Competition Tribunal Tribunal de la Concurrence

Reference: *Paradise Pharmacy Inc. and Rymal Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc.,* 2004 Comp. Trib. 21
File No.: CT-2004-004
Registry Document No.: 0008

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

AND IN THE MATTER OF an application by Paradise Pharmacy Inc. and Rymal Pharmacy Inc. (Paradise et al.) for an order pursuant to section 103.1 of the *Competition Act,* granting leave to bring an application under section 75 of the Act;

BETWEEN:

Paradise Pharmacy Inc. and Rymal Pharmacy Inc.
(applicants)

And

Novartis Pharmaceuticals Canada Inc.
(respondent)

Decided on the basis of the written record.
Presiding Member: Blais J.
Date of Reasons for Order and Order: September 20, 2004

REASONS FOR ORDER AND ORDER

APPLICATION

[1] The applicants are Paradise Pharmacy Inc. and Rymal Pharmacy Inc. (Paradise et al.), corporations incorporated under the laws of the Province of Ontario carrying on business in Hamilton, Ontario. Both pharmacies are owned and operated by Shirley Silberg, a licensed pharmacist.

[2] The respondent is Novartis Pharmaceuticals Canada Inc./Novartis Pharma Canada Inc. (Novartis), corporations incorporated under the laws of Canada. Novartis carries on business as a pharmaceutical manufacturer across Canada, including Ontario.

[3] Paradise et al. operate retail pharmacies in Hamilton since 1996, for Paradise, and 1997, for Rymal. The applicants offer the products and services associated with a neighbourhood pharmacy - health and beauty aides, cosmetics and prescription and over the counter medicines.

[4] There is significant competition among retail pharmacies in the area adjacent to Paradise et al. Both pharmacies have at least one large drugstore operation - Shoppers Drug Mart, Pharma Plus, Wal-Mart - within one mile of their location. Pharmacies depend on manufacturers to supply pharmaceutical products. In some cases, generic products are available. In other patent-protected cases, the drug manufacturer (including its authorized distributors) is the sole source of supply.

[5] Paradise et al. have been selling Novartis products since they began operating. Drugs produced by Novartis represent for each pharmacy approximately 7 per cent of their total annual pharmaceutical drug sales. Novartis manufactures a variety of prescription drugs for various ailments, including diabetes (Actos), high blood pressure (Diovan, Lotensin), breast cancer prevention (Femara) and psychiatric disorders (Zyprexa).

[6] Paradise et al.'s two distributors have advised them that Novartis has directed the distributors not to supply the pharmacies with any Novartis product. This refusal to deal has led to very serious disruptions, in loss of sales and loss of customer base. Paradise et al. submit that if customers need to fill multiple prescriptions and one of the products is unavailable, customers will simply change pharmacies to enable them to fill all their prescriptions in one same location. Paradise et al. allege that Novartis is seriously threatening their financial viability.

[7] Novartis occupies a dominant position in the marketplace with respect to its patented pharmaceutical products. Its products are widely available in the Hamilton area, including from Paradise et al.'s large competitors.

RESPONDENT'S POSITION

[8] Novartis Pharmaceuticals Canada Inc./Novartis Pharma Canada Inc. (respondent) opposes the application on two grounds: the business of the applicants is not directly and substantially affected, and the test to be applied in considering an application under section 103.1 of the *Competition Act,* R.S.C. *1985, c.* C-34, (the "Act") includes a review of section 75.

Direct and substantial impact:

[9] Nine of the eleven products listed by the applicants as being Novartis products actually are, while two (Actos and Zyprexa) are manufactured and sold by Eli Lilly, a pharmaceutical competitor of the respondent. According to IMS, the total sales for the nine products to the applicants for 2003 was approximately $3149.

[10] The respondent argues that the applicants are not substantially affected, given the way the Competition Tribunal (the "Tribunal") has construed this term in past decisions.

[11] The respondent has reason to believe the applicants have been involved in internet export sales of pharmaceutical products, contrary to the directions that the respondent has given to its independent distributors, in conformity with its Terms and Conditions of Sale.

Test for leave under section 103.1:

[12] The respondent argues that there are two separate conditions which must be satisfied for leave to be granted under section 103.1 : the business of the applicant must be directly and substantially affected by the practice of the respondent, and the practice could be subject to an order under section 75.

[13] The respondent submits that for a refusal to deal to be subject to a section 75 order, all five conditions specified at section 75 must be met. Yet the Tribunal has been provided with no evidence as to the inability of the applicants to obtain adequate supplies (75(l)(a)) when complying with usual trade terms, nor have the applicants shown that there is any adverse effect on competition (75(l)(e)). In the latter case, in fact, the applicants indicate that competition thrives in the areas surrounding both pharmacies. The respondent therefore contends that the Tribunal has no reason to believe that the respondent's practice could be subject to an order under section 75, since its conditions are not met.

ANALYSIS

[14] Section 103.1 of the Act is a new section which has been the basis of five decisions so far, which can be briefly summarized as follows:

[15] In *National Capital News Canada* v. *Milliken,* 2002 Comp. Trib. 41, Justice Dawson found that the refusal to grant the applicant full access to the Parliamentary Press Gallery was entirely within the privilege of Parliament, as vested in the Speaker, and thus could not be subject to an order under section 75 since the Tribunal did not have the jurisdiction, any more than the courts, to examine that particular exercise of the privilege. For this reason, the requirement of subsection l03.l(7) was not met.

[16] *In Barcode Systems Inc.* ***v.*** *Symbol Technologies Canada ULC,* 2004 Comp. Trib. 1, Justice Lemieux granted leave to Barcode, having found sufficient credible evidence to give the Tribunal reason to believe that the applicant may have been directly and substantially affected.

There was evidence that on petition of the Royal Bank of Canada, an interim Receiver had been appointed for all property, assets and undertakings of Barcode. Barcode also asserted in its materials that it had laid off half of its employees.

[17] In *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4 (Justice Lemieux), the applicant Allan Morgan and Sons Ltd. filed an application under section 103.1 for leave to make an application under section 75, alleging that the respondent La-Z-Boy Canada Ltd., by terminating its right to act as representative of the respondent, had directly and substantially affected its business.

[18] The applicant presented various tables to show sales by category, gross profits and estimates of profit loss due to the respondent's restrictions which occurred before the contract was terminated. Based on these figures, Justice Lemieux found that there was sufficient credible evidence to satisfy himself that the applicant "may have been directly and substantially affected by the actions of La-Z-Boy." He then added: "Morgan's Furniture, at the leave stage, is not required to meet any higher standard of proof threshold."

[19] Madam Justice Simpson has recently rendered two decisions on section 103.1 applications, *Robinson Motorcycle Limited. v. Fred Deeley Imports Ltd.,* 2004 Comp. Trib. 13 and Quinlan 's of Huntsville Inc. v. Fred Deeley Imports Ltd., 2004 Comp. Trib. 15. In both cases, leave was granted. Justice Simpson indicated that leave requirements set in subsection 103.1(7) of the Act had been met; she then added that under section 75, an order could issue, because for each condition the Tribunal could conclude that the condition was satisfied.

[20] In this case, I believe the applicants have failed to meet the test of "directly and substantially affected in the applicant's business." It is therefore not necessary to consider whether an order could be issued under section 75. The applicants must show sufficient credible evidence of a direct and substantial effect. In Barcode, for example, the company was in receivership and fifty per cent of the employees had been laid off. In *La-Z-Boy*, the applicant had figures showing a 46 per cent decrease in its sales. There was thus a credible basis as to substantial effect.

[21] The Tribunal has never defined specifically what was to be considered "substantial"; however, it stated as follows in Canada (Director of Investigation and Research) v. Chrysler Canada Ltd. (1989), 27 C.P.R. (3d) 1:

> The Tribunal agrees that "substantial" should be given its ordinary meaning, which means more than something just beyond de minimis. While terms such as "important" are acceptable synonyms, further clarification can only be provided through evaluations of actual situations.
>
> The cut-off resulted in a decline of over $200,000 in sales between 1986 and 1988. 1987 was a year of transition during most of which Brunet was able to obtain parts from Chrysler Canada dealers and Chrysler Canada continued to fill orders received by Brunet before October, 1986. The slight rise in 1988 sales of Chrysler US-sourced parts suggests that some substitution may have occurred between Chrysler Canada and Chrysler US. sourced parts, perhaps because of the increasing difficulty of obtaining parts in Canada. If such substitution did occur, it was far too limited to alleviate the decline in sales and gross profits from Chrysler auto parts. The decline in profits between 1986 and 1988 from sourcing Chrysler parts in Canada

> was in excess of $30,000. Losses of the order of magnitude of $200,000 in sales and $30,000 in gross profits constitute a substantial effect for a small business such as Brunet's.

[22] In its application, the applicants submit that the action of the respondent will have consequences for the business beyond the loss of sales of the respondent's products. Customers will go elsewhere if they cannot fill their prescription, or part of their prescription, at the applicants' pharmacies.

[23] No figures are provided to show exactly what has occurred in terms of the impact of the decision of the respondent on the applicants' businesses. Subsection 103.1(7) states that the Tribunal may grant leave if it has reason to believe that the applicant is directly and substantially affected. In other words, the evidence must be direct, not speculative. Since no figures are given, it is difficult for the Tribunal to form a *bona fide* belief that the financial viability of the business is threatened.

[24] From the materials submitted, it appears the applicants fear that loss of business will occur. There are no explanations given as to how loss is calculated, no basis nor reference point to show the effect of the loss of the respondent's product. In my view, evidence is insufficient to grant leave.

THEREFORE THE TRIBUNAL ORDERS THAT:

[25] Leave to make an application under subsection 75 is dismissed.

DATED at Ottawa, this 20th day of September, 2004.

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

(s) Pierre Blais

REPRESENTATIVES

For the applicants:

Paradise Pharmacy Inc. et al.

Mark Adilman
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For the respondents:

Novartis Pharmaceuticals Canada Inc.

A. Neil Campbell
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