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New rules constitutional, Competition Tribunal finds

Commissioner of Competition v. Canada Pipe Company Ltd.

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The Competition Tribunal held that new rules that limit discovery in most Tribunal proceedings do not violate parties' rights to a fair hearing in a decision issued on August 8, 2003.¹

New rules

The new rules, issued in 2002, do away with the obligation to list all relevant documents (including documents over which privilege is claimed) in an affidavit of documents. Instead, both parties must file "disclosure statements" that set out only the documents on which the parties intend to rely, will-say statements of non-expert witnesses, and the economic theory relied on by the parties. The will-say statements can be anonymous; parties can wait until two days before the witness is to testify to identify witnesses by name.

The new rules apply to all cases in the Tribunal except merger cases.²

Canada Pipe's motion

The Commissioner alleges in his application that Canada Pipe abused its dominant position and engaged in a practice of exclusive dealing in the market for cast iron pipe, fittings, and mechanical joint couplings.

The Commissioner's disclosure statement included a number of documents over which the Commissioner claimed public interest privilege, and five omnibus will-say statements covering a total of 42 witnesses.

Canada Pipe brought a motion seeking a declaration that the new rules violate its right to a fair hearing, as guaranteed by the *Canadian Bill of Rights*, a statute with "quasi-constitutional" status. Canada Pipe argued that under the new rules, the Commissioner was not obliged to produce "bad" documents, that is, documents that are not helpful to the Commissioner.

Canada Pipe contended that this unfairness was compounded by the fact that the Commissioner could effectively conduct documentary and oral discovery of Canada Pipe using s. 11 orders.³

¹ *Commissioner of Competition v. Canada Pipe Company Ltd.*, <http://www.ct-tc.gc.ca/english/cases/ct-2002-006/0030a.pdf>

² *Rules amending the Competition Tribunal Rules*, SOR/2002-62, <http://www.ct-tc.gc.ca/english/rulesrev.pdf>

³ Both parties materials can be found on the Tribunal's website at <http://www.ct-tc.gc.ca/english/cases/ct-2002-006/pipe.html>

The Tribunal's decision

The Tribunal held that the new rules do not violate the *Bill of Rights*. The Tribunal conceded that the new rules clearly replace the obligation to produce all *relevant* documents with an obligation to produce only the documents on which parties intend to *rely*. It follows that the Commissioner and other parties can hide "bad" documents.

But, the Tribunal held, this change in the rules does not prevent Canada Pipe from knowing the case it has to meet. The documents Canada Pipe was asking for were not documents it needed to know the case it had to meet, but rather documents that may bolster its case.

The Tribunal also held that:

- The Commissioner cannot claim privilege over documents listed in the disclosure statement. The Commissioner must decide at the time of issuing the disclosure statement between listing the document and waiving the privilege, or maintaining the privilege but not being able to rely on the document.
- Omnibus will-says are inadequate. Separate will-says must be provided for each lay witness.
- The Commissioner can continue to exercise his investigative powers under s. 11 even after bringing an application in the Tribunal. However, it is more difficult for the Commissioner to use information obtained under s. 11 after the disclosure statement has been served, and the Tribunal can deal with any unfairness arising from the use of s. 11 through its control over the introduction of information obtained through s. 11 orders.

Comment

The Tribunal appears not to have considered that the purpose of disclosure or discovery is not just to reveal the case that a party must meet; it is also to reveal information that will help the other party construct its own case, or weaken the case of the opposing party – that is, "bad" documents. In criminal and quasi-criminal cases, as part of the right to make "full answer and defence", defendants are entitled to disclosure of all relevant information. In civil litigation, discovery rules compel production of all relevant information. The Tribunal has the power to order parties to modify their conduct, and it can impose "administrative monetary penalties", that is, fines, in certain cases. The Tribunal's conclusion that parties in proceedings before it should not be entitled to disclosure of all relevant information is inconsistent with the policy of the law requiring full disclosure in both civil and criminal cases.