



Tribunal restores Sherbrooke store to Rona

BY [W. MICHAEL G. OSBORNE](#), AFFLECK GREENE ORR LLP.

On May 30, the Competition Tribunal ruled that home improvement retailer Rona Inc. can keep a store it had agreed to sell in order to gain Competition Bureau approval of its acquisition of competitor Réno-Dépot in 2003, because of a "change in circumstances".¹

Rona's application was under s. 106 of the *Competition Act*, a provision that hides numerous interpretive difficulties under deceptively simple language. The Tribunal's decision is the first interpretation of s. 106 as applied to a consent agreement and contains important comments on a number of interpretive difficulties that s. 106 presents.

Background

Rona has grown from small beginnings in 1939 as a buying group of hardware stores in Quebec to one of Canada's largest home improvement chains, with 566 stores, including 63 big box stores that compete with US home improvement giant Home Depot. Much of Rona's expansion outside of Quebec has come from acquisitions: Cashway in Ontario and Revy / Revelstoke / Lansing in Ontario and the west. In April 2003, Rona announced it was buying Réno-Dépot, a chain with 14 stores in Quebec and six The Building Box stores in Ontario. More recently, in December 2004, Rona announced it was buying Totem, a 14-store home improvement chain in Alberta (the transaction closed in April, 2005). About half of Rona's stores are affiliated stores under independent ownership.

The Bureau concluded that Rona's acquisition of Réno-Dépot would cause a substantial lessening of competition in Sherbrooke, Quebec. Home Depot had no store there and told the Bureau it had no

plans to open one. Rona insisted that Home Depot would soon open a store in Sherbrooke. Being unable to convince the Bureau, Rona agreed in September 2003 to sell the Sherbrooke Réno-Dépot store. A consent agreement was filed with the Tribunal requiring Rona to sell the store within five months, failing which a trustee would be appointed to sell it.

Exactly one week after the consent agreement was registered, evidence began to emerge that Home Depot had changed its mind and decided to expand into Sherbrooke. Over the next year the evidence mounted, to the point where Home Depot's store is expected to open in December 2005. Rona's lawyers passed all this evidence on to the Bureau, and by October, 2003, were taking the position that Home Depot's arrival would be a change in circumstances that would entitle Rona to keep the Sherbrooke store.

In the meantime, Rona tried, without success, to sell the Sherbrooke store. A trustee was appointed to sell the store. By late November, 2004, the trustee had a buyer.

The s. 106 application

Finally, in January 2005, Rona applied under s. 106 of the *Competition Act* to be relieved of its obligation to sell the Sherbrooke store.

Section 106 allows the Tribunal to vary or rescind its orders or consent agreements if (among other things):

- (i) the circumstances that led to the making of the agreement or order have changed; and

- (ii) in the circumstances that exist at the time of the s. 106 application, the agreement or order would not have been made.

Section 106 was amended in 2002 in connection with a change from a “consent order” system that required the Tribunal to approve settlements to a “consent agreement” system that allows parties simply to file consent agreements without needing Tribunal approval. These changes were made because the Tribunal had rejected some proposed consent orders. The Tribunal’s decision in this case is the first under the consent agreement provisions.

The Tribunal found that the imminent arrival of Home Depot was a change in the circumstances that led to the consent agreement, and that the agreement would not have been made in the present circumstances. It rescinded the consent agreement, rejecting the Commissioner’s arguments that it should refuse to do so as a matter of discretion.

The Tribunal’s decision contains important comments on the following issues:

- the interpretation of s. 106 as applied to consent agreements;
- what constitutes a “change in circumstances”;
- what circumstances are included in the “circumstances that exist” at the time of the s. 106 application;
- the meaning of “at the time the application is made”; and
- the duty of the Commissioner to remain responsive to changing circumstances.

Interpretation of s. 106 as applied to consent agreements

Before 2002, consent orders had to be approved by the Tribunal. Early on, the Tribunal made it clear that it would not rubber stamp consent orders, and would not approve orders that were ineffective or could not be enforced.² The Tribunal would typically hear evidence and argument, and intervenors might even participate. The process

could be slow and the outcome was never certain, to the frustration of the parties who had worked hard to achieve a deal.

In 2002, the Tribunal’s role in approving consent orders was taken away. The *Competition Act* now provides that the Commissioner and other parties can enter into “consent agreements” which are immediately registrable with the Tribunal and, once registered, have the force of an order of the Tribunal.³

This shift from consent orders to consent agreements entails a major shift in the interpretation of s. 106, as the Tribunal’s decision makes clear.

Before 2002, the second branch of the test in s. 106 simply read “in the circumstances that exist at the time the application is made under this section, the order would not have been made or would have been ineffective...”. Consent orders were orders of the Tribunal, even though the Bureau and the merging parties negotiated them. Consequently, the focus under the second branch of the test in s. 106 was whether the *Tribunal* would have made the order.

Section 106 was amended in 2002 to reflect the shift from consent orders to consent agreements. The second branch now reads, in English, “...the agreement or order would not have been made...”, and in French, “...le consentement ou l’ordonnance n’aurait pas été signé ou rendue...” [...the agreement or order would not have been signed or made...].

Consent agreements are negotiated and made by the parties, not the Tribunal, and s. 106 must be interpreted in this light, the Tribunal emphasized. While the Tribunal appears to have emphasized the word “signé” (signed) in the French version of s. 106, the same conclusion would flow from the English version.⁴

Thus, the Tribunal concluded, the test to be applied to a consent agreement is a subjective one:

Because the Tribunal did not make the order, it does not have to ask itself whether it would have made it. It can only consider the intentions of the parties, at the moment the consent agreement was signed and

at the time the application for variation or rescission is made.

Implications of the Tribunal's interpretation of s. 106

Because in this case Rona sought and obtained rescission of the consent agreement, the decision leaves open the question of how the Tribunal could vary a consent agreement. Under the consent order system, the Tribunal was restricted in varying a consent order to what it could do in a contested merger application, that is, the "blunt instruments" of divestiture or dissolution. The Tribunal could not make a new deal for the parties in the absence of their consent.⁵ It must be remembered that a requirement of the consent order process was that the Commissioner commence an application under one of the provisions in Part VIII. Consequently, a consent order and application to vary a consent order always occurred in the context of a potentially contested application.

The Tribunal's decision in *Rona* suggests that the new structure of s. 106 would not allow consent agreements to be varied. There is no basis in s. 106 as it is presently drafted that would allow the Tribunal to vary a consent agreement to impose divestiture or dissolution. There is no underlying potentially contested application in existence that could justify the Tribunal making such an order. The contractual nature of consent agreements means that the Tribunal cannot make a new deal for the parties. Before it could impose divestiture or dissolution, the Tribunal have to speculate that the parties would have agreed to this.

In the result, it appears that the Commissioner's attempt to prevent the Tribunal from interfering with settlements reached with merging parties will have the unintended consequence of making it relatively easy for merging parties to obtain rescissions of consent agreements, and likely impossible for the Commissioner to obtain variation directing the dissolution of a merger.

What constitutes a "change in circumstances"?

It is now clear that if a party knew about or anticipated a circumstance at the time of a hearing

but did not bring it to the attention of the Tribunal, it cannot later rely on that circumstance as a "change in circumstances" for the purposes of s. 106.⁶ The Commissioner relied on this principle, arguing that because *Rona* always believed Home Depot would open a store in Sherbrooke, but signed the consent agreement anyway, there was no change in circumstances.

The Tribunal rejected this contention. Rona never hid its belief that Home Depot was coming from the Bureau. It only signed the consent agreement because it could not convince the Bureau of this fact.

The Tribunal's approach to the "circumstances" also highlights another consequence of the shift from consent orders to consent agreements. Because a consent order requires that at least some evidence be filed with the Tribunal, there is a record that establishes what the circumstances were that led to the making of the consent order. By contrast, there is no formal record underlying consent agreements. For example, the *Rona* consent agreement merely refers to the fact that the Commissioner has "certain concerns regarding the impact of the Transaction on competition in the Sherbrooke area". The circumstances that led to the consent agreement must thus be established through witnesses and documents. Moreover, because of the focus on the intentions of the parties, at least part of the circumstances are the subjective reasons the parties had for signing the consent agreement.

What circumstances are included in "circumstances that exist"?

The Commissioner also argued that the "circumstances that exist" at the time of the s. 106 application include the fact that the trustee had reached an agreement to sell the store to a buyer.

In rejecting this objection, the Tribunal once again emphasized the contractual nature of consent agreements:

What followed the signing of the consent agreement is not relevant for the purposes of the Tribunal's analysis, because the analysis must define the circumstances in the

second branch of paragraph 106(1) in the context of the circumstances that led to the consent agreement.

The Tribunal then tied this to competition concerns that existed at the time, finding it unlikely that the Commissioner would insist on divestiture of the Sherbrooke store with the prospect of a Home Depot store opening a year later.

Timing

The second branch of s. 106 contains a curious blend of present and past tenses: "...in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective...".

This muddled syntax raises the question of whether the changed circumstances should be projected back to the time that the agreement or order was first made in a kind of thought experiment, or whether the question is whether the agreement or order would not be made today in those changed circumstances. In other words, in 2003, would the Commissioner have insisted and Rona have agreed to divest the Sherbrooke store if they knew that Home Depot would open a store three years later, in 2006? Or, would the Commissioner and Rona make this agreement in 2005, knowing that a Home Depot would open one year later?

Although the issue does not appear to have been argued in *Rona*, the Tribunal made it clear that the question is, in the changed circumstances, would the agreement or order be made "today" (that is, at the time of the s. 106 application)?

The Commissioner's duty to be responsive to changing circumstances

The Commissioner argued that the Tribunal should exercise its limited discretion and refuse to rescind the consent agreement because consent agreements need to be effective. The Commissioner added that rescinding the consent agreement would mean that in the future, merging parties need only delay divestiture until any competitive problems have resolved themselves, and then apply for rescission.

In dismissing this objection, the Tribunal was critical of the Commissioner's handling of the case. The Tribunal commented that the Commissioner herself has a duty to remain responsive to changing circumstances:

Though the Commissioner's intervention in 2003 appeared justified, the Commissioner nevertheless had the duty to remain responsive to the circumstances.

[...]

The Commissioner cannot, in the spirit of the Act, oppose as a matter of principle and force the performance of a consent agreement *despite* a change in circumstances, on the sole basis that consent agreements must remain in force at all costs.

The Commissioner's objection does, however, highlight the moral hazard that s. 106 creates. The possibility of being relieved of a divestiture obligation under s. 106 provides a merging party with a clear incentive to delay divestiture in hopes that changes in the competitive landscape will provide a basis for a s. 106 application. This undermines the principle that divestiture is supposed to be a quick remedy. The Tribunal left open the possibility that it would exercise its discretion to refuse to rescind a consent agreement where a party had delayed in bad faith.⁷

The Tribunal's decision might tempt the Commissioner to insist on shorter time frames for divestitures. This would be an unfortunate result, because it could turn divestitures into firesales. Moreover, such an approach by the Commissioner would be inconsistent with the Commissioner's obligation to be responsive to changing circumstances.

**For more information contact:**

W. Michael G. Osborne, Affleck Greene Orr LLP
Tel: 416-360-5919
Email: mosborne@agolaw.com

¹ *Rona Inc. v. Commissioner of Competition*, 2005 Comp. Trib. 18. As the decision is currently available only in French, quotations from it are the author's translations.

² *Canada (Director of Investigation and Research) v. Palm Dairies Ltd.* (1986), 12 C.P.R. (3d) 540; *Canada (Commissioner of Competition) v. Ultramar Ltd.*, [2000] C.C.T.D. No. 4.

³ Section 105.

⁴ The Tribunal did not comment on the difference in wording between the English and French versions of s. 106.

⁵ *Director of Investigation and Research v. Air Canada et al.* (1993), 49 C.P.R. (3d) 417 at 432 (F.C.A.).

⁶ *Canadian Waste Services Holdings Inc. v. Canada (Commissioner of Competition)*, [2004] C.C.T.D. No. 10; *Canada (Director of Investigation and Research) v. Imperial Oil Limited*, [1990] C.C.T.D. No.1; *Canada (Director of Investigation and Research) v. Imperial Oil Limited (1990)*, 31 C.P.R. (3d) 277; *Southam Inc. v. Canada (Director of Investigation and Research)* (1998), 78 C.P.R. (3d) 341 at 351

⁷ It should be noted that because the Rona consent agreement related to Quebec, the Tribunal applied civil law concepts relating to good faith in the performance of contracts.