



## Rebate program case settles

### *Canada Pipe agrees to offer alternative modified rebate program*

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#### Modified rebate program

Canada Pipe Company Ltd. and the Competition Bureau have settled their long running dispute over the rebate program offered by Canada Pipe to its distributors by filing a consent agreement with the Competition Tribunal. This brings to an end an abuse of dominance case begun in 2002.

Key provisions of the settlement include:

- Canada Pipe is to offer a modified rebate program to distributors as an alternative to the existing rebate program, beginning January 30, 2008.
- The program can include: (1) multiplier discounts off list-price; (2) quarterly rebates; (3) annual rebates; and (4) yearly head office rebates.
- The rebate cannot be conditional on the distributor acquiring other Canada Pipe products.
- Rebates available under the existing rebate program cannot be more than the rebates under the modified program.
- The consent agreement has a term of 5 years.
- Details of the modified rebate program are, unfortunately, confidential.

#### Canada Pipe's stocking distributor program challenged

Canada Pipe's Bibby division manufactures cast iron drain, waste and vent pipes ("DWV") for use in buildings. It markets most of its products through

distributors. Distributors who stock Bibby products exclusively and purchase a minimum amount pay a much lower price than non-exclusive distributors (in one example, 40% lower) and also receive quarterly rebates under Bibby's existing "Stocking Distributor Program" ("SDP").

In 2002, the Competition Bureau challenged the SDP, alleging that it amounted to an abuse of dominant position by Bibby.

In 2005, the Competition Tribunal found that Bibby dominated the market for cast iron DWV pipes, but that its SDP did not constitute a practice of anti-competitive acts and did not lessen or prevent competition substantially.

Several key features of the SDP led the Tribunal to this conclusion:

The terms of the program are clear and transparent. The program operates on a calendar year basis, and distributors renew their commitment to it on a quarterly basis.

There are no contractual constraints preventing distributors from terminating their participation in the program.

There are no heavy penalties for leaving the program. Distributors that leave the program do not have to pay back the discounts they obtained. At worst, they may not receive the rebate for purchases already made.

The Tribunal found that the SDP lacked the offensive characteristics that have in the past been declared "anti-competitive" by the Tribunal. The SDP's terms were clear and transparent, and distributors could leave the program without penalties, the Tribunal found.

The Tribunal also accepted that Canada Pipe has a reasonable business justification for the SDP. The program kept Canada Pipe's volumes of its standard products high enough that it could offer a complete array of "exotic", or specialized, cast iron fittings.

Both the Commissioner of Competition and Canada Pipe appealed. On June 23, 2006, the Federal Court of Appeal allowed the Commissioner's appeal and dismissed Canada Pipe's cross-appeal.

### The Federal Court of Appeal changes the test

The Federal Court of Appeal allowed the Commissioner's appeal. Although it purported to rely on past abuse of dominance jurisprudence, the court elaborated a new test for abuse of dominance in Canada. Its key aspects include:

**Competitors, not competition:** Past decisions of the Tribunal have defined anti-competitive acts in terms of an intended predatory, exclusionary or disciplinary effects on a competitor. The court emphasized that in identifying anti-competitive acts, one must look at the conduct's effects on a competitor, not on competition.

**Centrality of intention:** The court emphasized the centrality of intention, holding that anti-competitive acts are identified by reference to their purpose.

**Business justification neutralizes intent; not a defence:** a valid business justification is not an absolute defence. Rather, evidence of a business justification can only be used to counterbalance or neutralize evidence of anti-competitive intent. It must provide a "credible efficiency or pro-competitive explanation, unrelated to an anti-competitive purpose".

**But for test for substantial lessening of competition:** the Tribunal must in all cases undertake a comparison between market conditions with the impugned practice, and likely market conditions in the absence of the impugned practice to determine whether the practice substantially lessens or prevents competition. The fact that the market is competitive and experiences entry, even with the impugned practice, is not relevant.

Canada Pipe sought leave to appeal the Federal Court of Appeal decision to the Supreme Court. The Supreme Court denied leave in May, 2007.

### What now?

The settlement of the Canada Pipe case is in some respects unfortunate: businesses are left with little guidance on how to structure a rebate or loyalty program that will not offend the abuse of dominance provisions.

Past Tribunal decisions outline practices that are anti-competitive. The usefulness of these cases may be lessened by the changes to the test made by the Court of Appeal. As the findings of fact made by the Tribunal in *Canada Pipe* make it likely that it would have dismissed the Bureau's case again, this case had the potential to provide guidance on what features are acceptable in a rebate program, in light of the new test set out by the Court of Appeal. The settlement means that this guidance will not be forthcoming. Because most of the details of the modified rebate program are confidential, it provides little assistance to firms wishing to design a rebate program.



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