THE COMPETITION TRIBUNAL 2003-2011 AND BEYOND

Justice Sandra J. Simpson
Federal Court, Ottawa

It is my belief that no one should run a country, a court, a corporation or a tribunal for more than eight years. For this reason, when my second term as the Tribunal's chairperson expires in June 2012, I will not seek a further renewal.

Given this decision, I have been commenting on developments at the Tribunal in the last eight years and on possible reforms. The following points summarize the remarks I have made in speeches over the last year.[1]

Regarding developments to date, I have said:

i. The Tribunal imposes tight case and hearing management. Its pre-hearing scheduling orders and its use of the "chess clock" procedure in hearings ensure that cases are heard in an efficient and predictable manner. This means that the problems which were experienced years ago in *Southam* (delays) and *Superior Propane* (eighty witnesses for the Commissioner) are ancient history and no longer relevant.

ii. The Tribunal's Rules, which were entirely rewritten in 2008, provide the flexibility the Tribunal needs to respond to the requirements of individual cases and parties. Formality has been reduced and evidence-in-chief in hearings have been abolished. This latter change has significantly reduced the length of hearings.

iii. The Tribunal has also reduced the length of its hearings by developing the capability to hold fully electronic hearings both in Ottawa and across the country. At the end of this year, it will move to e-hearings as the norm in all cases.

iv. In urgent cases, the Tribunal has an established a record of rapid response. For example, in *Labatt*, it held a two-day hearing four days after the application was filed and the decision was released one day later.

v. In fully contested cases, Tribunal hearings are held, on average, thirteen months from the date the application is filed and decisions are issued, on average, three months after the conclusion of the hearing.

vi. Criticisms of the Tribunal members' lack of expertise are unjustified. The members have exactly the expertise which was expected of them when the Tribunal was established. In 1986, its creators decided that the lay members would be experienced business people who would bring the necessary expertise and judges would ensure that hearings were conducted fairly.

vii. However, since competition law has become increasingly influenced by economic theory and since parties frequently use industry experts to explain their businesses, the original view of the roles to be played by the Tribunal's members needs to be reassessed. In my opinion, the composition of the Tribunal should be altered as new appointments are made so that its members will be economists and judges with commercial backgrounds.

viii. The Tribunal has not had enough work to keep its members and staff engaged. In my view, its jurisdiction should be expanded to include the following:

   a. Single damages for parties in private actions;
   b. Private actions for abuse of dominance with leave (it should be noted that the Tribunal has exercised its power to grant leave to private parties responsibly);
   c. A reference power for parties in negotiations with the Commissioner;
   d. The approval of consent agreements by a judge alone - with written comments from but no interventions by affected parties. This will ensure that the Commissioner has a defensible theory of harm to support his or her settlements.

Regarding future developments, I have said:

i. In response to the suggestion that other models for the adjudication of civil competition law cases be considered, it is my view that the present model – with the revised membership described above – is the preferable model. The separation of adjudication from enforcement that we now enjoy avoids the perception of bias which has been the FTC experience.

ii. The priority of assignments between the Federal Court and the Competition Tribunal needs to be established. The Tribunal's six judges are appointed on a full-time basis to both the Tribunal and the Federal Court. However when a judge is needed for Tribunal work, he or she usually has previously assigned Federal Court matters. There have been times when the Court has refused to relieve the judges of their Federal Court work and they have either had to perform double duty or decline their Tribunal assignments. This state of affairs is unacceptable and the *Competition Tribunal Act* and perhaps the *Federal Courts Act* need to be amended to show that, when the Chair deems it necessary, Tribunal work takes priority over Federal Court assignments.