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Member Exclusive Guidebook

Ordinary Selling Price Representations in Canada

Developed by



Retail Council of Canada



Conseil canadien du
commerce de détail

Prepared in
conjunction with



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ORDINARY SELLING PRICE REPRESENTATIONS IN CANADA

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1. INTRODUCTION

RETAIL COUNCIL OF CANADA (“RCC”) IS COMMITTED TO SERVE AS A KNOWLEDGE SOURCE FOR ITS MEMBERS ON IMPORTANT ISSUES FACING THE RETAIL INDUSTRY IN CANADA.



One such issue is how to comply with the *Competition Act’s* rules governing representations about sales and savings.

As part of its mandate to enforce accurate and truthful claims by advertisers, the

Competition Bureau has made it a priority to ensure that when retailers promote products as being “on sale”, they do not mislead consumers by making reference to inflated (or even non-existent) “ordinary” or “regular” prices. A substantial portion of the Bureau’s work is focussed on these issues, and both large and small retailers have been required to pay substantial fines and face other penalties for non-compliance.

To assist Retail Council of Canada’s members in avoiding issues with their “ordinary sales price” (“OSP”) representations, RCC, in conjunction with Davies Ward Phillips & Vineberg LLP, has prepared this *Guidebook to Ordinary Selling Price Representations* (the “OSP Guidebook”). The goal is to explain the requirements of the law and to provide practical guidance on how to comply with these requirements.

Among the features included in the OSP Guidebook, you will find:

- (i) an overview of the *Competition Act’s* rules governing OSP representations;
- (ii) “Best Practices” on how to avoid violating the OSP rules;

- (iii) an easy-to-follow “OSP Decision Tree” with a step-by-step analysis of how and when the OSP rules may apply to your business;

- (iv) a set of “Frequently Asked Questions” (FAQs) that address specific questions you may have and scenarios you may encounter;

- (v) a note on two common situations, “clearance sales” and “compare at” claims;

- (vi) “case studies” based on actual OSP proceedings.

Representations about savings are one of the most powerful marketing tools available to retailers, and a frequent point of interaction with customers. But retailers and consumers only benefit if these claims are accurate and truthful. Otherwise, the market is operating unfairly to everyone’s detriment.

We hope you find RCC’s OSP Guidebook helpful in keeping your savings claims truthful and in conformity with the law. We encourage you to provide this Guidebook to all key employees responsible for setting and monitoring your pricing and invite you to reach out to RCC should you require additional assistance by contacting Karl Littler at klittler@retailcouncil.org or 416-467-3783.

Kind regards,

Diane J. Brisebois

2. EXECUTIVE SUMMARY

2a. THE OSP PROVISIONS

The Competition Act (the “Act”) contains a set of rules designed to ensure that “savings” claims by advertisers are not misleading to consumers. These rules form part of the Act’s general prohibition against making false or misleading representations to the public when promoting a product or business interest.

The specific prohibitions against misleading representations about savings are set out in sections 74.01(2) and 74.01(3) of the Act, known as the “ordinary sales price” provisions. These provisions prohibit false or misleading statements to the public regarding:

- the “ordinary” (or “regular”) price of a product in the broader market; and
- the seller’s own ordinary price for that product.

Violations of these provisions can result in significant penalties, including fines of \$10 million (or more). That is why compliance is so important for your business and you.

Violations of these provisions can result in significant penalties, including fines of \$10 million (or more).



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2b. BEST PRACTICES

Generally speaking, the validity of your “ordinary sales price” or “OSP” representations will depend on whether: (i) the product was offered for sale in good faith at the benchmark ordinary price for a sufficient period of time (referred to as the “Time Test”), or (ii) sufficient volumes of sales of the product occurred at the benchmark ordinary price (referred to as the “Volume Test”).

Further details regarding these two tests, and suggestions on how to comply with them, are set out in this Guidebook. Broadly speaking, however, here are key “best practices” that you should follow to promote compliance with the Act’s OSP provisions:

(I) TIME TEST



- Identify the relevant time period for the product at issue (typically six months, this can vary).
- Ensure that the ordinary price you are using as a benchmark was set in “good faith” (e.g., is not inflated).
- Ensure that your product was offered at or above the benchmark ordinary price for more than 50% of the relevant time period before (or after) the representation was made.

(II) VOLUME TEST



- Identify the relevant time period for the product at issue (typically 12 months, this can vary).
- Calculate the total volume of sales of the product (in units) over the applicable time period at the specific price points that were offered.
- Determine the price point at which you sold more than 50% of the volume of the product during the relevant period.

(III) OTHER KEY BEST PRACTICES

- Familiarize appropriate employees with the rules governing OSP representations and misleading representations generally.
- Keep records of (i) the prices at which products are sold, (ii) the volumes sold at each price, (iii) the time periods at which the products were on sale at particular prices, and (iv) the duration and amount of any “storewide” promotions, coupons or other discounts.
- Always bear in mind the “general impression” of your claims – advertisements may still be misleading even if every word in them is technically accurate.
- Be careful when using disclaimers – they will not help if the main text of the claim is misleading without them.

3. WHAT IS AN ORDINARY SELLING PRICE REPRESENTATION?

THE OSP PROVISIONS

Everyone loves a bargain. We all want to get the most value for our money and buy items at a discount from the regular price whenever we can. That is why so many advertisements and other sales materials refer to discounts or reductions from the ordinary price of a product or service. Such claims might include, for example:

- All mattresses half off!
- Up to 70% off the manufacturer's suggested retail price!
- \$99 off list price!
- Was \$14.99 – now only \$4.99!
- Our price \$50; compare at \$75!
- Online only sale – 40% below retail!
- Sale price \$30 – after sale price \$45!

All of these claims have something in common: each conveys a representation about the product's regular or usual price. In legal terms, they are known as "ordinary selling price" (OSP) representations, sometimes also referred to in this Guide (and generally) as "regular price claims".

OSP representations can be extremely useful to both businesses and consumers and can help to make markets more competitive. However, they are only valuable when the ordinary selling price is represented accurately. If an ordinary price claim is misleading (for example, because the reported "regular price" is falsely inflated), consumers may be deceived into thinking they are getting a great deal when they really are not. That is unfair to consumers and to the other sellers in the marketplace. A set of kitchenware may seem like a great value at \$200 if it is advertised as being "75% off", but if it was never actually sold for \$800, it may not be a bargain at all.



OSP representations can be extremely useful to both businesses and consumers and can help to make markets more competitive.

4. WHAT ARE THE RULES GOVERNING OSP REPRESENTATIONS?

4a. GENERAL PROHIBITION AGAINST MISLEADING REPRESENTATIONS

Because of the potential harm to consumers and the marketplace, Canada's *Competition Act* (the "Act") contains specific rules prohibiting misleading OSP representations. It is important for you to understand these rules so that you can protect your business from the risk of liability.

The Act's OSP rules are part of its "deceptive marketing" provisions. The purpose of the deceptive marketing provisions is to prevent parties from making false or misleading representations to the public when promoting a product or business interest. The scope of these prohibitions is very broad: they apply not just to traditional forms of advertising such as print and broadcasting, but to any type of representation, including oral statements and electronic messages. They even cover the subject line of an email.

Importantly, no consumer actually needs to have been misled to fall off-side the Act's deceptive marketing provisions. In addition, the "general impression" as well as the literal meaning of the representation will be taken into account when assessing whether a claim is false or misleading. This means that the authorities will not just focus on the text of an advertisement, but also on its appearance, including images, font size and graphics.

The purpose of the deceptive marketing provisions is to prevent parties from making false or misleading representations to the public.



4 WHAT ARE THE RULES GOVERNING OSP REPRESENTATIONS?

(CONTINUED)

4b. SPECIFIC PROHIBITION AGAINST MISLEADING OSP REPRESENTATIONS

In addition to the general prohibition against false and misleading representations, there are two provisions in the Act that deal specifically with OSP representations. These are:

- Section 74.01(2), which prohibits false or misleading statements to the public regarding the ordinary price of a product in the broader market (e.g., “why pay twice as much at other stores?” or “save 30% compared to retail!”); and
- Section 74.01(3), which prohibits false or misleading statements to the public regarding a seller’s own ordinary price (e.g., “this week only, \$200 off!” or “was \$14.99 – now just \$4.99!”).

Regardless of whether you are comparing a price to the ordinary price of your competitors or your own regular price, the validity of the benchmark ordinary price you are using will be determined by evaluating whether: (i) the product was offered for sale in good faith at the ordinary price for a sufficient period of time (referred to as the “Time Test”); OR (ii) sufficient volumes of sales of the product occurred at the ordinary price (referred to as the “Volume Test”).



4 WHAT ARE THE RULES GOVERNING OSP REPRESENTATIONS?

(CONTINUED)

The specific legal requirements of each Test are as follows:

TIME TEST: the product has to have been offered for sale, in “good faith”, at the claimed ordinary price, or at a higher price, for a “substantial period of time” either before or after making the representation.



In other words:

- (i) the product was offered at or above the ordinary price;
- (ii) in “good faith”;
- (iii) during more than 50% of the relevant time period – generally means six months, but may be shorter or longer depending on the sales cycle of the product (such as a seasonal product);
- (iv) before or after the representation was made.

For the purposes of the time test, “good faith” means, for instance, that:

- the product was available in appropriate volumes;
- the ordinary price was based on sound pricing strategy and was reasonable in the circumstances;
- the ordinary price was a price that the retailer expected the market to support (i.e., customers would expect to purchase at that price), whether or not the market supported that price (as evidenced by actual sales); and/or
- the ordinary price was a price at which sales actually occurred, or was comparable to pricing offered by competitors.



4 WHAT ARE THE RULES GOVERNING OSP REPRESENTATIONS?

4b. SPECIFIC PROHIBITION AGAINST MISLEADING OSP REPRESENTATIONS (CONTINUED)

VOLUME TEST: a “substantial volume” of the product has to have been sold at the claimed “ordinary” price, or at a higher price, within a “reasonable period of time” either before or after making the representation.



In other words:

- (i) 50% or more of product sales;
- (ii) must have been at or above the ordinary price;
- (iii) during the relevant time period – generally means twelve months, but may be shorter depending on the sales cycle of the product (such as a seasonal product);
- (iv) before or after the representation was made.

In the following sections of this Guide, we discuss various aspects of the Time and Volume Tests in more detail, and provide tips on how to comply with them.



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5. HOW DO I APPLY THE TIME TEST

Here are a few easy to follow steps to help you determine whether your OSP representation meets the Act’s Time or Volume Tests.

STEPS FOR APPLYING THE TIME TEST:

1. Step One – Identify the relevant time period for the product at issue:

- As a starting point, the relevant time period generally means six months.
- Consider whether the product has a shorter/longer sales cycle (for instance, is the product seasonal in nature)? If so, use the typical sales cycle rather than automatically using six months (e.g., calculate when you first start stocking the product and when you begin to clear out the product).

2. Step Two – Was the benchmark ordinary price set in good faith?

- Ensure that the ordinary price is not inflated but reflects a reasonable price that consumers were/are expected to purchase at.
- If you are unsure, consider evaluating how your benchmark price compares with that of your competitors? If you undertake any such pricing comparisons, be sure to retain the documentation.

3. Step Three – Has the product been offered at or above the benchmark ordinary price for more than 50% of the relevant time period before or after (or some combination thereof) the representation was made?

- Be sure to take into account any store-wide promotions in your calculations of the pricing at which the product sold and/or was on offer (such as “Buy One Get One Free”).

EXAMPLE APPLYING THE TIME TEST: ORDINARY PRICES PERMITTED UNDER THE TIME TEST (USING SIX MONTHS OR 26 WEEKS AS RELEVANT PERIOD)

PRICE	% of relevant time period the price was offered	Could this be the “ordinary” price under the time test?
\$100	6 weeks or 23%	Time test is not met.
\$90	8 weeks or 31%	Time test is met. <small>(Product was offered at or above \$90 for 14 weeks or 54% of the 26 week period)</small>
\$70	12 weeks or 46%	Time test is met. <small>(Product was offered at or above \$70 for 100% of the 26 week period)</small>

Under this scenario, the ordinary price advertised could be either \$70 or \$90 since both prices meet the Time Test.

6. HOW DO I APPLY THE VOLUME TEST?

STEPS FOR APPLYING THE VOLUME TEST:

1. Step One – Identify the relevant time period for the product at issue:
 - The starting point is typically 12 months but this time period can be adjusted if the sales cycle of the product is shorter or longer.
2. Step Two – Calculate the total volume of sales (in units) for the applicable time period at each price point.
 - Be sure to include any store-wide promotions when calculating the total sales at each price point (such as “Buy One Get One Free”).
3. Step Three – Determine the price point at which you sold more than 50% of the volume of the product during the relevant period.

EXAMPLE APPLYING THE VOLUME TEST: ORDINARY PRICES PERMITTED UNDER THE VOLUME TEST (USING SIX MONTHS OR 26 WEEKS AS RELEVANT PERIOD)

PRICE	% of total sales at price (of total volume sold in relevant time period)	Could this be the “ordinary” price under the volume test?
\$100	10% of total units	Time test is not met.
\$90	40% of total units	Time test is met. <small>(More than 50% of the units were sold at or above \$80 during the relevant period)</small>
\$70	50% of total units	Time test is met. <small>(More than 100% of the units were sold at or above \$60 during the relevant period)</small>

In this example, either \$60 or \$80 could be used as the ordinary price since both prices meet the Volume Test.

7. WHAT HAPPENS IF MY BUSINESS VIOLATES THE OSP RULES?

Businesses that violate the Act’s OSP provisions face serious potential consequences. These include being ordered to:

- stop the offending conduct;
- publish a “corrective notice”;
- pay a fine of up to \$10 million for an initial contravention and up to \$15 million for subsequent contraventions; and
- pay restitution to customers (where the representation is determined to be false or misleading).

Individuals can also be fined up to \$750,000 for a first violation and up to \$1 million for any subsequent violations.

These are all “civil”, non-criminal penalties. But violations of the OSP provisions can also form the basis of a criminal offence, if the authorities and courts conclude that the misleading OSP representations were made “knowingly or recklessly”. Persons convicted of a criminal offence can face unlimited fines, a term of imprisonment as high as 14 years, or both. They would also open themselves to civil claims for damages (including class actions) by those allegedly affected by the misrepresentation.

In short, making misleading OSP representations, even inadvertently, can expose a business – and individual owners, directors, officers and employees – to significant liability.

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8. HOW DO I AVOID VIOLATING THE OSP RULES?

BEST PRACTICES

If your business makes OSP representations, here are some “best practices” that you should follow to help avoid violating the Act’s OSP provisions:

Ensure that your business keeps sufficient records of: (i) the prices at which the product has sold at as well as the volumes sold at each price; (ii) the time period the product was on offer at each price; and (iii) the duration and amount of any “store wide” promotions, coupons or other discount codes.

IF YOU ARE MAKING OSP REPRESENTATIONS ABOUT YOUR OWN “ORDINARY” PRICE:

- Before the representation is made, evaluate what ordinary price can be supported under either the Volume or Time Test. Please see the examples above and the detailed decision tree in Appendix A.
- Ensure that the products being compared are either identical or very similar.
- Ensure that pricing promotions have been taken into account when evaluating the volumes sold and the time on offer.
- Keep supporting calculations and documentation.

IF YOU ARE MAKING REPRESENTATIONS ABOUT YOUR COMPETITORS’ PRICING:

- These representations involve more risk and representations will need to meet the Time Test (as you will not have sufficient information about your competitor’s sales to satisfy the Volume Test).
- Keep all supporting documentation for any price-checks conducted of competitors’ pricing (with dates).
- Ensure that any competitor price checks are updated regularly.
- Review the “general impression” of the claim – including images, font size, colours and graphics when assessing whether the claim might be considered problematic.

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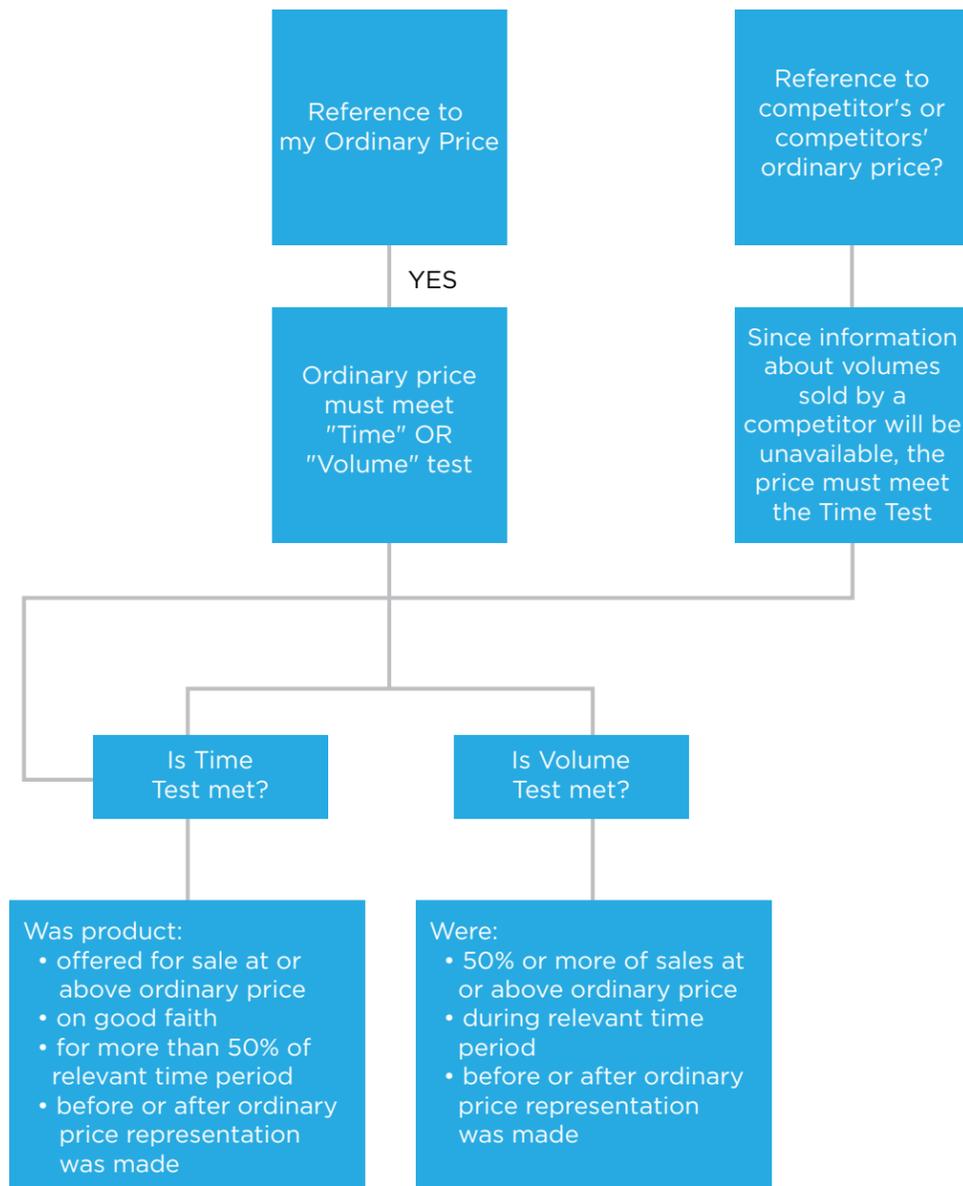
- Clearly specify any limitations up front (e.g., sale is only available for certain SKUs).
- Be careful when using disclaimers or fine print. Fine print and disclaimers will not help if the main text of the claim is misleading without them.
- Cover up the disclaimer/fine print and evaluate whether the main text is misleading without the disclaimer/fine print. If it is, you will need amend the main text.
- Familiarize appropriate employees with the rules governing OSP representations and misleading representations generally. You may be able to avoid legal consequences if you can demonstrate that you took appropriate steps to prevent illegal conduct from occurring.

You should also refer to the “OSP Decision Tree” in Appendix A, the “OSP FAQs” in Appendix B, the note on “clearance sales”, “compare at claims”, and seasonal products in Appendix C, and the “OSP Case Studies” in Appendix D.

Fine print and disclaimers will not help if the main text of the claim is misleading without them.



OSP DECISION TREE



OSP FAQs

These FAQs are designed to highlight situations and questions that may arise and to provide initial responses to help you deal with them. You should consider consulting counsel on more specific or complicated issues.

WHAT KINDS OF “REPRESENTATIONS” ARE COVERED BY THE OSP RULES?

- The Act applies to an extremely broad range of representations. All forms of advertising, including print, broadcast, television, and electronic advertising are included, as are any representations that accompany the product itself, such as store displays and signage, price stickers and tags, even comments made by salespeople.

WHEN IS A REPRESENTATION MADE “TO THE PUBLIC”?

- Any representation made by a retailer to even a single customer can constitute a representation “to the public”. Furthermore, any representations made in an area that can be accessed by the public are considered to be made to the public.

DO THE OSP RULES KEEP ME FROM REDUCING MY PRICES UNLESS I MEET THE “TIME TEST” OR THE “VOLUME TEST”?

- No. The OSP provisions of the Act do not regulate pricing, only what you may say about the ordinary price of a product. A retailer may lower its price on a product, and even publicize that lower price, without regard to the OSP provisions of the Act. The OSP provisions only become an issue if you make any type of claim about the “ordinary” price of the product in your advertisement.

ARE THERE DIFFERENT RULES FOR ONLINE VS. IN-STORE SALES?

- The Act’s OSP provisions apply the same regardless of whether a claim relates to online sales or in-store sales. However, retailers making online claims about competitors’ pricing or pricing in the market generally should know that comparison pricing checks performed for online claims may need to include a broader set of competitors. For instance, if an online claim states “30% cheaper than our competitors”, the comparison pricing checks conducted to verify the claim should include a broad set of online retailers in addition to “bricks and mortar” competitors.

ARE THERE SPECIAL RULES FOR CLEARANCE SALES?

- The use of the term “clearance” suggests the item is being offered at a significant reduction from “regular” pricing and that the products will not be offered at that regular price again. As a result, you should only advertise that an item is “on clearance” if the product is in stock and you do not intend to sell it at a “regular price” again. See Appendix C for more details.

Appendix B – OSP FAQs

(CONTINUED)

WHAT CONSIDERATIONS APPLY TO “COMPARE AT” REPRESENTATIONS?

- Price claims inviting the customer to “compare at” a certain price (“our price \$30 – compare at \$50!”) will be treated as an ordinary price claim about the price in the market. In this case, the “compare at” must be supported by objective marketplace pricing data and cannot simply reflect the retailer’s opinion as to what price a customer is likely to find elsewhere. See Appendix C for more details.

I WANT TO ADVERTISE THAT A PRODUCT IS ON SALE NOW FOR A LIMITED TIME AFTER WHICH THE PRICE WILL BE RAISED (“NOW \$50 – AFTER SALE PRICE \$100”). DO THE OSP RULES APPLY? IF SO, WHAT DO I NEED TO DO TO COMPLY?

- The OSP rules apply to comparisons to future or “after sale” prices just as they do to comparisons to past prices (“was”) and current prices (“regular”). A representation of this nature is effectively a commitment that the product will be offered at the higher indicated price after the sale ends. To stay within the Act’s OSP provisions, you would have to (a) offer the product in good faith for \$100 immediately after the sale period ends and for a “substantial period of time” thereafter (e.g., six months), or (b) sell a substantial volume of the product at or above \$100 within the 12 months immediately after the sale.

WHAT ABOUT COMPARISONS TO A MANUFACTURER’S SUGGESTED RETAIL PRICE (“MSRP”)?

- If a product’s MSRP is referenced in a pricing claim (e.g., “MSRP: \$70.00, our price: \$50.00”), then the MSRP must be authentic. To be prudent, if the MSRP is used as the comparison price, then you should either offer the product for sale at the MSRP (and ensure that you can meet the Volume or Time Test) or ensure that your competitors are using the MSRP (and conduct pricing checks).

CAN I MAKE CLAIMS COMPARING THE PRICING OF SIMILAR BUT NOT IDENTICAL PRODUCTS?

- In general, items that are substantially similar can be compared in pricing claims. However, if there are material differences in the product (e.g., quality, size) it would be prudent not to draw pricing comparisons between such products.

CAN I USE A DISCLAIMER OR QUALIFYING FINE PRINT TO CORRECT OR EXPLAIN MY CLAIM?

- Care should be taken when using disclaimers or fine print. Using a disclaimer or fine print will not cure an otherwise misleading advertisement or pricing representation. For example, if an advertisement says “50% off everything”, the disclaimer should not provide exclusions to the advertised discount. Furthermore, additional fees or charges should not be buried in the fine print.

Appendix B – OSP FAQs

(CONTINUED)

WHAT IF MY PRODUCT IS SEASONAL?

- The time periods used to determine compliance with the Time Test and the Volume Test are not fixed in the Act and may be shortened based on the nature of the product. Thus, a seasonal product may be offered for sale for a shorter period of time and still pass the Time or Volume Test. You should decide whether a shorter time period is appropriate based on the selling cycle of the product in question. See Appendix C for more details.

WHAT IF MY PRODUCT IS NEW TO THE MARKET?

- If the product is new (such that there is no previous sales history to rely upon), you should ensure that the ordinary price meets the Time or Volume Test based on sales/pricing after the OSP representation was made. For example, if the new product has a sales cycle of six months and the “regular price” is set at \$49.99 (in good faith), you should ensure that the new product will be offered for sale at this price for more than three of the next six months after the OSP representation was made.

WHAT IS THE “ORDINARY” PRICE IF MY PRODUCT HAS CHANGED PRICE MULTIPLE TIMES DURING THE RELEVANT PERIOD?

- You will need to take these different prices into account when applying the time or volume tests. For example, if a product was offered for sale, in good faith, at \$80 for 30% of the relevant period, \$70 for 25% of the period, \$60 for 25% of the period, and \$50 for the remaining 20% of the period, it would be permissible to claim that the ordinary price was \$70, but you could not use \$80 as the reference price. That is because the price was \$70 or higher for more than 50% of the relevant period, satisfying the time test. The same type of analysis applies under the volume test.

WHAT DO I NEED TO KNOW ABOUT “UP TO X% OFF” CLAIMS?

- When making a claim that products are “up to 50% off”, the most prudent approach is to ensure that a majority of the SKUs on sale are available at the highest advertised discount (in this case 50% off), and that the regular price meets either the Time or Volume Test.

WHAT TYPE OF RECORDS SHOULD I KEEP?

- In order to monitor and ensure compliance of your OSP representations you should keep records of (i) the prices at which products are sold, (ii) the volumes sold at each price, (iii) the time periods at which the products were on sale at particular prices, and (iv) the duration and amount of any “storewide” promotions, coupons or other discounts.

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WHAT CAN I DO IF I THINK MY COMPETITORS ARE MAKING MISLEADING OSP CLAIMS?

- There are a variety of options available to draw this conduct to the attention of the authorities. As a first step, you should seek advice from legal counsel. More importantly, simply because your competitors are engaging in such conduct does not give you licence to do so.

WHERE CAN I GET MORE INFORMATION/GUIDANCE?

- A good starting point is the Competition Bureau's Enforcement Guidelines on Ordinary Price Claims available at: [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/20100409_OrdinaryPriceClaims-e.pdf/\\$FILE/20100409_OrdinaryPriceClaims-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/20100409_OrdinaryPriceClaims-e.pdf/$FILE/20100409_OrdinaryPriceClaims-e.pdf)
- For more complicated questions/issues, you should speak to legal counsel.

CLEARANCE SALES, “COMPARE AT” CLAIMS, AND SEASONAL PRODUCTS

Clearance Sales and “Compare At” claims are two commonly encountered circumstances that may raise issues under the Act's OSP provisions.

Here are a few tips to help you deal with them.

1. CLEARANCE SALES

- The use of the term “clearance” suggests the item is being offered at a significant reduction from “regular” pricing on a one time basis.
- You should only advertise that an item is “on clearance” if the product is in stock and you do not intend to sell it at a “regular price” again.

2. “COMPARE AT” CLAIMS

- Unless it is made clear that the comparison is being drawn to your own company's pricing, any general reference to “compare at” will be treated as a claim about relevant pricing in the market.
- As you will never have sufficient information about the volumes of products your competitors have sold at various price points (because this is competitively sensitive information), you should ensure that your “compare at” claim can meet the Time Test.
- In order to meet the Time Test, you must conduct pricing checks of your competitors in the relevant geographic area during the relevant period.
- The scope of the relevant geographic area will depend on the medium over which the representation is made. For example, if the representation is made online, then the price check must include a broad set of online competitors. Here is an example of what to do in that situation:
 - For example, if an online retailer claims: “Compare at X” – then the inference is that its competitors are typically pricing at that price. To make sure that the Time Test is met in this case:
 - Consider what is the relevant time period for the product (is the sales cycle at least 6 months or should it be adjusted based on a shorter or longer sales cycle?);
 - Conduct on-line price checks for a reasonable set of competitors and retain the documentation. Be sure to take into account any promotions that are on offer;
 - Repeat online price checks consistently throughout relevant time period;
 - Ensure that the comparison pricing you intend to use has been the price at which the product was on offer for at least 50% of the relevant time period.



Get more information:
Download the *Competition Bureau's Enforcement Guidelines on Ordinary Price Claims* available online.

Appendix C

CLEARANCE SALES, “COMPARE AT” CLAIMS, AND SEASONAL PRODUCTS (CONTINUED)

- If, on the other hand, the “compare at” representation is made only in-store (e.g., on a price tag), then the comparison pricing checks could be made amongst a smaller set of competitors.
- Let’s assume that your price checks conducted in the relevant six month period show that:
 - 10% of the time, the pricing was \$49.99; 40% of the time the pricing was \$39.99; 40% of the time, pricing was \$29.99 and 10% of the time pricing was at \$19.99. What should your “compare at” price be?

Under this scenario, the highest “compare at” price that could be used is \$39.99, because the \$49.99 price was only charged during 10% of the relevant time.

3. SEASONAL PRODUCTS

- The relevant time period for the time test is six months by default, but a different period may be appropriate in certain circumstances, such as for “seasonal” products (e.g., summer or winter clothing and equipment, and short-term “test” or “trend” products).
- For seasonal products, it is usually appropriate to use the length of time the product is actually offered as the relevant time period.
 - For example, if a retailer wishes to advertise that its summer sandals, sold only between May 1 and September 1, are “now 50% off”, it should make sure that the sandals were offered at or above the benchmark ordinary price for more than 50% of the relevant time period of four months before the representation was made.



Appendix D

OSP CASE STUDIES

CASE STUDY #1 - THE GOOD FAITH REQUIREMENT IN THE TIME TEST

A retailer offers a product for sale for over 6 months at the “regular price” of \$49.99. During this time period, there are various promotions (such as buy one get one free) that could be applied to the product (i.e., buy one product at \$49.99 and get the other free). When these promotions are taken into account, the product has been offered “on sale” for 50% of the time or more of the relevant time period. Furthermore, very low volumes of sales have been at the regular price during the relevant period. Finally, while the retailer conducted comparison pricing checks for similar product offerings, it only did so in the United States and not in Canada.

ANALYSIS:

- This scenario is based on the *Michaels* case, which involved representations regarding the ordinary sales price of custom and ready-made frames. As part of its settlement with the Bureau, Michaels agreed, among other things, to pay a fine of \$3.5 million.
- Based on the above facts, and its approach in the *Michaels* case, the Competition Bureau is likely to take the view that the regular price was not offered “in good faith”. In particular, the Bureau is likely to point to the absence of any comparisons of competitive pricing in Canada as well as the low volume of sales at the regular price.
- In order to make sure that the regular price was offered “in good faith” –the regular price should be one that the supplier thinks the market will support (i.e., it is not artificially inflated to allow for exaggerated savings claims).
 - To help establish that the regular price was set in good faith, it may be helpful to conduct a comparison of the price charged for similar products by competing Canadian retailers (i.e., competitors charge a similar price for such products)



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CASE STUDY #2 – MSRP AND LIST PRICE

A retailer creates a tag for its products that shows a “list price” for the product and “our price” (with “our price” being substantially lower). The retailer has not confirmed whether any competitors sell at the “list price” and it does not offer the products for sale at the “list price” for any period.

ANALYSIS:

- This scenario is based on the *Curry's Art* case which involved representations regarding the “list price” for art supplies. As part of its settlement with the Bureau, *Curry's Art* agreed, among other things, to display a corrective notice in its retail stores, holiday guide and website and ensure that all future price advertising complies with the *Competition Act*.
- Based on the above facts, and its approach in the *Curry's Art* case, the Bureau is likely to take the view that the representation regarding the “list price” contravenes the OSP provisions as well as the general and misleading advertising provision found in section 74.01(1)(a). According to the Bureau, Curry's compared its selling prices to list prices which were not being changed by Curry's or other retailers and as a result consumers may have been misled into believing that art supplies were regularly sold at those list prices.
- If a “list price” or “MSRP” is to be used in any pricing representations, the list price or MSRP must be genuine (not simply created by the retailer). Furthermore, it would be prudent to ensure that the list price/MSRP is one that is used in the marketplace (i.e., does your company or do your competitors actually price at the MSRP?)

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CASE STUDY #3 – COMPARE AT AND REGULAR PRICING

A retailer uses price tags that refer to a “regular white ticket price” and a “sale price”. For example: “compare at regular white ticket price: \$49.99 – sale \$29.99”. The retailer has not sold the product or offered it at this “regular white ticket” price. In fact, when new products arrive, they are typically placed “on sale” immediately (at a price lower than the “regular white ticket price”).

The retailer has not conducted any price checks to confirm whether the “regular white ticket price” was comparable to that of its competitors.

ANALYSIS:

- This scenario is based on the *Grafton Fraser* case which involved representations regarding the “regular white ticket price” for the clothing sold. As part of its settlement with the Bureau, Grafton Fraser agreed to pay a fine of \$1.0 million, pay \$200,000 of the Bureau's costs, display a corrective notice and ensure that its current and future pricing is in compliance with the *Competition Act*.
- Based on the above fact scenario and its approach in the *Grafton Fraser* case, the Bureau is likely to take the view that the representation regarding the regular white ticket price contravenes the OSP provisions and is false or misleading (contrary to the general prohibition under section 74.01(1)(a)) because the impression that is created is that the clothing was on offer at the pricing referred to as the “regular white ticket price”.
- Retailers should ensure that any pricing that is referred to as the “regular price” in any form should meet either the Volume or Time Test.



Appendix D – OSP CASE STUDIES

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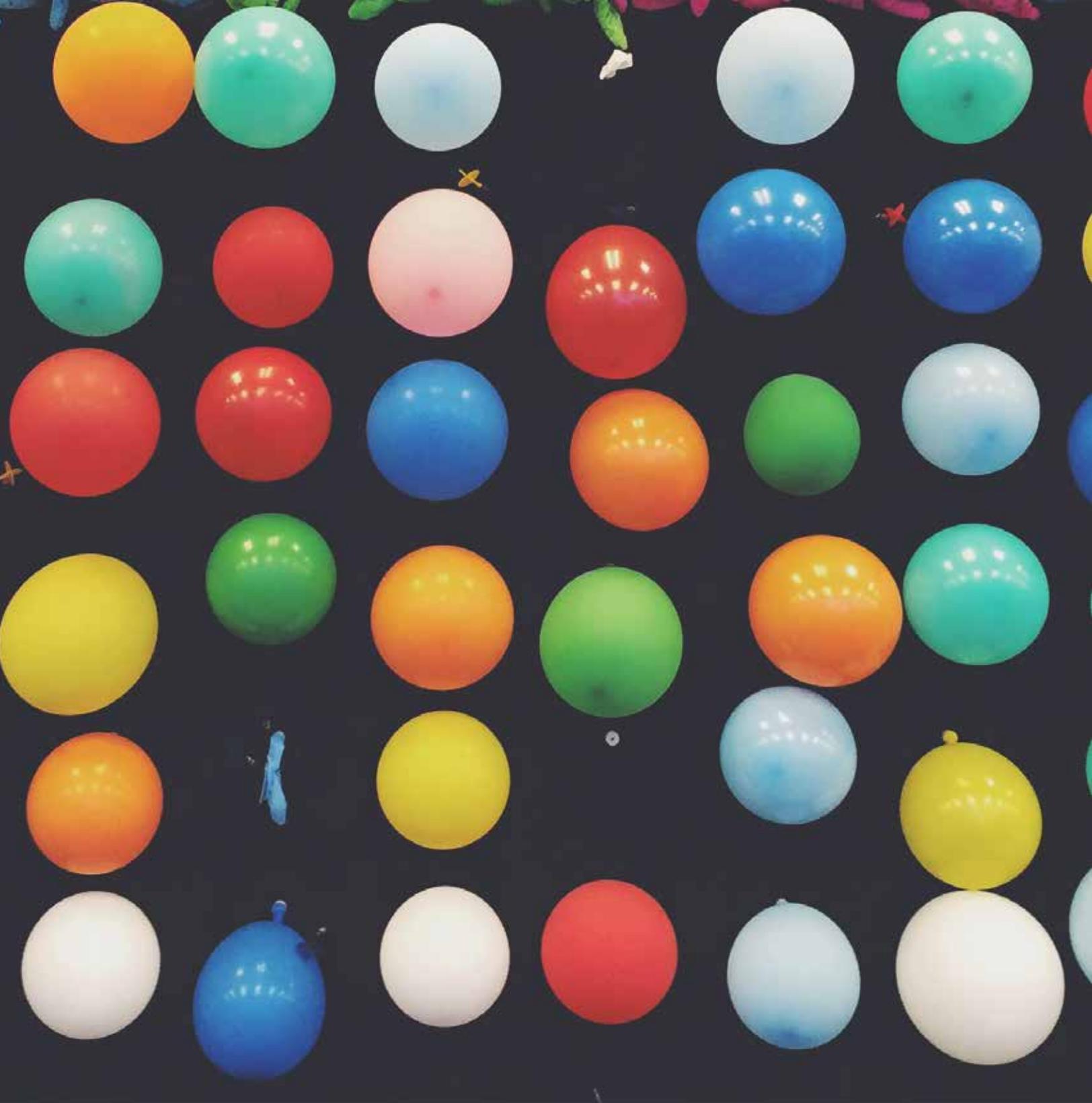
CASE STUDY #4 – OUTLET STORES

A clothing retailer runs an outlet store where the clothing is specifically produced for the outlet and is not the same quality of clothing as is offered at its retail outlets. The retailer would like to advertise that the clothing is “50% off retail prices”. Would such a claim raise any issues under the OSP provisions?

ANALYSIS:

- Yes, such claims are likely to raise issues under the OSP provisions and under the general misleading advertising prohibition as well because the general impression of the claim that the clothing is “50% off retail” suggests that the clothing sold at the outlets is the same as the clothing sold at retail.
- If the quality between the outlet and retail merchandise is comparable, care should be taken to ensure that what is being compared is made very clear (e.g., Outlet Exclusive Merchandise: \$49.99 – Our Retail Version: \$69.99).
- On the other hand, if the quality differences (or other differences) between the “outlet specific” merchandise and the retail merchandise are substantial and significant, it is most prudent to avoid any comparisons between the two products at all.





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