

**THE COMPETITION TRIBUNAL**

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

**AND IN THE MATTER OF** an inquiry pursuant to subsection  
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 74.10 of the  
*Competition Act*;

**AND IN THE MATTER OF** Sears Canada Inc.'s opposition to the  
Application and Sears Canada Inc.'s request for certain relief from  
the Competition Tribunal;

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

COMPETITION TRIBUNAL  
TRIBUNAL DE LA CONCURRENCE

**THE COMMISSIONER OF COMPETITION**

**FILED / PRODUIT**

Date: September 18, 2002

CT- 2002 - 004

Jos La Rose

for / pour

REGISTRAR / REGISTRAIRE

- and -

**Applicant**

**SEARS CANADA INC.**

**Respondent**

OTTAWA, ONT.

# 0002a

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**RESPONDING STATEMENT OF GROUNDS AND  
MATERIAL FACTS OF SEARS CANADA INC.**

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**TAKE NOTICE** that Sears Canada Inc. (“Sears”) opposes the application aforesaid (the “Application”) made to the Competition Tribunal by The Commissioner of Competition (the “Commissioner”) on July 22, 2002, pursuant to subsection 74.01(3) of the *Competition Act*, R.S.C. 1985, c. C. 34, as amended (the “Act”), for certain relief pursuant to section 74.10 of the Act.

**AND TAKE NOTICE** that in support of its opposition to the Application and for the relief requested herein, Sears relies on the following Responding Statement of Grounds and Material Facts.

**AND TAKE NOTICE** that Sears intends to question the constitutional validity, applicability or effect of subsection 74.01(3) of the Act.

**AND TAKE FURTHER NOTICE** that Sears requests the relief set out below, including a determination by the Competition Tribunal that subsection 74.01(3) of the Act is constitutionally invalid and of no force or effect by reason of its infringement of Sears fundamental freedom of commercial expression guaranteed by subsection 2(b) of the *Canadian Charter of Rights and Freedoms*, pursuant to subsections 8(1) and (2) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2<sup>nd</sup> Supp.), as amended.

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**PART I - THE CONSTITUTIONAL INVALIDITY, INAPPLICABILITY OR  
INOPERABILITY OF SUBSECTION 74.01(3) OF THE  
COMPETITION ACT**

**Introduction**

1. The Commissioner seeks the following relief at paragraphs 80 to 84 of the Notice of Application (the "Application"):
  - (a) an order that Sears and any person acting on its behalf or for its benefit, for a period of ten years from the date of such order, cease and desist from engaging in the reviewable conduct alleged in the Application;
  - (b) Sears publish or otherwise disseminate a notice or notices with respect to the reviewable conduct allegedly engaged in by Sears;
  - (c) Sears pay an administrative monetary penalty in the amount of \$500,000; and
  - (d) costs of the Application be awarded to the Commissioner.

2. The Commissioner alleges at paragraph 1 of the Application.

that in connection with the promotion of the supply of five models of automotive tires to the public, Sears engaged in “reviewable conduct” by employing deceptive marketing practices within the meaning of subsection 74.01(3) of the Act.

3. Subsection 74.01(3) of the Act (the “Impugned Legislation”) reads:

“(3) **Ordinary price: supplier’s own** – 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; 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.”

### **The Canadian *Charter of Rights and Freedoms***

4. By paragraph 32(1)(a) of the Canadian *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*,<sup>\*</sup> being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11, as amended (the “*Charter*”), both the Impugned Legislation

and the government of Canada are subject to the *Charter* and the fundamental rights and freedoms guaranteed to all persons by the *Charter*.

**Subsection 2(b) of the *Charter***

5. Subsection 2(b) of the *Charter* guarantees to Sears and others the fundamental freedom of expression, including commercial expression and, in particular, advertising.
6. The practices allegedly engaged in by Sears in connection with commercially advertising, promoting, selling, supplying and representing to the public the prices at which certain tires (or like and other products) were ordinarily supplied by Sears, falls within the scope of the freedom of expression guaranteed by subsection 2(b) of the *Charter*.
7. These alleged practices, including commercial advertising, are expressive activities that convey or aim to convey a meaning, that have expressive content and that have expressive form that is perfectly usual, acceptable and professional and consistent with industry practice.

8. The Impugned Legislation has the purpose or, alternatively, the effect of severely limiting Sears and others' fundamental freedom of expression guaranteed by subsection 2(b) of the *Charter* because:

(a) the purpose of the Impugned Legislation is to restrict or control attempts by Sears and others to convey a meaning, either by directly restricting the content of expression or by restricting a form of expression tied to content; and/or, alternatively,

(b) the effect of the Impugned Legislation is to severely restrict Sears and others' guaranteed fundamental freedom of expression as described below.

9. The Impugned Legislation limits Sears and others' guaranteed fundamental freedom of expression by:

(a) proscribing "reviewable conduct" and imposing both restrictions and controls in relation to ordinary price representations, by any means whatever, including commercial advertising, which is, in effect, a prohibition and



prior restraint impugning on the guaranteed fundamental freedom of expression; and/or

(b) subjecting Sears and others to a civil prohibition on expression that is sanctioned by, and coupled with, a variety of civil and administrative sanctions, remedies and orders that can be obtained against Sears and others in relation to ordinary price representations pursuant to, or arising from, the Impugned Legislation, which deter Sears and others from engaging in commercial advertising.

10. Sears guaranteed fundamental freedom of expression was wrongfully controlled and restricted by (a) the Impugned Legislation itself, (b) the Commissioner's Inquiry (as defined below) and (c) the Application commenced by the Commissioner, pursuant to, or arising from, the Impugned Legislation.
11. Sears was deterred and, in fact, refrained, from commercially expressing itself through advertising by the prospect of the invocation of the Bureau's enforcement process and the prospect of the imposition of various sanctions, restrictions, controls and administrative remedies, including cease and desist orders, publication orders, administrative monetary penalties, contempt of court

and other enforcement orders, in relation to ordinary price representations, pursuant to, or arising from, the Impugned Legislation.

12. The effect of the Impugned Legislation is to control or restrict Sears guaranteed freedom of commercial expression, including its advertising, which activity promotes and aims to convey a meaning reflective of the following principles and values underlying freedom of expression:
  - (a) commercial expression has intrinsic value as expression;
  - (b) freedom of commercial expression protects listeners, including consumers, and allows them to make rational, intelligent and informed economic decisions, which is an important aspect of individual fulfilment and personal autonomy; and
  - (c) commercial expression contributes to healthy economic activity and makes a valuable contribution to the marketplace of ideas that is fostered by the constitutional guarantee of freedom of expression in subsection 2(b) of the *Charter*.

13. In addition, the Impugned Legislation, especially as it has been interpreted and applied by the Commissioner and the Competition Bureau's staff, pursuant to the Ordinary Price Guidelines (the "Guidelines," as further defined below) published by the Commissioner on September 22, 1999, to the advertising allegedly engaged in by Sears and others for the purpose of administering and enforcing the Impugned Legislation, is an unreasonable time, place and manner restriction on Sears fundamental freedom of expression guaranteed by subsection 2(b) of the *Charter*.
  
14. The Impugned Legislation by its intent and/or effect adversely impacts on the content of Sears and others' commercial advertising or, alternatively, adversely interferes with the supply, availability and use of certain products, or determines who may be involved in these, in relation to ordinary price representations, including commercial advertising, proscribed by the Impugned Legislation.
  
15. By subsection 52(1) of the *Constitution Act, 1982*, the Impugned Legislation is, to the extent of its inconsistency with the provisions of the *Charter*, of no force or effect.
  
16. The Impugned Legislation, in whole or in part, is inconsistent with the provisions of the *Charter* and, in particular, has infringed or denied Sears

guaranteed fundamental freedom of expression, contrary to subsection 2(b) of the *Charter* and, therefore, is of no force or effect.

**Section 1 of the *Charter***

17. The Impugned Legislation and its limits on Sears guaranteed fundamental freedom of expression, including commercial advertising, are not reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Consequently, these limits are not justified under section 1 of the *Charter*.
  
18. The Impugned Legislation and, in particular, the parts thereof set out below:
  - (a) do not satisfy the requirement that any limitation on rights and freedoms guaranteed by the *Charter* be a limit prescribed by law under section 1 of the *Charter*, because: (i) they are excessively vague, uncertain and imprecise; (ii) they are subject to unintelligible standards as not to give sufficient guidance for legal debate; and (iii) they are subject to arbitrary application by the Commissioner and the Competition Bureau's staff; and/or,

- (b) do not impair the guaranteed fundamental freedom of expression as little as possible, are excessively broad, and have application to an unnecessarily broad range of activity and, therefore, are constitutionally invasive of Sears fundamental freedom of expression, and are limits that are unreasonable and cannot be justified in a free and democratic society under section 1 of the *Charter*.

### **Particulars**

- 19. The particular parts of the Impugned Legislation, and the unreasonable and arbitrary interpretation thereof in the Guidelines, that are in issue are:

- (1) In paragraph 74.01(3)(a) of the Act – Ordinary price claims relating to actual sales (volume test) – the words:

- (a) **“substantial volume”**

The Guidelines provide that the substantial volume of product requirement will be met if more than fifty per cent of sales are at or above the reference price.

(b) **“reasonable period of time before or after”**

The Guidelines provide that the time period to be considered will be the twelve months prior to (or following) the making of the representation (but may be shorter depending on the nature of the product).

(2) In paragraph 74.01(3)(b) – Ordinary price claims relating to offered prices (time test) - the words:

(a) **“substantial period of time recently before or immediately after”**

The Guidelines provide that:

- (i) the substantial period of time requirement will be met if the product is offered at or above the reference price for more than fifty per cent of the time period considered; and
- (ii) the time period to be considered will be the six months prior to (or following) the making of the representation

(but may be shorter having regard to the nature of the product).

20. Sears and others who are affected directly or indirectly by the Impugned Legislation are:

- (a) denied proper notice of the law;
- (b) wrongfully forced to guess at its meaning;
- (c) required to speculate or surmise how and in what circumstances the Impugned Legislation will apply and will be enforced;
- (d) left to determine without adequate guidance whether their conduct would fall inside or outside the conduct proscribed by the Impugned Legislation;
- (e) faced with Impugned Legislation that allows for arbitrary governmental action – which has been taken against Sears - by the Commissioner and by the Competition Bureau's staff

in enforcing the Impugned Legislation pursuant to, or arising from, the Impugned Legislation and the Guidelines; and

- (f) subjected to restrictions on their constitutionally guaranteed fundamental freedom of expression founded on highly discretionary administrative practices, on unfettered discretion for the exercise of extraordinary power vested and reposed in the Commissioner and on administrative, non-binding and non-legal guidelines which, in essence, define and proscribe the conduct enforced by the Commissioner, purportedly under the Impugned Legislation, and which are not “prescribed by law” within the meaning of section 1 of the *Charter*.

21. Further, or in the alternative:

- (a) the objective of the Impugned Legislation is not of sufficient importance as to be capable of overriding a right guaranteed by the *Charter* and, in particular, the fundamental freedom of expression guaranteed by subsection 2(b) of the *Charter*;



- (b) the Impugned Legislation, or part thereof, is not rationally connected to its objective; and
- (c) the effect of the Impugned Legislation, or part thereof, is disproportionate to its objective, and the adverse effects of its infringement of subsection 2(b) of the *Charter* outweigh the benefits, if any, conferred by the Impugned Legislation.

### **Constitutional Remedies Sought**

22. By reason of the foregoing, Sears requests the following relief from this Honourable Tribunal:

- (a) a determination that the Impugned Legislation, in whole or in part, is inconsistent with the provisions of the *Charter* and, in particular, has infringed or denied Sears fundamental freedom of expression guaranteed by subsection 2(b) of the *Charter* and, therefore, is of no force or effect; and
- (b) an order dismissing the Application with costs.

## **PART II – RESPONDING STATEMENT OF GROUNDS**

23. Sears denies each ground and each material fact alleged by the Commissioner in the Application, except as expressly admitted below and, in particular, denies:
- (a) that it is engaging in or has engaged in the reviewable conduct under subsection 74.01(3) of the Act, as alleged, or at all; and/or
  - (b) that any of its representations as to price were false or misleading in a material respect, as alleged, or at all.
24. Further, or in the alternative, Sears exercised due diligence to prevent the alleged reviewable conduct from occurring.
25. Further, or in the alternative, the relief sought by the Commissioner in paragraphs 80 to 84 of the Notice of Application, including the administrative monetary penalty, is unfair, unreasonable and excessive, having regard to the factors set out in paragraphs 74.10(5)(a) – (h) of the Act.
26. Sears complied fully with the requirements of subsection 74.01(3) of the Act with respect to its promotion of the supply of the five models of tires.

27. Before advertising the prices at which the five models of tires were ordinarily supplied to the public, Sears, having regard to the nature of the product and the relevant geographic markets,
  - (a) sold a substantial volume of the product at that price or a higher price within a reasonable period of time before and after the making of the representation; and/or
  - (b) offered the product at that price or a higher price in good faith for a substantial period of time recently before and after the making of the representation.
28. Sears did not artificially inflate its tire prices to mislead or deceive its customers in any way.
29. Sears offered the products at the prices in “good faith” with Sears customers’ satisfaction, loyalty and interests foremost in mind, having regard to its competition, and other relevant factors, in each local trade area.
30. In particular, Sears had a reasonable and *bona fide* expectation of supplying the five models of tires at their “regular” prices, which were competitive in light of the prices offered by Sears “off-price” competitors for the most comparable (or

lower quality) tires for which no money-back guarantee and inferior or no mileage warranty, customer care or service packages were offered.

31. The prices at which the five tires were ordinarily supplied or offered by Sears were consistent with the prices at which substantial sales of tires were being made by competing retailers in each trade area in which Sears advertised the tires.
32. The Commissioner's allegations are based on inaccurate facts and information, and a fundamental misconception of Sears tire business, Sears discount competitors' tire offerings, the different pricing strategies employed by tire retailers, and the tire marketplace generally.
33. The Commissioner's allegations are based on improperly drawn and unfounded comparisons of Sears tire prices against those of Canadian Tire Corporation.
34. Sears retail pricing policy complied with the requirements of subsection 74.01(3) of the Act. Sears enforced its retail pricing policy diligently and employed a variety of effective audit, verification and like processes to ensure that its prices for the tires were competitive, credible and trustworthy. Sears maintained an inventory tracking system to monitor the quantity of the five tires that were sold and/or offered at both regular and promotional prices.

### **PART III – RESPONDING STATEMENT OF MATERIAL FACTS**

35. In opposing the Application and requesting the relief set out herein, Sears relies on the following material facts.

#### **The Parties**

(a) **The Commissioner of Competition**

36. The Commissioner is appointed under section 7 of the Act.

(b) **Sears Automotive**

37. Sears is a corporation incorporated pursuant to the laws of Canada, having its head office located at Toronto, Ontario, which carries on business by, among other things, offering general merchandise, including automotive tires, to the public through its various business channels, including retail outlets located across Canada.
38. Sears is one of the most trusted retailers in Canada. By offering premium value and a wide range of products and services consistently and competitively, Sears has achieved the highest levels of customer satisfaction, loyalty and trust.

39. Sears Automotive is the business division of Sears responsible for the supply of automotive tires to the public, along with other automotive-related products and services. The material facts set out below and relied on by Sears relate solely to Sears Automotive.
  
40. At all material times, Sears Automotive operated sixty-seven Retail Automotive Centres situated in local geographic areas across Canada. Contrary to the Commissioner's allegations in the Application, the market for the supply and promotion of automotive tires is local, not national.
  
41. Sears Automotive supplied twenty-eight different types or lines of automotive tires to the public at its Retail Automotive Centres in 1999, of which twelve were all-season passenger automotive tires.
  
42. For sales and marketing purposes, the local areas in which Sears Retail Automotive Centres competed in 1999 were located in the following broadly defined regions (the "Regions"):
  - (a) an Eastern Region (comprising New Brunswick, Nova Scotia, Newfoundland and the part of Ontario not covered by the Central Region);

- (b) a Quebec Region;
- (c) a Central Region (comprising Manitoba and part of Ontario); and
- (d) a Western Region (comprising British Columbia, Alberta and Saskatchewan).

### **Background to the Application**

- 43. On or about April 23, 2000, pursuant to subsection 10(1)(b)(ii) of the Act, the Commissioner commenced an inquiry (the “Inquiry”) into certain marketing practices allegedly engaged in by Sears Automotive with respect to the sale of automotive tires between January 1, 1999 and December 31, 1999 (the “Relevant Period”).
- 44. Pursuant to the Inquiry, the Commissioner alleged that Sears Automotive had made certain “ordinary price” representations to its customers with respect to the tires offered for sale by Sears Automotive during the Relevant Period, within the meaning of subsection 74.01(3) of the newly enacted Part VII.I of the Act.

45. By written notice to Sears of the commencement of the Inquiry, the Commissioner relied expressly on certain arbitrary and inflexible standards adopted recently in an Information Bulletin entitled "Ordinary Price Claims," published by the Commissioner on September 22, 1999 (defined above as the "Guidelines"). The Commissioner relies on the Guidelines in enforcing subsection 74.01(3) of the Act, and indeed in this Application.
  
46. During the Commissioner's Inquiry, Sears expended substantial time, money and resources to openly, co-operatively and in a timely manner:
  - (a) provide the Commissioner with voluminous proprietary and confidential records and documents, which it had formatted and organized for easy reference by the Commissioner, related to, amongst other things, the promotion of all the automotive tires supplied to the public by Sears Automotive during the Relevant Period;
  
  - (b) furnish the Commissioner with comprehensive written answers under oath to more than fifty detailed questions asked of it by the Commissioner with respect to the supply of all Sears Automotive's tires and virtually every aspect of



Sears Automotive's business activities during the Relevant Period;

- (c) perform internal investigations and analyses manually and electronically with respect to the supply of all its automotive tires to assist the Competition Bureau;
- (d) respond to the Commissioner's and the Competition Bureau's staff's ongoing demands for information throughout the Inquiry; and
- (e) produce three representatives of Sears Automotive for examination under oath by counsel for the Commissioner for a total number of eight days.

47. As a result of an application for judicial review filed by Sears at the Federal Court of Canada, the Commissioner has limited the scope of the Application to the Relevant Period, in accordance with the conduct of the Commissioner's and the Competition Bureau's staff (and the scope of their investigative activities) throughout the Inquiry.

### **Scope of the Application**

48. Despite the Commissioner's investigation for more than two years of the marketing practices engaged in by Sears Automotive with respect to the twenty-eight different types of automotive tires it offered for sale to the public during the Relevant Period, the scope of the Application is limited expressly to:

- (a) one year (1999);
- (b) the following five all-season passenger tires (the "Tires"), out of twenty-eight types of tires offered by Sears Automotive:
  - (i) the RoadHandler "T" Plus (manufactured by Michelin);
  - (ii) the BF Goodrich Plus (manufactured by BF Goodrich);
  - (iii) the Weatherwise (manufactured by Michelin);
  - (iv) the Response RST Touring 2000 (manufactured by Cooper); and

- (v) the Silverguard Ultra IV (manufactured by Bridgestone);
  
- (c) the supply or promotion of the Tires at Sears Retail Automotive Centres;
  
- (d) specifically pleaded representations allegedly made by Sears Automotive on specific dates (the "Representations"), which were allegedly contained within:
  - (i) Sears Automotive's pre-print entitled "Sears Shop Wish and Win," number C112F599, certain newspaper advertisements and certain in-store promotional leaflets distributed at Sears Retail Automotive Centres, with respect to the Michelin RoadHandler "T" Plus and the Response RST Touring 2000 Tires only;
  
  - (ii) Sears Automotive's pre-print entitled "Sears Store Manager's Best Buy," number C114F599, certain newspaper advertisements and certain in-store promotional leaflets distributed at Sears Retail

Automotive Centres, with respect to the Silverguard Ultra IV Tire only; and

- (iii) Sears Automotive's pre-print entitled "Sears 2 Day Power Sale," number W123W199, with respect to the BF Goodrich Plus and Weatherwise Tires only.

### **Sears Automotive's Limited Market Participation**

- 49. On a local market basis, Sears Automotive held a \_\_\_\_\_ share of sales with respect to the total supply of tires and the supply of all-season passenger tires during the Relevant Period.
- 50. All-season passenger tires are only one type of automotive tire sold by tire retailers in the marketplace.
- 51. The sale of all-season passenger automotive tires represented approximately \_\_\_\_\_ of the total volume of automotive tires sold by Sears Automotive during the Relevant Period, which amounted to approximately \_\_\_\_\_ than the industry average for tire retailers.

52. With respect to the Relevant Period, the supply of the Tires by Sears Automotive comprised:

- (a) \_\_\_\_\_ per cent of the total number of automotive tires sold in Canada;
- (b) approximately \_\_\_\_\_ per cent of the total number of all-season passenger automotive tires sold in Canada;
- (c) approximately \_\_\_\_\_ per cent of the total number of automotive tires sold by Sears Automotive in Canada;
- (d) \_\_\_\_\_ of the total number of all-season passenger automotive tires sold by Sears Automotive in Canada;
- (e) in dollar terms, approximately \_\_\_\_\_ per cent of the total sales generated by Sears Automotive with respect to the sale of all its tires;
- (f) in dollar terms, \_\_\_\_\_ per cent of the total sales generated by Sears Automotive with respect to the sale of all its all-season passenger tires;

(g) five tires of a total of twenty-eight types of tires offered for sale to the public by Sears Automotive; and

(h) five all-season passenger tires out of a total of twelve all-season passenger tires offered for sale to the public by Sears Automotive.

53. Sears Automotive estimates that its total retail share of sales in Canada with respect to the supply of all its tires during the first half of the Relevant Period was

54. Sears Automotive estimates that its total retail share in Canada with respect to the sale of the Tires during the Relevant Period was per cent. With respect to all-season automotive tires in Canada during the Relevant Period, the supply of the Tires by Sears Automotive represented approximately per cent.

55. The sale of automotive tires by Sears Automotive is a aspect of Sears business. The sale of the Tires by Sears Automotive represented per cent of Sears total revenue for the Relevant Period. The sale of all twenty-eight types of tires by Sears Automotive represented of Sears total revenue for the Relevant Period.

**Sears Automotive's General Advertising Practices with Respect to the Tires  
During the Relevant Period**

56. Sears Automotive distributed various advertising and promotional material to its customers with respect to the supply of the Tires in the local geographic market areas in which Sears Automotive Retail Centres competed during the Relevant Period.
57. Generally, \_\_\_\_\_ in the advertisements that Sears Automotive disseminated in both national and local newspapers across Canada during the Relevant Period with respect to the Tires.
58. Sears Automotive advertised the Tires for sale during the Relevant Period by utilizing the following media:
- (a) pre-prints (referred to as "flyers" by the Commissioner), which were distributed by Sears Automotive to its retail customers across Canada in varying quantities;
  - (b) newspapers, published nationally as well as regionally in specific geographic areas;

- (c) in-store leaflets, which reinforced, supported and were identical to advertisements in pre-prints or newspapers, or both, and which were distributed in Sears Retail Automotive Centres across Canada in varying quantities; and
- (d) corporate-wide, national events, which were advertised in newspapers across Canada.

**Sears Automotive's Regular and Reduced Prices for the Tires During the Relevant Period**

- 59. Sears Automotive offered the Tires for sale in each specific market area in which a Retail Automotive Centre competed.
- 60. During the Relevant Period, Sears Automotive offered the Tires for sale at the following prices:
  - (a)



(b)

⋮

(c)

61. Sears Automotive's regular pricing policy during the Relevant Period applied to both the Regular Price and Multiple Regular Price (collectively, Sears "Regular Prices") at which the Tires were offered for sale to the public at Sears Retail Automotive Centres.

62. With respect to the Tires, the Multiple Regular Price was available to Sears Automotive customers who visited a Retail Automotive Centre during the Relevant Period and who:

(a)

(b)

(c)

63.

64.

65.

66.

**The Tires Were Private Labels, National Brand Exclusives or Sears Exclusives**

67. The allegations by the Commissioner contained in paragraphs 10 and 16 of the Application are inaccurate. The Tires were private labels, national brand exclusives or simply exclusive to Sears Automotive. In any case, no other tire retailer in Canada supplied the Tires to the public during the Relevant Period.
68. The RoadHandler "T" Plus, Weatherwise and Silverguard Ultra IV were private label tires, manufactured for sale exclusively by Sears Automotive during the

Relevant Period. The Silverguard Ultra IV Tires displayed Sears brand name only. The RoadHandler "T" Plus and Weatherwise Tires were dual branded.

69. The BF Goodrich Tire was a national brand exclusive tire, which was also manufactured for sale by Sears Automotive exclusively, but which was dual-branded (i.e., this Tire displayed both the manufacturer's and Sears brands).
70. The Response RST Touring 2000, one of Sears Automotive's premium all-season passenger tires during the Relevant Period, was manufactured by Cooper for sale by Sears Automotive exclusively. This Tire displayed Sears brand name only.
71. The Tires were promoted for sale exclusively by Sears Automotive during the Relevant Period.
72. In addition, various premium and industry leading warranty, customer care and service packages were offered by Sears Automotive with the purchase of the Tires. For example, the purchase of the RoadHandler "T" Plus Tire was backed by a six-year unlimited mileage Tread Wearout Warranty. The warranty, customer care and service packages, including a money-back guarantee were offered by Sears Automotive with the Tires.

73. No meaningful comparison between Sears Automotive and one or more of its competitors can be drawn with respect to the prices at which Sears Automotive ordinarily supplied the Tires during the Relevant Period without taking the above factors into consideration.

### **The Highly Competitive Tire Marketplace in Canada**

74. The marketplace for tires, particularly all-season passenger tires, in Canada is highly competitive. Consumers evaluate, weigh and scrutinize the quality and attributes of the tires they purchase for a variety of important reasons, such as the safety of their families, mileage economy, handling and the overall performance of their vehicles. Generally, consumers demand tires of the highest quality, rating and reliability. Although the allegations advanced by the Commissioner in the Application clearly downplay, or simply deny, the importance of these factors in the buying decision of a typical tire consumer, this is not the case.
75. As a result, price is not the primary factor influencing consumers when they purchase tires. Consumers are primarily interested in the safety, quality, features and performance of a tire, together with the warranty, customer care and service packages offered with the tire. Tire consumers are also very sensitive to tire brands, the condition and the age of their current vehicles, their

expectations for their vehicles, the availability of the tire sizes they may wish to purchase and various other factors unrelated to price.

76. For these reasons, generally speaking, there is an abundance of product information and tire specifications from a variety of sources available to consumers who wish to purchase automotive tires. Consumers tend to examine and rely on this information when choosing to buy a particular tire.
  
77. Sears Automotive's customers choose to purchase automotive tires of the highest quality combined with market-leading warranty, customer care and service packages and a money-back guarantee.
  
78. Sears denies the allegations by the Commissioner at paragraph 40 of the Application. As explained in greater detail below, the "intrinsic attributes" of the Tires were not "difficult for most consumers to evaluate," but, rather, were in fact the most important factors evaluated by consumers (and about which they typically gathered an abundance of information) when they made their purchasing decisions. Sears Automotive's 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.

79. Tire purchases are not impulse purchases. Consumers conduct extensive research on tire offerings before making a purchase, including the non-price attributes of tires set out above, and the end or ultimate prices charged or offered by numerous competitors in the various local areas where Sears competes. Contrary to the Commissioner's allegations, "perceived savings" comparisons are made on an "inter-brand" (i.e., between different brands), as opposed to an "intra-brand" (i.e., between the same brands), basis. Consumers compare Sears prices to those in the marketplace.
80. The Tires represented a \_\_\_\_\_ percentage of the total number of all-season passenger tires sold by tire retailers in Canada during the Relevant Period.
81. The Commissioner's allegations contained in paragraph 46 and elsewhere of the Application mischaracterize Sears Automotive's position within the highly competitive tire marketplace in Canada during the Relevant Period.
82. Sears Automotive's major competitor during the Relevant Period was not solely Canadian Tire Corporation ("Canadian Tire").
83. While Canadian Tire was a dominant tire retailer in Canada (enjoying approximately a \_\_\_\_\_ share of tire sales in Canada during the

Relevant Period), it was only one of many tire retailers in competition with Sears during the Relevant Period.

84. Depending on the specific market area in question, Sears Automotive's competitors during the Relevant Period included:

(a) \_\_\_\_\_ (which also sold automotive tires nationally);

(b) \_\_\_\_\_ (which also sold automotive tires nationally);

(c) Independents (such as \_\_\_\_\_ and other independent, regional and/or provincial tire retailers located throughout Canada);

(d) Automotive Dealerships; and

(e) Manufacturers (who operated corporate stores and advertised their tires by various print advertising during the Relevant Period).



## **How Regular Prices Were Determined by Sears**

85. The Regular Prices at which Sears Automotive offered the Tires to its customers were based partly on the prices offered for different tires by its principal competitors, having regard to the specific market area in question. While Canadian Tire was only one of Sears Automotive's "national" competitors, Canadian Tire was not Sears Automotive's major retail competitor in many regional markets across Canada. For example, in Ontario, Sears Automotive faced intense competition in the Greater Toronto Area (one of the largest regional markets in which the greatest volume of tires was sold).
86. Although Canadian Tire typically engaged in "Every Day Low Pricing" ("EDLP") with respect to its supply of automotive tires to the public during the Relevant Period, many of Sears Automotive's other major competitors across Canada, including engaged in "off-pricing" or "value-pricing," similar to Sears Automotive.
87. The Commissioner's comparison between Canadian Tire's and Sears Automotive's prices during the Relevant Period is misleading and meaningless. Moreover, since the Relevant Period, Canadian Tire has changed its tire pricing

strategy to primarily “off-pricing” in order to compete effectively in the marketplace.

88. The automotive tire marketplace in Canada during the Relevant Period was characterized by many different pricing strategies.
  
89. Sears Automotive’s Regular Prices for the Tires were different from Canadian Tire’s EDLPs for its different tires during the Relevant Period because:
  - (a) Sears Automotive and Canadian Tire engaged in two fundamentally different pricing strategies during the Relevant Period;
  
  - (b) Sears Automotive engaged in “off-pricing,” by which the Regular Prices for the Tires were offered in good faith and reflected the intrinsic value of the Tires and competition in the local trade area;
  
  - (c) the Tires were offered for sale at Reduced Prices that were comparable to Canadian Tire’s EDLPs (which is consistent with any “off-pricing” strategy); and

(d) premium and industry-leading warranty, customer care and service packages, as well as a money-back guarantee, were offered with the purchase of the Tires.

90. The Commissioner has failed to properly examine Sears Automotive's Regular Prices against, and in the context of, the ordinary prices offered by other competitors in different market areas. Moreover, no meaningful analysis of Sears Automotive's compliance with subsection 74.01(3) of the Act may be undertaken based on a comparison of Sears Automotive's prices with those of Canadian Tire.

**Sears Automotive's Regular Prices for the Tires Were Reasonable, Justified and Competitive**

91. Sears denies the allegations by the Commissioner at paragraphs 69 and 79(a), (b) and (c) (and elsewhere) of the Application that Sears Automotive "never considered" or "knew" that "its Regular Prices for the Tires were not reasonable in light of competition" and that "there was no reasonable likelihood that its Regular Prices would be validated by the market."

92. The Regular Prices at which the Tires were offered for sale by Sears Automotive were established pursuant to sound pricing principles based in part on its competitors' offerings.
93. The Tires were offered for sale during the Relevant Period at Regular Prices that were comparable to the prices offered by all of Sears Automotive's competitors in each local trade area in Canada.
94. In fact, Sears Automotive's Tire prices were generally lower than those offered by its competitors. Specifically, with respect to the most comparable tires available in the marketplace, Sears Regular Prices for the Tires were consistently lower than the "regular" prices offered by its "off-price" competitors, while its Reduced Prices for the Tires were typically lower than the EDLPs offered by its other competitors.
95. The Tires were offered for sale exclusively by Sears Automotive during the Relevant Period. To the extent there were tires offered for sale by Sears Automotive's competitors during the Relevant Period that were comparable in some respects to any of the Tires, Sears Automotive's Regular Prices were competitive with the prices advertised for those other tires.

96. Sears denies the allegations by the Commissioner that Sears Regular Prices for the Tires were not competitive, for the following reasons:

- (a) the Commissioner's allegations are based on factually inaccurate and improperly drawn comparisons between the Regular Prices at which the Tires were offered for sale by Sears Automotive and the EDLPs offered by Canadian Tire for entirely different tires;
- (b) they are grounded upon the Commissioner's mistaken perception that Canadian Tire was Sears Automotive's only major competitor in the Canadian tire marketplace;
- (c) they fail to consider the quality, attributes and characteristics of the Tires, the money-back guarantee and the premium warranty and service packages offered with the Tires beyond anything offered by Canadian Tire, and consumers' recognition and validation of that added value;
- (d) they fail to recognize and appreciate the variety of pricing strategies employed by tire retailers in Canada;

- (e) they are not supported by the prices offered by any of Sears Automotive's other major competitors (especially the Tire Independents) with respect to other tires offered for sale in the marketplace;
- (f) they fail to identify or realize that Canadian Tire's prices, for the most part, did not include any mileage warranty or "satisfaction guaranteed or money refunded" policy;
- (g) they are based fundamentally on a failure by the Commissioner to recognize that, as an "off-price" retailer, naturally Sears Automotive's Regular Prices for the Tires were higher than the EDLPs offered by Canadian Tire for entirely different tires; and
- (h) they improperly and over-broadly compare Sears Automotive's Regular Prices for the Tires on a "national" basis, whereas the competitiveness of the Regular Prices must be evaluated solely in terms of the unique competitive environment of the specific market areas in which Retail Automotive Centres competed.

97. Sears Automotive fully and reasonably expected to sell the Tires at the Regular Prices that were offered to its customers in good faith.

98. Amongst other factors, during the Relevant Period the Regular Prices for the Tires were established by Sears Automotive fairly, reasonably and competitively (“in light of the competition”) based upon:

(a)

(b)

(c)

(d)

(e) the warranty, customer care and service packages offered by Sears Automotive nationally with the purchase of the Tires including, but not limited to, Sears Automotive's:

- (i) Mileage Wear-Out Warranty;
- (ii) Road Hazard Warranty;
- (iii) 24-Hour Roadside Assistance Warranty on certain of the Tires;
- (iv) free tire rotation;
- (v) Sears Club Points;
- (vi) deferred payment plan;
- (vii) free puncture repair;
- (viii) free installation; and
- (ix) "satisfaction guaranteed or money refunded" policy;

(f)



- (g) the Tires' superior attributes compared to other tires in the marketplace;
- (h) the value-added features and the overall quality, attributes and characteristics of the Tires and consumers' perception of, and expectation for, the Tires generally, including the Tires' overall appearance, construction, tread patterns, performance characteristics, industry and manufacturers' ratings, history, suitability, weather-specific and other factors;
- (i) the market trends and consumers' spending preferences and expectations with respect to the sale of tires in Canada; and
- (j) the nature and the type of the other tires that Sears Automotive offered for sale to the public at the time (i.e., the position of a Tire within Sears Automotive's existing tire line structure).

99

100. In summary, Sears Automotive expressly denies the Commissioner's allegations that it artificially inflated its Regular Prices to mislead its customers in any way and that Sears Automotive knew that its Regular Prices were not reasonable in light of competition.
  
101. 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. To the extent that Sears Automotive's Regular Prices for the Tires were higher than the prices offered by its competitors for comparable tires (which is not admitted, but expressly denied) such higher prices, if any, were competitive, reasonably established, wholly justifiable and, in fact, were validated by Sears Automotive's customers time and again.

**The Relevant Provision of the *Competition Act***

102. The relief sought by the Commissioner in the Application is based on the allegation that Sears engaged in reviewable conduct under subsection 74.01(3) of the Act.
103. Paragraph 74.01(3)(a) of the Act is referred to by the Commissioner in the Guidelines as the “Volume Test.”
104. Paragraph 74.01(3)(b) of the Act is referred to by the Commissioner as the “Time Test.”

**Sears Automotive Complied with Subsection 74.01(3) of the Act**

**(1) Compliance with Paragraph 74.01(3)(b) of the Act: The “Time Test”**

105. 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.

**(a) The Applicable Time Period is at Least Twelve Months**

106. The “substantial period of time recently before” requirement of paragraph 74.01(3)(b) of the Act when flexibly interpreted and applied in this case is at least twelve months preceding the date of the Representations, because:

- (a) the Tires were all-season passenger tires, which were purchased by Sears Automotive’s customers throughout the Relevant Period;
- (b) as alleged by the Commissioner at paragraph 43 of the Application, a twelve-month period of time “would cover all four seasons” during which the Tires were offered for sale to, and purchased by, Sears Automotive’s customers;
- (c)

- (d) the Tires were not offered for sale by Sears Automotive for a period of time shorter than twelve months;
- (e) the Tires were not offered for sale for a period of time shorter than any other automotive tires that were offered by Sears Automotive or its competitors during the Relevant Period;  
and
- (f) although the Tires were offered for sale throughout the Relevant Period, Sears Automotive's customers tended to purchase all-season passenger tires

and, therefore, the application of a twelve-month period would better account for the effects of this consumer preference and behaviour.

**(b) Sears Automotive Offered the Regular Prices for the Tires for a "Substantial Period of Time"**

107. Sears denies the allegations by the Commissioner at paragraph 44 of the Application. The information and data therein and the Commissioner's statistical analysis of the information and data are inaccurate.

108. With respect to the date of each alleged Representation relied on arbitrarily by the Commissioner at paragraph 44 of the Application, Table One below demonstrates Sears Automotive's compliance with paragraph 74.01(3)(b) of the Act.
  
109. Sears has complied with paragraph 74.01(3)(b) of the Act in respect of all the Tires. Table One below incorporates the twelve-month period (as opposed to the six-month period of time applied by the Commissioner) and shows that all tires were offered for a "substantial period of time recently before" and in particular, the Tires meet or exceed even the arbitrary fifty per cent threshold set out in the Guidelines.

**Table One**

**Sears Automotive's Compliance with Paragraph 74.01(3)(b) of the Act with respect to the Tires Offered for Sale at Sears Retail Automotive Centres Pursuant to the Alleged Representations Identified Arbitrarily by the Commissioner at Paragraph 44 of the Application**

<b>Tire</b>	<b>BFGoodrich Plus</b>	<b>Response RST Touring 2000</b>	<b>Silverguard Ultra IV</b>	<b>RoadHandler T Plus</b>	<b>Michelin Weatherwise</b>
<b>Date of Alleged Reference Price Representation</b>	December 18, 1999	November 8, 1999	November 22, 1999	November 8, 1999	December 18, 1999
<b>Start and End Dates of the Applicable Twelve-Month Period ("Period of Analysis")</b>	December 19, 1998 to December 17, 1999	November 9, 1998 to November 7, 1999	November 23, 1998 to November 21, 1999	November 9, 1998 to November 7, 1999	December 19, 1998 to December 17, 1999
<b>Total Number of Days During Period of Analysis</b>					
<b>Total Number of Days During Period of Analysis on Which the Tire was Offered for Sale at a Sears Reduced Price</b>					
<b>Percentage of Time During Period of Analysis for Which the Tire was Offered for Sale at a Sears Reduced Price</b>					
<b>Total Number of Days During Period of Analysis on Which the Tire was Offered for Sale at Sears Regular Prices</b>					
<b>Percentage of Time During Period of Analysis for Which the Tire was Offered for Sale at Sears Regular Prices</b>					

110. Table Two below indicates the average percentages of time at which both the Tires and all of the all-season passenger tires offered by Sears Automotive were offered for sale at Sears Regular Prices during the periods of 1999, 2000 and, specifically, the twelve months following the date on which the Commissioner published the Guidelines. As demonstrated in columns two and three of Table Two, the Tires, taken together, were advertised at Regular Prices for more than fifty per cent of the time during the specified time periods.

**Table Two**

**Percentage of Time at which the Tires and All of Sears Automotive's All-Season Passenger Tires were Offered for Sale at Sears Regular Prices During Specified Periods of Time**

	January 1 to December 31, 1999 (1)	January 1 to December 31, 2000 (2)	September 22, 1999 to September 22, 2000 (being the twelve-month period immediately following the publication of the Guidelines by the Commissioner) (3)
Percentage of Time at which the Tires were Offered for Sale by Sears Automotive at Sears Regular Prices			
Percentage of Time at which All of the All-Season Passenger Tires Offered by Sears Automotive were Offered for Sale at Sears Regular Prices			



**(c) The Relevant Geographic Markets**

111. Sears denies the allegations by the Commissioner at paragraph 41 of the Application. These allegations affirm the Commissioner's misconception of the nature of the competitive tire markets in Canada and, particularly, the way in which Sears Automotive competed in the market during the Relevant Period.
112. The Commissioner's allegations that Sears Automotive did not offer Regular Prices for the Tires in "good faith" are based on his allegation that the "relevant geographic market" in this case is all of Canada.
113. In this case, the "relevant geographic market," within the meaning of paragraph 74.01(3) of the Act, is not Canada at large (as alleged by the Commissioner) but, rather, each separate and local geographic market in which Sears Retail Automotive Centres competed during the Relevant Period.
114. Each of these local market areas must be examined and evaluated independently in order to apply paragraph 74.01(3)(b) of Act (and, particularly, the requirement for "good faith") for the following reasons:
  - (a) the market area served by any particular Sears Retail Automotive Centre must be determined depending on a

variety of factors, such as consumers' buying and travel preferences, their behaviour, demand and supply for the Tires, and the presence of competitors and alternative product choices in the local area in question;

- (b) properly identifying Sears Automotive's competitor(s) (including its major competitors) with respect to the supply of all-season passenger tires depends substantially upon the local geographic market in question (i.e., Sears Automotive competed with different retailers in different specific market areas across Canada);
- (c) while Sears Automotive may have competed substantially with a certain competitor in a particular geographic market, that competitor may have had no meaningful presence in other specific trade areas in which Sears Automotive also competed aggressively;
- (d) consumers' buying patterns varied widely from market area to market area;

- (e) different pricing strategies were employed by Sears Automotive's competitors in different geographic trade areas across Canada;
  - (f) Sears Automotive's competitors offered different all-season passenger tires at different prices in different market areas across Canada during the Relevant Period;
  - (g) the volume, price and type of all-season passenger tires sold during the Relevant Period depended upon the specific market area of Canada in question; and
  - (h) there were no Sears Automotive Retail Centres located in many of the market areas for tires in Canada (in which Sears competitors sold all-season passenger tires) during the Relevant Period.
115. Any determination of whether Sears Automotive offered Regular Prices for the Tires in "good faith" (and, particularly, whether Sears Automotive "inflated" its Regular Prices, as alleged by the Commissioner) would depend heavily on analyzing the unique competitive environments of the local trade areas in

question. This analysis cannot properly be made on a national basis, or by making reference to merely one of Sears "national" competitors.

116. The Commissioner has failed to allege a proper geographic market for the purpose of this case, as required by the Act. It is immaterial that Sears Automotive employed \_\_\_\_\_ in each local market area. Nor it is material that Sears Automotive utilized \_\_\_\_\_ advertising for the Tires across Canada. An assessment of whether Sears Automotive offered Regular Prices for the Tires in "good faith" must be conducted in the context of each specific market area in which Sears Retail Automotive Centres competed.

**(d) Sears Automotive Offered the Tires for Sale at Regular  
Prices in "Good Faith" During the Relevant Period**

117. Sears expressly denies the Commissioner's allegations that it "inflated" the Regular Prices at which the Tires were offered for sale and that those prices were not offered to the public in "good faith" during the Relevant Period or otherwise.

118. The Regular Prices at which Sears Automotive offered the Tires for sale before, during and after the Relevant Period were established and offered to the public

in good faith, having regard to the nature of the Tires and each specific trade area in which the Tires were offered for sale, 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 anything 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) Sears Automotive offered with every Tire a tire warranty 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.

- 119. As stated above, Canadian Tire was not Sears Automotive’s only major competitor during the Relevant Period, either nationally or in any specific local market area. Furthermore, in those regions in which both a Canadian Tire store and a Retail Automotive Centre were located, they may not have competed due to the significant geographic distance between the retail stores.
- 120. However, the Commissioner’s allegations at paragraphs 46 to 56 of the Application incorrectly assume this to be the case. For example, at paragraph 46 of the Application, the Commissioner improperly identifies Canadian Tire as Sears Automotive’s “principal competitor in the replacement tire market in 1999, particularly with respect to private label tires.”

121. While Canadian Tire may have been one of many competitors of Sears Automotive in a specific market area, Canadian Tire was not Sears Automotive's only competitor. Sears Automotive's compliance with paragraph 74.01(3)(b) of the Act should not be determined by measuring its pricing activities solely against those of Canadian Tire.

(e) The Commissioner's Mischaracterization of the "Competitive Profiles" Created by Sears Automotive

122. The Commissioner's allegations throughout the Application that Sears Automotive did not offer Regular Prices for the Tires in good faith are based on his comparison of those Regular Prices against Canadian Tire's EDLPs for entirely different tire offerings. These allegations reflect a fundamental misinterpretation of the meaning of, and reason for which, the "Competitive Profiles," identified at paragraphs 48 to 50 of the Application, were created by Sears Automotive personnel.

123. In particular:

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i)

(j) they do not indicate any comparison of Sears Automotive's Regular Prices for the Tires against the prices for tires offered by other competitors in each specific local geographic market area in which Sears Retail Automotive Centres competed.

124. Accordingly, Sears denies that the Competitive Profiles created by Sears Automotive establish that “Sears Regular Prices for the Tires were clearly not comparable to the regular prices for those competitive offerings” (as alleged at paragraph 50 of the Application) and that “Sears own documents reveal that it knew that its regular prices on the tires were not comparable to the regular prices offered by competitors” (as alleged at, amongst others, paragraph 79(a) of the Application).
  
125. Further, the Commissioner alleges at paragraph 48 of the Application that Sears Automotive identified the Motomaster Touring LXR tire as the “competitive offering” to Sears Automotive’s Silverguard Ultra IV. This allegation is misleading. There was no tire available in Canada during the Relevant Period remotely comparable to Sears Automotive’s Silverguard Ultra IV Tire, in terms of quality and tread design.
  
126. Sears denies the Commissioner’s allegation that Sears Automotive did not offer Regular Prices for the Tires in good faith because they were higher than the EDLPs offered by Canadian Tire for different tires.
  
127. The Commissioner has failed to set out any material facts in the Application dealing expressly with the “regular” prices offered for tires by Sears

Automotive's competitors other than Canadian Tire, particularly those Tire Independents who were also engaged in "off-pricing."

128. Canadian Tire engaged in a different pricing strategy from Sears Automotive and did not offer for sale any tires directly comparable to the Tires during the Relevant Period. Specifically:

(a)

(b)

(c)

(d)



**(f) The Commissioner's Mischaracterization of Sears  
Automotive's "Buying Plans"**

129. Sears denies the allegation by the Commissioner at paragraph 53 of the Application concerning Sears Automotive's alleged use of "Buying Plans" for the Tires.

130.

131.

Contrary to the Commissioner's allegations, the Buying Plans do not indicate, expressly or by implication, that Sears Automotive perceived Canadian Tire's Motomaster AW Plus tire as comparable to its BF

Goodrich Tire.

132. Sears denies the Commissioner's allegations at paragraph 53 of the Application.

133. Sears denies the Commissioner's allegation in paragraph 51 of the Application - that Sears Automotive "could not command price premiums of 25% to 65% over its competitors" - for the following reasons:

- (a) it is based solely on a comparison of the Regular Prices for the Tires against Canadian Tire's EDLPs for entirely different tires of different quality and for which no mileage warranty and consumer service packages were offered;
- (b) it is not supported by any factual information regarding a comparison of Sears Automotive's Regular Prices for the Tires against the "regular" or "ordinary" prices at which the most comparable tires were offered by other "off-price" retailers in specific market areas;
- (c) Sears Automotive's Regular Prices for the Tires were the same or less than the "regular" prices offered by its major "off-price" competitors for the most comparable tires in most, if not all, specific geographic market areas;
- (d) it fails to appreciate that different tire retailers in Canada employed different legitimate pricing strategies (i.e., "off-pricing," EDLP, etc.), all of which were recognized, expected and accepted by tire consumers generally;

- (e) it expressly or impliedly purports to make a comparison between tires of like quality and for which comparable warranty and service packages were offered, which is simply not the case;
- (f) in view of Sears Automotive's "off-price" strategy for tires, it cannot be said that the difference between the Regular Price for a Tire and the EDLP for an entirely different tire sold by Canadian Tire was an attempt by Sears Automotive to "command price premiums of twenty-five percent to sixty-five percent over its competitors"; and
- (g) it relies upon inaccurately low numbers for the total volume of Tires sold by Sears Automotive at Regular Prices during the Relevant Period.

134. By reason of the foregoing, the Regular Prices at which Sears Automotive offered the Tires for sale during the Relevant Period were established and offered to the public in good faith, having regard to the nature of the Tires and each specific market area in which Sears Retail Automotive Centres competed.

135. The Commissioner has failed to plead sufficient material facts to establish that Sears Automotive failed to make an honest estimate of the actual prevailing retail prices for tires in each specific market area in which it competed. Sears acted in good faith in establishing its Regular Prices for the Tires that did not appreciably exceed the price at which substantial sales of tires were being made by tire retailers throughout the country and in each specific market area in which it operated. In addition, the facts alleged by the Commissioner fail to demonstrate that the Regular Prices advertised by Sears were in excess of the highest prices at which substantial sales of tires were being made in every trade area in which the advertisements were published. There are no material facts alleged by the Commissioner tending to show any intention on the part of Sears to establish a basis for a deceptive comparison in any local trade area.

(2) **Compliance with Paragraph 74.01(3)(a) of the Act: The “Volume Test”**

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

137. Having regard to the nature of the Tires and the relevant geographic markets in question, during the Relevant Period (and, specifically, the periods of time chosen arbitrarily by the Commissioner in the Application with respect to the Representations), Sears had previously sold a substantial volume of the Tires at

those Regular Prices within a reasonable period of time before those Regular Prices were advertised to the public.

**(a) The Applicable Time Period is at Least Twelve Months**

138. For the reasons given above in connection with paragraph 74.01(3)(b) of the Act (and those given by the Commissioner at paragraph 43 of the Application), the reasonable amount of time necessary to evaluate properly in this case whether a substantial volume of the Tires were sold previously at Regular Prices is at least twelve months immediately preceding the date on which those Regular Prices were allegedly offered to the public.

**(b) Sears Automotive Sold a “Substantial Volume” of the Tires at Their Regular Prices**

139. Sears denies the allegations, information and data at paragraph 42 of the Application.

140. Many of the tire purchases by Sears Automotive’s customers during the Relevant Period were for replacement tires, for which no sense of urgency or immediacy was perceived by Sears customers. Accordingly, customers rationally and thoroughly compared product alternatives, both in the

marketplace and within Sears Automotive's full merchandise line, and could purposely delay their purchasing decision until the tires they wished to purchase were offered at Reduced Prices.

141. Rather than purchasing lower quality tires offered by competitors for which inferior or no warranty packages or guarantee are offered, Sears Automotive's customers either purchase tires at Regular Prices or, to the extent they may not perceive any urgency for their purchase, delay their purchase until Sears Automotive offers the tires at Reduced Prices.
142. During the Relevant Period, Sears Automotive sold to its customers approximately                      units of the Tires at both Regular and Reduced Prices.
143. For the substantial periods of time in the Relevant Period during which the Tires were offered for sale in good faith at Regular Prices, Sears Automotive sold to its customers more than                      units of the Tires at Regular Prices. These sales represented more than                      of the total number of Tires sold by Sears Automotive to its customers during the Relevant Period.
144. During the twelve months preceding November 8, 1999 (being the date selected arbitrarily by the Commissioner at paragraph 42 of the Application), Sears

Automotive sold to its customers more than                    units of the RoadHandler  
“T” Plus Tire at Regular Prices.

145. During the twelve months preceding December 18, 1999, Sears Automotive sold to its customers                    units of the Weatherwise Tire and                    units of the BF Goodrich Tire at Regular Prices.
146. Similarly, during the twelve months preceding November 22, 1999, Sears Automotive sold to its customers                    units of the Silverguard Ultra IV Tire at Regular Prices.
147. During the twelve months preceding November 11, 1999, Sears Automotive’s customers validated the Regular Prices offered for the Response RST Touring 2000 Tire by purchasing                    units of the Tire at those Regular Prices.
148. Sears Automotive complied fully with the requirements of paragraph 74.01(3)(a) of the Act.



## **Sears Retail Pricing Policy**

### **(a) Background of the Policy**

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153.

**(b) The Policy Complied with Subsection 74.01(3) of the Act**

154. Contrary to the Commissioner's allegations, both the Policy and the manner in which it was interpreted and enforced by Sears Automotive personnel complied fully with the requirements of subsection 74.01(3) of the Act, notwithstanding that the Policy was issued in advance of subsection 74.01(3) of the Act coming into force.

(i)

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(a)

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(a)

(b)

157. Sears denies the Commissioner's allegations contained in paragraph 61 of the Application.

158. As explained in greater detail below, prior to and during the Relevant Period, Sears Automotive had firmly established a variety of effective processes by

which it ensured when a “substantial sales volume” of a Tire had been achieved (which, as stated in the Policy, would “depend on the nature of the product and industry”), or when a Tire had been offered for sale at Regular Prices for a period of time that complied strictly with both the requirements of the Policy and of subsection 74.01(3).

159. Sears Automotive personnel who were responsible for the advertising programs for the Tires during the Relevant Period gathered, assembled and analysed detailed and reliable market and sales data and information on which they relied to ensure that the sale of the Tires during the Relevant Period complied with the terms of the Policy and of subsection 74.01(3) of the Act.
  
160. With respect to offering Regular Prices for the Tires, Sears denies the Commissioner’s allegations at paragraph 62 of the Application that “it would of course be necessary for Sears to first determine what volume of sales had been made at that price.”

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168. Sears denies the allegations by the Commissioner set out in paragraph 76 of the Application with respect to the element of “good faith” in the “Time Test” promulgated by paragraph 74.01(3)(b) of the Act. Specifically, Sears Automotive always offered the Tires for sale in “good faith,”

169. In addition, Sears states that:

- (a) no guidance is provided in subsection 74.01(3) as to the meaning of “good faith”;
- (b) Sears Automotive acted with due diligence in ensuring that each advertisement was to be “truthful and accurately describe and illustrate the product, and that every advertisement be free from ambiguous or incomplete representation”;

(c)

(d) as set out in greater detail above, Sears Automotive fully expected its customers to validate the Regular Prices for the Tires (and such prices were in fact validated) during the Relevant Period; and

(e) as explained in greater detail above, Sears Automotive offered both Regular and Reduced Prices for the Tires that were reasonable and justified in light of its local area competitors' offerings.

170. In summary, Sears Automotive diligently engaged a variety of internal processes and procedures by which it ensured that the Tires were offered for sale to the public properly

171. Sears Automotive complied with either or both the "Time Test" or the "Volume Test" with respect to its offers to sell each Tire at Regular Prices during the

Relevant Period and, therefore, Sears Automotive has complied fully with subsection 74.01(3) of the Act.

**Sears Automotive's Audit, Verification and Editorial Procedures for the Tires**

172. To ensure compliance with subsection 74.01(3) of the Act, Sears Automotive employed a number of audit, verification and other procedures in connection with the prices at which the Tires were offered for sale during the Relevant Period. These processes are described more fully below.

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**(b) The Retail Advertising Validation Process for the Tires**

176. Sears Automotive personnel validated all of the promotions of the Tires during the Relevant Period, pursuant to the requirements of the Policy and subsection 74.01(3) of the Act.

**(c) Ongoing Training, Education and Mentoring**

177. Every Sears Automotive Retail Manager and Sales Associate who may have been involved in some way with the supply of the Tires to the public was and continues to be trained with respect to the Policy and Sears Automotive's advertising practices and operations generally. For example, new Automotive Managers and Sales Associates were trained and instructed on:

- (a) how to operate Sears Automotive's point-of-sale terminals properly by ensuring the prices at which customers purchased the Tires complied with the Policy and existing marketing and advertising rules;
- (b) the proper manner in which to address Sears Automotive's customers and to respond effectively and fully to their requests (such as product information inquiries, etc.) with respect to the uniqueness and quality, attributes and characteristics of the Tires and their corresponding warranty packages; and
- (c) how to handle and manage effectively customer complaints, if any, concerning the Tires or the prices at which they were offered for sale.

178. In addition, each new Automotive Sales Associate was teamed-up with an experienced Sales Associate who acted as a mentor and advised the new Associate of his or her duties and responsibilities with respect to the sale of the Tires during the Relevant Period.

179. New Sears Automotive Sales Associates were required to review and understand thoroughly the product information for the Tires (provided by both the manufacturers of the Tires and Sears Automotive), as well as to obtain “hands on” experience on the unique features and attributes of the tires under the guidance of the Associates’ mentors.
  
180. In order to assist new Associates to further understand and appreciate the features and attributes of the Tires, and to convey this product information effectively to customers, Sears Automotive offered both Managers and Associates ongoing product knowledge-related seminars designed to assist them in providing knowledgeable responses to their customers inquiries. Various training and product information-related materials were given to the Managers and Associates during or before these seminars.
  
181. Finally, when each Tire was first offered for sale at Sears Retail Automotive Centres, Sears Automotive offered its Managers and Associates detailed product-knowledge training and education with respect to the Tire.

**Sears Automotive Exercised Due Diligence**

182. By reason of its compliance with the requirements of subsection 74.01(3) of the Act and the Policy before, during and after the Relevant Period, Sears asserts



that no exercise of due diligence by Sears Automotive was necessary. In any event, at all material times Sears did exercise due diligence.

183.

184.

185. Following the coming into force of subsection 74.01(3) of the Act (and the publication of the Guidelines by the Commissioner), Sears and/or Sears Automotive:

(a)

(b)

(c)

(d)

- (e) consistently reacted to changing market forces to ensure that its Regular Prices, which were continuously validated by the marketplace, were always competitive with, or reasonably justifiable in light of, the most comparable offerings by its competitors, if any; and
  
- (f) despite the absence of any proper guidance in subsection 74.01(3) of the Act, always offered the Tires for sale to the public in good faith and competitively with a view to generating sales legitimately by providing the best possible product value to consumers, while maintaining high levels of customer satisfaction and loyalty above and beyond those of any of its competitors.

186. In considering the due diligence exercised by Sears Automotive to prevent reviewable conduct under subsection 74.01(3) of the Act, proper regard must be had to the following factors:

- (a) subsection 74.01(3) of the Act did not come into force until March 18, 1999;
- (b) the Guidelines, based expressly on which the Commissioner commenced both the Inquiry and the Application, were not published by the Commissioner or made available officially to retailers in Canada until September 22, 1999 – almost 9 months into the period for which Sears' conduct is attacked herein;
- (c) the Guidelines are not law in Canada and should neither be interpreted nor accepted as such – in fact, they apply fixed and predetermined weights to legal concepts that must be applied flexibly and in a context-specific manner;
- (d) as a matter of public policy and of the commercial reality in Canada, a reasonable amount of time is necessary for large retailers of general merchandise to comply with new pricing-related regimes and to adjust their pricing behaviour (to the extent any adjustment may be required) to comply fully with the requirements of new legislation or guidelines;

- (e) fair notice and a reasonable lead-in time must be afforded to general merchandise retailers in Canada to comply with new pricing-related legislation and guidelines, especially in the case of very large retailers of general merchandise with diverse national operations and multiple business divisions, such as Sears;
  
- (f) even if a large retailer were able to have made changes immediately to its "ordinary price" advertising following the coming into force of subsection 74.01(3) and the Guidelines, statistically speaking, a certain amount of time would likely have to pass before any specific comparative price claim made thereafter would comply absolutely with the requirements of the new Guidelines, based on the period of time necessary for the proper analysis of such a comparative claim;
  
- (g) the Commissioner's exercise of his statutory authority to commence the Inquiry and the Application based solely on representations allegedly made by Sears Automotive less than two months after the Commissioner published the Guidelines,

and merely six months after the relevant legislation came into force;

- (h) subsection 74.01(3) is a new civil legislative provision of the Act for which there has been no judicial scrutiny or consideration; and
- (i) subsection 74.01(3) promulgates vaguely stated requirements, but offers little or no guidance to retailers as to the efforts required of them to comply with those requirements.

**Sears Automotive's Customers are Rational and Informed Decision-Makers**

187. Sears expressly denies the allegations by the Commissioner that Sears Automotive offered its Regular Prices for the Tires to deceive or mislead its customers in any way.

**(a) The Representations Were Not False or Misleading**

188. The Regular Prices at which the Tires were offered for sale to the public by Sears Automotive during the Relevant Period were not false or misleading in a material, or any, respect.

189. The Regular Prices offered for the Tires in the Representations were, in fact, reasonably comparable to the prices being offered by many, if not most, of the principal tire retail outlets in each individual trade area in which Sears Automotive competed.

(b) **Materiality**

190. Neither the general impression nor the literal meaning of the Representations relied on by the Commissioner deceived or misled Sears Automotive's customers either materially, or at all, for the following reasons:

- (a) they did not convey any information that was wrong;
- (b) they did not actually affect Sears customers' choice of, or conduct regarding, any of the Tires;
- (c) consumers were fundamentally influenced by the quality and attributes of the tires they purchased for a variety of important reasons, such as reliability, safety, mileage economy, rating, handling, performance, money-back guarantee and warranty,

customer care and service packages offered with the Tire, and the overall performance of their vehicles;

- (d) the net impressions of the Representations, evaluated from the perspective of the audience to whom the Representations were directed;
- (e) 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 of 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;
- (f) whether any particular discount had an impact on consumers depends strongly on the identity of the retailer and the consumer's experience with the retailer;
- (g) consumers actually purchased the Tires from Sears Automotive at Regular Prices even though they had knowledge and awareness of discount or EDLP tire retailers in their vicinity, including



- (h) the longstanding loyalty of Sears Automotive's customers is incompatible with the inference that the public was attracted or remained attracted to Sears Automotive by allegedly erroneous impressions concerning the price advantages offered by Sears Automotive;
- (i) consumers in Canada are familiar with reference price advertising, which acts as a signal to consumers of the type of retailer that is advertising;
- (j) Sears Automotive's customers clearly understood that they could have bought other tires at discount and EDLP prices from other retail stores in their neighbourhoods and they understood that the savings they realized were based on the regular, retail price, which was not necessarily the least expensive price at which they could have purchased the tires locally, if they had chosen to do so;
- (k) the tire marketplace is characterized by a high degree of competition, which imposes significant constraints on the likelihood of material, or any, deception;

(l) consumers in the tire marketplace 'shopped around' and were generally aware of the various retailers' prices for tires and how much they would have saved by buying a tire from one retailer as opposed to another;

(m) Sears Automotive's customers cannot be said by the Commissioner to be ignorant, unthinking and credulous, nor can the Representations be measured by anything other than the standard of knowledge and market wisdom possessed by Sears Automotive's customers; and

(n) the Representations must be viewed in their entirety.

191. Sears Automotive's customers perceived and validated the entire "value" presented by the purchase of a Tire at a Regular Price by recognizing not only a competitive price, but the money-back guarantee and warranty, service and customer support features offered by Sears Automotive within those Regular Prices.

192. In making rational decisions, Sears Automotive's customers also relied on the knowledgeable, professional and highly-trained sales associates employed by

Sears Automotive, who were well-informed and aware of competitors' offerings in the marketplace.

193. In light of the multitude of tire retailers in Canada, the different pricing strategies employed by each and the abundance of product information available in the marketplace and at the point-of-sale, Sears Automotive customers were able to assess the value of automotive tires sold not only by Sears Automotive, but also by Sears Automotive's competitors.

**No Relief Should be Granted in this Case**

194. Sears denies that the Commissioner is entitled to the relief requested in paragraphs 80 to 84 of the Application and requests, in any event, that the Tribunal exercise its discretion not to make any order under section 74.10.

**(i) Paragraph 80 of the Application**

195. The relief sought by the Commissioner at paragraph 80 of the Application is improper for the following reasons:

- (a) the Commissioner has failed to properly limit the scope of the relief to the Tires only, which comprises the scope of the Application;
  - (b) no relief in the nature of prohibition with respect to the Tires is required by reason of Sears Automotive's past, present and future compliance with subsection 74.01(3) of the Act;
  - (c) the duration of the order sought is excessive and unnecessary if the purpose of seeking the relief is to ensure that Sears engages in conduct that is in conformity with subsection 74.01(3) of the Act, which is already the case; and
  - (d) the other grounds and material facts stated above.
- (ii) **Paragraph 81 of the Application**

196. The relief sought by the Commissioner at paragraph 81 of the Application should not be granted for the following reasons:

- (a) the relief is not aimed at ensuring conduct by Sears that is in conformity with Part VII.I of the Act;

- (b) the order sought exceeds the relief that is available under the Act;
- (c) as explained in greater detail above, before and after the coming into force of subsection 74.01(3) of the Act, Sears exercised due diligence to prevent entirely the reviewable conduct in which the Commissioner alleges it has engaged;
- (d) granting the relief requested will not bring any alleged reviewable conduct by Sears to the attention of the class of persons likely to have been reached or affected by such conduct, if any;
- (e) the relief sought is not properly limited in scope to the specific media in which Sears Automotive advertised the Tires only, or to the class of persons likely to have been affected by Sears alleged reviewable conduct;
- (f) the relief could not be implemented by Sears within the unreasonably short time constraints requested by the Commissioner;

(g)

(h)

**(iii) Paragraph 82 of the Application**

197. The relief sought by the Commissioner at paragraph 82 of the Application should be denied for the reasons set out in paragraphs 74.10(5)(a) - (h) of the Act as well as:

- (a) the facts set out above, including the fact that Sears exercised due diligence;
  
- (b) the amount sought exceeds the clear statutory limit of \$100,000 (by \$400,000) set out in subparagraph 74.10(1)(c)(ii);
  
- (c) granting an order with respect to each Tire would be unnecessary, abusive and inconsistent with both the requirements and objectives of the Act and the other relief sought by the Commissioner, as opposed to granting one order with respect to all the Tires (in the same way that the Commissioner seeks one order in the nature of prohibition with respect to all of Sears products collectively, pursuant to paragraph 80 of the Application);
  
- (d) the total administrative monetary penalty (and the penalty for each Tire individually) sought by the Commissioner is excessive, having regard to the following factors:

- (i) as explained above, the representations allegedly made by Sears with respect to the Tires were not false or misleading in a material or any respect;
- (ii) Sears has demonstrated repeatedly a willingness to revise its practices to comply with the Act, should such be necessary;
- (iii) Sears Automotive's alleged conduct, even if true, would not have impacted negatively on competition or consumers in the specific market areas in question or the aggregated tire market;
- (iv) as it relates to price considerations, consumers are primarily interested in the actual price they pay for tires and are motivated in their buying decisions by factors equal to, or more important than, regular prices;
- (v) consumers were not actually deceived or harmed;



(vi) Sears voluntarily conducted and performed extensive internal analyses and investigation to assist the Bureau during the Inquiry; and

(vii) the other grounds and material facts stated above.

### **General Matters**

198. On a balance of convenience, Sears requests that the hearing of the Application be conducted in the English language at Toronto, Ontario.
199. Sears requests that a timetable be established by this Honourable Tribunal for the conduct of the Application.
200. Sears also requests that any records on which the Commissioner intends to rely at the hearing of the Application be presented to the Tribunal and made available to Sears in both paper format and electronically.
201. Sears intends to call both non-expert and expert witnesses at the hearing of the Application.

**Relief Requested by Sears**

202. In addition to the relief set out in Part I (Constitutional Relief), Sears requests the following relief from this Honourable Tribunal:

- (a) an order dismissing the Application;
- (b) an order terminating the Inquiry by the Commissioner;
- (c) an order awarding Sears its costs of the Application and all related matters preceding and following the Application, fixed by the Tribunal and payable forthwith by the Commissioner; and
- (d) such further and other relief as to this Honourable Tribunal may seem fair and just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED TO  
THIS HONOURABLE TRIBUNAL ON THIS 18<sup>TH</sup> DAY OF  
SEPTEMBER, 2002.

**OGILVY RENAULT**  
Barristers and Solicitors  
Patent and Trade-mark Agents  
Suite 1100, P.O. Box 11  
Merrill Lynch Canada Tower  
Sun Life Centre  
200 King Street West  
Toronto, Ontario, Canada  
M5H 3T4

**William W. McNamara**  
**Marvin J. Huberman**  
**Brian A. Facey**  
**Jason Ward**

Tel: (416) 340 - 6000  
Fax: (416) 977 - 5239

Solicitors for the Respondent,  
Sears Canada Inc.

**TO: THE DEPARTMENT OF JUSTICE**  
Competition Law Division  
Place du Portage, Phase 1  
50 Victoria Street  
Hull, Quebec  
K1A 0C9

**John Syme**

Tel: (819) 953-3901  
Fax: (819) 953-9267

Counsel for the Applicant,  
The Commissioner of Competition