Competition Tribunal Tribunal de la Concurrence

CT - 1994 / 001 – Doc # 104

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

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[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).

> (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,
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> (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

[2] *Ibid.* at 7.

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]

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

[4] *Ibid.*

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

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

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[6] *Ibid.* at 346

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