Competition Tribunal | Tribunal de la Concurrence

PUBLIC VERSION

Reference: *RONA INC. v. Commissioner of Competition* 2005, Comp. Trib. 18
File no: CT-2003/007
Registry document No: 0089c

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

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

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

B E T W E E N:

RONA INC.
(Applicant)

and

THE COMMISSIONER OF COMPETITION
(Respondent)

and

ERNST & YOUNG ORENDA CORPORATE FINANCE INC.
(Intervenor)

Date of hearing: 20050404 to 20050408, 20050411 to 20050415, 20050419, 20050425, 20050426
Members: Blais J. (presiding), Lemieux J. and L. Riedle
Date of reasons and order: May 30, 2005
Reasons and order signed by Pierre Blais, François Lemieux, JJ. and Lucille Riedle

REASONS FOR ORDER AND ORDER

Table of Contents

I. INTRODUCTION

[1] Pursuant to section 106 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended ("Act"), the applicant RONA Inc. ("RONA") has applied to the Competition Tribunal ("Tribunal") to rescind the consent agreement signed on September 3, 2003 ("Consent Agreement") by RONA and the Commissioner ("Commissioner"). The Consent Agreement was signed by acting Commissioner Gaston Jorré. Commissioner Sheridan Scott, the current Commissioner, took office on January 12, 2004.

[2] At the beginning of the hearing, the Tribunal also had before it a motion to approve the sale of a store belonging to RONA. The Consent Agreement concerned the divestiture of that store. The parties submitted a joint draft in order to settle this dispute. The order was made on April 29, 2005 (*RONA Inc. v. Commissioner of Competition*, 2005, Comp. Trib. 16).

[3] For the following reasons, the Tribunal allows RONA's application and rescinds the Consent Agreement registered by the Tribunal on September 4, 2003.

II. FACTS

A. BACKGROUND: THE CONSENT AGREEMENT

[4] In April 2003, RONA entered into an agreement with Kingfisher plc to purchase all the shares of competitor Réno-Dépôt for $350 million ("Transaction"). By virtue of this Transaction, RONA became the owner of Réno-Dépôt's 20 home improvement stores, consisting of 14 stores under the Réno-Dépôt banner in Quebec and six "The Building Box" stores in Ontario.

[5] Since this merger exceeded the thresholds established by Part IX of the *Competition Act* (Notifiable Transactions), RONA and Réno-Dépôt submitted a notice of merger to the Commissioner along with a competitive analysis seeking to show that the merger would not prevent or lessen competition substantially in any of the affected markets, namely the markets in which RONA would be acquiring stores previously owned by Réno-Dépôt.

[6] Following his own investigation, the Commissioner had some reservations about the effect of the purchase of the Réno-Dépôt stores on competition in the home improvement retail superstore market, and he found that the buyout was likely to lessen competition substantially in the Sherbrooke area. After discussions in August 2003, the Commissioner stated that if RONA agreed to divest itself of the Réno-Dépôt store in Sherbrooke ("Sherbrooke Business"), the Commissioner would not oppose the Transaction. The Consent Agreement reflecting this understanding was signed on September 3, 2003, and was registered with the Tribunal the following day. On September 10, 2003, RONA closed the Transaction with Kingfisher for the purchase of the Réno-Dépôt shares.

[7] The Consent Agreement stated that the divestiture had to occur no more than five months following the closing of the Transaction. If it did not, the Commissioner would appoint a trustee after consulting RONA. Under the terms of the Consent Agreement, the trustee had all the powers necessary to realize the sale, and was required to use reasonable efforts to do so within six months of being appointed.

[8] RONA could object to the divestiture by trustee if the trustee failed to abide by the provisions of the Consent Agreement. The Consent Agreement provided *inter alia* that the Sherbrooke Business could only be sold to a purchaser that would operate it for the retail sale of home improvement products and that had the financial and operational capacity needed to manage the business.

[9] The Consent Agreement stated that the trustee was to provide the Commission and RONA with a Divestiture Notification after entering into any binding agreement with a buyer. The Commissioner or RONA would then have 14 days to request additional information on the proposed divestiture. The Commissioner or RONA had 21 days after receiving such additional information to notify the trustee of its objection. If either of them made such an objection, the sale by trustee could only proceed with the Tribunal's approval.

[10] The Consent Agreement contained two clauses permitting its amendment: clause 18, allowing the parties to agree on any amendment; and clause 21, allowing either party to apply to the Tribunal to vary or rescind any provision in the event of a change of circumstances, in accordance with section 106 of the Act.

B. WITNESSES

[11] The Tribunal heard several witnesses. The following is a brief summary of their testimony. The following timeline of events is based mainly on the testimony of Mr. Guévin and Ms. Laflamme.

Claude Guévin, Executive Vice–President and Chief Financial Officer of RONA

[12] Mr. Guévin testified about the entire process leading up to the Consent Agreement and the divestiture, beginning in April 2003, the date of the Transaction with Kingfisher for the purchase of the Réno-Dépôt shares, and ending on the date of the application to rescind the Consent Agreement, which was filed on January 10, 2005.

Claude Marcoux, Director of Urban Development, Ville de Sherbrooke

[13] Mr. Marcoux testified about the development of the Plateau St-Joseph site in Sherbrooke — the future site of a Home Depot home improvement superstore. He also testified about the specific measures that Home Depot took at the municipal level to obtain the various permits for deforestation, construction, etc.

Robert Frodyma, Director of Real Estate, Home Depot

[14] Mr. Frodyma testified rather vaguely about the development of the Home Depot project in Sherbrooke and the related correspondence with the Competition Bureau ("Bureau"). Of Home Depot's two witnesses, namely Messrs. Frodyma and Rivet (see below), the Tribunal considers that Mr. Rivet's testimony is more detailed and accurate.

David Taras, Executive Director and General Counsel, First Pro

[15] Mr. Taras works for First Pro, a major real estate developer in the shopping centre sector. First Pro is Wal-Mart's real estate developer in Canada, and often works with Home Depot. First Pro is the company that looked after the Plateau St-Joseph area in Sherbrooke. Mr. Taras testified that Home Depot had been interested in the site as early as September 2003. First Pro and Home Depot closed the sale of the land on February 21, 2005, but the site planning took place long before. Mr. Taras testified that in November or December 2004, well before the closing of the sale of the land, First Pro was certain that a Home Depot would be built on the site.

Mike Ferris, Regional Vice-President for Ontario, Canadian Tire

[16] [CONFIDENTIAL]

Sylvain Rivet, Real Estate Development Manager, Home Depot

[17] Mr. Rivet testified that, in December 2003, Home Depot ordered a preliminary plan for the construction of a store on the Plateau St-Joseph. In February 2004, when Mr. Rivet began working for Home Depot, a study by MapInfo Thomson regarding the Sherbrooke market was already underway. The report was submitted on March 29, 2004. From that moment onward, Mr. Rivet knew that the project would become a reality. As of April 8, 2004, Sherbrooke was on the agenda at real estate development committee meetings.

Brian Fahey, Founding President, Fahey & Associates

[18] Mr. Fahey's firm offers professional services in urban planning and landscape design. He testified that, in December 2003, Home Depot mandated him to develop site plans for a Home Depot store on the Plateau St-Joseph. The work began substantially in August 2004.

Andrée Laflamme, Competition Law Officer, Competition Bureau

[19] Ms. Laflamme, who was involved from the outset of the RONA-Réno-Dépôt merger process, testified about the entire process leading up to the Consent Agreement and divestiture, from the mandatory notice in April 2003 until February 2005.

Marv Ettinger, former director of Réno-Dépôt's Sherbrooke store and former Vice-President of the buyer

[20] Mr. Ettinger testified about the Sherbrooke Business acquisition process and the way in which the buyer intended to operate the business.

[21] Generally, the Tribunal found the witnesses credible. The Commissioner raised some questions about Mr. Guévin's testimony in her closing arguments. In the Tribunal's opinion, the points raised by the Commissioner are not of determinative importance in the decision and do not impugn Mr. Guévin's credibility. The size of the Sherbrooke Business's deficit, the proportion of products and the surface area of the superstores are not pivotal issues and the vagueness is easily explainable. It is of little importance whether Mr. Guévin was involved directly or indirectly in the drafting of clause 20 (later clause 21) of the Consent Agreement. In the Tribunal's view, the apparent contradictions that the Commissioner pointed out in Mr. Guévin's testimony are more of a reflection of a different perspective from those of the other witnesses regarding the same events. The Tribunal regards them as minor differences, not contradictions. In fact, the Tribunal finds that the testimonies of the two main witnesses, Ms. Laflamme and Mr. Guévin, were consistent on the whole.

C. TIMELINE

[22] In order to follow these events, it is important to understand from the outset that this is a story about two situations that crossed each other and ultimately intertwined: the first was the divestiture process contemplated in the Consent Agreement, and the second was the arrival of Home Depot in Sherbrooke, announced repeatedly by RONA.

[23] The Consent Agreement was signed on September 3, 2003, and registered the following day. On September 11, 2003, Mr. Gascon, counsel for RONA, sent an e-mail to the Competition Bureau:

> [TRANSLATION]
>
> (Exhibit CR3, RONA vol. 2, tab 9)
> . . . I am also sending you two interesting articles which appeared in two Montréal dailies this morning: *La Presse* and *The Gazette*. The articles discuss the expansion of Home Depot in Quebec in 2004. . . . The areas in which imminent expansion is planned by Home Depot include the Outaouais, Mauricie-Bois-Francs, Montréal and (I cannot help but emphasize) the Eastern Townships (specifically Sherbrooke). Naturally, we believe it would be important for RONA and the Competition Bureau to follow up on Home Depot's actual expansion plans for Sherbrooke, especially since, according to the information you sent us, Home Depot had apparently stated in response to the Bureau's formal request for information that Sherbrooke was not one of the locations in its expansion plans. . . .

[24] The Bureau did not reply to Mr. Gascon's e-mail message. However, Mr. Brantz, counsel for the Bureau, sent a letter to counsel for Home Depot on September 16, 2003, in which he asked him to explain an apparent inconsistency: the information provided by Mr. Gascon contradicted the information obtained from Home Depot in the course of the investigation that preceded the Commissioner's finding that Home Depot would not be opening a store in Sherbrooke within the next two years:

> (Exhibit CD-12)
> Following recent articles published in Quebec dailies regarding Home Depot's planned stores for the next years, we would like to obtain from your client, Home Depot of Canada Inc., further clarifications regarding its intent in Sherbrooke, Quebec. . . . Could you explain this apparent inconsistency between the documents provided and announced plans by Mr. Roger Plamondon in the newspapers?

[25] Home Depot responded through its counsel, Mr. Gormley, on September 22, 2003:

(Exhibit CD-9)
. . . Some of the documents produced in response to the Section 11 Order do in fact make brief reference to Sherbrooke. The references are brief because during the relevant period Home Depot did not give serious or in-depth consideration to entering the Sherbrooke market.

Following Home Depot's compliance with the Section 11 Order and indeed, as a direct result of the Competition's Bureau announcement of the resolution of its investigation of the RONA/Réno-Dépôt merger, Home Depot did engage in some discussions with third parties in the Sherbrooke area. . . . In an interview with a reporter from the Sherbrooke newspaper, Mr. Plamondon alluded to the discussions with parties in the Sherbrooke area and Home Depot's openness to exploring a potential entry into the Sherbrooke market generally. . . . [Emphasis added.]

[26] Despite this clear change in Home Depot's intentions, the Bureau did not see fit to closely monitor the developments with regard to Home Depot's arrival in Sherbrooke. It is clear from Ms. Laflamme's testimony that the divestiture was the Commissioner's chief concern.

[27] On September 18, 2003, Michaël Hassan, counsel for RONA, e-mailed Mr. Brantz and attached a newspaper article entitled "*Home Depot pourrait acheter Réno-Dépôt*" [Home Depot may buy Réno-Dépôt] which ran in the Sherbrooke daily *La Tribune* on September 13, 2003. He added the following comment: "We suggest to follow [*sic*] developments carefully in light of this article which seems to confirm our previous submissions regarding Home Depot's expansion plans in the Province of Québec, particularly in the Sherbrooke region." (Exhibit CR3, RONA vol. 2, tab 9).

[28] On October 9, 2003, Mr. Gascon contacted Mr. Brantz again in a lengthy, seven-paragraph e-mail. Like his colleague Mr. Hassan a month earlier, Mr. Gascon urged the Bureau to communicate with various entities such as First Pro to [TRANSLATION] "obtain . . . the relevant particulars regarding the actual status of Home Depot's Sherbrooke project and the time frame in which these particulars will materialize." (Exhibit CR3, RONA vol. 2, tab 11). He even alluded to the possibility of amending the Consent Agreement signed a few weeks earlier: [TRANSLATION] "The more this information accumulates, the more it appears that we are nearing a "change in circumstances" in the competitive structure of the Sherbrooke market, and if this information regarding Home Depot's imminent

expansion plans in Sherbrooke is confirmed, we should seriously ask ourselves whether there is still a reason to require RONA to divest itself of its Réno-Dépôt store in the Sherbrooke market." (Exhibit CR3, RONA vol. 2, tab 11).

[29] On October 15, 2003, Ms. Laflamme contacted Pierre Langlois, an urban planner with the city of Sherbrooke, to obtain information about the Home Depot development plans. Mr. Langlois told her that requisite zoning change for the construction of a commercial building had been authorized, but that the construction would not begin until at least 2005. Following this conversation, the Commissioner's position, according to Ms. Laflamme, was that [TRANSLATION] "We were not at all certain of the date or of whether Home Depot would actually be launched at that time." (Transcript , volume 7, page 1923 (April 12, 2005)).

[30] On October 20, 2003, Ms. Laflamme contacted David Taras of First Pro to check on the status of the negotiations with Home Depot regarding a site in Sherbrooke. Mr. Taras stated that there was "no deal or expression of interest." (Transcript, volume 7, page 2041 (April 12, 2005)).

[31] In late October 2003, Ms. Laflamme phoned Mr. Gascon to follow up on the divestiture process. At that time, RONA was working on an information document for potential buyers.

[32] On November 25, 2003, Mr. Gascon informed Ms. Laflamme by e-mail that the process of selling the Sherbrooke Réno-Dépôt had begun, as RONA mandated the Intercom real estate brokerage to represent it on November 1. In the same e-mail, he pointed out that three potential buyers had already been contacted (Patrick Morin, Canac Marquis and Kent) but were not interested. They did not discuss Home Depot.

[33] On January 6, 2004, Mr. Gascon sent Ms. Laflamme the report from the Intercom representative dated December 17, 2003. In that letter, he pointed out that [TRANSLATION] "RONA had approached five prospective buyers . . . and only two of them signed an acknowledgement of receipt that said they were interested in considering the possibility of purchasing the Réno-Dépôt store in Sherbrooke." It should be noted that Home Depot was one of these prospective buyers. Indeed, Mr. Frodyma of Home Depot signed the acknowledgement of receipt and then returned the documents. The evidence at the hearing indicates that it was at this time that Home Depot took the first steps toward setting up on the Plateau St-Joseph.

[34] Ms. Laflamme contacted Mr. Gascon on January 9, 2004, after receiving the report from Intercom. Stunned about the limited number of purchasers contacted, she wanted to remind Mr. Gascon that, in light of the report, the process for appointing the trustee would have to be initiated. Under the terms of the Consent Agreement, there was only one month left to appoint a trustee.

Mr. Gascon phoned Ms. Laflamme back on January 13. During the call, she asked him to suggest some names of trustees. Also during the call, Mr. Gascon told her that RONA wanted to meet with representatives of the Commissioner before moving on to the next stage, i.e. appointing the trustee, in early February. Ms. Laflamme took this request to mean that RONA wanted to vary the Consent Agreement.

[35] The process of finding a trustee began on January 13, 2004, on the part of both the Commissioner and RONA. The Commissioner was particularly proactive during this period and identified at least four trustees. While on the lookout for trustees that would not be in a conflict of interest, RONA continued to receive and send out documents regarding Home Depot's imminent arrival in the Sherbrooke market.

[36] On January 23, 2004, Mr. Gascon faxed Mr. Brantz and Ms. Laflamme an excerpt from the December 2003 issue of the magazine *Hardware Merchandising* in which Roger Plamondon, a member of Home Depot Canada's senior management, said that a Home Depot would probably be opening in Sherbrooke: "other cities likely to get a Home Depot include . . . Sherbrooke." (Exhibit CR3, RONA vol. 2, tab 12). During a phone conversation initiated by Mr. Gascon that same day, RONA suggested a single trustee: Denis Labrèche of Ernst & Young. They scheduled February 2 as the date of a meeting between RONA and the Commissioner's representatives.

[37] On February 2, 2004, Messrs. Guévin and Mérineau of RONA, their counsel Messrs. Gascon and Hassan, and Mr. Brantz and Ms. Laflamme of the Bureau, met to go over the events of the previous months. They discussed the measures undertaken by Intercom, the requisite qualifications of a purchaser, the candidates for the trusteeship and the method of remunerating the trustee.

[38] On February 5, 2004, Ms. Laflamme personally notified RONA and Ernst & Young of the trustee chosen. The Commissioner decided to accept the only trustee that RONA had suggested because, according to Ms. Laflamme, the firm [TRANSLATION] "appeared to know the industry best and would therefore be most likely to find potential candidates." (Transcript, volume 6, page 1841 (April 11, 2005)).

[39] On February 10, 2004 — five months, to the day, after closing the sale of Réno-Dépôt — a first meeting was held between the trustee (represented by Messrs. Labrèche and Ianni), RONA (represented by Messrs. Mérineau and Guévin and by RONA's counsel Messrs. Gascon and Hassan) and the representatives of the Commissioner (represented by Mr. Newman and Ms. Laflamme). The meeting helped clarify the trustee's mandate under the Consent Agreement and the qualifications that a purchaser should have under the agreement.

[40] By February 9, the day before this first meeting between the trustee, RONA and the Commissioner, Mr. Hassan (counsel for RONA) had sent a first draft of a trust agreement to Denis Labrèche of Ernst & Young. Other versions of the draft agreement were sent to the Commissioner and the trustee on February 10, 17, and 23, as RONA's lawyers made changes reflecting the various stakeholders' comments.

[41] On February 27, 2004, the trust agreement was signed by Anthony Ianni for the trustee and by Claude Guévin for RONA. The Commissioner, through Mr. Richard Annan, confirmed the trustee's mandate on March 1, 2004.

[42] In March, RONA's representatives and the trustee's representative contacted each other almost daily. By March 2, Martin Kamil of Ernst & Young contacted Mr. Mérineau to get additional information from RONA so that the "teaser", an information document sent to potential buyers, could be prepared. Other requests of the same nature were sent to RONA on March 11, 16, and 17, 2004.

[43] A "Draft List of Prospective Purchasers/Summary Prospect List" was sent to RONA and the Commissioner for comment on March 10, 2004. On March 23, 2004, a final list of prospective purchasers was submitted to RONA and the Commissioner. On March 30, 2004, the trustee sent an e-mail to the Commissioner and RONA confirming receipt of all the information requested from RONA between March 2 and March 17.

[44] On May 17, 2004, Mr. Hassan e-mailed Mr. Brantz and Ms. Laflamme and sent them an article which had appeared that morning in the Montréal daily *La Presse*, discussing Home Depot's expansion plans in Quebec. The following day, May 18, 2004, Ms. Laflamme sent a terse response to Mr. Hassan, stating that she had already seen the article in question and that the fact that Sherbrooke was not specifically mentioned in Home Depot's expansion plans had not escaped her. It should be noted that this was the first of the Commissioner's two replies to the series of missives received from RONA regarding the arrival of Home Depot. The other reply was the e-mail of November 19, 2004, which we will address later.

[45] On July 14, 2004, the trustee e-mailed RONA and the Commissioner, advising them that only one of the three prospects that had expressed an interest in the Sherbrooke Réno-Dépôt was still interested, and that he would be meeting with an executive of the prospective purchaser in the coming days.

[46] At RONA's request, a teleconference was held on August 13 between RONA's representatives (Messrs. Guévin and Gascon), the trustee's representative (Mr. Ianni) and the Commissioner's representatives (Mr. Brantz and Ms. Laflamme). It was on this occasion that, for the first time, Mr. Guévin told the Commissioner that RONA did not consider that the prospective purchaser was serious.

[47] The first letter of intent from the purchaser is dated August 18, 2004. On August 25, 2004, Mr. Hassan e-mailed Mr. Brantz and Ms. Laflamme, advising them, *inter alia*, that First Pro's website contained a development plan for the Sherbrooke area and that "these elements would tend to suggest that Home Depot's arrival in the Sherbrooke market is imminent."(Exhibit CR3, RONA volume 2, tab 15).

[48] On August 26, 2004, Ms. Laflamme sent an information request directly to the purchaser. On August 27, 2004, further to Mr. Hassan's e-mail, the Commissioner's representatives (Ms. Laflamme and Mr. Brantz) contacted Mr. Zender and Mr. Frodyma of Home Depot to check on the status of that company's expansion plans in the Sherbrooke market. Home Depot's representatives told them that no agreement had yet been reached with First Pro, and that the opening of a store in Sherbrooke remained subject to the approval of Home Depot's board of directors. They also told the Commissioner's representative that the Sherbrooke store was expected to open in the last quarter of 2005 or the first quarter of 2006 (Transcript, volume 7, page 2064 (April 12, 2005)).

[49] On August 30, 2004, the trustee sent a letter to RONA's representatives and counsel, and to the Commissioner's representatives, reporting on the most recent negotiations with the purchaser. On the same day, the Consent Agreement was amended and extended (the divestiture was to occur within a year) in order to enable the trustee to accept a letter of intent as late as October 15, 2004 and close the sale prior to December 15, 2004. On August 31, 2004, the trust agreement was also amended.

[50] The divestiture process stagnated in September 2004 because the purchaser's president was away. On September 28, 2004, Mr. Guévin sent the Commissioner and the trustee a list of seven questions intended to help them assess the purchaser's qualifications. However, Ms. Laflamme only became aware of this list when she returned from the meeting with the purchaser's representatives.

[51] On October 6, 2004, Ms. Laflamme sent the purchaser a request for additional information. The request complemented the one sent out on August 26. On October 7, 2004, Mr. Zender, counsel for Home Depot, left a message for Ms. Laflamme notifying her that "if we are successful in reaching a deal soon, again purely speculation based on past experience, the hope would be, that assuming that we then get site plan approval and all other necessary regulatory approvals, that we could be having a store built within approximately a year from now, give or take a couple of months, but again based under a number of assumptions." (Transcript, volume 11, page 2951 (April 19, 2005)). On the same day, Ms. Laflamme also contacted Mr. Taras of First Pro to check on the status of negotiations with Home Depot. He responded that nothing had been signed but that the negotiations were going well (transcript, volume 9, page 2558 (April 14, 2005)). He asked her to call back in a month, which she did.

[52] On October 8, 2004, the trustee approved the purchaser's offer. The due diligence process commenced in the days following that approval. On October 12, 2004, the trustee sent RONA the purchaser's first request regarding the due diligence documents. A second request was sent to RONA on October 15 and pertained to the legal aspects of the due diligence process.

[53] Between October 18 and October 26, 2004, Mr. Guévin and the trustee corresponded regularly regarding the due diligence process. The purchaser was troubled by the slow pace of the process and contacted the Commissioner twice during this period.

[54] On October 27, 2004, a teleconference was held between RONA's representatives (Messrs. Guévin and Gascon), the Commissioner's representatives (Mr. Brantz, Mr. Efraim and Ms. Laflamme) and the trustee's representatives (Mr. Ianni, Mr. Shah and Mr. Jarjour). Held at RONA's request, the teleconference was intended to explain the problems that RONA encountered during the process of extracting the information required by the trustee in the course of the due diligence process. The problem was in isolating the Sherbrooke Business's figures from the remainder of the corporate data, which RONA did not wish to share with the purchaser because it considered that information to be confidential.

[55] On November 3, 2004, Ms. Laflamme contacted Mr. Taras of First Pro to check on the status of the negotiations with Home Depot regarding Sherbrooke. She left him a telephone message, to which he did not reply. She did not see fit to try again later because [TRANSLATION] "many other things were going on at the time." (Transcript, volume 9, page 2559 (April 14, 2005)).

[56] On November 8 and 9, 2004, Mr. Ianni, representing the trustee, and Mr. Guévin, representing RONA, exchanged two letters in which they reminded each other of their duties and obligations under the Consent Agreement.

[57] On November 12, 2004, Ms. Laflamme got a call from a journalist about the possible arrival of Home Depot in Sherbrooke. Later that day, she called Mr. Zender, counsel for Home Depot, and left a message. On November 17, 2004, Mr. Gascon contacted Mr. Brantz by e-mail and attached two documents: an excerpt from the newspaper *La Presse* dated November 8, 2004, announcing the arrival of a "megacentre" in Sherbrooke, and an excerpt from the "monster.ca" website seeking employees for a Home Depot store in Sherbrooke. Mr. Gascon asked the Commissioner to rule on what RONA considered to be a clear change of circumstances:

> [TRANSLATION]
>
> It is once again our view that, in light of these developments, we now have a change of circumstances based on which the Consent Order for the divestiture of the Réno-Dépôt store would not have been made. After you have read this e-mail, could you please contact me to state the Commissioner's position on these developments at Home Depot's end? (Exhibit CR3, RONA volume 2, tab 16)

[58] On November 18, 2004, Mr. Frodyma returned Ms. Laflamme's call and, according to Ms. Laflamme's testimony, informed her that [TRANSLATION] "there was almost an agreement with First Pro, that it was almost certain at that time, but that the board of directors or the board had not yet given its approval and the project was at that time contemplated for November 2005." (Transcript, volume 7, page 2080 (April 12, 2005)).

[59] Despite Mr. Frodyma's confirmation that Home Depot would be arriving in Sherbrooke, the Office of the Commissioner seemed unwilling to consider that there had been a change of circumstances. The following are excerpts from Ms. Laflamme's testimony:

> [TRANSLATION]
>
> - "[I]n November, we had just obtained information from Mr. Frodyma – among others – confirming that Home Depot's entry was much more certain that it had been before. I remember that we had internal discussions on how to react to this, and the discussions were based on everything that was said. We realized that RONA had been playing for time during the process. All those circumstances were present. (Transcript, volume 8, page 2274 (April 13, 2005)).
>
> - "In our opinion, it did not make much sense to allow RONA – to allow a process to be drawn out until something happened in the market. My misgiving was that, at the time, we did not say – we did not definitively say – that 106 could not apply, that it was out of the question. We examined a whole set of factors, and we found that if an amendment

were permitted at that stage, it would allow all vendors to enter into consent agreements intending to do whatever was necessary to ensure that the circumstances that we put forward ultimately came to pass, if you will. They had always alleged that RONA's arrival was imminent. What does "imminent" mean? In the end, they knew it would take more than a year, and yet they signed a Consent Agreement and, finally, if you look at all the events, they did what needed to be done so that it would take more than a year for the consent." (Transcript, volume 8, page 2275 (April 13, 2005)).

- JUSTICE FRANÇOIS LEMIEUX: Pardon me, Madam. In your opinion, was the Commissioner sufficiently certain, after the 18th, that Home Depot would be in the market – that it would open some time later – in November 2005 – was she certain that it would open?
ANDRÉE LAFLAMME: There was certainty that it would open.
JUSTICE FRANÇOIS LEMIEUX: In November? Because Mr. Frodyma —
ANDRÉE LAFLAMME: No, wait. It was certain – there was no doubt that Home Depot was going to arrive in Sherbrooke at some point.
JUSTICE FRANÇOIS LEMIEUX: Yes.
ANDRÉE LAFLAMME: I remember my discussions with Mr. Jorré. Yes, we heard it would probably get the board of directors' approval but Mr. Jorré was very firm: [TRANSLATION] "Board approval is necessary." The Commissioner cannot decide without – based on – and I don't like to use the work "speculative" again, but based on a chance that it might not happen.
JUSTICE FRANÇOIS LEMIEUX: So in your opinion – and that was the other question I was about to ask you – the point of no return in all these circumstances, in your opinion, was the decision made in Atlanta to approve the project?
ANDRÉE LAFLAMME: In –
JUSTICE FRANÇOIS LEMIEUX: For Sherbrooke.

ANDRÉE LAFLAMME: For Sherbrooke, that is what we had determined we had to obtain in terms of assurance from Home Depot. But, at that time, there

> was all of the other situation that we could not disregard. That, I am obliged to say. (Transcript, volume 9, page 2600 (April 14, 2005)).

[60] On November 19, 2004, Mr. Brantz replied to Mr. Gascon's e-mail of November 17:

> [TRANSLATION]
>
> If your client is of the opinion that the circumstances referred to in your e-mail warrant the amendment of the Consent Order, your client should apply to the Tribunal for such an amendment. The Commissioner will state her position on the conduct of this matter and on the information sent in your e-mail when she receives the application for an amendment. (Exhibit CR3, RONA volume 2, tab 18).

[61] The trustee and the purchaser signed the Agreement of Purchase and Sale on November 24, 2004. On November 25, 2004, the trustee sent RONA and the Commissioner the Notice of Divestiture in accordance with the Consent Agreement.

[62] On December 8, 2004, RONA sent the trustee a request for additional information in accordance with clause 9 of the Consent Agreement. The trustee replied to this request on December 20, 2004. During this period, RONA received additional information regarding the imminent opening of a Home Depot in Sherbrooke: a supplier told Mr. Guévin that he had received a schedule from Home Depot which referred to an opening date. On January 10, 2005, i.e. within the 21 days provided under clause 10 of the Consent Agreement, RONA filed a notice of objection to the proposed sale. On the same day, RONA filed the Section 106 application now before the Tribunal.

[63] In fact, a few days earlier, during the week of January 4, 2005, Mr. Guévin received the document that his supplier had alluded to in mid-December: the "Easy Bake" document, an internal Home Depot document that states that a Home Depot store will be opening in Sherbrooke on November 17, 2005.

[64] On January 12, 2005, Ms. Laflamme contacted Home Depot (specifically Messrs. Plamondon and Zender) and learned that, in mid-December, the board of directors had approved the opening of a store in Sherbrooke (Transcript, volume 7, pages 2086-2087 (April 12, 2005)).

[65] On February 4, 2005, Ms. Laflamme again contacted Messrs. Frodyma and Zender of Home Depot about the Easy Bake document received January 18, 2005,

in the context of these proceedings. (Transcript, volume 7, page 2099 (April 12, 2005)).

III. APPLICABLE STATUTORY PROVISIONS

[66] Before June 2002:

Consent orders

105. Where an application is made to the Tribunal under this Part for an order and the Commissioner and the person in respect of whom the order is sought agree on the terms of the order, the Tribunal may make the order on those terms without hearing such evidence as would ordinarily be placed before the Tribunal had the application been contested or further contested.

Ordonnance Par Consentement

105. Lorsqu'une demande d'ordonnance est faite au Tribunal en application de la présente partie et que le Commissaire et la personne à l'égard de laquelle l'ordonnance est demandée s'entendent sur le contenu de l'ordonnance en question, le Tribunal peut rendre une ordonnance conforme à cette entente sans que lui soit alors présentée la preuve qui lui aurait autrement été présentée si la demande avait fait l'objet d'une opposition.

After June 2002:

Consent agreement

105. (1) The Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under this Part, other than an interim order under section 103.3 or a temporary order under section 104.1, may sign a consent agreement.

Terms of consent agreement

(2) The consent agreement shall be based on terms that could be the subject of an order of the Tribunal against that person.

Registration

(3) The consent agreement may be filed with the Tribunal for immediate registration.

Consentement

105. (1) Le Commissaire et la personne à l'égard de laquelle il a demandé ou peut demander une ordonnance en vertu de la présente partie - exception faite d'une ordonnance provisoire rendue en vertu des articles 103.3 et 104.1 - peuvent signer un consentement.

Contenu du consentement

(2) Le consentement porte sur le contenu de toute ordonnance qui pourrait éventuellement être rendue contre la personne en question par le Tribunal.

Dépôt et enregistrement

(3) Le consentement est déposé auprès du Tribunal qui est tenu de l'enregistrer immédiatement.

Effect of registration

(4) Upon registration of the consent agreement, the proceedings, if any, are terminated, and the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.

Effet de l'enregistrement

(4) Une fois enregistré, le consentement met fin aux procédures qui ont pu être engagées, et il a la même valeur et produit les mêmes effets qu'une ordonnance du Tribunal, notamment quant à l'engagement des procédures

Before June 2002:

Rescission or variation of order

106. Where, on application by the Commissioner or a person against whom an order has been made under this Part, the Tribunal finds that

(a) the circumstances that led to the making of the order have changed and, in the circumstances that exist at the time the application is made under this section, the order would not have been made or would have been ineffective to achieve its intended purpose, or

(b) the Commissioner and the person against whom an order has been made have consented to an alternative order, the Tribunal may rescind or vary the order accordingly.

Annulation ou modification de l'ordonnance

106. Le Tribunal peut annuler ou modifier une ordonnance rendue en application de la présente partie lorsque, à la demande du Commissaire ou de la personne à l'égard de laquelle l'ordonnance a été rendue, il conclut que :

a) les circonstances ayant entraîné l'ordonnance ont changé et que, sur la base des circonstances qui existent au moment où la demande prévue au présent article est faite, l'ordonnance n'aurait pas été rendue ou n'aurait pas eu les effets nécessaires à la réalisation de son objet;

b) le Commissaire et la personne à l'égard de laquelle l'ordonnance a été rendue ont consenti à une autre ordonnance.

After June 2002:

Rescission or variation of consent agreement or order

106. (1) The Tribunal may rescind or vary a consent agreement or an order made under this Part other than an order under section 103.3 or 104.1 or a consent agreement under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the Tribunal finds that

(*a*) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose; or

(*b*) the Commissioner and the person who consented to the agreement have consented to an alternative agreement

Annulation ou modification du consentement ou de l'ordonnance

106. (1) Le Tribunal peut annuler ou modifier un consentement ou une ordonnance rendue en application de la présente partie, à l'exception d'une ordonnance rendue en vertu des articles 103.3 ou 104.1 et du consentement visé à l'article 106.1, lorsque, à la demande du Commissaire ou de la personne qui a signé le consentement, ou de celle à l'égard de laquelle l'ordonnance a été rendue, il conclut que, selon le cas:

a) les circonstances ayant entraîné le consentement ou l'ordonnance ont changé et que, sur la base des circonstances qui existent au moment où la demande est faite, le consentement ou l'ordonnance n'aurait pas été signé ou rendue, ou n'aurait pas eu les effets nécessaires à la réalisation

or the Commissioner and the person against whom the order was made have consented to an alternative order.

(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.

de son objet;

b) le Commissaire et la personne qui a signé le consentement signent un autre consentement ou le Commissaire et la personne à l'égard de laquelle l'ordonnance a été rendue ont consenti à une autre ordonnance.

(2) Toute personne directement touchée par le consentement - à l'exclusion d'une partie à celui-ci - peut, dans les soixante jours suivant l'enregistrement, demander au Tribunal d'en annuler ou d'en modifier une ou plusieurs modalités. Le Tribunal peut accueillir la demande s'il conclut que la personne a établi que les modalités ne pourraient faire l'objet d'une ordonnance du Tribunal.

Competition Tribunal Rules (SOR/94-290):

Application for a Consent Order

77. (1) An application for a consent order shall be made by filing

(a) a notice of application for a consent order;
(b) a consent order impact statement;
(c) a draft consent order; and
(d) a consent form signed by the parties.

(2) A notice of application for a consent order

(a) shall be signed by the person making the application;
(b) shall indicate if the parties consider that a hearing need not be held;
(c) where an application pursuant to section 3 has not been made, shall set out, in numbered paragraphs,

(i) the sections of the Act under which the application for a consent order is made,
(ii) the name and address of each person in respect of whom the consent order is sought,
(iii) a concise statement of the grounds for the application for a consent order and of the material facts relevant to the application, and
(iv) the official language to be

Demande d'ordonnance par consentement

77. (1) La demande d'ordonnance par consentement se fait par le dépôt :

a) d'un avis de demande d'ordonnance par consentement;
b) d'un résumé d'impact;
c) d'un projet d'ordonnance par consentement;
d) d'une formule de consentement signée par les parties.

(2) L'avis de demande d'ordonnance par consentement :

a) est signé par la personne qui fait la demande;
b) indique si les parties estiment qu'une audience n'est pas nécessaire;
c) dans le cas où une demande n'a pas été faite selon l'article 3, est divisée en paragraphes numérotés et comprend les renseignements suivants :

(i) les articles de la Loi en application desquels la demande d'ordonnance par consentement est présentée,
(ii) les nom et adresse de chacune des personnes à l'égard desquelles l'ordonnance par consentement est demandée,
(iii) le résumé des motifs de la demande d'ordonnance par consentement et des faits substantiels pertinents,

used by the parties in the proceedings; and

(d) where an application pursuant to section 3 has been made, shall set out any changes or additions relating to the application for a consent order.

(3) A consent order impact statement shall provide an explanation of the draft consent order, including an explanation of the circumstances giving rise to the draft order or any provision of the draft order, the relief to be obtained if the order is made and the anticipated effects on competition of that relief. SOR/96-307, s. 11.

77.1 An application for a consent order made under section 74.12 of the Act shall be made by filing a consent form that

(a) is signed by the parties; and
(b) sets out

(i) the sections of the Act under which the application is made,
(ii) the name and address of each person in respect of whom the order is sought,
(iii) a brief statement of the grounds for the application, and
(iv) the terms of the order to which the Commissioner and the person in respect of whom the order is sought agree. SOR/2000-198, s. 8.

78. (1) Where an application pursuant to section 3 has not been made, the person making an application for a consent order shall,

(a) within three days after the documents set out in subsection 77(1) are filed, serve the documents on each person in respect of whom a consent order is sought; and
(b) within two days after the service of the documents, file proof of service.

(iv) la langue officielle que les parties utiliseront dans l'instance;

d) dans le cas où une demande a été faite selon l'article 3, fait état de toute modification ou adjonction relative à la demande d'ordonnance par consentement.

(3) Le résumé d'impact explique le projet d'ordonnance par consentement et décrit notamment les circonstances ayant donné lieu à tout ou partie du projet, le redressement qui sera obtenu si l'ordonnance est rendue et les effets anticipés de ce redressement sur la concurrence. DORS/96-307, art. 11.

77.1 La demande d'ordonnance par consentement visée à l'article 74.12 de la Loi se fait par le dépôt d'une formule de consentement qui, à la fois :

a) est signée par les parties;
b) indique :

(i) les articles de la Loi au titre desquels la demande est présentée,
(ii) les nom et adresse de chacune des personnes à l'égard desquelles l'ordonnance est demandée,
(iii) les motifs de la demande, résumés succinctement,
(iv) les modalités de l'ordonnance auxquelles ont consenti le Commissaire et la personne contre laquelle l'ordonnance est demandée. DORS/2000-198, art. 8.

78. (1) Dans le cas où une demande n'a pas été faite selon l'article 3, la personne qui fait la demande d'ordonnance par consentement :

a) d'une part, dans les trois jours suivant le dépôt des documents visés au paragraphe 77(1), les signifie aux personnes à l'égard desquelles l'ordonnance est demandée;
b) d'autre part, dans les deux jours suivant la signification des documents, dépose la preuve de leur signification.

(2) Where an application pursuant to section 3 has been made, the person making an application for a consent order shall

(a) serve the documents set out in subsection 77(1) on each person on whom the notice of application pursuant to section 3 was served and on any intervenors in proceedings in respect of that application; and
(b) file the documents with proof of service. SOR/96-307, s. 11.

(2) Dans le cas où une demande a été faite selon l'article 3, la personne qui fait la demande d'ordonnance par consentement :

a) d'une part, signifie les documents visés au paragraphe 77(1) aux personnes qui ont reçu signification de l'avis de demande visé à cet article et aux intervenants dans les procédures relatives à cette demande;
b) d'autre part, dépose les documents avec la preuve de leur signification. DORS/96-307, art. 11.

IV. ISSUES

[67] This is an application to rescind the Consent Agreement of September 3, 2003. In the Tribunal's opinion, the issues are as follows:

1. How must the new wording of section 106 be interpreted?

2. Have the conditions set out in section 106 been met?

3. Are there other circumstances based on which the Tribunal should not grant RONA's application?

V. ANALYSIS

A. THE PARTIES' POSITIONS

(1) RONA's position

[68] RONA's position is simple and clear enough: the Consent Agreement should be rescinded because the circumstances that led to it being signed have changed and, under the new circumstances, RONA would never have agreed to divest itself of the Réno-Dépôt store in Sherbrooke. RONA recommends a strict interpretation of the new wording: once the conditions set out in section 106 have been met, the Tribunal need not consider whether it would have rendered such an order, or examine other considerations. However, if the Tribunal considers that it has some discretion regarding the application of section 106, another factor to consider should be the actions of the Commissioner, who systematically refused to take into account the changes in circumstances throughout the life of the Consent Agreement.

(2) The Commissioner's position

[69] The Commissioner opposes rescission for several reasons. Firstly, in the Commissioner's opinion, there has not been a true change of circumstances. Indeed, RONA has always contended that Home Depot would open in Sherbrooke in the near future. Consequently, there is nothing new about the fact that Home Depot will actually be opening its doors in November or December 2005.

[70] In addition, the Commissioner favours an objective analysis of the second component of subsection 106(1). In her submission, the issue is whether an order would have been made under the circumstances that prevailed on January 10, 2005. She submits that the issue is not the parties' wishes, but rather, what the Tribunal should do, acting reasonably and taking all the circumstances into account. The Commissioner adds that the circumstances include not only the certainty of Home Depot's arrival (which she admits) but also the circumstances that prevailed on January 10, 2005: the signature of an Agreement of Purchase and Sale by the purchaser, and the slow pace at which RONA went about divesting itself of the Sherbrooke Business and assisting the trustee in this regard, which the Commissioner characterizes as bad faith and an abuse of rights.

[71] If however, the Tribunal should find that there has been a change of circumstances and that the Consent Agreement would not have been signed, the Commissioner has other arguments against rescission: the rescission would end a remedial measure that would have helped correct the current anti-competitive situation in the Sherbrooke market; it is important to ensure that Consent Agreements are enforceable; an Agreement of Purchase and Sale has been signed which would prejudice a third party; and the Tribunal would be eliminating what could be an immediate solution to the current lack of competition in the Sherbrooke home improvement superstore market. The Commissioner also claims that RONA's application is barred because RONA abused its rights by unduly delaying the divestiture contrary to the spirit of the Consent Agreement, and because RONA abused its contractual rights by signing a Consent Agreement all the while hoping it would never have to comply with it. This, in the Commissioner's submission, bars RONA from relying on the Consent Agreement or the Act in order to end the Consent Agreement.

B. THE TRIBUNAL'S ANALYSIS

(1) The interpretation of the new wording of subsection 106(1)

[72] In June 2002, the amendments to the *Competition Act* (S.C. 2002, c. 16) came into force. One important amendment pertains to the way in which parties can have consent agreements ratified. Previously, the Tribunal had to consider the terms and conditions of the agreement and ensure that, at a minimum, it eliminated the substantial lessening or prevention of competition (see for example

Commissioner of Competition v. Trilogy Retail Enterprises L.P., 2001 Comp. Trib. 29). Under the new scheme, the consent agreement is simply filed with the registry of the Tribunal "for immediate registration" under subsection 105(3) of the Act.

[73] Even if the evidence adduced before the Tribunal to obtain a consent order under the former section 105 need not have been as substantial as the evidence required, for example, in section 92 merger cases, some evidence had to be filed as provided by the *Competition Tribunal Rules*. For a consent order, the parties were required to submit an impact statement (Rule 77(1)(*b*)) providing "an explanation of the draft consent order, including an explanation of the circumstances giving rise to the draft order or any provision of the draft order, the relief to be obtained if the order is made and the anticipated effects on competition of that relief." (Rule 77(3)).

[74] Under the current scheme, the Tribunal sees none of the evidence supporting the Commissioner's decision to deny a merger without a consent agreement and is not to engage even in the most cursory assessment of the proposed remedial measure. The Tribunal must register the consent agreement immediately, whereupon it "has the same force and effect . . . as if it were an order of the Tribunal" even though it is not, strictly speaking, such an order.

[75] Section 106 was amended accordingly. It now includes the words "the agreement . . . would not have been made." This change of wording undoubtedly changes the interpretation to be given to section 106. Indeed, the words of an Act must always be interpreted in accordance with the principles set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, *per* Iacobucci J.:

> 21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the

> object of the Act, and the intention of Parliament. Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp*., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.
>
> 22 I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

[76] In other words, Parliament never speaks unnecessarily, and provisions must be interpreted in their grammatical sense, based, however, on the context and intent of the statute.

[77] By the amendments of 2002, Parliament sought to give the parties greater flexibility in negotiating consent agreements. Consequently, subsection 106(1) acknowledges that consent agreements are a product of the parties' wishes, and that one cannot contemplate amending them without considering those wishes. The Act is about competition and, in enacting the amendments of 2002, Parliament was adopting a way to quickly resolve problems that arise and lessen competition. Instead of allowing a non-competitive situation to persist, Parliament gave the parties a way to settle the issue. Also, since Parliament recognized that this approach should not be more rigid than actual orders of the Tribunal, which can still be amended under section 106, it supplied a mechanism for amending consent agreements made on the basis of what they are: tools negotiated by two parties, not orders made by the Tribunal. This explains the words "the agreement . . . would not have been made."

[78] Under the former test, the Tribunal had to decide, in light of the change of circumstances, whether it would have rendered the order. The current test for an application to vary or rescind a consent agreement is whether, in light of the new circumstances existing at the time of the application, the consent agreement would have been signed. In insisting on the order that the Tribunal would have made, the Commissioner is attempting to impose a reading that is simply no longer consistent with the wording of the provision. Since the Tribunal has not issued an order, it does not have to consider whether it would have rendered the order. It can only consider the parties' intentions at the time that the consent agreement was made and at the time that the application to vary or rescind the agreement was filed.

(2) Have the conditions set out in subsection 106(1) been met?

The circumstances have changed

[79] On September 3, 2003, RONA and Réno-Dépôt were the only home improvement superstores in Sherbrooke. Home Depot, which, based on the testimony, was RONA's main competitor, was not planning to set up in Sherbrooke. Within the meaning that the Federal Court of Appeal ascribed to the concept in *Canada (Director of Investigations and Research) v. Air Canada*, [1994] 1 F.C. 154 ("*Air Canada*"), a simple causal relationship can be found between RONA's acquisition Réno-Dépôt shares, the anticipated absence of competition in Sherbrooke (which, based on the information obtained by the Commissioner, will not be corrected within two years of the transaction) and the signing of the Consent Agreement. In *Air Canada*, the Court held at 166:

> In my view, there is no warrant in the language of section 106 itself or in the scheme of the statute generally for reading the words "the circumstances that led to the making of the order" in other than their ordinary grammatical sense. This involves a determination by the Tribunal of the existence of a simple causal relationship between the circumstances and the order, but no more. It is not necessary that such relationship be "direct" or "demonstrable" other than in the very limited sense that the Tribunal must be satisfied that it exists. Nor is it necessary to relate the circumstances to the purposes sought to be achieved by the order, although it is of course always legitimate to look to such purposes as a guide to identifying some of the circumstances leading to it.

[80] At the end of its investigation into the competitive impact of RONA's acquisition of Réno-Dépôt, in August 2003, the Bureau found that competition was sufficient in all the markets where RONA would acquire stores belonging to Réno-Dépôt, except the Sherbrooke market. Since there was no other superstore in the Sherbrooke market, RONA's acquisition of the Réno-Dépôt store created a non-competitive situation.

[81] However, based on the testimony of Ms. Laflamme, Mr. Guévin and Mr. Ettinger, the Tribunal finds that the arrival of a Home Depot store in the Sherbrooke market fully assuages the Commissioner's concerns of a substantial lessening of competition in the home improvement superstore market. Given its size, purchasing power and extraordinary growth in Canada, it is clear that Home Depot is RONA's competitor *par excellence*. In such a context, the evidence of its arrival is a change of the circumstances that led to the signing of the Consent Agreement.

[82] On January 10, 2005, RONA obtained a document which was issued by Home Depot and which stated that a Home Depot store would be opening in Sherbrooke on November 17, 2005. In addition, the evidence at the hearing established as follows:

> (1) Home Depot's board of directors approved the store opening on December 14, 2004.
>
> (2) On November 23, 2004, the city of Sherbrooke received Home Depot's plan for a store.
>
> (3) Since March 29, 2004, the date of the MapInfo Thomson report, Home Depot's Sherbrooke project has been an almost certain reality. When Mr. Justice Lemieux asked Mr. Rivet on which date it was certain that the Sherbrooke store project would proceed, Mr. Rivet's reply was March 2004, once the report was received.

[83] The Commissioner submits that there has been no change of circumstances because RONA was convinced from the outset that Home Depot would arrive sooner or later. In this regard, she cites various decisions in which the Tribunal refused to acknowledge a change of circumstances because the new circumstances had been anticipated: *Canada (Director of Investigation and Research) v. Air Canada*, [1994] 1 F.C. 154 (C.A.); *Canada (Director of Investigation and Research) v. Imperial Oil Ltd.*, [1990] C.C.T.D. No. 1 (CT 8903/390); *Canada (Director of Investigation and Research) v. Imperial Oil Ltd.* (1990), 31 C.P.R. (3d) 277 (C.T.); and *Canadian Waste Services Holdings Inc. v. Canada*, [2004] C.C.T.D No. 10. The Commissioner cites *inter alia* paragraph 37 of the decision in *Canadian Waste Services Holdings Inc. v. Canada*, [2004] C.C.T.D. No. 10, which reads as follows:

> The Tribunal concludes that, at the Section 92 Hearing, CWS did not present a realistic assessment about when the Expansions could be in operation. This appears to have occurred because it did not consider the possible impact of the judicial review applications and the lack of HMS. In the Tribunal's view, it is not open to CWS to raise revised expectations about timing as changes of circumstances when the facts which could reasonably have been expected to impact the timing were known to CWS and not presented at the Section 92 Hearing.

[84] It seems clear that the Tribunal's intention was to ensure that the applicant was not concealing evidence or acting evasively during a Section 92 hearing by raising a fact that it had known from the outset, once the consent agreement was signed. Here, RONA never concealed the fact that it believed Home Depot would be coming to Sherbrooke. On the contrary, it tried to convince the Commissioner of this both before and after the Consent Agreement was signed.

[85] The Commissioner's argument does not hold water. RONA signed the Consent Agreement precisely because it could not convince the Commissioner that Home Depot's arrival was imminent. Once the evidence was available and it was certain that Home Depot would be arriving, the circumstances had clearly changed.

The parties would not have signed the agreement based on the circumstances that existed at the time of the application

[86] As discussed above, the question must not be considered in terms of the order that the Tribunal would have rendered, but rather, in terms of the parties' wishes. It is a matter of considering the intent of the parties in view of the circumstances at the time the application was made. What are those circumstances? There is evidence — the Commissioner admits this — that Home Depot will be opening in the coming year. Based on the very wording of section 106, we are not to ascertain what the parties' intent would have been on September 3, 2003, had they known that Home Depot would open in November 2005. Rather, we must ascertain their intention on January 10, 2005, when the application for rescission based on a change of circumstances was filed.

[87] Mr. Guévin bluntly stated, on RONA's behalf, that if he had been in possession of the evidence that Home Depot would be opening less than a year later, he would never have signed the Consent Agreement. As for the Commissioner, Ms. Laflamme testified that she would not have recommended the divestiture. Her answer was cautious and qualified: ultimately, the decision whether or not to require a divestiture was not one for Ms. Laflamme to make, according to her testimony.

[88] The Commissioner submits that the circumstances that existed at the time the application was filed include the signing of an agreement of purchase and sale with the purchaser as well as RONA's conduct since the signing of the Consent Agreement. However, based on our reading of subparagraph 106(1)(*a*), the Tribunal finds that the circumstances "that exist at the time the application is made" must be understood having regard to the first element of the sentence, namely "the circumstances that led to the making of the agreement . . . have changed." Whatever might have followed the signing of the Consent Agreement is not relevant for the purposes of the analysis to be carried out by the Tribunal, since the circumstances in the second branch of subsection 106(1) must be ascertained

having regard to the circumstances that led to the Consent Agreement. The circumstances raised by the Commissioner do not constitute a change in circumstances that led to the Consent Agreement. At the time the Consent Agreement was made, namely September 2003, the Commissioner perceived a lack of competition, and this led her to require a Consent Agreement. The change, at January 10, 2005, was the arrival of a competitor. Consequently, at this stage of the analysis, the Tribunal does not have to consider the circumstances invoked by the Commissioner.

[89] According to the Bureau's Merger Enforcement Guidelines, discussed below, the Bureau's position is that there will be no substantial lessening of competition if one or more competitors are expected to arrive in the same market within two years following the merger. In view of these guidelines, the Tribunal is of the opinion that had the Commissioner been certain that Home Depot would be arriving during the year following the acquisition (i.e. the acquisition that followed the signing of the Consent Agreement), it is unlikely that she would have insisted on the divestiture of the Sherbrooke Business.

(3) Are there other circumstances based on which the Tribunal should not allow RONA's application?

[90] Since both conditions set out in subsection 106(1) have been met, it remains to be determined whether the Tribunal should allow RONA's application and rescind the Consent Agreement.

[91] The Commissioner submits that, in terms of achieving the objectives of the Act, the Tribunal can and must exercise its discretion having regard to other factors before it rescinds the Consent Agreement. She argues that the Tribunal's discretion stems from the fact that subsection 106(1) reads "The Tribunal *may* rescind or vary . . ." In *Maple Lodge Farms Ltd. v. Canada* [1981] 1 F.C. 500 (C.A.), Le Dain J.A. (as he then was) gave the following opinion regarding the use of the word "may": "Section 28 of the *Interpretation Act*, R.S.C. 1970, c. I-23 [now section 11 of that Act, R.S. 1985, c. I-21], requires, of course, that the word "may" in section 8 be construed as permissive unless the context indicates a contrary intention."
Le Dain J.A. then specified that this discretion must be exercised in keeping with the purposes of the administrative body's enabling Act. The Supreme Court of Canada affirmed the judgment ([1982] 2 S.C.R. 2) and specified, at paragraph 7, the scope of the discretion which could be subject to judicial review:

> Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

Thus, in exercising its discretion, the Tribunal must be guided by the purposes of the *Competition Act*.

[92] The Commissioner advances three main arguments which would justify the exercise of the Tribunal's discretion to refuse RONA's application: the fact that competition will not be restored to the home improvement superstore market, and that by giving effect to the Agreement of Purchase and Sale, which has already been signed, competition could soon be restored; the fact that it is important that consent agreements be effective; and the fact that there is now an Agreement of Purchase and sale with a purchaser and rescinding the Consent Agreement at this stage would be prejudicial to the purchaser and would delay the restoration of a competitive market in Sherbrooke.

[93] The Commissioner raised an additional argument for the dismissal of RONA's application. She submits that RONA is barred from applying for the rescission of the Consent Agreement because it is only by virtue of its abuse of rights that it was in a position, 16 months after the agreement was registered, to bring the application.

(a) Competition will not be restored to the home improvement superstore market in Sherbrooke

[94] The Commissioner submits that it is important to restore competition to the Sherbrooke market. The Tribunal certainly understands the importance of encouraging competition, an objective articulated at the very beginning of the Act. However, in the instant case, based on the Act and the case law, the Tribunal's concern is not to restore competition to the Sherbrooke market, but rather, to ensure that competition will not be substantially lessened.

[95] Under section 92, the Tribunal may order a divestiture if it finds that the merger prevents or lessens competition substantially. The case law confirms that the test for consent orders is based on this concern. In *Commissioner of Competition v. Trilogy Retail Enterprises L.P.*, 2001 Comp. Trib. 29, the Tribunal wrote as follows at paragraph 21:

> The test to be applied by the Tribunal in determining whether to issue a consent order is not whether the remedy will create a more competitive environment than existed prior to the merger or even restore competition to the pre-merger level. The relevant question for the Tribunal to answer is whether the remedy will, in all likelihood, eliminate the substantial lessening or prevention of competition which is presumed . . . to arise from the merger. [Emphasis added.]

[96] *Trilogy* was decided under the former Act at a time when the Tribunal ratified the consent order. At paragraph 23 of the same decision, the Tribunal specifies the scope of its examination of the proposed remedy:

> The Tribunal's role is to determine if the proposed measures are adequate to eliminate the substantial lessening of competition that would otherwise arise from the merger. The Tribunal must not determine whether other remedies are more likely to achieve the elimination of the substantial lessening of competition.

[97] Under the new scheme, in the Tribunal's opinion, it need not go beyond this test. In our view, the certain arrival of Home Depot is a sufficient basis for determining whether rescission of the Consent Agreement can be granted despite the current non-competitive situation in the relevant Sherbrooke market. We find that the arrival of a competitor of such stature addresses the concerns about a substantial lessening of competition.

[98] The Bureau's guidelines define a substantial lessening of competition as an absence of viable competitors that can discipline prices in the two years following a merger. In its own guidelines, the Bureau acknowledges that the concern is not about restoring competition immediately after a merger. Rather, it is about determining whether the market will be able to correct a situation which, *prima facie*, presents a risk that competition will be lessened substantially.

> *Merger Enforcement Guidelines - September 2004*
>
> **Substantiality**
>
> 2.13 When the Bureau assesses whether competition is likely to be substantially prevented or lessened, it evaluates whether the merger is likely to provide the merged entity (unilaterally or in coordination with others) with an ability to materially influence price. (footnote 16) In doing so, it considers the likely magnitude, scope and duration of any price increase that is anticipated to arise as a result of the merger. Generally speaking, the prevention or lessening of competition is considered to be "substantial" where:

- the price of the relevant product(s) would likely be materially greater in a substantial part of the relevant market than it would be in the absence of the merger (hereinafter “material price increase”); and
- the material price increase is not likely to be eliminated by existing or new competitors within two years. (footnote 19).

> Note 16: As discussed above at [paragraph] 2.2, "price" is shorthand for other dimensions of competition. Also, as noted in *Superior Propane*, *supra* note 8 at [paragraph] 58, there is no requirement under the Act to find that the merged entity will likely raise the price (or reduce quality, service or product choice) but rather that the merged entity has the ability to do so.
>
> Note 19: A two year period is typically used as a rule of thumb, recognizing that some time is required for potential competitors to become aware of a material price increase, to develop products and marketing plans, to build facilities or make adjustments to existing facilities, and to achieve a level of sales sufficient to prevent or eliminate a material price increase.

[99] Given that the Tribunal must be concerned with the elimination of a substantial lessening of competition, and that the Bureau’s own guidelines show that it considers this risk is addressed if an effective competitor is expected to appear on the scene within two years of a merger, there does not appear to be any reason to be concerned about the temporary absence of competition in the market of Sherbrooke’s home improvement superstores because a sizeable competitor will be arriving in that market within a few months.

[100] The Consent Agreement was a means to remedy a non-competitive situation that the Commissioner anticipated in September 2003. Today, based on the above findings of fact, the risk of non-competition (as defined by the Bureau, from a two-year perspective) no longer exists. The remedial measure that the Commissioner is insisting on, i.e. the maintenance of the Consent Agreement, no longer appears necessary having regard to the purpose of the Act.

(b) It is important that consent agreements be effective

[101] The Commissioner submits that it is important that consent agreements be effective. The Tribunal fully supports this principle, but in order for it to apply, the consent agreement must actually contain effective measures and the Commissioner must take into account the wording of the Act, which allows these agreements to be varied or rescinded (apart from any clauses that the parties may negotiate on the subject.)

[102] A consent agreement is a versatile and important tool for settling an impasse to the parties' satisfaction. In fact, from the outset, RONA's case is a good illustration of the useful role of consent agreements. RONA was in a hurry to conclude the Transaction with Kingfisher to secure its position in Canada against the American giant Home Depot. The Commissioner, whose mandate is to ensure competition in Canada, had some reservations but did not wish to block the Transaction entirely. The consent agreement offered an elegant solution as it removed the situation from the judicial sphere in the sense that cumbersome section 92 proceedings were avoided.

[103] It is important to note that a consent agreement is a negotiated tool. Each party negotiates clauses that meet its needs. At the same time, each party must honour its commitment. The Consent Agreement is not simply a divestiture agreement. For Mr. Guévin, at the time it was signed by RONA, the Consent was a way to resolve an impasse so that a transaction could move ahead. RONA relied on the Consent Agreement in that, it was of the view that its rights would be protected if its rival were to arrive on the Sherbrooke market earlier than the Commissioner seemed to believe it would.

[104] The Commissioner alleges that RONA did not comply with its commitment to divest. As discussed below, the Tribunal does not accept these allegations by the Commissioner. Moreover, it appears that the Commissioner did not respect its own undertakings. Ms. Laflamme told us that, from the moment the Consent Agreement was signed, the Competition Bureau's main concern was the completion of the divestiture, to the point that the Bureau disregarded increasingly obvious signs that the circumstances had changed. This situation culminated with the signing of the Agreement of Purchase and Sale in November 2004 when the Commissioner knew that Home Depot's opening was assured in the coming year.

[105] The Commissioner contends that rescinding the Consent Agreement would convey the unfortunate impression that a party need only wait long enough for the circumstances to change, in such a way that the consent agreement ceases to be valid. In reality, it was sufficient in this instance to wait about two years for the anticompetitive situation to resolve on its own. This has nothing to do with the effectiveness of consent agreements. While the Commissioner's intervention appeared warranted in September 2003, both the acting Commissioner and the

Commissioner who succeeded him were duty-bound to remain sensitive to the circumstances. But the Commissioner did not take advantage of the flexibility that the consent agreement offered. She certainly had the opportunity to adapt to the change of circumstances by revising the Consent Agreement in consultation with RONA as the evidence of Home Depot's arrival began to accumulate. To cite just one example, when Mr. Frodyma confirmed on November 18, 2004, that the store would open and that the Board's approval in Atlanta was a mere formality, the Commissioner could have revised the Consent Agreement rather than allow the Agreement of Purchase and Sale to be signed six days later. By November 2004, and perhaps even August 2004, it would appear, based on Ms. Laflamme's testimony, that the Bureau attached so much importance to the divestiture that no other solution was conceivable, and, alas, none was contemplated.

[106] The Commissioner continues to insist that the divestiture must occur, *inter alia* to ensure the enforceability of consent agreements. The Commissioner submits that the parties should not be permitted to extend deadlines unduly so that, sooner or later, the circumstances change and the consent agreement loses its reason for being.

[107] Apart from the fact that the Consent Agreement no longer responds to the needs of the situation, the Commissioner's reasoning to the effect that consent agreements must be enforced at all costs has three flaws. First of all, the very clauses of the Consent Agreement are inconsistent with the enforceability that the Commissioner would like to read into it. Secondly, the Act itself provides for the possibility of amendment. Thirdly, a Consent Agreement is not an end in itself. It is one means among many to ensure that the objectives of the Act are achieved, and its strength depends on its usefulness, not merely its existence.

[108] First of all, the wording of the Consent Agreement between the Commissioner and RONA is distinguished by its flexibility. Clause 21 reaffirms the obligation set out in section 106 of the Act: it states that the Tribunal shall retain jurisdiction for the purpose of an application by either party to rescind or vary any of the provisions of the Consent Agreement in the event of a change of circumstances. It provides that the Consent Agreement may be amended by simple agreement between the parties (clause 18). It also includes provisions enabling RONA to request additional information regarding the divestiture negotiated by the trustee with a proposed purchaser (clause 9), and, within 21 days following receipt of the additional information, it allows RONA to object to the sale by trustee by notifying the trustee in writing of the objection (clause 10). RONA may object to the sale by trustee in the event of misappropriation or misconduct by the trustee (neither of which were an issue in this case) and if the trustee "fails to abide by the provisions of this Consent Agreement." This provision leaves the door wide open for RONA. Indeed, the Consent Agreement speaks quite explicitly to the type of purchaser required. In this case, RONA objected because it believed that the purchaser that entered into the Agreement of Purchase and Sale with the trustee did

not meet the criteria set out in the Consent Agreement. The Commissioner now submits that RONA objected to the sale on false pretences. The Tribunal need not decide this issue because it is settled by the order upon the application to have the sale approved. But the Tribunal cannot help but note that once the sale was in the trustee's hands, RONA still had many opportunities to intervene in the divestiture — opportunities arising from an agreement negotiated by the parties.

[109] It should also be borne in mind that the very wording of section 106 of the Act contemplates the possibility of varying or rescinding a consent agreement. In its wisdom, Parliament has recognized that human predictions are sometimes flawed, and that there can be a change in the status of a market in which the Commissioner sees fit to intervene. Parliament decided that it was not appropriate to insist on the enforcement of a consent agreement or order if the circumstances that prevailed when the remedial measure was adopted later change and it is established that the new circumstances eliminate the need for the measure. The need to ensure the stability of consent agreements negotiated by the Commissioner and private parties cannot be used as a pretext to deny the existence of a remedy that Parliament has deemed appropriate to include in the Act as an exception to the principle of *res judicata*. As the Tribunal stated in *Southam Inc. v. Canada (Director of Investigation and Research)*, [1998] C.T.D.D. No. 1 at paragraph 24:

> Paragraph 106(*a*) of the Act [as it was then numbered] is a statutory exception to the doctrine of *res judicata*. However, the existence of paragraph 106(*a*) does not mean that the doctrine of *res judicata* does not apply to Tribunal decisions. For example, if it can be demonstrated that an applicant under paragraph 106(*a*) held back evidence or failed to advance a particular argument or that facts existed prior to the original decision that the applicant now attempts to introduce under the guise of changed circumstances, the doctrine of *res judicata* would operate to preclude such introduction. However, <u>where matters arise subsequent to the making of the original order</u>, the doctrine of *res judicata* does not preclude them from being the basis of an application under paragraph 106(*a*). That is the purpose of paragraph 106(*a*). [Emphasis added.]

[110] The Commissioner submits that RONA concealed its intentions when it signed the Consent Agreement. Based on Mr. Gascon's correspondence in September 2003, it is clear that RONA, prior to signing the Consent Agreement, had mentioned that it believed Home Depot would be arriving soon. It is also clear that in the first days following the signature of the agreement, the circumstances

changed. Mr. Gormley's letter attests to this: once the Sherbrooke Business was being divested pursuant to the Consent Agreement, Sherbrooke became an interesting market for Home Depot. This had not emerged from the investigation conducted by the Commissioner prior to August 2003.

[111] Lastly, the value of a consent agreement lies in the purpose it serves: it makes a transaction possible, while correcting an apparently non-competitive situation. Once it becomes clear that the competition is restoring itself, the consent agreement loses all of its purpose and it is only logical that it should also lose its enforceability. The ultimate aim of the Act, which is to encourage competition, should always be borne in mind. If no intervention is needed, it becomes superfluous to maintain a mechanism simply because it was valid 16 months earlier. It is not in keeping with the spirit of the Act for the Commissioner to object on principle and enforce the Consent Agreement *despite* the change of circumstances, solely on the basis that consents must remain in force at all costs.

(c) An Agreement of Purchase and Sale has been signed

[112] The Tribunal is of the opinion that the signing of the Agreement of Purchase and Sale results from the Commissioner's wish to ignore an increasingly obvious change in circumstances, and, accordingly, that it should no longer be a consideration. The Tribunal is not satisfied that the purchaser will be prejudiced; the purchaser negotiated in full knowledge of the facts and was aware that the sale of the business stemmed from a Consent Agreement that could be rescinded pursuant to the Act. Given the real prejudice that RONA would suffer, and all the reasons listed above for which the Consent Agreement should be rescinded, the signing of the Agreement of Purchase and Sale is simply not a sufficient justification for dismissing RONA's application.

d) RONA's action is barred on the basis of an alleged abuse of rights

[113] To allege an abuse of rights is to make a serious allegation that could be a valid reason for dismissing an application. However, the allegation must be founded. The Tribunal finds that the allegations in this case are not supported by the evidence.

[114] In Quebec law, good faith is presumed in every contract. Since this action arises in Quebec, the Tribunal finds that the principles of Quebec civil law should be applied when interpreting the parties' obligations under the Consent Agreement. In fact, both parties invoked Quebec law.

[115] In his treatise, Professor Jean-Louis Baudouin, now a Justice of the Quebec Court of Appeal, wrote as follows with regard to good faith and the abuse of rights in contractual matters:

> [TRANSLATION]
>
> The conduct of the parties must especially be guided by good faith in its objective sense. Each party must exercise its rights as a prudent and diligent person would. This very broad standard even prohibits rights from being used for purposes altogether different from those which the parties or the legislator intended. However, the Court of Appeal and the lower courts — guided, among other things, by a concern for the stability of contracts — tend to hold creditors liable only for conduct that clearly deviates from what is acceptable or what society would generally allow, as opposed to just any imprudent or questionable conduct. As noted, a contract is a selfish instrument. Many questionable instances of vigorous defence of a contracting party's interests do not meet the critical threshold and do not constitute an abuse in the legal sense.
> J.L. Baudouin & P.G. Jobin, *Les Obligations*, 5th ed, (Cowansville: Yvon Blais) at pp. 132 *et seq*.

[116] It cannot be said that RONA used its rights [TRANSLATION] "for purposes altogether different from those which the parties or the legislator intended." The Commissioner submits that the slow pace at which RONA proceeded with the divestiture and assisted the trustee in realizing the sale constitutes an abuse of rights. The Tribunal finds that RONA's actions, its use of the remedies contemplated in the Consent Agreement, and its admitted desire to convince the Commissioner that the Consent Agreement was unnecessary for the Sherbrooke area in view of Home Depot's future arrival, disclose nothing that approaches an abuse of rights.

[117] The Commissioner contends that RONA dragged its heels in taking the measures necessary to divest itself of the Sherbrooke Business, in nominating the trustee, in delivering the necessary information to the trustee, and, finally, in collaborating with the trustee to negotiate the Agreement of Purchase and Sale following the first letter of intent in August.

[118] The evidence adduced at the hearing paints another picture of reality. The Consent Agreement was registered in September 2003. RONA drew up a first list of potential purchasers based on the criteria contained in the Consent Agreement: the ability to operate a superstore and to offer a range of products similar to that offered by RONA. These requirements assume solid purchasing power and a sizeable distribution network. RONA selected only a few potential purchasers, and put Intercom, a brokerage, in charge of the sale efforts. It became clear in December 2003 that the efforts were not bearing fruit. Intercom submitted a report in January.

[119] After that, a trustee had to be appointed pursuant to the Consent Agreement. RONA had five months, after the closing of the Transaction on September 10, 2003, to make the divestiture. On February 10, 2004, the trustee was appointed. The Trust Agreement was signed by RONA on February 27 and by the Commissioner on March 1.

[120] The trustee contacted RONA to obtain the information necessary to prepare a document of sale. E-mails were exchanged in March. By March 31, 2004, the trustee had all of the information requested. The trustee took three weeks to finally file the document. Only in August did a purchaser finally express the intention to purchase. From March 31 to August 2004, RONA was not involved in the divestiture process. When the purchaser came forward, RONA expressed its dissatisfaction: in its view, the purchaser did not meet the criteria set out in the Consent Agreement. As it happened, the store meant not only the creation of a competitor, but also a significant loss for RONA, which was unable to negotiate an advantageous price. Mr. Guévin testified that the store merely had to be sold without conditions to any retailer, as opposed to a home improvement retailer, RONA could have made a profit, or at least covered its costs. Since the Consent Agreement contemplates a serious business, RONA insisted on this requirement as well. From August to October 2004, before the trustee signed the letter of intent, RONA sent the trustee and the Commissioner a number of comments about the purchaser. However, the evidence shows that RONA had nothing to do with the slow pace of negotiations in September: the purchaser's CEO was out of the country on vacation and the purchasing process was paralysed. In October, the trustee signed the letter of intent, which, according to the trustee's letter to the Commissioner, had been considerably improved because of RONA's suggestions.

[121] After the due diligence preceding the signing of an Agreement of Purchase and Sale, Ms. Laflamme testified that the trustee was getting impatient with RONA's slow pace. In a letter dated November 8, the trustee told the Commissioner (and sent a copy to RONA) that the selling price of the store had been reduced by $600,000 because the purchaser was unsatisfied with RONA's cooperation. Yet, at the hearing, RONA tendered a thick stack of correspondence regarding the due diligence process. The Tribunal does not see anything unusual about negotiations for an Agreement of Purchase and Sale extending from October 8 to November 24 and has no evidence that RONA stalled the process.

[122] RONA later made a request for information, as permitted by the Consent Agreement. It was not satisfied with the information, and tendered a notice of objection because it felt the purchaser did not meet the criteria set out in the Consent Agreement. Once again, it did nothing that was not provided for under the Consent Agreement.

[123] The Commissioner also submits that RONA abused recourse provided under the Consent Agreement. Once again, we note that the Consent Agreement was a negotiated instrument, voluntarily signed by two parties, each of which was represented by competent counsel. In the Tribunal's view, RONA's use of the recourse contemplated in the Consent Agreement cannot be termed abusive. The Tribunal also finds that seeking recourse within the time permitted under the contract, even on the last day, is not an abuse of rights.

[124] The Commissioner's final submission is that it was abusive for RONA to invoke a change of circumstances when it *knew* that a Home Depot would be coming to Sherbrooke. According to the Commissioner, RONA signed the Consent Agreement firmly intending to convince the Commissioner that she had reason to fear the imminent arrival of Home Depot.

[125] Mr. Guévin testified very frankly about the state of mind of RONA's management when it signed the Consent Agreement. RONA was convinced that Home Depot was coming. It did not hide this from the Commissioner in August 2003. On the contrary, RONA tried to convince the Commissioner that there was no reason to fear for competition in Sherbrooke because, based on the evolution of Home Depot stores in Canada, it was clear that Home Depot would become interested in that market. At that time, the Commissioner refused to accede to RONA's arguments. A battle-weary RONA gave up and signed the agreement.

[126] By September 2003, one week after the Consent Agreement was registered, Mr. Gascon's sent out an e-mail that referred to Home Depot's future plans — plans that included Sherbrooke. The e-mail clearly stated that RONA had expressed its conviction to the Commissioner that Home Depot would be coming to Sherbrooke. It was obvious in this context that RONA continued to hope the circumstances would change in the sense that there would be evidence which would convince the Bureau that the Consent Agreement was unnecessary. The Tribunal does not find anything abusive about the fact that RONA, whose involvement in the home improvement market makes it more sensitive to market movements, believed that Home Depot would be coming to Sherbrooke before the Commissioner did. Nor does the Commissioner find anything abusive about RONA attempting to find evidence of this reality so that it could submit that evidence to the Competition Bureau.

VI. CONCLUSION

[127] For all the above reasons, the Tribunal allows RONA's application and rescinds the Consent Agreement registered on September 4, 2003. The Tribunal finds that the conditions set out in section 106 have been met and that there are no other grounds that would warrant the dismissal of the application.

[128] At the hearing, the applicant asked whether it could make submissions as to costs. The applicant shall file its written submissions on costs within ten days of the issuance of these Reasons for Order. The Commissioner shall then have ten days in which to reply to the applicant's submissions. The applicant shall have five days in which to file a counter-reply, if necessary.

[129] These Reasons for Order are confidential. In order to enable the Tribunal to issue a public version, the parties will attempt to reach an agreement, if need be, regarding what should be omitted so that the information that must remain confidential can be adequately protected. Before the closing of the Registry on Friday, June 3, 2005, the parties shall file a joint memorandum setting out their agreement and, if applicable, any points of disagreement regarding what should be omitted from these confidential reasons. In the event of a disagreement, the parties shall file their respective representations before the closing of the Registry on Monday, June 6, 2005.

DATED at Ottawa, this 30th day of May 2005.

SIGNED on behalf of the Tribunal by the members.

(s) Pierre Blais

(s) François Lemieux

(s) Lucille Riedle

REPRESENTATIVES

For the applicant
RONA Inc.

William W. McNamara
Eric Lefebvre
Martha A. Healey
Dominique Simard
Denis Gascon

For the respondent
Commissioner of Competition

Diane Pelletier
Steve Joanisse
André Brantz

For the intervener
Ernst & Young Orenda Corporate Finance Inc.

Marc-André Boutin
Joseph Jarjour
Louis-Martin O'Neill