

# **The Marginalization of the Competition Tribunal**

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## **I. INTRODUCTION**

When the Competition Tribunal (the "Tribunal") was created in 1986, it was intended to be a necessary institution for developing Canadian competition law and economic theory: a venue where the competitive realities of Canadian commerce could be understood and thoroughly examined by those with the expertise to understand and apply complex economic theory. This, in turn, would lead to the development of a body of law to guide competitors in Canada on how to aggressively compete, without crossing into anti-competitive activity.

Instead, the Tribunal has become a bit player in competition matters in Canada. These days, most of the cases before the Tribunal are deceptive marketing cases, private access matters or disputes arising out of registered consent agreements. None of these require the expertise of a specialized economic Tribunal. For matters that could benefit from the Tribunal's economic expertise, such as mergers and abuse of dominance cases, the Tribunal plays virtually no role.

The original idea of a specialized Tribunal to deal with complex competition matters remains good in theory, but has not worked in practice. That is not the fault of the members or staff of the Tribunal. The problem is that not enough cases are brought to the Tribunal.

It is premature to do away with the Tribunal now, but something must be done to increase the Tribunal's role in the development of competition law and economic theory in Canada. This paper advocates some changes to get the Tribunal more involved by getting more cases brought before it. If that does not happen in the relatively near future, serious consideration should be given to exploring other options.

## **II. THE CURRENT STATE OF AFFAIRS: THE COMPETITION TRIBUNAL IS IRRELEVANT**

In 1997, Trebilcock et al wrote that "... the Competition Tribunal has become a minor institutional player in the competition policy process relative to the Bureau."<sup>1</sup> This statement applies with even greater force today.

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<sup>1</sup> A. N. Campbell, H.N. Janisch & M.J. Trebilcock, "Rethinking the Role of the Competition Tribunal" (1997), 76 Can. Bar Rev. 297 at 299.

In the almost 20 years since its creation, the Tribunal has heard and determined only four contested merger applications: *Hillsdown*<sup>2</sup>, *Southam*<sup>3</sup>, *Superior Propane*<sup>4</sup> and *Canadian Waste*<sup>5</sup>. The last five years have seen a further decline, despite healthy merger activity. The Tribunal has not heard a single contested merger case since *Canadian Waste*, which was filed in April 2000 and decided by the Tribunal in 2001.<sup>6</sup> The only other contested merger application filed by the Commissioner in the past five years was against United Grain Growers Limited in January 2002. That Application was resolved by way of a consent agreement in October 2002.<sup>7</sup> There are currently no contested merger applications before the Tribunal and none have been filed since 2002.

The absence of contested merger proceedings is not due to a lack of merger activity during this period. According to the Commissioner's Annual Reports, between 2000 and 2004, the Bureau has examined 1,182 mergers<sup>8</sup>. Yet the Tribunal has only heard one contested merger application during that period.<sup>9</sup> Thirteen additional applications were filed by the Commissioner and resolved by way of consent agreements. There has not even been a contested interim order application in a merger case before the Tribunal since 1998.<sup>10</sup>

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<sup>2</sup> *Canada (Director of Investigation and Research) v. Hillsdown Holdings Ltd.* (1992), 41 C.P.R. (3d) 289 (Comp. Trib.)

<sup>3</sup> *Canada (Director of Investigation and Research) v. Southam* (1992), 43 C.P.R. (3d) 161 (main decision); and (1993), 47 C.P.R. (3d) 240 (remedy decision).

<sup>4</sup> *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2002), 18 C.P.R. (4<sup>th</sup>) 417 (Comp. Trib.); affirmed (2003), 23 C.P.R. (4<sup>th</sup>) 316 (Fed. C.A.).

<sup>5</sup> *Canada (Commissioner of Competition) v. Canadian Waste Holdings Inc.* (2001) 11 C.P.R. (4d) 425 (Comp. Trib.) (Initial Tribunal Decision), (2002) 15 C.P.R. (4d) 5 (Remedy decision); affirmed (2003) 24 C.P.R. (4<sup>th</sup>) 178 (F.C.A.), leave to appeal dismissed [2003] S.C.C.A. No. 222 (S.C.C.).

<sup>6</sup> *Ibid*

<sup>7</sup> *Canada (Commissioner of Competition) v. United Grain Growers*, Tribunal file number CT-2002-001, Registered Consent Agreement dated October 17, 2002. Available online: [www.ct-tc.gc.ca](http://www.ct-tc.gc.ca). On August 12, 2005, United Grain Growers Limited brought an application to rescind the Registered Consent Agreement.

<sup>8</sup> Competition Bureau, "Annual Report of the Commissioner of Competition on the Enforcement and Administration of the *Competition Act*, *Consumer Packaging and Labelling Act*, *Precious Metals Marking Act*, and *Textile Labelling Act*" for the Years ending March 31, 2001, 2002, 2003 and 2004. Available online: [www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca)

<sup>9</sup> *Canada (Commissioner of Competition) v. Canadian Waste Holdings Inc.*, *supra*. note 5.

<sup>10</sup> *Canada (Director of Investigation and Research) v. Superior Propane Inc.* (1998), 85 C.P.R. (3d) 194 (Comp. Trib.)

The Tribunal's role in approving consent agreements has been substantially eliminated by amendments to the *Competition Act* (the "Act").<sup>11</sup> Instead of the old consent order process, which required examination by and approval of the Tribunal<sup>12</sup>, the consent process is now limited to bilateral negotiations with the Commissioner. The resulting consent agreements are merely filed with the Tribunal, relegating the Tribunal to the very rubber stamp that it rejected in earlier cases. In 2005, the Tribunal's arguably most active and controversial case, *Burns Lake*,<sup>13</sup> is an application to set aside a registered consent agreement. The issues in this case are legal, not economic: they involve the test for setting aside a registered consent agreement and who has standing to bring such an application. The other matters at issue in the *Burns Lake* application, including the application of the *Bill of Rights* and fiduciary duty principles, highlight the Tribunal's new role as arbiter of disputes arising out of consent agreements - hardly a role that requires the specialized expertise of an economic Tribunal.

The marginalization of the Tribunal also applies to abuse of dominance cases. Since 1986, the Tribunal has heard and fully determined only five abuse cases: *NutraSweet*<sup>14</sup>, *Laidlaw*<sup>15</sup>, *Neilsen*<sup>16</sup>, *Tele-Direct*<sup>17</sup>, and *Canada Pipe*<sup>18</sup>. The *Air Canada*<sup>19</sup> case, filed in 2001, was partially heard and determined, but subsequently settled by the parties. The most recent abuse case was *Canada Pipe*, filed in October 2002, which was decided in February 2005. This is the only abuse case to have been fully determined by the Tribunal in the last five years. The Commissioner lost *Canada Pipe* and is now facing the prospect of paying a significant cost

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<sup>11</sup> R.S.C. 1985, c. C-34, as amended by Bill C-23, *An Act to Amend the Competition Act and the Competition Tribunal Act*, 1<sup>st</sup> session, 37<sup>th</sup> Parliament., Canada, 2002, clause 14 (amending s. 105 of the *Competition Act*).

<sup>12</sup> See for example *Canada (Director of Investigation and Research) v. Air Canada* [1989] CCTD No 29 and *Canada (Director of Investigation and Research) v. Asea Brown Boveri Inc.* [1989] CCTD No. 35

<sup>13</sup> *Burns Lake Native Development Corporation et al v. Canada (Commissioner of Competition) and West Fraser Timber Co. Ltd. et al.*, Competition Tribunal file number 2004-013, Notice of Application filed February 3, 2005. Available online: [www.ct-tc.gc.ca](http://www.ct-tc.gc.ca)

<sup>14</sup> *Canada (Director of Investigation and Research) v. NutraSweet*, (1990), 32 C.P.R. (3d) 1 (Comp. Trib.).

<sup>15</sup> *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.).

<sup>16</sup> *Canada (Director of Investigation and Research) v. D & B Companies of Canada* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.)

<sup>17</sup> *Canada (Director of Investigation and Research) v. Tele-Direct* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.).

<sup>18</sup> *Canada (Commissioner of Competition) v. Canada Pipe*, 2005 Comp. Trib. 3 (February 3, 2005) CT-2002-006 (unreported)

<sup>19</sup> *Canada (Commissioner of Competition) v. Air Canada* (2003), 26 C.P.R. (4<sup>th</sup>) 476 (Comp. Trib.)

award in favour of Canada Pipe. There are no new abuse of dominance applications pending before the Tribunal and there have not been any filed since 2002.

The lack of abuse cases being brought to the Tribunal is surprising given the emphasis the Commissioner has placed upon abuse of dominance in recent years. The Commissioner clearly views abuse of dominance as a priority, having published several sets of Enforcement Guidelines<sup>20</sup> (including general and industry specific guidelines), and promoting the imposition of significant administrative monetary penalties in abuse cases.<sup>21</sup>

In partial recognition of the lack of cases before the Tribunal, amendments to the *Competition Act* were introduced in 2002 to permit private parties to seek leave from the Tribunal to bring cases of refusal to deal, exclusive dealing, tied selling, and market restriction.<sup>22</sup> Since 2002, there have been eleven private access leave applications filed with the Tribunal.<sup>23</sup> The Tribunal has granted leave in some cases and denied it in others, but to date, there has yet to be an actual decision on the merits of a private application. The only case in which a hearing on the merits was pending, has recently been settled.<sup>24</sup> Further, most of the private cases brought before the Tribunal have been applications for refusal to deal, which do not require the specialized economic expertise of the Tribunal.

In recent years, the Tribunal's most significant activity has been in deceptive marketing practices cases. The Commissioner has filed fifteen deceptive marketing applications since 2000, two of

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<sup>20</sup> Competition Bureau, *Enforcement Guidelines on the Abuse of Dominance Provisions* (released July 2001); *Enforcement Guidelines: The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Retail Grocery Industry* (released December 2001); *Draft Enforcement Guidelines on Abuse of Dominance in the Airline Industry* (released February 2001). Available online: [www.competitionbureau.gc.ca](http://www.competitionbureau.gc.ca).

<sup>21</sup> Bill C-19, currently before the House of Commons Standing Committee on Industry, Trade and Commerce, if passed, would implement administrative monetary penalties for those found to have abused their dominant position up to a maximum \$10 million for a first finding and up to \$15 million for any subsequent finding.

<sup>22</sup> Bill C-23, *An Act to Amend the Competition Act and the Competition Tribunal Act*, 1<sup>st</sup> session, 37<sup>th</sup> Parliament., Canada, 2002.

<sup>23</sup> Those cases include: *National Capital News v. Speaker of the House of Commons*, CT-2002-005; *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, CT-2003-008; *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Limited*, CT-2003-009; *Mrs. O's Pharmacy Inc. v. Pfizer Canada Inc.*, CT-2004-003; *Paradise Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc.*, CT-2004-004; *1177057 Ontario Inc. v. Wyeth Canada Inc.*, CT-2004-005; *1177057 Ontario Inc. v. Pfizer Canada Inc.*, CT-2004-006; *Robinson Motorcycle Limited v. Fred Deeley Imports Ltd.*, CT-2004-007; *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, CT-2004-009; *Construx Engineering Corporation v. General Motors of Canada Limited*, CT-2005-004; *B-Filer Inc. v. The Bank of Nova Scotia*, CT-2005-006.

<sup>24</sup> *B-Filer Inc. v. The Bank of Nova Scotia*, CT-2005-006. See pleadings online at: [www.ct-tc.gc.ca](http://www.ct-tc.gc.ca).

which (filed in 2005) remain outstanding.<sup>25</sup> Even in this most active area, the Tribunal has only heard and determined two contested cases since 2000.<sup>26</sup> The remainder have involved the registration of consent agreements. While these cases are important, they do not require an expert economic tribunal for their determination. A Judge with no specialized economic expertise has the ability to determine whether a tire ad is misleading.

After almost twenty years in existence, the Tribunal has become an increasingly minor institutional player in the Canadian competition policy process. It plays virtually no role in the matters that would benefit from its expertise (such as mergers and abuse of dominance cases) and its expertise is unnecessary for its current workload of deceptive marketing cases and disputes over consent agreements. Parties in potential cases before the Tribunal have been dissuaded from having their cases determined by the Tribunal, partly because the dearth of Tribunal jurisprudence increases the uncertainty of outcome and the attractiveness of a more certain, negotiated solution. With more Tribunal decisions, legal counsel could better advise, and businesses would be able to more intelligently determine, whether the risks of taking on the Commissioner outweigh the benefits of the particular transaction or business practice at issue.

The increase in registered consent agreements and the decrease in adjudicated cases in recent years effectively puts the Bureau in the position of both investigator and adjudicator. That is not the right model. The lack of jurisprudence from the Tribunal means that the Bureau's position on a particular matter, and its enforcement guidelines and advisory opinions, carry more weight

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<sup>25</sup> Those cases include: *Commissioner of Competition v. Professional Consultants (Electroprotections) Inc.*, CT-2000-003; *Commissioner of Competition v. P.V.I. International Inc.*, CT-2001-001; *Commissioner of Competition v. Antirouilles Électroniques*, CT-2001-006; *Commissioner of Competition v. Phone Directories Company, Inc.*, CT-2002-002; *Commissioner of Competition v. Sears Canada Inc.*, CT-2002-004; *Commissioner of Competition v. Thane Direct Canada Inc.*, CT-2002-007; *Commissioner of Competition v. Fine Gold Jewellers and the Diamond Co.*, CT-2002-008; *Commissioner of Competition v. Gold Factory Ltd.*, CT-2002-003; *Commissioner of Competition v. Para Inc.*, CT-2003-004; *Commissioner of Competition v. Suzy Shier Inc.*, CT-2003-006; *Commissioner of Competition v. 932552 Ontario Limited*, CT-2003-010; *Commissioner of Competition v. Teleresolve Inc.*, CT-2004-001; *Commissioner of Competition v. Forzani Group Ltd.*, CT-2004-010; *Commissioner of Competition v. Urus Industrial Corporation*, CT-2004-011; *Commissioner of Competition v. Performance Marketing Ltd.*, CT-2004-014; *Commissioner of Competition v. Goodlife Fitness Clubs Inc.*, CT-2005-001; *Commissioner of Competition v. Fabutan Corporation et al.*, CT-2005-003; and *Commissioner of Competition v. Gestion Lebski Inc. et al.*, CT-2005-007. *Commissioner of Competition v. Fabutan Corporation et al.*, CT-2005-003; and *Commissioner of Competition v. Gestion Lebski Inc. et al.*, CT-2005-007 remain outstanding.

<sup>26</sup> *Canada (Commissioner of Competition) v. P.V.I. International* (2004), 31 C.P.R. (4<sup>th</sup>) 331 (F.C.A.); varying (2002), 19 C.P.R. (4<sup>th</sup>) 129 (Comp. Trib.); *Canada (Commissioner) of Competition v. Sears Canada Inc.* (2005), 37 C.P.R. (4<sup>th</sup>) 65 (Comp. Trib.).

with market participants. These documents and the Bureau's position in particular cases are informed only by the Bureau's interpretation of the law and its own application of economic theory. They are not informed by findings of fact made with the benefit of cross-examination of witnesses before a Tribunal with specialized expertise. Businesses should not be in the position of having to either satisfy the Bureau or abandon their business plans. There needs to be objective oversight; which the Tribunal is supposed to provide. The Bureau as enforcer and the Tribunal as adjudicator is a good model, as long as the Tribunal actually has an adjudicative role.

The marginalization of the Tribunal is not the fault of its members or its staff. The Tribunal has the necessary expertise and has generally done a good job in the very few cases it has heard. It is also not the fault of the appellate courts, which have, in recent decisions, shown deference to the Tribunal's expertise.<sup>27</sup> The problem is that there simply are not enough cases brought before the Tribunal.

Therefore, we propose some measures to get more cases before the Tribunal. If these ideas (or others) do not succeed over the next few years, and if the Tribunal continues in its current state of irrelevance, then serious consideration should be given to doing away with the Tribunal altogether, and to having its very small docket of contested cases determined by the Courts.

### **III. SOME IDEAS FOR GETTING MORE CASES TO THE TRIBUNAL**

The main problem with the Tribunal is that it does not hear enough contested merger or abuse of dominance cases. The suggestions which follow are intended to increase the number of such cases brought before the Tribunal in order to make the Tribunal a relevant player in competition law and policy in Canada. An augmented case load for the Tribunal requires increasing the Commissioner's incentives to bring cases before the Tribunal, increasing respondents' incentives to allow cases to get to the Tribunal, and broadening private access to the Tribunal.

1. To state the obvious, the Commissioner should bring more merger and abuse of dominance cases to the Tribunal. These need not always be full-blown applications. The

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<sup>27</sup> See for example, *Canada (Commissioner of Competition) v. Superior Propane Inc.*, *supra.* note 4 and *Canada (Commissioner of Competition) v. Canadian Waste Holdings Inc.*, *supra.* note 5.

Tribunal has shown that it can deal with discreet issues<sup>28</sup>, and there are provisions in the *Competition Tribunal Act*<sup>29</sup> and Rules<sup>30</sup> to allow the Tribunal to do so. The Commissioner should be encouraged to use the reference provision in the *Competition Act*<sup>31</sup>, but should not have a monopoly on the ability to do so. Parties who are the subject of an inquiry should also be permitted to bring references before the Tribunal on discreet issues.

2. The Commissioner should use sections 104 and 100 of the *Competition Act* to bring interim order applications before the Tribunal, and the parties should require her to do so, at least some of the time. The Commissioner has not brought any section 104 applications since 2000<sup>32</sup>, and has never brought an application under the current iteration of section 100<sup>33</sup>. Section 104, and to a lesser extent section 100, provide the Commissioner and the parties with an opportunity to obtain the Tribunal's preliminary views on their case. In other contexts, decisions of Courts or Tribunals on interim injunction applications can be determinative. Unfortunately, the Competition Tribunal rarely has that opportunity. Instead, parties tend to capitulate to the Commissioner's requests that they delay their mergers, or abandon their business plans altogether. In the right cases, parties and their counsel should instead force the Commissioner to make her case before the Tribunal, by way of interim and/or substantive applications.
3. Costs awards should not be available in cases brought by the Commissioner. The Commissioner has a public duty to bring responsible cases. There is no reason to believe that the Commissioner will do otherwise. The threat of an adverse costs award may act as a disincentive to the Commissioner to bring worthwhile cases to the Tribunal. We do not need disincentives to the Commissioner to bring cases before the Tribunal. Costs awards should continue to be available in cases brought by private parties.

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<sup>28</sup> See for example *Canada (Commissioner of Competition) v. Canadian Waste Holdings Inc.*, *supra*. note 5.

<sup>29</sup> R.S.C. 1985, c. 19 (2<sup>nd</sup> Supp.), as amended, s. 9

<sup>30</sup> SOR/94-290, as amended.

<sup>31</sup> *Supra*. note 11, s. 124.2.

<sup>32</sup> *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2000), 7 C.P.R. (4<sup>th</sup>) 385 (Comp. Trib.), additional reasons at [2001] 3 F.C. 175 (Fed. C.A.)

<sup>33</sup> s. 100 was amended in 2002 by Bill C-23, *An Act to Amend the Competition Act and the Competition Tribunal Act*, 1<sup>st</sup> session, 37<sup>th</sup> Parliament., Canada, 2002.

4. The current provision in the *Competition Tribunal Act* requiring all questions of law to be decided by the judicial member should be changed.<sup>34</sup> It sidelines the economist and business members of the Tribunal from participating on issues within their purview of expertise. It makes no sense, for example, to exclude economists on the Tribunal from determining the proper approach to market definition (which the Courts view as a question of law). Instead, the judicial member should decide matters of evidence and procedure, but all other questions should be decided by the whole panel. Allowing the Tribunal's expertise to be fully utilized should be an incentive to get more cases before it.
5. The proposal in Bill C-19 to provide for administrative monetary penalties ("AMP's", a.k.a. fines) in abuse of dominance cases should be abandoned. Significant monetary penalties within the context of the current Tribunal Rules will only serve to ensure lengthy constitutional challenges before the merits of a particular competitive practice can begin to be considered. With AMP's, respondents will rightly demand the procedural safeguards required in criminal cases. AMP's will defeat any efforts to make the Tribunal process more expeditious.
6. The Tribunal Rules must be fair to Respondents, otherwise they will be reluctant to allow their cases to be brought to the Tribunal, preferring instead to settle at all costs. Most importantly, the 2002 amendments to the Rules which changed the production standard in non-merger cases from relevance to reliance, should be reversed.<sup>35</sup> The former requirement that parties to Tribunal proceedings disclose all relevant information and documents in their control should apply to non merger-cases, as well as merger cases.
7. The Tribunal should exercise flexible case management in all cases, tailored to fit the circumstances of each case. There should be a case conference shortly after an Application is filed to set a schedule (including a hearing date), that should be more or less cast in stone. Apart from the basic procedural rules necessary to ensure procedural fairness (disclosure statements, production of all relevant documents) which should apply in all cases, the Tribunal should take a flexible approach to pre-hearing matters to suit the

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<sup>34</sup> *Competition Tribunal Act*, *supra*. note 29, s. 12.

<sup>35</sup> SOR/2002-62, ss. 3, 4 and 6.

specific case, and to fulfil the requirement of s. 9(2) that "all proceedings be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit."<sup>36</sup>

8. Private parties should be able to bring abuse of dominance cases before the Tribunal, with leave. The Commissioner has not filed an abuse case since 2002 and experience to date shows that the limited private access currently available has not opened the "flood gates" of private Tribunal litigation. On the contrary, the limited range of cases which can be brought by private applicants has made private access to the Tribunal of limited relevance. It makes sense, therefore, to allow parties who perceive themselves to be harmed by the anti-competitive practices of a dominant player, to bring their cases before the Tribunal. We would not propose that damages be available in such cases, only the remedies currently available in abuse cases brought by the Commissioner. Costs awards should be available in abuse cases brought by private parties

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<sup>36</sup> *Competition Tribunal Act, supra.* note 29, s. 9(2).

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