Competition Tribunal | Tribunal de la Concurrence

Reference: *Commissioner of Competition v. Sears Canada Inc*., 2003 Comp. Trib. 28
File no.: CT2002004
Registry document no.: 0100

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: 20031022
Member: Dawson J. (presiding)
Date of reasons: 20031029
Reasons signed by: Madam Justice Eleanor R. Dawson

REASONS FOLLOWING THE TRIBUNAL'S ORDER REGARDING A REQUEST TO ADMIT

[1] On September 30, 2003 the Commissioner of Competition ("Commissioner") served a document in the form of a request to admit pursuant to Rules 255 and 256 of the Federal Court Rules, 1998 ("Federal Court Rules") on Sears Canada Inc. ("Sears"). Sears took the position in correspondence sent to the Commissioner on October 17, 2003 that the request to admit process has not been incorporated into proceedings before the Competition Tribunal ("Tribunal") and that any request for admissions was a matter that should have been brought before the Tribunal at a pre-hearing conference pursuant to subsections 21(1) and (2) of the *Competition Tribunal Rules*, SOR/94-290 ("Tribunal Rules"). The Commissioner disagreed. It was his position, expressed in correspondence sent to counsel for Sears on October 20, 2003, that section 72 of the Tribunal Rules, together with Rules 255 and 256 of the Federal Court Rules allow a party such as the Commissioner to seek admissions in this fashion.

[2] In consequence, on October 22, 2003 Sears moved during hearing of this application for an order:

> (i) directing that the request to admit is not valid; or
>
> (ii) in the alternative, extending the time in which Sears is permitted to respond to the request to admit.

[3] For reasons to be delivered in writing, the Tribunal ordered, on October 23, 2003, that the request to admit was valid and authorized pursuant to the Tribunal Rules, and extended the time in which Sears might respond to the request to admit. These are the reasons for that order.

[4] The relevant provisions of the Tribunal Rules and the Federal Court Rules are subsections 21(1), 21(2) and 72 of the Tribunal Rules, and Rules 255 and 256 of the Federal Court Rules. They are as follows.

In the Tribunal Rules:

> **21.** (1) The Tribunal may, at the request of a party or if the Chairman deems it advisable, conduct one or more pre-hearing conferences
> (*a*) at any time after the expiration of the period for filing a response to a notice of application; or
> (*b*) at any time after the expiration of the period for filing a statement pursuant to subsection 9(3).
> (*c*) [Repealed, SOR/96-307, s. 6]
> (2) The Tribunal may consider the following matters at a pre-hearing conference:
> (*a*) any pending motions or requests for leave to intervene;
> (*b*) the clarification and simplification of the issues;
> (*c*) the possibility of obtaining admissions of particular facts or documents;
> (*d*) the desirability of examination for discovery of particular persons or documents and the desirability of preparing a plan for the completion of such discovery;
> (*d*.1) in the case of applications referred to in subsection 2.1(2) and if warranted by the circumstances, the matters referred to in paragraph (*d*);

(*e*) any witnesses to be called at the hearing and the official language in which each witness will testify;
(*f*) a timetable for the exchange of summaries of the testimony that will be presented at the hearing;
(*g*) the procedure to be followed at the hearing and its expected duration; and
(*h*) such other matters as may aid in the disposition of the application.

And further,

72(1) Where, in the course of proceedings, a question arises as to the practice of procedure to be followed in cases not provided for by these Rules, the practice and procedure set out in the *Federal Court Rules*, C.R.C., 1978, c.663 shall be followed, with such modifications as the circumstances require.
(2) Where a person is uncertain as to the practice and procedure to be followed, the Tribunal may give directions on how to proceed.

And in the Federal Court Rules:

255. A party may, after pleadings have been closed, request that another party admit a fact or the authenticity of a document by serving a request to admit, in Form 255, on that party.
256. A party who is served with a request to admit is deemed to admit a fact or the authenticity of a document set out in the request to admit unless that party serves a response to the request in Form 256 within 20 days after its service and denies the admission, setting out the grounds for the denial.

[5] Sears argues that if a party to a proceeding before the Tribunal wishes to obtain admissions of facts or documents the party is required to raise this at a pre-hearing conference. Sears submits that paragraph 21(2)(*c*) of the Tribunal Rules expressly provides for this. Sears further states that because no such request for admissions or for leave to serve a request to admit was made at a pre-hearing conference and sanctioned by the Tribunal, the request to admit is a nullity. Because the Tribunal Rules thus expressly deal with admissions, Sears asserts that there is no "gap" in the rules and no recourse can be made to section 72 of the Tribunal Rules.

[6] Sears also argues that to hold otherwise would mean that a party to a non-merger proceeding would be entitled to oral discovery as of right by resorting to the gap rule, section 72 of the Tribunal Rules, which would in turn allow a party to access oral discovery through the Federal Court Rules.

[7] Finally, Sears points out that this proceeding was commenced by the Commissioner by way of a document entitled "notice of application". The Federal Court Rules with respect to requests to admit are found in the portion of those rules which deal with actions, not applications. Because the Federal Court Rules with respect to requests to admit do not apply to proceedings commenced in the Federal Court by notice of application, Sears says that this is a further basis on which to conclude that the request to admit was a nullity.

[8] The first matter to be considered is whether, as Sears submits, the effect of paragraph 21(2)(*c*) of the Tribunal Rules is to provide a specific path for securing admissions such that it cannot be said that the practice or procedure for securing admissions by way of request to admit is a case "not provided for" by any of the rules of the Tribunal. If the Tribunal Rules deal with the process of securing admissions it follows that recourse may not be made to the Federal Court Rules through section 72 of the Tribunal Rules because there would be no gap.

[9] With respect to the contrary submission of Sears, I do not conclude that the provision in paragraph 21(2)(*c*) of the Tribunal Rules, which allows the Tribunal to consider at a pre-hearing conference "the possibility of obtaining admissions of particular facts or documents", is so exhaustive on the issue of admissions that it can be said to provide a complete practice or procedure with respect to securing admissions.

[10] It is to be remembered that the Federal Court Rules with respect to requests to admit provide for a procedure which does not require the involvement of a judicial officer. Nor is it a procedure that is dealt with at a hearing. It is therefore inconsistent with that procedure to assert that if the procedure is available in proceedings before the Tribunal it requires the intervention of the Tribunal at a pre-hearing conference. Further, the Federal Court Rules, in addition to providing in Rules 255 and 256 for requests to admit, provide in Rule 263(*d*) that participants at a pre-trial conference must be prepared to address "the possibility of obtaining admissions that may facilitate the trial". This further illustrates, in my view, that the procedure involved in serving a request to admit is a separate and distinct practice or procedure from reviewing at a pre-hearing conference the possibility of securing admissions. It follows that because they are different practices or procedures, the absence of specific reference to requests to admit in the Tribunal Rules raises a question as to a practice or procedure not provided for in the rules of the Tribunal. This in turn allows the Commissioner to apply the Tribunal's gap rule and to have recourse to the Federal Court procedure with respect to requests to admit.

[11] I similarly, with respect, do not accept the correctness of Sears' argument that this interpretation would allow a party to a proceeding before the Tribunal to obtain oral discovery by recourse to the Tribunal's gap rule. Paragraphs 21(2)(*d*) and (*d*.1) of the Tribunal Rules require that oral discovery is considered to be "desirable" in merger matters or "warranted by the circumstances" in non-merger matters. The right to oral discovery in Federal Court actions cannot apply to permit unlimited discovery in matters before the Tribunal when the Tribunal Rules expressly limit access to oral discovery.

[12] What is different in the case of a request to admit is that it is a different practice or procedure from the simple process of considering the possibility of admissions at a pre-hearing conference. Because of that difference, as noted above, the procedure with respect to requests to admit is a practice or procedure not provided for by the Tribunal Rules.

[13] As to the argument that the Federal Court request to admit procedure does not apply to matters commenced by notice of application, it is true that proceedings before the Tribunal are commenced by a document entitled "notice of application". However, when one looks at the

procedure then followed in proceedings before the Tribunal, it is clear that the proceedings are much more akin to an action than an application in the Federal Court. For example, a respondent served with an application before the Tribunal in a non-merger matter must file a responding pleading, and then provide a disclosure statement. There is a process in the Tribunal Rules providing for the possibility of seeking oral discovery. The matter proceeds to an oral hearing where *viva voce* evidence is adduced. Experts may only testify at that oral hearing if at least 30 days before the hearing an affidavit of the expert witness in served on the other party. This resembles the procedure followed in an action before the Federal Court. In contrast, proceedings commenced by notice of application under the Federal Court Rules are much more summary in nature. No responsive pleading is filed, and absent special order there is no *viva voce* evidence. Matters are decided on the basis of affidavit evidence.

[14] Subsection 72(1) of the Tribunal Rules contemplates that the procedure set out in the Federal Court Rules is to be followed "with such modifications as the circumstances require". I am satisfied that the application of the procedure with respect to requests to admit to proceedings before the Tribunal, albeit commenced in the Tribunal by a document called a notice of application, is a modification required in the circumstances.

[15] The Tribunal Rules are intended to make the Tribunal a flexible and efficient forum for adjudication. The practice of securing admissions of fact and/or documents facilitates the timely and fair adjudication of issues. Recourse to the request to admit procedure fills a gap in the Tribunal Rules.

[16] Having so concluded, the remaining issue is Sears' request for an extension of time in order to respond to the request to admit. It is common ground between the parties that the time for responding expired on October 21, 2003, the second day of the hearing of the Commissioner's application. I concluded that an extension should be granted for two reasons.

[17] First, as Mr. Justice MacKay of the Federal Court observed in *Clarke v. Her Majesty the Queen*, [2000] F.C.J. No. 475, in fairness a request to admit should be served more than 20 days in advance of the beginning of a hearing. This is because whether something is deemed to be admitted by operation of the rules of court is a matter that should be settled before the beginning of the hearing. I respectfully agree with the view of Mr. Justice MacKay. Mr. Justice MacKay contemplated the exercise of judicial discretion in a case where a request was not served more than 20 days in advance of the commencement of the hearing.

[18] Second, the issue of the applicability of the request to admit procedure to matters before the Tribunal was not free of doubt, and it was in my view reasonable for Sears to raise the issue.

[19] I was therefore satisfied that considerations of fairness required the granting of an extension. The extension provided, until noon, Saturday, October 25 was not as generous as sought by Sears (which requested an extension until the resumption of the hearing on Monday, October 27) but was more generous than that suggested by the Commissioner (who suggested, if granted, an extension until the end of the day on Friday, October 24). The extension granted sought to best balance the competing needs of the parties.

DATED at Ottawa this 29th day of October, 2003.

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

(s) Eleanor R. Dawson

APPEARANCES

For the applicant:

The Commissioner of Competition

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For the respondent:

Sears Canada Inc.

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