

Competition Tribunal



Tribunal de la Concurrence

Reference: *Broadview Pharmacy v. Wyeth Canada Inc.*, 2004 Comp. Trib. 22

File No.: CT-2004-005

Reference: Registry Document No.: 0009

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

AND IN THE MATTER OF an application by 1177057 Ontario Inc. c.o.b. as 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:

1177057 Ontario Inc. c.o.b. as Broadview Pharmacy
(applicant)

and

Wyeth 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. The pharmacy operates in Toronto.

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

[3] Broadview has been operating at its Toronto address since 1960. Within a two block radius, there are six other retail pharmacies.

[4] Broadview has sold Wyeth products for the past several years. The sale of Wyeth drugs represents a little more than 5 per cent of Broadview's total annual sales. Some of Wyeth's patented medicines include an anti-depressant (Effexor), a number of very popular birth control pills (Triasil, Alesse, Minovral) and female hormone replacement drugs (Premarin and Premplus).

[5] In a letter dated April 26, 2004, Wyeth informed its Canadian distributors that they were not to sell any Wyeth products to purchasers appearing on a list of "unapproved purchasers". Broadview being on this list, it can no longer obtain pharmaceutical products from Wyeth.

[6] Broadview believes this refusal to deal is linked to the fact that Broadview has in the past supplied some pharmaceutical products through the internet pharmacy business. Broadview has ceased this practice. Despite assurances to this effect given by Broadview, Wyeth continues to refuse to supply or deal with Broadview.

[7] For now, Broadview has managed to obtain some short-term substitute supplies; however, this solution cannot be long-term. Without the supply coming directly from Wyeth, Broadview will not be able to serve its customers, which will have a significant negative impact on its business. Broadview argues that customers who cannot fill all their prescriptions in one location will take their business elsewhere.

[8] Broadview's alleges that its financial viability is threatened. Wyeth occupies a dominant position in the market place with respect to its patented pharmaceutical products. Wyeth's products are widely available in the Toronto area, including from Broadway's neighbouring competitors.

RESPONDENT'S POSITION

[9] Wyeth Canada Inc. (respondent) opposes the application on the grounds that there is no reason to believe the applicant will suffer direct and substantial effects from the alleged conduct of the respondent, and no reason to believe that the conduct could be subject to an order under section 75 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act").

[10] The applicant had engaged in internet selling of pharmaceutical products. The applicant contends it has stopped doing so, but has given the respondent no assurance that it would abide by the usual terms of trade and refrain from selling products through the internet.

No direct and substantial effect

[11] Given the small percentage which the respondent's pharmaceutical products represent for the applicant, the first branch of the test under subsection 103.1(7), direct and substantial effect, would not be satisfied. As acknowledged in the applicant's affidavit, only 5 per cent of the applicant's sales of pharmaceutical drugs (not total sales) are from the sale of drugs manufactured by the respondent. At present, the applicant is able to obtain the respondent's pharmaceutical drugs from other sources. The applicant provides no figures to support its contention that it will suffer from loss of clientele because customers cannot fill multiple prescriptions.

Test under section 75

[12] The applicant states that there is significant competition among retail pharmacies in the area where it is located. The respondent contends that the test under section 103.1 must include an assessment of whether an order could be granted under section 75. Since all the conditions of section 75 are not met, namely paragraph 75(1)(e) (adverse effect on competition), an order could not be granted, according to the respondent.

ANALYSIS

[13] 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:

[14] 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.

[15] 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.

[16] 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.

[17] 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."

[18] 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.

[19] 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.

[20] 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.

[21] In this case, the losses are speculative and undocumented. From the applicant's affidavit, Wyeth products represent 5 per cent of its annual sales of pharmaceutical drugs. The applicant fears losing customers because they will not be able to fill multiple prescriptions including the respondent's products. No figures are provided to show the impact or potential impact of the loss of the respondent's products, and no evidence presented to support the assertion that not

filling all the prescriptions for a given patient will mean not filling any. A loss of 5 per cent of pharmaceutical sales, which does not represent the totality of the business of the pharmacy, cannot in good faith be considered a substantial impact.

THEREFORE THE TRIBUNAL ORDERS THAT:

[22] 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:

Wyeth Canada Inc.

Neil Finkelstein
Jeff Galway
Matthew Homer