Competition Tribunal Tribunal de la Concurrence

Reference: *Commissioner of Competition v. Sears Canada Inc.*, 2004 Comp. Trib. 8
File no.: CT2002004
Registry document no.: 0131

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 74.01 of the *Competition Act*.

B E T W E E N:

**The Commissioner of Competition**
(applicant)

and

**Sears Canada Inc.**
(respondent)

Date of hearing: 20040610
Member: Dawson J. (presiding)
Date of reasons and order: 20040611
Reasons and order signed by: Madame Justice Eleanor R. Dawson

**REASONS AND ORDER REGARDING SEARS' MOTION TO AMEND THE SCHEDULING ORDER REGARDING FINAL ARGUMENT**

**[1]** Sears Canada Inc. ("Sears") has moved for an order amending the Scheduling Order Regarding Final Argument, 2004 Comp. Trib. 6, issued on consent of the parties ("consent scheduling order") to require the Commissioner of Competition ("Commissioner") to provide her written argument in respect of subsection 74.01(5) of the *Competition Act*, R.S.C. 1985, c. C-34 ("Act") on or before June 17, 2004, and to allow Sears to file a written response to that argument on or before June 25, 2004. In the alternative, Sears seeks an order adjourning the hearing of the oral argument, now scheduled to commence on June 28, 2004, for three days, pending the filing of these arguments.

**[2]** Sears seeks this relief on the basis of its assertions that:

1. The Commissioner has split her case and has reserved the right to present the Commissioner's argument on this key issue in reply leaving no ability for Sears to file written argument in response in advance of the hearing.

2. Although the Commissioner will have had an opportunity to fully present her written argument in advance of the hearing, Sears will not have the same opportunity.

3. This result works to the prejudice of Sears and to the benefit of the Commissioner.

**[3]** The evidentiary basis for these assertions are paragraphs 58 and 59 of the Commissioner's Written Final Argument (Confidential) where the Commissioner states:

> 58. Subsection 74.01(5) of the Act is in the nature of an affirmative defence. It provides as follows:
>
> > (5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.
>
> 59. If Sears relies on ss. 74.01(5) in its Response to this Argument, the Commissioner will address the issue of materiality, as it relates to reviewable conduct, in her Reply. The issue of materiality is addressed below pursuant to para. 74.1(5)(d), in the context of the Commissioner's argument regarding the appropriate amount of an administrative monetary penalty.[1]

[1] While these paragraphs are contained in a confidential document, counsel for the Commissioner confirmed that the content of these two paragraphs is not confidential.

**[4]** The authorities relied upon by Sears in support of its position all deal with splitting the evidentiary portion of a party's case or with the right to call rebuttal evidence. Those authorities are inapplicable to the extent that in the present case the evidentiary portion of the case is closed. What is in issue in the present case is the timing of written argument to be filed in advance of oral argument for the purpose of assisting the Competition Tribunal ("Tribunal") to properly anticipate the full oral arguments to be addressed to the Tribunal.

**[5]** Moreover, in oral argument counsel for Sears agreed that the Commissioner was not obliged as part of her case to lead evidence and make argument as to the materiality of any representation as to price. Therefore, in awaiting receipt of Sears' written argument, the Commissioner can not be said to have failed to have addressed an essential part of her case.

**[6]** In my view, the fundamental question is whether any unfairness will accrue to Sears in the event that the consent scheduling order is not varied and the hearing of oral argument is not adjourned. In that circumstance, Sears will receive the Commissioner's written reply argument on Friday, June 25, 2004, and oral argument will commence on Monday, June 28, 2004. No such unfairness is, in my view, made out on the record.

**[7]** In this regard, Sears has filed no affidavit evidence and simply asserts as a fact prejudice because Sears will not have the opportunity to respond in writing to the Commissioner's written reply.

**[8]** Fairness requires that Sears know the case it has to meet and has a full and fair opportunity to present its argument to the Tribunal. Sears has failed to persuade me that the current arrangement fails to provide Sears with those requirements. Sears will have the right to argue fully its case orally, and, if required, will have the "last word" in oral argument on its subsection 74.01(5) defence. I am satisfied that given such full right of oral argument that Sears will not be prejudiced on the basis that it will not have replied in writing to the Commissioner's written argument about subsection 74.01(5) before the commencement of oral argument. Further, as the Tribunal will have the oral argument transcribed and the transcript will be provided to the judicial member, there will be a permanent written record of Sears' argument on this point. In cases of this nature, the designated judicial member sits alone.

**[9]** Having dealt with the argument that the process is inherently unfair, on a practical level I do not know at present the length and complexity of the argument Sears intends to address with respect to subsection 74.01(5) of the Act, the evidence Sears will point to in support of its argument, and what if any authorities will be relied upon. [2] Similarly, I do not know the nature and extent of any reply the Commissioner will make with respect to subsection 74.01(5). While I can imagine a scenario where the nature and extent of the Commissioner's reply might be sufficiently complex or surprising to cause Sears difficulty because of the timing of the reply, at present any such prejudice is speculative.

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[2] I note that this uncertainty would make it difficult, if not impossible, for the Commissioner to file meaningful submissions on subsection 74.01(5) of the Act before receiving Sears' argument.

**[10]** The time, in my view, to assess any such actual prejudice is after the delivery of all of the written arguments. Then, immediately before the commencement of oral argument on June 28, 2004, the matter may be dealt with on an informed basis. Measures available at that time to address any potential prejudice would include adjourning the oral argument relevant to subsection 74.01(5), adjourning the oral argument generally, or allowing Sears to file additional written representations.

**[11]** In conclusion, I am mindful of the obligation of the Tribunal to conduct its proceedings fairly. There is no doubt that in the absence of full oral argument Sears should have the right to have the last word in writing with respect to its subsection 74.01(5) defence. However, in this case the written representations are simply an aid to full oral argument.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

**[12]** The motion is dismissed.

DATED at Ottawa, this 11th day of June, 2004.

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

(s) Eleanor R. Dawson

APPEARANCES

For the applicant:

The Commissioner of Competition

John L. Syme
Leslie Milton
Genevieve Lavallée

For the respondent:

Sears Canada Inc.

William W. McNamara
Phillip J. Kennedy