

CANADA COMPETITION TRIBUNAL

BETWEEN:

1177057 ONTARIO INC. c.o.b. as
BROADVIEW PHARMACY

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED	CB. JUN 10 2004
REGISTRAR - REGISTRAIRE	
OTTAWA, ON	5(a)

Applicant

- and -

WYETH CANADA INC.

Respondent

**WRITTEN REPRESENTATIONS OF THE RESPONDENT,
WYETH CANADA**

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OVERVIEW

1. The Respondent, Wyeth Canada ("Wyeth") opposes the Applicant's ("Broadview") application for leave to make application under section 75 of the *Competition Act*. There is no reason to believe that Broadview has or will suffer direct and substantial effects from the alleged conduct of Wyeth, or that such conduct could be subject to an order under section 75 of the Act. Accordingly, the statutory test for granting leave under section 103.1 of the Act has not been met and the application for leave should be dismissed.

PART I - THE FACTS

Wyeth Canada

2. Wyeth is a partnership, formed under the laws of Ontario between Wyeth Canada Inc. and Wyeth Holdings Canada Inc. Wyeth's business involves the development, manufacture and distribution of pharmaceutical medicines and other health care products in Canada. In the normal course of its business, Wyeth distributes its products both through distributors and directly to retail pharmacies in Canada under its usual terms of trade.

Affidavit of Terri Power, sworn June 9, 2004 (the "Power Affidavit"), at paras. 2-3.

3. Wyeth's usual terms of trade stipulate that its products are intended for sale in Canada only, and require that purchasers agree not to sell or otherwise dispose of Wyeth products to any person who the purchaser knows, or ought to know, will export such products from Canada. The usual terms of trade further require that the purchaser shall provide such information, records or assurances that Wyeth may reasonably request from time to time to allow Wyeth to confirm that the purchaser has complied with these obligations.

Power Affidavit at para. 4.

Background to the Application

4. Wyeth has provided pharmaceuticals to Broadview Pharmacy ("Broadview") under the usual terms of trade for several years. Early in 2004, however, Wyeth observed that the sales volumes of Broadview had grown unexpectedly high. Accordingly, Wyeth conducted an audit of distribution to Broadview and determined (and Broadview has subsequently admitted) that Broadview had been supplying some pharmaceutical medicines to internet pharmacy businesses for sale to the United States, contrary to the usual terms of trade.

Power Affidavit at para. 5.

5. By letter dated April 26, 2004, Wyeth informed its Canadian distributors that they should only sell Wyeth products to purchasers that have been approved by Wyeth. Distributors were also informed that any purchaser that had not been approved by Wyeth should be advised to contact Wyeth directly in order to determine how they could obtain such approval. Broadview was not an approved purchaser.

Power Affidavit at para. 6.

6. Subsequently, by undated letter, Broadview advised Wyeth that it had altogether ceased selling to internet pharmacies, and requested that Wyeth resume distribution to Broadview.

Power Affidavit at para. 7.

7. In response to this request, it was Wyeth's desire to resume distribution of its pharmaceutical medicines to Broadview. However, in light of Broadview's previous violation of the usual terms of trade, Wyeth sought to confirm Broadview's representation that it had and would continue to refrain from selling Wyeth pharmaceuticals to internet pharmacies by requesting, in accordance with its usual terms of trade, that Broadview provide data regarding its current domestic usage of Wyeth products. In or about May, 2004, Wyeth orally requested Broadview to provide the required data. Broadview did not comply with this request.

Power Affidavit at paras. 8-9

8. In a letter dated June 4, 2004, Wyeth again requested the data from Broadview. No response was received from Broadview and, accordingly, Wyeth has no assurance that Broadview will, if distribution resumes, abide by the usual terms of trade.

Power Affidavit at para. 9-10.

Effects of the Alleged Conduct

9. As is acknowledged in the affidavit of Herbert Cohen, only 5% of Broadview's annual sales of pharmaceutical drugs (not its total sales) are from the sale of drugs manufactured by Wyeth and, at present, it is obtaining supplies of Wyeth products from alternative sources. However, Mr. Cohen speculates that Broadview will not be able to obtain these products in the future, and that if it ceases to carry Wyeth products, its customers will go elsewhere to fulfill multiple prescriptions. Broadview does not provide any evidence of the percentage of its clients that have multiple prescriptions filled at its store, or of the percentage of those prescriptions that include Wyeth products.

Affidavit of Herbert Cohen, sworn May 10, 2004 (the "Cohen Affidavit") at paras. 7, 12, 13.

Effect on Competition

10. Broadview also acknowledges that there is "very significant competition" among retail pharmacies in the area of Toronto in which Broadview is located. In fact, according to the affidavit of Mr. Cohen, there are six other retail pharmacies located within a two-block radius of Broadview's location.

Cohen Affidavit at para. 5.

PART II - ISSUES AND THE LAW

11. The issue raised by this application is whether Broadview has established sufficient reason to believe that it is directly and substantially affected in its business by an action on Wyeth's part that could be subject to an order under section 75.

12. The test for granting leave to bring a private application under section 75 of the Act is set out at subsection 103.1(7) of the Act as follows:

103.1 (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 his or her business by any practice referred to in one of those sections that could be subject to an order under that section.

Competition Act, R.S.C. 1985, c. C-34, as amended, s.103.1.

13. Section 103.1 creates a two-part test for leave, both elements of which must be satisfied before leave to bring an application under section 75 will be granted. The applicant must put sufficient evidence before the Tribunal to satisfy it that there is reason to believe that:

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

National Capital News Canada v. Canada (Speaker, House of Commons), [2002] C.C.T.D. No. 38, at para. 15.

14. In *National Capital News*, *supra*, Dawson J., after having reviewed relevant jurisprudence, concluded that the "reason to believe" standard provided for in subsection 103.1(7) requires the Tribunal to determine:

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. [emphasis added]

National Capital News, supra at para. 14.

15. Here, where Broadview admits that only a small proportion of its products are supplied by Wyeth, and that there is “very significant competition” within its market, neither branch of the leave test has been satisfied.

Broadview has failed to establish any direct and substantial effect on its business

16. The allegation of direct and substantial effect advanced by Broadview fails to rise to the level required in order for leave to be granted under section 103.1.

17. Broadview admits that only 5% of its sales of pharmaceutical drugs are from the sale of drugs manufactured by Wyeth, and admits that, at present, Broadview has not experienced any effect from the actions of Wyeth. Wyeth submits that, even if accepted as true, Broadview’s allegation of a 5% effect on total sales cannot be considered “substantial.” Moreover, Broadview’s figure of 5% refers only to its sales of pharmaceutical drugs, not to Broadview’s total gross revenues, which would include sales of non-pharmaceutical drug products.

Cohen Affidavit at paras. 7 and 12.

18. Accordingly, Broadview has provided no evidence that Wyeth’s actions would result in a substantial effect on its business.

19. While the “reason to believe” standard does not place a high evidentiary standard on the applicant, the Tribunal must nonetheless be satisfied that the evidence establishes more than a “mere possibility” that there has been a direct and substantial effect on the applicant’s business. As Justice Lemieux held in *Barcode Systems Inc. v. Symbol Technologies Canada ULC*:

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. [emphasis added]

Barcode Systems Inc. v. Symbol Technologies Canada ULC, [2004] C.C.T.D. No. 1 at para. 13.

See also: *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, [2004] C.C.T.D. No. 4.

20. Further, the future effects of Wyeth's actions suggested by Broadview are entirely speculative. Broadview provides no statistics relating to the number of customers that have multiple prescriptions filled at Broadview, nor any evidence of what proportion of those multiple prescriptions include Wyeth pharmaceuticals. Additionally, Broadview provides no evidence that such customers would cease to shop at its store.

Cohen Affidavit at para. 13.

21. These facts differ greatly from those in *Barcode, supra* and *Allan Morgan, supra*, in which the applicants were able to provide real evidence of a substantial effect caused by the respondents' actions. In *Barcode, supra*, for instance, the respondent was the applicant's main supplier and, as a result of its refusal to deal, the applicant provided evidence that it had been forced to lay off 50% of its employees, and that an interim receiver had been appointed on all of its property, assets and undertakings. In *Allan Morgan, supra*, the applicant provided significant data relating to its past sales and the loss in sales and profits that had occurred since the respondent had ceased to supply its products.

Barcode, supra at paras. 2, 14-16.

Allan Morgan, supra at paras. 15-21.

22. None of these features figure in the herein application, where the alleged effects are both minor and are, moreover, entirely speculative. Accordingly, Broadview has failed to satisfy the first branch of the section 103.1 leave test.

The alleged practice could not be subject to a section 75 order.

23. The second branch of the leave test created by subsection 103.1(7) requires that the Tribunal determine whether there is reason to believe that the alleged practice, even if it has had a direct and substantial effect on the applicant, could be subject to an order under section 75.

24. It was this second branch of the test that led the Tribunal to refuse leave in *National Capital News, supra*. In that case, Dawson J. held that the “the applicant has failed to establish that the alleged reviewable practice could be subject to an order under section 75 of the Act.” Dawson J. reached this conclusion on the basis that the applicant in that case had failed to establish a reasonable basis to believe that the Tribunal would have the constitutional jurisdiction to make a section 75 order against the Speaker of the House of Commons.

National Capital News, supra at para. 16.

25. While the issue here is not one of jurisdiction, the second part of the test that was adopted in *National Capital News*, and which applies the plain meaning of the words of section 103.1(7), is equally applicable in this case. The applicant must establish a reasonable basis for believing that, given the terms of section 75, the actions of Wyeth could be subject to an order under that section.

26. Section 75 of the Act provides that:

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, with 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.

Competition Act, supra at s. 75

27. In order for a section 75 order to issue, an applicant must satisfy the Court that all five elements of section 75 have been met. If one of the five elements is not present, the application must fail, and no section 75 order can issue.

28. Here, it is evident that a section 75 order could not issue for at least 3 reasons.

29. First, as indicated above, Broadview has failed to establish reason to believe that its business has or will be substantially affected by the actions of Wyeth.

30. Second, section 75 permits the Tribunal to issue an order requiring that a product be supplied "on usual trade terms." Here, Wyeth has offered to sell Broadview its products on the basis of its usual terms of trade, which include:

- (1) a requirement that the purchaser not sell or otherwise dispose of Wyeth products to a person who the purchaser knows or ought to know will export such products from Canada to any other jurisdiction, and
- (2) a requirement that the purchaser shall provide such information, records or assurances that Wyeth may request to permit Wyeth to confirm that the purchaser has complied with its obligations not to export Wyeth products.

Power Affidavit at paras. 8-9.

31. Broadview has not responded to this offer.

Power Affidavit at para. 10

32. Accordingly, Broadview is in fact asking the Tribunal to either (1) issue an order, the terms of which have already been agreed to by Wyeth, or (2) issue an order requiring Wyeth to supply products to Broadview on terms more favourable than Wyeth's usual terms of trade. In the former case, given Wyeth's proposal, the order sought by Broadview would accomplish nothing and would be a waste of the Tribunal's limited resources. In the latter case, Broadview would be seeking a remedy that is not authorized by section 75, and therefore could not be subject to an order of the Tribunal.

33. Third, it is admitted by Broadview that there is "very significant competition" in the marketplace in which it does business. Accordingly, there is no evidence that any refusal to deal on the part of Wyeth will have an adverse effect on competition in the market, the fifth element of the reviewable practice defined in section 75. As such, there is no reason to believe that a section 75 order could issue from the fact scenario described by Broadview. If one element of the section 75 test is not present, no order can issue.

Cohen Affidavit at para. 5.

34. In putting forth these arguments, Wyeth submits that the decisions of the Tribunal in *Barcode, supra* and *Allan Morgan, supra* should not be followed with respect to the application of the second part of the leave test. In those cases, both of which were decided by Lemieux J., the Tribunal held that in order to grant leave it is not required to have reason to believe that the alleged refusal to deal "has or is likely to have an adverse effect on competition in a market."

Barcode, supra at para. 8

Allan Morgan, supra at para. 14

35. In so holding, Justice Lemieux relied upon the decision of Justice Dawson in *National Capital News*, in which, as noted above, Dawson J. held that there must be reason to believe that "the practice in question could be subject to an order" under section 75. Wyeth submits that these two approaches are not, in fact, consistent, as the requirement that there be reason to

believe that the practice in question could be subject to an order under section 75 necessarily requires that the Tribunal determine whether sufficient preliminary evidence exists to establish reason to believe that all five elements of section 75 could be satisfied. Otherwise, any conduct that causes direct and substantial harm to a person, regardless of its relationship to section 75, could provide a basis for gaining leave to bring an application before the Tribunal.

Barcode, supra at paras. 10-12.

36. As with the direct and substantial effect test, the evidentiary bar on the second part of the leave application test is not necessarily an onerous one, and does not rise to the level of a balance of probabilities. Nonetheless, for the Tribunal to adequately fulfil its gatekeeper function with respect to private actions under the Act, a role it is required to fulfill in order to defend against tactical litigation, an applicant must be required to establish some reasonable basis for believing that a section 75 order could result from the application.

37. Accordingly, where, as here, the applicant admits that “very significant” competition exists in its marketplace, and seeks a variation of the usual terms of trade, it has failed to establish a reasonable basis for believing that the Tribunal could issue a section 75 order.

38. Unlike in *Barcode, supra* and *Allan Morgan, supra*, Wyeth is not asking the Tribunal to make credibility findings on the basis of conflicting affidavits, but instead to fulfill its “screening function” by determining that the evidence advanced by the applicant is itself insufficient to raise a reasonable basis for a successful application

Barcode, supra at paras. 19-20.


39. In sum, given the lack of evidence provided by Broadview in relation to the alleged effects it will suffer and the effect on competition in the market, and given Wyeth willingness to supply its product to Broadview pursuant to its usual terms of trade, Wyeth submits that this is precisely the type of case in which the Tribunal should exercise its role as gatekeeper, and refuse leave to bring an application under section 75.


PART III - ORDER REQUESTED

40. Wyeth requests that the herein application for leave to bring an application under section 75 be dismissed, and requests its costs in this proceeding.

41. In light of the relative novelty of the section 103.1 leave application process, and the apparently conflicting methods of its application that have been described above, Wyeth requests that an oral hearing be held so that full argument may be made before the Tribunal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9th DAY OF JUNE, 2004


for Neil Finkelstein


for Jeff Galway


Matthew Horner

Counsel for the Respondent, Wyeth Canada

SCHEDULE 'A' – LIST OF AUTHORITIES

Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd., [2004] C.C.T.D. No. 4.

Barcode Systems Inc. v. Symbol Technologies Canada ULC, [2004] C.C.T.D. No. 1

National Capital News Canada v. Canada (Speaker, House of Commons), [2002]
C.C.T.D.No. 38

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File No: CT-2004-005

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Proceeding commenced at TORONTO

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