



Reference: *Commissioner of Competition v. Abitibi-Consolidated Inc.*, 2002 Comp.Trib. 3
File no.: CT2001009
Registry document no.: 014

IN THE MATTER OF an application by the Commissioner of Competition for a consent order pursuant to sections 92 and 105 of the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF the acquisition by Abitibi-Consolidated Inc. of all of the outstanding shares of Donohue Inc.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Abitibi-Consolidated Inc.
(respondent)

Date of hearing: 20020111
Member: McKeown J. (Chairman)
Date of reasons: 20020122
Reasons signed by: McKeown J.



REASONS FOR ORDER

[1] The applicant, the Commissioner of Competition (“the Commissioner”), has brought a motion before the Competition Tribunal for directions or a determination of several issues relating to the proper procedure to resolve disputes which have arisen between the parties with respect to the sale of a mill owned by the respondent, Abitibi-Consolidated Inc. (“ACI”). Specifically, the Commissioner has requested this Tribunal determine whether the Competition Tribunal process or the procedure under the arbitration provisions of an undertaking (“the Undertaking”) between the parties is the appropriate process to determine the issues. If the Tribunal finds that it is the appropriate forum, the Commissioner also seeks a scheduling order establishing a hearing date for any motion that may be brought by ACI in respect of the above issues and all steps leading up to that hearing.

[2] The first issue in this proceeding is whether the Competition Tribunal has jurisdiction to deal with the issues in dispute between the parties. This issue can also be characterized as whether an application for a Consent Order is properly before the Tribunal. If there is jurisdiction, the second issue is whether the Competition Tribunal is the appropriate forum in which to resolve these disputes.

FACTS

[3] Effective as of June 22, 2000, ACI acquired all of the issued and outstanding Class “A” Subordinate Voting Shares and Class “B” Shares of Donohue Inc. Following a review of the merger, the Commissioner concluded that it would likely result in a substantial lessening or prevention of competition in the market for the supply of newsprint in Eastern Canada.

[4] Following a series of negotiations, the Commissioner and ACI agreed upon the Undertaking, effective December 15, 2000, to resolve the Commissioner’s concerns in respect of the merger. In the Undertaking, ACI committed to use its best efforts to sell its Port-Alfred newsprint mill (the “Mill”) and certain related assets to a third party purchaser within a specified period.

[5] In the event that the Mill was not divested within the one year period specified in the Undertaking, the parties agreed that the Commissioner could appoint an independent agent (the “Agent”) to carry out the sale of the Mill. Paragraph 8 of the Undertaking provides, in part:

8. In the event that the Designated Assets have not been divested in accordance with the procedure set out above by December 15, 2001 or by such other date fixed in accordance with paragraphs 14 or 15 below, the Commissioner may appoint an agent for the sale of the Designated Assets (“the Agent”) within five (5) business days of such outside date, as the case may be, who shall carry out the sale of the Designated Assets in accordance with the following procedure:
 - (a) the Designated Assets may be sold by the Agent within [confidential] from the date of the appointment of the Agent at a price and on terms that are then most advantageous to ACI and consistent with accomplishing the sale, in the opinion of the Agent, acting reasonably (the “Agent Sale”), and, without in any manner limiting the foregoing, in no event will the price and terms of an Agent Sale equate to those of a “going out of business”, “fire” or liquidation sale;

- (b) after the appointment of the Agent becomes effective, the Agent shall have the sole right to effect a sale of the Designated Assets during the period of its mandate, which mandate shall terminate [confidential] ... following the Agent's appointment or by such other date fixed in accordance with paragraph 16 below, and neither the Agent nor the Commissioner shall have further rights in respect of the Designated Assets following the expiry of that period of time;...

[6] The parties also agreed that the Commissioner would have the option to seek a Consent Order from the Competition Tribunal under section 105 of the *Competition Act* to appoint an Agent to conduct the divestiture of the Mill. Paragraph 12 of the Undertaking reads, in part:

- 12. Should the Commissioner appoint an Agent to conduct the sale of the Designated Assets pursuant to paragraph 8 hereof, ACI hereby irrevocably consents to an application by the Commissioner for a consent order under section 105 of the *Competition Act* on the terms set out below (the "Consent Order"):
 - (a) the Designated Assets may be sold by the Agent within [confidential] ... from the date of the appointment of the Agent at a price and on terms that are then most advantageous to ACI and consistent with accomplishing the sale, in the opinion of the Agent, acting reasonably and, without in any manner limiting the foregoing, in no event will the price and the terms of an Agent Sale equate to those of a "going out of business", "fire" or liquidation sale;
 - (b) after the appointment of the Agent becomes effective, the Agent shall have the sole right to effect a sale of the Designated Assets during the period of its mandate, which mandate shall terminate [confidential] ... following the Agent's appointment or by such other date fixed in accordance with paragraph 16 below and neither the Agent nor the Commissioner shall have further rights in respect of the Designated Assets following the expiry of that period of time;...

[7] Paragraph 13 of the Undertaking also deals with ACI's consent to the Consent Order. It reads:

- 13. ACI hereby irrevocably consents to the form and content of all documents and pleadings required to be filed with the Competition Tribunal to secure the issuance of the Consent Order, including, but not limited to: the draft Consent Order, Agreed Statement of Grounds and Material Facts, Consent Order Impact Statement, Notice of Application and affidavit attached hereto as Schedule "C", subject only to such modifications as may be subsequently agreed upon to reflect the circumstances at the time of the application.

[8] The parties agreed that disputes relating to the sale process engaged in by ACI or by the Agent under paragraph 8 of the Undertaking were to be determined under an arbitration mechanism appended to the Undertaking as Schedule “D”. The parties further agreed that matters relating to the sale process conducted pursuant to a sale mandated by a Consent Order issued by the Competition Tribunal would be subject to the exclusive jurisdiction of the Competition Tribunal. Paragraph 25 of the Undertaking states:

25. Alternatively, provided that no Consent Order has been issued by the Competition Tribunal in accordance with paragraph 12 hereof, ACI and the Commissioner acknowledge and agree that any disputes arising between the parties in respect of a breach of this undertaking or any application for an interpretation of this undertaking may be submitted by either party for resolution to an arbitral tribunal in accordance with the procedure outlined in Schedule “D” attached.

[9] ACI did not divest of the Mill within the one-year period specified in the Undertaking which expired on December 15, 2001. On December 17, 2001, the Commissioner appointed Deloitte & Touche LLP as the Agent to carry out the sale of the Mill in accordance with paragraph 8 of the Undertaking.

[10] Two issues of dispute have arisen between the parties. The first issue concerns paragraphs 8(a) and 12(a) of the Undertaking and, in particular, the basis upon which the Agent can proceed to sell the Mill. ACI interprets these sections as meaning that the Agent must sell the Mill at a price and on terms that would not equate to those of a “going out of business”, “fire” or liquidation sale, and that there is a floor price below which no sale can be effected by the Commissioner’s Agent. The Commissioner disagrees. His position is that they provide the Agent with the sole discretion to determine the price at which the Mill may be sold, and that a dispute on pricing is limited to an examination of whether the Agent has exercised his or her discretion reasonably.

[11] The second issue of dispute concerns the dates of commencement and termination of the period in which the Commissioner’s Agent can sell the Mill. This issue arises as a result of a discrepancy between the terms of the Undertaking and the terms of the draft Consent Order the Commissioner has asked the Competition Tribunal to issue. The draft Consent Order, a copy of which was ultimately attached as part of Schedule “C” to the Undertaking, deviates from paragraph 12 of the Undertaking as follows. Paragraphs 8(a), 8(b), 12(a) and 12(b) of the Undertaking clearly provide that, to the extent that the Commissioner elected to appoint an Agent to sell the Designated Assets, he was required to do so within five business days of December 15, 2001. These terms also state that the Agent is required to sell the assets within a specifically defined sale period, and that that period commences on the date the Agent is appointed by the Commissioner and terminates a specified number of months from the date of the appointment. The draft Consent Order, by contrast, provides that the Agent Sale Period commences on the date the Competition Tribunal actually issues the contemplated Consent Order, and not the date on which the Commissioner’s Agent was appointed.

[12] On December 14, 2001, after unsuccessful negotiations between the parties to resolve the first issue in dispute (with respect to the floor price), ACI commenced an arbitration pursuant to paragraph 25 of the Undertaking. ACI also commenced an application that same day returnable before the Superior Court of Quebec concerning the appointment of the Commissioner's nominee to the Arbitral Tribunal. This proceeding was dismissed for want of jurisdiction. An application is now before the Ontario Superior Court of Justice.

[13] On December 17, 2001, ACI notified representatives of the Commissioner that the draft Consent Order deviated in a material way from the terms set out in paragraph 12 of the Undertaking. The following day, the Commissioner applied to the Competition Tribunal for the issuance of the order, without having made the changes requested by ACI.

[14] On December 28, 2001, ACI delivered a supplemental notice of arbitration to have the Arbitral Tribunal also determine the issue described above concerning the commencement, duration and termination of the period in which the Commissioner's Agent is permitted to attempt to sell the Mill.

[15] The parties were in disagreement as to whether ACI had, in fact, consented to the Draft Consent Order as it was written, apart from its consent to the Undertaking. The Competition Bureau had requested that ACI obtain Board approval for the terms of the Undertaking on December 15, 2000. That day, Mr. Weaver, the Chief Executive Officer of ACI, wrote to the Commissioner to request that Board approval be delayed until January 15, 2001, due to an internal dispute at ACI that was going on at the time. The Commissioner agreed. At that time the schedules to the Undertaking, including the draft consent order, had not yet been finalized. Then on January 10, 2001, the Commissioner sent a letter to counsel for ACI which included drafts of the schedules. The draft Consent Order at this time stated that the time frame in which the mill was to be sold commenced from the date of the order, not from the date of the agent's appointment. On January 15, 2001, Board approval was obtained for the Undertaking. At that time, however, the schedules had still not been finalized. It appears that several drafts were exchanged between the parties containing certain changes in wording, although the clause at issue, dealing with the date of the agent's appointment, was not changed.

ANALYSIS

[16] I note at the outset that I have no jurisdiction to enforce undertakings between the parties (see Rothstein J. in *Canada (Director of Investigation and Research) v. Imperial Oil Limited*, [1994] C.C.T.D. No. 23 at 7), nor can I rule on the jurisdiction of an arbitral tribunal established pursuant to the *Arbitration Act* (S.O. 1991, c.17). The issue which I must decide is strictly whether the Competition Tribunal has the jurisdiction to deal with the disputes that have arisen between the parties in this matter, and, if so, whether it is the appropriate forum.

[17] Counsel for the Commissioner argues that the issues which are the subject of ACI'S Notice of Arbitration are properly the subject of the Competition Tribunal's jurisdiction pursuant to the terms of the Undertaking and on the basis that they relate to a term of the Consent Order that is being sought in the within matter. The Commissioner relies on section 105 of the *Competition Act*, which provides:

105. Where an application is made to the Tribunal under this Part for an order and the Commissioner and the person in respect of whom the order is sought agree on the terms of the order, the Tribunal may make the order on those terms without hearing such evidence as would ordinarily be placed before the Tribunal had the application been contested or further contested.

[18] The Commissioner also relies on section 8 of the *Competition Tribunal Act*, which provides:

8(1) The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.1 or Part VIII of the *Competition Act* and any related matters.

(2) The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record.

[19] This section was interpreted broadly by the Supreme Court of Canada in *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* [1992] 2 S.C.R. 394. There Gonthier J. stated at 409, after citing subsection 8(1):

The core of the Tribunal's jurisdiction is the hearing and determination of Part VIII applications. When both versions are read together, it becomes apparent that the additional powers conferred by the phrase "any matters related thereto"/ "toute question s'y rattachant" pertain to the applications, and not to the hearing and determination of the applications. In English, the phrase "any matters related thereto" may refer to the applications or to their hearing and determination, though, to my mind, the latter reading is constrained and does not reflect the natural meaning of the words, namely: "... hear and determine all applications made under Part VIII of the *Competition Act* and hear and determine all matters related to the applications". In French, "s'y rattachant" can only refer to the noun "demandes", and not to the verb "entend", or otherwise the clause would read "toute question se rattachant aux auditions". Section 8(1) *CTA* therefore confers on the Tribunal jurisdiction not only over the hearing and determination of applications, but also over related matters. The jurisdiction of the Tribunal does not terminate upon the determination of an application, as the respondent argues, but it may encompass other matters related to the application, such as the enforcement of an order made pursuant to the application.

... Since this phrase should be given some meaning, it should be taken as a grant of jurisdiction over matters related to Part VIII applications, but arising outside of the hearing and determination of these applications.

[20] The Commissioner argues that in this case, although a Consent Order has not yet been issued by the Tribunal, since an application has been made, the Tribunal has jurisdiction over anything that relates to that application. Thus it would have jurisdiction over the issues in dispute between the parties, which involve the interpretation of provisions found in both the Undertaking and the Consent Order.

[21] Counsel for the Respondent suggested that the Tribunal does not have jurisdiction over this matter in part because of paragraph 25 of the Undertaking, which provides that disputes are to be resolved by way of arbitration, unless a Consent Order has been issued. In this case, counsel argued that since no Consent Order has been issued, the parties must proceed by way of arbitration. I disagree with this argument. While this paragraph may be relevant to which is the appropriate forum in which to resolve the disputes, an undertaking alone cannot deprive the Competition Tribunal of its jurisdiction as set out by statute and case law.

[22] Counsel for the Respondent also argued that the Tribunal did not have the jurisdiction to enforce or determine disputes arising out of undertakings, relying on *Imperial Oil, supra*. While I do not disagree with this general proposition, in my view if there was a proper Consent Order application before the Tribunal, I would have jurisdiction to decide any related issues. This would be because of the Consent Order, however, and not because of the Undertaking.

[23] The real issue in this case is whether or not a proper Consent Order application is before this Tribunal. If there was a proper Consent Order application before the Tribunal, I would have jurisdiction over the matters in issue, following *Chrysler, supra*, as they would then be matters relating to the application. On the facts before me, however, there is not a proper Consent Order application before this Tribunal. I am not satisfied on the evidence that ACI ever consented to this particular order. Although the evidence indicates that the Board of Directors of ACI approved the Undertaking on January 15, 2001, the Schedules contemplated in the Undertaking, including the draft Consent Order, had yet to be finalized at that time. Further, as submitted by the respondent, I find that ACI's agreement in the Undertaking did not constitute consent to this draft Consent Order, and that this draft Consent Order is not a Consent Order within the meaning of the Undertaking. Paragraph 12 of the Undertaking defines "Consent Order" as "...a consent order under section 105 of the *Competition Act* on the terms set out below..." As previously stated, one of these terms related to the time-frame in which the Agent was to sell the assets. This is the term which was altered in the draft Consent Order. Since this draft Consent Order did not comply with the terms set out in paragraph 12, it does not constitute a "Consent Order" within the meaning of paragraph 12.

[24] Counsel for the Commissioner argued that the draft Consent Order did come within the Undertaking by virtue of paragraph 13 of the Undertaking, which states:

13. ACI hereby irrevocably consents to the form and content of all documents and pleadings required to be filed with the Competition Tribunal to secure the issuance of the Consent Order, including, but not limited to: the draft Consent Order, Agreed Statement of Grounds and Material Facts, Consent Order Impact Statement, Notice of Application and affidavit attached hereto as Schedule "C", subject only to such modification as may be subsequently agreed upon to reflect the circumstances at the time of the application. (Emphasis Added)

[25] In my view, since “Consent Order” is a defined term in paragraph 12, any draft “Consent Order” must comply with the requirements of paragraph 12. In this case, it does not. Thus the Competition Tribunal does not have the jurisdiction to deal with matters related to the application.

[26] I note as well that, as pointed out by counsel for the respondent, the application filed in this case does not meet the requirements of a Consent Order application as set out in the *Competition Tribunal Rules* (the “Rules”). Subsection 77(1) of the Rules requires that a consent order application include a consent form signed by all parties. In this case the Commissioner filed only the Undertaking, and not a consent form. I do not have to decide whether this would be sufficient in itself to deprive the Tribunal of jurisdiction.

[27] Counsel also made arguments concerning whether the Competition Tribunal or the arbitral tribunal was the most appropriate forum in which to deal with these issues. However, in view of my finding that I do not have jurisdiction, I do not need to deal with this issue.

[28] The motion is dismissed.

DATED at Toronto, Ontario, this 22nd day of January, 2002.

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

APPEARANCES:

For the applicant:

Commissioner of Competition

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Josephine A.L. Palumbo
Adam F. Fanaki

For the respondent:

Abitibi-Consolidated Inc.

Kent E. Thomson
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