

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:

THE COMMISSIONER OF COMPETITION

-and-

SEARS CANADA INC.

COMPETITION TRIBUNAL		P R O D U I T
TRIBUNAL DE LA Applicant Applicant		
F L E D	JUL 22 2002 <i>gz</i>	
REGISTRAR -- REGISTRAIRE		
OTTAWA, ONT.		# 1(a)

Respondent

NOTICE OF APPLICATION

TAKE NOTICE that the Commissioner of Competition (hereinafter the "Commissioner") will make an application to the Competition Tribunal (the "Tribunal") pursuant to subsection 74.01(3) of the *Competition Act* (the "Act") for an order pursuant to section 74.1 of the Act. The particulars of the order sought by the Commissioner are set out in paragraphs 80 through 84 of this Application.

AND TAKE NOTICE that in the support of this Application, the Commissioner will rely on the following Statement of Grounds and Material Facts.

STATEMENT OF GROUNDS AND MATERIAL FACTS

I. GROUNDS FOR APPLICATION

1. The Commissioner states that, in connection with the promotion and sale of certain tires to the public as set out herein, Sears Canada Inc. (hereinafter “Sears”) employed deceptive marketing practices which constituted “reviewable conduct” under subsection 74.01(3) of the Act.
2. Specifically, the Commissioner states that in 1999 Sears offered certain tires to the public at significantly inflated regular prices, and subsequently made specific reference to those inflated regular prices when advertising those tires at sale prices. These advertisements contained ‘*save*’ and ‘*percentage off*’ representations which purported to be substantial discounts off Sears’ regular prices on tires. For example, *Sears reg. \$133.99, Sale each \$72.49*; and, “*Save 45% - Our Lowest Price of the Year*”.
3. These representations were disseminated by Sears to millions of Canadians in weekly flyers, weekend flyers, newspaper advertisements and other promotional

material, such as in-store leaflets.

4. The Commissioner states that the prices referred to by Sears as being regular prices were inflated in that:
 - a) having regard to the nature of the product and the relevant geographic market, Sears did not sell a substantial volume of these tires at the regular price featured in the representations within a reasonable period of time before making the representations; and
 - b) having regard to the nature of the product and the relevant geographic market, Sears did not offer these tires in good faith at the regular price featured in the representations for a substantial period of time recently before making the representations.

5. The Commissioner states that Sears did not offer certain tires at its regular prices in good faith in that:
 - a) Sears had no reasonable expectation that it would sell a substantial volume of those tires at its regular prices;
 - b) Sears' regular prices for those tires were not comparable to, and in fact

were much higher than the regular prices for tires that were offered by Sears' competitors, which tires Sears had identified as being competitive offerings;

- c) Sears' regular prices on those tires were not reasonable in light of the competitive forces that Sears itself had identified in the relevant market; and
- d) Sears' regular prices for those tires did not make rational economic sense given the nature of the tire market.

Accordingly, the Commissioner states that Sears did not offer those tires at regular prices in good faith, but rather with the ulterior motive of attracting customers and generating sales, by creating the impression that the tires when promoted "on sale", represented a greater value than was really the case.

II. STATEMENT OF MATERIAL FACTS

(a) The Parties

- 6. The Applicant is the Commissioner of Competition appointed under section 7 of the Act.

7. The Respondent, Sears, is a corporation incorporated under the laws of Canada. Sears is one of Canada's largest single full-line retailers of general merchandise and home-related services, and in 1999 operated 67 Retail Automotive Centres across Canada. Sears reported total revenues of \$6.131 billion and earnings before income taxes of \$344.6 million for the fiscal year ended January 2, 2000. Tires are among the products sold by Sears, and are sold by the Automotive Department.

(b) Tires Offered to the Public by Sears

8. In the period from January 1999 through December 1999, Sears offered 28 different lines of tires for sale to the public through its retail store operations. A tire line refers to a particular brand of tire offered by Sears, as well as subsets thereof. For example, Line 55 is actually comprised of the Bridgestone RoadHandler, the Bridgestone SCR, the Bridgestone RoadHandler LE and the Bridgestone RoadHandler "GT".
9. Of the 28 lines offered by Sears, 12 were all-season passenger tire lines. All-season passenger tires accounted for over []% of all tires sold by Sears in 1999.
10. Sears offered "private label" and "national brand" tires to the public in 1999.

Private label tires are tires which were sold only by Sears under a Sears' brand name, such as RoadHandler. National brand name tires are tires that were sold by Sears and by other retailers in Canada under a national brand, such as the Uniroyal Tiger Paw Nail Guard.

(c) The Commissioner's Inquiry

11. On April 25, 2000, the Commissioner commenced an inquiry (hereinafter the "Inquiry") pursuant to subparagraph 10(1)(b)(ii) of the Act into certain marketing practices engaged in by Sears. In particular, the Inquiry pertained to the making of "ordinary price" representations within the meaning of subsection 74.01(3) of Part VII.1 of the Act in connection with the promotion of the supply of tires by Sears.
12. While the Commissioner's Inquiry into certain marketing practices by Sears in respect of tires has continued up to the present, Sears has challenged in Federal Court the scope of the Commissioner's Inquiry as it pertains to periods after 1999. As such, this Application is limited to an examination of Sears marketing practices for the Tires in 1999.
13. After a review of the evidence gathered with respect to all tires offered by Sears, the Commissioner elected to focus the within Application on Sears' all-season

passenger tires, given that, in 1999, they accounted for over []% of the tires sold by Sears in Canada, and as a class represented nearly 80% of all replacement tires sold in Canada.

14. Of the 12 lines of all-season passenger tires sold by Sears, the Commissioner selected five lines (hereinafter the "Tires") for analysis:
- a) RoadHandler "T" Plus (by Michelin)
 - b) BF Goodrich Plus (by BF Goodrich)
 - c) Weatherwise (by Michelin)
 - d) Response RST Touring 2000 (by Cooper)
 - e) Silverguard Ultra IV (by Bridgestone)

These five Tires were selected for analysis in that they represent all of the all-season passenger tires which were offered for sale to the public at promotional prices by Sears during the three promotional sales events which form the basis of this Application, as set out below in paragraphs 25 through 34.

15. The Tires represent nearly []% of the all-season passenger tire sales for Sears in 1999 and, in dollar terms, approximately []% of Sears' total tire sales for all 28 lines. Sears sold nearly [] of the Tires in the period of time analyzed in this Application.

16. The Tires are private label tires. However, despite the fact that the Tires are

available exclusively at Sears, several of them are “dual branded”, in that the manufacturer’s name also appears on the product, such as the *Weatherwise by Michelin*.

17. Sears sells tires through both catalogue and retail operations. However, the Commissioner elected to focus only on retail operations, as catalogue sales account for only a small percentage of Sears’ total tire sales.

(d) Pricing Structure of Tires Sold By Sears

18. Sears was an “off-price” retailer as opposed to an “every day low price” or “value priced” retailer in 1999. This means that Sears relied on discounting and promotions to build in-store traffic and generate sales of the Tires.
19. During 1999, Sears employed at least four different price points for each size of each line of tire, as set out herein:
 - a) Sears’ “**Regular Price**” or “**Regular Each Price**” was the price of a single unit of any tire offered by Sears, when that particular tire was not promoted as being “on sale”. For example, the Regular Price for the *Response RST Touring 2000 (P215/70R14)* in 1999 was \$133.99. This was the price used as the reference price when the tires were promoted

“on sale” at retail by Sears.

- b) Sears’ “**2 For Price**” was the price at which Sears would sell two or more of a given tire to consumers. In 1999, Sears’ 2 For Price for a given tire was always lower than its Regular Each Price. For example, Sears’ 2 For Price for the *Response RST Touring 2000 (P215/70R14)* in 1999 was \$87.99, while its Regular Each Price, as noted above, was \$133.99 .
- Sears did not use its 2 For Price as a reference price in any of the sales representations referred to below, and it never advertised its 2 For Prices when promoting retail sales. As set out in paragraph 37 below, approximately 94% of the tires sold in Canada are sold in multiples of two or more. As such, for approximately 94% of the tires sold by Sears, the 2 For Price was the highest purchasers would have paid.
- c) Sears’ “**Normal Promotional Price**” was the usual sale price advertised by Sears. The Normal Promotional Price was a set percentage off the Regular Price for each tire, which discount varied depending on the line of tire. For example, the Normal Promotional Price for the *Response RST Touring 2000 (P215/70R14)* in 1999 was \$79.99, being a 40% discount off the Regular Each Price of \$133.99. When Normal Promotional Prices were advertised in 1999, they were always compared to the Regular Each Price for the relevant Tire, and not the 2 For Price. These discounts were

referred to internally by Sears as “Save Stories”.

- d) Sears’ “**Great Item**”, “**Big News**”, “**Lowest Prices of the Year**” or other similar expressions refer to Sears’ promotional prices where the Save Story was greater than the Normal Promotional Price. For example, the *Response RST Touring 2000 (P215/70R14)* in 1999 sold for \$72.49 at this price level, with a 45% save story off the Regular Each Price of \$133.99. When Great Item-style promotional prices were advertised in 1999, they were always compared to the Regular Each Price for the relevant Tire, and not the 2 For Price. These sales were often subsidized by the manufacturer of the relevant line of tires by way of cost reductions to Sears.
20. In 1999, the price points for each size of each line of tire were the same for all Sears Retail Automotive Centres in Canada.

(e) Elements of subsection 74.01(3)

21. Subsection 74.01(3) of the Act 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”]

22. The material facts relevant to each of the elements contained in subsection 74.01(3) are set out in turn below.

(i) promotion of a product or business interest

23. Sears generated over [\$] in sales for tires in 1999, including [\$] in sales for the Tires forming the subject matter of the within Application.

(ii) made representations to the public as to the price the product was ordinarily supplied

24. Throughout 1999, Sears advertised the Tires that it sold through various media, including flyers, newspaper advertisements and other promotional material, such as in-store leaflets. These advertisements contained representations as set out herein (the “Representations”) relating to the price at which the Tires were ordinarily supplied by Sears, and those prices were then compared to the “sale” prices on the Tires being promoted. The following representations were contained in advertisements promoting three different sales events.

“Sales Event # 1”, Ending November 14, 1999

25. A weekly flyer entitled “**SEARS Shop Wish and Win**” (C112F599) was distributed nationally (circulation of 4,254,385), advertising sale prices on certain of the Tires which were in effect between November 8 and November 14, 1999. In flyer C112F599, Sears made the following representations to the public with respect to the Michelin RoadHandler “T” Plus tire:

MICHELIN®**RoadHandler T Plus tires**

Size	Sears reg.	Sale, each
P175/70R13	153.99	91.99
P185/70R14	168.99	99.99
P205/70R14	190.99	113.99
P205/70R15	203.99	121.99
P185/65R14	179.99	107.99
P195/65R15	188.99	112.99
P205/65R15	199.99	119.99
P225/60R16	219.99	131.99

Other sizes also on sale

save 40%

ALL MICHELIN ALL-SEASON PASSENGER TIRES

Shown: RoadHandler® T Plus tire is made for Sears by Michelin.
Backed by a 6-year unlimited mileage Tread Wearout Warranty;
details in store. #51000 series

26. In flyer C112F599, Sears also made the following representations to the public in respect of the Response RST Touring 2000 tire:

RST Touring 2000 tires

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.

#59000 series.

27. In addition to the foregoing, in support of "Sales Event # 1", Sears published newspaper advertisements promoting the Michelin RoadHandler "T" Plus and/or the Response RST Touring 2000 in a number of newspapers including:

- the Calgary Sun: Wednesday, November 3rd

- the Hamilton Spectator: Wednesday, October 27th, November 3rd and 10th
- the Ottawa Citizen: Thursday, October 28th, Wednesday, November 3rd and Monday, November 8th
- the Vancouver Sun: Wednesday, October 27th, November 3rd and 10th
- the Province (Vancouver): Wednesday, October 27th, November 3rd and 10th
- the Metro (Winnipeg): Thursday, November 11th
- the Montreal Gazette: Sunday, October 24th and 31st
- La Presse (Montreal): Sunday, October 24th and 31st
- Journal de Montréal: Sunday, October 24th and 31st
- the Era Banner (Newmarket): Tuesday, October 26th, November 2nd and 9th
- the Edmonton Journal: Wednesday, November 3rd and 10th
- the Standard Freeholder (Cornwall): Wednesday, October 27th, November 3rd and 10th
- the Windsor Star: Wednesday, October 27th, November 3rd and 10th
- the Record (Kitchener): Wednesday, November 3rd and 10th
- Le Nouvelliste (Trois-Rivières): Wednesday, October 27th
- the Daily Gleaner (Fredericton): Wednesday, October 27th, November 3rd and 10th
- the Telegram (St.John's): Wednesday, October 27th, November 3rd and 10th
- the StarPhoenix (Saskatoon): Wednesday, November 3rd and 10th.

28. Sears' newspaper advertisements were 5.625" x 9.625" or larger in size.

Examples of representations in the newspaper advertisements include:

a) **Save 45%**

Our lowest prices of the year on Response RST Touring '2000' tires
5-rib tread provides a substantial footprint for superior wet, dry and snow traction.

Available in 70, 65, 60 and 55 aspect sizes and Whitewall or Blackwall, depending on size. #59000 series.

Sale Prices End Sunday, November 14, 1999, while quantities last

From 56⁴⁹ each

P175/70R13.

Sears reg. 104.99

120,000 km tread Wearout Warranty

Response RST Touring '2000' tires

Size	Sears reg.	Sale, each
P175/70R14	114.99	62.49
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
P175/65R14	116.99	63.49
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
P225/60R16	156.99	85.49
P205/55R16	164.99	89.49

Includes No-charge Road Hazard Warranty*.

Other sizes also on sale. *Details in store

b) RoadHandler T Plus tires by Michelin

Size	Sears reg.	Sale, each
P175/70R13	153.99	91.99
P185/70R14	168.99	99.99
P195/70R14	176.99	105.99
P205/70R14	190.99	113.99
P205/70R15	203.99	121.99
P185/65R14	179.99	107.99
P195/65R15	188.99	112.99
P225/60R16	219.99	131.99

Includes No-charge Road Hazard Warranty*.

Other sizes also on sale

SAVE 40 %**All Michelin® all-season passenger tires**

RoadHandler T Plus tire (shown) is made for Sears by Michelin and backed by a 6-yr. unlimited mileage Tread Wearout Warranty*. Include 24-hr. Roadside Tire Assistance*. #51000 series.

**Sale prices end Sunday, November 14, 1999,
while quantities last**

29. "Sales Event # 1" was also advertised in leaflets distributed in-store at all Sears Retail Automotive Centres (distribution 50,000), which leaflets contained the following representations:

OUR LOWEST PRICES OF THE YEAR!

Save 45%

**The Response RST Touring '2000' all-season tire
is backed by a 120,000 km Tread Wearout Warranty!**

The 5-rib tread substantial tire foot print for superior wet, dry and snow traction. Available in 70, 65, 60 and 55 aspect sizes and attractive whitewall or blackwall, depending on the size. #59000 series.

Response RST Touring '2000'

Size	Sears reg.	Sale, each
P175/70R13	104.99	56.49
P185/70R13	109.99	59.49
P175/70R14	114.99	62.49
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
P215/70R15	141.99	77.49
P225/70R15	144.99	78.49
P175/65R14	116.99	63.49
P185/65R14	121.99	66.49
P195/65R14	126.99	68.49
P195/65R15	134.99	73.49
P205/65R15	139.99	76.49
P215/65R15	144.99	78.49
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 available on sale.

Includes No-charge Road Hazard Warranty

Complete Warranty Details at Sears

Sale prices from October 25th - November 14th, 1999 while quantities last

"Sales Event # 2", Ending November 28, 1999

30. A weekly flyer entitled "**SEARS Store Manager's Best Buy**" (C114F599) was distributed nationally (circulation of 4,254,385), advertising sales prices on the Silverguard Ultra IV tire in effect between November 22 and November 28, 1999. In flyer C114F599, Sears made the following representations to the public in

respect of the Silverguard Ultra IV tire:

Silverguard Ultra IV tires

Size	Sears reg.	Sale, each
P185/75R14	109.99	54.99
P195/75R14	116.99	58.49
P235/75R15XL	149.99	74.49
P175/70R13	99.99	49.99
P185/70R14	113.99	56.99
P195/70R14	119.99	59.99
P205/70R14	123.99	61.99
P215/70R14	129.99	64.99
P205/70R15	133.99	66.99
P205/65R15	139.99	69.99

Other sizes also on sale

1/2 PRICE

SILVERGUARD 'ULTRA IV' ALL-SEASON TIRES

Made for Sears by Bridgestone and backed by a 110,000 km

Tread Wearout Warranty: details in store. #68000 ser. From **45⁴⁹**
each. P155/80R13. Sears reg. 90.99

31. In addition to the foregoing, in support of "Sales Event # 2", Sears published newspaper advertisements promoting the Silverguard Ultra IV tire in a number of newspapers including:

- the Calgary Sun: Wednesday, November 17th
- the Ottawa Citizen: Thursday, November 18th
- the Daily Gleaner (Fredericton): Wednesday, November 17th
- the Standard Freeholder (Cornwall): Wednesday, November 17th

- the Windsor Star: Wednesday, November 17th
- the Hamilton Spectator: Wednesday, November 17th
- the Era Banner (Newmarket): Tuesday, November 16th
- the Edmonton Journal: Wednesday, November 17th
- the StarPhoenix (Saskatoon): Wednesday, November 17th
- the Telegram (St.John's): Wednesday, November 17th
- the Vancouver Sun: Wednesday, November 17th
- the Province (Vancouver): Wednesday, November 17th.

32. Sears newspaper advertisements were 5.625" X 9.625" or larger in size.

Representations in the newspaper advertisements included the following:

1/2

Price

Silverguard® Ultra IV tire...

The ultimate all-season performer!

Made for Sears by Bridgestone with superior snow/wet traction and leading-edge construction.
#68000 series

110,000 km Tread Wearout Warranty

From 45⁴⁹ each
P155/80R13. Sears reg. 90.99

Silverguard Ultra IV tires

Size	Sears reg.	Sale, each
P185/75R14	109.99	54.99
P195/75R14	116.99	58.49
P205/75R14	123.99	61.99
P205/75R15	128.99	64.49
P215/75R15	134.99	67.49
P235/75R15XL	149.99	74.99
P175/70R13	99.99	49.99
P185/70R14	113.99	56.99
P195/70R14	119.99	59.99
P205/70R14	123.99	61.99
P215/70R14	129.99	64.99
P205/70R15	133.99	66.99
P205/65R15	139.99	69.99

Includes No-charge Road Hazard Warranty*.

*Details in store

33. "Sales Event # 2" was also advertised in leaflets distributed in-store at all Sears Retail Automotive Centres (distribution 50,000), which leaflets contained the following representations:

1/2 price!

**Silverguard Ultra IV All-Season Passenger Tire
is made for Sears by Bridgestone and backed by a 110,000 km Tread
Wearout Warranty.**

**Superior snow and wet tractions, along with leading edge construction. Maintains a
smooth, quiet ride. #68000 series.**

Silverguard Ultra IV

Size	Sears reg.	Sale, each
P155/80R13	90.99	45.49
P185/75R14	109.99	54.49
P195/75R14	116.99	58.49

P205/75R14	123.99	61.99
P205/75R15	128.99	64.49
P215/75R15	134.99	67.49
P235/75R15	149.99	74.99
P175/70R13	99.99	49.99
P185/70R14	113.99	56.99
P195/70R14	119.99	59.99
P205/70R14	123.99	61.99
P215/70R14	129.99	64.99
P205/70R15	133.99	66.99
P205/65R15	139.99	69.99

Other sizes available on sale

Includes No-charge Road Hazard Warranty
Complete Warranty Details at Sears

Sale prices from November 15th - November 28th, 1999, while quantities last

“Sales Event # 3”, Ending December 19, 1999

34. A weekend flyer entitled “**SEARS 2 Day Power Sale**” (W123W199) was distributed nationally (circulation of 4,973,270), advertising sales prices in effect on December 18 and 19, 1999 on certain of the Tires. In flyer W123W199, Sears made the following representations to the public in respect of the BF Goodrich Plus and Weatherwise tires:

- a) **All tires on sale**
Including all-season, performance, snow & truck tires
save
25%
BF Goodrich Plus tires
90,000 km Tread
Wearout Warranty*.

#36000 ser. From **39.99**

Each. P155/80R13.

Sears reg. 55.99.

Automotive products and services not available in all stores.

For all tires shown above: Other sizes also on sale: prices vary by size.

*Details in store.

b) **All tires on sale**

Including all-season, performance, snow & truck tires

save

40%

Weatherwise tires

Made for Sears by

Michelin® 120,000 km Tread Wearout

Warranty*. #58000 ser.

From **49.99**

Each. 155R12.

Sears reg. 89.99.

Automotive products and services not available in all stores.

For all tires shown above: Other sizes also on sale: prices vary by size.

*Details in store.

(iii) The Nature of the Product

35. Tires are a necessity good for those who drive vehicles. In 1999, there were approximately 16.5 million "light vehicles" on the road in Canada. In 1999, approximately 36% of those vehicles had their tires replaced.
36. Primary demand for tires is externally constrained, in that it is a derived demand which is based almost exclusively on the number of cars on the road. Demand is

essentially a replacement demand (i.e., to replace old or worn out tires).

37. Approximately 94% of tires sold in Canada are purchased in multiples of two or more.
38. All-season passenger tires represent approximately 80% of all replacement tires sold in Canada, and represented over []% of tires sold by Sears in 1999.
39. All-season passenger tires are a non-seasonal good which are offered for sale and are purchased throughout the year. The greatest volume of all-season passenger tires are sold in the Spring and Fall.
40. This class of product is such that the intrinsic attributes are difficult for most consumers to evaluate. As such, consumers are likely to rely on extrinsic cues, such as price and perceived savings, to signal product quality. Tires are also a price-sensitive product.

(iv) Geographic Market

41. Sears made the same Representations regarding the Tires in flyers distributed across Canada. As such, the geographic market for purposes of this matter is Canada.

(v) **The 'Volume Test':**

(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;

substantial volume

42. The following table sets out the volume of each of the Tires sold at Sears' Regular Prices compared to the volume of the Tires sold at a price below Sears Regular Prices. As set out in paragraph 43 below, the "reasonable period of time" selected for each of the Tires is 12 months from the date of the representation:

Table 1
Volume of Tires Sold at Sears' Regular Prices and at Reduced Prices
(Going Back 12 Months from the Date of Relevant Flyer Representation)

Tire (Line #)	Date of Representation	Total # of the Tires sold at any price	# of the Tires sold at Sears' regular price	% of the Tires sold at Sears' regular price	# of the Tires sold at a price below Sears' regular price	% of the Tires sold at a price below Sears' regular price
RoadHandler "T" Plus (Line 51)	Nov. 8, 1999	[]	[]	4.18%	[]	95.82%
Response RST Touring 2000 (Line 59)	Nov. 8, 1999	[]	[]	3.23%	[]	96.77%
Silverguard Ultra IV (Line 68)	Nov. 22, 1999	[]	[]	3.74%	[]	96.26%
BF Goodrich Plus (Line 36)	Dec. 18, 1999	[]	[]	5.26%	[]	94.74%
Weatherwise /RH Sport (Line 58)	Dec. 18, 1999	[]	[]	2.35%	[]	97.65%
TOTALS		[]	[]	3.79%	[]	96.21%

reasonable period of time

43. In light of the nature of the product at issue, as set out in paragraphs 35 to 40 above, and in particular the fact that the Tires were available throughout the year (with two peak periods), a reasonable period of time for evaluating whether a substantial volume of the Tires were sold at the regular price is 12 months, which would cover all four seasons.

(vi) **The 'Time Test':**

(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.

offered the product

44. The following table sets out the number of days that the Tires were offered by Sears at the Sears' Regular Price, compared to the number of days the Tires were offered at a price below the Sears' Regular Price, other than the 2 For Price. As set out in paragraph 45 below, the "substantial period of time" selected for each of the Tires is six months preceding the date of the representation:

Table 2
Summary of Time Analysis
(For the Six Month Period Preceding the Relevant Representations)

	BF Goodrich Plus	RoadHandler "T" Plus	Weatherwise/RH Sport	Response RST Touring 2000	Silverguard Ultra IV
Date of Representation	Dec. 18, 1999	Nov. 8, 1999	Dec. 18, 1999	Nov. 8, 1999	Nov. 22, 1999
Start and End of 6 month period	June 18 to Dec. 17	May 9 to Nov. 7	Jun. 18 to Dec. 17	May 9 to Nov. 7	May 23 to Nov. 21
Total of Days	183	183	183	183	183
Number of Days at Reduced Prices*	100	113	148	99	73
% of Days at Reduced Prices*	55%	62%	81%	54%	40%
Number of Days at Regular Prices*	83	70	35	84	110
% of Time at Regular Prices	45%	38%	19%	46%	60%

* Excludes 2 For Prices, which were offered by Sears throughout 1999 on the purchase of two or more tires.

substantial period of time

45. In light of the nature of the product at issue, as set out above, a reasonable period of time for evaluating whether the Tires were offered in good faith for a substantial period of time recently before making the representation is six months.

in good faith

46. Sears identified [] as its principal competitor in the replacement tire market in 1999, particularly with respect to private label tires. In 1999, [] had approximately []% market share of the replacement tire market in Canada and was the dominant retailer in the private label tire market in Canada. In 1999, Sears market share of the replacement tire market in Canada was approximately []%.
47. Sears' pricing strategy and tactics in 1999, as set out in Sears' Commodity Marketing Reviews for all tires, were as follows:
- a) Private label tires: to index Sears 2 For Pricing to be equal to or within []% of []'s every day low price.
 - b) National brand tires: to index Sears 2 For Pricing to be [] to []% of the equivalent national brand at "normal discounted price".
48. Sears created Competitive Profiles for each of the Tires, which identified the principal competitive offering in the market for each of the Tires and competitors' prices for the offering as compared to Sears' pricing at various reduced prices. For example, the Competitive Profile for the Silverguard Ultra IV identified the

[] as the competitive offering in the marketplace. The Competitive Profile provided as follows with respect to the pricing of the Silverguard Ultra IV (P205/75R14):

**Table 3
Extract of Competitive Profile of the Silverguard Ultra IV**

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

49. Sears' Competitive Profiles reveal that Sears' 2 For Prices for each of the Tires were indexed in a manner consistent with Sears' stated pricing tactics as set out in paragraph 47 above.
50. However Sears' Regular Prices formed no part of the competitive assessment in Sears' Competitive Profiles. Analysis of the Competitive Profiles reveals that Sears' Regular Prices on the Tires in 1999 were 25% to 65% higher than the regular prices of the tires determined by Sears to be competitive offerings. As such, Sears' Regular Prices for the Tires were clearly not comparable to the regular prices for those competitive offerings. For example, for the Silverguard Ultra IV (P205/75R14) Sears' Regular Price was \$123.99 while [] had a regular price of \$75.99. As such, Sears' Regular Price was 63.17% higher

than the competitive offering. Sears' Regular Prices did not appear as a comparison price in any of the Competitive Profiles.

51. As borne out by the low volumes of sales of the Tires at Sears' Regular Prices in 1999 (being less than 4%), Sears could not command price premiums of 25% to 65% over its competitors. As such, Sears' Regular Prices were not reasonable in light of competition.
52. In 1999, Sears knew or ought to have known that approximately 94% of all-season passenger tires were sold in multiples of two or more. Given that the Tires were available for purchase at the 2 For Price throughout 1999, Sears could have had no reasonable expectation that the Regular Price would be validated by the marketplace.
53. Sears used "buying plans" as a planning tool in connection with the marketing of tires. Among other things, for a given tire, the buying plans set out how many tires Sears expected to sell at certain price points. Of those buying plans which were provided to the Commissioner that are relevant to this Application, all indicate that it was Sears' expectation that it would not sell any tires at the Sears' Regular Price.

54. Sears was aware that the tire market was price-sensitive, and was aware that it could not command significant premiums for the Tires. As such, Sears had no expectation that Sears' Regular Prices would be validated by the marketplace.
55. In light of the nature of the tire market, Sears' Regular Prices for the Tires, on their own, were unlikely to yield a volume of sales which would be profitable and, as such, did not make rational economic sense.
56. Sears' Regular Prices can only be understood when viewed in the overall context of Sears' strategy as an off-price retailer. Sears' Regular Prices were set in that context with the ulterior motive of attracting customers and generating sales, by creating the impression that the tires when promoted "on sale", represented a greater value than was really the case.

f) Absence of Due Diligence

57. In 1999, in respect of representations it made to the public regarding the Tires, Sears failed to exercise due diligence to ensure compliance with subsection 74.01(3) of Act.

Sears' Pricing Policy

58. Sears recognized that its pricing strategy as an off-price retailer and, in particular, its practice of referencing Regular Prices in the save stories it employed in its advertising, created certain obligations under the Act. In recognition of and to ensure compliance with those obligations, in 1995 Sears instituted a pricing policy in the form of Bulletin M-968 (hereinafter the "Pricing Policy"), which applied to all departments, including Automotive. The Pricing Policy was posted electronically on Sears' internal system for all key staff to review.
59. In terms of the use of price comparison type representations of the sort which underpin this Application, the Pricing Policy required, among other things, that:
- a) "All comparison prices must refer to the last Sears' Price which was active within the preceding twelve months, unless otherwise stated.
Comparison prices which imply savings must be to our regular selling price."; and
 - b) "... the comparison price should reflect a substantial sales volume."
60. Pricing Policy M-968 was in effect throughout 1999, and those persons within

Sears' Automotive who were responsible for ensuring compliance with the Act relied on the policy in connection with the making of regular price representations such as those set out in paragraphs 25 to 34 above.

61. However, Sears failed to adhere to, or even apply, its Pricing Policy in connection with the Representations it made to the public regarding the Tires in 1999.
62. The Pricing Policy required that before a comparison price (i.e., a regular price) for a given item was utilized, that there be "a substantial sales volume" at that price. To determine whether in any given instance there had been a substantial sales volume at a given comparison price, it would of course be necessary for Sears to first determine what volume of sales had been made at that price. Only once that determination had been made, would it be possible for Sears to assess whether the volume of sales at the comparison price could be considered "substantial".
63. However, in 1999, Sears never determined the volume of sales for any of the Tires at the Sears' Regular Price. Sears did not collect data on the volume of sales of the Tires at Regular Prices used in its advertising. Instead, in respect of each of the Tires, Sears combined or aggregated the volume of sales at the Regular Price and at the 2 For Price. In fact, Sears' information gathering

systems were not configured in a manner which would allow Sears to obtain a report or generate data regarding the volume of Tire sales at Regular Prices.

Those systems had been programmed such that they could only provide reports in respect of any given tire that would indicate the volumes of that tire sold at the Regular Price and 2 For Price on an aggregate basis.

64. In view of the foregoing, it was impossible for Sears to assess whether or not there had been a substantial volume of sales at those prices.
65. To the extent that in 1999 Sears did attempt to assess whether there had been a substantial sales volume at the Regular Prices for any of the Tires, the Sears' personnel responsible for compliance with the Pricing Policy considered the total volume of sales for the Tires at both the Regular Price and the 2 For Price on a combined basis. In other words, contrary to Sears' Pricing Policy, Sears failed to consider the volume of Tire sales at Sears' comparison price (i.e. Sears Regular Price).
66. Therefore, prior to making the representations regarding the Tires which are set out in paragraphs 25 to 34 above, contrary to its own Pricing Policy, Sears did not ensure that the comparison price reflected a "substantial sales volume".
67. The practice of considering aggregated Regular Price and 2 For Price sales data

was followed consistently in 1999 despite the fact that only Regular Prices and not 2 For Prices were used as a comparison price when promoting tires on sale and despite the fact that Sears' own buying plans projected no sales for unblemished tires offered by Sears at the Regular Prices.

68. In addition to the foregoing, the Pricing Policy provided that, "Generally speaking, substantial sales volume will be achieved when the product has been sold at regular price for more than 50% of the time it is offered by Sears". However, Sears failed to achieve a 50% sales volume for the Tires at the Regular Prices. Rather, as set out in Table 1 above, Sears sold only 3.79% of the Tires at Regular Prices.
69. Sears also never considered whether its Regular Prices were reasonable in light of competitors' prices in connection with compliance under the Pricing Policy.
70. In addition, notwithstanding the very small sales volumes of the Tires at Regular Prices in 1999, Sears did not adjust its Regular Prices downwards.

The 1999 Memorandum

71. On May 11, 1999, Sears legal department circulated a memorandum (hereinafter the "1999 Memorandum") to all Vice-Presidents. The 1999

Memorandum summarized the changes to the Act relating to “regular selling price claims” which came into force on March 18, 1999. It indicated that if a claim passed either the time or the volume test, “... it will be considered legitimate”.

72. Consistent with this view of compliance, throughout 1999 Sears used a “checkerboard” document as a planning tool to keep track of the frequency with which tires were put on sale. Using the checkerboard, various tires were rotated through promotional sales. Sears used the checkerboard to assist it in an attempt to ensure that the tires that it sold in 1999 were “on sale” less than 50% of the time. The checkerboard was also used to accumulate historical data regarding what tires had been “on sale” in a given period and what the results of those sales promotions had been.
73. The 1999 Memorandum was never converted into a formal Bulletin by Sears, nor was the Pricing Policy amended to reflect the 1999 Memorandum. Sears’ Automotive Retail Marketing Manager in 1999, who was one of the key individuals responsible for ensuring compliance with the Pricing Policy, was not familiar with the 1999 Memorandum and did not recall ever using it in discharging his responsibilities.
74. In any event, the 1999 Memorandum indicated that meeting the volume test

under the Act required that more than 50% of sales must be at or above the “higher comparison price”. As noted above, Sears did not meet the “volume test” with respect to any of the Tires, in that Sears only sold an average of 3.79% of the Tires at Regular Price.

75. In terms of the “time test”, the 1999 Memorandum indicated that the “substantial period of time requirement will be met if the product is offered at the higher comparison price for more than 50% of the time period considered.” The 1999 Memorandum indicated that, in general, the time period considered would be 6 months. As set out in Table 2 (paragraph 44), in respect of 4 out of 5 of the Tires, Sears failed to meet the “substantial period of time requirement” which it had ostensibly established for itself.
76. In addition to the foregoing, the 1999 Memorandum recognized, in passing, that the time test requires that the product at issue must have been “offered for sale, in good faith, for a substantial period of time”. However, the 1999 Memorandum provides no guidance as to how the words “in good faith” should be interpreted or applied. Rather, in terms of the guidance it provides relating to the time test, the 1999 Memorandum ignores the good faith element of the time test and simply prescribes an arithmetic or mechanical approach, which focuses on the percentage of time the product was offered at the comparison price.

77. Sears failed to ensure that the Pricing Policy was amended to take into account the information contained in the 1999 Memorandum. Sears failed to ensure that the 1999 Memorandum was provided to those persons within its Automotive Department who were responsible for ensuring compliance with the Pricing Policy and ultimately subsection 74.01(3) of the Act.
78. Even if Sears had used the 1999 Memorandum in connection with the marketing of tires in 1999, it failed to adhere to its provisions with a view to complying with the ordinary selling price provisions of the Act with respect to the Tires. Further, the 1999 Memorandum was inadequate to achieve compliance with the provisions of the Act even if Sears had incorporated it into its Pricing Policy and adhered to it, in that it failed to adequately address the “good faith” component of the time test, and instead provided only for a mechanical calculation of “substantial period of time” to achieve compliance with the Act.
79. In summary, Sears was not duly diligent in ensuring that its representations to the public in respect of the Tires complied with the Act. In fact, Sears utilized a marketing structure designed to mislead consumers into believing that Sears’ promotions offered better product value than was actually the case. Specifically:
- a) Sears’ own documents reveal that it knew that its Regular Prices on the Tires were not comparable to the regular prices offered by competitors;

- b) Sears' own documents indicate that it knew that its Regular Prices for the Tires were not reasonable in light of competition;
- c) Sears' own documents also indicate that it knew that there was no reasonable likelihood that its Regular Prices would be validated by the market;
- d) in any event, Sears knew or ought to have known that the vast majority of tires are purchased in multiples of two or more, and that as such, its Regular Prices were only relevant for approximately 6% of the market; and
- e) Sears knew or ought to have known that it was failing to generate substantial sales at the Regular Prices for the Tires, yet failed to take action to change either the Regular Prices for the Tires or to stop using those Regular Prices as a reference price for promotional purposes. Instead, Sears advertisements towards the end of 1999 continued to rely heavily on alleged savings off the Regular Price to entice consumers and drive sales.

III) PARTICULARS OF ORDER SOUGHT:

80. An order that the Respondent and any person acting on its behalf or for its benefit, including all directors, officers, employees, agents or assigns of the Respondent, or any other person or corporation acting on behalf of the Respondent, shall for a period of 10 years from the date of such order, cease making, causing to be made, or permitting to be made, by any means whatsoever, for the purpose of promoting, directly or indirectly, the supply or use of a product, representations 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 Respondent where the Respondent, 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; 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.
81. An order that within 45 days from the date of the order, the Respondent publish

or otherwise disseminate a notice or notices, as set out herein:

- a) the notices shall bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the Respondent carries on business and the determination made by the Tribunal with respect to this Application, including:
 - i. a description of the reviewable conduct,
 - ii the time period and geographical area to which it relates, and
 - iii a description of the manner in which the Representations were disseminated, including the names of the publications or mediums employed.

- b) the notices shall be published in the following media:
 - i. in flyers (“pre-prints”) by the Respondent as follows:
 - (1) in two weekly (“core”) flyers as ordinarily distributed by the Respondent; and in one weekend flyer as ordinarily distributed by the Respondent.

(2) the flyers shall be distributed across Canada with a circulation of no fewer than 4,200,000, and shall be distributed in the same manner as normally distributed by the Respondent, including the same linguistic distribution, and shall be distributed in the following proportions:

(a) 84% to be distributed through newspapers;

(b) 15% to be distributed door-to-door; and

(c) 1% to be distributed in-store.

(3) the notices shall fill the entire third page of the flyer, and in any event be no less than 9.5 inches X 9.5 inches in size.

ii in newspapers by the Respondent as follows:

(1) in the language appropriate to the newspaper;

(2) within the first nine pages of the Wednesday edition of each of the following newspapers, or in the case of a newspaper that is not published on Wednesdays, within the first nine pages of an edition of said newspaper:

Burlington Post	Windsor Star
Hamilton Spectator	Brampton Guardian
Ajax/Pickering News	Barrie Examiner
Richmond Hill Liberal	Newmarket Era Banner
Oshawa/Whitby This Week	Markham Economist
St. Catherines The Standard	Belleville Intelligencer
Welland Tribune	Brantford Expositor
Niagara Falls Review	Guelph Daily Mercury
Kitchener/Waterloo Record	Peterborough This Week
Sarnia Observer	Sorel Les Deux Rives
Sarnia Lampton Shopping	L'Express
Ottawa Citizen	La Parole
Cornwall Standard Freeholder	Journal Lac St. Jean
Sudbury Northern Life	L'Union
Fredericton Daily Gleaner	La Nouvelle De Victoriaville
Moncton Times Transcript	Vancouver Sun
Saint John Evening Times Globe	Langley Times
Bonjour Dimanche Outaouais	Vancouver The Province
La Revue De Gatineau	Surrey North Delta Leader
Québec Les Grands Hebdo	Victoria News Group
Journal De Québec	Chilliwack Progress
Journal De Montréal	Abbotsford News
Montréal La Presse	Chilliwack Times
Montréal The Gazette	Abbotsford Times
Journal St. Bruno	Kamloops This Week
Le Courier St. Hyacinthe	Prince George Citizen
Le Quotidien	Calgary Herald
Canada Français	Calgary Sun
Richelieu Dimanche	Edmonton Journal
Le Nord	Edmonton Sun
Le Mirable	Red Deer Advocate
La Tribune	Lethbridge Shopper
Sherbrooke The Record	Medicine Hat News
Le Nouvelliste	Saskatoon Star Phoenix
L'Impact	Winnipeg Transcontinental
Le Regional Le Beauce	Weeklies
La Voix de Sorel	St. John's The Telegram

- (3) the newsprint advertisements shall be no less than 5.625 inches X 9.625 inches in size.

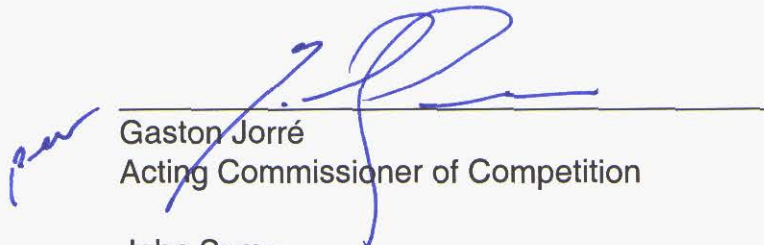
82. An order that the Respondent, Sears, pay an administrative monetary penalty in the amount of \$100,000 for each of the impugned Tires, for a total amount of \$500,000;
83. An order that the Commissioner receive his costs on the within Application; and
84. Such further relief as this Honourable Tribunal may permit.

IV. PROCEDURAL MATTERS

85. The Commissioner requests that this proceeding be conducted in the English language.
86. The Commissioner requests the hearing of this application be heard in the City of Ottawa.
87. The Commissioner requests that documents be in paper format, except for those documents which are voluminous or documents already in electronic format.

88. The address of Sears Canada Inc. is: 222 Jarvis St., Toronto, Ontario, M5B 2B8.

Dated at Gatineau, Quebec, this 22nd day of July, 2002



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