

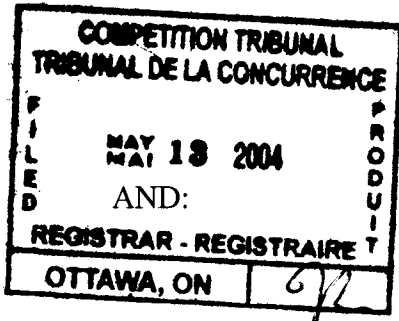
THE COMPETITION TRIBUNAL

File No. CT-2004-004
Registry Document No.: i(a)

BETWEEN:

PARADISE PHARMACY INC. and
RYMAL PHARMACY INC.

Applicants



NOVARTIS PHARMACEUTICALS CANADA INC./
NOVARTIS PHARMA 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 Applicants, Paradise Pharmacy Inc. and Rymal Pharmacy Inc., are 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, Novartis Pharmaceuticals Canada Inc./Novartis Canada Inc. ("Novartis"), accept the Applicants as customers on the "usual trade terms", forthwith upon issuance of said Order.

AND TAKE NOTICE THAT:

2. The Applicants will rely on the Statement of Grounds and Material Facts attached hereto and on the Affidavit of Shirley Silberg, duly sworn on May 7th, 2004.

3. The person against whom an Order is sought is the Respondent, Novartis. Its address is set out below.
4. The Applicants will seek directions from the Competition Tribunal for the expeditious hearing of this application.
5. The Applicants request that this application proceed in English.
6. The Applicants request 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
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One Queen Street East, Suite 1500
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Tel.: 416-364-3100
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Solicitors for the Applicants, Paradise
Pharmacy Inc. and Rymal Pharmacy Inc.

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: Novartis Pharmaceuticals Canada Inc./Novartis
Pharma Canada Inc.
385 Bouchard Boulevard
Dorval, Quebec
H9R 4P5

The Applicants' address for service is as follows:

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STATEMENT OF GROUNDS AND MATERIAL FACTS

MATERIAL FACTS

The Parties

1. The Applicants, Paradise Pharmacy Inc. and Rymal Pharmacy Inc., are corporations duly incorporated under the laws of the Province of Ontario and carry on business, respectively, at 930 Upper Paradise Road, Hamilton, Ontario, and 505 Rymal Road East, Hamilton, Ontario. The Applicants are owned and operated by Shirley Silberg, who is a licensed pharmacist.

2. The Respondent, Novartis Pharmaceuticals Canada Inc./Novartis Pharma Canada Inc. ("Novartis"), is a corporations incorporated pursuant to the laws of Canada with its head office at 385 Bouchard Boulevard, Dorval, in the Province of Quebec. Novartis carries on business as a pharmaceutical manufacturer across Canada, including Ontario.

Nature of Applicant's Business

3. The Applicants operate retail pharmacies at their respective Hamilton addresses. The retail pharmacy operating at 930 Upper Paradise Road was established in April, 1996. The retail pharmacy operating at 505 Rymal Road East was established in July, 1997. From these locations, the Applicants offer their customers a wide selection of products and services, including prescription and over the counter medicines, health and beauty aides, and cosmetics and fragrances, as is customary with a neighbourhood pharmacy.

4. There is significant competition among retail pharmacies in the areas immediately surrounding both of the Applicants' retail pharmacies. Both pharmacies have at least one Shoppers Drug Mart, a Pharma Plus, a Fortino 's Pharmacy and a Wall-Mart within one mile of its respective 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 those operated by the Applicants.

Novartis Products Sold by Applicants

6. Each of the Applicants has sold Novartis products since the establishment of their respective retail stores. Of their respective total annual pharmaceutical drug sales of approximately \$2 million each, approximately 7% (or \$140,000 a year, per store) arise from the sale of drugs manufactured by Novartis.

7. The main Novartis products are:

Drug	Indication
Actos	Diabetes
Diovan	High blood pressure
Femara	Breast cancer prevention
Lesco	High cholesterol
Famvir	Long term herpes treatment
Exelon	Alzheimers
Lotensin	High blood pressure
Foradil	Asthma
Tegretol Chew Tablets	Epilepsy
Zomeca	Bone Metabolism regulator
Zyprexa	Psychiatric disorders

8. The Applicants' two distributors, Kohl & Frisch and Rep Pharm, have both advised that Novartis has directed them, as of May 5, 2004, not to supply the Applicants with any Novartis products. As a result of this action, the Applicants are no longer able to obtain pharmaceutical products from Novartis.

9. Novartis' refusal to deal with the Applicants will lead to a very serious disruption in its sales revenue and to the loss of its customer base. Many customers of the Applicants have regular multiple prescriptions and come to the Applicants to fill all of their prescription needs in one visit. If the Applicants are not able to fill the whole prescription because they are out of Novartis product, customers will generally choose to fill the whole prescription at another pharmacy that can do so. If the Novartis products are not available, the Applicants' patients will go elsewhere for their general pharmaceutical and other needs. In such circumstances, it is very likely that the Applicants will lose such customers for good. Novartis' actions seriously threaten the financial viability of the Applicants.
10. Novartis occupies a dominant position in the marketplace with respect to its patented pharmaceutical products. Novartis' products are otherwise in ample supply in the Hamilton area, including the Applicants' large competitors.

GROUND FOR APPLICATION UNDER SECTION 103.1

11. In this application, the Applicants seek 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.”

12. 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.”

13. 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

14. 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.”

15. The foregoing test is clearly met in this application, as the materials in support of the application establish unequivocally the following:
- (a) Novartis is engaged in activity which constitutes a refusal to deal under section 75 of the Act; and
 - (b) the Applicants' businesses are directly and substantially affected by Novartis' refusal to deal, and refusal to allow others to deal, with it.
16. In support of the foregoing, the Applicants refer to the affidavit of Shirley Silberg, sworn May 7th, 2004.
17. The actions of Novartis in refusing to deal with the Applicants and in refusing to allow its distributors to deal with the Applicants 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

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