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NO DETERMINATION OF ABUSE OF DOMINANCE BY TRIBUNAL: NO PRIVATE DAMAGE CLAIM

BY JIM SCHMIDT AND SALIM HIRJI

On July 22, 2010, the British Columbia Supreme Court released its decision in *Novus Entertainment Inc. v. Shaw Cablesystems Ltd.*, 2010 BCSC 1030, which considered whether a civil cause of action for interference with economic or business interests can be based on an allegation that the defendant abused its dominant position contrary to the *Competition Act* (Canada). The Court decided that without a prior determination of abuse of dominance by the Competition Tribunal, there is no valid cause of action.

While courts in the past have held that without a determination by the Competition Tribunal, reviewable conduct under the *Competition Act* is not “unlawful conduct” for the purposes of a common law tort, this is the first case to consider the effects of the recent amendments to the *Competition Act*, which gave the Competition Tribunal power to impose a large administrative monetary penalty (up to \$10 million for a first occasion and \$15 million for subsequent orders). Some commentators had argued that by giving the Tribunal the power to impose large fines, Parliament had changed the fundamental character of abuse of dominance from conduct that is presumptively legal to conduct that is generally unlawful, and as such it could supply the “unlawful” element in common law torts like interference with economic or business interests.

At the centre of the dispute between Novus and Shaw was a series of advertising campaigns conducted by Shaw in 2009. In one of the advertising campaigns, Shaw offered new customers promotional pricing for services offered by Shaw, including high-definition television, telephone and high-speed internet. Novus alleged that Shaw was engaging in anti-competitive behaviour contrary to s. 79 of the *Competition Act*. On this basis, Novus advanced a claim based on the tort of “unlawful interference with business and economic interests.”

In the 2006 case of *Pro-Sys v. Microsoft*, the British Columbia court held that a party could not rely on an alleged “breach” of s. 79 of the *Competition Act* as the basis for a claim of unlawful interference, unless the Tribunal had first issued an order prohibiting the conduct. In that case, the Court held that conduct falling within the ambit of s.79 of the *Competition Act* was not unlawful until that conduct had been specifically prohibited by an order from the Tribunal.

Novus argued that since the *Competition Act* now permits the Tribunal to impose an AMP for past conduct, that conduct must be considered unlawful regardless of whether there has been an order prohibiting the conduct.

The Court rejected Novus’s argument, stating as follows:

In my view, the amendments to the Act do not change the rationale underlying the decision in *Pro-Sys*. While the amendments have the effect of allowing the Tribunal to consider a respondent’s prior conduct in the determination of any monetary penalty it might impose under the Act, the Tribunal must first make an Order under s. 79(1) that a respondent has engaged or is engaging in anti-competitive acts. [Para 35]

In the result, the Court struck out Novus’s pleadings based on abuse of dominant position, along with other pleadings not directly related to the *Competition Act* claims.

Jim Schmidt and Salim Hirji of the Vancouver office of Fraser Milner Casgrain LLP acted for Shaw.

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