Competition Tribunal Tribunal de la Concurrence

Reference: *Mrs. O's Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 24
File No.: CT-2004-003
Registry Document No. : 0006

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

AND IN THE MATTER OF an application by Mrs. O's Pharmacy ("Mrs. O's") for an order pursuant to section 103.1 of the *Competition Act* granting leave to bring an application under section 75 of the Act;

B E T W E E N:

Mrs. O's Pharmacy
(applicant)

and

Pfizer 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 applicant, Mrs. O's Pharmacy Inc. (Mrs. O's) is a corporation incorporated under the laws of the Province of Ontario, carrying on business in the Town of Fort Erie, Ontario.

[2] The respondent, Pfizer Canada Inc. (Pfizer) is a corporation incorporated under the laws of Canada. Pfizer carries on business as a pharmaceutical manufacturer across Canada, including Ontario.

[3] Mrs. O's operates a retail pharmacy in Fort Erie. The pharmacy offers a wide selection of products and services, including prescription and over the counter medicines. The pharmacy is located in downtown Fort Erie, about two miles from the Peace Bridge. Every summer, an influx of Americans doubles Fort Erie's population of about 25,000. Mrs. O's began operating in January 2004.

[4] Pfizer previously supplied a number of key products to Mrs. O's: Lipitor (for high cholesterol), Accupril and Norvasc (for high blood pressure), Ministrin and Loestrin (for birth control), Bextra and Arthotec (for arthritis) and Detrol (for bladder incontinence). These important therapeutic products represented a significant portion of Mrs. 0's gross sales. In the industry, such products represent about 20 per cent of gross annual sales for an Ontario pharmacy.

[5] In a letter dated March 11, 2004, without prior notice, Pfizer advised Mrs. O's that it was not in compliance with Pfizer's terms of trade, namely selling or distributing Pfizer products only to persons in Canada. Consequently, the pharmacy was no longer approved to purchase Pfizer pharmaceutical products from Pfizer authorized distributors.

[6] Mrs. O's argues that it has never exported Pfizer products out of Canada. Pfizer offered to reinstate supplies if Mrs. O's agreed to four annual audits by Pfizer. Mrs. O's contends that such a requirement is not a usual term of trade, and breaches the pharmacy's professional obligations of privacy and confidentiality to its customers. Pfizer also required that the pharmacy sign a declaration stating that the pharmacy would not export Pfizer products nor sell to anyone where there was reason to believe that such a person would export Pfizer products.

[7] Pfizer occupies a dominant position in the marketplace with respect to its patented pharmaceutical products. Its products are widely available in the Fort Erie region. Pfizer's actions have had a significant impact on Mrs. O's growth. Patients who cannot fill all their prescriptions at the pharmacy take their business elsewhere. Thus, Mrs. O's claims its financial viability is threatened by Pfizer's actions.

RESPONDENT'S POSITION

[8] Pfizer Canada Inc. (respondent) opposes the application, arguing that the applicant has not established that its business has been substantially affected by the respondent's decision to cease supplying its products.

[9] The respondent submits that despite a restatement, couriered on February 20, 2004, of the requirement for all Pfizer products purchased to be sold only in Canada (requirement in existence since 2000), the respondent was made aware of a website registered to Mrs. O's. The respondent then advised the applicant that it was not in compliance with the Terms and Conditions of the purchasing agreement.

[10] The applicant was given the opportunity to be supplied with Pfizer's products provided it complied with the Terms and Conditions. Pfizer would be willing to reinstate supply provided that the applicant be subject to certain report and audit requirements, for the sole purpose of confirming that the applicant complies with the respondent's Terms and Conditions.

[11] The respondent submits that the applicant has not met the test stated in subsection 103.1(7) of the Competition Act, R.S.C. 1985, c. C-34 (the "Act"), for leave to apply under section 75, because the applicant has not provided sufficient credible evidence that its business has been directly and substantially affected by the respondent's conduct. The impact stated in the affidavit and Statement of Grounds and Material Facts is "overstated, unreasonable and based on insufficient and speculative information."

[12] The respondent states the following facts to support this argument:

> 1) Since it began operating, the applicant has only purchased $10,000 of the respondent's products.
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> 2) The applicant does not provide hard data as to actual sales lost as a result of the respondent's decision to cease supply. The applicant relies only on forecasts made prior to opening its business.
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> 3) The applicant claims that eight products it attributes to the respondent represent some 20 per cent of a pharmacist's gross annual sales; the respondent submits that figure is not substantiated.
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> 4) Two of the eight products attributed to the respondent have been divested to another corporation.
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> 5) Based on data generated by IMS, an independent third party pharmaceutical data collection service, the six products identified by the applicant represent only 12 per cent of sales to Ontario pharmacists and to the applicant.

[13] The applicant bases its losses on projections, not actual figures. It plans to service downtown Fort Erie, which has been without a pharmacy for ten years. Clearly, states the respondent, the community has relied on other pharmacy options for that period. Given the market, the applicant's forecasts are unreasonable, and cannot support a claim for loss of sales.

[14] The respondent contends that the term "substantial" has been interpreted by the Competition Tribunal (the "Tribunal") as meaning a much more significant impact than that

reported by the applicant. Moreover, the applicant had ample opportunity to comply with Pfizer's usual trade terms, which are reasonable terms of trade.

ANALYSIS

[15] Section 103.1 of the Act is a new section which has been the basis of a few decisions so far.

[16] *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 103.1(7) was not met.

[17] *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.

[18] *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.

[19] 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."

[20] 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.

[21] In this case, I believe the applicant has 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 issue 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.

[22] 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 rninirnis. 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 U.S.-sourced parts suggests that some substitution may have occurred between Chrysler Canada and Chrysler U.S. 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.

[23] The applicant submits that Pfizer's actions have significantly limited the growth of the pharmacy. However, no figures are provided. Based on the evidence in the supporting affidavit, the direct effect on the business of the applicant has been that it has been unable to fulfill the expectations of the business plan. After some 5 months in business, the pharmacy had forecast filling 50 prescriptions a day; it is only filling 20.

[24] The Tribunal cannot rely on such evidence to grant the leave. No figures are provided as to the loss of prescription sales due to the respondent's actions. The applicant states that customers fill multiple prescriptions, and may take their business elsewhere if part of the prescription is not filled at the applicant's pharmacy. However, no evidence is provided of the number or percentage of such multiple prescriptions, nor how often these multiple prescriptions include the respondent's products.

[25] The test, as stated by Justice Dawson in National News and repeated by Justice Lemieux, is that there be "sufficient edible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice." I understand this to mean that the Tribunal must have reason to believe that there exists a causal relationship between the action of the respondent and the business consequences for the applicant. In this case, the causality is speculative. Many factors could have an impact on the growth or lack thereof of a new business. There is no convincing evidence to lay the blame on the respondent.

THEREFORE THE TRIBUNAL ORDERS THAT:

[26] 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 applicant:

Mrs. O's Pharmacy

Mark Adilman
D.H. Jack

For the respondent:

Pfizer Canada Inc.

Philip Spencer, Q.C.
Emily Winter