



Reference: *The Commissioner of Competition v. Fabutan Corporation*, 2005 Comp. Trib. 45
File no.: CT-2005-003
Registry document no.: 0019

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

AND IN THE MATTER OF an inquiry pursuant to subsection 10(1)(b)(ii) of the *Competition Act* relating to the marketing practices of The Dosco Group Inc., Fabutan Corporation, Fabutan Studios and Douglas Scott McNabb, President, carrying on business as Fabutan Sun Tan Studios;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.01 of the *Competition Act*.

BETWEEN

The Commissioner of Competition
(applicant)

and

The Dosco Group Inc., Fabutan Corporation
Fabutan Studios and Douglas Scott McNabb, president
carrying on business as Fabutan Sun Tan Studios
(respondents)

Date of hearing: 20051125
Presiding Judicial Member: Dawson J.
Date of Reasons: December 2, 2005
Reasons signed by: Madam Justice Eleanor Dawson



**REASONS FOR ORDER DISMISSING MOTION FOR LEAVE TO BE
REPRESENTED BY AN OFFICER**

[1] On Friday, November 25, 2005, the Competition Tribunal (“Tribunal”) heard argument with respect to the motion brought on behalf of the respondents other than Mr. McNabb ("corporate respondents") for leave for them to be represented by its corporate officer, Mr. McNabb, rather than by a solicitor. Later that day the Tribunal issued an order, for reasons to be delivered, dismissing the motion. These are the reasons for that order.

BACKGROUND FACTS

[2] The respondents were represented by counsel until on November 4, 2005 they purported to file a notice of intention to act in person. In response, the Tribunal drew to the parties’ attention Rule 72(1) of the *Competition Tribunal Rules*, SOR/94-290 and Rule 120 of the *Federal Courts Rules*, SOR/2004-283. Rule 72(1) of the *Competition Tribunal Rules* provides that where a question arises as to the practice or procedure to be followed in cases not expressly provided for in those rules, the practice and procedure in the *Federal Courts Rules* shall be followed, with such modifications as may be required. Rule 120 of the *Federal Courts Rules* is as follows:

120. A corporation, partnership or unincorporated association shall be represented by a solicitor in all proceedings, unless the Court in special circumstances grants leave to it to be represented by an officer, partner or member, as the case may be.

120. Une personne morale, une société de personnes ou une association sans personnalité morale se fait représenter par un avocat dans toute instance, à moins que la Cour, à cause de circonstances particulières, ne l'autorise à se faire représenter par un de ses dirigeants, associés ou membres, selon le cas.

[3] In response to this direction, the corporate respondents filed a motion seeking the required leave, supported by the affidavit of Douglas Scott McNabb. The Commissioner of Competition ("Commissioner") opposed the motion.

THE AFFIDAVIT EVIDENCE

[4] In his affidavit, Mr. McNabb swore that:

1. He is the sole director of the three corporate respondents (the respondent Fabutan Studios apparently being correctly styled as Fabutan Studios Inc.).
2. He is the owner of three other corporations that operate Fabutan franchises and carry on business as Fabutan Sun Tan Studios.
3. He is authorized by the corporate respondents to act on their behalf in this application.

4. Unaudited financial statements for the period ending September 30, 2004 relating to the corporate respondents and the three other corporations are attached to his affidavit. For the corporate respondents pertinent information is as follows:

FINANCIAL INFORMATION FOR FISCAL YEAR ENDING
SEPTEMBER 30, 2004 (UNAUDITED)

CORPORATION	Net Income (\$)	Retained earnings (\$)
The Dosco Group Inc.	2,902	348,459
Fabutan Corporation	20,830	208,655
Fabutan Studios Inc.	108,433	319,336

5. He has pledged all of his personal assets as security for purchases of capital assets and the financial operating needs of the corporate respondents.

6. To date the respondents have incurred legal fees in excess of \$55,000.00 and counsel provided to them an estimate of the fees required to proceed to the end of the application. That estimate was in excess of \$150,000.00.

7. The respondents could be responsible for costs if unsuccessful in this proceeding, and any contemplated appeal could not be exercised if Mr. McNabb is not able to represent the corporate respondents.

8. He is not a lawyer.

9. He will be a witness but his "...role as a witness will be limited to that of more a logistical and background nature".

10. He has prepared the expert witness affidavits and is capable of dealing appropriately with the issues before the Tribunal.

[5] Missing from that evidence is any evidence of how the various corporations are related to one another. I note that The Dosco Group Inc. is described as a "Holding Company" and its balance sheet discloses "Advances from Shareholders" (underlining added). There is no evidence as to the financial status of any principal shareholder other than Mr. McNabb, and the evidence as to his shareholdings with respect to the corporate respondents is ambiguous.

[6] Also missing is any information as to the relationship between the corporate respondents and the 126 franchises referred to in the financial statements of Fabutan Corporation which are not owned in whole or in part by what is described as the "parent company", or by the president of the parent company, or by family members of the president.

APPLICABLE LEGAL PRINCIPLES

[7] The jurisprudence of the Federal Courts that has considered Rule 120 establishes that:

1. Orders under Rule 120 are not routinely granted. See: *Source Services Corp. v. Source Personnel Inc.*, (1996) 105 F.T.R. 42.
2. The factors relevant to determining whether special circumstances exist 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 representatives will appear as both advocate and witness. See: *Kobetek Systems Ltd. v. Canada*, [1998] 1 C.T.C. 308 (T.D.); *Gunner Industries Ltd. v. Canada*, [2002] 4 C.T.C. 190 (F.C.A.); *S.A.R. Group Relocation Inc. v. Canada (Attorney General)* (2002), 289 N.R. 163 (F.C.A.).
3. With respect to impecuniosity, the Court must be satisfied that the corporation is truly unable to pay for a lawyer. Such impecuniosity must extend to the company's principal shareholder(s). See: *Source Services*, above and *S.A.R. Group Relocation*, above.

APPLICATION OF LEGAL PRINCIPLES TO THE EVIDENCE

[8] In my view, on the evidence before the Tribunal the two most important criteria are the financial situation of the corporate respondents and the status of their proposed representative as a witness.

[9] With respect to the financial situation of the corporate respondents, the evidence has failed to persuade me that the corporate respondents are truly unable to pay for a lawyer. Each corporation shows significant retained earnings, each in an amount in excess of the estimated future legal costs. Fabutan Studios Inc. showed a net income of \$108,433.00 over its last reported financial period. Aside from that, the evidence is silent as to the ability of the corporate respondents to raise the necessary funds.

[10] In oral argument, Mr. McNabb argued that the corporate respondents do not have the ability to pay for a solicitor out of their existing cash flows, and that it would take between 12 to 24 months for them to pay legal fees out of their cash flows. Even if true, this falls far short of the evidence required to establish impecuniosity within the contemplation of Rule 120.

[11] With respect to the second criteria, it is agreed that Mr. McNabb will be a witness in the proceeding. While he has sworn that his participation would relate to "more a logistical and background nature", the Commissioner argues that the respondents' disclosure statement indicates that Mr. McNabb is expected to testify with respect to a number of matters, including:

- The relationship between the corporate respondents;
- The nature of ultraviolet radiation and the tanning process;
- The nature of the tanning industry;
- Fabutan's equipment, standards and practices; and
- The risks and benefits associated with tanning.

[12] Much of this evidence, particularly the last enumerated item, is central to the issues in dispute between the parties. While the fact the representative will be a witness may not be an absolute bar to the making of an order under Rule 120, the fact Mr. McNabb will give evidence on disputed matters is a factor that militates against granting the requested order.

[13] With respect to the remaining two criteria, the Commissioner conceded that the legal issues in this case are not complex. The case will turn on matters of fact together with scientific and medical opinion. The fact that Mr. McNabb considers himself capable of researching the relevant rules and procedures so as to ensure that the Tribunal hearing will be conducted in a businesslike manner and proceed expeditiously does not, with respect, necessarily make it so.

CONCLUSION

[14] Primarily taking into account the financial situation of the corporate respondents, but also considering that Mr. McNabb will give evidence with respect to matters in dispute, the motion was dismissed.

DATED at Ottawa, this 2nd day of December, 2005.

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

(s) Eleanor R. Dawson

APPEARANCES:

For the applicant:

The Commissioner of Competition

J. Sanderson Graham

For the respondents:

The Dosco Group Inc.

Fabutan Corporation

Fabutan Studios

Douglas McNabb