PUBLIC VERSION
OFFICIAL ENGLISH TRANSLATION

Citation: *Commissioner of Competition v RONA INC.*, 2005 Comp Trib 7
File No: CT-2003-007
Registry Document No: 106

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34, and its amendments;

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.*

BETWEEN:

THE COMMISSIONER OF COMPETITION
(moving party)

and

RONA INC.
(responding party)

and

ERNST & YOUNG ORENDA CORPORATE FINANCE INC.
(third party)

Date of hearing: February 21 to 22, 2005
Before: Blais J.
Date of order: February 24, 2005
Order signed by: Mr. Justice Blais

REASONS FOR ORDER AND ORDER

[1] The Commissioner of Competition (the "Commissioner") filed a motion on January 21, 2005, amended on January 28, 2005, pursuant to sections 38 and 49 and subsection 72(1) of the *Competition Tribunal Rules*, SOR/94-290, and paragraph 227(1)(f) of the *Federal Courts Rules, 1998*, SOR/98-106, to strike out the application filed by RONA Inc. ("RONA") pursuant to section 106 of the *Competition Act*, RSC 1985, c C-34 (the "Act"). RONA is seeking to rescind the consent agreement to divest itself of the Réno-Dépôt in Sherbrooke. That consent agreement was registered with the Competition Tribunal (the "Tribunal") on September 4, 2003.

FACTS

[2] RONA is a major Canadian hardware and renovation company, with a chain of approximately 540 stores. In April 2003, RONA entered into a purchase agreement to acquire all the shares of a competitor, Réno-Dépôt, for $350 million. With this purchase, RONA became the owner of 14 Réno-Dépôt stores in Quebec, as well as six "The Building Box" stores located in Ontario.

[3] Following an inquiry, the Commissioner had some reservations regarding the effect of the purchase of the Réno-Dépôt stores on competition in the retail market for hardware/renovation products, and concluded that the purchase was likely to substantially reduce competition in the Sherbrooke area.

[4] Discussions were therefore held between the Commissioner and RONA, which resulted in an agreement to the effect that RONA would divest itself of the Sherbrooke Réno-Dépôt store and in return, the Commissioner would not object to RONA's purchase of Réno-Dépôt shares. The consent agreement was registered with the Tribunal on September 4, 2003, allowing RONA to acquire the shares of Réno-Dépôt.

[5] Under the terms of the consent agreement, RONA had **[CONFIDENTIAL]** to complete the sale of the Sherbrooke Réno-Dépôt. The sale did not proceed, and Ernst & Young Orenda Corporate Finance Inc. ("the trustee" or "Ernst & Young") was appointed as trustee for the divestiture sale as contemplated in the consent agreement.

[6] On November 24, 2004, the trustee entered into a purchase and sale agreement with a purchaser, **[CONFIDENTIAL]**.

[7] On December 8, 2004, which was the deadline set out in the consent agreement, RONA sent a list of questions to the trustee seeking additional information regarding the sale and the purchaser. On or about December 15, 2004, RONA also stopped sending the weekly inventory reports required under the agreement.

[8] The Commissioner brought a motion before the Tribunal to order RONA to continue sending the inventory reports, and to extend the time for completing the sale, which had already been extended **[CONFIDENTIAL]**. RONA consented to this motion, and on January 6, 2005, the Tribunal issued an order extending the time for the divestiture to up to 14 days after the

deadline for RONA to object to the sale, or in the event of an objection by RONA, to up to 14 days after the Tribunal ordered the sale.

[9] On January 10, 2005, RONA filed a notice of objection to the sale pursuant to the consent agreement. It also filed a notice of application for rescission of the consent agreement pursuant to section 106 of the Act. According to RONA, the circumstances that gave rise to the consent agreement have changed, given that there will now be strong competition in the hardware/renovation market in Sherbrooke, with the arrival of a Home Depot store in late 2005, **[CONFIDENTIAL]**. RONA is also seeking a stay of the January 6, 2005, order.

PROCEDURAL HISTORY

[10] It may be useful here to provide a brief overview of the procedural steps in this case:

September 4, 2003	Registration of the consent agreement. RONA agrees to divest of the Réno-Dépôt store in Sherbrooke, and the Commissioner consents to the purchase of Réno-Dépôt by RONA.
March 1, 2004	Appointment of the trustee for the sale (Ernst & Young).
August 18, 2004	Letter of intent from the purchaser.
September 24, 2004	Court order extending the time for the sale to **[CONFIDENTIAL]** (the consent agreement having fixed the time at **[CONFIDENTIAL]** following appointment of the trustee).
October 8, 2004	Trustee's acceptance of the letter of intent.
November 24, 2004	Signing of the purchase and sale agreement between the trustee and the purchaser.
December 8, 2004	Request by RONA for additional information regarding the purchaser.
[**CONFIDENTIAL]**	Filing of the motion by the Commissioner to extend the deadline for the sale by the trustee and to order RONA to submit inventory reports.
December 31, 2004	Filing of the Commissioner's amended motion.
January 6, 2005	Tribunal order following RONA's agreement to extend the closing date and submit the inventory reports.
January 10, 2005	RONA sends the trustee its notice of objection to the sale, pursuant

	to paragraph 10 of the consent agreement. RONA files an application pursuant to section 106 of the Act to rescind the consent agreement.
January 21, 2005	The Commissioner files a motion to strike RONA's application to rescind the consent agreement.
January 28, 2005	The Commissioner files an amended motion.
January 28, 2005	The trustee files a motion under paragraph 12 of the consent agreement asking the Tribunal to approve the sale of the Sherbrooke Réno-Dépôt.
February 3, 2005	Order of the Tribunal scheduling the hearing on the motion to strike for February 21, 2005.

ISSUE

[11] The only issue in this proceeding is whether the Tribunal should grant the motion to strike.

PARTIES' ARGUMENTS

The Commissioner

[12] The Commissioner submits that given the lack of diligence on the part of RONA in carrying out the terms of the consent agreement, and given the existence of a purchaser with whom the trustee has already entered into an agreement of purchase and sale, RONA's section 106 application constitutes an abuse of process within the meaning of paragraph 221(1)(f) of the *Federal Courts Rules, 1998*, and should therefore be struck. The Commissioner further alleges that it is in the best interest of the public to resolve this matter as quickly as possible in order to ensure an adequate level of competition in the Sherbrooke area.

[13] The Commissioner relies on the following facts as grounds for her motion:

1. All the steps for the sale of the Sherbrooke Réno-Dépôt have been completed. As part of the negotiations for the sale, the Commissioner and the trustee ensured that the purchaser intends to operate the business for the retail sale of hardware/renovation products, and that it has the financial and operational capacity to do so.

2. The agreement between the trustee and the purchaser creates rights and obligations that cannot be set aside by the Tribunal. The agreement is binding, subject only to RONA's right to object under the consent agreement. By seeking to rescind the consent agreement, RONA is indirectly asking the Tribunal to set aside an agreement between two parties

that are not otherwise parties to the consent agreement.

3. RONA did not act diligently in pursuing its remedy. In particular, the Commissioner notes that RONA waited until the deadline to file a request for additional information, which was less about obtaining information than about challenging the trustee's negotiations, contrary to the spirit of the consent agreement. RONA once again, according to the Commissioner, waited until the deadline to file its notice of objection to the sale.

4. Conditions have not really changed, given that RONA was already claiming, even before the consent agreement was signed, that Home Depot would soon be opening a store in the Sherbrooke area.

RONA

[14] RONA is challenging the motion to strike with the following arguments:

[15] The application to rescind or vary a consent agreement is contemplated in both the Act (section 106) and the consent agreement itself, at paragraph 21, which reads as follows:

> [TRANSLATION]
>
> 21. The Tribunal retains jurisdiction over any application by the Commissioner or RONA to rescind or vary any provision of this consent agreement in the event of a change in circumstances or for any other reason.

[16] Nothing in the Act prevents a party from applying to rescind or vary a consent agreement as long as it is in effect.

[17] In addition, RONA argues that the Commissioner has not offered any argument for striking out the pleading. The case law on this point, still in RONA's opinion, is particularly strict. The Commissioner would have to demonstrate the futility and frivolity of the application to justify striking it.

[18] RONA further asserts that the Commissioner's office itself suggested the section 106 application when RONA advised it of the change in circumstances brought about by the arrival of Home Depot in the Sherbrooke market.

[19] The consent agreement does not end with the execution of the purchase and sale agreement, but rather when the transfer of the asset is completed, according to paragraph 22 of the consent agreement, which reads as follows:

> [TRANSLATION]
>
> 22. This consent agreement shall be in effect until the Commissioner notifies the Tribunal in

writing that the divestiture has occurred, or until an order of the Tribunal.

[20] The divestiture requirement in paragraph 2 of the consent agreement is subject to the provisions of the consent agreement, including the provision in paragraph 21 for recourse to the Tribunal in the event of altered circumstances.

[21] RONA has complied with all of the time limits set out in the consent agreement. The Commissioner cannot, in RONA's view, seek to strike an application that is provided for in both the Act and the consent agreement simply because the divestiture proceeded more slowly than the Commissioner would have liked. Furthermore, RONA states that it filed the section 106 application as soon as it received official confirmation that Home Depot would be opening a store in Sherbrooke.

[22] Finally, RONA argues that the allegations contained in Ms. Laflamme's affidavit, filed in support of the motion, are not only erroneous but also irrelevant for purposes of the section 106 application. RONA counters this affidavit with the affidavit of Claude Guévin, Senior Vice President and Chief Financial Officer of RONA, who states that RONA took all reasonable steps to cooperate with the Commissioner and the trustee, and exercised due diligence.

[23] Furthermore, according to RONA, its conduct in the divestiture process has nothing to do with the section 106 application, which simply requires the Tribunal to determine whether the circumstances surrounding the consent agreement have changed such that, based on the circumstances at the time of the application, the consent agreement would not have been made.

[24] RONA argues, based on the test set out in *David Bull Laboratories v Pharmacia Inc.*, [1995] 1 FC 588 (CA), that the application should not be struck. Where the issue is serious and is not obvious, the Federal Court case law is clear that it is preferable not to dispose of a case summarily.

[25] The only ground raised by the Commissioner for striking the application is abuse of process by RONA. However, RONA responds that instituting proceedings or asserting its rights is not an abuse of process. The fact that RONA applied to the Tribunal to be relieved of its obligation to divest itself because of a change in circumstances was an exercise of its rights under both the Act and the consent agreement. In RONA's view, the Commissioner has in no way demonstrated that this was an abuse of process.

[26] Finally, RONA requests that the costs of the motion be paid to it forthwith on a solicitor-client basis on the following grounds:

1. The Commissioner's motion is without merit;
2. It is based on allegations that are inaccurate or immaterial;
3. The Commissioner's position contradicts the advice given to RONA to file an application pursuant to section 106;
4. The motion not only caused a delay in the proceedings, but resulted in research costs that were rendered unnecessary by the Commissioner's

amendments to the motion; and

5. The motion is contrary to public policy given that it seeks to deprive a party of a remedy provided for in the Act and expressly included in the consent agreement signed by the parties.

ANALYSIS

[27] Three legislative texts appear to be relevant to this application, and are reproduced here for ease of understanding the analysis that follows:

Competition Act, RSC 1985, c C-34, and subsequent amendments

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	**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) 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	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 de son objet;
(b) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.	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.

Federal Courts Rules, 1998, SOR/98-106

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	**221**. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	a) qu'il ne révèle aucune cause d'action ou de défense valable;
(b) is immaterial or redundant,	b) qu'il n'est pas pertinent ou qu'il est redondant;
(c) is scandalous, frivolous or vexatious,	c) qu'il est scandaleux, frivole ou vexatoire;
(d) may prejudice or delay the fair trial of the	d) qu'il risque de nuire à l'instruction

action,	équitable de l'action ou de la retarder;
(e) constitutes a departure from a previous pleading, or	e) qu'il diverge d'un acte de procédure antérieur;
(f) is otherwise an abuse of the process of the Court,	f) qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
Competition Tribunal Rules, SOR/94-290	*Competition Tribunal Rules*, SOR/94-290
72. (1) Where, in the course of proceedings, a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the practice and procedure set out in the Federal Court Rules, C.R.C., 1978, c. 663, shall be followed, with such modifications as the circumstances require.	**72.** (1) Les Règles de la Cour fédérale, C.R.C. (1978), ch. 663, s'appliquent, avec les adaptations nécessaires, aux questions qui se posent au cours des procédures quant à la pratique ou la procédure à suivre dans les cas non prévus par les présentes règles.

[28] Subsection 72(1) of *the Competition Tribunal Rules* expressly provides that in the event of a legal vacuum, the *Federal Courts Rules* will apply. In her application, the Commissioner relies solely on paragraph (f) of section 221 (*Federal Courts Rules, 1998*). She must therefore demonstrate that RONA's section 106 application is an abuse of process.

[29] The Commissioner is attempting to show that RONA did not cooperate in the execution of the consent agreement, that RONA instead stretched the time limits to the maximum, raised last-minute issues that had little or no relevance, and demonstrated a certain contempt for the consent agreement signed and filed on September 4, 2003.

[30] The most serious point raised by the Commissioner is to the effect that RONA always claimed that Home Depot would be opening in Sherbrooke in the near future, that ultimately the consent agreement was signed to allow the entire transaction to proceed without objection from the Commissioner, and that RONA's intention from the outset was to seek to have the consent agreement rescinded by way of a section 106 application.

[31] The Commissioner suggests that the evidence shows that RONA never intended to sell the Sherbrooke Réno-Dépôt and that every effort was made to frustrate the efforts of the Commissioner and the trustee to proceed with the sale.

[32] The Commissioner is of the opinion that RONA believed that Home Depot would soon be entering the Sherbrooke market and that despite this deep conviction, given that it did not

seem possible to convince the Commissioner of this fact, signed the consent agreement without any intention of giving effect to it. Following from that, the Commissioner concludes that there has not been a change of circumstances within the meaning of the Act, and that the section 106 application is an abuse of process.

[33] Finally, the Commissioner suggests that all of the facts demonstrated by the evidence, coupled with RONA's clear intention to prevent the sale from proceeding, constitute an abuse of process within the meaning of paragraph 221(f) of the *Federal Courts Rules, 1998*.

[34] Obviously, RONA denies this interpretation of the evidence filed with the Tribunal and asserts that it acted in accordance with the provisions of the Act and the Rules as well as the agreements between the parties.

[35] In *David Bull*, the Federal Court of Appeal upheld the dismissal of an application to strike out a notice of motion to institute proceedings. The Court of Appeal did not interpret the court rules as permitting such a procedure. In the Court's view, this was for good reason, as it was far better to hear arguments on the motion than to terminate it prematurely.

> For these reasons we are satisfied that the Trial Judge properly declined to make an order striking out, under Rule 419 or by means of the "gap" rule, as if this were an action. This is not to say that there is no jurisdiction in this Court either inherent or through Rule 5 by analogy to other rules, to dismiss in summary manner a notice of motion which is so clearly improper as to be bereft of any possibility of success. [See e.g. *Cyanamid Agricultural de Puerto Rico, Inc. v. Commissioner of Patents et al.* (1983), 74 C.P.R. (2d) 133 (F.C.T.D.); and the discussion in *Vancouver Island Peace Society v. Canada*, 1993 CanLII 2977 (FC), [1994] 1 F.C. 102 (T.D.), at pp. 120-121.] Such cases must be very exceptional and cannot include cases such as the present where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion. (*David Bull Laboratories (Canada) Inc. v Pharmacia Inc.* [1995] 1 FC 588 (CA) at paragraph 15)

[36] Striking out an originating document is a drastic measure that puts an end to a proceeding, unlike, for example, striking out certain evidence. In short, striking out an originating document is a summary judgment in that the court describes the litigant of the remedy they are seeking.

[37] The case law from the Federal Court and the Federal Court of Appeal emphasizes the exceptional nature of striking out an originating document. A principle was established in *Creaghan Estate v The Queen*, [1972] FC 732 (TD), where Justice Pratte writes:

> Finally, in my view, a statement of claim should not be ordered to be struck out on the ground that it is vexatious, frivolous or an abuse of the process of the Court, for the sole reason that in the opinion of the presiding judge, plaintiff's action should be dismissed. In my opinion, a presiding judge should not make such an order unless it be obvious that the plaintiff's action is so clearly futile that it has not the slightest chance of succeeding, whoever the judge may be before whom the case could be tried. It is only in such a situation that the plaintiff should be deprived of the opportunity of having "his day in Court". (*Creaghan Estate*, p 736)

[38] In *Apotex Inc. v Merck & Co.*(T-2869-96), (1999) 167 FTR 59 (TD), Justice Muldoon

summarizes the state of the law in this area as follows:

> The power to arrest an action by striking out a pleading is one that courts have consistently held should be exercised rarely and cautiously, reserved only for those cases where the action is an obvious abuse of legal procedure. In *Attorney General of Canada* v. *Inuit Tapirisat of Canada*, [1980] 2 SCR 735, Mr. Justice Estey, on behalf of the Court, stated
>
> > As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross* v. *Scottish Union and National Insurance Co*. [(1920), 47 O.L.R. 308 (C.A.)].
>
> The test to be applied became known as the "plain and obvious" test: it must be plain and obvious that the plaintiff's statement of claim discloses no reasonable claim or cause of action before it can be struck out.
>
> This formulation was affirmed by Madam Justice Wilson in *Operation Dismantle Inc.* v. *The Queen*, [1985] 1 S.C.R. 441. In *Hunt* v. *Carey Canada Inc.*, [1990] 2 S.C.R. 959, Madam Justice Wilson, speaking for the majority of the Supreme Court of Canada, reviewed the origin and development of the rule permitting courts to strike pleadings. Early English decisions stressed the proposition that the rule derived from the court's power to ensure that it remained a forum in which genuine legal issues were addressed, and that it did not become an avenue for vexatious actions designed to harass another party through litigation. (*Apotex Inc. v Merck & Co*. at paras 13 and 14)

[39] It is difficult to characterize RONA's approach as an abuse of process. Repeatedly filing the same application (*Black v NsC Diesel Power Inc. (Trustee of)* (2000), 183 FTR 301, aff'd 2003 FCA 300), or filing an application when the matter is *res judicata* (*Beattie v Canada* (T-1373-99, November 11, 2000) 197 FTR 209, aff'd 2001 FCA 309), are examples of abuse of process. A vexatious action used only to harass the other party, as Justice Wilson put it in *Hunt*, would clearly be an abuse of process.

[40] Here, it must be noted that RONA is relying on a provision of the Act and on a clause in the consent agreement to support its notice of application. The consent agreement expressly provides at paragraph 21 that the parties agree to the jurisdiction of the Tribunal for any application by either party to rescind or vary the consent:

> [TRANSLATION]
>
> 21. The Tribunal retains jurisdiction over any application by the Commissioner or RONA to rescind or vary any provision of this consent agreement in the event of a change in circumstances or for any other reason.

[41] The section 106 application is neither vexatious, scandalous, frivolous, immaterial or redundant, nor is it devoid of merit in law. (See *Sweet v Canada*, [1999] FCJ No. 1539 (CA); *Burnaby Machine & Mill Equipment Ltd. v Berglund Industrial Supply Co. et al* (1982), 64 CPR (2d) 206 (FCTD.)

[42] As discussed above, in respect of the section 106 application, by discussing substantive issues, the parties have moved outside the scope of the motion to strike.

[43] Although the Commissioner has demonstrated the seriousness of her arguments with respect to RONA's section 106 application, I find that it is premature to draw conclusions on the merits. However, the relevance of these arguments leads me to believe that the process should be accelerated to ensure that the rights of all parties are safeguarded and the remedies don't become nugatory.

[44] The Commissioner's interlocutory motion will therefore be dismissed, but the parties should expect the section 106 application and the other motions relating to the purchase agreement to be heard as soon as possible. The parties have all agreed to this expedited process in advance, which will respect the parties' rights. The parties will be asked to cooperate further in this regard.

COSTS

[45] The *Competition Tribunal Act* now gives the Tribunal the power to award costs (section 8.1), in line with the provisions of the *Federal Court Rules, 1998.* Subsection 401(2) provides as follows:

401. (1) The Court may award costs of a motion in an amount fixed by the Court.	**401. (1)** La Cour peut adjuger les dépens afférents à une requête selon le montant qu'elle fixe.
(2) Where the Court is satisfied that a motion should not have been brought or opposed, the Court shall order that the costs of the motion be payable forthwith.	**(2)** Si la Cour est convaincue qu'une requête n'aurait pas dû être présentée ou contestée, elle ordonne que les dépens afférents à la requête soient payés sans délai.

[46] In exercising its discretion under section 400 of the *Federal Court Rules, 1998*, the Tribunal may consider a variety of factors in determining costs, as applicable, including the factor described in paragraph 400(3)(k):

400. (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.	**(k)** whether any step in the proceeding was
	(i) improper, vexatious or unnecessary, or
(3) In exercising its discretion under subsection (1), the Court may consider	(ii) taken through negligence, mistake or excessive caution;
. . .	

400. (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.	. . .
(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :	**k)** la question de savoir si une mesure prise au cours de l'instance, selon le cas :
	(i) était inappropriée, vexatoire ou inutile,
	(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;

[47] RONA is requesting costs for the motion on a solicitor-client basis. Each of these issues must therefore be considered.

[48] Rule 401 allows a judge to award costs regardless of the outcome of the litigation. This is in fact an exception, replacing the principle confirmed in *Toronto Dominion Bank v Canada Trustco Mortgage Co.* (1992), 50 FTR 317. In *A. Lassonde Inc. v Island Oasis Canada Inc.*, [2001] 2 FC 568, Justice Létourneau stated that once satisfied that a motion should not have been brought, the motion judge should order costs forthwith, regardless of the outcome of the case (*Oasis*, at para 25).

[49] On the other hand, costs on a solicitor-client basis are awarded only in exceptional cases, to sanction bad faith on the part of one of the parties.

[50] In *Sedpex, Inc. v Canada*, [1989] 2 FC 289 (FC TD), Justice Strayer wrote:

> The respondent requested that, if I dismissed the application, I order costs against the applicant on a solicitor and client basis. Counsel based this request on the insubstantiality of the applicant's case. Normally costs should not be awarded on a solicitor and client basis just because of the lack of merits in the case of the losing party, but instead because of the manner in which the proceedings have been conducted. I can find nothing reprehensible in the way the applicant has conducted its case. It is regrettable for the due administration of section 61.5 that these proceedings will have delayed the adjudicator for a year or so in dealing with the merits. But this was a recourse which the applicant was legally entitled to pursue because of the supervisory role courts have assured for themselves in matters of jurisdiction. I therefore award costs against the applicant, but only on a party and party basis. (*Sedpex*, para 16)

[51] In *Roberts v Canada* (1999), 247 NR 350, the Federal Court of Appeal ruled that the fact that a case has little merit or is very weak is not in itself a basis for awarding solicitor-client costs. Here also, the Court emphasized that an award of such costs is exceptional, and is reserved for particularly reprehensible conduct (para 88). That principle is affirmed in the decision of the Supreme Court of Canada in *Young v Young*, [1993] 4 SCR 3 at 134:

> Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. Accordingly, the fact that an application has little merit is no basis for awarding solicitor-client costs[.]

[52] I do not find that the Commissioner engaged in particularly reprehensible conduct in

bringing this motion to strike. I am of the opinion, however, that the grounds for the motion were rather weak, and that the motion further delays a process that the Commissioner wished to see expedited. For these reasons, I do not think that costs on a solicitor-client basis are warranted, but it is appropriate to award costs to responding party RONA.

CONCLUSION

[53] For the reasons set out, I would dismiss the motion to strike and award costs to responding party RONA, but on a party-and-party basis in accordance with Column IV of Tariff B.

[54] This order shall remain confidential until 5:00 p.m. on Tuesday, March 1, 2005.

[55] The parties shall notify the Registrar of the matters they wish to be kept confidential, with reasons, by no later than 5:00 p.m. on Monday, February 28, 2005.

ORDER

THE TRIBUNAL ORDERS THAT:

[56] The motion to strike is dismissed;

[57] Costs for the application are awarded to responding party RONA on a party-and-party basis in accordance with Column IV of Tariff B;

[58] This order shall remain confidential until 5:00 p.m. on Tuesday, March 1, 2005; the parties shall inform the Registrar of the matters they wish to remain confidential, with reasons, by no later than 5:00 p.m. on Monday, February 28, 2005.

DATED at Ottawa, this 24th day of February 2005.

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

(s) Pierre Blais

Certified true translation
Johanna Kratz

REPRESENTATIVES

For the moving party:

Commissioner of Competition:

Diane Pelletier
André Brantz

For the responding party:

RONA INC.

Eric Lefebvre
Martha A. Healey
Denis Gascon

For the third party:

Ernst & Young Orenda Corporate Finance Inc.

Louis-Martin O'Neill