Competition Tribunal Tribunal de la Concurrence

Reference: *Commissioner of Competition v. Sears Canada Inc.*, 2003 Comp. Trib. 2
File no.: CT2002004
Registry document no.: 0028

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: 20021121
Member: Dawson J. (presiding)
Date of reasons and order: 20030205
Reasons and order signed by: Dawson J.

REASONS AND ORDER REGARDING RESPONDENT' S MOTION

[1] On July 22, 2002, the Commissioner of Competition (the "Commissioner") filed an application under the ordinary selling price provisions of subsection 74.01(3) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"), against Sears Canada Inc. ("Sears"). The Commissioner alleges that Sears employed deceptive marketing practices which constituted reviewable conduct in connection with the promotion and sales of certain tires to the public. Sears filed a responding statement of grounds and material facts ("response") on September 18, 2002, opposing the application and putting in issue the constitutional validity, applicability or effect of subsection 74.01(3) of the Act. The Commissioner filed a reply on October 21, 2002, to the response filed by Sears. In that reply the Commissioner conceded that subsection 74.01(3) of the Act infringes Sears' right to freedom of expression under paragraph 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, as amended ("Charter"), but submitted that this infringement is a reasonable limit that is demonstrably justified in a free and democratic society, under section 1 of the Charter. Pursuant to sections 4.1 and 5.1 of the *Competition Tribunal Rules*, SOR/94-290, as amended (the "Rules"), the Commissioner and the respondent served disclosure statements on each other, following, respectively, the filing of the application and the response.

[2] At a pre-hearing conference, the Competition Tribunal ("Tribunal") heard argument on a motion brought by Sears in which it sought an order pursuant to paragraph 21(2)(d) of the Rules allowing Sears to examine for discovery particular persons or documents, and cross-examination on certain affidavits and will-say statements. More particularly Sears sought:

> (i) an order directing all non-expert witnesses who will testify at the hearing of the application at the request of the Commissioner, to attend individually for examination for discovery, or, alternatively, for cross-examination by counsel for the Respondent on their will-say statements served by the Commissioner;
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> (ii) an order directing a Compliance Officer with the Competition Bureau, Industry Canada, who has been involved in gathering and analyzing the information relied on by the Commissioner in respect of this application to attend for examination for discovery or, alternatively, for cross-examination on his will-say statement, if any, served by the Commissioner herein; and
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> (iii) an order directing a representative of Bridgestone/Firestone Canada Inc., and of Michelin North America (Canada) Inc. to attend for cross-examination on their affidavits identified in the Disclosure Statement served by the Commissioner on August 6, 2002 herein, by Counsel for the Respondent, at Toronto, Ontario.

[3] In the alternative, Sears sought an order requiring the Commissioner to produce to the respondent meaningful written summaries of all relevant information gathered in the context of inquiry conducted by the Commissioner, to the extent that such information did not come from Sears.

[4] At the hearing of the motion, as a preliminary matter, counsel for Sears requested an order that six exhibits attached to the affidavit of the Competition Law Officer ("officer") filed in opposition to Sears' motion be expunged.

A. THE EXHIBITS ATTACHED TO THE AFFIDAVIT OF THE OFFICER

[5] Counsel for Sears argued that exhibits S, T, U, V, W and X attached to the affidavit of the officer should be expunged on the basis that they are extracts from the transcript of an examination of a Sears' representative by the Commissioner, conducted pursuant to paragraph 11(1)(a) of the Act, and that they should remain confidential. Counsel relied upon subsection 10(3) of the Act which states that "All inquiries under this section shall be conducted in private." Counsel argued that these extracts from the examination should therefore remain private and not be made reference to in this public proceeding. Further, and in any event, counsel for Sears submitted that in order to use the transcript of an examination conducted pursuant to paragraph 11(1)(a) of the Act in these proceedings, the Commissioner must bring a motion seeking leave pursuant to section 22.1 of the Rules.

[6] Counsel for the Commissioner responded that since the Commissioner filed this application with the Tribunal on July 22, 2002, section 29 of the Act now governs this matter. Subsection 29(1) states that:

> **29.**(1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration and enforcement of the Act.
> ...
> (*b*) any information obtained pursuant to section 11, 15, 16 or 114; (emphasis added)

[7] Counsel for the Commissioner submitted therefore that the Commissioner has authority under section 29 of the Act to communicate information obtained pursuant to section 11 for purposes of the administration and enforcement of the Act. It was argued that this is what the Commissioner was doing in the context of the pre-hearing conference.

[8] I agree. The portions of the transcripts from the examination of Sears' representative were exhibited to the officer's affidavit in response to a contested motion brought in a proceeding under the Act. Further, in *Director of Investigation and Research v. Southam Inc.* (1991), 38 C.P.R. (3d) 390, [1991] C.C.T.D. No 10 (QL) (Comp. Trib.), Justice Reed sitting as the presiding judicial member of the Tribunal observed that the provisions of subsection 29(1) of the Act only relate to the inquiry or investigation stage. It follows that subsection 29(1) does not prohibit the Commissioner from using information obtained pursuant to section 11 of the Act on this motion.

[9] As for Sears' argument that a motion for leave was required pursuant to section 22.1 of the Rules, that provision is as follows:

> The Commissioner may by motion request authorization from the Tribunal to read into evidence information obtained pursuant to paragraph 11(1)(a) of the Act from an officer of the person filing the response, unless the person undertakes to call the officer as a witness.

Under this rule a respondent may preclude a motion by the Commissioner to read into evidence information obtained pursuant to paragraph 11(1)(a) of the Act by undertaking to call the officer who made the statement as a witness. This reflects, I believe, that section 22.1 of the Rules is intended to operate at a hearing.

[10] Where at a pre-hearing conference the Commissioner seeks to refer to a transcript of an examination conducted pursuant to paragraph 11(1)(a) of the Act only for the purpose of showing that a statement was made for the purpose of explaining the course of dealings between the Commissioner and the respondent, I am not satisfied that section 22.1 of the Rules has any application.

[11] It follows that the Commissioner was not obliged to make any motion under section 22.1 of the Rules.

B. RESPONDENT'S RIGHT TO DISCOVERY

[12] Sears premises much of its argument with respect to discovery on principles of procedural fairness and natural justice. It is therefore helpful to consider the level of disclosure now mandated by the Rules.

[13] New provisions of the Rules require the service of disclosure statements following the filing of the application and the response. Section 4.1 of the Rules requires the Commissioner to serve a disclosure statement on the respondent within 14 days after the notice of application is filed. Section 5.1 of the Rules requires the respondent to serve a disclosure statement on the Commissioner within 14 days after the service of the response. Under the Rules, there is no express requirement for the Commissioner to serve a disclosure statement following the filing of the Commissioner's reply. The relevant sections of the Rules provide:

> **4.1**(1) The Commissioner shall, within 14 days after the notice of application other than an application for an interim order is filed, serve on each person against whom an order is sought the disclosure statement referred to in subsection (2).
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> (2) The disclosure statement shall set out
>
> (*a*) a list of the records on which the Commissioner 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 application, except with respect to applications made under Part VII.1 of the Act.
>
> ...

> **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.
>
> (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.

[14] This disclosure process in non-merger matters was intended in most circumstances to replace the existing discovery process, and to ensure that contested proceedings with respect to reviewable matters be dealt with fairly and expeditiously. Paragraph 21(2)(d.1) of the Rules requires that for such proceedings discovery is not automatic but may be granted by the Tribunal "if warranted by the circumstances".

[15] In the present case no specific attack is made on the adequacy of the Commissioner's disclosure statement as it relates to issues other than the constitutional validity of the Act.

[16] Sears' strongest arguments with respect to discovery related to its right to obtain relevant and helpful information obtained from other industry participants. Bridgestone/Firestone Canada Inc. and Michelin North America (Canada) Inc. were named respondents in an *ex parte* application by the Commissioner for an order requiring them, and Sears, to produce certain records and to provide written returns of information under oath pursuant to paragraphs 11(1)(b) and (c) and subsection 11(2) of the Act. That application was granted by order of the Federal Court. Documents obtained pursuant to that application and upon which the Commissioner intends to rely were disclosed in the Commissioner's disclosure statement and copies are to be provided to Sears when the terms of a confidentiality order are settled.

[17] Further, during the course of argument of this motion an agreement was reached that the Commissioner would provide will-say statements to Sears in respect of the affidavits from Bridgestone/Firestone Canada Inc. and Michelin North America (Canada) Inc. in lieu of Sears' request for an order permitting cross-examination of those affiants.

[18] Having considered the pleadings filed by the parties, the agreement to provide will-say statements, and the oral and written submissions of the parties, I have not been persuaded that, aside from the constitutional issue raised in the pleadings, there is anything out of the ordinary raised in the pleadings in this case which would warrant the broad discovery sought by Sears.

[19] The disclosure provided by the Commissioner in his pleadings and disclosure statement and in the documents and will-say statements to be provided has not been shown to fall short of disclosing to Sears the case it has to meet. The affidavit filed in support of Sears' motion for discovery was sworn by a lawyer with the firm of solicitors representing Sears in this matter. It was confined to describing the procedural steps in the investigation which led to this application and in this application. The affidavit did not focus on specific information or documents said to be necessary for the defence of the application, did not state that Sears is unable to obtain this information without discovery, did not allege any actual unfairness if Sears has to proceed to hearing without specific evidence, and did not deal with the delay or expense which would flow from granting the requested discovery. These are things which in my view are relevant considerations when assessing whether discovery is warranted by the circumstances.

[20] In arguing that discovery was warranted, Sears particularly relied upon the facts that the Commissioner had embarked upon an inquiry under section 10 of the Act and obtained orders under section 11 of the Act. However, those are procedures which may commonly be employed by the Commissioner in the conduct of an inquiry under the Act. Here where there is no attack on the sufficiency of the disclosure statement, something more than recourse to those tools must, in my view, be established in order to constitute circumstances which warrant discovery.

[21] Turning now to Sears' constitutional challenge and whether discovery is warranted with respect to the constitutional issues, as noted above, in this proceeding Sears requests the Tribunal to determine that subsection 74.01(3) of the Act is constitutionally invalid and of no force or effect. The Commissioner concedes in his reply that subsection 74.01(3) infringes the right of Sears to freedom of expression under subsection 2(b) of the Charter but submits that the infringement of Sears' freedom of expression is a reasonable limit that is demonstrably justified in a free and democratic society.

[22] While the Commissioner responded in his reply to the constitutional challenge raised in Sears' response, the Commissioner did not serve any disclosure statement following the filing of the reply nor did he amend the original disclosure statement to address this new issue. Although the Rules do not require that a disclosure statement be served following the Commissioner's reply, without doubt Sears is entitled to know the case that it has to meet regarding the constitutional law issue.

[23] The Commissioner fairly conceded this in his written submission, where he indicated that he is prepared to provide Sears with documentary disclosure and will-say statement(s) in respect of the constitutional issue, in conformity with Rule 4.1.

[24] In view of this position I have concluded that the appropriate remedy at this stage is not to order the relief sought by the respondent, but rather to require the Commissioner to reveal his case on the constitutional law issue by serving a disclosure statement on the respondent as contemplated by Rule 4.1 that sets out with respect to the constitutional issue: (a) a list of the records on which the Commissioner intends to rely on at the hearing; and (b) the will-say statements of non-expert witnesses.

[25] If, after such disclosure, Sears wishes to pursue the right to examine particular persons for discovery, Sears may so move. At that time it will have to show that such discovery is warranted by the circumstances, as required by paragraph 21(2)(d.1) of the Rules.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[26] The motion of the respondent to expunge exhibits S, T, U, V, W and X attached to the affidavit of the officer is denied.

[27] The motion of the respondent seeking examination for discovery of particular persons or documents, cross-examinations on affidavits and will-say statements is dismissed with leave to re-apply at a later date with respect to the constitutional issue.

[28] The Commissioner shall, within 14 days of the issuance of this order, serve on the respondent a disclosure statement to address the constitutional law issue. The disclosure statement shall set out: (a) a list of the records on which the Commissioner intends to rely on at the hearing; and (b) the will-say statements of non-expert witnesses.

DATED at Ottawa, this 5th day of February, 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.

Marvin J. Huberman
Brian A. Facey