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Recent Developments in Civil Matters under Canadian Competition Law

Competition Tribunal Cases A Two Year Review

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Table of Contents

Introduction.....	1
Abuse of Dominance	1
Polar Ice Express: the abuse case that wasn't	1
Canada Pipe Company Ltd.....	3
Private applications.....	3
The meritorious: a chicken in every pot?.....	4
The unmeritorious	7
The just plain silly	9
Mergers	13
Labatt staves off interim order	13
Rescission or Variation of an Order.....	15
Marketing practices	18
In private is not "to the public"	18
Chim chiminey, chim chim cher-ee!.....	19
The Future of the Tribunal	22
Amendments to the <i>Competition Act</i>	22
Changes to Administrative Review: <i>Dunsmuir v. New Brunswick</i>	27
Conclusion	29

COMPETITION TRIBUNAL CASES — A TWO-YEAR REVIEW

By W. Michael G. Osborne and Donna N. Wilson¹

INTRODUCTION

In the last two years, there have been no abuse of dominance cases and one contested merger case, which was dropped. The only cases to receive an oral hearing before a full panel of three members of the Competition Tribunal were the *Nadeau* private application under section 75 (refusal to deal) and part of the *Saskatchewan Wheat Pool* case.² Apart from this, the Tribunal's work has consisted of dismissing unmeritorious applications for leave to commence a private application and dealing with sundry persons accused of deceptive marketing practices.

Recently, however, amendments to the *Competition Act* transfer jurisdiction over some anti-competitive agreements and price maintenance to the Tribunal. This may increase its caseload.

This article reviews the cases in the Tribunal over the last two years and the recent amendments to the *Competition Act*, as they affect practice in the Tribunal.

ABUSE OF DOMINANCE

Polar Ice Express: the abuse case that wasn't

In *Polar Ice Express Inc. v. Arctic Glacier Inc.*,³ the Alberta Court of Queen's Bench found that ice supplier Arctic Glacier Inc. tried to crush its fledgling competitor, Polar Ice Express Inc., by unlawfully interfering with its economic relations. Arctic Glacier bribed or attempted to bribe customers of Polar Ice to

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² The Commissioner dropped this case in the middle of the hearing, on July 12, 2007.

³ 2007 ABQB 717, affirmed in part (costs award reduced): 2009 ABCA 20.

deal exclusively with it, broke contracts (or threatened to break contracts) with customers who also bought ice from Polar Ice,⁴ and offered special discounts to liquor stores and Sobeys to induce them to breach their contracts with Polar Ice. It even pulled a truck off of a construction site, jeopardizing a large concrete pour.

The court also held that the selective discounts to retailers supplied by Polar Ice violated the discriminatory pricing provision of the *Competition Act* (section 50), as Arctic Glacier did not offer the same prices to competitors of those retailers. This conclusion was almost certainly wrong, as the court did not consider whether the requirements of the discriminatory pricing provision were met, including whether the discounts were in respect of a sale of articles of like quality and quantity. It simply held that offering targeted discounts is unlawful.

What is interesting about *Polar Ice* is that Arctic Glacier's behaviour likely could have supported an application under the abuse of dominance provisions. Arctic Glacier was described as being the biggest supplier of ice in Manitoba, Saskatchewan, and Alberta, with a near-monopoly in Alberta for the supply of ice to various retailers and concrete supply companies.

Arctic Glacier's actions consisted of a mix of dirty tricks and unlawful behaviour (including criminal – offering bribes) in order to induce its customers to agree to buy ice exclusively from it. Its actions were “specifically intended” to injure Polar Ice.⁵ The Tribunal would likely have found that Arctic Glacier's actions were intentionally “exclusionary”, if not also “disciplinary” and “predatory”.

It is less clear whether the final element, substantial lessening or prevention of competition, would have been met in this case. Polar Ice suffered “serious economic loss”, including the business of two liquor stores, ten grocery stores, and a major concrete supplier.⁶ While the trial judge speculates that Polar Ice might have targeted business with certain other retail stores, there are no

⁴ Arctic Glacier's behaviour would clearly have satisfied the requirements of the separate tort of inducing breach of contract. Unfortunately, the trial judge appears not to have distinguished between this tort and the tort of unlawful interference with economic interests.

⁵ At ¶84.

⁶ At ¶96-101.

findings about the effect of Arctic Glacier's behaviour on competition, as this was not an element of the tort of unlawful interference with economic interests.

Canada Pipe Company Ltd.

In *Commissioner of Competition v. Canada Pipe Company Ltd.*,⁷ Canada Pipe and the Competition Bureau settled, by way of a consent agreement, a long running dispute over the rebate program offered by Canada Pipe to its distributors. This settlement ended an abuse of dominance case that began in 2002.

Under the consent agreement, which has a term of 5 years, Canada Pipe agreed to offer a modified rebate program to its distributors as an alternative to its existing rebate program, beginning January 30, 2008. Although the details of the modified rebate program are unfortunately confidential, the public settlement explains that the program can include multiplier discounts off list-price, quarterly rebates, annual rebates, and yearly head office rebates. Further, the rebates cannot be conditional on the distributor acquiring other Canada Pipe product, and the rebates available under the existing program cannot be more than the rebates available under the modified program.

PRIVATE APPLICATIONS

Private applications under section 103.1 for leave to make an application under sections 75 or 77 can be divided into three categories: the meritorious, the unmeritorious, and the just plain silly. Most of the applications fall into the unmeritorious and just plain silly categories.

The test to be applied to a leave application was first established in *National Capital News Canada v. Miliken*,⁸ where the Tribunal held that:

...the appropriate standard under subsection 103.1(7) of the *Competition Act* is whether the leave application is supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected

⁷ CT-2002-006 [*Canada Pipe*].

⁸ 2002 Comp. Trib. 41.

in the applicant's business by a reviewable practice, and that the practice in question could be subject to an order.⁹

The Federal Court of Appeal clarified in *Symbol Technologies Canada ULC. v. Barcode Systems Inc.*¹⁰ that all the elements of the main provision (section 75 or 77) must be considered and the facts relevant to those elements must be set out in the affidavit filed in support of the leave application.

The meritorious: a chicken in every pot?

In *Nadeau Poultry Farm Limited v. Groupe Westco Inc.*,¹¹ the Tribunal granted leave to Nadeau Poultry Farm Limited to bring an application under subsection 75(1) of the *Competition Act* against Group Westco Inc. and Groupe Dynaco, Coopérative Agroalimentaire, and Volailles Acadia S.E.C., and Volailles Acadia Inc./Acadia Poultry Inc.

Nadeau is a wholly-owned subsidiary of Maple Lodge Holding Corporation, which is one of the largest processors of chicken in Canada. Maple Lodge operates two processing facilities in Canada, one of which is located in St-François de Madawaska, New Brunswick, and is operated by Nadeau. The respondents are a group of chicken producers in New Brunswick who have consolidated their quotas and together produce almost 75% of New Brunswick's live chickens. At the time of the application Nadeau was obtaining about 48% of its chickens from the respondents.

Nadeau's primary competitor in Quebec and the Eastern provinces, Olymel, in consort with Group Westco Inc., wanted to buy the St-François plant in order to form a chicken company that is vertically integrated from "farm to fork". Negotiations between Nadeau and Olymel/Group Westco failed and Group Westco then notified Nadeau that it would no longer supply it with live chickens. The other respondents subsequently informed Nadeau that they also would no longer supply it with live chickens.

⁹ *Ibid.* at para. 14.

¹⁰ 2004 FCA 339.

¹¹ 2008 Comp. Trib. 7.

Nadeau lead evidence that the refusal to deal would reduce its supply of live chickens by 48%, processing would be reduced to just over $\frac{3}{4}$ of one shift, and a majority of the 340 jobs at the St-François plant would be lost immediately.

Justice Blanchard found that Nadeau would be directly and substantially affected by the respondents' refusal to deal. Blanchard J. was satisfied that there was evidence of ties between the respondents that allowed him to consider the collective impact of all the respondents' refusal to deal on Nadeau. Also, he rejected the respondents' argument that the business to be examined was Maple Lodge. He ruled that the business to be examined was that of the applicant, Nadeau, not its parent corporation.

Blanchard J. also found that the refusal to deal could result in an order of the Tribunal. He accepted Nadeau's uncontested evidence that it could not obtain replacement supplies of live chickens because the supply management system creates monopoly production rights for producers and all production is already allocated to other processing plants, leaving Nadeau unable to replace lost volumes from other sources. He also found that Nadeau was willing and able to meet the usual trade terms, that the Tribunal could conclude that live chickens are in "ample supply", and that the closure of the St-François plant due to the refusals to deal is likely to have an adverse effect on competition in the market.

The Tribunal later allowed Nadeau's subsequent application for an interim order under section 104 directing the respondents to continue to deal with it and to supply it with live chickens on the usual trade terms, in the volumes previously supplied, pending the Tribunal's decision on the main application under section 75 of the *Competition Act*.¹²

The Tribunal applied the *RJR-MacDonald* test: first, there must be a serious issue to be tried; second, the applicant must show it will suffer irreparable harm if the injunction were refused; third, the parties must suffer less harm from the granting than from the refusal of the remedy pending a decision on the merits.¹³

Justice Blanchard concluded that Nadeau had raised serious issues to be tried on the merits of its case under section 75 of the *Competition Act*. He noted that

¹² *Nadeau Poultry Farm Limited v. Groupe Westco Inc.*, 2008 Comp. Trib. 16.

¹³ *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311.

at this step Nadeau was only required to meet the low threshold of showing that its case is neither frivolous nor vexatious. The respondents' arguments raised complex issues of fact and law which may require assessments of credibility and considerations of expert evidence which are not appropriate in an interim proceeding. While he stopped short of saying this, it would seem that the fact that leave was granted means that Nadeau's case met the threshold.

Blanchard J. found that Nadeau would suffer irreparable harm if the interim relief were not granted. Nadeau would lose at least 50% of its profits on an annualized basis. This harm is irreparable because the Tribunal has no authority to award damages should Nadeau succeed in its underlying application. Nadeau would also be unable to provide the same level of service to its customers without adequate supplies; the resultant loss of goodwill would be irreparable. Further, the extra costs associated with decreased production while overhead remains high and the extra costs of shipping chickens from out of province would contribute to the irreparable loss of profits Nadeau would suffer.

Blanchard J. found that the balance of convenience weighed in favour of Nadeau. He wrote that the harm suffered by Nadeau was more than a loss of profits, but also a significant impact on its customer base and operational efficiencies. This harm was not outweighed by the respondents' delay in integrating chicken processing into its business plan.

Blanchard J. rejected arguments from the respondents that the Tribunal should refuse to exercise its discretion to grant an order. They argued that the interim order would be contrary to the spirit of the *Competition Act* because it would guarantee Nadeau's dominant position in the New Brunswick chicken processing market. Blanchard J. stated that the interim order was not contrary to the spirit of the *Competition Act* but provides for a temporary measure pending the final disposition of the case. The respondents also referred to a bill recently passed by the New Brunswick Legislature giving the New Brunswick Minister of Agriculture the power to designate the plants where chickens may be processed.¹⁴ Blanchard J. stated that the alleged conflicts with Bill 81 were in his view, speculative at this stage.

¹⁴ *An Act to Amend the Natural Products Act*, 2d Sess., 56th Leg., New Brunswick, 2008.

The interim order decision would appear to establish that on any future applications for interim relief after leave is granted, the first two elements of the *RJR-MacDonald* test are automatically met: the first, because the granting of leave precludes a finding that the case is frivolous, and the second, because the Tribunal has no power to compensate for any losses caused by the refusal to deal. Thus the test will collapse to a mere consideration of balance of convenience. Where the respondent has previously been supplying the applicant, it will be difficult for the respondent to avoid the finding that the balance of convenience favours the applicant. Thus, in theory at least, interim relief should be easy to get in the future.

The hearing in the main application has now been held but the decision has not yet been released.

The unmeritorious

Cosmetic changes at Sears

In *Sears Canada Inc. v. Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd.*,¹⁵ the Tribunal dismissed Sears' application for leave to commence an application to compel Christian Dior and Givenchy to continue supplying it with fragrances and cosmetics.

Sears is a large Canadian retailer. Christian Dior and Givenchy are wholly-owned subsidiaries of LVMH Louis Vuitton Mœt Hennessy that have supplied Sears with fragrances and cosmetics for the last 14 years. The sale of the respondents' products amounted to approximately sixteen million dollars of Sears's annual revenues, which exceeded six billion dollars.

In January 2007 the respondents informed Sears that they would no longer supply it with their products. Sears claimed that the refusal to supply was motivated by the discounts it offered in December 2006 on all cosmetic products, including those of the respondents.

Sears's evidence showed that the revenues from the sale of the respondents' products represented an insignificant percentage of Sears's overall sales and a modest percentage of its overall cosmetic business. Sears had been losing market

¹⁵ 2007 Comp. Trib. 6.

share to the Bay in the cosmetics and fragrance market over the three years that preceded the application.

The Tribunal rejected Sears's argument that the business for the purpose of its application was the sale of the respondents' products. Justice Simpson stated that in accordance with previous decisions of the Tribunal¹⁶ and the plain language of the *Competition Act*, subsection 75(2) requires an examination of Sears's entire business, and not only a portion thereof.

The Tribunal acknowledged that Sears may suffer a loss of sales of the respondents' products, a loss of sales from customers drawn to the store for the respondents' products who then buy other products, a loss related to an inability to compete with the Bay, and a loss of marketing power for its fragrance and cosmetics departments with the respondents' refusal to deal. However, Simpson J. ruled that the effect on Sears's department store business was not substantial. She gave little weight to Sears's argument that its bargaining position with other cosmetic and fragrance brands would be harmed because Sears's affidavit did not set out a basis for that opinion.

Simpson J. found it unnecessary to consider whether the Tribunal could make an order under paragraphs 75(1)(a-e) of the *Competition Act* in view of the conclusion that Sears was not directly and substantially affected in its business. She therefore dismissed the application with costs.

On a wing and an e-ticket

In *Canadian Standard Travel Agent Registry v. International Air Transport Association*,¹⁷ the Tribunal dismissed an application for leave brought by Canadian Standard Travel Agent Registry to make an application under section 75 of the *Competition Act* against International Air Transport Association. CSTAR does business as a non-profit trade association representing travel agencies across Canada, the majority of which are accredited by the respondent.

¹⁶ See *Director of Investigation & Research v. Chrysler Canada Ltd.*, 27 C.P.R. (3d) 1, aff'd 38 C.P.R. (3d) 25 (F.C.A.); *1177057 Ontario Inc. (c.o.b. as Broadview Pharmacy) v. Wyeth Canada Inc.*, 2004 Comp. Trib. 22; *Paradise Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc.*, 2004 Comp. Trib. 21; and *Broadview Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 23.

¹⁷ 2008 Comp. Trib. 14 [*CSTAR v. IATA*].

IATA is an international trade association representing approximately 240 airlines.

CSTAR alleged that IATA's implementation of exclusive e-ticketing and elimination of paper airline tickets is a refusal to deal and that paper tickets are essential to the business of travel agencies as opposed to airlines. More particularly, it said that the elimination of paper tickets would prevent travel agencies from selling or servicing a wide variety of air transportation.

Justice Simpson rejected the application for leave because CSTAR did not lead any evidence to demonstrate a direct and substantial effect on the *applicant's*—that is, its own—business. Rather, CSTAR provided evidence regarding possible effects on non parties, that is IATA-accredited travel agencies. She dismissed the application without prejudice to a further application on the same issues by a party that is directly and substantially affected by the move away from paper tickets.

This case thus makes it clear that a party cannot bring a private application in a representative capacity.

The just plain silly

Dolby complaint silenced

In *Sono Pro Inc. v. Sonotechnique P.J.L. Inc.*,¹⁸ the Tribunal dismissed an application by Sono Pro for leave to make an application under section 75 of the *Competition Act* against Sonotechnique. Sono Pro brought its application for leave because Sonotechnique, the exclusive Canadian distributor of Dolby products, does not share its exclusive distribution network with any other retailer. Sono Pro maintained that this substantially affected its business because Dolby products represent 10% of its sales but that its sales are affected even more significantly when the loss of related products and services are taken into account. Sonotechnique responded that it was prepared to sell Dolby products to Sono Pro at the price it charged end-users. It added that exclusive distribution arrangements are common in the audio products business and, that such arrangements are reasonable because Sonotechnique assumes the cost of

¹⁸ 2007 Comp. Trib. 18.

repairing Dolby products sold in Canada and guarantees the quality of its sales force to Dolby.

The Tribunal applied *Construx Engineering Corporation v. General Motors of Canada*¹⁹ in refusing Sono Pro's leave application. Here, as in *Construx Engineering*, the applicant lacked "sufficient credible evidence" to show that it was directly and substantially affected in its business by the respondent's refusal to deal. Sono Pro had not provided enough details about the volume of its business, its sales figures or its geographic market. The only information provided was Sono Pro's bare assertion that the sale of Dolby products represented 10% of its sales and that its loss from the sale of related products and services is roughly 25% of its sales. Sono Pro did not explain how the 25% figure was calculated or how it was linked to Sonotechnique. The Tribunal had no hesitation dismissing the application for leave in the absence of sufficient and credible evidence that Sono Pro's business was substantially affected.

Help is exclusively at Home

In *Steven Olah v. Her Majesty the Queen as represented by the Correctional Service of Canada*,²⁰ the Tribunal dismissed Steven Olah's application on behalf of the inmates at the Fenbrook Medium Security Institution against the Correctional Service of Canada for leave to bring an application under section 77 of the *Competition Act*.

Mr Olah, a former inmate of the Fenbrook Institution, brought this application on behalf of that institution's inmates because he alleged that the Crown's implementation of a privatized inmate purchasing service that required inmates to purchase merchandise exclusively from Home Hardware constituted exclusive dealing under subsection 77(1) of the *Competition Act*. Mr Olah objected to the arrangement because Home Hardware charges a 10% mark-up for hobby craft goods and a 20% mark-up for general merchandise which it does not regularly stock.

The Tribunal dismissed the application as it related to the Crown because the *Competition Act* applies to an agent of the Crown but not to the Crown itself.

¹⁹ 2005 Comp. Trib. 21 [*Construx Engineering*].

²⁰ 2008 Comp. Trib. 29.

Furthermore, the *Competition Act* only applies to commercial activities and the arrangement was a policy decision regarding the workings of an inmate service at the prison and not a commercial activity.

The Tribunal dismissed the application as it relates to Home Hardware because Mr Olah's affidavit provided no evidence to show that he is directly and substantially affected in his business or that the alleged practice could be subject to an order under subsection 77(2) of the *Competition Act*. Simpson J. also found that the arrangement did not constitute exclusive dealing as defined in subsection 77(1) because it was the Correctional Service of Canada that decided to deal exclusively with Home Hardware, and not Home Hardware that induced the exclusivity.

Simpson J. dismissed the application with \$100 in costs payable to the Crown.

The Gauthier saga continues

In *National Capital News Canada v. Speaker of the House of Commons*,²¹ the Tribunal dismissed a second application by National Capital News for leave to make an application pursuant to sections 75 and 77 of the *Competition Act*. Mr Gauthier brought the application as proprietor of The National Capital News Canada asserting that the Speaker of the House of Commons should give him the same access to the Parliamentary precincts as that given to members of the Parliamentary Press Gallery, a private association which had denied him full membership.

Mr Gauthier maintained that his application should be reconsidered in light of the subsequent decision of the Supreme Court of Canada in *Canada (House of Commons) v. Vaid*²² and the Federal Court in *Gauthier v. Canada (Minister of Justice)*²³.

The Tribunal began by noting that the original application was dismissed because there was no evidence that the information Mr Gauthier was seeking

²¹ 2007 Comp. Trib. 23.

²² [2005] 1 S.C.R. 667.

²³ [2004] F.C.J. No. 794.

was outside the scope of Parliamentary privilege and therefore it follows that the practice complained of could not be subject to an order of the Tribunal.

The Tribunal went on to reject Mr Gauthier's assertion that after his original leave application was dismissed there had been changes in the law that would result in a different disposition of the leave application. First, in Mr Gauthier's unsuccessful appeal of the Tribunal's original order, the Federal Court of Appeal had determined that the issue of whether the Speaker of the House of Commons could deny access to the requested facilities by Mr Gauthier was *res judicata* because the precise issue had already been determined in a proceeding by Mr Gauthier in the Ontario Court (General Division).²⁴ Second, previously decided cases cannot be re-opened on the basis of a change in the law.²⁵ Third, the Tribunal found that the result of Mr Gauthier's application would be identical even if the previous order could be considered in light of the new decisions. The Tribunal thus dismissed the application.

Goin' down the road, not available for cross-examination

North Dakota RV dealer Swenson Inc. sells into western Canada as well as the US. It used to advertise in Trader Corporation's *Bike, Boat & RV Trader* advertising publication, until Trader started telling it that it had no space for its ads. Swenson believes that Trader started refusing its ads because of pressure from its Canadian advertisers. So it filed an application for leave to bring an application under section 75.

However, when its president, Darold Swenson, was not available to be cross-examined on his affidavit, and his lawyer could not say when he would be available, and could not reach him for instructions, the Tribunal dismissed Swenson's application without prejudice to Swenson's right to re-file when it is ready to proceed.²⁶ Simpson J. determined that she was not prepared, even on consent, to grant an open ended adjournment for the filing of the response. Swenson Inc. has not re-filed.

²⁴ *Gauthier v. Canada (House of Commons)*, 2004 F.C.A. 27.

²⁵ *Metro Canada Construction Ltd. v. Canada*, 2001 F.C.A. 227.

²⁶ *Swenson Inc. v. Trader Corporation*, 2008 Comp. Trib. 20.

The Tribunal can't solve your hockey team's problems

John Guy Annable, a private individual who works for ADT as a senior security representative was upset by the Ottawa Senators' practice of selling multi-game ticket packages. So he applied to the Tribunal for leave to commence a private application alleging tied selling.

The Tribunal dismissed Mr Annable's application for leave because he did not demonstrate that he was directly and substantially affected in his business or that the alleged practice could be subject to an order under the tied selling provisions (section 77).²⁷ His affidavit contained no evidence of any effect of the tied selling on his business, or even that he had a business, and no evidence showing that the multi-game ticket package offers were likely to have any of the effects described in subsection 77(2) of the *Competition Act*.

The Tribunal also concluded that the application was presented with such disregard to the requirements of a leave application that it amounted to an abuse of the Tribunal's process, and ordered \$300 in costs against Mr Annable.

Hockey fans take note: the Tribunal is not the appropriate forum for expressing discontent with your team's ticket sales practices, management or performance. Best stick to call-in radio shows.

MERGERS**Labatt staves off interim order**

In *Commissioner of Competition v. Labatt Brewing Co. Ltd.*,²⁸ the Tribunal dismissed an application by the Commissioner for an interim order under section 100 of the *Competition Act* to delay the proposed merger of Labatt with its discount brewer rival Lakeport.

On February 1, 2007, Labatt announced that it intended to acquire Lakeport. When Labatt refused to delay closing beyond the statutory waiting period, the Commissioner filed an application for an Interim Order pursuant to section 100 to prevent this merger until her inquiry was completed. Labatt offered to enter

²⁷ *Annable v. Capital Sports and Entertainment Inc.*, 2008 Comp. Trib. 5.

²⁸ 2007 Comp. Trib. 9.

into a hold separate agreement with the Commissioner, but the Commissioner rejected this proposal.

This application was the first section 100 application since the provision was amended to remove the requirement of a finding of a reasonable likelihood of substantial lessening or prevention of competition. The amendments also extended the duration of interim orders to 30 days from 21, with another possible 30 days extension due to “circumstances beyond the control of the Commissioner”. As well, the provision retained the requirement that an interim order only be granted where the Tribunal’s ability to remedy the effect of a merger on competition would be substantially impaired absent an interim order. The changes suggest that a paragraph 100(1)(a) application is now a less onerous process, but they also create an expectation that 42 days should be sufficient to complete a merger review. Furthermore, although the new changes make it easier to put a temporary stop to a merger, the maintenance of the requirement for a substantial impairment of the Tribunal’s ability to remedy the effects of a merger indicates that Parliament did not intend that the Commissioner should get more time whenever she considers she needs it.

The test under section 100 of the *Competition Act* is two fold: first, whether an inquiry is on-going and the Commissioner needs more time to complete it; and second, whether the Tribunal’s ability to remedy the effect of a merger on competition would be substantially impaired in the absence of an interim order because an action by a party to a merger would be difficult to reverse.

The Tribunal found that the Commissioner met the relatively low initial threshold for the commencement of a paragraph 100(1)(a) application. Justice Phelan wrote that it was clear that an inquiry had been commenced and was ongoing.

Turning to the second step of the test, the Tribunal found that its ability to remedy the effect of the merger on competition was not substantially impaired and difficult to reverse in the absence of an interim order.

Phelan J. rejected the Commissioner’s argument that an inability to restore matters to pre-merger conditions constituted a substantial impairment. He noted that in *Southam*, the Supreme Court rejected the notion that the remedy

for a merger that substantially lessens competition is to return to pre-merger conditions.²⁹ The goal is simply to bring matters back to the point that the substantial lessening of competition ceases. Thus when considering the substantial impairment requirement of the test, it is not sufficient to say that pre-merger conditions cannot be restored. The Commissioner's principal expert focused his testimony on the ability to restore pre-merger conditions, which was not sufficient, Phelan J. held. The Commissioner did not meet the threshold of showing that the Tribunal's ability to remedy a *substantial* lessening of competition would be substantially impaired.

Phelan J. went on to consider Labatt's argument that the Commissioner was unreasonable to reject their proposed hold separate agreement. He stated that it is not within his jurisdiction to order the Commissioner to enter into an agreement. Further, he noted that even if he had jurisdiction, he would not order that the Commissioner enter the agreement because it would be unworkable given that the Commissioner would be an unwilling participant.

Phelan J. noted that since he did not have the power to order the Commissioner to enter the hold separate agreement, he must consider the effect of the merger in the absence of that agreement. However, even absent the hold separate agreement, he found that the Commissioner had not shown that the merger prevented the Tribunal from imposing remedies that could remedy a substantial lessening in competition, and that the loss of an opportunity to prevent the merger substantially impaired the Tribunal. He therefore dismissed the Commissioner's application.

RESCISSION OR VARIATION OF AN ORDER

Section 106 gives the Tribunal the power to rescind or vary an order or consent agreement. The provision sets out two alternative grounds:

- (a) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not

²⁹ *Director of Investigation and Research v. Shoutham* [1997] 1 S.C.R. 748 at 789-790 [Southam].

have been made or would have been ineffective in achieving its intended purpose; or

(b) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.

The first branch of this test applies to contested rescission or variation applications. Rescission or variation of an order made after contested proceedings is extremely difficult to obtain unless the Commissioner consents, as *Canadian Waste Services*³⁰ shows. It may be easier to obtain rescission or variation of a consent agreement, since the intention of the parties at the time of making the consent agreement is relevant.³¹

If both parties consent to an alternative order, then it is not necessary to show a change in circumstances under the test set out in paragraph 106(1)(a).

There have been many amendments to consent agreements. Many are minor. For instance, in 2008, the Tribunal ratified an agreement between the Commissioner and Superior Plus LP to substitute a 30,000 tank for an 85,000 tank as part of a divestiture.³²

Recently, however, the Tribunal reminded parties that it is not a rubber stamp when it comes to consent rescission or variation applications. In 2007, Akzo Nobel NV agreed to a consent order requiring it to divest itself of assets relating to Para and Crown Diamond paints in order to complete its acquisition of Imperial Chemical Industries plc.³³ The Commissioner was concerned that the merger was likely to lessen competition substantially in the wholesale supply of “decorative coatings” (paints, etc.) in Quebec. In June 2008, Akzo reached an agreement to sell the assets to be divested to General Paint Corp. However, the agreement excluded a Para plant located in Etobicoke. Since the plant was on the list of assets to be divested, an amendment to the consent agreement was required. The Commissioner and Akzo submitted a joint letter to the Tribunal

³⁰ *Canadian Waste Services Holdings Inc. v. Commissioner of Competition*, 2004 Comp. Trib. 10.

³¹ *Rona Inc. v. Commissioner of Competition*, 2005 Comp. Trib. 18.

³² *Commissioner of Competition v. Superior Plus LP*, 2008 Comp. Trib. 33.

³³ *Commissioner of Competition v. Akzo Nobel NV*, CT-2007-010-02.

requesting this amendment.³⁴ The Tribunal was not satisfied and asked the Commissioner to explain why the divestiture sans the Etobicoke factory still addressed her concerns relating to the wholesale supply of paints in Quebec. The Commissioner responded that General Paint had sufficient capacity to produce paint, including a new plant in Toronto, to produce the quantities of Para and Crown Diamond paint that were then being shipped to Quebec.³⁵

The Tribunal then allowed the amendment. Although there are no reasons, the recitals to the order provide some insight into the test the Tribunal applied.³⁶ Simpson J. noted that amendments to consent orders are a matter of discretion for the Tribunal. She then wrote:

[6] AND UPON asking counsel for the Commissioner for a letter explaining why the Commissioner has concluded that a divestiture of the Etobicoke Production Facility is no longer required;

[7] AND UPON considering a letter from counsel for the Commissioner dated July 17, 2008, in which he explained that General Paint Corp. has a manufacturing facility in Toronto with sufficient capacity to ensure that the Para and Crown Diamond brands will continue to compete in the wholesale supply of Decorative Coatings in Quebec and that the objectives of the Consent Agreement can therefore be achieved without the sale of the Etobicoke Production Facility;

[8] AND UPON being satisfied with the explanation provided;

Thus parties seeking a consent amendment to a consent agreement must be prepared to satisfy the Tribunal that the amendment should be made, either by showing that the consent agreement, as amended, will still be effective, or that the consent agreement, or part of it, is no longer needed.

³⁴ *Commissioner of Competition v. Akzo Nobel NV*, CT-2007-010-04.

³⁵ *Commissioner of Competition v. Akzo Nobel NV*, CT-2007-010-05.

³⁶ *Commissioner of Competition v. Akzo Nobel NV*, CT-2007-010-06.

MARKETING PRACTICES

In private is not “to the public”

In *Commissioner of Competition v. Premier Career Management Group*,³⁷ the Tribunal dismissed the Commissioner’s application under section 74.1 of the *Competition Act*. The Commissioner alleged that Premier Career Management Group and its principal misled potential clients about their chances of finding employment if they used Premier’s career management services.

The Tribunal found that while Premier made material misrepresentations, those representations were not made “to the public” and therefore were not reviewable under the *Competition Act*.

Premier provides individuals with career management services and career counselling. The Commissioner alleged that Premier and its principal made three oral representations during meetings with prospective clients: first, that Premier screened prospective clients and only accepted those that it considered highly qualified; second, that Premier had an extensive network of personal contacts with senior executives at companies that were hiring and could use these contacts to arrange interviews for clients; and third, that prospective clients would almost certainly find work with Premier’s help, typically within 90 days and their new positions would have salaries and benefits equal to or better than their previous positions.

Justice Simpson found that Premier made these representations for the purpose of persuading prospective clients to purchase its services, that they were false or misleading, and that the second and third representations were material. However, the representations were made in private meetings in an office, and thus, not to the public. Therefore the representations were not reviewable under the *Competition Act*. She rejected the Commissioner’s arguments that the repeated representations to different clients in private meetings were akin to telecommunications found to be made “to the public” when information was

³⁷ 2008 Comp. Trib. 18 [*Premier Career*] Disclaimer: the author is counsel for Premier and its principal on the appeal.

repeated and available to customers.³⁸ She distinguished those cases because they involved different members of the public accessing the same information, whereas the information exchanged in the meetings with Premier's prospective clients was private and could not be accessed by other clients. She also wrote that the purpose of prohibiting false or misleading representations to the public was the prevention of distorted information being fed into the marketplace and having an impact on competition. Since the representations made in Premier's private meetings did not do this, they cannot be said to be made "to the public". Furthermore, the discussions in meetings with Premier's prospective clients involved private matters and there was an expectation that those discussions would be kept private.

The Commissioner has appealed to the Federal Court of Appeal. In the appeal, Premier is challenging the Tribunal's finding that the representations were false or misleading. The appeal has not yet been heard.

Chim chiminey, chim chim cher-ee!

In *Commissioner of Competition v. Imperial Brush Co. Ltd.*,³⁹ the Tribunal found that Imperial Brush Manufacturing (which represents two companies) failed to conduct proper and adequate tests of special logs and spray cleaners which they claimed cleaned chimneys when burned, or sprayed into fireplaces, thus contravening paragraph 74.01(1)(b). In finding against Imperial, Justice Phelan also found that although paragraph 74.01(1)(b) infringes freedom of expression as guaranteed under section 2(b) of the *Canadian Charter of Rights and Freedoms*,⁴⁰ the infringement is justified under section 1 of the *Charter*.

Imperial researches, develops, and manufactures chemical chimney cleaning products. It claimed on its packaging that its Supersweep Cleaning Log, Imperial Chimney Cleaning Log, Creosote Cleaner, and Creosote Conditioner eliminate

³⁸ See *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] S.C.R. 339; *Canadian Wireless Telecommunications Association v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, 290 D.L.R. (4th) 753.

³⁹ 2008 Comp. Trib. 02.

⁴⁰ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Competition Act*, 1982, being Schedule B to the *Canada Competition Act 1982* (U.K.), 1982, c. 11 [*The Charter*].

creosote, reduce some creosote to ash, or react with chimney deposits to reduce their adhesiveness.

Dealing first with Imperial's *Charter* argument, Phelan J. found that paragraph 74.01(1)(b) of the *Competition Act* limits commercial speech which is protected under the freedom of expression guaranteed by section 2(b) of the *Charter*, but that this infringement was justified under section 1 of the *Charter*. Phelan J. noted that under the proportionality analysis, the nature of the infringed activity is a relevant contextual consideration. In this case, the expression limited is allegedly unsupported information about the performance, efficacy, and length of life of a product for the purpose of promoting the supply or use of that product. Phelan J. ruled that this was far removed from the core values protected by section 2(b) of the *Charter*. The objective of the *Competition Act*, which is to maintain or encourage competition in Canada is a second contextual factor. Improving the quality and accuracy of marketplace information achieves this purpose.

Phelan J. found that paragraph 74.01(1)(b) had a pressing and substantial objective, namely, to protect customers and competitors and to ensure the proper functioning of the market free from the harm caused by unsubstantiated representations about the performance, efficacy, or length of life of a product. He rejected Imperial's argument that the legislation was aimed only at preventing false advertising. He stated that there must be some objective basis to ensure that the representations being put to the public are true.

Paragraph 74.01(1)(b) was rationally connected to its objective, Phelan J. found. Moreover, it was minimally impairing because the objective of the impugned legislation could not be addressed through less rights-infringing means such as relying on the false claims prohibition in paragraph 74(1)(a). The objective of paragraph 74.01(1)(b) is not just the prevention of false claims, but the prevention of speculative or irresponsible claims, even if such claims turn out to be true.

Turning to the merits, Phelan J. noted that whether a test is adequate and proper will depend on the nature of the claim being made. The results do not need to meet a test of certainty. Rather, the tests must be fit, apt, or suitable as required by the circumstances.

Here, a high standard of testing is required because the product is used to address the dangerous situation of chimney fires, Phelan J. held. While the tests still need not be as exacting as those in scientific journals, they should clearly demonstrate that the results claimed are not due to mere chance. Furthermore, he noted that the tests must be done before the representations are made. Paragraph 74.01(1)(b) does not require that a consumer complaint precede the testing of the product. Finally, it is essential that the test establish that it is the product and not some other variable that is causing the effect claimed.

Turning to the four different products at issue in turn, Phelan J. found none of them had been the subject of proper and adequate tests. The reasons he cited provide a handy list of things not to do when conducting tests.

Tests of the Supersweep Cleaning Log were not performed until *after* the representations about its effectiveness were made to the public. The fact that the product has been in use for many years, in and of itself, does not constitute a proper and adequate test, Phelan J. held. The product's effectiveness is not a defence where an advertiser has failed to conduct proper and adequate tests, even though it would be a defence to a false advertising charge.

The Imperial Chimney Cleaning Log was tested outside, which does not simulate the conditions under which the product will be used. A proper and adequate test for this product would require a comparison-method to be used, Phelan J. held. The behaviour of the appliances used in the test must be as identical to real world conditions as possible. In any event, the tests that were conducted did not show that any reduction in creosote could be attributed to the product as opposed to some other variable like temperature.

Imperial relied on books that stated that the ingredients in the Creosote Cleaner could have the desired effects. Phelan J. wrote that there is "no doubt" that these books "do not constitute adequate and proper tests". Furthermore, one of the tests was made well after representations were made to the public and thus does not constitute a proper and adequate test.

Similarly, Imperial's reliance on a manual and published studies of the ingredients in the Creosote Conditioner was not sufficient. The test relied upon by Imperial was conducted after the representations were made to the public. As

well, Imperial did not refer to any tests to substantiate the representations that the product is “non-toxic” or “non-corrosive”.

Having found that Imperial had engaged in reviewable conduct, Phelan J. noted that it is necessary to arrange some sort of public notice to alert customers of the inadequacy of the tests that formed the basis of the representations that customers relied upon. The products should also either be recalled or repackaged without the unsubstantiated representations until proper and adequate tests can be performed. Phelan J. ordered that the parties be given an opportunity to make submissions on these issues at a later date, as well as submissions as to costs. The Commissioner asked for an administrative penalty of \$100,000 from each of the companies. Phelan J. noted that there was really only one respondent and that the representations, as serious as they are, were based on a sincerely held belief without any intended deception. He therefore ordered a penalty of \$25,000 assessed jointly and severally against the companies, but he noted that future breaches of the requirement for proper and adequate testing are likely to attract larger administrative penalties now that the Tribunal has decided this case.

THE FUTURE OF THE TRIBUNAL

Two recent changes in the law could have an effect on future cases of the Tribunal. First, the recent amendments to the *Competition Act* increase the Tribunal’s powers. Second, the Supreme Court’s recent revision of the law of judicial review of administrative decisions has the potential to impact appeals from the Tribunal.

Amendments to the Competition Act

As part of Budget 2009 (Bill C-10), Parliament passed the most important amendments to the *Competition Act* in a generation. Most of the amendments became law on March 12, 2009.⁴¹ Four of them will have an impact on cases in the Tribunal:

⁴¹ S.C. 2009, c. 2. The amendments can be found at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Parl=40&Ses=2&Mode=1&Pub>

- The new dual track conspiracy provisions
- The civil price maintenance provision
- AMPS for abuse of dominance
- Closing up loop-holes in the deceptive marketing practices provisions

Dual track conspiracy provisions

In amendments that come into effect one year from the date of Royal Assent, section 45 will be replaced with a dual-track régime for conspiracies. The criminal track consists of a *per se* offence of conspiring to fix prices, allocate markets, or fix production. It is designed to catch hard-core cartel behaviour. Other agreements are left to a new civil provision that empowers the Tribunal to prohibit an agreement that prevents or lessens competition substantially.⁴² The provision sets out an analytical framework similar to that employed in merger review, including efficiencies as a defence, not just a factor.

In theory this represents an important new jurisdiction for the Tribunal. Apart from the specialization agreements provisions (which have never been used), this is the first time that it has expressly been given jurisdiction over coordinated behaviour. It remains to be seen, however, whether this will lead to an increase in the number of cases brought to the Tribunal. Anti-competitive agreements could have been attacked in the Tribunal under a joint abuse of dominance theory; yet the only case to date is the Interac consent order.

Civil price maintenance

Bill C-10 also decriminalized price maintenance and enacted new civil price maintenance provisions that are substantially similar to the criminal provisions. The civil provisions have been narrowed to cover only vertical price maintenance, and a requirement of showing an adverse impact on competition has been added. Remedial provisions dealing with refusal to supply because of a

=Bill&Doc=C-10_4&Language=E&File=578, see also *A Guide to the Amendments* <http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/03045.html>, and *Frequently Asked Questions* <http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/03046.html>.

⁴² Section 90.1, as am., S.C. 2009, c. 2.

low pricing policy have also been added.⁴³ The Tribunal will thus become the custodian of the existing jurisprudence on price maintenance.

Once again, this is an important new area of jurisdiction for the Tribunal, and once again, it remains to be seen whether it will impact on the caseload in the Tribunal. There have been relatively few price maintenance cases of late, and those few have tended to be horizontal, rather than vertical. Moreover, the current trend is that price maintenance is generally not considered to be anti-competitive.⁴⁴

AMPS for abuse

Bill C-10 allows the Tribunal to impose administrative monetary penalties of up to \$10 million for abuse of dominance for a first “order” and \$15 million for each subsequent “order”. The sky is the limit, however, as the Bureau takes the position that individual “counts” can count as separate orders, thus ratcheting up the AMPS.⁴⁵ So far, the record is twelve times the statutory maximum, which would suggest the possibility of AMPS as high as \$120 million!

AMPS for abuse of dominance raise a number of issues. First, as a practical matter, firms with large market shares will almost certainly compete less aggressively. The fact that the Bureau has not brought an abuse of dominance application in over seven years, strongly suggests that the Bureau does not consider that abuse of dominance is pervasive in the Canadian economy. It is difficult to avoid the conclusion that the new provisions are intended to discourage firms with large market share from competing aggressively.

Second, providing for AMPS for abuse fundamentally changes the nature of the abuse of dominance provisions. Certain economic torts, such as unlawful

⁴³ Section 76, as am., S.C. 2009, c. 2.

⁴⁴ See for example *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877.

⁴⁵ The Bureau has done this successfully in deceptive marketing practices cases. For example, in 2004, the Bureau obtained a \$1.2 million AMP from The Forzani Group Ltd., which is more than ten times the statutory maximum. *Commissioner of Competition v. The Forzani Group Ltd.*, Consent Agreement, CT-2004-010. Earlier that same year, the Commissioner obtained an AMP of \$750,000 from Teleresolve Inc. *Commissioner of Competition v. Teleresolve Inc.*, Consent Agreement, 2004-001. In 2003, the Commissioner obtained an AMP of \$1 million from Suzy Shier: *Commissioner of Competition v. Suzy Shier Inc.*, Consent Agreement, CT-2003-006. The authors consider that the AMPS in these cases exceed the statutory maximums. However, since each of these cases involved a consent agreement, the issue was never decided by the Tribunal.

interference with economic interests, require the plaintiff to establish an unlawful act by the defendant as an essential element. Until now, courts have rebuffed attempts to rely on allegations of abuse of dominance as supplying the unlawful element, based on the reasoning that the allegedly anti-competitive conduct only becomes unlawful when the Tribunal orders the firm to stop the conduct. Imposition of AMPS, however, means that the conduct *was* unlawful, even before the Tribunal made the order. Thus abuse of dominance may now qualify as an unlawful act for purposes of economic torts. Canada has an aggressive plaintiff class action bar that can be counted on to exploit this possibility.

Third, such high financial penalties may qualify as a true penal consequence, and change the constitutional character of the abuse of dominance provisions from civil to criminal. This would automatically entitle a person accused of abuse of dominance to all of the protections of criminal process, including the requirement that the charge be proved beyond a reasonable doubt. It would also disqualify the Tribunal from hearing the case, since the Tribunal is not a court of criminal jurisdiction. Since the current provisions do not provide these protections, they would be unconstitutional.⁴⁶

⁴⁶ Professor Peter Hogg testified to this effect to a House of Commons committee when the same amendments came before Parliament in 2005. He said, in part:

In my letter of opinion to the Retail Council of Canada, I have advised the council that those penalties are unconstitutional. The basis for the opinion is this. Parliament has the power to impose whatever penalties it sees fit for breach of federal laws, and so the high numbers by themselves are not unconstitutional. The constitutional problem is that the bill ignores the safeguards that are guaranteed by section 11 of the Charter of Rights and Freedoms for any person charged with an offence.

It is the view, I believe, of the Government of Canada that the charter does not apply to AMPs because the word “fine” is never used, either in the Competition Act or in Bill C-19, and the Competition Act even goes so far as to claim that the purpose of an AMP is not to punish, but to promote conformity with the act.

What the Supreme Court of Canada has said, in a case called *Wigglesworth*, which is talked about in the opinion, is that any proceeding that may lead to a “true penal consequence” is subject to the safeguards of section 11. The *Wigglesworth* case involved a penalty of imprisonment, but the court also said that a very large fine—a fine, they said, that by its magnitude indicated an intention to pursue the public interest—would also

Deceptive marketing practices

The amendments to deceptive marketing provisions include an attempt to close up loop-holes revealed by recent cases. The *Stucky* case raises the issue of whether the *Competition Act* applies to representations made from Canada to outside of Canada. The Ontario Superior Court held that it does not;⁴⁷ the Court of Appeal held that it does.⁴⁸ The *Premier Career* case (discussed above) raises the issue of whether representations made in an office in private are

be a true penal consequence, which would attract the guarantees of section 11 of the Charter of Rights and Freedoms.

I believe that ruling would probably catch the AMPs that are now in the Competition Act—I can talk some more about that, if people would like to discuss it. But the magnitude of the new penalty of \$15 million is unheard of, even in statutes that are avowedly criminal. Indeed, the Competition Act itself limits the fines for conspiracy and bid-rigging, which are two deliberate, serious criminal offences, to \$10 million. So the most serious fine is less than the AMPs. I see the government is proposing to add an amendment that would increase the fine for conspiracy to \$25 million, but these numbers are enormous.

[...]

It's also important that the AMP in each case is assessed by the Competition Tribunal after taking into account a series of factors, mitigating and aggravating, that bear on the blameworthiness of the defendant. Those are the kinds of factors that would be considered by a criminal court in imposing a sentence on a convicted accused. In contrast, administrative penalties—for example, in the Income Tax Act or in the Customs Act—are typically assessed simply by a mathematical formula related to the amount of tax evaded or the goods that have been improperly imported.

There are three ways--and I will be very quick--in which the Competition Act fails to meet the charter standards. One is the presumption of innocence. These AMPs are simply proved on the balance of probability; criminal offences must be proved beyond a reasonable doubt.

[...]

A second problem is the disclosure of evidence. In criminal cases there must be full disclosure to the defence, and the defence has a right of silence. Those guarantees are ignored by the act.

And the third problem--and Ms. Brisebois referred to it briefly--is the vagueness of the reviewable practices that are the subject of the act. There is not a clear standard set upon which retailers can rely. For example, deceptive marketing that is neither knowing nor reckless is subject to a higher penalty under the AMPs than deceptive marketing that is knowing or reckless and that is the subject of a criminal charge.

⁴⁷ *R. v. Stucky*, 2006 CanLII 41523.

⁴⁸ *R. v. Stucky*, 2009 ONCA 151.

representations “to the public”. The Tribunal said they are not; it remains to be seen what the Federal Court of Appeal will say. Bill C-10 adds some new language to a definitional provision that says that it is not necessary to establish that a member of the public to whom a representation was made was in Canada, or that the representation was made in a place to which the public had access.

The administrative penalties for non-criminal offences have been increased enormously. AMPS that can be imposed on individuals are up fifteen-fold, from \$50,000 to \$750,000 for the first order, and from \$100,000 to \$1 million for subsequent orders. For corporations, AMPS rise one-hundred-fold, from \$100,000 to \$10 million for the first order, and from \$200,000 to \$15 million for subsequent orders. As with AMPS for abuse, the sky truly is the limit, given the Bureau’s position that individual counts of deceptive marketing practices count as separate “orders” enabling it to collect much more than the maximum, even the first time it brings an application.

As well, AMPS of \$1 million for individuals and \$10 million for corporations may qualify as a true penal consequence, rendering the provision unconstitutional, since it does not provide the protections a person accused of a criminal offence is entitled to.

Bill C-10 also adds a new provision to the *Competition Act* that allows a court or Tribunal to order restitution to purchasers from an individual or corporation that has engaged in false and misleading representations.

Changes to Administrative Review: *Dunsmuir v. New Brunswick*

The recent Supreme Court case of *Dunsmuir v. New Brunswick*⁴⁹ changed both the standards of review of administrative actions, and revised the method for determining the standard of review. Justices Bastarache and LeBel, writing for the majority, decided that the distinction between patent unreasonableness and reasonableness *simpliciter* was illusory and thus the two should be collapsed into the standard of reasonableness. Accordingly there are now only two standards of review: reasonableness and correctness.

⁴⁹ 2008 SCC 9, [2008] S.C.J. No. 9 [*Dunsmuir*].

Bastarache and LeBel JJ. also clarified the proper approach for determining the standard of review. First, the court must determine whether the jurisprudence has already established the standard of review for a particular category of question. Second, if the jurisprudence has not established the standard of review, the court must analyze the factors relevant to determining the standard of review.

Bastarache and LeBel JJ. noted examples where the standard of review has been established by jurisprudence. Constitutional questions have been found to be subject to the standard of correctness. Questions of jurisdiction or *vires* are subject to the standard of correctness. Questions of law that are “both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise”⁵⁰ are subject to the standard of correctness. Questions regarding the jurisdictional lines between specialized tribunals are subject to the standard of correctness.

Turning to the second part of the test, Bastarache and LeBel JJ. explained the factors that determine the standard of review when it has not been established in the jurisprudence. First, the existence of a privative or preclusive clause is a strong indicator that the standard of review is reasonableness. Questions of fact, discretion, or policy will usually automatically give rise to deference and thus the standard of review of reasonableness. Questions where the legal and factual issues are intertwined and cannot be readily separated will also be subject to the reasonableness standard. Further, with regard to expertise of a tribunal, a reasonableness standard will apply in two instances: (i) where a tribunal is interpreting its own statute or statutes closely connected to its function with which it will be particularly familiar, and (ii) where an administrative tribunal has developed an expertise in the application of a general common law or civil law rule in relation to a specific statutory context.

Curiously, Bastarache and LeBel JJ. do not discuss the importance of expertise aside from the two factors mentioned above. More particularly, they only refer to a tribunal’s expertise in relation to its experience in applying particular legal tests, but not its expertise in a certain factual area such as in

⁵⁰ *Ibid.* at para. 60.

Southam where the Supreme Court recognized that those with business experience rather than legal training are better suited to appreciate the economic and commercial ramifications of the Tribunal's decisions.⁵¹

It is unlikely, however, that the court in *Dunsmuir* intended to overrule *Southam* on this point. Therefore the factual and legal expertise of the Competition Tribunal should still be a factor that indicates its decisions be treated with deference on review. Thus *Dunsmuir* will likely not change the way the Tribunal's cases are reviewed.

CONCLUSION

It has been seven years and five months since the last abuse of dominance case was filed by the Commissioner. In the past two years there have been two contested deceptive marketing cases and one merger case brought by the Commissioner, and one private application. There have been no new abuse of dominance cases, but *Canada Pipe* settled in 2007 after being commenced in 2002. There have been eight leave applications, only one of which was successful.

This lack of activity in the Tribunal is unfortunate for a number of reasons. First, it reduces transparency and accountability in the enforcement process. Bureau backgrounders and press releases are no match for reasoned decisions that explain provisions of the *Competition Act* and develop the law. The danger is that we will have a law that is enforced in private, with informal precedents known to a select few, and a tendency to rely on considerations that may not find support in the statute.

Second, it can erode the expertise of the Tribunal. Already, the Tribunal has had trouble attracting and retaining a full-time economist as a member. Inevitably, the judicial members will spend most of their time doing "regular" Federal Court cases that have little in common with competition law. The lack of cases can leave judicial members with little reason to stay current with developments in competition law, while the demands of a court busy dealing with immigration and security matters occupy their time.

⁵¹ *Southam supra* note 26 at paras. 49, 52.

Third, it can erode the capability of the Bureau to prepare cases to the standard required to win at trial. In an environment where there are no cases, junior officers will not learn from senior officers how to prepare abuse and merger cases for trial, because none are going to trial. The longer this goes on, the fewer senior officers there will be who can pass this knowledge on.

It is possible that the new areas of jurisdiction granted to the Tribunal will increase its caseload. However, this remains to be seen. These areas tend to involve matters where there has been little enforcement.