

ADVERTISING &

MARKETING

BULLETIN

*A Report on Recent  
Developments in Advertising  
& Marketing Law*

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October 2003

### MISLEADING DISCOUNTS CAN COST YOU

In June 2003, Suzy Shier Inc. agreed to pay the Competition Bureau (Bureau) one million dollars to resolve an investigation into its pricing practices. The settlement was widely reported in the Canadian media. In the weeks that followed, “corrective notices” published by Suzy Shier appeared in twelve newspapers around the country. The notices explained (without admitting) the allegation that Suzy Shier had deceived customers by referring to inflated “ordinary” prices.

In a marketplace driven by discount marketing, it is important to ensure that your pricing practices attract the right sort of headlines. This bulletin focuses on the “ordinary price” provisions of the *Competition Act*, and the lessons arising from the Suzy Shier settlement.

### WHEN IS A BARGAIN REALLY A BARGAIN?

Price is an essential component in a company’s marketing-mix. Consumers respond to bargains: the greater the discount, the greater the perceived value in the customer’s mind. Therefore, it is not surprising that retailers may be tempted to create implied savings for consumers by making reference to inflated “regular” prices.

Section 74.01(2) of the Act makes it a reviewable practice to mislead the public concerning the “ordinary” price of a product. An “ordinary price” claim will be legitimate if it meets either a “volume” test or a “time” test:

**Volume Test** – was a “substantial volume”<sup>1</sup> of the product sold at that price or a higher price within a “reasonable period of time”<sup>2</sup> before the making of the representation?

OR

**Time Test** – was the product offered for sale, in good faith, at that price or a higher price, for a “substantial period of time”<sup>3</sup> recently before or immediately after the making of the representation?

The section applies whether the price comparison is being made to past, current or future prices. The period of time examined under either test will be influenced by the nature of the product. For example, a seasonal product, such as ski equipment, may attract a shorter evaluation period. The relevant geographic market is usually captured by the area covered by the medium of communication employed the retailer.

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1 While not law, the Bureau’s Information Bulletin on Ordinary Price Claims reflects the prevailing enforcement approach to the section. The Bulletin states that the substantial volume of product requirement will be met if more than 50% of sales are at or above the reference price.

2 According to the Bureau, generally the twelve months prior to (or following) the making of the representation, although this period may be shortened or lengthened depending on the nature of the product.

3 In the Bureau’s view, this requirement will be met if the product is offered at or above the reference price for more than 50% of the time in the six months preceding (or following) the making of the representation.

Note that the provision only prohibits representations that are “materially misleading”. Even if a particular representation meets neither test, the Bureau has acknowledged, in its Information Bulletin on Ordinary Price Claims, that an advertiser may argue (although not without some difficulty) that the representation is not misleading in a material respect. The general impression conveyed by the representation must be weighed when considering its materiality.

On finding a breach of the section, a court may order the retailer to cease the practice, publish a “corrective notice” describing the reviewable conduct, or pay a penalty of up to one hundred thousand dollars. Retailers should note that section 74.12 of the Act provides that Consent Agreements are not restricted to the terms of the Act; as such, Suzy Shier’s penalty far exceeded the statutory cap.

### THE ENFORCEMENT CONTEXT

What does the Suzy Shier settlement tell us about the Bureau’s enforcement priorities? Companies have run afoul the ordinary price provisions of the Act before. In 1994 and 1995, for example, a number of high profile retailers were charged, convicted and fined under the ordinary price provisions. Suzy Shier itself pled guilty

in 1995 to a charge under the ordinary price provisions, and was fined \$300,000 – a prior conviction that likely contributed to the much larger penalty this time around.

But there are a number of indications that the Bureau is focusing on regular price representations. In February 2002, the Bureau advised the Retail Council of Canada (RCC) that it was investigating complaints against its members under the ordinary price provisions of the Act. The RCC in turn issued a newsletter to its 8,500-odd members.<sup>4</sup> The Bureau’s first application under the new ordinary price guidelines was served on Sears Canada in July 2002.

In late April 2003, the Bureau announced that a Newfoundland-based jewellery company had advertised inflated regular prices. The Suzy Shier settlement, announced a short time later, reinforces a pattern of heightened vigilance toward regular price representations.

The Suzy Shier settlement points up the bottom-line importance of the issue. It is difficult to quantify the public relations damage done by a Bureau investigation to a business’s “brand.” Canadian retailers would be well advised to review their pricing practices, and to establish corporate compliance programs that specifically address the ordinary price provisions of the Act.

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<sup>4</sup> The member notice can be found at: <http://www.retailcouncil.org/govrelations/federal/notice0207.asp>

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*The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.*

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