Competition Tribunal Tribunal de la Concurrence

Reference: *Commissioner of Competition v. Sears Canada Inc*., 2003 Comp. Trib. 25
File no.: CT2002004
Registry document no.: 0097

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 reasons: 20031027
Reasons signed by: Madam Justice Eleanor R. Dawson

REASONS REGARDING RESPONDENT'S MOTION FOR LEAVE TO AMEND PREVIOUSLY SERVED WILL-SAY STATEMENTS AND TO AMEND DISCLOSURE STATEMENT

The Motion

[1] On October 17, 2003, the Friday before the commencement of this hearing on October 20, 2003, the respondent Sears Canada Inc. ("Sears") filed a motion for leave to amend its disclosure statement in order to: (1) amend the will-say statements of Mr. William McMahon (General Manager of Automotive), Mr. Harry McKenna (Retail Marketing Manager), and Mr. Paul Cathcart (Home & Hardlines Group Manager) and (2) include the will-say statements of Mr. Vince Power (Director of Corporate Communications) and Ms. Bonnie Drever (Business Analyst) in the form attached as Schedule "A" to their notice of motion. Alternatively, Sears sought a direction that it could lead evidence from those 5 individuals as disclosed in Schedule "A". The Commissioner filed his responding material on Tuesday October 21, 2003 and the motion was heard on Tuesday, October 21, 2003.

[2] Subsequently, the Competition Tribunal ("Tribunal") for reasons to be delivered in writing, granted Sears' motion for leave to amend its disclosure statement in order to amend the will-say statements of Mr. McMahon, Mr. McKenna, and Mr. Cathcart. The balance of the relief sought was denied and costs were reserved to a later date. These are the reasons for that order.

Factual Background

[3] On or about October 10, 2003, counsel for the Commissioner was served with the further and amended will-say statements. Their service was rejected on the grounds that leave to amend the disclosure statement had not been obtained pursuant to subsection 5.1(3) of the *Competition Tribunal Rules*, SOR/94-290 ("Rules"). This motion for directions was subsequently filed by the respondent, Sears. The affidavit of Ms. Susan E. Rothfels sworn October 17, 2003 was filed by Sears in support of the motion. Ms. Rothfels is a lawyer with the firm of solicitors representing Sears in this matter. The existing and proposed will-say statements were exhibits to the affidavit. In opposition of the motion, the Commissioner filed the affidavit of a competition law officer, Mr. George A. Weber, dated October 21, 2003. Counsel for Sears wished to cross-examine the competition law officer on that affidavit and to expedite consideration of this matter that cross-examination was conducted before the Tribunal.

[4] As to the nature of the proposed changes, there were varying amounts of alterations to the original three will-say statements. The most significant change was made to the will-say statement of Mr. McMahon. The old will-say statement was 25 paragraphs long and the new statement is six paragraphs in length. Much material in the original will-say had been deleted and the scope of the new will-say was much narrower as a result. However, the material from the original McMahon will-say was very similar to that contained in the original Cathcart will-say, which was only changed by one paragraph in the amended version. The information deleted from the old McMahon will-say therefore continued to be contained in the new Cathcart will-say.

[5] As to the substance of the proposed changes, Mr. Weber advised on his cross-examination that he was not surprised by anything in the three amended statements.

[6] The two new will-say statements were both quite brief. Ms. Drever's was only two paragraphs in length. Her evidence implies that she was to testify about a chart which she prepared and which was delivered to counsel for the Commissioner on October 10, 2003. This chart was not attached to the will-say statement. The information in the chart was temporally related to events occurring in 1999, however the chart was prepared shortly before it was sent to counsel for the Commissioner on October 10, 2003.

[7] Mr. Power's will-say statement was eleven paragraphs long but the information contained within it was, according to Mr. Weber, generally familiar to the Commissioner. However, because Sears did not disclose its intent to rely on evidence from Mr. Power in its disclosure statement, the Commissioner did not have the opportunity to consider whether a case could be made before the Tribunal that oral discovery of Mr. Power was warranted by the circumstances as contemplated by paragraph 21(2)(*d*.1) of the Rules.

Evidence in Support of the Motion

[8] Sears alleges that it requires the evidence set out in the amended will-say statements in order to fully and fairly respond to these proceedings. The evidence Sears put before the Tribunal is set out in Ms. Rothfels' affidavit, as follows:

> 6. In the course of the investigations and preparation for the hearing of this proceeding, which is scheduled to commence on October 20, 2003, Mr. Kennedy advises me and I believe that counsel met with Messrs. McMahon, McKenna and Cathcart. During the course of these meetings, Mr. Kennedy advises me and I believe that counsel acquired additional information about the witnesses' respective job responsibilities that better situated them to adduce certain evidence already disclosed by Sears to the Commissioner through the will-says, documents and discovery evidence. Mr. Kennedy and Mr. McNamara also learned who had authored or contributed to particular documents upon which Sears intended to rely, and which therefore needed to be adduced into evidence.
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> 7. As a result of that information, they determined that Vince Power, who was the National Business Manager at the relevant time (and is now the Director of Corporate Communications), and Bonnie Drever, who is a business analyst with Sears, were better able to proffer certain evidence on behalf of Sears, which evidence Mr. McNamara and Mr. Kennedy determined to be relevant and important to Sears' response to these proceedings.
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> 8. Ms. Drever has been responsible for the production of certain reports containing numerical information concerning sales which are relevant to these proceedings. I am advised by Mr. Kennedy that some of these reports were prepared by Ms. Drever after the delivery of the will-say statements in December 2002, and were relied upon by the experts retained by Sears.

12. I am advised by Mr. McNamara and Mr. Kennedy that the evidence described in the Amended Will-Says is necessary to the ability of Sears to fully and fairly respond to this proceeding.

Applicable Rules of the Tribunal

[9] Subsections 5.1(1) and (2) of the Rules provide that a respondent shall, within 14 days of service of its response, serve a disclosure statement on the Commissioner, which will include will-say statements of non-expert witnesses. These subsections read as follows:

> 5.1(1) A person served with a notice of application, other than an application for an interim order, who wishes to oppose the application shall, within 14 days after the service of the response, serve a disclosure statement referred to in subsection (2) on the commissioner and on each other person against whom an order is sought.
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> (2) The disclosure statement shall set out
>
> > (a) a list of the records on which the person served with a notice of application intends to rely;
> >
> > (b) the will-say statements of non-expert witnesses; and
> >
> > (c) a concise statement of the economic theory in support of the response, except with respect to applications made under Part VII.1 of the Act.

[10] Subsections 4.1(3) and 5.1(3) of the Rules, which respectively apply to the Commissioner and to a respondent, require that leave be granted by the Tribunal in order to amend a disclosure statement. Subsection 5.1(3) of the Rules, which applies, to Sears provides:

> If *new* information that is relevant to the issues raised in the response *arises before* the hearing, the person who serves the disclosure statement referred to in subsection (2) *may by motion request authorization* from the Tribunal to amend the disclosure statement. (emphasis added)

Background to the New Rules

[11] Amendments to the Rules dealing with Reviewable Matters Other Than Mergers came into effect on February 13, 2002 (the date of publication in the *Canada Gazette Part II* (Vol. 136, No. 4). These amendments are found at sections 4.1, 4.2, subsection 5(2), sections 5.1, 5.2, 13.1, 13.2, paragraph 21(2)(d.1) and sections 22.1, 48.1 and 48.2 of the Rules, and of course include section 5.1 of the Rules which is relevant to this motion. As noted in the Regulatory Impact Analysis Statement, also published in the *Canada Gazette Part II*, the amendments were designed to ensure that such proceedings would "be dealt with as informally and expeditiously as possible while preserving fairness" (*Canada Gazette* at 432).

[12] The objectives of such Rules were reiterated clearly by Mr. Justice Blanchard, sitting as the presiding judicial member of the Tribunal, in *Commissioner of Competition v. Canada Pipe Company*, 2003 Comp. Trib. 15. He wrote at paragraph 13:

> The amendments to the Rules were designed to streamline the proceedings of the Tribunal. The regulatory objectives included: (i) ensuring that the Commissioner's investigation is completed and that the case is in final form at the time an application is filed with the Tribunal; (ii) ensuring that the issues are clearly defined at the outset of the case by having them set out in disclosure statements; (iii) streamlining the Tribunal's pre-hearing procedure by eliminating examinations for discovery as of right; and (iv) providing a more effective presentation of expert witness evidence.

Submissions of the Parties

[13] Counsel for Sears submits that evidence has arisen in the course of the investigations and preparation for this proceeding that is relevant to the issues raised by Sears' response. Counsel submits that further witnesses have been identified who are able to proffer the evidence previously disclosed in Sears' disclosure statement. Hence, Sears argues that the evidence set out in the amended will-say statements is required in order to fully and fairly respond to these proceedings.

[14] Counsel for Sears argues that considerations of fairness before a tribunal such as the Competition Tribunal include providing a respondent with an opportunity to respond fully to the allegations against it. Sears refers to the decision of *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817. Further, Sears relies on subsection 9(2) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19, which states that all proceedings before the Tribunal are to be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit. With respect to subsection 5.1(3) of the Act, counsel argues that it should be interpreted in a way as to allow for the reality that evidence may evolve or be refined in the period between the exchange of disclosure statements and the hearing.

[15] Counsel for the Commissioner argues that the changes to the original will-say statements result in substantive changes to the information previously provided. Counsel submits that: (1) certain new information has been added that was not in the original will-say statements; (2) certain information that was not in the original will-say statements has been removed from the amended will-say statements and (3) certain evidence is being adduced by a different person that originally specified.

[16] Counsel for the Commissioner argues that in order for the Tribunal to authorize amendment of Sears' will-say statements in the form of the amended will-say statements and to allow the disclosure statement to be amended to allow two new will-say statements, Sears must demonstrate that the information is "new" and "arose" before the hearing. The Rules do not provide any definition of the word "new". The Commissioner submitted that the test should be of the nature of that of Rule 351 of the Federal Court Rules, 1998, where for new evidence to be

admissible, it could not have been known or obtainable by reasonable diligence before the end of the hearing being appealed.

Analysis

[17] As already noted, the relevant amendments to the Rules were designed to streamline the proceedings. The purpose of the disclosure rules, found at subsections 4.1(3) 5.1(3) of the Rules, is to ensure that the issues are clearly defined at the outset of the case by having them set out disclosure statements which contain will-say statements of non-expert witnesses. The intent of the rule is clear that neither the Commissioner nor the respondent are to disclose the factual and non-expert evidentiary basis of their case on a piecemeal basis.

[18] I therefore accept the submission of counsel for the Commissioner that the word "new" as found in subsection 5.1(3) of the Rules must be read as information that could not have been known or obtained by reasonable diligence before the disclosure statement was filed.

[19] With respect to the three proposed amended will-say statements, having heard the cross-examination of Mr. Weber, I am satisfied that no new information was included in the amended will-say statements, in the sense that the information was available earlier and was made known to the Commissioner. However, no prejudice or delay would flow from allowing these changes. It is not clear to me that a party is obliged to adduce all of the evidence set out in a will-say statement and much of the amendments related to the deletion of material. The hearing may well be facilitated by reducing unnecessary duplication of evidence. For these reasons, these changes to the existing will-say statements were allowed.

[20] With respect to the new will-say statements of Mr. Power and Ms. Drever, counsel for the Sears did not adduce any evidence to show that the information was not available when Sears' disclosure statement was filed. The evidence was simply that in the course of the investigations and preparation for the hearing, counsel acquired additional information about the witnesses' respective job responsibilities that better situated them to adduce certain evidence already disclosed by Sears and learned who authored or contributed to particular documents on which Sears intended to rely.

[21] Only general evidence was adduced in paragraph 12 of Ms. Rothfels' affidavit as to the need for the additional evidence.

[22] I was of the view that allowing the Sears' motion for leave to include the will-say statements of two new witnesses Mr. Power and Ms. Drever would be contrary to subsection 5.1(3) of the Rules, which provides that a disclosure statement may be amended, with leave, where new information that is relevant to the issues raised in the response arises before the hearing. Sears failed to establish that this was new information which was not known or could not have been ascertained by reasonable diligence before the disclosure statement was served on the Commissioner. The lateness of this motion, combined with the weak evidentiary record in support of the motion led me to conclude that Sears ought not be granted leave to include the two new will-say statements.

[23] To allow these amendments would be antithetical to the wording, the spirit and the purpose of the new Rules. Allowing a party to supplement its disclosure statement with information which with reasonable diligence was previously available is, as well, likely to lead to delay.

[24] I have carefully considered Sears' argument that fairness requires that it be allowed to add the two additional will-say statements. However the Rules of the Tribunal afforded to Sears a full and fair opportunity to respond to the allegations against it in its response and in its disclosure statement. Further, no satisfactory reason has been given why an application to amend the disclosure statement could not have been made on a more timely basis.

[25] In other contexts parties have been held to the requirement of early and full disclosure of the factual basis of their position, and have not been permitted to later cure deficiencies by adding to the facts on which they intend to rely. See for example, *AB Hassle v. Canada (Minister of National Health and Welfare)* [2000] F.C.J. No. 855 (F.C.A.).

DATED at Ottawa this 27th 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
Arsalaan Hyder

For the respondent:

Sears Canada Inc.

William W. McNamara
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Stephen A. Scholtz
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