

Competition Tribunal



Tribunal de la Concurrence

Reference: *Commissioner of Competition v. Canada Pipe Company Ltd.*, 2007 Comp.Trib. 30  
File No.: CT-2002-006  
Registry Document No.: 0124

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

AND IN THE MATTER OF an application by the Commissioner of Competition pursuant to sections 77 and 79 of the *Competition Act*;

AND IN THE MATTER OF certain practices by Canada Pipe Company Ltd. through its Bibby Ste-Croix Division.

B E T W E E N:

**The Commissioner of Competition**  
(applicant)

and

**Canada Pipe Company Ltd. /  
Tuyauteries Canada Ltée**  
(respondent)



Decided on the basis of the written record  
Presiding Judicial Member: Simpson J. (Chairperson)  
Date of order: November 15, 2007  
Order signed by: Madam Justice S. Simpson

**CONFIDENTIALITY ORDER – ON CONSENT OF THE PARTIES**

[1] **FURTHER TO** the application filed by the Commissioner of Competition (the “Commissioner”) pursuant to sections 77 and 79 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”);

[2] **AND FURTHER TO** the Federal Court of Appeal decision of June 23, 2006, referring the matter back to the Tribunal for a redetermination in accordance with the Court’s reasons (*Canada (Commissioner of Competition) v. Canada Pipe Co.* (F.C.A.), 2006 FCA 233, leave to appeal to S.C.C. refused on May 10, 2007);

[3] **AND FURTHER TO** the draft confidentiality order filed on consent by the parties on November 8, 2007;

**THE TRIBUNAL ORDERS THAT:**

[4] For the purposes of this order:

- (a) “Document” means any document whatsoever, including the things defined as “records” in subsection 2(1) of the Act.
- (b) “Independent Expert” means an expert retained by a Party who (i) is not a current employee of the Respondent or its affiliates, (ii) has not been an employee of the Respondent or its affiliates within 5 years prior to the date of this Order, and, (iii) is not a current employee of a competitor or customer of the Respondent or its affiliates.
- (c) “Protected Documents” means Documents identified as confidential at the initial hearing before the Tribunal in this matter held in 2003 and 2004 (the “Initial Hearing”), including information contained in those documents, and transcripts of testimony from witnesses or submissions made *in-camera* at that hearing.
- (d) “Redetermination Proceeding” means the hearing to be held in accordance with the Federal Court of Appeal decision of June 23, 2006, referring the matter back to the Tribunal for a redetermination in accordance with the Federal Court of Appeal’s reasons and on the basis of the evidence currently on record; and,
- (e) “Parties” means the Commissioner and the Respondent, and “Party” means the Commissioner or the Respondent;

[5] Disclosure of Documents containing any of the following types of information could cause specific and direct harm:

- (a) Information relating to prices (to the extent that such prices have not been published or made generally known to competitors and customers), specific output or revenue data or market shares, or negotiations relating to prices, rates and incentives;

- (b) Lists of existing, prospective, and former customers;
- (c) Confidential contractual arrangements between the Respondent or third parties and their customers;
- (d) Financial data and reports;
- (e) Business plans, marketing and strategic plans, budgets, forecasts, and other similar information;
- (f) Internal market studies and analyses;
- (g) Confidential financial information relating to the parties, their customers; and,
- (h) Other documents containing competitively sensitive and/or proprietary information of the parties.

**[6]** If information from a Protected Document is incorporated into any other document, that document shall be a Protected Document.

**[7]** Subject to a further order of the Tribunal, the consent of the Parties or as required by law, Protected Documents may only be disclosed to the following people: (i) counsel for the Parties and their staff; (ii) Independent Experts retained by the Parties who have executed Confidentiality Undertakings in the form attached as Schedule “A”; and, (iii) the Commissioner and the Commissioner’s staff directly involved in the Redetermination Proceeding .

**[8]** If a Party is required by law to disclose a Protected Document, or if a Party receives written notice from a person who has signed a Confidentiality Undertaking pursuant to this Order that they are required by law to disclose a Protected Document, that Party shall give prompt written notice to the Party that claimed confidentiality over the Protected Document so that the Party that claimed confidentiality may seek a protective order or other appropriate remedy.

**[9]** Counsel for a Party and his or her staff, and the Commissioner and her staff may make copies of the Protected Documents as they require in connection with the Redetermination Proceeding.

**[10]** Nothing in this Order prevents a Party from having full access to Protected Documents that originated from that Party.

**[11]** For greater certainty, all persons who obtain access to documents through the Redetermination Proceeding are subject to an implied undertaking to use the documents and information solely for the purposes of this Redetermination Proceeding (including any application or proceedings to enforce any order made by the Tribunal in connection with this Proceeding and any application under section 106 of the Act to vary or rescind any order made by the Tribunal in connection with this Proceeding) and any related appeals.

[12] At the Redetermination Proceeding:

- (a) Protected Documents referred to at the Redetermination Proceeding shall be identified as such and clearly marked as confidential;
- (b) Protected Documents, including information contained in those documents and references to testimony made *in-camera*, shall not form part of the public record, subject to the consent of the Parties or further order of the Tribunal.

[13] Any filings of documents or compendia with the Tribunal which include Protected Documents shall be filed with redacted versions which may be distributed to the public.

[14] The termination of the Redetermination Proceeding shall not relieve any person to whom Protected Documents were disclosed pursuant to this Order from the obligation of maintaining the confidentiality of such Protected Documents in accordance with the provisions of this Order and any confidentiality agreement.

[15] This Order shall be subject to further direction of the Tribunal and may be varied by order of the Tribunal.

DATED at Ottawa, this 15<sup>th</sup> day of November, 2007.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Sandra J. Simpson

## SCHEDULE "A"

### Confidentiality Undertaking

IN CONSIDERATION of being provided with information or documentation in connection with the Redetermination Proceeding in the Competition Tribunal (the "Tribunal"), File Number CT-2002-006 (the "Redetermination Proceeding"), between the Commissioner of Competition and Canada Pipe Company Ltd., over which claims for confidentiality have been advanced ("Protected Documents"), I, \_\_\_\_\_, of the Province of \_\_\_\_\_, hereby undertake and agree to maintain the confidentiality of any Protected Document that I obtain, and in particular:

1. I will not copy or disclose a Protected Document to any other person, except to a person permitted to receive it under the Confidentiality Order of the Tribunal dated November \_\_\_\_, 2007, or such further order as the Tribunal may make.
2. I will not use the information or documentation so obtained for any purpose other than in connection with the Redetermination Proceeding (including any application or proceedings to enforce any Order made by the Tribunal in connection with the Proceeding and any application under section 106 of the Act to vary or rescind any order made by the Tribunal in connection with this Proceeding), and any related appeals.
3. Upon completion of this application and any related appeals, I agree that all Protected Documents in my possession, shall be dealt with in accordance with instructions from counsel for the party I am retained by or as prescribed by order of the Tribunal. I may retain in my confidential files, subject to the requirements of confidentiality imposed by this undertaking, materials prepared by me, such as my expert report, as well as study results and materials of a general nature which do not replicate any confidential information from a Protected Document.
4. I have read the Confidentiality Order, a copy of which is attached to this agreement, and agree to be bound by it. I acknowledge that any breach of this undertaking by me will be considered to be a breach of the said order of the Competition Tribunal.
5. I acknowledge and agree that Canada Pipe Company Ltd., or any other owner of a Protected Document may not have an adequate remedy at law and would be irreparably harmed in the event that any of the provisions of this undertaking are not performed in accordance with its specific terms or otherwise breached. Accordingly, I agree that Canada Pipe Company Ltd., or any other owner shall be entitled to injunctive relief to prevent breaches of this agreement and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled at law or in equity.
6. In the event that I am required by law to disclose any Protected Document that is subject to this undertaking, I will provide [*insert name of retaining or employing party*] with prompt written notice so that the person that claimed confidentiality over such information or documentation may seek a protective order or other appropriate remedy. In any event, I will

furnish only that portion of the Protected Document that is legally required and I will exercise my best efforts to obtain reliable assurance that confidential treatment will be accorded it.

7. I will promptly, upon the request of the person providing a Protected Document, advise where it is kept by me.

8. I hereby attorn to the jurisdiction of the Federal Court of Canada and/or the Competition Tribunal to resolve any disputes arising under this agreement.

SIGNED, SEALED AND DELIVERED before a witness this \_\_\_\_day of \_\_\_\_\_, 2007

\_\_\_\_\_

(Witness Signature)

\_\_\_\_\_

(Signature)

\_\_\_\_\_

(Print Name)

\_\_\_\_\_

(Print Name)

COUNSEL:

For the applicant

Commissioner of Competition

Leslie Milton  
Adam Fanaki  
Roger Nassrallah  
Robert Levine

For the respondent

Canada Pipe Company Ltd./Tuyauteries Canada Ltée

James Doris  
Anita Banicevic