DAVIES

PERSPECTIVE

Canadian Court Confirms No Private Right of Action for Abuse of Dominance

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Last year, provisions in the Canadian *Competition Act* that permit the Competition Bureau to challenge anti-competitive conduct by dominant firms that substantially prevents or lessens competition were amended to allow for the imposition (by the Competition Tribunal) of monetary penalties of up to C$10 million for a first contravention. Where an abuse of dominance has been established, the Tribunal can also issue injunctions or make other orders necessary to restore competition. Only the Commissioner of Competition, the head of the Competition Bureau, can bring an abuse of dominance case to the Tribunal.

Prior to the recent amendments, civil courts in Canada had consistently ruled that conduct alleged to constitute an abuse of dominance was not an "unlawful" act that could form the basis of a common law tort claim, such as unlawful interference with economic interests. The courts ruled that, until and unless such conduct was found by the Tribunal to be a violation of the Act, it was not unlawful and therefore could not form the basis of such a private action.

In a British Columbia civil proceeding, Novus Entertainment Inc. alleged that a competing cable services provider had, among other things, abused a dominant position by means of below-cost pricing. Novus argued that the amendments to the Act permitting monetary penalties for past conduct constituting an abuse of dominance meant that Parliament changed the fundamental character of such conduct so that it is now unlawful when it occurs.

However, in a ruling last month Mr. Justice Greyell of the Supreme Court of British Columbia disagreed and struck the portion of Novus' tort claim which was based on an alleged contravention of the abuse of dominance provisions. Justice Greyell ruled that the lawfulness or unlawfulness of a defendant's conduct under the abuse of dominance provisions continues to remain subject to a finding by the Tribunal. Until such a determination is made by the Tribunal, it cannot be said that a defendant's conduct is unlawful. The judge also pointed out that the Tribunal may impose a monetary penalty only if it issues a remedial order under the abuse of dominance provisions. However, the Tribunal retains a discretion not to issue a remedial order even where conduct within the scope of the abuse of dominance provisions of the Act is established.

This ruling in the *Novus* case, if followed and upheld on any appeal, should help to address concerns that the recent amendments to the Act may chill pro-competitive competition by potentially dominant firms. In many cases, particularly where allegations of low pricing are raised, it can be difficult to distinguish acceptable vigorous competition from conduct that may be found to be abusive for the purposes of the Act. Accordingly, some businesses could choose to price less aggressively rather than risk multi-million dollar penalties and damage claims in private actions. It remains to be seen whether and in what amount and circumstances the Tribunal will issue monetary penalties for abuse of dominance, but a reduced prospect of civil actions will help provide Canadian businesses with greater confidence to compete vigorously in their markets.

If you have any questions regarding the foregoing, please contact George Addy, John Bodrug, Adam Fanaki, Mark Katz, Anita Banicevic, Hillel Rosen or any other member of the Competition & Foreign Investment Review Group at Davies Ward Phillips & Vineberg LLP at 416.863.0900 (Toronto) or 514.841.6400 (Montréal).

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