CANADIAN COMPETITION RECORD

THE FIRST SECTION

ABUSE OF DOMINANCE: A CRITIQUE OF *CANADA PIPE*

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Introduction

This paper addresses a number of important and problematic issues relating to the scope of the abuse of dominance provisions in the *Competition Act* raised by the Federal Court of Appeal's decision in *Commissioner of Competition v. Canada Pipe Company Limited*.[1] This was an appeal from a decision of the Competition Tribunal of February 3, 2005, dismissing the application by the Commissioner of Competition under sections 79 and 77 of the *Competition Act*.[2] The Commissioner sought an order against Canada Pipe to prohibit it from engaging in the practice of anti-competitive acts leading to an abuse of dominant position under section 79, as well as to prohibit it from continuing to engage in the practice of exclusive dealing under section 77.

The conduct at issue in this case consisted of a loyalty rebate program offered by Canada Pipe known as the Stocking Distributor Program (SDP). Under the SDP, distributors of Canada Pipe's iron drain, waste and vent (DWV) products obtain significant rebates or discounts in return for stocking only cast iron products produced by Canada Pipe. These distributors were free to stock other companies' DWV products that were not made of cast iron.

The Tribunal dismissed the Commissioner's application based upon the following findings *inter alia*.[3] With respect to Section 79 (abuse of dominant position), the Tribunal found that the SDP is a practice but does not qualify as an anti-competitive act and that, in any event, the Commissioner had not demonstrated that the SDP had substantially lessened or prevented competition. With respect to Section 77 (exclusive dealing), the Tribunal found that while the SDP can be characterized as a practice of exclusive dealing, there was insufficient evidence to establish that the SDP had impeded entry or expansion of competitors or that it is having any other exclusionary effect on the market or, in any event, that it has caused or is likely to cause a substantial lessening of competition.

On appeal by the Commissioner to the Federal Court of Appeal from the Tribunal's findings in these respects, the Federal Court of Appeal overruled the Tribunal's findings, concluding that it had committed errors of law in interpreting relevant provisions of the *Competition Act* to which, under the Supreme Court of Canada's decision in *Southam*[4], a standard of correctness applied.[5] I note at the outset that this case is the first abuse of

dominance case to come before the Federal Court of Appeal since the enactment of the current *Competition Act* in 1986, while over this period the Tribunal has decided five abuse of dominance cases, including the present case: *Nutrasweet*,[6] *Laidlaw*,[7] *Nielsen*,[8] *Tele-Direct*[9] and *Canada Pipe*[10].

The case is important not only for this reason. "The substantial lessening of competition" element that was a central feature of contention in this case is found in a number of the key provisions in the *Competition Act*, including abuse of dominance (section 79), reviewable practices (section 77), and mergers (section 92). The conspiracy provisions in the Act that turn centrally on proof of "undue lessening of competition" implicate similar issues. In short, "substantial lessening of competition" is the central element in most of the key competition provisions in the *Competition Act*.

While of less general significance to the interpretation and application of competition policy in Canada than the "substantial lessening of competition" element, a second issue of central contention in this case and of central importance in the Federal Court of Appeal's decision – the interpretation and application of the requirement of proof of a practice of "anti-competitive acts" in section 79 (abuse of dominance) – also raises important issues as concerns over unilateral exercise or abuse of market power in recent years have attracted increasing attention from competition law enforcement authorities not only in Canada but in other competition law regimes in industrialized countries around the world and in international fora such as the OECD and the International Competition Network.[11]

A third issue of contention in this case relates to the threshold requirement in section 79 that a firm against which relief is sought "substantially controls a relevant market." Here the Tribunal's application of the "market power" concept which was undisturbed by a majority of the Federal Court of Appeal, creates serious uncertainty as to the indices of market power – another key concept in virtually every area of competition law and policy.

The Substantial Lessening of Competition Test

The Commissioner in *Canada Pipe* submitted that the correct legal test for assessing whether an impugned practice substantially lessens competition in a relevant market involves a "but for" analysis: Would markets – in the past, present, or future – be substantially more competitive but for the impugned practice?[12] In other words, but for the impugned practice, would markets be characterized by greater price competition, choice, service or innovation than exists in the presence of this practice? The Commissioner argued that the Tribunal erred in that its assessment of the substantial lessening of competition test focused exclusively on the narrow question of whether the SDP prevented entry or switching of suppliers or, in other words, whether a substantial level of competition continued to exist in the relevant market. Rather, the Commissioner argued that the Tribunal should have considered the broader question of whether the SDP impeded or hindered the competition that would otherwise exist if this program were absent from the market.[13]

The Federal Court of Appeal accepted the Commissioner's contention. The court took the view that the issue was one of law and not mixed law and fact, relating to the appropriate interpretation of relevant provisions in the *Competition Act*, and therefore was required to meet a correctness standard. In the Court's view, the requisite

assessment of whether a practice substantially lessens competition is a relative one; it is not the absolute level of competition in the market which must be substantial, but rather the preventing or lessening of competition that results from the impugned practice must be substantial. The Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice and then determine whether the preventing or lessening of competition, if any, is substantial.[14] The Court stated that the comparative interpretation that it adopted was equivalent to the "but for" test proposed by the Commissioner. Would the relevant markets – in the past, present, or future – be substantially more competitive but for the impugned practice or anti-competitive acts? According to the Court, application of the "but for" test could conceivably involve the construction of a hypothetical comparator model, a market identical to reality in all respects except that the impugned practice is absent. In appropriate circumstances, the "but for" test might also be applied by comparing the competitiveness of the market across time and treating the market conditions before and after the introduction of the impugned practice as proxies for the market with and without the practice.[15]

According to the Court, the Tribunal should have considered whether, without the SDP, the relevant product market would be substantially more competitive.[16] Proper examination of this question might include the following considerations: whether entry or expansion might be substantially faster, more frequent, or more significant without the SDP; whether switching between products and suppliers might be substantially more frequent; whether prices might be substantially lower; and whether the quality of products might be substantially greater.[17]

According to the Court, the Tribunal had narrowly focused on the fact that since the introduction by Canada Pipe of the SDP program in 1998, the first new manufacturer of DWV products in Canada in 30 years had been established and had acquired a 10% share of the Canadian market and that over the past five years imports of the relevant products had increased significantly from a negligible share at the beginning of the period to about 5% at the end of the period, indicating in the Tribunal's view that barriers to entry were not substantial and that relevant product and geographic markets were effectively contestable, as demonstrated particularly in the case of Western Canadian and Ontario regional markets, where the evidence suggested that prices had fallen to competitive levels as a result of entry by the new domestic manufacturer and by imports.[18]

While the Tribunal noted that it did not have historical data which would allow it to measure the state of competition in the relevant markets before and after the SDP came into effect, the Court said that it was insufficient for the Tribunal to conclude that the Commissioner had not met a burden of proof because no historical data was provided, for the Tribunal was required also to consider whether the evidence on the record demonstrated that the SDP had the effect of substantially lessening competition in the past, present or future, as compared to the market's "likely" competitiveness in the absence of the practice. In the Court's view, the failure to consider this possibility in this case constituted an error of law.[19]

In my view, the so-called "but for" test as applied by the Federal Court of Appeal in this case is seriously misconceived. While the Court claimed that it was not simply "counting heads", the implicit assumption underlying the Court's "but for" test is that a goal of competition policy is to maximize the number of competitors in a market and to constrain practices that are inconsistent with this objective, whether or not this may entail protecting inefficient actual or potential competitors from the competition posed by the dominant firm and whether

or not an efficient industry structure is consistent with a larger number of firms.[20] The error of this structuralist approach is demonstrated most starkly in the context of merger review, where under section 92 of the *Competition Act* a similar substantial lessening of competition test is adopted. Suppose, in a relatively concentrated industry (as is often the case in many industries in smaller economies like Canada's), there are currently five firms in the industry, each with 20% market shares, and two of the five firms proposed to merge, reducing the number of firms in the industry to four. Applying the Court's "but for" test to the substantial lessening of competition requirement, one would need to ask whether the market with the merger would be more or less competitive than a relevant market without the merger given that the post-merger market would comprise one fewer firm. The answer suggested by the Court's "but for" test would be that the merger fails the test. On this approach, many, perhaps most, horizontal mergers of any significance in Canada would be rendered suspect. This would be to resurrect the structuralist approach taken by the U.S. Supreme Court in its notorious and widely discredited decisions in *Von's Grocery*[21] and *Brown's Shoes*[22] where relatively minor horizontal mergers were enjoined for essentially these reasons.[23]

This is not to say that some form of "but for" test is inappropriate. However, the appropriate comparators need to be specified with some care. More specifically, one needs to compare the effectiveness of competition in the relevant market with the impugned practice with the effectiveness of competition in a counterfactual market without the impugned practice. But in making this comparison, it is crucial not simply to compare the number of competitors in both scenarios (a structuralist approach) but rather price and non-price proxies for competitive behavior in both scenarios. If these performance characteristics of a market would not be substantially different in the market without the practice than with the practice, it would be inappropriate to conclude that the impugned practice has substantially lessened competition in the market.

On this approach – which effectively the Tribunal adopted in *Canada Pipe* – one would look at the actual market after the practice in question has been adopted (in the above example, the merger in question) and ask whether this market is still effectively competitive, in terms of entry barriers, other evidence of contestability, and evidence of pricing and other behaviour. If on these criteria there is effective competition remaining, there should not, as a matter of law and policy, be a finding of a substantial lessening of competition (as reflected in section 93(e) of the *Competition Act* in the case of mergers).[24] If there is effective competition remaining in a market, then the deadweight losses and other social harms associated with market power cannot, by definition, exist. In short, I consider that the Federal Court of Appeals' decision in *Canada Pipe* will throw not only the abuse of dominance and exclusive dealing provisions in the Act into a state of serious uncertainty, but more importantly, at least from a practical standpoint, will introduce uncertainty into the administration of any provision in the Act that includes a substantial lessening of competition test, including mergers.

Compounding this uncertainty engendered by the Court's decision in this case are other observations made regarding the application of the "but for" test for the substantial lessening of competition requirement. The Court stated in its judgment that the "but for" test is not necessarily the only correct approach. It expressly left open the possibility that the Tribunal might in a future abuse of dominance case find evidence corresponding to a different test sufficient to discharge the burden placed upon the Commissioner by virtue of paragraph

79(1)(c). However, according to the Court, as the "but for" test describes an approach that corresponds to the requirements mandated by the statutory language of paragraph 79(1)(c), it is one that the Tribunal must consider in all cases – although it may in future cases choose to consider other unidentified tests as well.[25] Compounding the uncertainty yet further, the Court referred to the four different purposes of the *Competition Act* set out in the preambular section of the Act (section 1.1)[26] – which are in some cases inconsistent with or at least in tension with each other[27] – and stated that all of these purposes must be reflected in the methodology adopted by the Tribunal to assess the existence of an actual or likely substantial lessening of competition for the purposes of paragraph 79(1)(c).[28]

The Anti-Competitive Act Requirement

Under section 79(1)(b) of the Act (abuse of dominant position), one of the requirements that must be demonstrated by the Commissioner in seeking to prove an abuse of dominance is that the party whose conduct is being impugned is engaging in a practice of "anti-competitive acts" This phrase is not defined generally in the Act, although section 78 sets out a non-exhaustive list of anti-competitive acts, without "restricting the generality of the term". As the Court correctly pointed out, most of the acts listed in section 78 require proof that the practice in question was adopted for the purpose of injuring or disadvantaging a competitor or competitors.[29]

The Commissioner in this case asserted on appeal that the Tribunal erred in law by interpreting the requirement of "anti-competitive acts" as requiring proof of a link between the SDP and a decrease in competition, and by improperly extending the scope of the valid business justification doctrine. As a result, argued the Commissioner, the approach to section 79(1)(b) adopted by the Tribunal conflated the discrete statutory tests established by section 79(1)(b) and section 79(1)(c) (substantial lessening of competition).[30] The Court adopted both of the Commissioner's arguments.

In doing so, the Court adopted the statement of the Tribunal in *NutraSweet*, that the purpose of all acts falling within section 78, except for that found in paragraph section 78(f), is an intended negative effect on a competitor that is "predatory, exclusionary, or disciplinary" The Court stated that two aspects of this definition should be noted. First, an anti-competitive act is identified by reference to its purpose. Second, the requisite purpose is an intended predatory, exclusionary, or disciplinary negative effect on a competitor.[31] Relevant factors to be considered and weighed to determine the over-arching purpose include the reasonably foreseeable or expected objective effects of the act (from which intention may be deemed) and any evidence of subjective intent, if available.[32] The second aspect of the definition describes the type of purpose required in the context of section 79(1)(b): to be considered anti-competitive under section 79(1)(b), an act must have an intended predatory, exclusionary, or disciplinary negative effect on *a competitor*. Thus, the section 79(1)(b) inquiry is focused upon the intended effects of the act on a competitor.

According to the Court, in adopting this interpretive approach to section 79, it is conceivable that a practice might be found to be composed of anti-competitive acts within the meaning of section 79(1)(b), but at the same time for the purposes of section 79(1)(c) be held not to have the effect of preventing or lessening competition substantially in the market in question.[33]

The Court went on to say that in appropriate circumstances, proof of a valid business justification for the conduct in question can overcome the deemed intention arising from the actual or foreseeable effects of the conduct by showing that such anti-competitive effects are not in fact the overriding purpose of the conduct in question. In essence, a valid business justification provides an alternative explanation as to why the impugned act was to be performed.[34] To be relevant in the context of section 79(1)(b), a business justification must provide a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects or subjective intent of the acts.[35]

The Tribunal in *Canada Pipe* stated that there must be a link between the impugned practice and a decrease in competition. Moreover, if the practice does not appear to have an exclusionary effect or cause detriment to the consumer it cannot be said to be anti-competitive.[36] The Court took issue with this statement on two grounds. First, for the purpose of section 79(1)(b), a link need not be proven between the impugned practice and a decrease in competition.[37] Section 79(1)(b) is simply concerned with whether the act displays the requisite intended effects on competitors; it is not directly concerned with the state of competition in the market or the general causes thereof. Second, the Court said the Tribunal mistakenly suggested that the impugned practice's effect on the consumer should or could be considered within the section 79(1)(b) analysis. However, according to the Court, detriment to the consumer is not a relevant consideration for the purpose of section 79(1)(b), as evidence of this type does not relate directly to whether or not it has the requisite defining characteristic of an intended negative effect on a competitor. Such evidence is largely irrelevant for the purposes of a section 79(1)(b) assessment and is more appropriately considered under section 79(1)(c).[38]

The Court held also that the Tribunal's conflation of the legal tests in section 79(1)(b) and 79(1)(c) was also apparent in its discussion of the business justification arguments proffered by the respondent, including the argument that the SDP makes possible the high volume of sales necessary to enable Canada Pipe to maintain a full line of products, including more esoteric products in limited demand, which justification the Tribunal accepted.[39] However, according to the Court a business justification is relevant only insofar as it is pertinent and probative in relation to the determination required by section 79(1)(b), namely the determination as to whether the purpose for which the act was performed was a predatory, exclusionary, or disciplinary negative effect on a competitor.[40] According to the Court, the Tribunal's reasons do not establish the requisite efficiency-related link between the SDP and the respondent, and hence do not supply a legitimate explanation for the latter's choice to engage in the impugned conduct, unrelated to an anti-competitive purpose. Without such a link only self-interest remains as the justification for the SDP, which is attributable to the respondent for the purposes of section 79(1)(b).[41]

The Court's interpretation of an "anti-competitive act" raises a number of concerns, which threaten to sweep into the ambit of the abuse of dominant position provisions a whole range of benign and, indeed, pro-competitive business practices. This follows from the narrow focus by the Court on the intended negative effects of an act on a *competitor*.[42] Most forms of vigorous competition, while benefiting consumers and successful competitors, also have negative effects on less efficient and less successful competitors. For example, if I price my products more keenly than my competitors, my consumers win, I attract more business, and my competitors lose market share, and at the limit are driven out of the market. All of these effects are foreseeable and in that sense are

intended consequences of my vigorously competitive conduct. Indeed, the only reason to lower price is to win customers at the expense of competitors; similarly, where I develop a breakthrough innovation, which is of major benefit to consumers and to me in terms of expanding my business and market share, but is clearly and foreseeably detrimental to my competitors. But to call these anti-competitive acts simply because they have foreseeably negative effects on competitors is a gross distortion of the phrase "anti-competitive act," but more importantly, a gross distortion of the purposes of competition law, which is to protect the competitive process, not to protect inefficient competitors or to maximize the number of competitors in a market (again reflecting a now widely discredited structuralist orientation to competition policy) and in so doing to promote more efficient utilization of resources in the economy.

The Court, if confronted with this concern, might by way of justification point out that it did not intend to embrace within the phrase "anti-competitive act" any act that had an intended negative effect on competitors, but rather only those acts that, in the language of the Tribunal in the *NutraSweet* case, are "predatory, exclusionary, or disciplinary."[43] However, none of these phrases is self-defining, and an unsuccessful or vanquished competitor might well describe my aggressive pricing or innovative behaviour as predatory, exclusionary, or disciplinary. Thus, in order to give economically coherent content to these phrases, one is compelled, notwithstanding the Court's opinion, to move beyond negative effects on competitors to negative effects on competition or negative effects on consumer welfare, as the Tribunal did in this case.[44] For example, it is widely accepted that predation (or predatory pricing), in order to have economically coherent or defensible content as an anti-competitive practice requires rather precise definition, as for example elaborated by the Competition Bureau itself in its predatory pricing guidelines.[45] Without exploring here the details of these guidelines or the extensive scholarly literature around predation, it is conventional economic wisdom that aggressive pricing policies are only predatory if in the long run they harm consumers, i.e., by lowering prices in the short run with a view to raising them in the long run above the pre-predation level when competitors have been driven out of the market. But crucially, the emphasis is not on the effect of aggressive pricing on competitors *per se*, but rather on the state of competition in the market, and in particular on long-run consumer welfare. Therefore, when the Tribunal in *NutraSweet* referred to predatory intent, for this to be economically coherent there must ultimately be reference to consumer welfare.[46] Therefore, the Tribunal in this case quite appropriately required an impact of the impugned practice on consumer welfare. The single greatest advance in thinking in the competition policy field over the past 30 years in Canada and most other developed countries with mature competition law regimes is that the purpose of competition law is <u>not</u> the protection of competitors (including less efficient competitors) or maximizing the number of competitors in a market, but rather protecting the competitive process so that the ultimate goal of competition policy – the efficient utilization of resources in a market economy – is maximized.[47] In practical terms, this goal is often appropriately proxied by the adoption of a consumer welfare standard for evaluating the desirability or undesirability of a given market structure or practice.

The Court, of course, might rejoin that while these considerations are important, they should be remitted for consideration under section 79(1)(c), so as to avoid conflating the requirements of section 79(1)(b) and section 79(1)(c). At one level, such a response might seem to entail a harmless exercise in legal formalism or semantics. Eventually, the essence of the issues in question are substantively addressed, albeit following a particular

formalistic sequence. However, on this view, despite the Court's insistence on giving relevance and significance to every statutory element in section 79, in fact, somewhat incongruously, its decision achieves the opposite effect. "Anti-competitive act" is now likely to be interpreted to include any form of aggressive competition with foreseeably negative effects on competitors, such that this requirement is met, almost *pro forma*, in every case, and all the important analysis is remitted to section 79(1)(c). However, rendering the requirement of an anti-competitive act a formality may not be as harmless as it seems. First, firms that acquire dominance simply through superior efficiency, rather than through anti-competitive acts, may now risk legal consequences under section 79. Second, this may invite some form of ongoing price regulation where prices diverge from competitive levels, which the Tribunal has previously eschewed and which presents much more daunting challenges than simply prohibiting anti-competitive acts that have led to dominance.

An alternative view of the Court's decision is that rather than reducing the requirement of an anti-competitive act to any form of aggressive competition with foreseeably negative effects on competitors, what it may have had in mind was that an act could constitute an anti-competitive act under section 79(1)(b) in terms of its effect on the state of competition in the market or on consumer welfare, but this effect might be of such a limited scale or magnitude or duration that it would not satisfy the substantiality requirement in section 79(1)(c) (substantial lessening of competition). However, the Court seems to have foreclosed this view of its decision by rejecting the view of the Tribunal in this case that a link was required between an allegedly anti-competitive act and a decrease in competition or a detriment to the consumer.

Further confounding the confusion as to what exactly the Court contemplated as constituting an anti-competitive act for the purpose of section 79 is its treatment of the business justification doctrine. The Court accepted that a business justification might in some circumstances provide a credible efficiency or pro-competitive explanation unrelated to an anti-competitive purpose for why the dominant firm engaged in the conduct alleged to be anti-competitive.[48] In this case, the Court rejected as irrelevant to an inquiry into anti-competitive intent the Tribunal's finding that one of the respondent's justifications for the SDP was to support a broader line of inventory, including esoteric products in limited demand, hence enhancing the welfare of its direct customers (distributors) and their ultimate consumers.[49] While no doubt, as the Court stated, this justification was motivated by self-interest on the part of Canada Pipe,[50] this is true of all competitive conduct (not only anti-competitive conduct), and self-interest is generally regarded as socially desirable where it leads to the adoption of competitive practices that benefit consumers, even if in so doing both consumers and producers share the total surplus generated by the practice in question.

Thus, what would constitute a valid business justification for an allegedly anti-competitive act under section 79(1)(b) is obscure, given the Court's view that any practice that is self-interested (i.e., profit maximizing) is suspect, whatever its impacts, whether beneficial or otherwise, on consumers. Again, this might be a harmless exercise in formalism or semantics if, as the Court suggests in its decision, these matters can be remitted for consideration under section 79(1)(c), but again this is in curious irony with the Court's insistence that every statutory element of section 79 should be given independent meaning. Moreover, even if business justifications of the kind proffered by the respondent in this case, while in the Court's view not relevant under section 79(1)(b),

can be considered under section 79(1)(c), the Court's decision renders uncertain exactly what weight is to be attached to these justifications even under section 79(1)(c).

Hence, the Court's treatment of the requirement of an anti-competitive act in section 79, by its exclusive focus on the intended negative effects of an act on competitors, and its insistence on disregarding effects on competition more generally or on consumer welfare more specifically, casts the net of practices that are rendered suspect under section 79 much more broadly than any economically defensible conception of abuse of dominance can justify, and as with its interpretation of the substantial lessening of competition requirement in section 79, renders a broad range of mostly benign and often pro-competitive business practices suspect and without clear guidance for the parties involved, in terms of what are permissible forms of business conduct.

Substantial Control

Under section 79(1)(a), as a threshold issue, in evaluating applications by the Commissioner for relief against abuses of dominant position, the Tribunal must find that one or more persons substantially or completely control, throughout Canada or an area thereof, a class or species of business. In a cross-appeal in *Commissioner of Competition v. Canada Pipe*, Canada Pipe challenged a range of determinations by the Tribunal with respect to the definition of relevant markets and its application of the substantial control test to some of these markets.[51] The cross-appeal was dismissed by a majority of the Federal Court of Appeal, but upheld in some respects by Pelletier J. dissenting.

As Pelletier J. pointed out in his dissent, there is much common ground amongst the parties that the substantial control test in section 79(1)(a) is equivalent to a market power test, and that the reference to class or species of business is equivalent to a relevant product market, and the reference to Canada or any area thereof is equivalent to a relevant geographic market.[52] Hence, the substantial control test requires a demonstration that the party against whom relief is sought possesses market power in relevant product and geographic markets. None of these points were contentious in the current case. Focusing specifically on the market power requirement, Pelletier J. also pointed out that it was uncontentious that market power is defined as the ability to profitably raise prices above competitive levels for a significant period without losing a significant portion of business to rivals, and that the Tribunal had correctly interpreted the requirement of market power in this way in this case.[53] However, Pelletier J. in dissent, after noting that the issues raised by the market power requirement were properly characterized as issues of mixed law and fact calling, under the Supreme Court of Canada's decision in *Southam*, for a standard less deferential on the part of the reviewing court than the patently unreasonable test applicable to findings of fact, but more deferential than the correctness test applicable to findings of law, concluded that the Tribunal's determinations on the existence of market power in several geographic markets were unreasonable. In particular, he noted that the Tribunal after defining market power as the ability to set prices profitably above competitive levels for a considerable period, had itself found that in several geographic markets, in particular British Columbia, Alberta, the Prairies, and Ontario, prices had fallen to competitive levels as a result of entry by importers and a new domestic manufacturer, and that margins in some cases were to the point of being negative for considerable periods of time, in contrast to the higher prices and margins that prevailed in Quebec and the Maritimes.[54] Thus, in Pelletier J.'s view the Tribunal's findings as to market power could only be sustained with

respect to Quebec and the Maritimes, and the fact that Canada Pipe was required to lower its prices in response to competition from other suppliers of cast iron products in the other geographic markets was inconsistent with its own definition of market power.[55]

Pelletier J.'s judgment in this case is compelling. Curiously, the majority of the Federal Court of Appeal, who applied the standard of correctness strictly, even expansively, to the previous two issues reviewed above, adopted a highly deferential approach to the Tribunal's determinations on this third issue, even though the Tribunal's determinations were inconsistent with its own premises and thus internally contradictory.[56] More importantly, by allowing this internal contradiction in the Tribunal's determinations to stand, the majority of the Federal Court of Appeal has now seriously clouded the appropriate interpretation and application of the market power test in the threshold requirement of section 79(1)(a). If a party against whom relief is sought under section 79 is able to demonstrate that prices in relevant product and geographic markets have fallen to competitive levels in response to entry, but yet still risks a determination that it possesses market power, the concept of market power becomes largely incoherent (as Pelletier J. correctly pointed out in his dissent).

Thus, on this third issue, the judgment of the majority of the Federal Court of Appeal has raised serious uncertainties as to the scope of the abuse of dominance provisions, and given that market power is an essential predicate of a number of other anti-competitive offenses or reviewable practices, similarly casts doubt as to the meaning of market power in these related competition law contexts.

Conclusion

The obfuscation in the enunciation of principles governing abuse of dominance in the Federal Court of Appeal's decision stands in sharp contrast to the articulation of principles by the D.C. Circuit in the *Microsoft* case:

> From a century of case law on monopolization under S. 2, however, several principles do emerge. First, to be condemned as exclusionary, a monopolist's act must have an "anticompetitive effect." That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice. "The [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."
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> Second, the plaintiff, on whom the burden of proof of course rests, must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect. In a case brought by a private plaintiff, the plaintiff must show that its injury is "of 'the type that the statute was intended to forestall,'"; no less in a case brought by the Government, it must demonstrate that the monopolist's conduct harmed competition, not just a competitor.
>
> Third, if a plaintiff successfully establishes a *prima facie* case under S. 2 by demonstrating anticompetitive effect, then the monopolist may proffer a "procompetitive justification" for its conduct. If the monopolist asserts a procompetitive justification—a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claim.

> Fourth, if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit. In cases arising under S. 1 of the Sherman Act, the courts routinely apply a similar balancing approach under the rubric of the "rule of reason." The source of the rule of reason is *Standard Oil Co. v. United States*, in which the Supreme Court used that term to describe the proper inquiry under both sections of the Act
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> Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of S. 2, our focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct.[57]

In summary, three concepts that are central to Canada's competition law and policy have been left in a state of serious uncertainty by the Federal Court of Appeals' decision in *Canada Pipe*: (a) the meaning of substantial lessening of competition; (b) the meaning and scope of the concept of anti-competitive acts; and (c) the meaning and application of the concept of market power. With the decision of the Supreme Court of Canada of May 10, 2007, declining leave to appeal in this case, legislative amendments may now be necessary, not only in order to render more predictable the legal environment in which dominant firms operate in Canada, but in order to enable Canada to play a coherent and constructive role in emerging and extensive discussions in international antitrust fora on promoting greater convergence of approaches to abuse of dominance in the world's major antitrust jurisdictions.[58]

Notes

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1 *Canada (Commissioner of Competition) v. Canada Pipe Company Ltd.*, 2006 FCA 233 (23 June 2006) [*Appeal Decision*].

2 *Canada (Commissioner of Competition) v. Canada Pipe Company Ltd.* (2005) Comp. Trib. 3 (Competition Tribunal) [*Tribunal Decision*].

3 See *Tribunal Decision*, *ibid.* paras. 284-285.

4 *Canada (Director of Investigation and Research) v. Southam* [1997] 1 S.C.R. 748.

5 *Appeal Decision*, *supra* note 1 at paras. 34, 58, 92, 95, and 98.

6 *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) [*NutraSweet*].

7 *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.) [*Laidlaw*].

8 *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.* (A.C. Nielsen) (1995), 64 C.P.R. (3d) 216 [*Nielsen*].

9 *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc. Ltd.* (1997), 73 C.P.R. (3d) 1 [*Tele-Direct*].

10 *Supra* note 2.

11 See Paul Crampton, "Abuse of Dominance in Canada: Building on the International Experience" (2006) 73 *Antitrust L.J.* 803.

12 *Appeal Decision*, *supra* note 1 at para. 30.

13 *Ibid.*

14 *Ibid.* at paras. 38 and 47-48.

[15] *Ibid.* at para. 46.
[16] *Ibid.* at para. 53.
[17] *Ibid.* at para. 58.
[18] *Ibid.* at paras. 51 and 52.
[19] *Ibid.* at para. 55.
[20] In a medium-sized and relatively concentrated economy like Canada, fewer firms will be able to achieve minimum scale in many industries. See for example, C.S. Goldman, "The Impact of the Competition Act of 1986" (delivered at the National Conference on the Centenary of Competition Law in Canada, Toronto, Ontario, October 24, 1999).
[21] *United States v. Von's Grocery Co.*, 384 US 270 (1966).
[22] *Brown Shoe Co. v. United States*, 370 US 294 (1963).
[23] These decisions have been widely denounced as "decisions emphasizing artificial presumptions not soundly grounded in economic reasoning" See, e.g., R.H. Pate, "Antitrust Law in the U.S. Supreme Court" (presented at the British Institute of International and Comparative Law Conference, London, England, May 11, 2004).
[24] Section 93(e) instructs the Tribunal in assessing whether a merger is likely to lessen competition substantially to consider "the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger."
[25] *Appeal Decision*, *supra* note 1 at para. 44.
[26] Section 1.1 of the *Competition Act* sets out the purposes of the Act as follows: "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."
[27] See for example, *Commissioner of Competition v. Superior Propane Inc. et al.* (2001), 11 C.P.R (4th) 289 at para. 90 (F.C.A.).
[28] *Appeal Decision*, *supra* note 1 at para. 48.
[29] *Ibid.* at para. 64.
[30] *Ibid.* at para. 61.
[31] *Ibid.* at para. 66.
[32] *Ibid.* at para. 67.
[33] *Ibid.* at para. 69.
[34] *Ibid.* at para. 87.
[35] *Ibid.* at para. 90.
[36] *Tribunal Decision*, *supra* note 2 at para. 191.
[37] *Appeal Decision*, *supra* note 1 at para. 77.
[38] *Ibid.* at para. 79.
[39] *Ibid.* at para. 83.
[40] *Ibid.* at para. 87.
[41] *Ibid.* at para. 91.
[42] *Ibid.* at para. 68.
[43] *NutraSweet*, *supra* note 6 at 34; *Appeal Decision*, *ibid.* at paras. 64 and 65.
[44] See, for example, the decisions in *Tele-Direct, supra* note 9 at 179, 180, 191, 195, 196 and 199; *Canada (Director of Investigation & Research) v. D&B Companies of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 at 257 (Comp. Trib.); *Laidlaw*, *supra* note 7 at 333.
[45] Competition Bureau, *Predatory Pricing Enforcement Guidelines* (Ottawa: Competition Bureau, 1992).
[46] See, *e.g.*, *NutraSweet, supra* note 6 at 45: "Even if NSC was pricing below cost after 1988, it is highly unlikely that NSC would be able to recoup from Canadian consumers the foregone profits resulting from below cost pricing."
[47] See e.g., the Competition Bureau's Draft *Intellectual Property Enforcement Guidelines* (April, 2000) which state that "a fundamental objective of competition law is to ensure the efficient use of resources through effective competition."
[48] *Appeal Decision*, *supra* note 1 at para. 87.
[49] *Ibid.* at para. 90.
[50] *Ibid.* at para. 91.
[51] The Court of Appeal issued separate decisions to address the appeal by the Commissioner of Competition and the cross-appeal

by Canada Pipe: *Canada (Commissioner of Competition) v. Canada Pipe Ltd.* 2006 FCA 236 (23 June 2006) [*Cross Appeal Decision*].

[52] *Cross Appeal Decision*, *ibid.* at paras. 102-107.

[53] *Ibid.* at para. 106.

[54] *Ibid.* at para. 114.

[55] *Ibid.* at para. 118.

[56] *Ibid.* at para. 53.

[57] *United States v. Microsoft Corp.* 253 F.3d 34 at 58-59.

[58] See Crampton, *supra* note 11.