

## Competition Tribunal Rules that Canada Pipe did not Abuse its Dominant Position

The Commissioner of Competition has suffered her first loss in an abuse of dominance application brought before the Competition Tribunal pursuant to section 79 of the *Competition Act*. The Tribunal's decision in *Commissioner of Competition v. Canada Pipe* provides some encouragement for firms in Canada with significant market positions that they can engage in vigorous competitive activity without crossing the line to anti-competitive practices.

In *Canada Pipe*, the Commissioner alleged that a rebate program offered by a division of Canada Pipe to its distributors constituted an anti-competitive act by a dominant firm which substantially lessened competition. The rebate program provided that distributors would qualify for rebates with preferential treatment if they exclusively stocked Canada Pipe cast iron drain, waste and vent ("DWW") pipe, fittings and couplings.

The Tribunal held that each of DWW cast iron pipes, fittings and couplings constituted separate product markets, and that Canada Pipe had sufficient market power to exercise market control in all three product markets in each of six geographic markets in Canada. Despite this finding of dominance, the Tribunal held that the rebate program did not constitute an anti-competitive act and did not have the requisite negative effect on competition to constitute abuse of dominance.

A distributor who decided to switch from Canada Pipe to another supplier would not suffer any significant cost, especially if the decision was made at the beginning of the year, before the Canada Pipe rebates began to accumulate. Further, there was expert evidence that during the program's existence, competition in the relevant markets had actually increased, and that new entrants could distribute their products in a variety of alternative channels.

The Tribunal's decision that there was no abuse of dominance, even where a dominant firm used competitive tactics designed to promote exclusivity, provides some comfort to dominant firms that they can aggressively compete in the marketplace. Where the intent of a practice is to stimulate competition through legitimate business practices, rather than to prevent or eliminate an efficient competitor, it is not an abuse.

The *Canada Pipe* decision adds some clarity that being dominant is not an evil, in and of itself. Dominant firms must however, remain cautious and aware of the potential effects of their competitive tactics. Given the potential imposition of Administrative Monetary Penalties ("AMP's") in the range of up to \$10 to \$15 million in future cases as proposed in Bill C-19 (currently before the House of Commons), the ramifications for a dominant firm that employs anti-competitive tactics with substantial market effects could become much more significant.

The *Canada Pipe* decision also highlights the difficulties faced by respondents to an application by the Commissioner before the Tribunal. The Tribunal Rules currently provide that the Commissioner need only disclose the documents and evidence which she intends to rely upon, rather than all of the documents and evidence that are relevant for the Tribunal's decision. Under the common law rules of evidence, a party may ask a trier of fact to draw a negative inference from another party's failure to present relevant evidence.

In *Canada Pipe*, the respondent asked the Tribunal to draw a negative inference from the Commissioner's failure to present all of the relevant evidence gathered during her investigation, i.e. that such evidence would have been adverse to the

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Commissioner's case. The Tribunal declined to do so, stating that the Commissioner's disclosure was within the bounds of the Tribunal Rules and the most that could be inferred was that such information would not have been helpful to the Commissioner's case.

The Tribunal's decision on this issue may add to the criticism of the Tribunal's current Rule on disclosure, particularly when respondents may in the future face substantial AMP's under the abuse provisions. The potentially penal nature of the proposed AMP's may further call into question the fairness of the ability of the Commissioner to only reveal evidence that is helpful to her case.

For more information regarding how the Tribunal's decision in *Canada Pipe* may affect your business, please contact Randy Hughes, Don Houston, Barry Zalmanowitz, or any other member of the **FMC Competition Law Group**:

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