

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an inquiry pursuant to subsection 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 74.10 of the *Competition Act*;

AND IN THE MATTER OF Sears Canada Inc.'s opposition to the Application and Sears Canada Inc.'s request for certain relief from the Competition Tribunal;

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE		P R O D U I T
F L E D	SEP 18 2002 <i>gl</i>	
REGISTRAR -- REGISTRAIRE		
OTTAWA, ONT.	# 4	

- and -

SEARS CANADA INC.

Respondent

NOTICE OF CONSTITUTIONAL QUESTION

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THE COMMISSIONER OF COMPETITION

Applicant

- and -

SEARS CANADA INC.

Respondent

NOTICE OF CONSTITUTIONAL QUESTION

TAKE NOTICE that the Respondent, Sears Canada Inc., intends to question the constitutional validity, applicability, or effect of subsection 74.01(3) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Impugned Legislation").

This Notice of Constitutional Question is provided pursuant to section 57 of the *Federal Court Act*, R.S.C. 1985, c. F-7, as amended, and section 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended.

The question is to be argued on a date, and at a time and place, to be fixed by the Competition Tribunal established by subsection 3(1) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), as amended.

The following are the material facts and the legal basis for the constitutional question.

Copies of the Notice of Application, filed July 22, 2002, and the Responding Statement of Grounds and Material Facts, filed September 19, 2002, herein, are attached hereto as Schedules "A" and "B", respectively.

**THE CONSTITUTIONAL INVALIDITY, INAPPLICABILITY OR
INOPERABILITY OF SUBSECTION 74.01(3) OF THE *COMPETITION ACT***

Introduction

1. The Commissioner seeks the following relief in paragraphs 80 to 84 of the Notice of Application (the "Application"):
 - (a) an order that Sears and any person acting on its behalf or for its benefit, for a period of ten years from the date of such order, cease and desist from engaging in the reviewable conduct alleged in the Application;
 - (b) Sears publish or otherwise disseminate a notice or notices with respect to the reviewable conduct allegedly engaged in by Sears;
 - (c) Sears pay an administrative monetary penalty in the amount of \$500,000;
and
 - (d) costs of the Application be awarded to the Commissioner.

2. The Commissioner alleges in paragraph 1 of the Application, which allegations are not admitted, but expressly denied, that in connection with the promotion of the supply of five models of automotive tires to the public, Sears engaged in

“reviewable conduct” by employing deceptive marketing practices within the meaning of subsection 74.01(3) of the Act.

3. Subsection 74.01(3) of the Act (the “Impugned Legislation”) reads:

“(3) **Ordinary price: supplier’s own** – 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; 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 Canadian *Charter of Rights and Freedoms*

4. By paragraph 32(1)(a) of the Canadian *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11, as amended (the “*Charter*”), both the Impugned Legislation and the government of Canada are subject to the *Charter* and the fundamental rights and freedoms guaranteed to all persons by the *Charter*.

Subsection 2(b) of the *Charter*

5. Subsection 2(b) of the *Charter* guarantees to Sears and others the fundamental freedom of expression, including commercial expression and, in particular, advertising.
6. The practices allegedly engaged in by Sears in connection with commercially advertising, promoting, selling, supplying and representing to the public the prices at which certain tires (or like and other products) were ordinarily supplied by Sears, falls within the scope of the freedom of expression guaranteed by subsection 2(b) of the *Charter*.
7. These alleged practices, including commercial advertising, are expressive activities that convey or aim to convey a meaning, that have expressive content and that have expressive form that is perfectly usual, acceptable and professional and consistent with industry practice.
8. The Impugned Legislation has the purpose or, alternatively, the effect of severely limiting Sears and others' fundamental freedom of expression guaranteed by subsection 2(b) of the *Charter* because:

- (a) the purpose of the Impugned Legislation is to restrict or control attempts by Sears and others to convey a meaning, either by directly restricting the content of expression or by restricting a form of expression tied to content; and/or, alternatively,
 - (b) the effect of the Impugned Legislation is to severely restrict Sears and others' guaranteed fundamental freedom of expression, as described below.
9. The Impugned Legislation limits Sears and others' guaranteed fundamental freedom of expression by:
- (a) proscribing "reviewable conduct" and imposing both restrictions and controls in relation to ordinary price representations, by any means whatever, including commercial advertising, which is, in effect, a prohibition and prior restraint impinging on the guaranteed fundamental freedom of expression; and/or
 - (b) subjecting Sears and others to a civil prohibition on expression that is sanctioned by, and coupled with, a variety of civil and administrative sanctions, remedies and orders that can be obtained against Sears and others in relation to ordinary price representations pursuant to, or arising from, the

Impugned Legislation, which deter Sears and others from engaging in commercial advertising.

10. Sears guaranteed fundamental freedom of expression was wrongfully controlled and restricted by (a) the Impugned Legislation itself, (b) the Commissioner's Inquiry (as described below) and (c) this Application commenced by the Commissioner, pursuant to, or arising from, the Impugned Legislation.
11. Sears was deterred and, in fact, refrained, from commercially expressing itself through advertising by the prospect of the invocation of the Bureau's enforcement process and the prospect of the imposition of various sanctions, restrictions, controls and administrative remedies, including cease and desist orders, publication orders, administrative monetary penalties, contempt of court and other enforcement orders, in relation to ordinary price representations, pursuant to, or arising from, the Impugned Legislation.
12. The effect of the Impugned Legislation is to control or restrict Sears guaranteed freedom of commercial expression, including its advertising, which activity promotes and aims to convey a meaning reflective of the following principles and values underlying freedom of expression:
 - (a) commercial expression has intrinsic value as expression;

(b) freedom of commercial expression protects listeners, including consumers, and allows them to make rational, intelligent and informed economic decisions, which is an important aspect of individual fulfilment and personal autonomy; and

(c) commercial expression contributes to healthy economic activity and makes a valuable contribution to the marketplace of ideas that is fostered by the constitutional guarantee of freedom of expression in subsection 2(b) of the *Charter*.

13. In addition, the Impugned Legislation, especially as it has been interpreted and applied by the Commissioner and the Competition Bureau's staff, pursuant to the Ordinary Price Guidelines (the "Guidelines," as further defined below) published by the Commissioner on September 22, 1999, to the advertising allegedly engaged in by Sears and others for the purpose of administering and enforcing the Impugned Legislation, is an unreasonable time, place and manner restriction on Sears fundamental freedom of expression guaranteed by subsection 2(b) of the *Charter*.

14. The Impugned Legislation by its intent and/or effect adversely impacts on the content of Sears and others' commercial advertising or, alternatively, adversely

interferes with the supply, availability and use of certain products, or determines who may be involved in these, in relation to ordinary price representations, including commercial advertising, proscribed by the Impugned Legislation.

15. By subsection 52(1) of the *Constitution Act*, 1982, the Impugned Legislation is, to the extent of its inconsistency with the provisions of the *Charter*, of no force or effect.

16. The Impugned Legislation, in whole or in part, is inconsistent with the provisions of the *Charter* and, in particular, has infringed or denied Sears guaranteed fundamental freedom of expression, contrary to subsection 2(b) of the *Charter* and, therefore, is of no force or effect.

Section 1 of the *Charter*

17. The Impugned Legislation and its limits on Sears guaranteed fundamental freedom of expression, including commercial advertising, are not reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Consequently, these limits are not justified under section 1 of the *Charter*.

18. The Impugned Legislation and, in particular, the parts thereof set out below:

- (a) do not satisfy the requirement that any limitation on rights and freedoms guaranteed by the *Charter* be a limit prescribed by law under section 1 of the *Charter*, because: (i) they are excessively vague, uncertain and imprecise; (ii) they are subject to unintelligible standards as not to give sufficient guidance for legal debate; and (iii) they are subject to arbitrary application by the Commissioner and the Competition Bureau's staff; and/or,

- (b) do not impair the guaranteed fundamental freedom of expression as little as possible, are excessively broad, and have application to an unnecessarily broad range of activity and, therefore, are constitutionally invasive of Sears fundamental freedom of expression, and are limits that are unreasonable and cannot be justified in a free and democratic society under section 1 of the *Charter*.

Particulars

19. The particular parts of the Impugned Legislation, and the unreasonable and arbitrary interpretation thereof in the Guidelines, that are in issue are:

- (1) In paragraph 74.01(3)(a) of the Act – Ordinary price claims relating to actual sales (volume test) – the words:

- (a) **“substantial volume”**

The Guidelines provide that the substantial volume of product requirement will be met if more than fifty per cent of sales are at or above the reference price.

- (b) **“reasonable period of time before or after”**

The Guidelines provide that the time period to be considered will be the twelve months prior to (or following) the making of the representation (but may be shorter depending on the nature of the product).

- (2) In paragraph 74.01(3)(b) – Ordinary price claims relating to offered prices (time test) - the words:

- (a) **“substantial period of time recently before or immediately after”**

The Guidelines provide that:

- (i) the substantial period of time requirement will be met if the product is offered at or above the reference price for more than fifty per cent of the time period considered; and
 - (ii) the time period to be considered will be the six months prior to (or following) the making of the representation (but may be shorter having regard to the nature of the product).
20. Sears and others who are affected directly or indirectly by the Impugned Legislation are:
- (a) denied proper notice of the law;
 - (b) wrongfully forced to guess at its meaning;
 - (c) required to speculate or surmise how and in what circumstances the Impugned Legislation will apply and will be enforced;

- (d) left to determine without adequate guidance whether their conduct would fall inside or outside the conduct proscribed by the Impugned Legislation;

- (e) faced with Impugned Legislation that allows for arbitrary governmental action – which has been taken against Sears - by the Commissioner and by the Competition Bureau’s staff in enforcing the Impugned Legislation pursuant to, or arising from, the Impugned Legislation and the Guidelines; and

- (f) subjected to restrictions on their constitutionally guaranteed fundamental freedom of expression founded on highly discretionary administrative practices, on unfettered discretion for the exercise of extraordinary power vested and reposed in the Commissioner and on administrative, non-binding and non-legal guidelines which, in essence, define and proscribe the conduct enforced by the Commissioner, purportedly under the Impugned Legislation, and which are not “prescribed by law” within the meaning of section 1 of the *Charter*.

21. Further, or in the alternative:

- (a) the objective of the Impugned Legislation is not of sufficient importance as to be capable of overriding a right guaranteed by the *Charter* and, in particular, the fundamental freedom of expression guaranteed by subsection 2(b) of the *Charter*;
- (b) the Impugned Legislation, or part thereof, is not rationally connected to its objective; and
- (c) the effect of the Impugned Legislation, or part thereof, is disproportionate to its objective, and the adverse effects of its infringement of subsection 2(b) of the *Charter* outweigh the benefits, if any, conferred by the Impugned Legislation.

Constitutional Remedies Sought

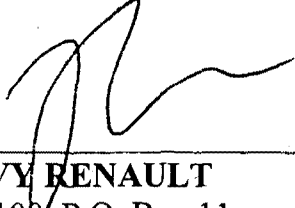
22. By reason of the foregoing, Sears requests the following relief from this Honourable Tribunal:

- (a) a determination that the Impugned Legislation, in whole or in part, is inconsistent with the provisions of the *Charter* and, in particular, has

infringed or denied Sears fundamental freedom of expression guaranteed by subsection 2(b) of the *Charter* and, therefore, is of no force or effect; and

- (b) an order dismissing the Application with costs.

Date: September 18, 2002



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THE COMPETITION TRIBUNAL

B E T W E E N:

The Commissioner of Competition
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- and -

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