Tribunal File No. CT-2002-04

THE COMPETITION TRIBUNAL

BETWEEN:

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE
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June 18, 2004
Jos LaRose for / pour
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OTTAWA, ONT
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THE COMMISSIONER OF COMPETITION

Applicant

- and -

SEARS CANADA INC.

Respondent

WRITTEN SUBMISSIONS OF THE RESPONDENT, SEARS CANADA INC.

(*Re* Constitutional Question)

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THE COMPETITION TRIBUNAL

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

SEARS CANADA INC.

Respondent

WRITTEN SUBMISSIONS OF THE RESPONDENT
(*Re* Constitutional Questions)

PART I – FACTS

1) Introduction

1. It is Sears' position in this proceeding that subsection 74.01(3) of the *Competition Act* (the "*Act*" or the "Impugned Legislation") is an unjustifiable infringement of Sears' fundamental freedom of commercial expression guaranteed by subsection 2(b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

2. The Commissioner of Competition (the "Commissioner") has conceded that Sears' right of commercial speech has been infringed. The Commissioner submits, however, that this infringement is a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society, under section 1 of the *Charter*.

3. In Sears' submission, the Impugned Legislation and the limits that legislation imposes on Sears' rights are not reasonable limits under section 1 of the *Charter*. Specifically, the

Impugned Legislation is excessively vague, uncertain and imprecise and is subject to not only unintelligible standards but also to arbitrary application by the Commissioner.

4. The Impugned Legislation has not been carefully designed to achieve its objectives. It sets unfair and unascertainable rules in respect of ordinary selling price advertising and does not meet, but rather undermines, even defeats its legislative objective, and the Commissioner's duty to act fairly and efficiently in the exercise of her duties. It uses means which are broader and impairs Sears' guaranteed freedom of expression more than is necessary to accomplish its objectives. Due to its vagueness and overbreadth, the Impugned Legislation deters not only false or misleading ordinary price advertising – the targeted expression – but also legitimate expression.

5. Accordingly, Sears submits that the effects of the Impugned Legislation so severely trench on Sears' *Charter* rights that the objectives of the Impugned Legislation are far outweighed by the abridgement of rights or freedoms. The deleterious effects of the Impugned Legislation are grossly disproportionate to its alleged, but unproven, salutary effects.

2) Legislative Background and the Enactment of the Impugned Legislation

(a) The Impugned Legislation

6. In March 1999, the *Competition Act* was amended to create a dual track regime (civil and criminal) to address allegations of misleading advertising (the "1999 Amendments"). The Impugned Legislation was enacted as part of the 1999 Amendments.

> *Competition Act*, R.S.C. 1985, c. C-34

7. Prior to the 1999 Amendments, misleading advertising allegations were prosecuted under subsection 52(1)(d) of the *Act*. This provision, dealing with regular price claims, provided that:

> 52(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 the relevant market unless it is clearly specified to be the price at which the product has been sold, by the person by whom or on whose behalf the representation is made.

8. The *Act* also contained a general prohibition against misleading advertising in subsection 52(1)(a). Violators of these provisions were subject to criminal prosecution.

9. Since the 1970's, concerns have been expressed about the inefficiencies of criminal prosecutions of misleading advertising. These concerns include, in particular, the lack of speedy decision-making, "widely disparate, and indeed, in policy terms, incoherent patterns of regulation on fundamental, conceptual issues", *ad hocery* and disproportionately severe responses for some instances of unintentional misleading advertising. As recently as 1995, the Competition Bureau has acknowledged these concerns.

> M.J. Trebilcock, *et al.*, "Proposed Policy Directions for the Reform of the Regulation of Unfair Practices in Canada", *A Study on Consumer Misleading and Unfair Trade Practices*, vol. 1 (Ottawa: Information Canada, 1976), Exhibit J1, Tab 180 at 3730 and 3731 *et seq.*
>
> Rachel Larabie-LeSieur, "Misleading Advertising and the *Competition Act*" (Aylmer: September 28, 1995), Exhibit J1, Tab 213 at 5161.

10. More recently, stakeholders, including leading consumer, retailer, legal, and advertising organizations, have explicitly and forcefully lamented the vagueness and lack of precision, certainty and understanding relating to the ordinary selling price legislation. These stakeholders also highlighted the critical need to clearly define and clarify the concept of ordinary selling price in the *Act* in order to establish fair competitive practice in the marketplace. Particulars of these responses are set out in Appendix "A" hereto.

11. In 1996, a consultative panel (the "Panel") established by the then Director of Investigation and Research issued a report recommending that the *Act*, and specifically the ordinary price claim provision, be amended to make that provision "*easier for retailers to understand and apply*", and to make it "*more reflective of what consumers and retailers understand by 'regular' price claims in today's marketplace*". Contrary to the Commissioner's submissions in this proceeding, the Panel's Model Provision, particularly with respect to the volume and time tests, was **not** enacted as recommended.

> Canada, "Report of the Consultative Panel on Amendments to the *Competition Act*" (Ottawa: March 6, 1996), Exhibit J1, Tab 178 at 3649 and 3652.

12. Also in 1996, amendments to the *Act* were introduced in the House of Commons to revise and clarify the law regarding comparative price advertising by retailers. Members of the retail industry and some consumer groups continued to express concern that the existing law lacked sufficient clarity to determine under what circumstances ordinary price claims might be made. In 1998, a retail stakeholder clearly and unequivocally asserted that the ordinary price claim section proposed by the amendments required further clarification before the actual scope of the proposed law could be fully understood.

> Industry Canada, "News Release: Competition Act Amendments Introduced" (November 7, 1996), Exhibit J1, Tab 204.
>
> Industry Canada, Competition Bureau, *CompAct*, Issue 6 (July-September 1997), Exhibit J1, Tab 228 at 5346; Brenda Pritchard, "Misleading Price Claims and the Proposed Amendments to s. 52(1)(D) of the Competition Act", Exhibit J1, Tab 232 at 5518-5521 and 5549.
>
> Hélène M. Yaremko-Jarvis, "Overview of Bill C-20 from a Retailer's Perspective", *Misleading Advertising and Deceptive Trade Practices*, tab 1 (Toronto: October 15, 1998), Exhibit J1, Tab 233 at 5563.

13. On March 18, 1999, the Impugned Legislation became law. Notwithstanding the ongoing concerns that had been expressed (by retailers, among others) the Competition Bureau stated that the new *Act* spelled out the criteria and cleared up the prior questions respecting the provisions dealing with ordinary price claims.

Industry Canada, Competition Bureau, "Information: Improvements to the *Competition Act...Ordinary Price Claims*" (March 18, 1999), Exhibit J1, Tab 226.

14. The Impugned Legislation 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; 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.

(b) "Interpretive" Guidelines

15. The Impugned Legislation is interpreted in an Information Bulletin – Ordinary Price Claims (the "Guidelines") prepared by the Commissioner as an interpretative document to the Impugned Legislation. The Guidelines were published approximately six months after the enactment of the Impugned Legislation.

Canada, "Information Bulletin: Ordinary Price Claims Subsections 74.01(2) & 74.01(3) of the *Competition Act*" (September 22, 1999), Exhibit J1, Tab 187.

16. The Guidelines provide that the substantial volume of product requirement set out in paragraph 74.01(3)(a) (the "volume test") will be met if more than fifty percent of sales are at or above the reference price. The Guidelines further provide that the time period to be considered in connection with the volume test 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).

17. With respect to paragraph 74.01(3)(b) of the *Act*, the words "substantial period of time recently before or immediately after" (the "time test") are interpreted in the Guidelines as follows:

> 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 percent 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).

18. The Guidelines have no legal force of any kind and are not binding on the Commissioner or her staff; hence, they do not constitute a "law" that is "prescribed by law" within the meaning of those words in section 1 of the *Charter*. The Guidelines, therefore, cannot be used to justify any limitation on Sears' freedom of expression pursuant to section 1 of the *Charter*.

> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

19. Rather than serving as an aid to market participants, the Guidelines contribute to the uncertainty and confusion surrounding the meaning and application of the Impugned Legislation. Indeed, the existence and purpose of the Guidelines strongly support Sears' contention that the Impugned Legislation is unconstitutionally vague, and may even constitute an acknowledgement by the Commissioner that the Impugned Legislation standing alone does not provide adequate guidance to retailers and others.

(c) Freedom of Commercial Expression – Preliminary Comments

20. Prior to addressing the specific points in issue in this proceeding, it is important to review, briefly, the role that freedom of expression plays in Canadian society and the treatment afforded to this fundamental right by Canada's highest court.

21. The right to freedom of expression is at the very core of our free and democratic society and is guaranteed under the *Charter*. Subsection 2(b) of the *Charter* provides as follows:

> 2. Everyone has the following fundamental freedom:
>
> ...
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

22. The *Charter* applies to Parliament and to the government of Canada (s. 32). Pursuant to s. 52(1) of the *Constitution Act, 1982*, the *Constitution* (including the *Charter*) is the supreme law of Canada. Any law that is inconsistent with the provisions of the *Constitution* is, to the extent of the inconsistency, of no force or effect.

23. A significant body of Canadian jurisprudence establishes that 'expression' includes any activity that "conveys or attempts to convey meaning." Protection is given "irrespective of the particular meaning or message sought to be conveyed."

> Irwin Toy Ltd. v. Québec (Attorney General), [1989] 1 S.C.R. 927 at 968 [Irwin Toy]; R. v. Keegstra, [1990] 3 S.C.R. 697 at 729 [Keegstra].

24. The Supreme Court of Canada has held that commercial expression or advertising falls within the scope of subsection 2(b) because it conveys or attempts to convey meaning to an audience and can play "a significant role in enabling individuals to make informed economic choices."

> Ford v. Québec (Attorney General), [1988] 2 S.C.R. 712 at 767; Rocket v. Royal College of Dental Surgeons, [1990] 2 S.C.R. 232 at 247.

PART II – POINTS IN ISSUE

25. Given the concession by the Commissioner that the Impugned Legislation violates Sears' right to freedom of expression, the focus then shifts to the following issues pursuant to a section 1 analysis under the *Charter*:

> (a) Whether the Impugned Legislation satisfies the burden and standard of proof required to establish that any limitation on rights and freedoms guaranteed by the *Charter* is a limit prescribed by law under section 1 of the *Charter*?

(b) Whether the objectives of the Impugned Legislation are of sufficient importance as to be capable of overriding Sears' fundamental freedom of expression guaranteed by subsection 2(b) of the *Charter*?

(c) Whether the Impugned Legislation is rationally connected to its objectives?

(d) Whether the Impugned Legislation impairs Sears' fundamental freedom of expression guaranteed by subsection 2(b) of the *Charter* as little as possible, that is no more than is necessary to accomplish its objectives?

(e) Whether there is proportionality between the deleterious effects of the Impugned Legislation and its objectives, and between the deleterious and the salutary effects of the Impugned Legislation?

PART III - SUBMISSIONS

3) The Burden And Standard Of Proof – The Impugned Legislation is not a "limit prescribed by law" or "reasonable and demonstrably justified"

(a) Burden and Standard of Proof

26. The Commissioner bears the burden of establishing, on a very high degree of probability, that the limitation on Sears' fundamental freedom of expression is both prescribed by law and is reasonable and demonstrably justified in a free and democratic society, under section 1 of the *Charter*. As Chief Justice Dickson noted in *R. v. Oakes*:

> ... s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the *Charter*. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society.
>
> The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation ...

> The standard of proof under s. 1 is the civil standard, namely, proof by a preponderance of probability ... nevertheless, the preponderance of probability test must be applied rigorously. Indeed, the phrase 'demonstrably justified' in s. 1 of the Charter supports this conclusion. Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case ...
>
> *R. v. Oakes*, [1986] 1 S.C.R 103 at 136-137 [*Oakes*]; See also *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295 at 351-352.

27. When assessing whether a limitation of a Charter right may be justified, the analysis (under section 1 of the *Charter*) must be undertaken with a thorough examination of the Impugned Legislation's legislative and factual context. As Bastarache J. stated:

> The analysis under s. 1 of the Charter must be undertaken with a close attention to context. This is inevitable as the test devised in R. v. Oakes . . . requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses. Similarly, the proportionality of the means used to fulfill the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a Charter right.
>
> Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877 at 939-946.

28. The party seeking to justify the restrictive law must, therefore, satisfy the following test:

(i) the purpose of the law is pressing and substantial;

(ii) the law is rationally connected to this pressing and substantial purpose;

(iii) the law restricts the *Charter* right or freedom no more than is necessary to achieve its pressing and substantial purpose; and

(iv) the law's detrimental effect on the restricted right or freedom is proportionate to its salutary effects.

> *Oakes*, *supra* at 138-139; *Dagenais v. CBC*, [1994] 3 S.C.R. 835 at 889 [*Dagenais*]

(b) The Impugned Legislation does not Constitute a "Limit Prescribed by Law"

29. Sears submits that the Impugned Legislation does not satisfy the requirement that any limitation on rights and freedoms guaranteed by the *Charter*. The words used in the Impugned Legislation are excessively vague, uncertain and imprecise; are subject to unintelligible standards and arbitrary application by the Commissioner.

(i) The Impugned Legislation Is Excessively Vague, Uncertain And Imprecise

30. In *Osborne*, Sopinka J. for the majority of the Supreme Court of Canada, confirmed that a law may not satisfy the section 1 "prescribed by law" requirement if it is too vague:

> A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on government power. The uncertainty may arise either from the generality of the discretion conferred on the donee of power or from the use of language that it is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools. In these circumstances, there is no single 'limit prescribed by law' and no section 1 analysis is necessary as the threshold requirement for its application is not met.
>
> *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 at 94 [*Osborne*].

31. The Impugned Legislation uses language that is so uncertain that it cannot be interpreted with any degree of precision using the ordinary tools for the interpretation of statutes.

> R. v. Dubois, [1935] S.C.R. 378 at 397; Thomson v. Canada (Deputy Minister of Agriculture), [1992] 1 S.C.R. 385 at 403.

(1) Natural and Ordinary Meaning

32. The words of a statute must be interpreted in their "natural and ordinary sense" unless a contrary intention is clearly expressed in the statute or is implied from the context.

> Toronto College Park Ltd. v. Ontario (Minister of Revenue) (1992), 7 O.R. (3d) 159 (Gen. Div.) [Toronto College Park]; R. Sullivan, Driedger on the Construction of Statutes, 3rd ed. (Toronto : Butterworths, 1994) at 1.

33. In interpreting the words of a statute in their "natural and ordinary sense", the court may not devise its own meaning of the words. It is imperative that the court have guidance

which may be found in statutory definitions, previous judicial definitions, expert evidence, and the careful use of dictionary definitions.

Toronto College Park Ltd., supra at 171.

34. The *Act* contains no definition of the words "substantial volume", "reasonable period of time", "substantial period of time", or "recently", used in the Impugned Legislation.

35. While the words "substantial" and "substantially" are used throughout the *Act*, including the merger provisions (sections 92 and 93), these words are left undefined. Their meaning is dependent on a variety of factors and their specific context. The *Act* expressly lists various factors to be considered by the Tribunal regarding prevention or lessening of competition (section 93 – Mergers); but, then fails to delineate specific factors to be considered when determining the scope of a legitimate ordinary price representation.

36. The Impugned Legislation provides that the "nature of the product" and the "relevant geographic market" are factors to be considered in determining whether a person engages in reviewable conduct under that section. However, the *Act* does not define these factors, it does not provide any assistance or direction as to what weight should be given to each of these factors and it offers no guidance as to how these factors affect the determination as to whether a person has complied with or failed the volume and time tests in the Impugned Legislation.

(2) Judicial Interpretation

37. A provision does not violate the doctrine of vagueness simply because it is subject to interpretation. However, it is necessary to determine whether a term is capable of being given a constant and settled meaning by the courts.

R. v. Morales, [1992] 3 S.C.R. 711 at 729-730 [*Morales*].

38. Sears submits that the evidence before the Tribunal has established that despite the lengthy legislative history, there is still no definitive answer in the jurisprudence – including case law authorities – to the fundamental question: "What is a regular or ordinary price in a comparative savings claim?"

> James B. Musgrove and David M.W. Young, "The Internet and Other Advertising Law Developments – Canada and Elsewhere", ch. 3, s. A, *Papers of the Canadian Bar Association Competition Law Section 1997 Annual Conference: Competition Law for the 21st Century* (Ottawa: Juris Publishing, 1997), p. 107, Exhibit J1, Tab 231 at 5483.

39. Courts have found it difficult to decide what is meant by the "regular" price.

> Regular price is capable of being interpreted in a number of ways, i.e., either as the printed "regular price" ... or as the usual price at which the defendant had been selling these same type and size of tires, or what competitors were regularly selling these tires for ...
>
> *R. v. City Tire Services Ltd.* (1974), 19 C.P.R. (2d) 124 at 129 (N.B. Co. Ct.).

40. In Ontario, the price at which an item was "ordinarily" sold in a particular area was found to be the "regular price"; however, little guidance was provided by the court as to the precise meaning of regular price.

> *R. v. J. Pascal Hardware Co.* (1972), 8 C.P.R. (2d) 155 at 163 (Ont. Co. Ct.).

41. The Federal Court of Canada identified the following synonyms for "ordinarily": "normally"; "as a matter of regular occurrence"; "commonly", and "usually".

> *Imray v. Minister of National Revenue* (1998), 154 F.T.R. 71 at 76 (T.D.); *Healy v. R.*, [1979] 2 F.C. 49 at 54 (C.A.).

42. The term "substantial" has been considered in a variety of situations. It has been noted that the term is highly contextual and dependent on the particular facts of the case.

> Manning Timber Products Ltd. v. Canada (Minister of National Revenue), [1952] 2 S.C.R. 481 at 484.

43. In *Canada (Director of Investigation) v. Chrysler Canada Ltd.*, the Tribunal, when interpreting the meaning of "substantially affected", stated:

> The Tribunal agrees that "substantial" should be given its ordinary meaning, which means more than something just beyond de minimis. While terms such as "importance" are acceptable synonyms, further clarification can only be provided through evaluations of actual situations.
>
> *Canada (Director of Investigation) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 at 23 (Comp. Trib.), aff'd (1991), 38 C.P.R. (3d) 25 (F.C.A.).

44. The Federal Court of Appeal accepted the *Shorter Oxford English Dictionary* definition of "substantial", as meaning, *inter alia*, "essential"; "that is, constitutes or involves an essential part"; and, "of ample or considerable amount, quantity or dimension".

> *General Enterprises Construction Ltd. v. R* (1987), 25 C.L.R. 157 at 162 (Fed. C.A.).

45. The term "reasonable time" has been described as being "vague and indefinite".

> *Nazzareno v. Algoma Eastern Railway* (1922), 70 D.L.R. 268 at 276 (S.C.C.).

46. Courts have held that:

> What will amount to reasonable time is sometimes a question of difficulty, but is a question of fact, not of law. As such it must depend on the circumstances of the particular case.
>
> *Dartboard Holdings Ltd. v. Royal Bank* (1991), 12 C.B.R. (3d) 88 at 99 (B.C.S.C.); *Mister Broadloom (1968) Ltd. v. Bank of Montreal et al.* (1983), 44 O.R. (2d) 368 (C.A.); *Bennett v. Newcombe* (1913), 11 D.L.R. 87 (B.C.C.A.).
>
> *Chapman v. Great Western R.W. Co.* (1880), 5 Q.B.D. 278 at 282 (Q.B.); *Pleet v. Canadian Northern Québec R.W. Co.* (1920), 56 D.L.R. 404 (H.C.), aff'd [1923] 4 D.L.R. 1112 (S.C.C.).

47. Sears submits that it is not possible for the Tribunal, in construing the Impugned Legislation, to determine the intention of Parliament by interpreting the words at issue using the ordinary tools of statutory interpretation, including statutory definitions, previous judicial definition, evidence, and the careful use of dictionary definitions.

48. Even dictionary definitions of specific words used in the Impugned Legislation highlight the imprecise nature of the terms found in the Impugned Legislation.

> Merriam-Webster, online: <http://www.m-w.com>, *s.v.* "reasonable", "recent" and "substantial".
>
> Oxford English Dictionary, online: <http://dictionary.oed.com>, *s.v.* "reasonable", "recent" and "substantial".

49. In summary, the meaning of the critical words in the Impugned Legislation has not been clearly or consistently defined in the jurisprudence. These words are imprecise and ambiguous. Dictionary definitions of these words are broad and unhelpful. Ultimately, they may have as many varying meanings as their differing factual contexts. Accordingly, any party subject to the Impugned Legislation is placed in an untenable position when attempting to ascertain or comply with the Impugned Legislation.

(3) The Evidence

50. The expert evidence proffered by the Commissioner establishes that the Impugned Legislation is so unclear as to be incapable of being construed with any degree of precision or certainty. Whereas the Commissioner has interpreted and enforced the Impugned Legislation as determining an ordinary selling price by using one of either a volume test (s. 74.01(3)(a)) or a time test (s. 74.01(3)(b)), Dr. Moorthy, an expert witness offered by the Commissioner, disagreed and misinterpreted the Impugned Legislation as requiring Sears to satisfy <u>both</u> the volume and the time tests.

> Affidavit and Expert Report/Opinion of S. Moorthy, sworn September 22, 2003, paragraph 47, Exhibit CA123; Transcript, Volume 14 at 2406, line 23–2408, line 6.

51. Dr. Lichtenstein, who also was tendered as an expert witness by the Commissioner, agreed in cross-examination that:

a) the word "substantial" opens the door up for more than one meaning, something meaning a considerable amount, and something meaning something else, that is there can be variance within an interpretation of "substantial";

> Pub. Hr. Tr., Vol. 4, 781 (20) – 782(2), Oct. 23, 2003.

b) the word "substantial" could mean days, months, or years depending upon the context;

Pub. Hr. Tr., Vol. 4, 782 (9); 783 (25); 805 (24) – 806 (2), Oct. 23, 2003.

c) in terms of the time test, an example of a product where days could constitute "substantial" is a highly perishable item, for example, food, magazines, and things of that nature with a short shelf life.

Pub. Hr. Tr., Vol. 4, 806 (13-21), Oct. 23, 2003.

52. Mr. Henry, Q.C., former Director of Investigation and Research under the *Combines Investigation Act* [now the *Competition Act*], stated that, in establishing an ordinary price, "the price so established must be not an unusual, artificial or ineffective price but must be usual, accepted and regular."

D.H.W. Henry, Q.C., Director of Investigation and Research under the Combines Investigation Act [now the Competition Act], "Notes for an Address to the Better Business Bureau of Ottawa and Hull Inc." (Ottawa: November 13, 1962) in Donald S. Affleck and K. Wayne McCracken, *Canadian Competition Law*, vol. 2 (Toronto: Carswell, loose-leaf), p. 45-110, Exhibit J1, Tab 209 at 5135.

53. Mr. Henry further stated that "where goods are ordinarily sold at list price (and by this I mean according to an established pattern, not a few non-characteristic sales) a reference to list price would presumably not be misleading ..."

D.H.W. Henry, Q.C., Director of Investigation and Research under the Combines Investigation Act [now the Competition Act], "Notes for an Address to the Canadian Automotive Wholesalers' & Manufacturers' Association" (Toronto: March 22, 1962) in Donald S. Affleck and K. Wayne McCracken, *Canadian Competition Law*, vol. 2 (Toronto: Carswell, loose-leaf), p. 45-84, Exhibit J1, Tab 207 at 5125.

54. The Tribunal is, therefore, without any meaningful assistance or guidance as to what factors and indicia should properly be taken into account in determining the meaning and the application of the words in issue.

55. Sears submits that the Impugned Legislation, because of its excessive vagueness, uncertainty and imprecision, does not satisfy the requirement that any limitation on *Charter* rights and freedoms be a limit prescribed by law under section 1 of the *Charter*.

(ii) The Impugned Legislation Does Not Set Intelligible Standards or Provide Fair Notice

(1) Intelligible Standards

56. For a statutory provision to satisfy the section 1 "prescribed by law" requirement, the provision must set out intelligible standards for the limitation of a *Charter* right.

> Irwin Toy, supra at 983.

57. A law will not meet the threshold of an intelligible standard if an individual cannot ascertain, after careful reflection, whether his or her conduct would fall inside or outside the proscribed conduct.

> Committee for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139 at 213 [Committee for the Commonwealth of Canada].

58. The Supreme Court of Canada expressed the test for determining whether a law is unconstitutionally vague thus:

> 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 any 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 it 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. The term 'legal debate' is used here not to express a new standard or one departing from that previously outlined by this Court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of the quality and limits of human knowledge and understanding in the operation of the law.
>
> (our emphasis)
>
> R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606 at 639-640 [Nova Scotia Pharmaceutical Society].

59. It is necessary for a court to develop the full interpretive context surrounding an impugned provision to determine whether the law provides sufficient guidance for a legal debate.

Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031 at 1070.

(2) Fair Notice

60. "Fair notice" means that citizens must be able to regulate their conduct, to determine with some degree of accuracy whether or not conduct is permissible under the law, and to judge the consequences of a proposed course of action. If a law is so general that citizens are unable to reach such a determination, the law may be determined not to have given fair notice. The critical point is that even though citizens may not know the exact details of the law, they are generally aware of "the substratum of values underlying the legal enactment".

Nova Scotia Pharmaceutical Society, supra at 634; *The Sunday Times Case,* [Eur. CT. H.R.] Judgment of April 26, 1979, Series A, No. 30 at 22 cited with approval in *Nova Scotia Pharmaceutical Society, supra* at 637.

61. Given that the Impugned Legislation is so general and broad, suppliers, such as Sears, cannot regulate their conduct or predict the consequences of a proposed ordinary price representation. They have no meaningful guidance as to the parameters of the volume and time tests set out in the Impugned Legislation.

62. As there are some legitimate and some illegitimate ordinary selling price practices, it is imperative to know and understand what is, or is not, legitimate. The Impugned Legislation, however, does not provide this essential framework and leaves the interpretation open to varying, and arbitrary, interpretations made *post facto*.

Pub. Hr. Tr., Vol. 4, 740 (22) – 742 (16), Oct. 23, 2003.

63. The evidence before the Tribunal failed to identify any conventions, practices, or shared understandings about when a representation as to the ordinary selling price of a product is false or misleading in a material respect, or more specifically, about the volume of the product that should be sold or the length of time the product should be offered for sale, before a representation as to price can fairly be described as "ordinary". Absent this context, the words at

issue in the Impugned Legislation have no discernable content. Their meaning can only be ascertained by statutory provisions or regulations that define these words or that delineate contextual factors that must be considered in determining their meaning.

64. In *Irwin Toy*, Dickson C.J. for the Court held that sections 248 and 249 of the *Consumer Protection Act*, R.S.Q., c. P-40.1, which prohibit advertising aimed at children, are not too vague to constitute a limit prescribed by law under section 1 of the *Charter*.

65. Section 248 requires the advertisement to have commercial content and be aimed at those under thirteen years of age. Section 249 requires the judge to weigh three factors relating to the context in which the advertisement was presented, namely, the nature and intended purpose of the goods advertised, the manner of presenting the advertisement, and the time and place it is shown, in order to determine whether or not an advertisement is directed at persons under thirteen years of age.

66. The Court held that because these sections can be given a sensible construction, producing no contradiction or confusion, and not leaving the courts with too wide a discretion, and because the legislation specifically delineates contextual factors that must be considered, these provisions provide the courts with an intelligible standard to be applied in determining whether an advertisement is subject to restrictions.

> Irwin Toy, supra at 980-983.

67. Accordingly, Sears submits that the Impugned Legislation does not sufficiently delineate the area of risk by which people can modify their conduct, and therefore it cannot provide fair notice to citizens or a limitation of enforcement discretion.

(iii) No Limitation of Enforcement Discretion

68. Sears submits that, given its vagueness and inadequate guidance for legal debate, the Impugned Legislation is subject to arbitrary application by the Commissioner and the Competition Bureau's staff.

69. In *Re Ontario Film & Video Appreciation Society*, the Ontario Divisional Court held that where a legislative provision authorizes administrative officials to exercise discretion in a manner that may infringe *Charter* rights, the exercise of discretion must be conducted in accordance with recognizable criteria. The decision as to how and when to exercise a discretion should not be "left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law".

> Re Ontario Film & Video Appreciation Society and Ontario Board of Censors (1983), 41 O.R. (2d) 583 at 592 (Div. Ct.), aff'd (1984), 45 O.R. (2d) 80 (C.A.) [Ontario Film Video Appreciation Society].

70. The Impugned Legislation offers no meaningful guidance to the Commissioner and her staff, and fails to expressly delineate recognizable criteria by which her discretionary powers in commencing and maintaining proceedings in respect of ordinary selling price representations are to be carried out.

71. Rather, the Impugned Legislation affords the Commissioner an unfettered discretion for the exercise of statutory powers, and the ability to interpret and enforce the Impugned Legislation in a manner which comports with the Commissioner's opinion of the law. Regulatory compliance, therefore, is reduced something in the eye of the beholder. Both the Commissioner and her opinion of the Impugned Legislation could change at any time and without advance notice to the public.

(iv) The Guidelines

72. Sears submits that the Guidelines are non-legal and non-binding administrative guidelines which may be amended or replaced at will.

73. In *Re Ontario Film & Video Appreciation Society*, the Court held that while the board had its own publicly available criteria (like the Guidelines), those criteria were not binding on the board and, therefore, did not constitute a "law" that was "prescribed by law" within the meaning of those words in section 1 of the *Charter*. Those criteria could therefore not be employed to justify any limitation on expression, pursuant to section 1 of the *Charter*.

> Ontario Film & Video Appreciation Society, supra at 592; R. v. Glad Day Bookshops Inc., [2004] O.J. No. 1766 at 19 (S.C.J.).

74. A similar conclusion was reached in *Committee for the Commonwealth of Canada*, a case involving a *Charter* challenge based on freedom of expression in respect of a prohibition purported to be based on regulations imposed by airport officials on the distribution of pamphlets in an airport. Lamer C.J. and Sopinka J. opined that the action of the government official in question was based on an established policy or internal directive that was not a "law" for the purposes of the threshold requirement of "prescribed by law" within the meaning of those words in section 1 of the *Charter*.

> Committee for the Commonwealth of Canada, supra at 164 and 209-215.

75. A further significant difficulty with the Guidelines is that they arbitrarily and unreasonably set the volume and time requirements at more than fifty percent, the time period for the volume test at twelve months, and the time requirement for the time test at six months, while allowing for a shorter period of time depending on the nature of an unspecified product in unidentified circumstances. While the Guidelines suggest that certain factors such as the seasonal character of the product may affect the time and volume standards, they do not, however, indicate how these standards are affected or what the standards are in such a case. The relevant and essential contextual factors are not delineated.

76. Sears further submits that the existence and purpose of the Guidelines, and the absence of regulations which could have been made under the *Act* in respect of ordinary selling price advertising, strongly support Sears' contention that the Impugned Legislation is unconstitutionally vague, and may constitute an acknowledgement by the Commissioner that the Impugned Legislation standing alone does not provide adequate guidance to retailers and others.

> Irwin Toy, supra at 983.

77. Another critical problem with the Impugned Legislation is highlighted by Messrs. Young and Fraser, in their leading text *Canadian Advertising & Marketing Law*, as follows:

> When considering the volume of sales test, the time period one looks to is "a reasonable period of time before or after the making of the representation"; however, when considering the time offered for sale test, the relevant time period is defined as "a substantial period of time recently before or immediately after the making of the representation" (emphasis added). A "reasonable" time suggests a lesser period than a "substantial" time; therefore compliance with the volume of sales test permits a shorter reference period than the time offered for sale test. However, this is not supported by the Bureau's guidelines, discussed below, which suggest that a "reasonable period of time" for the volume test may be up to a year, but that a "substantial period of time" for the time offered test will be generally a period of six months.
>
> David M.W. Young and Brian R. Fraser, "Misleading Advertising", ch. 1, *Canadian Advertising & Marketing Law*, looseleaf (Toronto: Carswell), p. 1-83, Exhibit J1, Tab 230 at 5451.

78. Accordingly, Sears submits that the Guidelines do not provide a fair and accurate interpretation of the Impugned Legislation. They do not clarify subsection 74.01(3) of the *Act*, nor do they reduce the possibility of arbitrary enforcement thereof. Rather than serving as an aid to market participants, the Guidelines contribute to the uncertainty and confusion concerning the meaning and application of the Impugned Legislation.

4) Pressing And Substantial Objective

79. The appropriate focus for this Tribunal at this stage of the section 1 of the *Charter* analysis (the *Oakes* test) is the objective of the Impugned Legislation. The onus is on the

Commissioner to establish that the objective of the Impugned Legislation is of sufficient importance as to be capable of overriding a right guaranteed by the *Charter* and, in particular, Sears' fundamental freedom of expression guaranteed by subsection 2(b) of the *Charter*.

Vriend v. Alberta, [1998] 1 S.C.R. 493 at 555.

80. The evidence before the Tribunal in this proceeding has confirmed that the objectives of the Act include, *inter alia*, setting and making known the rules or parameters governing competition in Canada and, importantly, having the *Act* judicially enforced in a manner that is fair to all and in accordance with the rules previously established. Other objectives include the improvement of the quality and accuracy of marketplace information and discouraging deceptive marketing practices.

81. The critical question to be answered is whether the Impugned Legislation can be justified in light of these objectives. Sears submits that it cannot. In particular, Sears submits that the Impugned Legislation is not rationally connected to its objectives, does not impair Sears' fundamental right as little as possible, is overbroad and does not minimally impair Sears' guaranteed right. Finally, Sears submits that one overall effect of the Impugned Legislation is disproportionate to its objectives and outweighs its salutary effects.

5) Rational Connection - The Impugned Legislation Is Not Rationally Connected To Its Objectives

82. The Impugned Legislation fails the "rational connection" test because, as noted above, it is excessively vague, uncertain and imprecise, and has application to an unnecessarily broad range of activity. It has not been carefully designed to achieve its objectives and it sets unfair and unascertainable rules in respect of ordinary selling price advertising.

83. Under the test set in *Oakes*, the requirement of a rational connection calls for an assessment of how well the "legislative government has been tailored to suit its purpose". Moreover, it is clear that the law must be carefully designed to achieve the objective in question and should not be "arbitrary, unfair or based on irrational consideration".

> R. v. Edwards Books and Art, [1986] 2 S.C.R. 713 at 770 [Edwards Books];
> Oakes, supra at 139.

84. Professor Elliot has noted that the rational connection requirement will be satisfied "[s]o long as those actions can rationally be said to further the objectives the government seeks to rely on ..."

> R. Elliot, "Developments in Constitutional Law: The 1989-90 Term" (1991) 2 S.C.L.R. (2d) 83 at 144; E. P. Mendes, "The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1", in Gérald-A. Beaudoin and E. P. Mendes, *The Canadian Charter of Rights and Freedoms*, 3rd ed. (Toronto: Carswell, 1996) at 3-21.

85. The evidence before the Tribunal clearly establishes that the Impugned Legislation does not adequately address the fundamental questions, concerns, legislative objectives and options raised by industry stakeholders over many years prior to the enactment of the Impugned Legislation, as particularized in Appendix "A" attached hereto.

86. The overwhelming weight of the evidence has established that the Impugned Legislation does not meet, but rather undermines, thwarts, even defeats, its legislative objectives, and especially the *Act*'s overriding objective to be clear and transparent to the business community, and to have its provisions – including the Impugned Legislation – appropriately enforced.

87. Sears therefore submits that there is no rational connection between the Impugned Legislation and its objectives based on the evidence or common sense. The Impugned Legislation is thus not justified under section 1 of the *Charter*, and is unconstitutional.

> Oakes, supra at 142; Morales, supra at 734.

6) Minimal Impairment – Least Drastic Means

(a) The Impugned Legislation Does Not Impair As Little As Possible Sears' Fundamental Freedom Of Expression

88. Sears submits that the Impugned Legislation fails the minimal impairment test under section 1 of the *Charter* in two respects. First, the Impugned Legislation is overbroad. Second, there are other legislative options available to Parliament which would be more effective at achieving Parliament's objectives and which would place a lesser burden on Sears' constitutionally guaranteed freedom of expression than the Impugned Legislation.

89. In *Oakes*, the requirement of least drastic means was described as the second element of proportionality, and as requiring that the law "should impair 'as little as possible' the right or freedom in question", that is no more that is necessary to achieve the desired objectives.

> Oakes, supra at 139; RJR-MacDonald Inc. v. Canada (A.G.), [1995] 3 S.C.R. 199 at 342-343 [RJR-MacDonald].

90. A statutory provision that creates a greater restriction of a right or freedom than is necessary to accomplish its purpose is overbroad, and fails the minimal impairment test under section 1 of the *Charter.*

> *R. v. Heywood*, [1994] 3 S.C.R. 761 at 802 [*Heywood*].

91. A vague and imprecise statutory provision may also constitute and overbroad law and fail the minimal impairment test under section 1 of the *Charter*. As Sopinka J. stated in *Osborne*:

> A law which passes the threshold test, may nevertheless by reason of its imprecision, not qualify as a reasonable limit. Generality and imprecision of language may fail to confine the invasion of a Charter right within reasonable limits. In this sense, vagueness is an aspect of overbreadth.
>
> *Osborne, supra* at 94-95; Nova Scotia Pharmaceutical Society, supra at 629-631.

92. According to Gonthier J., the relationship between vagueness and overbreadth was "well expounded" by the Ontario Court of Appeal in *Zundel*:

> Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely inter-related. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad. Alternatively, as an example of the two concepts being closely inter-related, the wording of a statute may be so vague that its effect is considered to be overbroad.
>
> *R. v. Zundel* (1987), 58 O.R. (2d) 129 at 157 (C.A.), aff'd [1992] 2 S.C.R. 731; *Nova Scotia Pharmaceutical Society, supra; Heywood, supra.*

93. A law that is considered sufficiently clear for the purpose of the threshold "prescribed by law" requirement may nevertheless be found to be overbroad due to vagueness. The minimal impairment test demands greater clarity than does the prescribed by law requirement.

> Nova Scotia Pharmaceutical Society, supra at 630; R. v. Sharpe, [2001] 1 S.C.R. 45 at 68-69 [Sharpe].

94. In assessing whether a law is overbroad, a reviewing authority must first attempt to ascertain the meaning of the legislation and, from there, then assess whether it is, in fact, overbroad.

> *R. v. Biller* (1999), 174 D.L.R. (4th) 721 at 733 (Sask. C.A.) [*Biller*].

(b) The Impugned Legislation is Overbroad

95. Sears submits that the Impugned Legislation is overbroad. It uses excessively vague, imprecise, and broad terms, including "substantial volume", "reasonable period of time", "substantial period of time", and "recently". It also fails to include specific guidelines, contextual factors, standards, criteria, or definitions concerning the volume of product sold or offered for sale, and the periods of time to be considered for the volume and time tests, before a price may be lawfully advertised as an "ordinary price". One of the critical problems with the Impugned Legislation is that its meaning, for the reasons noted above, cannot be readily ascertained. Having said that, the potential scope of the legislation is so broad as to unduly restrict legitimate commercial expression.

96. The scope of the Impugned Legislation, even if read in connection with the non-binding Guidelines (which Sears submits is inappropriate), will frustrate, or even defeat, the

purported objectives of the Impugned Legislation. As Dr. Lichtenstein, the Commissioner's expert witness, testified:

a) placing the percentage requirement for sales and time tests at 51 percent or higher is objectionable as a *per se* or equivalent *per se* rule;

Pub. Hr. Tr., Vol. 4, 791 (6) – 793 (16), Oct. 23, 2003.

b) placing the percentage requirement high enough to be sure that all deception is routed out will preclude some consumers from receiving non-deceptive information that they may, in fact, value in making decisions. Retailing efficiency, in turn, would be affected adversely in that retailers may be constrained in making temporary price reductions or could not communicate them as effectively to their customers ...;

Expert Affidavit of Dr. Donald Lichtenstein ("Lichtenstein Report"), sworn September 22, 2003, paragraph 77, Exhibit CA114; Transcript, Volume 4 at 789-790.

c) requiring products to stay at a mistakenly high price for substantial periods of time before the retailer can let customers know of its mistake through reference to that price again may deprive some customers of important information about both the product and the retailer; and

Lichtenstein Report, paragraph 77; Transcript, Volume 4 at 791.

d) if consumers believed that there was a time test at 51 percent or higher, that test is objectionable.

Pub. Hr. Tr., Vol. 4, 793 (17) – 794 (7), Oct. 23, 2003.

97. Sears submits that because the Impugned Legislation may embrace the applications described above, it uses means which are broader and impairs Sears' guaranteed freedom of expression more than is necessary to accomplish its objectives. It thus fails the minimal impairment test of the proportionality inquiry mandated by section 1 of the *Charter*, and is unconstitutional.

(c) Minimal Impairment – Other Legislative Options Exist

98. Sears further submits that the Impugned Legislation does not minimally impair Sears' guaranteed freedom of expression because there are practical legislative alternatives to the Impugned Legislation as currently drafted. These legislative alternatives will give clearer

direction, guidance, and notice of the law to those subject to it and to those entrusted with the responsibility for its enforcement. Further, legislative alternatives would advance its objectives and those of the *Act* far more effectively, and interfere less with Sears' constitutional rights than the Impugned Legislation.

99. Peter Hogg, a renowned Canadian constitutional law expert, writes:

> The requirement of least drastic means has turned out to be the heart and soul of s. 1 justification ...
>
> A number of laws have failed the requirement of least drastic means ...
>
> In each of these cases, the Supreme Court of Canada held that other laws were available to the enacting legislative body which would still accomplish the desired objective but which would impair the Charter right less than the law that was enacted.
>
> P. Hogg, *Constitutional Law in Canada*, looseleaf (Toronto: Thomson/ Carswell, 1997) at 35-33 and 35-34.

100. In order to be saved under section 1 of the *Charter*, an infringement on a *Charter* right or freedom must impair the right or freedom at issue as little as possible.

> RJR-MacDonald, supra at 342-343; Trociuk v. Attorney General of British Columbia et al., [2003] 1 S.C.R. 835 at 850-851.

101. Sears submits that other laws were and still are available to Parliament which would better achieve the intended objectives of the Impugned Legislation and which would impair Sears' *Charter* rights less than the Impugned Legislation. Such laws may be found in certain U.S. state statutes and/or regulations which incorporate specific and more precise standards, criteria, or definitions concerning comparative price advertising. These selected states include Alaska, California, Connecticut, Illinois, Massachusetts, Missouri, New Jersey, Nevada, Ohio, Oregon, South Dakota, and Wisconsin.

> Expert Affidavit of Stephen Paul Mahinka, sworn September 22, 2003 ("Mahinka Affidavit"), Exhibit CR115, Transcript, Volume 5.

102. The law of these selected U.S. states governing comparative price advertising was described in detail and proven as fact in this proceeding by Sears' expert witness, Stephen Mahinka as outlined in Appendix "C".

103. Mr. Mahinka was tendered by Sears and accepted by this Tribunal as an expert witness qualified and entitled to opine on areas of U.S. federal and state comparative price advertising, consumer protection, and antitrust law.

Transcript, Volume 5 at 871-873.

104. As is evident from Mr. Mahinka's affidavit and evidence, the selected U.S. state laws, described above, are reasonable legislative alternatives to the Impugned Legislation. These alternatives involve the inclusion in a statutory provision – either an Act or a regulation – of clear, simple, and fixed standards, or a scale of standards tied to specific contextual factors, criteria, or definitions set out in the legislation concerning the volume of products sold or offered for sale, and the periods of time to be considered for the volume or time tests, before a price may be advertised as an ordinary or regular price under the legislation.

Mahinka Affidavit, paras. 18-40.

105. While retailers or others affected by such comparative or ordinary price advertising legislation may have various objections to such explicit standards, or scale of standards, they could not legitimately complain that such laws are constitutionally objectionable because of vagueness or overbreadth. And if such legislation provides flexibility, it cannot properly be objected to as *per se* legislation. As Dr. Lichtenstein agreed:

> ... provided that the ordinary selling price rules afford flexibility, the inclusion in those rules of clear factors, criterion, and guidelines to properly inform and guide those who are affected by the rules, would be acceptable and, in fact, they may assist.

Pub. Hr. Tr., Vol. 4, 796 (2-19), Oct. 23, 2003.

106. The Commissioner contends that "there is a need for flexibility to provide for unforeseen circumstances, and to account for the numerous ways of carrying out deceptive

advertising". However, Sears submits that flexibility is neither an absolute nor an unalloyed good; and clarity should not be sacrificed on the altar of flexibility. The vagueness and overbreadth of the Impugned Legislation's come at an unjustified cost, as described below, and must be replaced or supplemented by more precise provisions which serve to clarify the way the legislation ought to be interpreted, applied (and, where appropriate, enforced) by industry, the Commissioner and this Tribunal.

107. Legislation that provides greater clarity and guidance as to when ordinary selling price (OSP) claims can lawfully be made, will invariably be more effective in advancing Parliament's pressing and substantial legislative objectives, including the objective of informing consumers. As agreed by Dr. Dr. Lichtenstein, since there are some legitimate and some illegitimate OSP practices, it is imperative to know what is legitimate and what is not.

Pub. Hr. Tr., Vol. 4, 741 (18-25), 758 (2-6), Oct. 23, 2003.

108. Thus, Sears submits that the record before this Tribunal contains ample and uncontroverted evidence that there were and still are other practical and reasonable means open to Parliament to obtain its chosen legislative objectives; that these alternative legislative options would be more effective at achieving the government objectives, and would place a lesser burden on Sears' constitutional rights than the Impugned Legislation.

7) Proportionate Effect

(a) The Detrimental Effects Of The Impugned Legislation Are Disproportionate To Its Objectives And Outweigh Its Salutary Effects

109. The proportionate effect requirement is the third element of proportionality and the last step in the *Oakes* test of justification under section 1 of the *Charter*.

110. This step, according to Dickson C.J. in *Oakes*, requires "a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'".

Oakes, supra at 139.

111. The requirement of proportionate effect was restated by Dickson C.J. in *Edwards Books and Art* thus: "their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights".

Edwards Books, supra at 768.

112. Lamer C.J. in *Dagenais* refined the test by stating that the requirement of proportionate effect should also take into account the "proportionality between the deleterious and the salutary effects of the measures".

Dagenais, supra at 889.

113. The Commissioner asserts that "the extent of the restriction imposed on commercial sellers who choose to advertise their products is relatively small, and the benefits brought about justify the technical requirements imposed on sellers when they advertise....". Sears disagrees and notes that this contention is unsupported by the evidence. The purported salutary effects of the Impugned Legislation alleged by the Commissioner are not supported by any direct evidence. The Supreme Court of Canada has clearly held that:

> Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not...a mere technicality; rather it is essential to a proper consideration of Charter issues...Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

McKay v. Manitoba, [1989] 2 S.C.R. 357 at 361-362.

114. The deleterious effects of the Impugned Legislation, on the other hand, have been proven by clear and cogent evidence before this Tribunal, as described below.

(b) A Chilling Effect

115. Suppliers, concerned as to whether or not they might offend the Impugned Legislation, may decide not to provide useful and important price information to consumers or, indeed,

discontinue programs that are beneficial to consumers because they fear that the advertisement of this information might run afoul of the law. This is referred to as a "chilling effect".

116. McLachlin J., dissenting in *Keegstra,* describes a chilling effect as:

> A second characteristic peculiar to freedom of expression is that limitations on expression tend to have an effect on expression other than that which is their target. In the United States this is referred to as the chilling effect. Unless the limitation is drafted with great precision, there will always be doubt about whether a particular form of expression offends the prohibition. There will always be limitations inherent in the use of language, but that must not discourage the pursuit of the greatest drafting precision possible. The result of a failure to do so may be to deter not only the expression which the prohibition was aimed at, but legitimate expression. The law-abiding citizen who does not wish to run afoul of the law will decide not to take a chance in a doubtful case. Creativity and the beneficial exchange of ideas will be adversely affected. This chilling effect must be taken into account in performing the balancing required by the analysis under s. 1. It mandates that in weighing the intrusiveness of a limitation on freedom of expression our consideration cannot be confined to those who may ultimately be convicted under the limit, but must be extended to those who may be deterred from legitimate expression by uncertainty as to whether they might be convicted.
>
> Keegstra, supra at 850.

117. In *Luscher*, the court held that vague or uncertain laws may have the effect of deterring individuals from engaging in behavior which is in fact legal.

> Luscher v. Deputy Minister, Revenue Canada (Customs & Excise), [1985] 1 F.C. 85 at 89 (C.A.).

118. Dr. Lichtenstein, the Commissioner's expert, confirmed the chilling and detrimental effects of unclear ordinary selling price legislation when he testified that:

a) uncertain or unclear OSP advertising regulatory rules hinder OSP price advertising;

   Pub. Hr. Tr., Vol. 4, 758 (17) – 759 (2), Oct. 23, 2003.

b) if the regulations are not clear, some retailers may choose not to engage in OSP advertising as much or at all;

Pub. Hr. Tr., Vol. 4, 759 (3-8), Oct. 23, 2003.

c) if retailers choose not to engage in OSP advertising as much or at all, that would hinder price reduction;

Pub. Hr. Tr., Vol. 4, 759 (13-19), Oct. 23, 2003.

d) if price reduction is hindered, that could result in competitors not having any pressure to lower their prices; and

Pub. Hr. Tr., Vol. 4, 759 (20-24), Oct. 23, 2003.

e) if competitors do not lower their prices, the consumer would be harmed by higher prices.

Pub. Hr. Tr., Vol. 4, 759 (25) – 760 (16), Oct. 23, 2003.

119. In January 2001, as a result of the Competition Bureau's approach to and enforcement of the Impugned Legislation, Sears discontinued its "two for" selling prices, and set its regular prices for the subject Tires from January to April/May 2001 at prices close to its 1999 "two for" selling prices to allow it to compete with the EDLP (Every Day Low Price) competition. This pricing structure failed and resulted in a dramatic drop (22 %) in unit sales in the first half of 2001.

120. Consequently, while maintaining its decision to not use a separate "two for" price, Sears increased its regular prices of the subject Tires in May 2001 to prices similar to its 1999 prices and which were in line with the manufacturer's suggested list prices for comparable products. Although this reversion to higher regular prices caused little difference in the volume of sales at regular prices, the volume of sales at promotional prices, however, and thus total unit sales, increased significantly.

Confidential Transcript of William F. McMahon, January 19, 2004 at 00282, line 9 – 00287, line 14.

121. Sears therefore submits that the deleterious effects of the Impugned Legislation are deep and fundamental, and constitute profound and significant infringements not only on Sears'

fundamental freedom of expression guaranteed by subsection 2(b) of the *Charter* but also on activities that flow from the exercise of that right. These effects so severely trench on Sears' *Charter* rights or freedoms that the Impugned Legislation's objectives are far outweighed by the abridgment of rights or freedoms. Further, the deleterious effects of the Impugned Legislation are grossly disproportionate to its alleged but unproven salutary effects.

8) Conclusion

122. In conclusion, Sears submits that on the evidence before this Tribunal, and for all the foregoing reasons, the Commissioner has failed to establish, to the requisite high degree of probability, that the Impugned Legislation's limitation on Sears' fundamental freedom of expression guaranteed by subsection 2(b) of the *Charter* is prescribed by law and is reasonable and demonstrably justified in a free and democratic society under section 1 of the *Charter*.

PART IV – ORDER SOUGHT

123. Sears therefore requests the following relief from this Honourable Tribunal:

a) a declaration 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.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: June 17, 2004

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APPENDIX "A" – RESPONSES TO THE DISCUSSION PAPER

Exhibit / Tab / Page No.	Description of Stakeholder	Questions, Concerns, Objectives and Options
J1/241/5674	Osler, Hoskin & Harcourt, "Response to the Director of Investigation and Research in Connection with the Discussion Paper Regarding Competition Act Amendments dated June 1995" (October 6, 1995)	*Misleading advertising/deceptive practices/price advertising -* • We are very supportive of the need to clarify the concept of ordinary selling price in the *Act.* However, we are of the view that a volume-based standard is unrealistic and commercially unworkable.
J1/241/5711		*Definition of Ordinary Selling Price -* • In our view, the definition of ordinary selling price in the *Act* should be expressed clearly to provide more certainty to advertisers about the criteria to be considered in establishing ordinary price. This is particularly necessary with respect to the determination of the advertiser's regular price.
CJ2/267/6163	Consumers' Association of Canada, "Comments on the Discussion Paper Prepared by Bureau of Competition Policy, Industry Canada" (Ottawa: October 1995)	*Regular Price Claims and Section 52(1)(d) -* • We believe a well-worded "time" test could catch all of these misleading practices. The "volume" test bears no relation to consumer purchasing habits for big ticket items in particular.
CJ2/268/6167	Consumers Council of Canada, "Response to the Discussion Paper Competition Act Amendments, June 1995"	*Regular Price Claims and Section 52(1)(d) -* • It is entirely appropriate that the Bureau clearly set out definitions and requirements for advertising.
CJ2/268/6168		The statement is made (Page 18 of the Discussion Paper) that the ordinary selling price means "...that a substantial volume of sales of the product must have occurred at the represented price during the relevant time period". This statement (it cannot be called a definition) is far too vague. The words "substantial volume" and "relevant time period" must be clear.

Exhibit / Tab / Page No.	Description of Stakeholder	Questions, Concerns, Objectives and Options
CJ2/263/6092	Letter from Brenda L. Pritchard, Vice-Chair, Media and Communications Law Section, Canadian Bar Association, to Mr. George Addy, Director of Investigation and Research, Bureau of Competition Policy (November 8, 1995) "Proposed Amendments to the *Competition Act* (Canada)"	*Regular Price Claims and Section 52(1)(d)* - • The *Act* does not define "ordinary selling price", nor has a clear definition emerged from case law.
CJ2/263/6093		• Further, the term "ordinarily" lacks the precision necessary to enable retailers to determine whether or not an offence has been committed.
CJ2/264/6114	National Competition Law Section of the Canadian Bar Association, "Comments on Misleading Advertising and Deceptive Marketing Practices and Regular Price Claims and Section 52(1)(d) and Deceptive Telemarketing Solicitations" (November 1995)	*Regular Price Claims and Section 52(1)(d)* - • It is obvious that a clearer and commonly understood definition of ordinary price is needed, because there is great consternation in the retail community over the current situation. A final decision must be made on whether the "time" test or the "volume" test will be used, because the current uncertainty creates unfairness.

Exhibit / Tab / Page No.	Description of Stakeholder	Questions, Concerns, Objectives and Options
J1/243/5741	Letter from Canadian Daily Newspaper Association, to Mr. George Addy, Director of Investigation and Research, Bureau of Competition Policy (October 31, 1995)	*The factors to be considered in establishing "ordinary selling price" -* • The law should be sufficiently clear to allow an advertiser to be able to know that an advertisement is not unlawful. The calculations and assumptions required to accommodate the "volume test" will be difficult for most advertisers.
CJ2/260/6073	Letter from Thomas P. d'Aquino, President and Chief Executive of Business Council on National Issues, to Mr. George N. Addy, Director of Investigation and Research, Bureau of Competition Policy (October 12, 1995) "Preliminary Response of the Business Council on National Issues to Proposed Amendments to the Competition Act"	• At a minimum, there needs to be a clear understanding by both the business community and the Director as to the appropriate test to measure ordinary selling price and how these provisions will be enforced.
CJ2/260/6074		• As stated above, clear rules are necessary to provide greater certainty to the business community.
J1/247/5765	Stentor Telecom Policy Inc., "Comments in Response to: A Discussion Paper on Proposed *Competition Act* Amendments Released by the Bureau of Competition Policy, June 1995" (October 4, 1995)	*Regular Price Claims -* • It is generally acknowledged that the language of section 52(1)(d) of the *Act* lacks sufficient clarity such that there is confusion as to the circumstances under which ordinary price claims can be made. To that end, amending the provision is warranted to make clear what "ordinary price" actually means for the rules as presently stated may not be appropriate for all types of products.

Exhibit / Tab / Page No.	Description of Stakeholder	Questions, Concerns, Objectives and Options
J1/248/5793	Telus, "Comments by Telus Corporation in Response to the Bureau of Competition Policy's June 28, 1995 Discussion Paper" (October 6, 1995)	*Regular Price Claims and Section 52(1)(d) -* • There is some confusion in the marketplace as to what is meant by the term "ordinarily sold" within the meaning of section 52(1)(d) of the *Act*. It would be helpful if the legislation provided some express guidance regarding the relative importance of "time" and "volume" as factors.
CJ2/257/5994	The Retail Task Force: Dylex Limited, Hudson's Bay Company, The Oshawa Group, "Competition Act Misleading Advertising Guidelines: The Imperative to be Clear and Simple" (June 1995)	*Clear and simple guidelines must be established -* • Retailers need to know with certainty how to comply with the requirement that sale price representations must not be misleading.
CJ2/271/6232	The Retail Task Force: Dylex Limited, Hudson's Bay Company, The Oshawa Group Limited, "Competition Act Misleading Advertising Guidelines: Submission Responding to the Policy Discussion Paper" (October 1995)	*Summary of Recommendations -* • New legislation be introduced, or guidelines be developed, that are clear, simple and practical to apply and enforce.

Exhibit / Tab / Page No.	Description of Stakeholder	Questions, Concerns, Objectives and Options
J1/251/5845	Letter from The Retail Task Force: Dylex Limited, Hudson's Bay Company, The Oshawa Group Limited, to The Honourable John Manley, P.C., M.P., Ministry of Industry (July 25, 1996)	*Outstanding Issues Grid – Competition Act Amendments* - RTF Concern – • Shift to time test is clearly welcome. However, lack of clarity on interpretation of terms, such as "substantial time", "substantial volume" gives rise to uncertainty. RTF Position – • Amend legislation to define terms; advertisers must know what is meant by "substantial volume", "recently" and "good faith". As a general rule, the time test should require that goods not be on sale more than 51 percent of the time. However, there may be need to be flexible from time to time for different types of products.
CJ2/270/6201 and 6202	Retail Council of Canada, "Retail Council Submission Amendments to the Competition Act" (October 16, 1995)	• The volume test causes particularly serious problems for consumers and retailers of fashion goods where the need to move the merchandise quickly creates strong pressure to reduce prices aggressively until the merchandise is cleared out. • This not only creates an impossible situation for the retailer, it is hopelessly confusing for the consumer and, in fact, prevents the consumer from making any price comparison that can be helpful in arriving at an intelligent buying decision. • In the view of the Retail Council of Canada, these effects of the volume test are absurd, and do nothing to bring about fairness in the market. This weakness alone demands that the volume test be removed as the criterion for judging comparative advertising claims. *Principles for Sound Policy Design* - • In looking for a law that will establish 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;

Exhibit / Tab / Page No.	Description of Stakeholder	Questions, Concerns, Objectives and Options
		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.

APPENDIX "B" - AUTHORITIES

Caselaw

1. *Bennett v. Newcombe* (1913), 11 D.L.R. 87 (B.C.C.A.)

2. *Canada (Director of Investigation) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Comp. Trib.), aff'd (1991), 38 C.P.R. (3d) 25 (F.C.A.)

3. *Chapman v. Great Western R.W. Co.* (1880), 5 Q.B.D. 278 (Q.B.)

4. *Commissioner of Competition v. Canada Pipe Company*, 2004 Comp. Trib. 2, File No. CT2002006, Registry Document No. 0045

5. *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139

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

7. *Dartboard Holdings Ltd. v. Royal Bank* (1991), 12 C.B.R. (3d) 88 (B.C.S.C.)

8. *Ford v. Québec (Attorney General)*, [1988] 2 S.C.R. 712

9. *General Enterprises Construction Ltd. v. Canada (F.C.A.)* (1987), 25 C.L.R. 157 (Fed. C.A.)

10. *Healy v. R.*, [1979] 2 F.C. 49 (C.A.)

11. *Imray v. Minister of National Revenue* (1998), 154 F.T.R. 71 (T.D.)

12. *Irwin Toy Limited v. Québec (Attorney General)*, [1989] 1 S.C.R. 927

13. *Luscher v. Deputy Minister, Revenue Canada (Customs & Excise)*, [1985] 1 F.C. 85 (C.A.)

14. *Manning Timber Products Ltd. v. Canada (Minister of National Revenue)*, [1952] 2 S.C.R. 481

15. *McKay v. Manitoba*, [1989] 2 S.C.R. 357

16. *Mister Broadloom* (1968) *Ltd. v. Bank of Montreal et al.* (1983), 44 O.R. (2d) 368 (C.A.)

17. *Nazzareno v. Algoma Eastern Railway* (1922), 70 D.L.R. 268 (S.C.C.)

18. *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031

19. *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69

20. *Pleet v. Canadian Northern Québec R.W. Co.* (1920), 56 D.L.R. 404 (H.C.); aff'd [1923] 4 D.L.R. 1112 (S.C.C.)

21. *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295

22. *R. v. Biller* (1999), 174 D.L.R. (4th) 721 (Sask. C.A.)

23. *R. v. City Tire Services Ltd.* (1974), 19 C.P.R. (2d) 124 (N.B. Co. Ct.)

24. *R. v. Dubois*, [1935] S.C.R. 378

25. *R. v. Edwards Books and Art*, [1986] 2 S.C.R. 713

26. *R. v. Glad Day Bookshops Inc.*, [2004] O.J. No. 1766 (S.C.J.)

27. *R. v. Heywood*, [1994] 3 S.C.R. 761

28. *R. v. J. Pascal Hardware Co.* (1972), 8 C.P.R. (2d) 155 (Ont. Co. Ct.)

29. *R. v. Keegstra*, [1990] 3 S.C.R. 697

30. *R. v. Morales*, [1992] 3 S.C.R. 711

31. *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606

32. *R. v. Oakes*, [1986] 1 S.C.R. 103

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

34. *R. v. Zundel* (1987), 58 O.R. (2d) 129 (C.A.); aff'd [1992] 2 S.C.R. 731

35. *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors* (1983), 41 O.R. (2d) 583 (Div. Ct.), aff'd (1984), 45 O.R. (2d) 80 (C.A.)

36. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199

37. *Rocket v. Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232

38. *The Sunday Times Case*, [Eur. CT. H.R.] Judgment of April 26, 1979, Series A, No. 30

39. *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385

40. *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877

41. *Toronto College Park Ltd. v. Ontario (Minister of Revenue)* (1992), 7 O.R. (3d) 159 (Gen. Div.)

42. *Trociuk v. Attorney General of British Columbia et al.*, [2003] 1 S.C.R. 835

43. *Vriend v. Alberta*, [1998] 1 S.C.R. 493

Statutes

1. *Competition Act*, R.S.C. 1985, c. C-34

2. *Canadian Charter of Rights and Freedoms*

Literature and Other Sources

1. R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed., (Toronto: Butterworths, 1994)

2. R. Elliot, "Developments in Constitutional Law: The 1989-90 Term" (1991), 2 S.C.L.R. (2d) 83

3. E. P. Mendes, "The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1", in Gérald-A. Beaudoin and E. P. Mendes, *The Canadian Charter of Rights and Freedoms*, 3rd ed. (Toronto: Carswell, 1996)

4. P. Hogg, *Constitutional Law in Canada*, looseleaf (Toronto: Thomson/ Carswell, 1997)

5. Merriam-Webster, online: <http://www.m-w.com>

6. Oxford English Dictionary, online: <http://dictionary.oed.com>

APPENDIX "C" - EVIDENCE OF STEPHEN PAUL MAHINKA

1) Introduction

1. Mr. Mahinka was tendered by Sears and qualified by the Tribunal as an expert witness qualified and entitled to opine on areas of U.S. federal and state comparative price advertising, consumer protection, and antitrust law.

   Transcript, Volume 5 at pages 871-873.

2. Mr. Mahinka adopted the contents of his affidavit, sworn September 22, 2003, and filed with the Tribunal, as part of his testimony on record in this proceeding.

   Transcript, Volume 5 at pages 875-876.

2) Qualifications

3. Mr. Mahinka is a partner in and the manager of the Antitrust Practice Group of the Washington, D.C. office of the law firm of Morgan, Lewis & Bockius LLP. The Antitrust Practice Group is involved in counselling on and litigation of all aspects of U.S. federal and state antitrust and trade regulation matters, including matters related to pricing, marketing, advertising, and consumer protection.

   Expert Affidavit of Stephen Paul Mahinka, sworn September 22, 2003, ("Mahinka Affidavit"), paragraph 1, Exhibit CR115; Transcript, Volume 5 at pages 818-820.

4. Mr. Mahinka is an attorney licensed to practice in the District of Columbia, and his practice regularly calls for him to evaluate and provide legal counsel regarding U.S. federal law and the laws of the states.

   Mahinka Affidavit, paragraph 2; Transcript, Volume 5 at pages 820-821.

5. During his 28 years as a lawyer, Mr. Mahinka has provided counselling and litigation services on pricing, marketing, advertising and consumer protection matters involving the Federal Trade Commission ("FTC"), officials representing various states within the United States, and private parties.

Mahinka Affidavit, paragraph 3; Transcript, Volume 5 at pages 820-821.

6. Mr. Mahinka has been retained by clients to provide advice regarding compliance with price comparison requirements under U.S. and state laws. He has also been retained to draft the pricing and price comparison guidelines used by sellers of products in the U.S. who sell in multiple states, both through physical store locations and Internet sales.

Mahinka Affidavit, paragraph 4; Transcript, Volume 5 at pages 822-823.

3) The Evidence

7. Mr. Mahinka's evidence established:

a) the law in the United States governing price advertisements that contain a comparison between a seller's former and current offering price;

Mahinka Affidavit, paragraph 8.

b) the *Federal Trade Commission Act* prohibits unfair acts and deceptive practices. Under this authority, the FTC promulgated "Guides Against Deceptive Pricing," which are codified in the FTC's regulations and which have the force of law;

Mahinka Affidavit, paragraph 10.

c) the principle that one is trying to look at in all cases in an FTC proceeding in comparative advertising is whether there is any adverse impact on consumer welfare;

Transcript, Volume 5 at pages 836-837.

d) it all derives from the basic principle of whether it is unfair or deceptive;

Transcript, Volume 5 at pages 837-838.

e) law relating to comparative price advertising varies from state to state in the United States;

Mahinka Affidavit, paragraph 42.

f) the relevant state statute and/or regulation typically contains all applicable guidance to sellers regarding price comparison advertising;

Mahinka Affidavit, paragraph 11.

g) state authorities primarily enforce state statutes and regulations addressing the use of price comparisons in product advertisements;

Mahinka Affidavit, paragraph 12.

h) because the law varies among the states, sellers will commonly seek to comply with a more specific, relevant state statute or regulation governing price comparisons as this practice can be expected to result in compliance with more general state statutes;

Mahinka Affidavit, paragraph 14.

i) it is common for state statutes and regulations to incorporate time-related standards, criteria or definitions for comparative price advertising;

Mahinka Affidavit, paragraph 15.

j) simply to say substantial or good faith doesn't give you any guidance;

Transcript, Volume 5 at pages 842-843.

k) with respect to advising clients as to United States comparative price advertising law, the FTC guidance is not particularly helpful because it is so general. It doesn't really give a client any guidance as to what to do. The various statutes and regulations of selected states vary. Some are specific and some are general. As a practical matter, the specific states are looked at. Some states have specific time periods under which you should have been advertising at the higher price, the "was" price. You can't go back more than a certain number of days. You have to do it in terms of advertising for a certain number of days. For example, in

some states you are required to have 28 days or 4 weeks of advertising within the last 90 days at the old price. We look at those kinds of specifics and then we come up with guidelines. The guidelines have to be specific.

We have to be more precise and so what we end up doing is looking at the more precise standards in certain of the states and using those. And why do we do that? Because that way we believe that if we comply in good faith and try to be accurate about it with more specific states, then we will comply with the more general statutes of other states. So that's how we actually do it; and

Transcript, Volume 5 at pages 881-882.

l) in his lengthy career assisting U.S.-based sellers on pricing, marketing and advertising issues, and specifically, in advising sellers how best to ensure compliance with the laws on price comparisons nation-wide, Mr. Mahinka has looked to the U.S. state statutes and/or regulations which incorporate specific standards, criteria, or definitions concerning comparative price advertising.

Mahinka Affidavit, paragraph 43; Transcript, Volume 5 at page 905.

4) Selected U.S. State Law

8. Alaska

a) Testimony

Alaska is one of the more specific statutes and it indicates that you have to have a price at which the goods are actually sold for more than six months out of any 12-month period.

Transcript, Volume 5 at page 889.

b) Affidavit

It is an unfair or deceptive act or practice in Alaska for a seller to advertise the same merchandise as being "on sale" or reduced from the seller's regular price if, in fact, the "on sale" price is the

price for which the goods are actually sold for more than six months out of any 12-month period, or, in the case of seasonal merchandise, for more than one-half the time it is offered by the seller unless the price is permanently reduced to clear the merchandise.[1/]

Mahinka Affidavit, paragraph 18.

9. California

a) Testimony

California is a more specific statute and in that state you are not allowed to advertise unless the former price was the prevailing price within three months, within 90 days preceding the ad, or unless the date where the former price did prevail is clearly, exactly, and conspicuously stated in the ad. In California, there is no volume test prescribed.

Transcript, Volume 5 at pages 889-890.

b) Affidavit

Section 17501 of the California Business and Professions Code prohibits the advertisement of a former price for an article, "unless the alleged former price was the prevailing market price . . . within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement."[2/] The statute also states that "the worth or value of any thing advertised is the prevailing market price . . . . at the time of publication of [the] advertisement in the locality wherein the advertisement is published."[3/]

Mahinka Affidavit, paragraph 19.

1/ Alaska Admin. Code tit. 9, § 05.020(d) (2003).

2/ Cal. Bus. & Prof. Code § 17501 (Deering 2003).

3/ Id.

10. Connecticut

a) Testimony

Connecticut is a very specific statue. There are a lot of alternatives for a seller. There are four different possibilities. You can use a price where the product was actually sold in the last 90 days immediately preceding the new price, or where it was actually sold during any other period and you disclose the period in the ad.

Then for cases where you use a price where it has been offered for sale but no sales have been made at all, then you can use a price where it has been offered for sale for at least 28 days, four weeks, during the last 90 days preceding the day of the price comparison or you can use a price where it's actually offered for sale for four weeks during any 90-day period as is clearly disclosed in the ad. Connecticut does not have a volume test.

Transcript, Volume 5, at pages 890-891.

b) Affidavit

Connecticut requires adherence to one of the four following standards to properly use a last previous, customary price for advertising purposes. A seller can use a price at which: (1) the product was actually sold in the last 90 days immediately preceding the date on which the price comparison is stated in the advertisement, or (2) the product was actually sold during any other period, and the advertisement discloses with the price comparison the date, time or season period when such sales were made;[4/] if the seller uses a price at which the product has been offered for sale but no sales have been made, then the price must be: (3) a price at which the product has actually been offered for sale for at least four weeks during the last 90 days immediately preceding the date the price comparison is stated in the advertisement, or (4) a price at which the product was actually offered for sale for at least four weeks during any other 90-day period as is clearly disclosed in the advertisement.[5/] Further, Connecticut mandates that if a seller uses the term "original" or "originally" in a price comparison, if the comparative price is not the last

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4/ Conn. Agencies Regs. § 42-110b-12a(a) (2003).

5/ Conn. Agencies Regs. § 42-110b-12a(b) (2003).

selling price, that fact shall be disclosed by stating the last previous selling price, (e.g., "Originally $25.00, Formerly $20.00, Now $15.00,") or indicating "intermediate markdowns taken."[6]

Mahinka Affidavit, paragraph 21.

11. Illinois

a) Testimony

Illinois is a very specific statute. It allows you to make comparisons to a former price and give the seller a couple of alternatives if the former price is equal to or below the price where you made a substantial number of sales, or if the former price is equal to or below the price where it was offered for a reasonably substantial period of time and there was an attempt to sell the product at those prices. The statute is saying, trying to give some clarity, that you have to have a reasonable number of items offered for sale at that 50 percent discount. It further provides that what we mean by reasonable is at least 5 percent of them better be at the highest price to sort of give some clarity and guidance to the seller. If at least 5 percent of the items are offered ... a rebuttable presumption is created. What this means is, if you had 5 percent of the items offered at that 50 percent level, then you would have established a presumption that a reasonable number were offered. Then whoever was challenging you would have to say, "Well, yes it's 5 percent, yes, it meets the guidance, but was deceptive for some other reason" that they would have to come up with.

Transcript, Volume 5 at pages 892-895.

b) Affidavit

In Illinois, it is a deceptive trade practice to make false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions.[7] Illinois regulations under this statute governing price comparisons, which became effective in 1989, further provide

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6/ Conn. Agencies Regs. § 42-110b-12a(g) (2003).

7/ 815 Ill. Comp. Stat. Ann. 510/2(a)(11) (2003).

that a seller may make a comparison to its former price if one of the following criteria are met: (1) the former 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 (2) the former price is equal to or below the price(s) at which the product was offered for a reasonably substantial period of time in the recent regular course of business, openly and actively in good faith, with an intent to sell the product at that price(s).[8/] The regulation further provides that if a range of prices or fractional discounts are advertised (e.g., "Save from 1 percent to 50 percent off"), the ad will be unfair or deceptive unless the highest price or lowest discount in the range is clearly and conspicuously disclosed in the advertisement, and a reasonable number of the items are offered for sale with at least the largest advertised discount.[9/] If at least five percent of the items are offered with at least the largest advertised discount, a rebuttable presumption is created that a reasonable number were offered with at least the largest advertised discount.[10/]

Mahinka Affidavit, paragraph 25.

12. Massachusetts

a) Testimony

Massachusetts is a very specific statute. It gives the seller an alternative. You can have a former price equal to or below, a price where you made at least 30 percent of your sales in the 12-month period preceding the ad or you can use a different standard for guidance for yourself, which is you can make a comparison during a 180-day period following the establishment of the former price and the product isn't offered at a lower price for more than 45 percent of that 180-day period.

The former price is established by offering it openly in good faith for at least 14 days preceding the initial price comparison ad, so you have the old price for two weeks.

8/ Ill. Admin. Code tit. 14, § 470.220 (2003).

9/ Ill. Admin. Code tit. 14, § 470.240 (2003).

10/ Id.

The burden is on the seller to show that you are not using an inflated or exaggerated price in your comparison. There are guidances Massachusetts gives you in the law about how to show that it's not inflated. There are various ways that are set out there.

Transcript, Volume 5 at pages 895-896.

b) Affidavit

Under Massachusetts law, if a seller makes a comparison between its current and former price, the former price must be either: (1) equal to or below the price(s) at which the seller made at least 30 percent of its sales in the state in the 12 month period immediately preceding the advertisement; or (2) the comparison is made during a 180-day period immediately following the establishment of the former price and the product is not offered at a lower price for more than 45 percent of that 180-day period.[11/] A former price is established under Massachusetts regulations by offering the product for sale at such price or a higher price openly and in good faith on each business day for at least 14 consecutive calendar days immediately preceding the initial price comparison advertisement.[12/]

The regulations further provide that the burden is on the seller in Massachusetts to show that its former price is not an inflated or exaggerated price. The following factors will be considered to determine whether the seller has met such burden: (1) whether the seller compares its current price to its former price when the seller knows at the time it sets the former price that no sales, or very few sales, will be made at such former price; (2) whether the former price substantially exceeds the price at which a reasonable number of non-discount sellers sell the product in the seller's trade area; (3) where a manufacturer's suggested retail price or list price exists, whether the former price exceeds such price and by what amount; (4) whether the product was openly and actively offered in the recent, regular course of business, such as by devoting reasonable display space to the product during the period(s) in which it was at the former price, maintaining reasonable inventory during former price periods, advertising the product at the former price; or (5) the former price is equal to or below the price(s) at which the seller has offered the product

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[11/] Mass. Regs. Code tit. 940, § 6.05(3)(a) (2003).

[12/] Mass. Regs. Code tit. 940, § 6.05(3)(1)(2) (2003).

for sale in Massachusetts for less than 14 days, and the seller clearly and conspicuously discloses in all advertisements for the product the specific period during which the seller offered the product at the former price.[13/]

Mahinka Affidavit, paragraphs 26-27.

13. Missouri

a) Testimony

Missouri is also a very specific statute. Here you can only make a comparative price ad if it's an actual price at which reasonably substantial sales of the product were made during a reasonably substantial period of time.

The way that they try to define that then is again stating a rebuttable presumption that you have not complied unless you can demonstrate that the percentage of sales at the comparable price is 10 percent or more of the unit sales for no less than 30 days or not more than 12 months.

You can also do it alternatively if the comparison price is one at which the product was openly and actively offered during a reasonably substantial period of time. Then they give you a rebuttable presumption on that as well.

The way you comply with that is if you can show that the product was offered for sale at the comparative price or higher, 40 percent or more of the time during not less than 30 days or more than 12 months.

Again, they try to refine it for you. They also give you a similar kind of guidance for price comparison where reasonably substantial sales were made.

Transcript, Volume 5 at pages 897-898.

[13/] Mass. Regs. Code tit. 940, § 6.05(3)(1)(2) (2003).

b) Affidavit

Under Missouri law, a price comparison may only be made if the comparative price is an actual, *bona fide* price at which reasonably substantial sales of the product were made in the regular course of business and on a regular basis during a reasonably substantial period of time in the immediate, recent period prior to the advertisement.[14/] A rebuttable presumption that a seller has not complied with this requirement exists unless the seller can demonstrate that the percentage of unit sales of the product at the comparative price or higher is 10 percent or more of the total unit sales of the product, for no less than 30 days nor more than 12 months.[15/] A price comparison may also be made in Missouri if the comparison price is one at which the product was openly and actively offered for sale to the public by the seller in the regular course of the seller's business, and on a regular basis during a reasonably substantial period of the time in the immediate, recent period preceding the advertisement.[16/] A rebuttable presumption exists that the seller has not complied with this requirement unless the seller can show that the product was offered for sale at the comparative price, or at prices higher than the comparative price, 40 percent or more of the time during a period of time not less than 30 days or more than 12 months which includes the advertisement.[17/]

Missouri regulations also provide that a price comparison may be made to a price at which reasonably substantial sales of the product were made to the public in the regular course of the seller's business, and on a regular basis during a reasonably substantial period of time in any period preceding the advertisement, and the advertisement clearly discloses the date, time, or seasonal period of that offer.[18/] A rebuttable presumption exists that the seller has not complied with this requirement unless the seller can show that the percentage of unit sales of the product at the comparative price or higher is 10 percent or more of the total unit sales of the product during the disclosed date, time, or seasonal period.[19/] Further, a price comparison advertisement may be

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14/ Mo. Code Regs. Ann. tit. 15, § 60-7.060(2)(B)(1) (2003).

15/ Id.

16/ Mo. Code Regs. Ann. tit. 15, § 60-7.060(2)(B)(2) (2003).

17/ Id.

18/ Mo. Code Regs. Ann. tit. 15, § 60-7.060(2)(B)(3) (2003).

19/ Id.

made to a price at which the product was openly and actively offered for sale to the public in the regular course of the seller's business and on a regular basis during a reasonably substantial period of time in any period preceding the advertisement, and the advertisement with the price comparison clearly discloses the date, time, or seasonal period of that offer.[20/] A rebuttable presumption exists that the requirement has not been complied with if the seller cannot show that the product was offered for sale at the comparative price or higher 40 percent or more of the time during a period of time not less than 30 days or more than 12 months during the disclosed date, time, or seasonal period.[21/]

Mahinka Affidavit, paragraphs 28-29.

14. New Jersey

a) Testimony

New Jersey is a very specific statute.

In this case the former price has to be in effect for at least 28 days, about four weeks, out of the 90 days prior to the effective date of the ad or where you disclose the period.

They also try, as the FTC did, to give some examples of where a price might be fictitious. They give some examples where a substantial number of sales were made within the most recent 60 days or where the merchandise was actively and openly offered in the regular course of business for 28 days of the most recent 90 days or where the price doesn't exceed the supplier's cost.

Transcript, Volume 5 at page 899.

b) Affidavit

In New Jersey, for products offered at retail prices of $100.00 or more, the former price must be in effect for at least 28 days out of the 90 days prior to the effective date of the advertisement or

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20/ Mo. Code Regs. Ann. tit. 15, § 60-7.060(2)(B)(4) (2003).

21/ Id.

during such other period as disclosed.[22/] "A former price or price range or amount of reduction will be deemed fictitious if it cannot be substantiated, based on proof" that: (1) "a substantial number of sales of the advertised or comparable merchandise . . . [were] made [in] the advertiser's trade area in the regular course of business at any time within the most recent 60 days during which the advertised merchandise was available for sale prior to, or which were in fact made in the first 60 days during which the advertised merchandise was available for sale following the effective date of the advertisement;" (2) the merchandise or comparable merchandise "was actively and openly offered for sale at that price within the advertiser's trade area in the regular course of business during at least 28 days of the most recent 90 days before or after the effective date of the advertisement;" or (3) "that the price does not exceed the supplier's cost plus the usual and customary mark-up used by the advertising merchant in the actual sale of advertised merchandise or comparable merchandise in the recent regular course of business."[23/]

Mahinka Affidavit, paragraph 30.

15. Nevada

a) Testimony

Nevada is a more specific statute.

To give further guidance they establish again a rebuttable presumption that if the product has been offered for sale for less than 21 days immediately preceding the date of the comparison, then you would establish it was temporarily lowered for the purpose of destroying the surveyor's results.

If you offered it for sale at more than that, then you would have met that presumption.

There is no volume test in Nevada.

Transcript, Volume 5 at pages 900-901.

22/ N.J. Admin. Code tit. 13, 13:45A-9.4(a)(6) (2003).

23/ N.J. Admin. Code tit. 13, 13:45A-9.6(b) (2003).

b) Affidavit

In Nevada, a seller may not make an assertion of price in an advertisement unless the price comparison is based on a reliable and trustworthy survey, the price of the products at the time of comparison can be substantiated, and each product of the competitor being compared in the survey is the same or comparable in all material respects.[24/] An advertisement containing a price comparison must clearly and distinctly disclose the date on which the prices being compared were used, the method used to determine the prices being offered, and the name of the seller or other person who surveyed the prices and who will substantiate the price comparison assertion upon request by the State.[25/] The price of a product being used in a comparison must be not be temporarily lowered to distort the survey results required. A rebuttable presumption that the product's price was temporarily lowered for the purpose of distorting a survey's results will exist if the product has been offered for sale for less than 21 days immediately preceding the date of the comparison.[26/]

Mahinka Affidavit, paragraph 32.

16. Ohio

a) Testimony

Ohio also is a specific statute. Here it's unlawful if the price is not the selling price for at least 31 days out of the immediately preceding 60 or if it was offered for less than 30 preceding the price comparison and substantial sales were not made, that would be *prima facie* evidence it's not the regular price.

They also give further guidance about the use of certain terms in price comparisons.

Transcript, Volume 5 at page 901.

[24/] Nev. Admin. Code ch. 598, § 598.270 (2003).

[25/] Nev. Admin. Code ch. 598, § 598.260(1) (2003).

[26/] Nev. Admin. Code ch. 598, § 598.260(5) (2003).

b) Affidavit

Under Ohio law, if a price is not the selling price of the goods for at least 31 days out of the immediately preceding 60 days, or if it was offered for less than 30 days preceding such advertised price comparison and substantial sales of the goods were not made during such period, this will provide prima facie evidence that the offered price is not the regular price.[27/] If a supplier makes a comparison to its own price using terms such as "regularly . . ., now. . .," ". . . percent off," "reduced from . . . to . . .," save $ . . .," then the comparison must be to the supplier's regular price or clear disclosures must be made to the other price used for comparison.[28/] If a supplier uses language indicating a range of savings or reduction, it is deceptive if the goods or services offered at the savings do not contain a reasonable number of items priced at the maximum reduction or lower, unless this fact is clearly and conspicuously disclosed.[29/]

Mahinka Affidavit, paragraph 33.

17. Oregon

a) Testimony

Oregon is a more specific statue. It prohibits engaging in unfair or deceptive practices where the goods are available at less than a reference price unless it's stated or readily ascertainable and it is a price where the seller has made good faith sales or, if no sales were made, or offered of the same or similar goods within the preceding 30 days or within any other identified time in the past.

Transcript, Volume 5 at pages 901-902.

b) Affidavit

[27/] Ohio Admin. Code § 109:4-3-12(B)(6) (2003).

[28/] Ohio Admin. Code § 109:4-3-12(E)(1) (2003).

[29/] Ohio Admin. Code § 109:4-3-12(E)(2) (2003).

Oregon law makes it unlawful to make false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions.[30] Oregon's regulations provide that a person engages in unfair or deceptive trade or commerce when he or she represents that goods are available at an offering price less than a reference price, unless the reference price is stated or readily ascertainable and is a price at which the person, in the regular course of business, made good faith sales of the same or similar goods or, if no sales were made, offered in good faith to make sales of the same or similar good either: (1) within the preceding 30 days; or (2) at any other identified time in the past.[31] Good faith will not be found if the seller raises the price in order to subsequently make reductions.[32] The statute also provides that a chain store may reduce its price in one or two retail outlets to meet local competition, and the price throughout the rest of the chain may be used as the reference price.[33]

Mahinka Affidavit, paragraph 34.

18. South Dakota

a) Testimony

South Dakota is a very specific statute. It is deceptive to advertise price reductions without (1) disclosing the specific basis for the reduction claim or (2) offering it at a higher price for at least seven days during the 60 days prior to the ad. No actual sales are needed under the statute.

Transcript, Volume 5 at page 902.

b) Affidavit

It will be considered deceptive in South Dakota for any person to advertise price reductions without either: (1) disclosing in the advertisement the specific basis for the price reduction

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[30] Or. Rev. Stat. § 646.608(1)(j) (2002).

[31] Or. Admin. R. 137-020-0010(6) (2003).

[32] Id.

[33] Id.

claim; or (2) offering the merchandise at the higher price for at least seven consecutive business days during the 60 day period prior to the advertisement.[34/]

Mahinka Affidavit, paragraph 36.

19. Wisconsin

a) Testimony

Wisconsin is a specific statue. You can not make price comparisons where you haven't sold any merchandise unless the price is one at which the goods were offered for sale, again for at least four weeks during the last 90 days preceding the date where you give a lower price in an ad or you can do it if the price is where the goods were offered for sale for at least four weeks during any other 90 day period and you disclose the period.

If you actually made sales in Wisconsin, then the former price has to be one where the goods were actually sold in the last 90 days immediately preceding the date of the price comparison or the price is one where the goods were actually sold in any other period as long as you disclose that period in the ad.

Transcript, Volume 5 at pages 903-904.

b) Affidavit

In Wisconsin, a price comparison based on a price at which a seller has offered for sale but not sold any merchandise may not be made unless: (1) the price is one at which the goods were offered for sale for at least four weeks during the last 90 days immediately preceding the date on which the price comparison is stated in the advertisement; or (2) the price is one at which the goods were offered for sale for at least four weeks during any other 90 day period and the advertisement clearly discloses such other period.[35/] Similarly, if sales of the goods were actually made, then the former price must be one at which the goods were actually sold in the last 90 days immediately preceding the date on which the price comparison is stated in the

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34/ S.D. Codified Laws § 37-24-6(2) (2003).

35/ Wis. Admin. Code § 124.05 (2003).

advertisement, or the price is one at which the goods were actually sold in any other period, so long as that time period is disclosed in the advertisement.[36/]

A Wisconsin court has further clarified that, "[a]n advertisement, however, must be considered in the context of (1) whether a seller or competitor has actually sold goods or services at the prices compared, (2) within a specified period of time, and (3) within the trade area that the price comparison is made."[37/]

Mahinka Affidavit, paragraphs 39-40.

[36/] Wis. Admin. Code § 124.04 (2003).

[37/] Wisconsin v. Menard, Inc., 358 N.W.2d 813, 815 (Wis. Ct. App. 1984).

Tribunal File No. CT-2002-004

THE COMPETITION TRIBUNAL

B E T W E E N:

The Commissioner of Competition

Applicant

- and -

Sears Canada Inc.

Respondent

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