

CANADIAN ANTITRUST REPORT

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COMPETITION TRIBUNAL ISSUES REASONS IN IMPORTANT ABUSE OF DOMINANCE CASE - CANADA PIPE'S AGGRESSIVELY COMPETITIVE CONDUCT DETERMINED NOT TO BE ANTI-COMPETITIVE

On February 14, 2005, the Competition Tribunal released its reasons for dismissing an application to restrain Canada Pipe Company Ltd. from engaging in alleged "anti-competitive acts" under the abuse of dominance provisions of the *Competition Act*. The case is the first consideration of the provisions since the Commissioner of Competition released her Enforcement Guidelines on the Abuse of Dominance Provisions, the last abuse case being the Tribunal's 1997 consideration of certain advertising and marketing practices of Tele-Direct.

THE CANADA PIPE CASE IS IMPORTANT FOR SEVERAL REASONS:

- Abuse of dominance is one of three pillars of the Competition Act (the others being mergers and cartels) and bringing abuse of dominance cases is a priority of the Commissioner. It is expected that more cases will be brought in future and the dominance provisions will be given greater prominence if Bill C-19, which currently is before Parliament, becomes law. The Bill introduces so-called "Administrative Monetary Penalties" of up to C\$10 million (C\$15 million for second offences) as a remedy in abuse of dominance cases.
- It confirms that the focus of an abuse of dominance inquiry is whether the impugned conduct is aggressive competition or an anti-competitive act. The decision provides helpful guidance on the criteria that the Tribunal will apply to make that distinction, and affirms the need for objectively verifiable evidence that the acts complained of were intended to, and have had, an exclusionary effect in the market place. Evidence of effective entry and expansion in the marketplace weighs heavily against a finding that an act is anti-competitive.
- The Tribunal affirms that high market shares (in this case 80%-90%) and an ability of a dominant firm to exercise market power is not sufficient for an order in the absence of proving an anti-competitive act that prevents or lessens competition substantially.
- Like in prior cases, the Tribunal defined markets narrowly. By way of example, although Canada Pipe monitored the price of plastic DWV products and promoted the physical characteristics of its cast iron products as compared to plastics, there was no evidence that the price of plastic products had any disciplinary effect on the Canada Pipe's pricing of its cast iron DWV products. This inclined the Tribunal to conclude that plastic DWV products were not in the same product market as cast iron DWV products.
- The case demonstrates that while the Tribunal requires and will give full consideration the testimony of economic experts, evidence of marketplace participants is key. Canada Pipe successfully disputed the Commissioner's contention that its "Stock Distributor Program" (under which customers received significant rebates and discounts if they stocked Canadian Pipe-supplied cast iron drain, waste and vent products exclusively) was not anti-competitive with evidence from market participants that stayed in the Program for reasons unrelated to the rebates offered and of customers leaving the Program without incurring switching costs.

The Tribunal's lengthy reasons demonstrate its willingness to delve deeply into the facts to test the underpinnings of the Commissioner's allegations and the veracity of opinions expressed by expert witness. Without making an explicit endorsement of the Commissioner's Enforcement Guidelines, the Tribunal made frequent references to the Guidelines and used them to frame its analysis.

What next? Loss of the case is a blow to the Commissioner and the eight years of investigation and litigation against Canada Pipe. While an appeal is possible, the Tribunal's reasons appear soundly based on the facts of the case, making a successful appeal challenging. As with other cases that the Commissioner has lost recently (e.g., Superior Propane), the Commissioner might use the excuse of her defeat to seek amendments to the law to make cases less difficult to prove. But this remains to be seen.

A summary of the case and key findings of the Tribunal is available at <http://www.mcmillanbinch.com/Upload/Publication/CaseSummaryCommissionerCompetition0205.pdf>. The Tribunal's full reasons for decision are available on the Tribunal's website at <http://www.ct-tc.gc.ca/english/CaseDetails.asp?x=233&CaseID=163#216>.

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