Tribunal File No. CT-2002-004

THE COMPETITION TRIBUNAL

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

SEARS CANADA INC.

Respondent

WRITTEN SUBMISSIONS
OF THE RESPONDENT, SEARS CANADA INC.

(Re Documentary Evidence)

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1. These are the submissions of Sears Canada Inc. ("Sears") in response to the Commissioner of Competition's Submission Re: Documentary Evidence filed in this proceeding on September 10, 2004 (the "Commissioner's Submissions").

OVERVIEW

2. The Commissioner's Submissions provide an overview of the basis for the Commissioner's allegation that certain documents ought to admitted into evidence in this proceeding for the truth of their contents. The Commissioner, in this regard, relies on certain exceptions to the evidentiary rule against the admission of hearsay evidence. The Commissioner also submits that she relies on the documents for evidence of a belief purportedly held either by Sears or by another person. In this later case, the Commissioner submits that she does not rely on an evidentiary exception to provide the basis upon which the Commissioner suggests documents ought to be admitted and, further, interpreted in this proceeding.

3. Sears' position is that in the present case, documents that form part of the record in this proceeding (i.e. documents received as exhibits at the Hearing) must be reviewed and assessed in light of s. 69 of the *Competition Act* (being the basis under which they were tendered at the

Hearing). Where a document requires interpretation, the Commissioner cannot attempt to assert an interpretation of the document as established fact. That is a matter the Tribunal must assess in light of the totality of the evidence in the proceeding. Sears objects to the conclusions the Commissioner says may (or indeed must) be taken from the documents in the guise of an evidentiary exception to the hearsay rule.

INTERPRETATION OF EVIDENCE

4. Sears, in its Written Submissions Re: Ordinary Price Representations ("Sears' Initial Submissions"), has provided a detailed overview of the interpretation that it says ought to be given to key documents in issue in this proceeding. In Sears' submission, rules of evidentiary exceptions cannot be used as an attempt to bolster an interpretation proposed by the Commissioner. That is the very issue that the Tribunal must determine.

5. The Commissioner relies on four bases for the admission of categories of documents into evidence:

(a) section 69 of the *Competition Act* (the "Act");

(b) section 30 of the *Canada Evidence Act*;

(c) the common law doctrine of possession; and

(d) the common law exception of necessity and reliability.

6. It is important to note that the basis upon which the document, such as, for example, the Sears Documents (as defined by the Commissioner) were tendered at the hearing was s. 69 of the Act.

7. It was not until final argument that the Commissioner expanded the grounds upon which the documents were tendered into evidence and, from there, similarly expanded the conclusions that the Commissioner to be drawn from the documents.

8. With respect, it is too late to raise these issues. Had the Commissioner intended to rely on other doctrines or bases for admission (assuming, of course, that other doctrines or bases are applicable, which Sears does not admit), that reliance ought to have been disclosed in order to permit Sears an opportunity to challenge the Commissioners interpretation of applicable evidentiary doctrines during the course of the actual hearing.

SECTION 69 OF THE *COMPETITION ACT* – A REBUTTABLE PRESUMPTION

9. Section 69(2) of the Act provides as follows:

> In any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act,
>
> (a) anything done, said or agreed on by an agent of a participant shall in the absence of evidence to the contrary, be deemed to have been done, said or agreed on, as the case may be, with the authority of that participant;
>
> (b) a record written or received by an agent of a participant shall in the absence of evidence to the contrary, be deemed to have been written or received, as the case may be, with the authority of that participant; and
>
> (c) a record proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is prima facie proof
>
> (i) that the participant had knowledge of the record and its contents,
>
> (ii) that anything recorded in or by the record as having been done, said or agreed on by any participant or by an agent of a participant was done, said or agreed on as recorded and, where anything is recorded in or by the record as having been done, said or agreed on by an agent of a participant, that it was done, said or agreed on with the authority of that participant, and
>
> (iii) that the record, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.
>
> (emphasis added)

10. S. 69 creates a limited, and rebuttable, presumption to be applied to a document associated with a participant in a proceeding (in this case Sears) and, in the case of s. 69(2)(c) the reference to "prima facie proof" speaks to proof absent evidence to the contrary.

> *R. v. Independent Order of Foresters (No. 2)* (1986), 14 C.P.R. (3d) 254 (Ont. Dist. Crt.).

11. The Commissioner alleges that Sears did not "object" to the admission of the documents. This is incorrect. Sears challenged the admission of documents under section 69 and, to the extent necessary, led evidence to rebut any presumption associated with such documents.

12. In order to derive meaning from certain documents, an interpretation or analysis must be made of the documents themselves in light of section 69 of the Act and the totality of the evidence presented during the Hearing. For example, in the Commissioner's Submissions, the Commissioner references documents relating to the Sears' 1999 Spring Review and raises issues relating to National Brand and Private Label Strategies. These are issues upon which the Tribunal heard a considerable amount of evidence and which must be reviewed and interpreted by the Tribunal.

13. In its Initial Submissions, Sears noted that the Spring 1999 Automotive Reviews (Exhibit CA-30) were created by the Buyer, Stan Keith, and the National Business Manager, Vince Power, for a twice-a-year presentation to Sears' CEO and senior executive team. The Automotive Reviews provided details of the introduction of new product lines and set out how Sears would address its tire retailing competition.

> Written Submissions of the Respondent, Sears Canada Inc. (Re: Ordinary Price Representations), paragraph 109.

14. Sears noted in its Initial Submissions that despite the breakdown between "national brand" and "private label" marketing strategies with respect to the pricing of these products, Sears' multiple-tier pricing strategy was adopted across all tire offerings, whether flag (national) brand or private label, and tires in the Sears' line-up were priced rationally relative to one another. The good, better, best line structure was reflected in a range of pricing that was clearly rational and competitive at both the high and low ends of the product offerings, as respectively represented by the Michelin RoadHandler T Plus and the BF Goodrich Plus.

> Written Submissions of the Respondent, Sears Canada Inc. (Re: Ordinary Price Representations), paragraph 110.

15. In its Initial Submissions, Sears also noted that the Commissioner's contention was that these documents demonstrate Sears' lack of good faith in relation to its regular prices for the Tires. The Commissioner pointed, in particular, to the phrase *"every day pricing"* within the pricing strategy description and contended that the only logical interpretation of this phrase was that it referred to Sears' 2-for pricing, and that this therefore undermined Sears' contention that its single unit price was both its regular price and a price offered in good faith.

Written Submissions of the Respondent, Sears Canada Inc. (Re: Ordinary Price Representations), paragraphs 111, 113.

16. Sears' concern was that the hasty conclusion drawn by the Commissioner failed to take into account the context in which, and the purpose for which, the documents were prepared. As Mr. Cathcart testified, the Automotive Reviews were part of an intense presentation made to Sears' CEO. The purpose of the presentation, as Mr. Cathcart explained, was to convey to senior management how the Sears' Automotive team intended to respond to the competition's EDLP or promotional pricing strategies. The meaning or interpretation of any document, therefore, must be considered in light of the whole of the evidence before the Tribunal.

Written Submissions of the Respondent, Sears Canada Inc. (Re: Ordinary Price Representations), paragraph 114.

17. By virtue of a misapplication of evidentiary exception, the Commissioner is asking the Tribunal to ascribe to documents certain meaning extending far beyond the purview of s. 69 of the Act. Sears addressed the issue of the Spring Review at the hearing of the application and, indeed, in Sears' Initial Submissions as noted above. In Sears' submission, the meaning or interpretation to be drawn from such documents is a matter for the Tribunal to assess after reviewing, assessing and weighing all the evidence in light of s. 69 of the Act.

18. Importantly, and as discussed in greater detail below, the Commissioner purports to ascribe meaning to the Spring 1999 Review (Exhibit CA-30) – and suggests that the document ought to be admitted for the "truth of its contents" – when one of the key parties involved in the preparation of the document was available, but not permitted, to testify at the Hearing.

19. Sears sought to have Mr. Vince Power (the co-author of CA-30) testify at the Hearing. In support of that request, counsel for Sears noted that witnesses who would be better able to speak to the documents (i.e. Mr. Power) were available to testify at the proceeding. The Commissioner opposed this request – a request that would have permitted the Tribunal to have the benefit of the evidence of a person involved in the preparation of a document at issue in the proceeding.

20. Sears submits that having opposed the attendance of a witness who would have been able to speak specifically to the content of the Spring Review, it is not now open to the Commissioner to attempt to use an evidentiary exception to ascribe an interpretation to a document when there

was *viva voce* evidence on the document in question and the Commissioner herself opposed the receipt of testimony from the co-author of a document in issue.

21. As counsel for Sears noted at the motion seeking leave to add Mr. Power and Ms. Drever as witnesses:

> **Mr. McNamara:** At any rate, Your Honour, where we find ourselves now quite simply is instead of a lineup of three witnesses, a lineup of five, evidence which, in my submission, was all fairly encompassed by the three original willsays and is now virtually unchanged, but will be given by the appropriate witnesses, i.e. those who have personal knowledge or [are] otherwise the right witnesses to give evidence.
>
> (emphasis added)
>
> Pub. Hr. Tr., Vol. 2, 266 (4-12), October 21, 2003.

22. It is for the Tribunal to interpret documents and to determine what "facts" documents are evidence of and to consider whether those facts, when viewed in the context of the entire body of evidence, establish reviewable conduct. The weight to be accorded to such documents and the meaning to be ascribed to such documents and indeed the conclusions to be drawn from any documents must be assessed by the Tribunal and in light of s. 69 of the Act.

> *R. v. Rolex Watch Co. of Canada Ltd.*, (1980), 50 C.P.R. (2d) 222 (Ont. C.A.) at 226.
>
> *Sunbeam Corp. (Can.) Ltd. v. R.*, [1969] S.C.R. 221.

NO NOTICE WAS GIVEN UNDER S. 30 OF THE *CANADA EVIDENCE ACT*

23. Section 30(7) of the *Canada Evidence Act* provides as follows:

> 30.(7) Unless the court orders otherwise, no record or affidavit shall be admitted in evidence under this section unless the party producing the record or affidavit has, at least seven days before its production, given notice of his intention to produce it to each other party to the legal proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by that party.
>
> (emphasis added)
>
> *Canada Evidence Act*, R.S. 1985, c. C-5

24. In the Commissioner's Submissions, the Commissioner now alleges that she gave notice under the *Canada Evidence Act*. In support of this position, the Commissioner relies on the fact that the documents were listed in the Commissioner's Disclosure Statement and included in the

Joint Book of Documents prepared and filed by the parties in this proceeding. With respect, the Commissioner's purported use of the *Competition Tribunal Rules* (which mandate the preparation of disclosure statements) cannot be used to circumvent the direct requirements of the *Canada Evidence Act*. Counsel to the Commissioner has, in fact, twice admitted that no notice was given under the *Canada Evidence Act*.

25. In preparing for oral argument in this proceeding, counsel for Sears wrote to counsel for the Commissioner to verify that in fact no notice was given under the *Canada Evidence Act*. By e-mail dated June 26, 2004, Ms. Healey wrote to Mr. Syme posing the following question:

> John, would you please provide us with a fax copy of the Commissioner's notice under s. 30 of the [*Canada Evidence Act*].
>
> Many thanks.
>
> Martha

26. Mr. Syme responded by e-mail on June 27, 2004:

> Martha, As you know, the Commissioner did not provide notice under s. 30 (i.e., had notice been provided, it would have been provided to you and your colleagues).
>
> See you tomorrow.
>
> John
>
> (emphasis added)
>
> E-mail correspondence M. Healey and J. Syme, June 26-27, 2004.

27. Similarly, in oral argument, the question of whether notice had been given under the *Canada Evidence Act* was raised. Mr. McNamara noted that it was common ground that no notice had been given, and Mr. Syme confirmed this understanding to be true:

> **Mr. W.W. McNamara**: ...There was no notice under the *Canada Evidence Act*, I think that is common ground.
>
> **Mr. J.L. Syme**: Yes it is, Your Honour.
>
> **The Chairperson**: Yes.
>
> (emphasis added)
>
> Pub. Hr. Tr., Vol. 31, 5019 (13-16), August 20, 2004.

28. The question raised by counsel to Sears in advance of oral argument was to confirm that no notice had been given under the *Canada Evidence Act*. Counsel to the Commissioner confirmed (twice) that that was the case. The Commissioner cannot now purport to re-create notice out of a document required by the Tribunal Rules and which neither the Commissioner nor Sears understood was provided in fulfilment of the requirements of the *Canada Evidence Act* (or in the case of the Commissioner intended to serve as notice). The Commissioner cannot, similarly now, after the close of the proceeding, purport to rely on the *Canada Evidence Act* when indeed this legislation did not form part of her case. The Commissioner based the admission of certain documents, for example, the Sears Documents, entirely on the operation of s. 69 of the Act.

29. Quite apart from the absence of notice under the *Canada Evidence Act*, the Commissioner has not established that the documents that it purports to include in the "notice" were all, in fact, business records prepared in the ordinary course of business. As the Nova Scotia Court of Appeal noted in *R. v. Wilcox*:

> Is Exhibit 24 admissible under the common law business records exception to the hearsay rule? All respondents accept R. v. Monkhouse, ... as an accurate statement of the requirements for such admissibility. The following passage from the judgment of Laycraft, C.J.A., for the Court at p. 732 sets out the applicable principles:
>
> In his useful book, Documentary Evidence in Canada (Carswell Co., 1984), Mr. J.D. Ewart summarized the common law rule after the decision in Ares v. Venner as follows at p. 54:
>
> ...the modern rule can be said to make admissible a record containing (i) an original entry (ii) made contemporaneously (iii) in the routine (iv) of business (v) by a recorder with personal knowledge of the thing recorded as a result of having done or observed or formulated it (vi) who has a duty to make the record and (vii) who had not motive to misrepresent. Read in this way, the rule after Ares does reflect a more modern, realistic approach for the common law to take towards business duty records.
>
> To this summary, I would respectfully make one modification. The "original entry" need not have been made personally by a recorder with knowledge of the thing recorded. On the authority of Ormand, Ashdown, and Moxley, it is sufficient if the recorder is functioning in the usual and ordinary course of a system in effect for the preparation of business records...
>
> (emphasis added)
>
> *R. v. Wilcox*, [2001] N.S.J. No. 85 at para 49.

30. The Commissioner's disclosure statement (the alleged "notice") included, for example, an index of records produced pursuant to the order issued by Justice Dubé under s. 11 of the Act; copies of preprint advertising, a chronological listing of newspaper advertisements, copies of newspaper proofs, facsimile or e-mail correspondence, letters between counsel relating to responses to undertakings, documents prepared for the purposes of the Commissioner's inquiry as required under s. 11 of the Act and, indeed, documents of analysis prepared by the Commissioner's staff.

Commissioner of Competition, Disclosure Statement.

31. The Commissioner asks the Tribunal to determine that the Commissioner's Disclosure Statement, which clearly contains documents not prepared in the ordinary course of business, somehow serves as the notice required under s. 30 of the *Canada Evidence Act* and as notice to a party, after the close of a hearing, that if there were any documents prepared "in the ordinary course of business", those records would be relied upon for the truth of their contents. Such an approach would entitle the Commissioner to produce any number of records she wished under the guise that they could be submitted for the truth of their contents whether or not they actually were business records prepared in the ordinary course of business and notwithstanding *viva voce*, or other documentary, evidence relating to those documents.

32. Sears notes that the Commissioner did serve Sears with a Request to Admit to which Sears responded. The Request to Admit was prepared in standard form and served on Sears. Sears submits, therefore, that to the extent the Commissioner was searching for admissions by Sears, she did so by way of a Request to Admit and not by way of notice under the *Canada Evidence Act*. The Commissioner is not entitled to now seek to rely on a document prepared for an entirely different purpose (documentary disclosure) as a required notice under the *Canada Evidence Act*.

33. The preparation of a Joint Book of Documents is, similarly, no notice that the Commissioner intended to, or did, serve notice under the *Canada Evidence Act*.

DOCTRINE OF POSSESSION

34. As noted in the Commissioner's Submissions, the common law doctrine of possession is based on possession of a document. However, assuming the doctrine applies in the face of s. 69

of the Act, the document is inadmissible to prove the truth of its contents unless the possessor has recognized, adopted or acted upon it. In order to make any such determination, there must first be an assessment or review of the available evidence. It is not sufficient to simply review the document and to draw conclusions the Commissioner says ought to flow from the document. The Tribunal heard the evidence of Messrs. Cathcart, McKenna and McMahon. This evidence must be considered and any documents received into evidence must be assessed in light of the available evidence.

35. However, given s. 69 of the Act this doctrine is not applicable. As noted in *The Law of Evidence in Canada*:

> 18.61 Corporations are capable of possessing documents. Although the case law has arisen mainly in the context of prosecutions for restraint of trade, the issue may arise in both civil and criminal proceedings. Unless governing legislation has specific provisions addressing the issue of the admissibility of documentary evidence, the common law documents in possession doctrine applies.
>
> (emphasis added)
>
> Sopinka, J., S.W. Lederman, A.W. Bryant, *The Law of Evidence in Canada*, 2nd ed., Butterworths: Toronto, 2002 at 1031.

36. In the present case, s. 69 of the Act speaks to the admissibility of documents in possession (s. 69(2)(c)) and is the applicable authority in the present proceeding (as set out above). It was, in addition, the basis upon which the Commissioner sought to introduce documents, for example the Sears' Documents, into evidence.

37. As noted in *The Law of Evidence*:

> In proceedings under the *Competition Act*, the common law co-conspirator evidentiary rule has been abrogated. Although this statutory provision makes the document found in possession of one party *prima facie* evidence against the co-conspirator, its evidentiary value may be challenged.
>
> *The Law of Evidence, supra*, at 1034.
>
> *R. v. Rolex Watch, supra.*
>
> *Sunbeam Corp. (Canada) Ltd. v. R., supra.*
>
> *R. v. Anthes Business Forms Ltd.*, (1975) 10 O.R. (2d) 153 (CA), aff'd [1978] 1 S.C.R. 970.

38. As the Ontario Court of Appeal noted in *R. v. Anthes* (at 188):

> Parliament, in enacting what is now s. 45, clearly intended to create a presumption of fact that documents written or received by an agent of a "participant" were written or received with the authority of that participant; that those persons appearing from the documents or otherwise shown to be officers, agents, servants, employees or representatives of a participant acted with authority; and that anything recorded in a document as having been done, said or agreed upon by a participant or an agent of a participant was in fact done, said or agreed upon as recorded, and where done, said or agreed upon by an agent, then it was done, said or agreed upon with the authority of the participant. In short, the common law principles and rules of evidence enunciated in *Ash-Temple, supra*, were abrogated by Parliament.
>
> (emphasis added)

NECESSITY AND RELIABILITY

39. In light of s. 69 of the Act, the need to consider or assess the principled approach to the admission of hearsay evidence is abrogated to the extent documents fall within s. 69 of the Act such as, for example, the Sears' Documents as described by the Commissioner. However, to the extent, if any, documents that the Commissioner seeks to rely upon do not fall within s. 69, the doctrine of necessity and reliability has not been established.

40. As a general principle, hearsay is an out-of-court statement that is offered to prove the truth of its contents. Absent an exception basis upon which to admit hearsay into evidence, such evidence is not admissible. Hearsay statements are excluded from evidence in trials because of the difficulty of testing their reliability. Without court attendance by the individual who has made the out-of-court statement, it is impossible to effectively test through cross-examination that person's perception, memory, narration or sincerity in regard to the statement.

41. In *R.* v. *Starr* the Supreme Court of Canada recognized a principled approach to the admission of hearsay evidence relying on both necessity and reliability as the basis for the admissibility within a framework established by the Court. Necessity and reliability must be assessed contextually and both must be present in order to fall within the principled approach. A general framework for considering the admissibility of hearsay evidence is as follows:

> 1. Is the statement being adduced to prove the truth of its contents? If so, it is hearsay evidence and the starting point is that it is inadmissible. The mover of the evidence then has the onus of either bringing the hearsay within a recognized exception, or showing that it is admissible under the principled approach.

> 2. Hearsay evidence is presumptively admissible - without the need for a *voir dire* - if it falls under an exception to the hearsay rule.
>
> 3. The hearsay exception may be challenged and, if so, a hearing may be held to determine if the hearsay exception complies with the requirements of the principled approach. If the hearsay exception does not confirm to the principled approach it should be modified, where possible, to bring it into compliance.
>
> 4. In some rare cases, it may also be possible under the particular circumstances of a case for evidence clearly falling within an otherwise valid exception nonetheless not to meet the principled approach's requirements of necessity and reliability. In such a case, the evidence would have to be excluded. The trial judge will determine the procedure, whether by *voir dire* or otherwise to determine this issue. The party challenging the admissibility of the evidence falling within a valid exception bears the burden of showing that the evidence should nevertheless be excluded.
>
> 5. If evidence does not fall under a hearsay exception, or a hearsay exception is not relied on, then it may still be admitted using the principled approach. In these circumstances, a *voir dire* will need to be held to examine the necessity and reliability of receiving the statement.
>
> 6. Finally, where the evidence is admissible under an exception to the hearsay rule or under the principled approach, the judge may still refuse to admit the evidence if its prejudicial effect outweighs its probative value.
>
> D.M. Paciocco & L. Stuesser, *The Law of Evidence*, 3rd ed., Irwin Law: Toronto, 2002 at 95-96.
>
> *R.* v. *Starr* (2000), 147 C.C.C. (3d) 449 (S.C.C.)

42. In the present case, there is no clear basis upon which necessity has been established. There was extensive *viva voce* evidence on all matters in issue in the proceeding. There was no allegation by the Commissioner that witnesses were not called because it was not necessary or more expedient not to do so. In the face of *viva voce* evidence, that evidence must be preferred.

43. Notwithstanding s. 69 of the Act, the Commissioner seeks to rely on the principled approach to the Sears' Documents. However, quite apart from the fact that the Commissioner relied only on s. 69 of the Act in the course of the Hearing, a review of the basis or procedure to be followed highlights the concerns with the approach adopted by the Commissioner. The Commissioner has not brought the admission of evidence within an exception to the hearsay rule. The requirements of the *Canada Evidence Act* were not met. Section 69 of the Act operates

within the context set out in the framework of that section and to the exclusion of the common law evidentiary principles. Finally, the Commissioner did not seek to have the admissibility of the documents, for the truth of their contents, established by way of *voir dire* during the course of the proceeding. The principled approach to the admission of hearsay evidence is an issue raised by the Commissioner only after the close of the proceeding.

44. With respect to documents prepared by Mr. Keith (exhibit CA-30, for example), Sears sought to have Mr. Power added as a witness to the proceedings. In light of the opposition by the Commissioner to such testimony, the Commissioner cannot rely on necessity. Direct evidence by an author of a document was available and the Commissioner sought, successfully, to exclude this evidence. Necessity, if any, is of the Commissioner's making and cannot meet the requirements imposed by the Supreme Court of Canada. It is not now open to the Commissioner, having resisted a relevant witness, to now seek to rely on the death of a co-author of a relevant document to support the application of doctrine to circumvent the hearsay rule. Similarly, other direct evidence (that of Mr. Cathcart, for example) was presented.

45. As the Supreme Court of Canada noted in *R. v. Hawkins*:

> ...this modern framework should also be applied in a manner which preserves and reinforces the integrity of the traditional rules of evidence. Accordingly, the new hearsay analysis should not permit the admission of statement which the declarant, if he or she had been available and competent at trial, would not have been able to offer into evidence through direct testimony because of the operation of an evidentiary rule of admissibility.
>
> ...
>
> Under this Court's principled framework, hearsay evidence will be necessary in circumstances where the declarant is unavailable to testify at trial and where the party is unable to obtain evidence of a similar quality from another source.
>
> (emphasis added)

R. v. Hawkins, [1996] 3 S.C.R. 1043 at paras 69, 71.

See also *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 at 796.

46. Apart from the witnesses Sears wished, but was not permitted, to call in this proceeding, the Commissioner made no reference, either throughout the course of the proceeding or in the Commissioner's Submissions, that witnesses were not called or examination or cross-examination was not pursued in view of the Commissioner's reliance on necessity and reliability.

There is no indication by the Commissioner that full *viva voce* evidence would not have been possible given the availability of numbers of witnesses. Quite the contrary, in fact, there is an extensive transcript before the Tribunal in this proceeding. The Commissioner cannot ignore, seek to exclude or have the Tribunal fail to consider the volume of evidence in this proceeding.

47. Had the Commissioner wished to rely on a hearsay exception, she should have done so during the course of the proceeding. The issue of s. 69 of the Act came up in the course of the proceeding and Sears, as it is entitled to do and in accordance with that section, presented evidence, to the extent it was permitted to do so, in response to the documents that had been produced and entered into evidence in the Hearing.

MICHELIN AND BRIDGESTONE/FIRESTONE DOCUMENTS

48. For the same reasons set out above, i.e. the absence of notice under the *Canada Evidence Act*, the failure of the Commissioner to establish the requirements of necessity and reliability and direct evidence from both Michelin and Bridgestone, the Commissioner has not established necessity as a basis upon which to confer a particular interpretation on the documents at issue. Statements and documents at issue in the proceeding were, in fact, tested in the course of the hearing before the Tribunal and it is on the basis of that evidence that the Tribunal must base and render a decision in this matter. The principled approach to the admission of hearsay evidence cannot be used to circumvent the existence of testimony before the Tribunal.

SEARS' WRITTEN RESPONSES

49. Finally, the Commissioner refers to Sears' Written Responses as "out-of-court admissions" by Sears. The Commissioner provided no specifics as to what statements the Commissioner viewed as such admissions. Certainly, the Commissioner did serve Sears with a Request to Admit to which Sears responded. Apart from that document, Sears has challenged the allegations made by the Commissioner, cross-examined witnesses brought by the Commissioner and presented witnesses to respond to the Commissioner's case.

CONCLUSION

50. The basis upon which the Commissioner tendered documents at the hearing of this matter was s. 69 of the Act. That section creates a rebuttable presumption which Sears responded to and rebutted. It is not now open to the Commissioner to seek to recast the basis

upon which it tendered documents at the hearing. Had the Commissioner wished to do so during the course of the hearing and at the time documents were introduced it was incumbent upon her to do so in order to allow Sears a fair opportunity to respond in a timely fashion and not once the evidentiary portion of the Hearing had concluded.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: September 24, 2004

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Tribunal File No. CT-2002-004

THE COMPETITION TRIBUNAL

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

SEARS CANADA INC.

Respondent

WRITTEN SUBMISSIONS OF THE RESPONDENT, SEARS CANADA INC.

(Re Documentary Evidence)

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