

**THE COMPETITION TRIBUNAL**

**B E T W E E N:**

**THE COMMISSIONER OF COMPETITION**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
June 18, 2004	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 0133c

Applicant

- and -

**SEARS CANADA INC.**

Respondent

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**WRITTEN SUBMISSIONS  
OF THE RESPONDENT, SEARS CANADA INC.**

**(Re Ordinary Price Representations)**

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Canada Inc.**

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<b>Called by the Commissioner of Competition</b>			
<b>Witness Name</b>	<b>Employer</b>	<b>Job Title</b>	
Christian Warren	Competition Bureau	Competition Bureau Officer (Currently)	
Jim King	Bridgestone/Firestone Inc.	National Sales Manager for Corporate Accounts and Original Equipment (in 1999)	
William Merkley	Michelin Canada	National Director of Sales for the Corporate Account Group (in 1999)	
<b>Called by Sears Canada Inc.</b>			
<b>Witness Name</b>	<b>Employer</b>	<b>Job Title in 1999</b>	<b>Job Title at Date of Hearing</b>
Paul Cathcart	Sears Canada Inc.	Retail Marketing Manager and 190 Service Operations Manager	Group Operations Manager and Process Improvement Manager
Harry McKenna	Sears Canada Inc.	National Sales Manager, Automotive (Retail Marketing Manager Automotive)	Manager of Sales and Promotion for the Off-Mall Channel
William McMahan	Sears Canada Inc.	Group Retail Marketing Manager, Group 700-2	General Manager, Automotive

**TABLE OF EXPERT WITNESSES**

<b>Called by the Commissioner of Competition</b>			
<b>Witness Name</b>	<b>Employer</b>	<b>Job Title</b>	<b>Qualified as Expert In</b>
Donald Gauthier	Al's Tire	Vice President of Town and Country Tire and Wheel Reconditioning	<ul style="list-style-type: none"> <li>- Practical application of marketing and retail strategies in the Canadian tire market;</li> <li>- The marketing and sale of original equipment; and</li> <li>- The Structure of the Tire Market in general in Canada in 1999.</li> </ul>
Dr. Donald Lichtenstein	Leeds School of Business, University of Colorado	Professor of Marketing	<ul style="list-style-type: none"> <li>- Marketing and consumer behaviour and response to pricing advertised stimuli; and</li> <li>- Research design and methodology within social sciences.</li> </ul>
Dr. Sridhar Moorthy	Rottman School of Management and the Institute of Policy Analysis, University of Toronto	Professor of Marketing	<ul style="list-style-type: none"> <li>- Marketing and the use of economic principles/theory to understand marketing;</li> <li>- Consumer response to marketing stimuli; and</li> <li>- Marketing study design and implementation.</li> </ul>
<b>Called by Sears Canada Inc.</b>			
<b>Witness Name</b>	<b>Employer</b>	<b>Job Title</b>	<b>Qualified as Expert In</b>
Dennis DesRosiers	DesRosiers Automotive Consultants Inc.	Founder/Consultant	Survey methodology and analysis relating to the Canadian aftermarket in Tires
John Winter	John Winter Associates Limited	Management Consultant	Issues relating to retailing in Canada including pricing strategies employed by retailers
Dr. Michael Trebilcock	Faculty of Law, University of Toronto	Director of Law and Economics	Competition policy and economic regulation

**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  
(*Re Ordinary Price Representations*)**

**PART I - OVERVIEW**

1. This proceeding was commenced by Notice of Application dated July 22, 2002 (the "Application").
2. The Application, brought pursuant to section 74.01(3) of the *Competition Act* (the "Act"), alleges that ordinary selling price representations made in connection with three sales events held in November and December, 1999 (the "Representations") by Sears Canada Inc. ("Sears") regarding the ordinary or regular selling prices of five all-season tire lines (the "Tires") were misleading.
3. The remedies sought include a prohibition order (which, if granted, would effectively extend to products with respect to which no allegations were made and no evidence was led), the publication of corrective notices in numerous Canadian newspapers and the payment of an administrative monetary penalty in the amount of \$500,000.00.

4. Sears contests the Application. Sears asserts that the Representations were not misleading, and that Sears complied with section 74.01(3) by offering the Tires at the stated regular price in good faith and for a substantial period of time. Moreover, the remedies sought by the Commissioner are unavailable and inappropriate for various reasons set out herein, and particularly since Sears exercised due diligence to prevent the occurrence of reviewable conduct.

## **PART II - THE ISSUES<sup>1</sup>**

5. These Written Submissions will focus primarily on issues relating to the good faith and the time test requirements of section 74.01(3)(b) and on the question of the applicable administrative remedies under section 74.1 (which question arises only if the Representations are found to constitute reviewable conduct, which is denied by Sears).

6. The issues relating to section 74.01(3)(b) may be summarized as follows:

- (a) Whether Sears' regular prices for the Tires were offered in good faith;
- (b) Whether Sears met the frequency requirements of the time test; and
- (c) In the event that Sears did not meet the good faith or frequency requirements of the time test, whether Sears has established that the Representations were not false or misleading in a material respect, in which case, pursuant to subsection 74.01(5), section 74.01(3) does not apply to Sears.

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<sup>1</sup> The issue of the constitutionality of section 74.01 is addressed separately (see Respondent's Memorandum of Argument *re* Constitutional Questions, dated June 17, 2004).

7. With respect to administrative remedies, the issue is whether the Tribunal should or may issue one or more of the orders contemplated by section 74.1, namely:

- (a) An order not to engage in the conduct or substantially similar conduct, pursuant to section 74.1(1)(a);
- (b) An order to publish or otherwise disseminate a notice, pursuant to section 74.1(1)(b); or
- (c) An order to pay an administrative monetary penalty, pursuant to section 74.1(1)(c).

### **PART III – SUBMISSIONS OF SEARS**

#### **1) Offered In Good Faith**

##### **a) Introduction:**

8. The issue of good faith (within the meaning of section 74.01(3)) lies at the heart of the Application.

9. In essence, the Commissioner alleges that Sears' ordinary selling prices for the Tires were not offered in good faith, as required by section 74.01(3). The Commissioner contends that Sears is therefore in breach of the statutory requirements, even if Sears has met the frequency requirements of the time test in section 74.01(3)(b).

10. The Commissioner's contention with respect to Sears' lack of good faith rests primarily upon the following:



- (a) The Commissioner's interpretation of certain internal Sears documents (namely, the National Brand Marketing Strategy, the Private Label Marketing Strategy, the Competitive Profiles, the January 1999 Buyer's Letter and the June 2000 Buying Plans). The Commissioner contends that these documents, individually and collectively, indicate that Sears knew its regular prices for the Tires were not competitive and, therefore, a fiction;
- (b) The expert report and oral evidence of Donald Gauthier regarding the retail tire market in 1999;
- (c) The business records provided by Michelin North America (Canada) Inc. ("Michelin") and by Bridgestone/Firestone Inc. ("Bridgestone-Firestone") in response to an *ex parte* Order pursuant to section 11 of the *Act* issued on October 17, 2000; and
- (d) Concerning the interpretation of the Sears' documents relied upon by the Commissioner, the expert testimony of Profs. Lichtenstein and Moorthy.

*Written Final Argument of the Commissioner of Competition, para 10.*

11. Sears strenuously contests the Commissioner's allegations and submits, for the reasons set out below, that its regular prices for the tires in question met the good faith requirement.

**b) Manufacturer's Suggested Retail Prices:**

*i) Introduction:*

12. One of the central factual questions pertaining to the good faith requirement which arose during the evidentiary portion of the Hearing was the question of Manufacturer's Suggested Retail Prices ("MSRPs") for tires comparable to those at issue.

13. It is submitted that the issue of MSRPs is critically important for three reasons:

- (a) The evidence adduced by Sears (through Paul Cathcart and Harry McKenna) demonstrates that these prices were relied on by Sears in establishing its regular prices, particularly for the flag brand<sup>2</sup> tires at issue (the Michelin Weatherwise, the Michelin T Plus, and the BF Goodrich Plus);
- (b) The evidence demonstrates that certain other flag brand tires for which MSRPs for 1999 were available<sup>3</sup> were directly comparable to three of the five Tires (the Michelin Weatherwise, the Michelin T Plus and the BF Goodrich Plus), and, therefore, relevant to the good faith issue; and
- (c) The existence of MSRPs in the market place constitutes an objective, independent mechanism to directly verify the *bona fides* of Sears' regular prices for three of the tire lines in question (i.e., the Michelin Weatherwise, the Michelin T Plus and the BF Goodrich Plus), and, indirectly, the *bona fides* of the regular prices for the remaining two tire lines.

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<sup>2</sup> In accordance with Mr. Merkley's evidence, the term "flag brand" is used herein with respect to a brand of tires that has been installed by car manufacturers as original equipment (OE) somewhere. Examples of flag brands are Michelin and BF Goodrich. Flag brands are sold through all channels of distribution, and supported heavily by the manufacturer in order to build brand equity. A particular line of tires bearing the flag brand is still considered "flag brand", even if sold exclusively by one retailer.

<sup>3</sup> And possibly, certain associate brand tires as well in the case of the BF Goodrich Plus tire line.

14. The Commissioner's evidence on the issue of regular prices and MSRPs for comparable products was given by Messrs. King, Merkley and Gauthier. Sears submits that the evidence of Messrs. King and Merkley supports Sears' contention that its regular prices for the tires in question were offered in good faith within the meaning of section 74.01(3), particularly when read with the evidence of Sears' witnesses Paul Cathcart and Harry McKenna, and that the evidence of Mr. Gauthier should be accorded little or no weight (for reasons explained below).

***ii) Evidence of William Merkley:***

15. Counsel for the Commissioner described Mr. Merkley's evidence as "*very important*". Sears agrees. Mr. Merkley's evidence was particularly instructive because it was apparent from his demeanour that he was extremely knowledgeable about the tire industry but had no bias or "axe to grind".

***Pub. Hr. Tr., Vol. 10, 1641 (10), Oct. 31, 2003.***

16. Mr. Merkley's evidence relates directly to several important issues.

17. For example, he testified that every tire sold bearing the Michelin name is a "flag brand" tire, including the Michelin Weatherwise and T Plus tires sold exclusively by Sears.

***Pub. Hr. Tr., Vol. 10, 1611, 1612, Oct. 31, 2003.***

***Pub. Hr. Tr., Vol. 10, 1615 (16-21), Oct. 31, 2003.***

18. Mr. Merkley also testified that all Michelin-branded products are considered premium products and that the Michelin tires sold by Sears derive benefit from the Michelin brand-equity.

***Conf. Hr. Tr., Vol. 10A, 61 (4) - 62 (4), Oct. 31, 2003.***

19. Mr. Merkley testified that Michelin brand tires are priced higher than the tires offered by competitors, a fact which the Commissioner did not consider at any time in her analysis of whether Sears' regular prices were offered in good faith.

*Pub. Hr. Tr., Vol. 10, 1630 (12-14), Oct. 31, 2003.*

20. Mr. Merkley testified that certain flag brand Michelin and BF Goodrich tires were comparable ("*the closest substitutes*") to three of the five Tires. These flag brands were the Michelin X One (comparable to the Michelin T Plus), the Michelin RainForce (comparable to the Michelin Weatherwise) and the BF Goodrich Momenta SE (comparable to the BF Goodrich Plus).

*Conf. Hr. Tr., Vol. 10A, 62 (5) – 63 (25), Oct. 31, 2003.*

21. Product books or catalogues for Michelin and BF Goodrich brand tires (including the three competing flag brands, Michelin X One, the Michelin RainForce and the BF Goodrich Momenta SE) were made available to virtually all levels of distribution selling these brands of tires to consumers in 1999. These books were also part of the Commissioner's Disclosure and were marked as CR-107, CR-108 and R-129 during the hearing. The MSRPs stated in the books were in force throughout 1999.

*Pub. Hr. Tr., Vol. 10, 1632 (7-24), Oct. 31, 2003.*

*Exhibit CR-107: Michelin Suggested Retail Prices effective June 1, 1998.*

*Exhibit CR-108: Michelin Suggested Retail Prices effective August 1, 1999.*

*Exhibit R-129: BF Goodrich – Suggested Retail Prices.*

22. According to Mr. Merkley's evidence, the MSRPs for Michelin products (including for competing flag brand tires comparable to 3 of the 5 Tires) were used by some dealers as their offering price to the public for the tires in question:

*MR. SYME: You said a lot of things there, sir. I just want to make sure I understand it. Would dealers have used these as their offering prices to the public?*

*MR. MERKLEY: Some would, yes.*

*MR. SYME: Some would?*

*MR. MERKLEY: Yes.*

*[...]*

*MR. SYME: So the relationship between their published price and this published price, are you saying that those bigger dealers would simply duplicate this list as part of their published price?*

*MR. MERKLEY: Some would. Some would use a factor off or on.*

*[...]*

*MR. MERKLEY: Do you follow what I am saying?*

*MR. SYME: I'm not sure that I do exactly.*

*MR. MERKLEY: Really what I am trying to say is not everybody used it the same way. They are independent businessmen. They do their own thing. Some would use this all the time; others not at all, and everybody in between to varying degrees, and it would also affect the lines that they are selling.*

*--- Pause*

*MR. SYME: Your Honour, I don't know if this is an opportune moment. I have been asked by my client to request an adjournment for 15 minutes. I know we have just gotten rolling here, but -- ten might do it.*

*THE CHAIRPERSON: All right.*

*MR. SYME: There is something that I think I need to get instructions about.*

*THE CHAIRPERSON: We will then adjourn for ten minutes.*

*Pub. Hr. Tr., Vol. 10, 1635 (9-16); 1637 (3-9); 1638 (7) – 1639 (2), Oct. 31, 2003.*

23. Mr. Merkley's evidence was particularly at odds with the Commissioner's theory of the case, which was that MSRPs were never used in the marketplace and therefore irrelevant to the good faith issue. This explains why, at this point in Mr. Merkley's evidence, the Commissioner's counsel sought an adjournment for the purpose of seeking instructions.<sup>4</sup>

24. The Commissioner's counsel eventually continued his examination-in-chief of Mr. Merkley. He showed Mr. Merkley the Sears' Competitive Profile which compared the Sears' regular, 2-for and sale prices for the Michelin RoadHandler T Plus to a "Dealer price", which was stated to be

25. The question put by the Commissioner's counsel was to explain the apparent discrepancy between the Sears' regular price and the dealer's discounted price for the comparable tire. Mr. Merkley's response underscored the Commissioner's misunderstanding of the issue:

*MR. MERKLEY: We are comparing two different things which is why there is the disconnect.*

*MR. SYME: Okay.*

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<sup>4</sup> The Tribunal will recall that this was the first of two adjournments sought by counsel for the Commissioner during Mr. Merkley's examination in chief. The second adjournment was sought shortly after counsel for the Commissioner resumed Mr. Merkley's examination. The Tribunal later concluded that this second adjournment was sought for the purpose of considering whether a motion would be made to have Mr. Merkley declared a hostile witness. Such a motion was never brought, although Mr. Merkley was obliged to retain counsel during the second adjournment.

*MR. MERKLEY: To compare to the regular price on the RoadHandler, you would need to compare that to the manufacturer's suggested list price, not a 40 per cent reduction of that list price.*

*MR. SYME: Okay. May I have just a moment, Your Honour? I just want to confer very quickly with my colleague.*

*THE CHAIRPERSON: Very quickly.*

*Pub. Hr. Tr., Vol. 10, 1709 (11-24), Oct. 31, 2003.*

26. Mr. Merkley's response and the common sense comparison he suggested be made is highly significant: it is exactly the comparison the Commissioner should have made (but failed to make) prior to asserting that Sears' regular prices were not offered in good faith. It also vindicates Sears' assertion that its regular prices, which were based at least in part on known MSRPs for competitive products, were offered in good faith.

27. To summarize:

- (a) The Commissioner failed to adduce any direct evidence of the use made of MSRPs by passenger tire retailers in the marketplace;
- (b) The Commissioner also failed to adduce any evidence of the regular and sale prices of the three flag brand tires comparable to the Michelin T Plus, Michelin Weatherwise and BF Goodrich Plus (namely, the Michelin X One, the Michelin RainForce and the BF Goodrich Momenta SE);
- (c) Further, the Commissioner has failed to appreciate that although flag brand product (e.g., Michelin-branded tires) is sold through all channels of distribution, nonetheless a particular Michelin tire, bearing the Michelin name, can be sold

exclusively and still be considered "flag brand". The importance of this fact is that flag brand tires will benefit from the manufacturer's brand equity, and the opportunity to command higher retail prices, even if sold exclusively through one retailer; and

- (d) Last, and perhaps most important, is Mr. Merkley's evidence that the Sears' regular price and the discounted price offered by some tire dealers were not comparable, and that a valid comparison would be between the Sears regular price and the MSRP.

28. In conclusion, it is apparent that several aspects of Mr. Merkley's evidence are completely at odds with various critical components of the Commissioner's analysis of the Representations in this case and, for this reason undercut the basic premise of the Commissioner's Application.

29. For these reasons, Sears submits that the Commissioner's allegations with respect to Sears' absence of good faith cannot stand in light of Mr. Merkley's testimony.

***iii) Evidence of Jim King:***

30. The Commissioner also called Jim King, who in the first part of 1999 worked for Bridgestone-Firestone as its Sales Manager for Associate Brands, and from August of 1999, as the Bridgestone-Firestone's Sales Manager for Corporate Accounts and Original Equipment.

31. The backdrop to Mr. King's evidence is that only one of the Tires, the Silverguard Ultra IV, was manufactured by Bridgestone/Firestone, Mr. King's employer in 1999; and that the Silverguard Ultra IV tire is a private label brand, sold exclusively by Sears.



32. Mr. King also gave evidence about the role played by MSRPs (referred to by Bridgestone/Firestone as Manufacturer's Suggested *List Prices*) for flag brand tires contained in product books distributed by Bridgestone/Firestone to Sears and many of its competitors.

33. In this regard, Mr. King confirmed that the MSRP was a "*rational*" price, the price "*marketing would determine that would be a reasonable price for a tire given the construction and the segment it was targeted for*". He confirmed that the MSRP would "*in most cases*" serve as the starting point or starting price used by independent tire retailers in selling tires to the public, the amount of the discount being dependent on the negotiation between the purchaser and the retailer and the market in which the transaction takes place.

***Pub. Hr. Tr., Vol. 7, 1140 (21 - 24), Oct. 28, 2003.***

***Pub. Hr. Tr., Vol. 7, 1167 (24) – 1168 (7), Oct. 28, 2003.***

***Pub. Hr. Tr., Vol. 7, 1169 (13) – 1170 (9), Oct. 28, 2003.***

34. During his examination in chief, Mr. King testified that the normal selling price for a specialized tire dealer (Mr. King cited Green & Ross and Okay Tire Store as examples) for flag brand tires was 35% off the MSRP. In cross-examination, however, he acknowledged that he was not present when retail transactions were consummated and indeed, confirmed that neither he nor his employer, Bridgestone/Firestone, sold tires at the retail level. Thus, Mr. King's evidence about the normal selling price or market price for flag brand tires is anecdotal at best. Moreover, Mr. King's evidence does not speak to prices prevailing in other channels of distribution, or whether prices differed across the country.

***Pub. Hr. Tr., Vol. 7, 1169 (10-12), Oct. 28, 2003.***

***Pub. Hr. Tr., Vol. 7, 1148 (9-20), Oct. 28, 2003.***

35. In any event, Mr. King testified that there were no Bridgestone/Firestone flag brands comparable to the Silverguard Ultra IV tire when price is taken into account. Thus, his evidence on the role of the MSRP, and whether flag brand tires were sold at that price, is not relevant to four of the five Tires.

***Pub. Hr. Tr., Vol. 7, 1135 (23) – 1136 (20), Oct. 28, 2003.***

36. However, Mr. King identified several associate brand tires which were, according to Bridgestone/Firestone's section 11 written return, directly comparable to the Silverguard Ultra IV model. These were the

Mr. King also testified that associate brand tires were non-flag brand tires made by a manufacturer such as Bridgestone/Firestone and sold *"to any number of outlets, but not necessarily on an exclusive basis"*.

***Pub. Hr. Tr., Vol. 7, 1156 (6-20), Oct. 28, 2003.***

***Pub. Hr. Tr., Vol. 7, 1137 (21-25), Oct. 28, 2003.***

37. From an evidentiary viewpoint, it was unfortunate that Mr. King had no recollection as to whether the product books for the Tires (which had been transmitted to the Commissioner) contained any information pertaining to pricing (such as the MSRP). Despite the Commissioner having requested and obtained these product books, they did not form part of the Commissioner's disclosure and are not in evidence.

***Pub. Hr. Tr., Vol. 7, 1160 (23) - 1161 (9), Oct. 28, 2003.***

38. Mr. King was also asked about the comparability of specific tires. In this regard, he was asked whether the Silverguard Ultra IV tire was comparable to any Bridgestone/Firestone flag

brand tires. Mr. King's evidence was that they were comparable but not if the comparison included price since national or flag brand tires were priced higher. This testimony underscores once again the Commissioner's failure to pursue relevant avenues of inquiry as part of her analysis. She failed, for example, to consider the impact of technically comparable tires being offered by competing retailers at higher regular prices than the Sears' private label product on the issue of Sears' good faith. She also failed to adduce any concrete evidence of actual regular prices for competitive products, as sold by Sears' competition in the various distribution channels.

39. Mr. King was also asked whether the Silverguard Ultra IV was comparable to a Canadian Tire Corporation ("CTC") product. He indicated that his knowledge about the CTC product was limited but indicated that he "would place them in a similar segment" and confirmed that a CTC product was somewhat comparable to the Ultra IV. However, he was not asked whether these two tires were comparably priced, or indeed, whether it was even appropriate to compare Sears' regular price with CTC's EDLP price.

*Pub. Hr. Tr., Vol. 7, 1133 (19) – 1134 (9), Oct. 28, 2003.*

*iv) Evidence of Paul Cathcart and Harry McKenna:*

40. Mr. Cathcart, who in 1999 held the position of Retail Marketing Manager and Group 190 Service Operations Manager, testified that the MSRP for comparable flag brand tires was one of the factors taken into account by Sears in establishing its regular price for the Tires.

*Pub. Hr. Tr., Vol. 14, 2448 (22) – 2449 (3), Nov. 6, 2003.*

*Pub. Hr. Tr., Vol. 16, 2580 (13) – 2581 (7), Nov. 12, 2003.*

41. Mr. Cathcart also demonstrated (using the manufacturers' product catalogues and Sears' documents) that the Sears' regular prices for the Michelin T Plus, Michelin Weatherwise and BF Goodrich Plus lines were indeed competitive to the MSRP for the comparable flag brands.

*Pub. Hr. Tr., Vol. 16, 2580 (13) – 2588 (8), Nov. 12, 2003.*

42. Harry McKenna corroborated Mr. Cathcart's evidence regarding the use made of MSRP as a reference point for the Sears' regular price. Mr. McKenna testified that, as Inventory Analyst in 1999, he worked closely with the Tire Buyer, the late Mr. Stan Keith. He further testified that Mr. Keith frequently used the MSRP reference books as well as competitors' catalogues and advertisements.

*Pub. Hr. Tr., Vol. 19, 3046 (19) – 3050 (8), Jan. 16, 2004.*

*Pub. Hr. Tr., Vol. 19, 3090 (4) – 3093 (2), Jan. 16, 2004.*

43. Specifically, Mr. McKenna testified that the MSRP price guides:

*[...] helped [Stan Keith] establish our regular price on comparable product to what manufacturers were carrying. It enabled him to identify the irregular price [sic] that dealers would be carrying their product at, and he was able to anticipate the range of discounts applied to the various lines.*

*Pub. Hr. Tr., Vol. 19, 3092 (15-21), Jan. 16, 2004.*

44. Mr. McKenna also confirmed that warranty adjustments were based on the price in effect at the time tires were returned. Sears consistently treated "the price in effect" (within the meaning of the Sears' warranty) as either Sears' regular price or the promotional price if the tire was on sale, but never had regard to the 2-for price. This is further evidence of the fact that the Sears' regular prices were offered in good faith.

*Pub. Hr. Tr., Vol. 19, 3061 (8) – 3062 (9), Jan. 16, 2004.*

45. Mr. Cathcart's evidence, along with that of Messrs. Merkley and King regarding the existence and use of the MSRP by Sears' competitors in the marketplace, makes it apparent that the good faith requirements were met in this instance. Sears submits that, objectively, its regular prices were "*based on sound pricing principles, were reasonable in light of competition in the relevant market*", were prices which Sears "*fully expected the market to validate*", were prices "*at which genuine sales occurred*" and/or were "*prices comparable to those offered by competitors*", as stipulated in the Competition Bureau's *Information Bulletin – Ordinary Price Claims* (the "Guidelines").

*Information Bulletin – Ordinary Price Claims, Subsections 74.01(2) and 74.01(3) of the Competition Act, published Sept. 22, 1999.*

v) ***Evidence of Donald Gauthier:***

46. The only other evidence of a factual nature adduced by the Commissioner having any bearing at all on the issue of the competitiveness of Sears' regular prices was that of the Commissioner's expert witness Donald Gauthier.

47. Mr. Gauthier testified that the MSRP was used by "*tire dealers*" across Canada to establish a retail selling price. He testified that flag and associate brands were not being retailed at the MSRP in 1999. However, he also testified that the discount off the MSRP "*varied depending on the brand and depending on the list price the manufacturer had established*" and that the discounting approach and quantum was not consistent or applied uniformly by all retailers.

*Pub. Hr. Tr., Vol. 11, 1846 (18) – 1847 (12), Nov. 3, 2003.*

*Pub. Hr. Tr., Vol. 11, 1851 (21) – 1852 (12), Nov. 3, 2003.*

48. Mr. Gauthier also testified on the issue of manufacturers encouraging dealers not to advertise products as a percentage off list price. His evidence on this issue is particularly informative as it corroborates Sears' evidence about both the highly competitive nature of the market in which Sears was competing in 1999 and Sears' argument regarding the Commissioner's conspicuous failure to adduce relevant evidence on the regular prices charged by Sears' competitors in the retail marketplace for comparable products:

*Typically what they [the manufacturers] did is they encouraged the dealers to advertise at a low net price or a dollar savings [...]. The issue – and this is an issue that has been around since I have been in the business – is that the typical feeling is that the retailer has to be able to – to be in compliance with would have to prove that they had an established regular price for the period of time prior to the sale.*

*Given the nature of the business and some of the participants, who maybe were not as sophisticated as they are today, but at the start – and were not good in record keeping, they would not be in a position to easily prove their established every day sell price – and I'm not talking sale price, I'm talking sell price – and since they wouldn't be able to prove their everyday sell price they may not in fact be in compliance in their sale. Their sale (sic) may not be able to prove that in fact it is a true sale or savings to the consumer.*

[Our emphasis]

***Pub. Hr. Tr., Vol. 11, 1859 (3) – 1860 (2), Nov. 3, 2003.***

49. As is apparent from both his affidavit and his oral testimony, Mr. Gauthier's only evidence on the issue of whether transactions took place at the MSRP was anecdotal, overly broad, unsubstantiated and, it is submitted, not credible<sup>5</sup>. It also remains troubling, in Sears'

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<sup>5</sup> Mr. Gauthier's evidence also lacks credibility for another reason, namely, his apparent misunderstanding of Every Day Low Pricing and of CTC's approach to pricing as an every day low price or EDLP retailer.

submission, that Mr. Gauthier is not a truly independent expert witness given his employment with a regional tire dealer which competes in some of the same geographic markets as Sears.

50. Sears therefore submits that Mr. Gauthier's evidence should be accorded little weight. If his testimony is to be regarded at all, it should be noted that he conceded that the Canadian tire aftermarket is not a single, homogeneous one, but rather one which includes distinct channels of distribution and a spectrum of prices. The Commissioner has failed to factor this reality into her analysis of good faith.

**c) The Retail Environment – Competitive and Diverse:**

51. Any analysis of whether Sears Automotive determined and offered its prices in good faith must consider the competitive retail environment within which Sears was promoting the Tires. The evidence at the Hearing established that the pricing framework Sears employed in 1999 was in response to a highly competitive retail market, which embraced various channels of distribution. The evidence as to the competitive nature of the retail tire market was undisputed.

*Pub. Hr. Tr., Vol. 21, 3541 (12-21), Jan. 20, 2004.*

52. Automotive industry consultant Mr. Dennis DesRosiers noted that while there is no census data available, there are at least 20,000 outlets in Canada where tires can be replaced. Sears' expert, Mr. John Winter, gave a more conservative estimate of 14,000 replacement tire outlets, which did not include body shops, independent service stations and other non-traditional outlets taken into account by Mr. DesRosiers.

*Pub. Hr. Tr., Vol. 21, 3442 (14) – 3443 (13), Jan. 20, 2004.*

*Pub. Hr. Tr., Vol. 21, 3542 (3) - 3543 (19), Jan. 20, 2004.*

53. In a universe of 14,000 – 20,000 tire outlets, Sears operated 66 or 67 Automotive Centres in 1999. In the same year, CTC operated approximately 480 outlets.

*Pub. Hr. Tr., Vol. 14, 2430 (11-13), Nov. 6, 2003.*

*Pub. Hr. Tr., Vol. 14, 2433 (13-18), Nov. 6, 2003.*

54. Mr. Gauthier agreed with Messrs. Merkley and Winter that tire retailing outlets can be further subdivided into various channels. These include price clubs, mass merchandisers, car dealers, service stations and garages, and tire dealers.

*Exhibit CA-116: Affidavit of Donald Gauthier, sworn September 22, 2003, para. 12.*

*Pub. Hr. Tr., Vol. 10, 1595 (18) – 1597 (9), Oct. 31, 2003.*

*Exhibit CR-145: Affidavit of Mr. John O. Winter, sworn September 19, 2003, para. 21.*

55. In his evidence, Mr. Gauthier emphasized that pricing practices among these various channels of distribution varied. Concerning wholesale clubs, Mr. Gauthier testified "[t]hey tended to position themselves towards the lower end of the spectrum when it comes to flag brand retail prices." [Our emphasis.]

*Pub. Hr. Tr., Vol. 11, 1831 (12-14), Nov. 3, 2003.*

56. Even within a particular channel of distribution, prices were far from uniform in 1999.

Mr. Gauthier testified:

*The tire dealers would in turn use the list price to establish a retail selling point. Depending upon the situation, depending on the market, depending on the competitive nature of the market, and it even varied from province to province, town to town.*

*Pub. Hr. Tr., Vol. 11, 1846 (25) – 1847 (6), Nov. 3, 2003.*



**d) The Relevant Geographic Market:**

57. Section 74.01(3) makes it clear that the Tribunal is to have regard to "the relevant geographic market" in applying the time test, and particularly the good faith element. The overwhelming conclusion from the evidence at the Hearing was that the retail tire market in Canada is made up of various local markets, each of which is subject to competitive pressures.

58. The questions to be asked by the Tribunal in determining the scope of the relevant geographic market are:

- (a) Where can a consumer go to purchase tires; and
- (b) Do the options available to the consumer vary by location?

59. Sears submits that the Tribunal should adopt Professor Trebilcock's conclusions, that:

*The relevant geographic market for tires is a local regional market, adopting a demand side or consumer-oriented perspective and asking the question: What range of choices would any given consumer consider that he or she had available to them.*

*Pub. Hr. Tr., Vol. 23, 3804 (20-25), Jan. 22, 2004.*

60. Although Sears employed the same overall marketing strategy across the country, this fact yields no information on the supply choices and prices in any area.

61. For example, although Sears operated Automotive Centres across Canada, and although Sears operated Automotive Centres in South-Western Ontario, and in some of the same cities as the chain of independent tire stores located in South-Western Ontario for which the Commissioner's expert Mr. Gauthier worked, this was not sufficient, according to Mr. Gauthier,

to make them competitors. Indeed, speaking specifically of Al's Tire Stores in Sarnia and Brantford, towns where Sears also maintained Automotive Centres, Mr. Gauthier testified that not once in three years has either of those operators cited Sears as a competitor.

*Pub. Hr. Tr., Vol. 11, 1784 (13-19), Nov. 3, 2003.*

62. Professor Trebilcock's opinions as to the nature of the market were largely corroborated by the evidence of witnesses called by the Commissioner. In particular:

- (a) Mr. King testified that the level of discounting by dealers varied "depending on the market he is in, in most cases";

*Pub. Hr. Tr., Vol. 7, 1170 (5-9), Oct. 28, 2003.*

- (b) Mr. Gauthier testified prices and pricing practices varied "*depending upon the situation, depending on the market, depending on the competitive nature of the market, and it even varied from province to province, town to town*";

*Pub. Hr. Tr., Vol. 11, 1846 (25) – 1847 (6), Nov. 3, 2003.*

- (c) At another point in his testimony, Mr. Gauthier observed, "*Again I would have to look at it by market. Because if I look at some marketplaces -- and I will give you an example of Atlantic Canada where you have car dealers that have been in business for quite some time and have multiple outlets, they are going to market like regular dealers and are participating in pricing at similar price levels*"; and

*Pub. Hr. Tr., Vol. 11, 1897 (21) – 1898 (3), Nov. 3, 2003.*

- (d) Professor Moorthy quite reasonably acknowledged that the competitive nature of the tire market varied across the country.

*Pub. Hr. Tr., Vol. 13, 2352 (17) – 2357 (7), Nov. 5, 2003.*

63. These statements support the conclusion that in the retail tire business, competition occurs at the local level, and from a pricing perspective, markets should be defined on no more than a regional basis. It follows that the particular competitors faced by the various Sears Automotive centres differed by location.

64. The evidence from the Commissioner's witnesses concerning price variability across and within various markets was supported by Mr. Cathcart's testimony regarding a 1999 experience in the Ottawa area. In explaining Sears' response to the differing competitive realities within the various local markets, Mr. Cathcart testified to the use of a "Hi-Low" pricing approach and of a multi-tier pricing structure, which included a 2-for price point. The 2-for price was, in Sears' view, a volume discount made necessary by consumer expectations and general industry practice.

*MR. McNAMARA: Was it your understanding that your high-low competitors were behaving in a similar way in terms of a volume discount?*

*MR. CATHCART: Yes, absolutely.*

*MR. McNAMARA: Can you give us a for instance of that?*

*MR. CATHCART: Certainly. In 1999 Vincent Power and myself actually came to Ottawa. We were scouting out a potential new auto centre in the east end of the city. Part of the criteria in establishing where to put an auto centre is to drive around and check out the area, check residential areas, check who your competition is.*

*In this case we were looking forward to being within fairly close proximity to the St. Laurent store, because we didn't have an Automotive Centre in the east end of the city. So on that day we came across a Goodyear Tire Centre who was fairly close to -- it was on Bank Street actually, so it was not that close, but close enough. There wasn't a lot of competition around this location that we were looking. So we went into the Goodyear Tire Centre and we looked around and I picked a tire and asked the sales associate how much this tire was. They gave me the regular price on the tire and offered me a discount on four if I could do it right now. In fact he was able to do it right away and offered me a discount on the purchase of four, which I knew they would.*

*So we left the store. I said "Thank you anyway" and we left and continued on our drive-about in Ottawa.*

*We came across another Goodyear store and happened to -- we actually got turned around on the street I remember and we stumbled across this Goodyear store.*

*We went in to turn around at this store and took the chance to go in and I asked about the same tire to one of the sales associates. They provided me with the regular price on the tire and then a discount if I was to buy all four, and was very, very persistent if I could buy all four and he could do them right away while I wait. But I guess the interesting thing was on that day, and that is why I remember it so well, was that was the same tire as the first Auto Centre we visited, yet the discounted price on the four was different from the first Goodyear an hour earlier, which is kind of typical of what happens in the independents. They run the same way.*

*Even our sales managers in the field, when they do competitive shops, will be offered deals depending on how much volume the store did that day. If they had a real slow day they would be more anxious to offer a discounted price. If their books were full and they had no room, they would be less anxious to offer the price.*

*MR. McNAMARA: Do you remember when that happened?*

*MR. CATHCART: I was with Vince Power and it was in 1999. I'm not sure if it was the -- I think it was the spring of 1999. I'm just trying to remember if there were leaves on the trees or not. It was in the spring of 1999 with him.*

65. The evidence cited above with respect to pricing and marketing differences indicates the need to address regular pricing practices at least by region, and considerably more systematically and comprehensively than was done by the Commissioner. In the face of conflicting statements from her own expert and industry witnesses, the Commissioner has unreasonably relied on Sears' national advertising strategy to assert the relevant geographic market is a national market. The dearth of evidence on the regular prices offered by competitors in various parts of Canada points to the conclusion that the Commissioner has failed to discharge the burden incumbent upon her as the Applicant in these proceedings.

**e) Sears as a Hi-Low Retailer:**

66. Hi-Low retailers, and particularly promotional tire retailers, hold several expectations concurrently regarding sales generated through use of the Hi-Low pricing framework. They are not being dishonest or deceptive when they expect to sell the majority of their goods on promotion. Moreover, an expectation regarding a high level of sales on promotion becomes especially reasonable and realistic when regard is paid to the nature of the product – as required by section 74.01(3) of the Act.

67. The uncontested evidence at the Hearing was that in 1999 Sears Automotive used a well-established pricing framework known as "Hi-Low" or "Promotional" pricing in retailing the Tires. Mr. Winter explained that this pricing framework employs a high regular price and temporary price discounts that are event driven. He testified that typically a Hi-Low retailer charges higher prices than an Every Day Low Price (EDLP) competitor on an everyday basis but then runs reasonably frequent promotions on selected items, during which prices are temporarily lowered below the EDLP level.

68. Many other tire retailers used the Hi-Low approach to promote and sell tires. These included manufacturer corporate stores such as Goodyear Tire Centres; and the automotive dealers, like General Motors and Ford. The strategy was particularly prominent among the independent tire stores and repair shops. In 1999, these two types of outlets represented a very significant part of the market. Mr. Dennis DesRosiers testified that the independent tire dealers had about a 35.6 % market share and the repair shops had about a 13.8% market share, based on results from the 2000 Light Vehicle Study.

*Pub. Hr. Tr., Vol. 14, 2433 (6-12), Nov. 6, 2003.*

*Pub. Hr. Tr., Vol. 21, 3440 (2-15), Jan. 20, 2004.*

69. The widespread use of the Hi-Low strategy by tire retailers allowed those retailers to distinguish between consumers that vary in price sensitivity, one of the most basic and long-standing principles in economics. At paragraphs 13 and 14 of his Reply Affidavit, Professor Trebilcock opined that such differential pricing is not uncommon:

*It also allows a retailer to differentiate between those consumers with more inelastic demand (i.e. consumers who, as a result of some sort of tire failure, require tire replacement quickly and only want a single tire) from those consumers with more elastic demand (i.e. consumers replacing tires as part of regular maintenance). Such differential pricing is not uncommon.*

*Exhibit CR-151, Reply Affidavit of Michael Trebilcock, sworn Oct. 3, 2003, paras. 13 and 14.*

70. Professor Trebilcock also provides the example of airline carriers practicing differential pricing.

71. Hi-Low pricing allows the retailer to discriminate between informed and uninformed consumers. With a Hi-Low policy, retailers can attract price sensitive switchers with promotions to build store traffic while store loyal consumers buy merchandise both on promotion and at higher everyday prices. Many Hi-Low retailers also believe that aggressive temporary price reductions help to sustain a low price, value image.

72. Mr. Winter concluded that, as a Hi-Low retailer, Sears was utilizing a well-established and accepted marketing approach, with which Canadian consumers have been familiar for decades. He testified that many Canadian consumers expect, and indeed, relish the sales promotions that are associated with this approach:

*Certainly, in Canada, they [consumers] have been brought up to expect promotions. There is a segment of the market that only buys on sale, loves going around cherry picking, has enough time to drive around the metropolitan area getting the lowest possible costs anywhere.*

***Pub. Hr. Tr., Vol. 21, 3536 (17-22), Jan. 20, 2004.***

***Pub. Hr. Tr., Vol. 21, 3533 (23) – 3534 (6); 3537 (3-12), Jan. 20, 2004.***

73. The Hi-Low strategy relies in part upon consistently presenting an attractive differentiation between regular and sale prices. When this differential is not present, or when retailers attempt to use different pricing strategies, promotions will falter and overall sales levels decline.

***Pub. Hr. Tr., Vol. 21, 3539 (22) – 3540 (4), Jan. 20, 2004.***

***Exhibit CR-145, Affidavit of John O. Winter, sworn Sept. 19, 2003, Exhibit "H", para. 19.***

74. Additionally, Mr. DesRosiers pointed out that whereas other automotive parts, when worn, may stop a vehicle from operating, a worn tire may continue to be used, and a spare can replace a damaged tire. Hence, there is significant opportunity for consumers to shop around for tire replacements.

***Pub. Hr. Tr., Vol. 21, 3441 (9) – 3442 (8), Jan. 20, 2004.***

75. This is, in fact, what most consumers did do. Dr. Kenneth Deal's findings in this regard were that *"more than half of the respondents (57%) said that they had compared prices from a variety of different stores prior to purchasing their tires at Sears in 1999"*. Dr. Deal further found that *"63% of respondents say that they comparison shop even when they see ads that indicate reduced tire prices"*.

***Exhibit R-146: Affidavit of Kenneth Deal, sworn Sept. 19, 2003, paras. 25 and 31.***

76. Mr. DesRosiers' evidence, which is confirmed by the survey findings of Dr. Deal, represents the best evidence on consumer search behaviour with respect to tires. The Commissioner's experts, Drs. Lichtenstein and Moorthy, who opine that it was difficult to search, acknowledge that the studies upon which they based their opinions were not tire studies.

***Pub. Hr. Tr., Vol. 12, 2066 (11-22), Nov. 04, 2003.***

***Pub. Hr. Tr., Vol. 13, 2345 (2-22), Nov. 05, 2003.***

77. Since consumers can, and will, wait for sales, it follows that to maintain a viable business, with reasonably steady sales volume, cash flow and inventory levels, a Hi-Low tire



retailer competing against an endless array of competitors including promotional retailers and EDLP retailers, must advertise sales with some frequency.

**f) Evidence *re* Pricing Strategy:**

78. As stated above, the Commissioner concedes that her allegation of an absence of good faith in the Application is based largely on an analysis of Sears' documents. Conspicuous by its absence at the Hearing was independent evidence of retail market prices. Although the Commissioner's witnesses made some general allusions to the discounts offered by the dealer channel, these statements must be viewed against other statements by the same witnesses about pricing variability between the various retail channels and across the various geographic markets.

79. As the foundation for her argument that Sears' regular prices for the Tires do not meet the good faith requirement, the Commissioner relies in particular on certain internal documents known as Competitive Profiles which, according to the Commissioner's interpretation, show that Sears' regular price for certain of the tires was not competitive to \_\_\_\_\_ for comparable private label products.

80. In adopting this approach, the Commissioner has again proceeded on the basis of a flawed and reductive assumption about the competition faced by Sears Automotive centres in 1999.

81. Two of the Commissioner's fact witnesses, Messrs. King and Merkley, testified to the extensive competition – local, regional and national – in the retail tire marketplace in 1999.

82. This evidence was corroborated by Paul Cathcart. As described by Mr. Cathcart, Sears' competitors in the retail tire market included such well-known retailers as CTC, Wal-Mart, Costco and a large number of independent tire retailers (the Independent Tire Retailers).

83. As explained by Paul Cathcart, these competitors employed different pricing strategies in the marketplace. As mentioned previously, Sears Automotive employed a Hi-Low or promotional pricing strategy in 1999. Several of its competitors, including CTC (a significant competitor in the private label segment of the market), adopted an EDLP pricing strategy.

84. Mr. Cathcart explained how Sears Automotive adopted a three-tier pricing structure to respond to these competitive pressures, consisting of regular, 2-for (volume discounted price) and promotional prices<sup>6</sup>.

*Pub. Hr. Tr., Vol. 17, 2784 (15) - 2785 (14), Nov. 13, 2003.*

85. Mr. Cathcart's evidence about the rationale behind this three-tiered approach can be summarized as follows:

- (a) Sears anticipated that its regular price would be competitive with the regular prices of comparable flag brand or associate brand tires offered by its Hi-Low competitors (which regular price Sears Automotive personnel believed to be the MSRP) but would not be competitive with EDLP;
- (b) Sears expected that its 2-for price would be within EDLP; and

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<sup>6</sup> Promotional prices included a standard promotional price and a 'Great Item' price.

- (c) Sears further anticipated that its promotional price would be equal to or lower than the maximum discounted price offered by its Hi-Low competitors.

86. Significantly, Mr. Merkley's response to a question by Commissioner's counsel fully corroborates Sears' position. As noted above, Mr. Merkley was asked to comment on the Competitive Profile which contained price information on the Michelin X One (i.e., a flag brand competitor) and the Michelin RoadHandler T Plus (one of the Tires). Mr. Merkley responded:

*MR. MERKLEY: To compare the regular price on the RoadHandler, you would need to compare that to the manufacturer's suggested list price, not to a 40 percent reduction of that list price.*

***Pub. Hr. Tr., Vol. 10, 1708 (7) – 1709 (19), Oct. 31, 2003.***

87. Thus, comparing Sears' regular price and EDLP in order to form a conclusion as to good faith (or the lack thereof) is, according to Mr. Merkley, inherently flawed. When the appropriate analysis is made, Sears' regular prices for the Michelin RoadHandler T Plus, Michelin Weatherwise and BF Goodrich Plus tires were comparable to the MSRP's for the closest substitute Michelin X One, Michelin RainForce and BF Goodrich Momenta tires. In fact, as demonstrated through Mr. Cathcart, Sears' regular prices were slightly lower than the competing tires' MSRP's.

***Pub. Hr. Tr., Vol. 14, 2444 (3) – 2445 (23), Nov. 6, 2003.***

**g) Evidence *re* Pricing Factors:**

88. Mr. Cathcart also testified with respect to the process followed by Sears and the various factors taken into account by its personnel when establishing the prices (regular, 2-for and promotional) for the Tires.

89. In this regard, Mr. Cathcart testified that the three prices were first established by the Buyer, the late Mr. Stan Keith. Several witnesses testified to the fact that Mr. Keith was extremely knowledgeable about tires and the tire industry generally.

90. Mr. Cathcart testified that Mr. Keith took a number of factors into account in determining Sears' retail prices for tires. In addition to considering the MSRPs of comparable flag brand and associate brand tires, Mr. Keith conducted competitive shops, solicited input from manufacturers' representatives and Sears' field managers, and acquired competitors' advertising.

*Pub. Hr. Tr., Vol. 14, 2448 (12) – 2449 (3), Nov. 6, 2003.*

91. Mr. Cathcart testified that his responsibilities included reviewing and approving Mr. Keith's suggested pricing.

92. Mr. Cathcart testified that the price levels for 1999 were set in the Fall of 1998 and remained unchanged throughout 1999.

*Pub. Hr. Tr., Vol. 16, 2565 (11-23), Nov. 12, 2003.*

93. Mr. Cathcart demonstrated that Sears' regular prices for the Michelin T Plus, Michelin Weatherwise and BF Goodrich Plus tires were slightly less than the MSRP for the comparable

national brand products (the Michelin X One, Michelin RainForce and BF Goodrich Momenta, respectively).

*Pub. Hr. Tr., Vol. 16, 2580 (13) – 2588 (12), Nov. 12, 2003.*

94. Mr. Cathcart also testified that Sears expected to sell approximately 5 to 10% of tires as single units on a volume basis. Approximately 11% of transactions related to the Tires in 1999 involved single tires.

*Pub. Hr. Tr., Vol. 14, 2492 (12-16), Nov. 6, 2003.*

*Exhibit R-127: Retail Tire Transactions for January 1, 1999 to December 31, 1999.*

95. The evidence of Messrs. Cathcart, Merkle and King is relevant to the issue of good faith in that, taken together, it confirms that Sears' regular prices for the Tires were economically rational and competitive.

96. As noted above, the evidence indicates that Sears Automotive's regular prices for the Tires were competitive with the regular selling prices of comparable (if not virtually identical) tires offered by the Respondent's Hi-Low competitors in the marketplace during 1999. No substantive, credible evidence to the contrary was offered by the Commissioner.

**h) Evidence *re* Sales and Volume Expectations:**

97. In her written submissions, the Commissioner emphasizes certain aspects of Mr. Cathcart's evidence in cross-examination including, in particular, his acknowledgment that 5-10% of the tires were sold singly while 90-95% were sold in multiples of two or more; his acknowledgment that the regular single unit price was irrelevant to buyers of multiple tires; and

his acknowledgment that Sears' expectation for 1999 was that 10% of tires would be sold at regular or 2-for price, 90% at promotional.<sup>7</sup> The Commissioner's submission is that these factors, taken together, establish on the balance of probabilities that Sears' regular, single unit price for the Tires was not offered in good faith. Sears strenuously disputes this assertion for the reasons set out below.

98. First, Sears submits that the actual volume of tires sold at promotional prices is irrelevant given that the legislation provides for a disjunctive test. Sears had the option of meeting the time test or the volume test contained in section 74.01(3)(a). Sears does not contest the Commissioner's Application on the basis of the volume test.

99. Second, the Commissioner's thesis ignores the issue of MSRPs and objective evidence which was available (but not tendered) concerning the regular prices for comparable tires offered by Sears' competitors.

100. Third, Sears submits that in order to succeed on this point, the Commissioner would have had to adduce convincing evidence establishing, on the balance of probabilities, that tires comparable to those in question were generally not sold or advertised for sale in the marketplace at the MSRP. There can be no doubt that this avenue of inquiry was available to the Commissioner. Sears submits that she failed entirely to pursue it and consequently, has failed to discharge the burden incumbent upon her pursuant to section 74.01(3)(b). Indeed, the evidence of Messrs. King and Merkley (summarized above) demonstrates either an absence of substantive

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<sup>7</sup> Sears' R&P ("Regular and Promotional") Sales History Reports for 1999, evidence adduced through Mr. McKenna, demonstrate that the actual ratio of promotional to regular sales (including 2-for) for the Tires was closer to 75:25%, or 80:20%. See *Pub. Hr. Tr., Vol. 19, 3104 (17) – 3122 (25)*, Jan. 16, 2004. In light of this clear documentary evidence, and perhaps as a result of the number of figures put to him during intense cross-examination, it may be that Mr. Cathcart simply misspoke.

evidence on the point (in the case of Mr. King and the Silverguard Ultra IV Tire) or evidence contrary to the Commissioner's contention (in the case of Mr. Merkley and the Michelin and BF Goodrich Tires).

101. Fourth, Mr. Cathcart's evidence was that Sears' pricing practices for passenger tires reasonably considered MSRP information and applied this information in the context of its valid expectations for single unit sales and, as stated above, that 11% of tire sales involves single tires, of which 30% were sold at the Sears' regular price.

102. Single unit purchasers are a consistent and dependable segment of tire retailers' business.

*Pub. Hr. Tr., Vol. 19, 3054 (21) – 3055 (14), Jan. 16, 2004.*

**i) Evidence *re* Context of the Documents Relied Upon:**

103. As stated above, the Commissioner's principal fact witness, Christian Warren, conceded that the Commissioner's position in the Application is based primarily on its analysis of certain internal Sears documents.

*Conf. Hr. Tr., Vol. 9A, 40 (2) – 45 (13), Oct. 30, 2003.*

104. The documents in question are the Competitive Profiles, the Buyer's Letter, the National Brand Strategy and the Private Label Strategy, and the Buying Plans, as set out in greater detail below.

105. The evidence establishes that the Commissioner's interpretation of these documents was significantly flawed and that her subsequent reliance upon them was misguided.

106. Each of these documents were prepared by Mr. Keith who, regrettably, predeceased even the Commissioner's examinations conducted pursuant to section 11 of the Act. Although the documents were tendered pursuant to section 69 of the Act, discerning the author's intent under these circumstances must therefore be pursued with caution given these circumstances.

*i) The Competitive Profiles:*

107. The Competitive Profiles are contained in a document entitled "1999 Automotive Training Program" (Exhibit CR-128). Mr. Cathcart testified that this Handbook, and the Competitive Profiles contained therein, were prepared by Mr. Keith and used by him to explain the various tire lines offered by Sears in 1999 as well as Sears' pricing strategies. He described it as *"a training program that the buyer would use in his travels coast to coast. He would use this package to inform our field associates and management on changes to the tire line, new product introductions. It was a product knowledge training package that we would use."*

*Pub. Hr. Tr., Vol. 16, 2566 (7) – 2567 (7), Nov. 12, 2003.*

108. With respect to the Competitive Profiles, the Commissioner incorrectly assumed that because Mr. Keith did not include a reference to Sears' regular single unit price as a percentage of price, that this was evidence of an absence of good faith in setting the single unit regular price. Professor Lichtenstein made the same assumption, stating *"The OSP is not at all considered to be a relevant market price"*. The reality, as stated above, was that Mr. Keith prepared these documents for the specific purpose of demonstrating to Sears sales associates how Sears Automotive would respond to competition from both EDLP and Hi-Low retailers. The Competitive Profiles were not intended to show how the single unit regular price stood up



against the broad range of retailers and retail practices in the tire market. The Commissioner failed to consider this reality in her analysis.

*Conf. Hr. Tr., Vol. 12A, 116 (4-5), Nov. 4, 2003.*

*Pub. Hr. Tr., Vol. 17, 2778 (20) – 2779 (6), Nov. 13, 2003.*

**ii) *The National Brand Strategy and the Private Label Strategy documents:***

109. These Sears' documents formed part of the Spring 1999 Automotive Reviews (Exhibit CA-30). In 1999, the Automotive Reviews 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. They also set out aspects of Sears' marketing of both private label and flag brand (or national brand)<sup>8</sup> tires.

*Exhibit CA-30: Sears Automotive Reviews Spring and Fall 1999.*

*Pub. Hr. Tr., Vol. 16, 2596 (16) – 2597 (14), Nov. 12, 2003.*

*Pub. Hr. Tr., Vol. 16, 2631 (11-14), Nov. 12, 2003.*

110. Despite the breakdown between "national brand" and "private label" marketing strategies, with respect to the pricing of these products it should be kept in mind that 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,

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<sup>8</sup> The distinction between "flag brand" and "national brand", which is that national brand tires need not be specified as original equipment, is not relevant to the points made here

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.

111. The Commissioner's contention is that these documents demonstrate Sears' lack of good faith in relation to its regular prices for the Tires.

112. Sears' pricing strategy was summarized by Mr. Keith in the Spring Automotive Review as follows: *"Weekly off price promos supported by everyday plan to sell"*. On another page, under the heading *"Private Label Strategy"*, Mr. Keith wrote *"Index our every day pricing to*

*with a better warranty package."* Under the heading *"National Brand Strategy"*, Mr. Keith indicated Sears' tactic would be to *"Continue to index our every day pricing to of the equivalent National Brand normal discounted price. When on sale indexed to of the National Brand price. In the case of items we will match price."*

***Exhibit CA-30: Sears Automotive Reviews Spring and Fall 1999.***

113. The Commissioner points in particular to the phrase *"every day pricing"* within the pricing strategy description and contends that the only logical interpretation of this phrase is that it refers to Sears' 2-for pricing, and that this therefore undermines Sears' contention that its single unit price was both its regular price and a price offered in good faith.

114. This hasty conclusion fails to take into account the context in which, and the purpose for which, the documents were prepared by Mr. Keith. 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 explains, was to convey to senior management how the Sears Automotive team intended to respond to the competition's EDLP or promotional pricing strategies.

*Pub. Hr. Tr., Vol. 16, 2596 (21) – 2599 (1), Nov. 12, 2003.*

115. In the case of EDLP competition it is a given (as Mr. Cathcart explained) that Sears' regular price would not be competitive.

116. Hence, Mr. Cathcart testified that he found Mr. Keith's language "*somewhat confusing*", but explained that, in the context of this document, Mr. Keith was referring to Sears' every day strategy to compete . According to Mr. Cathcart, this would necessarily result in a focus on the 2-for price level, since Sears' regular price (the "Hi" of the Hi-Low strategy) was considered uncompetitive when directly compared with EDLP.

*Conf. Hr. Tr., Vol. 16A, 202 (2) – 205 (4), Nov. 4, 2003.*

117. Mr. McMahon gave evidence concerning the Fall 2000 Automotive Review document, which he had prepared jointly with Mr. Keith. Mr. Keith's input was related to the product and pricing sections of the document, including the page bearing Bates number 16541.

118. That page was similar to but more complete than a corresponding page in the 1999 Automotive Reviews.

119. Unlike the 1999 version, the page identifies both the Sears' tire and the national brand tire to which the Sears' product is being compared. The document identifies the national brand product (which the 1999 version did not) as the Michelin X One, for which regular and sale prices are given. The document also refers to the competing vendor as a "Dealer". This product

comparison, incidentally, confirms the evidence of other witnesses (particularly Mr. Merkley) that the Michelin X One and the Sears' RoadHandler T Plus tire were comparable, and were considered comparable by Mr. Keith.

120. Using the Michelin product book, Mr. McMahon demonstrated that the competitive (dealer) regular price was the MSRP. Thus, the document also confirms Mr. Keith's intention to target MSRP as the dealer competition's regular price for comparable product.

*Exhibit CA-141: Fall Automotive Review 2000.*

*Pub. Hr. Tr., Vol. 20, 3291 (9) – 3295 (20), Jan. 19, 2004.*

121. With respect to the references to the term "plan to sell" in certain pages of the Spring 1999 Automotive Review, Mr. Cathcart's evidence was that this term was used in a variety of contexts and with a range of meanings. He testified that "plan to sell" can refer to a promotional plan to sell; it can refer to an unadvertised special plan to sell. According to Mr. Cathcart, Sears' Automotive personnel used it to describe their total pricing package, including regular individual pricing, unadvertised specials, promotions, and deep discounts. He described it as "*just a phrase we use on what we are going to market with or how we are going to market with [...] it is just whatever plan you have to sell product.*"

*Conf. Hr. Tr., Vol. 16A, 203 (2-16), Nov. 12, 2003.*

122. Sears submits that it was evident that even the Commissioner's witness, Competition Officer Christian Warren, who devoted many hours to the Commissioner's Application, also found the term ambiguous:

*MR. SYME: You used the expression plan to sell.*

MR. WARREN: *Plan to sell which would be the --*

MR. SYME: *What is your understanding of what that term means?*

MR. WARREN: *My understanding is that this refers to the monthly planner.*

MR. SYME: *The monthly planner? You are going to have to help me with that.*

MR. WARREN: *What we refer to as the --*

MR. SYME: *Take your time, sir. No rush.*

MR. WARREN: *Retail marketing planner for each of the months.*

MR. SYME: *Okay. So the plan to sell refers to -- I guess I am just a bit confused. Can you help me with this? I guess my understanding, looking at this chart, was that these things are prices or price levels.*

MR. WARREN: *Yes, I'm sorry.*

MR. SYME: *Can you help me understand?*

MR. WARREN: *Yes. My understanding is that plan to sell refers to the 2-for prices which are Sears prices -- the tires for multiple purchases, the 2-for price.*

[Our emphasis]

*Pub. Hr. Tr., Vol. 14, 2487 (7-17), Nov. 6, 2003.*

*Pub. Hr. Tr., Vol. 8, 1356 (12) – 1357 (15), Nov. 12, 2003.*

**iii) The Buyer's Letter:**

123. The Commissioner also relied on a document known as the Buyer's Letter (Exhibit CA-23). This document was prepared by Mr. Keith in the early part of 1999 and accompanied the

1999 Merchandise List. These documents were sent as a package to the sales associates in the field. Mr. Cathcart testified that the Buyer's Letter directed the sales associates by setting out *"basically the buyer's strategy on how our field associates are going to address the competition"*.

*Pub. Hr. Tr., Vol. 14, 2504 (3) – 2506 (10), Nov. 6, 2003.*

124. In informing the sales associates of the strategy being implemented by Sears Automotive in that particular year, and under the heading "Our Strategy", Mr. Keith proposed certain measures to address the competition offered by all tire retailers. In the paragraph following, he addressed what Sears proposed to do in response to changes that had been recently implemented by:

125. Within that paragraph, Mr. Keith advised *"[i]t is imperative that we utilize the 2-for pricing when the tire is not on sale as we are generating less margin in some lines at the promotional price than in the past"*. Regrettably, the author of the Buyer's Letter is deceased, and thus the meaning of the direction given cannot now be determined with certainty. Mr. Cathcart reasonably surmised that, in the specific context of responding to the competitive challenge posed, Mr. Keith was encouraging the sales associates to make use of the opportunity to sell at the 2-for price (the volume discounted price for multiple sales), rather than to focus their efforts on the tire lines which happened to be on promotion at any particular time. In other words, it was a straightforward encouragement to sell more tires during non-promotional periods. The rationale for this, as expressed in the letter, was that the promotional prices on some tire lines were not generating the same levels of margin as they had in the past.

*Pub. Hr. Tr., Vol. 16, 2563 (9) – 2565 (10), Nov. 12, 2003.*

126. Confirming the fact that he regarded the single unit regular prices as meaningful, good faith prices, in the same paragraph Mr. Keith advised the sales associates of changes to Sears Automotive's regular selling prices, and distinguished between Sears regular and 2-for prices. He wrote, "*You will see in the early part of 1999 changes to our lines in both the regular and 2-for selling structure, along with changes to our mileage warranties*" [our emphasis]. This language strongly suggests that Mr. Keith expected that the sales associates would regard changes to Sears' regular prices as a consequential development, which would only be the case if those regular prices (which in this context do not include 2-for prices), were believed to be competitive.

*Pub. Hr. Tr., Vol. 14, 2507 (10) – 2508 (4), Nov. 6, 2003.*

127. Thus, the language of the Buyer's Letter must be considered in light of the Hi-Low strategy being employed by Sears Automotive. It must also be considered in light of the particular concern of the moment – namely, the competitive changes the strategy of that retailer. The interpreter of this document must also keep in mind that while competitor of Sears for certain tire lines, it was hardly the only competitor. Only by disregarding the relevant commercial context, and by giving selected statements a broad application unintended by their author, can the Commissioner find support for her allegation that Sears' regular prices were not offered in good faith.

*iv) The Buying Plans:*

128. Professor Lichtenstein wrongly assumed these documents were simple sale forecasts. The reality was demonstrably different, and indeed, if they were sale forecasts, they bore little

semblance to the historical sales levels shown in the reports generated by Sears' Retail Inventory Management ("RIM") system.

*Exhibit CA-48: Buying Plans for each of the five Tires and one for all lines.*

*Conf. Hr. Tr., Vol. 12A, 123 (3-14); 131 (16) – 133 (1), Nov. 4, 2003.*

129. Mr. McKenna, who had first-hand knowledge of the purpose of the documents, explained that the Buying Plans in evidence were conservative, worst-case scenario margin estimates developed by the Buyer in a very specific context – the "annual review", a presentation in the Fall of 2000 to the President and CEO of Sears. The conservatism was by design, to increase the likelihood that the Automotive group would meet its promised contribution to Sears' overall profitability. The mechanics of generating a conservative estimate required that the percentage of sales at the lower, promotional price be artificially inflated.

*Pub. Hr. Tr., Vol. 19, 3093 (21) – 3095 (7); 3101 (18) – 3126 (14), Jan. 16, 2004.*

**j) The Ordinary Price Claims Information Bulletin:**

130. On September 22, 1999, just two months prior to the Representations, the Commissioner released the Guidelines.

131. With respect to the good faith requirement, the Guidelines set out "*some of the factors that the Bureau would likely consider*" in assessing whether a product was offered for sale at the regular price in good faith. These factors include the following:

- (a) Whether the product was openly available in appropriate volumes;



- (b) Whether the reference (i.e., the regular) price was based on sound pricing principles and/or was reasonable in light of competition in the relevant market during the time period in question;
- (c) Whether the reference price was a price that the supplier fully expected the market to validate, whether or not the market did validate this price; and / or
- (d) Whether the reference price was a price at which genuine sales had occurred, or it was a price comparable to that offered by competitors.

132. Sears submits that the Commissioner has failed to adduce any credible evidence demonstrating, on the balance of probabilities, that Sears failed to comply with these factors. Rather, the evidence demonstrates that Sears had every reason to believe it was conducting its business in such a way so as to conform with the guidance given by the Commissioner.

133. With respect to the availability of the product in appropriate volumes, the uncontested evidence of Mr. McKenna was that Sears used its sophisticated RIM system to maintain significant and appropriate levels of in-store inventory of the Tires. He testified that the RIM system was designed to maintain and protect inventory levels sufficient to handle the Automotive Group's regular business, that is, the transactions occurring outside of promotional periods. For promotions, various members of the automotive team, including the Buyer, would decide what additional inventory needed to be acquired.

*Pub. Hr. Tr., Vol. 19, 3079 (5) – 3082 (18), Jan. 16, 2004.*

*Conf. Hr. Tr., Vol. 19A, 254 (9) – 256 (14), Jan. 16, 2004.*

134. With respect to whether the reference price was based on sound pricing principles, the uncontested evidence was that for three of the Tires, the reference prices were lower than the MSRP for the closest competing tires. These three tires were the only flag brand tires among the five Tires, and thus the only ones for which uncomplicated comparisons could be made with a MSRP. MSRPs were described by industry professionals as rational prices; as what manufacturers suggest to dealers should be their list price. A compelling inference is that manufacturers would suggest prices that made economic sense and which were in the best interests of the tire retailer.

*Pub. Hr. Tr., Vol. 7, 1169 (13) – 1170 (9), Oct. 28, 2003.*

135. It was made clear by Mr. Merkley and Mr. King that MSRPs are widely used by tire retailers: some retailers used it as a transaction price; almost all retailers used MSRP as a starting point, or starting price, for their pricing and discounting decisions.

*Pub. Hr. Tr., Vol. 7, 1140 (19) – 1141 (19); 1167 (24) – 1168 (7), Oct. 28, 2003.*

*Pub. Hr. Tr., Vol. 10, 1634 (8) – 1637 (13), Oct. 31, 2003.*

136. The evidence concerning the three flag brand tires was that they represented the bottom one and top two Tires in Sears' good, better, best line structure, and moreover, that all of the tires in the Sears' line structure were priced rationally relative to one another. Thus at both the high and low ends of the line structure, and at all points in between, the regular price was based on sound pricing principles.

137. The Commissioner contends that Sears did not expect the market to validate the single unit regular price. This is wrong. Sears Automotive personnel knew that there was a consistent

segment of tire purchasers who purchased a single tire. Sears Automotive personnel also knew that the single unit regular price was set slightly lower than MSRP and that some channels of tire retailers charged the MSRP or even higher. Additionally, Sears was prepared to base its day-in, day-out warranty adjustments on the single unit regular price.

*Pub. Hr. Tr., Vol. 14, 2490 (25) – 2492 (16), Nov. 6, 2003.*

138. In fact, the market did validate the price. This validation is evidenced by actual sales in a quantity which, while not constituting a large proportion of total sales, were a significant proportion of the Tires that were sold singly (approximately 31%). Professor Trebilcock opined that these sales were not consistent with a conclusion that Sears had not set the price in good faith.

*Pub. Hr. Tr., Vol. 23, 3799 (3) – 3801 (3), Jan. 22, 2004.*

139. In any event, the actual number of tires sold at the reference price cannot be determinative of the issue of whether the price was based on sound pricing principles and expected to be validated by Sears, given that Sears also offered a 2-for price throughout 1999. The evidence of Mr. McMahon was that when Sears Automotive dropped the 2-for price in 2001, in response to the Commissioner's impugning of the practice, the volume of tires sold at regular prices that were comparable to both the 1999 single unit regular price and the 2001 MSRPs was very significant.

*Conf. Hr. Tr., Vol. 20A, 286 (19) – 287 (14), Jan. 17, 2004.*

140. It was reasonable for Sears to differentiate between single-tire purchases (and purchasers) and multiple-tire purchases (and purchasers) in setting its prices. Mr. McKenna testified that

single-tire purchasers, whose purchases represent about 11% or so of all transactions, are motivated by a somewhat different array of considerations than the multiple-tire purchaser. The single-tire purchaser is less price sensitive and more focussed on a particular brand and style of tire.

*Pub. Hr. Tr., Vol. 19, 3054 (21) – 3055 (25), Jan. 16, 2004.*

141. Therefore, and as set out in detail above, the Commissioner has fundamentally misconstrued the import and intent of the Sears' documents in question.

142. Moreover, the Commissioner knew or should have known that the documents relied on were prepared for specific purposes and, in several instances, give rise to questions of interpretation on their face.

143. Sears contends that an expectation that the majority of sales would occur at something other than the regular price is reasonable, and certainly not an indication of bad faith, once there is cognizance of certain real-world factors. These include the facts that retail channels for after-market tires are sophisticated and ubiquitous; that in such an environment retailers often are required to depend on promotion, especially price promotion, to drive sales; that this is especially true when there are many alternative tire offerings that could meet the consumer's needs; and that the product is difficult to differentiate, at least at first impression.<sup>9</sup>

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<sup>9</sup> See Professor Trebilcock's Affidavit, Exhibit CR-149, sworn September 22, 2003, para. 15, where he states, "For any particular vehicle, there are typically a large number of tire choices available." At paragraph 16 of the Affidavit, Professor Trebilcock adds, "Even a single manufacturer may produce tires that are relatively close substitutes for one another."

144. Logically, evidence about regular prices charged by Sears' competitors for comparable tires would, at first glance, appear to be highly relevant to the question of Sears' good faith, or lack thereof.

145. It is astonishing that, in presenting her case, the Commissioner led very little evidence about the regular prices offered by Sears' competitors (particularly its Hi-Low competitors) for comparable tires (either national or associate brands), and chose rather to focus on internal Sears' documents.

**2) The Time Test – Offered for a Substantial Period of Time**

**a) Time Test to be interpreted reasonably:**

146. Section 1.1 of the Act states the overall intention of the legislation:

*1. The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.*

147. The weight of evidence at the Hearing demonstrated that the impugned conduct was:

- (a) Commercially reasonable;
- (b) Not out of line with reasonable consumer expectations;
- (c) Encouraging of efficient consumer behaviour;

- (d) Intended to be competitive and not anti-competitive; and
- (e) Necessary to allow Sears Automotive, constrained as it was by Sears' centralised, well-established and uniform Hi-Low marketing approach, a fair opportunity to participate and compete in the various and diverse tire retailing markets existing in Canada.

148. In Sears' submission, therefore, it would be incongruous and inconsistent with the purpose of the *Act* to interpret the time test contained in section 74.01(3) in a manner that results in sanctions being applied for commercially reasonable and competitive behaviour that entailed no demonstrated or demonstrable consumer harm.

**b) Time Test requirements met:**

*i) Reference Period Should be 12 Months:*

149. It was agreed by the Applicant and by the Respondent that Sears offered the Tires at regular price, for the six and twelve month periods preceding the representations, at the frequencies of time set out in the table below:

	<b>Response RST Touring 2000</b>	<b>Michelin RoadHandler "T" Plus</b>	<b>Silverguard Ultra IV</b>	<b>BF Goodrich Plus</b>	<b>Michelin Weatherwise</b>
Date of Representation	November 8, 1999	November 8, 1999	November 22, 1999	December 18, 1999	December 18, 1999

% of time at regular price in previous 6 months	46% <sup>10</sup>	38%	60%	45%	19%
% of time at regular price in previous 12 months	66.85%	32.6%	49.6%	50.41%	22.47%

150. Sears adopts and relies upon the judgment of this Tribunal in *Canada (Director of Investigation) v. Chrysler Canada Ltd.*, which interpreted the meaning of "substantial" as "more than something just beyond *de minimis*"; the reasons of the Ontario District Court in *Re Catholic Children's Aid Society of Toronto (Metropolitan) v. M. et al.* that "substantial" means "actual, real, not illusory" to support its strong contention that for each of the Tires, the frequency indicated represents a "substantial period of time".

*Canada (Director of Investigation) v. Chrysler Canada Ltd. (1989)*, 27 C.P.R. (3d) 1 (Comp. Trib.) at 23; aff'd (1991), 38 C.P.R. (3d) 25 (F.C.A.).

*Re Catholic Children's Aid Society of Toronto (Metropolitan) v. M. et al. (1987)*, 62 O.R. (2d) 535 (Dist. Ct.) at 538.

151. Sears submits that the appropriate time period for assessing whether Sears complied with the time test is the 12 month period preceding the Representations.

152. Sears bases this submission on the fact that analysis of the sale and promotion of passenger tires reveals an unparalleled, seasonal spike in the Fall months, and thus a twelve

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<sup>10</sup> Mr. McKenna's evidence demonstrated that Sears' planning documents created during the relevant period, that is, the checkerboard and monthly pocket planners, would have led Sears Automotive to believe that the percentage of time at which the Response RST Touring 2000 was offered at regular prices was over 49%. However, Sears concedes that a sales report generated in 2001 contains slightly conflicting information, indicating that the Response RST Touring 2000 may have been offered on sale for one additional week.

month period is more appropriately used to determine whether Sears has met the frequency requirements of the time test.

153. Mr. Winter, who analysed data from Statistics Canada, described the sale of passenger tires generally, and the selling pattern demonstrated by Sears Automotive in particular, as a "*seasonal business*" with a "*distinct bulge at the end of the year, in the October and November period*".

***Pub. Hr. Tr., Vol. 21, 3457 (3) – 3458 (25), Jan. 20, 2004.***

154. Corroborating Mr. Winter's analyses, Mr. McKenna testified that Sears increased its tire inventory levels in the Fall to support a dramatic shift in sales.

***Pub. Hr. Tr., Vol. 19, 3082 (6) – 3083 (3), Jan. 16, 2004.***

155. Mr. Gauthier, commenting on the same data, identified two sales peaks, one in the Spring and the other in the Fall. However, it was clear that the Fall increase was of a much greater magnitude than that of the Spring. Asked to comment on the two peaks, Mr. Gauthier first stated that sales levels were "*significantly different in the fall*" but then sought to qualify his response by asserting that sales were merely "*noticeably different*". In any event, Mr. Gauthier agreed that the Sears' data analysed and presented in Mr. Winter's expert report exhibited a single peak.

***Pub. Hr. Tr., Vol. 25, 4213 (12) – 4223 (23), Feb. 3, 2004.***

***Exhibit CR-145, Affidavit of John O. Winter, sworn Sept. 19, 2003, paras. 29 and 30.***



**ii) Percentage Required for Compliance:**

156. Sears submits that there is no basis, either in law or on the facts of this case, which would oblige it to comply with the 50% requirement proposed in the Guidelines. The Guidelines are not binding in law.

157. Nevertheless, the evidence before the Tribunal is that Sears Automotive generally sought to meet the 50% mark with respect to the promotion of the Tires. For two of the Tires, the Response RST Touring 2000 and the BF Goodrich Plus, the evidence is that Sears met or exceeded this mark when the prior twelve months is considered.

158. A third Tire, the Silverguard Ultra IV, being offered at regular prices for 49.6% of the prior twelve months, or 60% of the 6 months preceding the relevant Representation, substantially complied with the requisite 50% time requirement. If the 50% compliance requirement is held to be applicable (which Sears does not concede), Sears submits that the 0.4% deficit for the 12 month period should be considered *de minimis*.

159. With respect to the two Tires that did not meet the 50% guideline, namely the Michelin RoadHandler T Plus and the Michelin Weatherwise, Mr. Cathcart testified as to two commercial factors which served to explain why these particular Tires were more heavily promoted.

160. The first of these related to the unavailability of the RoadHandler T Plus in the 80 aspect ratio size. Mr. Cathcart testified that to avoid disappointing customers looking for this size tire, he would simultaneously offer at promotional prices the Michelin Weatherwise, which was available in the 80 aspect ratio.

161. The second factor, arising in the fourth quarter of 1999, related to an off-shore labour issue in Asia. Mr Cathcart testified that Sears expected to receive three shipments of Bridgestone snow tires - the first shipment to arrive in August-September, a second shipment in October and a third shipment in November. A labour dispute resulted in Sears not receiving its third shipment. This was especially disruptive, because, as Mr. Cathcart explained, the final months of the year are when snow tires are most heavily promoted. Sears Automotive had already committed to running a promotional program for these tires.

162. Mr. Cathcart testified that Mr. Keith requested and obtained from Michelin a further supply of tires to be promoted in place of the undelivered Bridgestone snow tires. This resulted in the frequency of promotion for the two Michelin Tires being increased.

*Pub. Hr. Tr., Vol. 16, 2610 (3) – 2613 (10), Nov. 12, 2003.*

163. Mr. Cathcart's testimony on these issues was both unchallenged and uncontradicted by the Commissioner.

164. Sears therefore submits that with respect to each of the Tires, it has met both the good faith and frequency requirements imposed by section 74.01(3)(b).

### **3) Representations not False or Misleading in a Material Respect<sup>11</sup>**

165. In the alternative, Sears submits that the Representations were not false or misleading in a material respect, and that the defence afforded by section 74.01(5) is therefore applicable.

166. Section 74.01(5) of the *Act* provides as follows:

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<sup>11</sup> Sears reserves the right to submit further written argument on this issue prior to the start of the oral hearing.

(5) *Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.*

167. The criterion of materiality involves consideration of "*the degree to which the purchaser is affected by these words in coming to a conclusion as to whether or not he should make a purchase*". Also, "*A mere misrepresentation is not sufficient to justify a conviction. It must be one which is material. The material misrepresentation could, and perhaps I should say and/or should apply, to the end result, that is, the value of what the person is obtaining.*"

***R. v. Kellys on Seymour Ltd. (1969), 60 C.P.R. 24 at 26.***

168. In a more recent case, materiality was defined as follows:

*Material is noted as being of much consequence, important, pertinent, germane. Accordingly, taken as a whole, the question must be asked, what is the general impression upon the ordinary citizen.*

[Our emphasis]

***R. v. D.E.S. Security Systems, [1987] O.J. 2489 at para. 14.***

169. During the hearing, evidence from experts Winter, Trebilcock and Deal coalesced to demonstrate that the Representations made as to price were not false or misleading in a material respect, and more specifically, that the representations as to Sears' regular prices were not of "*much consequence, important, pertinent, germane*". The primary strands of evidence are summarized below.

170. In examining reliance on the Representations, regard should be had to the broad consensus in the academic literature, which was accepted by Professor Lichtenstein on more than

one occasion during the course of his testimony, that consumers consistently discount ordinary selling price representations by about 25 percent.

*Pub. Hr. Tr., Vol. 4, 735 (25) – 736 (23), Oct. 23, 2003.*

*Pub. Hr. Tr., Vol. 12, 2104 (2-18), Nov. 4, 2003.*

171. Further, by virtue of the fact that the reference price is identified as "Sears reg.", the representation is placed squarely in the context of consumers' knowledge that Sears is a promotional retailer, which would reasonably lead them to interpret the reference price somewhat differently to ordinary price representations made by a retailer known to be an EDLP marketer, or an ordinary price representation stated to be that of suppliers generally.

172. Moreover, with respect to the relative regard paid by consumers to the advertised savings and the final transaction price, Mr. McKenna's evidence demonstrated the comparative success of Sears' tire advertisements, published during the Relevant Period, that did *not* feature "Sears reg." representations; that is, which informed the potential consumer of the selling price only. These advertisements produced more of an uplift in sales levels from non-promotional periods than did the "Sears reg." advertisements, even though the tires featured in them were not the lowest-priced tires offered by Sears.

173. Mr. McKenna's reasonable conclusion was:

*That the consumer or the customer recognized value when it was shown them. They recognized value without a price point or a comparative regular and certainly without a save story.*

*Conf. Hr. Tr., Vol. 19A, 261 (3) – 269 (16), Jan. 16, 2004.*

174. The same or a similar point can be made from the "Tireland" advertisement that was the focus of an exchange between Sears and Michelin in 1999. As Mr. Merkley acknowledged in

cross-examination, this advertisement relied on consumers' ability to discern value, without reference to a "save story" or a "percentage off".

*Pub. Hr. Tr., Vol. 10, 1714 (9) – 1715 (19), Oct. 31, 2004.*

175. Sears also relies on the expert testimony of Mr. John Winter, who was accepted by the Tribunal as an expert on issues relating to retailing in Canada, including pricing strategies employed by retailers.

176. Mr. Winter testified concerning the heavily promotional nature of the automotive aftermarket, and of tire retailing in particular. In assessing the materiality of the "Sears' reg." representations, Mr. Winter stated that consideration must be given to consumer knowledge of the fact that tires are sold in a highly promotional context. Mr. Winter's evidence should be considered alongside the evidence concerning the large number of tire purchasers who compared various tire retailers' offerings prior to purchasing.

*Exhibit CR-145, Affidavit of John O. Winter, sworn Sept. 19, 2003, Exhibit "H", para. 32.*

*Exhibit R-146: Affidavit of Kenneth Deal, sworn Sept. 19, 2003 para. 31.*

177. Sears also relies on the extensive survey of the attitudes of Sears' customers who purchased the Tires in 1999, conducted by Dr. Kenneth Deal.

178. Specifically, Dr. Deal's survey established that approximately 63% of consumers comparison shop even when they see ads that indicate reduced tire prices. This also signifies that undue reliance is not being placed upon the Sears' regular price representation.

*Exhibit R-146: Affidavit of Kenneth Deal, sworn Sept. 19, 2003 para. 31.*

179. The assessed impact of the "Sears reg." representation is also reduced by the recognition that consumer response to price is context-dependant and is affected by the presence or absence of other ancillary benefits or "add-ons". Professor Lichtenstein acknowledged and agreed that each of the following factors could enhance a consumer's perception of value and positively impact the decision to purchase a tire:

- (a) Warranties to repair or replace tires if there are manufacturing defects, damage due to road hazards or early wear-out (Mr. Cathcart's evidence was that Sears' warranties were "second to none");
- (b) A 24-hour, 1-800 number to call for roadside assistance; and
- (c) The promise to consumers, "satisfaction guaranteed or your money refunded".

*Pub. Hr. Tr., Vol. 12, 2075 (12) – 2079 (1), Nov. 4, 2003.*

*Pub. Hr. Tr., Vol. 12, 2095 (11-25), Nov. 4, 2003.*

*Pub. Hr. Tr., Vol. 14, 2435 (17) – 2436 (8), Nov. 6, 2003.*

180. In any event, even if consumers purchased solely on the strength of the Representations, they were satisfied with the value they obtained. In actual fact, 78% of the respondents to Dr. Deal's survey indicated that they had received good value for their money from their Sears' tire purchase, and 93% were satisfied with their tire purchase experience at Sears in 1999.

*Exhibit R-146: Affidavit of Kenneth Deal, sworn Sept. 19, 2003 paras. 36 and 38.*

181. Any customers who believed they had been misled by the Representations into making a disadvantageous purchase could have returned the tires for a full refund pursuant to Sears'

"satisfaction guaranteed or money refunded" policy. This policy was widely publicized to all Sears' customers.

*Pub. Hr. Tr., Vol. 14, 2435 (17) – 2436 (8), Nov. 6, 2003.*

182. The obtaining of value by the consumer, and thus the immateriality of the Representations, is reflected in the expert opinion of Professor Trebilcock that the significant proportion of tire consumers (almost 60%) who search extensively before making their purchase is sufficient to discipline retailers' behaviour, and thus to ensure that the transaction price offered (in this case by Sears) was a competitive price.

*Ms L. MILTON: So you would agree that we can't conclude anything with respect to the effect of the ordinary sale price advertizing in issue from the response to this question?*

*DR. M.J. TREBILCOCK: No, I think the question yields richer information than that. It is true we don't know who had seen the regular price -- sale price ads, but what we do know is that almost 60 per cent of people who bought tires from Sears in 1999 engaged in price shopping.*

*This is a strikingly high percentage.*

*One may quibble over the number but in most markets that I study, if a firm thought they would lose 60 per cent of their customers or even 30 per cent or 40 per cent to rivals by virtue of having uncompetitive prices, this would be sufficient to discipline their pricing behaviour.*

*Ms L. MILTON: All right. But would you agree with me that there is also 42 per cent -- I think you already have agreed with me that 42 per cent said they did not compare prices.*

*DR. M.J. TREBILCOCK: Yes.*

*Ms L. MILTON: Would you agree with me that that is a significant number?*

*DR. M.J. TREBILCOCK: No, I don't believe it to be a significant number.*

*I often do the grocery shopping for the family on the weekend and I never go to three supermarkets. I go to the local Loblaws store and I assume there are other people out there keeping them honest by doing what the 57 per cent do here.*

*Ms L. MILTON: All right. But the fact that 57 per cent compare, that is significant. But the 42 per cent who don't compare, those 42 per cent are not a significant group of people?*

*M.J. TREBILCOCK: No, they are not. In economic terms, this is not significant. Sears had 60 per cent of their customers at risk if they would have charged final prices that were uncompetitive with that of their rivals because this 60 per cent were, so to speak, footloose, searching, comparing prices.*

*And if Sears had asked me "Can we afford to lose 60 per cent of our customers to rivals by charging final transaction prices that are not competitive with our rivals?", I would say "You know the answer to that without me telling you."*

*Ms L. MILTON: All right.*

***Pub. Hr. Tr., Vol. 23, 3873 (1) – 3874 (25), Jan. 22, 2004.***

183. Sears submits that a market-sophisticated, real-world view should be taken in assessing *"the degree to which the purchaser is affected by these words in coming to a conclusion as to whether or not he should make a purchase"* (*R. v. Kellys on Seymour Ltd.*). Consideration of the average consumer's cognition of the nature of ordinary selling price representations generally and Sears' long-standing style of Hi-Low promotion; the ability of the consumer to recognize value and the propensity of the majority of tire-consumers to compare products and prices; and the widely-publicised ability of Sears' customers to obtain a complete refund if dissatisfied with their purchase leads to a conclusion that the Representations, inasmuch as they included information as to Sears' regular prices, were not of *"much consequence, important, pertinent, germane"*.



**4) Administrative Remedies**

**a) Introduction:**

184. With respect to the administrative remedies, and only in the event that the Representations are determined to constitute reviewable conduct, Sears submits that it exercised due diligence to prevent the reviewable conduct from occurring and, consequently, that no order for the publication or dissemination of a notice or for the payment of an administrative monetary penalty should issue.

185. In the alternative, Sears further reserves the right to adduce further evidence and submit further argument (both written and oral) regarding the aggravating or mitigating factors identified in section 74.1(5).

186. In the further alternative, Sears submits that the maximum administrative monetary penalty to be ordered cannot exceed the sum of \$100,000.00 and should be far less than this amount given the extensive mitigating factors (within the meaning of section 74.1(5)) established in the evidence adduced by Sears at the hearing of the Application.

**b) Promulgation of the Legislation and Publication of the Guidelines:**

187. Sears submits that the impugned Representations, made in November and December 1999, should also be considered against the fact that section 74.01 was an amendment to the Act made as recently as March of the same year. It was not until late September 1999, that the Bureau of Competition published the Guidelines. In assessing the due diligence exercised by Sears, and whether the impugned conduct is deserving of any reprobation, this chronology is also relevant.

**c) Administrative Remedies Are Discretionary:**

188. Section 74.1(1) sets out various *discretionary* administrative remedies. Even if the Tribunal finds reviewable conduct has occurred, there is no necessity that each, or any, of these remedies be applied. The Respondent submits that the coincidence of the date of the relevant enactment (March 18, 1999) and of the impugned behaviour (a substantial period of time before November and December 1999), together with the uncertainties arising on the face of section 74.01(3) itself and exacerbated by the lack of interpretive jurisprudence vis-à-vis the time and volume tests, make the imposition of any sanction inappropriate. Moreover, the discretionary nature of the available remedies make it incumbent upon the Commissioner to demonstrate that each administrative remedy sought is warranted in the circumstances.

**d) A Prohibition Order is unavailable and a Cease and Desist order is unwarranted:**

189. The Commissioner requests a Prohibition Order. Under the Act, a Prohibition Order is a specific remedy set out in section 34, and available only where the Commissioner has decided to proceed under Part VI. Where, as here, the Commissioner has proceeded under Part VII.1 of the *Act*, the available remedy is more commonly known as a Cease and Desist order. The difference is more than semantic, but will not now be enlarged upon given that the Commissioner appears to rely solely on section 74.1(1)(a) for the sought-after order.

190. In support of a cease and desist order, the Commissioner has made two arguments in her Written Submissions: first, that such would be appropriate because Sears has readily acknowledged it is a Hi-Low retailer and thus, it is argued, "*relies extensively on ordinary selling*

*price representations*"; and second, that the Respondent *"has repeatedly engaged deceptive marketing behaviour [sic]"*.

191. By her first argument, the Commissioner seeks, inappropriately, to punish Sears for depending on promotional events to market its products. If indeed Sears continues to use Hi-Low marketing techniques generally throughout its business today, this should not be used to its prejudice. The uncontroverted evidence before the Tribunal is that Hi-Low is an accepted and commonplace marketing and pricing strategy in Canada, and a practice generally appreciated, not deprecated, by consumers.

192. Even the Commissioner's expert, Professor Lichtenstein, stated unequivocally that *"OSP advertising is a legitimate practice."*

***Pub. Hr. Tr., Vol. 3, 547 (19) – 548 (11), Oct. 22, 2003.***

193. Professor Lichtenstein also opined that ordinary selling price advertising done in good faith will enhance consumer welfare by reducing search costs. It is unjust to sanction Sears merely for engaging in a marketing method – Hi-Low pricing and ordinary selling price advertising – that is acknowledged as generating positive consumer reaction and enhancing consumer welfare.

***Pub. Hr. Tr., Vol. 12, 1991 (11-23), Nov. 6, 2003.***

194. A cease and desist order is inappropriate inasmuch that the evidence before the Tribunal demonstrates that Sears had proactively turned its mind to complying with the ordinary selling price provisions of the Act, by creating and distributing written policies to instruct its personnel as clearly as possible, given the uncertainties of section 74.01(3). The evidence establishes that

the Automotive group conducted its activities based on the 1995 Policy, which anticipated that legal requirements for sale of a substantial volume could be achieved if the product was offered at regular price fifty percent of the time. The Commissioner has taken no issue with the written policies of Sears – and indeed, has attempted to use the due diligence measures taken by Sears to bolster a case against Sears.

195. Mr. Cathcart sought to implement the directive contained in the 1995 Policy by preparing a "checkerboard" in which he both planned and recorded promotional activity. The checkerboard was initially prepared by Mr. Cathcart, in consultation with Mr. Keith, well before the relevant period and at a high level. It was used as the year unfolded to track the frequency of promotions.

*Pub. Hr. Tr., Vol. 16, 2602 (17) – 2603 (14); 2606 (12-16), Nov. 6, 2003.*

196. In support of its allegation that Sears has repeatedly engaged in deceptive marketing behaviour, the Commissioner has been required to stretch back a minimum of twenty-one years to the conviction of Simpsons-Sears Limited; twenty-eight years to the conviction of Simpsons-Sears Limited for an offence under section 37(1)(a) of the *Combines Investigation Act* (concerning a catalogue advertisement for multi-vitamins); and all of thirty-five years to the conviction of Simpsons-Sears Limited under s. 33C(1) of the *Combines Investigation Act* (concerning the advertising of a particular refrigerator in Ottawa).

197. Sears submits that it is unreasonable to assume that there have been no significant and material changes in ownership, management and control since the early 1980's, the date of the last conviction cited by the Commissioner. In addition to these changes, consideration must be given to the not insignificant changes to the statutory regime.

198. If the Tribunal is nonetheless inclined to make a cease and desist order, the decision in *Canada (Commissioner of Competition) v. P.V.I. International Inc.* (hereinafter, "*P.V.I.*") - the only decided case in which a cease and desist order has been made under section 74.1(1)(a) - indicates that such an order should be made specifically with reference to the subject matter at issue in the Application, *i.e.*, tires. In that case, the respondents had misrepresented that, when installed in a gasoline-fuelled internal combustion engine, the platinum vapour injector increased combustion efficiency in the engine, thereby both increasing fuel efficiency and reducing emissions. On the basis of this finding, the Tribunal made orders under paragraphs 74.1(1)(a) of the Act prohibiting the respondents from repeating these misrepresentations with respect to "*the PVI or any similar allegedly gas-saving, emission-reducing and/or performance-enhancing device*".

*Canada (Commissioner of Competition) v. P.V.I. International Inc. (P.V.I.)*  
(2002), 19 C.P.R. (4th) 129; aff'd [2004] F.C.J. No. 876 (F.C.A.).

e) **The dissemination of a Notice would serve no purpose:**

199. In her Application, the Commissioner has also requested the dissemination of a notice, pursuant to section 74.1(1)(b).

200. Sears submits that, pursuant to section 74.1(3), no notice can be required due to the exercise by Sears of due diligence to prevent the impugned conduct from occurring. As noted above, Sears' legal department provided pertinent and directive written policies which in the Automotive department were implemented by the use of a checkerboard.

201. In the *Report of Consultative Panel on Amendments to the Competition Act, to the Director of Investigation and Research, Competition Act*, the Consultative Panel stated, "*when misleading advertising or deceptive marketing practices have occurred, there may be residual*

*mistaken impressions in the marketplace even if the practices in question have ceased. In such cases, it is desirable to inform marketplace participants about the impugned practices".* In the present case, it is extremely doubtful that there are residual mistaken impressions in the marketplace that would be appropriately corrected by a published notice.

**G.N. Addy, *Report of Consultative Panel on Amendments to the Competition Act, to the Director of Investigation and Research, Competition Act*, (March 16, 1996), available at <http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct00064e.html>. Exhibit J1, Tab 178 at 20.**

202. Sears submits that temporal considerations alone mitigate against the publication of a written notice, given that the behavior in question occurred in 1999.

203. However, beyond the temporal aspects, a written notice is inappropriate given that the class of persons reached or affected by the impugned conduct has not suffered any harm. The evidence available to the Tribunal supports the contention of Professor Trebilcock that consumers who purchased the Tires at Sears during the impugned sales events received very good deals.

***Pub. Hr. Tr., Vol. 23, 3803 (1) – 3804 (8), Jan. 22, 2004.***

204. Professor Trebilcock examined the issue of whether consumers were *"harmed in any economically significant way by the manner in which Sears advertised its tire prices"*. In answering this question in the negative, Professor Trebilcock concluded:

- (a) it is unlikely that consumers would have made alternative tire purchase decisions in the absence of the alleged deception;
- (b) Sears had the lowest tire sale prices for comparable tires of the same size, and that consumers were satisfied with [their] Sears tire purchases; and

- (c) consumers are primarily concerned with final transaction prices rather than advertised savings.

***Exhibit CR-149: Affidavit of Michael Trebilcock, sworn Sept. 22, 2003, para. 66(c).***

205. Requiring Sears to publish a notice aimed at persons for whom the available evidence strongly suggests are content with their tire purchases; who likely would have made the same decision in the absence of the ordinary selling price representation; and who in any event made their purchase almost five years ago would only create confusion. Sears notes that the Application is not claimed to be founded upon, or even supported by, consumer complaints.

206. Moreover, section 74.1(3) states that such an order cannot be made against a person where *"the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring"*.

207. Sears submits that the evidence before the Tribunal clearly establishes that prior to the enactment of section 74.10(3) on March 18, 1999, Sears had adopted a pricing policy (Pricing Policy No. M-968, issued on March 6, 1995 and reviewed in March 1997) and employed methods to ensure compliance with its pricing policy. Those methods included the use of a checkerboard to monitor the frequency of promotional events. After March 18, 1999, when section 74.01 was enacted, Sears prepared an amendment to its corporate pricing policy, dated May 11, 1999. These steps were taken prior to the Competition Bureau's publication of the Guidelines in September, 1999.

***Exhibit CA-24: Pricing policy M-968 of Sears.***

***Exhibit A-29: Memorandum dated May 11, 1999 to All Vice-Presidents re: Competition Act Amendments - Regular Price Claims, Misleading Advertising***

*and Deceptive Marketing Practices, Deceptive Telemarketing and Whistleblowing.*

**f) The Administrative Monetary Penalty sought is unavailable, contrary to the Act and improperly punitive:**

**i) Unavailable:**

208. Sears again relies on the operation of section 74.1(3) and its exercise of due diligence to prevent the impugned conduct from occurring, to state that no administrative monetary penalty may be assessed in the circumstances of this Application.

**ii) Contrary to the Act:**

209. The Commissioner is seeking, contrary to the maximum provided for in section 74.1(1)(c) of the *Act*, an administrative monetary penalty of \$500,000.00.

210. In the event that reviewable conduct is established, the amount payable by a corporation is not to exceed \$100,000.00. In the event of a subsequent order, a term defined in section 74.1(6) of the *Act*, the maximum payable by a corporation is limited to \$200,000.00.

211. It is respectfully submitted that any Order that might be made by this Honourable Tribunal cannot be a "subsequent order" within the meaning of section 74.1(6) of the *Act*.

212. Moreover, the Commissioner improperly seeks to make each of the Tires the subject of a separate penalty. This is wholly inappropriate, given that the Application concerns a single form of activity for one product group.



213. In *P.V.I.*, the respondents used a variety of means to promote their platinum vapour injector, including newspaper advertisements, radio advertisements, the Internet, promotional literature, and mass distribution facsimile. In these advertisements, representations were made with respect to three areas: fuel savings, emissions reduction, and government approval. In finding against the respondents in that case, the Honourable Justice McKeown stated, at paragraphs 65 and following:

*I also do not think it is appropriate to award the maximum administrative monetary penalty. [...] In my view, each of the individual respondents should be given an administrative monetary penalty of \$25,000 and the corporate respondent, P.V.I. International Inc., should be given an administrative monetary penalty of \$75,000 because the company accepted Mr. Robinson's representations without question. In my view in the circumstances of this case there can be a distinction between the actions of the company and the individuals. This distinction is implied under subsection 74.1(3) which indicates that no order should be made against the person under paragraph 1 (b) or (c) ...where the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring. There was no evidence presented before me by the respondents with respect to anyone exercising due diligence to prevent the reviewable conduct in this case. I also note in this case that the advertisements in Canada only took place over less than a two year period. The advertisements seem to have been around in the United States over a twenty year period but, as stated, there is no indication that any successful action has been taken there to preclude the advertising.*

[Our emphasis]

*Canada (Commissioner of Competition) v. P.V.I. International Inc. (2002), 19 C.P.R. (4<sup>th</sup>) 129 at para. 65 et seq.; aff'd [2004] F.C.J. No. 876 (F.C.A.)*

214. The *Consultative Panel on Amendments to the Competition Act* had the following to say with respect to the issue of penalties:

*Civil Monetary Penalties*

15) *The adjudicators should have the authority to order the payment of a civil monetary penalty in an amount appropriate in*

*the circumstances giving rise to the breach of the relevant provision.*

16) A maximum penalty \$100,000 in respect of a first breach (e.g. a number of separate advertisements involving the same misrepresentation in various media over a period of months would constitute one breach) and \$200,000 in respect of a second or subsequent breach involving similar conduct should be available.

17) *The criteria for establishing an appropriate fine level within the maxima should be: the projected reach of the representation in the relevant market; the vulnerability of the target audience; the number of times that the representation was repeated and the duration of the representation; the materiality of the deception; the likelihood of marketplace self-correction; evidence of harm to the marketplace/competition; and, the advertiser's compliance history. The Bureau should consider whether these criteria should be established by means of guidelines or in the legislation.*

[Our emphasis]

**G.N. Addy, Report of Consultative Panel on Amendments to the Competition Act, to the Director of Investigation and Research, Competition Act, (March 16, 1996), available at <http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct00064e.html>. Exhibit J1, Tab 178 at 23.**

215. It is clear from the reasons in *PVI*, and from the quotation from the Report of the Consultative Panel, that Parliament never intended an administrative monetary penalty to be assessed in the manner or in the amount sought by the Commissioner. The plain and ordinary meaning of the provision demonstrates that for corporate entities, the maximum penalty is \$100,000.00. The Commissioner's approach would mean, in essence, that there was no maximum penalty.

216. Finally, it is to be noted that the Commissioner is taking a position in this Application that is inconsistent with commentary contained in a pamphlet issued by the Competition Bureau, which is also, we submit, evidence of the plain meaning of the section:

*Under the civil regime, certain practices may be brought before the Competition Tribunal, the Federal Court or the superior court of a province and require that each element of the conduct be proven on a balance of probabilities. The court may order a person to cease the activity, publish a notice and/or pay an administrative monetary penalty. On first occurrence, individuals are liable to penalties of up to \$50,000 and corporations are liable to penalties of up to \$100,000. These amounts may double for second and subsequent occurrences.*

[Our emphasis]

*Misleading Representations and Deceptive Marketing Practices, Cat. No. RG52-29/10-2003 ISBN 0-662-67738-2, Updated: 2003-11-24. Exhibit J1, Tab 227 at 2.*

*iii) Improperly punitive:*

217. Subsection (4) of section 74.1 further indicates Parliament's intention that any administrative monetary penalty is not to be imposed with a view to punishment. The Commissioner's pre-Application inquiry process, including the cost of complying with orders made under section 11.(1) of the Act; the changes made to business practice flowing from the inquiry (the abandonment of 2-for pricing); and the present Application by the Commissioner, have already put Sears to great expense in lost time and profits. The costs arising from submitting to 8 days of examination pursuant to section 11 orders, of collecting and assembling voluminous reports and documents, in addition to the unrecoverable portion of the costs of defending itself before the Tribunal, make any gains obtained by Sears through its method of advertising the Tires inconsequential. The imposition of a further penalty on top of these costs thrown away would be unduly punitive.

218. Sears therefore submits that, because it exercised the requisite level of due diligence to prevent the reviewable conduct from occurring, the only measure available to the Tribunal is a "cease and desist" order. Sears further submits that a cease and desist order, if issued at all, may

only be made with respect to the subject matter of the Application, and the evidence received at the Hearing, which was limited to the product category of all-season passenger tires.

#### **PART IV - ORDER SOUGHT**

219. For the reasons set out above, Sears respectfully requests that the Commissioner's Application be dismissed with costs payable to Sears.

220. Sears therefore respectfully requests that the Tribunal dismiss the Commissioner's Application in its entirety; or, in the event that some part of the Application is upheld, that the Tribunal make no further order beyond a finding that reviewable conduct has occurred.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

**Date:** June 17, 2004

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**THE COMPETITION TRIBUNAL**

**B E T W E E N:**

**THE COMMISSIONER OF COMPETITION**

Applicant

- and -

**SEARS CANADA INC.**

Respondent

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**WRITTEN SUBMISSIONS  
OF THE RESPONDENT, SEARS CANADA INC.**

***(Re Ordinary Price Representations)***

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