BULLETIN

MAY 1994, No: 1

LAVERY, DE BILLY
BARRISTERS AND SOLICITORS

1 Place Ville Marie
Suite 4000
Montreal, Quebec
H3B 4M4
Tel.: (514) 871-1522
Fax: (514) 871-8977

925 chemin St-Louis
Suite 500
Québec, Québec
G1S 1C1
Tel.: 1-800-463-4002
Tel.: (418) 688-5000
Fax: (418) 688-3458

65 Queen Street
20th floor
World Exchange Plaza
Ottawa, Ontario
K1P 1A1
Tel.: (613) 594-9361
Fax: (613) 594-3783

Associated firms:
Blake, Cassels & Graydon
Toronto, Ontario
Calgary, Vancouver
London, England

REFUSAL TO DEAL

Can a supplier or a distributor refuse to do business with a particular person

SUMMARY

ACT RESPECTING THE LEGAL PUBLICITY OF SOLE PROPRIETORSHIPS, PARTNERSHIPS AND LEGAL PERSONS

SUMMARY

REFUSAL TO DEAL

Can a supplier or a distributor refuse to do business with a particular person

I. A WIDESPREAD PRACTICE

It is a common business practice for a producer, distributor or manufacturer to refuse to sell or provide a product or a service down the line. In most cases, this practice is highly justified for business reasons: the buyer's financial soundness, his ability to provide after-sale service, his technical know-how, experience, the geographical location of his establishment or his refusal to comply with the manufacturer's or retailer's business practices. The law by no means prohibits such a refusal. In general, the refusal to conduct business is neither illegal nor forbidden.The purpose of the Competition Act (the "Act") is to maintain and promote competition in Canada and, in particular, to ensure that small- and medium-sized businesses have an equitable opportunity to participate in the Canadian economy and to provide consumers with competitive prices and a wide choice of products.

Consequently, the Act stipulates the circumstances under which the Competition Tribunal may remedy a wrong sustained by the person who was at the receiving end of a refusal. We intend to examine these circumstances with reference to two significant decisions rendered on refusal to deal, namely, the Chrysler case *(Director of Investigation and Research v. Chrysler Canada Ltd. (1989) 27 C.P.R. (3d) 1 (Competition Tribunal)* and the Xerox case *(Director of Investigation and Research v. Xerox Canada Inc., (1990) 33 C.P.R. (3d) 83 (Competition Tribunal).*

II. A REVIEWABLE PRACTICE

Pursuant to the Act, refusal to deal is a reviewable practice, civil in nature, as opposed to conduct prohibited by the Act which constitutes a criminal offence.

The practice of refusing to deal may lead to an investigation by the Director. Subsequently, he may ask the Competition Tribunal to ban the practice or mitigate the consequences.

Some particulars of refusal to deal described in the Act are as follows:

(1) in principle, it is not criminal behaviour; it only becomes criminal if prohibited by the Competition Tribunal and if, afterwards, the person concerned does not comply with the Competition Tribunal's order;

(2) the Director of the Competition Bureau is the only person who can initiate a recourse based on refusal to deal;

(3) the burden of proof rests entirely on the Director; there is no presumption of fact or of law; and

(4) the Tribunal has very broad discretion; it is under no obligation to render an order or impose any ban whatsoever.

III. REFUSAL TO DEAL MAY SOMETIMES BE TANTAMOUNT TO CRIMINAL BEHAVIOUR

Refusal to deal is part of the reviewable practices which, in particular, include tied selling and exclusive dealing and which are overseen by a more encompassing provision: abuse of dominant position. According to Section 79, if one or more persons controls a given market, i.e., benefits from a so-called monopolistic or quasi-monopolistic position, and engages in anti-competitive behaviour which considerably decreases competition, the Competition Tribunal may intervene.

If the company engaged in refusing to deal finds itself in a dominant position, this refusal, in addition to becoming a reviewable practice in itself, becomes anti-competitive behaviour as well as an abuse.

Note that a company's conduct may constitute both a criminal offence and a reviewable practice. For instance, the manufacturer who refuses to sell a product because the retailer refuses to offer it to his customers at the manufacturer's suggested price may not only be the subject of a criminal prosecution under Section 61 of the Act which prohibits maintaining the resale price, but also civil proceedings pursuant to Section 75 of the Act which covers refusal to sell.

IV. FACTS TO ESTABLISH

For the refusal to deal to become a reviewable practice, the Director must establish four facts:

(1) the person is significantly hampered in his business or cannot operate his business because he is unable to procure a sufficient quantity of a product in a market at normal trade terms. The activity must therefore be important enough to the complainant and not simply pertain to a product or a service which constitutes a small portion of his commercial activity;

(2) the person is unable to procure a sufficient quantity of a product because of a lack of competition among suppliers. In this case, the Director must establish this lack of competition. If there is just one supplier, there is no obligation to establish the lack of competition. This lack of competition is the most difficult factor to establish because the evidence is economic in nature and subject to expert debate;

(3) the person must be able to respect normal trade terms. The potential buyer must meet the financial, skill and proficiency conditions needed in the industry to sell the product and must be authorized;

(4) ample quantities of the product must be available. The existing production of this article must be sufficient to accommodate it. There is no need for suppliers or manufacturers to increase or change their production volume to accommodate the complainant.

To begin with, note that pursuant to the Act, a "product" includes an article and a service. When the four aforementioned facts are established, the Tribunal may order the supplier to accept the person as a customer according to normal trade terms, that is to say, in credit matters and requirements of a technical, maintenance or service nature. If the products can be imported, instead of asking Canadian suppliers to supply this person, the Tribunal may order that custom duties on the article be removed, reduced or remitted thereby putting this person on equal footing with his competitors. If he cannot get supplies from Canadian suppliers, he is given the opportunity to get supplies from foreign suppliers according to conditions prevailing in Canada.

V. EXCEPTIONS

Concurrent to the obligation of some suppliers, producers and manufacturers to accept, in the cases set forth by the Act, a person as a client, the legislator acknowledged that some products may only be sold in specific establishments; for instance, designer clothing or perfume and franchising products. Furthermore, some luxury products are only sold by very limited and very set distribution networks.

One exception is described in the second paragraph of Section 75:

> "(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated."

So-called exclusive and high-end products constitute a market exempt from the application of Section 75 of the Act unless the product's position in the market is dominant to the extent that the refusal to deal hampers the operation of a business. In

fact, the legislator takes it for granted that some products which are similar but of a different brand, such as perfume, sweaters, suits, clothes, may be obtained at many locations.

VI. THE CHRYSLER CANADA AND XEROX CASES

In matters of refusal to deal, two important decisions were recently rendered by the Competition Tribunal, that is, the Chrysler Canada and Xerox cases.

1. The Chrysler Canada case

R. Brunet and Company ("RBC") had built up a business in Canada which exported automobile parts to South American countries. RBC dealt with some parts manufacturers and, in particular, Chrysler Canada ("Chrysler").

In 1987, Chrysler informed RBC that in the future Chrysler would refuse to supply it. Chrysler's decision prevented RBC from filling its buyers' orders and RBC approached some Chrysler dealers which accepted to sell it parts.

Chrysler was made aware of this practice and sent instructions to its sales representatives to the effect that the sale of some parts was strictly "to our Canadian customers and not for export" and had a provision included in its concession agreement to the effect that dealers implicitly had no right to sell parts for export outside of Canada.

The Tribunal decided that the "products" to be considered were "Chrysler" parts, not alternatively branded parts designed for Chrysler cars.

Chrysler argued that the targeted market was the automobile parts market in Canada as well as in the United States and that if RBC could get its supplies in Canada, it could do so in the United States. This attempt to merge the two markets was of prime importance in Chrysler Canada's argument which tried to minimize the impact of the price gap between Chrysler Canada and Chrysler U.S.A. by stipulating that RBC and all part exporters located in the United States (its competitors) were on an equal footing.

As Canadian prices are lower than American prices, RBC had a vested interest in getting its supplies from Chrysler Canada. The Tribunal concluded that market conditions in the United States and Canada were different. This decision acknowledges that the difference in price, in matters of refusal to deal, constitutes one of the features of a given market.

The Tribunal decided that RBC was in fact hampered in its business because of the impossibility of procuring supplies in Canada. The decision adds that the study of refusal to deal includes, in particular, the analysis of four factors:

(a) the product's importance for the business;

(b) the possibility of replacing it with another product;

(c) the possibility of replacing the sale of this product by other activities;

(d) the fact that the sale of the product is tied to other products or services.

The Tribunal concluded that the obligations imposed by Chrysler Canada on its dealers constituted a refusal to deal with RBC, especially in light of the fact that Brunet had a long-time business relationship with Chrysler Canada, and ordered Chrysler to supply Brunet.

2. The Xerox Canada Inc. case

Xerox had a large inventory of used photocopy machines and decided to liquidate them at a low price. Exdos purchased some equipment which Xerox had taken back at the end of an equipment lease, put it in working order and resold it. Xerox sold Exdos replacement parts.

Xerox's maintenance activities became significant and, in August 1988, Xerox U.S. and Xerox Canada decided to stop the supply of parts to other service companies claiming that these companies were in competition with them.

The Tribunal concluded that: Xerox's offer of parts was amply sufficient to meet Exdos' needs; the latter was in a position to fulfill the normal conditions required by Xerox but was unable to obtain parts elsewhere and this impediment considerably hampered its business.

For these reasons, the Competition Tribunal concluded that all the conditions of Section 75 of the Act were met and, consequently, ordered Xerox to accept Exdos as a customer to purchase Xerox parts. (The Xerox case is before the Federal Court of Appeal. Hearings which were expected to begin on April 12, 1994 were postponed).

VII. RECOURSE TO THE COURTS

In addition to being regulated by the Act, this practice of refusal to deal is marked by the notion of public order as defined by case law and becomes subject to the application of the basic principles of our civil law and, more particularly, the principle of the freedom to contract. In the case of Philippe Beaubien et Cie Ltée vs. Canadian General Electric Company Limited et al., [1976] C.S. 1459, the court did not hesitate to find that refusal to deal may lead to damages when it constitutes an unfair use of the law.

As between using the courts or complaining to the Director, several reasons favour turning to the Director. In fact, the administration and the economy of the Act

rest on the Director's intervention; it is up to him to conduct an investigation and decide whether to bring the matter before the Competition Tribunal. Consequently, it is less costly for the complainant to address the Director.

VIII. CONCLUSION

Generally, refusal to deal is not prohibited. It is a current and well-established business practice. Only after establishing some aggravating circumstances will the Director decide to bring the matter before the Competition Tribunal. When all the factors set forth in the Act exist, the Tribunal may order a supplier, manufacturer or producer to accept the complainant as a customer.

In Canada, refusal to deal as such is the object of a separate provision, Section 75 of the Act. Nonetheless, it may constitute an abuse of dominant position under some circumstances when the refusal to deal is engaged in by one or more persons controlling a given market. In this case, the refusal to deal must, in particular, have the effect of substantially preventing or lessening competition in a given market by anti-competitive behaviour and thus fall under the application of Section 79 of the Act.

Serge Bourque in collaboration with
Pascale Chapdelaine

ACT RESPECTING THE LEGAL PUBLICITY OF SOLE PROPRIETORSHIPS, PARTNERSHIPS AND LEGAL PERSONS

I. INTRODUCTION

In the context of reforming the Civil Code of Quebec, the National Assembly has adopted the Act Respecting the Legal Publicity of Sole Proprietorships, Partnerships and Legal Persons (companies) ("Bill 95") which came into force, with the new Civil Code, on January 1, 1994. This Bill substantially amends the obligations of legal persons, partnerships and natural persons operating a sole proprietorship, insofar as the information which they must make public is concerned. This Bill amends 45 acts and, more particularly, amends the Companies Act (Quebec) and supersedes or repeals three acts which imposed obligations on legal persons, namely the Companies and Partnerships Declaration Act, the Companies Information Act and the Extra-Provincial Companies Act.

Before Bill 95 came into force, companies (which are "legal persons" within the meaning of Bill 95 and the Civil Code of Quebec) had to file an annual return with the Inspector General of Financial Institutions (the "Inspector") pursuant to the Companies Information Act and, pursuant to the Companies and Partnerships Declaration Act, they had to file a declaration with the office of the Prothonotary of the Superior Court in every judicial district in which they conducted business. Bill 95 simplifies these obligations. Legal persons that wanted to conduct business in Quebec but which were not constituted pursuant to Quebec, federal or Ontario law, also had to obtain a permit to conduct business in Quebec pursuant to the Extra-Provincial Companies Act. This act was repealed.

Bill 95 provides for the creation of just one register containing all information on persons subject to the requirement of registration (the "registrants"). It also establishes a mechanism to update information pertaining to registrants whereby exact and up-to-date information about them can be obtained.

II. CREATION OF A REGISTER

One new computerized register, administered by the Inspector, was created for the whole of Quebec. This register

serves to receive information pertaining to the registrants and to make the information public.

It may be consulted at the Inspector's offices in Quebec City and Montreal and at the office of the Clerk of the Superior Court in every judicial district. Furthermore, it will be accessible by a telecommunications system authorized by the Inspector.

1. Declaration of Registration

Legal persons constituted pursuant to Quebec law after December 31, 1993 will register by filing the certificate of incorporation with the Inspector. Unless provided otherwise, other legal persons may register by filing a declaration of registration with the Inspector.

Partnerships and natural persons operating a sole proprietorship may register by filing a declaration of registration with the Clerk of the Superior Court.

The declaration contains general information on the registrant e.g. the registrant's name, address of domicile, name and address of its directors, and the addresses of its establishments in Quebec.

Even though the registration of legal persons constituted pursuant to Quebec law after December 31, 1993 is done by filing the certificate of incorporation, they must also file an initial declaration. This declaration may be filed at the same time as the certificate which exempts the legal person from the obligation of filing the notice pertaining to the address of the head office (Form 2) and the notice pertaining to the composition of the board of directors (Form 4), as this information was already included in the initial declaration. The initial declaration may also be filed after the certificate, without cost if filed within 60 days following the filing of same.

Unless provided otherwise in Bill 95, legal persons constituted after Bill 95 came into force and legal persons not constituted in Quebec must file a declaration of registration between July 1, 1994 and December 31, 1994. Natural persons who operated a sole proprietorship before Bill 95 came into force must file a declaration of registration between January 1, 1994 and June 30, 1994. Partnerships constituted before Bill 95 came into force must file a

declaration of registration between January 1, 1994 and December 31, 1994.

2. Amending Declaration

To ensure that the public has up-to-date information about the registrants, the legislator obliges registrants to file an amending declaration every time there is a change in the information. The amending declaration must be filed with the Inspector as soon as the change occurs.

3. Annual Declaration

As of 1995, registrants will also be obliged to file an annual declaration. This declaration is similar to the annual return which had to be filed every year pursuant to the Companies Information Act. This declaration must be filed between August 1st and October 31st for legal persons and between February 1st and April 30th for partnerships and natural persons operating a sole proprietorship.

The Inspector will send a reminder notice to registrants who have failed to file their annual declarations for the preceding year.

4. Failure to File

Bill 95 provides various sanctions in the event that a declaration of registration, an initial declaration, an amending declaration or an annual declaration are not filed:

- the failure to file constitutes an offence within the meaning of Bill 95 and penal prosecutions may be commenced against the registrant in default and against the directors, officers and agents of a registrant who ordered, authorized or advised the commission of an offence or who consented thereto or otherwise took part therein;

- the Inspector may strike the registration of a registrant who failed to file two consecutive annual declarations;

- the examination of an application or proceeding filed by an unregistered registrant before a court or administrative tribunal may be suspended until the registration takes place.

III. REGISTRANT'S NAME

Bill 95 and the Companies Act (Quebec) contain similar provisions concerning the choice of a name. They provide certain criteria pertaining to the choice of a name, for instance, the name must not contravene the provisions of the Charter of the French Language and it must not be confused with a name used by another person.

Previously, in the context of an application to reserve a firm name, the Inspector verified if all the criteria set forth by the Companies Act (Quebec) was respected. From now on, the Inspector will no longer be obliged to verify if all the criteria set forth by Bill 95 and the Companies Act (Quebec) is respected. For instance, he is no longer obliged to verify if the proposed name could be confused with another name already in use. The fact that the use of a name is initially authorized by the Inspector is no guarantee that this name will not be confused with another name already in use. It is therefore up to those who reserve a name to ensure that the proposed name cannot be confused with another name already in use.

The Inspector however exercises *a posteriori* control over the registrant's name, both pursuant to Bill 95 as well as the Companies Act (Quebec). At the request of any interested person, the Inspector may order a registrant to change the name used to carry on his or its activities if the name does not comply with the provisions of Bill 95 or the Companies Act (Quebec).

René Branchaud

LAVERY, de BILLY

PROFESSIONAL NOTES

During the recent symposium on human resources development held and organized in Quebec City last February 9, 10 and 11 by the *Association des cadres scolaire du Québec*, **Jean Pomminville** was invited to act as a resource person for the workshop pertaining to support relations and disciplinary measures. . **Marie-Claude Perreault** gave the same conference on March 29, 1994 to all management personnel of the City of Châteauguay.

Last February 24th, **Odette Jobin-Laberge** gave a lecture to the brokers of La Garantie Insurance Company about new practices in risk underwriting.

Last March 25th, **Raymond Doray** and **Alain Gascon** both spoke before the International Research Institute. **Mr. Doray**'s speech pertained to the impact of *Bill 68* on the confidential nature of files and the impact of the changes made to the Civil Code entailing new liabilities in light of employee disabilities. **Mr. Gascon** spoke about changes in labour relations and disability.

Richard Wagner gave a speech in Toronto on March 7th to the International Council of Shopping Centers (I.C.S.C.). The topic pertained to cases giving rise to an injunction because of the application of a continuous operation clause in commercial leases.

Last April 8th, **Georges Dubé** spoke about engineering contracts for the Meredith series of conferences organized by the Faculty of Law of McGill University. The topic of the symposium was transboundary transactions..

In April, **Don McCarty** participated in several seminars on the safe management of contaminated soil and waste given by Browning-Ferris Industries Limited.

The real estate law sector of the Canadian Bar Association organized a breakfast conference last April 13th at which **Christian Drapeau** spoke about commercial leases in the context of the Quebec Civil Code.

The task force on women in the Montreal school system under the auspices of The Island of Montreal's school council invited **Marie Gaudreau** to a dinner conference on women's rights in the Civil Code and related laws.

Michel Yergeau was guest lecturer of the Canadian Bar Association's environmental sector and discussed recent caselaw in environmental matters in 1993-94.

LAVERY, DE BILLY

BARRISTERS AND SOLICITORS