

Competition Tribunal



Tribunal de la Concurrence

Reference: *Steven Olah v. Her Majesty the Queen as represented by the Correctional Service of Canada et al.*, 2008 Comp. Trib. 29

File No.: CT-2008-008

Registry Document No.: 0022

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

AND IN THE MATTER of an application by Steven Olah for an order pursuant to section 103.1 granting leave to make an application under section 77 of the *Competition Act*;

B E T W E E N:

Steven Olah
(applicant)

and

**Her Majesty the Queen as represented
by the Correctional Service of Canada
and Gravenhurst Home Hardware**
(respondents)



Decided on the basis of the written record.

Date of Reasons and Order: November 5, 2008

Reasons and Order signed by: Madam Justice Sandra J. Simpson

**REASONS AND ORDER DISMISSING AN APPLICATION FOR LEAVE UNDER
SECTIONS 103.1 AND 77 OF THE *COMPETITION ACT***

I. INTRODUCTION

[1] Steven Olah (the “Applicant”) has applied to the Competition Tribunal (the “Tribunal”) pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “Act”), for leave to make an application under section 77 of the Act.

II. THE PARTIES

[2] When the application was filed, the Applicant was an inmate at the Beavercreek Minimum Security Institution located near Gravenhurst, Ontario. He had previously been an inmate of the Fenbrook Medium Security Institution (“Fenbrook Institution”) which is also located in Gravenhurst. The Notice of Application was filed on the Applicant’s behalf and on behalf of all inmates at the Fenbrook Institution.

[3] The Respondent, Her Majesty the Queen as represented by the Correctional Service of Canada (“Her Majesty the Queen”), was at all material times responsible for the operation of the Fenbrook Institution.

[4] The Respondent Gravenhurst Home Hardware (“Home Hardware”) is a hardware store in Gravenhurst Ontario.

III. THE PARTIES’ POSITIONS

[5] The Applicant alleges in his Notice of Application that the Respondent Her Majesty the Queen’s implementation of a privatized Inmate Purchasing Service at the Fenbrook Institution which requires inmates to purchase merchandise exclusively from Home Hardware (the “Alleged Practice”) constitutes exclusive dealing under subsection 77(1) of the Act. The Applicant complains about the Alleged Practice because Home Hardware charges a 10% mark-up for hobbycraft goods and a 20% mark-up for general merchandise which it does not regularly stock.

[6] In her written representations of October 22, 2008, the Respondent Her Majesty the Queen opposes the application and asserts that the Tribunal has no jurisdiction over the Crown’s management of the Fenbrook Institution. She also asserts that there is no evidence of a direct and substantial effect on the Applicant’s business and that there is no evidence of exclusive dealing.

[7] Home Hardware has not filed written representations.

IV. JURISDICTION

[8] Section 2.1 of the Act governs the application of the act to the Crown. It reads:

2.1 This Act is binding on and applies to an agent of Her Majesty in right of Canada or a province that is a corporation, in respect of

2.1 Les personnes morales mandataires de Sa Majesté du chef du Canada ou d’une province sont, au même titre que si elles

commercial activities engaged in by the corporation in competition, whether actual or potential, with other persons to the extent that it would apply if the agent were not an agent of Her Majesty.

n'étaient pas des mandataires de Sa Majesté, liées par la présente loi et assujetties à son application à l'égard des activités commerciales qu'elles exercent en concurrence, réelle ou potentielle, avec d'autres personnes.

[9] In *Sebastian v. Saskatchewan (Dept. of Highways & Transportation)* (1987), 61 Sask. R. 71, the Saskatchewan Court of Queen's Bench stated that the Act applies to an agent of the Crown which is incorporated but not to the Crown itself.

[10] In this case the action was brought directly against Her Majesty the Queen and not an agent of the Crown. Furthermore, neither Her Majesty the Queen nor the Correctional Service of Canada are corporations involved in commercial activities. The Alleged Practice in this case is a policy decision regarding the workings of the Inmate Purchasing Services at the Fenbrook Institution and not a commercial activity. For this reason, the Act does not apply.

[11] In view of this conclusion, the application for leave will be dismissed as it relates to Her Majesty the Queen.

[12] I now turn to the leave application as it relates to Home Hardware.

V. THE TEST FOR LEAVE

[13] Subsection 103.1(7) of the Act sets out the test for leave on an application under section 77 of the Act. It reads:

103.1(7) 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.

103.1(7) 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.

[my emphasis]

[14] In *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41, the Tribunal held that the "appropriate standard under subsection 103.1(7) of the Act 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." The test was subsequently adopted by the Federal Court of Appeal in *Symbol Technologies Canada ULC. v. Barcode Systems Inc.*, 2004 FCA 339.

[15] All the elements of the reviewable trade practice must be considered and the facts relevant to those elements must be set out in the affidavit filed in support of the leave application. See *Barcode*, above, at paragraph 18.

[16] The affidavit sworn by the Applicant on August 27, 2008, in support of his application for leave provides no evidence demonstrating that he is directly and substantially affected in his business by the Alleged Practice as required by subsection 103.1(7) of the Act and no evidence showing that the Alleged Practice could be subject to an order under subsection 77(2) of the Act. Furthermore, the Alleged Practice in this case does not constitute exclusive dealing as defined in subsection 77(1) of the Act since it is not the result of a supplier's initiative. The evidence shows that it was the Correctional Service of Canada that decided to deal exclusively with Home Hardware for the acquisition of the inmates' supplies.

[17] In view of these findings the application for leave will also be dismissed as it relates to Home Hardware.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[18] The application for leave against both respondents is hereby dismissed with costs in the amount of \$100.00 payable forthwith to the Respondent Her Majesty the Queen by certified cheque.

DATED at Ottawa, this 5th of November, 2008

SIGNED on behalf of the Tribunal by the Chairperson of the Tribunal

(s) Sandra J. Simpson

COUNSEL:

For the applicant

Steven Olah

John L. Hill

For the respondents

Her Majesty the Queen as represented by the Correctional Service Canada

Matthew Sullivan

Susan Keenan

Gravenhurst Home Hardware

Not represented