Competition Tribunal Tribunal de la Concurrence

Reference: *Commissioner of Competition v. Sears Canada Inc*., 2003 Comp. Trib. 20
File no.: CT2002004
Registry document no.: 0092

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: 20031021
Member: Dawson J. (presiding)
Date of order: 20031021
Order signed by: Madam Justice Eleanor R. Dawson

REASONS REGARDING SEARS' NOTICE OF MOTION FOR ADJOURNMENT AND/OR STAY OF PROCEEDINGS

[1] On October 14, 2003 Sears filed a notice of motion in which it sought an order:

(i) abridging the time for service of this motion;

(ii) staying that part of the Competition Tribunal's (the "Tribunal") order dated October 6, 2003 which dismissed Sears' motion for leave to amend its pleading, pending the disposition of the appeal from that order to the Federal Court of Appeal; and

(iii) adjourning the hearing of this matter pending the disposition of the appeal.

[2] The motion was argued on Monday, October 20, 2003 at the commencement of the hearing into the inquiry of the Commissioner of Competition's (the "Commissioner") application for an order pursuant to section 74.10 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act").

[3] No affidavit evidence was filed supporting the motion by Sears, nor was affidavit evidence filed by the Commissioner, who opposes the granting of any stay or adjournment.

[4] The Commissioner did not oppose the granting of short leave, and I am satisfied that this is an appropriate case for the granting of short leave. These are my reasons, delivered orally, for refusing the requested stay or adjournment. These reasons will be edited for grammar and readability, but not substance, and then will be delivered in writing in the Tribunal's usual format.

[5] I will deal first with that part of the motion which requests a stay of the Tribunal's order of October 6, 2003. That order, as noted, refused leave to Sears to file a fresh as amended response to the Commissioner's application.

[6] Sears did not argue this part of the motion strenuously, indicating that this relief was sought out of an abundance of caution in conjunction with the requested remedy of an adjournment. Given that the order under appeal did not require Sears or the Commissioner to take any action, I am unsure of the effect a stay of the order would have. The original response to the Commissioner's application filed by Sears would remain extant and would govern the upcoming hearing. Given that a stay of the order refusing leave to amend would provide no effective remedy, I am not prepared to issue a stay of the order refusing leave to amend.

[7] I next turn to the second head of relief sought, the request that the hearing scheduled to start on October 20, 2003 be adjourned pending adjudication by the Federal Court of Appeal upon the appeal from the order refusing leave.

[8] The parties agree that for such adjournment to be granted Sears must establish that it meets the tri-partite grounds established in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The Tribunal has previously held that this is the test to be applied when an adjournment is sought pending the appeal of an interlocutory order of the Tribunal. See: *Canada (Competition Act, Director of Investigation and Research) v. The D & B Companies of Canada*, [1994] C.C.T.D. No. 17. This decision was upheld by Chief Justice Isaac of the Federal Court of

Appeal on a motion for a stay of proceedings subsequently brought in the Federal Court of Appeal. Chief Justice Isaac noted that he was in substantial agreement with the analysis of the Tribunal. See: *Canada (Director of Investigation and Research) v. The D & B Companies of Canada*, [1994] F.C.J. No. 1504 at paragraph 18.

[9] The three grounds which must each be established, because the grounds are conjunctive and not disjunctive, are:

(i) a serious issue to be tried;

(ii) refusal of the adjournment would cause irreparable harm to Sears; and

(iii) the balance of convenience favours granting the stay. In this case this means that Sears must show that the harm to it if the adjournment is refused is greater than the harm to the Commissioner if the adjournment is granted.

[10] Now, considering each element of the test, the threshold for establishing a serious issue is low. The Commissioner has conceded that the issue in the present case meets this threshold.

[11] Irreparable harm requires, as a matter of law, that the applicant must show that the refusal of relief ". . . could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application". (See: *RJR MacDonald, supra* at paragraph 58.) The applicant is required to show irreparable harm that is clear and non-speculative. The word "irreparable" refers to the nature of the harm to be suffered.

[12] In this case, Sears asserts in its notice of motion that if the adjournment is refused it will be prevented from defending itself as outlined in its fresh as amended response. I agree. The question is whether this reaches the level of irreparable harm as opposed to inconvenience, or a matter which may be otherwise remedied. Sears argues that this harm cannot be remedied or compensated in any way, including on appeal, because on appeal the record will have been set. Sears says therefore that its appeal will be rendered nugatory if no adjournment is granted.

[13] However, there is no evidence before the Tribunal of evidence which Sears wishes to lead, but which it will be prohibited from leading on the basis of the existing pleading. Similarly, Sears has not set out in any detail any legal argument not available to it on the basis of the existing pleading. Counsel for Sears argued that Sears wants to make its argument clearer with respect to section 74.01 of the Act, which is the gravamen of its defence. This, in my view, falls short of establishing that the defence is inadequately pleaded so Sears will be irreparably harmed if it has to proceed on this defence. Sears continues to argue (at paragraph 3 of its written submissions and orally) that the proposed amendments are ". . . largely stylistic rather than substantive in nature." This is not consistent with irreparable harm being caused if Sears has to proceed on the basis of its existing pleading.

[14] To the extent Sears argues irreparable harm because, even if successful on appeal, the "record will be set" so that the appeal becomes nugatory, this seems to pre-suppose that the hearing before the Tribunal would have concluded before the appeal is heard and decided by the Federal Court of Appeal (otherwise the record would not be finally set). In the event that the Tribunal hearing had concluded, and Sears had been unsuccessful before the Tribunal but was later successful on its interlocutory appeal to the Federal Court of Appeal, it would be within the jurisdiction of the Court of Appeal to remit the entire matter for rehearing, if satisfied that was appropriate and necessary. This would undoubtedly amount to serious inconvenience, but as Mr. Justice Rothstein, sitting as the presiding judicial member of the Tribunal, wrote in *D & B Companies, supra* at page 4 of the report:

> The issue of disruption to Tribunal proceedings is not one that, in my view, can be characterized as coming within the category of irreparable harm. It is true that there could be serious inconvenience but that is not of itself tantamount to irreparable harm. It may be that examinations and cross-examinations may change if the respondent is successful on appeal and further information is produced and the matter is reheard. However, again, this is a matter of inconvenience and not irreparable harm. Whenever a case is sent back for rehearing as a result of appeal or judicial review, the parties are in the same position. Such rehearings are a regular part of the judicial process; I cannot conclude that this case is in some way unique so as to cause irreparable harm to the respondent if indeed examinations and cross examinations have to change.

[15] Similarly, I cannot conclude that Sears has established irreparable harm.

[16] In oral argument counsel for Sears advised that the Court of Appeal has time within the next one to three weeks to hear an interlocutory appeal, and counsel for the Commissioner indicated that he had instructions to consent to the appeal being expedited. I have given careful consideration to adjourning the proceeding on this basis, however after reflection I have concluded that such adjournment is not warranted for the following two reasons. First, Sears has not established, in my view, irreparable harm. This is a necessary prerequisite at law to an adjournment. Second, even if the case proceeds before the Tribunal this week on the constitutional issue, and counsel confirmed that this issue could be proceeded with notwithstanding the pending appeal, it is likely that if the hearing is thereafter adjourned awaiting hearing and adjudication of the appeal, sufficient time would be lost to make it impossible for the hearing before the Tribunal to be concluded in the time allotted. (I note parenthetically that on May 30, 2003, the Tribunal ordered that this matter would be heard for four weeks from October 20, 2003 to November 14, 2003, and that final arguments would be heard from December 1, 2003 to December 5, 2003.) Failure to complete the hearing will result in a significant delay in arranging for the proceeding to be rescheduled. That delay and inconvenience is not, in my view, warranted in the absence of a finding of irreparable harm if the matter is not adjourned.

[18] I am satisfied however, that if the parties move to expedite the appeal it may well be heard and decided before the evidence is closed before the Tribunal. This further reduces the possibility of harm to Sears if the interlocutory appeal is successful. The Tribunal would certainly

accommodate a one-half day or one day adjournment for the purpose of allowing the interlocutory appeal to be argued in the Federal Court of Appeal.

[19] In view of my finding on irreparable harm it is not necessary for me to deal with the balance of convenience.

[20] For these reasons, the motion for a stay and/or an adjournment is dismissed.

DATED at Ottawa, this 21st day of October, 2003.

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

(s) Eleanor R. Dawson

COUNSEL

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