CT-2012-003

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c.C-34, as amended;

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the Competition Act;

AND IN THE MATTER OF certain policies and procedures of Direct Energy Marketing Limited.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

DIRECT ENERGY MARKETING LIMITED

Respondent

- and -

NATIONAL ENERGY CORPORATION

Intervenor

THE COMMISSIONER OF COMPETITION'S MEMORANDUM OF FACT AND LAW
(For answers to preliminary determination of questions of law)

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PART I THE COMMISSIONER'S POSITION IN A NUTSHELL

1. Can a company abuse its dominant position for years and then avoid the consequences of its actions by exiting the relevant market *after* the Commissioner commences an application but *before* the Competition Tribunal has determined the application? That is the question for the Tribunal to determine on this motion.

2. If the answer to this question is yes, then businesses will know that they can engage in anti-competitive conduct that harms competition, comfortable that they have an out. The company can avoid the consequences of its actions by exiting the relevant market prior to any application by the Commissioner being decided by the Tribunal.

3. To avoid this outcome, the Commissioner submits that the answer to the two questions he has asked is that the Tribunal can make an order under subsection 79(1)(a) and 79(3.1) of the *Competition Act* even though the Respondent has exited the relevant market.

PART II THE FACTS

A. The Application

4. The Commissioner and the Respondent have agreed to an Agreed Statement of Facts.

ISSUES AND LAW

5. The issues are:

(a) whether the Tribunal can make an order against Direct Energy under subsection 79(1)(a) of the Act; and

(b) whether the Tribunal can make an order against Direct Energy under subsection 79(3.1) of the Act;

in each case, in the circumstances set out above.

B. An interpretation of section 79(1)(a) that is consistent with the section as a whole and the purposes of the Act is that the respondent must have market power when it engaged in the conduct or at a minimum when the application was commenced

6. There is no direct jurisprudence that answers the questions the Commissioner has asked. None of the six applications heard by the Tribunal under section 79 of the Act have dealt with a situation where the respondent exits the relevant market before the application is heard.

7. Similarly, Parliament never directly considered whether section 79 would apply in this situation, either when section 79 was originally passed in 1986 or when section 79 was amended to allow the Tribunal to impose an administrative monetary penalty in 2009.

8. Therefore, the Tribunal must rely upon statutory interpretation to determine the answers to these questions. As described in more detail below, when these principles are applied, the Tribunal can make an order under section 79(1).

The Modern approach to statutory interpretation is to be applied

9. The Tribunal has adopted – as has the Supreme Court of Canada – the "modern approach" to statutory interpretation: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament". [1]

10. The modern approach is supported by sections 10 and 12 of the Federal *Interpretation Act*:

> Law always speaking
>
> 10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.[2]
>
> Enactments deemed remedial
>
> 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.[3]

11. The effect of a certain interpretation also forms parts of the modern approach. An absurd result – an interpretation that frustrates a legislative purpose or thwarts a legislative scheme – must be avoided.[4]

The use of present tense in s. 79(1)(a) does not mean the section is limited to present or prospective conduct

12. "Law always speaking" under section 10 of the *Interpretation Act* means an Act of Parliament is deemed to be speaking to the *circumstances as they arise*. In particular,

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[1] *Canada (Commissioner of Competition) v. Sears Canada Inc.* [2005] C.C.T.D. No. 1, at para. 223; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Ruth Sullivan, Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) at page 1.
[2] *Interpretation Act*, R.S.C. 1985, c. I-21.
[3] *Ibid.*
[4] Sullivan, *supra* note 1, at page 309.

use of the present tense in legislative drafting does not mean that the legislation's application is limited to present or prospective conduct.[5]

13. For example, in *Genentech Canada Inc., Re*, the respondents dedicated to the public (i.e. relinquished control over) a certain patented medicine *after* they were served with a notice of hearing alleging that that patented medicine had been sold in Canada at excessive prices but *before* the Canada Patent Medicine Prices Review Board (the "**Board**") determined the hearing (circumstances akin to the present case).

14. The respondents submitted that the Board no longer had jurisdiction over the respondents, in part, because the relevant section of the *Patent Act*[6] used the present tense (i.e. "is being sold") and was therefore limited to present conduct. The Board rejected this submission. Relying on sections 10 and 12 of the *Interpretation Act*, the Board concluded the following, in part:

> In the view of the Board (the respondents') approach is inconsistent with the scheme of the Act and, if adopted, would impede the Board in giving effect to the legislation.
>
> Were (the respondents') literal construction to be applied, the Board would be required to terminate a proceeding, regardless of the stage it had reached, if it was shown that the patentee had ceased, even temporarily, selling the medicine in the relevant Canadian market, or had, as in this case, dedicated its patents to the public. In the Board's view, either outcome would frustrate Parliament's scheme for the regulation of prices of patented medicines.[7]

Requiring market power at the time of the conduct or when the application is brought is consistent with the purpose of section 79(1) and the purpose of the Act

15. The Commissioner acknowledges that a literal meaning of section 79(1)(a), that the Tribunal find that "one or more person substantially or completely **control**, throughout Canada..", may suggest that the respondent must be in the relevant market at the time the Tribunal issues its order. However, section 79(1)(a) cannot be read in

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[5] *Genetech Canada Inc., Re* 1992 CarswellNat 1661, 44 C.P.R. (3d) 316 [Genetech]; *McKinstry v. York Condominium Corp. No. 472* 2003 CarswellOnt 4948, 15 R.P.R. 181 at para. 34; *R. v. Cross* 2006 CarswellAlta 1224, 2006 ABQB 682 at paras. 16-18.
[6] R.S.C. 1985, c. I-21.
[7] Genentech, *supra* note 5 at paras. 42-43.

isolation. It must be considered in the context of the purpose of section 79 as a whole and the purpose of the Act.

16. Reviewing the rest of section 79(1) shows that the section contemplates that the respondent's conduct and the effect of that conduct can be in the past. In particular, sections 79(1)(b) and 79(1)(c) state "that person or those persons **have engaged** in or are engaging in a practice of anti-competitive acts" and that "the practice **has had**, is having, or is likely to have the effect of preventing or lessening competition substantially in a market".

17. Requiring that the respondent have market power under 79(1)(a) at the time the conduct was engaged in is consistent with the purpose of section 79 which is to stop those who have market power from harming competition by engaging in anti-competitive conduct. This is also consistent with the purpose of the Act which is to maintain and encourage competition in Canada so that the benefits generated by competitive markets will be afforded to Canadians and Canadian businesses.[9]

18. Further, the preface to subsections 79(a)-(c) is "(w)here, on application by the Commissioner, the Tribunal finds...". This indicates that the relevant date for determining dominance is when the application was brought. Similarly, the Board in *Genentech* concluded that the relevant date for determining whether the offence was committed was a date no later than the date the originating process was issued (in other words, the relevant date was not the date the Board would issue its order).[10]

19. The phrase "(w)here on application", when considered in the context of the purpose of section 79 as a whole, the purpose of the Act, sections 10 and 12 of the *Interpretation Act* and the decision in *Genentech Canada Inc.*, means that the relevant date for determining a violation of section 79 of the Act is a date no later longer than the date the Commissioner issued his Notice of Application (in this case, December 20, 2012).

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[9] *Competition Act*, R.S.C., 1985, c. C-34, s. 1.1.
[10] Genentech, *supra* note 5 at para 39.

Interpreting 79(1)(a) to require market power at the time of the conduct avoids an absurd and unjust result

20. Adopting an analysis that permits Direct Energy to avoid the consequences of its acts by exiting the market prior to a finding by the Tribunal leads to an interpretation that defeats the purposes of the Act and leads to an absurdity and an unjust result.

21. In this case, assuming the facts of the Commissioner's application are proved, that would mean that Direct Energy has, since 21 February 2012, preserved and enhanced its market power in the Relevant Market by implementing water heater return policies and procedures that impose significant costs on competitors and prevent customers from switching to those competitors.

22. Direct Energy's exclusionary water heater return policies and procedures have likely substantially lessened and prevented competition. In the absence of these policies, customers would likely have benefited from lower prices and greater product quality and choice.

23. Direct Energy has profited from its anti-competitive conduct for almost three years.

24. This is exactly the mischief that section 79 is supposed to address. Direct Energy's conduct is also inconsistent with the general purpose of the Act, which is to encourage and maintain competition in Canada.

25. It is of no moment for Direct Energy to argue that the mischief has been solved because it is no longer in the Relevant Market and cannot re-enter because of a non-competition agreement. Section 79 recognizes that the conduct does not need to be engaged in at the time of the finding. There is a risk that the conduct could commence again after this application is complete where, Direct Energy, as alleged in the Notice of Application, is a recidivist.[12] Similarly, assets that have been sold can be re-acquired, non-competition agreement renegotiated or abandoned, and the conduct commenced

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[12] Notice of Application, paragraphs 3-4 and 15-17, Statement of Agreed Facts, Tab A.

again after the application is complete. The Tribunal should be able to issue an order prohibiting this from occurring.

C. THE PURPOSE OF 79(3.1) IS TO ENCOURAGE COMPLIANCE WITH 79 REGARDLESS OF WHETHER THE RESPONDENT IS ENGAGING IN THE CONDUCT OR IN THE RELEVANT MARKET

26. Section 79(3.1) and section 79(3.3) provides as follows:

> (3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000.
>
> (3.3) The purpose of an order made against a person under subsection (3.1) is to promote practices by that person that are in conformity with the purposes of this section and not to punish that person.

27. Where the Tribunal makes an order under section 79(1) or 79(2), then it can make an order under section 79(3.1). If the Tribunal answers the Commissioner's first question in the Commissioner's favour, then section 79(3.1) becomes available to the Tribunal (assuming the Commissioner successfully proves the three elements of section 79(1)).

28. Ordering an administrative monetary penalty ("**AMP**") under section 79(3.1) - even when Direct Energy has exited the relevant market - is consistent with section 79(3.3). An administrative monetary penalty under section 79(3.1) is informed by section 79(3.3), which states that "the purpose of an order made against a person under subsection (3.1) is to promote practices by that person that are in conformity with the purposes of this section and not to punish this person".

29. The Tribunal can order an AMP to promote the practices of the respondent that are in conformity of the Act, even if the Respondent was in the relevant market but not presently engaging in the conduct. In other words, the respondent will have shown that

in the past it was willing to engage in conduct contrary to section 79 and would need to be encouraged not to repeat this conduct in the future.

30. Similarly, if the Tribunal accepts that market power is required at the time of the application or when the respondent engaged in the conduct, then the AMP would be to promote the practices of the respondent in conformity with section 79 should Direct Energy re-enter the relevant market in the future.

PART III ORDER REQUESTED

31. The Commissioner seeks an order answering the legal questions asked in the affirmative.

32. The Commissioner seeks the costs of this motion payable forthwith, and such further and other relief as this Tribunal may deem just.

DATED AT GATINEAU, QUÉBEC, this 25 day of November, 2014.

SIGNED BY:

Jonathan Hood

Jonathan Hood

Antonio Di Domenico

Counsel to the Commissioner of Competition

SCHEDULE "A"

Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42, [2002] 2 S.C.R. 559.

Canada (Commissioner of Competition) v. Sears Canada Inc. [2005] C.C.T.D. No. 1.

Genetech Canada Inc., Re 1992 CarswellNat 1661, 44 C.P.R. (3d) 316.

McKinstry v. York Condominium Corp. No. 472 2003 CarswellOnt 4948, 15 R.P.R. 181.

R. v. Cross 2006 CarswellAlta 1224, 2006 ABQB 682.

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27.

Ruth Sullivan, Sullivan on the Construction of Statutes, 5th ed. (Markham: LexisNexis Canada Inc., 2008).

SCHEDULE "B"

COMPETITION ACT, R.S.C., 1985, c. C-34

1.1 The purpose of this Act is 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.

79. (1) Where, on application by the Commissioner, the Tribunal finds that

(*a*) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
(*b*) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
(*c*) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

79. (3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000.

79. (3.3) The purpose of an order made against a person under subsection (3.1) is to promote practices by that person that are in conformity with the purposes of this section and not to punish that person.

INTERPRETATION ACT R.S.C., 1985, c. I-21

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

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