



Reference: *Commissioner of Competition v. Sears Canada Inc.*, 2003 Comp. Trib. 7
File no.: CT2002004
Registry document no.: 0044

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 pre-hearing conference: 20030425
Member: Dawson J. (presiding)
Date of order: 20030428
Order signed by: Madame Justice Eleanor R. Dawson



INTERIM CONFIDENTIALITY ORDER

[1] WHEREAS the Commissioner of Competition (the “Commissioner”) and Sears Canada Inc. (the “Respondent”) served their disclosure statements on each other;

[2] AND WHEREAS the Commissioner intends to claim confidentiality over certain documents listed in the Commissioner’s disclosure statement and has deferred to the Respondent to claim confidentiality on any of the Respondent’s Documents (as defined in paragraph 4(b) of this order) contained in the Commissioner’s disclosure statement;

[3] AND WHEREAS the Respondent has provided the Commissioner with written notice identifying the Respondent’s Confidential Documents (as defined in paragraph 4(c) of this order);

[4] AND UPON hearing the submissions by the parties at the pre-hearing conference held on April 25, 2003;

THE TRIBUNAL ORDERS THAT:

[5] For the purposes of this order:

(a) The “Commissioner’s Confidential Documents” shall mean those documents designated by the Commissioner as confidential. The Commissioner may designate as confidential any documents that (i) are listed in the Commissioner’s disclosure statement or any supplementary disclosure statements or are otherwise produced by the Commissioner in this application (including expert affidavits and will-say statements), and (ii) are not Respondent’s Documents. The Commissioner’s Confidential Documents shall be designated as “Confidential - Level A” or “Confidential - Level B”, to denote the persons who are permitted access to those documents. The Commissioner’s Confidential Documents which are designated as Confidential - Level A may be disclosed by the Respondent only in accordance with paragraph 13 below. The Commissioner’s Confidential Documents which are designated as Confidential - Level B may be disclosed by the Respondent only in accordance with paragraph 14 below.

(b) The “Respondent’s Documents” shall mean those documents listed in the Respondent’s disclosure statement or any supplementary disclosure statements, any document provided to the Commissioner by the Respondent that is listed in the Commissioner’s disclosure statement or supplementary disclosure statements, including expert affidavits and will-say statements.

(c) The “Respondent’s Confidential Documents” shall mean those Respondent’s Documents designated as confidential by the Respondent, and shall be designated “Confidential - Level C”. The Respondent’s Confidential Documents may be disclosed by the Commissioner only in accordance with paragraphs 10 and 11 below.

(d) The Commissioner’s Confidential Documents and the Respondent’s Confidential Documents are collectively referred to as the “Protected Documents”. For greater certainty, “Protected Documents” includes the information contained in those documents.

(e) “Parties” shall mean the Commissioner and the Respondent, and “Party” shall mean the Commissioner or the Respondent.

(f) “Independent Expert” shall mean an expert retained by a Party who (i) is not a current employee of the Respondent or its affiliates, (ii) has not been an employee of the Respondent or its affiliates within 5 years prior to the date of this order, and (iii) is not a current employee of a competitor or customer of the Respondent or its affiliates.

(g) “Designated Representatives” shall mean those persons designated by the Respondent in accordance with paragraph 9 below.

[6] No Protected Document shall be disclosed except with the prior written consent of the Party that claimed confidentiality over the Protected Document or in accordance with this order or further order of the Competition Tribunal (the "Tribunal").

[7] The Parties shall use their best efforts to resolve any issues that may arise between them concerning the appropriate level of confidentiality for the Protected Documents. If agreement cannot be reached, either Party may apply to the Tribunal to determine the appropriate level of confidentiality of any Protected Document.

[8] A Party may, at any time, redesignate its Protected Documents as non-confidential or from Confidential - Level A to Confidential - Level B. Documents redesignated as non-confidential shall then cease to be confidential and shall form part of the public record if introduced into evidence at the hearing of the application, unless the Parties agree otherwise or the Tribunal orders otherwise.

[9] The Respondent may designate up to five of its employees as its representatives (the “Designated Representatives”) who will be permitted access to documents designated by the Commissioner as Confidential - Level B in accordance with the terms of this order. The designation of the Representatives shall be made by written notice to the Tribunal, with a copy sent to the Commissioner simultaneously.

[10] For the purposes of this proceeding, the Commissioner may disclose the Respondent’s Confidential Documents only to counsel for the Commissioner, their staff directly involved in the application, and on a “need to know” basis only, the Commissioner’s Independent Experts. The Respondent’s Confidential Documents shall be clearly marked “CONFIDENTIAL - Level C” on the face of the document and on each page which is claimed as confidential.

[11] The Commissioner may disclose all records and information obtained from the Respondent pursuant to section 11 orders and by way of voluntary submission, subject to the limits prescribed in section 29 of the *Competition Act*, R.S.C. 1985, c. C-34.

[12] The Respondent may disclose any of the Respondent’s Confidential Documents to any person.

[13] The Commissioner's Confidential Documents designated by the Commissioner as Confidential - Level A may be disclosed only to external counsel for the Respondent, counsel's staff that are directly involved in the application and, on a "need to know" basis only, the Independent Experts.

[14] The Commissioner's Confidential Documents designated by the Commissioner as Confidential - Level B may be disclosed only to the persons identified above in paragraph 13 and the Designated Representatives.

[15] The Commissioner's Protected Documents shall be clearly marked "CONFIDENTIAL - Level A" or "CONFIDENTIAL - Level B", as is appropriate, on the face of the document and on each page which is claimed as confidential.

[16] Notwithstanding any provision of this order, the Commissioner is permitted to disclose the Commissioner's Confidential Documents to any person.

[17] Independent Experts and Designated Representatives shall not copy or disclose Protected Documents directly or indirectly to any other person, except for persons permitted to receive such Protected Documents by this order or any other order of the Tribunal.

[18] Prior to gaining access to Protected Documents referred to in this order, Independent Experts and Designated Representatives permitted by this order to have such access shall execute a confidentiality agreement in the form attached as Schedule A ("Confidentiality Agreement"). A Confidentiality Agreement signed pursuant to this order shall be filed promptly with the Registrar of the Tribunal. Such Agreements shall be kept confidential from all persons, including from opposing counsel, until such time as the experts' reports are filed pursuant to the *Competition Tribunal Rules*, SOR/94-290.

[19] If a Party is required by law to disclose a Protected Document provided by the other Party, or if a Party receives written notice from a person who has signed a Confidentiality Agreement pursuant to this order that they are required by law to disclose a Protected Document provided by the other Party, that Party shall give prompt written notice to the other Party so that the Party that claimed confidentiality may seek a protective order or other appropriate remedy.

[20] Documents over which no privilege or confidentiality claim has been asserted shall form part of the public record in this proceeding if introduced into evidence at the hearing of this application or otherwise placed on the record.

[21] The confidentiality of Protected Documents shall be maintained up to and throughout the hearing of the application and thereafter. Protected Documents shall not form part of the public record in the application if introduced into evidence at the hearing of this application, unless the Parties agree otherwise or the Tribunal orders otherwise after hearing the submissions of the Parties.

[22] Subject to paragraph 23 below, all documents produced by a Party during the course of disclosure shall be deemed authentic with respect to such aspects of authorship, execution, copies, sending, service or delivery as they appear on the face of the document.

[23] At the hearing of the application, a Party may challenge the authenticity of a document in respect of any of the aspects referred to in paragraph 22 above, as long as notice of such challenge is provided to the other Party no later than 10 days prior to the commencement of the hearing of the application. The Party so challenging shall have the burden of proof.

[24] This order does not determine the admissibility of any documents as evidence at the hearing of the application.

[25] The termination of proceedings in this application shall not relieve any person to whom Protected Documents were disclosed pursuant to this order from the obligation of maintaining the confidentiality of such information in accordance with the provisions of this order, subject to any further order of the Tribunal.

[26] This order shall be subject to further direction or order of the Tribunal, including in relation to the use of Protected Documents at the hearing of the application.

DATED at Ottawa, this 28th day of April, 2003.

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

(s) Eleanor R. Dawson

[27] Schedule A: Confidentiality Agreement

IN CONSIDERATION of being provided with information or documentation in connection with this application over which claims for confidentiality have been advanced (the “Confidential Information”), I _____, of the City of _____, in the Province of _____, hereby agree to maintain the confidentiality of the Confidential Information so obtained. I will not copy or disclose the Confidential Information so obtained to any other person, except (a) my staff who are directly involved in this matter; (b) counsel for the party on whose behalf I have been retained and members of his firm who are directly involved in this application; (c) other experts retained by or on behalf of the party on whose behalf I have been retained and who have signed a similar confidentiality agreement with the parties to this application; and (d) persons permitted by order of the Competition Tribunal. Nor will I use the Confidential Information so obtained for any purpose other than in connection with this application and any related appeals.

Upon completion of this application and any related appeals, I agree that the Confidential Information, and any copies of same, shall be dealt with in accordance with instructions from counsel for the party I am retained by or as prescribed by order of the Competition Tribunal.

I acknowledge that I am aware of the order granted by the Competition Tribunal on _____, in this regard, a copy of which is attached to this agreement and agree to be bound the same. I acknowledge that any breach of this agreement by me will be considered to be a breach of the said order of the Competition Tribunal. I further acknowledge and agree that the Commissioner of Competition (“Commissioner”), Sears Canada Inc. and its affiliates shall be entitled to injunctive relief to prevent breaches of this agreement and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled in law or in equity.

In the event that I am required by law to disclose any of the Confidential Information, I will provide [insert name of retaining or employing party] with prompt written notice so that the person that claimed confidentiality over such Confidential Information may seek a protective order or other appropriate remedy. In any event, I will furnish only that portion of the Confidential Information that is legally required and I will exercise my best efforts to obtain reliable assurance that confidential treatment will be accorded to the Confidential Information.

I will promptly, upon the request of the person providing the Confidential Information, advise where such material is kept. At the conclusion of my involvement, I will, upon the request and direction of the person providing the Confidential Information destroy, return or otherwise dispose of all Confidential Information and copies thereof received or made by me having been duly authorized and directed to do so.

I hereby attorn to the jurisdiction of the Federal Court of Canada and/or the Competition Tribunal to resolve any disputes arising under this agreement.

SIGNED, SEALED AND DELIVERED before a witness this ____ day of _____, 2003.

(Witness Signature)

(Signature)

APPEARANCES

For the applicant:

The Commissioner of Competition

John L. Syme
Arsalaan Hyder

For the respondent:

Sears Canada Inc.

William W. McNamara
Martha A. Healey