

## PRIVATE ENFORCEMENT: A FIVE-YEAR RETROSPECTIVE

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### I. INTRODUCTION

It has been five years since Bill C-23 received Royal Assent on June 4, 2002 and section 103.1 was added to the *Competition Act* providing a limited ability for private parties to bring applications, with leave from the Tribunal, in respect of the refusal to deal (section 75) and tied selling, market restriction and exclusive dealing (section 77) provisions.

The focus of this paper will be to review the events that lead to the 2002 amendments, to discuss what has happened in the five years that section 103.1 has been available and to consider where the provisions are or should be going in the future.

### II. HISTORY

Unlike the United States, where private actions have always been part of antitrust law enforcement<sup>1</sup>, in Canada, the concept of private enforcement has only taken hold fairly recently. Although the *Combines Investigation Act*<sup>2</sup> was enacted in 1889, a year before the Sherman Act, it did not provide for a private right of action. When the Act was finally amended in 1976, it provided a single damages remedy for breach of its criminal provisions.<sup>3</sup> However, it would be another 25 years until private litigants gained the ability to proceed under any of the reviewable matters found in Part VIII of the Act.

In June 2000, the House of Commons Standing Committee on Industry released an *Interim Report on the Competition Act*. Following this report, the Competition Bureau engaged the Public Policy Forum (the "PPF") to collect Canadian public's opinions on the changes to the Act. These changes were articulated in four Private Member's bills. In December 2000, the PPF published its report, entitled *Amendments to the Competition Act and the Competition Tribunal Act: A Report on Consultations*, which summarized the submissions it had received and discussions it had held during the consultation process. The Government of Canada then combined parts of the four Private Member's bills and inputs from both the *Interim Report*

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<sup>1</sup> Section 7 of the Sherman Act of 1890 (15 U.S.C.A. § 1-7) provided that any person "injured in his business or property ... by reason of anything forbidden ... by this Act" may sue for and recover "three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee". Section 7 has now been superseded by Section 4 of the Clayton Act of 1914 (15 U.S.C. § 2-27), which permits the recovery of treble damages by "any person ... injured in his business or property by reason of anything forbidden in the antitrust laws." The Clayton Act also incorporated a number of new provisions designed to assist and encourage private enforcement.

<sup>2</sup> The *Combines Investigation Act* (S.C. 1889, c. 41) is the predecessor of the modern *Competition Act* (R.S.C. 1985, c. C-34, as amended). For ease of reference, this article will refer to both the *Combines Investigation Act* and the *Competition Act* as the "Act".

<sup>3</sup> The provision, originally found in section 31.1, was enacted as part of the "Stage I" amendments to the *Combines Investigation Act*. At the time of the "Stage II" amendments in 1986, the provision was renumbered as section 36 and the *Combines Investigation Act* was renamed the *Competition Act*.

and the PPF's report into Bill C-23: *An Act to Amend the Competition Act and the Competition Tribunal Act*.

In April 2002, shortly before Bill C-23 came into force, the House of Commons' Standing Committee on Industry, Science and Technology released a report entitled *A Plan to Modernize Canada's Competition Regime*<sup>4</sup>. The Industry Report contained 29 recommendations aimed at improving the perceived shortcomings of the Canadian competition law regime. "Recommendation 8" proposed "that the Government of Canada amend the *Competition Act* and the *Competition Tribunal Act* to extend the private right of action in the case of abuse of dominant position (section 79) and to permit the Competition Tribunal to award damages in private action proceedings (sections 75, 77 and 79)."

A few months later, section 103.1 was finally enacted in a significantly more truncated form than the Committee had recommended. Contrary to Recommendation 8, it did not give the Tribunal the power to award damages, nor did it include private access to section 79 (abuse of dominance). This significant departure from the Committee's recommendations was largely a result of considerable opposition from various stakeholders who were concerned that the right of private access would, among other things, open a floodgate of strategic litigation and would result in over-deterrence. The Government Response to the Industry Report promised "a review of the amendments relating to private access in c. 16 will take place two years after it comes into force. At that time, the Government will be in a better position to assess whether rights of private access should be extended to section 79."<sup>5</sup>

The debate about the role of private enforcement was renewed in June 2003, when the Government of Canada released a Discussion Paper entitled *Options for Amending the Competition Act: Fostering a Competitive Marketplace*. Once again, one of the proposals advanced by the Discussion Paper was the introduction of a broader civil cause of action and, in particular, allowing the Tribunal to award damages in actions under sections 75 and 77. However, subsequent PPF consultations indicated that the majority of participants still did not believe that this right should be introduced. To our knowledge, no review of the amendments relating to private access has occurred to date. In July 2007, the Government appointed a Competition Policy Review Panel<sup>6</sup> to review key elements of Canadian competition and investment policies. Given its broad mandate, it appears that other considerations will likely be the focus.

### III. WHAT HAVE WE ACCOMPLISHED

Prior to its introduction, section 103.1 provoked considerable debate. Its opponents were concerned about undesirable consequences of allowing private access to the Tribunal, including the promotion of a

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<sup>4</sup> Canada, Report of the Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime*, (Ottawa, April 2002) (the "**Industry Report**").

<sup>5</sup> Government Response to the Report of the House of Commons Standing Committee on Industry, Science and Technology "*A Plan to Modernize Canada's Competition Regime*", (October 2002) at 9.

<sup>6</sup> <http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/home>.

flood of litigation, particularly strategic litigation. Its proponents, on the other hand, touted the new provision as a means of obtaining much needed case law in the area and permitting the Bureau to more efficiently allocate its scarce resources.<sup>7</sup> However, in the five years since its introduction, it appears that while section 103.1 has achieved some things, it has not entirely lived up to either the fears or the hopes associated with it.

**A. Has Section 103.1 Resulted in Undesirable Consequences?**

**(a) Has There Been a Cascade of Litigation?**

Although some commentators have suggested that introduction of private access to the Tribunal has considerably increased litigation<sup>8</sup>, the reality is that to date, private actions under section 103.1 remain sparse. Since 2002, there have been only 15 leave applications filed with the Tribunal, which amounts to an average of three applications per year. That number in itself overstates things, as several cases followed from the same factual matrix (e.g., *Quinlan's* and *Robinson Motorcycle*; *Sears* and *London Drugs*; and the four pharmacy cases). Moreover, two are not commercial cases in the normal sense (the two *National Capital* cases). Consequently, there have been only ten discrete respondents in five years.

Even using the higher number, out of the 15 applications, leave was granted in five<sup>9</sup>, denied in nine<sup>10</sup> and one leave application was withdrawn.<sup>11</sup> All of the five cases where leave was granted were eventually dismissed, with only one case proceeding to the merits.<sup>12</sup>

**(b) Has There Been Strategic Behaviour?**

Strategic behaviour can occur at a number of levels. Most obviously, strategic behaviour would involve using a refusal to deal application to extend supply beyond the notice period that would otherwise apply

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<sup>7</sup> See T. Kennish, "Bill C-23 may expand competition law enforcement", *The Lawyers Weekly*, vol. 21, no. 45 (April 5, 2002); Industry Report, *supra* note 4 at Ch. 2 and 3.

<sup>8</sup> J. MacNeil & J.B. Musgrove, "Til Death Us Do Part: Does the Law of Refusal to Deal Make Your Distributor a Life Partner?" (August 16, 2007) found at: <http://www.langmichener.ca/index.cfm?fuseaction=content.contentDetail&ID=9665&tID=244>.

<sup>9</sup> *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1; aff'd [2005] 2 F.C.R. 254 ("**Barcode Systems**"); *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 15 ("**Quinlan's**"); *Robinson Motorcycle Limited v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 13 ("**Robinson Motorcycle**"); *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4 ("**Allan Morgan**"); and *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2005 Comp. Trib. 38 ("**B-Filer**").

<sup>10</sup> *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41; aff'd (2004), 29 C.P.R. (4<sup>th</sup>) 421 (FCA) ("**National Capital**"); *Broadview Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 23 ("**Broadview Pharmacy**"); 1177057 *Ontario Inc. (c.o.b. Broadview Pharmacy) v. Wyeth Canada Inc.*, 2004 Comp. Trib. 22 ("**Ontario Inc.**"); *Paradise Pharmacy Inc. and Rymal Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc.*, 2004 Comp. Trib. 21 ("**Paradise Pharmacy**"); *Mrs. O's Pharmacy Inc. v. Pfizer Canada Inc.*, 2004 Comp. Trib. 24 ("**Mrs. O's**"); *Construx Engineering Corporation v. General Motors of Canada Limited*, 2005 Comp. Trib. 21 ("**Construx Engineering**"); *Sears Canada Inc. v. Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.*, 2007, Comp. Trib. 6 ("**Sears**"); *Sono Pro Inc. v. Sonotechnique P.J.L. Inc.*, 2007 Comp. Trib. 18 ("**Sono Pro**"); and *National Capital News Canada v. Speaker of the House of Commons*, 2007 Comp. Trib. 23 ("**National Capital #2**").

<sup>11</sup> *London Drugs Limited v. Parfums Givenchy Canada Ltd.*, CT-2007-002 ("**London Drugs**").

<sup>12</sup> *B-Filer* was dismissed by the Tribunal on the merits; *Robinson Motorcycle*, *Quinlan's* and *Allan Morgan* were dismissed or discontinued on consent; and *Barcode Systems* was dismissed pursuant to section 106 of the Act.

under common law or contract. Even if the applicant does not expect to win, the profits generated from continued supply during the pendency of the case could easily outweigh the costs of litigation.

For this strategy to be successful, three conditions must be met. First, the threshold for granting leave to bring a private application must be relatively low. Second, there must be a reasonable prospect of obtaining an interim order for supply. Finally, the consequences (in terms of costs or otherwise) must not outweigh the expected profits derived from continued supply.

#### *Threshold for Leave*

While the threshold for obtaining leave (discussed more fully below) is not particularly high, it does, nevertheless, appear to be an effective mechanism for weeding out applications that have absolutely no chance of success (such as the pharmacy or the *National Capital* applications).

#### *Interim Orders*

Interim orders were sought in several private applications, both where leave was granted and denied. In *Quinlan's*, the first private application where an interim order was sought (and granted), the Tribunal noted that "orders which preserve or resume supply should not be viewed as exceptional".<sup>13</sup> The Tribunal applied a three-part test where the applicant would have to demonstrate (i) a serious issue in the sense that it was not frivolous or vexatious; (ii) irreparable harm; and (iii) that the balance of convenience favoured the granting of an order.<sup>14</sup>

It is difficult to know how high a hurdle this test will prove to be in the future, as many applications where parties sought interim relief were denied leave, so the issue was never addressed. So far, out of the five applications in which the Tribunal granted leave, it granted only one contested interim supply order.<sup>15</sup> A very limited interim supply order was granted on consent in *Robinson Motorcycle*,<sup>16</sup> and an application for an interim order was denied in *B-Filer*<sup>17</sup> because the applicants had failed to establish irreparable harm.

#### *Costs*

Costs may serve as another possible check against strategic litigation, although it is not clear, based on current decisions, how effective a check. The first case where the Tribunal considered costs in a private application was *Robinson Motorcycle*, where the parties agreed to a consent dismissal order but both sought costs from the Tribunal. After considering the factors outlined in Rule 400 of the Federal Court

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<sup>13</sup> *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28 at para. 24.

<sup>14</sup> *Ibid.* at paras. 24-27.

<sup>15</sup> *Quinlan's*.

<sup>16</sup> *Robinson Motorcycle Limited v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 30.

<sup>17</sup> *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2005 Comp. Trib. 52.

Rules, the Tribunal concluded that no costs should be awarded.<sup>18</sup> In *Quinlan's*, after leave was granted, the proceedings were subsequently dismissed without costs by the Tribunal with consent of the parties. The Tribunal did not award costs in dismissing leave applications in *Construx Engineering* or *National Capital #2*, but did award costs in dismissing the leave applications in *Sears* and *Sono Pro*.<sup>19</sup>

In *B-Filer*, the Tribunal did not award costs for a leave application, but did award costs overall. In addition, the Tribunal felt that The Bank of Nova Scotia's offer to settle warranted an additional cost award because the offer "was more favourable than the result obtained by B-Filer, the offer contained a reasonable element of compromise, and the offer was made when the parties were still incurring fees in respect of the preparation for the hearing."<sup>20</sup> In the Tribunal's view, these factors "warranted additional costs such that the Bank should be entitled to a lump sum award that is based upon 150% of the top end of Column IV of the Tariff for services rendered after July 31, 2006."<sup>21</sup>

Given the paucity of reasoned Tribunal decisions regarding costs, it is hard to determine in what circumstances costs will be awarded and whether, in fact, they will serve as an effective deterrent against strategic litigation.

## **B. Has Section 103.1 Achieved its Intended Goals?**

### **(a) Developing New Case Law**

We have certainly had some achievements in this area, as the cases decided thus far have clarified several issues. First, it is clear that the Tribunal will assess the evidence supporting a leave application against a fairly low standard, *i.e.* less than the balance of probabilities but more than a "mere possibility".<sup>22</sup> Second, following the Federal Court of Appeal's decision in *Symbol Technologies*, in which *Symbol Technologies* appealed from the Tribunal's decision granting leave to *Barcode Systems*, it is clear that the Tribunal must consider all of the elements of the alleged reviewable practice and all of these elements must be satisfied before leave is granted.<sup>23</sup>

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<sup>18</sup> *Robinson Motorcycle Limited v. Fred Deeley Imports Ltd.*, 2005 Comp. Trib. 40.

<sup>19</sup> The Tribunal did not provide reasons regarding costs in either of these decisions. It should also be noted that in *National Capital #2* costs were not sought.

<sup>20</sup> *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2007 Comp. Trib. 26 at para. 31.

<sup>21</sup> *Ibid.* at 32. Federal Court Rules' Tariff B has five Columns. Costs are assessed based on a formula, which takes into account the number of units allocated to each service, the unit value and the amount of assessable disbursement. The highest number of units that may be awarded for Column IV is 9, which may be awarded for such services as preparation and filing of original documents, contested motions and discovery. The 2006 unit value is \$120.

<sup>22</sup> *Barcode Systems*, *supra* note 9 at para. 13.

<sup>23</sup> *Symbol Technologies Canada ULC v. Barcode Systems Inc.* [2005] 2 F.C.R. 254 (FCA) at paras. 18-19 ("**Symbol Technologies**"). The Tribunal originally held, at paras. 8-10, that, while finding of an "adverse effect of competition" is necessary to the finding of breach of section 75, it was not part of the test for granting leave.

Third, the Tribunal also clarified the meaning of “directly and substantially affected”<sup>24</sup> in the four pharmacy cases.<sup>25</sup> Although the circumstances differed in each of those cases, the Tribunal denied leave on the basis that the applicants had not adduced sufficient evidence to demonstrate that their businesses had been substantially affected by the conduct of the respondents.<sup>26</sup> In *Broadview Pharmacy*, Justice Blais quoted the following passage from the *Chrysler* decision<sup>27</sup> in which the Tribunal considered the requirement that a party be “substantially affected” by a refusal for the purposes of section 75(1)(a) of the Act and stated:

The Tribunal agrees that “substantial” should be given its ordinary meaning, which means more than something just beyond *de minimis*. While terms such as “important” are acceptable synonyms, further clarification can only be provided through evaluations of actual situations.<sup>28</sup>

In *Sears*,<sup>29</sup> the Tribunal clarified how it will approach the issue of whether the applicant has been substantially affected in its business where the refused items only impacted one segment of a multi-product business. After reviewing previous jurisprudence, the Tribunal concluded that “substantial effect” on a business should be “measured in the context of the entire business”<sup>30</sup> and dismissed Sears’ application on the basis that the impact on its entire business (\$16 million in lost perfume sales in the context of a \$6 billion business) would not be substantial.

Finally, while the Tribunal has also considered the meaning of “adverse effect on competition” in *B-Filer*, unfortunately, it did not provide as much guidance on the point as one would have hoped. Because section 75 is relatively new, the Tribunal found it helpful to rely on the interpretation of “substantial lessening of competition” in abuse of dominance cases. After considering the Court of Appeal’s decision in *Canada Pipe*<sup>31</sup>, the Tribunal concluded that section 75 requires “an assessment of the competitiveness or likely competitiveness of a market with, and without, the refusal to deal.”<sup>32</sup> In the Tribunal’s view,

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<sup>24</sup> The Court of Appeal adopted a two-part test from *National Capital*. To obtain leave, an applicant must provide reasonable grounds to show that (i) it is, or could be, directly and substantially affected by the reviewable practice and that (ii) the alleged practice could be the subject of a Tribunal order. The Court of Appeal interpreted “reasonable grounds” to mean a *bona fide* belief in a serious possibility based on credible evidence.

<sup>25</sup> *Broadview Pharmacy, Ontario Inc., Paradise Pharmacy* and *Mrs. O’s*, *supra* note 10.

<sup>26</sup> For example, in *Ontario Inc.*, the lost sales represented only 5% of the applicant’s pharmaceutical sales, not its total business. In *Paradise Pharmacy*, sales of the respondent’s products represented 7% of the applicant’s total pharmaceutical sales and the applicant provided no evidence to support its assertion that it would lose additional business. In *Mrs. O’s*, the applicant provided no figures to demonstrate the effect on its business beyond alleging that it had been unable to fulfill the expectations of its business. The applicant also failed to establish a causal relationship between the actions of the respondent and the effect on its business. In *Broadview Pharmacy*, the applicant had estimated its losses as 20% of its pharmaceutical sales, but the Tribunal noted that the loss of business only represented 11% of total sales, as the Act requires a substantial effect on the applicant’s business, not part of it.

<sup>27</sup> *Canada (Director of Investigations) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d).

<sup>28</sup> *Broadview Pharmacy*, *supra* note 10 at para. 17.

<sup>29</sup> *Supra*, note 10.

<sup>30</sup> *Ibid.* at para. 21.

<sup>31</sup> *Canada (Commissioner of Competition) v. Canada Pipe*, 2006 FCA 2330.

<sup>32</sup> *B-Filer*, *supra* note 9 at para. 200.

“competitiveness”, which refers to “the degree of market power that prevails in that market,”<sup>33</sup> is similar for refusal to deal as for abuse of dominance and merger cases. Based on this analysis, the Tribunal concluded that “for a refusal to deal to have an adverse effect on a market, the remaining market participants must be placed in a position, as a result of the refusal, of created, enhanced or preserved market power.”<sup>34</sup> This is substantially the same test as the one established under sections 92<sup>35</sup> and 79<sup>36</sup> (at least prior to *Canada Pipe*).<sup>37</sup> We will have to wait for further jurisprudence to delineate the degree of difference that exists between the two.

**(b) Freeing up the Bureau’s Resources**

Section 103.1 certainly seems to be accomplishing another one of its principal rationales – alleviating the Bureau’s financial and other resource constraints, which prevented it from pursuing all potentially meritorious cases. Since private action provisions were introduced, the Commissioner has not brought her own application exclusively under sections 75 or 77,<sup>38</sup> nor has she made written representations in respect of, or intervened in, a leave application. Also, the Bureau does not appear to have commenced any refusal to deal inquiries since section 103.1 came into force.

**IV. WHERE TO GO FROM HERE**

Five years and 15 applications later, it is timely to consider where, if anywhere, private enforcement is likely going over the next five years. What amendments, if any, could or should be considered? There are at least seven options:

- (a) Revert to the original scheme of the Act and remove the private right of access.
- (b) Modify the criteria for leave.
- (c) Remove the requirement to obtain leave.
- (d) Expand the scope of section 103.1 to permit private parties to seek leave to bring applications in respect of the abuse of dominance provisions.
- (e) Expand the remedies available to the Tribunal to include damages.
- (f) Eliminate section 75 from the Act all together.
- (g) Maintain the *status quo*.

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<sup>33</sup> *Ibid.* at para. 201.

<sup>34</sup> *Ibid.* at para. 208.

<sup>35</sup> *Canada (Director of Investigation and Research) v. Hilldown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 at 314.

<sup>36</sup> *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 at 47; see also *Canada (Director of Investigation and Research) v. The D&B Companies of Canada Ltd.* (1995), 64 C.P.R. (3d) 216.

<sup>37</sup> *Supra* note 31.

<sup>38</sup> The Commissioner brought an application on October 31, 2002 against Canada Pipe Company under sections 77 and 79 of the Act.

**A. Remove the Private Right of Access**

While the introduction of private access to the Tribunal had been opposed by many, it is not anticipated that there will be a clamour to revert to the original scheme of the Act which gave the Commissioner the exclusive jurisdiction to apply to the Tribunal. The limited private access provided by section 103.1 has not, by and large, resulted in the problems predicted by those who opposed its introduction and there will likely be little pressure from this quarter to advocate for its removal.

Any attempt to remove section 103.1 would be seen as a move to re-establish the Commissioner's monopoly on access to the Tribunal – a characterization not likely to benefit her. Moreover, eliminating section 103.1 would remove the Bureau's ability to advise disappointed distributors whose case the Bureau is not prepared to advance that they can apply for leave to pursue their complaint on their own.

**B. Modify the Criteria to Obtain Leave**

Modification of the criteria or process to obtain leave could affect the number of private applications brought to the Tribunal, depending upon the nature of the modifications. The present legislation places a reasonable, but not insurmountable, hurdle upon the applicant for leave to demonstrate that its application could succeed. It is unlikely that tinkering with the criteria would provide any significant change in the number of cases.

**C. Remove the Requirement to Obtain Leave**

Elimination of the leave requirement would likely increase the number of applications brought before the Tribunal. However, this would not likely increase the number of successful applications unless potential successful applicants were either dissuaded from proceeding because of the preliminary hurdle of having to obtain leave or because their leave application was dismissed in circumstances where their application on the merits would have succeeded. Neither circumstance is likely.

As a result, while eliminating the leave requirement would put private parties on the same footing in respect of applications to the Tribunal as applies in civil litigation generally, the leave process has not proved to be unworkable. The leave application requirement likely saves both parties from expending additional resources in the case of unmeritorious applications. For meritorious applications, the parties may face a delay as a result of the leave process.<sup>39</sup> However, as the Tribunal seems prepared to grant interim relief, it should reduce the potential difficulties created in this regard.

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<sup>39</sup> The Tribunal has taken from 28 to 147 days from the date the application was filed (with an average of 84 days) to determine a leave application.

#### **D. Expand the Scope of Private Access to Include the Abuse of Dominance Provision**

As stated above, one of the recommendations made by the Standing Committee was to extend the private right of action to the abuse of dominance provisions (section 79),<sup>40</sup> in response to which the Government promised to undertake a review of the amendments two years after their introduction because at that time, it would be “in a better position to assess whether rights of private access should be extended to section 79.”<sup>41</sup>

If the Government has conducted a review of private access in the five years since the provisions came into force, the results have yet to be publicly disclosed. In any event, it is doubtful that the experience of the past five years provides much helpful guidance with respect to the question of whether rights of private access should be extended to section 79.

Some commentators expressed the view that private access provisions should be extended to abuse of dominance as one of the means of increasing the number of contested merger or abuse of dominance cases brought before the Tribunal to make the Tribunal a more relevant player in the competition and law policy in Canada.<sup>42</sup>

In our view, expanding section 103.1 to include section 79 is unnecessary and undesirable. Before we embark on another round of reforms, we should ask ourselves one fundamental question: What is the purpose we are trying to achieve? According to the Industry Report, the purpose of expanding the right of private action to abuse of dominance is the same as for sections 75 and 77, namely, to create additional jurisprudence and to help the Bureau’s enforcement efforts by alleviating some of its budgetary and resource burdens.<sup>43</sup> However, given the paucity of private applications (and resulting case law) in the last five years, there is no reason to expect that expanding section 103.1 to include abuse of dominance would necessarily yield different results, *i.e.*, more jurisprudence in the area. Besides, one should keep in mind that more jurisprudence does not necessarily equal good jurisprudence. Nor is there evidence that the Bureau does not adequately enforce section 79. Also, given that the abuse of dominance provisions require proof of a “substantial lessening of competition”, they presumably carry a public interest component of preventing practices that have a substantial impact on competition. Consequently, the Commissioner representing broad public interest seems to be better suited than a private party to enforce these provisions.

In addition, there continue to be valid reasons to be concerned that strategic litigation could be a risk if private parties could bring an abuse application, even if they were required to obtain leave. The fact that

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<sup>40</sup> Industry Report, *supra*, note 4, Recommendation 8.

<sup>41</sup> Government Response, *supra* note 5 at 9.

<sup>42</sup> D. Houston and J.L. Pratt, *The Marginalization of the Competition Tribunal* (paper presented at the CBA National Competition Law Conference in Gatineau, Quebec on November 3 and 4, 2005).

<sup>43</sup> Industry Report, *supra* note 4, Ch. 2.

strategic litigation has not proven problematic in the context of section 75 applications, does not mean that the risks do not continue to exist in respect of section 79, having regard to the significant differences between the nature of the provisions. The ability to require a competitor to account in a Tribunal proceeding in respect of its broad business practices and its strategic approach to its competitors, which is what can occur in a section 79 application, is a powerful weapon for one competitor to be able to bring against another. Consequently, there is a significant risk that any benefits achieved by expanding a private right of action to section 79 may be more than offset by economic losses resulting from a chilling effect on business from these actions.

#### **E. Expand the Remedies Available to Private Applicants to Include Damages**

The Standing Committee also recommended that the Tribunal be permitted “to award damages in private action proceedings (sections 75, 77 and 79)”.<sup>44</sup> The Committee viewed the right to damages as a “fundamental right accorded to plaintiffs in civil proceedings throughout the world” and considered it an “injustice” that applicants before the Tribunal should be denied this fundamental right.<sup>45</sup> The rationale was that the absence of damages as an available remedy discourages the bringing of cases and creates a “less than optimal” balance of litigation.<sup>46</sup> The Committee also cited deterrence among the primary reasons for allowing damages.<sup>47</sup>

We do not believe that damages should be awarded in private actions brought in respect of sections 75, 77 or 79 (if the right was ever extended to abuse of dominance). First, there is a real question of whether permitting the Tribunal to award damages in these cases would be constitutionally valid, but this question is beyond the scope of the paper. Constitutional validity aside, there are other factors which make awarding damages undesirable.

While the right to damages is indeed fundamental in civil litigation, one should think whether it is appropriate in the context of the Act, whose objectives include protection of competition and not protection of competitors. Introducing damages may, very well, result in discouraging businesses from engaging in aggressive, pro-competitive activities.

One should also think whether it is appropriate to talk about “deterrence” in the context of reviewable matters provisions. Deterrence only makes sense when the conduct is unambiguously harmful. Unlike conspiracies or other clearly socially-undesirable behavior, activities caught by sections 75, 77 and 79 are not violations of the Act. Rather, they are “reviewable practices”, which may be pro-competitive and do not involve the same economic loss to society. Frequently, the question of legality of arrangements that may be subject to review under sections 75, 77 and 79 is far from clear and there is often no consensus

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<sup>44</sup> *Ibid.* Recommendation 8.

<sup>45</sup> *Ibid.* Ch. 3.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

that the conduct is bad. For example, as most of the refusal to deal cases involve the termination of a distributor, the prospect of damages could discourage suppliers from using third parties to market their products. Similarly, activity that is subject to an abuse of dominance application may very well be efficiency-enhancing. One only needs to look at *Canada Pipe* to realize that one person's abusive conduct is another's efficiency-enhancing loyalty program.

Given that there is good reason to believe that practices reviewable under sections 75, 77 and 79 are often pro-competitive, awarding damages in these situations may do more harm than good by creating a significant "chilling effect" as businesses will be reluctant to engage in aggressive business conduct due to the desire to avoid litigation.

Also, it is difficult to gauge what exactly an "optimal" balance of litigation is. Unless there is hard evidence that potential plaintiffs are unwilling to bring cases in the absence of financial rewards, the lack of cases may simply indicate general compliance with the law.

#### **F. Eliminate Section 75 from the Act**

Various commentators have pointed out that section 75 is a somewhat unusual provision and questioned whether it belongs in the Act at all.<sup>48</sup> Unlike most of the reviewable practices in Part VIII of the Act, which require that a "substantial prevention or lessening of competition" be established before a remedy can be granted, section 75 merely requires an "adverse effect on competition in a market". To the extent that it establishes a different standard<sup>49</sup>, the policy rationale for this difference is not apparent. Some call the section "an auxiliary private remedy for distributors who did not bargain in their distribution contracts for the protection from termination which they subsequently desire."<sup>50</sup> There is also a legal question as to the constitutional validity of section 75, as it is primarily concerned with private rights.<sup>51</sup>

Constitutional validity aside, in our view, whether section 75 is to remain in the Act depends on what one perceives to be the purpose of the Act. This is a much broader question and beyond the scope of this paper. In sum, if one subscribes to the view that the purpose of the Act is to protect efficiency of the market, then section 75, which is really aimed at protecting small and medium-sized competitors, should be removed. If, on the other hand, one views the Act as a consumer protection statute, then section 75 should remain. Rolling section 75 into section 79 has also considerable appeal as a concept. The move

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<sup>48</sup> See J.B. Musgrove and J. MacNeil, "Recent Developments in the Canadian Law of Refusal to Deal" *Competition Law*, v. X, No. 4, 698 ("**Musgrove & MacNeil**"); Y. Bériault, *Private Access and Section 75 of the Competition Act*, Paper presented at the 2005 Competition Litigation Invitational Forum, Northwind Professional Institute ("**Bériault**").

<sup>49</sup> See discussion at pages 8-9 of this paper.

<sup>50</sup> Musgrove & MacNeil, *supra* note 47 at 706.

<sup>51</sup> Bériault, *supra* note 47.

would shift the focus of the Act more towards pure consumer welfare, bringing it closer into line with the US and, increasingly, the EU.<sup>52</sup>

On a pragmatic level, however, we believe that any proposal to eliminate section 75 would be highly controversial. It would likely consume significant scarce resources of the Bureau and the bar. In our view, at this point it is simply not worth the effort. Rather, the Bureau should concentrate its resources on other amendments, such as dealing with criminal pricing provisions. The Bureau should also (and in effect has done so) abdicate the responsibility of enforcing section 75 to private parties and concentrate its scarce resources on enforcement matters that have a broad public interest.

### **G. Maintain the *Status Quo***

There are a number of reasons for maintaining the *status quo*:

- The availability of private access has removed the criticism that the Bureau had an unwarranted monopoly on access to the Tribunal.
- There has been some modest level of activity and some increased jurisprudence in the area.
- The test for obtaining leave and the approach adopted by the Tribunal has not lead to an unmanageable number of actions or the strategic litigation feared by some.
- While there have not been any successful private applications to date, the possibility of private applications may be having a disciplining effect on the market. Market participants may recognize that a private application under section 75 is more likely than if it had to be brought by the Bureau.
- If the *status quo* prevails, it would not be expected that there will be a significant amount of activity over the next five years. As the criteria for obtaining leave have now largely been clarified by the Tribunal, parties who do not meet them may be less inclined to bring a leave application that will not likely succeed. At the same time, potential applicants have more guidance as to the type of evidence that must be presented for the application to succeed.

In summary, a reasonable case can be made that section 103.1 is having a relatively neutral impact on the economy, that is, it may not be doing much good, but it isn't causing any harm. In such circumstances, where there are arguably other, more pressing, areas of the Act where legislative amendment should be considered, it may not be the best use of the Bureau's limited resources to commit them to the amendment process.

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<sup>52</sup> See A. Pera and V. Auricchio, "Consumer Welfare, Standard of Proof and the Objectives of Competition Policy" *European Competition Journal*, March 2005, vol. 1, issue 1, 153; W.H. Rooney, "Consumer Injury in Antitrust Litigation: Necessary, But by What Standard?", *St. John's Law Review*, Fall 2001.

## APPENDIX A – PROCEDURAL PRACTICE ISSUES

Section 103.1 of the Act gives rise to some interesting procedural/practice issues.

The approach adopted with respect to the drafting of section 103.1 is somewhat unusual, to the extent that it addresses more procedural aspects of a leave application than are dealt with in the Act in respect of other applications before the Tribunal. For example, the time limit for a person opposing leave to make written representations to the Tribunal is 15 days pursuant to section 103.1(6) of the Act. As this is a statutory time limit, does the Tribunal have the jurisdiction to vary this provision?

Section 103.1 and the Tribunal's Practice Directions do not expressly address whether the respondent is permitted to file affidavit material in response to a leave application or whether cross-examinations may be conducted in respect of the affidavits filed in support or in opposition to a leave application.

The Practice Directions do provide that the response shall contain "a concise statement of the grounds on which the application is opposed and of the material facts on which the person opposing the application relies." However, it does not address how conflicts between the facts put forward by the applicant and those alleged by the respondents in their response (or supported by affidavit evidence submitted by the respondent) should be handled.

Affidavits have been filed by respondents in some leave applications (e.g., *Paradise Pharmacy*; *Broadview Pharmacy*). Affidavits were filed by Symbol and referred to by Justice Lemieux in *Barcode Systems*. However, he did not permit additional materials to be filed by either the applicant or the respondent in connection with the leave application:

[19] On an application for leave, it is not the function of the Tribunal to make credibility findings based on affidavits which have not been cross-examined. I note that the Act requires an applicant to support an application for leave by a sworn affidavit while, for a person opposing leave only written representations are contemplated.

[20] These provisions confirm that the Tribunal's role when granting leave is a screening function simply deciding on the sufficiency of evidence advanced.

[21] There may be situations, however, where it can be demonstrated that an applicant's evidence is simply not credible without engaging the Tribunal in weighing contested statements from opposing parties and the applicant. This is not the case here.

[22] I close on a procedural point. Both Symbol and Barcode have sought leave to file additional material as a result of the limited right of reply granted by the Tribunal to Barcode, as an exception in the interest of justice.

[23] In only exceptional circumstances will the Tribunal grant parties a right of reply in leave applications which are to be dealt with expeditiously.

[24] The Tribunal sees no need to have additional evidence before it as proposed by Barcode or Symbol.

On appeal, Justice Rothstein noted at para. 24 that:

Having determined the correct legal test on an application seeking leave to apply for an order under subsection 75(1), the question is whether this matter should be remitted to the Tribunal for redetermination or whether this Court should dispose of it. Barcode has pointed out that a leave application is intended to be a summary screening process. There is no right of cross-examination on the affidavit filed in support of the application for leave, there is no provision for the respondent to file affidavit evidence and the time limits in section 103.1 are short, consistent with leave applications being dealt with summarily. For these reasons, I think the appropriate course of action in this case would be for this Court to resolve the matter without further delay.

In *London Drugs*, the parties, with the concurrence of the Tribunal, agreed to have some written discovery questions put by the respondents to the applicants, in lieu of cross-examination on the applicant's affidavit. The Tribunal dismissed an application by the respondent for further disclosure (2007 Comp.Trib.10).

The Tribunal used the "chess clock procedure" with respect to time management in the *B-Filer* case, as noted in its decision that all members of the Tribunal were of the view that the procedure worked well and that the hearing would not otherwise have finished on time (2006 Comp. Trib. 42 at paras. 279-283).

There are a number of open questions that have yet to be decided in the context of private applications, including (i) are the private application provisions constitutionally valid; and (ii) does section 69 apply in a private application?

## APPENDIX B – SECTION 103.1 AND THE TRIBUNAL’S PRACTICE DIRECTION

### A. Process to Obtain Leave

Private parties are required to obtain leave from the Tribunal pursuant to section 103.1 before bringing an application. The applicant is required to file an application for leave, a notice of application and an affidavit setting out the facts supporting the application, which are to be served on the Commissioner and any person against whom the order is sought (section 103.1(1)). The leave application and the notice of application are to contain a concise statement of the grounds and material facts relied upon in support of the leave application.<sup>53</sup>

Within 48 hours of being served with a leave application, the Commissioner is required to certify to the Tribunal whether the matter in respect of which leave has been sought is the subject of an inquiry by the Commissioner or was the subject of an inquiry that has been discontinued because of a settlement (section 103.1(3)). If either of those circumstances apply, or if the matter is the subject of an application already submitted to the Tribunal by the Commissioner, the Tribunal shall not consider the leave application (section 103.1(4)). If the Commissioner certifies that a matter is under inquiry and subsequently discontinues that inquiry other than by way of a settlement, the Commissioner is required to notify the person who was seeking leave to bring a private application that the inquiry has been discontinued (section 103.1(12)).

As soon as practical after the Commissioner’s certification, the Tribunal is to notify the applicant and respondent(s) whether it can hear the application (section 103.1(5)). The Commissioner and respondent(s) then have 15 days to make written representations to the Tribunal (section 103.1(6)). The written representations are to include a concise statement of the grounds on which the application for leave is opposed and the material facts relied upon, and an admission or denial of each ground and each material fact set out in the leave application.<sup>54</sup>

To grant leave, the Tribunal must “(have) reason to believe that the applicant is directly and substantially affected by any practice referred to in (sections 75 or 77) that could be subject to an order under that section” (section 103.1(7)). The Tribunal may render its decision on a leave application on the basis of the written records without a formal oral hearing.<sup>55</sup> However, the Tribunal is required to provide written reasons for its decision to grant or refuse leave (section 103.1(9)). The Tribunal is also expressly directed to draw no inferences from the fact that the Commissioner has or has not taken any action in respect of the matter raised by a private application (section 103.1(11)).

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<sup>53</sup> Canada, Competition Tribunal, *Practice Directions for the Competition Tribunal*, as amended (Ottawa: Competition Tribunal, 2005) at Part IV, sections 105, 111 (“**Practice Directions**”).

<sup>54</sup> *Ibid.*, section 109.

<sup>55</sup> *Ibid.*, section 110.

A private application must be brought within one year after the practice that is the subject of the application has ceased (section 103.1(12)).

### **B. Hearing of the Application**

If leave is granted, the notice of application is deemed to be filed as of that date. It must be served on the respondents and the Commissioner within five days. A respondent who wishes to oppose the application must file a response within 30 days, which must contain a concise statement of the grounds upon which the application is opposed, the material facts relied upon and an admission or denial of each ground and material fact set out in the notice of application.<sup>56</sup>

The parties to the application are required to file affidavits outlining the relevant records which are or were in their possession within 20 days after the deadline for filing a response. The affidavits of records must contain a list of relevant documents that are or were in the possession or control of the party, a brief description of each document, any claims for privilege and an indication of any intention to apply pursuant to section 119(2) of the Practice Directions to restrict inspection or copying of the documents.<sup>57</sup> The Tribunal may conduct one or more case management conferences to consider matters that may aid in the disposition of the application.<sup>58</sup>

If a private party obtains leave and brings an application, the Commissioner is precluded from making an application under sections 75, 77 or 79 on the basis of the same or substantially the same facts as alleged in the application (section 103.1(10)). However, the Commissioner is able to intervene in the private application (section 103(2)).<sup>59</sup>

### **C. Costs**

The costs provisions in section 8.1 of the *Competition Tribunal Act*<sup>60</sup> apply to private applications. The Tribunal may award costs of such proceedings “on a final or interim basis, in accordance with the provisions governing costs in the Federal Court Rules, 1998.”

### **D. Interim Orders**

The Tribunal may issue an interim order pursuant to section 104 of the Act “having regard to the principles ordinarily considered by superior courts when granting injunctive or interlocutory relief”.

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<sup>56</sup> *Ibid.*, sections 111-113.

<sup>57</sup> *Ibid.*, sections 115-119.

<sup>58</sup> *Ibid.*, section 120.

<sup>59</sup> *Ibid.*, sections 122-123.

<sup>60</sup> R.S.C. 1985, c. 19 (2<sup>nd</sup> Supp.), as am. S.C. 1995, c. 1, s. 62(1)(e); 1999, c. 2, ss. 41-43; 2000, c. 15, s. 16; 2002, c. 8, ss. 130, 183(1)(g), 198(c)(iv); 2002, c. 16, ss. 16-19; 2003, c. 22, s. 224 (z.19).

## E. Consent Agreements

Private parties who have obtained leave can file a consent agreement with the Tribunal for registration pursuant to section 106.1 of the Act provided “the terms of the order are agreed to by the person in respect of whom the order is sought and consistent with the provisions of (the) Act”.<sup>61</sup> The consent agreement must be served on the Commissioner when filed (section 106.1(2)) and must be published in the Gazette without delay (section 106.1(3)).<sup>62</sup> The consent agreement is registered 30 days after publication unless a third party makes an application before then to cancel the agreement or replace it with an order of the Tribunal (section 106.1(4)). Upon registration, a consent agreement has the force of an order of the Tribunal (section 106.1(5)).

The Commissioner can apply to the Tribunal to vary or rescind a consent agreement pursuant to section 106.1(6) if the Tribunal finds that the agreement has or is likely to have anti-competitive effects.<sup>63</sup> Otherwise, the Act does not appear to expressly contemplate the variation of consent agreements as section 106 expressly states that it does not apply to consent agreements under section 106.1.

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<sup>61</sup> Practice Directions, *supra* note 49, section 124.

<sup>62</sup> *Ibid.*, section 125.

<sup>63</sup> *Ibid.*, sections 126-128.