

PUBLIC

File No. CT-2002/004


THE COMPETITION TRIBUNAL

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

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

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

B E T W E E N:

F I L E D	COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	P R O D U I T
	OCT 28 2002	
	REGISTRAR - REGISTRAIRE 	
	OTTAWA, ONT. # 11b	

THE COMMISSIONER OF COMPETITION

Applicant

-and-

SEARS CANADA INC.

Respondent

REPLY

I. INTRODUCTION

1. This is the Applicant, Commissioner of Competition's ("Commissioner's"), reply to the Response (the "Response") filed on September 18, 2002 by the Respondent, Sears Canada Inc. ("Sears"). The Commissioner's Reply to the constitutional law issue raised in Sears' Response is set out in Appendix "A" to this Reply.

2. The Commissioner repeats the allegations in his Notice of Application. Except as is hereinafter expressly admitted, the Commissioner denies each and every allegation in the Response.

3. The Commissioner agrees with paragraphs 36, 37, 41, 50, 57, 58, 62, 64, 70, 71, 102, 103 and 104 in Sears' Response.

4. The Commissioner agrees with paragraph 69 of Sears' Response, with the proviso that it be read as referring to the BF Goodrich "Plus" Tire.

II. SEARS' "REGULAR PRICES" AND S.S 74.01(3) OF THE *COMPETITION ACT*

5. The Commissioner submits that Sears' Response is, in large measure, unresponsive to the Commissioner's Application in that Sears' submissions and, in particular, the facts which underpin those submissions, fail to address the tests set out in s.s 74.01(3) of the *Competition Act* (the "Act").

(a) Subsection 74.01(3) of the *Competition Act*

6. The Commissioner's Application in this matter was filed pursuant to s.s 74.01(3) of the Act, which provides as follows:

(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,

(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; [hereinafter the “volume test”] and

(b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be. [hereinafter the “time test”]

7. The Commissioner submits that the starting point for a s.s 74.01(3) analysis is the representation made to the public by the person whose conduct is being examined. It is the price at which the product will be “ordinarily supplied” that is featured in any such representation that is the focal point of the analysis.

8. Once the ordinary price in the representation has been identified, determinations may be made under the volume and time tests using that price. In this case, s.s 74.01(3) of the Act requires a determination of whether Sears sold a substantial volume of each of the five tires that are the subject of the Commissioner’s Application (the “Tires”) at the ordinary selling prices appearing in Sears’ representations to the public; and, whether Sears offered the Tires at those ordinary selling prices in good faith for a substantial period of time.

9. The Commissioner submits that it is plain on the face of s.s 74.01(3) of the Act that the foregoing analytical approach is required. Put another way, an examination of conduct pursuant

to s.s 74.01(3) of the Act, which uses a price (or combination of prices) other than the ordinary selling price as its focal point, would be fundamentally flawed. Yet, as described below, that is precisely what Sears' Response prescribes.

(b) The Commissioner's Application

10. In paragraphs 25, 26, 28, 29, 30, 32, 33 and 34 of the Application, the Commissioner sets out a number of representations made to the public by Sears concerning the Tires (the "Representations"). The Representations feature Sears' ordinary selling prices for the Tires, which are identified as "Sears reg." prices. This fact is [] of its Response, where Sears states as follows:

[]

11. The representation regarding the Silverguard Ultra IV Tire set out in paragraph 30 of the Commissioner's Application is typical of the representations that Sears made in respect of the Tires in calendar year 1999. In the "Sears reg." column, Sears sets out its ordinary selling price. The representation at paragraph 30 is, in part, as follows:

Size	Sears reg.	Sale, each
P185/75R14	109.99	54.99
...		
P205/65R15	139.99	69.99

12. After setting out the Representations, the Application goes on to address the questions mandated by s.s 74.01(3); that is, did Sears sell a substantial volume of each of the Tires at the ordinary selling price (i.e., “Sears reg.”); and, did Sears offer the Tires at the ordinary selling price in good faith for a substantial period of time.

(c) Sears’ Response

13. In terms of its ordinary price analysis, the point of departure for Sears’ Response is found in paragraphs 59 through 66, where Sears describes its pricing for tires.

14. In paragraph 60, Sears indicates that Sears’ “Regular Price” is the price at which a Sears Automotive customer purchased []; and, Sears’ “Multiple Regular Price” is the “ [] at which a Sears Automotive customer purchased [] .”

15. An illustration gives some meaning to those definitions. In calendar year 1999, Sears’ Regular Price and Multiple Price for a size of tire (P215/70R14) of the Response RST Touring 2000 tire were as follows:

- Sears’ Regular Price (i.e., price for a single unit of a Tire) - \$133.99; and
- Sears’ Multiple Price (i.e., price per tire for a bundle of two or more units of the same size of the same Tire) - \$87.99.

16. Therefore, in 1999, a purchaser buying a single unit of a P215/70R14 size Response RST Touring 2000 tire would have paid \$133.99. Had that same purchaser purchased four P185/70R14 size Response RST Touring 2000 tires, rather than paying \$535.96 (i.e., Sears' Regular Single-unit Price - 4 @ \$133.99), that customer would have paid \$351.96 (i.e., Sears' Multiple Unit Price - 4 @ \$87.99).

17. Sears' Multiple Regular Price in respect each of the sizes of each of the Tires was substantially below Sears' Regular Price for the same size of each of the Tires.

18. It is important to recall that, only Sears' Regular Prices (i.e., the price for a single unit of any Tire) and Sears' sales or promotional prices were featured in the Representations. Sears never featured its Multiple Unit Price in any representation made to the public regarding the Tires. Moreover, as noted above, Sears admits that its Single-unit Regular Prices were always the "ordinary" reference prices in the Representations.

19. In light of the foregoing, the Commissioner anticipated that, in responding to the Application, Sears would address whether or not it had sold substantial volumes of each of the Tires at the Sears' Regular Single-unit Price featured in the Representations and whether or not it had offered the Tires at that price in good faith for a substantial period of time. It is submitted, as noted above, that this is the line of inquiry that s.s 74.01(3) of the Act necessarily requires.

20. However, in paragraph 61 of its Response, Sears states that for purposes of the Response, Sears' "Regular Price" and Sears' "Multiple Regular Price" are collectively referred hereafter in the Response as Sears' "Regular Prices". Sears thereafter embarks on a discussion of how its Regular Prices were set and, finally, beginning at paragraph 102 of its Response, addresses the relevant provisions of the Act. Throughout that discussion, with a few of notable exceptions which are addressed below, Sears does not differentiate between its Regular Single-unit Price and its Multiple Price.

21. For example, in paragraph 101 of its Response, Sears submits:

Contrary to the Commissioner's allegations throughout the Application, Sears Automotive fully expected to sell the Tires at their Regular Prices during the Relevant Period.

22. The Commissioner submits that Sears' Response is unresponsive to the Application because it uses as a factual base Sears' Regular Single-unit and Multiple Unit Prices on a combined basis. The Commissioner never made any allegations relating to Sears' expectations regarding its aggregate sales of each of the Tires at Sears' Regular Single-unit and Multiple Unit Prices. The Commissioner never made such allegations because they would have been irrelevant: pursuant to s.s 74.01(3) of the Act, only Sears' expectations regarding sales of the Tires at its ordinary selling prices featured in the Representations (i.e., Sears' Single-unit Prices) are relevant to this case.

23. Continuing with the example from paragraph 101 of Sears' Response, the Commissioner

submits that the real question (which Sears has not addressed), is whether or not, "... Sears Automotive fully expected to sell the Tires at their Regular [Single-unit] Prices during the Relevant Period". The Commissioner submits that Sears chose not to answer that question and instead elected to introduce an irrelevant and extraneous pricing element. Sears did not respond to the Commissioner's allegation squarely because, based on the facts, it could not.

24. The Commissioner submits that the fundamental flaw illustrated by the foregoing example runs through and undermines Sears' entire Response.

III. THE VOLUME TEST

25. The Volume Test which is set out in paragraph 74.01(3)(a) of the Act, provides as follows:

(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be;

(a) "that price"

26. The Commissioner submits that the phrase "that price" in paragraph (a) refers to the ordinary selling price featured in a representation at issue. In this case, "that price" refers to the ordinary selling prices set out in the "Sears reg." column featured in the Representations.

27. Sears responds to the Commissioner's allegations regarding the volume test in paragraphs 136 through 148 of its Response.

28. Paragraph 139 contains a blanket denial of the Commissioner's allegations regarding the volume test; however, it does not address the Commissioner's allegations in a substantive way.

29. The Commissioner submits that paragraphs 140 and 141 do not address the issue of "substantial volume". Rather, they describe the tire buying process at Sears from a customer's perspective. Sears' Response indicates that, absent urgency, Sears' customers would not purchase tires at Sears' Regular Prices as they know that the tires will inevitably go on sale.

30. Sears goes on in paragraphs 139 through 148 to address the volume test. However, the fundamental flaw described above undercuts Sears' submissions.

(b) "substantial volume"

31. In paragraph 143, Sears states that in 1999 it sold more than [] units of the Tires at "Regular Prices". Based on total sales of [] units in 1999, Sears sold approximately 20% of the Tires at Regular Prices. However, in Sears' Response, Regular Prices mean Sears' Single-unit Prices and Sears' Multiple Unit Prices. Therefore, what Sears relies on to arrive at [] is an aggregate figure which captures the combined volume of sales at Sears' Single-unit Prices and Sears' Multiple Unit Prices.

32. The Commissioner submits, it is beyond contention that, for the purposes of paragraph 74.01(3)(a), the volumes of sales that should be considered by the Tribunal are the volumes of

sales at Sears' ordinary selling price. Sears' has admitted that its Single-unit Prices featured in the Representations are the ordinary selling prices for the Tires. Therefore, the Commissioner submits that Sears' use of the aggregate figures described above is inappropriate under paragraph 74.01(3)(a). The Commissioner submits that the real question (which Sears has not addressed) is what volumes of the Tires Sears sold at the ordinary selling prices of each Tire and, whether or not those volumes were "substantial".

33. The Commissioner reiterates that the reason Sears chose not to answer that question and instead elected to introduce an irrelevant pricing element is obvious in light of paragraph 42 and Table 1 of the Commissioner's Application. The fact is that Sears did not sell a volume of approximately 20% of the Tires at its ordinary selling price; rather, it sold less than 4% of the Tires at that price.

IV. THE TIME TEST

(a) Time Test generally

34. In paragraph 106 of the Response, Sears states that, for purposes of the time test, the "substantial period of time recently before" requirement created in paragraph 74.01(3)(b) should in this case be at least 12 months preceding the date of the Representations. The Commissioner maintains that six months is the appropriate substantial period of time for this case.

35. In this regard, the Commissioner notes that Sears’ own internal policy (see Application paragraph 75) provides as follows:

in general, the time period to be considered will be the six months prior to (or following) the making of the representation (this time period can be shorter if the product is seasonal in nature)

36. With respect to the “time test,” in paragraph 105, Sears states as follows:

Sears Automotive complied fully with the requirements of paragraph 74.01(3)(b) of the Act in connection with both the Representations and its promotions to supply the Tires at Regular Prices before, during and after the Relevant Period.

37. In Table 1 of its Response, Sears sets out, among other things, the percentage of time that the Tires were offered at Sears’ Reduced Prices. The table indicates as follows:

Tire	BF Goodrich Plus	Response RST Touring 2000	Silverguard Ultra IV	Roadhandler T Plus	Michelin Weatherwise
Percentage of time During Period of Analysis the Tire was Offered for Sale at a Sears Reduced Price	[]	[]	[]	[]	[]

38. In paragraph 109 of its Response, Sears states that Table 1 “shows that all tires were offered for a ‘substantial period of time recently before’ and in particular, [] of the Tires meet or exceed even the arbitrary fifty per cent threshold set out in the [Commissioner’s] Guidelines.”

39. The Commissioner has four submissions to make regarding Sears’ position.

40. **First**, contrary to Sears' submission, on Sears' own evidence, three of the five Tires fail the 50% per cent threshold contemplated by the Guidelines: they are on sale more often than not.

41. **Second**, the suggestion that the 50% threshold contemplated by the Guidelines is "arbitrary" defies logic. Subsection 74.01(3) of the Act contemplates "ordinary selling prices" featured in representations.

42. **Third**, as noted in Sears' Response, Regular Prices means Sears' Single-unit Prices and Sears' Multiple Unit Prices. The Commissioner submits that the Tribunal should remain mindful of that fact in considering Sears' assertion that it "complied fully with the requirements of paragraph 74.01(3)(b) of the Act in connection with both the Representations and its promotions to supply the Tires at Regular Prices".

43. **Finally**, based on Sears' admission that its customers could purchase the Tires at Sears' Multiple Price [], other than when the Tires were on sale, the Commissioner submits that Sears offered the Tires for sale to the public at a price below its ordinary selling price 100% of the time.

44. Put simply, [], Sears either had the Tires "on sale" or at Regular Prices. When they were "on sale," they were offered to the public at below ordinary selling prices. When they were not "on sale" they were offered to the public at the Regular Single-unit Price and

the Multiple Price. The Multiple Price per tire was always significantly below the Single-unit Price per tire. Moreover, as noted in the Commissioner's Application, 94% of the tires sold in Canada are sold in multiples of 2 or more. Based on the foregoing, the Commissioner submits that Sears offered the Tires for sale at prices below the ordinary selling prices featured in its Representations 100% of the time, or at best, 94% of the time.

(b) Good Faith

Good faith and the Use of Aggregated Regular Prices

45. The Commissioner alleged in the Application that Sears had not offered the Tires at Sears' Regular Single-unit Prices in good faith. At paragraph 117 through 121 Sears denies that allegation. However, Sears' denial is again founded upon Sears' expansive definition of Regular Prices (i.e., Regular Single-unit and Multiple Unit Prices).

46. In paragraph 118, Sears offers a number of submissions to support its assertion that the Tires were offered in good faith. The Commissioner submits that the Tribunal should note the fact that in all but five of the 17 following subparagraphs, Sears makes reference to Sears' "Regular Prices" (i.e., Regular Single-unit and Multiple Unit Price).

47. Sears states in paragraph 118 of its Response that the Tires were offered in good faith because:

- a. the Tires were openly available in appropriate volumes for sale at their **Regular Prices** in every specific market in which Sears Retail Automotive Centres were located in Canada;
- b. the **Regular Prices** for the Tires were set by Sears Automotive based on sound pricing principles, careful and responsible planning, thorough market research and analysis and a solid understanding of the unique quality and attributes of the Tires;
- c. in the Representations, Sears “regular” prices were prices at which the Tires were actually sold;
- d. Sears honestly believed that the **Regular Prices** in question were comparable to those being offered in the relevant local trade areas;
- e. the **Regular Prices** in question were objectively reasonable and *bona fide* having regard to the prices charged in the relevant trade areas;
- f. Sears Automotive offered the Tires at **Regular Prices** that were reasonable in light of the nature of the tires (and the prices for those tires) offered by Sears Automotive’s competitors in the specific market areas in question;
- g. the **Regular Prices** at which the Tires were offered for sale were competitive with (if not lower than) the “regular” or “ordinary” prices offered by Sears Automotive’s “off-price” competitors and, when the Tires were offered for sale at Reduced Prices, they created significant value for Sears Automotive’s customers;
- h. as explained in greater detail above, the **Regular Prices** at which the Tires were offered for sale were justified, set reasonably, and were competitive, with respect to the prices offered by Sears Automotive’s EDLP competitors for entirely different tires and, when offered for sale at Reduced Prices, the Tires created significant value for Sears Automotive’s customers;
- i. in the context of Sears Automotive’s strategy as an “off-price” retailer, Sears Automotive fully expected its customers to validate its **Regular Prices** for the Tires based on the competitiveness of those prices in the marketplace, the quality and uniqueness of the Tires and the added value offered by the Tires over and above everything else available in the local marketplace;
- j. based on the competitiveness of the **Regular Prices** for the Tires, Sears Automotive fully expected its customers to perceive and realize significant value by purchasing the Tires at Reduced Prices (which were often lower than the EDLPs offered by Sears Automotive’s competitors);
- k. in fact, Sears Automotive’s customers did validate the **Regular Prices** at which the Tires were offered for sale;
- l. substantial sales of the Tires occurred at their **Regular Prices**;
- m. setting “regular” prices for quality tires (with premium warranty packages and a money-back guarantee) that were higher than competitors’ (i.e., Canadian Tire’s) EDLPs for wholly different tires made economic sense;
- n. in the context of Sears Automotive’s pricing strategy as an “off-price” retailer, Sears Automotive’s customers realized, expected and accepted that its “regular” prices (in the same way

as the “regular” prices offered by other “off-price” tire retailers) would *prima facie* be higher than other retailers’ EDLPs, without even taking into account the uniqueness and the quality of the Tires and the industry-leading warranty and customer care packages offered by Sears Automotive with those Tires;

- o. Sears Automotive’s customers legitimately perceived and realized substantial *bona fide* value by purchasing the Tires at Sears Reduced Prices;
- p. unlike any other retailer in the marketplace, including Canadian Tire, Sears Automotive offered with every Tire a tire warranty (Canadian Tire offered a rating only), Sears “Club Points,” a “Satisfaction Guaranteed or Money Refunded” policy, and an extensive deferred payment program; and
- q. Sears Automotive reasonably expected that its customers would perceive and appreciate the high quality of the Tires and the value created by purchasing the Tires at their **Regular Prices** and that such value would be validated by the marketplace by reason of consumers purchasing the Tires at those prices.

48. The Commissioner submits that of particular note is the fact that in three of the foregoing subparagraphs - (c), (m) and (n) - Sears makes reference to “Sears’ ‘regular’ prices” as opposed to “Sears’ Regular Prices”. The Commissioner submits that it is clear from the context in which the phrase “Sears’ ‘regular’ prices” is used that it means Sears’ Regular Single-unit Prices; that is, the appropriate ordinary selling price for purposes of s.s 74.01(3) (see also paragraph 65 of Sears’ Response).

49. Further, the Commissioner notes that subparagraph 118(c) of the Response provides that:

- c. in the Representations, Sears “regular” prices were prices at which the Tires were actually sold;

whereas subparagraph 118(l) of the Response provides:

- l. substantial sales of the Tires occurred at their **Regular Prices**;

50. The Commissioner submits that the juxtaposition of those two statements begs the question, why Sears didn't simply state that, "substantial sales of the Tires occurred at "regular" prices"?

51. More generally, in respect of the submissions contained in paragraph 118 of Sears' Response, the Commissioner submits that the use of this aggregated price concept in the context of an examination of good faith is, for the reasons described above, not appropriate. The Commissioner submits that in order to be relevant to this matter, as a starting point, the submissions contained in paragraph 118 would have to relate to Sears' Regular Single-unit Prices which, as noted above, Sears has admitted were the ordinary selling prices featured in the Representations. The Commissioner submits that the question for the Tribunal's determination is whether or not Sears offered the Tires at its Sears' Regular Single-unit Price in good faith. The Commissioner submits that to the extent Sears' submissions refer to a price other than Regular Single-unit Prices. They are not instructive.

Good faith - Sears Offered Consumers Good Value

52. In its Response, Sears also goes to considerable lengths in attempting to establish that it provided good value to its customers. For example, in subparagraph 118(o) Sears states that, "Sears Automotive's customers legitimately perceived and realized substantial *bona fide* value

by purchasing the Tires at Sears' Reduced Prices." Sears' argument seems to be that because consumers received good value by purchasing tires at prices below Sears' Regular Single-unit Prices (which is not admitted) there is no problem.

53. However, the Commissioner submits that Sears' submission misses the mark. It must be recalled that s.s 74.01(3) of the Act is not a price regulation provision *per se*. Subject to s. 45 of the Act, retailers are free to set their regular prices at whatever level they see fit. The Commissioner cannot take any action if, for example, a retailer elects for whatever reason, to set its prices at uncompetitive levels. If regular prices are set by a retailer at uncompetitive levels, the market will correct that situation.

54. However, for the market to operate, consumers must be provided with information which is not misleading or deceptive. If a consumer purchases a product on the basis of a deceptive or misleading ordinary price representation, then the market has been prevented from operating, regardless of whether or not the price paid by the consumer was competitive. That is the "mischief" that s.s 74.01(3) of the Act is intended to address.

55. Moreover, the Commissioner submits that s.s 74.01(3) of the Act is a "seller's own" ordinary price provision. This application was brought pursuant to s.s 74.01(3) because in the Representations, Sears compares its sale prices to its own Regular Single-unit Price.

Good Faith - The Commissioner did not Mischaracterize Sears Competitive Profiles

56. The Commissioner did not mischaracterize Sears' competitive profiles.

57. Sears' pricing strategy and tactics in 1999, as set out in Sears' Commodity Marketing Reviews for all tires, were as follows:

- Private label tires: to index Sears 2 For Pricing to be equal to or within [] of [] every day low price.
- National brand tires: to index Sears 2 For Pricing to be [] of the equivalent national brand at "normal discounted price" (2 for pricing is the same as Multiple Pricing).

58. It is important to note that these were Sears' strategies and tactics not only *vis a vis* [], but rather in respect of all competitors in all markets.

59. Sears' Competitive Profile for the Silverguard Ultra IV identified the [] as a competitive offering in the marketplace and provided as follows with respect to size P205/75R14 (any other size would reveal the same relative price differences):

Table 3
Extract of Sears' Competitive Profile for the Silverguard Ultra IV

PRICE COMPARISON		Silverguard Ultra IV 110,000 km Revised Selling Prices				[] 120,000 km rated PRICING LEVEL			
		Regular Selling	2 for Each	Promo tional Spring 99	Great Item Spring 99	Fall '98	2 for Each	Promotion Fall 98	Great Item Fall 98
SIZE						EDLP			
340	P205/75R14 92S	\$123.99	\$79.99	\$73.99	\$67.99	\$75.99	105.26%	97.37%	89.47%

60. For the Silverguard Ultra IV (P205/75R14), Sears' Regular Single-unit Price was \$123.99 while [] had a regular price of \$75.99. At a premium of 63.17%, Sears' Regular Single-unit price for the Silverguard Ultra IV was plainly uncompetitive with [] offering. However, that fact, by itself, is not problematic.

61. What is significant is the fact that, when the Competitive Profiles are viewed together with Sears' pricing strategy for private label tires, it becomes evident that Sears knew its tires were not competitive at the Regular Single-unit Prices. This is significant because it means that Sears could not have that expected the market would validate its ordinary selling prices or that consumers would purchase substantial volumes of the Tires at those prices. Therefore it cannot be said that Sears offered the Tires in good faith at its ordinary selling prices.

V. ABSENCE OF DUE DILIGENCE

62. Sears did not and could not comply with its own Pricing Policy for establishing the ordinary selling price for the Tires in 1999 for use in the Representations, either before or after the issuance of the May 11, 1999 Memorandum to All Vice-Presidents concerning the amendments to the Act.

63. Sears' Pricing Policy stated that a substantial volume of sales must occur at a price which was active within the proceeding twelve months before it could be used as a comparison price and that the comparison price should reflect a substantial volume of sales.

64. Sears' Automotive personnel relied on the Regular and Promotional ("R & P") report produced by Sears' Retail Inventory Management ("RIM") system to track tires sales at regular and promotional prices in order to establish the comparison regular price (single unit price). Within the RIM system, tire sales at regular price included tires sold at the Sears' Single-unit Prices and tires sold at the Sears' Multiple Unit Prices. The RIM system was incapable of producing reports or any data at all which would indicate the volume of tires sold by Sears at its Regular Single-unit Prices.

65. Due to the inability of the RIM system to report the volume of tire sales at Sears' Single-unit Price, it was impossible for Sears to determine what volume of tires it had sold at Regular Single-unit Prices. Sears therefore had no idea whether it had sold a substantial volume of the

Tires at its Regular Single-unit Prices (i.e., the ordinary selling prices featured in the Representations). Thus, Sears was clearly unable to conform to its own policy.

66. Moreover, the May 11, 1999 Memorandum to All Vice-Presidents, while providing some guidance to Sears' personnel concerning the "Volume" and "Time" tests of the amended provisions of the Act relating to ordinary price claims, fails to provide any guidance of how Sears' personnel are to ensure that comparison prices are offered in "good faith".

67. Sears' lack of due diligence in ensuring the new provisions of the Act were properly considered by its personnel is highlighted by the fact that an individual in Sears Automotive responsible for ensuring adherence to the Pricing Policy and the May 11, 1999 Memorandum had no recollection of having seen the Memorandum at any time prior to being examined by the Commissioner.

VI. OTHER MATTERS

Sears' Co-operated with the Commissioner

68. In paragraph 46 of its Response, Sears states that it, "openly, co-operatively and in a timely manner" took various measures to assist the Commissioner in his inquiry. That is untrue.

69. In fact, virtually everything that Sears did was done under compulsion of s. 11 orders issued by the Federal Court of Canada. Moreover, notwithstanding such orders, Sears delayed responding and provided responses which were materially deficient.

Sears' Market Participation

70. In paragraph 49 through 55 of its Response, Sears attempts to marginalize its own significance as a participant in the retail tire market in Canada. The Commissioner has two submissions regarding that position.

71. **First**, even if it were true that Sears were not a significant participant in the tire market in Canada, that fact would have absolutely no relevance to this matter. Does Sears mean to suggest that because it is a smaller player, an assertion which is denied, conduct which is otherwise reviewable should be excused?

72. **Second**, if the Tribunal was prepared to consider Sears' significance as a market participant as a factor in this case, the fact is that the retail tire market in Canada is highly fragmented. Sears, with a market share of approximately [] and tires sales of over [] in 1999, cannot be considered an insignificant player.

Price as a Factor in Tire Purchasing Decisions

73. At various points throughout the Response, Sears attempts to downplay the significance of price as a factor in consumers' purchasing decisions with respect to tires. For example, in paragraph 75 of its Response, Sears states that price is not the primary factor influencing consumers when they purchase tires.

74. The Commissioner submits that an examination of the Representations makes it clear that Sears believed that representations regarding price were highly material to consumers' purchasing decisions. In fact, price is by far the most prominent feature in all of the Representations.

75. Generally the words featured most prominently in the Representations related to price and savings. For example, Sears Representation for the RST Touring 2000 tire set out at paragraph 25 of the Application provided as follows:

Size	Sears reg.	Sale, each
P175/70R13	104.99	56.49
P185/70R14	118.99	64.49
P195/70R14	123.99	67.49
P205/70R14	128.99	69.49
P215/70R14	133.99	72.49
P205/70R15	136.99	74.49
P185/65R14	121.99	66.49
P195/65R14	126.99	68.49

P195/65R15	134.99	73.49
P205/65R15	139.99	76.49
P215/65R16	148.99	80.49
P215/60R16	149.99	81.49
P225/60R16	156.99	85.49
P205/55R16	164.99	89.49

Other sizes also on sale

save

45%

**OUR LOWEST PRICES OF THE YEAR ON TOURING 2000
TIRES**

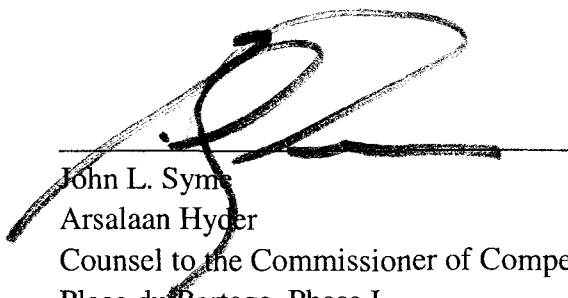
The Response RST Touring 2000 all-season tire is back by a 120,000 km Tread Wearout Warranty; details in store.

76. In paragraph 78 of its Response, Sears also states that, “Sears Automotive customers, despite the Commissioner’s allegations, were not so vulnerable and credulous so as to be forced to rely on ‘extrinsic cues, such as price and perceived savings’, in making their buying decisions.” Similarly, in paragraph 190(e), Sears submits that, “consumers were strongly influenced by, and primarily interested in, the actual price they paid for the Tires, rather than how much they may have been saving off an ordinary price and, therefore, they purchased the Tires at Reduced Prices in order to pay the lowest prices offered in the local tire marketplace;”.

77. The Commissioner submits that Sears’ position is at odds with Sears own conduct. Put simply, if consumers are not materially influenced by ordinary price representations, why does Sears use them so pervasively in the Representations it makes to the public?

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Gatineau, Quebec, this 18th day of October, 2002

A handwritten signature in black ink, appearing to read 'John L. Syme', is written over a horizontal line. The signature is stylized and somewhat cursive.

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APPENDIX A

1. The Commissioner's concedes that s. 74.01(3) infringes the right of Sears to freedom of expression under s. 2(b) of the Canadian *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the Canada Act, 1982 (U.K.), 1982, c. 11, as amended (the "*Charter*"). However, the Commissioner submits that this infringement of Sears' freedom of expression is a reasonable limit that is demonstrably justified in a free and democratic society, under s. 1 of the *Charter*.

2. The Commissioner agrees with paragraphs 1-9 and 12 of Sears' Response (the "Response"), insofar as these paragraphs state that section 2(b) of the *Charter* guarantees freedom of expression to Sears, and s.s 74.01(3) infringes this expression.

Section 2(b) Analysis

3. While the Commissioner agrees with Sears' assertion in paragraph 7 that the alleged practices are expressive activities, he disagrees with their characterization as "...perfectly usual, acceptable and professional and consistent with industry practice." It is not usual and acceptable to make misleading or deceptive claims in one's advertising, as is alleged in the Commissioner's Application.

4. The Commissioner disagrees with Sears' characterization in paragraph 8 of the limit on freedom of expression as 'severe'; in any case, it is submitted that the severity of the

limitation on Sears' freedom of expression is irrelevant for the purposes of a 2(b) analysis. In addition, Sears does not have standing to make argument regarding the effect of s.s 74.01(3) on other parties, as it purports to in paragraphs 5, 8, 9, 13, 14 and 20.

5. In paragraph 14, Sears asserts that s.s 74.01(3) "...adversely impacts on the content of Sears and others' commercial advertising...". While the Commissioner agrees that s.s 74.01(3) may effect the content of the advertising, he submits that such an effect cannot be characterized as adverse if it prevents misleading and/or deceptive representations from being made to the public. Sears also asserts that s.s 74.01(3) "...adversely interferes with the supply, availability and use of certain products, or determines who may be involved in these ...". The Commissioner submits that s.s 74.01(3) merely proscribes the making of misleading representations within a certain context, and in no way limits the "...supply, availability and use of certain products..."

Section 1 Analysis

6. In paragraphs 18, 20 and 21, Sears argues variously that s.s 74.01(3) is "...excessively vague, uncertain and imprecise..." and "...subject to arbitrary application by the Commissioner...".
7. The Commissioner disagrees. While s.s 74.01(3) does employ flexible terms, these terms are neither unintelligibly imprecise, nor do they imply arbitrary enforcement of the Act. There is a need for flexibility to provide for unforeseen circumstances, and to account

for the numerous ways of carrying out deceptive advertising. The courts have an interpretive role to play and can readily give sensible construction to s.s 74.01(3), which provides ample guidance for legal debate. In addition, the Guidelines contained in the ‘Information Bulletin - Ordinary Price Claims’¹ (the “Guidelines”) serve to clarify s.s 74.01(3), and further reduce the possibility of arbitrary enforcement.

8. In subparagraph 21(a), Sears argues that “...the objective of the Impugned Legislation is not of sufficient importance as to be capable of overriding a right guaranteed by the *Charter*...”.
9. The Commissioner disagrees, and submits that Parliament’s objectives of providing consumers with competitive prices and product choices and maintaining market fairness, by way of restricting misleading representations by advertisers, are important enough to justify restricting a constitutional right. These objectives are not inimical to the *Charter* values of respect for the inherent dignity of the individual and commitment to social justice and equality. Advertising plays an important role in Canadian society, and consumers must be able to rely on the truthfulness of the representations to make sound purchasing decisions.
10. In subparagraph 21(b), Sears argues that s.s 74.01(3) is not rationally connected to its

¹“Information Bulletin - Ordinary Price Claims: Subsections 74.01(2) and 74.01(3) of the *Competition Act*”, Publication Date: 1999-09-22, published by the Competition Bureau.

objective. The Commissioner disagrees. Rules which govern the use of representations about the ordinary price of a product in a public advertisement are rationally connected to the objectives of providing consumers with competitive prices and product choices and maintaining market fairness, by improving the quality and accuracy of marketplace information.

11. Sears argues that the effect of s.s 74.01(3) is disproportionate to its objectives [subparagraph 21(c)], and does "...not impair the guaranteed fundamental freedom of expression as little as possible..." [subparagraph 18(b)]. The Commissioner disagrees, and submits that the impairment to commercial expression is reasonably necessary; such expression is not impeded any further than is necessary to provide consumers with competitive prices and product choices and maintain market fairness.
12. S.s 74.01(3) only operates as a partial restriction on commercial advertising. It merely establishes parameters when referring to "ordinary price" in an advertisement, and prohibits representations that are misleading in nature. It does not restrict "ordinary price" advertising *per se*, nor does it overly intrude on a seller's ability to advertise. It is to be noted that the right to freedom of expression does not include the right to mislead or deceive consumers when advertising products.
13. The extent of the restriction imposed on commercial sellers who choose to advertise their products is relatively small, and the benefits brought about justify the technical

requirements imposed on sellers when they advertise. Sears' freedom of expression claim does not exist in a vacuum; it competes with the needs of different groups in society to be protected against deceptive marketing practices.

14. In subparagraph 20(f), Sears argues that the restrictions are founded on "...administrative, non-binding and non-legal guidelines which, in essence, define and proscribe the conduct enforced by the Commissioner...". The Commissioner submits that this is incorrect. The Guidelines referred to are simply that; they do not purport to be binding and merely set out the Commissioner's interpretation of the law and clarify the Commissioner's position as an aid to market participants². Sears also states that the restrictions are based on "...highly discretionary administrative practice..." and "...unfettered discretion for the exercise of extraordinary power...". The fact that the Commissioner has discretion in the exercise of his statutory powers does not render such exercise arbitrary. The Commissioner only has such powers as he is granted under the Act, and in the exercise of such powers, is bound by the laws of Canada, including the *Charter*.

15. In sum, it is submitted that in attempting to protect consumers against deceptive marketing and advertising practices, Parliament has enacted a limit that constitutes a justifiable infringement on commercial expression. S.s 74.01(3) sets fair and

²The Guidelines state: "This Information Bulletin outlines the approach that the Commissioner of Competition is taking in enforcing the ordinary price claims provisions of the Act. The guidelines contained in this Bulletin are not law. However, they may be relied upon as reflecting the Commissioner's interpretation of how the law is applied on a consistent basis by Competition Bureau Staff".

ascertainable standard rules in price advertising; is rationally linked to Parliament's important objectives of providing consumers with competitive prices and product choices and maintaining market fairness; minimally impairs Sears' freedom of expression as it is exercised through the act of marketing and advertising the ordinary prices of its products; and overall, is contextually proportional.