retailer's costs have stayed the same, and an increase in prices has led to substantial increases in profits, that makes it more likely that the price is unconscionable; and
 - The vulnerability of the purchasers.