

Making Sure Your Price Claims Are Legal

Presented By

**Bill Hearn, Partner, McMillan Binch Mendelsohn LLP
&
Martin Low, Q.C., Partner, McMillan Binch Mendelsohn LLP**

**The Canadian Institute's
12th Annual Advertising & Marketing Law Conference
January 26-27, 2006
Toronto**

Table of Contents

1. Introduction.....	3
2. Purpose of OSP provisions.....	3
3. History of OSP provisions in the <i>Competition Act</i>	4
4. The OSP provisions in the <i>Competition Act</i>	4
(a) The volume test	5
(b) The time test	6
5. Penalties for violating OSP provisions.....	8
6. Enforcement of the OSP provisions	8
(a) Suzy Shier	8
(b) The Forzani Group Ltd.....	10
(c) The Jewellery Consent Agreements	11
(d) Sears	12
7. How to avoid OSP claims	14
8. Binding Advisory Opinions.....	15
9. Bill C-19 update - amendments to the <i>Competition Act</i>	16
10. OSPs – the American experience.....	17
11. Conclusion	18
Appendix 1 Bureau’s Information Bulletin on OSP Provisions	27
Appendix 2 Notice by Suzy Shier Inc.....	27
Appendix 3 Mandatory Compliance Program Imposed by the Suzy Shier Consent Agreement.....	28
Appendix 4 Information Required by the Bureau to Give an Advisory Opinion.....	29

Making Sure Your Price Claims Are Legal¹

1. Introduction

Placing a product ‘on sale’ is one of the most potent tools in a business’s marketing repertoire because everyone likes a bargain. Sales have become so common that from a consumer perspective it seems like there is a sale for every month and every event: there are Boxing-Week sales, New Year’s sales, March Break sales, dog-days-of-summer sales, back-to-school sales, closing sales, renovation sales, end-of-season sales, and anniversary sales, just to name a few. However, in each of these sales, businesses must make sure that they do not violate the ordinary selling price (“OSP”) provisions in the *Competition Act* (the “Act”).² Making a false price claim is both costly and potentially embarrassing.

2. Purpose of OSP provisions

The OSP provisions require businesses to state honestly the price for which the discounted product ordinarily sells. The greater the discount, the greater the perceived value in the consumer’s mind. Therefore, the temptation is to inflate the OSP such that the consumer believes that the advertised selling price is significantly less than the OSP. This deception distorts the market and prevents it from operating efficiently by luring customers away from competitors who represent their product prices truthfully, putting those businesses at a competitive disadvantage. The purpose of the OSP provisions is to ensure the quality and

¹ This paper was written by Jonathan Hood (an associate at McMillan Binch Mendelsohn) under the direction of Martin Low, Q.C., a partner at McMillan Binch Mendelsohn, and Bill Hearn also a partner at McMillan Binch Mendelsohn and Co-Chair of the firm’s Advertising & Marketing Group. For more information on the group, please visit www.mcmbm.com/advertising.

² R.S.C. 1985, c. C-34.

accuracy of marketplace information by making sure that an advertised bargain is an actual bargain.

3. History of OSP provisions in the *Competition Act*

Before 1999, it was a criminal offence to misrepresent the OSP of an item.

Unfortunately, the section failed to specify how to determine the OSP. In 1999, the government amended the *Act* and moved the OSP provisions into the reviewable conduct provisions (the new Part VII.1 of the *Act*). Although the OSP provisions are no longer in the criminal offences part of the *Act*, the *Act* still contains a criminal offence provision that prohibits false or misleading representations to the public that are made “knowingly or recklessly”. This provision allows the Competition Bureau (the “Bureau”) to proceed either along the criminal track or the civil/reviewable track when investigating OSP claims. Although this paper focuses on the reviewable provisions, it is important to remember that making a misleading OSP claim can be a criminal offence and that the jurisprudence under the old criminal provision still applies.

4. The OSP provisions in the *Competition Act*

Section 74.01(2) of the *Act* makes it a reviewable practice to mislead the public about the “ordinary” selling price of a product. For example, if the sales tag on a shirt says “Regularly \$49.99, now \$20.00” when the shirt was regularly sold for \$25.00, then the retailer has misrepresented the OSP. This is an obvious example; however, price claims can be misleading in a less obvious way. For example, would the price in the example be misleading if the retailer sold ten shirts for \$49.99? Or five? Or Fifty? Would it be misleading if the price had been set at \$49.99 for a month but no shirts had been sold?

To deal with these grey areas, the OSP provisions outline two tests:

Volume test: An OSP claim will be legitimate if a “substantial volume” of the product was sold at that price or higher within a “reasonable” period of time prior to or following the representation.³

Time test: An OSP claim will be legitimate if the product was offered for sale, in good faith, at that price or a higher price, for a “substantial” period of time prior to or following the making of the representation.⁴

The language of these tests is difficult to interpret in isolation. What do “substantial volume” and “reasonable period” mean? To help advertisers interpret and hence comply with these provisions, the Bureau published guidelines in an Information Bulletin (the “Guidelines”) explaining both tests.⁵

(a) The volume test

The volume test has two components: 1. substantial volume and 2. reasonable period of time. The substantial volume requirement will be met if more than 50% of sales are at or above the reference price. Where no single price accounts for a substantial volume of sales, references may be made to the lowest of two or more of the prices which make up a substantial volume of the sales. The reasonable period of time is the twelve months prior to (or following)

³ *Supra* note 2, s. 74.01(2)(a).

⁴ *Ibid.* s. 74.01(2)(b)

⁵ Competition Bureau Information Bulletin, *Ordinary Price Claims – Subsections 74.01(2) and 74.01(3) of the Competition Act* (Industry Canada, 1999), available on-line at: <http://www.competitionbureau.gc.ca/>. Provided in Appendix 1.

the representation. However, this period may be shorter having regard to the nature of the product.⁶

(b) The time test

The time test also has two components: 1. the price has to be offered in good faith and 2. over a substantial period of time. Some of the factors that the Bureau will consider to determine whether a price will be offered in good faith are whether:

- the product was openly available in appropriate volumes;
- the reference price was based on sound pricing principles and/or was reasonable in light of competition in the relevant market during the period in question;
- the reference price was a price that the supplier expected the market to validate, whether or not the market did validate this price; or
- the reference price was a price at which either genuine sales had occurred or that was comparable to competitors' prices.

The substantial period of time requirement will be met if the product is offered at or above the reference price for more than 50% of the time period considered. The time period considered is the six months prior to (or following) the making of the representation. However, this period may be shorter having regard to the nature of the product.⁷ Where the product is offered for sale at different prices for different periods of time, the reference price may be the

⁶ *Ibid.* pg. 4. For example, a seasonal product such as holiday cards would likely have a shorter reference period.

⁷ *Ibid.* Other factors which can affect the time period include: whether the item is frequently or infrequently purchased, whether the item is new or commonplace, and whether the item is a national or private brand.

lowest of the two or more prices that make up the substantial period of time at which the product was offered for sale.⁸

The Guidelines also offer the following general principles:

- When the comparison is made to the supplier's own prices, the volume and time tests apply to those prices. Conversely, if the comparison is made to other suppliers prices then the volume and time test apply to those prices.
- Depending upon the specific circumstances of each case, the relevant geographic market will be determined based on a number of factors. These could include: the market reach of the representation, the number and location of competitors, the likelihood of travel to purchase the product in question, the location of consumers reached by the representation and the ease of price comparison.
- Price comparison representations that fail the time and volume tests may not raise an issue under the *Act* if the supplier can establish that they were not otherwise false or misleading in a material respect.⁹ For example, a clearance situation where the supplier had had few sales and has no plans to later raise the price to the reference level. The general impression conveyed by the representation must be weighed when considering its materiality.¹⁰

⁸ *Ibid.*

⁹ Arguably, this would be a risky defence to rely on because, in most instances, the Bureau could be expected to contend that a false OSP claim is inherently misleading.

¹⁰ *Ibid*, pg. 3.

5. Penalties for violating OSP provisions

The Commissioner of Competition (the “Commissioner”) is empowered to investigate reviewable practices and to bring the case before the Competition Tribunal (the “Tribunal”). If the Tribunal finds that the OSP provisions have been violated, then it may order the offender to:

- not engage in the conduct;
- publish a corrective notice; and
- pay an administrative monetary penalty (“AMP”).¹¹

6. Enforcement of the OSP provisions

Enforcement of the OSP provisions has been a priority for the Bureau in recent years. As outlined below, the Bureau has investigated a number of cases that have resulted in consent orders for million-dollar settlements. In addition, one case – *Commissioner of Competition v. Sears Canada Inc.*,¹² – has gone to the Tribunal. As the cases demonstrate, it is important to ensure that before making your OSP claims, you have all of your ducks in a row.

(a) Suzy Shier

In January, 2001, the Commissioner commenced an inquiry into the marketing practices of Suzy Shier Limited related to the pricing of women’s apparel by its subsidiary, Suzy Shier Inc.¹³ The Bureau’s investigation found that in some of its retail stores, Suzy Shier Inc.:

¹¹ The maximum fine for an individual is \$50,000 while the maximum fine for a corporation is \$100,000.

¹² 2005 Comp. Trib. 2, File No. CT2002004. (“Sears”).

¹³ Consent Agreement in *Commissioner of Competition v. Suzy Shier Inc.* (File No. CT-2003-006) available online at www.ct-tc.gc.ca.

- affixed price tags to the products that referred to regular prices when the products were being promoted at a reduced price;
- overstated these regular prices given the nature of the products and the relevant geographic market;
- did not sell a substantial volume of the products at the regular price on the price tag within a reasonable period after making the representations; and
- did not offer the products at the regular prices featured on the price tags for a substantial period of time immediately before making the representations.

Based on the results of the Bureau's investigation, a 10-year consent agreement was negotiated and filed. Under the agreement, Suzy Shier Inc.:

- committed to ensure that all future regular price representations complied with the OSP provisions of the *Act*;
- implemented a marketing and pricing practices corporate compliance program and policy designed to promote compliance with the *Act* generally, including the OSP provisions;
- had to publish corrective notices on the corporate Suzy Shier website and in the Wednesday and Saturday editions of sixteen different newspapers across Canada for a period of three consecutive weeks;¹⁴ and
- had to pay an AMP in the amount of \$1,000,000.

¹⁴ A sample of the corrective notice is included at Appendix 2.

(b) The Forzani Group Ltd.

On July 6, 2004, the Forzani Group Ltd. entered into a consent agreement with the Commissioner.¹⁵ The Commissioner had investigated Forzani's practices relating to price representations for the purpose of promoting the supply or use of sporting goods.¹⁶ As a result of the investigation, the Commissioner found that:

- Forzani overstated the OSPs offered by suppliers in the relevant geographic market (by using the words "compare at") such that Forzani could not meet the volume test; and
- Forzani overstated the OSPs, given the nature of the products and the relevant geographic market such that it could not meet the volume test.

As well, the investigation found that, with respect to some of the products, Forzani's claimed OSPs were higher than the manufactures' suggested retail prices. The Commissioner also found that Forzani failed to exercise sufficient due diligence in its efforts to ensure compliance with the *Act* in good faith.

Under the terms of the 10-year consent agreement, Forzani agreed to:

- comply with the *Act's* OSP provisions;
- indemnify the Bureau for all costs and disbursements incurred during the course of its investigation, which amounted to \$500,000;
- publish a series of corrective notices in newspapers;

¹⁵ Consent Agreement in *Commissioner of Competition v. The Forzani Group Ltd.* (File No. CT-2004-010) available online at www.ct-tc.gc.ca. ("Forzani").

- establish and maintain a corporate compliance program promoting compliance with the *Act* and specifically with the OSP provisions; and
- pay an AMP of \$1.2 million.

(c) The Jewellery Consent Agreements

The Bureau investigated OSP claims in the jewellery sector in two instances: *Fine Gold Jewellers*¹⁷ and *Gold Factory*.¹⁸ In both cases, the jewellers had price stickers on the jewellery that showed a “regular” price and an ongoing “sale-off-the-regular” price. The consent agreements in both cases were very similar, applied for ten years, and required each merchant to:

- develop a corporate compliance manual with respect to the *Act* and the *Precious Metals Marketing Act*;¹⁹
- keep records indicating the price at which the product would be offered for sale, the price at which that product was sold, and the length of time for which the product was offered for sale at a particular price; and
- be prepared to provide such records to the Bureau on 14 days notice.

They also agreed to avoid any representation relating to direct or implied savings from OSPs unless at least 50% of the volume of the product was sold at the alleged “regular”

¹⁶ Forzani operates sporting goods stores under the Sport Check, Sport Mart and Coast Mountain Sports banners.

¹⁷ Consent Agreement in *Commissioner of Competition v. Fine Gold Jewellers and the Diamond Co.* (File No. CT-2002-008) available online at www.ct-tc.gc.ca. (“*Fine Gold Jewellers*”).

¹⁸ Consent Agreement in *Commissioner of Competition v. Gold Factory Ltd. And Roger Pye* (File No. CT-2003-03) available online at www.ct-tc.gc.ca. (“*Gold Factory*”).

¹⁹ R.S.C. 1985, c. P-19.

price within 12 months prior to the making of the representation. In addition, *Fine Gold Jewellers* was assessed an AMP of \$25,000.

(d) Sears

To date, the Bureau's Sears investigation is the only one that has been litigated. Before the Tribunal, the Commissioner alleged that Sears has misrepresented the OSP of tires in 1999 advertisements and compared this price to alleged "sale" prices which were then being offered. In its advertisements, Sears used a reference price for one tire. It was higher than the price for two tires which is how tires normally sold. In its promotions Sears always compared to the single unit price inflating the claimed savings. Accordingly, the Commissioner alleged that Sears was using the incorrect OSP in its advertisements.

The Tribunal looked at several factors to determine that the OSP in this case must be for two tires and not for one. The Tribunal concluded that:

- tires are usually sold in pairs;
- tire sales are stable over time;
- consumers don't spend much time evaluating alternative products;
- consumers have a limited ability to evaluate tire qualities; and
- consumers only passively receive information about tires over time.

The Tribunal found that Sears failed both the time and the volume tests. Sears admitted that it had failed the volume test but argued that it had met the time test. The Tribunal found that the relevant geographic area for evaluating compliance with the time test was Canada.

It did not allow a regional split. The Tribunal found that the proper reference period for this case was six months before the sales claims were made for three reasons. First, Sears had internally chosen a six month reference period. Second, there was not much seasonal variation with respect to all-season tires. Third, there was little month-to-month variation with tires sales.

Finally, the Tribunal found that Sears could not truly have believed that the ordinary selling prices used in the ads were genuine prices offered in good faith for the following reasons:

- Sears did not expect it would sell many tires at the regular price;
- Sears did not expect to sell many single tires at the regular price;
- Sears referred to its practice of pricing tires in pairs as its every day pricing strategy;
- Sears did not keep track of the number of tires sold at the regular price; and
- the regular prices Sears used were not comparable and were much higher than the regular prices of their competitors, such as Canadian Tire.

Sears was ordered to pay an AMP of \$100,000, which is the maximum corporate penalty for reviewable conduct. This amount is significantly less than AMPs agreed to in consent agreements. In addition, Sears also had to pay \$387,000 towards the Bureau's legal costs. The Tribunal also ruled that a prohibition order for 10 years was appropriate.²⁰

²⁰ See McMillan Binch Mendelsohn Advertising and Marketing Client Alert, *Misleading Advertising: Bureau Crackdown Rolls on with Victory in Tire Case* (January 24, 2005) available online at www.mcmbm.com.

7. How to avoid OSP claims

To protect yourself from OSP claims, it is important to establish a solid corporate compliance regime and ensure that it is effectively implemented (e.g., through development of relevant policies and procedures and ongoing education of management and employees) and adhered to (e.g., through monitoring, auditing, reporting mechanisms, and disciplinary procedures).²¹ The following is a list of a few Do's and Don'ts which can help ensure that your company's OSP claims are in compliance with the *Act*:²²

- Don't refer to a "regular price" in advertisements unless a substantial volume of the product has been sold at that price, or the product has been offered for sale at that price for a substantial period of time.
- Don't artificially inflate a price in an attempt to establish an elevated "regular price" as the offerings must be in good faith.
- Don't run a sale for extended periods of time or repeat a sale week after week – the "sale" price may become the *de facto* ordinary price, thereby rendering your advertisement offside.
- Don't move your prices constantly up and down and claim that they are your everyday low prices.

²¹ For an example, see the Mandatory Compliance Program Imposed by the Suzy Shier Consent Agreement at Appendix 3.

²² This is only a partial list and does not constitute legal advice. If there is any doubt about whether your price claims are in conformity with the *Act* please contact a lawyer. List based in part on paper by Bill Hearn and Todd Prendergast titled *Ordinary Price Claims: Misleading Discounts Will Cost You* (McMillan Binch Mendelsohn Advertising & Marketing Group, November 2003) available online at: www.mcmbm.com and Josephine Palumbo's presentation *The Competition Act: Examining Recent Developments, New Horizons and Key Guidance* presented to the Canadian Institute's 12th Annual Advertising and Marketing Law Conference (January 26 & 27, 2006).

- Do keep records of the number of sale days or regular days for each of your products.
- Don't forget that an advertisement can be found misleading even if nobody was actually misled.
- Do set regular prices in good faith, following the test set out in Sears, as appropriate.
- Don't rely solely upon mathematical calculations of time to meet the time test – the “good faith” component of the test still has to be met.
- Do put the same efforts into setting regular prices as you do setting sale prices, including appropriate consideration of competitor's prices, as well as sales history for the same or similar products.
- Don't set regular prices that the market won't bear, and then advertise discounts off of those prices.
- Don't rely on manufacturers suggested retail price or list prices as a shortcut.

8. Binding Advisory Opinions

The Bureau will provide an advisory opinion at the request of a business that is unsure of whether a particular pricing policy or business plan will comply with the OSP provisions of the *Act*. The advisory opinion will bind the Bureau and protect the business where the business conduct or practice is carried out substantially as proposed and where the material facts remain substantially unchanged. The opinion will be based on information provided by the requestor and will take into account previous case law, prior opinions and the stated policies of

the Bureau.²³ It will take the Bureau two or six weeks to produce an advisory opinion depending on whether the Bureau considers the matter non-complex or complex and will cost \$1,000.²⁴

9. Bill C-19 update - amendments to the *Competition Act*

Bill C-19 was tabled in the House of Commons on November 2, 2004. It proposed substantial increases in the amount of AMPs for deceptive marketing practices. AMPs for individuals found to have engaged in reviewable conduct would increase from \$50,000 to \$750,000 upon first order and to \$1,000,000 for each subsequent order. AMPs for corporations engaged in such conduct would increase from \$100,000 to \$10,000,000 for the first incident and to \$15,000,000 for each subsequent order.

It also proposed that the courts and the Tribunal would be vested with the power to order an advertiser to pay restitution to persons to whom products were sold, in an amount not to exceed the amount paid by consumers for the product that is subject of the misrepresentation.

The proposed increase in AMPs was not well received by industry. Peter Hogg, a constitutional law authority, was retained by the Retail Council of Canada and provided an opinion dated March 8, 2005, which was widely circulated, that the proposed AMPs were unconstitutional because their magnitude made them criminal penalties which would require the same safeguards afforded by the *Charter*.²⁵ Bill C-19 was not passed before the minority

²³ *Supra* note 4, at pg. 6.

²⁴ Information required by the Bureau to make an advisory opinion is listed in Appendix 4.

²⁵ It is also arguable that the proposed amendments violate s. 2(e) of the *Canadian Bill of Rights*, S.C. 1960, c.44, which requires that no law deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of their rights and obligations. However, the Department of Justice is on record saying that the amendments are constitutionally sound.

government fell. It will be interesting to see if a similar version is revived once a new government is formed.

10. OSPs – the American experience

Regulators in the United States – namely, the Federal Trade Commission (“FTC”) - have taken a much different approach to their counterparts in Canada and have effectively abandoned prosecuting OSP claims.²⁶ The FTC believes that aggressive enforcement actually harms consumers by ‘chilling’ aggressive price discounting.²⁷

The theory is that aggressive discount pricing, even if technically ‘misleading’ is often innocuous because it is so exaggerated that it is ignored by customers or it can be easily checked by customers through comparison shopping. Aggressive enforcement, it is argued, is likely to have a chilling effect on healthy competition, and this chilling effect can be a barrier to entry to new competitors who would otherwise use discount advertising as a way to enter a market.

It is also arguable that to the extent that sales must actually be made at the higher price in order to avoid a price claim, rules requiring a certain amount of merchandise to be sold at the higher price may be harmful to consumers who are shopping during the required non-sale weeks, and end up paying higher prices.

²⁶ Some states such as New York have been quite aggressive in prosecuting OSP claims.

²⁷ See R. Pitofsky & R. Shaheen et al., “Pricing Laws Are No Bargain for Consumers”, *Antitrust* (Summer 2004) at 63 for additional discussion on this issue.

11. Conclusion

Pricing products is a fundamental part of business. Discounting those prices to increase sales occurs in almost every business model. Price claims made by businesses are governed by the OSP provisions of the *Act*. As surveyed above, the Bureau has made investigating and prosecuting OSP claims one of its top priorities in the marketing practices area. In addition to the significant monetary penalties, it is difficult to quantify the non-monetary harm, such as reputational damage to a business brand, which these investigations cause. Therefore, it is essential that businesses be aware of the OSP provisions and establish compliance programs to ensure price claims are legal. Otherwise, misleading discounts will be costly.

Appendix 1
Bureau's Information Bulletin on OSP Provisions

Appendix 2

Notice by Suzy Shier Inc.

The Competition Bureau (the “Bureau”) has informed Suzy Shier Inc. (“Suzy Shier”) that its pricing practices regarding the regular selling price of certain women’s clothing items have raised concerns under the civil deceptive marketing practices provisions of the *Competition Act*.

The Bureau’s concerns relate to its belief that Suzy Shier’s use of “regular” and “sale” prices overstated the savings that Suzy Shier’s customers would receive when purchasing certain clothing items at ‘sale prices’. The civil Ordinary Selling Price provisions of the *Competition Act* seek to ensure that retailers make ‘regular price’ claims only when they sell a substantial volume of a product or offer a product at that price for a reasonable amount of time.

Although Suzy Shier does not admit any conduct contrary to the *Competition Act*, in recognition of the Bureau’s concerns, and the importance of providing accurate information to consumers, Suzy Shier and the Bureau have filed a Consent Agreement with the Competition Tribunal in order to resolve this matter.

Pursuant to the Agreement, Suzy Shier will, among other things,

- ensure that all future savings claims and regular price representations comply with the deceptive marketing practices provisions of the *Competition Act*;
- implement a corporate compliance program designed to ensure that Suzy Shier complies with the deceptive marketing practices provisions of the *Competition Act*; and
- pay a substantial administrative monetary penalty.

The Agreement will remain in effect for a 10 year period.

This Notice has been published pursuant to the Agreement, copies of which can be found on the Competition Tribunal’s website. (www.ct-tc.gc.ca)

Appendix 3
Mandatory Compliance Program
Imposed by the Suzy Shier Consent Agreement

Suzy Shier shall establish and maintain a marketing and pricing practices Corporate Compliance Program (the “Compliance Program”) the goal of which will be to promote compliance with the *Competition Act* generally, and the deceptive marketing provisions of the *Competition Act* (Part VII.1) which include the ordinary selling price provisions of the *Competition Act* [subsection 74.01(3)] specifically.

The Compliance Program will include the following features:

- (a) the designation of a Corporate Compliance Officer within thirty (30) days of the execution of the Agreement, and in any event, no later than 48 hours prior to any Closing Date;
- (b) the preparation and dissemination of written materials relating to the Compliance Program directed to the persons identified in paragraphs (c) to (g);
- (c) the implementation of an initial compliance education session for senior management and employees materially involved in the formulation of advertising and pricing policies;
- (d) the implementation of an annual compliance education refresher session for senior management and employees materially involved in the formulation of advertising and pricing policies;
- (e) the provision of a written confirmation to the Competition Bureau that existing senior management and employees materially involved in the formulation of advertising and pricing policies have participated in the compliance education sessions;
- (f) the provision of a copy of the Corporate Compliance Policy (“Compliance Policy”) flowing from the Compliance Program to all current and future senior management and employees with responsibility for formulating advertising and pricing policies;
- (g) the execution of a statement indicating that new senior management and employees with responsibility for formulating advertising and pricing policies have read and understood the Compliance Policy; and
- (h) the preparation of a one to two page statement outlining the Compliance Policy that is to be inserted into the retail store operations manual and posted internally on the corporate Suzy Shier Intranet network.

Appendix 4

Information Required by the Bureau to Give an Advisory Opinion

Subsection 74.01(2): Misleading price representations – Suppliers Generally

Written opinion requests relating to comparative price representations, where reference prices are based on market prices, should include the following additional information, as applicable:

- a. The date or dates of the planned representation;
- b. The sale price as well as the reference price of the product;
- c. An indication as to whether the representation relates to the price at which the product or like products have been, are or will be ordinarily supplied by suppliers generally in the relevant market;
- d. A description of the product and an indication of any products available in the relevant market which should be considered to be like products for the purpose of analysis, complete with an explanation as to why the product should be considered a like product;
- e. A description of the nature of the product, with particular emphasis on the characteristics which might influence analysis under the provision when evaluating the representations (for example, whether the product is seasonal in nature);
- f. An identification of the relevant geographic market and an explanation as to why this is the geographic market for the purposes of analysis;
- g. The geographic scope of the proposed advertising;
- h. The names and addresses of all of the suppliers in the relevant geographic market who sell the product or like products;
- i. The approximate total volume of the product sold or to be sold by each of the suppliers generally in the relevant geographic market in the twelve months preceding the proposed representation or in the twelve months after the proposed representation, as appropriate;
- j. The approximate total volume of the product sold or planned to be sold at the reference price by each of the suppliers generally in the relevant geographic market in the twelve months preceding the proposed representation or in the twelve months after the proposed representation, as appropriate;
- k. The number of days the product will be offered at or above the reference price by other suppliers in the relevant geographic market in the six months preceding the proposed representation, or in the six months after the proposed representation, as appropriate; and,
- l. A full discussion demonstrating whether for the relevant period, to the best of the applicant's knowledge:

- i. the product is openly available in appropriate volumes by suppliers generally in the relevant geographic market;
- ii. the reference price offered by suppliers generally in the relevant geographic market is based on sound pricing principles and/or was reasonable in light of competition;
- iii. the reference price was a price that suppliers in the relevant geographical market fully expected the market to validate, whether or not the market did validate this price; and/or,
- iv. the reference price was a price at which genuine sales had occurred, or it was a price comparable to that offered by competitors.

Subsection 74.01(3): Misleading price representation - Suppliers Own

Written opinion requests relating to comparative price representations, where reference prices are based on the supplier's own prices, should include the following additional information, as applicable:

- a. The date or dates of the planned representation;
- b. The sale price as well as the reference price of the product;
- c. An indication as to whether the representation relates to the price at which the product or like products are or will be ordinarily supplied by the supplier making the representation in the relevant market;
- d. A physical description of the product and an indication of any products offered by the supplier in the relevant market which should be considered to be like products for the purpose of analysis, complete with an explanation as to why the product should be considered a like product;
- e. A description of the nature of the product, with particular emphasis on the characteristics which might influence analysis under the provision when evaluating the representations (for example, whether the product is seasonal in nature);
- f. An identification of the relevant geographic market and an explanation as to why this is the geographic market for the purposes of analysis;
- g. The geographic scope of the proposed advertising;
- h. The approximate total volume of the product sold or to be sold by the supplier in the relevant geographic market in the twelve months preceding the proposed representation or in the twelve months after the proposed representation, as appropriate;
- i. The total volume of the product sold or planned to be sold at the reference price by the supplier in the twelve months preceding the proposed representation or in the twelve months after the proposed representation, as appropriate;

j. The number of days that the product was or will be offered at or above the reference price by the supplier in the six months preceding the proposed representation, or in the six months after the proposed representation, as appropriate; and,

k. A full discussion demonstrating whether, for the period in question:

- i. the product will be openly available by the supplier in appropriate volumes;
- ii. the reference price is based on sound pricing principles and/or was reasonable in light of competition in the relevant market;
- iii. the reference price is a price that the supplier fully expects the market to validate, whether or not the market did validate this price; and/or,
- iv. the reference price is a price at which genuine sales has occurred, or it is a price comparable to that offered by competitors.