THE *SEARS* CASE

COMMISSIONER OF COMPETITION v. SEARS CANADA INC. – THE TRIBUNAL RELEASES ITS DECISION IN THE FIRST APPLICATION BROUGHT UNDER THE ORDINARY SELLING PRICE PROVISIONS OF THE *COMPETITION ACT*

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The decision of the Competition Tribunal in *Sears* finally saw the light of day earlier this year.[1] It was an eagerly anticipated decision, of course. The case was the first application brought by the Commissioner of Competition respecting ordinary price claims under section 74.01 of the *Competition Act* and the first case heard by the Tribunal under the revised Tribunal rules relating to non-merger reviewable matters. It was a hard fought case, at least judging from the numerous interlocutory proceedings that were a feature of the litigation.[2] Moreover, as the case was unfolding before the Tribunal, the Commissioner secured highly publicized consent agreements in *Suzy Shier* and *Forzani* which featured administrative monetary penalties approaching or exceeding $1 million as well as other relief.[3] In the background to the *Sears* case were questions about the interpretation and scope of the provisions that had been accumulating since section 74.01 found its way into the Act in 1999[4] and which were left unanswered by the Interpretation Bulletin[5] released by the Competition Bureau at that time.[6] As will be clear from the balance of this discussion, though, many of these questions remain unanswered post-*Sears*. Though the Tribunal has provided useful guidance on the content of the "good faith" requirement of the time test, and broadly confirmed aspects of the interpretative approach contained in the Bulletin concerning the "substantial period of time" requirement, those seeking further clarification of the scope of the ordinary selling price ("OSP") provisions will likely have to wait until the next Tribunal decision.

The Allegations

Following a two-year inquiry, the Commissioner commenced an application under the OSP provisions of the Act naming Sears Canada Inc. ("Sears") as respondent. The Commissioner alleged that during three sales events held in November and December of 1999, Sears made representations to the public with respect to the regular selling price of five lines of tires which violated the OSP provisions. The tires in question were offered for sale at four price points:

(i) a "regular" price, which was the price of a single tire and which was used as the reference price when the tires were the subject of sales promotions;

(ii) a "2For" price, which was the discounted price at which Sears would sell two or more of a given tire when the tire was not the subject of a sales promotion;

(iii) a "normal promotional price", which was the usual sales price advertised by Sears (at a percentage of the "regular" price); and

(iv) a special promotional price, which was event-driven and which referred to a further discount on the "normal promotional price" (again, with reference to the "regular" price).

The Commissioner alleged that Sears' references to its "regular" prices were deceptive, as most tires were purchased in multiples. Consequently, the true savings realized by most consumers would not have been the difference between the "regular" price and the "sale" price, but rather the difference between the latter and Sears' "2For" price, which was the regular discounted price offered on purchases of multiple tires.

The Commissioner's allegations in *Sears* largely followed the interpretative approach set out in the Bulletin. Under the volume test, for example, the Commissioner argued that a reasonable period of time for evaluating whether a substantial volume of tires was sold at the regular price was 12 months. Similarly, under the time test, the Commissioner maintained that the reference period of time for evaluating whether the tires were offered in "good faith" before making the representation was six months.

The Commissioner alleged that an order under the OSP provisions was therefore justified because:

(i) Sears did not sell a substantial volume of the 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 the tires in good faith at the regular price featured in the advertisements for a substantial period of time recently before making the representations.

In its defence, Sears argued that the OSP provisions infringed its right to freedom of commercial expression as guaranteed under section 2(b) of the *Charter of Rights and Freedoms* (the "Charter") and second, that its promotions met the time test. Sears argued, *inter alia*, that a "substantial period of time" – the language used in the Act – did not necessarily mean 50% or more of the time and that "recently before" did not necessarily relate to the six months prior to the making of the impugned representations. It was further argued that in determining the relevant geographic market, it was necessary to look at each separate market for tires and not the Canadian market as a whole. Sears conceded that the promotions in question did not meet the volume test.

The Tribunal's Decision

Oakes Analysis

The Tribunal found that though there had been an infringement of section 2(b) of the Charter, as conceded by the Commissioner, the violation was saved under section 1. The section 1 analysis undertaken by the Tribunal is of

interest from a competition law perspective because Sears argued that the OSP provisions were unconstitutionally vague and, therefore, not prescribed by law, as required by section 1. The vagueness argument advanced by Sears cited the allegedly indeterminate nature of the terms "substantial volume", "reasonable period of time", "substantial period of time" and "recently". The Tribunal relied on the analysis in *PANS*[7], finding that the terms in question were sufficiently precise to constitute a limit prescribed by law. In reaching this conclusion, the Tribunal reviewed evidence both of the consultative process that resulted in the enactment of the OSP provisions, and U.S. state and federal laws which regulated deceptive trade practices in general and OSP representations in particular. The Tribunal found that this evidence further supported the view that the OSP provisions constituted a reasonable limit prescribed by law that was demonstrably justified in a free and democratic society.

Section 74.01 Analysis

The Tribunal's analysis substantially followed the interpretation of the OSP provisions set out in the Bulletin.

The first substantive issue considered by the Tribunal was the question of the relevant geographic market. It expressly rejected what it described as the "traditional competition law approach" of defining geographic markets, which, though an element of the OSP provisions, is also a feature of analysis under other provisions of the Act.[8] Instead of considering the alternatives available to consumers, the Tribunal indicated that in the context of a misleading advertising case, the correct approach is to look at where and how the advertiser marketed the product in question, consistent with the approach set out in the Bulletin that "[t]he relevant geographic market is usually captured by the area covered by the medium of communication that is employed."[9] The Tribunal considered the fact that Sears' regular and promotional prices were set on a national basis without regional variation, that Sears did not produce or distribute separate marketing and promotional material for each region, that the representations in issue were contained in flyers that were distributed nationally, without regional variation, and that the advertisements were distributed nationally with no regional variation, in concluding that the relevant geographic market was Canada.[10]

In interpreting the term "good faith", the Tribunal explicitly agreed with the interpretation set out in the Bulletin. The Tribunal asked 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. In assessing that subjective belief, the Tribunal indicated that it was necessary to consider external, objective factors, including whether the reference price was similar to that offered by Sears' competitors and whether any sales had, in fact, occurred at that price.[11] According to the Tribunal, this interpretation was "...consistent with the description found in the Commissioner's Guidelines concerning the assessment of "good faith" in the context of the time test."[12] After an extensive review of the evidence, the Tribunal concluded that the "good faith" requirement had not been met by Sears. This is discussed in further detail in the section titled "Observations" below.

In considering the application of the time test, the Tribunal accepted the Commissioner's submission that the appropriate reference period was the six-month period prior to the making of the impugned representation and found that, at best, the tires were offered at the regular price 46% of the time in that period. As the Tribunal stated:

> ...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.
>
> 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.[13]

The Tribunal also followed the approach taken in the Bulletin in its analysis of the "substantial period of time" requirement by accepting the proposition that the requirement will be met if the product in question is offered at or above the reference price for more than 50% of the time period considered. As the Tribunal stated:

> ...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.[14]

As four out of five lines of tires were on sale for more than 50% of the time in the six-month period pre-dating the representations in issue, Sears was found to have failed this requirement.

Finally, the Tribunal found that Sears did not establish that the representations in question were not false or misleading in a material respect and therefore saved under subsection 74.01(5). The Tribunal looked to three factors: (i) the savings were substantially exaggerated, as the "2For" price was always substantially lower than the regular price and would be a material influence upon a consumer; (ii) upon discontinuance of the promotion, Sears' sales volumes of the tires declined; and (iii) consumers had a limited ability to evaluate the intrinsic attributes of tires.[15]

The Tribunal accordingly concluded that Sears had failed to meet the volume test (as conceded) for all five lines of tires, that Sears' ordinary selling prices were not offered in "good faith" under the time test, and that the representations were not saved under subsection 74.01(5) of the Act.

While the Commissioner had sought a penalty of $500,000 (presumably the statutory maximum of $100,000 for each of the five lines of tires with respect to which OSP representations were alleged to have been made), her costs, and the publication of corrective notices, the resulting order was far more limited. The Tribunal issued an order prohibiting Sears from engaging in conduct contrary to the OSP provisions for a period of 10 years, which, despite the Commissioner's position that the order should apply to all goods marketed by Sears, was limited to tires and other automotive-related products and services. Furthermore, the publication of corrective notices was not ordered, as the Tribunal believed that too much time had elapsed since the making of the impugned representations. This was a victory of sorts for Sears, as the Commissioner had requested notices to be published: (i) in two weekly flyers with a circulation of no less than 4.2 million, primarily to be inserted in newspapers and (ii) in the first nine pages of the Wednesday edition of approximately 80 newspapers nationwide. The financial

consequences to Sears of a requirement to issue corrective notices would obviously have been significant. Finally, on April 1, 2005, the Tribunal imposed an administrative monetary penalty of $100,000 upon Sears and ordered the company to pay $387,000 toward the Commissioner's costs.[16]

Observations

In upholding the constitutionality of the OSP provisions, the Tribunal observed that the provisions provided for flexibility "...in order to deal with the variety of circumstances which may arise... and evolving market practices".[17] Seen in this light, and having regard to the fact-sensitive nature of the case, it is unsurprising that the *Sears* case does not provide conclusive guidance on the application and interpretation of the OSP provisions. This is a regrettable result, given the priority placed upon enforcement of the provisions by the Commissioner and retailers' need for some certainty. The case does raise some issues worthy of further consideration.

Relevant Geographic Market

The Tribunal has confirmed the approach to be taken in interpreting the market definition requirement contained in the OSP provisions. The case law that preceded the coming into force of subsections 74.01(2) and (3) suggested that for the purposes of OSP cases, the relevant geographic market was often, but not exclusively, determined by the reach of the advertisement containing the offending representation. In the *Eaton* case, for example, the relevant geographic market was found to include locations outside of Winnipeg where the newspaper that contained the advertisement in question was distributed.[18] The approach taken in ordinary selling price cases is, therefore, not necessarily consistent with the market definition exercise undertaken under other provisions of the Act.[19] The confirmation by the Tribunal in *Sears* that the "traditional competition law approach" to market definition is of limited use under the OSP provisions is logical and provides further clarity with respect to this element of the provisions.

Meaning of "Good Faith"

The Tribunal has also clarified the content of the "good faith" requirement. First, the question of "good faith" is a subjective one, though reference will be made to objective facts to determine whether a retailer truly believed that its regular prices were genuine and *bona fide* prices able to be validated in the market.[20] This makes sense, given the forensic nature of the "good faith" inquiry. It is also consistent with the position taken by the Commissioner in the Bulletin.

The Tribunal's close examination of Sears' internal sales and marketing documentation (in preference to oral testimony) suggests that retailers will need to be careful about the evidentiary record underlying a decision to institute an ordinary selling price promotion. It is particularly significant that the Tribunal found such documents to be *prime facie* proof that Sears said, did and agreed to the matters set out in the documents. The fact that competitive profiles and automotive reviews used the "2For" price as the basis for Sears' planning purposes, as opposed to the regular price for single tires, was fatal to Sears' position that it had offered the tires for sale in "good faith". Neither was Sears able to persuade the Tribunal that the existence of Manufacturers Suggested

List Prices ("MSLPs") supported its "good faith" argument, as the Tribunal found that MSLPs were not widely or commonly used by tire dealers as their regular selling price.[21]

The bottom line, in the Tribunal's view, was that Sears could only have expected to sell no more than 6% of private label tires and 3.8% of national brand tires at the regular price for single tires for the relevant period and, objectively speaking, sold at most 2.3% of private label tires and 1.3% of national brand tires.[22] However, the Tribunal's reliance upon the very limited quantity of sales at the single tire price should be viewed with caution. The Tribunal has effectively suggested a restrictive approach to the use of a sale price that refers to a single product price in connection with products sold in multiples. For tires, this may have been a reasonable finding. On the other hand, there are obviously products which, though sold in multiples, may also be reasonably sold in single quantities as well. The Tribunal's decision could well place a chill on ordinary price representations made in such contexts.

Reference Period/Substantiality

Another significant aspect of the Tribunal's decision relates to its adoption of the approach taken in the Bulletin to the reference period contained in the time test. The Tribunal accepted the Commissioner's submissions on this point because (i) such a period would take into account the seasonality of the products in question and (ii) Sears' internal compliance documentation made reference to a six month reference period. The relevance of a six month reference period to a seasonal product such as snow tires is perhaps understandable, but reliance on what appears to be a general compliance memorandum describing the 1999 amendments is perplexing. It is unclear whether the memorandum explicitly contemplated the promotions at issue in the Commissioner's application. Presuming it did not, the Tribunal's reliance upon such a document in support of its finding is peculiar.

The Tribunal's endorsement of the 50% time period in which a product must be offered for sale at the ordinary price is also worthy of comment. In its reasons, the Tribunal primarily relied upon the decision in the *Eaton* case to conclude that a product on sale half, or more than half, of the time could not be said to have been offered at its regular price for a substantial period of time. The Tribunal has interpreted a "substantial period of time" as meaning a time period in excess of 50%. If it was Parliament's intent that the term "substantial" refer to a time period greater than 50%, it could have used language consistent with that intention. It did not. Moreover, the use of "substantial" elsewhere in the Act does not suggest such a reading. Apart from a cursory reference to the *Eaton* case, the Tribunal did not provide any detailed explanation on why this standard is appropriate, something that future cases will hopefully clarify.

Conclusion and Epilogue

For those observers who had hoped that *Sears* would provide comprehensive clarification with respect to the interpretation of the OSP provisions of the Act, the resulting decision may have come as somewhat of a disappointment. Beyond providing some clarification with respect to the "good faith" requirement and ostensibly confirming the interpretation of the time test set out in the Bulletin, the case does not provide firm guidance on

the interpretation of the provisions, which have been the subject of significant enforcement activity. Hopefully, these issues will be resolved in future cases.

In light of the continued uncertainty surrounding the interpretation of the OSP provisions post-*Sears*, and their seeming importance in the enforcement agenda, it is interesting to briefly consider the broader question of whether the enforcement of the provisions merits enforcement priority. Comparison with the approach taken to ordinary price representations in the United States is of some interest. In the U.S., Federal Trade Commission ("FTC") enforcement has declined to such an extent that no fictitious price cases have been brought by the agency since 1979.[23] The decline of FTC enforcement efforts in this area would appear to relate, in part, to the adoption of fictitious pricing statutes and regulations by the majority of the individual states. A more general explanation for the decline of the FTC's enforcement efforts has been suggested by a former FTC Chairman, Robert Pitofsky, in a recent article in *Antitrust*.[24] Pitofsky suggests that the increased ability of consumers to obtain information with respect to competing products and retailers has rendered FTC enforcement of fictitious price claims unnecessary. Alleged fictitious pricing is, on this reasoning, innocuous, as consumers are in a position to verify the validity of exaggerated claims.[25] The result is that as long as consumers are accurately informed as to the selling price, they are in a good position to mitigate any harm from deceptive pricing practices by comparing the values offered by one retailer to those offered by another.[26]

There are obvious contextual differences between the U.S. and Canadian approaches to regulating ordinary price representations. The Commissioner clearly is of the view that there is a reasoned justification for maintaining a more stringent approach to such representations in Canada. However, as more Canadians have become accustomed to the presence of large format discount retailers in their communities (along with the reassurance that many consumers find in everyday low pricing policies offered by such stores) and increasingly use the Internet as a source of product information (including pricing) it is an open question as to whether present day consumers are as vulnerable to misleading ordinary price representations as might have been the case when the OSP provisions found their way into the Act six years ago. This is a matter for another day, however. In the meantime, and in the present enforcement climate, stakeholders will have to rely upon the existing sources and the limited guidance contained in the *Sears* decision to ensure that promotions involving ordinary price representations do not raise concerns under the Act.

Notes

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1 *Commissioner of Competition v. Sears Canada Inc.* (2005), 37 C.P.R. (4th) 65 (Comp. Trib.) [*Sears*].

2 See S. Bhattacharjee & J. Musgrove, "The Civil Misleading Advertising Regime in Crisis: A Timely Solution" (Paper presented at the Annual Fall Conference on Competition Law – Canadian Bar Association – Competition Law Section, Ottawa, Canada, September 23, 2004).

3 Press Release, "Competition Bureau Investigation Leads to $1-Million Settlement with Suzy Shier Inc." online: Competition Bureau <www.competitionbureau.gc.ca/internet/index.cfm?itemID=305&lg=e> (date accessed June 20, 2005) and Press Release, "Canada's Largest Sporting Goods Retailer Pays $1.7-Million for Misleading Consumers" online: Competition Bureau <www.competitionbureau.gc.ca/internet/index.cfm?itemID=254&lg=e> (date accessed June 20, 2005).

4 The ordinary selling price provisions contained in subsection 74.01(2) and (3) of the Act address those situations where a retailer, in the course of promoting a product, compares the "sale" price of that product to the price at which the

product is regularly or "ordinarily" sold. The provisions prohibit misrepresentations as to the ordinary price of the product so as to prevent consumers from being mislead as to the extent of the bargain they believe they are receiving. With respect to "own price" comparisons, subsection 74.01(3) provides that ordinary price representations are legitimate only if a substantial volume of sales at that price were made before or after the making of the representation, or the product in question has been offered for sale at that price in good faith for a substantial period of time prior to or following the making of the representation. Only subsection 74.01(3) was in issue in *Sears*.

[5] "Ordinary Price Claims: Subsections 74.01(2) and 74.01(3) of the Competition Act", online: Competition Bureau <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1227&lg=e> (date accessed: June 20, 2005) [*Bulletin*].

[6] It is worth noting that the inclusion of stand alone provisions dealing with ordinary price representations in Part VII.1 of the Act was itself intended to bring some clarity to the treatment under the Act of bargain price representations. As other commentators have noted, prior to the passage of Bill C-20, there was limited guidance on the critical question of what the appropriate comparative test was under paragraph 52(1)(d) – the Act and courts were silent, while the Bureau chose to advance a test that was practically unworkable: see J. Musgrove & J. MacNeil, "Price Claims: Too Good to be True? Separating Fact From Fiction in Ordinary Pricing Claims" (Paper presented at 7th Annual Conference on Advertising & Marketing Law – Insight Information Co., Toronto, Ontario, November 29-30, 2004).

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

[8] *Sears, supra* note 1 at para. 225.

[9] *Bulletin, supra* note 5 at 3.

[10] *Sears, supra* note 1 at para. 227.

[11] *Ibid.* at para. 239.

[12] *Ibid.* at para. 240.

[13] *Ibid.* at paras. 308 and 309.

[14] *Ibid.* at para. 316.

[15] *Ibid.* at paras. 333 to 344.

[16] 2005 Comp. Trib. 13.

[17] *Sears, supra* note 1 at para. 55.

[18] *R. v. T. Eaton Co.*, [1973] O.J. No. 127 (Co. Ct.) [*Eaton*].

[19] See e.g. *Commissioner of Competition v. Canada Pipe*, 2005 Comp. Trib. 3.

[20] *Sears, supra* note 1 at para. 239.

[21] The Tribunal's analysis of the significance of the MSLP appears to be consistent with the contextual approach articulated in the *Allied Towers* case and subsequently followed in other cases prior to the 1999 amendments to the Act: see D.M.W Young & D.R. Fraser, *Canadian Advertising & Marketing Law* (Toronto: Thomson Canada Limited, 2005) at 1-101.

[22] *Sears, supra* note 1 at paras. 289-294.

[23] R. Pitofsky et al., "Pricing Laws Are No Bargain for Consumers" *Antitrust* (Summer 2004) 62 at 62.

[24] *Ibid.*

[25] *Ibid.*

[26] *Ibid.* at 64.

THE *SEARS* CASE AS AN OBJECT LESSON: THE CASE FOR EXPEDITED ADVERTISING HEARINGS

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Introduction

The case of the *Commissioner of Competition v. Sears Canada Inc.*[1] involved misleading ordinary price representations made by Sears Canada during the calendar year 1999. The case was commenced by the Commissioner on July 22, 2002, or a little over two and a half years after the last of the conduct challenged. The case was decided by the Competition Tribunal on January 24, 2005, or almost exactly two and a half years after the application was filed, and therefore just over five years after the last of the challenged conduct ceased. Following this finding of liability, the question of what amount by way of administrative monetary penalty should be imposed was determined, on consent of the parties, by the Tribunal on April 1, 2005. The result was a final decision in the range of three years from the commencement of the case – or about six years from the conduct in question.

The *Sears* decision is the first of the reviewable marketing practices cases to be dealt with under the new Competition Tribunal rules for civil matters other than mergers (the "2002 Amendments to the Rules").[2] Indeed, it is only the second contested misleading advertising case under the new (1999) civil regime and the only other contested case, *PVI*[3], is somewhat of an anomaly, given that it was dealt with under the previous rules and given that, because the Respondent was unrepresented, it had a somewhat unusual procedural path. A sample of one case is hardly decisive, but even if the length of time for the *Sears* case had been halved – to say one and a half years – or even reduced to a single year, in my view this is much too long a time for a civil misleading advertising case to take. This is a particularly timely question because the Tribunal in the *Sears* case specifically declined to make an order requiring corrective advertising because of the amount of time which had passed since the challenged advertising had appeared.

The *Sears* case involved ordinary pricing claims – a relatively common type of misleading advertising case. It did not involve any exotic science, nor did it involve, as many misleading advertising cases will, any significant disputes about consumer perceptions with respect to claims which may be literally true but which nonetheless may give a misleading consumer perception. That is, the *Sears* case was a fairly run-of-the-mill kind of case. It is true that it is one of the first under the new regime to be contested, and it is also true that it involved a constitutional challenge. That said, the new civil regime is largely built on the pre-existing criminal regime – so while there were new aspects it was not brand new – and the constitutional challenge, while interesting, was hardly startling in its nature or indeed, it is submitted, its almost inevitable conclusion.

This note is not an attempt to summarize or comment on the substance of the *Sears* case. The companion piece in this issue, written by Subrata Bhattacharjee and Gregory Sullivan, will attempt that. This brief article seeks to

advocate the simple proposition that, if a relatively straightforward case such as *Sears* takes two and a half or three years to be decided, then the procedures being employed are flawed and need re-evaluation.

I should also say that this note is not intended as any sort of criticism of the Tribunal or of the parties or counsel in the conduct of the *Sears* case itself. The parties and the Tribunal worked within the framework of the rules applicable to the case – as they are required to do. There is nothing inappropriate about that – indeed counsel would be remiss in not taking appropriate advantage of the available rules to advance his or her case most effectively. It is the appropriateness of the rules, not of the conduct of the Tribunal or the parties, which is, if anything, subject to some criticism.

Increased Consequences Versus Expedition

The Competition Bureau itself appears to be somewhat dissatisfied with the current state of affairs. It has begun "dual tracking" cases – keeping its options open as to whether it will proceed criminally or civilly. In addition, it has proposed significant changes to the consequences for civil misleading advertising. Bill C-19[4] proposes to introduce a massive increase to the level of administrative monetary penalties for reviewable advertising conduct – up to $10 million for a first "offence" (from $100,000), and $15 million for recidivists (from $200,000). That is, penalties in excess of the penalties for price fixing conspiracies. The Bill also proposes a complex and likely very expensive regime of restitution, which in many cases will involve payments to fund advocacy groups rather than restitution in any traditionally understood sense.

My thesis, in a nutshell, is that the problems with the civil misleading advertising regime are not that it lacks sufficient penalties or consequences, but rather that it is simply too slow. Consequently, the proposed "fix" is not to adjust the consequences, but rather the procedure.

Penalties and consequences of the nature proposed in Bill C-19 are not going to expedite hearings. In fact, just the opposite. With $10 or $15 million at stake, and perhaps restitution in an amount up to the total amount received for the products sold, the parties are not going to agree to expedite or streamline a hearing. They are going to make every possible effort to obtain full and complete discovery. The decision of the Federal Court of Appeal in the *Canada Pipe* case[5], that the procedural protections of discovery are not necessarily available under the Canadian Bill of Rights for reviewable conduct, may well be revisited in the light of these penalties. Indeed, there may be a question of constitutionality of AMPs of that magnitude, as a quasi-criminal penalty. That is, the proposals in Bill C-19 are not a recipe for expedition.

In addition, vastly increased penalties may have both positive and negative consequences with respect to substantive advertising content itself. Ramping up the penalties may have some consequence in frightening people away from risky advertising conduct (probably an intended consequence), but that may have ambiguous welfare outcomes. Discouraging people from advertising will no doubt have some beneficial effect in deterring misleading advertising claims – although presumably anything which was undertaken knowingly or recklessly was already subject to criminal prosecution if the Commissioner and the Attorney General wished to proceed that way. However, vastly increased penalties will also have the effect of discouraging useful but potentially somewhat

risky advertising – particularly comparative advertising – yet it is comparative advertising which is most likely to bring useful consumer information to the marketplace.

If the Bill C-19 advertising proposals proceed, and the consequences for misleading advertising are greatly expanded, then the proposals in this paper for expedited hearings will cease to be appropriate. On the other hand, if instead of tackling the perceived problem with the civil misleading advertising provisions by ramping up the consequences, presumably to achieve some deterrence, a more expedited hearing procedure were adopted, the cat may be otherwise skinned.

I also believe that an expedited hearing procedure is likely not only to obviate the need for increased penalties, but also should eliminate the Bureau's current approach of "dual tracking" misleading advertising cases – investigating them both civilly and criminally and keeping the option of proceeding either way open.[6] The threat of criminal prosecution would be less relevant when the threat of very expeditious proceedings before the Tribunal is credible.

A distinguishing feature of advertising disputes is their time-sensitivity. Indeed, as noted above, the Tribunal recognized this in the *Sears* case where it declined to order corrective advertising, given the passage of time. For this reason, the key relief sought in most advertising disputes is the cessation of what are thought to be misleading claims. The public is well served by such a remedy. Furthermore, if an expeditious civil remedy were available, advertisers would be well aware of such a remedy, and would govern their conduct accordingly. This, however, in no way detracts from the availability of very significant penalties and civil damages in cases of truly calculatedly misleading conduct. Such penalties are already available under section 52 (in conjunction with the right of private action under section 36).

Fairness Versus Expedition

Any proposal for expedited proceedings naturally meets with an objection that it may not allow for appropriate fairness in the proceedings. This is a concern for which I have some considerable sympathy. However, in the case of advertising disputes, based on my own experience I believe these concerns can be overcome. Marketing practices cases are not inherently complex (or at least do not usually exhibit the complexity of abuse of dominance cases, to take the most obvious example). Further, the advertiser ought to be in possession of evidence to justify the advertising claims it makes. The Commissioner can take whatever amount of time she deems appropriate in preparing her case before it is launched. Rules requiring expedition ought not unfairly prejudice the Commissioner or the Respondent.

I should note, however, that my observations here with respect to the 2002 Amendments to the Rules are restricted solely to the context of marketing practices cases. I do not believe that the evidence demonstrates the same problem with respect to the Tribunal rules as they apply to other reviewable practice cases. Indeed, just the opposite may be the case in respect of those sorts of disputes. The particular problem with which this paper is concerned arises from the application of the 2002 Rules to a particular kind of case which generally requires an expedited resolution, and which tends not to be particularly complex. I expressly do not take any position on

the question of whether the Tribunal rules that are now in force are appropriate for an abuse of dominance case. Indeed, it may well be that in such a case more procedural protections than the current Rules provide for would be appropriate – but that is for another day. The thesis of this paper is, however, that for advertising cases the Rules that now apply allow for too much time to elapse before matters are determined.

The Advertising Standards Canada Model

I take as a model for the proposal to establish expedited hearings in civil misleading advertising cases the Trade Dispute Procedure run by Advertising Standards Canada.[7] That procedure allows competitors to challenge advertisements which they believe to offend the Canadian Code of Advertising Standards – the key provision of the Code for these purposes being Section 1, which provides in part:

> Advertisements must not contain inaccurate or deceptive claims, statements, illustrations or representations, either direct or implied, with regard to a product or service. In assessing the truthfulness and accuracy of a message, the concern is...the general impression conveyed by the advertisement.

Advertising Standards Canada trade disputes typically can be concluded within five or six weeks from the filing of the complaint. That is, they are truly expeditious. The proposal I advocate for Part VII.1 proceedings, recognizing that there are consequences beyond pure cease and desist orders associated with section 74.1 applications under the existing regime, contemplates a somewhat longer period than that – indeed approximately 12 weeks. Still, one-quarter of a year is a much more appropriate timeframe for a misleading advertising dispute to be determined than is three years.

If the Tribunal were given a mandate to conduct summary advertising proceedings, along the lines suggested herein, the difficulties of what Professor Trebilcock has described as the "full court press"[8] in Tribunal matters would be reduced in marketing practices cases. The Commissioner could reasonably be expected to actually bring cases which she thought appropriate and in respect of which the advertiser was unwilling to compromise. Such matters could be dealt with on the merits. Advertisers would come to realize that the Commissioner has the practical power to bring cases and have them heard expeditiously, and therefore would be more inclined to reach reasonable accommodation with the Commissioner, or, in cases of genuine disagreement, to permit the matter to be determined by the Tribunal on the merits, without the stakes for either side being enormous. As well, without the risk of the additional penalties, while advertisers would be aware the Commissioner could proceed in appropriate cases, at the same time they would/ought not be dissuaded from engaging in aggressive advertising when they believe it appropriate, for fear of ruinous damages.

The Proposal

Given all of the foregoing, it is submitted that a better solution (better than increased penalties or "dual tracking") to the problem of enforcement of the provisions of Part VII.1 lies in the application of separate rules for proceedings before the Tribunal involving advertising disputes. In our earlier papers[9] we have provided a draft of such proposed rules.

By way of an outline of the proposed procedure envisioned:

1. The Commissioner shall serve, with her Application, the written evidence in chief of all of her witnesses. This shall constitute her case in chief, and those witnesses shall be available at the hearing for examination by members of the Tribunal and for cross-examination, but shall not give evidence in chief beyond the written statements, except in extraordinary cases and with leave of the Tribunal.

2. The Commissioner shall also, at that time, provide to the Respondent copies of all section 11 evidence gathered (including transcripts of examinations of witnesses under section 11), the results of all testing conducted with respect to the product in issue (whether favourable to her case or not), and all documents she relies upon.

3. Within four weeks of the date of service of the Application, the Respondent must file its Response, together with service of its written evidence in chief from each of its witnesses, as well as all testing evidence in its possession with respect to the product and all documents it relies upon.

4. The Commissioner shall have no more than two additional weeks to file any Reply and reply evidence.

5. The Respondent shall have no more than one additional week, and only with leave of the Tribunal, to file any rebuttal to the Reply.

6. The hearing shall be scheduled to commence not more than eight weeks after the service of the initial Application. The hearing is to be completed, in a typical case, in two sitting days, and in any case, in not more than a maximum of five sitting days.

7. The decision of the Tribunal must be released within 12 weeks of the service of the Application – with reasons to follow if necessary, but preferably with reasons given at the time of the decision.

The foregoing is a suggestion only. There are no doubt other and better methods to achieving an expedited hearing. The goal of this note is to advocate that outcome, and to encourage debate to develop the best set of procedures. However, I submit that some form of expedited procedure is worth exploring, before concluding that the civil misleading advertising provisions are not working, and that what are really required are draconian remedial provisions or "dual tracking".

Conclusion

The 2002 Rules were a first attempt at tailoring process to the substantive nature of disputes. In the context of marketing practices cases, the experience has been problematic with respect to expedition. This leads to broader concerns about the viability of the current civil deceptive marketing practices regime as a practical way of dealing with advertising disputes. The Bureau has proposed attacking the problem by expanding the scope of remedies available for conduct found to be in breach of the provisions of Part VII.1. Based on the limited

experience to date, however, (which has likely contributed to the Bureau's concern) it is submitted that the problem to be solved is the process under which such disputes are determined, rather than the adequacy of the sanctions. This paper proposes solving that process problem.

Notes

* With the assistance of Janine MacNeil. This article is a distillation of the ideas presented in a paper originally presented at the September 23, 2004 Canadian Bar Association Fall Conference "The Civil Misleading Advertising Regime in Crisis: A Timely Solution", and restated in the wake of the *Sears* decision, in a paper given at the Northwind Professional Institute Competition Litigation Forum on February 21, 2005 "Deceptive Marketing Practices: A Modest Procedure Proposal" These papers were co-authoured with Subrata Bhattacharjee and as well prepared with the assistance of Janine MacNeil and Michelle Wong. I express my continuing gratitude to them.

1 (2005), 37 C.P.R. (4th) 65 (Comp. Trib.).

2 *Rules Amending the Competition Tribunal Rules*, S.O.R. 2002-62.

3 *Canada (Commissioner of Competition) v. P.V.I. International Inc.* (2002), 19 C.P.R. (4th) 129 (Comp. Trib.).

4 *An Act to Amend the Competition Act and to make consequential amendments to other Acts*, 1st Sess. 38th Parl. 2004 (1st reading 2 November 2004).

5 *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2004), 30 C.P.R. (4th) 429 (F.C.A.).

6 A copy of Raymond Pierce's speech entitled *Report from the Competition Bureau: Deceptive Marketing Practices,* which was presented at the Canadian Bar Association's Annual Conference on Competition law held October 2-3, 2003, is available on the Bureau's website at <http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02732e.html>. Note, however, that Mr. Pierce's comments regarding the Bureau's dual track approach were made during a question and answer session and not within his formal presentation.

7 The Trade Dispute Procedure and Canada Code of Advertising Standards are available on ASC's website: www.adstandards.com (date accessed 14 February 2005).

8 M. Trebilock & L. Austin, "The Limits of the Full Court Press: Of Blood and Mergers" (1998) 48 U.T.L.J. 1.

9 See S. Bhattacharjee & J.B. Musgrove, "The Civil Misleading Advertising Regime in Crisis: A Timely Solution" (CBA Annual Fall Conference on Competition Law, 23 September 2004, unpublished) and J.B. Musgrove, "Deceptive Marketing Practices: A Modest Procedural Proposal" (Northwind Professional Institute Competition Litigation Forum, 21 February 2005, unpublished).