

Competition Tribunal



Tribunal de la Concurrence

Citation: Commissioner of Competition v. Canada Pipe, 2005 Comp. Trib. 17

File no.: CT-2002-006

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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 79 and 77 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.
(respondent)

Member: Blanchard J. (presiding)

Decided on the basis of the written record.

Reasons and Order signed by: Mr. Justice E. Blanchard

Date of reasons and order: May 4, 2005



ORDER AND REASONS FOR ORDER - COSTS

[1] Canada Pipe Company Ltd. (“Canada Pipe”), as the successful litigant, has presented a bill of costs and is asking the Competition Tribunal (the “Tribunal”) to exercise its discretion and award it costs in the lump sum amount of one million dollars, plus disbursements of \$573,203.63.

[2] The Commissioner of Competition (the “Commissioner”) finds wholly unreasonable the amount claimed for costs by Canada Pipe. The amount requested much exceeds the usual tariff under Column III of Tariff B. The basic principle argued by the Commissioner is that she should not be penalized for pursuing a matter with a view to protecting the interests of competition in Canada, as the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”) mandates her to do. The Commissioner does not oppose awarding a lump sum for costs. If the costs are awarded in accordance with the rates set out in Column III of Tariff B, total costs would not exceed \$324,659.88, including \$96,219.75 in counsel fees (incl. GST) and \$228,440.13 in disbursements.

[3] The Commissioner also requests that any order regarding costs be stayed pending the ultimate disposition of the appeal filed March 7, 2005 before the Federal Court of Appeal.

I. APPLICABLE LAW

[4] Section 8.1 of the *Competition Tribunal Act* (the “CTA”) empowers the Tribunal to award the costs of proceedings before it in accordance with the costs rules applicable in the Federal Court of Canada. Consequently, pursuant to Rule 400(1) of the *Federal Courts Rules*, SOR/98-106 am. SOR/2004-283 (the “Rules”), the Tribunal has “full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.” Rule 400(3) lists among others the following factors that may be considered, namely:

- 4.1.1 The result of the proceeding;
- 4.1.2 The importance and complexity of the issues;
- 4.1.3 Any written offer to settle;
- 4.1.4 The amount of the work;
- 4.1.5 Whether the public interest in having the proceeding litigated justifies a particular award of costs;
- 4.1.6 Any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;
- 1.1.7 Whether any step in the proceeding was improper, vexatious, unnecessary; and
- 1.1.8 Any other matter that it considers relevant.

II. ANALYSIS

[5] Various arguments, essentially based on the above factors, are advanced by Canada Pipe in support of its request for an increase in costs from the generally awarded party-and-party costs in accordance with Tariff B Column III rates (Rule 407). In response, the Commissioner argues that Canada Pipe’s request is excessive and that the circumstances do not warrant the increase sought. Both parties filed substantial written submissions in support of their respective positions.

[6] While the Tribunal accepted the Commissioner's position in respect to market definition and market power, in the end Canada Pipe was successful in having the application dismissed. In the circumstances, the Commissioner's success on certain elements of the case does not warrant a departure from the usual principle that costs follow the event. Other factors must be present however, to warrant an increase from the usual Column III rates set out in Tariff B.

[7] In my view, the novel economic issues and the amount of work involved in the preparation and conduct of the case, which was national in scope, warrant an upward adjustment of the costs. Twenty-seven lay witnesses and three expert witnesses testified over fourteen weeks. The joint book of documents comprised 31 volumes of materials. The application raised novel economic theories which had never before been addressed by the Tribunal. Seven days of the hearing were devoted to expert evidence and final arguments were made over a four day period. Few cases have been decided by the Tribunal on "Abuse of dominant position" which is an important and relatively new area of competition law in Canada in respect to civil proceedings under the Act. Potentially, the Tribunal's ruling could have far reaching consequences for both compliance with and enforcement of the *Competition Act*. The parties went to great lengths to present as completely as possible their respective positions on the issues raised before the Tribunal.

[8] In addition to the fact that a written offer to settle is a factor to be considered in determining costs under paragraph 400(3)(e) of the Rules, Canada Pipe asserts that the double costs rule found in paragraph 420(2)(b) should apply. Canada Pipe made three offers to settle; on February 25, 2002, on February 19, 2004 and on March 4, 2004. The offer made on February 25, 2002 does not appear in Canada Pipe's submissions, but is referred to in a March 25, 2002 letter submitted with Canada Pipe's Cost Submissions. The second offer dated February 19, 2004, was an official offer under the terms of the Rules. In this offer, Canada Pipe was willing to split the SDP into three separate programs, one each for pipe, fittings and couplings, and also offered to notify the Bureau of any acquisition. This offer was revoked by the third offer to settle. The third offer was made on March 4, 2004, after the hearing had begun. Under Rule 420 of the Rules, an offer which is not revoked may lead to an award of double costs from the date the offer was made.

[9] The Commissioner argues that the double costs provisions of the Rules should not apply to proceedings instituted in the public interest in furtherance of statutory objectives. The Commissioner also adds that doubling costs would be excessive in the circumstances, given that the first official offer was made just before the hearing began, and the second offer revoking the first was made after commencement of the hearing.

[10] There is merit to the Commissioner's argument, as well as jurisprudence supporting not doubling the award when the offer is made late in the process (*Algoma Central Corporation v. The Ship "Prestigious"* [1994] F.C.J. No. 960 (F.C.T.D.)). In this case, most of the work was completed and expenditures incurred in respect to pleadings, witnesses and preparation prior to the offer being made. I agree that doubling the costs in the circumstances would be excessive. However, the Tribunal cannot ignore the fact that a significant offer to settle was made on February 19, 2004, nor that a second offer stood for the duration of the hearing, the result of which provided better terms than the final decision of the Tribunal. Moreover, an increase in the cost award after the offer of settlement would recognize the considerable amount of work which was required of Canada Pipe to pursue the matter, when, in fact, it was open to negotiating a settlement.

[11] As to the allegations in respect to the conduct of the parties, I remain unconvinced that either party engaged in conduct which unnecessarily lengthened the duration of the proceeding.

[12] Canada Pipe submits that it should be awarded its costs incurred in responding to two section 11 orders issued by the Commissioner. In the Tribunal's view, it would be against public policy to order costs against the Commissioner for the expense of complying with an order mandated by the Act and ratified by a Court of competent jurisdiction.

[13] The principle to be followed in cost awards is found in *Apotex Inc. and Novopharm Ltd. v. Wellcome Foundation Ltd* (1998) 159 F.T.R. 233 (F.C.T.D.), affirmed (2001) 199 F.T.R. 320 (F.C.A.), where Justice Wetston states at p. 238 :

An important principle underlying costs is that an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party.

[14] Upon consideration of the factors set out in Rule 400(3), as well as the operation of Rule 420, and for the above reasons, I conclude that costs in this matter should be assessed in accordance with rates at the maximum range in Tariff B Column III until March 4, 2004, the date of the filing of the last standing settlement offer by Canada Pipe. After March 4, 2004, costs are to be assessed at 150% of the rates at the maximum range in Tariff B Column III. I conclude as well that given the amount of work and complexity of the case, Canada Pipe is entitled to counsel fees for two counsel and one half counsel fees for one counsel for the duration of the hearing.

[15] The several matters raised on behalf of the Commissioner with regard to the detailed Bill of Costs should properly be decided by the assessment officer on a basis of reasonableness.

[16] The Commissioner requested a stay of the order pending disposition of the appeal, but did not address the three-part test for granting a stay. In the circumstances, I fail to see any justification for staying the order on costs.

III. ORDER

[17] The respondent Canada Pipe is entitled to party-and-party costs to the date of service of the last settlement offer, i.e. March 4, 2004, according to the rates at the maximum range in Column III, Tariff B, and thereafter costs are to be assessed at 150% of the rates at the maximum range in Tariff B Column III.

[18] The respondent Canada Pipe is entitled to the fees of two counsel for the duration of the hearing at the 14a) rate of the Table of Tariff B, and to the fees of one counsel for the duration of the hearing at the 14b) rate of the Table of Tariff B.

[19] The task of determining the reasonableness of the disbursements in the respondent's Bill of Costs is left to the assessment officer.

DATED at Ottawa, this 4th day of May, 2005.

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

(s) Edmond P. Blanchard

APPLICABLE LEGISLATION

Federal Courts Rules, SOR/98-106 am. SOR/2004-283

400. (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

(2) Costs may be awarded to or against the Crown.

(3) In exercising its discretion under subsection (1), the Court may consider

- (a) the result of the proceeding;
- (b) the amounts claimed and the amounts recovered;
- (c) the importance and complexity of the issues;
- (d) the apportionment of liability;
- (e) any written offer to settle;
- (f) any offer to contribute made under rule 421;
- (g) the amount of work;
- (h) whether the public interest in having the proceeding litigated justifies a particular award of costs;
- (i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;
- (j) the failure by a party to admit anything that should have been admitted or to serve a request to admit;
- (k) whether any step in the proceeding was
(i) improper, vexatious or unnecessary, or

400. (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

(2) Les dépens peuvent être adjugés à la Couronne ou contre elle.

(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :

- a) le résultat de l'instance;
- b) les sommes réclamées et les sommes recouvrées;
- c) l'importance et la complexité des questions en litige;
- d) le partage de la responsabilité;
- e) toute offre écrite de règlement;
- f) toute offre de contribution faite en vertu de la règle 421;
- g) la charge de travail;
- h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;
- i) la conduite d'une partie qui a eu pour effet d'abrèger ou de prolonger inutilement la durée de l'instance;
- j) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;

(ii) taken through negligence, mistake or excessive caution;

(l) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;

(m) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;

(n) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299; and

(o) any other matter that it considers relevant.

(4) The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs.

(5) Where the Court orders that costs be assessed in accordance with Tariff B, the Court may direct that the assessment be performed under a specific column or combination of columns of the table to that Tariff.

(6) Notwithstanding any other provision of these Rules, the Court may

(a) award or refuse costs in respect of a particular issue or step in a proceeding;

(b) award assessed costs or a percentage of assessed costs up to and including a specified step in a proceeding;

(c) award all or part of costs on a solicitor-and-client basis; or

(d) award costs against a successful party.

k) la question de savoir si une mesure prise au cours de l'instance, selon le cas :

(i) était inappropriée, vexatoire ou inutile,

(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;

l) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;

m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;

n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;

o) toute autre question qu'elle juge pertinente.

(4) La Cour peut fixer tout ou partie des dépens en se reportant au tarif B et adjuger une somme globale au lieu ou en sus des dépens taxés.

(5) Dans le cas où la Cour ordonne que les dépens soient taxés conformément au tarif B, elle peut donner des directives prescrivant que la taxation soit faite selon une colonne déterminée ou une combinaison de colonnes du tableau de ce tarif.

(6) Malgré toute autre disposition des présentes règles, la Cour peut :

a) adjuger ou refuser d'adjuger les dépens à l'égard d'une question litigieuse ou d'une procédure particulières;

(7) Costs shall be awarded to the party who is entitled to receive the costs and not to the party's solicitor, but they may be paid to the party's solicitor in trust..

b) adjuger l'ensemble ou un pourcentage des dépens taxés, jusqu'à une étape précise de l'instance;

c) adjuger tout ou partie des dépens sur une base avocat-client;

d) condamner aux dépens la partie qui obtient gain de cause.

(7) Les dépens sont adjugés à la partie qui y a droit et non à son avocat, mais ils peuvent être payés en fiducie à celui-ci.

420. (2) Unless otherwise ordered by the Court, where a defendant makes a written offer to settle that is not revoked,

(a) if the plaintiff obtains a judgment less favourable than the terms of the offer to settle, the plaintiff shall be entitled to party-and-party costs to the date of service of the offer and the defendant shall be entitled to double such costs, excluding disbursements, from that date to the date of judgment; or

(b) if the plaintiff fails to obtain judgment, the defendant shall be entitled to party-and-party costs to the date of the service of the offer and to double such costs, excluding disbursements, from that date to the date of judgment.

420. (2) Sauf ordonnance contraire de la Cour, lorsque le défendeur présente par écrit une offre de règlement qui n'est pas révoquée et que le demandeur :

a) obtient un jugement moins avantageux que les conditions de l'offre, le demandeur a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et le défendeur a droit au double de ces dépens, à l'exclusion des débours, à compter du lendemain de cette date jusqu'à la date du jugement;

b) n'obtient pas gain de cause lors du jugement, le défendeur a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et au double de ces dépens, à l'exclusion des débours, à compter du lendemain de cette date jusqu'à la date du jugement.

REPRESENTATIVES:

For the Applicant:

Commissioner of Competition

John A. Champion

Donald J. Rennie

Graham M. Law

Catherine A. Lawrence

Nicole D. Samson

For the Respondent:

Canada Pipe

Kent E. Thomson

George N. Addy

James Doris

Edward Babin

Milos Barutciski

Anita Banicevic

Davit D. Akman

Charles Tingley