Competition Tribunal Tribunal de la Concurrence

Reference: *Robinson Motorcycle Limited v. Fred Deeley Imports Ltd.*, 2005 Comp. Trib. 40
File No.: CT2004007
Registry Document No.: 0035

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

AND IN THE MATTER OF applications by Robinson Motorcycle Ltd. 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 under section 75 of the Act and for an interim order pursuant to subsection 104(1) of the Act;

AND IN THE MATTER OF an application by Robinson Motorcycle Ltd. for an order pursuant to section 75 of the Act.

B E T W E E N:

Robinson Motorcycle Limited
(applicant)

and

Fred Deeley Imports Ltd.
(respondent)

Date of hearing: 20051004
Presiding Judicial Member: Phelan J.
Date of Reasons and Order: November 14, 2005
Reasons and Order signed by: Mr. Justice M. Phelan

ORDER AND REASONS FOR ORDER - COSTS

I. INTRODUCTION

[1] On September 15, 2005, Robinson Motorcycle Ltd. ("Robinson") and Fred Deeley Imports Ltd. ("Deeley") reached an agreement providing for the consent dismissal of Robinson's application filed under section 75 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act"), and referring solely the issue of costs to the Competition Tribunal (the "Tribunal").

[2] Robinson contends that it is entitled to recover its costs on a partial indemnity basis from Deeley or, in the alternative, requests that no costs be awarded. Robinson fixes its costs at $25,681.73. Deeley opposes Robinson's claim and argues that it is entitled to a cost award in the form of a $156,136.10 lump sum.

II. BACKGROUND

[3] On January 16, 2004, Deeley, the exclusive distributor of Harley-Davidson motorcycles and other related products in Canada, advised Robinson that its retailer agreement would not be renewed once the agreement expired on July 31, 2004. At the time, Robinson, an authorized Harley-Davidson retailer, had devoted its business exclusively to Harley-Davidson products for almost fifteen years.

[4] One month before the expiration of the retailer agreement, Robinson applied to the Tribunal pursuant to subsection 103.1(1) of the Act for leave to bring an application under section 75. Robinson was seeking an order which would direct Deeley to accept Robinson as a customer on the usual trade terms thereby allowing Robinson to continue selling Harley-Davidson products.

[5] Deeley vehemently opposed Robinson's application for leave claiming that Robinson could obtain an adequate supply of other brands of motorcycles and that the geographic area serviced by Robinson would continue to be well served by competing retailers. Despite these arguments, Robinson was granted leave to file an application under section 75 of the Act on July 16, 2004. On February 15, 2005, the Tribunal provided further reasons for the order as required by a judgment of the Federal Court of Appeal (*Fred Deeley Imports Ltd. v. Robinson Motorcycles Ltd*. (23 November 2004), Ottawa A-412-04 (F.C.A.)).

[6] On August 20, 2004, Robinson filed a motion for interim relief to secure continued supply of Harley-Davidson products. An order on consent was issued by the Tribunal on December 7, 2004, and provided that Deeley was to supply Robinson with non-seasonal general merchandise and parts until the Tribunal decided on the merits of the section 75 application.

[7] On February 7, 2005, Robinson served Deeley with a statement of claim filed with the Ontario Superior Court of Justice. Robinson asserted in this claim that Deeley had breached its retailer agreement and its duty of good faith and fair dealing. In this civil proceeding, Robinson was seeking a permanent mandatory injunction directing Deeley to continue to supply Robinson with Harley-Davidson products. In the alternative, Robinson asked that it be awarded equitable damages in the sum of $5,000,000.00 as well as $1,000,000.00 in punitive damages.

[8] Given the ongoing Tribunal proceedings, Robinson and Deeley agreed to hold the civil proceedings in abeyance. On September 15, 2005, they reached a settlement agreement on the section 75 proceedings providing for the dismissal of Robinson's application before the Tribunal as of December 31, 2005, and that Deeley continue to comply with the interim order of December 7, 2004, until that date. Although settlement agreements normally provide for the issue of costs, the parties could not agree and the agreement provided that the issue be referred to the Tribunal.

[9] On November 14, 2005, the Tribunal issued the order on consent pursuant to the terms proposed by the parties.

III. APPLICABLE LAW

[10] Since 2002, section 8.1 of the *Competition Tribunal Act*, R.S.C. 1985, c.19 (2d Supp.) as amended, empowers the Tribunal to award costs. The 2002 amendment was part of Bill C-23, *An Act to amend the Competition Act and the Competition Tribunal Act*, 1st Sess., 37th Parl., 2002 (assented to 4 June 2002), S.C. 2002, c.16, which established a regime in applications to the Tribunal by private parties. The Bill extended to private parties the right to seek limited relief directly from the Tribunal while, at the same, empowering the Tribunal to hear applications in a summary manner and to award costs.

[11] Section 8.1 provides that the Tribunal may award costs on a final or interim basis "…in accordance with the provisions governing costs in the *Federal Court Rules, 1998*". Rule 400 of the *Federal Court Rules*, SOR/98-106, grants a broad discretion to the Tribunal when determining costs and lists the factors the Tribunal may consider when exercising its discretion:

400. (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.	**400.** (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.
[…]	[…]
(3) In exercising its discretion under subsection (1), the Court may consider	(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :
(a) the result of the proceeding;	a) le résultat de l'instance;
(b) the amounts claimed and the amounts recovered;	b) les sommes réclamées et les sommes recouvrées;
(c) the importance and complexity of the issues;	c) l'importance et la complexité des questions en litige;
(d) the apportionment of liability;	d) le partage de la responsabilité;
(e) any written offer to settle;	e) toute offre écrite de règlement;
(f) any offer to contribute made under rule 421;	f) toute offre de contribution faite en vertu de la règle 421;

(g) the amount of work;	g) la charge de travail;
(h) whether the public interest in having the proceeding litigated justifies a particular award of costs;	h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;
(i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;	i) la conduite d'une partie qui a eu pour effet d'abréger ou de prolonger inutilement la durée de l'instance;
(j) the failure by a party to admit anything that should have been admitted or to serve a request to admit;	j) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;
(k) whether any step in the proceeding was (i) improper, vexatious or unnecessary, or	k) la question de savoir si une mesure prise au cours de l'instance, selon le cas : (i) était inappropriée, vexatoire ou inutile,
(ii) taken through negligence, mistake or excessive caution;	(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;
(l) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;	l) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;
(m) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;	m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;
(n) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299; and	n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;
(o) any other matter that it considers relevant.	o) toute autre question qu'elle juge pertinente.

[12] The parties before me rely on different factors set out in this provision.

IV. SUBMISSIONS OF THE PARTIES

A. APPLICANT'S POSITION

[13] Robinson argues that it is entitled to recover its costs on a partial indemnity basis because it raised novel issues and matters of public interest. According to Robinson, there is an inherently strong public interest aspect to each privately prosecuted application before the Tribunal. Robinson also asserts that the different interim steps should be examined to determine the

identity of the successful party since the final order merely reflects the terms of the settlement agreement. It stresses that it was successful at each of the interlocutory stages of the proceedings.

[14] In the alternative, Robinson asks that no costs be awarded. It submits that the Tribunal should only make cost awards when the evidence shows that the applicant initiated a proceeding in bad faith or otherwise abused the process. To do otherwise, argues Robinson, would deter small or medium sized companies from bringing meritorious applications under the Act.

[15] Finally, Robinson invites the Tribunal to consider the motives that induced it to settle. Robinson states that it agreed to settle because of the ongoing costs of the Tribunal proceedings as well as its belief that Deeley had no intention to deal with it fairly even if the Tribunal had made an order in its favour.

B. RESPONDENT'S POSITION

[16] Relying on the terms of the order on consent providing for the dismissal of Robinson's application, Deeley contends that it is the successful party to the litigation. The general rule that costs follow the event should therefore be applied and Deeley claims that the Tribunal should not consider other Tribunal orders that have been made in these proceedings since the courts have discouraged distributive awards of costs. Deeley also submits that Robinson does not meet the criteria for an award of "public interest litigation" as set out by the Federal Court in *Harris v. Canada*, [2002] 2 F.C. 484, and claims that Robinson's interest in bringing the application was motivated entirely by economic self-interest.

[17] Deeley asks that its costs be fixed in the form of a lump sum in the amount of $156,136.15. This sum includes costs of $99,443.13 and disbursements totalling $56,693.02. The amount claimed is a reduction from the time-docket value recorded by Deeley's counsel. Deeley underlines that it retained two experts to prepare for the hearing while Robinson apparently retained none.

V. ANALYSIS

(1) Preliminary Remarks

[18] Much ink has been spilled by Robinson over its motives for agreeing to settle the Tribunal proceedings. In particular, Robinson alleges bad faith on Deeley's part and submits that it only seriously pursued the possibility of a settlement after it came across evidence allegedly showing that Deeley had no intention to deal with it fairly even if the Tribunal had issued an order in Robinson's favour. Deeley vigorously denies these allegations and contends that Robinson agreed to settle because it knew that its application was without merit.

[19] Reasons for settling are, by definition, subjective in nature and will depend on the parties' personalities and priorities, the legal advice they were provided and many other variables of which an outsider will have no knowledge. In this case, the ability of the Tribunal to inquire into

Robinson's motives, or Deeley's motives for that matter, is severely limited. First, Robinson introduced very little evidence on the issue. Second, even if sufficient evidence had been presented, its relevance would have been dubious and, furthermore, its consideration would have led the Tribunal to potentially rule on the merits of the civil proceeding, if not on the merits of the Tribunal proceeding itself.

[20] As the majority of the Federal Court of Appeal held in *Uppal v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 565, at 575, a consent judgment reflects "…neither findings of fact nor a considered application of the law to the facts by the court". It will be up to the Ontario Superior Court to examine the conduct of both parties and to determine whether Robinson's allegations of bad faith are founded. It would be inappropriate for the Tribunal to speculate on the matter.

[21] With respect to Robinson's claim that it could not trust Deeley to comply with an order issued by the Tribunal, reference should be made to subsection 8(2) of the *Competition Tribunal Act* which provides that the Tribunal has all such powers, rights and privileges as are vested in a superior court of record with respect to the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction. These powers include the power over contempt for breaches of its orders (*Chrysler Canada Ltd. v. Canada (Competition Tribunal*), [1992] 2 S.C.R. 394) and the Tribunal will not hesitate to ensure that parties comply with its orders and that they are not rendered meaningless by parties acting in bad faith.

[22] The parties also referred to the absence of the Commissioner of Competition in their submissions. Deeley argued that the Commissioner's absence illustrated the fact that Robinson's application did not raise matters of public interest. Robinson, on the other hand, submitted that the Commissioner would have only intervened had she been of the opinion that the section 75 application constituted an abuse of process.

[23] Subsections 75(4) and 103.1(11) of the Act prohibit the Tribunal from drawing any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by an application brought under those provisions. It would be incongruous for the Tribunal to draw such an inference when making a determination regarding the allocation of costs with respect to an application brought under section 75.

[24] Robinson also submits that Deeley's bill of costs is grossly excessive and this submission would have been carefully analyzed had the Tribunal concluded that Deeley is entitled to its costs. Given my conclusion, however, that each party bear its own costs for the reasons below, it is unnecessary to comment on the matter. Nevertheless, I note that the disparity in the parties' respective bill of costs could be due to a number of different factors. In particular, Deeley's bill of costs includes fees for time spent with experts as well as other preparations for the hearing that were made up until September 14, 2005. On the other hand, the bill of costs presented by Robinson is for a period ending on August 2, 2005, more than one month before the parties reached a settlement agreement.

[25] As a result, it would have been difficult for the Tribunal to fully accept Robinson's submission that Deeley expended inordinate time on this application as it would have implied

that Deeley's counsel was wrong to proceed in the manner it did. Although Robinson's counsel may have had valid reasons for proceeding in a different fashion, the Tribunal can certainly not fault Deeley for having ensured that adequate preparations were made in anticipation of the scheduled hearing.

(2) Public interest

[26] The facts before me do not justify an award of costs to Robinson on the basis that the proceedings constituted public interest litigation. It is true that in most private access applications brought before the Tribunal, in addition to any pecuniary or other interests the parties themselves may have, a public interest component may be present. This public interest component, however, does not translate into an automatic cost award in favour of the person bringing the application. The Act is clear in that regard, and section 8.1 of the *Competition Tribunal Act* provides that the Tribunal must make its decision in accordance with the provisions governing costs set out in the *Federal Court Rules*.

[27] In *Harris v. Canada*, [2002] 2 F.C. 484, the judgment on which Robinson and Deeley both rely, the Federal Court awarded costs to Mr. Harris, a taxpayer who alleged that the Minister of National Revenue had acted illegally by bestowing a special benefit upon certain taxpayers. The Court, after hearing all the evidence at trial, dismissed Mr. Harris' action but ruled that he should be awarded some costs because there had been a clear public interest component to his action.

[28] The facts before us can be easily distinguished from those in *Harris v. Canada*, *supra*. Most importantly, there has been no hearing before the Tribunal on the merits of Robinson's application. The parties settled the proceedings two weeks before the scheduled hearing and no submissions have been made to the Tribunal regarding the application brought under section 75 of the Act. As Robinson stressed in its pleadings, it would have been the first time the Tribunal would have heard such an application and the issues raised could have almost certainly been qualified as novel. The parties settled however, and Robinson's submission might have been more convincing had it proceeded with its application.

[29] Furthermore, no evidence has been introduced showing Deeley has a clearly superior capacity to bear the costs of the proceedings; a factor that the Tribunal may consider pursuant to the Federal Court judgment in *Harris v. Canada*, *supra*.

[30] Given the above, I am of the opinion that the specific facts before me do not fall within the criteria for considering a claim to costs in the context of public interest litigation.

[31] Private Competition Act litigation is an important enforcement procedure of the Act. However, the facts of this case are not such as to justify an award of costs to an unsuccessful litigant.

(3) Divided success

[32] Success in the proceedings before me has been partially divided. Although it is true that Robinson's application under section 75 of the Act will be dismissed, this dismissal reflects the terms of the settlement agreement and not a consideration by the Tribunal of the merits of the application.

[33] Further, one cannot ignore the portion of the order on consent which provides that Deeley must continue to comply with the Tribunal's interim order until December 31, 2005. Deeley will therefore supply Robinson with non-seasonal general merchandise and parts until the end of the year. The final order thus reflects, to a certain extent, mixed results.

[34] It should also be noted that Robinson was successful in obtaining leave from the Tribunal and partially successful on its motion for interim relief. Although courts have discouraged so-called distributive awards of costs, they have mostly done so in cases where not all the submissions advanced by the successful party regarding the merits of the case were accepted by the court (see for example *Canada v. IPSCO Recycling Inc.*, (2004) 259 F.T.R. 204).

[35] In this case, however, the parties have not made any submissions regarding the merits of the section 75 application and there has been no hearing on this issue. Given the order on consent and other circumstances, the Tribunal can certainly examine the manner in which the interlocutory and other proceedings were disposed of pursuant to subsections 400(1) and (3) of the *Federal Court Rules*. Furthermore, subsection 400(6) specifically provides that the Tribunal may award or refuse costs in respect of a particular issue or step in a proceeding.

[36] With respect to this issue, a comment should be made regarding the order granting Robinson leave to file an application under section 75 of the Act. Passing the leave stage set out in section 103.1 is a crucial step for a person who wishes to bring a section 75 application. The Tribunal may only grant a person leave to file such an application if it has reason to believe that the person is directly and substantially affected in its business by any practice referred to in section 75 and that the practice could be subject to an order under that provision. Once a person passes this hurdle, he or she may bring an application seeking an order to deal without the intervention of the Commissioner of Competition.

[37] Section 103.1 thus ensures that only potentially meritorious applications be brought to the attention of the Tribunal. And the Tribunal, when exercising judicially its discretionary power over the amount and allocation of costs may, in my view, consider the fact that the applicant passed the leave stage. In that respect, I find the following statement made by professors Kent Roach and Michael Trebilcock in their article entitled "Private Enforcement of Competition Laws", (1996) 34 Osgoode Hall L.J. 461, at 504, particularly *à propos*:

> Along with a mandatory summary judgment procedure, cost awards can also deter frivolous and strategic litigation provided that the strategic benefits do not outweigh the risks of an adverse cost award. However, loser-pay cost rules also present a risk of deterring meritorious but innovative litigation, especially if a plaintiff litigates on behalf of a diffuse group or is not able to obtain a damages award or the costs of litigation. The conventional loser-pays rule may be the appropriate rule to apply to the preliminary stages of litigation up to and including the mandatory summary judgment procedure, but

> once a case has passed summary judgment, there may be good reasons, depending on the legal context, for applying a variety of no-way and one-way cost rules.

[38] This article was written well before the coming into force of section 8.1 of the *Competition Tribunal Act* and addresses the subject of mandatory summary judgment procedures. An analogy may, however, be made, to a certain extent, with the leave procedure set out in section 103.1 of the Act.

[39] It should be stressed that Parliament did not implement the proposition set out in the article. The Tribunal, through section 400 of the *Federal Court Rules*, may, however, consider different relevant factors when making a decision as to the allocation of costs. The fact that Robinson was successful in its application for leave constitutes one factor among many others that the Tribunal may take into consideration.

[40] Having examined the different stages of these proceedings as well as the final order on consent, I find that the proceedings before me have been characterized by mixed results as well as orders on consent which reflected the various agreements reached by the parties. For example, Robinson's motion for interim relief was partially granted by an order on consent and Robinson's application under section 75 of the Act will be dismissed pursuant to the parties' agreement.

(4) "David and Goliath syndrome"

[41] Robinson, in its submissions, argued that the fact that its application did not proceed to a hearing, was, in large measure, the result of a "David and Goliath syndrome". According to Robinson, consideration should be given to the fact that it is a "small business operator" with limited financial resources that do certainly not equal those at Deeley's disposal. Relying on a report issued by the House of Commons Standing Committee on Industry, Science and Technology, it stressed the Committee's recommendation that the Tribunal develop a policy that would allocate costs in a fair and equitable manner and that considers the resources available to the parties. Robinson adds that the Committee also recommended that "…such a policy consider the merits of exempting small businesses from liability for costs in Tribunal proceedings" (Canada, Parliament, Standing Committee on Industry, Science and Technology, "A Plan to Modernize Canada's Competition Regime", April 2002, recommendation no. 6).

[42] As Robinson itself admitted in its pleadings, Parliament elected to not adopt the Standing Committee's recommendation; it introduced instead section 8.1 of the *Competition Tribunal Act*. In a report entitled "Government Response to the Report of the House of Commons Standing Committee on Industry, Science and Technology '*A plan to Modernize Canada's Competition Regime*'", one may read that the "…Government believes the Federal Court Rules should continue to apply equally to all parties involved" and that the "…Committee's recommendation […] would undermine one of the safeguards recently put in place [by the amendments set out in Bill C-23]" (available online: Industry Canada <http://www.ic.gc.ca>).

[43] It is interesting to note that Bill C-23, the Bill that introduced section 8.1, initially provided that the Tribunal could only award costs in the context of frivolous proceedings. Clause 17 of Bill C-23 provided at its first reading that the Tribunal could award costs of proceedings

before it if it found that the "…proceedings [had been] frivolous or vexatious or that any step in the proceedings [had been] taken to hinder or delay their progress." (Bill C-23, *An Act to amend the Competition Act and the Competition Tribunal Act*, 1st Sess., 37th Parl., 2001, cl. 17 (first reading of April 4, 2001). This clause was, however, ultimately amended so as to apply the ordinary Federal Court cost rules of litigation to proceedings before the Competition Tribunal.

[44] This Tribunal applies the normal cost rules pursuant to section 8.1 and, as explained above, Robinson does not meet the criteria for considering the allocation of costs in the context of public interest litigation. In that regard, it is interesting to note that Robinson made a number of allegations regarding the inequality of economic strength between the parties but introduced very little evidence regarding the parties' respective ability to pay costs.

[45] After having considered all the relevant factors set out in Rule 400, the specific facts of the case, the fact that these proceedings have been characterized by mixed results as well as by agreements, and the admissions made by the parties that they both worked together to move the case along in an expeditious manner, I am of the opinion that no costs should be awarded.

VI. ORDER

[46] Each party shall bear its own costs.

DATED at Ottawa, this 14th day of November.

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

(s) Michael Phelan

COUNSEL

For the Applicant:

Robinson Motorcycle Limited

Mr. David M. McNevin

For the Respondent:

Fred Deeley Imports Ltd.

Mr. R.S.M. Woods
Ms. Martha Cook
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