Competition Tribunal | Tribunal de la Concurrence

PUBLIC

Reference: *Commissioner of Competition v. Sears Canada Inc*., 2005 Comp. Trib. 2
File no.: CT2002004
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IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

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

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.01 of the *Competition Act*.

B E T W E E N :

The Commissioner of Competition
(applicant)

and

Sears Canada Inc.
(respondent)

Dates of hearing: 20031020 to 20031024, 20031027 to 20031031, 20031103 to 20031107, 20031112 to 20031114, 20040116, 20040119 to 20040122, 20040202 to 20040203, 20040628 to 20040629, 20040819 to 20040820
Final written submissions filed: September 10, 2004; September 24, 2004 and October 1, 2004
Judicial Member: Dawson J. (presiding)
Date of Reasons: January 11, 2005

REASONS FOR ORDER

I. INTRODUCTION

[1] The Commissioner of Competition ("Commissioner") alleges that, during three sales events held in November and December of 1999, Sears Canada Inc. ("Sears") employed deceptive marketing practices in connection with price representations Sears made concerning five kinds, or lines, of all-season tires that Sears promoted and sold to the public. The Commissioner asserts that this constituted reviewable conduct contrary to subsection 74.01(3) of the *Competition Act*, R.S.C. 1985, c. C-34 ("Act").

[2] Specifically at issue are representations made in advertisements about the regular selling price of the five lines of tires. The advertisements contained "save" and "percentage off" statements. For example, Sears advertised "Save 45% Our lowest prices of the year on Response RST Touring '2000' tires", and advertised comparisons between Sears' regular prices and its sale prices. The Commissioner asserts that the prices referred to by Sears as being its regular prices were inflated because: i) Sears did not sell a substantial volume of these tires at the regular price featured in the advertisements within a reasonable period of time before making the representations; and, ii) Sears did not offer these tires in good faith at the regular price featured in the advertisements for a substantial period of time recently before making the representations.

[3] The Commissioner states that Sears did not offer the tires at its regular prices in good faith because Sears had no expectation that it would sell a substantial volume of the tires at its regular prices, and because Sears' regular prices for the tires were not comparable to, and were much higher than, the regular prices for comparable tires offered by Sears competitors. The Commissioner says that the regular prices were set by Sears at inflated levels with the ulterior motive of attracting customers and generating sales by creating the impression that, when promoted as being "on sale", the tires represented a greater value than was really the case.

[4] The remedies sought by the Commissioner include an order prohibiting such reviewable conduct for a period of 10 years, the publication of corrective notices, and the payment of an administrative monetary penalty in the amount of $500,000.00.

[5] Sears contests the Commissioner's application with vigour. Sears asserts that the representations contained in its advertisements with respect to its regular or ordinary selling prices were not misleading in any, or in any material, respect. Sears says that the regular prices referred to in the advertisements were reasonably comparable to the prices being offered by many, if not most, of the principal tire retail outlets in each individual trade area where Sears competed. As well, Sears argues that the remedies sought by the Commissioner are unavailable at law and inappropriate. Finally, Sears says that subsection 74.01(3) of the Act is an unjustifiable infringement of Sears' fundamental freedom of commercial expression guaranteed by subsection 2(*b*) of the *Canadian Charter of Rights and Freedoms* ("Charter"). Sears seeks a determination that subsection 74.01(3) of the Act is inconsistent with the Charter and, therefore, of no force or effect.

[6] The Commissioner has conceded that subsection 74.01(3) of the Act ("impugned legislation") infringes Sears' constitutionally guaranteed right of commercial speech. The Commissioner submits, however, that this infringement is justified under section 1 of the Charter as a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society.

[7] These reasons are lengthy. In them I find that: (i) subsection 74.01(3) of the Act is a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society; (ii) Sears conceded that it failed to comply with the volume test ; (iii) Sears' regular prices for the Tires were not offered in good faith as required by the time test; (iv) Sears did not meet the frequency requirement of the time test for 4 of the 5 lines of tires; (v) Sears failed to establish that its OSP representations were not false or misleading in a material respect; (vi) a prohibition order should issue; and (vii) no order should issue requiring publication of a corrective notice. The issues of payment of an administrative monetary penalty and costs are reserved pending further submissions. The following is an index of the headings and sub-headings pursuant to which these reasons are organized, and the paragraph numbers where each section begins.

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II. BACKGROUND FACTS

[8] The parties agree that Sears is one of Canada's largest and most trusted retailers. It sells

general merchandise to the public through various business channels, including retail outlets located across Canada. In 1999, Sears supplied 28 lines of tires to the public through 67 Retail Automotive Centres located across Canada.

(i) The Tires

[9] At issue are the following five tire lines (together the "Tires"):

i) RoadHandler "T" Plus (manufactured by Michelin)

ii) BF Goodrich Plus (manufactured by BF Goodrich)

iii) Weatherwise R H Sport (manufactured by Michelin)

iv) Response RST Touring '2000' (manufactured by Cooper)

v) Silverguard Ultra IV (manufactured by Bridgestone)

[10] The Tires are all-season passenger tires. Together they represented approximately **[CONFIDENTIAL]** % of the all-season passenger tire sold by Sears in 1999 and about **[CONFIDENTIAL]** % of the passenger vehicle tires sold by Sears in 1999. In dollar terms, the Tires represented approximately **[CONFIDENTIAL]** % of the total sales generated by Sears with respect to the sale of all of its tires. No other retailer in Canada promoted the Tires or supplied the Tires to the public in 1999. Each line was exclusive to Sears.

(ii) Sears' pricing strategy

[11] Sears is an "off-price" (also called a "high-low") retailer, which means that Sears relies on discounting and promotions to build in-store traffic and generate sales. An off-price or high-low retailer typically charges a higher "regular" price for its merchandise and then, from time to time, offers merchandise "on-sale" at event-driven discount sales.

[12] During 1999, Sears offered the Tires for sale at the following four price points:

a) Sears' "regular" price was the price of a single unit of any Tire offered by Sears, when that particular tire was not promoted as being "on sale". This was the price used as the reference price in advertisements when the Tires were promoted as being "on sale" by Sears.

b) Sears' "2For" price was the price at which Sears would sell two or more of a given tire to consumers when that tire was not being offered at a "sale" price. In 1999, Sears' "2For"

price for a given tire was always lower than its regular price for a single unit. Sears did not use its "2For" price as a reference price in any of the sales representations at issue

and did not advertise its "2For" price when promoting retail sales. The "2For" price came into effect when a customer bought more than one tire and the customer was only informed of the discount on a purchase of multiple tires by the sales associate at the store.

c) Sears' "normal promotional" price was the usual sale price advertised by Sears, which was a set percentage off the "regular" price for each tire. The amount of the discount depended on the line of tire. When "normal promotional" prices were advertised in 1999, they were always compared to the "regular" price for the relevant tire, and not to the "2For" price. These discounts were referred to by Sears as "Save Stories".

d) Sears' "Great Item", "Big News", "Lowest Prices of the Year" or other similar expressions refer to a further discounted promotional price where the discount consumers received was greater than the discount obtained with the "normal promotional" price. When "Great Item" style promotional prices were advertised in 1999, they were always compared to the "regular" price for a single relevant tire and not the "2For" price.

[13] The following illustrates the relationship between the four price levels. For the Response RST Touring '2000' tire (size P215/70R14), Sears' pricing in 1999 was as follows:

i) Regular (single unit) price - $133.99;

ii) 2For price - $87.99 (each);

iii) Normal promotional price - $79.99 (each, representing a 40 % discount off the regular single unit price);

iv) Great Item price - $72.99 (each, representing a 45 % discount off the regular single unit price).

[14] Sears' regular single unit prices for tires in 1999 were set in the Fall of 1998 and were not altered in 1999. Sears' 2For, normal promotional, and Great Item prices were also set in the Fall of 1998 and those prices remained largely unchanged in 1999. As a general rule, Sears' prices were set nationally so that the Tires sold for the same price at each Sears Retail Automotive Centre.

(iii) The promotion of the Tires

[15] Throughout 1999, Sears advertised the Tires through various media, including flyers (or "pre-prints"), newspapers, in-store leaflets, and corporate-wide, national events, which were advertised in various newspapers across Canada. Sears' advertisements contained representations of the price at which the Tires were ordinarily sold by Sears, compared with the sale prices on the Tires being promoted. The advertisements were placed in newspapers published across the country including, for example, the Vancouver Sun, the Montreal Gazette and the Calgary Sun.

[16] This application puts in issue the ordinary selling price representations made during three different national sales events in 1999, the first in effect between November 8 and November 14, the second in effect between November 22 and November 28, and the final event in effect on December 18 and 19.

[17] For the first sales event, Sears distributed nationally a flyer entitled "SEARS Shop Wish and Win" that advertised sale prices on the Response RST Touring '2000' and the Michelin RoadHandler "T" Plus tires. The following is an example of the advertisement found in the flyer promoting the sale:

> **MICHELIN®**
>
> **RoadHandler T Plus Tires**
>
> | **Size** | **Sears reg.** | **Sale, each** |
> |---|---|---|
> | P175/70R13 | 153.99 | 91.99 |
> | P185/70R14 | 168.99 | 99.99 |
> | P205/70R14 | 190.99 | 113.99 |
> | P205/70R15 | 203.99 | 121.99 |
> | P185/65R14 | 179.99 | 107.99 |
> | P195/65R15 | 188.99 | 112.99 |
> | P205/65R15 | 199.99 | 119.99 |
> | P225/60R16 | 219.99 | 131.99 |
>
> Other sizes also on sale
>
> **save 40%**
> **ALL MICHELIN ALL-SEASON PASSENGER TIRES**
> Shown: RoadHandler® T Plus tire is made for Sears by Michelin.
> Backed by a 6-year unlimited mileage Tread Wearout Warranty;
> details in store. #51000 series

[18] In support of the first sales event, Sears also published newspaper advertisements promoting the Michelin RoadHandler "T" Plus and/or the Response RST Touring '2000' in a number of large circulation newspapers across the country (including, for example, the Vancouver Sun and the Montreal Gazette). These newspaper advertisements were 5.625" x 9.625" in size or larger.

[19] The second sales event ran between November 22 and November 28, 1999. The event promoted a sale on Silverguard Ultra IV tires which was advertised in a weekly flyer, in newspaper advertisements and in leaflets distributed in-store at all Sears Retail Automotive Centres. The weekly flyer contained the following advertisement:

Silverguard Ultra IV Tires

Size	Sears reg.	Sale, each
P185/75R14	109.99	54.99
P195/75R14	116.99	58.49
P235/75R15XL	149.99	74.49
P175/70R13	99.99	49.99
P185/70R14	113.99	56.99
P195/70R14	119.99	59.99
P205/70R14	123.99	61.99
P215/70R14	129.99	64.99
P205/70R15	133.99	66.99
P205/65R15	139.99	69.99

Other sizes also on sale

½ PRICE

SILVERGUARD 'ULTRA IV' ALL-SEASON TIRES

Made for Sears by Bridgestone and backed by a 110,000 km Tread Wearout Warranty: details in store. #68000 ser. From **45**$^{\mathbf{49}}$ each. P155/80R13. Sears reg. 90.99

[20] The third sales event was held on December 18 and 19, 1999. The BF Goodrich Plus and Weatherwise tires were promoted during this event. The event was advertised in a weekend flyer which was distributed nationally. The BF Goodrich Plus tire was advertised as "save 25%" while the flyer described the Weatherwise tire price as "save 40%".

(iv) Tire sales

[21] The parties agree that the following table represents the sales numbers and percentages of the Tires sold at Sears' regular selling price in the 12 month period preceding the relevant regular selling price representations:

Table 1: Summary of Sales volumes

		1	2	3	4	5
Line	Time-frame	Total number of the Tires sold by Sears in the year before the relevant Representation	Tires sold as "singles", that is, not as a part of a bundle of two or more	Percentage of the total number of Tires sold, which were sold singly (col. 2 as a % of col. 1)	Of all singles sold, the number sold at the Regular, Single Unit Selling Price	Percentage of the total Tires sold at the Regular, Single Unit Selling Price (col. 4 as a % of col. 1)
BF Goodrich Plus	12/18/98 - 12/18/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	6.53%	**[CONFIDENTIAL]**	**2.29%**
Michelin Roadhandler 'T' Plus	11/08/98 - 11/08/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	3.84%	**[CONFIDENTIAL]**	**1.30%**
Michelin Weatherwise RH Sport	12/18/98 - 12/18/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	3.81%	**[CONFIDENTIAL]**	**0.82%**
Response RST Touring 2000	11/08/98 - 11/08/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	2.19%	**[CONFIDENTIAL]**	**0.51%**
Silverguard Ultra IV	11/22/98 - 11/22/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	3.22%	**[CONFIDENTIAL]**	**1.21%**
Totals		**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	4.03%	**[CONFIDENTIAL]**	**1.28%**

[22] The following two tables show the number of days that the Tires were offered by Sears at

Sears' regular price, compared to the number of days the Tires were offered at a price below Sears' regular price. The first table reflects the six month period that preceded the representations, the second table reflects the prior twelve month period.

Table 2: Summary of Time Analysis
(For the Six Month Period Preceding the Relevant Representations)

	BF Goodrich Plus	RoadHandler "T" Plus	Weatherwise /RH Sport	Response RST Touring '2000'	Silverguard Ultra IV
Date of Representation	Dec. 18, 1999	Nov. 8, 1999	Dec. 18, 1999	Nov. 8, 1999	Nov. 22, 1999
Start and End of 6 month period	June 18 to Dec. 17, 1999	May 9 to Nov.7, 1999	June 18 to Dec. 17, 1999	May 9 to Nov. 7, 1999	May 23 to Nov. 21, 1999
Total of Days	183	183	183	183	183
Number of days at reduced prices	100	113	148	99	73
% of days at reduced prices	**55%**	**62%**	**81%**	**54%* or 50.35%**	**40%**
Number of days at Regular Prices	83	70	35	84	110
% of Time at Regular Prices	**45%**	**38%**	**19%**	**46%* or 49.65%**	**60%**

* Sears argues that the correct figures are the second ones shown with respect to the Response RST Touring '2000'.

Table 3: Summary of Time Analysis
(For the Twelve Month Period Preceding the Relevant Representations)

	BF Goodrich	RoadHandler "T" Plus	Weatherwise /RH Sport	Response RST Touring 2000	Silverguard Ultra IV
Date of Representation	Dec. 18, 1999	Nov. 8, 1999	Dec. 18, 1999	Nov. 8, 1999	Nov. 22, 1999
Start and End of 12 month period	Dec. 19, 1998 to Dec. 17, 1999	Nov. 9, 1998 to Nov.7, 1999	Dec. 19, 1998 to Dec. 17, 1999	Nov. 9, 1998 to Nov. 7, 1999	Nov. 23, 1998 to Nov. 21, 1999
Total of Days	365	365	365	365	365
Number of days at reduced prices	181	246	283	121	184
% of days at reduced prices	**49.59%**	**67.40%**	**77.53%**	**33.15%**	**50.41%**
Number of days at Regular Prices	184	119	82	244	181
% of Time at Regular Prices	**50.41%**	**32.60%**	**22.47%**	**66.85%**	**49.59%**

III. THE APPLICABLE LEGISLATION

[23] Subsection 74.01(3) of the Act is found in Part VII.1 of the Act which is entitled "Deceptive Marketing Practices". Part VII.1 of the Act permits the Commissioner to pursue administrative remedies, rather than criminal prosecution, in relation to deceptive marketing practices including misleading advertising.

[24] Under section 74.01 of the Act, a person engages in reviewable conduct where the person, for the purpose of promoting any product or business interest, makes a representation to the public that is false or misleading in a material respect. The general impression conveyed by a representation as well as its literal meaning is to be taken into account when determining whether or not the representation is false or misleading in a material respect.

[25] Subsection 74.01(3) of the Act deals with misleading representations with respect to a seller's own ordinary selling price. Subsection 74.01(3) reads as follows:

74.01(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.

74.01(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des

intérêts commerciaux quelconques, des indications au public relativement au prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois :

a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.

[26] An ordinary selling price ("OSP") representation will not constitute reviewable conduct under subsection 74.01(3) if either one of the following tests is satisfied:

(a) a substantial volume of the product was sold at that price or a higher price within a reasonable period of time before or after the making of the representation ("volume test"); or

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

In the present case, the period of time to be considered is the period before the making of the representations at issue because the representations relate to the price at which the Tires were previously sold (subsection 74.01(4) of the Act).

[27] The requirement that any false or misleading representation must be material is found in subsection 74.01(5) of the Act which provides:

74.01(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.

74.01(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.

[28] The remedies available for a breach of subsection 74.01(3) of the Act are prescribed in section 74.1 of the Act. Subsection 74.1(1) provides that a court (defined to include the

Competition Tribunal ("Tribunal")) may, where it has determined that a person has engaged in reviewable conduct, order the person:

(a) not to engage in the conduct or substantially similar reviewable conduct;

(b) to publish a corrective notice describing the reviewable conduct; and

(c) to pay an administrative monetary penalty.

[29] No order requiring the publication of a corrective notice or the payment of an administrative monetary penalty may be made where the person in question establishes that they exercised due diligence to prevent the reviewable conduct from occurring (subsection 74.1(3) of the Act).

[30] Sections 74.01, 74.09 and 74.1 are set out in their entirety in the appendix to these reasons.

IV. THE CONSTITUTIONAL CHALLENGE

[31] As noted above, Sears alleges, and the Commissioner concedes, that subsection 74.01(3) of the Act infringes Sears' fundamental right of freedom of expression guaranteed under subsection 2(*b*) of the Charter. In my view, this is an appropriate concession.

[32] The Supreme Court of Canada has held with respect to the analysis of freedom of expression and its infringement that:

(i) The first step is to discover whether the activity which the affected entity wishes to pursue properly falls within "freedom of expression". Activity is expressive, and protected, if it attempts to convey meaning. If an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the Charter guarantee (unless meaning is conveyed through a violent form of expression).

(ii) The second step in the inquiry is to determine whether the purpose or effect of the government action in question is to restrict freedom of expression.

See: *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927, particularly at pages 967-979.

[33] Applying this analysis, the Supreme Court has previously held that prohibitions against engaging in commercial expression by advertising infringe subsection 2(*b*) of the Charter. See: *RJR Macdonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199 at paragraph 58.

[34] In the present case, Sears' OSP representations convey or attempt to convey meaning.

Those representations therefore have expressive content so as to fall, *prima facie*, within the sphere of conduct protected by subsection 2(*b*) of the Charter. The purpose of subsection 74.01(3) of the Act is to restrict or control attempts by Sears and others to convey a meaning by proscribing reviewable conduct and by imposing restrictions and controls in relation to OSP representations.

[35] It follows, as the Commissioner has conceded, that the impugned legislation limits the freedom of expression guaranteed to Sears by subsection 2(*b*) of the Charter. The next inquiry therefore becomes whether the impugned legislation is justified under section 1 of the Charter.

(i) Applicable principles of law

[36] To be justified under section 1 of the Charter, a limit on freedom of expression must be "prescribed by law". A limit is not prescribed by law within section 1 if it does not provide "an adequate basis for legal debate". See: *R. v. Nova Scotia Pharmaceutical Society,* [1992] 2 S.C.R. 606 at page 639. The onus of establishing that a limit is prescribed by law is on the state actor who claims that the limit is justified.

[37] The assessment of whether a limit prescribed by law is reasonable and demonstrably justified in a free and democratic society is to be conducted in accordance with the principles enunciated by the Supreme Court of Canada in *R. v. Oakes,* [1986] 1 S.C.R. 103. There are two central criteria to be met:

1. The objective of the impugned measure must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. To be characterized as sufficiently important, the objective must relate to concerns which are pressing and substantial in a free and democratic society.

2. Assuming that a sufficiently important objective is established, the means chosen to achieve the objective must pass a proportionality test. To do so, the means must:

    a. Be rationally connected to the objective. This requires that the means chosen promote the asserted objective. The means must not be arbitrary, unfair or based on irrational considerations.

    b. Impair the right or freedom in question as little as possible. This requires that the measure goes no further than reasonably necessary in order to achieve the objective.

    c. Be such that the effects of the measure on the limitation of rights and freedoms are proportional to the objective. This requires that the overall benefits of the measure must outweigh the measure's negative impact.

See also: *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519.

[38] Relevant considerations when conducting the analysis articulated in *Oakes*, *supra* are that:

1. The onus of proving that a limit on a right or freedom protected by the Charter is reasonable and demonstrably justified is borne by the party seeking to uphold the limitation. See: *Oakes* at page 137.

2. The standard of proof is the civil standard. Where evidence is required in order to prove the constituent elements of the section 1 analysis, the test for the existence of a balance of probabilities must be applied rigorously, recognizing, however, that within the civil standard of proof there exist different degrees of probability depending upon the case. See: *Oakes* at page 137.

3. The analysis taught in *Oakes* is not to be applied in a rigid or mechanical fashion. It is to be applied flexibly. See: *RJR Macdonald*, *supra*, at paragraph 63.

4. The analysis must be undertaken with close attention to the contextual factors. This is because the objective of the impugned measure can only be established by canvassing the nature of the problem it addresses, and the proportionality of the means used can only be evaluated in the context of the entire factual setting. See: *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at paragraph 87.

5. The context will also impact upon the nature of the proof required to justify the measure. While some matters are capable of empirical proof, others (for example, matters involving philosophical or social considerations) are not. In those latter cases, "it is sufficient to satisfy the reasonable person looking at all of the evidence and relevant considerations, that the state is justified in infringing the right at stake to the degree it has". Common sense and inferential reasoning may be applied to supplement the evidence. See: *Sauvé*, *supra*, at paragraph 18.

6. With respect to the minimal impairment test, where a legislative provision is challenged, the Supreme Court of Canada has held that Parliament need not choose the absolutely least intrusive means to attain its objectives, but rather must come within a range of means which impair guaranteed rights as little as reasonably possible.

(ii) A limit prescribed by law

[39] Turning to the application of these principles to the evidence which is before the Tribunal, I begin by considering whether the impugned legislation is a limit prescribed by law.

[40] Sears argues that the words used in subsection 74.01(3) of the Act are: i) excessively vague, uncertain and imprecise; ii) subject to unintelligible standards; and iii) subject to arbitrary application by the Commissioner. Particular reliance is placed on the fact that the Act provides no definition of the terms "substantial volume", "reasonable period of time", "substantial period of time" or "recently", which are all used in the impugned legislation. While subsection 74.01(3) 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, Sears argues that the Act does not define these factors, nor does the Act provide any assistance or direction as to what weight should be given to each of these factors, nor is guidance offered about how these factors affect the determination of whether a person has complied with the volume and time tests. In the result, Sears submits that it is not possible for the Tribunal to determine Parliament's intent by interpreting the words at issue using the ordinary tools of statutory interpretation.

[41] With respect to the Information Bulletin entitled "Ordinary Price Claims", published by the Commissioner to outline her approach to the enforcement of the ordinary price claims provisions of the Act ("Guidelines"), Sears states that, as non-legal and non-binding administrative guidelines, they may be amended or replaced at will by the Commissioner. As such, they are not criteria prescribed by law which can justify any limitation on expression. Indeed, Sears says that the existence and purpose of the Guidelines support Sears' contention that the impugned legislation is unconstitutionally vague and reflect the fact that subsection 74.01(3), standing alone, provides insufficient guidance.

[42] In short, Sears says that what is in issue is clarity; how much clarity should a statutory provision have and at what stage in the life of a statutory provision should clarity be evident?

[43] Two decisions of the Supreme Court of Canada provide significant assistance in dealing with Sears' submissions.

[44] In *Irwin Toy, supra,* at page 983, Chief Justice Dickson, writing for the majority, observed that absolute precision in the law exists rarely, "if at all". He said that the question to be asked is whether the legislation at issue provides an "intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies". However, where there is "no intelligible standard" and a "plenary discretion" has been given to do what "seems best", there is no limit prescribed by law.

[45] Subsequently, in *Nova Scotia Pharmaceutical Society, supra,* the Supreme Court reviewed its jurisprudence on this point and, at pages 626 and 627, Mr. Justice Gonthier, for the Court, set out the following propositions with respect to vagueness and its relevance to the Charter:

1. Vagueness can be raised under s. 7 of the *Charter*, since it is a principle of fundamental justice that laws may not be too vague. It can also be raised under s. 1 of the *Charter in limine*, on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on *Charter* rights be "prescribed by law". Furthermore, vagueness is also relevant to the "minimal impairment" stage of the *Oakes* test (*Morgentaler, Irwin Toy* and the *Prostitution Reference*).

2. The "doctrine of vagueness" is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion (*Prostitution Reference* and *Committee for the Commonwealth of Canada*).

3. Factors to be considered in determining whether a law is too vague include (a) the need for flexibility and the interpretative role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist (*Morgentaler, Irwin Toy, Prostitution Reference, Taylor* and *Osborne*).

4. Vagueness, when raised under s. 7 or under s. 1 *in limine*, involves similar considerations (*Prostitution Reference* and *Committee for the Commonwealth of Canada*). On the other hand, vagueness as it relates to the "minimal impairment" branch of s. 1 merges with the related concept of over breadth (*Committee for the Commonwealth of Canada* and *Osborne*).

5. The Court will be reluctant to find a disposition so vague as not to qualify as "law" under s. 1 *in limine*, and will rather consider the scope of the disposition under the "minimal impairment" test (*Taylor* and *Osborne*).

[46] Justice Gonthier went on to confirm that the threshold for finding a law to be so vague that it does not qualify as a "law" is relatively high.

[47] With respect to the principles of fair notice to citizens and limitation of enforcement discretion referred to above at point 2, Justice Gonthier observed that fair notice comprises an understanding that certain conduct is the subject of legal restrictions (pages 633-635) and that limitation of enforcement discretion requires that a law must not be so devoid of precision that a conviction automatically follows from a decision to prosecute (pages 635-636).

[48] The Court concluded its comments about vagueness in the following terms at pages 638-640:

> Legal rules only provide a framework, a guide as to how one may behave, but certainty is

only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.

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

Indeed no higher requirement as to certainty can be imposed on law in our modern State. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective. The ECHR has repeatedly warned against a quest for certainty and adopted this "area of risk" approach in *Sunday Times, supra*, and especially the case of *Silver and others*, judgment of 25 March 1983, Series A No. 61, at pp. 33-34, and *Malone, supra*, at pp.32-33.

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 an analysis of the quality and limits of human knowledge and understanding in the operation of the law. [underlining added]

[49] With that direction, I now consider whether subsection 74.01(3) of the Act gives sufficient guidance for legal debate, bearing in mind the caution of the Supreme Court that a relatively high standard must be applied in order to find legislation to be impermissibly vague, and the stated reluctance of the Supreme Court to find a provision so vague as not to qualify as a "law". Rather, the Court will consider vagueness as it relates to minimal impairment and over breadth.

[50] As noted above, the main challenge to subsection 74.01(3) is based on the use of the undefined terms "substantial volume", "reasonable period of time", "substantial period of time" and "recently". While these terms are not defined in the Act, and they defy precise measurement, they are terms of common usage with a commonly understood meaning. The word "substantial" has been held in another context under the Act to carry its ordinary meaning so as to mean something more than just *de minimus*. (See: *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Competition Tribunal); aff'd (1991) 38 C.P.R. (3d) 25 (F.C.A.)). As the Commissioner argues, there is no reason to conclude that the

Tribunal is not equally capable of interpreting and applying the meaning of "substantial" in the context of subsection 74.01.(3). The word "reasonable" is widely used in Canadian statutes and has an understood meaning at common law. Similarly, the word "recently" has, in the words of Mr. Justice Muldoon in *74712 Alberta Ltd. v. Canada (Minister of National Revenue)* (1994), 78 F.T.R. 259 at paragraph 12 "an inherently present tense connotation". It is defined in the Oxford English Dictionary to mean "at a recent date; not long before or ago; lately, newly". Thus, the terms about which Sears complains do carry commonly understood meanings.

[51] Further, the interpretation of subsection 74.01(3) is not constrained by a semantic inquiry into the meaning of each word used. In *Nova Scotia Pharmaceutical Society, supra,* the Supreme Court considered whether paragraph 32(1)*(c)* of the *Combines Investigation Act,* R.S.C. 1970, c. C-23 (predecessor legislation to the Act) was a limit prescribed by law. That provision prohibited agreements to "prevent, or lessen, unduly, competition". The unanimous Court noted, at pages 647-648, that the interpretation of the provision was conditioned by the purposes of the legislation, by the rest of the section and the mode of inquiry adopted by the courts which had considered this provision.

[52] In the present case, the purpose of the impugned legislation is to prohibit deceptive ordinary price representations. This is a purpose within the general purpose of the Act. That general purpose, as stated in section 1.1 of the Act, is "to maintain and encourage competition in Canada" in order, among other things, "to provide consumers with competitive prices and product choices". Those policy objectives contribute to an understanding of whether, under the impugned legislation, a price qualifies as a legitimate OSP price.

[53] Subsection 74.01(3) also specifies two factors to be considered when applying the volume and time tests. Those factors are the nature of the product and the relevant geographic market. By providing factors which must be considered in applying the volume and time tests, the legislation provides further indication as to how the discretion it gives is to be exercised. Those two factors also provide needed flexibility. For example, the seasonal or perishable nature of a product may well require that a shorter time or smaller volume test be applied. Those factors ensure that the discretion contained in the impugned legislation is not unfettered with respect to application of the time and volume test.

[54] While Sears argues that neither the term "nature of the product" nor the term "relevant geographic market" are defined, and no guidance is given as to their application, it is my view that neither term could be defined too precisely because their meanings could vary depending upon the particular circumstances. I am confident, in the context of determining the reasonableness of an OSP representation, that the regard to be given to the nature of the product

and the relevant geographic market contributes significantly to the adequacy of the basis for legal debate. It should be remembered that both the nature of a product and a geographic market are concepts which are commonly explored in the application of the Act.

[55] It follows, in my view, that the words used in the impugned legislation, when considered

in the context of the purpose of the impugned legislation and the purpose of the Act, are sufficiently precise as to constitute a limit prescribed by law. The Act provides a framework and an intelligible standard for legal debate and judicial interpretation. It does this by setting out, to paraphrase the words of the Supreme Court in *Nova Scotia Pharmaceutical Society*, *supra*, boundaries of permissible and non-permissible conduct which allow for discussion of their actualization. The boundaries limit enforcement discretion and sufficiently delineate an area of risk so as to give notice to potentially affected citizens. While providing a standard for legal debate, the legislation also provides flexibility in order to deal with the variety of circumstances which may arise (eg. seasonal goods, perishable goods) and evolving market practices.

[56] Confirmatory evidence that the impugned legislation provides an intelligible standard is, in my view, found in the "Report of the Consultative Panel on Amendments to the *Competition Act*" ("Consultative Panel") and in the legislation from other jurisdictions, put in evidence before the Tribunal.

[57] On June 28, 1995, the Minister of Industry announced the start of public consultations aimed at updating the *Competition Act*. As part of the consultation process, the Competition Bureau released a discussion paper which sought comments from interested parties on a number of potential amendments to the Act. Comment was specifically requested on misleading advertising and deceptive marketing practices, including the appropriate definition of an OSP for the purpose of assessing representations. A Consultative Panel, composed of eminent Canadian competition lawyers and academics, as well as representatives of Canadian consumer and retail associations, was established to review responses to the discussion paper. The recommendations of the Consultative Panel were set out in its report released on March 6, 1996 ("report").

[58] The report acknowledged that regular or ordinary price claims are common in the marketplace and that they can be a powerful and legitimate marketing tool because many consumers are attracted to promotions that promise a saving from the ordinary or regular price of a product. The Consultative Panel noted that the then current legislation prohibited materially misleading representations, but that most of those who commented on the discussion paper felt that the volume test applied by the Competition Bureau and the Attorney General under the existing legislation did not adequately reflect the reality of the marketplace. The Consultative Panel summarized the result of the public consultations on this point as follows at page 25 of its report:

> Some [commentators] asserted that the test should be based on the price at which a product is offered for sale for at least half of a relevant time period. It was asserted by both consumer and business commentators that consumers are most likely to interpret regular price claims as referring
>
> to the price at which the product is normally offered for sale. Such a test would be easy for retailers to meet since they can control the length of time at which they offer a product at a certain price.
>
> However, those supporting a time test generally were concerned that the offered price be *bona fide*. They believe a retailer should be required to demonstrate that it made *bona fide* efforts to generate some sales at the represented regular price to avoid artificially inflated regular prices for a product.
>
> Other commentators felt that the volume test was appropriate. Still others felt that both tests should be available, as alternatives.

[59] After discussion and consideration of several alternative proposals, the Consultative Panel concluded that revised legislative provisions "should explicitly identify two alternative tests. A price comparison that complied with either test would not raise a question. By clearly identifying the circumstances under which a challenge could take place, the revised provision would provide greater certainty". In its report, the Consultative Panel went on to say at page 26:

> Specifically, to comply with the law in the case of a representation of a former selling price, the represented price would have to reflect either the price of sellers generally in the relevant market at which a substantial volume of recent sales of the product took place, *or* the price of sellers generally in the relevant market at which the product was recently offered for sale in good faith for a substantial period of time prior to the sale.
>
> Where the comparison price is clearly specified to be the price of the advertiser, these tests would apply with reference to the price of that person alone, rather than in relation to the price of sellers generally in the relevant market.
>
> [...]
>
> The Panel discussed the desirability of defining for greater certainty several terms contained in the revised provision. Such terms included "substantial volume", "good faith", "like products", "substantial time", "nature of the product" and "relevant market". Some Panel members cautioned against defining these terms too precisely, since their meanings could vary depending on the circumstances of each case. The consensus was that existing and future jurisprudence could provide sufficient guidance regarding the meaning of some of these terms. [underlining added]

[60] The following model provision was recommended by the Consultative Panel at page 28 of its report:

> (ii) a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied which is clearly specified to be the price of the person by whom or on whose behalf the representation is made is not misleading if the person making the representation establishes that it is the price at which that person:
>
> > (A) recently sold a substantial volume of the product, or
> >
> > (B) recently offered the product for sale in good faith for a substantial period of time prior to the sale. [underlining added]

The model provided that, in making a determination under this test, regard should be had to the nature of the product and the relevant market.

[61] In the view of the expert Consultative Panel, salient terms, including the terms about which Sears now complains, could not be defined too precisely because their meaning could vary depending on the circumstances of each case. Clearly, the Consultative Panel was of the view

that the use of terms such as “recently”, “substantial volume”, and “substantial period of time” provided an intelligible standard for the exercise of discretion. It was the consensus of the Consultative Panel that existing and future jurisprudence could provide sufficient guidance regarding the meaning of the terms used. I take this to be recognition of: i) the need for flexibility and the interpretive role of the courts; and, ii) the impossibility of achieving absolute certainty. These are the factors to be considered in determining whether a law is too vague (*Nova Scotia Pharmaceutical Society*, *supra* at pages 626-627).

[62] With respect to comparable legislation from other jurisdictions, Sears called Mr. Stephen Mahinka, as an expert witness. Mr. Mahinka is a lawyer who is a partner in the law firm of Morgan, Lewis & Bockius LLP. There he manages the Antitrust Practice Group of the Washington, D.C. office. Mr. Mahinka has 28 years of experience advising clients with respect to pricing, marketing, advertising and consumer protection matters involving the U.S. Federal Trade Commission. He has advised clients regarding compliance with price comparison requirements under U.S. and state laws. He has defended clients whose pricing and advertising activities have been under investigation and he has acted as counsel in litigation asserting violations of state comparative pricing requirements. As well, he has published in the order of 60 articles concerning U.S. antitrust law and consumer protection issues.

[63] Over the Commissioner’s objection, the Tribunal ruled that Mr. Mahinka was qualified to opine upon comparative price advertising, consumer protection and antitrust law at the state level. The Tribunal also concluded that he was qualified to opine on U.S. federal comparative price advertising, consumer protection and antitrust law. The Commissioner conceded Mr. Mahinka’s expertise within the federal sphere.

[64] Mr. Mahinka testified as to his review of U.S. federal and state laws relating to the advertising of comparison prices. Included in his testimony was evidence that a number of U.S. jurisdictions have enacted legislation that contains broad general terms. For example, Florida’s Deceptive and Unfair Trade Practices Law generally prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce. Mr. Mahinka testified that regulations implementing these provisions were “repealed on the basis that it was neither possible nor necessary to codify every conceivable deceptive and unfair trade practice prohibited by the statute”.

[65] New York’s General Business Law makes false advertising in the conduct of any business unlawful. “False advertising” is defined as advertising that is misleading in a material respect.

[66] Under Virginia law, a former price may not be advertised unless: (1) it is the price at or above which a “substantial number of sales” were made in the “recent regular course of business”; (2) the former price was the price at which such goods or services or “substantially similar” goods or services were openly and actively offered for sale for a “reasonably substantial period of time” in the “recent regular course of business” honestly, in good faith and not for the

purpose of establishing a fictitious higher price on which a deceptive comparison might be based; (3) the former price is based on a markup that does not exceed the supplier's cost plus the usual and customary markup used by the supplier in the actual sale of such goods or services in the recent, regular course of business; or (4) the date on which "substantial sales" were made or the goods were openly and actively offered for sale is advertised in a clear and conspicuous manner. Mr. Mahinka testified that the term "substantial sales" is further defined in Virginia's statute as "a substantial aggregate volume of sales of identical or comparable goods or services at or above the advertised comparison in the supplier's trade area" but that the other terms used are not further defined.

[67] I find this evidence to confirm that other legislators have recognized the need for flexibility in regulating deceptive trade practices in general and OSP representations in particular. This less specific legislation establishes general boundaries of non-permissible conduct which is adequate for enforcement purposes. The existence of such general legislation in my view supports the view that the impugned legislation is capable of adequately giving rise to legal debate.

[68] It is true that Mr. Mahinka's evidence included examples of very specific state legislation. However, the fact that some legislation attaches consequences to more precisely-defined acts does not lead to the conclusion that more general provisions are not capable of constituting a limit prescribed by law.

[69] In rejecting Sears' position that the legislation is not a limit prescribed by law, I have also considered its submission based on the existence of the Guidelines. In *Irwin Toy, supra at* page 983, the majority of the Supreme Court noted that one could not infer from the existence of guidelines, (in that case, promulgated by the Quebec Office of Consumer Protection in order to help advertisers comply with advertising restrictions) that there was no intelligible standard to apply. In the view of the majority, one could only infer that the Office of Consumer Protection found it reasonable, as part of its mandate, to provide a voluntary pre-clearance mechanism. Similarly, I do not infer from the existence of the Guidelines that there are no intelligible standards for a court or the Tribunal to apply. I note that the report of the Consultative Panel included a recommendation that the Competition Bureau issue enforcement guidelines in draft form at the same time as the new legislation was introduced. One can infer that the Commissioner considered this recommendation to be reasonable and the Guidelines helpful.

(iii) Is the infringement reasonable and demonstrably justified?

[70] Having found the impugned legislation to be a limit prescribed by law, the next step is to apply the principles articulated in *Oakes* to the evidence before the Tribunal.

(a) Contextual considerations

[71] As already noted, in *Oakes*, the Supreme Court noted that the analysis is to be conducted with close attention to the contextual factors. The contextual factors are relevant to establishing the objective of the impugned legislation and to evaluating the proportionality of the means used to fulfil the pressing and substantial objectives of the legislation. Characterizing the context of the impugned provision also touches upon the nature of the evidence required at each stage of the analysis in order to establish demonstrable justification.

[72] I believe that the relevant contextual considerations are as follows.

[73] First, it is relevant to consider the nature of the activity which is infringed. This is necessary because, where the right to expression is violated, the value of the expression that is limited affects the degree of constitutional protection (*Thomson Newspapers, supra* at paragraph 91).

[74] Here, what is restricted are representations by a seller of the seller's own ordinary selling prices where the representations do not satisfy either the volume or the time test, and where any false or misleading representation is material.

[75] The core values of freedom of expression include the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process: *RJR Macdonald, supra* at paragraph 72. A lower standard of justification is required where the form of expression which is limited lies further from these core values.

[76] In my view, the expression limited by the impugned legislation does not fall within the core protected values. The limited expression is expression that is deceptive in a material way. This is far removed from the values subsection 2(*b*) of the Charter is intended to protect. In the result, a lower a standard of justification is required.

[77] Second, it is a relevant contextual factor to consider the vulnerability of the group the legislation seeks to protect: *Thomson Newspapers,* at paragraphs 90 and 112.

[78] Both the Consultative Panel and the Guidelines recognize that OSP claims are a powerful and legitimate marketing tool. Sears, in its own document entitled "Guidelines for Savings Claims", notes that "[s]avings claims, properly used, are a powerful selling tool".

[79] Dr. Donald Lichtenstein testified as an expert for the Commissioner. He is a Professor of Marketing at the Leeds School of Business at the University of Colorado in Boulder. He holds a Ph. D. with a major in Marketing obtained in 1984 from the University of South Carolina. Dr. Lichtenstein has lectured extensively about Marketing at the graduate and undergraduate level. He has served on the Editorial Review Board of the Journal of Marketing, the Journal of Consumer Research, and the Journal of Business Research. He is a member of the Editorial Review Board for the Journal of Public Policy and Marketing. In 2001, he received the

Outstanding Reviewer Award from the Journal of Consumer Research. Dr. Lichtenstein continues to be an ad hoc reviewer for the Journal of Marketing and other publications. As well, has presented numerous papers relating to marketing at conferences, has applied research experience, and has been published extensively in refereed publications and nationally refereed proceedings.

[80] The Tribunal ruled that Dr. Lichtenstein was qualified to provide opinion evidence on two topics. The first was marketing matters, and particularly consumer behaviour as it relates to pricing and other stimuli. The second topic was research design and methodology within the social sciences. Dr. Lichtenstein provided two separate written opinions, one pertaining to the constitutional question, the other pertaining to the Commissioner's deceptive marketing allegations. He testified with respect to both issues.

[81] I was impressed by Dr. Lichtenstein's expertise. Much of his testimony with respect to marketing matters was unchallenged and I accept his testimony given with respect to the constitutional issue. Relevant to the contextual factors at issue was his evidence that:

- OSPs have a powerful influence on consumers.

- OSP advertising creates a general impression of savings for the average consumer, positively affects intentions to purchase from the advertiser and negatively affects intentions to search competitors for a lower price.

- The average consumer has low levels of price knowledge and engages in very little pre-purchase search to gain this knowledge,
  even for expensive items. Thus, the average consumer is vulnerable to deceptive OSP advertising.

- By signalling a temporary bargain, a seller's own OSP advertising affects not only consumers who are currently contemplating the purchase of a given product but, particularly for products where wear-out occurs on a visible continuum, may also pull some customers into the market sooner than otherwise would be the case.

- Misleading OSP advertising can lead consumers to believe that, by purchasing the advertised product, they will receive a quality level that is commensurate with the higher reference price, while only having to pay the lower sale price.

- The average consumer who purchases a product advertised with an inflated seller's own OSP is unlikely to become aware that he or she was mislead, and thus, he or she remains susceptible to subsequent reference price deceptions.

- Receiving a "good deal" in and of itself is a significant motivation for purchase

for many consumers who purchase OSP advertised items. This is referred to as "transaction utility".

- Retailers who misuse OSPs as a marketing tool capitalize on consumers who view OSP claims as "proxies" for a good deal.

- The deceptive OSP advertisements from one retailer can result in negative goodwill to competitors who advertise in a non-deceptive manner. In Dr. Lichtenstein's words:

> For consumers who do patronize a competitor and then encounter and encode a deceptive OSP from a high credibility source, they will be more prone to question the value from the retailer they patronized. They will be likely to experience cognitive dissonance and a loss of goodwill and future purchase intentions toward the retailer from [whom] they purchased.

- A retailer who uses inflated OSP advertising not only benefits from deceptive advertising on the products that are promoted in this manner, but the beneficial effect also extends to other non-promoted product/service categories. When the nature of the promoted price is misrepresented to consumers, for example, with an inflated seller's own OSP, retailers not only capture sales on the item that attracted consumers to the store, but also on other items consumers purchase once in the store. Thus, competitors operating in good faith lose the opportunity to compete on a level playing field not only for the promoted item, but for all items that the consumer purchases.

- When advertiser behaviour results in consumers purchasing products that provide less value for money, it motivates manufacturers to allocate factors of production to those items instead of to items that would otherwise be produced (i.e., those that "truly" provide higher value for money). This harms competition and distorts price signals which interfere with the optimal allocation of productive resources, so that total consumer welfare is decreased.

[82] A third related contextual factor, conceded in oral argument by Sears to be relevant, is the objective of the impugned legislation and the nature of the problem it seeks to address. The Act seeks to encourage and maintain competition and the objective of the impugned legislation is to do this by improving the quality and accuracy of marketplace information and by discouraging deceptive marketing practices.

[83] Sears argues that a centrally important contextual factor is that, prior to the enactment of the impugned legislation, stakeholders had "explicitly and forcefully lamented the vagueness and

lack of precision, certainty and understanding relating to the ordinary selling price legislation". I agree that clarity of legislation is relevant to considerations of vagueness (as that relates both to the "prescribed by law" and minimal impairment requirements) and, in that sense, clarity touches on the proportionality of the legislation. I am not satisfied on the evidence that clarity and certainty are otherwise relevant contextual factors, or that clarity is an over-arching contextual factor.

(b) Does the infringement achieve a constitutionally valid purpose or objective?

[84] Having set out the relevant contextual considerations, I move to the first step of the *Oakes* analysis. The question to be answered at this stage is whether the objective of the impugned legislation is sufficiently important that it is, in principle, capable of justifying a limitation on Sears' freedom of expression.

[85] Sears concedes that the objective is sufficiently important. Notwithstanding that concession, it is important at this stage to properly state, and not over-state, the objective of the impugned legislation. Improperly stating the objective of the legislation will compromise the analysis.

[86] Sears describes the objectives of the impugned legislation as follows:

> 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.

[87] In my view, the evidence of the legislative history of the provisions of the Act relating to ordinary price representations is relevant to determining the objectives of the impugned legislation. It is described below.

[88] In 1960, a criminal prohibition on the making of misleading ordinary price representations was added to what was then the *Combines Investigation Act*. The initial provision read as follows:

33C(1) Every one who, for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public, by any means whatever, concerning the price at which such or like articles have been, are, or will be, ordinarily sold, is guilty of an offence.

(2) Subsection (1) does not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.

33c.(1) Quiconque, afin de favoriser la vente ou l'emploi d'un article fait au public un exposé essentiellement trompeur, de quelque façon que ce soit, en ce qui concerne le prix auquel ledit article ou des articles, semblables ont été, sont ou seront ordinairement vendus, est coupable d'une infraction punissable sur déclaration sommaire de culpabilité.

(2) Le paragraphe (1) ne s'applique pas à une personne qui fait paraître une annonce publicitaire qu'elle accepte de bonne foi en vue de la publication dans le cours de son entreprise.

[89] An explanation of the purpose of the criminal prohibition is found in remarks made to the House of Commons by the then Minister of Justice when he moved the second reading of the bill to amend the *Combines Investigation Act* to add the criminal prohibition. He said:

> The fourth and last amendment to which I wish to refer in this group is a new section forbidding anyone, for the purpose of promoting the sale or use of an article, to make a materially misleading representation to the public concerning the price at which the article is ordinarily sold. Quite a few instances have come to the attention of the combines branch, some of them occurring in the catalogues of so-called catalogue houses, but occurring in other places as well, where a merchant, in order to make it appear that the price at which he was offering an article was more favourable than was actually the case, misrepresented to the public the price at which such article was ordinarily sold elsewhere. Besides being deceptive as far as the buying public is concerned this practice also constitutes an unfair method of competition with respect to other merchants.
>
> In summary, these amendments relating to discriminatory and predatory pricing and deceptive price advertising have a multiple purpose and effect. In all instances they directly or indirectly protect the consumer and will bring greater honesty into all branches of trade. In some instances they also protect, or give a chance for protection, to merchants, usually the smaller merchants, against unfair competition which does not relate to competitive efficiency; they confirm to a manufacturer some right to prevent his product from being abused or used as a come-on device; and finally, but not least, they are in the long term direction of maintaining competition by cutting down practices or assisting in the prevention of practices which may serve to eliminate competitors and therefore competition through means other than straightforward and real competition itself. [underlining added]
>
> *House of Commons Debates*, Vol. IV (30 May 1960) at 4349 (Mr. Fulton).

[90] In 1976, the criminal prohibition was amended to read as follows:

36(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

36.(1) Nul ne doit, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques.

[...]	[...]
(d) make a materially misleading representation to the public concerning the price at which a product or like products have been, are or will be ordinarily sold; and for the purposes of this paragraph a representation as to price is deemed to refer to the price at which the product has been sold by sellers generally in a relevant market unless it is clearly specified to be the price at which the product has been sold by that person by whom or on whose behalf the representation is made.	(d) donner au public des indications notablement trompeuses sur le prix auquel un produit, ou des produits similaires ont été, sont ou seront habituellement vendus; aux fins du présent alinéa, les indications relatives au prix sont censées se référer au prix que les vendeurs ont généralement obtenu sur le marché correspondant, à moins qu'il ne soit nettement précisé qu'il s'agit du prix obtenu par la personne qui donne les indications ou au nom de laquelle elles sont données.

It was subsequently re-enacted as paragraph 52(1)(*d*) of the Act.

[91] As described in detail above, a discussion paper was released in 1995 seeking comments from interested persons with respect to amendments to the Act, including the appropriate definition of OSP. The Consultative Panel which was created to review the responses to the discussion paper made recommendations. Those recommendations are largely reflected in subsection 74.01(3) of the Act, which was originally contained in Bill C-20, *An Act to amend the Competition Act and to make consequential and related amendments to other Acts*, 1st Sess., 36th Parl., 1997, (1st reading 20 November 1997). A dual track regime of civil and criminal enforcement procedures and remedies was created.

[92] The summary to Bill C-20 specifically provided that "[t]he enactment ... revises the treatment of claims made about regular selling prices to provide greater flexibility and clarity". The then Minister of Industry described the amendments in more detail in the following terms when he moved second reading to the bill:

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

House of Commons Debates, Edited Hansard, No. 074 (16 March 1998) (Hon. John Manley).

[93] On the basis of the legislative history and the evidence before the Tribunal, I am satisfied that the Commissioner has established, on a balance of probabilities, that the objectives of subsection 74.01(3) of the Act are to: i) protect consumers from deceptive ordinary selling price representations; ii) protect businesses from the anti-competitive effects of deceptive ordinary selling price representations; and, iii) protect competition from the anti-competitive effects and inefficiencies that result from deceptive ordinary price representations. These were the expressed objectives of the original criminal prohibitions and I am satisfied that the original

purpose remained pressing when the civil remedy was enacted. As Sears noted in its written argument, since the 1970's concerns were expressed about the inefficiencies associated with the criminal prosecution of misleading advertising. The Consultative Panel recommended that misleading advertising should normally be addressed through a civil regime but that a criminal regime should exist for egregious cases. Both regimes were directed at the same purpose.

[94] These legislative objectives are to be viewed in light of the evidence before the Tribunal concerning the significant harm caused to consumers, business and competition by deceptive OSP advertising (particularly the evidence of Dr. Lichtenstein described above).

[95] I conclude, on the totality of the evidence before the Tribunal, that Sears has fairly and properly conceded that the objectives of the impugned legislation are of sufficient importance that, in principle, they are capable of justifying a limitation on Sears' freedom of expression.

(c) The rational connection

[96] The next step in the inquiry is to question the proportionality of the measure. This analysis begins with consideration of the rationality of the measure at issue. The issue is whether there is a causal relationship between the objective of the impugned legislation and the measures enacted by the law. Direct proof of such causal relationship is not always required. In *RJR Macdonald, supra* at paragraphs 86, 156-158, and 184, the Supreme Court held that a causal relationship between advertising and tobacco consumption could be established based upon common sense, reason or logic.

[97] In *Irwin Toy, supra* at page 991, Chief Justice Dickson found that there could be no doubt that a ban on advertising directed to children was rationally connected to the objective of protecting children from advertising because the "governmental measure aims precisely at the problem identified". I am similarly satisfied on the basis of common sense and logic that the impugned legislation, by sanctioning OSP representations that are materially misleading, aims directly at the objectives of the impugned legislation. Put another way, sanctioning materially false or misleading OSP representations promotes the protection of consumers from deceptive OSP representations, protects businesses from their anti-competitive effects, and protects competition from their anti-competitive effects and inefficiencies.

[98] In finding the impugned legislation to be rationally connected to the objectives of the

legislation, I also rely upon the opinion of Dr. Lichtenstein. As noted above, I generally accept his testimony. I found him to be extremely knowledgeable on the subject of marketing and particularly consumer behaviour as it relates to pricing and other stimuli. I also found that he gave his testimony is an unhesitating, candid, clear and even-handed manner. His obvious enthusiasm for the subject matter left no suggestion of partisanship. His opinion, as it related to marketing in the context of the constitutional question, was not, in my view, effectively challenged or limited on cross-examination.

[99] Sears' expert, Mr. Mahinka, dealt with a review of the scope of U.S. legislation and the factors to be considered at law by sellers when making OSP representations. However, since Mr. Mahinka was not qualified to opine, and did not opine, on marketing matters, his evidence did not contradict that of Dr. Lichtenstein.

[100] The following evidence, taken from Dr. Lichtenstein's written expert report, is relevant to the issue of rational connection:

> 62. The heart of the problem with seller's own OSP advertising is that consumers believe that the OSP relates to the seller's own "ordinary" selling price. Consumer perceptions of what a seller's ordinary price [is] relate to two factors: (1) how long the product [has] been offered at the price (consistency over time), and (2) how many other consumers have purchased the product at that price (consensus). Consequently, in my opinion, there is definitely a rational [connection] between these two factors and consumer perceptions of a price as a bona fide OSP. Thus, any legislation that has the goal of addressing the potential for consumer deception with respect to OSP advertising necessarily must address time and volume considerations.
>
> 63. When thinking in terms of deception, it is helpful to ask the question, "what would consumers believe if they had full information?" If there is no difference between consumer perceptions with and without the full information, there is no problem with deception. In this case, consumer inferences from a seller's own OSPs would accurately reflect missing information. However, if consumers would respond differently if they had full information, then consumer inferences would not be accurate, and there would be a problem of deception. Consider the example of a consumer who encounters an OSP. If the consumers were provided with (a) the time schedule for when that product has been offered for sale at the OSP (time test criterion), and (b) the number of consumers who have purchased the product at the OSP (volume test criterion), would the consumer accept the encountered OSP as the real *bona fide* "ordinary" selling price? If the answer to this question is "no," then there is an issue of deception.
>
> 64. Because consumers will not have this information, legislation is required to institute time and volume standards to bring them in line with consumer expectations so that consumers will not be deceived. In essence, the legislation fills the consumer information void in that with the legislation, consumers will be better able to rely on OSPs as *bona fide* selling prices. That is, instituted in a good faith manner, meeting time or volume tests will bring retailer practices more in line with consumer expectations such that where retailers offer products at OSPs, consumers will be able to rely on the OSPs as representing either the ordinary price from a time or volume perspective. [footnotes omitted]

[101] In finding there to be a rational connection between the impugned legislation and its objectives, I reject Sears' submission that the impugned legislation fails the rational connection test because it is excessively vague, uncertain and imprecise, and has application to an unnecessary broad range of activity. In my view, those arguments are better considered when determining whether the legislation is over broad so that it does not minimally impair Sears' rights. Indeed, in oral argument, counsel for Sears dealt with the evidence that supported his submission that unclear legislation defeats the objective of accurate marketplace information (and so was not rationally connected to the legislative purpose) in the context of his submission on minimal impairment.

[102] I am satisfied that the impugned legislation, on its face, cannot be viewed as being so vague or arbitrary that it is not rationally connected to its objectives.

(d) Minimal impairment

[103] The next stage of the *Oakes* analysis requires consideration of whether the impugned legislation, while rationally connected to its objectives, impairs Sears' freedom of expression as little as reasonably possible in order to achieve the legislative objectives.

[104] The Supreme Court has recognized that legislative drafting is a difficult art and that Parliament cannot be held to a standard of perfection. See: *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paragraph 95. In *Sharpe*, the majority of the Court described the required analysis in the following terms:

> 96 The Court has held that to establish justification it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account: see [...].
>
> 97 This approach to minimal impairment is confirmed by the existence of the third branch of the proportionality test, requiring that the impairment of the right be proportionate to the benefit in terms of achieving Parliament's goal. If the only question were whether the impugned law limits the right as little as possible, there would be little need for the third stage of weighing the costs resulting from the infringement of the right against the benefits gained in terms of achieving Parliament's goal. It was argued after *Oakes, supra*, that anything short of absolutely minimal impairment was fatal. This Court has rejected that notion. The language of the third branch of the *Oakes* test is consistent with a more nuanced approach to the minimal impairment inquiry – one that takes into account the difficulty of drafting laws that accomplish Parliament's goals, achieve certainty and only minimally intrude on rights. At its heart, s. 1 is a matter of balancing: see [...]. [emphasis in original] [jurisprudence and citations omitted]

[105] Sears argues that the impugned legislation fails the minimal impairment test in two respects. First, Sears says that the legislation is over broad because it uses excessively vague, imprecise and broad terms (including "substantial volume", "reasonable period of time", "substantial period of time" and "recently"). Further, the legislation fails to include specific guidelines, 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. The scope of the impugned legislation will, it is said, therefore frustrate or defeat its objectives. Second, Sears says that subsection 74.01(3) of the Act does not minimally impair its freedom of expression because there are practical legislative alternatives to the impugned legislation as it is now drafted. Those alternatives would, Sears argues, give greater clarity, advance the objectives of the legislation more effectively, and interfere less with Sears' right to commercial free speech.

[106] Turning to the first ground advanced by Sears in support of its argument that the

impugned legislation will frustrate or defeat the objectives sought to be achieved, Sears points to the evidence of the Commissioner's expert, Dr. Lichtenstein, that:

a) Placing the percentage requirement for sales and time tests at 51 % or higher (as the Guidelines do) is objectionable as a per se or equivalent per se rule;

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

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 the price may deprive some customers of important information about both the product and the retailer;

d) If consumers believed that there was a time test at 51 % or higher, that test is objectionable;

e) Uncertain or unclear OSP advertising rules hinder OSP price advertising;

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

g) If retailers chose not to engage in OSP advertising as much or at all, that could hinder price reduction;

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

i) If competitors do not lower their prices, the consumer will be harmed by higher prices.

[107] One legislative option available to deal with OSP claims is legislation that imposes specific per se standards, for example, the number of days a product must be on sale at a regular price, or the percentage of sales accepted as "substantial" for the volume test. Mr. Mahinka identified a number of state enactments in the U.S. which contained per se standards. It was Dr. Lichtenstein's opinion that such per se rules are not effective in addressing deception. He endorsed the following statement:

> "Per se rules relating to high-low pricing are not likely to detect all true deception nor exculpate all non-deceptive challenged pricing behavior. In the case of percentage of sales tests, few would argue with the presumption that if a retailer had 50% of its sales at the referenced price, that price had been set in good faith... A higher percentage test will certainly prevent deception, but at what cost? 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... Similarly, percent of time tests can be thwarted easily by the manipulation of the pricing calendars of comparable brands within a store. If compliance with a set time at the regular price (even relatively long periods of time) demonstrates good faith, some deception will escape further scrutiny. On the other hand, 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 consumers of important information about both the product and the retailer. In either case, these per se tests seem to offer much more in terms of financial savings for the litigants (on both sides) than they do in terms of ensuring a balance between the direct consumer interest in good price information and the indirect consumer interest in efficient retail practice."

[108] Dr. Lichtenstein advanced a "Rule of Reason" analysis of a retailer's prices and advertising and effect on consumers, described as follows:

> "Such an approach requires the court to explore issues relating not only to the retailer's activities and consumer perceptions, but also to industry and product characteristics. It is informed by generic and case specific research in consumer behavior. Most important, it seeks to strike a balance between the direct interests of consumers in receiving clear, truthful information and the indirect interest in the lower prices derived from permitting retailers to operate efficiently. Evidentiary shortcuts such as percentage of sales made at the reference price or length of time the reference price was in effect are relevant but not dispositive".

[109] Dr. Lichtenstein went on to state:

> The situation at hand has direct correspondence to measurement issues that behavioral researchers deal with on a continual basis. From a measurement theory perspective, it is generally recognized to be poor measurement practice to equate a concept that is not directly observable (e.g., deception) with a single observable behavior (e.g., "if a seller does X, it is deception; if the seller does Y, it is not deception") (see Lichtenstein, Netemeyer, and Burton 1990). That is, when the concept construct of "deception" is reduced to terms of a per se time or volume test, the validity of just what is "deception" is sacrificed. As a result, there may be many situations where the following [of] per se rules leads to incorrect outcomes regarding determinations of deception that if the subjective factors (consistent with the "rule of reason" approach) were applied with its multiple criteria, this would not occur.

[110] Noting that, under the impugned legislation, the volume and time tests are not determined in a vacuum, but rather recognize both the market-based attributes of the product and the geographic market, Dr. Lichtenstein concluded that, in his opinion, subsection 74.01(3) of the Act could not be less burdensome and still be effective.

[111] In this context, I do not find that the portions of Dr. Lichtenstein's testimony relied upon by Sears fundamentally undermine his expert opinion that the legislation could not be less

burdensome and still be effective, or his opinion that clearer per se rules will neither detect all deception nor exculpate all non-deceptive OSP advertising. Because the impugned legislation is not per se legislation but rather requires consideration of good faith and materiality, I believe the impugned legislation meets the concerns of Dr. Lichtenstein articulated at points (a) through (d) in paragraph 106 above.

[112] Put another way, Sears relied on the portions of Dr. Lichtenstein's evidence which criticised the enactment of per se rules. However, his views do not support the conclusion that the impugned legislation, which is not per se legislation, is over broad.

[113] To the extent that Dr. Lichtenstein agreed that uncertain or unclear OSP advertising regulations hinder and discourage OSP advertising, the evidence before the Tribunal does not in my view establish that the impugned legislation has prevented or discouraged accurate OSP advertising.

[114] Turning to Sears' argument that there are other, more effective legislative options, Sears points to the legislation of 12 American states and argues orally as follows:

> Now, in terms of the 12 states that are highlighted here, it is set out, Your Honour - - I can tell you that, in terms of the criteria that are set out here, it really is a menu of alternative ways to enact a provision like the impugned legislation and, from that menu, Your Honour will note that there are various tests that are enunciated here, set out, which involve different volume tests, different time tests.
>
> You have got percentages that vary. You have got "reasonable" set at 5 per cent. You have got "reasonably substantial" set at 10 per cent. You have got time periods and volume periods anywhere from more than 10 per cent to - - well, it runs to 31.1 per cent, which is 28 out of 90 days in a few cases that is required to have it at that regular price.
>
> And you have got 51.6 per cent in the case of Ohio, which is 31 out of 60 days, and you have got South Dakota, for example, 7 out of 60 days, 11.6 per cent.
>
> The point of it is, is that I am not suggesting you have to pick a percentage here or a criteria that you feel should be imposed here. That is not your job and, frankly, it is not my job either.
>
> What the point here is is that there are other legislative alternatives which do provide for that certainty and clarity and that also provide for that flexibility that we are looking for here, in that there are also exceptions to these fixed criteria.
>
> There are exceptions for clearance sales, for example. There are exceptions for providing for rebuttable presumptions and that, therefore, Your Honour has before you clear evidence that Parliament could have done the same and that, had it done the same, Sears' rights would not have infringed as much as they have been.

[115] However, there was no evidence before the Tribunal that such legislation was either less intrusive or more effective in targeting OSP representations. With respect to whether more

precise legislation is less intrusive, it was Mr. Mahinka's evidence that it has been his experience (which has formed the basis of his advice to clients) that, where sellers carry on business in more than one jurisdiction, 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". This evidence leads me to conclude that either the general and specific legislation are co-extensive, or the specific legislation is more intrusive. Otherwise, compliance with the specific legislation would not result in compliance with the more general legislation. Mr. Mahinka's evidence does not support Sears' contention that more specific legislation is less intrusive.

[116] With respect to the effectiveness of legislation regulating OSP claims, the following exchange in oral argument is illustrative. In response to a question from the Tribunal as to how the evidence of Mr. Mahinka, and particularly the state legislation he referenced, supports the submission that more precise legislation is more effective, counsel for Sears ultimately acknowledged that Mr. Mahinka's evidence did not say that precise legislation was more effective. The transcript on this point is as follows:

> **MR. M.J. HUBERMAN:** Well, if you are asking: Is that the approach he uses when he is dealing with a general statute only? He did not address that but, again, the general approach is illustrative and, I think, helpful in the sense that he is using precise standards and criteria to shape his advice to sellers who want to know what to do.
>
> The idea is that, if they know what to do, if they are going to comply with the specific standards, they are likely going to comply with the more general ones also.
>
> So to the extent that that advice would be appropriate in those circumstances, I take it that that is what the advice would be as well.
>
> **THE CHAIRPERSON:** But I don't recall his evidence to say that specific legislation is more effective than general legislation.
>
> **MR. M.J. HUBERMAN:** Well, it's more effective in letting the sellers know what to do in the sense of advertising. It is more effective in that sense.
>
> **THE CHAIRPERSON:** But he doesn't touch on whether it is more effective in discouraging objectionable advertising that is misleading with respect to ordinary selling price.
>
> **MR. M.J. HUBERMAN:** No.
>
> His point was a different point. His point was, I would suggest, the first branch of the unintelligible standard rationale, which is the fair notice part that we talked about yesterday.
>
> His point was, by looking at the more specific standards criteria tests, the citizen, i.e. the seller, would have greater guidance and knowledge of the law so that it could comply better with it. That was the gist of what he was saying and, in fact, that would, in my submission, show its effectiveness in accomplishing some of the objectives, certainly, of the Act that we talked about. [underlining added]

[117] Sears also complains that the Commissioner failed to explain why the model provision recommended by the Consultative Panel was not enacted. It is said by Sears to have been less intrusive and equally effective because of its "clarity and brevity".

[118] The model proposed by the Consultative Panel is set out at paragraph 60 above. The model provision proposed the use of terms such as "recently sold a substantial volume", "recently" and "substantial period of time". Regard was to be had to the nature of the product and the relevant market. I am not satisfied that the "clarity and brevity" of this model provision shows it to be less intrusive or more effective than the impugned legislation.

[119] Returning to the dicta of the Supreme Court of Canada in *Sharpe* quoted above, Parliament need not adopt the least restrictive measure. It is sufficient that the means adopted fall within a range of reasonable solutions, and the law must be reasonably tailored to its objectives.

[120] The evidence of Dr. Lichtenstein and the wording of the impugned legislation persuade me that the impugned legislation is reasonably tailored to its objectives. The legislation sets out time and volume tests which relate to consumer perceptions of a seller's ordinary price. An affirmative defence is provided whereby any representation that is not false or misleading in a material respect does not constitute reviewable conduct. There is a due diligence defence to most of the remedial measures.

[121] I am satisfied, on a balance of probabilities, that the impugned legislation falls within a range of reasonable alternatives. While the Act does not establish with precision whether any particular OSP representation will satisfy the time and volume test, the impugned legislation provides the necessary flexibility to ensure that it neither captures non-deceptive OSP advertising nor fails to capture deceptive OSP advertising.

(e) Proportionality of effects

[122] The final stage of the *Oakes* analysis requires:

> ... there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures. [Emphasis in original.]

See: *Dagenais v. CBC*, [1994] 3 S.C.R. 835 at page 889; and *Thomson Newspapers, supra* at paragraph 59.

[123] I accept, based upon the report of the Consultative Panel, the evidence of Dr. Lichtenstein, and the existence of legislation in numerous American jurisdictions restricting OSP advertising, that subsection 74.01(3) of the Act addresses the pressing and substantial objective preventing of harm caused by deceptive ordinary price claims. False OSP claims, on the evidence of Dr. Lichtenstein, (unchallenged on this point) can harm consumers, business competitors and competition in general.

[124] In comparison, the negative effects of the restrictions which result from subsection 74.01(3) of the Act are not great. The speech that is restricted is commercial speech that is materially false or misleading.

[125] Sears points to its experience when it eliminated its "2-For" price as evidence of the deleterious effect of the impugned legislation. At that time, when Sears lowered and set its regular single unit price at the "2-For" price, sales declined. When Sears then increased its regular prices, its promotional sales substantially increased. I do not understand this to be evidence of a chill caused by the regulation of OSP claims, as Sears argues, particularly since Sears continued to use OSP claims.

[126] I therefore conclude that the negative effects of the restriction on commercial speech are outweighed by the benefits that ensue from sanctioning deceptive OSP representations.

(f) Conclusion

[127] For the reasons set out above, I have concluded that subsection 74.01(3) of the Act is: i) a limit "prescribed by law"; ii) addresses pressing and substantial objectives; iii) is rationally connected to its objectives; iv) restricts freedom of expression as little as is reasonably possible; and, v) carries salutary benefits that outweigh the restriction on freedom of expression.

[128] It follows that, while it is conceded that subsection 74.01(3) does infringe subsection 2(*b*) of the Charter, the infringement is a reasonable limit that is demonstrably justified in a free and democratic society.

[129] Sears' request for constitutional remedies will, therefore, be dismissed.

V. THE ALLEGATION OF REVIEWABLE CONDUCT

(i) Standard of proof

[130] Having dismissed Sears' request for constitutional remedies, I now turn to consider whether the Commissioner has met the onus upon her to establish that Sears employed deceptive marketing practises which constitute reviewable conduct under subsection 74.01(3) of the Act.

[131] Neither party, in their written arguments, addressed submissions to the Tribunal with respect to the standard of proof. In oral argument, counsel agreed that the Commissioner must prove her case on a balance of probabilities, and acknowledged that within the civil standard of proof there exist different degrees of probability, depending upon the nature of the case. See also: *Oakes*, *supra*, at page 137. Counsel for the Commissioner agreed that, within the civil standard, the Commissioner would be obliged to prove her case at the higher end of the balance of probabilities.

[132] In light of the serious nature of the conduct alleged against Sears I am satisfied that, within the balance of probabilities, I should scrutinize the evidence with greater care and consider carefully the cogency of the evidence. See: *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164 at page 170.

(ii) The elements of reviewable conduct and the issues to be determined

[133] For ease of reference, I repeat subsections 74.01(3) and 74.01(5) here :

74.01(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,	74.01(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois:
(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	a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
(b) has not offered the product at that price or a higher price in good faith for a substantial period of	b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante

time recently before or immediately after the making of the representation, as the case may be.	précédant de peu ou suivant de peu la communication des indications.
[...]	[...]
74.01(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.	74.01(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.

[134] Sears acknowledges that the evidence before the Tribunal establishes Sears to be: (i) a person; (ii) who, for the purpose of promoting, directly or indirectly, the supply or use of tires and for the purpose of promoting, directly or indirectly, its business interests generally; (iii) in 1999, made representations to the public as to tire prices that were clearly specified to be the prices at which the Tires were ordinarily supplied.

[135] Sears also acknowledges that the evidence establishes that Sears did not comply with the volume test contained in paragraph 74.01(3)(*a*) of the Act.

[136] Accordingly, the issues to be determined are:

i) Were Sears' regular prices for the Tires offered in good faith as required by the time test?

ii) Did Sears meet the frequency requirement of the time test?

iii) If Sears did not meet the good faith or frequency requirements of the time test, has Sears established that the representations were not false or misleading in a material respect?

iv) If Sears engaged in reviewable conduct, what administrative remedies should be ordered?

(iii) The witnesses

[137] Before turning to the substance of the deceptive marketing case, it will be helpful to introduce and describe briefly the witnesses who testified before the Tribunal.

(a) The expert witnesses

[138] Seven individuals testified as experts before the Tribunal, three on behalf of the Commissioner and four on behalf of Sears. The Commissioner's experts were Dr. Donald Lichtenstein, Dr. Sridhar Moorthy and Mr. Donald Gauthier.

[139] Dr. Lichtenstein's qualifications and area of expertise have already been described. When Dr. Lichtenstein re-attended to give his opinion with respect to the deceptive marketing case, Sears agreed that he need not be re-qualified and that he could provide expert testimony with respect to "marketing and consumer behaviour and response to pricing advertised stimuli" and "research design and methodology within social sciences".

[140] Dr. Moorthy is the Manny Rotman Professor of Marketing at the Rotman School of Management, University of Toronto, and is a Research Associate at the Institute for Policy Analysis, University of Toronto. Sears did not challenge Dr. Moorthy's expertise to testify about "marketing and the use of economic principles and/or theory to understand marketing", "consumer response to marketing stimuli" and "marketing study design and implementation".

[141] Mr. Gauthier has worked in the tire industry in Canada since 1984 when he joined a company that was the predecessor corporation of Uniroyal Goodrich Canada Inc. He worked from 1984 to 1990 as its National Advertising Manager. In his later years with the company, he took on the additional role of Sales Manager for Atlantic Canada. From 1990 through 1995, Mr. Gauthier was with Michelin Tires Canada Inc. (after it acquired Uniroyal Goodrich), initially as National Advertising and Promotions Manager, then as Ontario Sales Manager for the Uniroyal Goodrich sales team, and finally as a Sales Manager in Ontario for the merged Michelin, Uniroyal and Goodrich lines. From 1995 to 2000, Mr. Gauthier was with Bridgestone/Firestone Canada Inc. successively as Director of Sales and Marketing, Vice-President Sales and Marketing, and Senior Vice-President Sales. From 2001, and at the time he testified before the Tribunal, Mr. Gauthier worked as the Sales and Marketing Manager/Vice-President of Retread Division of Al's Tire Service. Mr. Gauthier was found by the Tribunal to be qualified to provide opinion evidence touching upon "the practical application of marketing and retail strategies in the Canadian tire industry and Canadian tire market", "the marketing and sale of original equipment and replacement tires in Canada" and "the structure of the tire market in general in Canada", such expertise being recognized as being in existence as of 1999.

[142] While Sears did not challenge Mr. Gauthier's knowledge or expertise, it did object that Mr. Gauthier lacked the necessary independence because he now works for a company that sells tires in Ontario where Sears also sells tires.

[143] Without doubt, expert evidence must be seen as the independent product of an expert who is uninfluenced by the litigation, and an expert should provide independent assistance by objective, unbiased opinion. While Mr. Gauthier's employer does sell tires, Mr. Gauthier testified that he is paid a straight salary without performance bonuses, that he did not know where Sears Auto Centres were located, that, in his time with Al's Tires, no operator of any of its stores cited Sears as a competitor, and that, while he had dealt with some competitive situations (one example being competition from a Canadian Tire store), none of the competitive situations he had dealt with involved Sears.

[144] On that evidence, and on the basis of observing how Mr. Gauthier gave his evidence touching on his qualifications, I concluded that Mr. Gauthier had the required independence in

order to provide expert testimony. It was, and remains, my view that it is too tenuous for Sears to argue that Mr. Gauthier's testimony would be or was biased or coloured by the potential benefit to his employer of having Sears restricted in the content of its OSP advertising. My assessment of Mr. Gauthier's objectivity did not change, and was reinforced, as I observed his testimony in chief and his later testimony as a rebuttal witness.

[145] Sears' expert witnesses were Denis DesRosiers, John Winter, Dr. Kenneth Deal and Professor Michael Trebilcock.

[146] Mr. DesRosiers is the President of DesRosiers Automotive Consultants Inc. ("DAC"), an automotive market research and consulting group. The Commissioner argued that Mr. DesRosiers was not qualified to provide expert testimony. After hearing the examination and cross-examination of Mr. DesRosiers upon his qualifications, the Tribunal ordered that Mr. DesRosiers could testify and give opinion evidence touching upon "survey methodology and analysis relating to the Canadian after tire market", but that the Tribunal would reserve its decision as to whether he was properly qualified to give such testimony.

[147] In this regard, Mr. DesRosiers worked from 1974 to 1976 doing economic analysis for the Ontario Government related to the automotive sector. From 1976 to 1979, Mr. DesRosiers was the Senior Automotive Industry Analyst with the Economic Policy Branch of the Ministry of Treasury and Economics in Ontario. From 1979 to 1986, he was the Director of Research at the Automotive Parts Manufacturers Association of Canada. In 1985, Mr. DesRosiers started DAC. Since 1989, DAC has conducted annually a "Light Vehicle Study" in which 2,500 people across Canada are surveyed with respect to their automotive maintenance practices. Mr. DesRosiers wrote the original questionnaire used in this survey, with some professional advice as to how to properly ask a question for the purpose of a survey. Mr. DesRosiers testified that he understands the automotive industry "cold" so that he is able to design the "Light Vehicle Survey" and other surveys and to interpret the information collected. The interpretation he personally provides may include complex, strategic reports as to how a client company should respond to the market. Since its inception, DAC has conducted upwards of 200 surveys relating to the automotive sector, and every year, or second year, 3 or 4 tire companies buy tire survey data collected by DAC.

[148] Mr. DesRosiers initially provided an expert opinion for the Commissioner in this proceeding but, when the Commissioner decided not to call Mr. DesRosiers, Sears subpoenaed him and later commissioned a second expert report from him.

[149] I am satisfied that Mr. DesRosiers' involvement in the automotive sector, and specifically his involvement in the creation of surveys relevant to the automotive market and the interpretation of the results generated, allows Mr. DesRosiers to provide expert advice to the Tribunal based upon his own knowledge of Canadian consumers' buying habits and preferences, relating primarily to the Canadian after market for tires. I am satisfied that Mr. DesRosiers is, on the basis of his experience, a properly qualified expert to opine upon survey methodology and analysis relating to the Canadian automotive industry, and specifically the after market for tires.

[150] John Winter is a retail consultant with expertise in advising retailers, institutions and governmental bodies on retail, development and commercial strategies. He has been previously qualified as an expert in these areas and has testified on at least 50 occasions before numerous tribunals, regulatory bodies and the Ontario Court of Justice. The Commissioner conceded that Mr. Winter's qualifications enabled him to provide expert evidence on "issues relating to retailing in Canada, including pricing strategies employed by retailers".

[151] Dr. Kenneth Deal is the Chairman of Marketing, Business Policy and International Business in the Michael G. DeGroote School of Business at McMaster University. He is also the President of marketPOWER research inc., a market research company. The Commissioner accepted the qualifications of Dr. Deal to provide expert testimony in the area of "the methodology and conduct of market research surveys and the analysis of data resulting from such surveys".

[152] Professor Michael Trebilcock is the Director of the Law and Economics Program, Professor of Law and cross-appointed to the Department of Economics at the University of Toronto. He has written extensively on competition policy, trade and economic regulation during his career. For the past 20 years, he has consulted widely to government and the private sector on matters of competition policy and economic and social regulations. The Commissioner accepted Professor Trebilcock to be qualified to give testimony as an expert on competition policy and economic regulation.

(b) The lay witnesses

[153] Each party called 3 lay witnesses. The Commissioner's lay witnesses were Mr. Christian Warren, Mr. Jim King and Mr. William Merkley. Sears called Mr. Paul Cathcart, Mr. Harry McKenna and Mr. William McMahon.

[154] Mr. Warren is a Competition Bureau Officer, through whom the Commissioner tendered documents gathered in her investigation.

[155] Mr. King was first employed by Bridgestone/Firestone Canada Inc. in October of 1997 as its Sales Manager for associate brands. In August of 1999, he became the Sales Manager for Corporate Accounts and Original Equipment. The corporate accounts he was responsible for were mass merchandisers such as Sears, Canadian Tire, Costco and Wal-Mart. Mr. King had provided an affidavit in response to an order obtained by the Commissioner under section 11 of the Act which was directed to Bridgestone/Firestone Canada Inc.

[156] Mr. Merkley has been employed by Michelin Canada since 1977, and in 1999, he was its National Director of Sales for the Corporate Accounts Group. Mr. Merkley provided an affidavit in response to a section 11 order obtained by the Commissioner directed to Michelin North America (Canada) Inc.

[157] Mr. Cathcart has been employed by Sears since 1973. From 1997 through 2000, he served as the Retail Marketing Manager and 190 Service Operations Manager. As such, he was responsible for building a marketing plan for the Tires. At the time he testified, Mr. Cathcart was the Group Operations Manager and Process Improvement Manager for Sears Canada Home and Hardline.

[158] Mr. McKenna has been employed by Sears since 1981. From 1998 through to 2000, he was the Category Logistics Manager/Inventory Analyst for the Automotive Department. As such, he was responsible for supporting the buyer in visits to tire manufacturers and other vendors, and was responsible for ensuring the flow of merchandise to Sears Automotive Centres and the maintenance of proper inventory levels. When he testified, he was the Manager of Sales and Promotions for the off-mall channel of Sears.

[159] Mr. McMahon has been employed by Sears since 1977. In 1999, he was the Group Retail Marketing Manager of Group 700 - 2 at Sears. As such, he worked with the Corporate Marketing and Advertising Department and the Business Team in order to develop marketing strategies and events for merchandise which included the Tires at issue. At the time he testified, Mr. McMahon was the General Manager of Sears Automotive.

[160] Having introduced the witnesses, this may be the most convenient point to provide the Tribunal's reasons for its oral order, given during the course of the hearing, with respect to the Commissioner's request to adduce certain rebuttal evidence.

VI. RULING WITH RESPECT TO NON-EXPERT REBUTTAL EVIDENCE

[161] Near the conclusion of the evidence adduced by Sears in response to the Commissioner's allegations, the Commissioner advised Sears that, upon the close of Sears' case, she intended to introduce non-expert rebuttal evidence through Mr. Warren. Sears responded that it objected to such evidence being given and the Tribunal was advised of this dispute. In consequence, the Tribunal directed that the Commissioner serve Sears with a rebuttal will-say statement before Sears closed its case and advised that the Tribunal would hear argument on the issue of the admissibility of the proposed non-expert rebuttal evidence after Sears closed its case when the Commissioner endeavoured to call such evidence.

[162] The rebuttal will-say statement was served on Sears on January 27, 2004. On Monday, February 2, 2004 Sears closed its case and the Tribunal then heard submissions as to whether the proposed rebuttal evidence should be received. For reasons to be delivered later in writing, the Tribunal ruled during the hearing that a portion of the proposed rebuttal evidence could be admitted and a portion could not. What follows are the reasons for that ruling.

(i) The proposed rebuttal evidence

[163] The Commissioner sought to respond to two portions of the testimony of Mr. Cathcart.

[164] The first portion of Mr. Cathcart's testimony which the Commissioner sought to rebut was as follows ("the timing explanation"):

> MR. McNAMARA: Turning back to the checkerboards, there has been evidence before the Tribunal that some of the five tires that we are talking about were offered at regular prices for less than 50 per cent of the time, or were offered at sales prices for more than 50 per cent of the time.
>
> I am referring specifically to the RoadHandler T Plus and the Weatherwise tire.
>
> Can you offer any explanation as to why that would have been the case?
>
> And I am talking about 1999, of course.
>
> MR. CATHCART: Yes, I can.
>
> About mid-year of 1999 I began to receive communication from the field that when we advertised the Michelin T Plus it was not available in an 80 aspect ratio size. So beginning in about the third quarter, I chose to advertise the Weatherwise, not necessarily at the same price but at the same time as the T Plus.
>
> There were a number of customers who were coming in. We would advertise the Michelin tire, and in our advertising we could not indicate every size that was available in those tires. So they would come into our auto centres expecting to buy a Michelin tire, although if they had an 80 aspect ratio size requirement we were unable to sell them the AT Plus. It just was not available in that size.
>
> In a response to that, I offered the Weatherwise as a "go to" in the 80 aspect size for our sales associates and our customers.
>
> I knew very well that I would sell some. It certainly wasn't going to be the driving number of tires. Our T Plus would historically outsell the Weatherwise.
>
> What it did was it responded to the customer's request to have a Michelin tire in an 80 aspect ratio when we advertised it. That was my choice, and I did that for that reason.
>
> Second, there was in the fourth quarter of 1999 a situation around service and supply. What I mean by that is on snow tires we would place our orders and stagger our shipments, because on the Bridgestone snow tires they were made in the Orient. So we would have the first shipment arrive in August-September, a second shipment in October and a third shipment in November.
>
> In the fourth quarter of 1999 there were some labour issues in the Orient where we were unable to receive our third shipment, our promotional shipment -- because the deeper you get into that year obviously that is when the promotions start to happen of these snow tires.
>
> We found out very late in the year that we were not going to be able to get them because of labour issues in the Orient.

The problem was I had already booked space, newspaper space, preprint space. These were all completed programs in essence. So even in the preprints, if we were to pull out of there we would in essence be running a company-wide vehicle with a blank page.

What we did was I approached Stan and asked if he would approach Michelin, because they were the only other supplier that could give us a quantity of tires. That was our hope. They did respond and were able to switch the tires, the snow tire ads to Michelin.

What I mean when I say switch, when we advertise tires we would have a feature item on the page and then we would have sub-features. Historically the feature item, the lion's share of sales were created from that.

But because we had some snow tires in stock from our first and second shipment, we moved the feature item to a sub-feature, being the snow tire, and then featured the Michelin tires. That ran us over frequency in that fourth quarter.

It was purely in response to an offshore issue.

[165] The Commissioner proposed to rebut the timing explanation through testimony that the RoadHandler T Plus and the Weatherwise tires were on sale over 50 per cent of the time in each six-month period which preceded every day from July 3, 1999 to December 31, 1999. The Commissioner also sought to introduce into evidence a table entitled “Time Analysis-1999-Substantial Period” which illustrated this.

[166] The second portion of Mr. Cathcart’s testimony the Commissioner sought to rebut was as follows (“the third week of May advertising and promotions testimony”):

MR. McNAMARA: I would ask you to turn to Tab 9, to the checkerboard for the month of May.

MR. CATHCART: I am there, sir.

MR. McNAMARA: I would ask you to look at the Michelin T Plus tire and the Week 3 time column.

MR. CATHCART: Yes, sir.

MR. McNAMARA: Can you tell us what is going on there.

MR. CATHCART: In Week 3 the Michelin T Plus –

MR. McNAMARA: There is a reference there that says "NP" and then "ALB/BC" and the same thing for the Weatherwise.

MR. CATHCART: Yes. That was referring to a newspaper ad in Alberta and B.C. for those two lines of tires. But it was a newspaper ad only for those two provinces during that week.

MR. McNAMARA: Why was that?

MR. CATHCART: We would have promotions that would differ coast to coast depending on the market and the seasons.

> We would have snow tires running in Quebec in a newspaper ad in the fall, where we would have passenger tires in B.C. We wouldn't advertise snow tires in the Lower Mainland of B.C., although in northern B.C. and in Prince George we would have snow tires.
>
> We called them alts. We would alt our advertising, depending on the geographics of the product and of the country, weather and that.
>
> In this time frame we advertised these two tires only in Alberta and B.C. at these prices.

[167] The Commissioner proposed to rebut the third week of May advertising and promotions testimony by tendering, through the competition law officer, newspaper proofs and Sears pre-prints and flyers, all relating to the advertising and promotion of tires by Sears during the third week of May, 1999.

(ii) The objection to the rebuttal evidence

[168] Sears argued that the proposed rebuttal evidence should not be permitted because:

1. The Commissioner had failed to follow the procedure mandated by the rules of the Tribunal.

2. The proposed evidence was not proper rebuttal evidence.

3. The Commissioner had failed to cross-examine Mr. Cathcart upon that portion of his evidence which the Commissioner sought to rebut.

(iii) The ruling

[169] After hearing argument, the Tribunal ruled that the Commissioner would not be permitted to lead rebuttal evidence with respect to the timing explanation, but would be entitled to lead as rebuttal evidence Sears' newspaper proofs, pre-prints and flyers in order to rebut the third week of May advertising and promotions testimony.

(iv) The procedural objection

[170] Sears argued that before delivering the rebuttal will-say statement, which was in substance an amended will-say statement of the competition law officer, the Commissioner was obliged to bring a motion for leave to amend her disclosure statement. It was argued that, as the respondent, Sears puts in its case on the basis of the evidence adduced by the Commissioner as disclosed in her disclosure statement and in her rebuttal expert reports. Sears had adduced the bulk of its lay and expert evidence before it learned that the Commissioner sought to adduce rebuttal fact evidence. Requiring the Commissioner to move to amend her disclosure statement in this circumstance was said to be in accordance with the regulatory objectives of the Tribunal's rules, particularly the objective that the Commissioner's investigation be completed and her case be in final form at the time her application is filed with the Tribunal and the objective that the issues be clearly defined at the outset by having them set out in the parties' respective disclosure statements.

[171] In my view, the Commissioner was not obliged to move to amend her disclosure statement in order to adduce non-expert rebuttal evidence. The obligation of the Commissioner to file a disclosure statement is contained in section 4.1 of the *Competition Tribunal Rules*, SOR/94-290 which is as follows:

4.1 (1) The Commissioner shall, within 14 days after the notice of application other than an application for an interim order is filed, serve on each person against whom an order is sought the disclosure statement referred to in subsection (2)

(2) The disclosure statement shall set out

(a) a list of the records on which the Commissioner intends to rely;

(b) the will-say statements of non-expert witnesses; and

(c) a concise statement of the economic theory in support of the application, except with respect to applications made under Part VII.1 of the Act.

(3) If new information that is relevant to the issues raised in the application arises before the hearing, the Commissioner may by motion request authorization from the Tribunal to amend the disclosure statement referred to in subsection (2).

(4) The Commissioner shall allow a person who wishes to oppose the application to inspect and make

4.1 (1) Dans les quatorze jours suivant le dépôt de l'avis de demande autre qu'une demande d'ordonnance provisoire, le commissaire signifie la déclaration visée au paragraphe (2) à chacune des personnes contre lesquelles l'ordonnance est demandée.

(2) La déclaration relative à la communication de renseignements comporte :

a) la liste des documents sur lesquels le commissaire entend se fonder;

b) un sommaire de la déposition des témoins non experts;

c) un exposé concis de la théorie économique à l'appui de la demande, sauf dans le cas d'une demande présentée aux termes de la partie VII.1 de la Loi.

(3) Le commissaire peut, par voie de requête, demander au Tribunal l'autorisation de modifier la déclaration visée au paragraphe (2) en cas de découverte, avant l'audition, de nouveaux renseignements se rapportant aux questions soulevées dans la demande.

copies of the records listed in the disclosure statement referred to in subsection (2) and the transcript of information for which the authorization referred to in section 22.1 has been obtained.

(4) Le commissaire doit permettre à la personne qui entend contester la demande d'examiner et de reproduire les documents mentionnés dans la déclaration visée au paragraphe (2) ainsi que la transcription des renseignements pour lesquels l'autorisation visée à l'article 22.1 a été obtenue.

[172] The obligation to apply for leave to amend the Commissioner's disclosure statement is contained in subsection 4.1(3) of the *Competition Tribunal Rules* which provides that leave shall be sought where "new information that is relevant to the issues in the application arises before the hearing" [underlining added].

[173] The parallel obligation upon a respondent to file a disclosure statement is contained in section 5.1 of the *Competition Tribunal Rules*, which similarly provides that the obligation to apply for leave to amend the disclosure statement arises when new information arises before the hearing.

[174] Together, these rules function to ensure that, prior to the commencement of the hearing, each side knows both the documents and the factual, non-expert testimony upon which the opposite side intends to rely. Section 47 of the *Competition Tribunal Rules* operates to ensure that, prior to the commencement of the hearing, each side knows the expert testimony the opposite party intends to rely upon, including any expert rebuttal evidence.

[175] With respect to non-expert rebuttal evidence, as discussed in more detail below, as a matter of law an applicant may only call rebuttal evidence after completion of the respondent's case where the respondent has raised some new matter which the applicant had no opportunity to deal with and which the applicant could not reasonably have anticipated. The fact that the need for rebuttal evidence becomes apparent only after the Commissioner has closed her case makes it inappropriate, in my view, to require amendment of the applicant Commissioner's disclosure statement.

[176] Instead, in my view, the right of the Commissioner to adduce rebuttal evidence is properly governed by application of the common-law rules governing rebuttal evidence.

[177] Further, in the present case the Tribunal's direction that the Commissioner serve Sears with a rebuttal will-say statement prior to Sears closing its case prevented any element of improper surprise or prejudice to Sears. In my view it does not follow, however, that in another case the failure to provide such a will-say statement on a timely basis would, by itself, preclude calling what would otherwise be proper rebuttal evidence.

(v) Applicable principles of law with respect to rebuttal evidence

[178] The general principles applicable to rebuttal evidence were set out by Mr. Justice McIntyre for the Supreme Court of Canada in *R. v. Krause*, [1986] 2 S.C.R. 466 at paragraphs 15, 16 and 17. There, Mr. Justice McIntyre wrote:

> 15 At the outset, it may be observed that the law relating to the calling of rebuttal evidence in criminal cases derived originally from, and remains generally consistent with, the rules of law and practice governing the procedures followed in civil and criminal trials. The general rule is that the Crown, or in civil matters the plaintiff, will not be allowed to split its case. The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings; in a criminal case the indictment and any particulars: see R. v. Bruno (1975), 27 C.C.C. (2d) 318 (Ont. C.A.), per Mackinnon J.A., at p. 320, and for a civil case see: Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd., [1967] 1 O.R. 18 (Ont. C.A.), per Schroeder J.A., at pp. 21-22. This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence -- as much as it deemed necessary at the outset -- then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it [page 74] the full case for the Crown so that it is known from the outset what must be met in response.
>
> 16 The plaintiff or the Crown may be allowed to call evidence in rebuttal after completion of the defence case, where the defence has raised some new matter or defence which the Crown has had no opportunity to deal with and which the Crown or the plaintiff could not reasonably have anticipated. But rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made. It will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other.
>
> 17 In the cross-examination of witnesses essentially the same principles apply. Crown counsel in cross-examining an accused are not limited to subjects which are strictly relevant to the essential issues in a case. Counsel are accorded a wide freedom in cross-examination which enable them to test and question the testimony of the witnesses and their credibility. Where something new emerges in cross-examination, which is new in the sense that the Crown had no chance to deal with it in its case-in-chief (i.e., there was no reason for the Crown to anticipate that the matter would arise), and where the matter is concerned with the merits of the case (i.e. it concerns an issue essential for the determination of the case) then the Crown may be allowed to call evidence in rebuttal. Where, however, the new matter is collateral, that is, not determinative of an issue arising in the pleadings or indictment or not relevant to matters which must be proved for the determination of the case, no rebuttal will be allowed. [underlining added]

[179] In *Halford v. Seed Hawk Inc.*, 2003 FCT 141; 24 C.P.R. (4th) 220 Mr. Justice Pelletier, then sitting in what was the Trial Division of the Federal Court, re-stated the principles governing the admissibility of rebuttal evidence. At paragraph 16, Mr. Justice Pelletier noted that evidence, which otherwise would be excluded because it should have been led as part of a plaintiff's case in chief, would nonetheless be examined in order to determine if it should be admitted in the exercise of the judge's discretion.

[180] Similarly, in *DRG v. Datafile Ltd.* (1987), 16 C.P.R. (3d) 155 (F.C.T.) Mr. Justice McNair observed that a judge has discretion to admit further confirmatory evidence in rebuttal either for the judge's own enlightenment or where the interests of justice require it.

(vi) Proposed rebuttal of the timing explanation

[181] Turning to the application of these principles to the proposed evidence, the nature of the proposed rebuttal evidence with respect to the timing explanation did not purport to contradict Mr. Cathcart's evidence that there was an issue in the last half of 1999 with respect to the availability of Michelin tires in an 80 aspect ratio size. Nor did it directly contradict his evidence that in the last quarter of 1999 there were labour issues which prevented Sears from receiving a promotional shipment. Rather, the Commissioner sought to adduce evidence with respect to the frequency with which RoadHandler T Plus and Weatherwise tires were on sale in the first two quarters of 1999 in order to attack Mr. Cathcart's conclusion that, in the last half of 1999, those tires were offered at sale prices for more than 50 per cent of the time because of the 80 aspect ratio size issue and the labour issues.

[182] With respect to the length of time tires were offered at sale prices, it is an essential element of the Commissioner's case to establish that Sears did not offer the Tires at the regular single unit price in good faith for substantial period of time recently before or immediately after making the representations in issue. The parties substantially agreed about the volume of tires sold by Sears both in the six months preceding the representations and in the 12 months preceding the representations. As part of her case the Commissioner adduced evidence (see for example Exhibits A-97 and CA98 - 102) with respect to the period of time each relevant tire was on sale.

[183] The evidence which the Commissioner wished to adduce in rebuttal was described by counsel for the Commissioner as an analysis of that data. Counsel further advised that there was "admittedly some overlap between what is on the record" and the proposed evidence, but stated that there "is added value [in the rebuttal evidence] in the sense that it explains and articulates in greater detail, significantly greater detail, what is, in a sense, beneath the documents that are now [in evidence]". Counsel for the Commissioner also noted that more evidence had not been adduced by the Commissioner in chief because of the agreement between the parties as to the volume of tires sold and the times the Tires were on promotion.

[184] In my view, the nature of the evidence which the Commissioner proposed to call to rebut the timing explanation is the type of evidence which should not be permitted as rebuttal evidence. When calling evidence in chief, the Commissioner was obliged to exhaust her evidence with respect to the length of time that the Tires were offered at sale prices. She ought not split her case by relying on some evidence with respect to when the Tires were on sale and closing her case, and then after Sears adduces evidence, seek to introduce further evidence confirming the time the Tires were offered for sale at sale prices.

[185] To the extent that there is, or may be, a discretion to allow confirmatory evidence in rebuttal, there is one significant factor which militates against the exercise of such discretion. That factor is the failure of the Commissioner to cross-examine Mr. Cathcart upon the evidence which the Commissioner sought to rebut. If the Commissioner sought to contradict Mr. Cathcart's testimony, fairness required that he be cross-examined on his testimony so that he could provide any available explanation.

(vii) Proposed rebuttal of the third week of May advertising and promotions testimony

[186] The representations at issue in this application were made in November and December of 1999. Whether two lines of tires were promoted as being on sale only in Alberta and British Columbia in the third week of May of 1999 is relevant to the issue of the appropriate geographic market. As noted below, the Commissioner asserts that Sears marketed its tires nationally, while Sears asserts that it marketed tires in local, geographic markets.

[187] In its pleading, Sears asserts that:

> 56. Sears Automotive distributed various advertising and promotional material to its customers with respect to the supply of the Tires in the local geographic market areas in which Sears Automotive Retail Centres competed during the Relevant Period.
>
> 57. Generally, there were no regional variations in the advertisements that Sears Automotive disseminated in both national and local newspapers across Canada during the Relevant Period with respect to the Tires.
>
> [...]
>
> 59. Sears Automotive offered the Tires for sale at the same prices in each specific market area in which a Retail Automotive Centre competed.

[188] I am satisfied that, on the state of its pleading where Sears admitted that generally there were no regional variations in its advertisements, it was not incumbent upon the Commissioner to lead evidence as part of her own case with respect to the advertisement and promotion of two specific lines of tires in the third week of May, 1999. Further, the Commissioner argued, and Sears did not dispute, that there was nothing in the will-say statement of Mr. Cathcart to suggest that the Commissioner ought to have reasonably anticipated that the advertising and promotion of two lines of tires in the third week of May would be disputatious. Thus, subject to one concern addressed in the next paragraph, I was satisfied that rebuttal evidence ought to be received on this issue in order to ensure that, at the end of the hearing, each party would have the same opportunity to hear and respond to the full case of the other.

[189] The one remaining concern arose from the failure of the Commissioner to cross-examine Mr. Cathcart upon his evidence that the two specific tire lines were only advertised on sale in

Alberta and British Columbia and that different promotions were offered during that week. This concern arose because the rule in *Browne v. Dunn* (1893), 6 R 67 at pages 70-71 requires that where a party intends to contradict an opponent's witness by presenting contradictory evidence, such evidence should be put to the witness. It is unfair to a witness for a court or tribunal to receive evidence that casts doubt on his or her veracity when the witness has not been given an opportunity to deal with the contradictory evidence and offer any explanation. Requiring that a witness be challenged with contradictory evidence also assists the trier of fact in the process of weighing the evidence.

[190] I have no doubt that the Commissioner ought to have put the newspaper proofs, pre-prints and flyers she sought leave to adduce as rebuttal evidence to Mr. Cathcart when he was cross-examined.

[191] Notwithstanding, the failure to comply with the rule in *Browne v. Dunn* is not necessarily determinative of the right to tender contradictory evidence. The extent and manner to which the rule is applied is to be determined by the trier of fact in light of all of the circumstances. See, for example, *Palmer v. R.*, [1980] 1 S.C.R. 759 at pp. 781-72.

[192] In the present case, the circumstances which I considered to be significant with respect to this rebuttal evidence are the nature of the rebuttal evidence (Sears' own advertising material) and the fact that the documents were disclosed in both parties' disclosure statements. In my view allowing Sears' own advertising documents, previously disclosed in this proceeding, to be tendered would not be prejudicial to Sears, would clarify testimony which was somewhat unclear, and would be in the interests of justice.

[193] For these reasons, the Commissioner was permitted to introduce into evidence the newspaper proofs, pre-prints and flyers relating to the third week of May, 1999.

VII. ANALYSIS OF THE ISSUES

[194] As discussed above, subsection 74.01(3) of the Act specifies two factors to be considered when applying the volume and the time tests. Therefore, before considering whether Sears' regular prices for the Tires were offered in good faith as required by the time test, one must consider the nature of the product and the relevant geographic market.

VIII. THE NATURE OF THE PRODUCT

[195] The Commissioner argues that the Tires have certain characteristics that are relevant to the analysis under subsection 74.01(3). Those characteristics are said to be:

i) Almost all tires are sold in multiples.

ii) Tire sales are fairly stable over time.

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

iv) Consumers have a limited ability to evaluate the intrinsic qualities of tires.

v) Consumers engage in a passive search over time for tires.

[196] Each factor will be considered in turn.

(i) How tires are sold

[197] Tires are complementary goods in the sense that, for passenger cars, one tire must be used with three others. The following, in my view uncontroversial, facts flow from this:

- Tires are typically purchased in pairs, either one pair or two pairs at a time.
  Mr. DesRosiers expert report, paragraph 13
  Mr. Gauthier expert report, paragraph 38

- Survey data showed that in 1999, 89% of consumers purchased either two or four tires at the same time.

  Mr. DesRosiers expert report, paragraph 13

- Within the tire industry, at most, between 5% and 10% of tires are sold singly.

  Mr. Gauthier expert report, paragraph 38

- In 1999, Sears knew that it would sell between 5% and 10% of the Tires as single units.

  Mr. Cathcart, volume 14 at page 2486

- Consumers purchase a single tire for reasons that include tire failure (due to blow out, road hazard or defect) and the replacement of a space saver (or dummy) spare tire.

  Mr. DesRosiers expert report, paragraph 15
  Mr. McKenna, volume 19 page 3055
  Mr. Merkley, volume 10 page 1713

- Consumers who purchase single tires are typically constrained to purchase a model of tire that matches the tire which is on the same axle because, for safe handling, it is important to maintain the same traction capability on the axle.
  Dr. Lichtenstein expert report, paragraph 17
  Mr. Gauthier expert report, paragraph 38

- Where a tire is to be replaced due to a blow out or other damage, there may be a sense of urgency about replacing the tire.
  Mr. McKenna, volume 19, page 3055
  Dr. Lichtenstein expert report, paragraph 17.

(ii) Are tire sales stable over time?

[198] Dr. Lichtenstein testified that:

- by their nature, sales of "all-season" tires (such as those at issue) are less sensitive to seasonal variation.
  expert report paragraph 21

- tires are not a product category which people typically buy in advance to stockpile.
  expert report paragraphs 18 and 19

- while a sale price may pull a consumer into the market sooner than they would otherwise enter the market, a sale price will not lead to increased tire consumption.
  expert report paragraphs 18 and 19.

[199] This evidence was essentially unchallenged and I accept it.

[200] At the same time, as Dr. Lichtenstein acknowledged, there is an increase in tire sales in the Spring and Fall seasons. Mr. McKenna described this as a moderate increase in March, April and May, and a more dramatic shift in October and November.

[201] Mr. Winter also described a distinctive seasonal pattern based upon his analysis of Sears' retail daily tire sales data and from an analysis of a monthly retail trade survey conducted by Statistics Canada. It is important to note, however, that Mr. Winter's analysis of Sears' daily tire sales data included data with respect to the sale of winter tires, and that the Statistics Canada survey was based upon sales of tires, batteries, parts and accessories. Mr. Winter agreed that the sale of winter tires is more seasonal and he did not know if batteries exhibit a seasonal selling pattern. In consequence, while I accept Mr. Winter's evidence generally that tire sales increase in the Spring and Fall, I am concerned that his conclusion as to the magnitude of the fluctuation is flawed because it included data related to winter tires and non-tire products.

[202] On the whole, from all of this, I find that the sales of all-season tires are relatively stable

and predictable, with some predictable seasonal pattern.

(iii) Do consumers spend much time searching for tires or evaluating alternate products?

[203] In asserting that consumers do not spend much time searching for tires or evaluating alternatives, the Commissioner relies upon the evidence of Dr. Lichtenstein. Dr. Lichtenstein testified that consumers spend different amounts of time and effort searching for products, considering brand alternatives and comparing prices, depending on the nature of the item to be purchased. He said that items described as "convenience goods" are found at one end of a continuum and their purchases involve relatively little investigation. The purchase of "specialty goods", which are found at the other end of the continuum, involves a great deal of investigation. He describes tires as "shopping goods" and says that they fall at the mid-point of the continuum. This means, in his opinion, that many consumers of "shopping goods" have a pre-disposition for low levels of search and effort which means that a large number of consumers are not vigilant shoppers even when the shopping goods are expensive.

[204] Sears rejects this opinion and asserts that the best evidence on this point is that of Mr. DesRosiers and Dr. Deal. In Mr. DesRosiers' opinion, there is a significant opportunity for consumers to shop around for tire replacements. From August 27, 2003 to September 3, 2003, Dr. Deal surveyed Sears' customers who bought new replacement tires from Sears in 1999 in order to: survey their behaviour when buying tires in 1999 from Sears and when buying tires in general; determine their attitude toward purchasing tires; and, assess their perception of value of the 1999 tire purchases, their satisfaction with their purchases and their intention to consider Sears for future tire purchases. Dr. Deal's survey found that 57% of survey respondents said that they compared tire prices prior to purchasing their tires at Sears.

[205] I do not find Mr. DesRosiers' evidence to be of assistance on this point because the research he relied upon did not examine whether consumers actually exercised any opportunity available to them to shop around.

[206] When I compare the evidence of Drs. Lichtenstein and Deal, I am not satisfied that their evidence is that divergent. Dr. Lichtenstein does not quantify the proportion of consumers who, in his view, engage in a low level of search effort for goods such as tires. Dr. Deal's study would suggest that 42% of Sears' customers did not compare tire prices prior to buying their tires from Sears.

[207] Dr. Deal's study results must, in my view, be approached with some caution for the following reasons. At the time Dr. Deal conducted his survey and swore his first expert affidavit, he believed that the persons surveyed were selected from among all the persons who bought the Tires in 1999. Put another way, the target population intended to be surveyed was consumers from all 67 Sears Retail Automotive Centres and Dr. Deal assumed that he had received data from all or almost all of the centres. By "all or almost all" of the centres, Dr. Deal

believed he had received data from 90 to 95% of the Sears stores that sold the Tires. Dr. Deal later became aware that he had only received data from the 28 stores that kept electronic records. Thus, the survey was not based upon a random probability sample of purchasers from all 67 Retail Automotive Centres.

[208] Dr. Deal agreed that results based upon non-probability sampling were less generalizable to the parent population but observed that sometimes one does obtain an accurate representation of the target population even when one does not abide by the strict rules of statistical inference and takes a non-random sample.

[209] In the present case, Dr. Deal did not undertake a formal analysis to determine whether the customers from the 28 stores were similar to or different from the customers of the other 39 stores (although such an analysis could have been performed). In his view, based upon a large number of other surveys he has done, there would not likely be significant differences between the customers. Thus, while, pursuant to principles of statistics, his survey would have to be limited to be representative of Sears' customers who bought tires in 1999 from the 28 stores for which he received records, in Dr. Deal's view, the findings between the 28 stores and the other 39 stores would not be significantly different.

[210] Obviously, the fact that the data provided to Dr. Deal emanated from only 28 of the 67 stores (and not from all or almost all of the stores) impairs the ability of Dr. Deal to scientifically generalize the survey results. I accept, however, his general expertise to provide an opinion as to whether it was more or less likely that the survey results would have been different had consumers from all, or almost all, of the Sears stores that sold the Tires been included as part of the target sample.

[211] Thus, while I approach Dr. Deal's survey results with caution, and am prepared to accept that the overall accuracy of the survey's findings may not be accurate within plus or minus four percentage points in 19 out of 20 samples, I do generally accept Dr. Deal's conclusions.

[212] I am therefore satisfied by the evidence of Drs. Lichtenstein and Deal that a very significant percentage of consumers, in the order of 42% (plus or minus at least 4%), do not spend time searching for tires, considering alternatives, or comparing prices from a variety of different stores.

(iv) Do consumers have a limited ability to evaluate the intrinsic qualities of tires?

[213] The intrinsic attributes of tires are their physical attributes such as tread pattern and tire construction. It was Dr. Lichtenstein's opinion that most consumers do not have the ability to evaluate the quality of tires based on their intrinsic attributes. His opinion was based upon his experience with consumers in their evaluation of attributes for many categories of infrequently purchased shopping goods. He believed that he could reasonably generalize that experience to tires. His opinion was also supported, in his view, by reference to the evidence of both

Mr. Cathcart (given during his examination conducted under section 12 of the Act) and Mr. McMahon (given in his affidavit filed pursuant to section 11 of the Act).

[214] Mr. McMahon explained in his affidavit how Sears set its prices for its private label and flag brand tires. Flag brand tires are tires made by a manufacturer whose name appears on the sidewall of the tire (for example, the BF Goodrich Plus). A private label tire does not show the name of the manufacturer, but only shows the trade name owned by the retailer (for example, Silverguard Ultra IV and Response RST Touring). A tire is dual branded when it bears both the name of the manufacturer and the retailer's private name (for example, Michelin Weatherwise and Michelin RoadHandler T Plus). In the context of describing how private label prices were set, Mr. McMahon swore that:

> 251. For example, Sears Automotive compared its "BF Goodrich Plus" Relevant Product with **[CONFIDENTIAL]** "**[CONFIDENTIAL]**" tire. The BF Goodrich Plus tire was superior to the **[CONFIDENTIAL]** tire, however, consumers tended not to perceive the inherent value of the BF Goodrich Plus tire when Sears Automotive's opening price point was more than **[CONFIDENTIAL]** for the inferior **[CONFIDENTIAL]** tire. As a result, Sears Automotive set the price for its BF Goodrich tire in such a manner that consumers would compare the value of that tire against the value of **[CONFIDENTIAL]** tire.

[215] During Mr. Cathcart's examination, he confirmed that what had happened with the BF Goodrich Plus was that, even though Sears perceived, and he believed, the tire to be a superior tire to the comparable Canadian Tire offering, consumers were unable to perceive the qualities that justified the greater price for the superior tire.

[216] Mr. Cathcart also diminished the importance of needing to refresh Sears' tire product line, stating that people would not stop shopping because Sears was selling the same lines of tires. In Mr. Cathcart's words, "In tires, it – – you know, they are black and they are round, and there is not a lot of exciting tires". This is consistent with the view that consumers have a limited ability to evaluate tire's intrinsic qualities.

[217] In my view, Sears did not seriously impeach Dr. Lichtenstein's opinion as to the ability of consumers to evaluate tire quality for money based on the intrinsic qualities of the tire. Supported as it was by the evidence of Messrs. McMahon and Cathcart where they referred to Sears' own experience that consumers were unable to appreciate the intrinsic qualities of a specific tire and therefore compare true value for money, I accept Dr. Lichtenstein's opinion that consumers have a limited ability to evaluate the intrinsic attributes of tires.

[218] Before leaving this point, I also note that Sears tendered as an exhibit its Fall 2000 Automotive Review. When describing Sears' private label or brand structure, the Review described the assortment as "A quality private Brand structure that is totally Sears, allowing little comparison with competitor product". For this to be true, Sears must have been of the view that consumers lack the ability to assess the intrinsic qualities of non-identical tires.

(v) Do consumers engage in a passive search over time for tires?

[219] Dr. Lichtenstein opined that tires are usually replaced only when a consumer's existing tires become worn so that, except for the case of the purchase of a single tire, the timing of new tire purchases occurs on a continuum based on when the benefit of new tires exceeds the cost of obtaining them. Dr. Lichtenstein further opined that as consumers notice that their tires are becoming worn, they would likely go into a passive search mode during which they more readily perceive tire advertisements and are on the lookout for a good deal on tires.

[220] This opinion was not challenged and I accept it.

IX. RELEVANT GEOGRAPHIC MARKET

[221] Subsection 74.01(3) requires the Tribunal to have regard to the relevant geographic market when applying the time and volume tests. While the Commissioner asserts that the relevant geographic market for assessing the representation is Canada, Sears argues that, in the retail tire business, competition occurs at the local level so that the geographic market should be defined on no more than a regional basis.

[222] In support of this argument, Sears relies upon the evidence of a number of witnesses that, in 1999, the Canadian after tire market was highly competitive, with various channels of distribution, and the competitive nature of the after tire market varied across the country. Sears also relies upon the expert opinion of Professor Trebilcock to the effect that markets are more appropriately determined by considering the alternatives available to consumers, or by adopting a demand-side perspective. By asking what range of choices any given consumer would consider he or she had available to them, Professor Trebilcock concluded that the relevant geographic market for tires is a local, regional market. The analysis that led to this conclusion was based upon: a review of regional newspaper advertising that showed that the list of tire retailers is very different from one city to the next; a review of yellow pages listings for tire retailers in different regions which showed that retailers differed radically from one market to another; the DesRosiers' tire market study which showed that independent tire retailers are the most common source of tires and those retailers varied dramatically from one local market to the next; and information from Bridgestone/Firestone and Michelin that shows that the top dealers to vary significantly from one region to the next. Thus, the question of "where can I go to buy tires" is answered differently from one local market to the next.

[223] In considering the interpretation to be given to the term "relevant geographic market", I begin from the premise that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21).

[224] I have previously found, at paragraph 93, that the objectives of subsection 74.01(3) are:

to protect consumers from deceptive OSP representations; to protect businesses from the anti-competitive effects of such misrepresentations; and to protect competition from the anti-competitive effects and inefficiencies that result from such misrepresentations. The provision is designed to effect those objectives on the basis that, if acting in good faith, meeting the time or volume test will bring retailer practices in line with consumer expectations that an advertised OSP would relate to the seller's own ordinary selling price. The time and volume tests are to be applied having regard to the relevant geographic market.

[225] In light of the objectives of the provision, it is relevant to look at where Sears marketed the Tires and how Sears marketed the Tires in that geographic area so as to inform the view of whether an advertised OSP was really Sears' ordinary selling price. Because this is a misleading advertising case in which it is Sears' conduct that is at issue, I do not find, with respect, that Professor Trebilcock's traditional competition law approach to the definition of geographic market is relevant.

[226] In the traditional competition law context, geographic markets are defined as part of a determination about whether there has been a substantial lessening of competition. Dr. Trebilcock agreed, on cross-examination, that the concept of substantial lessening of competition is not relevant to the assessment of whether a representation is misleading.

[227] Turning to Sears' own conduct, I find the following to be relevant to the determination of the relevant geographic market:

- Sears' regular and promotional prices were set on a national basis without regional variation;

- Sears' internal documents, particularly its Spring and Fall Automotive Reviews, contained no discussion relating to local markets. These reviews were produced twice a year in order to present Sears' marketing strategy and tire product line to Sears' Chief Executive Officer and other executive officers;

- Sears did not produce or distribute separate marketing and promotional material for each region (with the exception of material relating to snow tires);

- he representations in issue were contained in flyers that were distributed nationally, without regional variation;

- Sears published advertisements in newspapers and there was no regional variation in the advertisements, except with respect to snow tires. The advertisements were distributed nationally through different newspapers;

- Sears tracked its pre-print distribution rates on a national basis; it could not track pre-prints on a regional basis;

- Sears determined what tires to offer for sale in a Sears' pre-print based upon factors which included "the current market trends and consumer preferences in

  Canada with respect to the sale of tires" [underlining added];

- Mr. Cathcart created "checkerboards" to, among other things, monitor the frequency with which tires were on promotion. Those checkerboards tracked sales volumes and promotional periods on a national basis only.

[228] In light of that evidence as to how Sears priced and marketed the Tires, and, in particular, that the regular prices for the Tires were set and advertised on a national basis, I find that it is most appropriate to consider Sears' compliance with the time test in the context of a geographic market that is Canada.

[229] This was also the conclusion reached by Drs. Lichtenstein and Moorthy.

[230] Having considered the nature of the product and the relevant geographic market, I turn to consider whether Sears' regular prices for the Tires were offered in good faith as required by the time test.

X. GOOD FAITH AS REQUIRED BY THE TIME TEST

[231] The Commissioner observes that the Act does not define "good faith", there are no other provisions in the Act that use the phrase, and there is no Canadian jurisprudence that has considered the concept of "good faith" in the context of OSP representations. There is, however, Canadian jurisprudence, which the Commissioner relies upon, which has considered the meaning of "good faith" in other legislative contexts.

(i) The subjective nature of "good faith"

[232] In *Dorman Timber Ltd. v. British Columbia* (1997), 152 D.L.R. (4th) 271, the British Columbia Court of Appeal considered whether a Crown employee was exempt from civil liability by virtue of legislation which exempted liability "for anything done or omitted to be done by a person acting reasonably and in good faith" while discharging certain responsibilities. The British Columbia Court of Appeal noted that the leading Supreme Court of Canada authority was *Chaput v. Romain*, [1955] S.C.R. 834 where the Supreme Court considered a provision that immunized police officers from liability where the officer exceeds his powers or jurisdiction but acts "in good faith in the execution of his duty". Mr. Justice Taschereau defined "good faith" to be "a state of mind consisting of the false belief that one's actions are in accordance with the law". Six judges of the Court adopted this definition. Mr. Justice Kellock, with Mr. Justice Rand concurring, wrote at page 856 that:

> What is required in order to bring a defendant within the terms of such a statute as this is a bona fide belief in the existence of a state of facts which, had they existed, would have justified him in acting as he did.

[233] Having reviewed this jurisprudence, the British Columbia Court of Appeal concluded, at paragraph 69, that:

> 69 Kellock J.'s formulation clearly tends towards a subjective understanding of honest belief, but Taschereau J.'s formulation removes all doubt. There is good faith when there is "a state of mind" that the acts are authorized. Kellock J.'s reasons give content to what this "state of mind" is: a "belief in the existence of a state of facts which, had they existed, would have justified him in acting as he did." As was noted in Hermann, the reasonableness of the belief is a factor to consider in determining whether the belief was honestly held, but reasonableness is not the issue.

[234] To similar effect is the recent decision of the Saskatchewan Court of Queen's Bench in *Nelson v. Saskatchewan* (2003), 235 Sask. R. 250 at paragraphs 102-109.

[235] The principle that good faith is inherently subjective is consistent with its dictionary definition. Blacks Law Dictionary, 7th edition (St. Paul, Minn.: West Pub. Co., 1979) defines good faith as follows:

> **good faith,** *n.* A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage. - Also termed *bona fides.* - **good-faith,** *adj.* Cf. BAD FAITH.

[236] A subjective view of good faith is also consistent with American jurisprudence that has considered legislative provisions similar to subsection 74.01(3) of the Act. In *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 76 F. Supp. 2d 868 (N.D. Ill. 1999) the U.S. District Court had before it a regulatory provision that provided:

> It is an unfair or deceptive act for a seller to compare current price with its former (regular) price for any product or service, [...] unless one of the following criteria is met:
>
> > (a) the former (regular) price is equal to or below the price(s) at which the seller made a substantial number of sales of such products in the recent regular course of its business; or
> >
> > (b) the former (regular) price is equal to or below the price(s) at which the seller offered the product for a reasonably substantial period of time in the recent regular course of its business, openly and actively and in good faith, with an intent to sell the product at that price(s). [underlining added]

[237] The Court found that the defendant Finlay did not, in good faith, intend to sell the relevant products at the regular price because:

> Finlay made little if any sales of the items at regular price over the course of several years at its Rockford stores. Finlay was obviously not concerned with the lack of sales at regular price, and in

> fact, intentionally chose not to monitor information of the number of gold jewelry items sold on a given day and at what price. Finlay calculates the regular and sale prices of its gold jewelry simultaneously with the objective that when an item is sold at a 50% discount it will yield the desired gross margin. Finlay monitors only whether a store is meeting its gross margin goal.

[238] Implicit in that finding is that the existence of a good faith intent to sell product is determined subjectively.

[239] I conclude therefore that good faith is to be determined on a subjective basis. In this case, the question to be asked is whether Sears truly believed that its regular prices were genuine and *bona fide* prices, set with the expectation that the market would validate those regular prices. As noted by the Court in *Dorman*, *supra*, the reasonableness of a belief is a factor to be considered in determining whether a belief is honestly held. I therefore also accept that other external, objective factors such as whether the reference price was comparable to prices offered by other competitors, and whether sales occurred at the reference price, may provide evidence that is relevant to assessing whether Sears truly believed its regular prices were genuine and *bona fide*.

[240] I believe this conclusion to be consistent with the description found in the Commissioner's Guidelines concerning the assessment of good faith in the context of the time test.

[241] I also understand Sears generally to accept that good faith is subjective. In oral argument, counsel for Sears observed that:

> The bottom line is that the Competition Bureau's Guidelines, the Commissioner's Guidelines, tell us that the analysis of good faith is going to be broadly based and will have regard for market conditions, not only those things perhaps, but those things will certainly be part of the mix. And the reason for that, in my submission, is - - the reason for that approach, I think, is obvious. <u>If there is no direct evidence of a subjective belief or ambivalent evidence of a subjective belief, or unclear evidence of a subjective belief, the Court will obviously refer to objective factors, or extrinsic factors which constitute evidence or can constitute evidence of the reasonableness of a subjective belief.</u> [volume 30, page 4811 line 23 to page 4812 line 10, underlining added]

[242] Counsel for Sears framed the question to be determined as follows:

> The only issue, in our submission, for Your Honour to decide is whether Sears reasonably expected to sell single tires at its regular single tire price and whether [it set] those prices in an intelligent manner, having regard to the regular prices of similar tires in the marketplace.

[243] However, the latter part of counsel's formulation is more objective. Shortly thereafter, counsel for Sears argued:

> In our submission, at the end of the day a good faith regular price is one which is reasonably credible and by that I mean looked at through the eyes of a reasonable person, is

credible given market conditions and is recognized as such by the market. And we submit that the Sears regular price clearly meets this definition.

[244] Sears cited no jurisprudence relevant to determining the nature of good faith.

[245] I remain satisfied, however, inspite of Sears' submissions about the reasonable person, that good faith is to be assessed on a subjective basis. I now move to consider the relevant evidence.

(ii) Sears' internal documents

[246] The Commissioner placed into evidence a number of documents provided by Sears to the Commissioner in response to a section 11 order. Documents that are particularly relevant to the assessment of good faith are:

a) Sears' competitive profiles for each of the Tires in issue; and

b) Sears' Automotive Reviews for the Spring and Fall of 1999.

[247] Section 69 of the Act provides that:

69(1) In this section, "agent of a participant" means a person who by a record admitted in evidence under this section appears to be or is otherwise proven to be an officer, agent, servant, employee or representative of a participant;

69(1) "participant" means any person against whom proceedings have been instituted under this Act and in the case of a prosecution means any accused and any person who, although not accused, is alleged in the charge or indictment to have been a co- conspirator or otherwise party or privy to the offence charged.

69(2) In any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act,

(a) anything done, said or agreed on by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been done, said or agreed on, as the case may be, with the authority of that participant;
(b) a record written or received by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been written or received, as the case may be, with the authority of that participant; and

69(1) Les définitions qui suivent s'appliquent au présent article. «agent d'un participant» Personne qui, selon un document admis en preuve en application du présent article, paraît être, ou qui, aux termes d'une preuve dont elle fait autrement l'objet, est identifiée comme étant un fonctionnaire, un agent, un préposé, un employé ou un représentant d'un participant.
69(1) «participant» Toute personne contre laquelle des procédures ont été intentées en vertu de la présente loi et, dans le cas d'une poursuite, un accusé et toute personne qui, bien que non accusée, aurait, selon les termes de l'inculpation ou de l'acte d'accusation, été l'une des parties au complot ayant donné lieu à l'infraction imputée ou aurait autrement pris part ou concouru à cette infraction.
69(2) Dans toute procédure engagée devant le Tribunal ou dans toute poursuite ou procédure engagée devant un tribunal en vertu ou en application de la présente loi :
a) toute chose accomplie, dite ou convenue par un agent d'un participant est, sauf preuve contraire, censée avoir été accomplie, dite ou convenue, selon le cas, avec l'autorisation de ce participant;

b) un document écrit ou reçu par un agent d'un participant est, sauf preuve contraire, tenu pour avoir été écrit ou reçu, selon le cas, avec l'autorisation de ce participant;

(c) a record proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is prima facie proof
(i) that the participant had knowledge of the record and its contents,
(ii) that anything recorded in or by the record as having been done, said or agreed on by any participant or by an agent of a participant was done, said or agreed on as recorded and, where anything is recorded in or by the record as having been done, said or agreed on by an agent of a participant, that it was done, said or agreed on with the authority of that participant, and
(iii) that the record, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.
[underlining added]

c) s'il est prouvé qu'un document a été en la possession d'un participant, ou dans un lieu utilisé ou occupé par un participant, ou en la possession d'un agent d'un participant, il fait foi sans autre preuve et atteste :
(i) que le participant connaissait le document et son contenu,
(ii) que toute chose inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par un participant ou par l'agent d'un participant, l'a été ainsi que le document le mentionne, et, si une chose est inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par l'agent d'un participant, qu'elle l'a été avec l'autorisation de ce participant,
(iii) que le document, s'il paraît avoir été écrit par un participant ou par l'agent d'un participant, l'a ainsi été, et, s'il paraît avoir été écrit par l'agent d'un participant, qu'il a été écrit avec l'autorisation de ce participant.
[Le souligné est de moi.]

[248] Sears concedes that all of the elements of subsection 69(2) of the Act are met but argues, correctly, that section 69 creates a limited, and rebuttable presumption to be applied to its documents and, in the case of paragraph 69(2)(*c*), the reference to *prima facie* proof speaks to proof absent credible evidence to the contrary.

[249] I accept that, as submitted by Sears, it is for the Tribunal to interpret Sears' documents and to determine what "facts" documents are evidence of and to consider whether those facts, when viewed in the context of the entire body of evidence, establish reviewable conduct. The meaning, weight and the conclusions to be drawn from any document must be assessed by the Tribunal.

[250] This means, I believe, that Sears' documents tendered in evidence are properly before the Tribunal and are *prima facie* proof that Sears said, did and agreed to the matters set out in the documents. For example, to the extent the automotive review sets out marketing strategies prepared by Mr. Cathcart and Sears' tire buyer, Mr. Keith, to be presented to Sears' chief executive officer for approval or ratification, the document is *prima facie* proof that such strategies were agreed upon to be presented to Sears' chief executive officer and that the Spring and Fall 1999 automotive reviews set out Sears' assessment of its significant competition and its responsive marketing strategy.

[251] To further illustrate, the Commissioner relies upon the buying plans prepared by the late Stan Keith, Sears' tire buyer, for the relevant period. The Commissioner argues that the year 2000 buying plans, created on June 19, 2000, and based on 1999 data for the Tires, did not forecast any sales at Sears' regular prices.

[252] It is true that the documents appear to be premised on the assumption that (based upon 1999 sales data) 10% of the Tires in each tire line would be sold at the 2For price and 90% would be sold on promotion. However, the Tribunal received credible evidence from Mr. McKenna that touched upon the interpretation to be given to the buying plans.

[253] Mr. McKenna identified "R & P Reports" which reported upon the regular and promotional sales of each line of a tire by month for 1999. The documents were tendered and received as exhibit CR-133 without objection. Mr. McKenna advised that he would receive this type of report on a monthly basis, as would Mr. Keith. Reviewing exhibit CR-133, Mr. McKenna testified that the breakdown between regular sales and 2For sales on the one hand, and promotional sales on the other, was as follows:

Tire Line	**Regular and 2For Sales**	**Promotional Sales**
BF Goodrich Plus	20-25%	75-80%
Michelin RoadHandler T Plus	25%	75%

The R & P Reports (to the extent they are wholly legible) reflect the following percentages for the remaining three tire lines:

Tire Line	**Regular and 2For Sales**	**Promotional Sales**
Michelin Weatherwise	13%	87%
Response RST Touring	20%	80%
Silverguard Ultra IV	23%	77%

[254] Turning then to the buying plans relied upon by the Commissioner, Mr. McKenna testified that he considered the buying plans with Mr. Keith in 2000 and that they were prepared in June 2000 as Mr. Keith prepared for the Fall presentation to Sears' chief executive officer. The buying plans, according to Mr. McKenna, were used to generate a conservative estimate of margin because "Stanley certainly was not one to want to position himself on being unable to deliver so he wouldn't [...] pigeon-hole himself on promising or committing to a margin that he wouldn't be able to deliver".

[255] Considering Mr. McKenna's explanation of the purpose of the buying plans, supported by the "R & P Reports" that showed the buying plans not to be based upon actual prior sales data, I am satisfied that Sears has provided credible evidence to displace any *prima facie* proof based upon the buying plans that Sears was not forecasting sales at its regular, single unit, prices.

(iii) The competitive profiles

[256] Mr. Keith was acknowledged within Sears as "the expert" with respect to the tire market in Canada and tire pricing. Mr. Cathcart acknowledged that Mr. Keith "most certainly" knew the tire market better than he did and that, arguably, Mr. Keith knew the tire market better than the manufacturer's representatives from whom he bought tires. As the tire buyer, Mr. Keith was responsible for building Sears' tire line structure and for, in the first instance, setting Sears' tire prices.

[257] One document prepared for each tire line was a "competitive profile" which compared, for each tire, Sears' pricing at the 2For, normal promotional and great item prices, with a competitive tire offering identified by Mr. Keith. No comparison was made in these competitive profiles to Sears regular prices. To illustrate, the competitive profile for the Silverguard Ultra IV compared it with Canadian Tire's Motomaster Touring LXR tire. For tire size P185/75R14, Canadian Tire's every day low price was $67.99. Sears' prices and the percentage comparisons with the competitive offering were as follows for this tire size:

Price		**Percentage price comparison to competitive tire**
Regular	$109.99	no comparison
2For	$ 72.99	107.35%
Promotional	$ 65.99	97.06%
Great Item	$ 59.99	88.23%

[258] The Commissioner argues that Mr. Keith created these competitive profiles as he built Sears' tire line structure and that they evinced Sears' competitive response to what it identified as its major competitor. Because Sears' regular, single unit, price formed no part of the competitive response, the Commissioner submits that Sears could not have in good faith believed that the market would validate its regular, single unit, prices.

[259] In response, Sears argues that the competitive profiles are contained in a document entitled "1999 Automotive Training Program" and that the program and the competitive profiles contained therein were prepared by Mr. Keith to explain to Sears' field associates Sears' tire lines and its pricing strategies. The competitive profiles were not intended to show how the regular price stood up against the broad range of retailers, but rather to show how Sears would respond to competition from both EDLP and hi-low retailers.

[260] I do not accept Sears' submission that the competitive profiles were simply training tools on the basis of this excerpt from the cross-examination of Mr. Cathcart wherein he was speaking about the competitive profiles:

> We have some comparisons where he has shown the AW+ to a Sears brand, and he would

compare. The comparison was built to inform the associates how to respond to the Canadian Tire pricing.

So he would pick a Canadian Tire tire - - he could use one of their tires - - as a compare to say we are at this price in our tire, with a far better warranty package. And this is what Canadian Tire will be offering for the tire that closely resembles our tire.

These documents were his documents that he used as a response to our field people to inform them on how to respond to the competition, be it Canadian Tire, be it dealers, whomever.

He would never reference regular price in them, because they already knew the regular prices. They would have that information.

2:30 p.m.

MR. SYME: So is it your evidence, sir, that these were prepared solely to take on training missions, these cross-Canada training missions?

MR. CATHCART: Well, they are his documents, Mr. Syme. I recall them being in this cross-country package, but Stan - - Stan would create these documents as part of his own comparer during his line structure building and he would use these documents as part of the training package.

He would take those - - he would build these documents as he would build his lines because we would have to have - - he would have to have some sort of strategy in response to what the competition is doing. Canadian Tire, by sheer volumes, was our largest competitor - -

MR. SYME: Right.

MR. CATHCART: - - so he would build them for that. He would take them on the training mission, but I can't for sure say - - no, I would say he didn't build them specifically just for that reason.

MR. SYME: He built them as a competitive analysis to position Sears pricing and Sears product opposite the comparable Canadian Tire product. I think you have just said it.

MR. CATHCART: Right. He would build it to compare our product to Canadian Tire's product, but we know the pricing - - and the pricing would reflect that.

MR. SYME: Right. And he would come to you with a proposal with respect to a tire and he would show you these profiles, wouldn't he?

MR. CATHCART: Not usually. He would just provide me with the buying plan.
[underlining added]

[261] From this, I conclude that the competitive profiles were used by Mr. Keith when building Sears' tire line structure. At the least, the competitive profiles indicate Sears' knowledge that:

i) With respect to the BF Goodrich Plus, Silverguard Ultra IV, and RST Touring 2000 (which were compared with competitive Canadian Tire offerings), the regular price was not competitive with the prices of Sears' largest competitor; and

ii) With respect to the Weatherwise and RoadHandler T Plus, the regular price was not competitive with the comparable competitive offerings selected by Mr. Keith.

[262] I also note, in passing, that the competitive profiles for the two tires manufactured by Michelin were in its possession and were produced in response to a section 11 order. The competitive profiles were produced as being documentation exchanged with Sears in relation to the development and establishment of retail prices. This, in my view, lends credence to the conclusion that the competitive profiles were strategic, competitive documents.

[263] Sears' beliefs about the nature of its competition and its competitive response are more clearly found in the Spring and Fall Automotive Reviews for 1999.

(iv) Automotive reviews

[264] The 1999 automotive reviews were prepared by Mr. Keith and Mr. Vince Power, the national business manager, for the purpose of presenting, twice yearly, Sears' strategies and product line to Sears' chief executive officer. In Mr. Cathcart's words:

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

[265] Contained in the Spring 1999 review were separate strategies for private label tires and national brand tires. Identical wording is found in the Fall 1999 review with respect to the strategies. Oral evidence confirmed that the reviews were presented to Sears' executives. There was no evidence that the strategies contained in the reviews were rejected.

[266] Sears argues that the Commissioner's reliance upon the 1999 automotive reviews is misplaced and points to Mr. Cathcart's evidence that he found more than one portion of the reviews to be confusing, and that, in places, he could not understand why Mr. Keith wrote what he did.

[267] I found such testimony to be incredible and unpersuasive when it was given, and remain unpersuaded by Mr. Cathcart's testimony as it touched on the automotive reviews for 1999. I so conclude because it is to be remembered that the automotive reviews formed part of a large and important presentation to Sears' chief executive officer (and others) about how Sears was to address the competition. In the past, some who had made presentations to the chief executive officer were summarily reassigned or let go if their presentations were found wanting. Mr. Keith was acknowledged to have a compendious knowledge of the tire market. Language contained in the Spring 1999 automotive review was repeated in the Fall 1999 automotive review. Weighing those facts against Mr. Cathcart's testimony that certain aspects of the automotive reviews were confusing or incomprehensible, I reject Mr. Cathcart's testimony. I accept, as discussed below, that the 1999 automotive reviews set out Sears' assessment of its significant competition in the tire market and Sears' responsive marketing strategies for private label tires and national brand tires.

[268] I will deal first with Sears' strategy with respect to private label tires.

(a) Private label strategy

[269] Sears' strategy was expressed to be:

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

[270] Among the tactics listed to implement this strategy was the following:

> "Index our every day pricing to **[CONFIDENTIAL]** (**[CONFIDENTIAL]** Private Brand retailer) to be equal to or within **[CONFIDENTIAL]** % of their every day low price with a better warranty package. On sale we will be lower than the equivalent tire at **[CONFIDENTIAL]**."

[271] **[CONFIDENTIAL]**, the competitive profiles built by Mr. Keith for the Silverguard Ultra IV and Response RST Touring compared each with Canadian Tire's comparable competitive offering. So too did the competitive profile for the BF Goodrich Plus. This was an entry-level tire, exclusive to Sears, that Mr. Keith compared to the Motomaster AW+. I accept, therefore, that while the BF Goodrich Plus was a flag brand tire, Sears chose internally to market it as if it were a private label tire.

[272] Mr. Cathcart admitted that Sears' "every day" strategy (**[CONFIDENTIAL]**) involved its 2For price, and not its regular price, because Sears' regular price was not competitive with Canadian Tire. Sears' 2For price was generally within 10% of Canadian Tire's pricing. Mr. Cathcart also confirmed that the "plan to sell price" referred to in the automotive review (for example at pages 1485-1488 and at page 1493) was the 2For price.

(b) National brand strategy

[273] The national brand strategy was expressed as follows:

> "To increase our market share in National Brands which represents over 50% of the Canadian replacement tire sales.
>
> To differentiate our product from our competitors which affords the opportunity to maximize our profitability."

[274] The tactics to implement this strategy included:

> "Continue to index our every day pricing to be 90 to 95% of the equivalent National Brand normal discounted price. When on sale indexed to be **[CONFIDENTIAL]** to **[CONFIDENTIAL]** % of the National Brand price. In the case of **[CONFIDENTIAL]** [**[CONFIDENTIAL]**] equivalent items we will match price".

[275] Mr. Cathcart admitted that:

- Sears' dual branded tires (including the Weatherwise and RoadHandler T Plus) were marketed under the national brand strategy;

- the competitive profiles for each of these tires reflect the national brand strategy in terms of pricing;

- Sears' regular prices were close to or lower than the relevant manufacturer's suggested list price ("MSLP");

- with respect to the competitive profile for the Weatherwise that referenced the competitive offering to be the Michelin RainForce MXA and that showed a comparison price described as "35% off list 9/1/97": Sears' regular prices for tire size P155/80R13 would be in the order of 147.92% of the comparison price; and

- the 2For price was 95.53% of the comparison price. Thus the 2For price was how Sears responded to a dealer who was selling at 35% off the MSLP.

(c) Sears' view of the pricing structure of its competitors

[276] Mr. Keith, in the automotive review, described the pricing structure of Canadian Tire and the independent tire stores as follows:

Canadian Tire:	"Value priced every day with occasional off price promos"
Tire Stores:	"Value priced off list with off price promo and gimmick promos"

[277] Sears' pricing strategy was described in the same document to be "**[CONFIDENTIAL]**".

(d) The MSLP

[278] Sears relies heavily upon the existence of MSLPs as constituting an objective, independent mechanism to verify the *bona fides* of its regular prices for the Michelin Weatherwise, Michelin RoadHandler T Plus, and the BF Goodrich Plus tire. However, on the basis of the following evidence, I find as a fact that, in 1999, MSLPs were not widely or commonly used by tire dealers as their regular selling price.

[279] First, Mr. Gauthier testified that:

- tire retailers set their own prices in the marketplace and, based on his experience, they tended to establish this price as a percentage of the MSLP;
- dealer prices so set represented a typical everyday selling price;
- tire retail selling prices in 1999 were not at the list price level;
- MSLPs were used to establish the tire dealer's acquisition price from the manufacturer and then by the dealer to set the dealer's retail price;
- in his experience, transactions did not occur at or close to MSLP.

[280] Second, Mr. King testified that:

- the MSLP would serve as the starting point, or the starting price, that independent tire retailers would use in selling tires to individual consumers;
- in 1999, dealers typically sold for 35% off list;
- that 35% discount was arrived at either because it was the dealer's offering price or because it was the finally negotiated price;
- to his knowledge, tires were not sold to consumers at MSLP.

[281] Third, Mr. Merkley testified that:

- various dealers would use the MSLP in different ways;
- in 1999 the norm, within Michelin's dealer channel, was to sell tires 30% to 35% off Michelin's list price.

[282] Fourth, as noted above, in the Spring Automotive Review Mr. Keith described the pricing strategy of "Tire Stores" to be "Value priced off list with off price promo and gimmick promotions". The competitive profile for the Weatherwise tire compared that tire with the Michelin RainForce at a price described to be "35% off list 9/1/97" and the competitive profile for the RoadHandler T Plus compared that tire with the Michelin X One at a price described to be "New List less disc 40%". Mr. Cathcart confirmed these references to "list" in the competitive profiles to be to Michelin's MSLP. I take the Spring Automotive Review to evidence Mr. Keith's knowledge or belief that tire stores generally sold tires at a percentage off the MSLP. For the two Michelin tires it would appear that Sears' pricing, to be competitive, must compete with pricing 35% and 40% off Michelin's MSLP.

[283] Professor Trebilcock's expert report sheds some light on the use of the MSLP by tire dealers as well. At paragraph 37, he notes that:

> The *Toronto Star* article also suggests that discounting off the manufacturers' suggested retail prices was common practice in tire retailing. The retailers referred to in the *Toronto Star* article discounted off manufacturers' suggested retail prices by about 30-35%.

[284] Professor Trebilcock also appends to his expert report an article dated January 17, 2000 written by Chris Collins and published in "Tire Business". The article quoted the following statement by John Goodwin, the Executive Director of the Ontario Tire Dealers Association ("OTDA"):

> Mr. Goodwin said the OTDA has a committee investigating the ads auto makers and mass merchandisers are running. Some ads claim to sell tires at 50 percent off list price, but he asks rhetorically, "Who sells at list?"

[285] In my view, the weight of the evidence leads to the conclusion that MSLPs were not commonly used by tire dealers as a selling price, and that in 1999, tire dealers typically sold national brand tires at a price in the order of 35% off the MSLP.

[286] Sears argues that Mr. King's evidence should be discounted because neither he nor his employer sold tires at the retail level so that his evidence is "anecdotal at best". Mr. Gauthier's evidence is also discounted by Sears as being "anecdotal, overly broad, unsubstantiated and [...] not credible". Sears also argues that Mr. Gauthier is not truly an independent expert and, in oral argument, took great exception to his evidence, on cross-examination, that he disagreed with Mr. Winter when Mr. Winter concluded that Canadian Tire did not dominate the marketplace. In Mr. Gauthier's view, Canadian Tire is the dominant influence in the tire market in Canada.

[287] I have previously described, generally, the background of these gentlemen in the tire industry. Mr. Gauthier has extensive experience dating since 1984 with respect to the promotion and wholesale sale of tires to tire retailers and I reject the suggestion that his testimony was partial or biased. Mr. King has two years of experience as Bridgestone's sales manager for associate brands and, since 1999, he has worked as its sales manager for Corporate Accounts and

Original Equipment. He was responsible for the sale of tires to merchandisers such as Sears, Canadian Tire and Costco. In my view, their knowledge of the use dealers make of an MSLP can not be dismissed as anecdotal. Their evidence is confirmed to a significant extent by Mr. Merkley, and by Mr. Keith's description of the manner in which tire dealers priced tires and by the use he made of the MSLP in the two competitive profiles referred to above.

[288] To the extent it was argued that Mr. Gauthier's view that Canadian Tire was the dominant influence in the tire market was not credible, I note that, at paragraph 83 of Sears' responding statement of grounds and material facts, Sears asserted that "Canadian Tire was a dominant tire retailer in Canada (enjoying approximately a twenty-two per cent share of tire sales in Canada during the Relevant Period)".

(v) Conclusion: Good faith - private label tires

[289] Did Sears truly believe that its regular price for the Silverguard Ultra IV, Response RST Touring and BF Goodrich tires were genuine and *bona fide* prices set with the expectation that the market would validate them? The following evidence touches on Sears' belief:

i) Mr. Cathcart admitted that, going into 1999, Sears would have expected that it would only sell between 5 and 10% of the Tires at their regular price. This was because between 90 to 95% of the Tires would be sold as multiples. This made the regular price irrelevant to 90 to 95% of the Tires Sears expected to sell because, when a tire was not on promotion, a purchaser would be offered, without requesting it, the 2For price.

ii) Sears viewed Canadian Tire as its main competitor in the private label segment. The competitive profiles prepared for these three tires only compared Sears' 2For, normal promotional and great item pricing to the Canadian Tire pricing. Sears' regular price was known not to be competitive with Canadian Tire and fell well outside the range of price which Sears believed to be competitive with its main competitor in the private label market.

iii) Sears' 2For prices were described as its "every day pricing" in Sears' private label strategy. The Sears regular price was not.

iv) Sears did not and could not track the number of tires it sold at the regular price.

v) With respect to the 5 to 10% of tires that Sears expected to sell singly, if the distribution of single unit tire sales was constant over time, Sears could expect to sell a percentage of single tires on promotion equal to the percentage of time the Tires were offered on promotion. For example, if a tire was on sale 25% of the time, Sears could expect 25% of the single tires to be sold at a promotional price.

For the six month period preceding the representations at issue, the following tires were offered for sale at regular single unit prices for the indicated percentage of time:

Response RST Touring	46%
Silverguard Ultra IV	60%
BF Goodrich Plus	45%

Thus, Sears could only have expected to sell the following:

Response RST Touring	between 2.3 and 4.6% at its regular price
Silverguard Ultra IV	between 3 and 6% at its regular price
BF Goodrich Plus	between 2.25 and 4.5% at its regular price.

[290] On the basis of that evidence, I find that Sears could not have truly believed that its regular prices for the Response RST Touring, Silverguard Ultra IV, and BF Goodrich Plus tires were genuine and *bona fide* prices that the market would validate.

[291] Turning to the objective factor of actual sales at their regular prices, for each of these three tires respectively, for the 12 month period preceding the representations at issue, only 0.51%, 1.21% and 2.29% of the Tires sold were sold at their regular prices.

[292] On the whole of the evidence, I find that Sears' private label tires were not offered for sale at Sears' regular prices in good faith.

(vi) Conclusion: Good faith - national brands

[293] Did Sears truly believe that the regular prices for the Michelin Weatherwise and RoadHandler T Plus were genuine *bona fide* prices set with the expectation that the market would validate them? The following is relevant evidence:

i) Again, 90 to 95% of these tires were expected to be sold as multiples and so the regular price would be expected to be irrelevant to 90 to 95% of these tires sold by Sears.

ii) I have found that, in 1999, flag brand tires were typically being sold by tire dealers at 35% off the MSLP and were not generally being sold at list price. Sears knew this, as evidenced by Mr. Keith's description of tire store pricing. Sears' competitive pricing was its 2For price which was referred to as its "every day pricing" in its national brand strategy. Sears' regular prices were greatly in excess of what it knew to be the competitive price range.

iii) Sears did not and could not track the number of tires it sold at the regular price.

iv) In the six month period preceding the representations at issue, the Weatherwise and RoadHandler T Plus tires were offered for sale at their regular prices respectively at 19% and 38% of the time. It follows that, knowing that only 5 to 10% of the Tires would be sold singly, Sears could only have expected to sell (if single tire sales were constant over time)

- between 0.95 and 1.9% of the Weatherwise tire at its regular price
- between 1.9% and 3.8% of the RoadHandler T Plus at its regular price.

[294] On the basis of that evidence, I similarly find that Sears could not have truly believed that its regular prices for the Weatherwise and RoadHandler T Plus were genuine and *bona fide* prices that the market would validate.

[295] Turning again to actual sales, in the 12 month period preceding the representations, only 1.3% and 0.82% respectively of sales by Sears of the RoadHandler T Plus and the Weatherwise tire were made at their regular price.

[296] On the whole of the evidence I find that Sears' national brand tires were not offered for sale at Sears' regular prices in good faith.

(vii) The opposing view

[297] In concluding that neither Sears' private label nor national brand tires were offered for sale at Sears' regular prices in good faith, I have had regard to the expert evidence of Professor Trebilcock, noting that he was not qualified as an expert in marketing. It was his opinion that:

> The information available on regular prices in 1999 indicates that Sears' regular prices were similar to or less than the regular prices of some [not all] of its competitors for comparable tires. At least some of Sears' regular prices were also similar to or less than manufacturers' suggested retail prices for comparable tires. Such observations are not consistent with a claim that Sears' regular prices did not make economic sense.

[298] In Professor Trebilcock's view, comparison between Sears' regular prices and those of its competitors should include Sears' regular 2For prices. This is because the 2For price was always available on all multiple sales of regular priced tires; it was not a sale price.

[299] For the following reasons, I have not found Professor Trebilcock's opinion to be of assistance.

[300] To the extent Professor Trebilcock opined that Sears' regular prices were similar to or less than the regular prices of some, not all, of its competitors, he acknowledged that limited data was available. No data was available to him for either the Response RST Touring or the

Michelin RoadHandler Plus tires. For the other three tire lines at issue, for only one tire (the BF Goodrich Plus) was Sears' regular single unit price lower than that of its competitors. For both the Michelin Weatherwise and Silverguard Ultra IV, Sears' regular single unit prices were significantly higher than its competitors' prices for comparable tires (eg. for the Weatherwise, Sears' regular price of $181.99 compared to competitive offerings of $110, $98 and $99; for the Silverguard Ultra IV, Sears' regular price of $133.99 compared with a competitive offering of $105). The reference prices quoted by Professor Trebilcock were all prices that were discounted off the MSLP by 30% or more.

[301] Professor Trebilcock acknowledged that Canadian Tire's regular prices were consistently lower than Sears' regular prices, but referred to add-ons that Sears' included in its prices. However, he did not have any information that would allow him to quantify how much consumers might be prepared to pay for those add-ons.

[302] Professor Trebilcock concluded that Sears' regular prices were genuine in that approximately 21% of all of its tire sales took place at regular prices; such calculation included sales at both Sears' regular and 2For prices. However, subsection 74.01(3) of the Act is concerned only with the reference price. In this case, the reference price was Sears' regular single unit price.

[303] With respect to the absence of consumer harm referred to by Professor Trebilcock, as noted below, consumer harm is not relevant to the consideration of the materiality of any misrepresentations and hence is not relevant to the existence of reviewable conduct.

XI. DID SEARS MEET THE FREQUENCY REQUIREMENTS OF THE TIME TEST?

[304] There are two elements contained in the time test: the goods must be offered at the alleged OSP (or a higher price) in "good faith" for "a substantial period of time recently before" the making of the representation as to price. Both elements of the test must be met.

[305] My finding that the Tires were not offered at Sears' regular single unit price in good faith is, therefore, dispositive of the time test. However, for completeness, and in the event that I am in error in my conclusion as to good faith, I will deal briefly with the frequency requirements of the time test.

[306] The parties agree, I believe, that the first step in the application of the time test is to select the time frame within which to examine Sears' conduct. Sears says that the appropriate time frame is 12 months. The Commissioner argues that the appropriate period is six months. Once the appropriate time frame is selected, the next step is to determine within that time frame whether Sears offered the Tires at their regular prices for a substantial period of time.

(i) The reference period

[307] For the following reasons, I accept the submission of the Commissioner that the appropriate reference period is six months.

[308] First, paragraph 74.01(3)(*b*) of the Act requires the good faith offering to have occurred "recently" before the representation at issue. This means that there must be, as the Commissioner argues, reasonable temporal proximity between the impugned representations and the offering of the Tires at regular prices.

[309] The word "recent" is commonly understood to mean "that has lately happened or taken place" (The Shorter Oxford English Dictionary, 3rd ed. vol. II) or "not long passed" (The Concise Oxford Dictionary, 7th ed.). A 12 month time frame would not, in my view, be in accordance with the requirement that the reference period be in reasonable temporal proximity to the making of the representation.

[310] Second, after subsection 74.01(3) of the Act came into effect, Sears' legal department circulated a memorandum dated May 11, 1999 to all Sears vice presidents which described amendments to the Act. The memorandum advised that, with respect to the time test, in general "the time period to be considered will be the six months prior to [...] the making of the representation (this time period can be shorter if the product is seasonal in nature)". Thus, Sears did not posit internally the need for a 12 month reference period. Further, Mr. McMahon confirmed that, when he applied the policy set out in the May 11, 1999 memorandum, he looked to see whether the Tires were on sale at or above the comparison price more than 50% of the time in the six month period that pre-dated the representations at issue. While Sears now argues that a 12 month reference period is more appropriate in order to capture the seasonal nature of tire sales, in my view, its own internal practice of monitoring sale frequency over a six month period belies this argument.

[311] Finally, I accept the opinion of Dr. Lichtenstein that six months is an appropriate reference period as it provides an accurate picture of Sears' OSP behaviour. In his view, the substantial period of time provision relates to the amount of time a product should be offered at an OSP such that it has the opportunity to be verified by the market as the "regular price". A six month period would provide such opportunity, in Dr. Lichtenstein's view, because:

i) there is not much seasonal variation with respect to all-season tires;

ii) to the extent there are sales increases in the Spring and the Fall, any contiguous six month period would capture some of the higher and lower periods; and

iii) there is little reason to expect month-to-month variation in the percentage of tires sold at the OSP.

[312] I do not find Dr. Lichtenstein's opinion on this point to have been impaired in cross-examination.

(ii) The frequency with which the Tires were not on promotion.

[313] Having concluded that a six month reference period is appropriate, Table 2, which follows paragraph 22 above, depicts that, for the six month period preceding the relevant representations, the Tires were offered for sale at their regular single unit price as follows:

Tire	Percentage of time offered at Regular Prices
BF Goodrich Plus	45%
RoadHandler T Plus	38%
Weatherwise RH Sport	19%
Response RST Touring	46 or 49.65%
Silverguard Ultra IV	60%

[314] With respect to the Response RST Touring tire and the dispute with respect to the percentage of time that the tire was not on promotion, Sears' planning documents (that is the checkerboard and monthly pocket planners) show that the Response RST Touring tire was offered at regular prices 49.65% of the time. However, Sears' actual sales reports show that the Response RST Touring tire was sold at sale prices for one additional week. This would reduce the time the tire was offered at its regular price to 46% of the time. Mr. McKenna was unable to explain the discrepancy in these Sears' documents. Given his testimony that if Sears sold the product at promotional prices the product was on promotion, I find the information contained in the sales reports to provide the most accurate evidence as to when the Tires were actually on sale. It follows that the Response RST Touring tire was offered at regular prices 46% of the time.

(iii) "Substantial Period of Time"

[315] In order to determine what is meant by the phrase "substantial period of time", regard must be had to the statutory context. The time test functions to assess whether a specified price actually constitutes a price at which a product was "ordinarily supplied" by the person making the representation for a "substantial period of time".

[316] In this context, it seems to me that if a product is on sale half, or more than half, of the time, it can not be said that the product has been offered at its regular price for a substantial period of time. This conclusion is consistent with the decision of the Ontario County Court in *Regina v. T. Eaton Co. Ltd.* (1973), 11 C.C.C. (2d) 74. In the context of a prosecution under paragraph 33(*C*)(1) of the *Combines Investigation Act*, the Court there observed that, if a product was on sale 50% of the time, or thereabouts, the product could not be said to be ordinarily sold for a regular, or any other price.

[317] In the present case, the following four lines of tires were on sale more than 50% of the time in the 6 month period pre-dating the relevant representations:

Tire	Percentage of time on sale
Weatherwise RH Sport	81%
RoadHandler T Plus	62%
BF Goodrich Plus	55%
Response RST Touring	54%

[318] I find, therefore, that Sears failed to offer those tires to the public at the regular price for a substantial period of time recently before making the representations.

[319] Having found that Sears did not meet the good faith requirement for all of the Tires, and did not meet the frequency requirements of the time test for four of the five tire lines, it is necessary to consider whether Sears has established that the representations were not false or misleading in a material respect.

XII. WERE THE REPRESENTATIONS FALSE OR MISLEADING IN A MATERIAL RESPECT?

[320] As an alternative to its position that it complied with the time test, Sears relies upon subsection 74.01(5) of the Act which relieves a person from liability under subsection 74.01(3) where the person establishes, in the circumstances, that a representation as to price is not false or misleading in a material respect. Subsection 74.01(5) must be read in conjunction with subsection 74.01(6) which requires that "the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect".

(i) What were the representations?

[321] Sears argues that subsection 74.01(3) deals only with a representation as to price so that the general impression conveyed by a representation must be confined to a representation as to price. I agree. This means that any aspect of the advertisements at issue not related to price, for example warranty information, is not relevant.

[322] Sears argues as well that the savings messages, or save stories, are also irrelevant because they are not representations as to price. I disagree. In my view, representations such as "save 40%" and "½ price" are properly characterized as representations as to price.

(ii) Were the representations false or misleading?

[323] Sears asserts that the representations as to price were neither false nor misleading. Therefore, it is necessary to first determine what impression the representations at issue created. This is consistent with the approach taken by the Court in *R. v. Kenitex Canada Ltd. et al.* (1980), 51 C.P.R. (2d) 103 (Ontario County Court). In *Kenitex*, the accused was charged under paragraph 36(1)(*a*) of the *Combines Investigation Act* which made it an offence to make any representation to the public that was false or misleading in a material respect. Subsection 36(4) of the *Combines Investigation Act* provided that:

36(4) In any prosecution for a violation of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading in a material respect.	36(4) Dans toute poursuite pour violation du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important il faut tenir compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

[324] Thus, the legislation considered by the Court in *Kenitex* is substantially the same as that now before the Tribunal.

[325] At page 107 of *Kenitex*, the Court considered the elements of the offence and wrote:

> In my view [...] the representation will be false or misleading in a material respect if, in the context in which it is made, it readily conveys an impression to the ordinary citizen which is, in fact, false or misleading and if that ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered.

[326] As to the concept of "ordinary citizen", the Court wrote:

> The ordinary citizen is, by definition, a fictional cross-section of the public lacking any relevant expertise, but as well possessing the ordinary reason and intelligence and common sense that such a cross-section of the public would inevitably reveal. In the last analysis, therefore, it is for the trier of fact to determine what impression any such representation would create, not by applying his own reason, intelligence and common sense, but rather by defining the impression that that fictional ordinary citizen would gain from hearing or reading the representation.

[327] Turning to the representations in this case, I find that the general impression conveyed by them to an ordinary citizen is that consumers who purchased the Tires at Sears' promotional prices would realize substantial savings over what they would have paid for the Tires had they not been on promotion. This impression is consistent with the literal meaning conveyed by the representations. For example, turning to the advertisement set out at paragraph 17 above, the advertisement stated that one could "save 40%" on Michelin RoadHandler T Plus tires. For the smallest size shown, Sears' regular price of $153.99 was compared with the promotional price of $91.99. For the largest size, the regular price of $219.99 was compared with the promotional price of $131.99.

[328] As to whether that impression was false or misleading, it is necessary to remember that:

- when the Tires were not on promotion, Sears' 2For price was always available if more than one tire was purchased;

- Sears' 2For price was always substantially lower than the regular (single unit) price;

- 90% to 95% of tires were sold in multiples; and

- Sears' regular (single unit) price would never have applied to sales of multiple tires.

[329] It follows, as conceded by Mr. Cathcart in cross-examination, that for tires purchased in multiples at Sears' promotional events, the savings realized by customers would not have been the difference between Sears' regular price and the promotional price. Rather, the savings would be the difference between the 2For price and the promotional price.

[330] Sears bears the onus under subsection 74.01(5) of the Act. It says that its representations as to price were not false or misleading because:

1. The representations accurately set out Sears' prices for a single unit of the Tires, and those were prices at which genuine sales took place.

2. The representations as to price were available to, and benefited, customers who purchased a single tire.

3. Averaged over the five Tires, 11% of purchasers would buy only one tire.

4. Any tire consumer to whom the representations were directed might choose to buy a single tire, so that the representations were true for 100% of the intended readers of the representations.

5. The representations as to price reflected prices that Sears used as a basis for calculating warranty adjustments and refunds.

[331] All of these points are literally correct. However, the general impression conveyed by the representations is that consumers (not just 11% of consumers) who purchased the Tires at Sears at promotional prices would realize substantial savings. For 89% of consumers and 90 to 95% of the Tires sold, this was not correct. I find, therefore, that representations as to price contained in both the regular/promotional price comparison and in the save stories were false or misleading.

[332] Before leaving this point, I note that a similar conclusion was reached in somewhat similar circumstances in *R. v. Simpsons Ltd.* (1988), 25 C.P.R. (3d) 34 (Ontario District Court).

There, Simpsons caused a number of "mini casino" cards to be printed and distributed. The cards advertised "you could save 10% to 25%" on practically everything in the store, and that the possible discounts were 10%, 15%, 20% or 25%. The mini casino cards each contained four tabs, under each tab was printed a symbol. When a tab was lifted, the symbol was revealed. There were four symbols, corresponding to each of the four percentage discounts available. Each card instructed a customer to lift one tab only in order to reveal the discount level available to them. Of the cards printed, 90% had the 10% discount symbol printed under all four tabs. The remaining 10% of the cards each contained all four symbols. On those facts, the Court found that the representation "you could save 10% to 25% on practically everything in the store" was manifestly false and misleading. The Court wrote at pages 37-38:

> The cards had been printed in such a way as to ensure that 9 out of 10 of the recipients of the cards had no chance to obtain other than the minimum discount of 10%. Each card displayed all four discount symbols, and it is obvious from the get-up of the card that it was designed to leave the impression that a different symbol lay concealed under each of the four tabs. As a consequence of the design of the promotion, the representation that "you could save 10% to 25%" was false as to nine tenths of the cards. The recipients of those cards were misled and intentionally so.
>
> To make out the offence, it would be sufficient if a false or misleading representation had been made to one member of the public. Here, on the acknowledged facts, the misleading representation was made to 927,000 people, or 90% of the recipients. Of those, most were among the 750,000 Simpsons credit card holders who were the addressees of the mailing.
>
> The fact that the representation was true as to one-tenth of the recipients of the randomly distributed cards does nothing more than reduce the magnitude of the deception.

(iii) Were the representations as to price false or misleading in a material respect?

[333] Prior jurisprudence in the context of criminal prosecutions under the Act or its predecessor has interpreted what is meant by "misleading in a material respect". As noted above, in *Kenitex*, the Court found that a materially false or misleading impression would be conveyed if the "ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered."

[334] In *R. v. Tege Investments Ltd.* (1978), 51 C.P.R. (2d) 216 (Alberta Provincial Court), the Court applied the dictionary meaning of "material" which was "much consequence or important or pertinent or germane or essential to the matter". The Court noted that it was not necessary to establish that any person was actually mislead by a representation. It was sufficient to establish that an advertisement was published for public view and that it was untrue or misleading in a material respect.

[335] Finally, in *R. v. Kellys on Seymour Ltd.* (1969), 60 C.P.R. 24 (Vancouver Magistrate's

Court, B.C.), the Court concluded that the word "material" refers to the degree to which the purchaser is affected by the words used in coming to a conclusion as to whether or not he should make a purchase. Whether or not a consumer in fact obtained a bargain and may have paid less than he would ordinarily have paid was not the relevant criteria.

[336] The question to be determined, therefore, is whether the impression created by the price comparisons and/or the save stories would constitute a material influence in the mind of a consumer. Put another way, I accept the submission of Sears that the relevant inquiry is not whether the type of representation is a material one, but whether the element of misrepresentation is material.

[337] I believe that the following are relevant considerations.

[338] First, the magnitude of the exaggerated savings. Returning to the Michelin RoadHandler T Plus advertisement set out at paragraph 17 above, for the smallest tire size advertised, an ordinary citizen considering the purchase of four tires would reasonably believe, in my view, their savings to be $248.00 or ($153.99 - $91.99) x 4. In fact, the 2For price for each tire was $94.99. Accordingly, the actual savings would be $12.00 or ($94.99 - $91.99) x 4. In this example, the savings were substantially exaggerated. Because Sears' 2For price was always substantially lower than its regular price, it follows that the savings were similarly substantially overstated in every OSP representation made concerning the Tires.

[339] In my view, that magnitude of advertised savings would be a material influence or consideration upon a consumer.

[340] Second, I look to Sears' experience when it eliminated its 2For pricing on January 1, 2001 and lowered its regular prices for tires. Sears' Great Item and normal promotional prices remained unchanged. Following the reduction of its regular prices, Sears' sales volumes at promotional prices decreased. Mr. McMahon acknowledged in cross-examination that it was probably true that promotional sales decreased because Sears could not use as favourable save stories. As Sears argued, if savings are represented at all, consumers expect them to be of a certain magnitude and if the represented savings are incongruous with consumers' expectations concerning the deals typically offered, or typically offered by the particular retailer, the promotion will be less effective. In the circumstances where Sears was recognized to be a high-low retailer, where tires were sold in a competitive market, and where national brand tires were typically sold by tire dealers at a price 35% off the MSLP, I find that Sears' misrepresentation of the extent of the savings to be realized by purchasing the Tires on promotion was, more probably than not, likely to influence a consumer. This means that Sears' misrepresentation of the extent of the savings to be realized was misleading in a material respect.

[341] Finally, I have found that consumers have a limited ability to evaluate the intrinsic attributes of tires, and it is admitted that the five lines of Tires were exclusive to Sears. In those circumstances, the following evidence from Dr. Lichtenstein's expert report is germane:

45. The Tires are private label brands in a product category where several intrinsic attributes are difficult for the average consumer to evaluate. Consumers seek to maximize value (i.e., the quality they get for the price they pay) in purchase situations. When consumers need a product where there are several brand alternatives, there are various purchase strategies they may employ to maximize value. First, for product categories where intrinsic attributes are easy for the consumer to evaluate (i.e., those physical attributes that comprise the brand), consumers can simply evaluate brand alternatives within and across merchants on a "quality for the money" criterion and select that brand from that merchant that offers the best value.

46. However, where intrinsic product attributes are difficult for consumes to evaluate, consumers can at least turn to a second strategy that encompasses comparing prices for like brands across merchants. By doing so, they can at least purchase a brand that represents the lowest price for that brand across merchants. In this manner, while consumers would not explicitly know how much quality they received for their dollar, they would at least know that they received the most for their dollar for that particular brand. However, when consumers lack the ability to evaluate products on intrinsic attributes *and* competing retailers carry brands unique to them, neither of these strategies is open to consumers.

47. What strategy is left for consumers? Research shows that in cases where consumers cannot evaluate product quality based on intrinsic attributes, they will take "shortcuts", i.e., rely on "decision heuristics" in making quality assessments. Most commonly, they will rely on "extrinsic cues" to signal product quality and a good deal (e.g., OSP claim, store name, brand name). Thus, the likelihood increases that they would respond to a merchant advertising "exceptional values," and especially if the merchant is perceived to be credible. As noted by Kaufmann et al. (1994), there is widespread recognition that OSP representations are likely to be more impactful for product categories where intrinsic attributes are hard for consumers to assess.

[342] Having regard to those circumstances, as required by subsection 74.01(5) of the Act, I accept that Sears' OSP representations are more likely to be relied upon to reflect quality or value so misrepresentation of the OSP is more likely to impact upon or influence a consumer.

[343] Similarly, I have found that a very significant percentage of consumers do not spend time searching for tires, considering alternatives, or comparing prices from a variety of different stores. Dr. Deal's study suggested that approximately 42% of Sears' customers did not compare tire prices prior to buying their tires from Sears. This evidence also supports the conclusion that Sears' OSP representations and save stories were more likely to influence consumers.

[344] Thus, on the whole of the evidence, Sears has failed to establish that its OSP representations were not false or misleading in a material respect.

(iv) Sears' arguments about materiality

[345] In so concluding, I have had regard to Sears' submissions that the representations as to price were not false or misleading in a material respect because:

a) consumers are recognized to consistently discount OSP representations by about 25%;

b) Sears is a promotional retailer, and because its reference price is identified as "Sears reg.", consumers would interpret the reference price differently than OSP representations made by an EDLP marketer or suppliers generally;

c) Sears' ads that did not feature Sears' regular price representations produced more of an uplift in sales levels from non-promotional periods;

d) Mr. Winter testified that, in 1999, tires were sold in a highly competitive and highly promotional context which included a variety of pricing frameworks in which no single pricing framework or competitor dominated the market. Further, Dr. Deal found approximately 63% of consumers comparison shop even where they see ads that indicate reduced tire prices;

e) factors such as warranties, roadside assistance and the provision of a "satisfaction guaranteed or your money refunded" guarantee could enhance a consumer's perception of value and positively impact the decision to purchase a tire; and

f) Dr. Deal found that 78% of survey respondents were satisfied with the value they received and 93% were satisfied with their tire purchase.

[346] I will deal with each item in turn.

(a) Consumers consistently discount OSP representation by about 25%

[347] It is correct that it was Dr. Lichtenstein's opinion that consumers mentally discount advertised reference prices and that one study found that consumers consistently discount OSP offerings by about 25%. However, it remained Dr. Lichtenstein's opinion that:

> 33. However, even though knowledgeable/skeptical consumers appear to "discount the discount" more than the average consumer, they tend to perceive that some portion of advertised discount may be bona fide. That is, research findings show that even for consumer populations that are more knowledgeable about the product category (see Grewal et al. 1998), and even for consumers who are more skeptical of OSP claims (see Blair and Landon 1981; Urbany et al. 1988; Urbany and Bearden 1989), they are still influenced by OSP claims. For example, based on their findings, Urbany and Bearden (1989, p. 48) conclude "Our subject's perceptions were influenced significantly by the exaggerated reference price ... even though, on the whole, they were skeptical of its validity... Even though it is discounted, the reference price still apparently increases subject estimates of (the advertiser's normal selling price) over those who are presented with no reference price." Also, Urbany et al. (1988) found that although consumers mentally discount higher advertised reference prices at higher rates, the positive impact of the higher absolute level of the advertised reference price on consumer perceptions more than offsets the higher rate of mental discounting such that the outcome is that consumers perceive more savings for higher levels of advertised reference prices.

> 34. Moreover, given the value consumers place on their time, "if the advertised sale represents a large enough reduction from the retailer's regular price, the consumer might infer that another similar retailer...could not afford to put the item on sale with a noticeably greater discount" (Kaufmann et al. 1994, p. 121). From the consumer's point of view, the "worst case" is that although the reference price may not be a bona fide price, "it does assure that the consumer has not paid too much... and (thus) the consumer may use the limited information contained in high-low (reference price) sale advertising in an informed effort to find a satisfactory price for the product" (Kaufmann et al. 1994, p. 122). But even in cases where this occurs, a non-advertising competitor retailer offering the same product at the same purchase price would be injured in that a deceptive reference price was used to attract the customer to the advertiser's store. Moreover, the consumer's perceptions of transaction utility, which may actually be a significant influence in the decision to purchase, would not be based on bona fide perceptions. [underlining added]

[348] Moreover, on cross-examination it was Dr. Lichtenstein's evidence that there would be less discounting of a reference price where the OSP representation is made by a credible retailer such as Sears.

[349] Thus, I do not find Dr. Lichtenstein's evidence with respect to discounting of OSP representations establishes that Sears' OSP representations were not material.

(b) Sears' regular price representations must be seen in the context of consumers' knowledge that Sears is a promotional retailer

[350] Sears says that because it is known to be a promotional retailer, its customers would interpret its OSP representations in a different fashion from their interpretation of OSP representations made by ordinary suppliers or EDLP retailers. No evidence was cited to support this submission.

[351] It would seem to be equally likely that if influenced by Sears' reputation as a promotional retailer, a consumer would be influenced by its OSP representations and find them to be very material as signalling an appropriate time to purchase in order to obtain substantial savings from the price consumers would ordinarily pay at Sears if the Tires were not on promotion.

(c) Sears' ads that did not feature OSP representations

[352] Sears argues that:

> 172. Moreover, with respect to the relative regard paid by consumers to the advertised savings and the final transaction price, Mr. McKenna's evidence demonstrated the comparative success of Sears' tire advertisements, published during the Relevant Period, that did *not* feature "Sears reg." representations; that is, which informed the potential consumer of the selling price only. These advertisements produced more of an uplift in sales levels from non-promotional periods than did the "Sears reg." advertisements, even though the tires featured in them were not the lowest-priced tires offered by Sears.
>
> 173. Mr. McKenna's reasonable conclusion was:
>
> > *That the consumer or the customer recognized value when it was shown them. They recognized value without a price point or a comparative regular and certainly without a save story.*
>
> 174. The same or a similar point can be made from the "Tireland" advertisement that was the focus of an exchange between Sears and Michelin in 1999. As Mr. Merkley acknowledged in cross-examination, this advertisement relied on consumers' ability to discern value, without reference to a "save story" or a "percentage off".

[353] Mr. McKenna testified that, with respect to the Michelin Weatherwise and the Silverguard ST (not one of the tires at issue), he compared sales for those tires when they were not on promotion to their sales during a period when they were on promotion. The Silverguard ST had no regular price, it was simply priced based on rim size, starting at $44.99. Thus, the Silverguard ST was advertised with no regular comparison price or save story. The Michelin Weatherwise was advertised with its regular price shown together with a 40% save story.

[354] When the Michelin Weatherwise was advertised, its unit sales increased by approximately **[CONFIDENTIAL]** times over sales when it was not advertised. Sales volumes of the Silverguard ST, when advertised, increased by **[CONFIDENTIAL]** times over sales when not advertised. In this context, Mr. McKenna concluded that customers recognized value.

[355] This evidence is anecdotal, relating to a tire that had no regular price, and is in conflict with Mr. McMahon's evidence and Mr. Cathcart's evidence about Sears' experience with the BF Goodrich Plus tire set out at paragraphs 214 and 215 above.

[356] For this reason, I do not find the evidence relating to the Silverguard ST establishes that Sears' OSP representations were not material.

[357] To the extent that Sears relies on Mr. Merkley's acknowledgement in cross-examination that a "Tireland" advertisement relied upon a consumer's ability to discern value without reference to a save story, Mr. Merkley simply responded "I guess, yes" to the suggestion that the retailer in question assumed that his potential customers would recognize value. Further, the

particular price advertised by Tireland was sufficiently low that it caused Sears to write to Michelin expressing its concern and caused Michelin to respond to Sears that it shared Sears' concern at the pricing. However, Michelin said that it found this to be an isolated case where the dealer intended to have a weekend sale for the fifth consecutive year.

[358] This evidence does not establish that Sears' OSP representations were immaterial.

(d) Mr. Winter's and Dr. Deal's evidence

[359] Sears relies upon Mr. Winter's evidence that, in 1999, tires were sold in a highly competitive and promotional context and Dr. Deal's evidence that his survey found that 63% of consumers comparison shop even when they see ads that show reduced tire prices.

[360] However, comparison shopping would seem to be directed to final transaction prices, and not necessarily the materiality of OSP representations. For those consumers who say they comparison shop, the OSP representations could nonetheless have: drawn the consumer into the market; attracted the consumer to Sears; and caused the consumer to purchase from Sears if no lower final transaction price was located in the consumer's search.

(e) The consumers' perception of value based upon factors such as warranties and the guarantee of satisfaction

[361] Sears relies upon Dr. Lichtenstein's acknowledgement that factors such as warranties, roadside assistance programs, and Sears' guarantee could enhance consumers' perception of value and positively impact upon the decision to purchase a tire. This is said to reduce the effect of Sears' OSP representations because response to price is context dependent.

[362] Given Professor Trebilcock's acknowledgement that he did not have information that would allow him to quantify how much consumers might be willing to pay for add-ons provided by Sears relative to add-ons provided by Canadian Tire, and the rather amorphous nature of Dr. Lichtenstein's acknowledgement, I am not persuaded that the value consumers attach to add-ons is sufficient to make Sears' OSP representations immaterial. Even with add-ons, the extent of the savings misrepresentation could still be influential to the consumer's decision to purchase.

(f) Sears' consumer satisfaction

[363] Sears says that even if consumers purchased their tires from Sears solely upon the strength of the representations at issue, 78% of respondents to Dr. Deal's survey indicated that they had received good value for their money.

[364] There are, I believe, two responses to this.

[365] First, harm is not a necessary element of reviewable conduct. As the Court noted in *Kellys on Seymour*, *supra*, at page 26, the "criteria is, did in fact the person think that what he was buying was, to the ordinary purchaser, in the ordinary market, worth the price it is purported to be worth, and from which it is reduced". Whether or not a consumer in fact got a bargain or paid less than what the consumer would ordinarily have paid is not the criteria. See also: *R. v. J. Pascal Hardware Co. Ltd.* (1972), 8 C.P.R. (2d) 155 at page 159 (Ont. Co. Crt).

[366] Second, I accept Dr. Lichtenstein's evidence, which I find was not substantially challenged on the point, that:

> 39. When consumers are deceived by an inflated OSP, the level of harm could be limited if they became aware of the deception. With a liberal return policy, the injury may be limited to the time, effort, and aggravation of returning the product to the store (assuming the store would accept the used product on return). However, in my opinion, most consumers are unlikely to recognize that they were deceived by an OSP representation. The reason for this is that for them to become aware of deception, they must become aware that the OSP price is, in the case of a seller's own OSP representation, not in truth the seller's own bona fide OSP.
>
> 40. Several factors work against consumers becoming price aware. First, as the research evidence (cited above in paragraph 29) strongly suggests that consumers are not willing to engage in much pre-purchase search, it is reasonable to conclude that most consumers are unwilling to expend time/effort necessary to engage in post-purchase price search. Thus, they are unlikely to monitor that seller's prices after the fact. Second, consumers have a built-in desire to maintain "cognitive consistency" and thus, they avoid encountering price information that indicates that they were duped, thereby creating cognitive inconsistency (called "cognitive dissonance," or "buyer's remorse/regret" in this specific domain). Since this mental state creates discomfort for the consumer, they are motivated to engage in "selective exposure to information" by actively avoiding information that would suggest that they did not receive the value represented by the OSP (Eagly and Chaiken 1993, p. 478; Engel, Blackwell, Miniard, 1995). [underlining added]

[367] Thus, for all these reasons, Sears failed to establish that its OSP representations were not false or misleading to a material extent.

(v) Conclusion

[368] Sears admitted that it did not meet the requirements of the volume test and I have found that the Tires were not offered at Sears' regular price in good faith and that Sears failed to meet requirements of the time test for four of the five tire lines. I have also found that Sears failed to establish that the representations at issue were not false or misleading in a material respect. It follows that the allegations of reviewable conduct have been made out and the Tribunal finds Sears to have engaged in reviewable conduct. It is therefore necessary to consider what administrative remedies should be ordered.

XIII. WHAT ADMINISTRATIVE REMEDIES SHOULD BE ORDERED?

[369] Section 74.1 of the Act sets out the range of remedies available and the circumstances in which the remedies may be ordered. Section 74.1 of the Act is as follows:

74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person
(a) not to engage in the conduct or substantially similar reviewable conduct;
(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including
(i) a description of the reviewable conduct,

(ii) the time period and geographical area to which the conduct relates, and
(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and
(c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding
(i) in the case of an individual, $50,000 and, for each subsequent order, $100,000, or

(ii) in the case of a corporation, $100,000 and, for each subsequent order, $200,000.

74.1(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.
74.1(3) No order may be made against a person under paragraph (1)(b) or (c) where the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.
74.1(4) The terms of an order made against a person under paragraph (1)(b) or (c) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.
74.1(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):

74.1 (1) Le tribunal qui conclut, à la demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen en application de la présente partie peut ordonner à celle-ci :
a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;
b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment :
(i) l'énoncé des éléments du comportement susceptible d'examen,
(ii) la période et le secteur géographique auxquels le comportement est afférent,
(iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias — notamment de la publication — utilisés;
c) de payer, selon les modalités que le tribunal peut préciser, une sanction administrative pécuniaire maximale :
(i) dans le cas d'une personne physique, de 50 000 $ pour la première ordonnance et de 100 000 $ pour toute ordonnance subséquente,
(ii) dans le cas d'une personne morale, de 100 000 $ pour la première ordonnance et de 200 000 $ pour toute ordonnance subséquente.
74.1(2) Les ordonnances rendues en vertu de l'alinéa (1)a) s'appliquent pendant une période de dix ans, ou pendant la période plus courte fixée par le tribunal.
74.1(3) L'ordonnance prévue aux alinéas (1)b) ou c) ne peut être rendue si la personne visée établit qu'elle a fait preuve de toute la diligence voulue pour empêcher un tel comportement.
74.1(4) Les conditions de l'ordonnance rendue en vertu des alinéas (1)b) ou c) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non à le punir.
74.1(5) Pour la détermination du montant de la sanction administrative pécuniaire prévue à l'alinéa (1)c), il est tenu compte des éléments suivants :

(a) the reach of the conduct within the relevant geographic market;
(b) the frequency and duration of the conduct;
(c) the vulnerability of the class of persons likely to be adversely affected by the conduct;
(d) the materiality of any representation;
(e) the likelihood of self-correction in the relevant geographic market;
(f) injury to competition in the relevant geographic market;
(g) the history of compliance with this Act by the person who engaged in the reviewable conduct; and

(h) any other relevant factor.
74.1(6) For the purposes of paragraph (1)(c), an order made against a person in respect of conduct that is reviewable under paragraph 74.01(1)(a), (b) or (c), subsection 74.01(2) or (3) or section 74.02, 74.04, 74.05 or 74.06 is a subsequent order if

(a) an order was previously made against the person under this section in respect of conduct reviewable under the same provision;

(b) the person was previously convicted of an offence under the provision of Part VI, as that Part read immediately before the coming into force of this Part, that corresponded to the provision of this Part;

(c) in the case of an order in respect of conduct reviewable under paragraph 74.01(1)(a), the person was previously convicted of an offence under section 52, or under paragraph 52(1)(a) as it read immediately before the coming into force of this Part; or
(d) in the case of an order in respect of conduct reviewable under subsection 74.01(2) or (3), the person was previously convicted of an offence under paragraph 52(1)(d) as it read immediately before the coming into force of this Part. [underlining added]

a) la portée du comportement sur le marché géographique pertinent;
b) la fréquence et la durée du comportement;
c) la vulnérabilité des catégories de personnes susceptibles de souffrir du comportement;
d) l'importance des indications;
e) la possibilité d'un redressement de la situation sur le marché géographique pertinent;
f) le tort causé à la concurrence sur le marché géographique pertinent;
g) le comportement antérieur, dans le cadre de la présente loi, de la personne qui a eu un comportement susceptible d'examen;
h) toute autre circonstance pertinente.
74.1(6) Pour l'application de l'alinéa (1)c), l'ordonnance rendue contre une personne à l'égard d'un comportement susceptible d'examen en application des alinéas 74.01(1)a), b) ou c), des paragraphes 74.01(2) ou (3) ou des articles 74.02,
74.04, 74.05 ou 74.06 constitue une ordonnance subséquente dans les cas suivants :
a) une ordonnance a été rendue antérieurement en vertu du présent article contre la personne à l'égard d'un comportement susceptible d'examen visé par la même disposition;
b) la personne a déjà été déclarée coupable d'une infraction prévue par une disposition de la partie VI, dans sa version antérieure à l'entrée en vigueur de la présente partie, qui correspond à la disposition de la présente partie;
c) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé à l'alinéa 74.01(1)a), la personne a déjà été déclarée coupable d'une infraction à l'article 52, ou à l'alinéa 52(1)a) dans sa version antérieure à l'entrée en vigueur de la présente partie;
d) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé aux paragraphes 74.01(2) ou (3), la personne a déjà été déclarée coupable d'une infraction à l'alinéa 52(1)d) dans sa version antérieure à l'entrée en vigueur de la présente partie. [Le souligné est de moi.]

[370] Each of the three available remedies shall be considered in turn.

(i) An order not to engage in the conduct or substantially similar reviewable conduct

[371] The Commissioner seeks an order prohibiting Sears and any person acting on its behalf or for its benefit, including all directors, officers, employees, agents or assigns, or any other person or corporation acting on its behalf, from engaging in conduct contrary to subsection 74.01(3) of the Act for a period of 10 years.

[372] In support of this submission, the Commissioner relies upon:

- Sears' admission that it is primarily a hi-low retailer which relies extensively on OSP representations in its advertising;

- Sears used hi-low marketing for 27 of the 28 lines of tires it sold in 1999 and continues to use hi-low marketing techniques to sell automotive products;

- ears continues to use hi-low marketing techniques generally throughout its business;

- Sears has engaged in deceptive marketing behaviour in the past as reflected in the following decisions:

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

[373] Sears argues that no administrative remedy is warranted. It points to the following:

- The representations at issue were made in November and December of 1999. Section 74.01 of the Act came into force in March of that year. The Guidelines were not published until late September, 1999, and there was no interpretive jurisprudence relating to the time and volume tests.

- OSP advertising is a legitimate practice and Sears should not be punished for depending upon promotional events to market its products.

- Sears turned its mind to complying with subsection 74.01(3) of the Act. It created and distributed a written policy and Mr. Cathcart maintained a checkerboard for planning and promoting the sale of the Tires.

- The convictions the Commissioner relies upon are old, going back 21, 28 and 35 years. The last two mentioned convictions relate to a catalogue advertisement for multi-vitamins and to the advertisement of a particular refrigerator in Ottawa.

- It is reasonable to assume that there have been significant changes in Sears' ownership, management and control since the early 1980's when the most recent conviction was entered.

[374] In the alternative, Sears says that any cease and desist order should relate only to tires. Sears points to the Tribunal's decision in *Canada (Commissioner of Competition) v. P.V.I. International Inc.* (2002), 19 C.P.R. (4th) 129; aff'd (2004), 31 C.P.R. (4th) 331 (F.C.A.) wherein the order prohibited the making of misrepresentations related to "PVI or any similar allegedly gas-saving, emission-reducing and/or performance-enhancing device".

[375] In light of the false or misleading impression given by Sears in its advertisements with respect to the OSP representations at issue concerning the Tires, I have concluded that it is appropriate to issue an order pursuant to paragraph 74.1(1)(*a*) of the Act. Such an order will address the harm subsection 74.01(3) was created to address. As the order will be directed only to OSP representations which do not conform with the Act, and will not be directed to all OSP representations, it cannot be said that such an order "punishes" Sears for depending upon promotional events.

[376] I am satisfied by virtue of Sears' internal memorandum of May 11, 1999 to its vice-presidents concerning the amendments to the Act that the timing of the enactment of the relevant statutory provision and the issuance of the Guidelines gave sufficient notice to Sears' employees of the requirements of the Act. Therefore, it is not inappropriate to make an order under paragraph 74.1(1)(*a*).

[377] As to the duration of the order, I see no reason to depart from the general provision found in subsection 74.1(2) of the Act that an order under paragraph 74.1(1)(*a*) applies for a period of 10 years unless otherwise specified. That 10 year period will commence when an order is issued. In this regard see paragraph 389 of these reasons.

[378] As to the scope of the order, I believe that it construes the intent of the Act too narrowly to limit any order so as to apply only to Sears' promotion of tires. The scope of the order issued by the Tribunal in *P.V.I., supra*, is distinguishable, in my view, because there misrepresentations as to the performance of a product relating to fuel savings, emission reduction and government approval were at issue. There was no basis on which the order should have applied to any other product other than an allegedly similar gas-saving, emission-reducing and/or performance-enhancing device (as the orders provided).

[379] Equally, however, I have not been persuaded that it is necessary that the order to apply to all goods marketed by Sears through its various business channels. In this regard, I note the relatively long period of time that has elapsed since Sears was last convicted of deceptive marketing behaviour.

[380] Here Sears has stated in its responding statement of grounds and material facts, at paragraph 39, that Sears automotive is the business division of Sears responsible for the supply of the Tires and other automotive-related products and services and for the operation of Sears' retail automotive centres. From this I conclude that it is appropriate for the order to be directed to the business division which was responsible for the misrepresentations at issue. Therefore, the order will apply only to tires and other automotive-related products and services.

(ii) A corrective notice

[381] The Commissioner requests an order requiring Sears to publish or otherwise disseminate a corrective notice or notices that shall:

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

   i. a description of the reviewable conduct,
   ii. the time period and geographical area to which it relates, and
   iii. a description of the manner in which the Representations were disseminated, including the names of the publications or mediums employed.

b. be published in the following media:

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

   (1) in two weekly ("core") flyers as ordinarily distributed by the Respondent and in one weekend flyer as ordinarily distributed by the Respondent.
   (2) the flyers shall be distributed across Canada with a circulation of no fewer than 4,200,000, and shall be distributed in a manner as normally distributed by the Respondent, including the same linguistic distribution, and shall be distributed in the following proportions:
      (a) 84% to be distributed through newspapers;
      (b) 15% to be distributed door-to-door; and
      (c) 1% to be distributed in-store.
   (3) the notices shall fill the entire third page of the flyer, and in any event be no less than 9.5 inches X 9.5 inches in size.

ii. <u>in newspapers</u> by the Respondent as follows:

   (1) in the language appropriate to the newspaper;
   (2) within the first nine pages of the Wednesday edition of each of the newspapers listed in paras. 26 and 27 of ***Exhibit CA-9***, or in the case of a newspaper that is not published on Wednesdays, within the first nine pages of an edition of said newspaper;
   (3) the newsprint advertisements shall be no less than 5.625 inches X 9.625 inches in size.

[382] Sears submits that temporal concerns alone mitigate against the publication of a written notice. Sears also points to the evidence of Dr. Trebilcock that consumers who purchased the Tires at Sears during the sales events at issue received very good deals. Finally, Sears submits that it exercised due diligence in order to prevent the reviewable conduct from occurring.

[383] In *PVI, supra*, the Federal Court of Appeal, at paragraph 26, considered that the time elapsed from the making of false or misleading representations was a relevant factor to consider when assessing the appropriateness of a corrective notice.

[384] In the present case, five years have elapsed since the representations at issue were made. In my view, that length of time alone militates against the issuance of a corrective notice.

[385] The report of the Consultative Panel contemplated that the purpose of a corrective notice was to inform marketplace participants about deceptive practices where those practices may have left residual mistaken impressions in the marketplace. I do not accept that, after 5 years, any residual mistaken impression exists which arises from the representations at issue. To require a corrective notice in that circumstance would, in my view, be punitive and not remedial.

[386] In view of this conclusion, it is not necessary for me to consider, and I do not consider, whether Sears has established that it exercised due diligence in order to prevent the reviewable conduct from occurring.

(iii) An administrative monetary penalty

[387] By its reasons for order and order dated August 5, 2004, the Tribunal ordered that, if it determined that Sears had engaged in reviewable conduct within the meaning of subsection 74.01(3) of the Act, Sears was given leave to present evidence and make submissions at a future hearing relating to the factors to be taken into account pursuant to subsection 74.1(5) of the Act. Accordingly, the issues of whether an administrative monetary penalty should be imposed, and if so, its amount are reserved. See in this regard, paragraph 390 of these reasons.

XIV. COSTS

[388] The issue of costs is also reserved.

XV. ORDER

[389] Once the issues of administrative monetary penalty and costs are finally decided by the Tribunal, an order will issue reflecting these reasons together with the Tribunal's rulings with respect to an administrative monetary penalty and costs.

XVI. DIRECTIONS TO THE PARTIES

[390] In light of these confidential reasons for order, the parties are directed as follows:

1) To enable the Tribunal to issue a public version of these reasons, the parties shall meet and endeavour to reach agreement upon the redactions to be made to these confidential reasons in order to properly protect information that should be kept confidential. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on Wednesday, January 19, 2005, setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons. (The Tribunal does not anticipate there will be any significant disagreement.)

2) If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from the reasons. Such submissions are to be served and filed by the close of the Registry on Friday, January 21, 2005.

3) Following the issuance of these reasons the Registry will contact counsel to set a date for a case management conference to address the following:

    i) The time required for the further hearing concerning the factors relevant to subsection 74.1(5) of the Act.

    ii) The number of any proposed witnesses to be called.

    iii) The provision of any required will-say statements and or expert reports.

    iv) The extent of the Commissioner's participation in this further hearing.

    v) Potential dates for such hearing.

    vi) The manner, nature and timing of the submissions as to costs.

DATED at Edmonton, this 11th day of January 2005.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Eleanor R. Dawson

XVII. APPENDIX

[391] Sections 74.01, 74.09 and 74.1 are as follows:

74.01 (1) 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,
(a) makes a representation to the public that is false or misleading in a material respect;
(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or
(c) makes a representation to the public in a form that purports to be
(i) a warranty or guarantee of a product, or
(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,
if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.

74.01(2) Subject to subsection (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 concerning the price at which a product or like products have been, are or will be ordinarily supplied where suppliers generally in the relevant geographic market, having regard to the nature of the product,

(a) have not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and
(b) have 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.
74.01(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

74.01 (1) Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques :
a) ou bien des indications fausses ou trompeuses sur un point important;
b) ou bien, sous la forme d'une déclaration ou d'une garantie visant le rendement, l'efficacité ou la durée utile d'un produit, des indications qui ne se fondent pas sur une épreuve suffisante et appropriée, dont la preuve incombe à la personne qui donne les indications;
c) ou bien des indications sous une forme qui fait croire qu'il s'agit :
(i) soit d'une garantie de produit,
(ii) soit d'une promesse de remplacer, entretenir ou réparer tout ou partie d'un article ou de fournir de nouveau ou continuer à fournir un service jusqu'à l'obtention du résultat spécifié,
si cette forme de prétendue garantie ou promesse est trompeuse d'une façon importante ou s'il n'y a aucun espoir raisonnable qu'elle sera respectée.
74.01(2) Sous réserve du paragraphe (3), est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel un ou des produits similaires ont été, sont ou seront habituellement fournis, si, compte tenu de la nature du produit, l'ensemble des fournisseurs du marché géographique pertinent n'ont pas, à la fois :
a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.
74.01(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au

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.
74.01(4) For greater certainty, whether the period of time to be considered in paragraphs (2)(a) and (b) and (3)(a) and (b) is before or after the making of the representation depends on whether the representation relates to
(a) the price at which products have been or are supplied; or
(b) the price at which products will be supplied.
74.01(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.
74.01(6) In proceedings under this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

[...]

74.09 In sections 74.1 to 74.14 and 74.18, "court" means the Tribunal, the Federal Court or the superior court of a province.

74.1(1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person
(a) not to engage in the conduct or substantially similar reviewable conduct;
(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including
(i) a description of the reviewable conduct,
(ii) the time period and geographical area to which the conduct relates, and

public relativement au prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois :

a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.
74.01(4) Il est entendu que la période à prendre en compte pour l'application des alinéas (2)a) et b) et (3)a) et b) est antérieure ou postérieure à la communication des indications selon que les indications sont liées au prix auquel les produits ont été ou sont fournis ou au prix auquel ils seront fournis.

74.01(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.
74.01(6) Dans toute poursuite intentée en vertu du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important, il est tenu compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

[...]

74.09 Dans les articles 74.1 à 74.14 et 74.18, « tribunal » s'entend du Tribunal, de la Cour fédérale ou de la cour supérieure d'une province.

74.1(1) Le tribunal qui conclut, à la demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen en application de la présente partie peut ordonner à celle-ci :
a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;
b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment :
(i) l'énoncé des éléments du comportement susceptible d'examen,

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and
(c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding
(i) in the case of an individual, $50,000 and, for each subsequent order, $100,000, or

(ii) in the case of a corporation, $100,000 and, for each subsequent order, $200,000.

74.1(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.
74.1(3) No order may be made against a person under paragraph (1)(b) or (c) where the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.
74.1(4) The terms of an order made against a person under paragraph (1)(b) or (c) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.
74.1(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):
(a) the reach of the conduct within the relevant geographic market;
(b) the frequency and duration of the conduct;
(c) the vulnerability of the class of persons likely to be adversely affected by the conduct;
(d) the materiality of any representation;
(e) the likelihood of self-correction in the relevant geographic market;
(f) injury to competition in the relevant geographic market;
(g) the history of compliance with this Act by the person who engaged in the reviewable conduct; and
(h) any other relevant factor.
74.1(6) For the purposes of paragraph (1)(c), an order made against a person in respect of conduct that is reviewable under paragraph 74.01(1)(a), (b) or (c), subsection 74.01(2) or (3) or section 74.02, 74.04, 74.05 or 74.06 is a subsequent order if

(ii) la période et le secteur géographique auxquels le comportement est afférent,
(iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias — notamment de la publication — utilisés;
c) de payer, selon les modalités que le tribunal peut préciser, une sanction administrative pécuniaire maximale :
(i) dans le cas d'une personne physique, de 50 000 $ pour la première ordonnance et de 100 000 $ pour toute ordonnance subséquente,
(ii) dans le cas d'une personne morale, de 100 000 $ pour la première ordonnance et de 200 000 $ pour toute ordonnance subséquente.
74.1(2) Les ordonnances rendues en vertu de l'alinéa (1)a) s'appliquent pendant une période de dix ans, ou pendant la période plus courte fixée par le tribunal.
74.1(3) L'ordonnance prévue aux alinéas (1)b) ou c) ne peut être rendue si la personne visée établit qu'elle a fait preuve de toute la diligence voulue pour empêcher un tel comportement.
74.1(4) Les conditions de l'ordonnance rendue en vertu des alinéas (1)b) ou c) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non à le punir.
74.1(5) Pour la détermination du montant de la sanction administrative pécuniaire prévue à l'alinéa (1)c), il est tenu compte des éléments suivants :

a) la portée du comportement sur le marché géographique pertinent;
b) la fréquence et la durée du comportement;
c) la vulnérabilité des catégories de personnes susceptibles de souffrir du comportement;
d) l'importance des indications;
e) la possibilité d'un redressement de la situation sur le marché géographique pertinent;
f) le tort causé à la concurrence sur le marché géographique pertinent;
g) le comportement antérieur, dans le cadre de la présente loi, de la personne qui a eu un comportement susceptible d'examen;
h) toute autre circonstance pertinente.

74.1(6) Pour l'application de l'alinéa (1)c), l'ordonnance rendue contre une personne à l'égard d'un comportement susceptible d'examen en application des alinéas 74.01(1)a), b) ou c), des paragraphes 74.01(2) ou (3) ou des articles 74.02,

(a) an order was previously made against the person under this section in respect of conduct reviewable under the same provision;

(b) the person was previously convicted of an offence under the provision of Part VI, as that Part read immediately before the coming into force of this Part, that corresponded to the provision of this Part;

(c) in the case of an order in respect of conduct reviewable under paragraph 74.01(1)(a), the person was previously convicted of an offence under section 52, or under paragraph 52(1)(a) as it read immediately before the coming into force of this Part; or

(d) in the case of an order in respect of conduct reviewable under subsection 74.01(2) or (3), the person was previously convicted of an offence under paragraph 52(1)(d) as it read immediately before the coming into force of this Part.

74.04, 74.05 ou 74.06 constitue une ordonnance subséquente dans les cas suivants :

a) une ordonnance a été rendue antérieurement en vertu du présent article contre la personne à l'égard d'un comportement susceptible d'examen visé par la même disposition;

b) la personne a déjà été déclarée coupable d'une infraction prévue par une disposition de la partie VI, dans sa version antérieure à l'entrée en vigueur de la présente partie, qui correspond à la disposition de la présente partie;

c) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé à l'alinéa 74.01(1)a), la personne a déjà été déclarée coupable d'une infraction à l'article 52, ou à l'alinéa 52(1)a) dans sa version antérieure à l'entrée en vigueur de la présente partie;

d) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé aux paragraphes 74.01(2) ou (3), la personne a déjà été déclarée coupable d'une infraction à l'alinéa 52(1)d) dans sa version antérieure à l'entrée en vigueur de la présente partie.

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