Competition Tribunal Tribunal de la Concurrence

OFFICIAL ENGLISH TRANSLATION

Citation: *Sono Pro Inc. v. Sonotechnique P.J.L. Inc.*, 2007 Comp. Trib. 18
File No.: CT-2007-004
Registry Document No.: 0020

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended, and the *Competition Tribunal Rules*, SOR/94-290;

AND IN THE MATTER OF an application under section 103.1 of the *Competition Act* by Sono Pro Inc. for leave to make an application under section 75 of the *Competition Act* concerning a refusal to deal by Sonotechnique P.J.L. Inc.

B E T W E E N:

Sono Pro Inc.
(applicant)

and

Sonotechnique P.J.L. Inc.
(respondent)

Decision on the basis of the written record.
Presiding Judicial Member: Blais J.
Date of Reasons and Order: June 11, 2007
Reasons and Order signed by: Mr. Justice P. Blais

REASONS AND ORDER REGARDING THE APPLICATION FOR LEAVE TO MAKE AN APPLICATION UNDER SECTION 75

[1] The company Sono Pro Inc. ("Sono Pro") filed an application for leave to make an application under section 75 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act") against the company Sonotechnique P.J.L. Inc. ("Sonotechnique"). Sono Pro, which deals in professional audio products, alleges that Sonotechnique refuses to sell Dolby products to it, which, according to the applicant's submissions, substantially and directly affects its business.

I. THE APPLICATION

[2] The applicant, Sono Pro, is a legal person legally constituted under the *Companies Act*, R.S.Q. c. C-38. It has been carrying on business since the end of December 2006 selling professional audio products. Before founding the company, the president of Sono Pro, Mario Sauriol, worked at Sonotechnique for about seven years.

[3] The respondent, Sonotechnique, is a legal person legally constituted under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. It specializes in the sale and distribution of professional audio products. It is the exclusive Canadian distributor of audio products for 31 manufacturers, including Dolby. Sonotechnique has three places of business in Canada, one in Burnaby, one in Toronto and one in Montréal.

[4] Sonotechnique established a business policy whereby it only sells Dolby products to end-users and, therefore, does not share its exclusive distribution network with any other retailer.

[5] In its application, the applicant maintains that it is directly and substantially affected in its business by the respondent's refusal to deal. In its request, the applicant asserts that Dolby products represent 10% of its sales but that the loss with respect to the sale of related products and services affects its sales more significantly. In particular, it states that it was unable to fill an order by the National Film Board in the province of Québec for the purchase of Dolby products and estimates this loss to be more than [TRANSLATION] "$5000 in commission after the deduction for the respondent's commission."

[6] According to the applicant, Dolby products have become increasingly popular during the last ten years and are integral to the professional audio products market. The applicant adds that the respondent's actions prevent any form of competition and that Sono Pro, by its application, [TRANSLATION] "intends to ensure compliance with the rules of fair competition that guarantee retailers the ability to make a living from their specialization by obtaining supplies of goods and services in order to resell them."

II. THE RESPONDENT'S POSITION

[7] The respondent states in its response that it is prepared to sell Dolby products to the applicant, but at the price it charges end-users. The respondent contends that an exclusive distribution arrangement is common in the audio products business and is justified from a business perspective because the respondent assumes the costs of repairing Dolby products sold in Canada and guarantees the quality of its sales force to Dolby. The respondent notes that it works in a very specialized market and that the profit margin on the sale of Dolby products in its segment of the market is small.

[8] Relying on jurisprudence of the Tribunal, the respondent argues that the applicant has not met the test set out in subsection 103.1(7) of the Act because it has not submitted any credible evidence to support its position that the respondent's refusal affects its business directly and substantially. The respondent asserts that the applicant's allegation that Dolby products represent 10% of its sales is without merit, not supported by any figures (for example, the sales figures by product category or the amount of gross profits) and does not meet the test of sufficient credible evidence.

[9] Finally, the respondent notes that the applicant's website indicates that the applicant sells a wide variety of products from various manufacturers; accordingly, the applicant could obtain supplies from other manufacturers. On this point, the respondent notes that Dolby technology has competitors, in particular DTS and Sony.

III. ANALYSIS

[10] Subsection 103.1(7) of the Act reads as follows:

103.1 (7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.	**103.1 (7)** Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles**.**

[11] The subsection thus provides for two conditions precedent to granting leave: first, the Tribunal must have reason to believe that the applicant is directly and substantially affected in its business by the refusal to deal; next, an order could be made under section 75. In *Symbol Technologies Canada ULC v. Barcode Systems Inc*., 2004 FCA 339, [2004] F.C.J. No. 1657 (QL), the Federal Court of Appeal adopted Madam Justice Dawson's interpretation of this provision in *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41, [2002] C.C.T.D. No. 38 (QL), at paragraph 14, where she wrote:

> Accordingly, on the basis of the plain meaning of the wording used in subsection 103.1(7) of the Act and the jurisprudence referred to above, I conclude 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.

[12] Moreover, in *Barcode* above, the Federal Court of Appeal also stated that the Tribunal must have reason to believe that each condition set out in subsection 75(1) could be met, given the applicant's allegations.

[13] In this case, I am of the view that the applicant has not met the test that the Tribunal must have reason to believe that the applicant is directly and substantially affected in its business by the respondent's refusal to deal.

[14] In *Construx Engineering Corporation v. General Motors of Canada*, 2005 Comp. Trib. 21, the Tribunal dismissed an application for leave under section 103.1 on the grounds that there was not "sufficient credible evidence" to give it reason to believe that the applicant was directly and substantially affected in its business by the respondent's refusal to deal. In that case, the applicant had not provided details about the volume of its business, its sales figures or its geographic market. Because of the inadequate information, the Tribunal was unable to conclude that there was reason to believe that the applicant was substantially affected in its business.

[15] This case suffers from the same deficiencies. The applicant paints quite a vague picture of its business, and does not explain the importance of Dolby products. The only information in this regard appears in the sworn declaration of Mr. Sauriol: [TRANSLATION] "The sale of Dolby products represents 10% of my sales but the loss with respect to the sale of related products and services affects roughly 25% of its [sic] sales."

[16] No other explanation is provided. The applicant does not indicate in any way which "related products and services" are involved, or the link that exists between the respondent, which sells Dolby products, and these related products and services. Nor does the applicant state how it calculated this 25% loss and provides no proof thereof.

[17] Accordingly, I have no hesitation in finding that the applicant has failed to demonstrate that leave to make an application under section 75 of the Act should be granted.

THEREFORE THE TRIBUNAL ORDERS:

[18] The application for leave to make an application under section 75 is dismissed with costs to the respondent.

DATED at Ottawa, this 11th day of June 2007.

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

(s) Pierre Blais

Certified true translation
Mary Jo Egan, LLB

COUNSEL:

For the applicant:

Sono Pro Inc.

Christian Joly

For the respondent:

Sonotechnique P.J.L. Inc.

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