CANADIAN COMPETITION RECORD

CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

RONA inc. v. COMMISSIONER OF COMPETITION – THINKING OUTSIDE THE (BIG) BOX: COMPETITION TRIBUNAL SETS NEW TEST TO VARY CONSENT AGREEMENTS UNDER THE *COMPETITION ACT*

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Introduction

On May 30, 2005, the Competition Tribunal handed down an important decision in *RONA inc. v. Commissioner of Competition*[2], marking the first time the Tribunal has had occasion to interpret the new wording of section 106 of the *Competition Act*. The section enables the Tribunal to rescind or vary consent agreements or orders issued in matters pertaining to mergers or restrictive trade practices where it finds, among other things, that the circumstances that led to the making of the agreement or order have changed. In the *RONA* case, the Tribunal noted that in amending sections 105 (dealing with consent agreements) and 106 of the Act in June 2002, Parliament had wanted to allow more flexibility in the consent agreement process for resolving the competition-related concerns that may arise in the context of a merger. In the Tribunal's view, the conditions set out in section 106 for varying or rescinding such consent agreements had to be seen in that light.

This decision came about as a result of the April 2003 acquisition of Réno-Dépôt inc. ("Réno") by RONA inc. ("RONA") whereby RONA was to become the owner of twenty Réno home improvement stores in Quebec and Ontario. The Commissioner of Competition in office at the time had approved the transaction subject to the divestiture by RONA of a Réno store located in Sherbrooke, Quebec (the "Sherbrooke Store").

The decision of the Competition Tribunal in *RONA*[3] provides a clear interpretation of the new consent agreement process under the Act and the test to be applied when a party seeks to have that consent agreement rescinded (the variation of a consent agreement was not at issue in *RONA*).[4] In doing so, the Tribunal sends a signal to both private parties and the Commissioner that sections 105 and 106 of the Act add greater flexibility to allow private parties and the Commissioner to resolve competition concerns that may arise, *inter alia*, in the context of a merger, as well as an expanded basis under which the Tribunal may later agree to vary or rescind such agreements. *RONA* was the first case to be decided by the Tribunal under new section 106 of the Act and while the Tribunal confirmed that consent agreements must have a degree of certainty, the Tribunal's decision may well encourage parties to enter into agreements in cases where future market changes (affecting competitive concerns expressed by the Commissioner) may be suspected although not established at the time of the agreement.

The Tribunal's decision confirms the continued applicability of the Federal Court of Appeal's decision in *Air Canada*[5] and sets out the additional factors and analysis that must be undertaken in order to give effect to the 2002 amendments to the consent agreement

process. It serves as clear confirmation that the legislator, in amending the Act in 2002, intended to effect change to the former consent order process – changes that may well limit the use of the consent agreement process in certain cases. The Tribunal reminds the Commissioner and private parties of the important purpose of voluntary consent agreements and of the need to live up to all of the terms of the consent agreement. Importantly, the decision also confirms that onerous restrictions or obligations under such agreements will not be maintained simply on the basis that such obligations had, at one time, been agreed to by the parties. In doing so, the Tribunal places a draconian remedy – an asset divestiture – in its proper place – as a remedy of last resort that will not be mandated where market conditions no longer require it.

Quite apart from the legal ramifications of the decision, which are significant, the Tribunal's reasoning also serves as a warning to all parties – the Commissioner and private parties alike – to remain vigilant throughout the negotiation of a consent agreement and thereafter. Parties would be well advised to carefully scrutinize the provisions of the consent agreement, to keep careful and detailed notes of all meetings and discussions with the Competition Bureau and to provide for a mechanism in the consent agreement so that market developments relevant to the operation of the agreement may be monitored and brought to light as appropriate.

Above all, the *RONA* case will, no doubt, serve as a harbinger of change in the manner in which future consent agreements are negotiated by prudent, and proactive, counsel and parties.

How It All Started

In April 2003, RONA and Réno entered into a transaction under which RONA would acquire twenty Réno home improvement stores in Quebec and Ontario. At that time, the competitive environment in each of the geographic markets where RONA and Réno were operating their home improvement retail stores included other "big-box" competition, with the exception of the Sherbrooke market where *RONA* and Réno were the only two big-box home improvement stores in the area. Information that *RONA* had at the time of the transaction as to the suspected entry of its main competitor, Home Depot (a "giant" in the home renovation market), into the Sherbrooke market was not accepted by the Commissioner as sufficiently concrete to resolve the competition concerns expressed by the Commissioner in respect of the effect of the transaction in the Sherbrooke area. The Commissioner, therefore, approved the transaction subject to the post-closing divestiture by RONA of the Sherbrooke store.

On September 3, 2003, RONA entered into a consent agreement with the Commissioner in which RONA agreed to divest the Sherbrooke Store (the "Consent Agreement").[6] Under the terms of the Consent Agreement, RONA would first attempt to sell the Sherbrooke Store, and if unsuccessful within a set period of time, the responsibility of finding a qualified purchaser and completing the divestiture would be placed in the hands of a trustee. The Consent Agreement was registered with the Competition Tribunal on September 4, 2003, thereby having the same force and effect as if the agreement were an order of the Tribunal.

The Consent Agreement included two important clauses. The first clause (paragraph 18 of the Agreement[7]) provided that the Commissioner and RONA could agree to amend the Consent Agreement in any manner. The second clause (paragraph 21[8]) mirrored section 106 of the Act and stated that the Tribunal would retain jurisdiction in the event either

party applied to rescind or vary any provision of the agreement in the event of a change of circumstances or otherwise. (The inclusion of these two paragraphs in the Consent Agreement, as discussed below, was significant to the findings of the Tribunal.)

Virtually immediately following registration of the Consent Agreement, news reports and other information began to emerge confirming that RONA's major competitor, Home Depot, was in fact planning to enter the Sherbrooke market within a short period of time. Importantly, RONA's ability to acquire information relating to the entry of Home Depot was limited to those news reports, speeches and other information that had either been reported in the press or otherwise distributed by Home Depot. The Commissioner's ability to obtain information (voluntarily or otherwise) far exceeded that of RONA. And, while RONA could forward information to the Competition Bureau, no responding information was returned by the Bureau to RONA.

The growing body of information relating to Home Depot's entry into Sherbrooke was forwarded to the Commissioner by RONA as it was received and served to provide the Commissioner with the further evidence and indicia of market activity that RONA had been unable to confirm or establish (to the Commissioner's satisfaction) before the Consent Agreement was signed. In January 2005, concrete evidence was obtained by RONA which finally confirmed that a Home Depot store was scheduled to open in Sherbrooke in the fall of 2005.

In January 2005, RONA filed an application under section 106 of the Act requesting the Tribunal, on the basis of a change of material circumstances, to rescind the consent agreement thereby removing the divestiture obligation. By the time the application was filed, the trustee had entered into a purchase and sale agreement with a prospective buyer, which agreement was still subject to the Tribunal's approval.

The Position Taken by RONA

The position advanced by RONA in the application was straightforward: RONA had agreed to divest the Sherbrooke store at a time when the Sherbrooke market was characterized by an absence of big-box competition in the home renovation retail market – at the time of the RONA/Reno transaction, Home Depot was not present in the Sherbrooke market – a notable distinction between the Sherbrooke market and every other market considered by the Commissioner in connection with the transaction. At the time of the application, it was clear that Home Depot had firm plans to enter the Sherbrooke market and that such entry would take place within a short period of time – amounting to only months beyond the two year time frame contemplated in the *Merger Enforcement Guidelines* published by the Bureau as a guide to assessing the impact of a merger on relevant markets.

In the changed circumstances, RONA would not have agreed to the Consent Agreement and, on that basis, the application under section 106 was commenced.

The Commissioner's Response

The Commissioner's response was equally straightforward. She contested RONA's application on the basis that although the entry of Home Depot would correct the competitive concerns the Commissioner had had initially, the divestiture would have a swifter impact on competition in the Sherbrooke market than awaiting the arrival of Home Depot.[9] The Commissioner also alleged that given that RONA had previously indicated that, in their view, Home Depot would enter the market, the actual arrival of Home

Depot did not constitute a change of circumstances within the meaning of section 106 of the Act. The Commissioner further attempted to convince the Tribunal that the order sought by RONA should not be granted on the basis of the manner in which RONA had conducted itself during the course of the divestiture process. Finally, the Commissioner claimed that the need to have certainty in consent agreements and the existence of a signed agreement of purchase and sale with a third party justified refusing the relief sought by RONA notwithstanding the plain wording of the Consent Agreement and section 106 of the Act.

The Commissioner's first attempt to defeat RONA's application came in the form of a motion to strike brought by the Commissioner only weeks after the application was launched and alleging that the application amounted to an abuse of process on the part of RONA (an argument similar to that ultimately raised by the Commissioner in her response to the application). The motion to strike was rejected by the Tribunal and the application proceeded to hearing.

Findings of the Competition Tribunal

Section 106 of the Act grants the Tribunal jurisdiction, and a discretionary power, to rescind or vary consent agreements or orders issued in matters pertaining to mergers or restrictive trade practices where it finds that the circumstances that led to the making of the agreement or order have changed and that, in the changed circumstances, *inter alia*, the agreement would not have been signed.

In its decision, the Tribunal carefully considered and assessed the consent order regime before, and the consent agreement regime after, the legislative changes to the Act in 2002. Prior to the 2002 amendments, where the Commissioner and the person against whom an order was sought had agreed to the terms of the order, the Tribunal under section 105 of the Act had the discretion to grant the order on those terms without hearing such evidence as might be placed before the Tribunal on a contested application.[10] The role of the Tribunal under this process was to review and assess the terms of the order proposed and to satisfy itself that, in a merger case, the substantial lessening of competition presumed to arise from the merger had, in all likelihood, been eliminated.[11]

When approving such consent proceedings, the Tribunal would have had before it a consent order impact statement which would have set out, *inter alia*, an explanation of the circumstances giving rise to the draft consent order or any provision of the draft order. The consent order impact statement would also have, at that time, set out the relief to be obtained if the order was made and the anticipated effects on competition of that relief.

Post 2002, however, consent agreements are simply filed with the Tribunal and the Tribunal is required to register them immediately, without any consideration or assessment of the effectiveness of the corrective measures agreed to by the parties.[12] No consent order impact statements are filed with the Tribunal and the substantive "record" at the Tribunal is simply the consent agreement itself (and possibly a separate consent document, depending on how the matter is arranged by the parties). The Tribunal, therefore, no longer has access to the evidence underlying the Commissioner's concerns as was formerly the case and plays no adjudicative role in the process at the registration stage. This change becomes significant when viewed in the context of an application to vary a consent agreement.

Mindful of this important distinction, and despite argument by the Commissioner that the changes to section 106 still required the Tribunal to assess a

variation application along the lines it would have prior to the 2002 amendments, the Tribunal noted in the *RONA* case that it was not necessary for it to determine whether it would have issued an order confirming the terms agreed to by the parties in a consent agreement if the circumstances subsequently brought to light at the time of an application to vary or rescind had been known to it. Rather, the Tribunal's role is to determine whether the consent agreement would have been entered into (i.e. signed) by the parties in such circumstances. In order to do this, the Tribunal considered the intent of RONA and the Commissioner at the time of the signing of the Consent Agreement and again at the time of the filing of the application to vary or rescind.

The Tribunal found, first, that the evidence had established that Home Depot would be coming to Sherbrooke in the fall of 2005 and that the entry in this geographic market of a major competitor like Home Depot did indeed amount to a change of circumstances for purposes of the first part of the test under section 106 of the Act. In the Tribunal's view, the proof and the certainty that Home Depot would be opening a store in Sherbrooke, which the Commissioner, throughout the entire divestiture process, had always characterized as "speculative", clearly represented a change of circumstances.

The Tribunal then considered the second part of the test, which required a determination of whether the parties would have signed the Consent Agreement based on these new circumstances. The Tribunal found that RONA would not have agreed to divest the Réno store in Sherbrooke had it known that Home Depot was in fact planning to open a store in the Sherbrooke area in the fall of 2005 and had the date of the arrival of its principal competitor been known in late summer 2003, when the consent agreement was signed. In addition, the Tribunal remarked that it was even unlikely that the Commissioner would have called for such a divestiture if the information about the opening of a Home Depot store had been known at the time.

Given that the power to rescind or vary a consent agreement is discretionary, the Tribunal then considered whether it was appropriate, in the circumstances, for it to rescind the Consent Agreement. The Commissioner's view was that the Tribunal should not exercise its discretion in RONA's favour. The Commissioner suggested, first, that RONA had abused its rights and unduly delayed the divestiture process and, secondly, that rescinding the Consent Agreement would be prejudicial to the rights of a third party, namely, the prospective buyer that had entered into a purchase and sale agreement with the trustee for the Sherbrooke Store and that was to have acquired the store. Lastly, it was argued that having a Consent Agreement in place would more effectively ensure that competition in Sherbrooke could be "re-established".

The Tribunal responded to the first point by stating that RONA's conduct during the divestiture process should be the subject of consideration only after a finding that both parts of the section 106 test were in fact met (which was found to be the case). The Tribunal then went on to conclude that the evidence showed the allegation of abuse by RONA to be without foundation. The steps taken by RONA in the course of the divestiture process either were provided for in the Consent Agreement or reflected normal business practice in the circumstances.

On the second point, the Tribunal noted that in exercising its discretionary power, it was required to take the aims of the Act into consideration. However, while it was important for consent agreements to be perceived by the public as stable and effective, that the Act makes explicit provision for varying or rescinding them where circumstances warrant could

not be overlooked – i.e. the plain wording of the statute had to be given effect. The Tribunal found that the rights of a third party flowing from the signing of a purchase and sale agreement for the Sherbrooke Store were not, in themselves, a sufficient basis for dismissing RONA's application to rescind the Consent Agreement. The Tribunal noted that the prospective buyer had signed the purchase and sale agreement with the trustee knowing that the Sherbrooke Store was being sold pursuant to the Consent Agreement and that the Consent Agreement could be set aside by the Tribunal.

Finally, the Tribunal found that the imminent arrival of Home Depot to Sherbrooke answered the concerns about a substantial lessening of competition in the Sherbrooke area. Accordingly, there was no reason for the Commissioner to insist on maintaining a corrective measure (i.e. the divestiture of the Sherbrooke Store) that was no longer necessary. In other words, the Consent Agreement no longer served any useful purpose since there was no longer any situation with regard to competition that needed correcting – the market would correct itself.

What It All Means

The Tribunal's ruling in *RONA* clarifies the interpretation to be given to the new test under section 106 of the Act (for rescission of a consent agreement) and confirms the continued applicability of the decision of the Federal Court of Appeal in *Air Canada*.[13] As Justice Hugessen noted in that case, the first part of the section 106 test (assessing whether the circumstances that led to the consent order or agreement have changed) involves a determination by the Tribunal of the existence of a "simple causal link" between the circumstances and the order (or now the agreement), but no more.

The new aspect of section 106 – assessing whether the parties would have signed the agreement – is a new element and one that requires a close look at what the parties intended at the time of the consent agreement. Notwithstanding the arguments made by the Commissioner, the Tribunal confirmed that the amendments to sections 105 and 106 of the Act effected a substantive change to the section 106 test. The *RONA* decision may be expected to have a significant impact on all consent agreements that are premised on correcting a situation involving an imbalance in the relevant markets, for it is a market shift or development that in *RONA* gave rise (and could in a future case) to no further need for the remedy set out in the Consent Agreement.

The decision further confirms the contractual nature of such consent agreements and the underlying principles that parties would act in good faith under the negotiated terms of the consent agreement. The Tribunal's decision also makes it clear that commitments set out in the consent agreement should be observed by all parties and that a consent agreement is more than simply a divestiture agreement. The Tribunal noted, however, that it appeared in the *RONA* case that the Commissioner had not respected the commitments under the Consent Agreement. In particular, the Tribunal noted the evidence from the Commissioner that the preoccupation of the Bureau was the completion of the divestiture of the Sherbrooke Store. The Tribunal noted that the Commissioner could not, within the spirit of the Act, force the execution of the terms of the Consent Agreement solely on the basis that the Consent Agreement must, at any cost, be upheld. This position was quite simply contrary to both the Consent Agreement (which spoke to the continuing jurisdiction of the Tribunal to alter the Agreement), as well as to a plain reading of section 106 of the Act.

Consent agreements are not, in the words of the Tribunal, "an end in themselves". The Tribunal clarifies that they must be read in the context of the Act and

the overall objectives of Canadian competition policy, and ought not to be artificially maintained when they have lost their *raison d'être*. Such remedies are designed to address a real competitive concern and once that concern has been eliminated – whether by means of a market change or otherwise – the need for a draconian remedy must accordingly fall.

Going Forward – "Lessons Learned"

The *RONA* decision affords useful insight into not only the consent agreement process under sections 105 and 106 of the Act but also into the negotiation process leading to the conclusion of a consent agreement in a merger review.

The decision first highlights that parties should carefully document all exchanges with the Bureau on the Bureau's views of the effect of the merger as well as all exchanges that led to the provisions in the consent agreement. Moreover, if a market change is anticipated, it would be prudent to ensure this market change is clearly identified as a basis upon which the consent agreement might be rescinded or varied. Parties should also be scrupulous in promptly informing the Bureau of any changes that occur in market conditions that could affect the competitive environment. The *RONA* decision illustrates the need to be as absolutely clear as possible as to the circumstances that led to the making of the consent agreement and to specifically provide, notwithstanding section 106 of the Act, for a "change of circumstances" provision in the consent agreement itself.

In *RONA*, the Commissioner attempted to argue that the old section 106 test – which presumed a substantial lessening of competition to arise as a result of the merger – still applied notwithstanding the new consent agreement procedure. Any consent agreement should explicitly disavow any agreement that there is, has been, or will be a substantial lessening of competition arising from the merger. The consent agreement should also indicate that in the event of litigation under section 106 of the Act (or otherwise), the issue of whether or not there has been, or will be, a substantial lessening of competition must be proven to the same standard as other issues.

If the consent agreement provides for timelines within which certain steps are to be accomplished (e.g. divesture efforts, filing a request for information, filing an objection, etc.), the consent agreement should clearly indicate that the Commissioner will not attempt to argue abuse of process in the event that the party took the full time permitted under the consent agreement. (This was the situation in *RONA* where the Commissioner attempted to argue that actions taken by RONA on the last day of permitted time periods were an abuse of process. While the Tribunal clearly rejected these claims, a clear provision in the consent agreement would help to avoid relitigating this argument in a future case.)

In the case of section 106 litigation and to redress the very serious information imbalance created under the *Competition Tribunal Rules* where parties (including the Commissioner) are required to disclose only those documents upon which they intend to rely, parties should be vigilant in assessing whether there is a need for documentary or oral discovery and, in cases where there is such a need, should bring a motion as early as possible in the litigation.[14] In *RONA*, the timelines were significantly compressed and there was neither documentary nor oral discovery.[15] Although witnesses and documents may be subpoenaed, this process is replete with practical difficulties – the timing of the production of documents and witnesses, the (natural and understandable) disinclination of a competitor to provide useful assistance to another market player, and confidentiality concerns in the event that the third party

subject to the subpoena is a competitor. Other ways to address the information imbalance could include adding an obligation on the Commissioner to alert the private party to the possibility of rescission or variation of a consent agreement in the event of significant changes to the competitive market (without disclosing information contrary to the Act[16]) or using other provisions of the Act, such as section 10(2)[17], to obtain information relevant to the remedy required by the Commissioner in advance of registering the consent agreement.

On a logistical front, the *RONA* case could be considered as a procedural "high-water mark". The hearing began only 12 weeks after the application was launched. The pre-hearing procedures included a substantive motion to strike by the Commissioner with affidavits and cross-examination. The motion to strike was heard over two days and the Commissioner's response to the application was filed only after the decision had been rendered on the motion to strike. During the proceeding, the Commissioner challenged RONA's ability to file a reply (notwithstanding it was expressly permitted to do so under the *Competition Tribunal Rules*) which necessitated a further motion seeking leave to do so. The procedural history in *RONA* highlights the need to be as prepared as possible in advance of actually launching an application and, thereafter, diligently pursuing all necessary procedural avenues to obtain access to relevant documents and information.

Going forward, this case raises the issue of whether the Commissioner, given the new test set by the Tribunal on a request to rescind a consent agreement, will move for shorter divestiture periods (to limit the potential for market developments to occur), seek a fix-it-first remedy or accept voluntary undertakings as opposed to consent agreements under section 105 of the Act and subject to rescission under section 106 of the Act.[18]

A Final Word

The Tribunal's analysis concerning the purpose of the Act, the role of the Commissioner and the use of remedial tools – such as a consent agreement to effect a divestiture – bears close reading not only for the relevance of that analysis to future consent agreements but also in virtually all cases. The Tribunal's decision reminds all parties, including the Commissioner, of the policy objectives of the Act and that the provisions of the Act must be read bearing in mind these objectives. The Tribunal's comments that consent agreements are not uniquely divesture agreements, that a consent agreement should not be maintained in the absence of a competitive rationale for doing so and that the role of the Commissioner and, on application, the Tribunal is to address issues of substantial lessening of competition, not to re-establish or restructure competition in a relevant market, reflect the fundamental principles of Canadian competition law and policy which must guide the Commissioner in the exercise of her extensive powers of investigation and enforcement.

Post-Script on Costs

On August 19, 2005, the Tribunal rendered its decision on the issue of costs.[19] RONA was awarded its costs in the matter on the basis of the tariff set in the *Federal Courts Rules* with allowance for two counsel at full tariff rates (given the additional work required as a result of the accelerated hearing process requested by the Commissioner). The Tribunal also awarded RONA an additional 50% increase on all fees after March 16, 2005. The fees were increased in recognition of an unaccepted offer to settle that had been made by RONA to the Commissioner before the Tribunal hearing began.

Notes

[1] RONA was represented by William M. McNamara, Denis Gascon, Martha A. Healey, Eric C. Lefebvre and Dominique Simard of Ogilvy Renault's Competition/ Antitrust Law group in the merger review before the Competition Bureau and in the proceedings before the Competition Tribunal.

[2] CT-2003-007 [*RONA*]. The public version of the decision may be accessed on-line at http://www.ct-tc.gc.ca/CMFiles/CT-2003-007_0089c_38LWO-8102005-4848.pdf?windowSize=popup.

[3] *Ibid.*

[4] The Commissioner of Competition did not appeal the decision of the Competition Tribunal.

[5] *Canada (Director of Investigation and Research) v. Air Canada*, [1994] 1 F.C. 154 (FCA), rev'g (1993), 49 C.P.R. (3d) 7 (Competition Tribunal) [*Air Canada*].

[6] The public version of the consent agreement may be accessed on the Competition Tribunal website at: www.ct-tc.gc.ca/CMFiles/CT-2003-007_0001c_40KGK-472004-4279.pdf?windowSize=popup.

[7] Section 18 of the Consent Agreement provided: "RONA and the Commissioner may agree to amend this Consent Agreement in any manner"

[8] Section 21 of the Consent Agreement provided: "The Tribunal shall retain jurisdiction for the purpose of any application by the Commissioner or RONA to rescind or vary any of the provisions of this Consent Agreement in the event of a change of circumstances or otherwise."

[9] The position taken by the Commissioner in *RONA* was surprising given that in *Washington v. Canada (Director of Investigation and Research)* (1998), 78 C.P.R. (3d) 479 (C.T.) the Commissioner agreed to the variation of a consent order to eliminate the requirements of four entities in the ship berthing business to divest themselves of certain shipberthing assets upon the entry of a new competitor in the relevant market.

[10] Prior to the amendments in 2002, sections 105 and 106 of the Act read as follows:

> 105. Where an application is made to the Tribunal under this Part for an order and the Commissioner and the person in respect of whom the order is sought agree on the terms of the order, the Tribunal may make the order on those terms without hearing such evidence as would ordinarily be placed before the Tribunal had the application been contested or further contested.
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> 106. Where, on application by the Commissioner or a person against whom an order has been made under this Part, the Tribunal finds that
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> (a) the circumstances that led to the making of the order have changed and, 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 to achieve its intended purpose, or
>
> (b) the Commissioner and the person against whom an order has been made have consented to an alternative order, the Tribunal may rescind or vary the order accordingly.

[11] See, for example, Canada (*Commissioner of Competition) v. Trilogy Retail Enterprises L.P.* (2001), 14 C.P.R. (4th) 216, *Director of Investigation and Research v. Palm Dairies* (1986), 12 C.P.R. (3d) 540 (Competition Tribunal) and *Southam Inc. v. Canada (Director of Investigation and Research)* (1998), 78 C.P.R. (3d) 341 (Competition Tribunal). In *Southam*, the Tribunal described the former section 106 test as follows:

> Under paragraph 106(a), an applicant must first establish that the circumstances that led to the making of the original order have changed. It is then necessary to demonstrate that in the changed circumstances, the original order would not have been made or would have been ineffective to achieve its intended purpose. If these criteria are satisfied, the Tribunal may then exercise its discretion to vary or rescind the original order.

[12] Sections 105 and 106 of the Act now provide:

> 105. (1) The Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under this Part, other than an interim order under section 103.3 or a temporary order under section 104.1, may sign a consent agreement.
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> (2) The consent agreement shall be based on terms that could be the subject of an order of the Tribunal against that person.
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> (3) The consent agreement may be filed with the Tribunal for immediate registration.
>
> (4) Upon registration of the consent agreement, the proceedings, if any, are terminated, and the consent agreement has the same force and effect, and

> proceedings may be taken, as if it were an order of the Tribunal.
>
> 106. (1) The Tribunal may rescind or vary a consent agreement or an order made under this Part other than an order under section 103.3 or 104.1 or a consent agreement under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the Tribunal finds that
>
> (a) the circumstances that led to the making of the agreement or order have changed and, 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 in achieving its intended purpose; or
>
> (b) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.

[13] *Supra* note 5.

[14] The notion of a relevance as opposed to a reliance standard in Competition Tribunal litigation is a matter of current discussion and debate within the Canadian competition law field.

[15] Prudence should be exercised in seeking discovery, however, to avoid a situation where the private party to the application is compelled to produce all relevant documents but where the Commissioner invokes either public interest privilege or the confidentiality of the investigation process, thereby limiting the documents that the Commissioner produces. The result in such a case is a, potentially significant, imbalance in document production.

[16] The protection of confidential information under section 29 of the Act is a key, and limiting, factor in the Commissioner's ability to disclose information on developments in the competitive marketplace. However, the Commissioner could, for reasons undisclosed, alert a party to a consent agreement that the Commissioner would agree to amend the consent agreement given information that has come to the attention of the Commissioner without specifically indicating the basis for the Commissioner's willingness to amend.

[17] Section 10(2) of the Act provides:

> The Commissioner shall, on the written request of any person whose conduct is being inquired into under this Act or any person who applies for an inquiry under section 9, inform that person or cause that person to be informed as to the progress of the inquiry. [emphasis added]

[18] The *RONA* decision leaves open for another day the issue of how a consent agreement could be varied in the absence of consent of the parties.

[19] The Tribunal's decision on costs may be accessed on-line at: http://www.ct-tc.gc.ca/CMFiles/CT-2003-007_0098a_38LOU-8232005-4536.pdf?window Size=popup.

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November 1, 2004
NEWS RELEASE: Pickering Man Charged for Operating Pyramid Scheme

November 2, 2004
NEWS RELEASE: Minister of Industry Tables Amendments to Strengthen the Competition Act

November 3, 2004
INFORMATION: Rogers-Microcell Merger Clears Bureau Scrutiny

November 9, 2004
NEWS RELEASE: Nippon Electrodes Fined $225,000 for Role in Conspiracy

November 15, 2004
NEWS RELEASE: Window Coverings Company Pleads Guilty to Attempting to Influence Competitor's Prices

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INFORMATION: Hold Separate Agreement Filed in Riverside-Tolko Merger

November 19, 2004
INFORMATION: Competition Bureau Responds to Complaint Regarding Canadian Olympic Broadcasting Rights

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NEWS RELEASE: Herbalife Marketers Plead Guilty to Pyramid Selling

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INFORMATION: Waste Management Must Sell Ridge Landfill

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NEWS RELEASE: Competition Bureau Reaches Agreement to Preserve Competition in Two B.C. Forestry Markets

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December 13, 2004
NEWS RELEASE: Consumers to Receive Full Refund for Bogus Diet Patches

December 14, 2004
INFORMATION: Randall Hofley Appointed as Special Counsel to the Commissioner of Competition

December 17, 2004
INFORMATION: Competition Bureau Concludes Inquity into Snow Crab Processing in Newfoundland and Labrador

January 4, 2005
NEWS RELEASE: Competition Bureau Approves Divestiture of Ridge Landfill to BFI Canada

January 24, 2005
NEWS RELEASE: Landmark Competition Act Ruling Against Sears Canada

February 1, 2005
NEWS RELEASE: Corporate Canada Joins Fraud Prevention Forum to Raise Public Awareness and Stop Fraud

February 9, 2005
NEWS RELEASE: Competition Bureau Reaches Settlement with Goodlife Fitness Clubs in Advertising Case

February 10, 2005
INFORMATION: February is Fraud Awareness Month

February 22, 2005
INFORMATION: Competition Bureau Participates in Worldwide Blitz on Scams and Spam

February 23, 2005
NEWS RELEASE: Competition Bureau Participates in the Creation of an Atlantic Partnership to Combat Cross-border Fraud

February 24, 2005
INFORMATION: Manitoba's Top 10 Scam List

March 2, 2005
NEWS RELEASE: Former UCAR Executive Pleads Guilty to Price Fixing

March 7, 2005
NEWS RELEASE: Competition Bureau Appeals Decision in Canada Pipe Case

March 10, 2005
NEWS RELEASE: Competition Bureau Reaches Settlement with Federal Auction Service in Advertising Case

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March 11, 2005
NEWS RELEASE: Multi-level Marketing Firm Pleads Guilty to Misleading Participants

March 14, 2005
NEWS RELEASE: Mail Order Companies Charged for Deceptive Marketing Practices

March 15, 2005
NEWS RELEASE: Competition Bureau Investigation Leads to Additional Guilty Pleas in Deceptive Telemarketing Operation

March 18, 2005
INFORMATION: Commissioner Appoints Advisory Panel on Efficiencies

March 31, 2005
NEWS RELEASE: Competition Bureau Concludes Examination into Complaints about High Gasoline Prices

March 31, 2005
NEWS RELEASE: Competition Bureau Challenges Tanning Health Claims

April 1, 2005
NEWS RELEASE: Sears Deceptive Tire Marketing Case

April 28, 2005
INFORMATION: Competition Bureau Implements Policy for Greater Transparency

April 29, 2005
INFORMATION: Competition Bureau Releases Report on Consultations with International Competition Authorities

April 29, 2005
NEWS RELEASE: Competition Bureau Concludes Examination into Canadian Cattle and Beef Pricing

May 4, 2005
INFORMATION: Competition Bureau Clarifies its Role in Private Access Cases

May 12, 2005
NEWS RELEASE: Mitsubishi Fined $1,000,000 for Aiding and Abetting Graphite Electrode Cartel

May 18, 2005
INFORMATION: Atlantic Partnership - Combatting Cross-Border Fraud

May 24, 2005
INFORMATION: Melanie Aitken Appointed as Assistant Deputy Commissioner in Mergers Branch

CANADIAN COMPETITION RECORD

June 8, 2005
NEWS RELEASE: Competition Bureau Targets Red Tape and Better Enforcement in the Global Economy

June 13, 2005
NEWS RELEASE: Competition Bureau Screens Cinema Merger: Cineplex Must Sell off 35 Theatres

June 20, 2005
NEWS RELEASE: Competition Bureau Investigation into Deceptive Telemarketing Operation Concludes

June 20, 2005
INFORMATION: Competition Bureau to Draft New Bulletin on the Regulated Conduct Defence

June 23, 2005
INFORMATION: Bureau Proposes Competition Analysis for Deregulating Local Telephone

June 28, 2005
NEWS RELEASE: Competition Bureau Challenges Weight Loss Claims Made by Quebec Companies

July 8, 2005
NEWS RELEASE: Competition Bureau Seizes Sunglasses with Misleading Claims

August 2, 2005
NEWS RELEASE: Criminal Charges Laid in Cancer Treatment Scam Following Competition Bureau Investigation

August 16, 2005
INFORMATION: Bureau Files Comments to Telecommunications Review Panel

August 30, 2005
NEWS RELEASE: Competition Bureau Investigation Leads to Over $1.6 Million in Fines for International Nucleotide Producers Conspiracy

August 30, 2005
INFORMATION: Competition Bureau Seeks Public Comment on its Information Bulletin on the Communication and Treatment of Information Under the Competition Act

August 30, 2005
INFORMATION: Beef Merger Can Proceed Following Bureau Scrutiny

September 2, 2005
NEWS RELEASE: Competition Bureau Closely Tracking Gasoline Price Increases Following Hurricane Katrina

September 7, 2005
NEWS RELEASE: Canada and Japan Sign Cooperation Agreement on Competition Law Enforcement

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September 27, 2005
NEWS RELEASE: Competition Bureau Participates in Boiler-Rooms Take-Downs

September 28, 2005
INFORMATION: Competition Bureau Joins Federal Trade Commission in Educating Consumers About Internet Weight-Loss Scams

September 30, 2005
NEWS RELEASE: Telemarketer Sentenced to Jail

September 30, 2005
INFORMATION: Competition Bureau's Concerns Resolved in Proctor & Gamble's Acquisition of Gillette