

Competition Tribunal



Tribunal de la concurrence

Citation: *The Commissioner of Competition v NuvoCare Health Sciences Inc. and Ryan Foley*,
2020 Comp Trib 5

File No.: CT-2020-003

Registry Document No.: 38

IN THE MATTER OF an application by the Commissioner of Competition for a temporary order pursuant to section 74.11 of the *Competition Act*, RSC 1985, c C-34 as amended, regarding conduct reviewable pursuant to paragraph 74.01(1)(b);

BETWEEN:

The Commissioner of Competition
(applicant)

and

**NuvoCare Health Sciences Inc. and
Ryan Foley**
(respondents)



Date of case management conference: April 29, 2020

Before: D. Gascon J. (Chairperson)

Date of order: April 30, 2020

ORDER FURTHER TO A CASE MANAGEMENT CONFERENCE

[1] **FURTHER TO** the Notice of Application for a Temporary Order (“**Application**”) filed on March 4, 2020 by the Commissioner of Competition (“**Commissioner**”) against NuvoCare Health Sciences Inc. (“**NuvoCare**”) and Ryan Foley (together, the “**Respondents**”), and the Commissioner’s affidavits of service filed on March 12, 2020;

[2] **AND FURTHER TO** the Directions issued by the Tribunal on March 16, March 19, April 21 and April 23, 2020;

[3] **AND FURTHER TO** the four e-mails received from counsel for the Respondents on April 28, 2020 in response to the Tribunal’s Direction of April 23, 2020 (“**April 28 e-mails**”), which included the Respondents’ 10-paragraph submissions (“**Respondents’ Submissions**”);

[4] **AND FURTHER TO** the Case Management Conference held on April 29, 2020 to discuss: 1) the April 28 e-mails; 2) the more specific request from counsel for the Respondents to cross-examine the Commissioner’s affiants; and 3) the Commissioner’s position on the “tests” sent by counsel for the Respondents in light of the comment made at paragraph 89 of the Commissioner’s memorandum of fact and law regarding potential submissions from the Respondents on the issue of testing;

[5] **AND UPON** considering that, in the April 28 e-mails, counsel for the Respondents raised various issues and made informal requests or motions to the Tribunal as follows:

- (a) A request to vary the Tribunal’s Direction on the urgency of the Application;
- (b) A complaint that the Respondents have not been properly served with much of the Commissioner’s “motion materials”;
- (c) A claim that it would be unfair to the Respondents to proceed with the hearing of the Application as scheduled on April 30, 2020;
- (d) A claim that Mr. Foley is too ill and unable to proceed with the hearing of the Application for at least three months due to his medical condition, and a request to adjourn the Application accordingly;
- (e) A motion for a confidentiality order, which should be put in place prior to the Respondents being required to provide affidavit evidence;
- (f) A request to cross-examine the two affiants of the Commissioner, as well as all individuals referred to in the affidavits they have filed;
- (g) A request to accept, as forming part of the Respondents’ Submissions, various “tests” sent by counsel for the Respondents as part of the April 28 e-mails; and
- (h) A request for an adjournment of this matter for a period of at least 60 days;

[6] **AND UPON** considering that an application for a temporary order pursuant to section 74.11 of the Act is an urgent proceeding seeking interim relief, which is to be heard and decided by the Tribunal on an expedited basis;

[7] **AND UPON** considering the following elements regarding the timeline and procedural context of the Application:

- (a) The Application was filed by the Commissioner on March 4, 2020 and the affidavits of service on the Respondents were filed on March 12, 2020;
- (b) On March 16, 2020, the Tribunal issued a Notice of Hearing scheduling the hearing of the Commissioner's Application for March 23, 2020 and informing the Respondents that they had until the end of the day on March 18, 2020 to serve and file any responding materials to the Commissioner's Application (including any affidavits and memorandum of fact and law);
- (c) On March 16, 2020, the Tribunal also issued a Direction whereby it granted permission to the Commissioner to serve his memorandum of fact and law on the Respondents and to file it with the Tribunal by March 17, 2020, and extended the deadline given to the Respondents to serve and file their memorandum of fact and law to March 19, 2020;
- (d) On March 19, 2020, the Tribunal issued a Direction whereby it informed all parties that, following an e-mail from counsel for the Commissioner advising the Tribunal that the Department of Justice did not consider it urgent that the Commissioner's Application be heard on March 23, 2020 in light of the COVID-19 situation, the hearing scheduled for that date was adjourned and postponed to the earliest possible date as soon as the Tribunal's normal activities resumed;
- (e) On or about March 20, 2020, further to exchanges that took place by e-mail and by telephone between the Tribunal's Registry Officer ("**Registry**") and Mr. Foley, Mr. Foley acknowledged having received the Notice of Hearing and the Directions from the Tribunal;
- (f) On March 20, 2020, Mr. Foley confirmed in an e-mail to the Registry that he accepted service by e-mail of all Tribunal's communications to the Respondents in this matter;
- (g) On April 16, 2020, further to a request from the Tribunal inquiring about the status of the Commissioner's Application, the Registry received an e-mail from counsel for the Commissioner informing the Tribunal that the Commissioner now considered that his Application must be decided during the Suspension Period (as defined in the Tribunal's April 15, 2020 *Updated Notice regarding the COVID-19 Pandemic* ("**COVID-19 Notice**"), and that there is urgency to hear his Application;
- (h) On April 16, 2020, the Registry sent an e-mail to both parties whereby the Tribunal: 1) informed all parties that, in light of the reasons outlined by counsel for the Commissioner in her April 16, 2020 e-mail, the Tribunal was satisfied, on a preliminary basis, that this is an urgent matter as contemplated under the COVID-19 Notice; 2) asked Mr. Foley, if he disagreed on the urgency of the

Commissioner's Application and had any submissions to make in that respect, to send them to the Registry by e-mail by the end of day on April 20, 2020; 3) informed all parties that, unless Mr. Foley convinced the Tribunal that this is not an urgent matter, the Tribunal intended to proceed with the hearing of the Commissioner's Application by way of telephone conference during the week of April 27, 2020; 4) asked Mr. Foley to advise the Registry, by e-mail before the end of day on April 20, 2020, as to his availability for a hearing by telephone conference during the week of April 27, 2020; and 5) reminded Mr. Foley that the deadline to serve and file responding materials had passed but that, if he intended to file any responding materials to the Commissioner's Application (such as affidavits and/or memorandum of fact and law), he should let the Registry know no later than the end of day on April 20, 2020;

- (i) On April 20, 2020, in e-mails exchanged between him and the Registry, Mr. Foley informed the Tribunal that he was requesting an "extension on this matter" and an adjournment of the proposed urgent hearing of the Commissioner's Application, and that he had received "little lead time" and would not be prepared for the hearing;
- (j) On April 21, 2020, counsel for the Commissioner sent an e-mail to the Registry opposing the Respondents' request for an adjournment and stating that "the Respondents have had notice of the Commissioner's intention to proceed with a temporary application in this matter for close to seven weeks, and have been made aware of the concerns relating to the representations that they were making for close to one year";
- (k) On April 21, 2020, the Tribunal issued a Direction pursuant to which the Tribunal: 1) denied Mr. Foley's request for an adjournment of this matter; 2) agreed to give Mr. Foley an additional and ultimate delay until noon on April 23, 2020 to respond to the questions asked by the Tribunal with respect to the urgency of the Commissioner's Application and his availability for a hearing, and to indicate whether he intended to serve and file any responding materials to the Application; 3) asked the Commissioner to inform the Tribunal, by noon on April 23, 2020, as to whether he still intended to proceed with an urgent hearing of his Application; and 4) advised the parties that, if it was not convinced by Mr. Foley's submissions with respect to the urgency to hear and consider the Commissioner's Application, and if the Commissioner still intends to proceed with the urgent hearing of his Application, the Tribunal would, by the end of the day on April 24, 2020, issue a Notice of Hearing fixing the hearing of the Commissioner's Application for April 30, 2020 at 9:30 am, by telephone conference, for a maximum duration of half a day;
- (l) On April 23, 2020, counsel for the Commissioner sent an e-mail to the Registry indicating that the Commissioner still intended to proceed with the urgent hearing of his Application;

- (m) On April 23, 2020, newly retained counsel for the Respondents filed a Notice of Appearance on behalf of the Respondents and sent a letter to the Registry in response to the Tribunal's Direction of April 21, 2020;
- (n) On April 23, 2020, after having considered the correspondence received from both parties earlier that day, the Tribunal issued a Notice of Hearing scheduling the hearing of the Commissioner's Application for April 30, 2020 and a Direction informing the Respondents that they had until the end of day on April 28, 2020 to serve and file any responding materials to the Commissioner's Application (including any affidavits and memorandum of fact and law); and
- (o) On April 28, 2020, counsel for the Respondents sent the April 28 e-mails to the Tribunal, which included the Respondents' Submissions but no affidavits;

[8] AND UPON considering that, as far as the urgency of this matter is concerned:

- (a) The Tribunal has already dealt extensively with the issue of the urgency to hear and consider the Application in its Direction of April 21, 2020 and its Notice of Hearing and Direction of April 23, 2020;
- (b) The Respondents and counsel for the Respondents both had opportunities to make submissions on this issue prior to the most recent Notice of Hearing and Direction of April 23, 2020;
- (c) The Tribunal has already ruled and decided on the question of urgency; and
- (d) In the April 28 e-mails, counsel for the Respondents has not provided any further convincing submissions or reasons for disputing the Commissioner's claim about the urgency to hear and consider the Application;

[9] AND UPON determining that, since the filing of the Commissioner's Application on March 4, 2020 and the various Directions issued by the Tribunal in this matter, the Respondents have already been granted ample time to prepare their responding materials to the Commissioner's Application and have benefited from multiple extensions, the last one being until the end of day on April 28, 2020;

[10] AND UPON observing that, according to the Tribunal's record, the Respondents have been properly served with the Commissioner's Application and supporting materials prior to March 12, 2020;

[11] AND UPON finding that the Respondents and their counsel have elected to wait to the very last minute before raising the issue of not being properly served with much of the Commissioner's materials and asking to cross-examine the Commissioner's affiants, despite the fact that the Respondents were served with the Commissioner's Application, including the two supporting affidavits, before March 12, 2020, and that they have not provided any compelling reasons to explain their lateness in raising such issue and making such request;

[12] **AND UPON** further concluding that the Respondents have not provided clear and convincing evidence to support their request for an adjournment based on the alleged medical condition of Mr. Foley:

- (a) Until the April 28, 2020 note from his doctor (“**Doctor’s Note**”) and the reference to this issue in the Respondents’ Submissions, Mr. Foley had not raised his medical condition as being an impediment to his response and participation in this Application;
- (b) More specifically, no mention of an illness or medical condition was made in his written and verbal communications and exchanges with the Tribunal’s Registry around March 20, 2020 or in his e-mails to the Registry on April 20, 2020;
- (c) The Doctor’s Note provides vague information on the nature of Mr. Foley’s medical condition and his alleged inability to function, does not contain a medical assessment stating that Mr. Foley’s condition requires an adjournment of the Application or for how long the inability is expected to last, and simply refers to Mr. Foley himself “requesting a postponement” of this matter for at least three months; and
- (d) Based on the April 28 e-mails, it appears that Mr. Foley continues to play a role in this matter and that he was involved in obtaining testing information for his counsel as recently as on April 28, 2020;

[13] **AND UPON** finding that, in light of the evidence provided, the Respondents have failed to persuade the Tribunal that Mr. Foley’s alleged medical condition justifies the requested postponement;

[14] **AND UPON** considering that the Commissioner has not asserted that the Respondents’ alleged reviewable conduct has abated since the filing of the Application;

[15] **AND UPON** finding that the Respondents have not provided any convincing grounds or arguments to persuade the Tribunal that this matter should be adjourned for a period of at least 60 days or of three months;

[16] **AND UPON** finding that, given the time that the Respondents have had since the filing and service of the Application, and the repeated extensions that the Tribunal has granted to the Respondents to file and serve their responding materials, and considering that the Respondents have ended up filing limited written submissions on April 28, 2020 with no affidavit evidence in support thereof, the Tribunal is not convinced that it would be unfair to the Respondents to quickly proceed with the hearing of the Application;

[17] **AND UPON** considering that, bearing these considerations of fairness in mind, the Tribunal is however prepared to grant a short extension of time to the Respondents to allow their counsel to conduct a cross-examination of the Commissioner’s two affiants on the following

conditions:

- (a) The cross-examinations shall each be for a maximum duration of 2.5 hours;
- (b) The cross-examinations shall take place by video conference or telephone conference at a time to be agreed upon by counsel for the parties;
- (c) The cross-examination of Ms. McKenzie shall take place on Monday May 4, 2020;
- (d) The cross-examination of Ms. Treyvaud Amiguet shall take place on Tuesday May 5, 2020 in the morning; and
- (e) There shall be no cross-examination of any other individuals;

[18] **AND UPON** considering that the hearing of the Application currently scheduled for April 30, 2020 will therefore need to be briefly adjourned in order to allow counsel to proceed with the cross-examinations and that, in these circumstances, the Tribunal reluctantly agrees that the hearing needs to be rescheduled to Monday, May 11, 2020;

[19] **AND UPON** determining that, with respect to the issue of a confidentiality order:

- (a) If the Respondents want a confidentiality order, they shall serve and file a draft confidentiality order specifying its scope and terms;
- (b) However, the Tribunal's 2008 *Practice Direction regarding the Filing of Confidential Documents* provides that, in urgent matters, with the prior approval of the presiding judicial member, confidential materials may be filed in confidence without an order or public version on the undertaking that, at the direction of the presiding judicial member once the urgent phase has passed, a confidentiality order and public versions of all confidential material will be added to the file; and
- (c) Pending the issuance of a formal confidentiality order, the Respondents can therefore file their responding materials in confidence by highlighting the portions they claim to be confidential and asking the Tribunal and opposing counsel to treat them accordingly;

[20] **AND UPON** considering that, since the "tests" and testing materials sent by counsel for the Respondents with the April 28 e-mails are intended to constitute evidence as opposed to authorities or arguments, they cannot be accepted for filing by the Tribunal as forming part of the Respondents' Submissions;

[21] **AND UPON** determining that, in order to be properly filed and accepted by the Tribunal as being part of the Respondents' evidence, such "tests" and testing materials will have to be filed by the Respondents as exhibits attached to an affidavit;

[22] **AND WHEREAS** the Tribunal is required, pursuant to subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), to deal with all proceedings before it “as informally and expeditiously as the circumstances and considerations of fairness permit”;

[23] **AND WHEREAS** the Tribunal is satisfied that the remedy sought by the Commissioner in the Application is of an urgent nature and that there is a public interest in having the matter dealt with expeditiously;

THE TRIBUNAL ORDERS THAT:

[24] The Respondents’ request to vary the Tribunal’s Directions on the urgency of the Application is denied;

[25] The Respondents’ request for an adjournment of this matter for a period of at least 60 days is denied;

[26] The Respondents’ request for an adjournment of this matter for a period of at least three months on the basis that Mr. Foley is too ill and unable to proceed with the hearing of the Application is denied;

[27] The Respondents’ request to cross-examine the two affiants of the Commissioner is granted on the terms and conditions detailed in paragraph 17 above, and the Respondents’ further request to cross-examine any other individual referred to in the two affidavits filed by the Commissioner is denied;

[28] Since the Respondents have the option of filing their responding materials in confidence by highlighting the portions they claim to be confidential and asking the Tribunal and opposing counsel to treat them accordingly, there is no need to issue a confidentiality order at this point in time. Once the urgent phase has passed, they shall serve and file a draft confidentiality order specifying its scope and terms;

[29] The “tests” and testing materials sent by counsel for the Respondents with the April 28 e-mails are not accepted for filing as forming part of the Respondents’ Submissions;

[30] In order to be properly filed as part of the Respondents’ responding materials, such “tests” and testing materials shall be served and filed by the Respondents as exhibits attached to an affidavit, by the end of day on Monday, May 4, 2020;

[31] Should counsel for the Commissioner want to cross-examine the affiant of the Respondents, if any, such cross-examination shall take place by the end of day on Wednesday, May 6, 2020 by video conference or telephone conference, at a time to be agreed upon by counsel for the parties and for a maximum duration of 2.5 hours;

[32] Transcripts of any cross-examinations shall be filed with the Tribunal by both parties by the end of day on Friday, May 8, 2020;

[33] The hearing of the Commissioner's Application is hereby fixed on a peremptory basis on Monday, May 11, 2020, at 9:30 am, and will be held by way of telephone conference, for a maximum duration of half a day.

[34] Costs in relation to the Respondents' informal requests and motions addressed in this Order shall be in the cause.

DATED at Montreal, this 30th day of April 2020.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

COUNSEL OF RECORD:

For the applicant:

The Commissioner of Competition

Talitha Nabbali
Ellé Nekiar

For the respondents:

Nuvocare Health Sciences Inc. and
Ryan Foley

Paul Robson