Lawyers Discuss Recent Sears Case at Canadian Institute Conference

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An expert legal panel discussion of the recent landmark decision by the **Competition Bureau** against **Sears Canada** - the first contested case to be decided by the **Tribunal** under the ordinary selling price provisions of the **Competition Act** - was one of the highlight sessions at the **Canadian Institute**'s **11th Annual Advertising and Marketing Law Conference** January 25-26/05 in Toronto.

Sheridan Scott, Commissioner of Competition, had stated in a news release that the Sears Canada case is about "truth in advertising" and ensuring "that consumers get honest and accurate pricing information from retailers".

Sears Canada had claimed in advertisements in 1999 that consumers were getting a substantial discount on its tires in comparison to the regular price of its tires. The Competition Bureau launched an investigation into Sears Canada's marketing practices in April, 2000, finding that very few tires had been sold at the regular price.

The Bureau's decision, handed down on Jan. 24/05, ruled that Sears Canada had exaggerated the sale price of its tires by misstating their 'regular' price in an advertising campaign, contrary to the deceptive marketing provisions of the Competition Act. The Competition Act prohibits sellers from inflating the regular price of items to mislead consumers about the sale price of an item, unless the regular price representation meets either a volume or time test as contained in the provisions.

Panelist **Subrata Bhattacharjee**, partner at **Heenan Blaikie**, says that while the Sears Canada decision is significant as the first of its type and, in part, confirms the interpretative approach taken by the Commissioner to the provisions, it has not necessarily provided comprehensive guidance on the application of these provisions.

"The Sears case only considered one of the two tests contained in the provisions, commonly called the 'time' test," says Bhattacharjee The time test basically asks whether the product in question has been offered at the original price or higher in good faith for a substantial period of time before or after making the sale price representation. The volume test, which looks to the quantity of the product that had been sold at the original price, was not considered by the Tribunal in its decision.

"Even with respect to the 'time test', the Tribunal may have overstated the meaning of the 'substantial' period of time for which products have to be previously offered in advance of making a sale price representation" Bhattacharjee says.

Panelist **James Musgrove**, partner at **Lang Michener**, also questions the Tribunal's finding on the meaning of 'substantial period' in the time test. According to the Tribunal, a product must be offered at the regular price for at least 50% of the time in order to meet the requirement that a product is being offered at regular price for a 'substantial' period of time. Musgrove says that a product being offered at the regular price for 45% of the time should also be considered a 'substantial' period of time.

He says, "If **Parliament** intended 'substantial' to mean 'a majority', it could easily have said so. By using the word 'substantial' Parliament clearly signaled that there was no precise mathematical test which would apply to all cases – contrary to the Tribunal's ruling here."

The Tribunal's findings also leave the question of what is 'good faith' unclear. According to the Tribunal, a retailer is offering a product for sale at regular price in 'good faith' if it genuinely believes that it was a price at which the goods would be purchased. But it is not an exact science and, "It makes it very tricky for retailers to know with certainty if the regular price of a product would be considered by the Tribunal to be a price offered in good faith" says

Musgrove.

The decision also illustrates how long the Competition Bureau and the Tribunal process can take in adjudicating advertising cases. It took between five and six years for the Tribunal to reach its findings – with remedies to be resolved in another hearing.

"This is completely inappropriate in an advertising case," says Musgrove. "**Advertising Standards Canada** resolves advertising cases much faster – in a matter of weeks, not years." Because of this delay - almost six years after the fact - the Tribunal did not order corrective notices.

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