



Reference: *Safa Enterprises Inc. v. Imperial Tobacco Company Limited*, 2013 Comp. Trib. 19
File No.: CT-2013-007
Registry Document No.: 21

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

AND IN THE MATTER of an application by Safa Enterprises Inc., doing business as My Convenience Store for an order pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended, granting leave to bring an application pursuant to section 76 of the *Competition Act*.

B E T W E E N:

Safa Enterprises Inc.
(applicant)

and

Imperial Tobacco Company Limited
(respondent)



Decided on the basis of the written record
Before Judicial Member: Rennie J. (Chairperson)
Date of Order and Reasons: December 9, 2013
Reasons and Order signed by: Justice Donald J. Rennie

REASONS FOR ORDER AND ORDER

I. INTRODUCTION

[1] Safa Enterprises Inc. (the “Applicant” or “Safa”) seeks leave to make an application pursuant to section 76 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”). Safa has also filed a motion seeking permission to be represented by its manager, Mr. Adnan Mustafa.

[2] For the reasons that follow the application for leave is dismissed.

II. BACKGROUND

[3] The Applicant carries on business as My Convenience Store in Vancouver, British Columbia. It sells various products including tobacco products. The Applicant purchases its tobacco products directly from Imperial Tobacco Company Limited (the “Respondent” or “Imperial”), for resale in its store.

[4] Imperial also supplies its products to New Hasty Market, another convenience store located in close proximity to the Applicant. Imperial, however, charges New Hasty Market less for its tobacco products as New Hasty Market is part of Imperial’s “Preferred Pricing Program” (“PPP”). New Hasty Market’s prices on tobacco products are therefore lower than those sold by the Applicant and the Applicant submits that it has, in consequence, been losing customers.

[5] The Applicant has made various attempts to participate in Imperial’s PPP. Recently, Imperial advised the Applicant that it could participate in the Respondent’s “Low Segment Term Program”, which provides it with rebates on certain brands. However, in a letter dated January 17, 2013, Imperial advised the Applicant that it was not eligible to enrol in the PPP.

[6] On September 19, 2013, Safa applied pursuant to section 103.1 of the Act for leave to make an application under section 76, the price maintenance provision. It also filed a motion seeking leave to be represented by its manager.

III. MOTION FOR LEAVE TO BE REPRESENTED BY AN OFFICER

[7] Safa’s Motion is filed pursuant to Rule 34 of the *Competition Tribunal Rules*, SOR/2008-141, and Rule 120 of the *Federal Courts Rules*, SOR/98-106.

[8] In an affidavit filed in support of the Motion, the sole shareholder and director of the Applicant, Ms. Raina Adnan, explains that the Applicant does not have the necessary funds to retain legal counsel. Attached to the affidavit are unaudited financial statements. She further explains that Mr. Adnan Mustafa, her husband, has a background in business studies and that he will ensure that the Tribunal hearing will be conducted in a business-like manner.

[9] Factors that are relevant in determining whether to grant leave include the company’s ability to afford a lawyer, the complexity of the legal issues, the ability of the proposed representative to handle the matter expeditiously; and whether the proposed representative will appear as both advocate and witness (*The Commissioner of Competition v. Fabutan Corporation*, 2005 Comp. Trib. 45).

[10] The Respondent has not opposed the Applicant's motion and, in the circumstances of this case, the motion is granted. The Tribunal finds that there is convincing evidence that the Applicant does not have the ability to afford a lawyer and that Mr. Mustafa is able to handle this case expeditiously and wisely.

IV. APPLICATION FOR LEAVE TO FILE A S. 76 APPLICATION

[11] Subsection 103.1(7) of the Act, reads as follows:

The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.	Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.
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[12] In *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41, the Tribunal interpreted subsection 103.1(7) as follows (at para. 14):

Accordingly on the basis of the plain meaning of the wording used in s. 103.1(7) of the Act and the jurisprudence referred to above, I conclude that the appropriate standard under s. 103.1(7) is whether the leave application is supported by sufficient credible evidence to give rise to a bona fide belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order.

[13] This test was subsequently adopted by the Federal Court of Appeal in *Symbol Technologies Canada ULC. v. Barcode Systems Inc.*, 2004 FCA 339.

[14] In this case, the Applicant is seeking leave to file an application in accordance with section 76. The Tribunal may grant leave pursuant to subsection 103.1(7.1) if it "has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section".

[15] While the language used in subsection 103.1(7.1) differs somewhat from that used in subsection 103.1(7), there are sufficient similarities to apply the principles developed by Justice Dawson in *Milliken*, above. I conclude that under subsection 103.1(7.1), the Tribunal must determine whether the leave application is supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly affected by the conduct referred to in section 76, and that the conduct in question could be subject to an order.

[16] The question at issue in this case is whether there is sufficient credible evidence to support a finding that there are reasonable grounds to believe that Imperial's conduct could be subject to an order under section 76.

[17] In considering this leave application, all the elements of section 76 must be addressed (see: *Barcode*, above, at para. 18-19). For example, with respect to the requirement of the presence of an adverse effect on competition in the market, set out in paragraph 76(1)(b), there must be some evidence led by the applicant and some consideration by the Tribunal of the effect of the conduct on competition in the market (see *Barcode*, above, at para. 23). However, the threshold at the leave stage is low.

[18] In this case, the Applicant asserts that the Respondent has engaged in discriminatory conduct, under subparagraph 76(1)(a)(ii):

76. (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that

(a) a person referred to in subsection (3) directly or indirectly

...

(ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons;
and

(b) the conduct has had, is having or is likely to have an adverse effect on

76. (1) Sur demande du commissaire ou de toute personne à qui il a accordé la permission de présenter une demande en vertu de l'article 103.1, le Tribunal peut rendre l'ordonnance visée au paragraphe (2) s'il conclut, à la fois :

a) que la personne visée au paragraphe (3), directement ou indirectement :

...

(ii) soit a refusé de fournir un produit à une personne ou catégorie de personnes exploitant une entreprise au Canada, ou a pris quelque autre mesure discriminatoire à son endroit, en raison de son régime de bas prix;

b) que le comportement a eu, a ou aura vraisemblablement pour effet de

competition in a market.

nuire à la concurrence dans un marché.

[emphasis added]

[mes soulignements]

[19] There is some debate as to whether section 76 requires an applicant to establish that its low pricing policy is the only cause of the refusal to supply or discrimination, or whether it is sufficient for the applicant to establish that although several proximate causes exist, the low pricing policy is one of them.

[20] It is not necessary to resolve this issue at the leave stage and if there are any facts in the affidavit that might meet the requirement of subparagraph 76(1)(a)(ii), for example some evidence of a nexus between the alleged discrimination and the Applicant's alleged low pricing policy, the benefit of any doubt should work in favour of granting leave (see *Barcode*, at para. 27). In this case, the Applicant has included in its application, letters that it has received from the Respondent and these letters do not clearly explain why the Applicant has not met the eligibility criteria.

[21] There is some evidence that Safa has offered low prices in the past on the Respondent's tobacco products. In an e-mail dated November 14, 2012, addressed to Mr. Rob Laing, the Applicant's Accounts Representative at Imperial, Mr. Mustafa wrote as follows:

As we mentioned during your visit that our pricing for Imperial tobacco products were already one of the lowest in Vancouver. [...] Our neighbour is [...] practicing this policy of selling products at or below our cost to get us out of the business and we believe Imperial Tobacco [is] supporting/helping him indirectly in his cause as he is our direct competition.

[22] Mr. Mustafa states as follows in paragraph 48 of his affidavit:

The conduct of [Imperial] of low pricing policy has had, is having and will be having an adverse effect on [the] Applicant's business and competition in the market.

[23] In its reply, the Applicant explains at paragraph 47 that it had to reduce its prices to or below cost "because PPP was offered to [its] direct competitor":

As far as **low pricing policy** of the Applicant is concerned [Safa] wants to keep the prices of [Imperial]'s products **lower** than the prices of [Safa]'s direct competitor (NHM) to increase sales volume but it cannot be possible if [Safa]'s acquisition cost of [Imperial]'s products is higher or equal to NHM's selling prices of [Imperial]'s products. [Safa]'s prices of other companies' tobacco

products and other products offered are one of the cheapest in Vancouver.

[24] However, it is not the low pricing policy of Imperial which is important at this stage, but that of the applicant who is seeking leave. The Applicant's low pricing policy, described above, is not the policy the legislator had in mind when drafting section 76 of the Act. The mischief to which the provision is directed (to use the example of the present case) would be the refusal of Imperial to supply Hasty New Market because Hasty re-sells Imperial's products at a price to which Imperial objects.

[25] In the circumstances, while the Tribunal understands that the Applicant faces a difficult situation, it finds that there is not, on the record before the Tribunal, reasonable grounds to believe that Imperial's conduct could be subject to an order under section 76. The application will therefore be dismissed.

[26] However, the application will be dismissed without prejudice.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[27] The Applicant's motion for leave to be represented by an officer is granted.

[28] The application for leave to file an application pursuant to section 76 is hereby dismissed without costs and without prejudice.

DATED at Ottawa, this 9th day of December 2013.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Donald J. Rennie

APPEARANCES:

For the applicant:

Safa Enterprises Inc.

Adnan Mustafa

For the respondent:

Imperial Tobacco Company Limited

Michelle Lally

Adam Hirsh