

Competition Tribunal File No: CT-2013-007

The Competition Tribunal

**In the matter of an Application by Safa Enterprises Inc.
doing business as My Convenience Store
for an order pursuant to Section 103.1
of the Competition Act, RSC 1985 c. C-34, as amended
granting leave to bring an application pursuant to
Section 76 of the Competition Act**

BETWEEN:

Safa Enterprises Inc.

Applicant

AND:

Imperial Tobacco Company Limited.

Respondent

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT CT-2013-007 September 19, 2013 Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 1

APPLICATION FOR LEAVE

TAKE NOTICE THAT:

- 1) (a) The Applicant, Safa Enterprises Inc. ("SEI") is applying to the Competition Tribunal pursuant to Section 103.1 of the Competition Act, R.S.C. 1985, c. C-34, as amended (the "Act"), seeking leave to bring an application for an order under Section 76 of the Act, that the Respondent, Imperial Tobacco Company Limited ("ITCO") prohibit from continuing to discriminate SEI of the low pricing policy awarded to SEI's direct competitor (New Hasty Market "NHM") and accept SEI as a customer on the "same discounted trade terms as SEI's direct competitor NHM", forthwith upon issuance; or
- (b) Applicant SEI seeks and order from Tribunal to direct Respondent ITCO to act according to the law and stop its discriminating policy and accept all the retailers across the board on similar trade terms unless the discounts awarded by the Respondent are volume discounts; and
- (c) Costs of the application; and

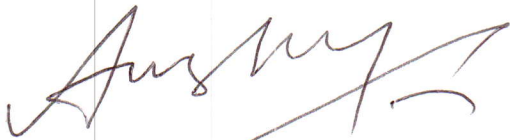
(d) Compensation for the loss incurred in past, present and future by SEI through loss of business, loss of profit and distress caused due to discriminating policy of Respondent towards Applicant in final or interim orders as Competition Tribunal deems just; and

(e) In the event Competition Tribunal rules in favor of the Applicant, the Applicant would seek an opinion from the Tribunal if the conduct of the Respondent was/is criminal in nature.

AND TAKE NOTICE THAT:

- 2) The Applicant will rely on the Statement of Grounds and Material Facts attached hereto and on the Affidavit of Adnan Mustafa, sworn **September 06, 2013**.
- 3) The person against whom an order is sought is the respondent. Its address is set out below.
- 4) If leave is granted, SEI will seek an interim order from the Competition Tribunal for the relief sought in this Application and directions from the Competition Tribunal for the expeditious hearing of this application.
- 5) Applicant request that this application proceed in English.
- 6) Applicant request that application be heard in Vancouver, British Columbia.
- 7) The Applicant requests that documents be filed in electronic form.

Dated at Vancouver, British Columbia, this **6th** day of **September, 2013**.



Adnan Mustafa

Manager

Safa Enterprises Inc.

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Vancouver BC V6B 1L1

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ADDRESS FOR SERVICE

TO: **Registrar**

The Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, On
K1P 5B4

AND TO:

John Pecman
Commissioner of Competition
50 Victoria Street
Gatineau, Quebec
K1A 0C9

AND TO:

Imperial Tobacco Company Limited
3711 Saint-Antoine Street
Montreal, Quebec
H4C 3P6
514-932-6161

The Applicant's Address for Service is as follows:

Safa Enterprises Inc.
450 West Hastings Street
Vancouver, BC
V6B 1L1
email: adnan.must@yahoo.ca

SCHEDULE A

STATEMENT OF GROUNDS AND METRIAL FACTS

1. The Applicant Safa Enterprises Inc. ("SEI") is a corporation incorporated under the laws of British Columbia. It has a head office in Surrey, British Columbia and registered to carry on a small family business of convenience store in Vancouver, British Columbia.
2. The Defendant Imperial Tobacco Company Limited ("ITCO") is a corporation incorporated under the laws of Canada from my knowledge. It has a head office in Montreal, Quebec and sole manufacturer and distributor of wide variety of tobacco products. Their major brands are Avanti, du Maurier, JPS, Marlboro, Matinee, Medallion, Pall Mall, Peter Jackson, Player's, John Player Standard, Viceroy, Vogue and more.

Description of the Industry

3. Tobacco companies in Canada manufacture tobacco products and sell it to wholesalers, and then retailers purchase these products from wholesalers to resell these products to the customers to consume.
4. Typically, retailers have 50 to 60 cents margin on individual pack of cigarette.
5. All retailers are required by law to purchase the tobacco products from an authorized wholesaler to sell tobacco product in Canada.
6. The Respondent Imperial Tobacco Company Limited ("ITCO") started Direct to Store Sales ("DSS") in 2006, to eliminate and/or reduce the role of wholesaler.
7. Wholesalers like Costco, Real Canadian Wholesale Club, Core Mark and others still distribute limited product line (best seller) of the Respondent ITCO's products at higher price than the Respondent.
8. Retailers are inclined towards purchasing Respondent ITCO's products directly from ITCO on weekly basis and in emergency when they run out of a certain product they purchase it from an authorized wholesaler.
9. The main objective or benefit of DSS as described by ITCO is, "Key benefits to retailer include better product availability, competitive prices, and efficient delivery".
10. By adopting the DSS the respondent ITCO became the first and only tobacco manufacturer distributing its products directly to the retailers.

11. Being the sole manufacturer the Respondent ITCO had, has been and will be having a dominant position in tobacco industry.
12. DSS has given the Respondent ITCO absolute control over the prices of its product to the wholesalers and retailers at Respondent's will.
13. Having this control ITCO should have shown responsibility and encouraged competitive atmosphere between the retailers carrying their products rather than favoring some and neglecting others.

History

14. In June 2011, the Defendant ITCO offered Preferred Pricing Program (the "PPP") to Applicant's competitor New Hasty Market ("NHM") located at 440 West Hastings St. Vancouver.
15. In Preferred Pricing Program, ITCO is selling its products to the NHM up to \$5.60 before GST/HST per carton (per 10 packs) cheaper than Applicant's cost from ITCO.
16. Typically our margin on one cigarette pack is 50-60 cents that makes \$5.00 to \$6.00 per carton.
17. It means If Applicant sells ITCO products at cost; Applicant's competitor NHM will still be making at least \$5.60 profit before GST/HST on its ITCO products.
18. During June 2011 and September 2012, the Applicant kept on losing customers as the Applicant's competitor NHM were selling cigarettes cheaper to the customers.
19. In October 2012, Applicant's competitor dropped the prices of ITCO products below Applicant's cost from ITCO.
20. I, Adnan Mustafa Manager of SEI as mentioned in my Affidavit requested ITCO Account Representative Mr. Rob Laing to visit our store in the first week of November 2012 and inquired if ITCO selling their products to Applicant's competitor at discounted prices. Mr. Laing confirmed that NHM is on PPP since June 2011.
21. I explained Mr. Laing the damage caused to the Applicant's business by ITCO's PPP offered to our neighbor NHM. As mentioned in my Affidavit that it was breach of trust towards the Applicant's business by awarding unfair advantage to the Applicant's competitor without Applicant's knowledge.

22. I inquired from Mr. Laing how does PPP work. Mr. Laing explained that the determination to be on PPP is between the relationship between the Account representative and the store. I told Mr. Laing that Applicant were never been visited by any Account representative since we set up our account with ITCO. The last visit at our store by ITCO Account representative was when Applicant set up its account with ITCO to collect the Retail Tobacco Authorization and to let the Applicant know about our order day.
23. Mr. Laing expressed his opinion by saying, "It is unfortunate but I cannot do anything at this time. Our next review is in December at that time we might consider you for the PPP. I will come back next week and will add you on John Player Standard program. This will match Applicant's and the competitor NHM prices for John Player Standard".
24. I requested in the meeting and in the email to provide us the same business opportunity. I got this meeting documented with Mr. Laing via email on November 14, 2012.
25. Mr. Laing put us on John Player Standard program after 3 weeks to match our price with our competitor NHM.
26. I was shocked to see the price difference between SEI old price and the new discounted price. There was \$5.17 per carton difference in the price. Then I realized how Applicant's competitor could offer low prices to the customers.
27. I waited patiently through the month of November and December while Applicant's business was still suffering both due to losing customers and by reducing the price to the cost on rest of the product lines of ITCO to stay in the market.
28. I contacted again Mr. Laing on December 27, 2012 via email to get an update about the review. Mr. Laing did not reply then I called again Mr. Laing on January 04, 2013 and requested for the visit.
29. Mr. Laing visited Applicant's store on January 07, 2013 and informed us that Applicant has not been selected for PPP. I asked Mr. Laing if Applicant's competitor is still on the discounted program PPP. Mr. Laing replied yes NHM is still getting ITCO products at discounted prices.
30. I informed Mr. Laing via email that Applicant will be taking legal action against ITCO if ITCO did not resolve the issue as it is the violation of Competition Act.
31. Mr. Laing came back to Applicant's store on January 11, 2013 and instead of resolving the issue was threatening that ITCO has a very good legal team.

32. I sent Mr. Laing the relevant section of Competition Act for review as I believed that this section applies to Applicant's situation:

76. (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that

- (a) a person referred to in subsection (3) directly or indirectly
 - (i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or
 - (ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and
- (b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.

• **Marginal note: Order**

(2) The Tribunal may make an order prohibiting the person referred to in subsection (3) from continuing to engage in the conduct referred to in paragraph (1)(a) or requiring them to accept another person as a customer within a specified time on usual trade terms.

• **Marginal note: Persons subject to order**

(3) An order may be made under subsection (2) against a person who

- (a) is engaged in the business of producing or supplying a product;

33. Mr. Thierry Schmidt the Regional Sales Manager of ITCO sent a letter dated January 17, 2013 in which Mr. Schmidt said that "It is legal to offer the PPP to some retailers and not to all". It means in my understanding that it is legal to discriminate two businesses operating side by side offering the same product lines; buying from the same manufacturer and supplier.

34. Mr. Schmidt insisted that it is legal to offer different prices to different customers and even after explaining Applicant's situation insisting on continue to discriminate the Applicant's business in future as well.

35. I requested ITCO to provide Applicant the copy of PPP policy so that they can better understand the PPP. In response Mr. Schmidt sent the factors to be considered to be eligible for PPP which are beyond my understanding in Applicant's situation. Namely:
- a. Retailer's volume of tobacco products relative to other stores in the area.
 - b. The geographical location of a retailer's outlet and demographic profile of the population surrounding the retailer's location; and
 - c. The retailer's willingness, capability and motivation to work with ITCO and to implement ITCO initiative.
36. Applicant believes that there is no difference in Applicant and its competitor NHM's ordering or selling volume of tobacco products. If there was any difference of ordering/selling volume in past was due to the ability of Applicant's competitor ability to sell the ITCO tobacco products at lower prices for being on PPP.
37. How could two stores side by side differ in geographical location and demographic profile of the population?
38. Exhibit J is a street view of Applicant's and its competitor's street view that clearly reflects the geographical location and products carried by both the businesses.
39. Applicant's business was never been visited by Account representative of ITCO during May 2011 till November 08, 2012 and even November 08, 2012 visit was on the request of the Applicant. How does ITCO get to know the willingness, capability and motivation to work with ITCO? And even now, when Applicant showing willingness, capability and motivation to work with ITCO, in response, Applicant is getting in response is it is unfortunate but you have to suffer further losses. What else should Applicant do so that ITCO stops its discriminating policy?

Justification for Discriminating Applicant

40. I tried to reason with Account representative Mr. Laing on his visit on November 08, 2012 that Applicant can justify ITCO discriminating policy although it will still be unfair under following circumstances:
- If Applicant's competitor is located at least 1 or 2 blocks away from the Applicant's location;

- If Applicant's competitor is a specialty smoke shop (exclusively selling tobacco products); or
 - Applicant's competitor is getting a volume discount.
 - If ITCO is not the ONLY manufacturer of its products and just a mere wholesaler.
41. Mr. Laing confirmed that the discounted prices offered to NHM is not a volume discount but is a part of PPP awarded by ITCO.
42. Mr. Schmidt wrote in his letter dated January 17, 2013 that the main objective of PPP is to ultimately offer lower retail prices to consumers on ITCO products. What should a retailer do who is supplied ITCO products at higher prices located besides a retailer who is supplied ITCO products at discounted prices?

Basis for Application Pursuant to Section 103.1

43. The test for granting leave under section 103.1 of the *Competition Act*, R.S.C 1985 c. C-34 (the "Act") is set out in subsection 103.1(7.1), as follows:

The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred in that section that could be subject to an order under that section.

44. In this Application, the Applicant seeks leave to bring an application for an order pursuant to section 76 of the *Act*, which states as follows:

- (1) On the application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that
- (a) a person referred to in subsection (3) directly or indirectly
 - (i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or
 - (ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and

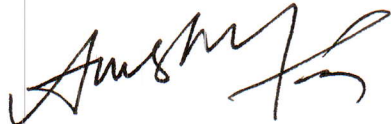
- (b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.
- (2) The Tribunal may make an order prohibiting the person referred to in subsection (3) from continuing to engage in the conduct referred to in paragraph (1)(a) or requiring them to accept another person as a customer within a specified time on usual trade terms.
- (3) An order may be made under subsection (2) against a person who
- (a) is engaged in the business of producing or supplying a product;
 - (b) extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards; or
 - (c) has the exclusive right and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography.
45. As the Section 76 of the *Act* under this application has never been brought before the Competition Tribunal where Tribunal could apply the Section 76 of the *Act* in its completeness, so there is no precedent available to be provided. This is a test case and will set a precedent for future.
46. Applicant's situation, Adnan Mustafa's Affidavit and conduct of ITCO clearly meet the requirements prescribed by Section 76 of the *Act* in the present Application, as the following points clearly established on the evidence before the Tribunal:
- (a) the Respondent is engaged in activity which constitutes a discrimination against Applicant under Section 76 of the *Act*;

Affidavit of Adnan Mustafa, sworn September 06, 2013 ("Mustafa Affidavit").
 - (b) the Applicant business has had, is having and will be adversely effected by the discriminately conduct of ITCO; and

Mustafa Affidavit, Paras. 35-48
 - (c) the Respondent is engaged in the business of producing and supplying (has exclusive rights) of Imperial Tobacco Company products.

47. The conduct of ITCO of discriminating Applicant and refusal to provide the same business opportunity clearly fall within the scope of activity prescribed by Section 76 of the Act and clearly amounts to a practice which, at the very least, could be subject to an Order under that section.
48. I have documentary evidence of discrimination conduct of ITCO which will be brought before the Competition Tribunal once leave to bring an Application is granted.

Dated at Vancouver, British Columbia, this **6th** day of **September, 2013**.



Adnan Mustafa

Manager

Safa Enterprises Inc.