

## Competition Law

February 15, 2005

### Competition Tribunal Sets the Rules for Comparative Price Advertising

On January 11, 2005, the Competition Tribunal found that Sears Canada Inc. (“Sears”) engaged in reviewable conduct under the civil misleading advertising provisions of the *Competition Act* (the “Act”). This case provides important guidance as to how the Competition Tribunal (“Tribunal”) interprets the civil ordinary selling price provisions of the Act. The decision has implications for all retailers and other suppliers that use comparative price advertising. Sears is considering whether to appeal the decision.

In 1999, the Act was amended to include a “two track” approach to misleading advertising by creating a set of civil provisions that would be used in most cases, leaving the criminal provisions for use only in the most egregious cases. The Competition Bureau issued guidelines concerning the civil ordinary selling price provisions. The Sears case was the first opportunity for the Competition Tribunal to interpret the civil ordinary selling price provisions. Sears also attacked the validity of these provisions as an unjustified infringement on the freedom of commercial expression, but the Tribunal rejected this argument.

The ordinary selling provisions prohibit any materially false or misleading representations to the public as to the ordinary selling price of a product. The ordinary selling price is established by using one of the two following tests: (1) either a substantial volume of the product was sold at that price or a higher price within a reasonable period of time before or after making the representation (volume test); or

(2) the product was offered for sale, in good faith, at that price or a higher price for a substantial period of time recently before or immediately after the making of the representation (time test).

In the Bureau’s guidelines, the Bureau indicated that for purposes of the volume test, it would expect 50% or more of the sales to occur at or above the reference price over a twelve month period or a shorter period depending on the nature of the product (i.e. a seasonal product). In terms of the time test, the Bureau guideline suggested that the product should have been sold at or above the reference price for more than 50% of the time for a period of six months or shorter depending on the nature of the product. In order to establish the “good faith” element of the time test, the Bureau suggested a number of factors should be examined, including the volumes offered and sold at the reference price and the reasonableness of the reference price in light of comparable prices in the market.

In this case, Sears admitted that it failed the volume test as it sold less than 3% of the concerned products (tires) at Sears’ regular selling price in the twelve month period preceding the comparative price advertisements.

In terms of the time test, the Tribunal agreed with the Bureau that to pass this test, the reference price must be offered more than 50% of the time over some relevant period. In this case, the Tribunal also adopted the Bureau’s six month reference period. In four of the five lines of tires under review, Sears did not meet the 50% benchmark in the reference period.

In terms of the “good faith” element, the Tribunal indicated that it is determined on a subjective basis, but that the reasonableness of a belief is a factor to be considered in determining whether a belief is honestly held. Consequently, the Tribunal considered that objective factors, such as whether the reference price was comparable to prices offered by other competitors and whether sales occurred at the reference price, may provide evidence that is relevant to assessing whether the advertiser believed its regular prices were genuine. In this case, the Tribunal held that Sears did not meet the good faith element for all of the tires under review as the evidence showed that they

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should have expected that less than 6% of the tires in question would be sold at their regular prices.

Before issuing an order under these provisions, the Tribunal must be satisfied that the ordinary selling price representation was false and misleading in a material respect. The word “material” in this context refers to the degree to which a purchaser is influenced by the price comparison representation in coming to a purchase decision.

The Tribunal, in deciding that the representations were material, considered four factors:

(1) the magnitude of the advertised savings; (2) the decline in sales volume at promotional prices that occurred when Sears lowered its regular prices, (3) the fact that consumers have a limited ability to evaluate the intrinsic attributes of tires and (4) that a significant percentage (42% in this case) of consumers do not spend time comparison shopping for tires.

The last two factors are interesting in that it suggests the Tribunal will consider ordinary selling price representations to have more impact on consumer behaviour where intrinsic attributes, such as product quality, are hard to assess and where a significant percentage of customers do not comparison shop for the products in question.

The Sears case is the latest sign that the Bureau is serious about enforcing the civil ordinary selling price provisions. Since 2003, two other large retailers have settled ordinary price claim matters with the Bureau. Forzani Group Ltd., the country’s largest sporting goods retailer, agreed to pay a \$1.2 million penalty and \$500,000 in costs, while Suzy Shier Inc., a women’s apparel retailer, agreed to pay a \$1 million penalty. In the Sears case, the Bureau has asked the Tribunal to levy an administrative monetary penalty of \$500,000 (\$100,000 for each of the five lines of tires in question).

On November 2, 2004, the Minister of Industry tabled amendments to the Act, which, if adopted, will dramatically raise the stakes for deceptive marketing practices, including misleading ordinary selling price representations. The maximum administrative monetary penalty for individuals

would be raised from \$50,000 to \$750,000 for the initial order, and for corporations, the maximum penalty would be increased from \$100,000 to \$10,000,000 for the initial order. In addition, a new power would be given to the court (which includes the Tribunal) to order restitution to consumers for false and misleading representations in an amount not to exceed the amount paid for the products.

If you have any questions or, if you wish to discuss the ordinary selling price provisions, please contact any member of the Goodmans’ Competition Group.

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