Competition Tribunal **Tribunal de la Concurrence**

Citation: *Commissioner of Competition* v. *Sears Canada Inc.*, 2004 Comp. Trib.16
Date of order: August 5, 2004
Docket: CT2002004

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

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

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

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Sears Canada Inc.
(respondent)

Before: Dawson J. (presiding)
Registry document no.: 0151
Date of Hearing: July 20, 2004
Order signed by: Madam Justice Eleanor R. Dawson

REASONS FOR ORDER AND ORDER REGARDING SEARS' MOTION FOR LEAVE TO PRESENT EVIDENCE AND MAKE SUBMISSIONS AT A SEPARATE HEARING RELATING TO SUBSECTION 74.1(5) OF THE *COMPETITION ACT*

[1] Sears Canada Inc. ("Sears") has moved for:

1. An order granting Sears leave to present evidence and make submissions at a separate hearing relating to:

   (i) the factors to be taken into account pursuant to subsection 74.1(5) of the *Competition Act,* R.S.C. 1985, c. C-34 (the "Act") in determining the amount of any administrative monetary penalty; and

   (ii) any penalty to be imposed pursuant to subsection 74.1(1) of the Act.

2. An order that such hearing only take place in the event the Competition Tribunal (the "Tribunal")determines that Sears engaged in reviewable conduct within the meaning of subsection 74.01(3) of the Act.

[2] Sears relies upon authorities such as *Finch v. Assn. of Professional Engineers & Geoscientists of British Columbia* (1994), 114 D.L.R. (4th) 292 (B.C.C.A.) and *Brock-Berry v. Registered Nurses' Assn. of British Columbia* (1995), 127 D.L.R. (4th) 674 (B.C.C.A.) to argue that Sears is, as of right, entitled to a determination of guilt before considerations relating to penalty are addressed. In the alternative, Sears says that the Tribunal has a discretion to allow a separate hearing, and considerations of fairness dictate that the Tribunal should exercise its discretion to grant such a separate hearing.

[3] While Sears' notice of motion refers to a separate hearing relating not only to subsection 74.1(5), but also to "any penalty to be imposed pursuant to subsection 74.1(1) of the Act", in oral argument counsel for Sears characterized the relief sought by Sears in the following terms:

> So we did not tender evidence, firmly tender evidence that was germane to 74.1(5). We tendered evidence that related to either the time test or the good faith requirement, which evidence might also be relevant to other issues; but that's all we did.
>
> My friend also says that the question of the remedy was always a live issue and always at play from the get-go, his Application and our Response.
>
> With the greatest respect, I think that is not exactly how I would put it. In our Response, we addressed the type of remedy and the scope of remedy.
>
> For example, the fact that the Order, if there is an order, should not be extended to products other than tires, which my friend seems to say it should have applied to, we did not address the mitigating factors and, for all the reasons that we have set out, we saw no reason to.
>
> Indeed, we are of the view that doing so would be prejudicial.
>
> Now, my friend also says that what this is is really a motion to split the case in

> half. That really also is not right, Your Honour, with the greatest respect.
>
> There isn't going to be - - if you see things the way we see them and the way we are urging you to see them, there isn't going to be further evidence about reviewable conduct.
>
> What there would be is a very limited hearing with respect to evidence pertaining to [sub]section 74.1(5).
>
> There isn't a splitting of the case. There isn't a cutting of the case in half. There is simply an opportunity to adduce evidence, if indicated, and to make submissions, if indicated, with respect to why the fine should be less rather than more.
>
> If there is evidence, that evidence is only with respect to mitigating factors, and I wouldn't propose to duplicate. For example, if there was evidence of Dr. Trebilcock that was somehow relevant to 74.1(5), I wouldn't propose to go over that evidence again.
>
> In other words, what we are talking about are things which have not been put into evidence thus far for the reasons that we have set out.

[4] The Commissioner of Competition (the "Commissioner") opposes Sears' motion. The Commissioner, relying upon *Re Therrien*, [2001] 2 S.C.R. 3, says that Sears does not have a right to a separate remedy hearing. The Commissioner, while conceding that the Tribunal must comply with the rules of natural justice and fairness, says that Sears was afforded the opportunity to address the issue of remedy and has to some extent done so. To the extent Sears has not adduced all evidence with respect to remedy, the Commissioner says this motion is simply too late and the Tribunal should not exercise its discretion to hold a separate hearing.

[5] It is not necessary for me to determine whether Sears has a right to the relief it seeks. Given the manner in which counsel for Sears has characterized the relief sought, I am persuaded to exercise my discretion to grant Sears the right to a separate hearing with respect to subsection 74.1(5) of the Act. I am so persuaded because throughout the hearing to date, Sears and the Commissioner have disagreed about whether there should be a separate hearing with respect to subsection 74.1(5). (See, for example, hearing transcript at 19:3213 (16 January 2004), and following; 19:3213 (16 January 2004), line 19). The issue arose during the hearing in the context of objections to the propriety of questions put to witnesses. Raised in that context, the Tribunal left open whether there would be a separate evidentiary portion of the hearing in the event there was a finding that Sears had engaged in reviewable conduct. (See, for example, hearing transcript 20:3350, 19 January 2004, line 14 through 23). Having left the issue open in circumstances where Sears has put on record that it was not adducing evidence with respect to subsection 74.1(5) of the Act, I feel obliged to afford that opportunity to Sears. With the benefit of hindsight it would have been preferable had the Tribunal, or counsel, brought the issue to a head at an earlier stage of the proceeding.

[6] The Tribunal will, therefore, hear final argument on whether reviewable conduct has been established and whether an order should be made under subsection 74.1(1). This will include argument on whether an order should be made under paragraph 74.1(1)(*a*) or (*b*) of the Act and whether due diligence has been established under subsection 74.1(3) of the Act. Once the Tribunal has ruled on the constitutionality of the legislation and whether reviewable conduct

has been established, if it is necessary to determine whether Sears should pay an administrative monetary penalty, the Tribunal will provide Sears with a separate hearing at which time Sears will, in the words of counsel for Sears, be afforded "an opportunity to adduce evidence, if indicated, and to make submissions, if indicated, with respect to why the fine should be less rather than more". More precise directions will be given in advance of such a hearing, if such a hearing is warranted. In this regard, counsel for Sears has suggested in oral argument that Sears would likely adduce its evidence first and the Commissioner could, in addition to cross-examining Sears' witnesses, adduce further evidence. While not finally deciding either point, it would seem that fairness would require that the Commissioner also be entitled to adduce further evidence relevant to any administrative monetary penalty.

[7] Before parting with this motion, I repeat that this result reflects the conduct of the hearing to date, specifically that evidence germane to subsection 74.1(5) of the Act was not led by Sears. In any future case, this is an issue that should be dealt with before evidence is adduced. Ideally the issue would be dealt with at an early stage in the Tribunal scheduling order issued under section 20 of the *Competition Tribunal Rules,* SOR/94-290.

[8] As requested by counsel, the costs of this motion are reserved to be dealt with at a later date.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[9] In the event that the Tribunal determines that Sears engaged in reviewable conduct within the meaning of subsection 74.01(3) of the Act, Sears is given leave to present evidence and make submissions at a separate hearing relating to the factors to be taken into account pursuant to subsection 74.1(5) of the Act in determining the amount of any administrative monetary penalty. All other issues are to be addressed during final argument on August 19 and 20, 2004.

[10] The costs of this motion are reserved.

DATED at Ottawa, this 5th day of August, 2004.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Madam Justice Eleanor R. Dawson

APPEARANCES:

For the applicant:

The Commissioner of Competition

John L. Syme
Leslie Milton
Arsalaan Hyder
Geneviève Léveillé

For the respondent:

Sears Canada Inc.

William W. McNamara
Philip J. Kennedy
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