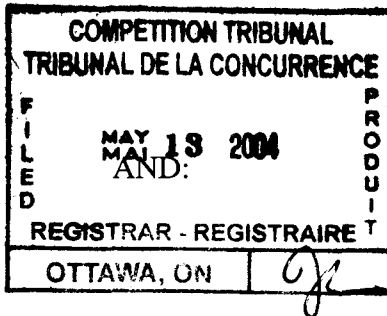


THE COMPETITION TRIBUNAL
File No. CT-2004-005
Registry Document No.: 1(a)

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

Applicant



WYETH CANADA INC.

Respondent

APPLICATION PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT*
FOR LEAVE TO MAKE APPLICATION UNDER SECTION 75 OF THE *ACT*

TAKE NOTICE THAT:

1. The Applicant, 1177057 Ontario Limited, carrying on business as Broadview Pharmacy ("Broadview Pharmacy"), is applying to the Competition 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, Wyeth Canada Inc. ("Wyeth") accept Broadview Pharmacy as customer on the "usual" trade terms, forthwith upon issuance of said Order.

AND TAKE NOTICE THAT:

2. Broadview Pharmacy will rely on the Statement of Grounds and Material Facts attached hereto and on the Affidavit of Herbert Cohen, duly sworn on May 10, 2004.

3. The person against whom an Order is sought is the Respondent, Wyeth. Its address is set out below.
4. The Applicant will seek directions from the Competition Tribunal for the expeditious hearing of this application.
5. The Applicant requests that this application proceed in English.
6. The Applicant requests that documents be filed in paper form.

DATED at Toronto, in the Province of Ontario, this 12th day of May, 2004.

D.H. Jack and Mark Adilman
McDONALD & HAYDEN LLP
Barristers and Solicitors
One Queen Street East, Suite 1500
Toronto, ON M5C 2Y3

Tel.: 416-364-3100
Fax: 416-601-4100
Solicitors for the Applicant

Address for Service:

TO: The Registrar
The Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario
K1P 5B4

AND TO: Sheridan Scott
Commissioner of Competition
Competition Bureau
50 Victoria Street
Gatineau, Quebec
K1A 0C9

AND TO: Wyeth Canada Inc.
1025 Marcel-Laurin Blvd.
Montreal, Quebec
H4R 1J6

The Applicant's address for service is as follows:

McDONALD & HAYDEN LLP
Barristers and Solicitors
One Queen Street East, Suite 1500
Toronto, ON M5C 2Y3

D.H. Jack
Email: djack@mchayden.ca
Direct Line: 416-601-4121

Mark Adilman
Email: madilman@mchayden.ca
Direct Line: 416-601-4101
Fax: 416-601-4100

STATEMENT OF GROUNDS AND MATERIAL FACTS

MATERIAL FACTS

The Parties

1. The Applicant, 1177057 Ontario Inc., carrying on business as Broadview Pharmacy (“Broadview Pharmacy”), is a corporation, duly incorporated under the laws of the Province of Ontario and carries on business at 381 Broadview Avenue, Toronto.
2. The Respondent, Wyeth Canada Inc. (“Wyeth”), is a corporation incorporated pursuant to the laws of Canada with its head office in Montreal, in the Province of Quebec. Wyeth carries on business as a pharmaceutical manufacturer across Canada, including Ontario.

Nature of Applicant’s Business

3. Broadview Pharmacy operates a retail pharmacy at its Toronto address. It has operated a pharmacy from that location since in or about 1960. From this location, Broadview Pharmacy offers its customers a wide selection of products and services, including prescription and over the counter medicines, health and beauty aides, cosmetics and fragrances, as is customary with a neighbourhood pharmacy.
4. There is significant competition among retail pharmacies in the Broadview and Gerrard area of Toronto. Six other retail pharmacies are located within a two block radius of Broadview Pharmacy’s location.
5. By their very nature, retail pharmacies are entirely dependent upon the supply of pharmaceutical medicines from the manufacturers of those products. In some cases, a generic version of a drug is available. Where no generic drug is available,

however, the drug manufacturers are the sole source of ongoing, longer-term supply for retail pharmacies such as Broadview Pharmacy.

Wyeth Products Sold by Applicant

6. Broadview Pharmacy has sold Wyeth products for the past several years. Of Broadview Pharmacy's total annual sales of \$1.5 million in pharmaceutical drugs, somewhat in excess of 5% (or \$75,000 a year) are from the sale of drugs manufactured by Wyeth.
7. Among the important patented medicines available only through Wyeth are the anti-depressant, Effexor, and a number of very popular birth control pills, including Triphasil, Alesse, Minovral, as well as the female hormone replacement drugs, Premarin and Premplus.
8. By letter dated April 26, 2004, Wyeth advised its Canadian distributors that they were not to accept any orders from, or otherwise sell products to, any purchasers on an attached list of "unapproved purchasers". Among the group of "unapproved purchasers" was Broadview Pharmacy. As a result of this action, Broadview Pharmacy is no longer able to obtain pharmaceutical products from Wyeth.
9. Broadview Pharmacy's present understanding is that Wyeth has refused to deal with it because, in the past, Broadview Pharmacy supplied some pharmaceutical medicines to some internet pharmacy businesses. Broadview Pharmacy has ceased this practice. By letter to Wyeth dated April 30, 2004, Broadview Pharmacy advised that it has altogether ceased selling to internet pharmacies. Notwithstanding, Wyeth continues to refuse to supply or otherwise deal with Broadview Pharmacy.

10. At present, Broadview Pharmacy is managing to obtain some short-term substitute supplies of the Wyeth products from other sources. However, this temporary source of supply cannot be sustained. Without the ongoing, longer-term supply of Wyeth products direct from Wyeth, Broadview Pharmacy will not be able to service its customers and its business will suffer very significantly.
11. Many customers of Broadview Pharmacy have regular multiple prescriptions and come to Broadview Pharmacy to fill all of their prescription needs in one visit. If Broadview Pharmacy is not able to fill the whole prescription, because it is out of Wyeth product, the customer will choose to fill the whole prescription at another pharmacy that can do so. If the Wyeth products are not available, Broadview Pharmacy's patients will go elsewhere for their pharmaceutical and their other needs. In such circumstances, it is very likely that Broadview Pharmacy will lose the customer for good. Wyeth's actions seriously threaten the financial viability of the Broadview Pharmacy.
12. Wyeth occupies a dominant position in the marketplace with respect to its patented pharmaceutical products. Wyeth's products are otherwise in ample supply in the Toronto area, including Broadview Pharmacy's neighbourhood competitors.

GROUNDS FOR APPLICATION UNDER SECTION 103.1

13. In this application, Broadview Pharmacy seeks leave to bring an application for an order pursuant to section 75 of the Act, which provides:

“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.”

14. Subsection 103.1(7) of the Act sets out the test for granting leave under section 103.1, as follows:

“The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the application is directed 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.”

15. The Competition Tribunal has held 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.”

Ref: *National Capital News Canada v. Milliken*, (2002) 23 C.P.R. (4th) 77

16. In *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1, the Competition Tribunal held:

“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.”

17. The foregoing test is clearly met in this application, as the materials in support of the application establish unequivocally the following:
 - (a) Wyeth is engaged in activity which constitutes a refusal to deal under section 75 of the Act; and
 - (b) Broadview Pharmacy’s business is directly and substantially affected by Wyeth’s refusal to deal, and refusal to allow others to deal, with it.
18. In support of the foregoing, the Applicant refers to the affidavit of Herbert Cohen sworn May 10, 2004.
19. The actions of Wyeth in refusing to deal with Broadview Pharmacy and in refusing to allow its distributors to deal with Broadview Pharmacy clearly fall within the scope of activity prescribed by section 75 of the Act, and clearly amount to a practice which could be subject to an order under that section.

DATED at Toronto, in the Province of Ontario, this 12th day of May, 2004.

D.H. Jack and Mark Adilman

McDONALD & HAYDEN LLP
Barristers and Solicitors
One Queen Street East, Suite 1500
Toronto, ON M5C 2Y3

Tel.: 416-364-3100
Fax: 416-601-4100
Solicitors for the Applicant