

SNC-Lavalin: The Concluding Chapter

Presented by: Kenneth Jull



The views are those of the author and are not meant to represent the views of Gardiner Roberts LLP .

SNC-Lavalin unit pleads guilty to fraud charge, to pay \$280-million fine



SNC-Lavalin unit pleads guilty to fraud charge, to pay \$280-million fine

<https://www.theglobeandmail.com/business/article-snc-lavalin-reaches-agreement-to-plead-guilty-to-charges-of-corruption/>

(December 18, 2019)

- A unit of SNC-Lavalin Group Inc. has pleaded guilty to fraud, ending a legal drama that had engulfed the engineering company and the Trudeau government.
- The Canadian engineering giant and prosecutors on Wednesday unveiled a deal in which the company's construction division pleaded guilty to a single charge of fraud related to activities in Libya. It will pay a \$280-million fine and receive a three-year probation order. A more potentially damaging charge of bribery under the Corruption of Foreign Public Officials Act was dropped.

SNC-Lavalin unit pleads guilty to fraud charge, to pay \$280-million fine

- Legal observers noted the settlement's effect is likely similar to what a DPA would have achieved: A hefty fine, a statement of guilt and monitoring of the company for a prescribed period.
- "One could say it's a DPA through the back door," said Kenneth Jull, who specializes in corporate compliance.

SNC-Lavalin settles Libya charges, pleads guilty to single count of fraud

[THE CANADIAN PRESS](#)

Dec. 18, 2019 5:00 p.m.

- One of the biggest risks faced by SNC-Lavalin in the event of a conviction on corruption charges involving foreign officials was its ability to bid for construction projects in Canada and abroad. Under federal law, a bribery offence could result in a bidding ban for federal contracts for up to 10 years. It could also prompt a ban on bidding for projects backed by the World Bank.

SNC-Lavalin settles Libya charges, pleads guilty to single count of fraud

[THE CANADIAN PRESS](#)

Dec. 18, 2019 5:00 p.m.

- While fraud committed against the Canadian government is covered under the public works department's integrity regime — and could thus trigger a ban — a fraud offence connected to a foreign government is not, said Kenneth Jull, an expert in financial crimes and corporate compliance at Gardiner Roberts law firm in Toronto.

SNC-Lavalin settles Libya charges, pleads guilty to single count of fraud

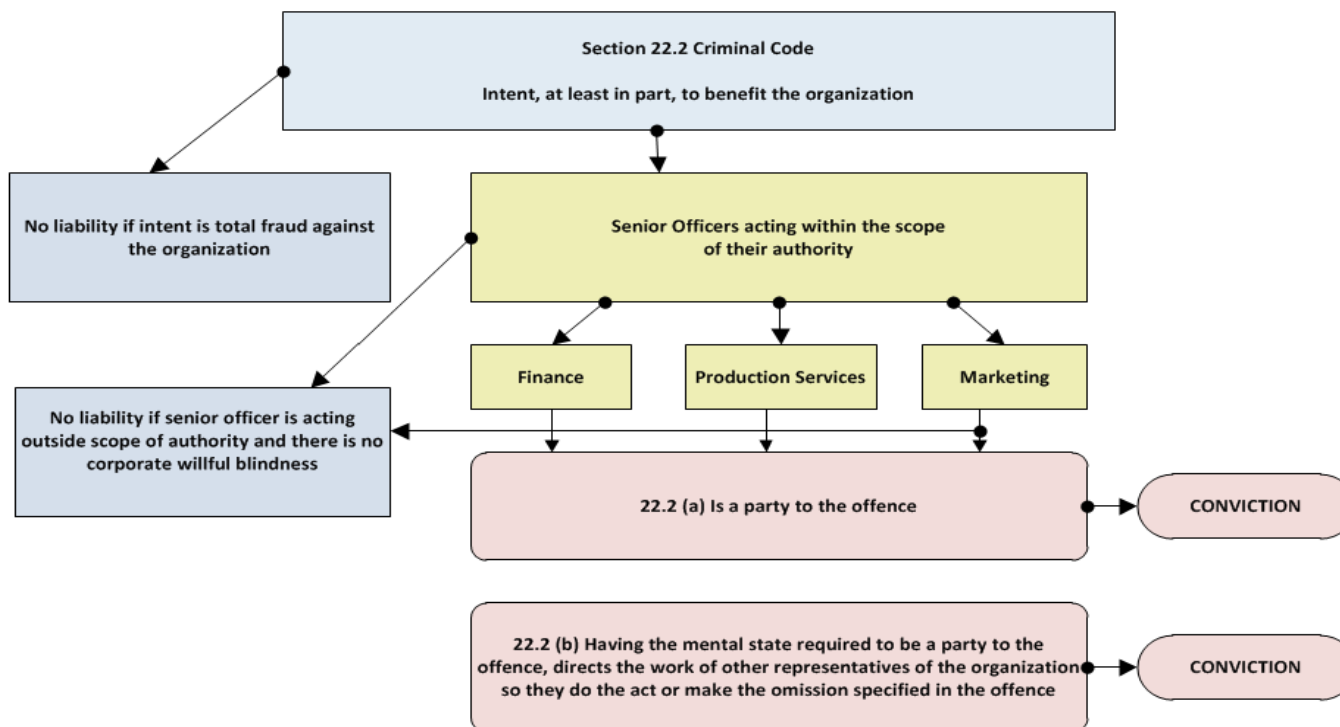
[THE CANADIAN PRESS](#)

Dec. 18, 2019 5:00 p.m.

- “It’s very clever. You could say it’s almost like a DPA through the back door,” said Jull, who has endorsed deferred prosecution agreements (DPA) — a type of plea deal that steers clear of admissions of guilt — as a way to avoid punishing innocent employees for C-suite offences.

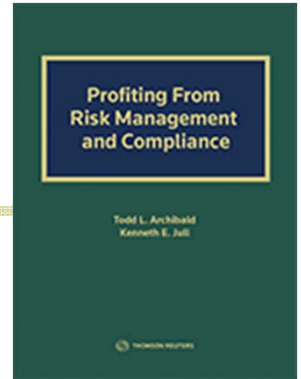
Public prosecutors also had risk, re scope of authority

Senior Officer Level



Scope of Authority

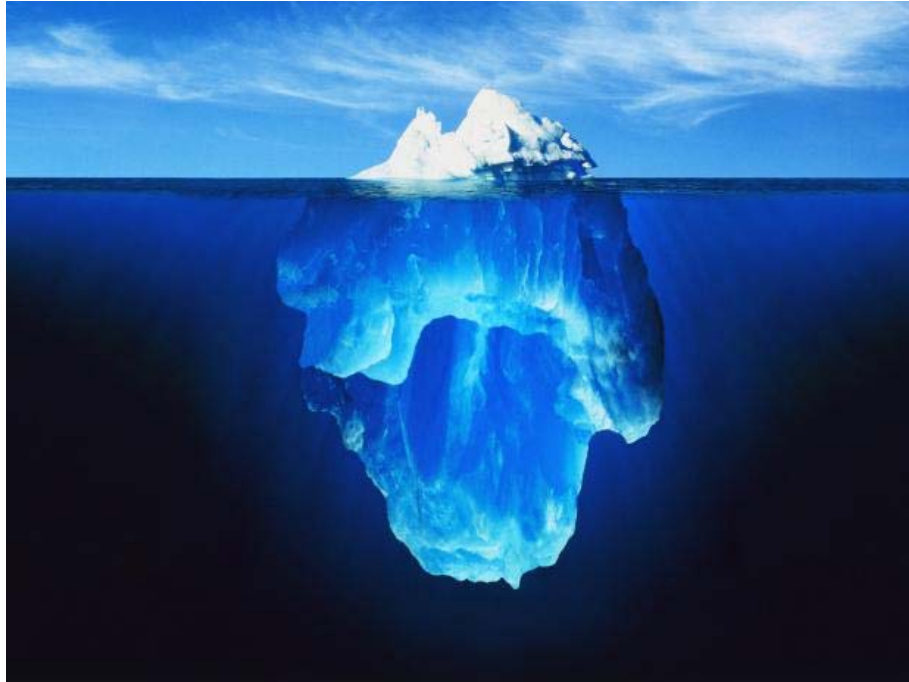
Archibald, Jull



- **The legislature chose to add the words "scope of authority" in both s. 22.2(a) and (b).** These words are presumed to make sense and to have a specific role to play in advancing the legislative purpose.
- Courts should avoid adopting interpretations that render any portion of a statute meaningless or redundant. If the words "scope of authority" do not add a second test, these words would be redundant, contrary to this statutory interpretation presumption.

Archibald, Jull

- **We submit that the wording "scope of authority" should be narrowly construed in accordance with the concept of willful blindness.**
- For example, it is not acceptable for an organization to permit bribery by permitting the finance department to look the other way while a bribe is paid from the marketing department.
- On the other hand, where corporate due diligence establishes that an anomalous payment was made outside the scope of a senior officer's job description and without complicity from those in other departments, the scope of authority requirement may not have been met to establish criminal liability.



**RISK OF A STAY OF PROCEEDINGS IN RELATION TO THE DELAY AND
TRIAL WITHIN A REASONABLE TIME**

R. v. Cody 2017 SCC 31

Presumptive time limits in *Jordan*:

The new framework for s. 11(b) can be summarized as follows:

- There is a ceiling beyond which delay becomes presumptively unreasonable. The presumptive ceiling is **18 months for cases tried in the provincial court, and 30 months for cases in the superior court** (or cases tried in the provincial court after a preliminary inquiry). Defence delay does not count towards the presumptive ceiling.
- *Once the presumptive ceiling is exceeded*, the burden shifts to the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied. If the exceptional circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the case's complexity, the delay is reasonable.

R. v. CIP Inc.

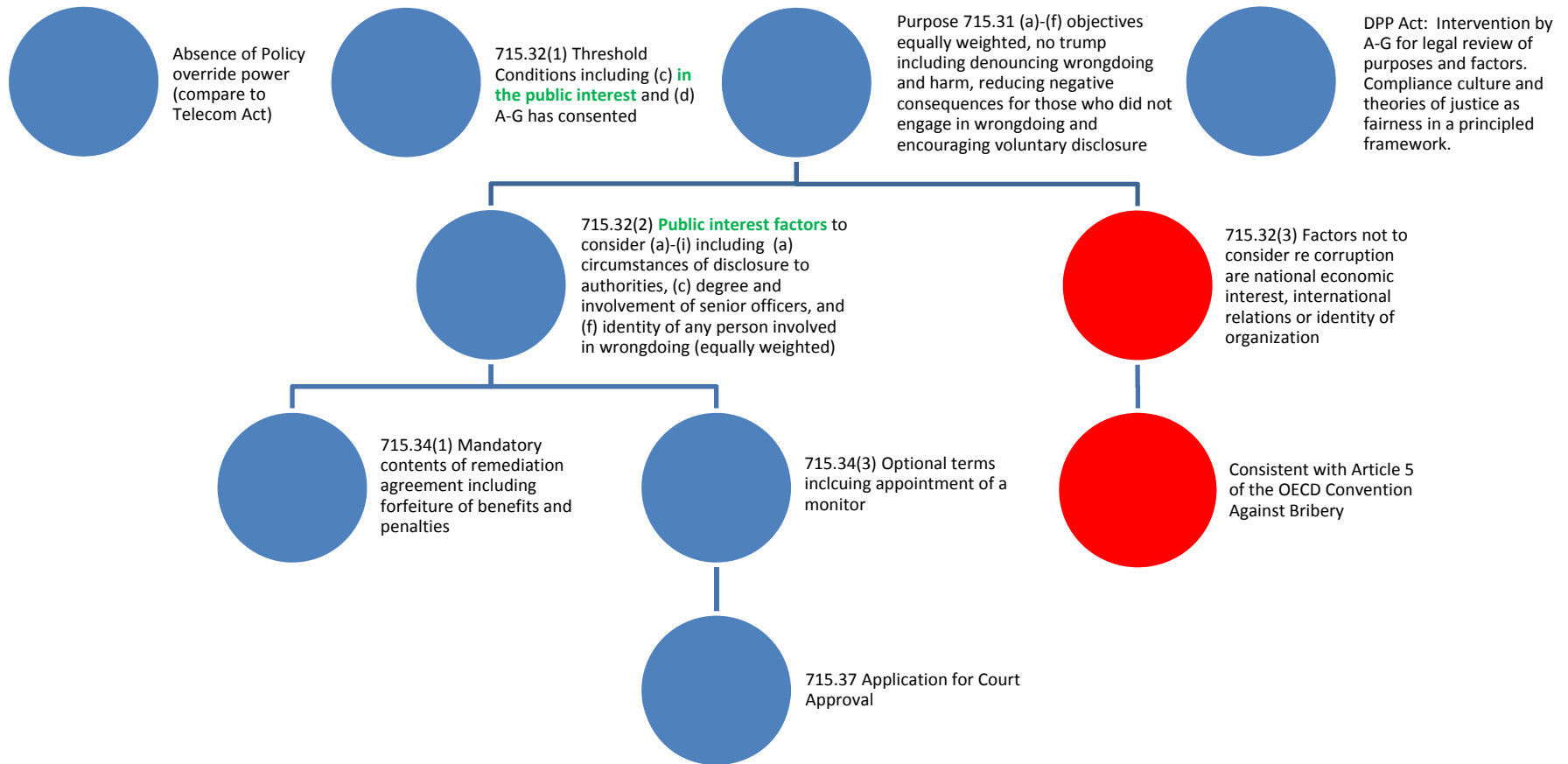
1992 CarswellOnt 82, [1992] 1 S.C.R. 843, at para. 50.

The issue becomes more complicated when a corporate accused is arguing that proceedings should be stayed. A corporation is considered a person within the meaning of s. 11 of the Charter. The Supreme Court in *R. v. CIP Inc.* confirmed that it would be unfair to suggest that the community is less interested in seeing corporations brought to trial.

The factors to be taken into account are set out in standard s. 11(b) jurisprudence: (1) length of the delay; (ii) waiver of the time periods; (iii) explanation for the delay; and (iv) prejudice to the accused. In *CIP*, a 19-month delay from the laying of the charge to the ultimate trial date was held to be *prima facie* excessive. With respect to the distinction between regulatory offences and criminal offences, the court made it clear that the distinction makes no difference with respect to trial within a reasonable time.

Lessons from the SNC-Lavalin story







**BEFORE THE HONOURABLE JUSTICE
CLAUDE LEBLOND, J.C.Q.**

THE QUEEN

Prosecutor

v.

**SNC-LAVALIN CONSTRUCTION INC.
(FORMERLY SOCODEC INC.)**

Lesson (1): Compliance programmes will mitigate penalty



[6.6] Since early 2012, the SNC-Lavalin Group Inc., the ultimate parent company of the wider organization, took measures to reduce the likelihood that it, or its affiliates, including SLCI and SLII, would commit a subsequent offence. Those measures include a complete turnover of the corporate executive team and Board of Directors, the implementation of a robust Compliance and Ethics Program, the adoption of the necessary and appropriate steps to ensure that checks and balances now exist in order to prevent any similar situation or wrongful conduct from occurring again.

Lesson (2): Look for classic red flags such as offshore companies in countries such as Panama and bank accounts in jurisdictions such as Switzerland.

- [6.22] *Dinova was incorporated on October 27, 2008 under the laws of Panama. A bank account for Dinova was opened in Switzerland by lawyer KAUFMANN at EFG Bank SA. The authorized signing officer of the bank account was KAUFMANN. KAUFMANN signed a declaration on January 6, 2011 that BEN AISSA had signing authority on the bank account. A letter from BEN AISSA to the bank dated February 15, 2011 indicates that sole beneficial ownership of Dinova was transferred to BEN AISSA and that BEN AISSA had beneficial ownership of the company and the bank account.*



Lesson (3): “Scope of authority” is important



- [6.35] *BEN AISSA and BEBAWI were "senior officers" and directing minds of SLCI, as defined by the jurisprudence and under section 2 of the Criminal Code. Pursuant to the theory of identification and section 22.2 of the Criminal Code, BEN AISSA and BEBAWI were acting within the **scope of their respective authorities** and were parties to an offence, had the mental state required to be a party to the offence and acted within the scope of their respective authorities to direct the work of other representatives in relation to the specified offence. They acted with the intent, at least in part, to benefit SLCI.*
(Emphasis added)

Lesson (4): Corporate “children” may be responsible for their parent



- [9.43] *The proposed Probation Order provides that **SLCI shall cause SNC-Lavalin Group** to maintain, and as required, further strengthen its compliance program, record keeping, and internal control standards and procedures. The Order aims to reduce the likelihood that the organization commit a subsequent offence pursuant to section 732.1 (3.1) (b) of the Criminal Code. (emphasis added)*

Lesson (5): Corporate subsidiaries are separate legal entities

- [10.29] *BEN AISSA set up off-shore companies with the help of a Swiss lawyer, Roland Kaufman. He then, with BEBAWI's knowledge and consent, proposed that SLCI (through SNC-Lavalin International Inc.) use the services of the off-shore companies as representatives in Libya. These companies were engaged for the purpose of providing representative services in foreign countries.*



Lesson (5): Corporate subsidiaries are separate legal entities

- *At the time of engagement and until the execution of search warrants on April 13, 2012, the executive management of SNC-Lavalin Group Inc., the ultimate parent company of SLCI, were unaware that SLCI executives owned these offshore companies. (emphasis added)*



Lesson (6): Impact on innocent employees will be considered

718.21 d) the impact that the sentence would have on the economic viability of the organization and the continued employment of its employees

- [10.36] *This mitigating factor considers the impact that a fine may have on individuals who are dependent on the corporation and who are not at fault. Such individuals include employees, as well as shareholders⁴² and other stakeholders such as pensioners, suppliers and clients.*
- ⁴² T. Archibald, K. Jull and K. Roach, *The Changed Face of Corporate Criminal Liability*, 48 Crim LQ 367 2003-2004, at 390.



Lesson (7): The SNC Lavalin probation order offers a template for corporate compliance

SNC-Lavalin Construction Inc. shall cause SNC-Lavalin Group to maintain, and as required, further strengthen its compliance program,

Lesson (7): The SNC Lavalin probation order offers a template for corporate compliance

- SNC-Lavalin Construction Inc. shall cause SNC-Lavalin Group to maintain, and as required, further strengthen its compliance program, record keeping, and internal control standards and procedures in accordance with the directions set out in appendix A to this order.
- **Comment:** Appendix A is a good template with respect to what the government considers to be important in a compliance programme.



Questions?

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Social Media vs. Privacy and Personality Rights

Some context

Presented by: Bob Nakano, Partner
February 27, 2020



Privacy in the News



- o Toronto Sidewalk Labs
- o Amazon Alexa
- o Facebook
 - o US \$550 million class action
- o 23andMe
 - o Drug development using DNA of clients

Classic Legal Issues (I)

o Canada's Constitution

o Section 8

“Everyone has the right to be secure against unreasonable search or seizure.”

o Expectation of privacy

- o Motor vehicle / personal searches

- o Hotel rooms

- o Telephone communications



Classic Legal Issues (II)

- o *Jones v. Tsige* (2012 Ont.)
 - o Improper access by one bank employee of banking and personal information of another bank employee
 - o Invasion of privacy
 - o Publicly placing in false light
 - o *Yenovkian v. Gulian* (2019 Ont.)
 - o Public disclosure of embarrassing private facts
 - o Appropriation of a person's name or likeness

Canadian Laws

o Federal

o *Privacy Act*

- o Collection of personal information by Federal government

o *Personal Information Protection and Electronic Documents (PIPEDA) Act*

- o Collection of personal information by private companies

o Privacy Commissioner

o Provincial

o *Freedom of Information and Protection of Privacy Act (Ontario)*



Other Jurisdictions

o Europe

o *General Data Protection Regulations (GDPR), 2018*

- o Use, protection, disclosure and consent requirements for personal data
- o Right to be forgotten

o United States

o *California Privacy Act, (2019)*

Social Media Contracts (I)



o User Agreements / Terms of Service

You or the owner of your User Content still own the copyright in User Content sent to us, but by submitting User Content via the Services, you hereby grant us an unconditional irrevocable, non-exclusive, royalty-free, fully transferable, perpetual worldwide licence to use, modify, adapt, reproduce, make derivative works of, publish and/or transmit, and/or distribute and to authorise other users of the Services and other third-parties to view, access, use, download, modify, adapt, reproduce, make derivative works of, publish and/or transmit your User Content in any format and on any platform, either now known or hereinafter invented.

You further grant us a royalty-free license to use your user name, image, voice, and likeness to identify you as the source of any of your User Content; provided, however, that your ability to provide an image, voice, and likeness may be subject to limitations due to age restrictions.

o TikTok User-Generated Content Terms



Social Media Contracts (II)



o Use of Information

How we use your information

We generally use the information we collect:

to fulfill requests for products, services, ...

... to send promotional materials from us or on behalf of our affiliates...

... to support the social functions of the Platform, including to permit you and other users to connect with each other...

... to use User Content as part of our advertising and marketing campaigns...

... to understand how you use the Platform, including across your devices

... for any other purposes disclosed to you....

o TikTok Sharing of Information Terms

Social Media Contracts (III)



o Sharing of Information

How we share your information

We share the categories of personal information listed above with service providers and business partners ... for business purposes, including research, ... advertising, analytics.

o TikTok Sharing of Information Terms

Social Media Contracts (IV)



o Courts' views of aspects of social media

- o R. v. Craig (2016 BC Court of Appeal)
 - o Criminal case – online Nexopia messages between Craig and a minor
 - o Court upheld Craig's constitutional expectation of privacy in the social media messages, so messages were not allowed as evidence
- o Douez v. Facebook (2017 Supreme Court)
 - o Douez, BC resident, sued Facebook in class action as part of a consent breach of BC's Privacy Act
 - o Some terms of Facebook's policies (choice of jurisdiction) were not enforceable

Personality Rights

- o Common law rights / trademarks
 - o Elvis Presley
- o Appropriation of a person's name or likeness
 - o *Jones v. Tsige* (2012 Ont.)

Privacy Breaches and Actions

o Breaches

- o Account hacks / theft
- o Social media targeting
- o Data breach by company
- o Misappropriation of private data

o Action / Remedy

- o Evaluate source of breach
- o Legal action / Legislation / Jurisdiction
- o Check account / device settings



Emerging Technologies



- o Smart home devices
- o Artificial Intelligence (AI) systems
- o 5G networks
- o Smart cars
- o DNA Profiling
 - o GED Match



Questions?
Thank you!



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Dealing with Digital Assets on Death:

Who owns them? Who can access them? What can be done to protect them?

Presented by:

Lindsay Histrop & Valentina Romano,
(Student at Law)
February 27th 2020



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- 7. Barriers to Access: Terms of Service & User Agreements**
- 8. Estate Planning Considerations**

Digital Assets – Prologue

Bitcoin Example:

- Of a capped total of 21 m. Bitcoins, 18 m. have been “mined”
- Some sources estimate that as many as 3 m. bitcoins (~\$38 billion) are irretrievable
- Due to:
 - Lost retrieval codes (“private keys”)
 - Lost USB’s where the only records are stored
 - Owner death without leaving the private keys accessible to executors or next of kin



Digital Assets - Prologue

Death of a CEO

- In December 2018, Gerald Cotten, CEO of QuadrigaCX, Canada's largest cryptocurrency exchange died suddenly at age 30
- Mr. Cotten was the only person who had passwords to ~115,000 customers' digital wallets
- Approximately C\$140m in digital currency held in safe keeping was deemed inaccessible
- Auditors found irregularities and managed to retrieve C\$33 m. in missing funds
- RCMP asked to exhume the body (Dec. 2019)

Defining and Categorizing

Digital Assets vs. Digital Accounts

- Classification is difficult: fluid, ever-growing
- Digital asset: a singular file
- Digital account: mechanism used to control and access the file

Defining and Categorizing

What is a Digital Asset?

- The file itself
- Photos, videos, blog posts, emails, Microsoft Office documents, music collections, playlists, tweets, etc.
- Potential value: customer invoices, health and medical records, tax documents

Defining and Categorizing

Digital Accounts

- Used to access files
- Email accounts, social network accounts, file sharing accounts, software licenses
- Can be separated into three categories:
 - Currency Accounts
 - Virtual Property Accounts
 - Social Media Accounts

Currency Accounts

Definition

- Holds currency that may be converted into fiat money
- PayPal, eBay, loyalty program accounts, cash-back programs, cryptocurrency (e.g. Bitcoin), etc.
- May be transferable to heirs or beneficiaries

Virtual Property Accounts

Definition

- Accounts that hold digital content
- No ownership in assets – just a license to use
- iTunes music collections, Kobo or Kindle library
- Contra physical counterparts (CDs, physical books)
- May not be transferable to heirs or beneficiaries

Social Media Accounts

Definition

- Accounts that contain information likely of personal or commercial interest
- Email, Facebook, Instagram, Twitter, Pinterest or LinkedIn account

The Law in Canada

General

- No general right of survivorship
- No federal or Ontario legislation on estate administration of a person's digital assets
- Only Alberta has legislation specifically ensuring representatives of a deceased's estate have access to administer digital assets

The Law in Canada

Uniform Access to Digital Assets by Fiduciaries Act (UADFA)

- Proposed in 2016 by the Uniform Law Commission
- Provides fiduciaries with default access to digital assets held by a deceased or incapable person
- Does not distinguish between types of fiduciaries (legal representatives, attorneys or guardians)

The Law in Canada

Uniform Access to Digital Assets by Fiduciaries Act (UADFA)

- **Digital asset:** any type of electronically stored information, including: information stored on a computer or other digital device, content on websites, and digital property rights (e.g. domain names, material created online)
- **Account holder:** individual who has entered into a service agreement with a custodian
- **Custodian:** person who holds, maintains, processes, receives, or stores a digital asset of an account holder (i.e., an online service provider)

The Law in Canada

Uniform Access to Digital Assets by Fiduciaries Act (UADFA), Cont'd

- Fiduciary can access, control and copy the digital asset
- A power of attorney, trust, will or court order can alter this default position
- Any service agreement that limits the fiduciary's access would be voided, unless the account holder accepts its terms and consents in a separate agreement

The Law in Canada

Privacy Laws

- Privacy rights continue after death
- Custodians are governed by the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA)
- When does PIPEDA allow an organization to disclose personal information without that individual's consent?
- PIPEDA does not compel custodians to disclose personal information in estate administration

Barriers to Access

Terms of Service and User Agreements

- Restrictive policies
- May prohibit access to estate trustees
- May deny estate trustees the ability to deal with content

Barriers to Access

Specific Examples

- Virtual Currency / E-Commerce Accounts:
 - Amazon, Bitcoin, PayPal
- Virtual Property Accounts:
 - Apple, Kindle
 - Licensed, not owned

Barriers to Access

Specific Examples, Cont..

- Points:
 - Aeroplan, Air Miles, Shopper Optimum Points
- Social Media Accounts:
 - Google (includes Gmail), Microsoft Hotmail, Facebook, Twitter, LinkedIn, Instagram

Barriers to Access

No right of survivorship for digital assets

+

Lack of legislation

+

Privacy-oriented Terms of Service and User Agreements

=

No immediate right to access, transfer or delete online accounts of a deceased

Estate Planning Considerations

- Digital assets are taxable like any other asset
 - subject to estate administration tax;
 - tax on capital gain on death, etc.
- Digital property will generally vest in the deceased's personal representative(s) (executor or estate trustee)

Estate Planning Considerations

- Access to the digital property is typically a challenge for the estate trustee
- For example, cryptocurrencies which are accessed via virtual wallets needing a private key
- Access to password protected electronic devices can prove impossible

Estate Planning Considerations

- It is possible to lose the Bitcoin wallet or delete the Bitcoins and lose them forever.
- There have also been thefts from websites that provide remote storage service for Bitcoins
- Owners are reluctant to give anyone the access codes, even loved ones

Estate Planning Considerations

Steps to Consider

- An inventory of all digital assets should be maintained
- A record of usernames and passwords be maintained and kept up to date in a secure place
- Location of usernames and passwords should be shared with executor/next of kin (subject to contractual restrictions by digital providers)

Estate Planning Considerations

Steps to Consider

- Will should address the disposition of digital assets
- Will should provide the Executor with specific authorization to access digital assets, usernames and passwords
- (sample clause annexed)

Estate Planning Considerations

Challenges for the Executor

- Practical challenges facing an Executor: Where and how does one locate and realize cryptocurrency?
- “Coin Cover”, for example, has created what it describes as one of the world's first cryptocurrency wills <https://www.coincover.com/wills>
- They advertise an "indestructible" card which has information about the client's cryptocurrency
- If the client dies, the executor contacts Coin Cover, with a unique number on the card, and a death certificate.

Estate Planning Considerations

Sign of the Times? This is Not an Endorsement!



The screenshot shows the Amazon.co.uk product page for the 'Coincover Cryptocurrency Will Kit'. The page features a large image of a family (a man, a woman, and three children) standing outdoors, with the 'coincover' logo in the top left corner of the image. Below the family image, there are two callout boxes: one stating 'Guaranteed cryptocurrency recovery' and another stating 'Includes 2 notification cards'. The main title of the product is 'Cryptocurrency Will Kit', followed by the tagline 'The internationally best selling, guaranteed recovery, Cryptocurrency Will Kit'. To the right of the image, the product title is repeated: 'Cryptocurrency Will Kit for Bitcoin, Ethereum, ERC20, Bitcoin Cash. Pass on Your Cryptocurrency to Your Family'. Below the title, it says 'by Coincover' and shows a 5-star rating with '2 ratings'. The price is listed as '£99.00'. A promotional message states: 'Pay £99.00 £79.00, get a £20 Amazon Gift Card on approval for the Amazon Platinum Mastercard. Terms apply.' A note indicates: 'Note: This item is eligible for click and collect. Details'. Below this, it says 'New (2) from £99.00 + FREE Shipping'. A list of bullet points describes the kit's features: 'The UK's best selling, guaranteed recovery, Cryptocurrency Will Kit', 'Guaranteed Cryptocurrency Fund recovery for loved ones', 'Kit includes: One Unique Solid Metal Lifetime Card & Two personalised Beneficiary Cards', 'Unlimited Changes and Lifetime Key Storage Subscription', and 'Detailed Cryptocurrency Will Instruction Guide and Business Grade Secure Wallet'. A link 'See more product details' is provided at the bottom of the list.

amazon.co.uk
Stationery & Office Supplies

Deliver to Canada

Best Sellers Prime Video Today's Deals Help New Releases Books Gift Ideas Gift Cards & Top Up Vouchers Electronics

Stationery & Office Supplies Bestsellers Deals Printer Ink Office Electronics Office Furniture Office Supplies Organisation Stationery School Supplies Paper Gifting

coincover

Cryptocurrency Will Kit

The internationally best selling, guaranteed recovery, Cryptocurrency Will Kit

Cryptocurrency Will Kit for Bitcoin, Ethereum, ERC20, Bitcoin Cash. Pass on Your Cryptocurrency to Your Family

by Coincover

★★★★★ 2 ratings

Price: £99.00

Pay £99.00 £79.00, get a £20 Amazon Gift Card on approval for the Amazon Platinum Mastercard. Terms apply.

Note: This item is eligible for click and collect. Details

New (2) from £99.00 + FREE Shipping

- The UK's best selling, guaranteed recovery, Cryptocurrency Will Kit
- Guaranteed Cryptocurrency Fund recovery for loved ones
- Kit includes: One Unique Solid Metal Lifetime Card & Two personalised Beneficiary Cards
- Unlimited Changes and Lifetime Key Storage Subscription
- Detailed Cryptocurrency Will Instruction Guide and Business Grade Secure Wallet

See more product details



Questions?

THANK YOU

The next presentation will begin shortly

The Competition Bureau's Digital Call out: Hudson's Bay and Ticketmaster

Presented by: Kenneth Jull
February 27, 2019

The views are those of the author and are
not meant to represent the views of
Gardiner Roberts LLP



Competition in the digital age: Competition Bureau unveils its 2020-2024 vision

- **News release**
- February 11, 2020 - GATINEAU, QC – Competition Bureau
- Today, the Competition Bureau published its [Strategic Vision](#) outlining how it will deliver the benefits of competition to Canadians from 2020 to 2024. As markets evolve, the Bureau will be at the forefront of the digital economy through strong enforcement and promotion activities.

<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04513.html>



- Over the next four years, we will develop and deploy new tools suited for the digital age. We will strengthen our capacity to investigate and analyze increasingly complex competition issues and growing data sets by improving our processes and modernizing our technology.
- For example, we will pilot and implement advanced analytical models, algorithms, automated processes and artificial intelligence capabilities. Starting in 2020, we will host an annual Digital Enforcement Summit Series that will bring together domestic and international stakeholders to foster open dialogue and collaboration on the challenges and opportunities of competition enforcement in the digital era.



<https://www.canada.ca/en/competition-bureau/news/2019/09/competition-bureau-calls-for-businesses-to-report-potentially-anticompetitive-conduct-in-the-digital-economy.html>

- September 4, 2019 – OTTAWA, ON – Competition Bureau
- The Competition Bureau has published a call-out for information from Canada's business community about conduct in the digital economy that may be harmful to competition.
- The Bureau is seeking information from businesses and other interested parties regarding certain strategies that firms may use to hinder competition in certain core digital markets, such as online search, social media, display advertising, and online marketplaces.
- All information provided to the Bureau will be kept confidential. Those who wish to respond are invited to provide written submissions by November 30, 2019,



DIGITAL ADVERTISING AND PURCHASING



DIGITAL ADVERTISING AND PURCHASING

- The entertainment aspect of interactive digital forums is one of the reasons it is such a psychologically addictive process. (Christina Gregory, "Internet Addiction Disorder: Signs, Symptoms, Diagnosis, and Treatments for Those Who May be Addicted to the Web on Their PC or Smart Phone" (2019) Psycom online: www.psychom.net/iadcriteria.html [permalink here].)



BACKGROUND ON DECEPTIVE MARKETING

AS ADVERTISED



IN REALITY



Hudson's Bay to pay \$4.5 million to settle Competition Bureau investigation

TIGHT TOP mattresses allow you to sleep closer to the pocket coil construction, maximizing conformability and support, and are less likely to retain body impressions over time. Although these mattresses often feel firmer and have a thinner construction, they can also be plush and feel very luxurious.

BEAUTYREST TruEnergy Brooklyn
tight top queen mattress set
Save \$1800
\$1298
Reg. \$3098

SEALY Posturepedic Reflex Mount Royal
tight top queen mattress set
Save \$1200
\$798
Reg. \$1998

BEAUTYREST Black Grace IV
tight top queen mattress set
Save \$3500
\$1798
Reg. \$1498

BEAUTYREST Recharge World Class Ashcroft
tight top queen mattress set
Save \$1800
\$1198
Reg. \$2998

SERTA iSeries Affirmation
tight top queen mattress set
Save \$1500
\$1198
Reg. \$2698

STEARNS & FOSTER Northampton
tight top queen mattress set
Save \$1700
\$1198
Reg. \$2898

FREE DELIVERY AND SET-UP & NO INTEREST UNTIL JULY 20
Free local delivery and set-up on all mattress sets (\$69 value). See store for details.
On all furniture, major appliances, mattresses and home entertainment when you use your Hudson's Bay MasterCard® or your Hudson's Bay Credit Card.
Information available. See info.

Hudson's Bay to pay \$4.5 million to settle Competition Bureau investigation

- <https://www.canada.ca/en/competition-bureau/news/2019/05/hudsons-bay-to-pay-45-million-to-settle-competition-bureau-investigation.html>
- The Bureau took [legal action against Hudson's Bay in 2017](#) to end what it considered to be deceptive marketing practices. The Bureau alleged that Hudson's Bay offered sleep sets **at inflated regular prices** and then advertised deep discounts on these prices, suggesting significant savings to consumers. The Bureau also alleged that Hudson's Bay made misleading representations as part of clearance promotions, **implying that the price of sleep sets was lowered to sell** the remaining on-hand inventory. In fact, Hudson's Bay did not have significant on-hand inventory, and instead ordered new products from manufacturers when consumers made purchases.

DIGITAL ADVERTISING



TICKETMASTER



- 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.
- See: https://www.ct-tc.gc.ca/CMFiles/CT-2018-005_Registered%20Consent%20Agreement_96_67_6-27-2019_2753.pdf.
- The author of this power point was General Counsel for the Bureau when the application was filed

DRIP

AND

PARTITIONS

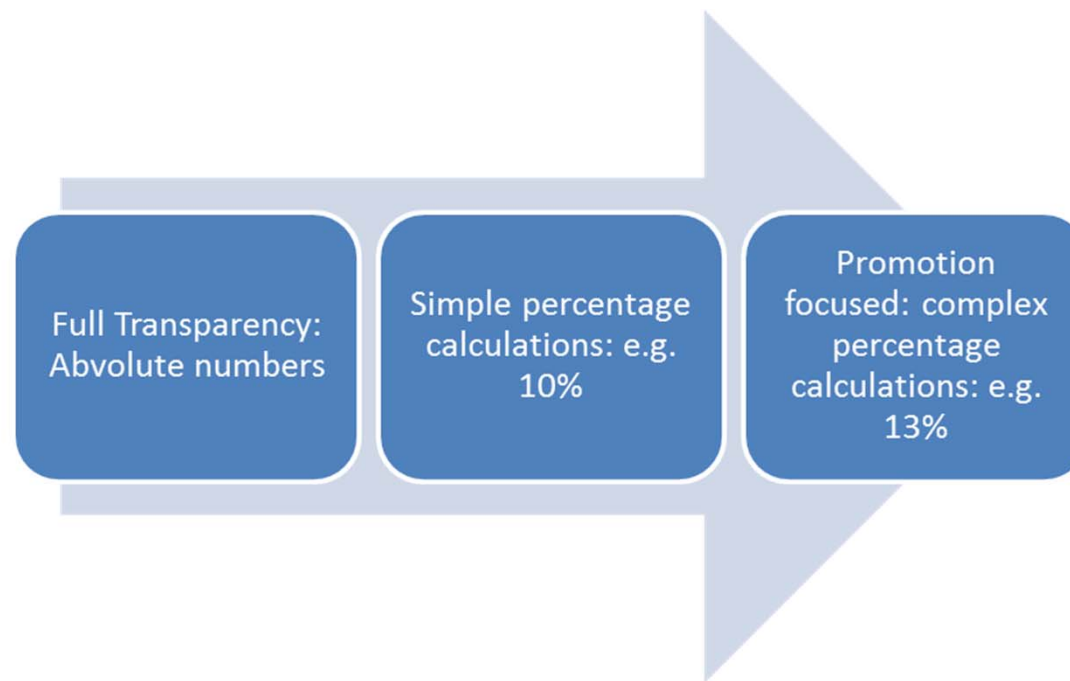
All inclusive	Partition	Flat fee	Drip
\$125 per ticket	\$100 face value + \$25 fee disclosed up front	\$100 face value + \$20 fee + plus \$5 flat order fee disclosed up front	\$100 face value disclosed up front. \$20 (profit) \$5 processing fee disclosed before payment authorization



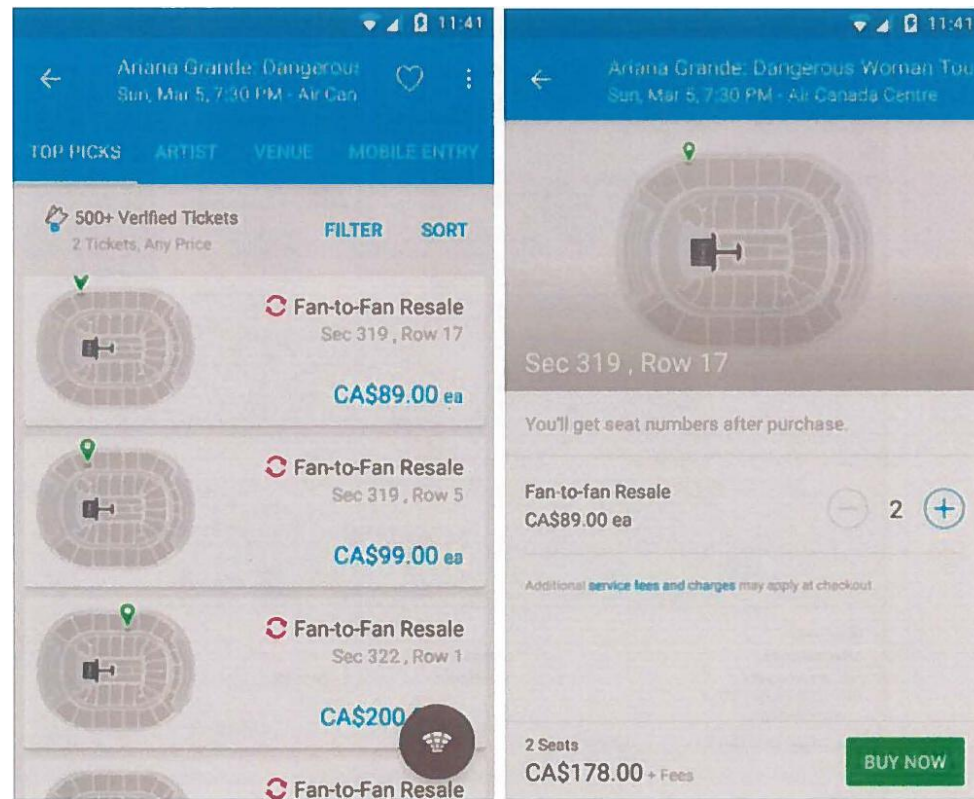
Spectrum

of

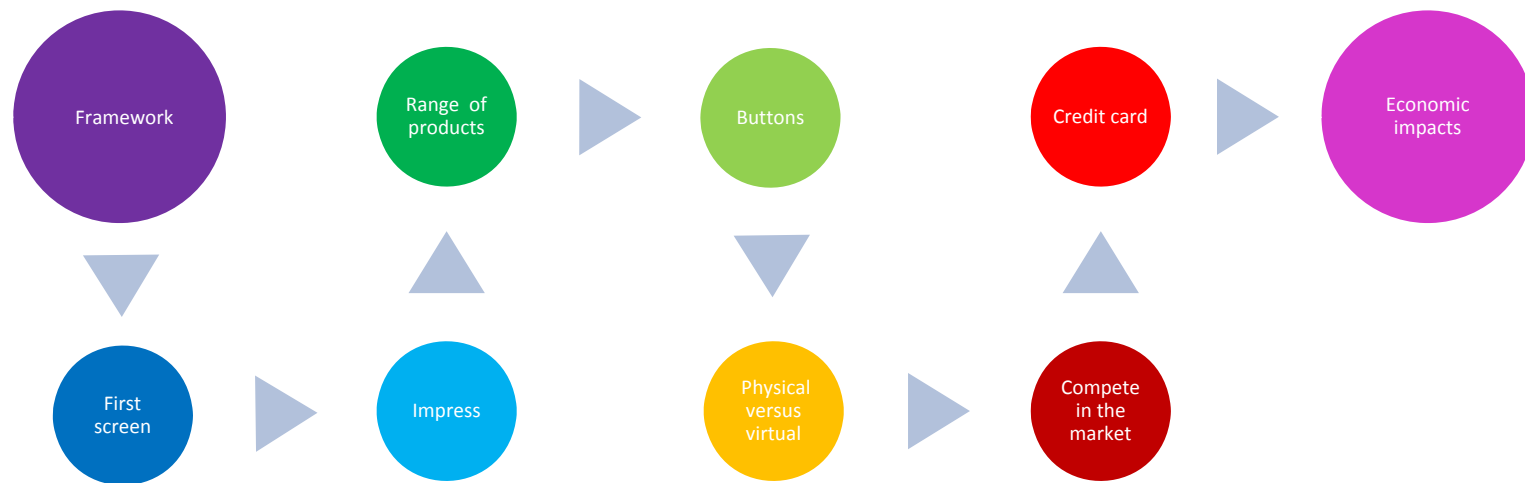
Partitions



*Commissioner of Competition and Ticketmaster, Competition
Tribunal Ct. 2018-005*



Behavioural Research Applied to Deceptive Marketing



*Commissioner of Competition and Ticketmaster, Competition
Tribunal Ct. 2018-005*

- The RCA in Ticketmaster sets out the following conclusions of the Commissioner which are not contested (but do not constitute formal admissions):
 - Ticketmaster supplies or offers to supply tickets to sports and entertainment events and have made representations about the price at which consumers could purchase tickets;
 - Representations were made to and target the public in Canada;
 - The Commissioner has concluded that Ticketmaster advertised prices for tickets that were not in fact attainable, because Ticketmaster charged consumers non-optional fees in addition to the prices initially advertised;

- The Commissioner has concluded that disclosure of the amount of the non-optional fees at later stages of the purchasing process was inadequate to prevent the representations from being false or misleading in a material respect;
- The Commissioner has concluded that the non-optional fees often increased the cost of tickets by over 20%, and in some cases, by over 65%;
- The non-optional fees consist of per-ticket fees and per-order fees, with the former charged on a per ticket basis and the latter charged on a per transaction basis;

- The Commissioner acknowledges that Ticketmaster made a number of changes to their websites and mobile applications beginning in July 2018, including changing many of their representations regarding certain non-optional fees and redesigning certain of their websites and mobile applications so that consumers are shown a price inclusive of per-ticket fees, and the maximum per-order fee that could be charged on the entire ticket order, the first time they are shown a price;
- Ticketmaster advised the Commissioner that they have applied these changes voluntarily across Canada in circumstances where their competitors have not made similar changes;

New format

Toronto Raptors vs. Orlando Magic Mon • Oct 28 • 7:30 PM



- **Sec 103, Row D** Verified Resale Ticket
 - CA \$220.82 ea
 - (CA \$181.00 + CA \$39.82 fees, including taxes)
- **Sec 309, Row 14** Verified Resale Ticket
 - CA \$220.82 ea
 - (CA \$181.00 + CA \$39.82 fees, including taxes)
- **Sec 121, Row 23** Verified Resale Ticket
 - CA \$223.26 ea
 - (CA \$183.00 + CA \$40.26 fees, including taxes)
- **Sec 113, Row 4** Verified Resale Ticket
 - CA \$223.26 ea
 - (CA \$183.00 + CA \$40.26 fees, including taxes)

The image shows the Ticketmaster logo, which consists of the word "ticketmaster" in a white, lowercase, sans-serif font, set against a solid blue rectangular background.

ticketmaster®

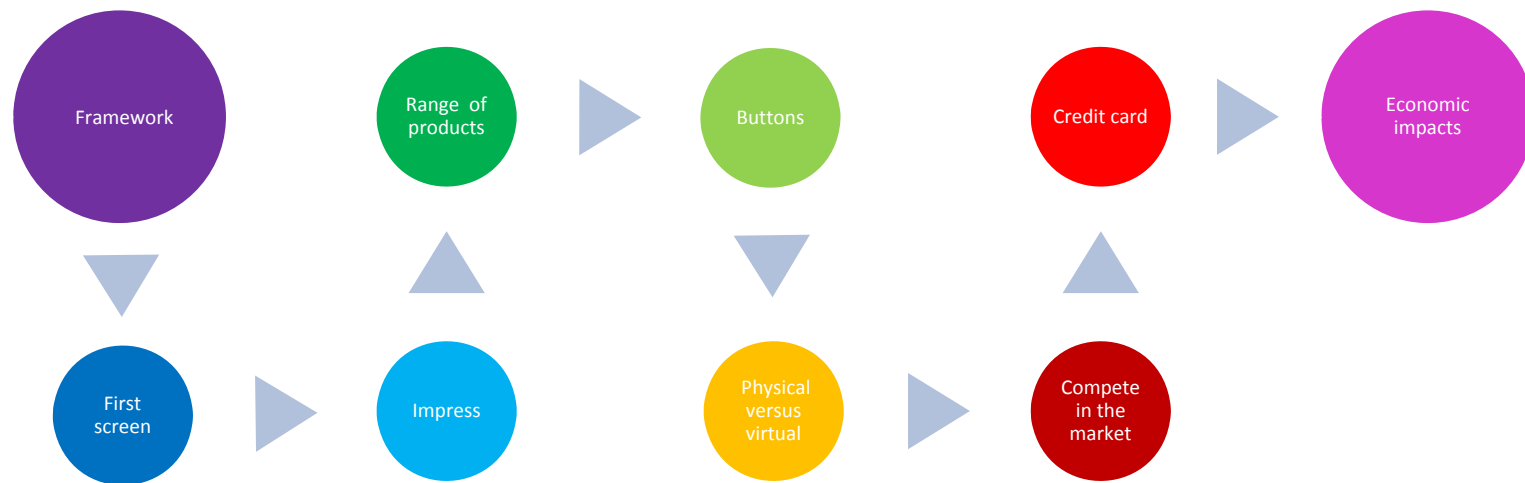


Digital Advertising and Purchasing: Fun or New Type of Deception

Forthcoming Canadian Competition Law Review Spring 2020

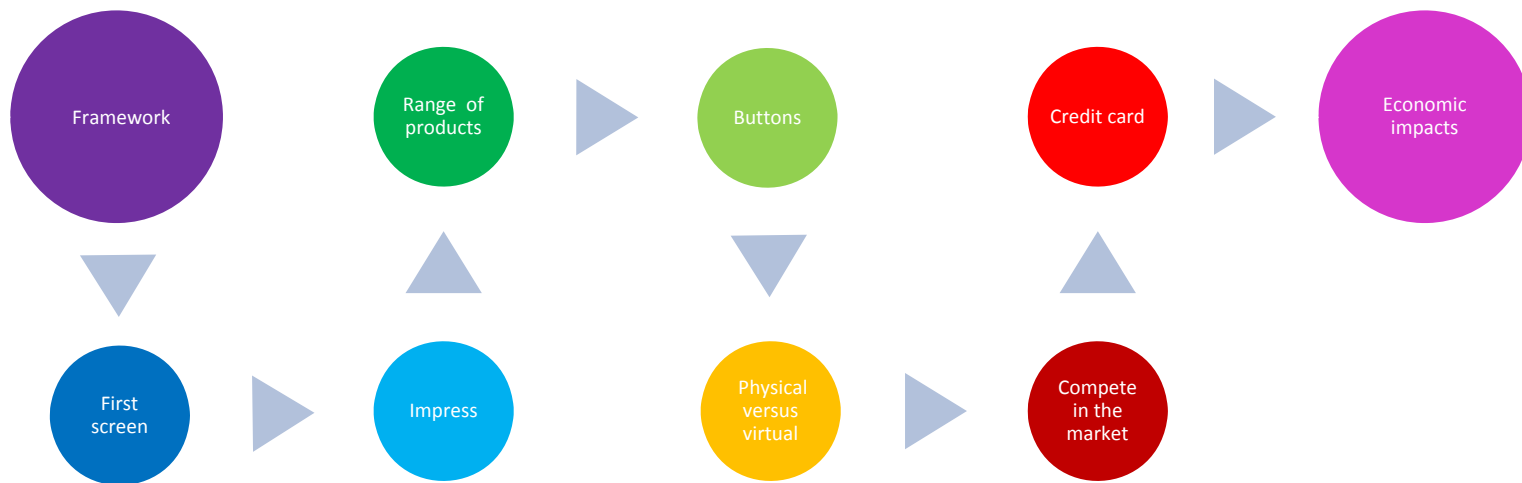


(i) **Anchoring:** The basic principle of anchoring is the concept that first impressions last



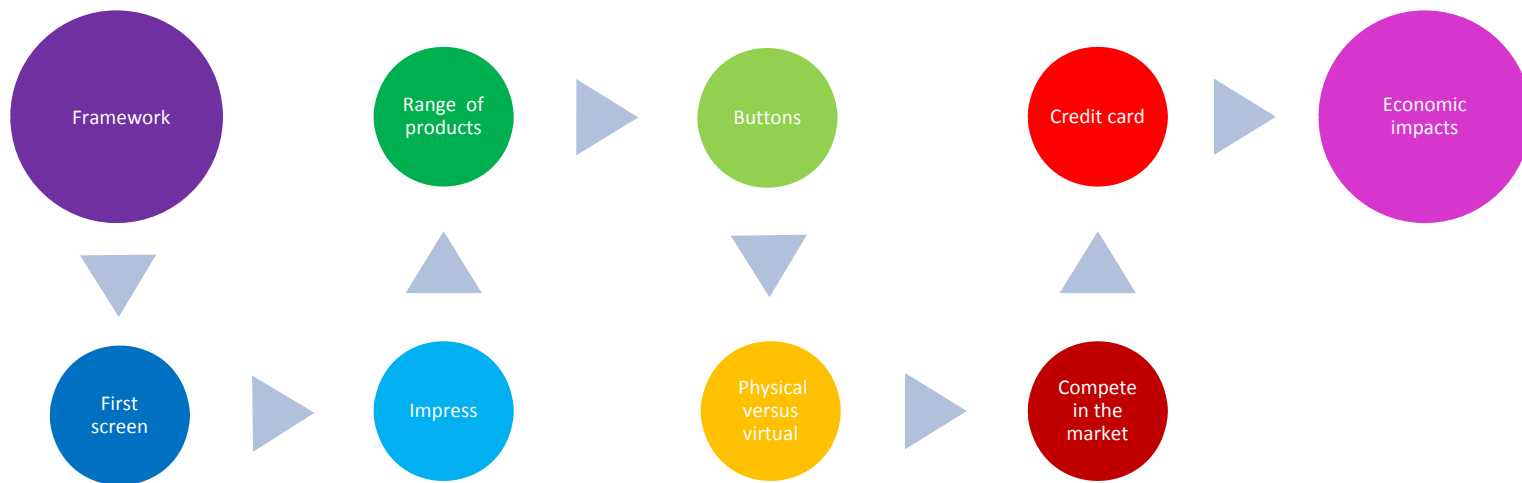
Henry C Su, "Thinking, Fast, Free, and Fashionable: Competition and Consumer Protection in a Mobile Internet World" (2012) 27:1 Antitrust 82 at 82 [Su].

(ii) Fast Pace: The digital environment is fast paced, which leaves consumers with an abundance of information in a world wherein choices must be made quickly



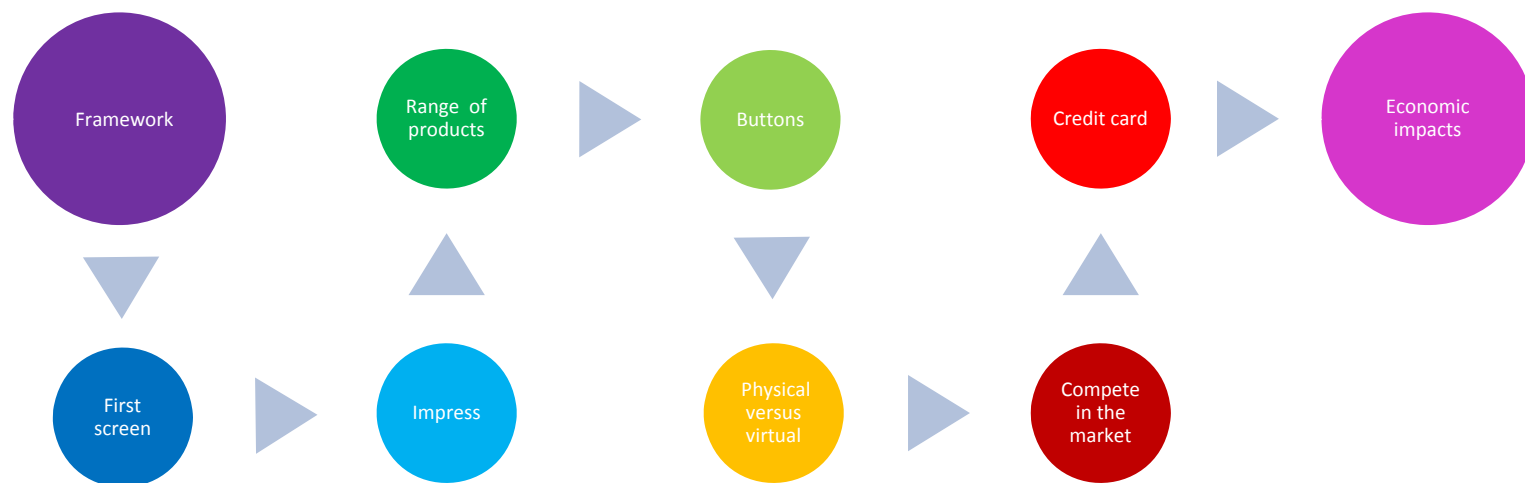
Katja Seim, Maria Ana Vitorino & David M Muir “Drip Pricing When Consumers Have Limited Foresight: Evidence from Driving School Fees” (2017) online (pdf):

(iii) Endowment effect: The endowment effect is when consumers perceive it costly to exit a transaction and search for alternative options



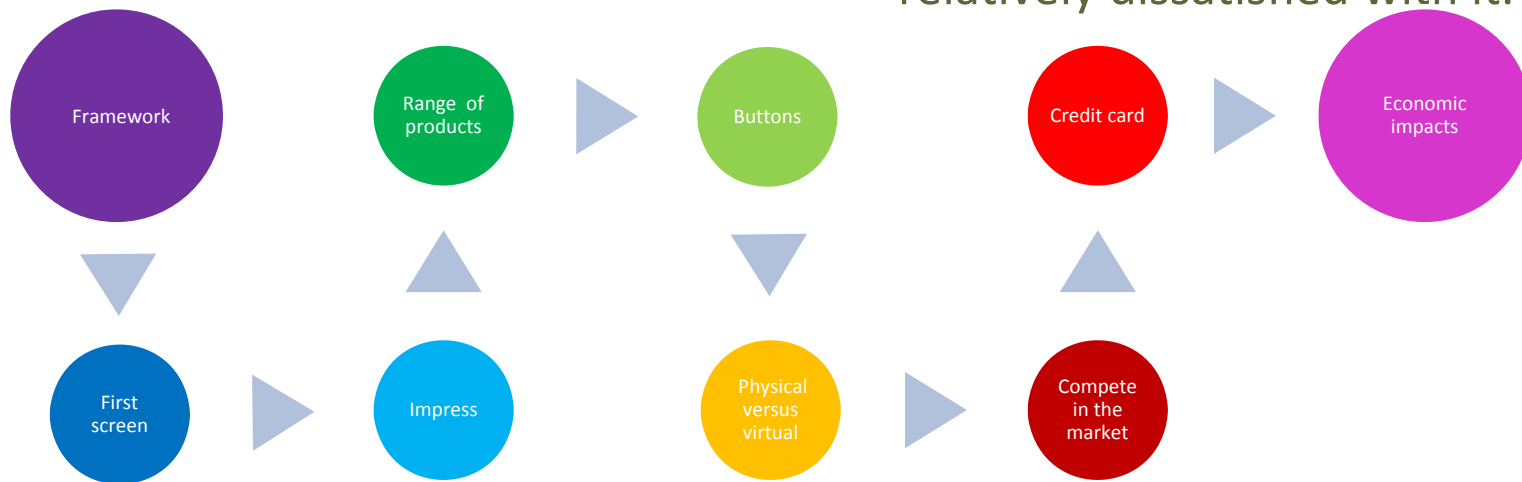
Gunanr Niels, Reinder Van Dijk & Leon Fields, “Behavioural Economics and Its Impact on Competition Policy: A Practical Assessment” (2013) 12:3 Competition LJ 374 at 376 [Niels].

(iv) Inertia: Inertia (consumers’ belief that switching takes too much time) may also help explain the stickiness of consumers’ initial selections when exposed to drip pricing.

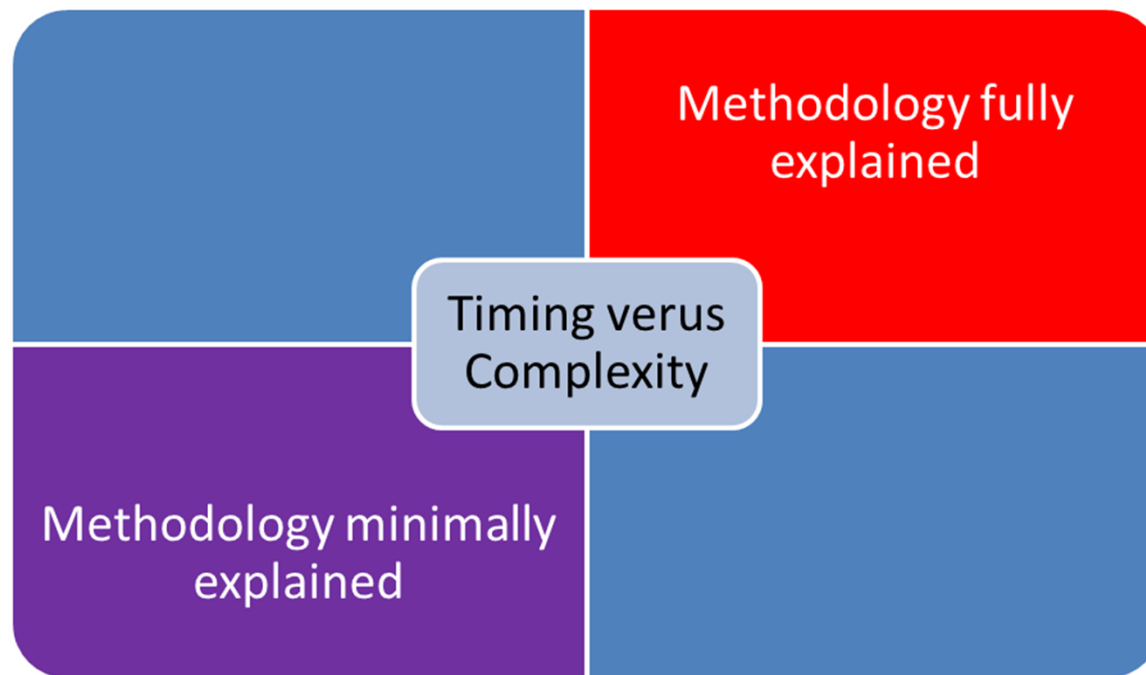


Shelle Santana, Steven Dallas & Vicki G Morwitz, “Consumer Reactions to Drip Pricing” (20 September 2017), online (pdf):

(v) Self-Justification: The concept of self-justification requires some elaboration as to why consumers exposed to drip pricing stick with their initial selection, even though it is more expensive and they are relatively dissatisfied with it.



MATRIX OF TIMING VERSUS COMPLEXITY



StubHub to pay \$1.3 million penalty for advertising unattainable prices for event tickets

<https://www.canada.ca/en/competition-bureau/news/2020/02/stubhub-to-pay-13-million-penalty-for-advertising-unattainable-prices-for-event-tickets.html>

- A Bureau investigation determined that StubHub advertised tickets at unattainable prices on its websites, mobile apps and in promotional emails to Canadians. The Bureau found that consumers could not buy tickets at advertised prices because StubHub charged consumers mandatory fees in addition to the prices advertised.



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- Unless consumers clicked or tapped to turn on optional filters to see prices inclusive of fees, those fees were only revealed at later stages of the purchasing process. The Bureau concluded that providing these optional filters and disclosing fees later in the process did not prevent the initial prices from being misleading. Moreover, the Bureau found that, in some cases, consumers who filtered results to see inclusive pricing were still asked to pay more than the prices shown as inclusive of fees.

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- As part of an agreement registered with the Competition Tribunal, StubHub will ensure that prices for tickets to events in Canada will now include all mandatory fees throughout the ticket purchasing process. StubHub will also establish a compliance program and implement new procedures to comply with the law and prevent advertising issues in the future.
- The Bureau acknowledges StubHub's voluntary cooperation in resolving this matter.

