

Court No. T-1347-03
T-1348-03

"F.E.G."

FEDERAL COURT OF CANADA
(TRIAL DIVISION)

Toronto, Ontario, this 18th day of August, 2003

PRESENT: THE HONOURABLE Mr. JUSTICE Gibson

BETWEEN:

HER MAJESTY THE QUEEN

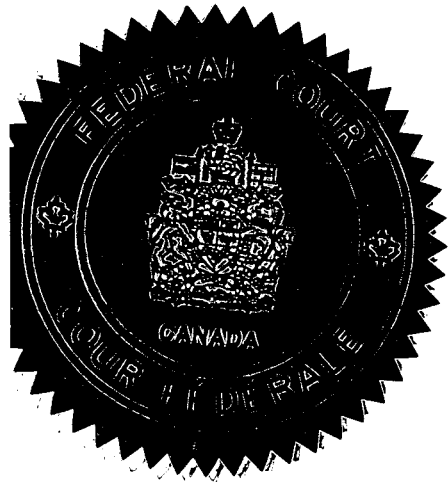
Applicant

- and -

AKZO NOBEL CHEMICALS BV

Respondent

PROHIBITION ORDER



UPON THE APPLICATION of the Attorney General of Canada for an order pursuant to subsections 34(1) and 35(1) of the *Competition Act*, R.S.C. 1985 c. C-34, as amended, and upon having registered convictions this day against the Respondent for having committed indictable offences, specified in the indictments filed herewith, contrary to paragraph 45(1)(c) of the *Competition Act*, and upon hearing counsel for the Attorney General of Canada and counsel for the Respondent, and upon reading the Agreed Statement of Facts, filed, and on consent:

1. **THIS COURT DOES PROHIBIT** the repetition of the said offences by the Respondent for a period of ten years from the date of this Order.
2. **AND THIS COURT DOES FURTHER PROHIBIT** the doing of any act or thing by the Respondent and each and every of the Respondent's directors, officers and employees directed towards the commission or repetition of the said offences for a period of ten years from the date

of this Order.

3. **AND THIS COURT DOES DIRECT** the Respondent to:

- (a) provide within 60 days of this Order, to the extent that it has not already done so, to each of its directors, officers and employees responsible for the sales or marketing of choline chloride and monochloroacetic acid and sodium monochloroacetate:
- (i) a copy of this Order,
 - (ii) a current copy of those sections of the *Competition Act* which are attached hereto as ~~Exhibit~~ "A", and "Appendix" "F.E.G."
 - (iii) a written statement that
 - it is company policy to require compliance with the *Competition Act* and this Order;
 - failure to comply would result in appropriate disciplinary action which may include termination of employment;
 - failure to comply with, or contravention of, this Order is punishable under subsections 34(6) and 35(2) of the *Competition Act*;
 - the corporate legal advisors are available to confer about any compliance questions;
- (b) for the period of three years after the date of this Order, provide a copy of each of the materials described in paragraph (a) to everyone who attains the status described in that paragraph within 60 days of attaining such status;
- (c) for the period of three years after the date of this Order, submit to the Commissioner of Competition under the *Competition Act* ("Commissioner"), on or before December 31st of each year, a written statement setting out the facts and the manner of compliance with paragraphs (a) and (b), including confirmation that each person referred to in paragraphs (a) and (b) has acknowledged their awareness of the materials set out in paragraph (a) and that the acknowledgment is recorded on the personnel file of each such person; and
- (d) provide to the Commissioner, for a period of three years after the date of this Order and within 60 days of receipt of a written request from the Commissioner, such information as he may

reasonably request for the purpose of monitoring compliance with this Order.

- 4. **AND THIS COURT DOES FURTHER ORDER** that each and every paragraph of this Order that applies to the Respondent shall be applicable to its corporate successors.
- 5. **AND THIS COURT SHALL** retain jurisdiction over the parties to this proceeding for the purposes of interpreting, varying or rescinding any of the provisions of this Order, upon the application of either party.

DATED at the City of Toronto, in the Province of Ontario, this 18th day of August , 2003.

"Frederick E. Gibson"
Judge

I HEREBY CERTIFY that the above document is a true copy of the original issued out of /filed in the Court on the 18 day of August A.D. 20 03
 Dated this 22 day of Aug 20 03
J M Das

No.: T-

FEDERAL COURT OF CANADA
(TRIAL DIVISION)

BETWEEN:

HER MAJESTY THE QUEEN

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- and -

AKZO NOBEL CHEMICALS BV

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PROHIBITION ORDER

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APPENDIX "A"

Competition Act

PART VI

OFFENCES IN RELATION TO COMPETITION

Conspiracy

45. (1) Every one who conspires, combines, agrees or arranges with another person

- (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
- (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
- (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
- (d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

Idem

(2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

Evidence of conspiracy

(2.1) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, combination, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties thereto, but, for greater certainty, the conspiracy, combination, agreement or arrangement must be proved beyond a reasonable doubt.

Proof of intent (2.2) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).

Defence (3) Subject to subsection (4), in a prosecution under subsection (1), the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to one or more of the following:

- (a) the exchange of statistics;
- (b) the defining of product standards;
- (c) the exchange of credit information;
- (d) the definition of terminology used in a trade, industry or profession;
- (e) cooperation in research and development;
- (f) the restriction of advertising or promotion, other than a discriminatory restriction directed against a member of the mass media;
- (g) the sizes or shapes of the containers in which an article is packaged;
- (h) the adoption of the metric system of weights and measures; or
- (i) measures to protect the environment.

Exception (4) Subsection (3) does not apply if the conspiracy, combination, agreement or arrangement has lessened or is likely to lessen competition unduly in respect of one of the following:

- (a) prices,
- (b) quantity or quality of production,
- (c) markets or customers, or
- (d) channels or methods of distribution,

or if the conspiracy, combination, agreement or arrangement has restricted or is likely to restrict any person from entering into or expanding a business in a trade, industry or profession.

Defence (5) Subject to subsection (6), in a prosecution under subsection (1) the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to the export of products from Canada.

Exception (6) Subsection (5) does not apply if the conspiracy, combination, agreement or arrangement

- (a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;
- (b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or
- (c) has prevented or lessened or is likely to prevent or lessen competition unduly in the supply of services facilitating the export of products from Canada.

(d) [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 30]

Defences (7) In a prosecution under subsection (1), the court shall not convict the accused if it finds that the conspiracy, combination, agreement or arrangement relates only to a service and to standards of competence and integrity that are reasonably necessary for the protection of the public

- (a) in the practice of a trade or profession relating to the service; or
- (b) in the collection and dissemination of information relating to the service.

Exception (7.1) Subsection (1) does not apply in respect of an agreement or arrangement between banks that is described in subsection 49(1).

Exception (8) Subsection (1) does not apply in respect of a conspiracy, combination, agreement or arrangement that is entered into only by companies each of which is, in respect of every one of the others, an affiliate. R.S., 1985, c. C-34, s. 45; R.S., 1985, c. 19 (2nd Supp.), s. 30.

Where application made under section 79 or 92 **45.1** No proceedings may be commenced under subsection 45(1) against a person against whom an order is sought under section 79 or 92 on the basis of the same or substantially the same facts as would be alleged in proceedings under that subsection. R.S., 1985, c. 19 (2nd Supp.), s. 31.

Foreign
directives

46. (1) Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.

Limitation

(2) No proceedings may be commenced under this section against a particular company where an application has been made by the Director under section 83 for an order against that company or any other person based on the same or substantially the same facts as would be alleged in proceedings under this section. R.S., 1985, c. C-34, s. 46; R.S., 1985, c. 19 (2nd Supp.), s. 32.

Definition of
"bid-rigging"

47. (1) In this section, "bid-rigging" means
(a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid in response to a call or request for bids or tenders, or
(b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,
where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is made by any person who is a party to the agreement or arrangement.

Bid-rigging

(2) Every one who is a party to bid-rigging is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

Exception

(3) This section does not apply in respect of an agreement or arrangement that is entered into or a submission that is arrived at only by companies each of which is, in respect of every one of the others, an affiliate. R.S., 1985, c. C-34, s. 47; R.S., 1985, c. 19 (2nd Supp.), s. 33.

Price
maintenance

61. (1) No person who is engaged in the business of producing or supplying a product, or who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trade-mark, copyright or registered industrial design shall, directly or indirectly,

(a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or

(b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.

Exception

(2) Subsection (1) does not apply where the person attempting to influence the conduct of another person and that other person are affiliated corporations or directors, agents, officers or employees of

(a) the same corporation, partnership or sole proprietorship, or

(b) corporations, partnerships or sole proprietorships that are affiliated, or where the person attempting to influence the conduct of another person and that other person are principal and agent.

Suggested
retail price

(3) For the purposes of this section, a suggestion by a producer or supplier of a product of a resale price or minimum resale price in respect thereof, however arrived at, is, in the absence of proof that the person making the suggestion, in so doing, also made it clear to the person to whom the suggestion was made that he was under no obligation to accept the suggestion and would in no way suffer in his business relations with the person making the suggestion or with any other person if he failed to accept the suggestion, proof of an attempt to influence the person to whom the suggestion is made in accordance with the suggestion.

Idem

(4) For the purposes of this section, the publication by a supplier of a product, other than a retailer, of an advertisement that mentions a resale price for the product is an attempt to influence upward the selling price of any person into whose hands the product comes for resale unless the price is so expressed as to make it clear to any person to whose attention the advertisement comes that the product may be sold at a lower price.

Exception

(5) Subsections (3) and (4) do not apply to a price that is affixed or applied to a product or its package or container.

Refusal to
supply

(6) No person shall, by threat, promise or any like means, attempt to induce a supplier, whether within or outside Canada, as a condition of his doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons.

(7) and (8) [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 36]

Offence and
punishment

(9) Every person who contravenes subsection (1) or (6) is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

Where no
unfavourable
inference to
be drawn

(10) Where, in a prosecution under paragraph (1)(b), it is proved that the person charged refused or counselled the refusal to supply a product to any other person, no inference unfavourable to the person charged shall be drawn from that evidence if he satisfies the court that he and any one on whose report he depended believed on reasonable grounds

- (a) that the other person was making a practice of using products supplied by the person charged as loss-leaders, that is to say, not for the purpose of making a profit thereon but for purposes of advertising;
- (b) that the other person was making a practice of using products supplied by the person charged not for the purpose of selling the products at a profit but for the purpose of attracting customers to his store in the hope of selling them other products;
- (c) that the other person was making a practice of engaging in misleading advertising in respect of products supplied by the person charged; or
- (d) that the other person made a practice of not providing the level of servicing that purchasers of the products might reasonably expect from the other person. R.S., 1985, c. C-34, s. 61; R.S., 1985, c. 19 (2nd Supp.), s. 36.