

82 Ridge Hill Drive
Toronto, Ontario M6C 2J8
tel: 416-785-4985
lschwartz5205@rogers.com

January 20, 2008

Mr. L.R. Wilson, Chair
Competition Policy Review Panel
10th floor, 280 Albert Street
Ottawa, Ontario K1A 0H5

Dear Mr. Wilson,

I appreciate the Panel's interest in receiving comments and submissions regarding its Consultation Paper. As a past full-time lay member of the Competition Tribunal, I have particular interest in competition policy and will limit my remarks to this aspect of the Panel's mandate.

1. Competition Tribunal

As the Consultation Paper correctly points out, the Competition Tribunal is rarely used. There are a number of reasons for this and various alternate structures have been proposed in recent years. I hope the Panel will look into this matter and make recommendations to the Government that will make the Tribunal a more active part of competition policy.

In this regard, I feel that it would not be a good idea to create a unified body. The enforcement and adjudicative roles in competition policy should continue to be separated, and the Tribunal should have the judicial and lay expertise that allows it to act as an independent institution.

2. Tribunal Scope

Part of the problem of the Tribunal's inactivity is that Parliament has increasingly given responsibility for competition policy issues to specialized regulatory bodies with a public interest mandate. As a result, cases that might have been heard by the Tribunal are heard by other bodies with different mandates.

The Panel may wish to consider whether "public interest" tests applied by specialized bodies are appropriate in light of the competition policy framework articulated first by the Economic Council of Canada in its Interim Report on Competition Policy in 1969. That report provided a framework that focused on Canada's industrial structure and the need for economic efficiency and productivity growth.

Under its mandate, the Panel is concerned with, for example, foreign ownership restrictions in certain industries. Noting that the Competition Tribunal does not have a public interest mandate, if the Panel will call for the relaxation of those and similar "public interest" restrictions on competition, then it should also recommend that the Tribunal should be the appropriate body to review competition issues in those industries.

3. Private Access

At present, there is only limited scope for private parties to come before the Tribunal without the involvement of the Commissioner of Competition. The major provision allowing private access to the Tribunal currently comes under the refusal-to-deal provisions in s.75 of the Competition Act. Since s.75 was amended to provide private access, there has been only one litigated case; the other provisions offering private access have resulted in no hearings.

Only the Commissioner of Competition should be able to apply to the Tribunal for orders in merger cases. However, the Panel may wish to consider whether it would be desirable to allow private access under the Abuse of Dominance (monopolization) provisions of the Act.

This matter has been under consideration for some time and, while the lack of Tribunal activity is not itself a reason to extend private access, doing so would likely expand the Tribunal's role.

4. Consent Agreements

The Tribunal's role was sharply curtailed by Parliament's decision to remove the need for hearings before the Tribunal on consent agreements. These hearings on consent were always limited to the question of whether the consent agreement resolved the competitive issues as required by the Act; there was no inquiry into the underlying facts of the merger. Accordingly, the consent hearing was virtually always quite short and in all but two circumstances the Tribunal sustained the proposed consent agreement, thereby giving it legal force.

However, the result of removing the requirement of a hearing on consent before the Tribunal is highly undesirable, as it gives the Commissioner of Competition the ability to enter into legally enforceable agreements with parties without the oversight provided by a court of first instance. As a result, the Commissioner is acting as both judge and prosecutor in consent matters.

The Panel should consider whether it is desirable to restore the requirement for hearings before the Tribunal on consent agreements. As part of this consideration, the Panel could recommend that the lay members of the Tribunal be involved in these hearings.

5. Misleading Advertising

At present, the lay members of the Tribunal do not participate in hearings involving misleading advertising. The reason for this is not clear, but the result is further lack of involvement of lay members.

Accordingly, the Panel may wish to consider recommending that the Tribunal sit in panels involving judicial and lay members when hearing cases of misleading advertising.

6. Lay Membership Involvement in Questions of Law

The Tribunal derives its expertise in competition policy by the requirement for lay members who bring knowledge of business and economics that allows the Tribunal to evaluate the specialized evidence that often arises in cases that come before it. It is widely accepted that judges of the Federal Court of Canada do not have the requisite training or experience.

At present, the Competition Tribunal Act reserves to the presiding judicial member of the panel the right to decide questions of law, including statutory interpretation; the lay members do not participate in adjudicating such matters.

Indeed, the suggestion has been made that lay members should be able to participate fully in deciding questions of law when they arise in specific cases. I disagree with this suggestion. While lay members may have their views on statutory interpretation, the better way to handle this is to allow them the full right to comment on decisions of law, whether in dissent or in full or partial concurrence.

While there is some precedent in the Tribunal for lay members to comment in writing on such decisions, the judicial members of the Tribunal have the power to deny them this expression. Since the lay expertise can be useful in understanding the Competition Act, the Panel should consider recommending that the lay members be given the unrestricted right to comment on questions of law.

7. Lay Membership: Recruitment

The Tribunal derives its expertise in competition policy from the lay members appointed to it. The Tribunal finds it difficult to attract lay members who are qualified in the various areas and disciplines that are needed to understand the specialized evidence that often arises in Tribunal hearings. In part,

the recruitment problem arises from the lack of Tribunal activity. Qualified individuals will not be interested in appointment to a body that rarely sits.

The absence of lay members with the relevant expertise means that the Tribunal may not be regarded as an expert body by courts of appeal, with the result that such courts, themselves lacking expertise, will have little reason to defer to Tribunal decisions.

Qualified individuals are usually engaged in their business and professional activities, and cannot leave those positions to participate in hearings that may extend for several weeks at a time. This problem will remain even if the Tribunal becomes more active in hearing cases. Accordingly, any attempt to enhance the activity level of the Tribunal will likely require that the lay membership will have to become salaried full-time appointees, or receive some form of remuneration.

Other quasi-judicial bodies at both the federal and provincial levels have full-time lay members and it would not be unusual for the Tribunal to be so structured. As part of an overall attempt to increase the activity and relevance of the Tribunal, the Panel may wish to recommend accordingly.

8. Federal Court of Appeal

In my view, it is unfortunate that the Federal Court of Appeal has chosen on occasion not to defer to Tribunal decisions even when those decisions are well within the Tribunal's expertise. This lack of deference was noteworthy in the landmark "Propane case" in which the Court's lack of expertise was particularly apparent and resulted, in some measure, in weakening the efficiency defence under s.96 of the Act.

It is interesting to note, and I believe that research would confirm, that the Court has deferred to a Tribunal decision only when the reviewing appellate panel contains a former judicial member of the Tribunal.

Since the Competition Tribunal Act provides the right of appeal to Tribunal decisions to the Federal Court of Appeal, the Panel may wish to consider an amendment thereto that would require an appellate panel to consist of a least one former judicial member of the Tribunal. I believe that such a requirement would enhance the expertise of the Federal Court of Appeal and lead to greater deference to Tribunal decisions within expertise.

If the Panel would find it helpful, I would be please to expand on any of the above remarks.

Sincerely yours,

(signed) Lawrence P. Schwartz, Ph.D.