



## Joint venturers not liable for price fixing

*Texaco Inc. v. Dagher*<sup>1</sup>

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It is not *per se* illegal for a lawful, economically integrated joint venture to set prices at which the joint venture sells products, the US Supreme Court held in a February 28, 2006, decision.

From 1998 to 2002, Texaco Inc. and Shell Oil Co. consolidated their gasoline refining operations in the western US through a joint venture called Equilon Enterprises. The joint venture refined and sold gasoline under the Texaco and Shell brands. After agreeing to certain divestitures, Texaco and Shell received approval for the joint venture from the Federal Trade Commission.

However, a group of Texaco and Shell gas station owners sued, claiming that Texaco and Shell were engaging in unlawful price fixing. The District Court dismissed the claim on summary judgment, but the Ninth Circuit appeal court reversed that decision. Texaco and Shell then appealed to the Supreme Court.

The issue before the Supreme Court was whether pricing by the joint venture was *per se* illegal, that is, whether it could be described as illegal without the need to engage in a "rule of reason analysis" to determine whether it constitutes an unreasonable restraint of trade.

The court reviewed the law on *per se* illegality, noting that the rule of reason analysis is presumptively applied. Only agreements that are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality",<sup>2</sup> such as price fixing between competitors, are *per se* illegal. All other agreements are reviewed under the rule of reason analysis, to

determine whether they are unreasonable and anti-competitive.

Here, however, because they consolidated operations in the joint venture, Texaco and Shell did not compete with each other in selling gas in the western US. Hence, "the pricing policy challenged here amounts to little more than price setting by a single entity", not price fixing between competitors.

The court appeared to leave open the possibility that the joint venture pricing might be unlawful under a rule of reason analysis, however.

While this decision is only persuasive authority in Canada, it should give some comfort to Canadian joint venturers.

Canada's anti conspiracy provision, s. 45 of the *Competition Act*, prohibits agreements that lessen competition "unduly". This standard has been described a "partial rule of reason" standard, lying on the continuum between *per se* illegality and rule of reason.<sup>3</sup> Proponents of amendments to s. 45 argue that it chills joint ventures.

However, the US Supreme Court has sent a strong signal that a joint venture should be treated as a single economic entity for competition purposes. This suggests that the appropriate tool for analysing joint ventures is not conspiracy provisions, but merger provisions.

As well, in Canada, s. 45.1 of the *Competition Act* prohibits proceedings under the conspiracy provisions (s. 45) where proceedings have been brought under the merger (s. 92) or abuse of dominance (s. 79) provisions. Consequently, if the

Competition Bureau were to challenge a joint venture under the merger provisions, and settle the matter through a consent agreement (as the FTC did to the Texaco-Shell joint venture), the joint

venture would likely be immune from criminal and civil proceedings alleging a price fixing conspiracy under s. 45.<sup>4</sup>



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<sup>1</sup> 547 U.S. \_\_\_ (2006).

<sup>2</sup> Citing *National Society of Professional Engineers v. United States*, 435 U.S. 679, 693 (1978).

<sup>3</sup> *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at ¶90.

<sup>4</sup> The Bureau would have to commence an application under s. 92. Section 45.1 is triggered only if “an order is sought” under s. 79 or 92. A consent agreement without a prior application likely would not trigger the immunity provided by s. 45.1.