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Competition Tribunal Releases Sears Decision

On January 24, 2005, the Competition Tribunal (the "Tribunal") released its decision in *Commissioner of Competition vs. Sears Canada Inc.* ("Sears"). The case dealt with tire advertisements run by Sears in 1999, in which Sears advertised prices discounted from its "regular" tire prices. The Tribunal concluded that those ads violated the "ordinary selling price" provisions of the Competition Act, and issued a ten year prohibition order against Sears. The Tribunal declined to require Sears to issue corrective notices and deferred its decision on whether it would order Sears to pay administrative monetary penalties (AMP's) pending submissions on that issue by the parties.

Highlights of the decision include the following:

- The Tribunal rejected Sears' constitutional challenge to the validity of section 74.01(3) of the Act. The Tribunal held that the ordinary price provisions of the Act are not too vague, and are a reasonable and demonstrably justifiable limitation on freedom of expression under the Charter of Rights;
- The Tribunal held that Sears' ads violated the Act because Sears did not pass the "time" test for ordinary price claims. In other words, Sears had not offered the tires in question at the advertised regular or ordinary price "...in good faith for a substantial period of time recently before or immediately after the making of the representation..." as required by section 74.01(3)(b) of the Act;
- In applying the "time" test, the Tribunal took the same approach as that set out by the Commissioner in her Information Bulletin on Ordinary Price Claims, albeit without saying so. It held:
 - a) that Sears' advertised regular or ordinary prices had not been offered in "good faith" because Sears had no realistic expectation of selling significant numbers of tires at those prices; and

- b) that Sears did not meet the frequency requirement of the time test because it did not offer the advertised regular or ordinary prices for at least 50 percent of the time during the six month period preceding its advertisement.

- Sears conceded that it did not meet the "volume" test set out in section 74.01(3)(a), so the Tribunal did not deal with the merits of that issue. Under the "volume" test, the Tribunal considers whether the advertiser actually sold a "substantial volume" of the product at or above the advertised ordinary price. To be reviewable under section 74.01(3), conduct must fail both the "time" and the "volume" tests;
- The Tribunal issued an order prohibiting Sears from engaging in similar conduct in regard to tires or other automotive products or services for ten years. Still to be determined is the Commissioner's request that Sears be ordered to pay administrative monetary penalties of \$500,000, and the Commissioner's request for costs, including the costs of her investigation.

Should you have any questions regarding the Sears decision and how it may affect your business, please contact one of the following members of the **FMC Competition Law Group**:

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