

Competition Tribunal



Tribunal de la Concurrence

**OFFICIAL TRANSLATION**

Reference: *Commissioner of Competition v. RONA INC.* 2005, Comp. Trib. 10

File no.: CT-2003/007

Registry document no.: 0061b

**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** a motion to vary a consent agreement under subsection 106(1) of the *Competition Act*.

**B E T W E E N:**

**THE COMMISSIONER OF COMPETITION**

(applicant)

and

**RONA INC.**

(respondent)

and

**ERNST & YOUNG ORENDA CORPORATE  
FINANCE INC.**

(third party)



Member: Mr. Justice Blais (Presiding)

Date of order: March 9, 2005

Order signed by: Blais J.

**REASONS FOR ORDER AND ORDER CONCERNING THE *DE BENE ESSE* MOTION  
BY THE COMMISSIONER OF COMPETITION**

[1] The Commissioner of Competition (“Commissioner”) filed a notice of motion on March 1, 2005, under section 38 of the *Competition Tribunal Rules* to change the motion filed by the Trustee on January 28, 2005, to have the sale of the Sherbrooke business approved by the Tribunal under the terms of the consent agreement between the Commissioner and RONA Inc. (“RONA”) dated September 4, 2003, into a motion by the Commissioner.

## RELEVANT FACTS

[2] The Trustee was appointed under a consent agreement between the parties dated September 4, 2003, and directed to carry out the sale of the Réno-Dépôt store in Sherbrooke, the divestiture of which was the subject of the consent agreement. The Trustee found a purchaser and an agreement of purchase and sale was entered into, but RONA opposed the sale, in a notice of opposition filed on January 10, 2005. Paragraph 12 of the consent agreement provides that in the event of opposition, the divestiture may proceed only with the approval of the Tribunal. The Trustee therefore applied to the Tribunal on January 28, 2005, by motion, to have the sale approved.

[3] RONA raised the issue of the standing of the Trustee in letters addressed to the Tribunal, dated February 15, 28 and 25, 2005, since the Trustee was not a party to the proceedings. To solve that problem, the Commissioner is proposing to make the motion herself and to have the Trustee be given standing as an intervenor.

## ISSUE

[4] Should the Commissioner’s motion be granted?

## ANALYSIS

### Statutory Provisions

*Competition Act*, R.S. 1985, c. C-34, sections 3 and 105:

3. No proceedings under this Act shall be deemed invalid by reason of any defect of form or any technical irregularity.

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.

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

(3) The consent agreement may be filed with the

3. Nulle procédure engagée sous le régime de la présente loi n'est réputée invalide à cause d'un vice de forme ou d'une irrégularité technique.

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.

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

(3) Le consentement est déposé auprès du Tribunal

Tribunal for immediate 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.

qui est tenu de l'enregistrer immédiatement.

(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.

*Competition Tribunal Act*, R.S. 1985, c. 19 (2nd Supp.), subsection 9(2):

9 (2) All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

9 (2) Dans la mesure où les circonstances et l'équité le permettent, il appartient au Tribunal d'agir sans formalisme, en procédure expéditive.

*Competition Tribunal Rules*, SOR/94-290, subsection 72(2) and sections 27, 28, 32 and 41

**72 (2)** Where a person is uncertain as to the practice and procedure to be followed, the Tribunal may give directions on how to proceed.

**72 (2)** En cas d'incertitude quant à la pratique ou la procédure à suivre, le Tribunal peut donner des directives sur la façon de procéder.

**27. (1)** A request pursuant to subsection 9(3) of the *Competition Tribunal Act* for leave to intervene shall be made by

**27. (1)** Toute demande d'autorisation d'intervenir présentée en application du paragraphe 9(3) de la Loi sur le Tribunal de la concurrence se fait :

(a) serving on each of the parties a request for leave to intervene and an affidavit setting out the facts on which the request is based; and

a) d'une part, par la signification aux parties d'une demande d'autorisation d'intervenir et d'un affidavit à l'appui faisant état des faits sur lesquels elle se fonde;

(b) filing the request and the affidavit with proof of service.

b) d'autre part, par le dépôt de la demande d'autorisation d'intervenir et de l'affidavit avec la preuve de leur signification.

(2) A request for leave to intervene shall set out

(2) La demande d'autorisation d'intervenir comprend les renseignements suivants :

(a) the title of the proceedings in which the person making the request wishes to intervene;

a) le titre des procédures dans lesquelles la personne demande d'intervenir;

(b) the name and address of the person making the request;

b) les nom et adresse de la personne;

(c) a concise statement of the matters in issue that affect that person;

c) un résumé des questions en litige qui la touchent;

(d) a concise statement of the competitive consequences arising from the matters referred to in paragraph (c) with respect to which that person wishes to make representations;

d) un résumé des effets que pourraient avoir sur la concurrence les questions visées à l'alinéa c) et à propos desquelles elle désire présenter des observations;

(e) the name of the party whose position that person intends to support;  
(f) the official language to be used by that person at the hearing of the request and, if leave is granted, in the proceedings; and

(g) any request to participate in the proceedings in a manner other than that set out in subsection 32(1).

(3) The Registrar shall serve the request for leave to intervene and the affidavit on each intervenor forthwith after they are filed.

(4) Where a notice has been published pursuant to paragraph 65(1)(a), a request for leave to intervene shall be filed within 30 days after publication of that notice. SOR/96-307, s. 7.

**28.** (1) A party served with a request for leave to intervene may, within 14 days after that service, serve a response to the request on the person making the request and on each of the parties.

(2) A party served with a request for leave to intervene shall, within the period set out in subsection (1), file any response to the request with proof of service.

(3) A response to a request for leave to intervene shall

(a) deal with the matters raised in the request; and

(b) state whether the party filing the response considers that a hearing should be held to determine the request.

**32.** (1) Unless the Tribunal orders otherwise, an intervenor may only attend and make submissions at motions, pre-hearing conferences and the hearing of the application.

(2) An intervenor may move at any time for leave to participate in the proceedings in a manner other than that set out in subsection (1).

**41.** (1) Subject to subsection (2), testimony on a motion shall be by affidavit.

e) le nom de la partie dont elle a l'intention d'appuyer la position;

f) la langue officielle qu'elle désire utiliser à l'audience relative à la demande d'autorisation d'intervenir et, si celle-ci est accordée, la langue officielle qu'elle désire utiliser dans l'instance;

g) le cas échéant, une demande de permission de participer aux procédures d'une façon autre que celle prévue au paragraphe 32(1).

(3) Dès le dépôt de la demande d'autorisation d'intervenir et de l'affidavit à l'appui, le registraire les signifie aux intervenants.

(4) Lorsqu'il y a eu publication de l'avis visé à l'alinéa 65(1)a), la demande d'autorisation d'intervenir est déposée dans les 30 jours qui suivent la publication de cet avis. DORS/96-307, art. 7.

**28.** (1) Dans les 14 jours après avoir reçu signification de la demande d'autorisation d'intervenir, une partie peut signifier une réponse à la personne qui a fait cette demande et aux autres parties.

(2) Le cas échéant, la partie ayant reçu signification de la demande d'autorisation d'intervenir dépose la réponse avec la preuve de sa signification dans le délai prévu au paragraphe (1).

(3) La réponse :

a) d'une part, traite des points soulevés dans la demande d'autorisation d'intervenir;

b) d'autre part, indique s'il y aurait lieu de tenir une audience pour trancher la demande d'autorisation d'intervenir.

**32.** (1) À moins que le Tribunal n'en ordonne autrement, l'intervenant ne peut qu'assister à l'audition des requêtes, aux conférences préparatoires et à l'audience relative à la demande et y présenter des exposés.

(2) L'intervenant peut, à tout moment, par requête, demander la permission de participer aux procédures d'une façon autre que celle prévue au paragraphe (1).

**41.** (1) Sous réserve du paragraphe (2), les témoignages à l'audition d'une requête sont présentés par voie d'affidavit.

(2) The judicial member designated to preside at the hearing of a motion may, before or during the hearing, grant leave for

(a) oral testimony in relation to an issue raised in the notice of motion; and

(b) the cross-examination of a deponent to an affidavit.

(2) Le juge désigné pour présider l'audition de la requête peut, avant ou pendant celle-ci, autoriser :

a) la présentation d'un témoignage oral relativement à tout point soulevé dans l'avis de requête;

b) le contre-interrogatoire de toute personne qui a présenté un affidavit.

### Position of the Parties

[5] The Commissioner submits that the motion should be granted on the ground that the Tribunal has the authority to remedy any oversight or irregularity. The purpose of the motion is to expedite the proceedings, a principle in which RONA has in fact concurred. RONA is not prejudiced by this correction to the motion first brought by the Trustee, which was served on January 28, 2005. The substantive issue is in no way altered by changing the motion in this way.

[6] In its memorandum, RONA submitted that by agreeing to hear a motion to approve the sale of the Sherbrooke business, rather than requiring that an application be made, the Tribunal would be depriving RONA of its procedural and substantive rights, and in particular the right to cross-examine the Commissioner's witnesses or the right to require third parties, such as the potential purchaser, to testify.

[7] RONA stated that it was prepared to agree that the Commissioner's response to the Trustee's application be considered to be a notice of application, and that the Trustee's motion be considered to be a request for leave to intervene. RONA further proposed a timetable that, in RONA's submission, would protect the parties' interests without unduly delaying the progress of the case.

### Analysis and Conclusion

[8] At the hearing, the parties agreed that the procedural vehicle should be a motion, filed under section 105 of the Act. Section 105 provides for registration of the consent agreement, and that upon registration the consent agreement has the same effect, and proceedings may be taken, as if it were an order of the Tribunal. Applying to the Tribunal to request enforcement of a provision of an order is more similar to a motion, made within a proceeding, than to an originating application.

[9] Given that section 105 of the *Competition Act* provides that proceedings may be taken on a consent agreement, it is not apparent that it is necessary to file a fresh application to have the consent agreement enforced. On the other hand, although paragraph 21 of the consent agreement provides that the Tribunal retains jurisdiction over any application to vary or rescind the consent agreement, nothing is specified regarding the manner of proceeding to obtain the Tribunal's approval for the sale, such approval being provided for in paragraph 12 of the consent agreement.

[10] In general, the purpose of rules of procedure is both to ensure the fairness of the procedure and to allow the objectives of the Act to be achieved. The *Competition Act*, and the *Competition Tribunal Act* and the *Competition Tribunal Rules*, all clearly express the intention of Parliament to give the Tribunal, which is an administrative tribunal, the flexibility and latitude that are needed in order to ensure the expeditious but fair resolution of the disputes submitted to it.

[11] The *Competition Act* allows the parties to enter into a consent agreement to avoid costly litigation. In the circumstances of this case, the Commissioner and RONA chose to enter into such an agreement to enable RONA to purchase the shares of Réno-Dépôt and at the same time ensure, to the satisfaction of the Commissioner, that competition would continue in the hardware and renovation market in Sherbrooke. The consent agreement provided for the appointment of a Trustee who would handle the sale of a RONA asset, to comply with the conditions of the consent agreement.

[12] In addition to the appointment of the Trustee, the consent agreement also provided for the possibility of an application to the Tribunal in the event of opposition to the divestiture by either party. Because the Trustee was directed to handle the sale, it is not surprising that he would have believed he was authorized to bring the application provided for in the consent agreement. To prevent a more formal opposition being made by RONA to the actions taken by the Trustee, who is actually not a party to the consent agreement or an intervenor recognized by the Tribunal, the Commissioner is today asking to be recognized as the party who is bringing the motion to force the completion of the sale, as provided in the consent agreement.

[13] RONA first opposed the Commissioner's motion out of a concern that its procedural rights be respected. Section 41 of the *Competition Tribunal Rules* allows apparent procedural deficiencies of a motion to be remedied. A motion generally proceeds by way of affidavit; however, the Tribunal may grant the parties the right to examine witnesses at the hearing and to cross-examine deponents on their affidavits. The Tribunal is of the opinion that doing this would ensure the fairness of the hearing of the motion.

[14] Moreover, there is a need to provide guidance for the action to be taken by the Trustee, who wishes to be heard on the matter of RONA's opposition to the sale and on the motion to have the sale approved by the Tribunal. The parties have agreed that the initial motion by the Trustee would, with the necessary alterations in form, become the Trustee's intervention to participate in the proceedings on the motion to be considered to have been filed under section 105 of the Act. RONA will be able to respond to the intervention in accordance with rule 28(1) by March 18, 2005, having regard to the fact that the intervention, in its initial form, was filed on January 28, 2005.

[15] The matter of placing the motion on the timetable was addressed informally during the hearing. It seems obvious that the decision on the application filed by RONA under section 106 of the Act will have an impact on the Tribunal's decision on the motion to approve the sale of the Sherbrooke business. The Tribunal is of the opinion that it is preferable to hear both the application and the motion at a single hearing. Certainly, the substantive question that arises in the case of the application under section 106 is not the issue in the motion for approval of the sale. Nonetheless, there are numerous facts in common, and the evidence at the hearing of the application could very well support the arguments made in submissions on the motion, and vice versa. For this reason, the Tribunal will set a common date for the hearing of the motion and the hearing of the application.

[16] This order provides for a timetable for the hearing of the motion under section 105 of the Act.

**FOR THESE REASONS, THE TRIBUNAL ORDERS AS FOLLOWS:**

[17] The Commissioner's motion to change the nature of the Trustee's motion is allowed. The Commissioner's response to the Trustee's motion to have the sale approved will now be the Commissioner's motion to have the sale approved under section 105 of the *Competition Act*.

[18] The response record filed on February 14, 2005, will be considered to be the Commissioner's motion record. The motion record also includes the affidavit sworn by Anthony Ianni on January 31, 2005, and the exhibits attached to it.

[19] The Trustee's motion to have the sale approved, which was filed on January 28, 2005, will now be, *mutatis mutandis*, an intervention in the motion, within the meaning of sections 27 and 28 of the *Competition Tribunal Rules*.

[20] At the hearing of the Commissioner's motion (motion under 105), the two parties and the intervenor will be given leave to examine and cross-examine the deponents, in accordance with sections 41 and 32 of the *Competition Tribunal Rules*.

[21] The following timetable is set for hearing the motion under section 105 of the Act for approval of the sale of the Sherbrooke business:

RONA will file the record for its response to the Commissioner's motion and the Trustee's intervention, with affidavits, by March 18, 2005.  
The pre-hearing conference will be held on March 22, 2005.  
The hearing of the motion will commence on April 4, 2005.

[22] Costs in the cause.

DATED at Toronto, this 9<sup>th</sup> day of March, 2005.

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

(s) Pierre Blais



REPRESENTATIVES:

For the applicant:

The Commissioner of Competition

Diane Pelletier

For the respondent:

RONA

William McNamara

Martha Healey

For the mis en cause:

Ernst & Young Orenda Corporate Finance Inc.

Louis-Martin O'Neill