

Competition Tribunal



Tribunal de la Concurrence

Reference: *Commissioner of Competition v. Sears Canada Inc.*, 2003 Comp. Trib. 27
File no.: CT2002004
Registry document no.: 0099

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: (commenced) 20031021 and (final submission heard) 20031027
Member: Dawson J. (presiding)
Date of reasons and order: 20031029
Reasons and order signed by: Madam Justice Eleanor R. Dawson

**REASONS AND ORDER REGARDING THE COMMISSIONER'S MOTION MAKING
CERTAIN DOCUMENTS PUBLIC**

[1] The Commissioner of Competition (“Commissioner”) has moved for an order that the documents listed in Schedule A to the Commissioner’s notice of motion filed on October 8, 2003 be designated as public, not confidential documents. The motion was supported by the affidavit of a Competition Law Officer, Mr. George A. Weber sworn October 7, 2003. Sears Canada Inc. (“Sears”) filed the affidavit of its General Manager of Automotive in opposition to the motion, but filed no responding memorandum of argument. The Commissioner consented to the matter being heard in the absence of Sears’ memorandum in view of the need to have the matter heard expeditiously, and on the basis that Sears’ position was set out in the affidavit of its General Manager of Automotive.

[2] The matter was argued orally during the hearing of the Commissioner’s application and supplemental submissions were received culminating in the supplementary submission of Sears which was given orally on October 27, 2003. By the time the motion was heard the parties had reached agreement with respect to all but three of the documents at issue. These reasons deal with those documents.

[3] I begin by considering the appropriate principles to be applied to the determination of whether a confidentiality designation should attach to a document.

[4] Both counsel for the Commissioner and counsel for Sears submit that the party wishing to restrict disclosure and to have a document declared confidential must establish specific, direct harm that is said likely to result from public access to the document. I agree. In matters before the Competition Tribunal (“Tribunal”) that require the exchange of affidavits of documents, section 16 of the *Competition Tribunal Rules*, SOR/94-290 (“Rules”) applies. There, the party seeking to restrict access to document must “. . . include in the grounds for the motion the details of the specific, direct harm that would allegedly result from unrestricted disclosure of the document. . . .” and the Tribunal may restrict access if “. . .of the opinion that there are valid reasons for restricting the disclosure of a document. . . .” In matters that require the exchange of disclosure statements, section 64 of the Rules permits the Tribunal to declare documents confidential. There, the party requesting confidentiality must “. . . advise the Tribunal of the reasons for the request, including details of the specific, direct harm that would allegedly result from public access to the document.” The Tribunal may declare a document confidential if “. . .of the opinion that there are valid reasons for restricting access to a document. . . .”

[5] I am satisfied that when considering whether to declare a document confidential or restrict access to it, the Tribunal is to balance the salutary effects of a confidentiality order against the deleterious effects of the order, as instructed by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522. The Tribunal is also required to consider whether reasonable alternative measures, such as expungement of a portion of the document, will prevent the risk of specific, direct harm and are available so as to restrict the scope of the confidentiality order as much as reasonably possible while still protecting the applicant for the order from specific, direct harm.

[6] I find the analysis of the Supreme Court of Canada in *Sierra, supra*, to be applicable because of the similarity between the confidentiality provision there considered by the Supreme Court (Rule 151 of the Federal Court Rules, 1998) and the comparable provisions in the Rules of the Tribunal.

[7] The documents at issue were disclosed by Sears in its disclosure statement provided pursuant to section 5.1 of the Rules and may be described generally as:

(i) document 71:

A Sears corporate document which outlines the provisions of paragraph 52(1)(d) of the *Competition Act*, R.S.C. 1985, c. C-34 (“Act”) as it existed prior to the 1999 legislative amendments. The document contains catalogue related information, information related to Sears’ advertising policy and examples of the application of the policy to retail store savings claims.

(ii) document 15:

A memorandum dated May 11, 1999 sent to all Sears’ vice-presidents from Sears’ Legal Department. The memorandum summarizes the 1999 amendments to the Act with respect to regular price claims, misleading advertising and deceptive marketing practices, deceptive telemarketing and whistle blowers. The memorandum directs that it be distributed to appropriate persons.

(iii) document 19:

Monthly retail marketing planners for the relevant period (the one for November 1999 is in evidence as an example of such a planner). The documents were issued to sales associates informing them of which automotive products were on sale during the month, the promotional prices of each, selling tips and specific features of promoted tires. The document appears to be meant to be of assistance to sales associates in informing customers as to the prices and characteristics of the tires being promoted in a particular month.

[8] The Commissioner is prepared to agree to the redaction of certain portions of document 71 which relate to catalogue and not retail sales. Otherwise, the Commissioner says the documents should be part of the public record.

[9] Sears provided no affidavit evidence relevant to documents 71 and 15. With respect to document 19, the General Manager of Automotive swore that a substantial number of the pages of the documents “. . .disclose pricing information about tire lines which are not in issue in this proceeding. They are commercially sensitive because they disclose information about our product mix and pricing strategy. In particular, these pages show how we mix goods for promotions.” (Affidavit of William F. McMahon (17 October 2003) at paragraph 4.)

[10] Turning to the application of the legal principles to these documents, I first consider documents 71 and 15. As noted, Sears provided no evidence in its affidavit that a confidentiality order is necessary with respect to documents 71 and 15 in order to prevent a specific, direct harm to Sears because reasonable alternative measures will not prevent the risk. In the absence of such evidence I have read that portion of the documents which the Commissioner does not agree should be redacted in order to see if on their face it is evident that there would likely be a specific, direct harm if those portions of the documents were made public. I am unable to see any such risk of harm.

[11] Sears argues that while it has not claimed solicitor-client privilege with respect to these two documents, they should nonetheless be kept confidential. What was said to be the “main thrust” of Sears’ argument with respect to these two documents was that not all relevant documents have to be treated in a public manner and sensitive issues should be dealt with in a confidential manner. However, with respect, in the absence of a proper claim to solicitor-client privilege, the test remains whether a confidentiality order is necessary in order to prevent specific, direct harm. Having found no such risk, the document should form part of the public record except for those portions which the Commissioner agrees should be redacted. I share the view that the redactions are appropriate.

[12] Further, I am satisfied that the documents were to be distributed within Sears on a sufficiently wide basis that the documents lack the level of confidentiality required for the provision of confidential legal advice. In any event, document 71 does not appear to me to provide of legal advice.

[13] With respect to document 19, Sears argues that it could serve as a tool to assess how Sears went about one aspect of its promotional structuring in 1999, and that the affidavit evidence is sufficient to establish the risk of specific, direct harm. I have respectfully concluded otherwise for the following reasons.

[14] First, the age of the information which Sears seeks to protect. As the Tribunal noted in *Canada (Director of Investigation & Research) v. Southam Inc.* (1991), 38 C.P.R. (3d) 395, information such as profit and pricing information may quickly lose its commercially sensitive nature. While counsel for Sears admitted that “Who knows, maybe that is the [way] Sears is still doing it today.”, transcript at 34: 110 (20 October 2003), this falls short of establishing specific, direct harm or the risk thereof.

[15] Second, I am not satisfied that the information in the document which Sears seeks to protect was not available at the relevant time to anyone who wished to obtain it by walking into a Sears store to observe the available products and what was on sale. I see no specific, direct harm in making the information public four years later.

FOR THESE REASONS THE TRIBUNAL THEREFORE ORDERS THAT:

[16] Documents 15 and 19 as disclosed in Sears' disclosure statement, and for greater certainty being exhibits V and Q to the affidavit of Mr. Weber, are designated to be public documents.

[17] Document 71 as disclosed in Sears' disclosure statement, and for greater certainty being exhibit T to the affidavit of Mr. Weber referred to above, is expunged in the following respects:

- (a) on page NADM 8649, in numbered paragraph 1 the first two sentences are expunged, and all of numbered paragraph 6 is expunged except for the paragraph number which shall remain; and
- (b) on pages NADM 8650, 8651 and 8652 all of the words below the heading at the top of each page are expunged. The headings remain.

[18] The balance of document 71 not expunged is designated to be a public document.

[19] The issue of costs is reserved for further submissions to be made at a time and in a manner directed by the Tribunal.

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

John L. Syme
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For the respondent:

Sears Canada Inc.

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