

## PREDATORY PRICING CLAIM DOES NOT FLY WITH FEDERAL COURT IN CASE INVOLVING FREE ONLINE AVIATION EXAM GUIDES

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Canada's Federal Court recently ruled that offering free on-line Canadian aviation exam guides did not constitute an act of predatory pricing under Canada's *Competition Act*, R.S.C., 1985, c. C-34. (*Culhane v. ATP Aero Training Products*, 2004 FC 535 (April 6, 2004, O'Keefe, J.; appeal filed on June 28, 2004)).

### Facts

The plaintiff, Michael Culhane, is an author and a publisher of a group of aviation publications, including practice exam guides available for sale on the plaintiff's website, in paper or electronic format.

The defendant, ATP Aero Training Products (hereinafter "ATP") is also a publisher and distributor of aviation books and exam guides. The guides were sold for a price until 1997. However, in the early 1990s, some guides were given away with orders. After 1997, ATP began offering free on-line guides on the internet in exchange of the e-mail address of the website visitor.

The plaintiff claimed that the availability of free on-line examinations was the cause of a decrease in sales of the plaintiff's competing publications. For example, the plaintiff was offering online exams for prices ranging between \$19.95 and \$24.95 and including the provision of exam results to the user within 48 hours. A required textbook was also made available at an additional cost. On the other hand, the defendant's on-line exams were graded automatically for free with results sent to the user instantly, with suggestions of other useful publications to consult.

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## Issues

Did the conduct of the defendant amount to predatory pricing under the Competition Act?

Did the defendant unlawfully interfere with the plaintiff's economic interests?

## Findings

In order for the defendant to be held liable for predatory pricing, the plaintiff had to establish that:

- 1) the defendant is engaged in a business;
- 2) the defendant is engaged in a policy of selling products;
- 3) pursuant to the policy, the products are being sold at prices which are unreasonably low;
- 4) the policy has the effect or tendency of substantially lessening competition or eliminating a competitor; and
- 5) the defendant's unreasonably low pricing causes loss or damage to the plaintiff.

Since the exam guides had been previously sold for a price, the Court found that ATP engaged in a policy of selling products, even though they were being provided free of charge since 1998. Furthermore, given that there are certain costs associated with the production and placement of the products on a website, providing the manuals free of charge suggests that the sale price (at no cost) is an unreasonably low one. Since this free offer was to be maintained for an indefinite amount of time, the Court stated that the longer the price decrease lasts, the more suspect it becomes. ATP's price reduction was also suspect since it was offensive in nature, and not in reaction to a price decrease implemented by the plaintiff.

However, the Court found that there was no evidence that the defendants had a design to substantially lessen competition or to eliminate the plaintiff. Among other arguments, the defendant testified that the free on-line guides were used as a marketing tool to increase the sale of other products.

Furthermore, in the Court's opinion, the plaintiff did not clearly establish that the ATP's actions caused loss or damages to the plaintiff, as the drop in sales appeared to be influenced by a number of other external factors not imputable to the defendant.

In order to establish a claim of unlawful interference with the economic interests of the plaintiff, the latter also had to establish: (1) interference with the plaintiff's trade or business; (2) unlawful means; (3) intent to injure the plaintiff; and (4) actual injury. The court found that none of the requirements of this tort were met.

## Comment

The court's decision illustrates the risks associated with the use of free on-line promotional materials in marketing strategies. Although the predatory pricing claim was rejected in the present case due to lack of evidence of intent of lessening competition, one can consider alternate scenarios in which sufficient evidence could be produced to maintain the claim. In situations involving products that have been previously sold for a price, the decision shows that giving away the same products as internet *freebies* could be construed as selling at an unreasonable low price and possibly become an act of predatory pricing under the *Competition Act*.

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