Competition Tribunal | Tribunal de la Concurrence

OFFICIAL ENGLISH TRANSLATION

Citation: Rona Inc. v. Commissioner of Competition, 2005 Comp. Trib. 26
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IN THE MATTER OF the *Competition Act*, R. S .C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the *Competition Tribunal* Act, R. S. 1985, c. 19 (2nd Supp.), as amended.

AND IN THE MATTER OF the acquisition of Réno-Dépôt Inc. by RONA Inc.;

AND IN THE MATTER OF the application to vary a consent agreement pursuant to subsection 106(1) of the *Competition Act;*

BETWEEN:

RONA Inc.
(Applicant)

and

Commissioner of Competition
(Respondent)

Decided on the basis of the written arguments filed by the pall
Members: Blais J. (presiding), Lemieux J., and L. Riedle
Date of reasons and order: August 19, 2005
Reasons and order signed by: Mr. Justice P. Blais, Mr. Justice F. Lemieux, Ms. L. Riedle

REASONS FOR ORDER AND ORDER RESPECTING COSTS

INTRODUCTION

[1] On May 30, 2005, the Competition Tribunal granted the application made by RONA Inc. ("RONA") to rescind the consent agreement it had signed with the Commissioner of Competition ("Commissioner") that had been registered on September 4, 2003 *(see RONA INC. v. Commissioner of Competition*, 2005 Comp. Trib. 18).

[2] In its written submissions following the decision, RONA asserted that not only was it entitled to costs because it had been successful but also that it was entitled to substantially increased costs in light of the factors that the Tribunal is required to consider in exercising its discretion. The Commissioner, on the other hand, did not object to paying RONA's costs, but at the regular tariff provided for by the general rule, without any increase.

APPLICABLE LAW

(1) Relevant legislative provisions

[3] Section 8.1 of the Competition Tribunal Act, R.S. 1985, c. 19 (2nd Supp.), gives the Tribunal a discretionary power to award costs:

8.1 (1) The Tribunal may award costs of proceedings before it in respect of reviewable matters under Parts VII.1 and VIII of the *Competition Act* on a final or interim basis, in accordance with the provisions governing costs in the *Federal Court Rules, 1998.*	**8.1** (1) Le Tribunal, saisi d'une demande prévue aux parties VII.1 ou VIII de la *Loi sur la concurrence,* peut, à son appréciation, déterminer, en conformité avec les *Règles de la Cour fédérale (1998)* applicables à la détermination des frais, les frais -- même provisionnels -- relatifs aux procédures dont il est saisi.

[4] The relevant provisions of the *Federal Court Rules,* SOR/98-106, am. SOR/2004-283 (the "Rules"), are as follows:

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. (2) Costs may be awarded to or against the Crown. (3) In exercising its discretion under subsection (1), the Court may consider *(a)* the result of the proceeding; *(b)* the amounts claimed and the amounts recovered; *(c)* the importance and complexity of the issues; . . . *(e)* any written offer to settle; . . . *(h)* whether the public interest in having the proceeding litigated justifies a particular award of costs; . . . *(0)* any other matter that it considers relevant.	**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. (2) Les dépens peuvent être adjugés à la Couronne ou contre elle. *(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)* le résultat de l'instance; *b)* les sommes réclamées et les sommes recouvrées; *c)* l'importance et la complexité des questions en litige; *(...)* *e)* toute offre écrite de règlement; *(...)* *h)* le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens; *(...)* *o)* toute autre question qu'elle juge pertinente.

407. Unless the Court orders otherwise, party-and-party costs shall be assessed in accordance with column III of the table to Tariff B.	**407.** Sauf ordonnance contraire de la Cour, les dépens partie-partie sont taxés en conformité avec la colonne III du tableau du tarif B.
420. (1) Unless otherwise ordered by the Court, where a plaintiff makes a written offer to settle that is not revoked, and obtains a judgment as favourable or more favourable than the terms of the offer to settle, the plaintiff shall be entitled to party-and-party costs to the date of service of the offer and double such costs, excluding disbursements, after that date.	**420.** (1) Sauf ordonnance contraire de la Cour, le demandeur qui présente par écrit une offre de règlement qui n'est pas révoquée et qui obtient un jugement aussi avantageux ou plus avantageux que les conditions de l'offre a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et, par la suite, au double de ces dépens, à l'exclusion des débours.

(2) Legal rules and rules from the case law

[5] The discretionary power of the Tribunal is affirmed both under section 8.1 of the *Competition Tribunal Act* and in Rule 400. The considerations listed in subsection 400(3) are given as examples and paragraph *(o)* allows the Tribunal to consider "any other matter that it considers relevant".

[6] The discretionary power of the Tribunal must be exercised reasonably. Rule 407 provides generally how costs should be assessed. In order to derogate from this provision, the Tribunal must have sound reasons. On this point, it would be appropriate to refer to a passage from the decision in *Wihksne v.* Canada *(Attorney General)*, [2002] F.C.J. No. 1394 (F.C.A.), where Décary J.A. stated the following on behalf of the Court of Appeal:

> The appellant seeks full compensation for the costs incurred to date in the Federal Court. I have not been convinced that there are valid reasons to derogate from Rule 407 which states the general principle that costs are to be awarded in accordance with column III of the table to Tariff B. As Wetston J. said in *Apotex Inc.* v. *Wellcome Foundation Ltd.* (1998) 159 F.T.R. 233, "an important principle underlying costs is that an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party." This decision was confirmed at (2001) 199 F.T.R. 320 (F.C.A.). Tariff B, admittedly, is already obsolete in many instances. But absent special considerations (see Rule 400(3)), the Court should be reluctant to attempt to rewrite Tariff B - a task better left to the Rules Committee - and to embark into a factual determination of costs which is better left in the hands of specialized taxing officers. [par.II]

[7] Finally, although Rule 420 sets out a right that must be granted to the applicant if the conditions are met, it begins with the words "unless otherwise ordered by the Court" (in this case, the Tribunal) and this suggests that the Rule is not binding and may be modified by the Tribunal, which is moreover confirmed by the case law.

[8] One reason why Rule 420 would not be fully applied would be the absence of an adequate compromise in the offer made by the party that ultimately succeeds so that for the party receiving the offer, it appears to be more like a demand for complete surrender than a settlement. We should note in this regard the decision in Baker *Petrolite Corp. v. Canwell Enviro-Industries Ltd.* 2002 FCA 482, [2002] F.C.J. No. 1710, where Strayer J.A. of the Court of Appeal stated the following at paragraph 4:

> As I understand Rule 420(2)*(b)*, where a defendant makes an offer to a plaintiff which is rejected and the plaintiff then fails to obtain judgment (which is the case here), the defendant is automatically entitled to a doubling of the taxable fees thereafter "unless otherwise ordered by the Court". In this situation there is no need for the defendant to show that the offer was more generous to the plaintiff than the outcome. I am inclined to order otherwise than a doubling, however. The offer of November 26, 1999 was not, in my view, a real offer of a compromise. Apart from a few technical differences, for all practical purposes it was a demand for complete surrender with regard to the enforcement of the plaintiffs' alleged patent rights *vis à vis* these defendants (appellants). As I understand it the Court still has a discretion to exercise in the application or non-application of rule 420 and I so exercise it in favour of increasing the fees after November 26, 1999 by 50%.

[9] It should also be noted that the issue of the offer to settle is already referred to in paragraph 400(3)(e), which gives the Tribunal even more latitude in considering the offer.

ANALYSIS

[10] In the interest of clarity, the Tribunal would like to point out that this decision applies to the costs relating to the application made under section 106 and the costs of the two motions in which the Tribunal had indicated that costs would follow the cause. The fact that RONA consented to pay the costs of the Commissioner in the context of the motion under section 105 and the fact that the Tribunal awarded RONA increased costs for the motion to strike out the application of the Commissioner have no impact on this decision.

(1) Costs in light of the factors listed in Rule 400(3)

[11] The starting point for this analysis is that the Tribunal must, in the words of Décary J.A. in ***Wihksne,*** have "valid reasons to derogate from Rule 1407 which states the general principle that costs are to be awarded in accordance with column I11 of the table to Tariff B" (paragraph 11). RONA made various arguments in support of its request for increased costs, which we will now consider.

[12] The first point the Tribunal may consider under paragraph 400(3)*(a)* of the Rules is the result of the proceeding. RONA was successful. That in itself does not justify an increase but RONA argued that, at the very least, RONA should be awarded costs pursuant to the usual practice. The Commissioner does not contest this fact. The dispute concerning costs turns on the increased assessment.

[13] The second paragraph of subsection 400(3) of the Rules refers to the amounts claimed and the amounts recovered. Although in this case, the application did not involve a sum of money, RONA maintains that the issue in RONA's application must be considered: i.e. that it be released from the obligation to sell a store worth (according to the evidence) approximately 20 million dollars. The Commissioner, on the other hand, is of the view that the argument is absurd because no such sum of money was at stake in the case.

[14] The Tribunal recognizes the importance of the economic issue to RONA, namely whether to keep the store in order to operate it or to sell it at a price below its actual value. Nevertheless,

the Tribunal's decision did not in any way involve the value of the business but rather the interpretation of the law and its application in the circumstances. In other words, the dispute between the parties did not relate to a monetary obligation between the parties. Consequently, the Tribunal places little weight on this criterion in this decision.

[15] RONA also submits that it is necessary to consider the importance and the complexity of the issues. It is true that this is the first time that the Tribunal has had to decide an application to rescind a consent agreement under the new provisions (sections 105 and 106) of the Competition Act, R.S. 1985, c. C-34, as am. by S.C. 2002, c.16, s. 14. In the view of the Tribunal, that is not sufficient to make this a particularly complex issue. Any issue that arises before either a court of law or an administrative tribunal deserves to be considered seriously and for a while expends the energy of the tribunal required to decide the matter. In this case, the facts were clear, as were the issues. The interpretation of the Act in light of the facts was not especially complex or difficult.

[16] RONA argued that paragraph 400(3)*(e)* lists as a consideration "any written offer to settle". Rule 420 also gives more specific instructions concerning the calculation of costs in the event of a written offer, subject to certain conditions. We shall come back to paragraph (e) when we consider an increased assessment under Rule 420, in order to present a general finding on the effect of the offer on the costs. For now, it is sufficient to note that there was in fact a written offer prior to the hearing that would have given the Commissioner a more favourable result than the outcome of the proceeding.

[17] Another argument made by RONA was justifying the "public interest" in accordance with paragraph 400(3)*(h)*. This case involves a disagreement between a public party, the Commissioner, and a private party, RONA. It may be presumed that the Commissioner is defending only the public interest, whereas RONA, as is its absolute right, is defending its own interests. Consequently, it is difficult to side with R-ONA on this point. This provision applies more in those cases where one party defends public interests and, without necessarily being successful, puts forward a meritorious case: Singh v. Canada (Attorney General), [I999] 4 F.C. 583, aff'd [2000] 3 F.C. 185 (F.C.A.); Shepherd v. Canada (Solicitor General) (1990), 36 F.T.R. 222 (T.D.).

[18] Without providing much justification, RONA claimed fees for three counsel for the duration of the hearing in accordance with paragraph l4(a) in Tariff B (RONA also claimed fees at the rate in column V). The Commissioner replied that the usual rate of one counsel and one-half of the fees of another counsel was more than adequate, especially since there were not always three counsel at the hearing.

(191 The Tribunal is of the view that RONA should be awarded the full fees of two counsels for the hearing time, in view of the additional work involved in an expedited process and counsel's hard work, of which the Tribunal was aware. However, the rate shall nevertheless remain the rate in column III in Tariff B.

(2) Increased costs under Rule 420

[20] Rule 420 provides that an applicant who makes a written offer that is not revoked and obtains a judgment as favourable or more favourable than the terms of the offer is entitled to double the party-and-party costs from the date of service of the offer.

[21] On March 16, 2005, three weeks before the hearing commenced, RONA served an offer on the Commissioner under which RONA offered to carry on an operation separate from the Sherbrooke business until the opening of Home Depot (scheduled for mid-November 2005), in exchange for the cancellation of the obligation to divest itself of the Sherbrooke business. The Commissioner never responded to this offer. If she had accepted it, this would have avoided the costs of the hearing and the costs occasioned by this order, and the Sherbrooke business would have continued to operate separately from the RON,4 stores, as the consent agreement provided. The decision is certainly as favourable if not more favourable, since RONA can immediately integrate the Sherbrooke business into its corporate structure.

[22] The Commissioner argued that the offer did not resolve the whole dispute since the motion filed by the Commissioner for the approval of the sale was still pending. In our opinion, the primary prevails over the peripheral: if the parties had agreed to eliminate the obligation to sell the store, the motion for approval of this sale would have been unnecessary. Nevertheless, the Tribunal is of the view that this is not a case in which Rule 420 should be fully applied, because the offer by RONA lacked an element of compromise. By offering to keep the business separate until the opening of Home Depot, while remaining the owner of the business, RONA was not giving up anything. It would continue to operate the store belonging to it and would be entitled, once Home Depot opened, to include it in its operations. Emphasis has often been placed on the element of compromise as the true mark of an offer (Canadian Olympic Association v. *Olymel, Société en commandite*, [2000] F.C.J. No. 1725). In all honesty, RONA was not offering the Commissioner much - it offered to accept the result that RONA wanted, which the Tribunal eventually imposed, i.e. the cancellation of the obligation to sell. The fact remains that the acceptance of the offer would have been a more favourable resolution of the dispute for the Commissioner, even just in terms of costs saved.

[23] The Tribunal takes into account the fact that a written offer was made, to which the Commissioner did not even respond. The principle expressed in the Rules, not merely Rule 420 but also paragraph 400(3)*(e)*, is that it is always preferable for the parties to agree rather than use the resources of a court (here the Tribunal) unnecessarily. To support the principle, the Rules provide that the party offering to end a proceeding in a more expeditious manner, with which the Tribunal sides in the final analysis, may be entitled to some compensation. Given all of the circumstances and the case law, the Tribunal is of the view that RONA should be awarded costs increased by 50%, again in accordance with column III in Tariff B, from March 16, 2005.

ORDER

[24] The Tribunal orders that:

> (a) RONA is entitled to party-and-party costs to the date of the offer, namely March 16, 2005, and is subsequently entitled to costs increased by 50%, determined in accordance with column III in Tariff B, with the exception of its disbursements, which will be authorized in accordance with the usual practice.
>
> (b) RONA is entitled to the fees of two counsels at the hearing, in accordance with paragraph 14(a) of the Table in Tariff B.
>
> (c) The bill of costs and disbursements will be assessed by the assessment officer in accordance with this order.
>
> (d) There will be no costs for this order.

Dated at Ottawa, this 19th day of August 2005.

Signed on behalf of the Tribunal by the members of the panel.

(s) Pierre Blais

(s) François Lemieux

(s) Lucille Riedle

APPEARANCES:

For the applicant:

RONA Inc.

William W. McNamara
Eric Lefebvre
Martha A. Healey
Dominique Simard
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For the Respondent:

The Commissioner of Competition
Diane Pelletier

Steve Joanisse
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