CT-2012-003

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c.C-34, as amended;

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the Competition Act;

AND IN THE MATTER OF certain policies and procedures of Direct Energy Marketing Limited.

B E T W E E N:

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE
FILED / PRODUIT
CT-2012-003
December 11, 2014
Jos LaRose for / pour
REGISTRAR / REGISTRAIRE
OTTAWA, ONT
118

THE COMMISSIONER OF COMPETITION

Applicant

\- and -

DIRECT ENERGY MARKETING LIMITED

Respondent

\- and -

NATIONAL ENERGY CORPORATION

Intervenor

THE COMMISSIONER OF COMPETITION'S REPLY MEMORANDUM OF FACT AND LAW
(For answers to preliminary determination of questions of law)

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A. THE COMMISSIONER'S REPLY IN A NUTSHELL

1. To resolve both the Commissioner's motion and Direct Energy's motion for summary judgment, the Tribunal must decide whether the relevant date for determining whether an order can be made under of section 79 of the *Competition Act* is (a) the date the Tribunal makes its final order, (b) the date the Commissioner makes his application, or (c) the date the respondent engaged in the anti-competitive conduct. If the Tribunal decides that the relevant date is the date the Tribunal makes its final order, then a respondent could (after profiting from anti-competitive conduct for three years as the Commissioner has alleged in this case) exit the market *at any time* before the Tribunal releases its final order.

2. This outcome would be both absurd, anti-competitive and would frustrate Parliament's scheme for the administration and enforcement of the *Competition Act*. To avoid this result, the relevant date for assessing dominance is when the exclusionary conduct was engaged in or, at a minimum, the date the Commissioner makes his application.

B. OVERVIEW

3. The Commissioner maintains (as argued in his memorandum of fact and law) that the correct interpretation of paragraph 79(1)(a) that is consistent with section 79 as a whole and the object of the *Competition Act* is that the respondent must have market power when it engaged in the conduct or, at a minimum, when the application was commenced. In addition to relying on the Commissioner's memorandum of fact and law, the Commissioner hereby replies to specific points raised in Direct Energy's responding memorandum of fact and law.

C. TEXTUAL ANALYSIS DOES NOT TRUMP THE MODERN APPROACH OF STATUTORY INTEPRETATION

4. Direct Energy argues that a textual analysis in statutory interpretation (otherwise known as the plain meaning rule) trumps the modern approach.[1] Applying this approach, Direct Energy textually interprets paragraph 79(1)(a) (and the other subsections of section 79) in isolation without reading the words of section 79 in their entire context and in their ordinary sense harmoniously with the scheme and object of the *Competition Act*.[2]

5. A premise of the modern approach - as noted by Elmer Driedger in *Construction of Statutes* and the Supreme Court of Canada - is that "statutory interpretation cannot be founded on the wording of the legislation alone".[3]

6. The Supreme Court, when discussing the relationship between textual and modern approaches of statutory interpretation in the context of the dispute before it, cautioned against not paying sufficient attention to the scheme and object of the Act:

> At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy

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[1] Direct Energy Responding Memorandum of Fact and Law, para. 24.

[2] *Ibid.* at paras. 25-44.

[3] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21; Elmer Driedger, *Construction of Statutes* (2nd ed. 1983).

> does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.
>
> …
>
> Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the ESA, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

7. Direct Energy's textual interpretation of each of the subsections in section 79 is, at best, incomplete and without regard to the modern approach of statutory interpretation.

D. THE BOARD'S DECISION IN *GENENTECH* IS APPLICABLE

8. Direct Energy mischaracterizes the basis upon which the Commissioner relies on *Genentech*.[4] It also relies on distinctions between *Genentech* and the present case that lack significance and do not affect the application of *Genentech*.

9. Direct Energy notes that the Commissioner relies on *Genentech* to argue that the use of the present tense in legislative drafting should not be given effect. That is not the Commissioner's argument. *Genentech*, as well as *McKinstry*[5], *Cross*[6] and section 10 of the *Interpretation Act*,[7] are authority for the following principle that the Commissioner does rely upon: an Act of Parliament is *deemed to be speaking to the circumstances as they arise*. In that regard, use of the present tense in legislative drafting does not mean that the legislation's application *is limited to* present or prospective conduct.[8]

10. Direct Energy also relies on factual distinctions between *Genentech* and the present case that lack significance. For example, Direct Energy raises its interpretation of what the respondents in *Genentech* argued (patented invention "is being sold" versus there was no longer a "patented invention…being sold."). It also

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[4] Direct Energy Responding Memorandum of Fact and Law, paras. 26-39.
[5] *McKinstry v. York Condominium Corp. No. 472* 2003 CarswellOnt 4948, 15 R.P.R. 181 at para. 34.
[6] *R. v. Cross* 2006 CarswellAlta 1224, 2006 ABQB 682 at paras. 16-18.
[7] *Interpretation Act*, R.S.C. 1985, c. I-21, section 10.
[8] *Genetech Canada Inc., Re* 1992 CarswellNat 1661, 44 C.P.R. (3d) 316; *supra*, notes 5, 6 and 7.

raises the availability of multiple remedial powers under the *Patent Act*. These distinctions do not affect the application of *Genentech* to the present case.

11. The respondents in *Genentech* and the present case (Direct Energy) argue that the governing statue (the *Patent Act* or the *Competition Act*) no longer permit an order to be made against them because they took certain steps (relinquishing control over certain patented medicine or exiting a relevant market) *after* a proceeding was brought against them but *before* a decision was made by the relevant governing body.

12. In rejecting the respondents' argument in *Genentech* (the argument that Direct Energy also makes in the motions before this Tribunal), the Board noted the following, in part:

> With respect to the use of the present tense in the term "is being sold" in paragraph 39.15(3)(b), the Board notes that section 10 of the *Interpretation Act*, which is one of the general Rules of Construction for all federal statutes, states:
>
> > 10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.
>
> The *Interpretation Act* establishes that the Board should not be bound to a strict or literal reading of paragraph 39.15(3)(b) but should instead construe this provision in a manner consistent with the scheme and intent of the legislation.
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> The Respondents invite the Board to interpret the term "is being sold" as meaning that, at any point in the Board's proceeding or hearing under paragraph 39.15(3)(b), there must be a medicine to which a patent pertains which is being sold. That is, both a patent pertaining to a medicine, and sales of the medicine are continuing prerequisites to the maintenance of the Board's jurisdiction under paragraph 39.15(3)(b) of the Patent Act. In the view of the Board such an approach is inconsistent with the scheme of the Act and, if adopted, would impede the Board in giving effect to the legislation.
>
> Were this literal construction to be applied, the Board would be required to terminate a proceeding, regardless of the stage it had reached, if it was shown that the patentee had ceased, even temporarily, selling the medicine in the relevant Canadian market, or had, as in this case, dedicated its patents

> to the public. In the Board's view, either outcome would frustrate Parliament's scheme for the regulation of prices of patented medicines.[9] [emphasis added]

13. The Board's analysis in *Genentech* is applicable to the present case and should be applied by this Tribunal.

E. DIRECT ENERGY CONFUSES SUBSTANCE OVER EVIDENCE

14. In various paragraphs of its responding memorandum of fact and law, Direct Energy argues that, because the Tribunal is permitted to consider facts and evidence arising after the commencement of the application, the relevant date for determining a violation of section 79 cannot be before the Tribunal makes its final order. In other words, Direct Energy assumes that evidence arising after commencement of the application would be irrelevant if the Tribunal adopts the Commissioner's interpretation of section 79. This is not accurate.

15. The Commissioner does not dispute that the Tribunal can consider evidence arising after an application is commenced. However, the admissibility of such evidence is an evidentiary point. Substantively, it does not change the date for determining the relevant date for determining whether an order can be made under section 79, which the Commissioner submits is a date no later than when the application is filed.

16. For example, if the respondent stops its anti-competitive conduct after the application is commenced, the Tribunal can consider this when determining whether an AMP is warranted. Likewise, in the present case, this Tribunal could consider the fact that the Commissioner has entered into a consent agreement with National related to its misleading conduct when assessing Direct Energy's business justification and also assessing whether to order an AMP.

17. Direct Energy also relies on the six prior applications pursuant to section 79 on the basis that each of these decisions considered relevant facts and evidence arising at the time of the hearing. Direct Energy submits that a finding in favour of the

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[9] *Genentech, supra* note 8 at paras. 40-43.

Commissioner would therefore be contrary to these cases and the Tribunal's practice and process. None of these six applications has dealt with a situation where the respondent exits the relevant market after an application is commenced but before the application is heard. Accordingly, Direct Energy's submission in this regard is without merit.

F. THIS APPLICATION IS NOT MOOT

18. Direct Energy argues that the Commissioner's application is now moot because there is no behaviour to correct and there are no market conditions to restore.[10] In particular, Direct Energy relies on its time-limited, non-competition agreement with EnerCare and the lack of evidence in this motion that Direct Energy sold its business to avoid the Commissioner's application.

19. In the future, there is nothing to stop Direct Energy from seeking to amend its agreement with EnerCare and deciding to re-enter the Residential Water Heater Business.

20. The Tribunal can make an order under section 79 to specifically deter a respondent from engaging in anti-competitive conduct in the future. In the present case, the Commissioner is entitled to seek an order at the final hearing preventing Direct Energy, an alleged recidivist[11], from re-entering the relevant market and engaging in the anti-competitive conduct.

G. THE ISSUE IN THIS MOTION IS WHETHER THE TRIBUNAL *CAN* ISSUE AN AMP

21. Direct Energy's argument confuses what this Tribunal has been asked to answer. In these motions, this Tribunal's will only determine whether it *can* order Direct Energy to pay an AMP when it has left the relevant market (i.e. whether the Commissioner *can* seek an order compelling Direct Energy to pay an AMP at the final hearing). This Tribunal will not determine whether it *will* order Direct Energy to pay an AMP in these motions. The latter issue will be determined at the final hearing.

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[10] Direct Energy Responding Memorandum of Fact and Law, paras. 71-79.

[11] The Commissioner pleads this fact and it is assumed true for the purposes of this application.

22. There is no dispute that the purpose of an AMP is to encourage practices by the person that are in conformity with the purposes of section 79 and not to punish that person. The Commissioner is seeking to neither punish Direct Energy nor generally deter others from engaging in similar anti-competitive conduct.

23. Contrary to Direct Energy's submissions[12], the Commissioner can seek an order compelling Direct Energy to pay an AMP in order to promote practices by Direct Energy that are in conformity with the purposes of section 79. Direct Energy, an alleged recidivist, has demonstrated its penchant on at least two occasions to engage in anti-competitive conduct. It is submitted that an AMP will deter Direct Energy from engaging in similar conduct in the future.

H. DIRECT ENERGY'S SUMMARY JUDGEMENT MOTION SHOULD BE DISMISSED

24. Direct Energy's summary judgment motion is unnecessary and should be dismissed.

25. The sole issue before this Tribunal are two questions of law based on an agreed statement of facts. The Commissioner seeks an order answering its legal questions in the affirmative, and for this matter to proceed to a final hearing on the merits expeditiously.

[12] Direct Energy Responding Memorandum of Fact and Law, para. 86.

SCHEDULE "A"

Genetech Canada Inc., Re 1992 CarswellNat 1661, 44 C.P.R. (3d) 316.

McKinstry v. York Condominium Corp. No. 472 2003 CarswellOnt 4948, 15 R.P.R. 181.

R. v. Cross 2006 CarswellAlta 1224, 2006 ABQB 682.

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27.

SCHEDULE “B”

INTERPRETATION ACT R.S.C., 1985, C. I-21

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

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