Competition Tribunal | Tribunal de la Concurrence

CT - 88 / 4
#243

IN THE MATTER OF an application by the Director of Investigation and Research under section 75 of the *Competition Act*, R.S.C., 1985, c. C-34, as amended;

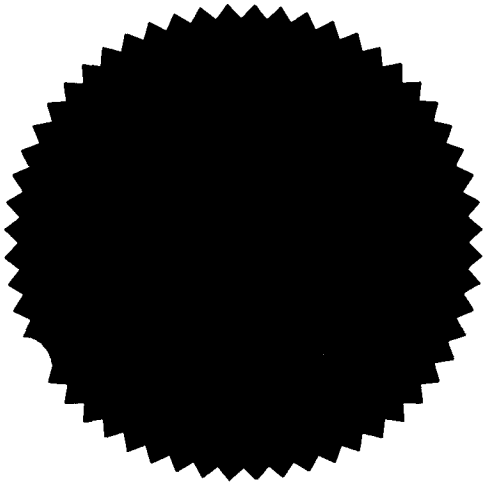
AND IN THE MATTER OF a refusal to supply automotive parts for export by Chrysler Canada Ltd. to Richard Brunet.

B E T W E E N :

The Director of Investigation and Research

Applicant

- and -



Chrysler Canada Ltd.

Respondent

- and -

Richard Brunet

Intervenor

REASONS AND ORDER ON
MOTION FOR SHOW CAUSE ORDER RE ALLEGED CONTEMPT

Date of Hearing:

February 27, 1990

Presiding Member:

The Honourable Madame Justice Barbara J. Reed

Judicial Member:

The Honourable Mr. Justice Leonard A. Martin

Lay Member:

Dr. Frank Roseman

Counsel for the Applicant:

Director of Investigation and Research

William J. Miller

Counsel for the Respondent:

Chrysler Canada Ltd.

Thomas A. McDougall, Q.C.
I.H. Fraser

Counsel for the Intervenor:

Richard Brunet

William Brock

COMPETITION TRIBUNAL

REASONS AND ORDER ON
MOTION FOR SHOW CAUSE ORDER RE ALLEGED CONTEMPT

The Director of Investigation and Research

v.

Chrysler Canada Ltd.

The Director of Investigation and Research ("Director") filed a motion seeking the issuance of a show cause order requiring Chrysler Canada Ltd. ("Chrysler Canada"), Chrysler Motors Corporation ("Chrysler U.S.") and Bernard Lerner to show cause why they should not be held to be in contempt of the Tribunal's order of October 13, 1989. That order requires that:

> ... Chrysler Canada Ltd. accept Richard Brunet as a customer for the supply of Chrysler parts on trade terms usual and customary to its relationship with Brunet as the said terms existed prior to August, 1986.[1]

The contempts alleged on the part of Chrysler Canada, on the one hand, and Chrysler U.S. and Mr. Lerner, on the other, are distinct and

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[1] *Director of Investigation and Research v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 at 28 (Competition Trib.).

different in nature. That alleged against Chrysler Canada is non-compliance with the order through a variety of actions designed to undercut the effective operation of the order. That alleged against Chrysler U.S. and Mr. Lerner is based on actions designed to pressure Mr. Brunet to forgo reliance on the order, particularly in the context of the appeal of that order which was then before the Federal Court of Appeal.

The facts relating to Chrysler Canada will be set out first. The Director alleges that Chrysler Canada is breaching the order of October 13, 1989 because Mr. Brunet is not being dealt with on trade terms which were ordinary to the relationship which existed prior to August 1986. Specifically, the affidavit of Mr. Brunet, filed by the Director, states that Chrysler Canada: (1) has an apparent "go slow" policy on Mr. Brunet's orders; (2) exhibits little cooperation in dealing with Mr. Brunet; (3) has attempted to change the pre-existing procedures; (4) creates difficulties in communications with Mr. Brunet; and (5) has attempted to change the terms of sale.

With respect to the first allegation, Mr. Brunet states that it took Chrysler Canada 45 days to fill 73% of one order while an equivalent order was filled by a dealer, who in turn orders from Chrysler Canada, in seven days (71% filled). In addition, two orders were submitted to Chrysler

Canada on January 3, 1990 and were still outstanding six weeks later (only one was outstanding as of the date of the hearing of the motion). There was some evidence with respect to the six weeks delay that the parts which had been ordered were readily available.

The second allegation, that Chrysler Canada is exhibiting little cooperation, is based on a difference between Mr. Brunet and Chrysler Canada as to who would pay shipping charges for the parts and at what location delivery should be taken. In August 1986, Mr. Brunet was taking delivery of parts, freight prepaid, at Hagersville, Ontario. The shipper he was then using, however, is no longer in business. Mr. Brunet requested delivery to a packer in Montreal. Chrysler Canada agreed provided that Mr. Brunet paid the shipping charges. Mr. Brunet is now taking delivery in Mississauga. Chrysler Canada pays the shipping charges to this location.

The third allegation flows from Mr. Brunet's assertion that Chrysler Canada is not providing him with "availability reports" even though new computer facilities are available. He was receiving availability reports prior to August 1986. At that time, when Mr. Brunet placed an order with Chrysler Canada, it responded with a report detailing the parts immediately available and the delay to supply the remainder. It is important for him to be able to give this information to customers. The day after the Director had

filed his application for a show cause order, an availability report was provided. There is some dispute as to whether an earlier facsimile dated January 25, 1990 should be treated as an availability report.

The fourth allegation relates to the discussion between the parties as to the treatment of back orders. Mr. Brunet was asked by Chrysler Canada if he would approve a procedure involving the cancellation of all back orders. He formerly received an initial delivery and then later delivery of back orders. Mr. Brunet did not agree. Mr. Brunet states in his affidavit that after he responded to the proposal of Chrysler Canada, they replied that his response did not answer the question and he responded once again. The processing of his orders was made conditional on the resolution of this question.

The fifth allegation is also based on Mr. Brunet's concerns about the question of choice of delivery location and payment of freight charges.

The facts on which the allegations against Chrysler U.S. and Mr. Lerner are based are as follows. Mr. Lerner is Manager, Domestic and International Parts Sales, for Chrysler U.S. Between December 1 and December 7, 1989, Mr. Brunet sent four orders for parts to Chrysler U.S.

Three of these orders were for parts for vehicles which Chrysler U.S. sold prior to 1987 ("Chrysler parts"). The fourth was for parts relating to the Jeep/Eagle product line, a product line which Chrysler started to carry in 1987 ("Jeep parts"). Chrysler U.S. refused to fill the order for Jeep parts on the ground that Mr. Brunet was not "an authorized Jeep/Eagle distributor". On making further enquiries, Mr. Brunet was told that the Jeep parts order was not being filled "because of the appeal". He was then told that none of his four orders would be filled for the same reason.[2] He was told that Mr. Lerner had indicated that if Mr. Brunet had any questions in this regard

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[2] Part of a letter, dated December 13, 1989, which Mr. Brunet sent by fax to Mr. Lerner reads as follows:

> On the afternoon of December 12, I returned a phone call from Phil Tarr who had phoned me earlier on an unrelated matter. Since it became obvious during the conversation that he did not know about my Jeep order, I took this opportunity to ask him what was the current policy on Jeep parts. Among other things, he said he "was absolutely certain" that we could purchase Jeep parts; that "everybody and his uncle was buying Jeep parts"; that if I had an order worth $3000 there would be no problem processing it. So I then told him about the order (worth $3326) and your refusal. He said that this could not be, and said he would inquire and call me back. When he called back that same afternoon, he said that the reasons was "because of the appeal". He was referring to the Canadian Competition Tribunal case involving Chrysler Canada Ltd. that is on appeal. In that same conversation, Mr. Tarr also informed me (for the first time) that all my orders placed with Detroit, not only the Jeep parts order, were similarly affected. This last point was confirmed by Ms. Stabile's FAX dated Dec. 13.
>
> ....
>
> I believe that it would have been well within your discretion to have given me ample warning about the situation that would affect this order and Chrysler application orders (and other orders which have since come in) well before I quoted and got the business for you. In the case of Jeep order, it was our first order from this overseas client and he was in my office on December 1 at the time that I phoned Brenda.
> (Affidavit of R. Brunet, sworn 19 February 1990, Exhibit H.)

he should have his lawyer contact "Chrysler's lawyers". The text of a fax Mr. Brunet received from an employee of Chrysler U.S. reads as follows:

> I have been advised by Mr. B.J. Lerner that the lawsuit filed against Chrysler is under appeal and I cannot process your parts orders.
>
> If you have any questions regarding this matter, please contact B.J. Lerner direct.[3]

The Director alleges that the actions by Chrysler U.S. and Mr. Lerner were designed to persuade Mr. Brunet to encourage the Director to compromise the appeal and cross-appeal. In a letter dated January 22, 1990, addressed to counsel for Chrysler Canada, counsel for the Director indicates that these actions place the Tribunal's order "in jeopardy".[4]

While Mr. Brunet's lawyer did contact Chrysler's lawyer as requested, there is no information given in the affidavit material filed with respect to the content of that communication. All that is recounted in the material filed is the Director's statement in his letter to counsel for Chrysler Canada:

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[3] *Ibid.*, Exhibit G.

[4] *Ibid.*, Exhibit J at 1.

> I am advised that the cut-off of supplies of automotive parts to Mr. Brunet, was accompanied by the suggestion that his lawyer should contact Chrysler's lawyers. I understand from Mr. Brunet that this contact occurred sometime ago but with no change in the referred to status.[5]

In response, the Director received the following reply from Chrysler Canada's counsel:

> First, Mr. Brunet's lawyer did contact me some time ago, but we did not discuss any of the matters raised in your letter. I had no knowledge of the matters raised in your letter until it was received by us.
>
> Second, we understand that Chrysler Corporation ("Chrysler U.S.") contacted Chrysler Canada after receiving correspondence from Mr. Brunet demanding that certain Jeep parts products be sold to him after he had earlier been advised that the order would not be processed. Chrysler Canada advised Chrysler U.S. to deal with Mr. Brunet as they would any other customer or person making inquiries.
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> .... Chrysler U.S. chose not to fill the request and furthermore advised Mr. Brunet to direct all future matters to Chrysler Canada. As was pointed out at the hearing of this matter and reflected in the Tribunal's Reasons for Decision of October 13, 1989, Chrysler U.S. has the Interparts Bulk Program (page 6), which sells to dealers, which Mr. Brunet is not (page 23), and that Chrysler U.S. would prefer to set [sic] for export to its U.S. based exporters who operate on a level playing field (page 45).
>
> If Mr. Brunet is of the opinion that Chrysler U.S. did not sell to him and has chosen to refer him to Chrysler Canada due to the Tribunal order or appeal, it is a mistaken opinion on the part of Mr. Brunet and may be taking a statement out of context. In this regard, we would request details of the allegations which form the basis of paragraph 1 on page 1 of your letter.

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[5] *Ibid.*

> We also note that the Tribunal stated that the Canadian and U.S. markets are separate markets (page 20) and that the order pertains only to Chrysler Canada (page 48), which is abiding by its terms regarding Mr. Brunet pending the outstanding appeal.[6]

The legal test that must be met in order to obtain the issuance of a show cause order was set out in *R. v. Perry*.[7] That decision held that on an application for a show cause order it is the duty of the judge to determine whether the affidavit evidence establishes, *prima facie*, a breach of the injunction or other order. If it does, the judge must issue the show cause order unless the evidence clearly shows the violation to be such that the judge is absolutely certain it does not deserve to be punished.

In making such a determination one asks the question whether, if all the facts as set out in the affidavit are true, there is a case which the respondent or respondents should be called upon to answer. In coming to that determination it is accepted that a breach of the spirit of the order is equally contemptuous as a breach of the literal terms thereof. In *Dubiner v. Cheerio Toys and Games Ltd.* it was said:

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[6] *Ibid.*, Exhibit K.

[7] [1982] 2 F.C. 519 at 525 (F.C.A.).

> ... compliance with an order of a Court is not a battle of wits but ... such an order must always be complied with in spirit as well as in letter.[8]

In *Metaxas v. The Ship "Galaxias" No. 1* it was noted:

> The court is provided with the power of contempt in order to control its process and ensure that its orders as well as the spirit of the orders are obeyed.[9]

It is recognized that the enforceability of orders of the Tribunal such as that in issue is not likely to be easy. As with any order of specific performance which involves the conduct of parties, there is a great deal of scope for activity on the edges of the order which clearly offends the spirit of the order but for which an argument might be made that a breach of the "exact" terms of the order did not occur. In the present case the order requires Chrysler Canada to deal with Mr. Brunet in a similar fashion to that in which he had been treated prior to August 1986.

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[8] [1965] 2 Ex. C.R. 488 at 499.

[9] (1988), 19 F.T.R. 104 at 106. See also *Canada Metal Co. v. Canadian Broadcasting Corp. (No. 2)* (1974), 4 O.R. (2d) 585 at 603, 48 D.L.R. (3d) 641 (H.C.), aff'd (1975), 11 O.R. (2d) 167, 65 D.L.R. (3d) 231 (C.A.).

The Tribunal is concerned that the implementation of its orders, especially those dealing with the re-establishment of business relationships, be approached with an attitude aimed at attempting to implement their intent and spirit, not one aimed at attempting to chip away at the edges so as to render them in practical terms ineffectual. The decision of the Supreme Court of Canada which held that the Tribunal had jurisdiction to entertain contempt proceedings with respect to the enforcement of its orders indicated that one of the Court's reasons for so finding was that the Tribunal had some expertise in the matters in issue.[10] This includes of course an awareness on the Tribunal's part of the difficulties which are bound to exist in effectively enforcing orders such as that which is in issue in this application. Defences which are based on the strict wording of a specific order without regard to the intent thereof are not likely to meet with much acceptance.

At the same time contempt is a serious allegation and evidence must be produced of a fairly specific nature to support the allegation being made. In addition, in a case such as the present, the Tribunal would have found it preferable for the Director to have communicated with counsel for Chrysler Canada, informing him of the Director's concerns about non-compliance with the order before commencing an application for a show

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[10] *Competition Tribunal v. Chrysler Canada Ltd.* (25 June 1992), 22151/22152 at 12 (S.C.C.).

cause order. We do not wish to be taken as saying that in all cases an alleged contemner must be given notice of the actions which are stated to be contempt, prior to the application for a show cause order being filed. That is clearly not so. But, in this case, where the nature of the contempt alleged is what might be called "chipping away at the edges of the order", the Tribunal considers that it would have been a preferable practice to follow.

With respect to the actions of Chrysler Canada which are alleged to constitute contempt in this case, two members of the panel are of the view that there is insufficient evidence in Mr. Brunet's affidavit to establish a *prima facie* case of contempt.[11] The presiding judicial member does not share that view. The explanation which follows, respecting the alleged contempt of Chrysler Canada, refers to the majority decision.

With respect to the allegation that Chrysler Canada was not implementing Mr. Brunet's orders in a timely fashion, Mr. Brunet's statement that the orders placed through a dealer and those placed directly with Chrysler Canada were "equivalent" is accepted to mean that the parts were equivalent with respect to availability. The difficulty arises with respect to whether the speed with which Chrysler Canada fills dealers' orders should be

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[11] While Mr. Justice Martin is no longer a member of the Tribunal his decision was recorded prior to his departure.

treated as the relevant standard by which to judge whether it is filling Mr. Brunet's orders in a timely manner. Mr. Brunet is and has been in a unique position. He is not a dealer. On first impression, the most valid standard by which to judge Chrysler Canada's response to Mr. Brunet's orders is his experience during the years when he had good relations with this company. The fact that it took Chrysler Canada six weeks to fill one order and that a second was still outstanding after this period was likewise presented to the Tribunal without a context for evaluating it. What is the relevant standard of comparison? Is this a long or a short period relative to Mr. Brunet's past experience? In the absence of some standard of comparison it is not possible to draw any inferences regarding whether Chrysler Canada was reasonably prompt in responding to Mr. Brunet.

With respect to the dispute concerning shipping charges and place of delivery, it is clear that Montreal is much further from the Chrysler parts depot than is Hagersville. The disagreement over the transportation charges that Chrysler Canada is responsible for may be a legitimate difference of opinion and cannot be considered as *prima facie* proof of contempt without more detailed proof of the surrounding circumstances.

The most recent evidence before the Tribunal respecting availability reports is that there are none outstanding.[12] No evidence has been advanced regarding the adequacy or the timeliness of the reports received. The question of the procedure with respect to back orders is, apparently, still unresolved but was the subject of discussion between the parties. In neither case does the evidence on the record raise a sufficient case to warrant a show cause order against Chrysler Canada.

Nevertheless, the Tribunal does question whether Chrysler Canada's approach to obeying the order truly reflects a spirit of positive compliance. Although there is a legitimate point of dispute, that spirit appears to be lacking in its approach to the question of delivery charges. The same can be said of the discussion with respect to back orders. In a communication dealing with the procedure for back orders, Chrysler Canada proposes that back orders will be cancelled if that is "acceptable" to Mr. Brunet.[13] It is difficult to see why Mr. Brunet, who previously received back orders, would agree to such a suggestion. It is equally difficult to see why the provision of availability reports by Chrysler Canada would ever become a source of friction in its relationship with Mr. Brunet.

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[12] Affidavit of R. Brunet, sworn February 28, 1990 at para. 3 (filed by the Director subsequent to the hearing).

[13] Affidavit of R. Brunet, sworn February 19, 1990, Exhibit M.

The order in question is the first issued by the Tribunal following contested proceedings and it is one that forces unwilling persons to resume a business relationship. At the time of the hearing of the motion for a show cause order, a relatively short period had elapsed since the issuance of the order. On the evidence before it, the majority of the Tribunal believes that Chrysler Canada wants to comply with the order. The affidavit of P. Richard Williams, filed with the Court of Appeal in the application by Chrysler Canada to stay the hearing of this motion, and urged on the attention of the Tribunal by its counsel, states that Mr. Williams believes that Chrysler Canada has obeyed the order and advises that court that it will continue to do so. Mr. Williams, the senior parts person in Canada, also advised that he would make himself available to communicate with Mr. Brunet respecting his orders and would use his "best efforts" to expedite those orders.[14]

In the light of these factors the majority of the panel which heard the show cause application came to the conclusion that there was insufficient evidence to justify the issuing of such an order.

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[14] Affidavit of P.R. Williams, sworn February 26, 1990 at paras 13, 19.

To turn then to the case respecting Chrysler U.S. and Mr. Lerner. Those parties were not formally represented by counsel before the Tribunal; at the same time, counsel for Chrysler Canada made certain arguments on their behalf. He conditioned his representations by saying that they were being made on behalf of Chrysler Canada insofar as that company is implicated in the contempt allegation respecting Chrysler U.S. and Mr. Lerner. This is a somewhat difficult position to put forward. While the notice of motion filed by the Director includes Chrysler Canada in the alleged contempt by Chrysler U.S. and Mr. Lerner, in oral argument the Director did not pursue this allegation. The Tribunal nevertheless thinks it desirable that it consider those arguments without any determination being made as to whether Chrysler U.S. or Mr. Lerner have attorned to the jurisdiction. (The Director's application for a show cause order is accompanied by a request for an order for service *ex juris*, of the show cause order on Chrysler U.S. and on Mr. Lerner.)

Counsel for Chrysler Canada asked the Tribunal to look closely at two aspects of the order being sought against Chrysler U.S. and Mr. Lerner: (1) the alleged contempt relates to the appeal which is before the Federal Court of Appeal and, thus, it is that body which has jurisdiction to entertain the application for the show cause order, not the Tribunal; (2) the evidence, as set out, which states that Chrysler U.S. has refused to sell parts to Mr.

Brunet "because of the appeal" and that he should have his lawyer contact Chrysler's lawyers, is simply insufficient as the basis of a conclusion that such action was taken for the purpose of pressuring Mr. Brunet to encourage the Director to compromise the appeal. With respect to this last, counsel argues that there is simply not enough evidence before the Tribunal to enable it to conclude that a *prima facie* case of contempt has been made out.

It is only necessary to deal with the second argument. The order of October 13, 1989 relates only to Chrysler Canada and only to the Canadian market. There was no allegation that Chrysler U.S. or Mr. Lerner were attempting to encourage or influence Chrysler Canada into breaching that order. Refusing to supply parts to Mr. Brunet in the United States is not a matter which by itself constitutes a breach of the Tribunal's order. It must be demonstrated that the actions taken by Chrysler U.S. and Mr. Lerner were designed to interfere with the operation of the Tribunal's order for the matter to come within our jurisdiction. The affidavit evidence filed indicates that the refusal to supply was "because of the appeal" and that Mr. Brunet had been instructed to have his lawyer call Chrysler's lawyers. Such a call was made but the Tribunal was not informed as to the content of that communication. The letter on file from Chrysler Canada's counsel to counsel for the Director indicates that while he had spoken to Mr. Brunet's lawyer, he was not aware of the allegations to which Mr. Brunet refers. It is argued that, in this context,

the apprehension of Mr. Brunet that the reason he was being refused supply in the U.S. was to influence him to compromise the appeal and not for some other legitimate business reasons is speculative evidence.[15] The Tribunal agrees with that argument. In its view there is not enough evidence filed to allow it to conclude that the actions of Chrysler U.S. and Mr. Lerner were designed to influence the course of the appeal.

Given this finding it is not necessary to decide whether the Tribunal has jurisdiction to deal with the contempt alleged against Chrysler U.S. and Mr. Lerner or whether the matter should more properly have been brought before the Federal Court of Appeal.

Accordingly, the motion for a show cause order will be dismissed. The Tribunal is concerned to emphasize, however, that this decision does not prejudice the Director's right to re-apply for a show cause

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[15] In this regard see: *Imperial Chemical Industries PLC v. Apotex Inc.* (1989), 24 C.P.R. (3d) 176 (F.C.T.D.).

order with respect to the same facts as are in dispute in this case, supported by additional evidence, or with respect to any subsequent actions which might constitute contempt, if such exist.

DATED at Ottawa, this 22nd day of September, 1992.

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

(s) B. Reed
B. Reed