File No.-2002-004

THE COMPETITION TRIBUNAL

IN THE MATTER OF THE *COMPETITION ACT*, R.S., 1985, c. C-34, as amended;

AND IN THE MATTER OF an inquiry pursuant to subparagraph 10(1)(b)(ii) of the *Competition Act* relating to certain marketing practices of Sears Canada Inc.;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act*.

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

-and-

SEARS CANADA INC.

Respondent

COMMISSIONER OF COMPETITION:
REPLY RE: DOCUMENTARY EVIDENCE

Introduction

1. This reply is filed by the Commissioner of Competition (the "Commissioner") in response to the submission of Sears Canada Inc. ("Sears") in respect of the admissibility of certain documentary evidence in this proceeding.

2. As set out in the Commissioner's previous submissions, the documentary evidence in issue falls in the following four categories: the Sears Documents; the Michelin Documents; the Bridgestone/ Firestone Documents; and the Sears Written Responses. The Commissioner's understanding of Sears' position in respect of each of these categories of documents, and the Commissioner's reply to Sears' submissions, are set out below.

3. As a general matter, Sears implies throughout it submission that the Commissioner is somehow seeking to use the rules of evidence to skew the interpretation of documents and to exclude consideration of *viva voce* evidence. The Commissioner's submissions of September 10, 2004 and these reply comments relate to the admissibility of documentary evidence in this proceeding for certain purposes. The Commissioner is not seeking to have evidence excluded by the Tribunal. Moreover, it is trite that the documentary evidence, including the Sears Documents, must be weighed and interpreted in light of all of the evidence in this proceeding.

The Sears Documents

4. It is the Commissioner's position that the Sears Documents are admissible in this proceeding pursuant to section 69 of the *Competition Act* (the "Act"). The Commissioner also submits that the Sears Documents are admissible for the truth of their contents under section 30 of the *Canada Evidence Act*, the common law doctrine of possession, and the common law exception to the hearsay rule, based on necessity and reliability.

(i) Section 69 of the *Competition Act*

5. The Commissioner understands that Sears accepts the admission of the Sears Documents pursuant to section 69 of the Act. The point of departure between the Commissioner and Sears appears to be the appropriate interpretation of these documents.

6. The purpose of this reply submission is to address the admissibility of documentary evidence for certain purposes. Issues of interpretation of the evidence were argued fully by the parties, both in writing and orally, and further argument on these matters at this time is, in the Commissioner's submission, inappropriate.

7. The Commissioner also submits that Sears has not provided any foundation for its suggestion that the Commissioner is seeking "to ascribe to documents certain meaning extending far beyond the purview of s. 69 of the Act". The mere fact that the Commissioner and Sears disagree on the interpretation of documents does not imply that the boundaries of section 69 have somehow been exceeded. Indeed, as Sears itself argues, section 69 establishes *prima facie* conclusions which may be rebutted by a respondent.

8. The Commissioner also notes that the fact that Mr. Power did not testify in the proceeding is irrelevant to the issue of whether the Sears Documents are admissible under section 69 of the Act. As argued in the Commissioner's submissions of September 10, 2004, all of the elements of section 69 are satisfied. Sears has not challenged this

conclusion. It follows that the Sears Documents are admissible as *prima facie* proof of the matters set forth in paragraphs 69(2)(a) - (c) of the Act.

9. In accordance with section 69, the Sears Documents are properly on the record of this proceeding as "*prima facie* proof" that Sears said, did and agreed to the matters set out in the Sears Documents. In order for Sears to rebut a matter which has been *prima facie* proven pursuant to section 69 of the Act, it must satisfy the Tribunal that there is "very clear, cogent and convincing evidence" that Sears did not say, do or agree to the matters recorded in the Sears Documents.

Ulmer v. Ulmer, [1997] A.J. No. 1278 (Q.L.) at para 49.

(ii) Section 30 of the *Canada Evidence Act*

10. Sears maintains that section 30 of the *Canada Evidence Act* does not apply to documents in this proceeding, as Sears did not receive formal notice, from the Commissioner, of invocation of this provision.

11. The Commissioner acknowledges that there was no formal notice of invocation of section 30 of the *Canada Evidence Act*. It is clear, however, that Sears had notice of the Commissioner's intention to produce and rely on all of the documents in issue, including the Sears Documents.

(iii) The Common Law Doctrine of Possession

12. Sears maintains that section 69 of the Act precludes resort to the common law doctrine of possession.

13. Documentary evidence is admissible under section 69 of the Act, notwithstanding the fact that the evidence may not satisfy the elements necessary to trigger one or more of the common law hearsay exceptions. This is the purpose of section 69 and the sense in which section 69 "abrogates" the common law. This does not mean, however, that invocation of the common law hearsay exceptions, including the doctrine of possession, is barred by section 69.

14. The Commissioner submits that section 69 in no way precludes resort to a common law hearsay exception where all of the elements of the common law exception are satisfied. This conclusion is consistent with the purpose of section 69, which is to broaden, not to restrict, the admissibility of evidence in proceedings brought under the Act. It is also consistent with the principle of statutory interpretation that the legislature is presumed not to modify the existing law beyond that which is explicitly stated.

Nadeau and Bernard v. Garneau, [1967] S.C.R. 209 at 218.

Goodyear Tire and Rubber Co. v. T. Eaton Co., [1956] S.C.R. 610 at 613-613

Goldhar v. The Queen, [1960] S.C.R. 60 at 65

15. As set out in the Commissioner's submission of September 10, 2004, the elements of the common law doctrine of possession are satisfied in this case. Accordingly, the Commissioner submits that the Sears Documents are admissible, for the truth of their contents, pursuant to the common law doctrine of possession. The proper interpretation of these documents remains, of course, a matter to be determined by the Tribunal, in light of all of the evidence before it.

(iv) The Common Law Principled Hearsay Exception

16. As in the case of the common law doctrine of possession, Sears maintains that the common law principled hearsay exception does not apply to documents that are admissible under section 69 of the Act. Sears also argues that, to the extent that section 69 is not applicable to certain documents, the standards of necessity and reliability have not been met. The principle basis for this position appears to be that the Commissioner opposed Sears' last minute request that Mr. Power be permitted to testify in the proceeding as a witness for Sears.

17. As discussed above, section 69 does not preclude invocation of a common law hearsay exception, where the essential elements of the common law exception are satisfied.

18. With respect to the absence of testimony by Mr. Power, the Commissioner notes that Sears requested, on the eve of the commencement of the hearing of this matter, that it be permitted to amend its disclosure statement to include, amongst other matters, a will-say

statement of Mr. Power. The Tribunal found that Sears had failed to satisfy the test for amendment of its disclosure statement to include the proposed new will-say statement of Mr. Power. Sears is now attempting to use its failure to respect the disclosure requirements set forth in the *Competition Tribunal Rules* to assert an advantage.

19. Moreover, the record is clear that Mr. Keith was Sears' sole buyer of tires during the relevant period and, as such, was responsible for building Sears' tire line structure. Mr. Keith was also clearly identified by Mr. Cathcart as *the* author of the Buyer's Letter 1999 (CA-23) and of the Competitive Profiles (A-33, A-34, A-35, CA-36, CA-37).

Tr. Vol. 14, p. 2426, 2446, 2448, 2505; Vol. 16, p. 2670

20. With respect to the Spring Review (CA-30), while Mr. Cathcart stated that this document was "created by" Mr. Keith and Mr. Power, in both examination-in-chief and cross-examination Mr. Cathcart repeatedly referred to the Spring Review as "Mr. Keith's document". At no time did Mr. Cathcart refer to the Spring Review as Mr. Power's document, or identify any element of the Spring Review as emanating from Mr. Power. Moreover, key pages of the document have Mr. Keith's, and only Mr. Keith's, name on them.

CA-30, p. 1482, 1483 and 1484 (See Exhibit "A" hereto)

Tr. Vol. 14, p. 2600; Vol. 16, p. 2596, 2630, 2641, 2662; Vol. 8 (Conf.), pp. 203 (l. 24) - 205 (l. 4), pp. 207 (l. 17) - 208 (l. 15), pp. 209 (l. 17) - 210 (l. 3), p. 210 (l. 14 - 22), p. 211 (l. 20-21); Vol. 17, p. 2897; Vol. 9 (Conf.), p. 230 (See Exhibit "B" hereto)

21. The Commissioner submits therefore that the test endorsed by the Supreme Court of Canada in *R v. Hawkins*, as cited by Sears at paragraph 45 of its submission, is clearly satisfied. Evidence of similar quality was not available from another source.

22. In any event, and as discussed at paragraph 26 of the Commissioner's submission of September 10, 2004, the Supreme Court of Canada has held that the necessity criterion should be interpreted flexibly and does not require that the evidence be unavailable in other than hearsay form or be the only evidence on point.

23. The Commissioner also notes that Sears has not objected to the reliability of the Sears Documents. As noted in the Commissioner's submissions of September 10, 2004, high circumstantial guarantees of reliability may offset the fact that only expediency and convenience militate in favour of admitting the evidence.

The Michelin Documents and the Bridgestone/Firestone Documents

24. It is the Commissioner's position that the Michelin Documents and the Bridgestone/Firestone Documents are admissible under section 30 of the *Canada Evidence Act* and the common law exception to the hearsay rule based on necessity and reliability.

25. Sears' position on these documents is difficult to follow. As noted in the Commissioner's submission of September 10, 2004, Sears has relied on these documents, for the truth of their contents, in its written final argument.

26. In its submission on the admissibility of documents, Sears states (at paragraph 48) that "the Commissioner has not established necessity as a basis on which to confer a particular interpretation on the [Michelin and Bridgestone/Firestone] documents in issue."

27. Based on this, the Commissioner understands that Sears does not object to the admission of the documents (which is consistent with its use of the evidence); rather, Sears' concern is that the documents must be interpreted in light of other evidence presented during the course of the proceeding. As noted at the outset, the Commissioner concurs that the documents must be interpreted in light of the totality of evidence before the Tribunal.

Sears Written Responses

28. It is the Commissioner's position that the Sears Written Responses are admissible as out-of-court admissions by Sears.

29. Again it appears that Sears concern lies not in the admission of these documents, but in the manner in which they are interpreted. As with all of the documentary evidence, the Sears Written Responses must be assessed in light of all of the evidence before the Tribunal.

Conclusion

30. For all these reasons and the reasons set forth in the Commissioner's submission of September 10, 2004, the Commissioner submits that the Sears Documents are admissible as *prima facie* proof under section 69 of the Act. The Sears Documents, the Michelin Documents, the Bridgestone/Firestone Documents and the Sears Written Responses are also admissible in this proceeding for the truth of their contents. Finally, to the extent that these documents are not relied on by the Commissioner for the truth of their contents but rather, for example, as evidence of the beliefs of Sears, the issue of hearsay does not come into play.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Gatineau, Quebec, October 1, 2004.

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