PUBLIC

File No. CT-2002-004

THE COMPETITION TRIBUNAL

IN THE MATTER OF THE *COMPETITION ACT*, R.S., 1985, c. C-34, as amended;

AND IN THE MATTER OF an inquiry pursuant to subparagraph 10(1)(b)(ii) of the *Competition Act* relating to certain marketing practices of Sears Canada Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act*.

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

-and-

SEARS CANADA INC.

Respondent

WRITTEN FINAL ARGUMENT OF THE COMMISSIONER OF COMPETITION

I. BACKGROUND

1. On July 22, 2002, the Commissioner of Competition (the "Commissioner") filed an application (the "Application") with this Tribunal alleging that in connection with the promotion and sale of tires to the public, Sears Canada Inc. ("Sears") had employed deceptive marketing practices which constituted "reviewable conduct" under subsection 74.01(3) of the *Competition Act* (the "Act"). The Application set out the grounds and material facts relied on by the Commissioner in making that allegation.

2. In its September 18, 2002 Response to the Application, among other things, Sears:

   i. sought a determination that ss. 74.01(3) of the Act is inconsistent with the provisions of the Canadian *Charter of Rights and Freedoms* (the "Charter") and, in particular, has infringed or denied Sears' fundamental freedom of expression guaranteed under section 2(b) of the Charter and, therefore, is of no force and effect; and

   ii. denied each ground and material fact alleged by the Commissioner, except as expressly admitted in its Response and, in particular denied:

      (1) that it was engaging or had engaged in reviewable conduct under ss. 74.01(3) of the Act; and

      (2) that any of its representations as to price were false and misleading in a material respect.

3. In the Commissioner's Reply to Sears' Response, the Commissioner conceded that ss. 74.01(3) of the Act infringes Sears' right to freedom of expression under section 2(b) of the Charter; however, the Commissioner submitted that this infringement constitutes a reasonable limit that is demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

4. The *Charter* issue is addressed in Schedule "A" attached. The deceptive marketing case follows below.

DECEPTIVE MARKETING

5. Sears distributed millions of advertisements to Canadians in 1999, with a view to promoting the sale of certain tires. In these advertisements, Sears offered large "save stories" off of its regular prices for the tires, so as to entice consumers to come to Sears to buy tires.

6. However, the regular prices used in the advertisements were inflated, so as to make the sales look better than they really were. They were inflated in that Sears was did not sell a substantial volume of the tires at the regular price prior to the advertisements, nor did Sears offer them in good faith for a substantial period of time at those regular prices prior to the advertisements.

7. Specifically, in terms of the volume, Sears sold on average of only 1.28% of the tires in issue at the regular prices stated in its advertisements prior to the representations being made. In other words, for every tire it sold at the purported regular price, Sears sold nearly 99 tires at a sale price.

8. In terms of time, four out of the five tires were on sale more than half the time in the period leading up to the advertisements. One of the tires was on sale 81% of the time.

9. Sears admitted that it believed that it would sell 90% of the Tires in issue at promotional prices, as opposed to regular prices. Sears had no honest belief that the market would validate its regular prices in that:

   a. Sears knew that its regular prices on their tires were not competitive. With respect to Sears' private label tires, Sears admitted that it's main competitor was Canadian Tire Corporation ("CTC"), and admitted that it wasn't competitive with CTC at their regular prices. With respect to Sears' tires that competed against national brands, Sears knew that tire dealers typically sold their national brand equivalent products well below manufacturers' list prices. Nevertheless, Sears' regular prices featured in the advertisements were close to list prices on comparable national brand tires;

   b. Sears knew that 90-95% of the tires would be sold in multiples, but made reference to its single unit regular prices in the advertisements in full knowledge of the fact that none of these multiple sales could have occurred at the regular price referenced in the

advertisement.

DOCUMENTARY EVIDENCE

10. The Commissioner will be relying *inter alia*, on documentary evidence in making her arguments. This documentary evidence falls into 4 categories:

    a. the business records provided by Sears in connection with the Commissioner's Inquiry (the "Sears Documents");
    b. the business records provided by Michelin North America (Canada) Inc. in response to the section 11 order issued October 17, 2000 (the "Dubé Order")(the "Michelin Documents");
    c. the business records provided by Bridgestone/Firestone Inc. in response to the Dubé Order (the "Bridgestone Documents"); and
    d. the written responses provided by Sears under oath in response to the Dubé Order, pursuant to s.11(1)(c) of the Act. ("Sears Written Responses").

11. Documentary evidence, if offered for the truth of its contents, is *prima facie* hearsay. For it to be admissible in evidence for the truth of its contents, it must fall under a hearsay exception.

***R.* v. *Wasylyniuk* [1981] 6 W.W.R. 684.**

***R.* v. Cosgrove and Dubois (1975) 22 C.C.C. (2d) 399.**

***"Documentary Evidence in Canada"* Douglas Ewart, Carswell, 1984 at pp. 12,19.**

12. The Commissioner submits that the Sears Documents fall under the following hearsay exceptions, and as such are admissible into evidence for the truth of their contents:

    a. section 69 of the Act;

    b. section 30 of the *Canada Evidence Act*;

    c. the common law doctrine of possession; and

    d. the common law exception to the hearsay rule, based on necessity and reliability.

13. The Commissioner submits that the Michelin and Bridgestone Documents fall under the following hearsay exceptions, and as such are admissible into evidence for the truth of their contents:

    a. section 30 of the *Canada Evidence Act*; and

    b. the common law exception to the hearsay rule, based on necessity and reliability.

14. The Commissioner submits that Sears' Written Responses are out-of-court admissions made by Sears, which is a recognized exception to the hearsay rule, and as such are admissible as against Sears for the truth of their contents.

***R. v. Terry* [1996] 2 S.C.R. 207.**

R. v. Streu **[1989] 1 S.C.R. 1521.**

R v. Wilson **(1911), 21 C.C.C. 105 (Alta. C.A.).**

"Documentary Evidence in Canada" **Douglas Ewart, Carswell, 1984 at p. 246.**

FACTS

I. THE TIRE MARKET IN CANADA

(i) Tire Brands

15. In 1999, there were basically three different categories of tires marketed in Canada: flag brand, associate brand and private brand.

Exhibit CA-116: Gauthier's Expert Report, para. 3.

16. Flag brand tires were tires that carried a manufacturer's name and were marketed under the manufacturers' label. They were available to a variety of retailers for sale on a non-exclusive basis. Examples include the Michelin X-One and the Firestone Firehawk tires. Typically, extensive retail marketing support for these tires was provided by the manufacturer, including: mileage and performance warranties; national distribution with fast pick up and delivery service; national and regional advertising and promotions; product brochures and price lists; and staff product and sales training.

Exhibit CA-116: Gauthier's Expert Report, para. 4.

17. Flag brands were owned by the tire manufacturer and the manufacturer retained very tight control of the brand's marketing support. The manufacturers attempted to build brand

awareness to the point that the consumer would seek out their product when in need of tire replacement. The better the job they did in this regard - the greater the consumer demand - the higher the price the consumer was willing to pay. The best example of this today is Michelin: its flag brand is positioned at the top end of the market.

Exhibit CA-116: Gauthier's Expert Report, para. 5.

18. Associate brand tires were manufactured by the same manufacturers as flag brand tires, but were not marketed under the manufacturers' name (for example, the Cavalier line which is made by Michelin). Manufacturers also owned the associate brands, however, unlike the case with flag brands, the associate brand tires received only limited retail marketing support. Further, retailers did not receive any "pull through" brand awareness support. Manufacturer support was limited to product warranty, limited sales representation, minimal point of sale and promotional material and price lists (containing product specifications and the manufacturer's list price).

Exhibit CA-116: Gauthier's Expert Report, paras. 6,7.

19. In 1999, the same companies that manufactured the flag and associate brands (i.e. Michelin, Goodyear and Bridgestone) also manufactured private brand tires. However, the brand associated with a private label tire was owned and controlled by the retailer in question and typically the retailer was responsible for all marketing support for its private brand tires.

Exhibit CA-116: Gauthier's Expert Report, para. 9.

20. As a rule, private brand retailers provided the manufacturer with a unit forecast and build schedule. The tires were then built and picked up by the retailer (or shipped collect) to correspond with anticipated sales activity and volumes. The retailer then took full responsibility for the product from this point on, including product warranty, price lists, advertising, promotion, training, etc. Private brand products were sold to the retailers at a price point well below the flag and associate brand levels. As a result, prices for private label tires tended to fall into the lower end of the retail market.

Exhibit CA-116: Gauthier's Expert Report, paras. 10, 11.

Pub. Hr. Tr., Vol. 7, 1113 (9-24).

(ii) Tire Retailers in Canada

21. In 1999, tires were marketed through five major tire retail groups in Canada: warehouse clubs, mass merchandisers, car dealers, service stations and garages and tire dealers.

a. Warehouse Clubs

22. In 1999, the warehouse clubs (e.g. Costco) positioned themselves primarily as retailers of flag brand product at wholesale prices. They did sell some associate brand products, but it represented a small part of their business. Generally speaking, their tire sales associates were not well trained and offered very little expertise when it came to qualifying customers tire needs and selling tire features and benefits. These retailers generally

marketed on price alone.

Exhibit CA-116: Gauthier's Expert Report, para. 13.

b. Mass Merchandisers

23. In 1999, the two big tire retailers in this category were Canadian Tire Corporation ("CTC") and Sears. Both CTC and Sears had well-developed national distribution networks across Canada and strong tire product offerings, complete with national warranty programs and uniform national advertising and promotional programs. However, their sales and technical staff had a reputation in the industry of lagging behind the tire dealers as far as tire knowledge and expertise is concerned.

Exhibit CA-116: Gauthier's Expert Report, para. 15.

Pub. Hr. Tr., Vol. 11, 1835 (2-13).

24. In 1999, both Sears and CTC carried flag brands. In addition, Sears also had co-branded products (i.e. products that carry their private brand name and the name of the manufacturer). The advantage of co-branded products was that they enabled Sears to market these products exclusively through their stores with the benefit of a flag brand label.

Exhibit CA-116: Gauthier's Expert Report, para. 17.

25. CTC and Sears made their mark and gained significant market share primarily with

private brand tires. With these products typically priced well below the flag brands in the marketplace, coupled with the fact that their staff lacked extensive tire knowledge and expertise, they had earned the reputation of marketing mainly on price.

Exhibit CA-116: Gauthier's Expert Report, para. 16.

26. In 1999, Sears, including Sears Automotive, was primarily a high-low retailer. This is still true today.

Pub. Hr. Tr., Vol. 19, 3157 (22-25).

Pub. Hr. Tr., Vol. 20, 3330 (17) - 3331 (1).

Pub. Hr. Tr., Vol. 19, 3158 (1-3) and (7-9).

27. An off-price or high-low pricing retailer typically charges a higher "regular" price for its merchandise and then from time to time offers that merchandise "on sale" at event-driven discount specials.

28. In 1999, Sears' tire ads typically featured deep discounts off their regular prices.

Exhibit CA-116: Gauthier's Expert Report, para. 16.

Exhibit CR-145: Winter's Expert Report, para. 9.

Pub. Hr. Tr., Vol. 21, 3533 (16-22).

Pub. Hr. Tr., Vol. 20, 3157 (16-21).

29. In 1999, CTC was an EDLP retailer. This was reflected in their advertising. An EDLP retailer typically charges a constant everyday price for its merchandise, with few or no

items temporarily discounted. These stable everyday prices eliminate week-to-week price fluctuations.

Exhibit CR-145: Winter's Expert Report, para. 6.

Pub. Hr. Tr., Vol. 21, 3531 (8-15).

c. Car Dealers

30. In 1999, car dealers provided their clients with full mechanical service as well as selling new and used vehicles. In the past, car dealers' focused primarily on mechanical service and not tires. If a car dealer needed tires, it would source them locally from a tire dealer or distributor.

Exhibit CA-116: Gauthier's Expert Report, para. 18.

31. Car dealers had a reputation for lacking tire knowledge and expertise, as well. They also had a reputation for charging higher prices for their tire products and/or services, compared to other tire retail groups.

Exhibit CA-116: Gauthier's Expert Report, para. 19.

d. Service Stations/Garages

32. In 1999, retailers in this group focussed on mechanical service sales and not tires. Tires tended to be a secondary component of their overall sales.

Exhibit CA-116: Gauthier's Expert Report, para. 20.

33. In 1999, the national chains of service stations/garages offered private brands and/or associate brands. The independent service stations/garages tended to source their tires from local tire dealers or distributors. In both cases their pricing tended to be towards the upper end of the market. They typically relied on their strong relationships and good service reputation to sell products and services, including tires.

Exhibit CA-116: Gauthier's Expert Report, para. 21.

e. Tire Dealers

34. In 1999, this group was made up of tire manufacturer company owned and/or co-owned stores (i.e. Goodyear, Fountain Tire, Beverly Tire), independent tire distributors (Remington, President), buying groups (OK Tire / Unimax), franchises (Firestone TAC), associate store groups (KalTire, TireCraft) and independent dealers. This group, as a whole, accounted for the largest share of the tire market in Canada - in excess of 50% in 1999.

Exhibit CA-116: Gauthier's Expert Report, para. 22.

35. These retailers marketed themselves primarily under the tire sales and service umbrella, even though the majority of them now offer mechanical services. Tire sales and service remains the primary focus of the tire dealers. They typically sell flag brands and/or

associate brands. However, because of their expertise, tire dealers predominantly sold flag brand tires.

Exhibit CA-116: Gauthier's Expert Report, para. 23.

Pub. Hr. Tr., Vol. 11, 1843 (1-8).

36. In 1999, Tire Dealers had a reputation of having well trained, experienced and knowledgeable sales and service staff. They also tended to price their products towards the upper end of the market. They tended to have a loyal customer base because of their reputation for having the expertise and because of their personalized service. They tended to have a strong relationship with their customers and as a result, price was less of a factor in the selling process.

Exhibit CA-116: Gauthier's Expert Report, para. 24.

(iii) Manufacturers' Suggested Retail Selling Prices ("MSRP")

37. In 1999 (and to this day), when tire manufacturers produced flag brand and associate brand tire product lines, they marketed them with the help of a price list that also doubled as a product catalogue. In addition to a MSRP, the catalogue included the various product specifications including, tire size, sidewall cosmetics, load ranges, speed rating, circumference measurement, tread depth measurement, etc.

Exhibit CA-116: Gauthier's Expert Report, para. 26.

38. Manufacturers list prices are basically a starting point from which all pricing, whether it be wholesale or retail, is based.

Pub. Hr. Tr., Vol. 10, 1628 (12) - 1629 (8).

39. To determine wholesale prices, manufacturers established a base discount off the MSRP for their various wholesale channel members. This discount usually varied depending on business type (distributor vs. retailer), sales volumes and/or in-house share committed to the manufacturer. Manufacturers then had separate programs/discounts to recognize annual volumes, special promotions, annual bookings, freight allowances, etc.

Exhibit CA-116: Gauthier's Expert Report, para. 28.

40. Tire retailers set their own pricing in the marketplace. They tended to establish their retail price as a percentage off of the MSRP. For example, in 1999 if a dealer was buying Firestone brand tires at list less 50%, he would retail them in the neighbourhood of list less 25% - 35%, depending on the established price level (the level other retailers were selling at) in the market. Tire dealers tended to investigate competitive selling prices before establishing their own retail price level. This scenario holds true for other manufacturers' tire brands. If a dealer was buying Michelin X-One's at list less 50%, he would retail that product at list less 25%-35%.

Exhibit CA-116: Gauthier's Expert Report, paras. 29, 30.

41. A small number of dealers established their selling price by simply marking up their cost

a set dollar amount (ie: $25 per 13"tire, $30 per 14"tire, $35 15" tire etc.).

Exhibit CA-116: Gauthier's Expert Report, para. 29.

42. Tire retail selling prices in 1999 were not at the MSRP. Given that MSRP's in 1999 did not reflect the true everyday or regular price for tires, manufacturers, such as Michelin and Bridgestone-Firestone, encouraged dealers not to advertise product prices as a "% savings" off of the MSRP.

Exhibit CA-116: Gauthier's Expert Report, paras. 31, 32.

(iv) Sears' Tire Marketing and Pricing Structure in 1999

a. Sears' Tire Advertising in 1999

43. In 1999, Sears operated 67 Retail Automotive Centres across Canada and offered 28 different lines of tires for sale to the public.

Exhibit A-118: Request to Admit, paras. 7, 8.

Exhibit A-119: Response to Request to Admit, para. 1.

44. Sears advertised the tires that it offered for sale to the public by making representations in various media, including flyers, newspaper advertisements and other promotional material, such as in-store leaflets. Twenty-seven of the 28 tires Sears sold in 1999 were marketed using a high-low pricing strategy. Sears' advertisements for these tires depicted

Sears' Regular Single Unit price (as defined below), its sale price (whether Normal Promo or Great Item) (as defined below) and typically included an indication of the savings consumers could realize by purchasing the tires at the sale prices shown. Representations of this sort are hereinafter described as "ordinary selling price representations" or "OSP representations".

Exhibit A-118: Request to Admit, para. 18.

Exhibit A-119: Response to Request to Admit, para. 1.

Pub. Hr. Tr., Vol. 16., 2700 (24) - 2701(6), Exhibit CA-30, pp. 1483-84.

Exhibit CA-9: Affidavit of William F. McMahon, sworn February 1, 2001, ("McMahon Feb. 1, 2001 affidavit"), para. 77.

Pub. Hr. Tr., Vol. 19, 3177 (10) - 3179 (18).

45. In its OSP representations, Sears' Regular Single Unit price for the given Tire was always the "ordinary" or reference price set out in the Sears "reg." column in the Representations.

Exhibit A-118: Request to Admit, para. 17.

Exhibit A-119: Response to Request to Admit, para. 1.

46. The following provides an illustration of the type of representations Sears made to the public in flyers, newspaper advertisements and in-store leaflets in connection with the three sales events:

RST Touring 2000 tires

Size	Sears reg.	Sale, each
P175/70R13	104.99	56.49
P185/70R14	118.99	64.49
P195/70R14	123.99	67.49
P205/70R14	128.99	69.49
P215/70R14	133.99	72.49
P205/70R15	136.99	74.49
P185/65R14	121.99	66.49
P195/65R14	126.99	68.49
P195/65R15	134.99	73.49
P205/65R15	139.99	76.49
P215/65R16	148.99	80.49
P215/60R16	149.99	81.49
P225/60R16	156.99	85.49
P205/55R16	164.99	89.49

Other sizes also on sale

save

45%

OUR LOWEST PRICES OF THE YEAR ON TOURING 2000 TIRES

The Response RST Touring 2000 all-season tire
is backed by a 120,000 km Tread Wearout Warranty;
details in store. #59000 series.

Exhibit A-50: p. 606

47. Sears made OSP representations concerning the tires it offered for sale to the public to millions of Canadians across the country on a regular basis throughout 1999, including representations in respect of the Tires.

Exhibit CA-9: McMahon Feb. 1, 2001 affidavit, paras. 16, 28, 31-33.

Exhibit CA-10: Exhibit "A" to the McMahon Feb. 1, 2001 affidavit, preprint circulation flyers.

Exhibit CA-11: Exhibit "B" to the McMahon Feb. 1, 2001 affidavit, Chronological Listing of Newspapers - 1999 .

48. The determination as to which tires to put on sale, at which price and at what time, was made up to one year prior to the date of a given promotion and was finalized, at the latest, four months prior to the promotion. Notwithstanding the foregoing, up to five weeks before a given promotion, Sears had an opportunity to check the advertising relating to that promotion and could make changes.

Pub. Hr. Tr., Vol. 20 , 3286 (21) - 2390 (1)

b. The Tires

49. Of the 28 different tires lines offered for sale by Sears in 1999, 12 were all-season passenger vehicle tires, including the following:

a. RoadHandler "T" Plus (the "Roadhandler");

b. BF Goodrich Plus (the "Goodrich Plus");

c. Michelin Weatherwise (the "Weatherwise");

d. Response RST Touring 2000 (the "Response"); and

e. Silverguard Ultra IV (the "Silverguard").

(the foregoing 5 tire lines hereinafter collectively referred to as the "Tires").

Exhibit A-118: Request to Admit, paras. 9 and 11.

Exhibit A-119: Response to Request to Admit, para. 1.

50. In dollar terms, the Tires represented approximately 39% of Sears' total tire sales for all 28 lines in 1999.

Exhibit A-118: Request to Admit, para. 13.

Exhibit A-119: Response to Request to Admit, para. 1.

51. No other retailer in Canada promoted or supplied the Tires to the public in 1999.

Exhibit A-118: Request to Admit, para. 14.

Exhibit A-119: Response to Request to Admit, para. 1.

c. Sears' Pricing Levels for Tires

52. Sears used the following four price levels in offering the Tires to the public in 1999.

A. The **regular single unit price**, which was the price that Sears charged for a single unit of any of the Tires when that Tire was not on sale (the "Regular Single Unit price").

Pub. Hr. Tr., Vol. 16, 2703 (1-10).

B. The **"2 for" price**, which was the price per Tire at which Sears would sell two or more units of the same size of a given Tire to consumers, when that Tire was not being offered by Sears at a "sale" price. For any given Tire, Sears' "2 for" price was always "significantly less" than the Regular Single Unit price for that Tire.

Pub. Hr. Tr., Vol. 16, 2703 (11-20).

Pub. Hr. Tr., Vol. 16, 2708 (11-17).

C. The **normal promotional price**, which was Sears' usual advertised "on sale" price for a given size of a Tire (the "Normal Promo price"). The Normal Promo price for

any given size of Tire, was calculated as a set percentage discount off the Regular Single Unit price.

Pub. Hr. Tr., Vol. 16, 2703 (21) - 2704 (11).

D. The **"great item", "big news" or "lowest prices of the year" price** (the "Great Item price"), was a further discounted promotional price for any given size of a Tire. Like Sears' Normal Promo prices, the Great Item prices were calculated as a set percentage discount off Sears' Regular Single Unit price for the given size of a Tire. For any given size of a particular Tire, the Great Item price was always lower than the Normal Promo price for that size of that Tire.

Pub. Hr. Tr., Vol. 16, 2704 (12-25).

53. The following example illustrates the relationship between the foregoing price levels. For the Response (size P215/70R14)[1], Sears pricing in 1999 was as follows:

a. Regular Single Unit price - $133.99;

b. 2 for price - $87.99;

c. Normal Promo price - $79.99, representing a 40% discount off the Regular Single Unit price; and

---

[1] All of the Tires were offered to the public in a variety of sizes. Throughout this argument, pricing and other examples are set out necessarily using one size or another of a given Tire. The examples are intended to be illustrative of pricing relationships which exist within Sears' tire lines and between Sears prices and those of its competitors. Using a different size of tire for purposes of any given example may alter the absolute numbers, but will not materially alter the relative pricing relationships.

d. Great Item price - $72.49, representing a 45% discount off the Regular Single Unit price.

Exhibits A-12-14, and A-35.

54. As indicated in paragraph 45, it was the Regular Single Unit price which was referenced as the ordinary selling price in the Representations. Sears' Regular Single Unit prices for the Tires in 1999 were set by Sears in the Fall of 1998. Those prices were not altered or varied during 1999.

Pub Hr. Tr., Vol. 16, 2565 (13-25).

Pub Hr. Tr., Vol. 16, 2705 (14) - 2706 (9).

55. Sears' "2 for", Normal Promo and Great Item prices for the Tires were also set or established by Sears in the Fall of 1998. Those prices were generally not altered or varied during 1999.

Pub. Hr. Tr., Vol. 16, 2565 (11) - 2566 (8).

Pub. Hr. Tr., Vol. 16, 2705 (16-20)

Pub. Hr. Tr., Vol. 17, 2819 (14-25)

REVIEWABLE CONDUCT

56. Subsection 74.01(3) of the Act provides as follows:

> (3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,
>
> > (a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; [the "*volume test*"] and
> >
> > (b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be. [the "*time test*"]

57. The Commissioner submits that under ss. 74.01(3) of the Act, subject to ss. 74.01(5), the Tribunal is required to make a finding of reviewable conduct if a person has made an ordinary selling price representation to the public to promote its business where that person, having regard to the nature of the product and the relevant geographic market, has not satisfied the volume test or the time test.

58. Subsection 74.01(5) of the Act is in the nature of an affirmative defence. It provides as follows:

> (5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.

59. If Sears relies on ss. 74.01(5) in its Response to this Argument, the Commissioner will

address the issue of materiality, as it relates to reviewable conduct, in her Reply. The issue of materiality is addressed below pursuant to para. 74.1(5)(d), in the context of the Commissioner's argument regarding the appropriate amount of an administrative monetary penalty.

60. Each of the elements of ss.74.01(3) of the Act is addressed in turn below.

I. "A person"

61. Sears is a person within the meaning of ss. 74.01(3) of the Act.

Exhibit A-118: Request to Admit, para. 1.

Exhibit A-119: Response to Request to Admit, para. 1.

***Interpretation Act,* R.S. 1985, c. I-21, ss. 35(1).**

II. "for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest,"

62. It is submitted that it is self-evident that the representations Sears made to the public in 1999 regarding tires (described in greater detail below) were made for purpose of promoting the supply or use of tires and for the purpose of promoting its business interests generally.

63. This is confirmed by the following exchange during the hearing between the

Commissioner's counsel and Harry McKenna, Sears' Automotive's Logistics Manager in 1999:

> MR. J.L. SYME: Sir, the question I asked you is whether Sears made those representations, those OSP representations we talked about to build in-store traffic and to increase tire sales. I am going to suggest to you that's what you were doing.
> MR. H. McKENNA: Yes.
>
> ***Pub. Hr. Tr., Vol. 19, 3164 (8-19).***

64. William McMahon, who was Sears' Group Retail Marketing Manager of Group 700-2 in 1999, its National Business Manager of Automotive from February 2000 to July 2000, and its General Manager of Automotive from July 2000 up to the time of the hearing before the Tribunal, agreed with McKenna in the following testimony:

> MR. J.L. SYME: I need to turn it up. I have a flyer from 1999 in front of me. What I wanted to ask you, sir, was whether you would agree with me or not that the ads that Sears put in flyers and newspapers and so forth in respect of tires in 1999 were meant to drive sales of multiple tires as well as singles?
>
> MR. W.F. McMAHON: It was meant to drive business into our stores on the items that were promoted -- based on the items that were promoted.
>
> ***Pub. Hr. Tr., Vol. 20, 3401 (23) - 3402 (7) and 3404 (10-22).***
>
> ***Pub. Hr. Tr., Vol. 20, 3282 (10-11).***
>
> ***Pub. Hr. Tr., Vol. 20, 3281 (14-17).***
>
> ***Pub. Hr. Tr., Vol 20., 3281 (1-6).***

65. In cases brought under the predecessor section to ss. 74.01(3) of the Act, the courts have had little difficulty finding this element of the offense to be satisfied.

66. In *R.* v. *Patton's Place Ltd.*, the court convicted the accused on a charge under paragraph 33(1)(c) of the *Combines Investigation Act*.[2] The accused's advertisement for a washing machine was published in the London Free Press on January 29, 1968 and indicated a "Mfg. regular" price of $229.95, a sale price of $129 and included the words "Save $100". With respect to the purpose of the advertisement, the court stated as follows:

> The purpose of the advertisement, obviously, and it is admitted by Mr. Patton, was to sell the article in question. So that, there is not doubt that the representation appearing in the advertisement was for the purpose of promoting sale (sic) of the article to the public. There is no question that the advertisement was geared to the public by appealing to the public by way of a reduced price and featuring the bargain value of the price against the price of $229.95 which was represented in the advertisement as the manufacturer's regular price, which as I said before was accepted by or interpreted by the witnesses meaning the manufacturer's list price.
>
> ***R. v. Patton's Place Ltd.***, (1968) 57 C.P.R. 12 at 15.

67. Similarly, in *R v. McKay's Television and Appliances Ltd.*, the accused was charged under paragraph 33(1)(c) of the *Combines Investigation Act* in connection with an ordinary selling price advertisement for a stereo/television that it caused to be published in the Windsor Star. Regarding whether or not the advertisements was for the purpose of promoting the sale or use of the goods in question, the court simply stated as follows:

> "I need not consider whether the representation was to the public for the purpose of promoting the sale or use of the article in question, because it is obvious that it was.
>
> ***R. v. McKay's Television and Appliances Ltd.***, 65 C.P.R. 126 at 128.

---

[2] Paragraph 33(c)(1) Everyone who, for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public, by any means whatever, concerning a price at which such or like articles have been, are, or will be, ordinarily sold, is guilty of an offence punishable on summary conviction. (emphasis added).

III. "makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation"

68. As noted in paragraph 44 above, in 1999 Sears advertised tires, including the Tires, by making OSP representations to the public in various media, including flyers, newspaper advertisements and other promotional material.

69. Among the OSP representations Sears made in 1999 regarding the Tires were representations made in connection with the following three 'Sales Events':

A. **Sales Event #1** - in which the Roadhandler and the Response were offered to the public by Sears at sale prices of 40% and 45% off Sears' Regular Single Unit prices, respectively, in the period from November 8 through 14, 1999.

B. **Sales Event #2** - in which the Silverguard was offered to the public by Sears at a sale price of 50% off Sears' Regular Single Unit price in the period from November 22 through November 28, 1999.

C. **Sales Event #3** - in which the Goodrich Plus and the Weatherwise were offered to the public by Sears at sale prices of 25% and 40% off Sears' Regular Single Unit prices, respectively, on December 18 and 19, 1999.

Exhibit A-118: Request to Admit, paras. 21-23, 32, and 34-38.

Exhibit A-119: Response to Request to Admit, para. 1.

70. In connection with each of the Sales Events #1 and #2, Sears made representations to the public in flyers, newspaper advertisements and in-store leaflets. In connection with Sales Event #3, Sears made representations to the public in flyers. (The foregoing representations hereinafter collectively referred to as the "Representations")

IV. Time and Volume Test

(I) "having regard to the nature of the product"

71. The Tires, being all-season passenger tires, have certain characteristics that are relevant to an analysis under ss. 74.01(3). These characteristics are relevant to the application of the time and volume tests, and in particular, the issues of substantial volume of product; a reasonable period of time, and good faith.

Almost all tires are sold in multiples

72. Tires are a product category where the need satisfying ability of the product can only be realized with multiple units.

> ***Exhibit CA-120: Lichtenstein's Expert Report (Main Case), para. 16.***
>
> ***Pub. Hr. Tr., Vol. 12, 1967 (18) - 1969 (1).***

73. Tires are complimentary goods; that is, they need to be consumed together in order to

provide utility (a set of four tires are needed).

Exhibit CA-120: Lichtenstein's Expert Report (Main Case), para. 16.

Pub. Hr. Tr., Vol. 12, 1967 (18) - 1969 (1).

74. The majority of tires are purchased in sets of either two or four, with a maximum of from 5-10% of tires sold singly. This was true in 1999 and would be true today.

Exhibit CA-116: Gauthier's Expert Report, para. 38.

75. Consumers in Canada typically purchase in multiple units (either one pair or two pairs at a time).

Exhibit R-142: DesRosiers Expert Report, para. 13.

76. Generally, consumers would purchase only one tire for one of the following reasons: tire failure (which is unforseen and the result of an emergency); a defective tire; replacement of a spare tire; or the need to match a single tire previously purchased because of tire failure.

Exhibit R-142: DesRosiers Expert Report, para. 15.

Pub. Hr. Tr., Vol. 10, 1713 (1-15).

Pub. Hr. Tr., Vol. 19, 3054 (21) - 3055 (14).

77. Consumers who need to purchase a single tire are a relatively captive audience, as retailers will generally recommend that consumers buy a tire that matches the other three tires on the car or, at a minimum, matches the tire on the other end of the axle from the tire being replaced. Such recommendations are made for safety reasons. Moreover, they are most

likely to purchase a single tire in an emergency situation; accordingly the purchase is not influenced by the existence or non-existence of a sale.

Exhibit CA-120: Lichtenstein's Expert Report (Main case), para 17.

Pub. Hr. Tr., Vol. 12, 1971 (15) - 1972 (13).

Tire sales are fairly stable over time

78. By their very nature, sales of "all-season" tires are less sensitive throughout the year than seasonal products (eg. winter coats, lawn tractors). The fall and spring are the higher selling seasons, and the winter and summer are the lower selling seasons.

Exhibit CA-120: Lichtenstein's Expert Report (Main Case), para. 21.

79. Regardless of variations in the seasons, tires are promoted for sale and are purchased all year long.

80. Because tires are not a product category which people typically buy in advance and stockpile, or for which prices have much effect on the rate of consumption, demand for tires is relatively stable over time. While a sale price may pull someone in the market sooner than would otherwise be, it will not lead to increased tire consumption or stockpiling.

Exhibit CA-120: Lichtenstein's Expert Report (Main Case), paras. 18 and 19.

81. As demand for tires is more stable and less sensitive to stockpiling, one would not expect to

see the spikes in demand caused by responses to promotional sales as would be expected with some other product categories.

Exhibit CA-120: Lichtenstein's Expert Report (Main Case), para. 19.

Consumers do not spend much time searching for tires or evaluating alternative products

82. All-season tires for the mass-market are a shopping good. Research shows that consumers engage in a low level of search for shopping goods such as the Tires.

Exhibit CA-120: Lichtenstein's Expert Report (Main Case), paras. 26, 37 and 39.

Pub. Hr. Tr., Vol. 12, 1986 (17-25).

Consumers have a limited ability to evaluate the intrinsic qualities of tires:

83. The Tires are private label brands in a product category where several intrinsic attributes are difficult for the average consumer to evaluate. Most consumers do not have the ability to evaluate the quality of tires based on intrinsic attributes such as tread pattern, tire construction, etc. Research shows that where consumers cannot assess intrinsic attributes, they will look to extrinsic indicators of the quality of the product (store names, brand names, OSP). Where intrinsic product attributes are difficult for consumers to evaluate, consumers may attempt to assess the quality of the product by comparing prices for like brands across merchants. However, when consumers lack the ability to evaluate products on intrinsic attributes and competing retailers carry brands that are unique to them, neither of these strategies is open to consumers. As such, the likelihood increases that they would

respond to merchants advertising "exceptional values," and especially if the merchant is perceived to be credible. There is widespread recognition that OSP representations are likely to have a greater impact for product categories such as the Tires where the intrinsic attributes are hard for consumers to assess.

Exhibit CA-120: Lichtenstein's Expert Report (Main Case), paras. 45-47 and 50.

Pub. Hr. Tr., Vol. 12, 1997 (8) - 1999 (21) and 2003 (24) - 2004 (9).

Exhibit CA-9: p. 1632, para. 251.

84. For tires, most consumers lack the expertise necessary to evaluate quality for money based on their intrinsic attributes.

Pub. Hr. Tr., Vol. 12, 2003 (19-23).

Consumers engage in passive search over time for new tires

85. Tires are usually replaced only when a consumer's existing tires become worn. Except for the case of the purchase of a single tire, the timing of new tire purchases is a continuum based on when the benefit of new tires exceeds the cost of obtaining, as opposed to a discrete point in time. As consumers notice that their tires are becoming worn, they will likely go into a passive search mode where they more readily perceive tire advertisements and are on the lookout for a good deal on tires.

Exhibit CA-120: Lichtenstein's Expert Report (Main Case), paras. 42, 43.

Pub. Hr. Tr., Vol. 12, 1991 (24) - 1994 (1).

(ii) "having regard to the relevant geographic market"

86. Compliance with the volume and time tests set forth in ss. 74.01(3) must be assessed "having regard to ... the relevant geographic market".

The Act, *supra*, ss. 74.01(3).

87. Interpretation of the phrase "relevant geographic market", as it is used in ss. 74.01(3), is informed by the purpose of the provision, and the role of the volume and time tests specified in paras. 74.01(3)(a) and (b) in achieving that purpose.

***Rizzo and Rizzo Shoes Ltd. (Re)* [1998] 1 S.C.R. 27.**

88. As discussed above, the purpose of ss. 74.01(3) is to prohibit a person from making deceptive representations to the public concerning the person's ordinary selling price for the product. The volume and time tests delimit when a price will or will not be considered to be a seller's ordinary selling price for the purposes of the provision. The tests involve an assessment of the volume of product sold at the reference price or the period of time the product was made available at the reference price in good faith, respectively. The time and volume tests are to be applied, in any given case, *having regard to* the relevant geographic market.

89. Nothing in ss. 74.01(3), in general, or in the time and volume tests, in particular, turns on the existence or non-existence of market power or of competitive market forces. Therefore, the anti-trust approach to market definition - which is designed to assess market power and the operation of competitive market forces - is irrelevant to, and does not inform in any way the analysis under ss. 74.01(3).

Pub. Hr. Tr., Vol. 23, 3819 (14-18).

90. The Commissioner submits that the relevant geographic market for assessing the Representations in this case is Canada, as:

a. The flyers and newspapers containing the Representations were distributed nationally and without regional variation;

b. Sears published advertisements in newspapers across Canada and that there were no regional variations in the advertisements (with the exception of snow tires), that Sears did not produce or distribute separate marketing and promotional material for each region in 1999 (with the exception of snow tires), and that Sears distributed the flyers in markets in which Sears did not even operate a Sears' Retail Automotive Centre during 1999;

Exhibit CA-9: McMahon Feb. 1, 2001 affidavit, paras. 8, 9 and 255.

Exhibits: A-50 to A-84.

c. Sears did not and could not track distribution rates of preprints on a regional basis; it could only track preprints on a national basis;

Exhibit CA-9: McMahon Feb. 1, 2001 affidavit, para. 20.

d. Sears regular and promotional prices were set on a national basis, without regional variation; and

> "... we have only one price which was in effect nationally so that the price in St. John's Newfoundland would have been the same as the price in Pickering, Ontario or in British

Columbia"

Pub. Hr. Tr. Vol. 19, 3053 (24) to 3054 (2).

See also McMahon Feb. 1 Affidavit, para. 255 and Pub. Hr. Tr. Vol. 16, 2705 (9-13).

e. The promotional events were designed and conducted as national events in light of, *inter alia,* [ ].

Exhibit CA-9: McMahon Feb. 1, 2001 affidavit, para. 153.

91. Given the facts, Professors Lichtenstein and Moorthy concluded that the relevant market for assessing the Representations is national.

Exhibit CA-120: Dr. Lichtenstein's Expert Report (Main Case), paras. 54-65.
Exhibit CA-123: Dr. Moorthy's Expert Report, page 4, para. 14-22.

92. The Commissioner notes that Sears' internal compliance practices corroborate this conclusion. Specifically, the so-called "checkerboards" that were used by Sears for compliance purposes tracked estimated sales volumes and promotional periods on a national basis only.

Exhibit CA-45 & CR-130: Promotional Checkerboards - Jan. 1999 to Dec. 1999.
Pub. Hr. Tr., Vol. 20, 3339 (22) - 3340 (6).

93. In the circumstances, compliance with the volume and time tests is most appropriately assessed in this case in the context of the national market.

(iii) The Volume Test

"(*a*) have not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be;"

94. The volume test requires an examination of the volume of the product sold at the "ordinary" price "within a reasonable period of time before or after the making of the representation, as the case may be".

The Act, *supra*, ss. 74.01(3).

95. Subsection 74.01(4) specifies whether the period of time before or after the representation is to be considered:

(4) For greater certainty, whether the period of time to be considered in paragraphs (2)(*a*) and (*b*) and (3)(*a*) and (*b*) is before or after the making of the representation depends on whether the representation relates to

(*a*) the price at which products have been or are supplied; or

(*b*) the price at which products will be supplied.

The Act, *supra*, ss. 74.01(4).

96. It is submitted that it is plain on the face of the Representations that they set out the Regular prices at which the Tires "have been or are supplied" by Sears, and not the Regular prices at which the Tires "will be supplied" by Sears (i.e., at some future time). Accordingly, the Tribunal must consider whether Sears sold substantial volumes of each of the Tires in a reasonable period of time before making the Representations.

97. In its Responding Statement of Grounds and Material Facts, Sears stated that "the reasonable amount of time necessary to evaluate properly in this case whether a substantial volume of the Tires were sold previously at Regular Prices is at least twelve months immediately preceding the date on which those Regular Prices were allegedly offered to the public."

Responding Statement of Grounds and Materials Facts of Sears Canada Inc., para. 138.

98. In light of the nature of the product, as set out in paragraphs 71 to 85 above, and in particular, the fact that the Tires are available throughout the year, with peak selling periods in the Spring and Fall, a reasonable period of time for assessing whether Sears sold a substantial volume of the Tires at the represented price is 12 months.

Exhibit CR-145: Winter's Expert Report, paras. 29-30.
Pub. Hr. Tr., Vol. 21, 3547 (1) -3550 (4).
Exhibit CA-120: Lichtenstein's Expert Report (Main Case), paras. 20-22.
Pub. Hr. Tr., Vol. 12, 1976 (1-15).

99. The volume test requires an assessment of the volume of sales at the price that the seller has represented to be its ordinary selling price in the representations in issue. In this case, the regular price referenced by Sears in the Representations is the Regular Single Unit Price for the Tires. Paragraph 74.01(3)(a) therefore mandates an assessment of the volume of sales of the Tires at the Regular Single Unit price.

The Act, *supra*, para. 74.01(3)(a).

100. Sears sold only 1.28% of the total volume of sales of all five Tires during the 12 month period preceding the Representations at the Regular Single Unit price.

Exhibit A-118: Request to Admit, para. 40.

Exhibit A-119: Response to Request to Admit, para. 1.

101. The table below sets out the percentage of total sales of each of the Tires at the Regular Single Unit price during the 12 month period preceding the Representations. The percentage of Tires sold at the Regular Single Unit price ranges from 0.51% to 2.29% for the individual tires.

Table - Volume of Sales at the Regular Single Unit Price

Tire	Time-frame	Total number of tires sold in the year before the relevant Representation	Number sold at the Regular Single Unit Price	Percentage of Tires sold at the Regular Single Unit Price
BF Goodrich Plus	12/18/98 - 12/18/99	49211	1129	2.29%
Michelin Roadhandler 'T' Plus	11/08/98 - 11/08/99	77098	1004	1.30%
Michelin Weatherwise RH Sport	12/18/98 - 12/18/99	55055	455	0.82%
Response RST Touring 2002	11/08/98 - 11/08/99	30140	155	0.51%
Silverguard Ultra IV	11/22/98 - 11/22/99	51230	620	1.21%
Total		262734	3363	1.28%

Exhibit A-118: Request to Admit, para. 40.

Exhibit A-119: Response to Request to Admit, para. 1.

102. Sales of 1.28% of total sales of an all-season product over a one year period clearly do not qualify as "substantial".

Exhibit CA-120: Dr. Lichtenstein's Expert Report, para. 72.

103. Expert witnesses tendered by the Commissioner opined that sales volumes at or below the sales volumes of the Tires during the relevant periods would not qualify as substantial, for the purposes of the volume test. In this regard, Sears' own Expert Economic Witness, Professor Trebilcock, admitted that he would "become concerned" about the genuineness of a regular price if only 1.8% of sales occurred at that price.

> ***Exhibit CA-120: Lichtenstein's Expert Report (Main Case), para. 71.***
> ***Pub. Hr. Tr., Vol. 23, 3845 (18) - 3846 (1).***

104. Finally, Sears own actions demonstrate that Sears did not consider its sales of the Tires at the Regular Single Unit price to be substantial. Sears did not keep track of its volume of sales at the Regular Single Unit price, but rather aggregated sales at the Regular Single Unit and "2-for" prices. In addition, certain buying plans did not anticipate *any* sales at the Regular Single Unit price. These actions clearly evidence an expectation that sales of Tires at the Regular Single Unit price would not be substantial.

> ***Pub. Hr. Tr., Vol. 14, 2485 (5-16).***
> ***Pub. Hr. Tr., Vol. 20, 3316 (12) - 3321 (9).***
> ***Exhibit CA-48: Buying Plans.***

105. The Commissioner submits therefore that Sears did not sell a substantial volume of the Tires at the regular prices referenced in the Representations.

(iv) The Time Test

> "(b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be."

106. There are two elements to the time test: "good faith" and "substantial period of time". If it is established that a seller has failed to satisfy either element, then the seller has failed the time test.

(a) "for a substantial period of time recently before or immediately after the making of the representation"

107. In its Responding Statement of Grounds and Material Facts, Sears stated that in applying the time test the Tribunal should consider a time frame of "at least twelve months preceding the date of the Representations". Accordingly, Table 1 of Sears' Responding Statement of Grounds and Material Facts sets out the percentage of time within the twelve month time frame preceding the Representations at which the Tires were offered by Sears at the Regular Single Unit price.

Responding Statement of Grounds and Materials Facts of Sears Canada Inc., paras. 106, 109.

108. The Commissioner disagrees with Sears, and submits that in this case the Tribunal should examine Sears' pricing conduct in respect of the Tires in the six month period preceding the Representations in respect of each Tire.

109. The Commissioner submits that, given Parliament's use of the word "recently" in

paragraph 74.01(3)(b) of the Act, there must be reasonable temporal proximity between the impugned Representations and the offering of the Tires to the public at Regular Single Unit prices. The question is: in selecting a time frame to evaluate Sears' pricing conduct under the time test, how far back in time should the Tribunal go?

110. The essence of the word "recent" is captured in the definitions below":

a. Lately done or made; that has lately happened or taken place, etc.; 2. Lately formed, created, originated, or begun ... ; 3. Belonging to a (past) period of time comparatively near to the present ...

***(The Shorter Oxford English Dictionary* ,3rd ed. Vol II).**

b. not long past, that happened or began to exist or existed lately; not long established, lately begun, modern; ...

(The Concise Oxford Dictionary, 7th ed.)

111. In his Deceptive Marketing Report, Professor Lichtenstein opined that "the substantial period of time provision relates to the amount of time a product should be offered at an OSP ... such that it has an opportunity to be verified by the market as the 'regular price'.

Exhibit CA-120: Dr. Lichtenstein's Expert Report, para.77.

Pub. Hr. Tr., Vol. 12, 2041 (12-18).

112. In Dr. Lichtenstein's view, given that there was some increase in sales volume for tires in both the Spring and the Fall, any six month period would capture both high and low volume

sales periods. Dr. Lichtenstein testified that, in any event, when sales are examined on a percentage basis (i.e., what percentage of the Tires were sold at the Regular Single Unit price), the fact that there were sales peaks and troughs in terms of absolute numbers becomes less significant. The more critical question - if sales are examined on a percentage basis - is whether or not there were seasonal variations in the percentage of Tires sold at the Regular Single Unit price. Dr. Lichtenstein testified that as there were no such variations, in his view, a six a month period would be "more than adequate" for purposes of evaluating Sears' pricing conduct under the time test.

Exhibit CA-120: Dr. Lichtenstein's Expert Report, para.77.

Pub. Hr. Tr., Vol. 12, 2041 (19) - 2043 (13).

113. The Commissioner submits that in setting an outer bound for "recently before", the Tribunal should select a time frame which provides a fair indication Sears' pricing conduct in respect of the Tires, without reaching so far back so as to run afoul of the requirement that the conduct examined be "recently before" or not too far removed from the representations at issue. The Commissioner submits that a six month time frame satisfies those requirements.

114. Finally, the Commissioner notes that shortly after ss. 74.01(3) of the Act came into force, Sears' own Legal Department circulated a memorandum dated May 11, 1999 (the "1999 Memo") to all Sears' Vice-Presidents in which it addressed the new provision. With respect to the time test, the 1999 Memo provided:

Was the product offered for sale, in good faith, for a substantial period of time,

at the price the advertiser claims is the regular price?

- the issue of whether a product has been offered for a substantial period of time will be determined by a consideration of the nature of the product and the sales history of the product;

- in general, the time period to be considered will be **six months** prior to (or following) the making of the representation (this time period can be **shorter** if the product is seasonal in nature);

- the substantial period of time requirement will be met if the product is offered at the higher comparison price for more than 50% of the time period considered. (emphasis added)

Exhibit A-29: Memorandum of Sears' Legal Department dated May 11, 1999, p. 1.

115. Consistent with the 1999 Memo, Mr. McMahon testified that he used a six month period in applying the time test to Sears' advertising in respect of tires.

Pub. Hr. Tr., Vol. 20, 3384 (4) - 3385 (13).

116. Sears has admitted that in the 6 months preceding the Representations relevant to the given tire:

a. the Roadhandler was offered to the public by Sears at the Regular Single Unit price 38% of the time (i.e., it was "on sale" 62% of the time);

b. the Silverguard was offered to the public by Sears at the Regular Single Unit price 60% of the time (i.e, it was "on sale" 40% of the time);

c. the Weatherwise was offered to the public by Sears at the Regular Single Unit price 19% of the time (i.e., it was "on sale" 81% of the time); and

d. the Goodrich Plus was offered to the public by Sears at the Regular Single Unit price 45% of the time (i.e., it was "on sale" 55% of the time).

Pub. Hr. Tr., Vol. 8, 1314 (7-10).

117. In addition, the evidence adduced in this proceeding establishes that the Response was offered for sale at the Regular Single Unit Price 46% of the time in the 6 month period preceding the Representations relevant to that Tire (i.e. it was on sale 54% of the time).

Exhibit A-88
Exhibit CA-140
Pub. Hr. Tr., Vol. 19, 3246 (21) - 3253 (23).

118. The Commissioner submits that in construing the phrase "substantial period of time" and, in particular, the word, "substantial", it is important that the Tribunal remain mindful of the context within which Parliament has used the word.

***Rizzo and Rizzo Shoes Ltd. (Re)*, supra**

119. The time test is intended to assess whether a price constitutes a price at which a product is "ordinarily supplied" by a person making a representation for a "substantial period of time". In the Commissioner's view, a seller who offers goods to the public at prices that are lower than the represented regular price (sale prices) more that half the time recently before making the regular price representation, cannot be said to have offered the goods in question at the represented ordinary price for a substantial period of time before making the representation.

120. This approach is consistent with jurisprudence under the predecessor legislation. In *R v. T. Eaton Co. Ltd.* , in finding Eatons guilty to a charge under paragraph 33(1)(c) of *the Combines Investigation Act*, the Court stated as follows:

> The bulk of the merchandise was not sold regularly, but the bulk of the merchandise is sold on these so-called sale days. I rather suspect, although the evidence was otherwise, that the days in between these so-called sales are in fact days which are used to set up merchandise and fix up the store, so to speak, this on the circumstances surrounding the evidence.
>
> In any case, a sale that goes on for at least 114 days out of the year is not a sale, and the prices which are charged for the other days cannot be described as ordinary prices. I know that it may very well be difficult for retailers to know exactly what they may or may not do, but so far as this Court is concerned, under this section what they may not do is call merchandising a "Sale" when it is really not in essence a "Sale": it is artificial and cannot be permitted.
>
> ***R v. T. Eaton Co. Ltd.*** (1971) 4 C.P.R. (2d) 226 at 228 (Ont. Prov. Ct.).

121. The Commissioner submits that, given that the Roadhandler, the Response, the Weatherwise and the Goodrich Plus were offered to the public by Sears at sale prices (i.e. Normal Promo or Great Item) more than 50% of the time (in the case of the Weatherwise, 81% of the time), Sears failed to offer those tires to the public at the Regular Single Unit price for a substantial period of time recently before making the Representations. On that basis alone, for those four tires, Sears fails the time test and the Tribunal need not inquire into the "good faith" element of the time test.

(b) "good faith"

122. The Commissioner submits that even if Sears did offer some or all of the Tires to the public at its Regular Single Unit price for a substantial period of time (which is not admitted), the Tires were not offered to the public at those prices in good faith.

A. The Meaning of Good Faith

123. The Act does not contain a definition of "good faith" and there are no other provisions in the Act that use that phrase. Moreover, the Commissioner submits that there is no Canadian jurisprudence on the meaning of "good faith" which would be of assistance to the Tribunal in this context. However, foreign jurisprudence reveals as follows.

124. In *Sanfield Inc. v. Finlay Fine Jewellery Corp.*, the Illinois District Court considered the issue of good faith in the context of an action brought by one jewellery retailer against another which was founded, in part, upon certain Regulations promulgated under the Illinois's *Consumer Fraud Act*. The relevant portion of those regulations provides:

> It is an unfair or deceptive act for a seller to compare current price with its former (regular) price for any product or service, . . .unless one of the following criteria is met:
>
> > (a) the former (regular) price is equal to or below the price(s) at which the seller made a substantial number of sales of such products in the recent regular course of its business; or
> >
> > (b) the former (regular) price is equal to or below the price(s) at which the seller offered the product for a reasonably substantial period of time in the recent regular course of its business, openly and actively and in **good faith**, with an intent to sell the product at that price(s). (emphasis added)
>
> ***Sanfield Inc. v. Finlay Fine Jewellery Corp.*, US District Court, 76 F. Supp. 2d 868; 1999**

125. Having found that Finlay's sales volume did not satisfy paragraph (a) above, the court went on to consider the issue of good faith. It stated:

> The stipulated sales at regular and sale prices support that finding. Finlay made little if any sales of the items at regular price over the course of several years at its Rockford stores. Finlay was obviously not concerned with the lack of sales at regular price, and in fact, intentionally chose not to monitor information of the number of gold jewellery items sold on a given day at what price. Finlay calculates the regular and sale prices of its gold jewellery simultaneously with the objective that when an item is sold at a 50% discount it will yield the desired gross margin. Finlay monitors only whether a store is meeting its gross margin goal.
>
> ***Sanfield Inc. v. Finlay Fine Jewellery Corp., supra* at p. 7**

126. In *State of Colorado v. The May Department Stores Company*, the court considered OSP representations made by May to the public. The court found that May's buyers did not keep statistics on the quantity of merchandise sold at the reference prices May employed in its advertising and that May's buyers set the reference prices at a level where substantial sales of merchandise were not expected. The court concluded:

> May D & F's policy and practice of comparison price advertising, in effect in its Home Store pursuant to its 1989 Policy violated the FTC Guides because its "regular" price is not a bona fide price but, rather, a subjective, artificial, and inflated price established for the purpose of advertising subsequent large reductions.
>
> ***State of Colorado v. The May Department Stores Company*, 1990 WL 322653 (Colo.Dist. Ct.)**

127. Black's Law Dictionary defines "good faith" as follows:

> A state of mind consisting in (1) honesty in belief and purpose (2) faithfulness to one's duty or obligation (3) observance of reasonable commercial standards of fair dealing in a given trade or business (4) absence of intent to defraud or to seek unconscionable advantage - also terms bona fides.
>
> ***Black's Law Dictionary (7th ed.).***

128. The Commissioner submits that "good faith" in ss. 74.01(3) of the Act is inherently a subjective concept. In this case, the Commissioner submits that the first definition in Black's is germane. It requires the Tribunal to answer the question: Were Sears' Regular Single Unit prices for the Tires genuine and *bona fide* prices, set by Sears with the honest belief that the prices would be validated by the market-place.

129. The Commissioner submits that Sears' prices were not genuine and *bona fide* prices set by Sears with the honest belief that the prices would be validated by the marketplace. As set out in greater detail below, the Commissioner's submission is based upon the following four grounds:

a. Sears could not have believed its Regular Single Unit prices would be validated by the market given its competitive analysis of its position in the market and given its view of where it had to be in terms of pricing to be competitive;

b. Sears knew that 90-95% of the tires would be sold in multiples, but made reference to the single unit regular prices in the advertisements in full knowledge of the fact that, given its 2-for price point, few sales could ever occur at the Regular Single Unit prices;

c. Sears sold only 1.28% of the Tires at Regular Single Unit prices; and

d. Tire sales at Regular Single Unit prices were of so little interest to Sears, that it did not bother to keep track of those sales.

130. The Commissioner submits that in determining whether or not Sears' Regular Single Unit prices were good faith prices, an understanding of how Sears viewed the competitive landscape in which it was operating in 1999 and its expectations with respect to sales of

Tires at Regular Single Unit prices is imperative.

131. In that connection, in addition to the testimony adduced at the hearing in this matter, the Commissioner submits that certain key documents prepared by Stan Keith, Sears' tire buyer until February 2001, provide valuable insights. Given the significance of these documents and Mr. Keith's role in their preparation, the next section of this argument briefly describes Mr. Keith's role within Sears Automotive and then describes each of the key documents. The balance of the Commissioner's argument regarding good faith addresses, for private label tires and then national brand tires, the following issues:

a. Sears' expectations for sales of the Tires at the Regular Single Unit prices given Sears' belief regarding the competitiveness of those prices;

b. Sears' expectations for sales of the Tires at the Regular Single Unit prices given Sears' belief that 90-95% of the tires it sold were sold as multiples; and

c. the volume of Tires Sears sold at Regular Single Unit prices; and

d. the fact that Sears did not track sales at the Regular Single Unit Price.

B. Stan Keith - Competitive Profiles, Buying Plans and Automotive Reviews

132. Stan Keith was acknowledged within Sears as *the* expert with respect to the tire market in Canada and tire pricing.

Pub. Hr. Tr., Vol. 17, 2776 (25) - 2777 (25).

133. As Sears' tire buyer, Mr. Keith was responsible for building Sears' tire line structure and for, in the first instance, setting Sears' tire prices.

Pub. Hr. Tr., Vol. 14, 2446 (8-25); and 2448 (17) - 2449 (3).

Pub. Hr. Tr., Vol. 17, 2774 (18) - 2777 (6); and 2780 (4-13).

134. Though Mr. Cathcart was Sears' Retail Marketing Manager for Automotive up to April 2000, with marketing responsibility for all facets of Sears' retail automotive business including tire pricing, in view of Mr. Keith's experience and expertise, Mr. Cathcart did not often challenge Mr. Keith's pricing decisions with respect to tires.

Pub. Hr. Tr., Vol. 16, 2619 (9-21).

Pub. Hr. Tr., Vol. 14, 2446 (8-25).

135. The key documents used by Mr. Keith in his tenure as Sears' tire buyer in building Sears' tire line and establishing Sears' tire pricing were competitive profiles and buying plans.

Pub. Hr. Tr., Vol. 16, 2666 (25) - 2672 (5).

Exhibit CR-128: 1999 Automotive Training Program

Exhibits A-33 to CA-37: Competitive Profiles

Exhibit CA-48: Buying Plans

Competitive Profiles

136. Mr. Keith created competitive profiles as he built Sears' line structure for tires. The competitive profiles encapsulated Sears' competitive response to what Sears' saw as its competition. Mr. Keith built the profiles as a competitive analysis to position Sears'

pricing opposite comparable competitive tire offerings identified by Mr. Keith.

Pub. Hr. Tr., Vol. 16, 2669 (21) - 2670 (12).

Pub. Hr. Tr., Vol. 16, 2670 (19) - 2671 (1).

137. For example, the competitive profile for the Sears' Silverguard tire compared, in both absolute and percentage terms, Sears' pricing at the 2 for, Regular Promo and Great Item price levels with CTC's pricing for the Motomaster Touring LXR tire.

Exhibit A-34: Competitive Profile for Line 68 - Silverguard Ultra IV

138. Sears' competitive profile for the Silverguard (size P205/75R14 92S) is set out below.

PRICE COMPARISON		**Silverguard Ultra IV 110,000 km Revised Selling Prices**				**Motomaster Touring LXR 120,000 km rated PRICING LEVEL**			
SIZE		**Regular Selling**	**2 for Each**	**Promotional Spring 99**	**Great Item Spring 99**	**Fall '98 EDLP**	**2 for Each**	**Promotion Fall 98**	**Great Item Fall 98**
340	P205/75 R14 92S	$123.99	$79.99	$73.99	$67.99	$75.99	105.26%	97.37%	89.47%

Buying Plans

139. As noted above, Mr. Keith also used buying plans in discharging his duties. Mr. Keith created a buying plan for each tire Sears offered to the public.

Pub. Hr. Tr., Vol. 17, 2830 (7-12).

140. The buying plans were a matrix type document which set out, among other things, Sears' cost from the manufacturer for a given tire, its prices at each pricing level (i.e., Regular Single Unit, 2 for, etc.) and an estimate of how many tires Sears expected to sell at certain price levels. The 2000 buying plans (based on 1999 data) for the Tires did not forecast any sales at Sears' Regular Single Unit prices. Rather, they indicated that only 10% of sales were expected at the 2 for price and the balance of sales were expected at promotional prices. Mr. Cathcart testified that the 1999 buying plans for the Tires would have employed a similar format and that it would have been Sears expectation heading into 1999 that it would sell, on average, 90% of the Tires at promotional prices and 5-10% of them a "regular" prices.

Pub. Hr. Tr., Vol 17, 2861 (5-25).

141. Buying plans were the documents that Mr. Keith used to develop the margins that would be associated with the selling prices of each line of tires and to determine whether or not the profitability of a given tire would fit within Sears tire line.

Pub. Hr. Tr., Vol. 17, 2331 (23) - 2832 (19).

Automotive Reviews

142. Twice a year, Mr. Keith and Mr. Vincent Power, Sears' National Business Manager, created an Automotive Review. The Automotive Reviews were a strategic marketing

document that were created for "one-on-one" presentations to Sears' CEO and Executive Committee. On cross- examination, Mr. Cathcart testified as follows with respect to purpose of the Spring Review and the presentations to the Sears' CEO:

> "Basically this whole communication to the CEO was to detail how we what we were going to introduce as new commodities possibly and how we were going to address the competition."

Pub. Hr. Tr., Vol. 16, 2596 (11) - 2597 (14).

Pub. Hr. Tr., Vol. 16, 2597 (18) - 2598 (6).

Pub. Hr. Tr., Vol. 16, 2631 (4-7).

Pub. Hr. Tr. , Vol. 16, 2632 (5-8).

143. The presentations were made by Sears' buyers and national business managers. Mr. Cathcart testified that the presentations were, "really the only opportunity the buyer [had] to show their stuff, so to speak, and prove themselves to our CEO." He testified that some buyers had been reassigned and others had been fired following unsuccessful presentations.

Pub. Hr. Tr., Vol. 16, 2597 (2-14).

Pub. Hr. Tr., Vol. 16, 2597 (18) - 2598 (6).

144. The 1999 Spring Review set out, among other things, Sears' assessment of what it viewed as its primary competition in the tire market and Sears' marketing strategies for private label tires and national brand tires.

Exhibit CA-30: Sears Automotive Reviews Spring and Fall 1999, pp. 1483-84.

145. The Commissioner will discuss good faith in the context of Private Label tires and National Brand tires separately:

C. Sears' Regular Single Unit Prices for Private Label Tires - Good Faith

Silverguard Ultra IV, Response RST Touring 2000, BF Goodrich Plus

146. The Silverguard and the Response were private label tires offered for sale to the public by Sears in 1999.

147. The Goodrich Plus was an "entry-level tire" offered for sale to the public by Sears in 1999. The Goodrich Plus was priced in accordance with Sears' Private Label Strategy. In the competitive profile for the Goodrich Plus, Mr. Keith identified CTC's Motomaster AW+, a private label tire, as the relevant competitive offering. The Commissioner submits that although, notionally, the Goodrich Plus was a flag brand tire, it was marketed by Sears as a private label tire, and was exclusive to Sears.

Pub. Hr. Tr., Vol. 20, 3283 (21) - 3284 (11).

Exhibit CA-30, p. 1483

Exhibit A-33

Sears' Belief - Competitiveness of Regular Single Unit Prices for Private Label Tires

148. Mr. Cathcart admitted that it would have been Sears' expectation going into 1999 that it would sell only 5-10% of the Tires at "regular" prices. The balance would be sold at promotional prices. This admission is consistent with Sears' view of the private label

market and the strategy it followed in marketing tires to that market.

149. Sears viewed Canadian Tire as its main competitor in the private label segment of the tire market. The only competitive profiles prepared by Mr. Keith for the Silverguard, the Response and the Goodrich Plus tires in respect of 1999, compared Sears' pricing at its 2 for, Normal Promo and Great Item prices to CTC's pricing for the competing tire offerings. However, the competitive profiles did not benchmark Sears' Regular Single Unit price as against CTC's price. Mr. Keith did not create any competitive profiles comparing the prices for the Silverguard, the Response and the Goodrich Plus to the price of any other tire retailer.

Pub. Hr. Tr., Vol. 16, 2700 (18-22).

Pub. Hr. Tr., Vol. 17, 2780 (4-13).

150. In his "Buyer's Letter 1999", Mr. Keith discusses the "Private Brand segment" of the tire market and identifies [ ] as Sears' "major competitor" in this area. No other private label competitor is identified.

Exhibit CA-23: 1999 Merchandise List & Buyer's Letter, p. 1247.

151. Sears' private label strategy in 1999 was as follows:

> "To increase our market share in Private Brand tires which represents almost 50% of the replacement tire sales in Canada. To differentiate our product from our competitors which affords the opportunity to maximize profitability."

Exhibit CA-38, NADM1869s

152. In terms of pricing and sales promotion, the "tactics" Sears intended to employ in pursuing

that strategy were as follows:

> " Index our every day pricing to [ ] ([ ] Private Brand retailer) to be equal to or within [ ]% of their every day low price with a better warranty package. On sale we will be lower than the equivalent tire at [ ]."
>
> ***Exhibit CA-30: Sears Automotive Reviews Spring and Fall 1999, p. 1483.***

153. As noted in paragraph 29, in 1999, Canadian Tire had EDLP prices for tires.

154. Mr. Cathcart admitted that Sears' Regular Single Unit prices for the Silverguard, the Response and the Goodrich Plus were not competitive with CTC's prices for comparable tires (i.e., Motomaster AW+ and Motomaster Touring LXR). In fact, Sears Regular Single Unit prices for those tires were as much as 65% more than CTC's prices for the Motomaster AW+ and Motomaster Touring LXR.

> ***Pub. Hr. Tr., Vol. 16, 2592 (16-19).***
>
> ***Exhibit CA-120: Lichtenstein's Expert Report (Main Case), para. 96.***
>
> ***Exhibit CA-123: Moorthy's Expert Report, para. 64.***

155. Mr. Cathcart testified that Sears' designed its 2 for prices for tires to be competitive with CTC's prices. In this regard, the Commissioner notes that Sears' 2 for prices were described as its "every day pricing" in Sears' private label strategy and its "Plan to Sell" price in various Sears documents.

> ***Exhibit CA-30, p. 1483.***

156. In view of the fact that Sears viewed CTC as its primary competitor in the private label segment of the tire market and Sears knew that its Regular Single Unit prices for the

Silverguard, the Response and the Goodrich Plus were not competitive with CTC's prices for comparable tires, the Commissioner submits that Sears could not have believed that the market would validate its Regular Single Unit prices.

157. Simply put, it is not credible that Sears believed that, with its Regular Single Unit prices for the Silverguard, the Response and the Goodrich Plus being as much as 65% higher than CTC's prices for comparable products, that consumers would opt to purchase the Sears' offerings. Indeed, Mr. Cathcart admitted that Sears could charge at most a premium of 10% over CTC on comparable tire products and still remain competitive, which is consistent with Sears' Private Label strategy.

Pub. Hr. Tr., Vol. 17, 2812 (2) - 2819 (9).

158. Moreover, Sears' Private Label Strategy set out Sears' competitive response in the private label sector of the market generally. That strategy sets out where Mr. Keith believed Sears private label pricing had to be in order to allow Sears to be competitive in the private label market. However, Sears' Regular Single Unit prices for the Tires fell well outside those ranges. In view of that fact, the Commissioner submits that Sears could not have believed that the market would validate its Regular Single Unit prices.

Exhibit CA-120: Lichtenstein's Expert Report (Main Case), paras. 86 - 88.

Sears' Belief - Only 5-10% of Tires sold Singly

159. In addition to the foregoing, it was Sears' belief in 1999 that between 5-10% of the tires it sold were sold singly and that the balance of the tires it sold -- 90-95% -- were sold as multiples. Based on Sears pricing structure in 1999, tires sold as multiples could only have been sold by Sears at a sale price or at the 2 for price. They could never have been sold at the Regular Single Unit price.

160. Consumers who need to purchase a single tire are a relatively captive audience as they must buy a tire that matches the other three tires on the car or, at a minimum, matches the tire on the other end of the axle from the tire being replaced. Moreover, they are most likely to purchase a single tire in an emergency situation; accordingly the purchase is not influenced by the existence or non-existence of a sale. Furthermore, because Sears regularly had its tires on sale in 1999, as per its monthly Plan to Sell Book, it could not have reasonably assumed that all of those 5-10% of tires sold as singles would be sold at Regular Single Unit prices.

161. At best, Sears could have assumed that if the distribution of single unit tire sales over time was constant, it would sell a percentage of tires at the Regular Single Unit price equal to the percentage of time that the tires were offered for sale at that price. For example, if a tire were offered at its Regular Single Unit price half the time in a given period, then Sears could expect to sell 2.5 - 5% of that tire at the Regular Single Unit price (i.e. half of 5 - 10%).

162. In the six months preceding the Representations, the following Tires were offered for sale at Regular Single Unit prices for the percentage of time indicated:

a. the Response - 46%;

b. the Silverguard - 60%; and

c. the Goodrich Plus - 45%.

163. The Commissioner submits that for those six month periods, Sears could have only expected, at best, that it would sell:

a. between 2.3% and 4.6% of the Response at its Regular Single Unit price;[3]

b. between 3 to 6% of Silverguard at its Regular Single Unit price; and

c. between 2.25% and 4.5% of the Goodrich Plus at the Regular Single Unit price.

164. The foregoing is based upon what volume of sales Sears *might* have expected at Regular Single Unit prices. Of course, had Sears been keeping track of its sales at the Regular Single Unit Price, as contemplated by ss. 74.01(3) and by Sears' own internal compliance policies it would have known that for the six months it was selling only 0.51% units of the Response, 1.21% units of the Silverguard and 2.29% units of the Goodrich Plus at Regular Single Unit prices.

Exhibits CA-24 and A-29

Exhibit CA-120: Lichtenstein's Expert Report (Main Case), paras. 90-91, 97-99.

---

[3] Sample calculation: 5% x 46% (time at Regular Single Unit price) = 2.3%
10% x 46% (time at Regular Single Unit price) = 4.6%.

Sears' Belief - Competitiveness of Regular Single Unit Prices for National Brand Tires

168. The Commissioner submits that Sears knew going into 1998 that its Regular Single Unit prices for the Roadhandler and the Weatherwise were not competitive. In view of that fact and Sears 2 for multiple pricing structure, the Commissioner submits that Sears could not have believed that the market would validate the regular prices for these tires.

169. Recall, first that Mr. Cathcart admitted that it would have been Sears' expectation going into 1999 that it would sell only 5-10% of the Tires at "regular" prices. The balance would be sold at promotional prices.

> ***Pub. Hr. Tr., Vol. 17, 2861 (5) - 2862 (23).***
>
> ***Exhibit CA-120: Lichtenstein's Expert Report (Main Case), para.96.***
>
> ***Exhibit CA-123: Moorthy's Expert Report, para. 64.***

170. That expectation is hardly surprising when viewed in context of Sears' National Brand Strategy for 1999. In 1999, the Roadhandler and the Weatherwise were priced by Sears in accordance with that strategy, which was included in the 1999 Automotive Spring Review.

171. In the competitive review included in Sears' 1999 Spring Review, Mr. Keith identified both CTC and the "Tire Stores" as Sears' primary competitors in the national brand segment of the market. According to Mr. Keith, half of the passenger tires offered by CTC and 85% of the tires offered by the Tire Stores were national brands.

Exhibit CA-30: p. 1482

172. In 1999, flag brand tires, including the Michelin X-One and the Michelin Rainforce were typically being sold by dealers at 25% to 35% off the manufacturers' list prices and, on occasion at 40% off list.

Exhibit CA-116: Gauthier's Expert Report, para. 30.

Pub. Hr. Tr. Vol. 7, 1143 (20) - 1144 (8); 1167 (25) - 1169 (12); and 1179 (21) - 1180 (13).

Pub. Hr. Tr. Vol. 10, 1694 (11) - 1695 (12).

Pub. Hr. Tr. Vol. 11, 1846 (8) - 1847 (24); and 1851 (21) - 1852 (1).

173. In 1999, flag brand and associate brand tires were not generally being sold at retail at list prices.

Exhibit CA-116: Gauthier's Expert Report, para. 25.

Pub. Hr. Tr. Vol. 11, 1847 (8-12).

Pub. Hr. Tr. Vol. 11, 1887 (19) - 1888 (2).

174. The Commissioner submits that in 1999, Sears knew that flag and associate brand tires were not being sold by dealers at list prices. Sears' own competitive review, which formed part of the Spring Review, described *dealers' pricing strategy as "value priced off list with off price promo and gimmick promo".* Mr. Cathcart agreed in cross-examination that "value pricing "is essentially another way of saying EDLP. In other words, value priced goods are goods in respect that carry the same price every day."

Pub. Hr. Tr. Vol. 16, 2701 (15-21).

175. Sears also knew that its Regular Single Unit prices for the Weatherwise and Roadhandler were not at a level such that it could reasonably expect that the market would validate them. In terms of pricing, Sears' National Brand Strategy provided as follows:

> "Continue to index our every day pricing to be [to %] of the equivalent National Brand normal discounted price. When on sale indexed to be [to %] of the National Brand price." (emphasis added)
>
> ***Exhibit CA-30: p. 1484***

176. The Commissioner submits that when Sears' prices for the Roadhandler and the Weatherwise are considered in the context of the foregoing statement, it is clear that Sears "everyday pricing" for the Roadhandler and the Weatherwise was its 2 for price and not, as Sears' maintained in this proceeding, its Regular Single Unit price.

177. In other words, to be competitive in the National Brand Segment in1999, Sears knew that its everyday pricing had to be 90-95% of the dealers normal discounted pricing, which was typically 35% off the MSRP. However, Sears' Regular Single Unit Prices for the Roadhandler and Weatherwise were far higher than that level.

178. Moreover, Sears knew it could not command a price premium on comparable products over dealers.

Sears Belief - Only 5-10% of Tires sold Singly

179. As described in paragraph 159 above, it was Sears' belief in 1999 that between 5-10% of the tires it sold were sold to purchasers singly and that the balance of the tires it sold -- 90-95% -- were sold to purchasers as multiples.

180. The Commissioner submits that the same analysis as is set out in paragraphs 159 through164 pertaining to the Response, the Silverguard and the Goodrich Plus, is applicable to the Weatherwise and the Roadhandler.

181. In the six months preceding the Representations, the Weatherwise and the Roadhandler were offered for sale at the Regular Single Unit Price 19% and 38% of the time, respectively.

182. The Commissioner submits that for those six month periods, Sears could have only expected, at best, that it would sell:

a. between 0.95% and 1.9% of the Weatherwise at the Regular Single Unit price; and

b. between 1.5% to 3% of the Roadhandler Regular Single Unit price.

Exhibit CA-120: Lichtenstein's Expert Report (Main Case), para

Good Faith - Actual Sales of National Brand Tires

183. As discussed above, Sears' economic expert, Professor Trebilcock, opined that good faith could be assessed by reviewing actual sales at the regular prices.

184. In the 12 month period preceding the representations, only 1.3% and 0.82% of sales by Sears of the two national brand tires in issue, the Roadhandler and the Weatherwise respectively, were made at the Regular Single Unit price.

Conclusion - Good Faith

185. The Commissioner submits that Sears did not offer the Tires at the Regular Single Unit prices to the public in good faith in the 6 months preceding the Representations for four reasons.

186. **First**, Sears knew that the Regular Single Unit prices for the tires were not competitive and would not be validated by the market.

- Mr. Cathcart's admission that it would have been Sears expectation that Sears would sell 90% of the Tires at promotional prices is, by itself, cogent evidence of this fact.

- In addition, Sears' strategic internal documents, including the competitive profiles and the 1999 Spring Automotive Review, make it clear that Sears had a clear view regarding its competitive position in the private label and national brand tire markets and regarding where it needed to be positioned in terms of price to be competitive in those markets. Sears' views in this respect were, for the most part, the views of Mr. Keith, who was universally acknowledged by witnesses at the hearing to be an expert on tires, as well as the Canadian tire market and pricing. However, Sears' Regular Single Unit prices fell well outside any of the required "competitive ranges" identified by Mr. Keith In point of fact, the Regular Single Unit prices formed no part of Sears' competitive analysis or response, other than to serve as reference prices. The Commissioner submits that in light of the foregoing, Sears cannot have reasonably have believed that the Regular Single Unit prices, would be validated by the market.

187. **Second,** Sears knew, because 90-95% of tires are sold in multiples; because it had a 2-for price and because the Tires were regularly "on sale", that only a very small percentage of the Tires could ever be sold at Regular Single Unit prices. Sears knew that for those persons purchasing those 90-95% of tires sold as multiples, the Regular Single Unit prices were irrelevant as a reference point. However, Sears also knew that big save stories would drive traffic and sales. Therefore, notwithstanding the fact that it knew that for 90-95% of tires sold as multiples the Regular Single Unit price were irrelevant as a reference point, it used them to gain a commercial advantage.

188. **Third**, Sears sold only 1.28% of the Tires at Regular Single Unit prices. That is direct evidence that those prices were not validated by the market.

189. **Fourth,** the volume of sales at the Regular Single Unit prices was irrelevant to Sears. For the reasons set out above, Sears knew that the volume of sales at Regular Single Unit prices would be negligible. For that reason, Sears did not bother to track its volume of sales at Regular Single Unit prices. Had Sears intended those prices to be a *bona fide* competitive response in the market, the Commissioner submits that Sears would have monitored the volume of sales at that level to determine whether or not the price positioning was appropriate.

REMEDY

190. The Commissioner seeks the relief set out in paragraphs 80 - 84 of the Application, which relief includes a prohibition order, the publication of corrective notices, and the payment of an administrative monetary penalty.

(a) Prohibition Order

191. Section 74.1(1)(a) of the Act provides as follows:

> Where, on application of the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person (a) not to engage in the conduct or substantially similar reviewable conduct;

192. The Commissioner submits that the evidence on the record of this proceeding clearly establishes that Sears has engaged in reviewable conduct contrary to ss. 74.01(3) of the Act.

193. The evidence also establishes that Sears is primarily a hi-lo retailer and accordingly relies extensively on ordinary selling price representations in its marketing literature. Sears has admitted on the record of this proceeding that it used hi-lo marketing for 27 of the 28 tires that it sold in 1999, that it used in 1999 and continues to use to the present, hi-lo marketing techniques to sell automotive products, and that it used in 1999 and continues to use today, hi-lo marketing techniques generally throughout its business.

194. Finally, Sears has repeatedly engaged deceptive marketing behaviour.

> ***R. v. Simpsons-Sears Ltd.*** **(1969) 58 C.P.R. 56 (Ont. Prov. Ct. (Crim. Div.))**
>
> ***R. v. Simpsons-Sears Ltd.*** **(1976) 28 C.P.R. (2d) (249) (Ont. County Ct. (Crim. Div.))**
>
> ***R. v. Simpsons-Sears Limited and H. Forth and Co. Limited*** **(1983), unreported (Ont. County Ct.)**

195. For these reasons, the Commissioner requests the Tribunal to issue an order prohibiting the Respondent and any person acting on its behalf or for its benefit, including all directors, officers, employees, agents or assigns of the Respondent, or any other person or corporation acting on behalf of the Respondent, for a period of 10 years from the date of such order, from engaging in conduct contrary to ss. 74.01(3) of the Act.

(b) Dissemination of Notice

196. Paragraph 74.1(1)(b) of the Act provides:

> Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person (b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including
>
> i. a description of the reviewable conduct,
> ii. the time period and geographical area to which the conduct relates, and
> iii. a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed;

197. Paragraph 74.1(1)(b) of the Act provides that the notice should be disseminated "in such manner and at such times as the court may specify, to bring to the attention of the class of

persons likely to have been reached or affected by the conduct". It follows, in the Commissioner's submission, that the Respondent should be required to place corrective notices in each of the media that it employed in its advertising. Clearly the Respondent felt that advertising through all the media used was necessary in order to reach the entire target audience for the representations.

198. In the circumstances, the Commissioner requests an order requiring Sears to publish or otherwise disseminate a notice or notices within 45 days of the order. The notice or notices shall:

a. bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the Respondent carries on business and the determination made by the Tribunal with respect to the Application, including:

i. a description of the reviewable conduct,

ii. the time period and geographical area to which it relates, and

iii. a description of the manner in which the Representations were disseminated, including the names of the publications or mediums employed.

b. be published in the following media:

i. in flyers ("pre-prints") by the Respondent as follows:

(1) in two weekly ("core") flyers as ordinarily distributed by the Respondent and in one weekend flyer as ordinarily distributed by the Respondent.

(2) the flyers shall be distributed across Canada with a circulation of no fewer than 4,200,000, and shall be distributed in a manner as normally distributed by the Respondent, including the same linguistic distribution, and shall be distributed in the following proportions:

(a) 84% to be distributed through newspapers;

(b) 15% to be distributed door-to-door; and

(c) 1% to be distributed in-store.

(3) the notices shall fill the entire third page of the flyer, and in any event be no less than 9.5 inches X 9.5 inches in size.

ii. in newspapers by the Respondent as follows:

(1) in the language appropriate to the newspaper;

(2) within the first nine pages of the Wednesday edition of each of the

newspapers listed in paras. 26 and 27 of ***Exhibit CA-9***, or in the case of a newspaper that is not published on Wednesdays, within the first nine pages of an edition of said newspaper:

(3) the newsprint advertisements shall be no less than 5.625 inches X 9.625 inches in size.

(c) Administrative Monetary Penalty

199. Paragraph 74.1(1)(c) of the Act provides:

> Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person
>
> (c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding
>
> (ii) in the case of a corporation, $100,000 and, for each subsequent order, $200,000

200. Subsection 74.1(5) of the Act provides:

> (5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):
>
> (a) the reach of the conduct within the relevant geographic market;
>
> (b) the frequency and duration of the conduct;
>
> (c) the vulnerability of the class of persons likely to be adversely affected by the conduct;
>
> (d) the materiality of any representation;
>
> (e) the likelihood of self-correction in the relevant geographic market;
>
> (f) injury to competition in the relevant geographic market;

(g) the history of compliance with this Act by the person who engaged in the reviewable conduct; and

(h) any other relevant factor.

(a) the reach of the conduct within the relevant geographic market

201. It is submitted that the reach of the representations within Canada was very broad, both in terms of the numbers of people exposed to the representations, and the numbers of locations across Canada.

202. As noted in para 44, in 1999, Sears advertised the tires that it sold by making representations in various media, including flyers, newspaper advertisements and other promotional material, such as in-store leaflets.

203. As noted in paras 69 and 70, among the representations made to the public by Sears in 1999 regarding the Tires were representations made in connection with three 'sales events'. In connection with each of the Sales Events #1 and #2, Sears made representations to the public in flyers, newspaper advertisements and in-store leaflets. In connection with Sales Event #3, Sears made representations to the public in flyers.

204. As noted in para 47, these representations concerning tires were made by Sears to millions of Canadians across the country on a regular basis throughout 1999.

Exhibit CA-9: McMahon February 1, 2001 Affidavit, paras. 16, 31-33.

Exhibit CA-10: Exhibit "A" to the McMahon Feb. 1, 2001 affidavit, preprint circulation flyers.

Exhibit CA-11: Exhibit "B" to the McMahon Feb. 1, 2001 affidavit, Chronological Listing of Newspapers - 1999 .

205. The total circulation for the pre-print of Sales Event #1, which was a weekly flyer entitled "Shop Wish & Win"(being preprint C112F599), was 4,254,385.

Exhibit A-118: Request to Admit, para. 21

Exhibit A-119: Response to Request to Admit, para. 1.

Exhibit CA-10: Exhibit "A" to the McMahon Feb. 1, 2001 affidavit, preprint circulation flyers.

206. The total circulation for the pre-print of Sales Event #2, which was a weekly flyer entitled "Sears Store Managers Best Buy" (being preprint C114F599), was 4,254,385.

Exhibit A-118: Request to Admit, para. 34 .

Exhibit A-119: Response to Request to Admit, para. 1.

Exhibit CA-10: Exhibit "A" to the McMahon Feb. 1, 2001 affidavit, preprint circulation flyers.

207. The total circulation for the pre-print of Sales Event #3, which was a weekly flyer entitled "Sears 2 Day Power Sale" (being preprint W123W199), was 4,973,270.

Exhibit A-118: Request to Admit, para. 38.

Exhibit A-119: Response to Request to Admit, para. 1.

Exhibit CA-10: Exhibit "A" to the McMahon Feb. 1, 2001 affidavit, preprint circulation flyers.

208. With respect to national newspaper advertisements, the ads were published in one or more of 72 newspapers across Canada.

Exhibit CA-9: McMahon Feb. 1, 2001 affidavit, para. 26.

209. With respect to newspaper advertisements published in a specific market, as opposed to a national advertisement, the ads were published in one or more of 29 newspapers across Canada.

Exhibit CA-9: McMahon Feb. 1, 2001 affidavit, para. 27.

(b) the frequency and duration of the conduct

210. It is submitted that the representations were frequent, and for a sustained period of time, as supported by the following evidence:

a. For the six month period preceding the December 18, 1999 representation, line 36, the

Goodrich Plus, was offered at reduced prices (which reduced prices do not include '2 for' price) 100 out of 183 days or 55% of the time.

See Exhibit A-85: Line 36 - BF Goodrich Plus - Time Test Table.

b. For the six month period preceding the November 8, 1999 representation, line 51, the RoadHandler "T" Plus, was offered at reduced prices (which reduced prices do not include '2 for' price) 113 out of 183 days or 62% of the time.

See Exhibit A-86: Line 51 - RoadHandler "T" Plus.

c. For the six month period preceding the December 18, 1999 representation, line

58, the Weatherwise/RH Sport, was offered at reduced prices (which reduced prices do not include '2 for' price) 148 out of 183 days or 81% of the time.

See Exhibit A-87: Line 58 - Weatherwise/RH Sport.

d. For the six month period preceding the November 8, 1999 representation, line 59, the Response RST Touring 2000, was offered at reduced prices (which reduced prices do not include '2 for' price) 99 out of 183 days or 54% of the time.

See Exhibit A-88: Line 59 - Response RST Touring 2000.

e. For the six month period preceding the November 22, 1999 representation, line 68, the Silverguard Ultra IV, was offered at reduced prices (i.e., reduced prices do not include '2 for' price) 73 out of 183 days or 40% of the time.

See Exhibit A-89: Line 68 - Silverguard Ultra IV.

211. Analysis over a period of time longer than six months yields similar results:

a. The Goodrich Plus was offered at reduced prices (which reduced prices do not include '2 for' price) 171 out of 351 days or 49% of the time between January 1st and December 17, 1999.

See Exhibit CA-98: Line 36 - BF Goodrich Plus - Date of Relevant Representations back to January 1, 1999.

b. The Roadhandler "T" Plus was offered at reduced prices (which reduced prices do not include '2 for' price) 197 out of 311 days or 63% of the time between January 1st and November 7, 1999.

See Exhibit CA-99: Line 51 - RoadHandler "T" Plus - Date of Relevant Representations back to January 1, 1999.

c. The Weatherwise was offered at reduced prices (which reduced prices do not include '2 for' price) 262 out of 351 days or 75% of the time between January 1st and December 17, 1999.

See Exhibit CA-100: Line 58 - Weatherwise RH Sport - Date of Relevant Representations back to January 1, 1999.

d. The Response was offered at reduced prices (which reduced prices do not include '2 for' price) 111 out of 221 days or 50% of the time between January 1st and November 7, 1999.

See Exhibit CA-101: Line 59 - Response RST Touring 2000 - Date of Relevant Representations back to January 1, 1999.

e. The Silverguard Ultra IV was offered at reduced prices (which reduced prices do not include '2 for' price) 151 out of 325 days or 46% of the time between January 1st and November 21, 1999.

See Exhibit CA-102: Line 68 - Silverguard Ultra IV - Date of Relevant Representations back to January 1, 1999.

(c) the vulnerability of the class of persons likely to be adversely affected by the conduct

212. As noted in para 83, because the Tires are private label goods for which consumers have difficulty evaluating intrinsic attributes, it is submitted that they are more vulnerable to extrinsic cues such as store name, brand name and OSP advertising.

(d) ***the materiality of any representation***

213. In *R v Simpson*, 25 CPR (3d) 34, Justice Sheard considered the meaning of the word "material" in the context of misleading advertising, and cited with approval the decision in *R v Pattons Place Ltd.* 57 CPR 12:

> "I think the word 'material' used here must bear its normal meaning and that is it is a representation which is calculated to, and in effect does, lead a person to a certain course of conduct because he believes the information put before him indicates that this would be advantageous to himself"

214. Justice Sheard also referred to *R v Canadian Tire*, in which the court referred to with approval the definition of materiality used in *R v Tege Investments Ltd.* (1978) 51 CPR (2d) 216:

> "The word material, I take to mean... the shorter Oxford Dictionary meaning of much consequence, or importance of pertinent or germane or essential to the matter."

215. It is submitted that in the context of this provision, a representation is material if it is likely to influence the behaviour of the consumer.

216. When examining materiality in the context of s. 74.01(5), one must look at *how* material the representation is likely to be in influencing the purchasing behaviour; that is, how important a role would the representations play in influencing the purchasing behaviour.

217. The expert evidence supports the Commissioner's position that the implied savings and 'sale prices' are pivotal considerations in the decisions accompanying purchase of the

Tires, including which retail outlets to visit and which product to buy. This is a function of the nature of the product: the Tires are a shopping good for which consumers will not expend much effort'searching'. In addition, consumers engage in 'passive search' for tires, leaving them more receptive to and aware of advertising. Because the Tires are private label goods for which consumers cannot evaluate intrinsic attributes, consumers tend to rely heavily on extrinsic cues such as store name, brand name and OSP advertising. It is submitted that the effects of the representations are amplified because Sears is perceived as highly credible by consumers.

(e) the likelihood of self-correction in the relevant geographic market

218. It is submitted that there is very little to no likelihood of self-correction by Sears, as consumers have no way of learning that Sears' OSP representations are misleading and so will not be able to discipline Sears.

219. Even Sears' expert witness Professor Trebilcock agreed that sometimes there are legitimate concerns abut the ability of consumers to discipline advertisers.

Volume 23, p. 3851 (4-18)

(f) that the misrepresentation injured competition in the relevant geographic market

220. It is submitted that Sears' OSP representations would be expected to result in less time

and effort spent searching for and evaluating alternative products, and increase the probability of purchase of tires from Sears. In effect, that would mean that consumers spent less time evaluating the wares of other tire merchants, and were more likely to purchase the tires from Sears.

221. This is especially important in the context of the tire market: tires are a necessity good, and the tire market in Canada is stable and relatively fixed, and the number of tires sold in Canada is essentially a zero-sum game. As such, any sales that Sears would gain would necessarily be at the expense of its competitors.

(g) the history of compliance with this Act by the person who engaged in the reviewable conduct

222. As noted in para 193, Sears has repeatedly engaged in deceptive marketing behaviour involving OSP representations:

> ***R. v. Simpsons-Sears Ltd.*** **(1969) 58 C.P.R. 56 (Ont. Prov. Ct. (Crim. Div.)).**
>
> ***R. v. Simpsons-Sears Ltd.*** **(1976) 28 C.P.R. (2d) (249) (Ont. County Ct. (Crim. Div.)).**
>
> ***R. v. Simpsons-Sears Limited and H. Forth and Co. Limited*** **(1983), unreported (Ont. County Ct.).**

(h) any other relevant factor - blatant disregard for internal compliance procedures

223. Sears showed blatant disregard for even its own internal policies / compliance procedures. In Sears Guidelines for Savings Claims ***(Exhibit CA-46)***, Sears notes that their policy is that "[ ]." Based on information provided in the report entitled "Summary of Time Analysis for the Six Month Period Preceding the Relevant Representations" ***(Exhibits A-85 to A-89)***, for four of the five Tires, Sears has violated its own policy.

Exhibit CA-120: Lichtenstein's Expert Report (Main Case), para. 85.

224. In light of the foregoing, the Commissioner request that the Tribunal order Sears to pay an administrative monetary penalty of $500,000, comprised of $100,000 for each of the Tires that are the subject of this Inquiry.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Gatineau, Quebec, April 19, 2004.

John L. Syme
Arsalaan Hyder
Leslie Milton
Geneviève Léveille

Competition Law Division
Department of Justice
Counsel to Commissioner of Competition
2220 - 50 Victoria Street
Gatineau, Quebec K1A 0C9
Telephone: (819) 997-3325
Facsimile: (819) 953-9267

Schedule "A"

CONSTITUTIONAL CHALLENGE

Nature of the Challenge

1. Sears has challenged the constitutional validity of ss. 74.01(3) of the *Competition Act* on the grounds that the provision constitutes an impermissible infringement of its right to freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*.

> ***Responding Statement of Grounds and Material Facts of Sears Canada Inc., paras. 4 to 18.***
>
> ***Public Hearing Transcript ("Pub. Hr. Tr."), Vol. 3, page 410.***
>
> ***Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act, 1982 (U.K.), 1982, c. 11, as amended (the "Charter").***

2. The Commissioner concedes that ss. 74.01(3) of the *Competition Act* infringes section 2(b) of the *Charter*. The Commissioner submits, however, that ss. 74.01(3) is justified under section 1 of the *Charter* as a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society.

> ***Charter, supra, s. 1.***

3. Subsection 74.01(3) is a carefully circumscribed provision that is designed to address the harm to consumers, businesses and competition that results from deceptive ordinary selling price ("OSP") representations. To provide clarity to consumers and businesses

alike, the provision sets out a time and volume test for assessing whether a price qualifies as a regular or ordinary selling price. It is only when neither of these tests is satisfied, that the restrictions in ss. 74.01(3) and associated civil remedies can be invoked.

4. The central tenet of Sears' argument appears to be that the phrases "substantial volume", "reasonable period of time" and "substantial period of time" which are used in the volume and time tests set out in paras. 74.01(3)(a) and (b) are so vague and imprecise that the prohibition on ordinary selling price representations established by ss.74.01(3) cannot be considered to be "prescribed by law". In the alternative, Sears maintains that the vagueness of these terms results in over-breadth such that ss. 74.01(3) cannot be considered reasonably and demonstrably justified in a free and democratic society.

Responding Statement of Grounds and Material Facts of Sears Canada Inc., paras. 17-19.

Pub. Hr. Tr., Vol. 3, 416 - 418.

5. The jurisprudence establishes that a law will fail to qualify as "prescribed by law" only if the standard imposed by the law is unintelligible in the sense that it fails to provide a basis for legal debate. The phrases "substantial volume", "reasonable period of time" and "substantial period of time recently before or immediately after" are not unintelligible. The words "reasonable" and "substantial" are used widely in Canadian legislation and throughout the common law and the interpretation and application of phrases involving these terms lies within the core expertise of the judiciary. As this very case also clearly illustrates, the phrases that Sears' challenges have and continue to spawn healthy legal

debate.

6. The limitation on freedom of expression established by ss. 74.01(3) also clearly satisfies the two-part *Oakes* test mandated by the Supreme Court of Canada for assessing whether a limit is reasonably and demonstrably justified in a free and democratic society. Under this test, the Government must demonstrate that: (1) the limit addresses a pressing and substantial objective; and (2) the limit is proportional to the objective and, more specifically, the limit is rationally connected to the objective, restricts *Charter* rights as little as possible, and has salutary benefits that outweigh any negative effects on *Charter* rights.

7. Subsection 74.01(3) addresses a pressing and substantial objective - the harm to consumers, competitors and competition caused by misleading price claims.

8. The rational connection between ss. 74.01(3) and this harm is obvious. The provision has been drafted to ensure that it targets only those ordinary selling price representations that refer to illegitimate ordinary sale prices. The time and volume tests have explicitly been drafted so as to permit case-specific assessment of these tests. This, in turn, ensures that the prohibition captures only those ordinary sale price representations that do, in fact, refer to illegitimate ordinary selling prices, given the relevant factual circumstances. *Per se* tests, in contrast, which arbitrarily prescribe specific time periods and/or volume calculations for assessing the legitimacy of an ordinary price representations, cannot

respond to unique fact situations and as a result may be both over and under-inclusive.

9. Finally, ss. 74.01(3) has salutary benefits that outweigh any adverse impact on freedom of expression. The harm to consumers, competitors and competition that is sought to be addressed is substantial, while the expression that is restrained has little value - it is commercial expression, that is misleading in a material respect.

10. The Commissioner submits therefore that ss. 74.01(3) is a limit, prescribed by law, that is reasonable and demonstrably justified in a free and democratic society.

11. The sections which follow discuss in detail the legal tests for ascertaining when a limit on a *Charter* right is justified under section 1 of the *Charter* and the application of these tests to ss. 74.01(3) of the *Competition Act*. Before proceeding to this analysis, however, it is important to review the nature of the prohibition established by ss.74.01(3) and its legislative history.

Nature of the Prohibition Established by Subsection 74.01(3) of the *Competition Act*

12. Subsection 74.01(3) is found in Part VII.1 of the *Competition Act*. This Part of the Act, which is entitled "Deceptive Marketing Practices - Reviewable Matters", provides for the application of civil remedies in relation to misleading advertising and other deceptive marketing practices.

Competition Act, R.S.C. 1985, c. 19 (2nd Supp), Part VII.1.

13. Subsection 74.01(3) deals specifically with misleading representations regarding a seller's own ordinary selling price. The provision establishes a limited prohibition on the making by a seller of a deceptive representation to the public concerning the seller's ordinary selling price, as defined in the provision, of a product.

14. Subsection 74.01(3) of the *Competition Act* states in full:

> A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatsoever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,
>
> > (a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and
> >
> > (b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

15. An ordinary selling price ("OSP") representation will not give rise to reviewable conduct under ss. 74.01(3) if either of the following tests is satisfied:

> (a) a substantial volume of the product was sold at the price or a higher price within a reasonable period of time before or after the making of the representation (the "volume test"); or
>
> (b) the product was offered for sale, in good faith, at the price or a higher price for a substantial period of time recently before or immediately after the making of the representation (the "time test").

16. The time and volume tests reflect the common sense proposition that a price is a legitimate ordinary selling price if a substantial volume of product was sold at the price and/or the product has been offered for sale in good faith at the price for a reasonable period of time. If neither of these conditions is satisfied, the price is not an ordinary or

regular selling price.

17. Subsections 74.01(4) - (6) clarify the scope of ss. 74.01(3). Subsection 74.01(4) speaks to whether the relevant time period to be considered is before or after the making of the representation. Subsection 74.01(5) exempts from the scope of ss. 74.01(3) "a representation as to price that is not false or misleading in a material respect." Subsection 74.01(6) clarifies that "the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect."

Competition Act, supra, ss. 74.01(4) - (6).

18. Breach of ss. 74.01(3) is subject to the civil remedies set out in section 74.1 of the *Competition Act*. These remedies are: a prohibition on engaging in the conduct or substantially similar conduct; publication of a notice describing the reviewable practice; and payment of an administrative monetary penalty ("AMP"). Subsection 74.1(4) specifies that the purpose of the publication and AMP remedies is to promote compliance, not to punish. Subsection 74.1(3) provides that no publication order or AMP may be imposed where it is established that the person exercised due diligence to prevent the reviewable conduct from occurring.

Competition Act, supra, s. 74.1.

19. In summary, ss. 74.01(3) establishes a limited civil prohibition on ordinary selling price

representations. A representation as to ordinary selling price will only fall under the prohibition if it cannot satisfy either the volume or time test. In addition, the prohibition will not apply where the seller making the representation establishes that the representation is not false or misleading in a material respect. This is a carefully tailored and confined restriction on a highly injurious form of deceptive commercial expression.

Legislative History of Subsection 74.01(3)

20. A criminal prohibition on misleading ordinary price representations was added to the *Combines Investigation Act* in 1960. The initial provision reads as follows:

> 33C (1) Every one who, for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public, by any means whatever, concerning the price at which such or like articles have been, are, or will be, ordinarily sold, is guilty of an offence.
>
> (2) Subsection (1) does not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.
>
> ***An Act to Amend the Combines Investigation Act and the Criminal Code, R.S.C. 1960, c. 45, s.13, Joint Book of Documents ("Joint Books"), Vol. 1, Tab 3.***

21. A detailed explanation of the purpose of the provision is found in the House of Commons debates:

> The fourth and last amendment to which I wish to refer in this group is a new section forbidding anyone, for the purpose of promoting the sale or use of an article, to make a materially misleading representation to the public concerning the price at which the article is ordinarily sold. Quite a few instances have come to the attention of the combines branch, some of them occurring in the catalogues of so-called catalogue houses, but occurring in other places as well, where a merchant, in order to make it appear that the price at which he was offering an article was more favourable than was actually the case, misrepresented to the public the price at which such article was ordinarily sold elsewhere. Besides being deceptive as far as the buying public is concerned this practice also constitutes an unfair method of competition with respect to other merchants.

> In summary, these amendments relating to discriminatory and predatory pricing and deceptive price advertising have a multiple purpose and effect. In all instances they directly or indirectly protect the consumer and will bring greater honesty into all branches of trade. In some instances they also protect, or give a chance for protection, to merchants, usually the smaller merchants, against unfair competition which does not relate to competitive efficiency; they confirm to a manufacturer some right to prevent his product from being abused or used as a come-on device; and, finally, but not least, they are in the long term direction of maintaining competition by cutting down practices or assisting in the prevention of practices which may serve to eliminate competitors and therefore competition through means other than straightforward and real competition itself.

House of Commons Debates, 1960, V. iv at 4349 (May 30, 1960), Joint Books, Vol. 1, Tab 4.

22. The prohibition on misleading ordinary price representations remained unchanged until 1976, when it was amended to read:

> 36(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,
>
> > (d) make a materially misleading representation to the public concerning the price at which a product or like products have been, are or will be ordinarily sold; and for the purposes of this paragraph a representation as to price is deemed to refer to the price at which the product has been sold by sellers generally in a relevant market unless it is clearly specified to be the price at which the product has been sold by that person by whom or on whose behalf the representation is made.

An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend the Combines Investigation and the Criminal Code, S.C. 1974-75-76, c.76, s. 18, Joint Books, Vol. 1, Tab 13.

23. In 1985, para. 36(1)(d) was renumbered and became para. 52(1)(d) of the *Competition Act*.

> ***Combines Investigation Act, R.S.C. 1985, c. C-34, Joint Books, Vol. 1, Tab 15.***
>
> ***Competition Act, supra, Joint Books, Vol. 1, Tab 16.***

24. Paragraph 52(1)(d) and its predecessors did not specify when a price would be considered to be a legitimate ordinary selling price. To help clarify this issue, the Director of

Investigation and Research under the *Competition Act* (the "Director") issued guidelines expressing the view that in order to qualify as a legitimate ordinary price for the purposes of para. 52(1)(d), the price should be one at which a substantial volume of sales have occurred over a sufficiently recent period as to be relevant.

> ***Misleading Advertising Guidelines, Special Edition 1991, Consumer and Corporate Affairs Canada (Ottawa: Canadian Government Publishing Centre, 1991), Joint Books, Vol. 8, Tab 185, p. 4326.***

25. There was considerable disagreement among various stakeholders, including business and consumer groups, about the appropriateness of the volume test endorsed by the Director for assessing the legitimacy of an ordinary sale price. This disagreement led the Standing Committee on Consumer and Corporate Affairs to recommend, in a comprehensive report on the treatment of misleading advertising in, *inter alia,* the *Competition Act* released in June, 1988 (the "Collins Report"), that the Director review para. 52(1)(d) of the *Competition Act* [then referred to as para. 36(1)(d)] "in order to dispel the confusion about pricing that appears to exist in the marketplace and, if necessary, seek appropriate amendments to the Act."

> ***Misleading Advertising, Report to the Standing Committee on Consumer and Corporate Affairs on the Subject of Misleading Advertising, Mary Collins, M.P. Chairperson (June 1988), Joint Books, Vol. 9, Tab 188, p. 4434.***

26. In June of 1995, the Bureau of Competition Policy released a discussion paper seeking comments from interested parties on a number of potential amendments to the *Competition Act*. The Bureau specifically requested comments on the appropriate definition of ordinary selling price for the purposes of assessing representations under para. 52(1)(d).

Competition Act Amendments, Bureau of Competition Policy (June 1995), Joint Books, Vol. 8, Tab 181, p. 4099 (the "Discussion Paper").

27. A consultative panel composed of leading Canadian competition lawyers and academics as well as representatives of Canadian consumer and retail associations (the "Consultative Panel") was established to review responses to the Discussion Paper. The findings and recommendations of the Consultative Panel were set out in a report released on March 6, 1996.

Report of the Consultative Panel on Amendments to the Competition Act (Ottawa: 1996), Joint Books, Vol. 7, Tab 178 (the "Consultative Panel Report").

28. The Consultative Panel recognized the prevalence of regular price claims in the marketplace, the power of regular price claims as a marketing tool, and the negative impact of misleading regular price representations on consumers and competition:

> Regular price claims are common in the marketplace. They can be a powerful and perfectly legitimate marketing tool because many consumers are attracted to promotions that promise a savings, from the "ordinary" or "regular" price of a product.
>
> Where comparisons are made between prices (e.g., the "regular" price and the "sale" price), customers are exhorted to buy based on implied savings. If there is no sound basis for the reference price, a misrepresentation has occurred. Fictitious ordinary selling prices can also manifest themselves in the phenomenon of continuous sales, wherein products are perpetually "on sale". In these circumstances, consumers are misled and fair and effective competition is undermined.

Consultative Panel Report, supra, p. 3649.

29. After summarizing the comments of interested parties, the Panel set out the following recommendations:

> The Panel recognized the importance of the provision in the *Act* prohibiting misrepresentations as to regular price, but sought to make the section easier for retailers to understand and apply as well as more reflective of what consumers and retailers understand by "regular" price claims in today's marketplace. In devising an amended ordinary price claim provision, one of the submissions on the discussion paper proposed a number of criteria:
>
> In looking for a law that will establish a fair competitive practice in comparative sale price advertising, there are a number of principles that can be used to guide policy development:

i) Clarity: the wording and intent of the law should be clear;

ii) Comprehension: it should be easily understood by retailers and consumers;

iii) Workability: it can be implemented by all retailers;

iv) Enforceability: it can be effectively and inexpensively enforced; and,

v) Choice: it should give merchants and consumers a measure of freedom of choice in selecting pricing strategies.

After some discussion and the consideration of several alternative proposals, a consensus was arrived at on amending the *Act* to address misleading price comparisons under the civil reviewable practices regime (see chapter on Misleading Advertising), and to permit price comparisons based on a substantial volume of sales or an offer of sale for a substantial period of time.

The Panel concluded that the revised provision should explicitly identify two alternative tests. A price comparison that complied with either test would not raise a question. By clearly identifying the circumstances under which a challenge could take place, the revised provision would provide greater certainty.

Specifically, to comply with the law in the case of a representation of a former selling price, the represented price would have to reflect either the price of resellers generally in the relevant market at which a substantial volume of recent sales of the product took place, *or* the price of sellers generally in the relevant market at which the product was recently offered for sale in good faith for a substantial period of time prior to the sale.

Where the comparison price is clearly specified to be the price of the advertiser, these tests would apply with reference to the price of that person alone, rather than in relation to the price of sellers generally in the relevant market.

Consultative Panel Report, supra, pp. 3649-3650. (emphasis added)

30. To implement its recommendations concerning the appropriate treatment of sellers' own ordinary selling price representations, the Panel proposed that para. 52(1)(d) be amended to include a new subpara. 52(1)(e)(ii) which would read as follows:

52(1)(e) For the purposes of paragraph (d):

(ii) a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied which is clearly specified to be the price of the person by whom or on whose behalf the representation is made is not misleading if the person making the representation establishes that it is the price at which that person:

(a) recently sold a substantial volume of the product, or

(b) recently offered the product for sale in good faith for a substantial period of time prior to the sale.

Consultative Panel Report, supra, p. 3652 (emphasis added)

31. The Consultative Panel considered and rejected further definition of the terms used in the proposed para. 52(1)(e) on the grounds that flexibility was required to address the circumstances of each case. In this regard, the Panel noted the need to allow for consideration of the nature of the product in the assessment of the legitimacy of an ordinary price claim, and to address unique issues associated with clearance sales. The panel also stated that "existing and future jurisprudence could provide sufficient guidance regarding the meaning of some of these terms."

Consultative Panel Report, supra, pp. 3650-51.

32. The recommendations of the Consultative Panel are reflected in ss. 74.01(3) of the *Competition Act* which, in addition to making the prohibition on misleading price representations a civil rather than a criminal offence, expressly incorporates both the "substantial volume" and "substantial time" tests recommended by the Consultative Panel for assessing ordinary selling price claims.

33. Amendments to the *Competition Act* repealing para. 52(1)(d) and introducing ss. 74.01(3) were initially tabled in the House of Commons in November, 1996 in Bill C-67. Bill C-67 died on the order paper, and the amendments were subsequently re-introduced a year later by Bill C-20.

Bill C-67, An Act to amend the Competition Act and another Act in Consequence, Second Session, Thirty-fifth Parliament, 45 Elizabeth II, 1996 (First Reading November 7, 1996), Joint

Books, Vol. 1, Tab 17.

Bill C-20, An Act to amend the Competition Act and to make consequential and related amendments to other Acts, First Session, Thirty-sixth Parliament, 46 Elizabeth II, 1997 (First Reading November 20, 1997), Joint Books, Vol. 1, Tab 20.

34. In addition to stating generally that the proposed amendments would increase flexibility and efficiency of administration and enforcement of the *Competition Act*, the summary to Bill C-20 specifically indicated that "[t]he enactment ... revises the treatment of claims made about regular selling prices to provide greater flexibility and clarity".

Bill C-20, supra, p. 346.

35. The proposed amendments to the regular selling price provisions of the *Competition Act* were described in more detail by then Minister of Industry, John Manley as follows:

> The regular price claims provisions of the Act will be amended for greater clarity and to better reflect what consumers and retailers understand by them. The legitimacy of regular price claims would be determined by an objective standard, a test based either on sales volume or the pricing of an article over time.
>
> Consumers will benefit from this clarification of the rules and merchants will have more freedom of choice in selecting pricing strategies and will be encouraged to innovate in ways beneficial to consumers and retailers alike.

House of Commons Debates, Edited Hansard in Official Reports of Debates (Hansard), No. 074 (16 March 1998), Joint Books, Vol. 1, Tab 22, p. 413.

36. The new ss. 74.01(3), and, in particular, the express inclusion of the so-called time and volume tests in the provision, was uniformly endorsed by witnesses that appeared before the Standing Committee of Industry regarding Bill C-20, including the Retail Council of Canada, the Consumers Association of Canada, and other major Canadian retailers such as the Hudsons Bay Company. Witnesses also underscored the need for flexibility in the

provision, so as to permit a fact-specific assessment of prices in light of the nature of the product, and clarification, as required, through the issuance of guidelines:

> Within the proposed changes there are a number of terms that will require clarification, such as "substantial volume", "substantial period of time" and "good faith". We agree that these and some other issues of interpretation are best left to guidelines to allow for flexibility as market practices evolve and change. We are working with the Bureau on the guidelines and are hopeful that we can arrive at a consensus. There are a couple of items of particular importance to our members: the treatment of clearance sales, and what constitutes an appropriate timeframe for evaluating price claims under the time test.
>
> ***Peter Woolford, Senior Vice-President, Policy, Retail Council of Canada, Submission to the House of Commons Standing Committee on Industry, Bill C-20 Amendments to the Competition Act (May 5, 1998), Joint Books, Vol. 2, Tab 44, p. 611.***

37. Following the enactment of ss. 74.01(3) and consultations with interested parties, the Commissioner released an Information Bulletin that provides guidance on the manner in which the Commissioner interprets ss. 74.01(3), including the Commissioner's interpretation of the phrases "substantial volume", "reasonable period of time" and "substantial period of time" for the purposes of applying paras. 74.01(3)(a) and (b) of the *Competition Act*.

> ***Guidelines for Application of the Competition Act, C. Gaz. 1999, Part I, Vol. 133, No. 12 (March 20, 1999), Joint Books, Vol. 9, Tab 186, pp. 4374-4377 ("Gazette Notice").***
>
> ***Information Bulletin, Ordinary Price Claims: Subsections 74.01(2) and 74.01(3) of the Competition Act, Joint Books, Vol. 9, Tab 187.***

38. The guidelines expressed in the Bulletin are not law and they have no binding legal force.

> ***Information Bulletin, supra, at p. 4379.***
>
> ***Innisfil v. Vespra*, [1981] 2 S.C.R. 145.**

Section 1 Analysis

(I) Prescribed by law

39. To be justified under section 1, a limit on freedom of expression must be "prescribed by law".

> ***Charter, supra, s. 1.***

40. Sears does not dispute that ss. 74.01(3) qualifies as law in the formal sense. Sears argues, however, that ss. 74.01(3) fails to satisfy the "prescribed by law" requirement on the grounds that certain terms in the provision are "excessively vague, uncertain or imprecise, give rise to "unintelligible standards" that do not "give sufficient guidance for legal debate", and "are subject to arbitrary application by the Commissioner and the Competition Bureau's staff".

> ***Responding Statement of Grounds and Material Facts of Sears Canada Inc., para. 18.***

41. The specific phrases in ss. 74.01(3) that Sears identifies as being excessively vague are the phrases "substantial volume" and "reasonable period of time" in ss. 74.01(3)(a), and the phrase "substantial period of time recently before or immediately after" in ss. 74.01(3)(b).

> ***Responding Statement of Grounds and Material Facts of Sears Canada Inc., para. 19.***

42. Paragraphs 74.01(3)(a) and (b) specify that a price will not qualify as a seller's legitimate ordinary selling price for the purposes of the provision where the seller:

> (a) has not sold a substantial volume of the product at that price or a higher price within a

reasonable period of time before or after the making of the representation, as the case may be, and

(b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

Competition Act, supra, ss. 74.01(3) (emphasis added)

43. The Supreme Court of Canada has set a high threshold for finding that a provision is so vague as not to be prescribed by law. In this regard, the Court has held that a limit is not "prescribed by law" within the meaning of s.1 of the *Charter* only if it does not provide "sufficient guidance for legal debate":

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate the area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics...

***R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 636-40.**

44. A law will fail to provide sufficient guidance for legal debate if it is "so obscure as to be incapable of interpretation with any degree of precision using ordinary tools". As such, the law fails to establish an intelligible standard.

The appellant argues that the provision is so vague that it is impossible to apply it. Vagueness must be considered in relation to two issues in this appeal: (1) is the law so vague that it does not qualify as "a limit prescribed by law"; and (2) is it so imprecise that it is not a reasonable limit. Dealing with (1), the test is whether the law "is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools" (*Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at p. 94). Put another way, does the law provide "an intelligible standard according to which the judiciary must do its work" (*Irwin Toy, supra*, at 983; adopted in *Osborne v. Canada (Treasury Board), supra*, at p. 96)...

Standards which escape precise technical definition, such as "undue", are an inevitable part of the law. The *Criminal Code* contains other such standards. ... It is within the role of the judiciary to attempt

to interpret these terms. If such interpretation yields an intelligible standard, the threshold for the application of s.1 is met.

***R. v. Butler*, [1992] 1 S.C.R. 452 at 490-91.**

45. In defining and applying the "prescribed by law" requirement, the Supreme Court of Canada has been careful to underscore that legal rules need not, and rarely will, provide absolute certainty. In *Irwin Toy*, for example, in rejecting arguments that prohibitions on commercial advertising directed at children were too vague to be considered to be "prescribed by law" a majority of the Supreme Court remarked:

Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how the standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law".

***Irwin Toy Limited v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 983.**

46. Subsequently, in *R v. Nova Scotia Pharmaceutical Society*, the Supreme Court of Canada considered and rejected the argument that the phrase "to prevent, or lessen, unduly, competition ..." in para. 32(1)(c) of the *Combines Investigation Act* [now para. 45(1)(c) of the *Competition Act*] was too vague to qualify as a limit "prescribed by law". Gonthier, J., writing for the Court, emphasized again that legal rules can only be expected to provide a framework or guide, not certainty:

Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do

more, unless they are directed at individual circumstances.

By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.

Indeed no higher requirement as to certainty can be imposed on law in our modern State. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent in our legal system that some conduct will fall along the boundaries or the area of risk; no definite prediction can be made. Guidance, not direction, of conduct is a more realistic objective...

***R. v. Nova Scotia Pharmaceutical Society*, supra, at 638-39**.

47. Gonthier, J. also warned against requiring the law to achieve a level of certainty that is inconsistent with the subject matter of the law, particularly where flexibility is necessary for the law to achieve its objects effectively:

...[L]aws that are framed in general terms may be better suited to the achievement of their objectives, inasmuch as in fields governed by public policy circumstances may vary in time and from one case to another. A very detailed enactment would not provide the required flexibility, and it might furthermore obscure its purposes behind a veil of detailed provisions. The modern State intervenes today in fields where some generality of enactments is inevitable. The substance of these enactments remains nonetheless intelligible. One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights. A measure of generality also sometimes allows for greater respect for fundamental rights, since circumstances that would not justify the invalidation of a more precise enactment may be accommodated through the application of a more general one.

***R. v. Nova Scotia Pharmaceutical Society*, supra, at 641-42.**

48. In light of these principles, the Court concluded that the phrase "to prevent, or lessen, unduly, competition" when viewed in the context of the purpose of the relevant provision and the *Competition Act*, as well as Canadian economic policy, constituted an intelligible

standard, notwithstanding that "it cannot readily be applied to a factual situation to yield an answer." As noted by the Court: "Few legal norms are so."

> ***R. v. Nova Scotia Pharmaceutical Society*, supra, at 650.**

49. Similarly, the Commissioner submits that ss. 74.01(3) and, in particular, the volume and time tests set out in paras. 74.01(3)(a) and (b), set out intelligible standards that can be applied by the courts to specific fact situations.

50. The terms "substantial volume", "reasonable period of time" and "substantial period of time" are intelligible standards that provide an adequate basis for legal debate. Indeed, legal debate on the meaning of these terms occurred in submissions to and discussion by the Consultative Panel that recommended codifying the volume and time tests, before the House of Commons and Senate Committees that reviewed Bill C-20 and in comments on the guidelines on ss. 74.01(3) initially released for comment and subsequently adopted by the Commissioner. Legal debate on the meaning of these terms has also occurred in this case.

> ***Consultative Panel Report, supra, at pp. 3650-3651.***
>
> ***Comments by Mr. P. Woolford, Vice-President, Retail Council of Canada, House of Commons, Standing Committee on Industry Evidence, 36th Leg., (6 May 1998), Joint Books, Vol. , Tab 33, pp. 531-32.***
>
> ***James B. Musgrove and David M.W. Young, "The Internet and Other Advertising Law Developments – Canada and Elsewhere", ch. 3, s. A in Papers of the Canadian Bar Association Competition Law Section 1997 Annual Conference, Joint Books, Vol. 10, Tab 231, pp 5487-88.***
>
> ***Gazette Notice, supra.***

51. The words "reasonable" and "substantial" are also used widely in the specification of objective standards in Canadian legislation and the common law. The phrases "reasonable person", "substantial compliance", "reasonable period of time" are obvious examples. The interpretation of these phrases and their application to specific fact situations lies within the core expertise of the judiciary.

52. As in the case of the phrase "reasonable person" or of the word "undue", the meaning ascribed to the terms "substantial volume", "reasonable period of time" and "substantial period of time recently before or immediately after" in ss. 74.01(3) is informed by the context and purpose of the legislative provision in which the terms are used.

***R. v. Nova Scotia Pharmaceutical Society*, supra, at 646-48.**

53. The purpose of ss. 74.01(3) is to prohibit deceptive ordinary price representations. This purpose falls within the broader purpose of the *Competition Act* "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, ... in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices".

House of Commons Debates, 1960, V. iv at 4349 (May 30, 1960), Joint Books, Vol. 1, Tab 4.

Competition Act, supra, s. 1.1.

54. The volume and time tests delimit the circumstances in which a reasonable person would consider that the price quoted by a seller qualifies as a legitimate ordinary or regular

price. Viewed within this context, the phrases "substantial volume", "reasonable period of time" and "substantial period of time" clearly provide an intelligible standard for legal debate and judicial interpretation and assessment of specific ordinary price claims.

55. The intelligibility of the standards set out in ss. 74.01(3) is corroborated by Sears' own evidence in this case showing that many other jurisdictions have enacted specific prohibitions on deceptive ordinary price representations that incorporate similar terminology including, in particular, the phrases "substantial sales" and "reasonably substantial period of time". Authorities in other jurisdictions have also promulgated guidelines that enunciate the circumstances in which an ordinary price claim will be considered to fall under a general prohibition on misleading advertising. These standards also speak in terms of "reasonable" volumes of sale and "substantial" periods of time.

> ***Exhibit R-115: Mahinka's Expert Report, paras. 16-41.***
>
> ***U.S. Federal Trade Commission, Guide Against Deceptive Pricing 29 C.F.R. 180 (1964), Joint Books, Vol. 2, Tab 59, pp. 960-61.***
>
> ***ILL. ADMIN. CODE tit. 14 § 470.210 (West Supp. 1998), Joint Books, Vol. 3, Tab 63, pp. 995-96.***
>
> ***U.S., NYC Department of Consumer Affairs, Advertising Guidelines for Retailers, (1994), Joint Books, Vol. 3, Tab 64, p. 1009.***
>
> ***Consumer Fraud - "Deceptive Pricing" Attorney General Consumer Fraud Division (Vermont), Joint Books, Vol. 3, Tab 70, p. 1053.***
>
> ***Legislative Branch, Article 10-15, "Deceptive Acts or Practices" (1994) (North Dakota), Joint Books, Vol. 3, Tab 71, pp. 1064-65.***
>
> ***New Zealand Commerce Commission, Fair Trading Act: A Guide for Advertisers & Traders (2002), Joint Books, Vol. 3, Tab 76, p. 1104.***

56. In affirming that ss. 74.01(3) establishes intelligible standards, the Commissioner does

not deny that ss. 74.01(3) uses flexible terms. As the Supreme Court of Canada has emphasized, however, absolute precision or certainty in the delineation of laws is neither necessary nor appropriate. This is particularly true in cases such as this, where flexibility is important to ensuring that ss. 74.01(3) achieves its objects effectively. The determination of whether or not a price is a legitimate ordinary sale price varies, depending on the nature of the product in issue. A provision that defines ordinary prices on the basis of pre-defined periods of time and/or volume of sales is inflexible to these factors and would incorrectly characterize some ordinary prices which are legitimate as illegitimate and vice versa.

Consultative Panel Report, supra, pp. 3650-3651.

57. As the Supreme Court of Canada has stated, "certainty is only reached in instant cases, where law is actualized by a competent authority". It is sufficient, for the purposes of satisfying the requirement that a limit be "prescribed by law" that the law provide a framework for legal debate. Subsection 74.01(3) clearly satisfies this requirement.

***R. v. Nova Scotia Pharmaceutical Society*, supra, at 638.**

(iii) Oakes Test

58. Assessment of whether a limit of a *Charter* right is reasonable and demonstrably justified in a free and democratic society is conducted in the accordance with the Oakes test. The Oakes test, as set forth in *R. v. Oakes* and refined in *Dagenais v. Canadian Broadcasting Corp.* and *Thomson Newspapers Co. v. Canada (Attorney General)* requires the

government to demonstrate on a balance of probabilities that:

> (1) The objective of the limit is sufficiently pressing and substantial to warrant over-riding a protected right; and
>
> (2) The means used to achieve the objective are proportional to the objective. That is:
>
> > (a) The limit is rationally connected to the objective;
> >
> > (b) The limit restricts the protected right as little as possible; and
> >
> > (c) The salutary effects of the impugned provision outweigh the adverse affects on the protected right.

***R. v. Oakes*, [1986] 1 S.C.R. 103 at 138-40.**

***Thomson Newspapers Co. v. Canada (A.G.)*, [1998] 1 S.C.R. 877 at 901-27.**

***Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835.**

59. The burden of proof lies on the government to establish on a balance of probabilities "through evidence supplemented by common sense and inferential reasoning", that a limit is reasonable and demonstrably justified. As the Supreme Court of Canada stated recently in *R v. Guignard*:

> To justify the intrusion of free expression, a government must demonstrate, through evidence supplemented by common sense and inferential reasoning, that the impugned law meets the tests set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 and refined in *Dagenais v. Canadian Broadcasting Corp.*, [1996] 3 S.C.R. 835, and *Thomson Newspapers Co. v. Canada (Attorney General), supra.* The goal of the impugned law must be pressing and substantial. The law must be proportionate to the goal in the sense of furthering the goal, being carefully tailored to avoid excessive impairment of the right, and productive of benefits that outweigh the detriment of freedom of expression.

***R. v. Guignard*, [2002] 1 S.C.R. 472 at 486-87.**

60. "[E]mpirical proof in a scientific sense" of each of the elements of the Oakes test is not required; rather "a reasonable person looking at all the evidence and relevant

considerations" should be satisfied that the infringement is justified.

> ... legislative justification does not require empirical proof in a scientific sense. While some matters may be proved with empirical or mathematical precision, others, involving philosophical, political and social considerations, cannot. In this case, it is enough that the justification be convincing, in the sense that it is sufficient to satisfy a reasonable person looking at all the evidence and relevant considerations, that the state is justified in infringing the right at stake to the degree it has ... What is required is "rational, reasoned defensibility" ... Common sense and inferential reasoning may supplement the evidence...

***Sauvé v. Canada (Chief Electoral Officer)*, [2003]168 C.C.C. (3d) 449 at 469.**

***R. v. Sharpe*, [2001] 1 S.C.R. 45 at 94.**

61. The Oakes analysis is not to be applied in a rigid or mechanical fashion. Rather, it should be applied flexibly, having regard to the factual and social context of each case. Relevant contextual factors include the nature and scope of the infringement and its relationship to the core values that underpin the protected right, as well as the nature and importance of the harm that is sought to be addressed by the limit.

***R. v. Oakes*, supra at 138-40.**

***RJR MacDonald v. Canada*, [1995] 3 S.C.R. 199 at 269-71.**

***R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 768-69.**

***R. v. Keegstra*, [1990] 3 S.C.R. 697 at 735-36.**

***Ross v. New Brunswick School Board No. 15*, [1996] 1 S.C.R. 825 at 871-72.**

62. In the case of freedom of expression, the value of the expression that is limited affects the degree of constitutional protection. "This is not because a lower standard is applied, but because the low value of the expression may be more easily outweighed by a government objective."

***Thomson Newspapers v. Canada*, supra, at 943.**

63. Where the expression promotes the core values of the right to freedom of expression - truth, political or social participation and self-fulfilment - it will be subjected to more exacting scrutiny than expression that lies further from and/or does not promote these values:

> In *RJR MacDonald* I stated that the "core" values of freedom of expression include "the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process". This Court has subjected state action limiting such values to "a searching degree of scrutiny". This standard of scrutiny is not to be applied in all cases, however, and when the form of expression allegedly impinged lies further from the "core" values of freedom of expression, a lower standard of justification under s.1 has been applied...

***Ross v. New Brunswick School Board No. 15*, supra, at 876-77.**

64. Finally, the extent of the infringement of freedom of expression, including the limit on expression and the penalty for infringement, are also relevant contextual factors that inform the Oakes analysis. Limited restrictions on expression are generally easier to justify than blanket prohibitions on a broad range of speech. Similarly, civil prohibitions on expression will typically be easier to justify than criminal prohibitions on expression.

65. Subsection 74.01(3) establishes a civil prohibition on representations by a seller of the seller's ordinary selling prices that do not satisfy either the volume or time tests. Also, a seller that can establish that the OSP representation was not misleading in a material respect cannot be sanctioned under ss. 74.01(3). This is a limited restriction on freedom of expression. Furthermore, the expression that is prohibited by ss. 74.01(3) is expression

that is of very low value. It is expression that is deceptive in a material respect, and that seeks to use consumer vulnerability and lack of information to gain a financial advantage in the marketplace. This is not expression that furthers the truth. Nor does it protect individual autonomy and self-development or promote public participation in the democratic process.

(a) Pressing and substantial objective

66. The first element of the *Oakes* test requires an assessment of the objectives of the impugned legislation. The objective of the law must be sufficiently pressing and substantial to justify limiting a Charter right.

> ***R. v. Oakes*, supra, at 138-3**

67. The Supreme Court of Canada has declared that the objects of the *Competition Act* are "a central and established feature of Canadian economic policy."

> ***R. v. Nova Scotia Pharmaceutical Society*, supra, at 649.**

68. The objects of the general criminal prohibition on misleading advertising in the *Competition Act* have also been held to be pressing and substantial.

> ***R. v. 671135 Ontario Ltd. (c.o.b. York Energy Conservation) (1994)*, 55 C.P.R. (3d) 204 (Ont. Ct. Gen. Div.) at 210.**

69. As discussed above at paragraphs 3, 8-9, the purpose of ss. 74.01(3) is three-fold: to protect consumers from deceptive ordinary selling price representations; to protect

businesses from the anti-competitive effects of deceptive ordinary selling price representations; and to protect competition from the anti-competitive effects and inefficiencies that result from deceptive ordinary price representations. These purposes are consistent with the over-all objects of the *Competition Act*.

> ***House of Commons Debates, 1960, supra at para. 25.***
>
> ***Consultative Panel Report, supra.***
>
> ***Competition Act, supra, s. 1.1.***

70. The Competition Bureau has repeatedly underscored the harmful effects of misleading advertising.

> [The] misleading advertising provisions played a significant role within the overall framework of competition policy in ensuring that the market mechanism operated effectively and consumers were protected from deceptive practices which might otherwise have occurred in the marketplace. It was with this purpose in mind that the original misleading advertising provisions were included in the *Combines Investigation Act*. Moreover, it can be shown that where there is a lack of complete information or where distorted information in relation to a product is fed into the marketplace, its functioning will be adversely affected and the distortion will be injurious to honest competitors.

> ***R.S. Khemani and W.T. Stanbury, eds., "Misleading Advertising and Deceptive Marketing Practices: The Evolution Legislation, Adjudication and Administration", Historical Perspectives on Canadian Competition Policy, Joint Books, Vol. 7, Tab 172, p. 3116.***

> Misleading advertising does not merely have an adverse effect upon consumers. Business competitors may also suffer economic injury. The fundamental purpose of the *Competition Act* is "to maintain and encourage competition in Canada". The vast majority of businesses, which are playing by the rules, should not face unfair competition in the marketplace from those who are not. Moreover, the presence of even a small but visible segment of misleading advertisers may adversely affect the credibility of all advertisers. In other words, to maintain a level business playing field, misleading advertising must be discouraged in advance and terminated and, if possible, sanctioned when it occurs. The reduction in misleading advertising can lead to a more equitable, competitive marketplace for the benefit of business as well as consumers.

> ***Effective and Equitable Enforcement, Report of the Working Group on Amendments to the Misleading Advertising and Deceptive Marketing Provisions of the Competition Act (Ottawa: 1991), Joint Books, Vol. 7, Tab 176, p. 3460.***

The Economic Impact of Misleading Advertising and Deceptive Marketing Practices

From an economic perspective, misleading advertising and deceptive marketing practices cause injury to both consumers and competitors by misallocating resources and revenues. Such practices lead consumers to buy products of lower quality and at higher prices than would otherwise occur in a competitive market where complete and accurate information is available. This, in turn, encourages the existence of a market in which returns to producers are geared not to their efficiency, but to their ability to disseminate inaccurate information. Competitive forces alone are often insufficient to discipline such abuses and, if such deception is allowed to persist, an acceptable level of quality may be replaced by an "acceptable level of deception".

Reform of the Misleading and Deceptive Marketing Practices Provisions of the Competition Act, December 31, 1993, Joint Books, Vol. 7, Tab 177, p. 3555.

71. Ordinary sale price representations are a particularly powerful form of advertising, as evidenced by the widespread use of this type of advertising.

Consultative Panel Report, supra, p. 25.

Exhibit CA-114: Dr. Lichtenstein's Expert Report (Section 1), para. 20.

Pub. Hr. Tr., Vol. 3, 557 (5) - 559 (6).

72. Legitimate ordinary selling price advertising conveys important information to consumers. However, deceptive ordinary selling price advertising results in substantial harm to consumers, businesses and competition.

Consultative Panel Report, supra, p. 3649.

Exhibit CA-114: Dr. Lichtenstein's Expert Report (Section 1), paras. 8, 9, 14.

Pub. Hr. Tr., Vol. 3, 534 (18) - 536 (12).

Pub. Hr. Tr., Vol. 3, 546 (19) - 547 (11).

73. By creating a general impression of savings, OSP advertising positively affects consumers' intentions to purchase goods. OSP advertising not only affects consumer

decisions on where they purchase a product, it also affects their perceptions of the quality of the product, and may artificially inflate demand for a product, by motivating consumers to purchase the product sooner than would ordinarily be the case.

Exhibit CA-114: Dr. Lichtenstein's Expert Report (Section 1), paras. 16-38.

Pub. Hr. Tr., Vol. 3, 548 (3) - 551 (16).

Pub. Hr. Tr., Vol. 3, 557 (1) - 559 (6).

Pub. Hr. Tr., Vol. 4, 624 (22) - 631 (13).

74. The power of OSP advertising, and the scope for harm, is enhanced by the use of private label brands, which make it more difficult to compare prices across suppliers and brands.

Exhibit CA-114: Dr. Lichtenstein's Expert Report (Section 1), paras. 45-49.

Pub. Hr. Tr.,Vol. 4, 650 (12) - 652 (6).

Exhibit CR-145: Winter's Expert Report - main case, para. 28.

75. Where consumers make purchases based on incorrect ordinary selling price information, inefficient levels of consumption result. Choice of supplier and demand are based on incorrect information and market outcomes are distorted. Sales by suppliers are not reflective of economic efficiency, with the result that both individual competitors and the market as a whole are harmed.

Exhibit CA-114: Dr. Lichtenstein's Expert Report (Section 1), para. 57.

Pub. Hr. Tr., Vol. 4 680 (15) - 683(6).

76. The evidence also establishes that the market will not generally discipline deceptive ordinary price representations on its own. The average consumer has low levels of price knowledge and engages in limited pre-purchase price research. This means that

consumers typically conduct little independent assessment of OSP representations and hence are unable to discipline deceptive OSP representations on their own. The average consumer is also unlikely to become aware, after the fact, that he or she was misled by an OSP representation.

Exhibit CA-114: Dr. Lichtenstein's Expert Report (Section 1), paras. 29-30 and 39-40.

Pub. Hr. Tr., Vol. 4, inter alia 591 (17) - 593 (12); and 642 (13) - 643 (20).

77. The pressing and substantial nature of the harm caused by deceptive price representations is further corroborated by the widespread implementation of measures throughout western economies that prohibit these activities.

Exhibit R-115: Mahinka's Expert Report, paras. 16-41.

Joint Books, Vol. 3, Tabs 61 - 93.

78. For all these reasons, the Commissioner submits that the objectives of ss. 74.01(3) are pressing and substantial.

(b) Proportionality

(i) rational connection

79. A limit on a *Charter* right must be a logical method of accomplishing the legislative objective.

***R. v. Laba*, [1994] 3 S.C.R. 965 at 1008.**

80. Scientific evidence is not required "to establish a rational connection between the impugned measure and its objective" where it is "reasonable to presume", on the basis of reason or logic, that there is "a causal relationship between the harm and the expression in question".

> ***Ross v. New Brunswick School Board No. 15*, supra, at 881.**

81. The Commissioner submits that the rational connection between ss. 74.01(3) and the harm it seeks to address is obvious. The provision has been carefully tailored to prohibit deceptive price representations without undermining the use of legitimate ordinary price representations in the marketplace. In this regard, the provision is on all fours with the advertising provisions that were considered and endorsed by the Supreme Court of Canada in *Irwin Toy*:

> The government measure aims precisely at the problem identified in the s.1 and s. 9.1 materials. It is important to note that there is no general ban on the advertising of children's products, but simply a prohibition against directing advertisements to those unaware of their persuasive intent.

> ***Irwin Toy Limited v. Quebec (A.G.)*, supra, at 991-92.**

82. The volume and time tests set out in paras. 74.01(3)(a) and (b) codify accepted objective tests for when a price should qualify as a legitimate ordinary or regular price.

> ***Exhibit CA-114: Dr. Lichtenstein's Expert Report (Section 1), paras. 62-64.***
>
> ***Consultative Panel Report, supra, pp. 3649-3650.***

83. There is therefore an obvious rational connection between ss. 74.01(3) and the harm that is sought to be addressed by the provision.

(ii) minimal impairment

84. In order to satisfy the minimal impairment element of the *Oakes* test, the impugned provision "must impair the right no more than reasonably necessary having regard to the practical difficulties and conflicting tensions that must be taken into account." As stated by McLachlin, C.J., for the majority of the Supreme Court of Canada, in *R. v. Sharpe*:

> ... This Court has held that to establish justification it is not necessary to show that Parliament adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account. [citations omitted]
>
> ... It was argued after Oakes that anything short of absolutely minimal impairment was fatal. This Court has rejected that notion. The language of the third branch of the Oakes test is consistent with a more nuanced approach to the minimal impairment inquiry – one that takes into account the difficulty of drafting laws that accomplish Parliament's goals, achieve certainty and only minimally intrude on rights. At its heart, s.1 is a matter of balancing. [citations omitted]
>
> ***R. v. Sharpe*, supra, at 101-02.**

85. This approach is consistent with earlier statements by McLachlin, J. as she then was, in *RJR-MacDonald*:

> As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it over-broad merely because they can conceive of an alternative which might better tailor objective to infringement [citations omitted]. On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.
>
> ***RJR MacDonald v. Canada*, supra, at 342-43.**

86. Sears' position appears to be that the failure to establish specific time periods for the assessment of whether or not a price qualifies as "ordinary" renders ss. 74.01(3) over-broad. Significantly, however, Sears has not identified any instances in which ss. 74.01(3) would capture ordinary sale price representations that are not misleading.

87. The expert evidence filed by Sears in this proceeding demonstrates that a range of legislative measures have been adopted in the U.S. to prohibit misleading price representations. U.S. federal legislation contains a general prohibition on unfair acts and deceptive practices. In its guidelines on deceptive practices, the Federal Trade Commission (the "FTC") has indicated that it considers that the product must have been offered at the quoted price on a regular basis for a "reasonably substantial period of time" in order for the price to qualify as a legitimate ordinary or regular price. If no sales have been made at the price, the FTC considers that the price must be "one at which the product was openly and actively offered for sale, for a reasonably substantial period of time, in the recent, regular course of business, honestly and in good faith". This language parallels the language in the time test set out in ss. 74.01(3)(b).

Exhibit R-115: Mahinka's Expert Report, para. 16 .

U.S. Federal Trade Commission, supra, at para. 59.

88. Some U.S. States have also adopted general prohibitions on deceptive marketing which are used to regulate misleading ordinary price representations. Other States have adopted bright line or *per se* tests for assessing the legitimacy of an ordinary price claim. Yet others have enacted legislation that defines legitimate ordinary prices in similar terms to

ss. 74.01(3) - the price must have been offered for a reasonably substantial period of time, in good faith, over a recent period and/or a substantial volume of sales of the product at the price must have occurred over a recent period.

Exhibit R-115: Mahinka's Expert Report, paras. 18-41.

89. The fact that a subset of U.S. states have adopted *per se* tests for ordinary prices does not imply that the more flexible tests set out in ss. 74.01(3)(a) and (b) are over-broad.

90. The evidence in this proceeding clearly establishes that the flexibility of the terms used in ss. 74.01(3)(a) and (b) is critical to ensuring that only price representations that are, in fact, illegitimate are caught by the provision. A *per se* rule, in contrast, that is inflexible to the nature of the product and marketplace conditions, may incorrectly classify ordinary price claims as legitimate or illegitimate and, in so doing, will be under- or over-inclusive.

Exhibit CA-114: Dr. Lichtenstein's Expert Report (Section 1), inter alia, paras. 77, 81.

Pub. Hr. Tr.,Vol. 4, 711 (24) - 712 (11); and 714 (10-22)

91. In this regard, the Commissioner does not deny that ss. 74.01(3) does not establish, with absolute precision, whether a specific ordinary price representation will or will not satisfy the time and volume test. Few laws do. As the Supreme Court of Canada has stated, "certainty is only reached in instant cases, where law is actualized by a competent authority".

***R. v. Nova Scotia Pharmaceutical Society*, supra, at 638.**

92. The Supreme Court Canada has also held that "if the ban [on advertising] is the only effective means to achieve the legislative objective, and if such a ban can only be implemented using a flexible balancing test, the legislature cannot be faulted for leaving that balancing to the courts. Indeed, this should help to ensure that minimal impairment of free expression is a constant factor in the application of the law."

***Irwin Toy Limited v. Quebec (A.G.)*, supra, at 998.**

93. Similarly, the flexibility in paras. 74.01(3)(a) and (b) is necessary to ensure that the provision is neither over-broad nor under-inclusive and, by implication, minimally impairs free expression.

94. It follows that ss. 74.01(3) satisfies the minimal impairment requirement of the *Oakes* test.

(iii) salutary benefits outweigh negative affects

95. The final requirement established by the *Oakes* test is that "there must be proportionality between the deleterious and the salutary effects of the measures" or, the benefits of the impugned provision must outweigh any negative effects on *Charter* rights.

***Thomson Newspapers Co. v. Canada*, supra, at 925.**
***Dagenais v. Canadian Broadcasting Corp.*, supra, at 887-88.**

96. Subsection 74.01(3) prohibits deceptive ordinary price claims. The provision addresses a pressing and substantial objective - the substantial harm to consumers, business and

competitive markets - that can result from deceptive ordinary price claims. The salutary benefits of ss. 74.01(3) are therefore great.

97. In contrast, the negative effects of any restriction on free expression resulting from ss. 74.01(3) are minimal. The restriction on speech is limited and directly targeted to the harm. Moreover, the speech that is restricted has a very low value - it is expression that is deceptive and made solely for commercial gain.

98. The flexibility in various terms used in paras. 74.01(3)(a) and (b) ensure that the provision captures only ordinary price claims that are in fact deceptive ordinary price claims. At the same time, codification of the objective volume and time tests in paras. 74.01(3)(a) and (b) has clarified the scope of the provision thereby providing important clarity to retailers like Sears on the legal framework that will be used to assess the legitimacy of ordinary price claims. The continued widespread use of OSP advertising - by Sears and other retailers - attests to the fact that ss. 74.01(3) has established an intelligible standard that adequately delineates the "area of risk".

Conduct of the Commissioner

99. In addition to challenging the constitutionality of ss. 74.01(3) *per se*, Sears has alleged that its freedom of expression was infringed by the Commissioner's inquiry into Sears' activities and the Commissioner's application to the Competition Tribunal in this matter.

100. If ss. 74.01(3) is found to be constitutionally valid, then the Commissioner's actions can only be impugned if it is established that the Commissioner misapplied the statute or acted in bad faith or on the basis of irrelevant considerations. Sears has not addressed any of these grounds.

101. Although Sears hints in its Response to the Commissioner's Application that the interpretations of the terms used in the volume and time test that are set out in the Commissioner's Bulletin are arbitrary, the interpretations are, in each case, directly linked to the terms in issue. In any event, Sears has not led any evidence to demonstrate that the Commissioner's interpretations are arbitrary and unfounded. The mere fact that the Commissioner has provided some general guidance on her views concerning the appropriate time frame for assessing ordinary prices under the volume and time tests do not render her actions arbitrary or capricious. In any event, the guidelines are simply that - they are not binding and have no force of law. Ultimately, the courts will determine whether or not the time and volume tests have been satisfied in any particular case.

102. The Commissioner also notes that Sears' prayer for relief does not refer to the actions of the Commissioner; it speaks only to the constitutionality of ss. 74.01(3).

103. In essence, therefore, Sears' challenge to the Commissioner's actions is premised entirely on the constitutionality of ss. 74.01(3). There is no independent challenge to the

Commissioner's actions.

Conclusion

104. In sum, the Commissioner submits that the limit on freedom of expression that results from ss. 74.01(3) is justified under s. 1 of the *Charter*. Subsection 74.01(3) establishes intelligible standards that provide - and indeed have and are providing - a framework for legal debate, and therefore clearly qualifies as a limit that is "prescribed by law". Subsection 74.01(3) is also reasonable and justified in a free and democratic society. In accordance with the *Oakes* analysis, ss. 74.01(3):

- addresses a substantial and pressing objective;
- is rationally connected to its objective;
- restricts freedom of expression as little as possible; and
- has salutary benefits that outweigh any adverse impact on freedom of expression.

105. Subsection 74.01(3) has been carefully crafted to address the pressing and substantial harm to consumers, businesses and competitive markets from deceptive ordinary selling price representations, without limiting legitimate price representations. The various terms used in paras. 74.01(3)(a) and (b), while flexible, are not vague. Nor are they over-broad. To the contrary, the flexibility in these terms ensures that only those ordinary price representations that are, in fact, deceptive, in a given fact situation, are captured by the provision.

106. For all these reasons, the Commissioner respectfully submits that Sears' constitutional challenge to ss. 74.01(3) should be dismissed.