

INFORMATION NOTE*

Commissioner of Competition v. Sears Canada Inc.

January 24, 2005. The Competition Tribunal ("Tribunal") issued its reasons and order today in the *Sears Canada Inc.* case. Madam Justice Dawson heard the case and ruled on behalf of the Tribunal.

The Commissioner of Competition ("Commissioner") alleged that Sears Canada Inc. ("Sears") had employed deceptive marketing practices, specifically in regard to the ordinary selling price of tires, contrary to subsection 74.01(3) of the Competition Act, R.S.C. 1985, c. C-34 ("Act").

Sears raised a constitutional issue, arguing that the provision in the Act was contrary to section 2 of the *Canadian Charter of Rights and Freedoms*, which protects freedom of expression, and could not be saved under section 1, as it was too vague to be "prescribed by law" and disproportionate. The Tribunal rejected those arguments and ruled that the provision was constitutional. The Tribunal held that the provision did infringe freedom of expression under section 2, but that it was a reasonable limit prescribed by law that was demonstrably justified in a free and democratic society.

On the merits, the Tribunal found that Sears had not complied with either the volume test or the time test which serve to determine whether a person has engaged in reviewable conduct in regards to the ordinary selling price, and had failed to establish that its representations on the ordinary selling price were not false or misleading in a material way.

Consequently, the Tribunal issued a prohibition order, applicable to tires and other automotive products and services, directing Sears not to engage in conduct contrary to subsection 74.01(3) of the Act for a period of ten years. The Tribunal saw no need for a corrective notice, considering the time elapsed (5 years) since the deceptive practice occurred. On the issue of an administrative monetary penalty, Sears had been granted leave by an order dated August 5, 2004, if it was determined that it had engaged in reviewable conduct, to present evidence and make submissions at a future hearing on the factors to be taken into account in setting the amount of the administrative penalty. The issue of costs was also reserved.

* This is an unofficial summary prepared by the Registry of the Tribunal.