Competition Tribunal Tribunal de la Concurrence

Reference: *Broadview Pharmacy* v. *Pfizer Canada Inc.*, 2004 Comp. Trib. 23
File No.: CT-2004-006
Reference: Registry Document No.: 0006

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c.C34;

AND IN THE MATTER OF an application by Broadview Pharmacy (Broadview) 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:

Broadview 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 is 1177057 Ontario Inc., carrying out business as Broadview Pharmacy (Broadview), a corporation incorporated under the laws of the Province of Ontario. Broadview has been operating at its Toronto address since 1960. Within a two block radius, there are six other retail pharmacies.

[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] The applicant has sold the respondent's products for many years; approximately 20 per cent of its pharmaceutical sales ($300,000 out of a total of $1.5 million in pharmaceutical sales) are from the sale of the respondent's products. A number of important patented medicines are available only from the respondent.

[4] The respondent has ceased supplying the applicant with its pharmaceutical products. In the past, Broadview sold some pharmaceutical products over the internet. It asserts that it has now ceased that practice, and is willing to sign an undertaking to that effect. It is also willing to agree to audits by the respondent to verify that it is not exporting Pfizer products outside of Canada. However, Broadview is not willing to agree to a cross-ownership clause, whereby none of its owners, directors or officers may hold any interest whatsoever in any Canadian pharmacy which may be exporting medical drugs out of Canada. This undertaking, according to the applicant, is "unnecessary, unreasonable and overreaching." The applicant found this clause to be applied in an arbitrary fashion, since other pharmacies held by one group of principals (the example given is Medicine Shoppe pharmacies) do not have to sign such a clause on cross-ownership.

[5] In its response, the respondent submits the following points:

[6] Broadview states that Pfizer products represent 20 per cent of its pharmaceutical sales, but presents no figures to support that statement.

[7] Two of the products attributed to Pfizer have been divested to another company.

[8] Broadview estimates the losses as a percentage of pharmaceutical sales, not as a percentage of its total sales. Yet the test under subsection 103.1(7) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"), indicates that the substantial effect must be on the applicant's business, not part of it. The respondent argues that according to the annual survey of pharmacy owners and managers, sales of pharmaceutical products represent 78 per cent of sales for independent pharmacies. Taking into account that factor to calculate the impact of the loss of the respondent's products, as well as the figures according to IMS for 2002 (when there were no internet sales), the loss is around 11 per cent.

[9] As to the undertaking on cross-ownership, the respondent replies that in the case of Medicine Shoppe pharmacies, there is no cross-ownership. Rather, it is a franchise agreement where individual pharmacists are wholly owners of their own Medicine Shoppe franchise, so that cross-ownership considerations do not apply. The respondent considers the cross-ownership clause essential to ensure that further sales by Broadview to internet pharmacies do not occur.

ANALYSIS

[10] 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:

[11] 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 Competition Tribunal (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.

[12] 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.

[13] 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.

[14] 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."

[15] 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.

[16] 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.

[17] 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 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.

[18] The applicant has not established that it is substantially affected in its business, both in terms of percentage and sales figures.

[19] The cross-ownership issue which arises between the parties in this case is not relevant to the subsection 103.1(7) enquiry; it has to do with the usual terms of trade, which would have to be considered under section 75. The only consideration for now is the substantial effect which again, has not been sufficiently established to satisfy the Tribunal and enable it to grant leave.

[20] Unfortunately for the applicants, the evidence presented in support of the application is not sufficient to grant leave for an application under section 75 of the Act.

THEREFORE THE TRIBUNAL ORDERS THAT:

[21] The application for leave 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:

Broadview Pharmacy

Mark Adilman
D.H. Jack

For the respondent:

Pfizer Canada Inc.

Philip Spencer, Q.C.
Emily Larose