

THE COMPETITION TRIBUNAL
File No.: CT2003009

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
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BETWEEN: ALLAN MORGAN AND SONS LTD.

APPLICANT

AND: LA-Z-BOY CANADA LIMITED

RESPONDENT

**MEMORANDUM OF FACT AND LAW OF THE APPLICANT,
ALLAN MORGAN AND SONS LTD.**

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PART I - OVERVIEW

1. This proceeding arises from an Application commenced by Allan Morgan and Sons Limited (“Morgan’s Furniture”) to the Competition Tribunal (“Tribunal”) pursuant to section 103.1 of the *Competition Act*, R.S. 1985, c.19 (2nd supp.), as amended (the “*Act*”), seeking leave to bring an application for an Order under section 75 of the *Act* that the Respondent, La-Z-Boy Canada Limited (“La-Z-Boy”) accept Morgan’s Furniture as a customer and dealer of La-Z-Boy’s Products (the “Product”) on the “usual” trade terms, forthwith upon issuance of said Order.
2. The Tribunal, by reasons delivered by Lemieux J. on the February 5th, 2004, granted leave to Morgan’s Furniture on the basis that Morgan’s Furniture may be directly and substantially affected in its business by the actions of La-Z-Boy. Lemieux J. further

stated that, at the leave stage, Morgan's Furniture was not required to meet any higher standard of proof threshold.

3. The decision of Lemieux J. granting leave is currently on appeal at the Federal Court of Appeal. No date has been set for the Appeal to be heard.
4. La-Z-Boy seeks an Order from this Tribunal staying the Order of Lemieux J. granting leave to bring an Application under section 75 of the Act. This would effectively stay the Application identified by file no. CT 2003-009 pending the outcome of the Appeal.

PART II - FACTS

5. Morgan's Furniture was established in 1957 and has operated since that time as a family business by the Morgan Family as a furniture retail store serving primarily the Avalon Peninsula ("Area").

Affidavit of Perry Morgan, paragraph 3

6. In the 1970's, Morgan's Furniture, then a well established furniture retail store, secured the dealership for La-Z-Boy products.

Affidavit of Perry Morgan, paragraph 4

7. Over the course of in excess of 25 years, Morgan's Furniture developed a significant market for the Product, including La-Z-Boy's recliners, in the Area. In fact, the Product comprised a significant portion of Morgan's Furniture's motion furniture sales.

Affidavit of Perry Morgan, paragraph 5

8. Morgan's Furniture and La-Z-Boy enjoyed a long and mutually prosperous relationship, however, in 1997 their relationship changed.

Affidavit of Perry Morgan, paragraph 6

9. Morgan's Furniture started to experience restrictions placed upon it by La-Z-Boy in the Product it could obtain from La-Z-Boy. The actions of La-Z-Boy referred to herein include, but are not limited to: (a) excluding Morgan's Furniture from vital product information to which retail dealers of the Product would normally have access; (b) restricting Morgan's Furniture from purchasing certain of the Product, which are high market product styles, for display to customers on its store floor and, in turn, preventing Morgan's Furniture from marketing such styles to its customers, while making such Product available to Morgan's Furniture's major competitor, Island Furniture ("Island Furniture"); (c) excluding Morgan's Furniture from the purchase of certain of the Product's style which are popular market items with Morgan's Furniture's customers while making these same styles available to Island Furniture; and (d) excluding Morgan's

Furniture from advertising and promotional campaigns, while making such advertising and promotional campaigns available to Island Furniture.

Affidavit of Perry Morgan, paragraph 7

10. As a consequence thereof, the Product Morgan's Furniture could offer to its customers and the market, in general, in the Area seriously diminished. In turn, Morgan's Furniture's sales of the Product decreased significantly. By the year 2001, Morgan's Furniture's sales of the Product was down by 46%.

Affidavit of Perry Morgan, paragraph 8

11. The actions of La-Z-Boy forced Morgan's Furniture to bring an application to the Tribunal pursuant to section 103.1 of the *Act* seeking leave to bring an application for an Order under section 75 of the *Act* that La-Z-Boy accept Morgan's Furniture as a customer and dealer of the Product on the usual trade terms.
12. Based on the evidence presented by Morgan's Furniture to the Tribunal, Lemieux J. was convinced that leave should be granted on the basis that Morgan's Furniture may be directly and substantially affected in its business by the actions of La-Z-Boy. Lemieux J. further made a point of stating that, at the leave stage, no higher standard of proof threshold is required.

13. La-Z-Boy appealed the decision granting leave alleging that Lemieux J. granted leave without having regard to whether the alleged practice could be the subject of an Order under section 75.
14. Morgan's Furniture responded to the appeal submitting that Lemieux J. did not err in granting leave and, in fact, properly applied the test, outlined in subsection 103.1(7) of the *Act*, for determining whether or not leave should be granted.
15. The Appeal process at the Federal Court of Appeal has been started, however, no date has been set for the Appeal to be heard.
16. La-Z-Boy seeks an Order from the Tribunal that the Application pursuant to section 75 of the Act be stayed pending the outcome of the Appeal of the Order granting leave to bring the Application.

PART III - LAW

17. Morgan's Furniture submits that the Application pursuant to section 75 of the Act should not be stayed pending the outcome of the Appeal of the Order granting leave to bring the Application because La-Z-Boy has not satisfied the test established in the Supreme Court

of Canada decision, *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311 (“*RJR-MacDonald*”).

18. The Supreme Court of Canada in *RJR-MacDonald* states:

Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

RJR-MacDonald Inc. v. Canada (Attorney General)
[1994] 1 S.C.R. 311 (“*RJR-MacDonald*”), Tab 1 at
paragraph 43

19. The test outlined in *RJR-MacDonald* has been adopted by the Tribunal in its past decisions. The notable decisions which interpret and discuss the application of this test are *Director of Investigation and Research v. The D & B Companies of Canada Ltd.*, 1994 CT-94/1 (“*D & B Companies*”) and *The Commissioner of Competition v. Sears Canada Inc.* 2003 Comp. Trib. 20 (“*Sears*”). Although these two decisions apply the test in the context of an adjournment pending appeal, the Tribunal has stated that an adjournment pending appeal has exactly the same result as a stay pending appeal and, for that reason, the same principles will be applied in each instance.

Director of Investigation and Research v. The D & B Companies of Canada Ltd., 1994 CT-94/1 (“*D & B Companies*”), Tab 2 at page 4

Serious Issue to be Tried

20. Rothstein J. in *D & B Companies* stated that the serious issue test is a low-level test and as long as the issue is not frivolous or vexatious it will pass the threshold.

D & B Companies, Tab 2 at page 4

21. Morgan’s Furniture submits that La-Z-Boy has not passed the threshold. The issue brought by La-Z-Boy is not serious and, in fact, is frivolous and vexatious.
22. La-Z-Boy argues that ensuring that section 103.1 is interpreted and applied consistently and completely to all applications made pursuant to that section is a serious issue to be tried.

Respondent’s Memorandum of Fact and Law,
paragraph 22

23. The interpretation and application of subsection 103.1(7), which is presently at issue in the Appeal at the Federal Court of Appeal, has been dealt with consistently and completely by the Tribunal. The decision made by Lemiux J. in the present circumstances parallels past decisions of the Tribunal, more specifically the decision of

Dawson J. in *National Capital News v. Milliken*, 2002 Comp. Trib. 41 (“*National Capital News*”) and the decision of Lemieux J. in *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1 (“*Barcode*”).

24. These decisions make it abundantly clear that subsection 103.1(7) requires that the applicant for leave support their application with sufficient credible evidence to give rise to reasonable grounds for believing that the applicant may be directly and substantially affected by the other party’s actions. Further, the threshold at the leave stage is not high. The Tribunal’s role is to screen applications on a scale which is less than the balance of probabilities. A higher threshold is reserved for the section 75 application itself.

National Capital News v. Milliken, 2002 Comp. Trib. 41 (“*National Capital News*”), Tab 3 at paragraph 8, 10 and 14

Barcode Systems Inc. v. Symbol Technologies Canada ULC, 2004 Comp. Trib. 1 (“*Barcode*”), Tab 4 at paragraph 12

25. There is no doubt as to how subsection 103.1(7) is to be interpreted and applied and, therefore, there is no serious issue to be tried, as argued by La-Z-Boy.
26. A motion to stay in such circumstances can be interpreted as a tactic to create hardship upon Morgan’s Furniture by increasing the costs and delaying the time to bring its complaint, and, consequently, force Morgan’s Furniture from the “court room”.

Irreparable Harm

27. Dawson J. in *Sears*, referencing *RJR-MacDonald*, states that the irreparable harm test requires, as a matter of law, that the applicant clearly show that the refusal of the stay could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

The Commissioner of Competition v. Sears Canada Inc. 2003 Comp. Trib. 20 ("*Sears*"), Tab 5 at paragraph 11

28. Sopinka and Cory JJ. explored the meaning of the term "irreparable" in *RJR-MacDonald*:

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damages to its business reputation (*American Cyanamid, supra*);

RJR-MacDonald, Tab 1 at paragraph 59

29. La-Z-Boy will not be put out of business nor suffer permanent market loss or irrevocable damage to its business reputation by a Tribunal decision not to grant a stay. If a stay is

not granted and, subsequently, Morgan's Furniture successfully obtains an Order requiring La-Z-Boy to accept Morgan's Furniture as a customer and dealer of the Product, on the usual trade terms, then Morgan's Furniture will have the Product available to its customers, just as it did for over 25 years preceding 1997. Customers will not be frustrated or confused, in fact they will be faced with more options and possibly better prices. Further, La-Z-Boy itself will have another supplier for its products and, as a result, it will likely benefit.

Affidavit of Perry Morgan, paragraph 11

30. If, following an Order pursuant to section 75, the Appeal at the Federal Court of Appeal is allowed, La-Z-Boy will no longer be required to accept Morgan's Furniture as its customer and dealer and, therefore, have the option of terminating the relationship. Again, customers will not be frustrated and confused by this. Customers will have benefited from the addition of the Product to Morgan's Furniture's store, even if for a brief period of time. And La-Z-Boy will likely have benefited for such time as it had to comply with the Order.

Affidavit of Perry Morgan, paragraph 12

31. Further, irreparable harm does not result from the fact that the Tribunal proceedings may be disrupted. Rothstein J. in *D & B Companies* stated:

The issue of disruption to Tribunal proceedings is not one that, in my view, can be characterised as coming within the category of irreparable harm. It is true that there could be serious inconvenience but that is not of itself tantamount to irreparable harm. It may be that examinations and cross-examinations may change if the respondent is successful on appeal and further information is produced and the matter is reheard. However, again, this is a matter of inconvenience and not irreparable harm. Whenever a case is sent back for rehearing as a result of appeal or judicial review, the parties are in the same position. Such rehearings are a regular part of the judicial process; I cannot conclude that this case is in some way unique so as to cause irreparable harm to the respondent if indeed examinations and cross-examinations have to change.

D & B Companies, Tab 2 at page 5 and 6

32. Morgan's Furniture submits that La-Z-Boy will not suffer irreparable harm if the stay is not granted.

Affidavit of Perry Morgan, paragraph 13

Balance of Inconvenience

33. The third part of the test requires examining whether the balance of convenience favours granting a stay. This requires a determination of which of the two parties will suffer the greater harm from the granting or refusal of the stay.

RJR-MacDonald, Tab 1 at paragraph 62

34. Sopinka and Cory JJ in *RJR-MacDonald* further state:

The factors which must be considered in assessing the “balance of inconvenience” are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautions, at p. 408, that:

[i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that “there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.”

RJR-MacDonald, Tab 1 at paragraph 63

35. La-Z-Boy will be put to no inconvenience if the stay is not granted and, subsequently, Morgan’s Furniture is successful in its section 75 application to be added as a customer and dealer of La-Z-Boy. In fact, La-Z-Boy could possibly serve to benefit from such a decision.

Affidavit of Perry Morgan, paragraph 14

36. Morgan's Furniture, however, would be put to the continued inconvenience of being prevented from selling the Product if a stay is granted.

Affidavit of Perry Morgan, paragraph 15

37. Morgan's Furniture developed a significant market for the Product and, in fact, the Product comprised a significant portion of Morgan's Furniture's motion furniture sales. Since La-Boy's refusal to deal, the Product Morgan's Furniture could offer to its customers and the market, in general, in the Area seriously diminished. In turn, Morgan's Furniture's sales of the Product decreased significantly. By the year 2001, Morgan's Furniture's sales of the Product was down by 46%.

Affidavit of Perry Morgan, paragraph 16

38. Restrictions were placed on Morgan's Furniture beginning in 1997 and by the start of 2003 Morgan's Furniture was no longer supplied with the Product at all. Morgan's Furniture has already suffered great harm because of La-Z-Boy's actions and such harm will continue if a stay is granted. The harm will continue until the Tribunal proceedings proceed and reach a conclusion.

Affidavit of Perry Morgan, paragraph 17

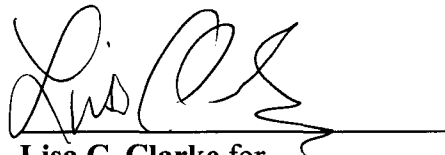
39. Morgan's Furniture submits that it will suffer greater harm if the stay is granted than La-Z-Boy would suffer if the stay is not granted.

Affidavit of Perry Morgan, paragraph 18

40. Morgan's Furniture respectfully submits that Application pursuant to section 75 of the Act should not be stayed pending the outcome of the Appeal of the Order granting leave to bring the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at St. John's, in the Province of Newfoundland and Labrador, this 23rd day of June, 2004.



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Indexed as:

RJR-MacDonald Inc. v. Canada (Attorney General)

RJR-MacDonald Inc., Applicant;

v.

The Attorney General of Canada, Respondent, and
The Attorney General of Quebec, Mis-en-cause, and
The Heart and Stroke Foundation of Canada, Interveners on the
the Canadian Cancer Society, application for the Canadian
Council on Smoking and Health, and interlocutory relief
Physicians for a Smoke-Free Canada

And between

Imperial Tobacco Ltd., Applicant;

v.

The Attorney General of Canada, Respondent, and
The Attorney General of Quebec, Mis-en-cause, and
The Heart and Stroke Foundation of Canada, Interveners on the
the Canadian Cancer Society, application for the Canadian
Council on Smoking and Health, and interlocutory relief
Physicians for a Smoke-Free Canada

[1994] 1 S.C.R. 311

[1994] S.C.J. No. 17

File Nos.: 23460, 23490.

Supreme Court of Canada

1993: October 4 / 1994: March 3.

**Present: Lamer C.J. and La Forest, L'Heureux-Dubé,
Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.**

APPLICATIONS FOR INTERLOCUTORY RELIEF

Practice — Interlocutory motions to stay implementation of regulations pending final decision on appeals and to delay implementation if appeals dismissed — Leave to appeal granted shortly after applications to stay heard — Whether the applications for relief from compliance with regulations should be granted — Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18. — Tobacco Products Control Regulations, amendment, SOR/93-389 — Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1) — Rules of the Supreme Court of Canada, SOR/83-74, s. 27 — Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.

The Tobacco Products Control Act regulates the advertisement of tobacco products and the health warnings which must be placed upon those products. Both applicants successfully challenged the Act's constitutional validity in the Quebec Superior Court on the grounds that it was ultra vires Parliament and that it violates the right to freedom of expression in s. 2(b) of the Canadian Charter of Rights and Freedoms. The Court of Appeal ordered the suspension of enforcement until judgment was rendered on the Act's validity but declined to order a stay of the coming into effect of the Act until 60 days following a judgment validating the Act. The majority ultimately found the legislation constitutional.

The Tobacco Products Control Regulations, amendment, would cause the applicants to incur major expense in altering their packaging and these expenses would be irrecoverable should the legislation be found unconstitutional. Before a decision on applicants' leave applications to this Court in the main actions had been made, the applicants brought these motions for stay pursuant to s. 65.1 of the Supreme Court Act, or, in the event that leave was granted, pursuant to r. 27 of the Rules of the Supreme Court of Canada. In effect, the applicants sought to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. They also requested that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

This Court heard applicants' motions on October 4 and granted leave to appeal the main action on October 14. At issue here was whether the applications for relief from compliance with the Tobacco Products Control Regulations, amendment should be granted. A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants.

Held: The applications should be dismissed.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the Supreme Court of Canada Act and r. 27 of the Rules of the Supreme Court of Canada.

The words "other relief" in r. 27 of the Supreme Court Rules are broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered. It can apply even though leave to appeal may not yet be granted. In interpreting the language of the rule, regard should be had to its purpose: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal.

Section 65.1 of the Supreme Court Act was adopted not to limit the Court's powers under r. 27 but to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. It should be interpreted as conferring the same broad powers as are included in r. 27. The Court, pursuant to both s. 65.1 and r. 27, can not only grant a stay of execution and of proceedings in the traditional sense but also make any order that preserves matters between the parties in a state that will, as far as possible, prevent prejudice pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. The Court therefore must have jurisdiction to enjoin conduct on the part of a party acting in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court.

Jurisdiction to grant the relief requested by the applicants exists even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* which established that the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established. If jurisdiction under s. 65.1 of the Act and r. 27 were wanting, jurisdiction would be found in s. 24(1) of the Canadian Charter of Rights and Freedoms. A Charter remedy should not be defeated because of a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

The three-part American Cyanamid test (adopted in Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*) should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question

to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the Metropolitan Stores test.

At the second stage the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving Charter rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

As a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

Here, the application of these principles to the facts required that the applications for stay be dismissed.

The observation of the Quebec Court of Appeal that the case raised serious constitutional issues and this Court's decision to grant leave to appeal clearly indicated that these cases raise serious questions of law.

Although compliance with the regulations would require a significant expenditure and, in the event of their being found unconstitutional, reversion to the original packaging would require another significant outlay, monetary loss of this nature will not usually amount to irreparable harm in private law cases. However, where the government is the unsuccessful party in a constitutional claim, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies. Although the required expenditure would impose economic hardship on the companies, the economic loss or inconvenience can be avoided by passing it on to purchasers of tobacco products. Further, the applications, since they were brought by two of the three companies controlling the Canadian tobacco industry, were in actual fact for a suspension of the legislation, rather than for an exemption from its operation. The public interest normally carries greater weight in favour of compliance with existing legislation. The weight given is in part a function of the

nature of the legislation and in part a function of the purposes of the legislation under attack. The government passed these regulations with the intention of protecting public health and furthering the public good. When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. The applicants, rather, must offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation. The only possible public interest in the continued application of the current packaging requirements, however, was that the price of cigarettes for smokers would not increase. Any such increase would not be excessive and cannot carry much weight when balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

Cases Cited

Applied: Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110; *considered:* Labatt Breweries of Canada Ltd. v. Attorney General of Canada, [1980] 1 S.C.R. 594; American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396; *referred to:* R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401; Keable v. Attorney General (Can.), [1978] 2 S.C.R. 135; Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1924), 55 O.L.R. 127; Laboratoire Pentagone Ltée v. Parke, Davis & Co., [1968] S.C.R. 269; Adrian Messenger Services v. The Jockey Club Ltd. (No. 2) (1972), 2 O.R. 619; Bear Island Foundation v. Ontario (1989), 70 O.R. (2d) 574; N.W.L. Ltd. v. Woods, [1979] 1 W.L.R. 1294; Trieger v. Canadian Broadcasting Corp. (1988), 54 D.L.R. (4th) 143; Tremblay v. Daigle, [1989] 2 S.C.R. 530; Dialadex Communications Inc. v. Crammond (1987), 34 D.L.R. (4th) 392; R.L. Crain Inc. v. Hendry (1988), 48 D.L.R. (4th) 228; MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577; Hubbard v. Pitt, [1976] Q.B. 142; Mills v. The Queen, [1986] 1 S.C.R. 863; Nelles v. Ontario, [1989] 2 S.C.R. 170; Ainsley Financial Corp. v. Ontario Securities Commission (1993), 14 O.R. (3d) 280; Morgentaler v. Ackroyd (1983), 150 D.L.R. (3d) 59; Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791; Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans) (1988), 21 F.T.R. 304; Island Telephone Co., Re (1987), 67 Nfld. & P.E.I.R. 158; Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439; Vancouver General Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; Rio Hotel Ltd. v. Commission des licences et permis d'alcool, [1986] 2 S.C.R. ix; Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373; R. v. Oakes, [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1).
 Code of Civil Procedure of Québec, art. 523.
 Constitution Act, 1867, s. 91.
 Fisheries Act, R.S.C. 1970 c. F-14.
 Rules of the Supreme Court of Canada, 1888, General Order No. 85(17).
 Rules of the Supreme Court of Canada, SOR/83-74, s. 27.
 Supreme Court Act, R.S.C., 1985, c. S-26, ss. 65.1 [ad. S.C. 1990, c. 8, s. 40], 97(1)(a).
 Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18.
 Tobacco Products Control Regulations, amendment, SOR/93-389.

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Canada. Minister of National Health and Welfare. Regulatory Impact Analysis Statement. (Statement following Tobacco Products Control Regulations, amendment, SOR/93-389.) In Canada Gazette, Part II, Vol. 127, No. 16, p. 3284.
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Berryman, ed. Remedies: Issues and Perspectives. Scarborough, Ont.: Carswell, 1991, 271.
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APPLICATIONS for interlocutory relief ancillary to constitutional challenge of enabling legislation following judgment of the Quebec Court of Appeal, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, allowing an appeal from a judgment of Chabot J., [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, granting the application. Applications dismissed.

Colin K. Irving, for the applicant RJR-MacDonald Inc.
 Simon V. Potter, for the applicant Imperial Tobacco Inc.
 Claude Joyal and Yves Leboeuf, for the respondent.
 W. Ian C. Binnie, Q.C., and Colin Baxter, for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

Solicitors for the applicant RJR-MacDonald Inc.: Mackenzie, Gervais, Montreal.
 Solicitors for the applicant Imperial Tobacco Inc.: Ogilvy, Renault, Montreal.
 Solicitors for the respondent: Côté & Ouellet, Montreal.
 Solicitors for the interveners on the application for interlocutory relief Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: McCarthy, Tétrault, Toronto.

The judgment of the Court on the applications for interlocutory relief was delivered by

SOPINKA AND CORY JJ.:—

I. Factual Background

¶ 1 These applications for relief from compliance with certain Tobacco Products Control Regulations, amendment, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

¶ 2 The Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

¶ 3 The first part of the Tobacco Products Control Act, particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

¶ 4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(f) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(b) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed \$100,000, imprisonment for up to one year, or both.

¶ 5 Each of the applicants challenged the constitutional validity of the Tobacco Products Control Act on the grounds that it is ultra vires the Parliament of Canada and invalid as it violates s. 2(b) of the Canadian Charter of

Rights and Freedoms. The two cases were heard together and decided on common evidence.

¶ 6 On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, finding that the Act was ultra vires the Parliament of Canada and that it contravened the Charter. The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

¶ 7 Up to that point, the applicants had complied with all provisions in the Tobacco Products Control Act. However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

¶ 8 On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not ultra vires the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(b) of the Charter but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the Charter. Brossard J.A. agreed with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the Charter. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

¶ 9 On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: Tobacco Products Control Regulations, amendment, SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

¶ 10 According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotograve cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about \$30,000,000.

¶ 11 Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the Supreme Court Act, R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the Rules of the Supreme Court of Canada, SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

¶ 12 The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find

the enabling legislation to be constitutionally invalid.

¶ 13 The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

- (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
- (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
- (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

¶ 14 In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

¶ 15 Chabot J. concluded that the dominant characteristic of the Tobacco Products Control Act was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the Tobacco Products Control Act as a law regulating advertising of a particular product, a matter within provincial legislative competence.

¶ 16 Chabot J. found that, with respect to s. 2(b) of the Charter, the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that Charter guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of

sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

¶ 17 However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that advertising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

¶ 18 In deciding whether or not to exercise its broad power under art. 523 of the Code of Civil Procedure of Québec to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a valid act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of valid legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under Sec. 5 after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it seems reasonable to order the suspension of enforcement under Sec. 5 of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.

We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.

...

Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (*A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110, 127, 135). [Emphasis in original.]

Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. LeBel J.A. (for the majority)

¶ 19 LeBel J.A. characterized the Tobacco Products Control Act as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

¶ 20 LeBel J.A. applied the criteria set out in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

¶ 21 LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(b) of the Charter but found that it was justified under s. 1 of the Charter. LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the Oakes test have been attenuated by later decisions of the Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [Translation] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

2. Brossard J.A. (dissenting in part)

¶ 22 Brossard J.A. agreed with LeBel J.A. that the Tobacco Products Control Act should be characterized as public health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

¶ 23 However, he did not think that the violation of s. 2(b) of the Charter could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

¶ 24 A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

¶ 25 First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was *intra vires* s. 91 of the Constitution Act, 1867 and justified under s. 1 of the Charter. Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no

jurisdiction to suspend the operation of the new regulations.

¶ 26 The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal judgment was rendered.

¶ 27 The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the Supreme Court Act and r. 27 of the Rules of the Supreme Court of Canada.

Supreme Court Act

65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

¶ 28 Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see Rules of the Supreme Court of Canada, 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rule-making power. Subsection (1)(a) of that section provides that the rules may be enacted:

97. ... (a) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an

order directed to a party. See *Keable v. Attorney General* (Can.), [1978] 2 S.C.R. 135. The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

¶ 29 Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

¶ 30 In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new regulations constitute conduct under a law that has been declared constitutional by the lower courts.

¶ 31 This, in our opinion, is the view taken by this Court in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594. The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court. I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

¶ 32 While the above passage appears to answer the submission of the respondents on this motion that Labatt was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in Labatt reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

¶ 33 In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110. In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

¶ 34 Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the Charter. A Charter remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

¶ 35 The applicants rely upon the following grounds:

1. The challenged Tobacco Products Control Regulations, amendment were promulgated pursuant to ss. 9 and 17 of the Tobacco Products Control Act, S.C. 1988, c. 20.
2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the Canadian Charter of Rights and Freedoms.
3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.
4. The tests for granting of a stay are met in this case:
 - (i) There is a serious constitutional issue to be determined.
 - (ii) Compliance with the new regulations will cause irreparable harm.

- (iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

¶ 36 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, supra. If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

¶ 37 The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

¶ 38 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

¶ 39 On the other hand, the Charter charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of Charter rights. Such a practice would undermine the spirit and purpose of the Charter and might encourage a government to prolong unduly final resolution of the dispute.

¶ 40 Are there, then, special considerations or tests which must be applied by the courts when Charter violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

¶ 41 Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores*, at p. 127, Beetz J. expressed the position in these words:

A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

¶ 42 We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

¶ 43 *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

B. The Strength of the Plaintiff's Case

¶ 44 Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong prima facie case" on the merits in order to satisfy the first test. In *American Cyanamid*, however, Lord Diplock stated that an applicant need no longer demonstrate a strong prima facie case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

¶ 45 In *Metropolitan Stores, Beetz J.* advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in Charter cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

¶ 46 The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following dicta of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269, at p. 272:

The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits. It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in *Adrian Messenger Services v. The Jockey Club Ltd.* (No. 2) (1972), 2 O.R. 619 (C.A.), at p. 620:

Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574 (H.C.), at p. 576:

While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

¶ 47 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer

obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in Charter cases.

¶ 48 The Charter protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged Charter violation to review the matter carefully. This is so even when other courts have concluded that no Charter breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores*, at p. 128, that "the American Cyanamid 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

¶ 49 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the Charter claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores*, supra, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

¶ 50 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

¶ 51 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the American Cyanamid principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:

Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

¶ 52 In *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

¶ 53 In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

¶ 54 The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

¶ 55 The second exception to the American Cyanamid prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores*, at p. 133:

There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the Canadian Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the Charter and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

¶ 56 The suggestion has been made in the private law context that a third exception to the American Cyanamid "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong prima facie case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in Charter cases. Even if the facts upon which the Charter breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. Irreparable Harm

¶ 57 Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

¶ 58 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

¶ 59 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

¶ 60 The assessment of irreparable harm in interlocutory applications involving Charter rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in Charter cases.

¶ 61 This Court has on several occasions accepted the principle that damages may be awarded for a breach of Charter rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the Charter. In light of the uncertain state of the law regarding the award of damages for a Charter breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. The Balance of Inconvenience and Public Interest Considerations

¶ 62 The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in Charter cases, many interlocutory proceedings will be determined at this stage.

¶ 63 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that:

[i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

¶ 64 The decision in *Metropolitan Stores*, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, at pp. 303-4:

Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

¶ 65 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores*. A few additional points may be made. It is the "polycentric" nature of the Charter which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives*, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in Charter litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in Charter disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

¶ 66 It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

¶ 67 We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that these women would suffer irreparable harm, such evidence would not indicate any irreparable harm to these applicants, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

¶ 68 When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

¶ 69 Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the Fisheries Act, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

- (b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in *Metropolitan Stores* at p. 139. It was applied by the Trial Division of the Federal Court in *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304.

¶ 70 A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in *Island Telephone Co. Re.*, (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The public interest is equally well served, in the same sense, by any appeal. . . .

¶ 71 In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

¶ 72 A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

¶ 73 Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an

"exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law than when the application of the law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix.

¶ 74 Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

¶ 75 In the course of discussing the balance of convenience in *American Cyanamid*, Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to ... preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the Charter is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. Summary

¶ 76 It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a Charter case.

¶ 77 As indicated in *Metropolitan Stores*, the three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

¶ 78 At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

¶ 79 At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

¶ 80 The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving Charter rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from

the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

¶ 81 We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

¶ 82 The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the Charter. The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in *R. v. Oakes*, [1986] 1 S.C.R. 103, to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. Irreparable Harm

¶ 83 The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

¶ 84 Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. Balance of Inconvenience

¶ 85 Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

¶ 86 The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of \$50,000,000. They have a greater capacity to absorb any loss than

would many smaller enterprises. Secondly, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

¶ 87 Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the Tobacco Products Control Act. On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in *Metropolitan Stores*. However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation".

¶ 88 The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in *Metropolitan Stores*:

Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically-elected legislatures and are generally passed for the common good, for instance: ... the protection of public health It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

¶ 89 The regulations under attack were adopted pursuant to s. 3 of the Tobacco Products Control Act which states:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

- (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
- (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
- (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

¶ 90 The Regulatory Impact Analysis Statement, in the *Canada Gazette*, Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

The increased number and revised format of the health messages reflect the strong

consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

¶ 91 These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

¶ 92 When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

¶ 93 The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

¶ 94 The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

/DRS



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Citation: *Canada (Director of Investigation and Research) v. D&B Companies of Canada Ltd.*

Date: 1994-10-05

Docket: CT-94/1

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CT - 94 / 1

IN THE MATTER OF an application by the Director of Investigation and Research

under section 79 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF certain practices by

The D & B Companies of Canada Ltd.

B E T W E E N :

The Director of Investigation and Research

Applicant

- and -

The D & B Companies of Canada Ltd.

Respondent

- and -

Information Resources, Inc.

Intervenor

REASONS AND ORDER REGARDING ADJOURNMENT PENDING APPEAL

Date of Hearing:

October 5, 1994

Presiding Member:

The Honourable Mr. Justice Marshall E. Rothstein

Counsel for the Applicant:

Director of Investigation and Research

Donald B. Houston

Counsel for the Respondent:

The D & B Companies of Canada Ltd.

Randal T. Hughes

Lawrence E. Ritchie

Counsel for the Intervenor:

Information Resources, Inc.

Gavin MacKenzie

Geoffrey P. Cornish

COMPETITION TRIBUNAL

REASONS AND ORDER REGARDING ADJOURNMENT PENDING APPEAL

The Director of Investigation and Research

v.

The D & B Companies of Canada Ltd.

The respondent, the D & B Companies of Canada Ltd., by notice of motion filed on September 30, 1994, moved for an order that the hearing in this matter, scheduled to commence on October 17, 1994, be adjourned, pending the outcome of an appeal of the interlocutory order of the Tribunal, dated September 22, 1994, to a reasonable date after the appeal is determined. In its September 22, 1994 order, the Tribunal, *inter alia*, ordered that

(3) The motion by Nielsen (now known as The D & B Companies of Canada Ltd.) that the Director produce for inspection and copying by Nielsen privileged documents as set out in paragraph (c) of the respondent's notice of motion, is dismissed.[1]

It is this portion of the Tribunal's order that the respondent is appealing. The notice of appeal was filed on September 28, 1994, and the material indicates that the appeal may well be heard before Christmas.

The information that the respondent sought and which was denied was

(i) the complaint by IRI or its counsel and any further correspondence, memoranda or submissions from IRI or its counsel to the Director, his staff or his counsel,

(ii) notes, materials and statements obtained or prepared by the Director, his staff or his counsel from meetings and discussions with IRI or its counsel, and

(iii) statements, notes, material and correspondence obtained or prepared by the Director, his staff or his counsel from meetings and discussions with Canadian and U.S. packaged goods retailers, manufacturers and market research companies.[2]

The issue on appeal is the nature and extent of public interest privilege, which was the basis for the Director refusing disclosure of this information.

The threshold question is the test to be employed by the Tribunal in considering whether to grant an adjournment of proceedings pending the outcome of an appeal of an interlocutory order made by it. Counsel for the respondent submits that the test is not the same as in the case of a stay of proceedings in which a court is asked to stay the proceedings of a tribunal or a lower court. While he concedes the applicable principles are similar to those in the case of a stay, he argues that the real issue is the power of the Tribunal to control its own proceedings.

Counsel for the Director and counsel for the intervenor submit that the test in the case of an adjournment pending appeal is the same as in the case of a stay of proceedings.

I agree with counsel for the Director and counsel for the intervenor. While not every request for an adjournment would be decided by application of the principles governing a stay of proceedings, certainly an adjournment pending appeal has exactly the same result as a stay pending appeal. Counsel for the respondent conceded that an alternative open to him is to seek a stay from the Federal Court of Appeal. I do not understand why the Tribunal, in considering this adjournment application, would apply different principles than the Federal Court of Appeal on the stay application, both relating to the same proceedings. I am of the view that the principles applicable to stays of proceedings, which themselves are the same as the principles applicable to interlocutory injunctions,[3] are to be applied in the case of an application for an adjournment pending appeal.

The principles are set out by the Supreme Court of Canada in *A.G. Manitoba v. Metropolitan Stores (MTS) Ltd.* and restated in *RJR - MacDonald Inc. v. A.G. Canada*:

Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.[4]

I turn first to the serious issue test. Counsel for the Director and counsel for the intervenor concede that this is a low-level test -- essentially, is the issue frivolous or vexatious? Here the question under appeal relates to the disclosure of information which is said to be subject to public interest privilege. It has been the subject of argument before the Tribunal and the subject of a decision of the Tribunal. It will be determined by the Federal Court of Appeal because the respondent's appeal is as of right.

I cannot say that the issue is frivolous or vexatious. I do not, and indeed should not, go further in view of the position of counsel on this point and the admonition in *RJR - MacDonald Inc.*:

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.[5]

I turn next to the irreparable harm test. Counsel for the respondent submits that, if the hearing proceeds as scheduled, the Tribunal may make findings and draw conclusions on the evidence before it which might be prejudicial to the respondent. He says that such findings may be recorded in the trade press and this could cause damage to the respondent's reputation. Further, he argues that if the case proceeds and the respondent is successful on appeal, the proceedings will be subject to serious disruption. Examinations and cross-examinations may be different. It may be necessary for the Tribunal to rehear the matter in its entirety with a differently constituted panel. Finally, he states that a favourable decision on appeal could be rendered nugatory.

As to the question of the respondent's reputation, I accept that a Tribunal decision made on inadequate information could include findings that could wrongfully affect the respondent's reputation. However, I have no evidence before me as to what these findings could be, how they would damage the reputation of the respondent or any other particulars that would satisfy me that the question of harm to reputation is not so speculative as to not support a finding of irreparable harm. Further, at this point, both the outcome of the Tribunal's proceedings on the merits and of the appeal are unknown. Also unknown is the impact of a successful appeal on any further proceedings or on the decision of the Tribunal. While these latter considerations themselves might not disqualify the stay application from being successful on the basis of speculation, when combined with the insufficient evidence of harm to reputation in this case, I am of the view that a finding of irreparable harm cannot be made.

The issue of disruption to Tribunal proceedings is not one that, in my view, can be characterized as coming within the category of irreparable harm. It is true that there could be serious inconvenience but that is not of itself tantamount to irreparable harm. It may be that examinations and cross-examinations may change if the respondent is successful on appeal and further information is produced and the matter is reheard. However, again, this is a matter of inconvenience and not irreparable harm. Whenever a case is sent back for rehearing as a result of appeal or judicial review, the parties are in the same position. Such rehearings are a regular part of the judicial process; I cannot conclude that this case is in some way unique so as to cause irreparable harm to the

respondent if indeed examinations and cross-examinations have to change.

Finally, I am not satisfied that the appeal will be rendered nugatory. If the respondent is successful, the Tribunal will conduct itself in the manner directed by the Federal Court of Appeal.

In view of my findings with respect to irreparable harm, it is unnecessary for me to deal with the balance of convenience. However, I would note, as counsel for the Director pointed out, that in this case there is a question of the public interest to be considered. Counsel cites the decision of the Supreme Court in *RJR - MacDonald Inc.*, which, while referring to Charter cases, is, in his view, equally applicable to ordinary stays of proceedings when public authorities, vested with the obligation of protecting the public interest, are involved. Sopinka and Cory, JJ. state:

In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with a duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.[6]

In the case at bar, the Director has the responsibility to protect the public interest in respect of competition in Canada in the manner conferred upon him by the relevant legislation. He may bring cases before the Competition Tribunal when he considers it necessary in order to carry out his responsibility of protecting competition. Here, the Director's activity in bringing this case before the Tribunal was undertaken pursuant to that responsibility. A strong case may exist therefore that there is irreparable harm if the Director is restrained from proceeding with that action.

In the present case, I indicated to counsel that if an adjournment were to be granted, the Tribunal could well be in a position to hear the merits of the case commencing on January 16, 1995. Such a delay is not lengthy and of itself might not be sufficient to constitute irreparable harm. However, as pointed out by counsel for the intervenor, there is no assurance that the matter could be heard commencing on that date. Perhaps the Federal Court of Appeal will not have rendered its decision by that date. Perhaps the losing party will seek to appeal to the Supreme Court of Canada. These eventualities are, of course, themselves speculative at this time. But they do give

rise to the concern that the delay involved may well be longer than three months. If so, the more lengthy delay may result in irreparable harm to the public interest in the manner indicated in *RJR - MacDonald Inc.*

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT the motion by the respondent to adjourn the hearing in this matter is dismissed.

DATED at Ottawa, this 5th day of October, 1994.

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

(s) Marshall Rothstein
Marshall Rothstein

[1] *Director of Investigation and Research v. A.C. Nielsen Company of Canada Limited* (22 September 1994), CT9401/82, Reasons and Order Regarding Matters Considered at Pre-Hearing Conference on September 14, 1994: Amendment to Notice of Application, Examination for Discovery, and Production of Documents at 19, [1994] C.C.T.D. No. 15 (QL).

[2] *Ibid.* at 7.

[3] *RJR - MacDonald Inc. v. A.G. Canada*, [1994] 1 S.C.R. 311 at 334.


[4] *Ibid.*

[5] *Ibid.* at 337-38.

[6] *Ibid.* at 346

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Reference: *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41

File no.: CT2002005

Registry document no.: 0004

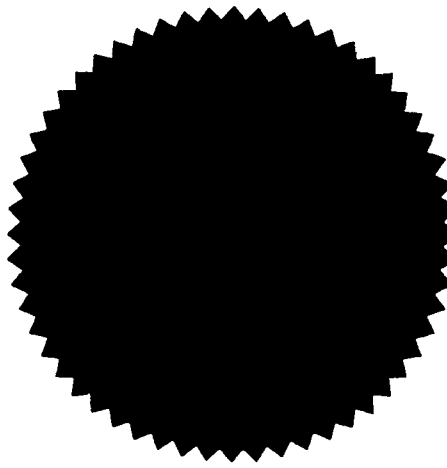
IN THE MATTER OF an application by Mr. Robert Gilles Gauthier, carrying on business as The National Capital News Canada, pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, for leave to make an application under section 75 of the Act.

B E T W E E N :

The National Capital News Canada
(applicant)

and

The Honourable Peter Milliken, M.P.
(respondent)



Decided on the basis of the written record.

Member: Dawson J. (presiding)

Date of reasons and order: 20021213

Reasons and order signed by: Dawson J.

REASONS AND ORDER REGARDING APPLICATION FOR LEAVE TO MAKE AN APPLICATION UNDER SECTION 75 OF THE *COMPETITION ACT*

I. INTRODUCTION

[1] This is the first application to the Competition Tribunal (“Tribunal”) brought by a party other than the Commissioner of Competition (“Commissioner”). Pursuant to recent amendments to the *Competition Act*, R.S.C. 1985, c. C-34, (“Act”) an application by a party other than the Commissioner can only be commenced if leave is granted by a judicial member of the Tribunal.

II. RELEVANT FACTS

[2] Mr. Robert Gilles Gauthier (“applicant”) filed, pursuant to subsection 103.1(1) of the Act, an application for leave (“leave application”) to make an application under section 75 of the Act (“application”) against the Honourable Peter Milliken. Mr. Milliken is named in his capacity as Speaker of the House of Commons (“Speaker”). Sections 75 and 103.1 of the Act are attached to these reasons as Schedule A.

[3] In substance, Mr. Gauthier, as proprietor of The National Capital News Canada (“National Capital News”), seeks an order under section 75 of the Act requiring that he and his associates and employees be provided with access to the Parliamentary Press Gallery, without becoming a member of Canadian Parliamentary Press Gallery Inc., and without “. . . being required to meet unfair or arbitrarily restrictive conditions of any other person, group or government official.”

[4] Contained within the leave application is a statement of grounds and material facts on which the applicant relies. The applicant also filed an affidavit sworn by him in support of the leave application. The applicant asserts that he has been substantially affected in his business, and is significantly precluded from carrying on business, due to his alleged inability to obtain full access to substantial supplies of information and to essential services (including listing on the Press Gallery journalist list) that are provided to his competitors by the Speaker. The Speaker is said to control such access on behalf of the Parliament of Canada. The affidavit describes the history of the National Capital News and its business environment, its alleged need to gain access to sources of information related to the Parliament and Government of Canada and the difficulties encountered over the years to obtain access. Exhibits attached to the affidavit consist of: (1) a copy of a March 25, 1994, letter from Mr. Brian A. Crane, Q.C., counsel for the Speaker of the House of Commons at the time; (2) a letter dated November 10, 1989, from Mr. Marcel R. Pelletier, Q.C., the House of Commons Law Clerk and Parliamentary Counsel, confirming that there has been no legislation ceding a certain power to the Parliamentary Press Gallery; (3) an order of the Ontario Court (General Division) dated January 8, 1996, prohibiting Mr. Gauthier from coming onto the premises of the Canadian Parliamentary Press Gallery; and (4) a letter dated October 16, 1995, from M.G. Cloutier, the Sergeant-at-Arms, House of Commons, confirming there is no restriction on Mr. Gauthier’s access to the buildings on Parliament Hill on the same basis as other visitors, with the exception of access to the Press Gallery premises.

[5] The affidavit does not describe in any detail the facilities and services provided to the media by the Speaker, the physical location of the Parliamentary Press Gallery, or the location at which other services are provided.

[6] The Speaker did not file any material in reply to the leave application. While a respondent to a leave application is not required to make any response, the Tribunal would generally be assisted by relevant material and submissions filed by a respondent in opposition to a leave application.

III. THE TEST FOR THE GRANTING OF LEAVE UNDER SECTION 103.1 OF THE ACT

[7] The test for the granting of leave is contained in subsection 103.1(7) of the Act. It provides as follows:

The Tribunal may grant leave to make an application under section 75 or 77 if it has *reason to believe* that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section. (emphasis added)

[8] In order to exercise its discretion to grant leave, the Tribunal must therefore be satisfied that it has reason to believe that: (1) the applicant is directly and substantially affected in the applicant's business by any practice referred to in section 75 or 77 of the Act; and (2) the alleged practice could be subject to an order under that section.

IV. THE REQUIREMENT OF "REASON TO BELIEVE"

[9] While the phrase "reason to believe" is new to the Act, it has been judicially considered in other contexts. In *Regina v. Rollins*, 80 C.C.C. (3d) 385, the British Columbia Supreme Court considered the phrase as it was contained in section 756 of the *Criminal Code*, R.S.C. 1985, c. 27 (1st Supp), which generally allowed a justice to place an offender in custody for observation where there was *reason to believe that evidence might be obtained* as a result of the observation that would be relevant to dangerous offender proceedings. The Court concluded that the expression "reason to believe" requires *reasonable grounds* for the "reason to believe". McKinnon J. wrote, at page 395, that:

I accept that s. 756 requires *reasonable grounds for the "reason to believe."* That is a precondition to the belief and in most cases will come from the medical opinion but might come from other sources as well; however, in any event, there nevertheless exists the requirement that the court's opinion must be supported by the evidence of at least one medical practitioner. There are, therefore, criteria which offer controlled direction in the exercise of the court's discretion and an ability to obtain a "settled meaning" in relation to the wording or test enunciated in s. 756 which can be used in each application.

I find that s. 756 is a broad test that is not unduly vague and which does set forth an “intelligible” standard, albeit not a difficult one to meet. (emphasis added)

[10] I accept that the requirement that the Tribunal has “reason to believe” does not require that it be satisfied that an applicant be directly and substantially affected, but rather that there are reasonable grounds to believe the applicant’s allegations that he has been so affected.

[11] As to the nature of the evidence required to establish reasonable grounds upon which to believe that an applicant has been directly and substantially affected, the Federal Court has considered the standard of proof required to show the existence of reasonable grounds for a belief.

[12] In *Canada (Attorney General) v. Jolly*, [1975] F.C. 216 (C.A.), the Federal Court of Appeal was asked to determine whether there were “reasonable grounds for believing” that an organization, with whom the respondent was associated, was a subversive organization. The Court concluded that, even after *prima facie* evidence had been adduced by the respondent denying the fact, it was only necessary for the Minister to show the existence of reasonable grounds for believing the fact. It was unnecessary for the Minister to go further and establish the subversive character of the organization. The Court stated at paragraph 18:

... But where the fact to be ascertained on the evidence is whether there are reasonable grounds for such a belief, rather than the existence of the fact itself, it seems to me that to require proof of the fact itself and proceed to determine whether it has been established is to demand the proof of a different fact from that required to be ascertained. *It seems to me that the use by the statute of the expression “reasonable grounds for believing” implies that the fact itself need not be established and that evidence which falls short of proving the subversive character of the organization will be sufficient if it is enough to show reasonable grounds for believing that the organization is one that advocates subversion by force, etc. In a close case the failure to observe this distinction and to resolve the precise question dictated by the statutory wording can account for a difference in the result of an inquiry or an appeal.* (emphasis added)

[13] Subsequently, in *Chiau v. Canada (Minister of Citizenship and Immigration)* (C.A.), [2001] 2 F.C. 297, the Federal Court of Appeal, when asked to determine the proper interpretation of the term “reasonable grounds” in the context of paragraph 19(1)(c.2) of the *Immigration Act of Canada*, R.S.C. 1985, c. I-2, stated at paragraph 60:

As for whether there were “reasonable grounds” for the officer’s belief, I agree with the Trial Judge’s definition of “reasonable grounds” . . . as a standard of proof that, while falling short of a balance of probabilities, nonetheless connotes “*a bona fide belief in a serious possibility based on credible evidence.*” See *Attorney General of Canada v. Jolly*, [1975] F.C. 216 (C.A.). (emphasis added)

Leave to appeal to the Supreme Court of Canada was denied (see [2001] S.C.C.A. No. 71).

[14] Accordingly, on the basis of the plain meaning of the wording used in subsection 103.1(7) of the Act and the jurisprudence referred to above, I conclude that the appropriate standard under subsection 103.1(7) is whether the leave application is supported by sufficient credible 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, and that the practice in question could be subject to an order.

V. APPLICATION OF THE TEST TO THIS LEAVE APPLICATION

[15] I turn now to whether the evidence before the Tribunal is sufficient to satisfy it that there is reason to believe that:

- (1) the applicant is directly and substantially affected in his business by a practice referred to in section 75 of the Act; and
- (2) the alleged practice could be subject to an order under section 75 of the Act.

[16] It is the second element of the test which I consider to be dispositive of the leave application. I conclude that, for the following reasons, the applicant has failed to establish that the alleged reviewable practice could be subject to an order under section 75 of the Act.

[17] The order sought by the applicant against the Speaker is an order that:

. . . pursuant to Section 75(1), (2) and (3) of the *Competition Act*, Restrictive Trade Practices, Refusal to Deal . . . full access to the Press Gallery facilities and services, including mailbox, listing and other benefits, be provided immediately to the applicant and his employees and associates without further delay . . . (application, paragraph 10)

[18] In the statement of grounds and material facts the applicant alleges that access to the services which he seeks is controlled by the Speaker, ". . . who controls such access on behalf of the Parliament of Canada." (application, paragraph 3) The evidence adduced by the applicant in his affidavit as it touches on this point is as follows:

6. I have invested 20 years of my life and more than my own financial resources into this business and have been seriously impeded by the Speaker of the House of Commons who finances and controls the facilities and services provided for the media by the House of Commons.

. . .

17. The House of Commons provides substantial facilities and services made available to members of the media and which allow journalists and their employers to earn their living and realize serious commercial rewards.

. . .

36. The facilities and services provided by the House of Commons fall under the direct control of the Speaker of the House of Commons who has the sole authority to determine who may have access to the Press Gallery facilities and services.
- ...
38. The power to regulate the admission of strangers to the precincts of Parliament, including the Press Gallery, resides with Parliament alone and has customarily been exercised by the Speaker. (Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 16th ed. London: Butterworths, 1976.)
39. There has been no delegation of that power by either Parliament itself nor the Speaker of the House of Commons to the privately-owned Canadian Parliamentary Press Gallery Corporation, as confirmed by the House of Commons Law Clerk and Parliamentary Counsel, in his letter 10 November 1989 to the applicant's Legal Counsel at that time, **being Exhibit "B" to this my affidavit.**
40. The applicant alleges that the Speaker is the sole person in control of the media facilities and services and therefore to the resultant commercial benefits derived by journalists and publishers who have access.
41. The Speaker has the duty to administer these publicly-funded facilities and services in a fair manner pursuant to the provisions of the *Competition Act*.

[19] The applicant is, I believe, correct that it is the Speaker who alone has the power to control access to any part of the House, including the Press Gallery. What is significant, however, is that the Speaker does so through constitutional powers and parliamentary privilege.

[20] The origin and nature of parliamentary privilege was reviewed by the Supreme Court of Canada in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)* [1993] 1 S.C.R. 319. There, Justice McLachlin, as she then was, writing for the majority noted that Canadian legislative bodies possess those historically recognized inherent constitutional powers which are necessary to their proper functioning. Writing with respect to the historical tradition of parliamentary privilege, Justice McLachlin stated at pages 378 to 379:

... It has long been accepted that in order to perform their functions, legislative bodies require certain privileges relating to the conduct of their business. It has also long been accepted that these privileges must be held absolutely and constitutionally if they are to be effective; the legislative branch of our government must enjoy a certain autonomy which even the Crown and the courts cannot touch.

The Parliamentary privilege of the British Parliament at Westminster sprang originally from the authority of Parliament as a court. Over the centuries, Parliament won for itself the right to control its own affairs, independent of the Crown and of the courts. The

courts could determine whether a parliamentary privilege existed, but once they determined that it did, the courts had no power to regulate the exercise of that power. One of those privileges, held absolutely and deemed to be constitutional, was the power to exclude strangers from the proceedings of the House.

[21] Justice McLachlin went on to confirm that Canadian legislative bodies properly claim as inherent privileges those rights which are necessary to their capacity to function as legislative bodies (page 381), and, added at page 383, that:

... If a matter falls within this necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not inquire into questions concerning such privilege. All such questions will instead fall to the exclusive jurisdiction of the legislative body. (emphasis added)

[22] As to the scope of that exclusive jurisdiction, at page 384 Justice McLachlin wrote:

... The parameters of this jurisdiction are set by what is necessary to the legislative body's capacity to function. So defined, the principle of necessity will encompass not only certain claimed privileges, but also the power to determine, adjudicate upon and apply those privileges. Were the courts to examine the content of particular exercises of valid privilege, and hold some of these exercises invalid, they would trump the exclusive jurisdiction of the legislative body, after having admitted that the privilege in issue falls within the exclusive jurisdiction of the legislative body. The only area for court review is at the initial jurisdictional level: is the privilege claimed one of those privileges necessary to the capacity of the legislature to function? A particular exercise of a necessary privilege cannot then be reviewed, unless the deference and the conclusion reached at the initial stage be rendered nugatory. (emphasis added)

[23] One of the specific privileges discussed by Justice McLachlin was the parliamentary privilege to eject strangers from the House and its precincts. She observed that this ancient privilege was now reposed in the Speaker "who alone has the power, whenever he or she sees fit, to order the withdrawal of strangers from any part of the House" (page 386). This privilege is necessary because the legislative chamber is at the core of the system of representative government (page 387).

[24] J.P. Joseph Maingot, Q.C., in *Parliamentary Privilege in Canada*, 2nd Ed. (Montreal: McGill-Queen's University Press, 1997) enumerates the rights, privileges and powers of the Senate and House of Commons in Chapter 11. One such privilege is the right to regulate internal affairs free from interference. This is said to include the right to administer internal affairs both within its precincts and beyond the debating chamber.

[25] No evidence or information was provided to suggest that any of the facilities or services that the applicant seeks fall outside the scope of Parliamentary privilege. The applicant asserts that the facilities and services which he seeks are provided by the House of Commons, and are

financed and controlled by the Speaker who exercises Parliament's power to regulate the admission of strangers to its precincts.

[26] Applying the principles articulated in *New Brunswick Broadcasting*, cited above, to the evidentiary record before me, I am satisfied that the Speaker's alleged refusal to grant to the applicant full access to the Parliamentary Press Gallery facilities and services is an exercise of the parliamentary privilege to control access to the House and its precincts and to regulate the internal affairs of the House. Such privilege also encompass the power to adjudicate and apply those privileges.

[27] A similar conclusion was reached by the Ontario Court (General Division) in *Gauthier v. Canada (Speaker of the House of Commons)*, (1994), 25 C.R.R. (2d) 286 where Madam Justice Bell found that the Court did not have jurisdiction to review the Speaker's decision to deny the plaintiff access to the precincts of Parliament.

[28] Just as a court may not examine a particular exercise of these privileges, I conclude that the Tribunal is without jurisdiction to embark upon such examination. The Tribunal is, pursuant to section 9 of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), a court of record and principles of Parliamentary privilege are as important and applicable to it as they are to other courts. Therefore the practice complained of could not be the subject of any order of the Tribunal under section 75 of the Act.

[29] It follows that the Tribunal does not have, and can not have, any basis upon which to believe that the practice complained of by the applicant could be subject to an order. This requirement of subsection 103.1(7) of the Act is not met and therefore the application for leave must fail. In view of this conclusion it is unnecessary to consider whether the applicant adduced sufficient evidence to meet the first element of the test for leave.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[30] The leave application is denied.

DATED at Ottawa, this 13th day of December, 2002.

SIGNED on behalf of the Tribunal by the judicial member.

(s) Eleanor R. Dawson

[31] Schedule A: Legislative References to sections 75 and 103.1 of the Act.

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

- (a) a person is *substantially affected in his business* or is precluded from carrying on business due to his *inability to obtain adequate supplies of a product anywhere in a market on usual trade terms*,
- (b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of *insufficient competition among suppliers* of the product in the market,
- (c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,
- (d) the product is in ample supply, and
- (e) the refusal to deal is having or is likely to have *an adverse effect on competition in a market*,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada. (emphasis added)

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

(3) For the purposes of this section, the expression “trade terms” means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person’s application under section 75 or 77.

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75 or 77 is sought.

(3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought

- (a) is the subject of an inquiry by the Commissioner; or
- (b) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order under section 75 or 77 is sought.

(4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(a) or (b) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75 or 77.

(5) The Tribunal shall as soon as practicable after receiving the Commissioner's certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.

(6) A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and shall serve a copy of the representations on any other person referred to in subsection (2).

(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75 or 77 must be made. The application must be made no more than one year after the practice that is the subject of the application has ceased.

(9) The Tribunal must give written reasons for its decision to grant or refuse leave and send copies to the applicant, the Commissioner and any other person referred to in subsection (2).

(10) The Commissioner may not make an application for an order under section 75, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a matter for which the Tribunal has granted leave under subsection (7), if the person granted leave has already applied to the Tribunal under section 75 or 77.

(11) In considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it.

(12) If the Commissioner has certified under subsection (3) that a matter in respect of which leave was sought by a person is under inquiry and the Commissioner subsequently discontinues the inquiry other than by way of settlement, the Commissioner shall, as soon as practicable, notify that person that the inquiry is discontinued.

REPRESENTATIVE

For the applicant:

Robert Gilles Gauthier, carrying on business as the National Capital News Canada

Robert Gilles Gauthier

For the respondent:

The Honourable Peter Milliken, M.P.

not represented



Reference: *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1

File no.: CT2003008

Registry document no.: 0011

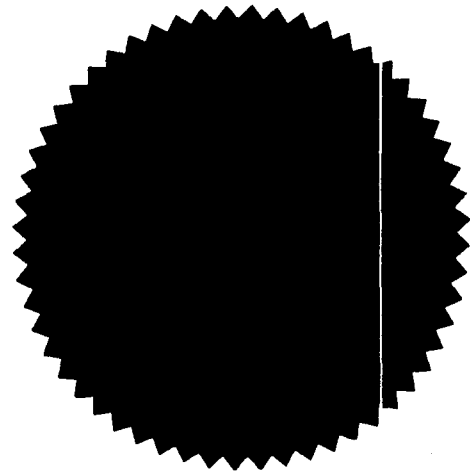
IN THE MATTER OF an application by Barcode Systems Inc., for an order pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, granting leave to bring an application under section 75 of the Act.

B E T W E E N :

Barcode Systems Inc.
(applicant)

and

Symbol Technologies Canada ULC
(respondent)



Decided on the basis of the written record.

Member: Lemieux J. (presiding)

Date of reasons and order: 20040115

Reasons and order signed by: Lemieux J.

REASONS AND ORDER REGARDING APPLICATION FOR LEAVE TO MAKE AN APPLICATION UNDER SECTION 75 OF THE *COMPETITION ACT*

[1] Barcode Systems Inc. (“Barcode”) has applied to the Competition Tribunal (the “Tribunal”) pursuant to subsection 103.1(1) of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”) for leave to make an application under section 75 of that Act.

[2] Barcode alleges Symbol Technologies Canada ULC (“Symbol”), a subsidiary of Symbol Technologies Inc. (“Symbol US”), is refusing to supply it with barcode scanners contrary to the provisions of section 75 of the Act and seeks an order, if leave is granted and appropriate findings are made by the Tribunal, that Symbol accept Barcode as a customer on the “usual trade terms” forthwith upon the issuance of such an order.

[3] This application for leave is only the second such application to the Tribunal brought under the recent amendments to the Act providing for what has been termed as “a private access action” because the Commissioner of Competition (the “Commissioner”) does not initiate the proceeding.

[4] The first application for leave was decided by Justice Dawson in *National Capital News v. Milliken*, 2002 Comp. Trib. 41 (“National Capital News”), a decision which I endorse entirely.

[5] The test for the Tribunal granting leave is set out in subsection 103.1(7) of the Act. It provides as follows:

The Tribunal may grant leave to make an application under section 75 or 77 if *it has reason to believe that the applicant is directly and substantially affected in the applicant[']s business by any practice referred to in one of those sections that could be subject to an order under that section.* (emphasis added)

[6] In this case, the practice that is complained of and that could be subject to an order under section 75 of the Act is Symbol’s refusal to sell its products to Barcode after Symbol terminated its ten year relationship with Barcode in March 2003.

[7] I make the following points about the Tribunal’s test for granting leave.

[8] What the Tribunal must have reason to believe is that Barcode is directly and substantially affected in its business by Symbol’s refusal to sell. The Tribunal is not required to have reason to believe that Symbol’s refusal to deal has or is likely to have an adverse effect on competition in a market at this stage.

[9] I make this observation because Symbol, in its vigorous opposition to leave being granted, described what, in its view, was a highly competitive marketplace and argued that Barcode had provided no evidence as to this requirement as described in paragraph 75(1)(e) of the Act.

[10] As I read the Act, adverse effect on competition in a market is a necessary element to the Tribunal finding a breach of section 75 and a necessary condition in order that the Tribunal make a remedial order under that section. It is not, however, part of the test for the Tribunal's granting leave or not.

[11] Justice Dawson in *National Capital News*, *supra*, described what kind of proof the Tribunal had to have before it in order to have "reason to believe". She concluded that

... the leave application [must be] supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in [its] business by a reviewable practice [the refusal to deal here], and that the practice in question could be subject to an order.

[12] What this standard of proof means is that the applicant Barcode must advance sufficient credible evidence supported by an affidavit to satisfy the Tribunal that there is a reasonable possibility that its business has been directly and substantially affected because of Symbol's refusal to deal.

[13] The Tribunal measures the evidence on a scale which is less than the balance of probabilities. It is not sufficient, however, that the evidence shows a mere possibility that Barcode's business has been directly and substantially affected by Symbol's refusal to supply.

[14] Barcode's evidence was to the effect Symbol's refusal to supply, either directly or by preventing Symbol distributors or Symbol resellers from doing so, has now caused a substantial loss of revenues to the point where it, if continued, would force Barcode out of business. On December 19, 2003, on petition from the Royal Bank of Canada, an interim Receiver was appointed of all the property, assets and undertakings of Barcode.

[15] Barcode states Symbol's actions also critically impacted its ability to perform its ongoing maintenance contracts.

[16] Barcode asserts that, as of the filing of its application, 50 percent of its employees have been laid off.

[17] Symbol filed written representations and affidavits to counter Barcode. Symbol outlines the reasons why it is not supplying Barcode with the Symbol products. Specifically it denies that Barcode's business has been substantially affected. It says Barcode has not been precluded from carrying on business by any actions attributable to Symbol.

[18] Symbol states, if Barcode suffered any loss, it is because it breached its contract with Symbol or because of factors which have nothing to do with Symbol such as declining market conditions generally, increased competition from suppliers, exchange rate changes and Barcode's failure to meet usual trade terms with its current suppliers.

[19] On an application for leave, it is not the function of the Tribunal to make credibility findings based on affidavits which have not been cross-examined. I note that the Act requires an applicant to support an application for leave by a sworn affidavit while, for a person opposing leave only written representations are contemplated.

[20] These provisions confirm that the Tribunal's role when granting leave is a screening function simply deciding on the sufficiency of evidence advanced.

[21] There may be situations, however, where it can be demonstrated that an applicant's evidence is simply not credible without engaging the Tribunal in weighing contested statements from opposing parties and the applicant. This is not the case here.

[22] I close on a procedural point. Both Symbol and Barcode have sought leave to file additional material as a result of the limited right of reply granted by the Tribunal to Barcode, as an exception in the interest of justice.

[23] In only exceptional circumstances will the Tribunal grant parties a right of reply in leave applications which are to be dealt with expeditiously.

[24] The Tribunal sees no need to have additional evidence before it as proposed by Barcode or Symbol.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[25] The application for leave is granted.

[26] The Tribunal is prepared to expedite the hearing of the application and invites the parties to communicate with the Deputy Registrar of the Tribunal for this purpose.

DATED at Ottawa, this 15th day of January, 2004.

SIGNED on behalf of the Tribunal by the judicial member.

(s) François Lemieux

REPRESENTATIVES

For the applicant:

Barcode Systems Inc.

David P. Church

For the respondent:

Symbol Technologies Canada ULC

Colin MacArthur, Q.C.



Reference: *Commissioner of Competition v. Sears Canada Inc.*, 2003 Comp. Trib. 20

File no.: CT2002004

Registry document no.: 0092

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

AND IN THE MATTER OF an inquiry pursuant to subparagraph 10(1)(b)(ii) of the *Competition Act* relating to certain marketing practices of Sears Canada Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.01 of the *Competition Act*.

B E T W E E N :

The Commissioner of Competition
(applicant)

and

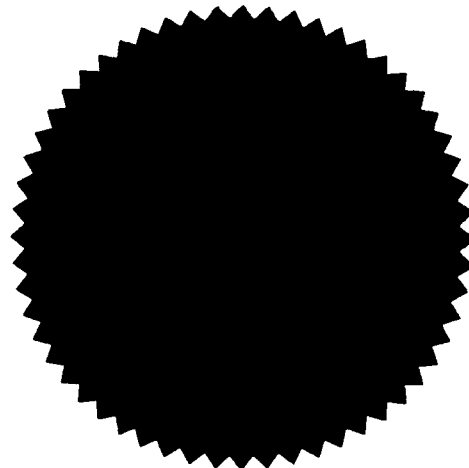
Sears Canada Inc.
(respondent)

Date of hearing: 20031021

Member: Dawson J. (presiding)

Date of order: 20031021

Order signed by: Madam Justice Eleanor R. Dawson



**REASONS REGARDING SEARS' NOTICE OF MOTION FOR ADJOURNMENT
AND/OR STAY OF PROCEEDINGS**

- [1] On October 14, 2003 Sears filed a notice of motion in which it sought an order:
- (i) abridging the time for service of this motion;
 - (ii) staying that part of the Competition Tribunal's (the "Tribunal") order dated October 6, 2003 which dismissed Sears' motion for leave to amend its pleading, pending the disposition of the appeal from that order to the Federal Court of Appeal; and
 - (iii) adjourning the hearing of this matter pending the disposition of the appeal.
- [2] The motion was argued on Monday, October 20, 2003 at the commencement of the hearing into the inquiry of the Commissioner of Competition's (the "Commissioner") application for an order pursuant to section 74.10 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act").
- [3] No affidavit evidence was filed supporting the motion by Sears, nor was affidavit evidence filed by the Commissioner, who opposes the granting of any stay or adjournment.
- [4] The Commissioner did not oppose the granting of short leave, and I am satisfied that this is an appropriate case for the granting of short leave. These are my reasons, delivered orally, for refusing the requested stay or adjournment. These reasons will be edited for grammar and readability, but not substance, and then will be delivered in writing in the Tribunal's usual format.
- [5] I will deal first with that part of the motion which requests a stay of the Tribunal's order of October 6, 2003. That order, as noted, refused leave to Sears to file a fresh as amended response to the Commissioner's application.
- [6] Sears did not argue this part of the motion strenuously, indicating that this relief was sought out of an abundance of caution in conjunction with the requested remedy of an adjournment. Given that the order under appeal did not require Sears or the Commissioner to take any action, I am unsure of the effect a stay of the order would have. The original response to the Commissioner's application filed by Sears would remain extant and would govern the upcoming hearing. Given that a stay of the order refusing leave to amend would provide no effective remedy, I am not prepared to issue a stay of the order refusing leave to amend.
- [7] I next turn to the second head of relief sought, the request that the hearing scheduled to start on October 20, 2003 be adjourned pending adjudication by the Federal Court of Appeal upon the appeal from the order refusing leave.
- [8] The parties agree that for such adjournment to be granted Sears must establish that it meets the tri-partite grounds established in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The Tribunal has previously held that this is the test to be applied when an adjournment is sought pending the appeal of an interlocutory order of the Tribunal. See: *Canada (Competition Act, Director of Investigation and Research) v. The D & B Companies of Canada*, [1994] C.C.T.D. No. 17. This decision was upheld by Chief Justice Isaac of the Federal Court of

Appeal on a motion for a stay of proceedings subsequently brought in the Federal Court of Appeal. Chief Justice Isaac noted that he was in substantial agreement with the analysis of the Tribunal. See: *Canada (Director of Investigation and Research) v. The D & B Companies of Canada*, [1994] F.C.J. No. 1504 at paragraph 18.

[9] The three grounds which must each be established, because the grounds are conjunctive and not disjunctive, are:

- (i) a serious issue to be tried;
- (ii) refusal of the adjournment would cause irreparable harm to Sears; and
- (iii) the balance of convenience favours granting the stay. In this case this means that Sears must show that the harm to it if the adjournment is refused is greater than the harm to the Commissioner if the adjournment is granted.

[10] Now, considering each element of the test, the threshold for establishing a serious issue is low. The Commissioner has conceded that the issue in the present case meets this threshold.

[11] Irreparable harm requires, as a matter of law, that the applicant must show that the refusal of relief "... could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application". (See: *RJR MacDonald, supra* at paragraph 58.) The applicant is required to show irreparable harm that is clear and non-speculative. The word "irreparable" refers to the nature of the harm to be suffered.

[12] In this case, Sears asserts in its notice of motion that if the adjournment is refused it will be prevented from defending itself as outlined in its fresh as amended response. I agree. The question is whether this reaches the level of irreparable harm as opposed to inconvenience, or a matter which may be otherwise remedied. Sears argues that this harm cannot be remedied or compensated in any way, including on appeal, because on appeal the record will have been set. Sears says therefore that its appeal will be rendered nugatory if no adjournment is granted.

[13] However, there is no evidence before the Tribunal of evidence which Sears wishes to lead, but which it will be prohibited from leading on the basis of the existing pleading. Similarly, Sears has not set out in any detail any legal argument not available to it on the basis of the existing pleading. Counsel for Sears argued that Sears wants to make its argument clearer with respect to section 74.01 of the Act, which is the gravamen of its defence. This, in my view, falls short of establishing that the defence is inadequately pleaded so Sears will be irreparably harmed if it has to proceed on this defence. Sears continues to argue (at paragraph 3 of its written submissions and orally) that the proposed amendments are "... largely stylistic rather than substantive in nature." This is not consistent with irreparable harm being caused if Sears has to proceed on the basis of its existing pleading.

[14] To the extent Sears argues irreparable harm because, even if successful on appeal, the “record will be set” so that the appeal becomes nugatory, this seems to pre-suppose that the hearing before the Tribunal would have concluded before the appeal is heard and decided by the Federal Court of Appeal (otherwise the record would not be finally set). In the event that the Tribunal hearing had concluded, and Sears had been unsuccessful before the Tribunal but was later successful on its interlocutory appeal to the Federal Court of Appeal, it would be within the jurisdiction of the Court of Appeal to remit the entire matter for rehearing, if satisfied that was appropriate and necessary. This would undoubtedly amount to serious inconvenience, but as Mr. Justice Rothstein, sitting as the presiding judicial member of the Tribunal, wrote in *D & B Companies*, *supra* at page 4 of the report:

The issue of disruption to Tribunal proceedings is not one that, in my view, can be characterized as coming within the category of irreparable harm. It is true that there could be serious inconvenience but that is not of itself tantamount to irreparable harm. It may be that examinations and cross-examinations may change if the respondent is successful on appeal and further information is produced and the matter is reheard. However, again, this is a matter of inconvenience and not irreparable harm. Whenever a case is sent back for rehearing as a result of appeal or judicial review, the parties are in the same position. Such rehearings are a regular part of the judicial process; I cannot conclude that this case is in some way unique so as to cause irreparable harm to the respondent if indeed examinations and cross examinations have to change.

[15] Similarly, I cannot conclude that Sears has established irreparable harm.

[16] In oral argument counsel for Sears advised that the Court of Appeal has time within the next one to three weeks to hear an interlocutory appeal, and counsel for the Commissioner indicated that he had instructions to consent to the appeal being expedited. I have given careful consideration to adjourning the proceeding on this basis, however after reflection I have concluded that such adjournment is not warranted for the following two reasons. First, Sears has not established, in my view, irreparable harm. This is a necessary prerequisite at law to an adjournment. Second, even if the case proceeds before the Tribunal this week on the constitutional issue, and counsel confirmed that this issue could be proceeded with notwithstanding the pending appeal, it is likely that if the hearing is thereafter adjourned awaiting hearing and adjudication of the appeal, sufficient time would be lost to make it impossible for the hearing before the Tribunal to be concluded in the time allotted. (I note parenthetically that on May 30, 2003, the Tribunal ordered that this matter would be heard for four weeks from October 20, 2003 to November 14, 2003, and that final arguments would be heard from December 1, 2003 to December 5, 2003.) Failure to complete the hearing will result in a significant delay in arranging for the proceeding to be rescheduled. That delay and inconvenience is not, in my view, warranted in the absence of a finding of irreparable harm if the matter is not adjourned.

[18] I am satisfied however, that if the parties move to expedite the appeal it may well be heard and decided before the evidence is closed before the Tribunal. This further reduces the possibility of harm to Sears if the interlocutory appeal is successful. The Tribunal would certainly

accommodate a one-half day or one day adjournment for the purpose of allowing the interlocutory appeal to be argued in the Federal Court of Appeal.

[19] In view of my finding on irreparable harm it is not necessary for me to deal with the balance of convenience.

[20] For these reasons, the motion for a stay and/or an adjournment is dismissed.

DATED at Ottawa, this 21st day of October, 2003.

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

(s) Eleanor R. Dawson

COUNSEL

For the applicant:

The Commissioner of Competition

**John L. Syme
Arsalaan Hyder**

For the respondent:

Sears Canada Inc.

**William W. McNamara
Marvin Huberman
Stephen Scholtz
Abbas Sabur (student-at-law)**