TRIALS AND TRIBULATIONS: A QUARTER-CENTURY OF THE COMPETITION TRIBUNAL

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I. Introduction

When Canada's Competition Tribunal (the "Tribunal") was established in 1986,[2] Parliament intended that it "deal with anti-competitive behaviour more effectively" and serve as a "charter for the marketplace."[3] However, lengthy proceedings and the often prohibitive expense and relative uncertainty of litigation have encouraged parties to negotiate with the Commissioner of Competition (the "Commissioner") rather than appear before the Tribunal. Although the Tribunal has not provided the degree of adjudicative oversight of competition law enforcement arguably envisaged by its founders, we suggest that it need not become an historical entity like its relatively short-lived predecessor, the Restrictive Trade Practices Commission (the "Commission"), nor do we suggest that it is "unsalvageable" as others have claimed.[4] Rather, reforms that we propose, in combination with the Commissioner's newfound willingness to challenge cases, have the potential to significantly reinvigorate the Tribunal.

By tracing the origins and early history of the Tribunal, we will highlight the obstacles that over the past quarter-century have prevented the Tribunal from functioning as effectively as some may have envisioned. We will draw a link to the propensity of parties to pursue a privately negotiated solution, which in turn, has resulted in an underdeveloped body of Canadian competition law jurisprudence. We conclude by discussing certain reforms that, if enacted, should enable the Tribunal to assert a greater role in performing its duties pursuant to the *Competition Tribunal Act*.[5]

II. Origins of the Competition Tribunal

Despite becoming the first western industrialized nation to enact antitrust legislation in 1889,[6] Canada did not establish an independent, quasi-judicial agency specializing in competition law matters until 1976.[7] In that year, amendments to the *Combines Investigation Act* led to the creation of the Commission, the predecessor to the Tribunal.

Although some may characterize the Commission as little more than a historical footnote, its legacy, in fact, endures. That legacy stems largely from the fallout of the Supreme Court of Canada's decision in *Hunter v. Southam*.[8] In

that landmark 1984 decision, the Supreme Court considered the Commission's role as an integrated agency responsible for both investigating and adjudicating alleged violations of the *Combines Investigation Act*. Upholding the Alberta Court of Appeal's finding that the *Combines Investigation Act* "was not entirely successful in separating the role of the Director as investigator and prosecutor from that of the Commission as adjudicator," the Supreme Court concluded that the lack of detachment between investigative and adjudicative functions would jeopardize the Commission's neutrality:

> [I]nvesting the Commission or its members with significant investigatory functions has the result of vitiating the ability of a member of the Commission to act in a judicial capacity ... This is not, of course, a matter of impugning the honesty or good faith of the Commission or its members. It is rather a conclusion that the administrative nature of the Commission's investigatory duties (with its quite proper reference points in considerations of public policy and effective enforcement of the Act) ill-accords with the neutrality and detachment necessary to assess whether the evidence reveals that the point has been reached where the interests of the individual must constitutionally give way to those of the state.[9]

The institutional design of Canada's modern competition law regime was heavily influenced by the Supreme Court's decision in *Hunter v. Southam*. Rather than replicate the Commission's integrated structure, for reasons of due process, fairness and to ensure compliance with the Charter, policymakers at the time concluded that adjudicative and investigative functions should be performed by independent bodies.[10] Thus, in passing the *Competition Act*[11] and *Competition Tribunal Act*[12] in 1986, Parliament established a bifurcated institutional regime for administering Canada's competition laws. While the Director of Investigation and Research (and head of the Competition Bureau) was given responsibility for investigating compliance with the *Competition Act*, the Tribunal was entrusted with the performance of adjudicative functions.

III. Early Growing Pains

In theory, the Tribunal was designed to strike an effective balance between due process and administrative efficiency. The *Competition Tribunal Act* stipulates that "[a]ll proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit."[13] In practice, however, "considerations of fairness" and respect for normative process took precedence over informality. As a result, Tribunal

proceedings were not conducted as expeditiously as likely had been foreseen by Parliament.

(a) *Southam*

The lengthy nature of Tribunal proceedings quickly became evident in the *Southam*[14] decision where the application was accepted at the Tribunal in November 1990 but a final order on divestiture was not rendered until March 1993. The Tribunal heard from 46 witnesses and received 520 documents into evidence, a sizeable number in an era pre-dating e-discovery.[15] The lengthy and vigorously contested proceedings at the Tribunal were merely the opening salvo in a protracted round of litigation. Appeals of the Tribunal's decision were not exhausted until 1997.

Southam provided a very visible early demonstration and served as a stark warning of the obstacles that parties were likely to encounter at the Tribunal. In addition to extensive pre-hearing discovery proceedings, parties would need to prepare for a lengthy and litigious hearing. Concerns stemming from the likely duration of any Tribunal proceeding were compounded by the lack of finality of the Tribunal's decision. Indeed, *Southam* demonstrated that parties could face the prospect of several years of judicial appeals following the already lengthy Tribunal process.[16]

(b) Consent Orders

One of the largest roles played by the Tribunal in its early years was its involvement in reviewing consent orders. Prior to 2002, in reviewing a proposed negotiated remedy between the Commissioner and the parties whose conduct was at issue, the Tribunal would undertake a substantive approval process wherein it would examine an agreed upon summary of the evidence and decide whether or not the proposed consent order would eliminate concerns regarding the anticompetitive effect of the practice at issue. While the Tribunal did bring oversight to the negotiated remedy process, concerns arose with respect to the Tribunal's degree of activism and the resulting costs and uncertainty associated with defending consent orders before the Tribunal.

The Tribunal declined to approve the proposed consent order in its very first proceeding in the *Palm Dairies* case.[17] In its decision, the Tribunal held that, "once the Director has invoked the adjudicative powers of the Tribunal, the Tribunal has a duty to determine the nature of the anti-competitive conduct and to fashion an order which in its judgment serves the purposes of the Act."[18] Thus, the Tribunal in *Palm Dairies* afforded itself a wide degree of latitude to reject consent orders negotiated between the Commissioner and private parties.

The decision had a chilling impact on applications for consent orders. From the time *Palm Dairies* was decided in 1986 until early 1989, not a single application for a consent order was brought before the Tribunal.[19]

The Tribunal received another opportunity to review a consent order in 1990 in *Imperial Oil*.[20] Notwithstanding the Tribunal's declaration that the Director's proposals should be treated with "deference," the consent order hearing involved several weeks of adversarial proceedings and required the parties to substantially revise the proposed order before it was ultimately approved by the Tribunal. While a number of consent orders were granted by the Tribunal throughout the 1990s, in *Ultramar*,[21] the Tribunal again refused to endorse a draft consent order that had been negotiated between the Commissioner and the parties, the Tribunal not being satisfied that certain behavioural remedies were "sufficiently clear to be enforceable and justifiable in order to provide an effective remedy that meets the objectives of the Act."[22]

The consent order process was again criticized for being time-consuming, costly and unpredictable. In 2002, the Act was amended to allow the Commissioner to file consent agreements with the Tribunal for immediate registration as an order. As a result of this statutory reform, the Tribunal's role in overseeing consent orders was dramatically circumscribed.[23] The Tribunal now acts as little more than a registrar for consent agreements and no draft consent agreements have been set aside by the Tribunal since the 2002 amendments were enacted.[24] The effect of the reforms was to transfer power over the terms of a proposed consent agreement from the Tribunal to the Commissioner, who is now largely unconstrained with respect to remedies fashioned in consent agreements.

(c) Later Tribunal Decisions

Later decisions served to reinforce perceptions that the Tribunal process was costly and highly adversarial. For example, *Superior Propane*[25] involved 48 days of hearings during which the Commissioner called 74 lay witnesses and another 17 expert witnesses.[26] Although the Notice of Application was filed in December 1998, the Tribunal did not release its decision until August of 2000. The decision was subsequently appealed by the Commissioner to the Federal Court of Appeal, which rendered judgment on April 4, 2001. The Commissioner was successful on appeal, however, and the matter was remitted to the Tribunal for re-determination. The Tribunal ruled against the Commissioner exactly one year later, on April 4, 2002, and the Commissioner's further appeal was dismissed by the Federal Court of Appeal on January 31, 2003.

The abuse of dominance case, *Canada Pipe*,[27] followed a similar pattern. The

matter was brought before the Tribunal in October 2002 but it took the Tribunal until February 2005 to conclude that Canada Pipe had not abused its dominant position. As in *Superior Propane*, the Commissioner appealed the Tribunal's decision and in June 2006, the Federal Court of Appeal provided clarification with respect to the abuse of dominance provisions of the Act and referred the matter back to the Tribunal for re-determination. A consent agreement was reached on December 20, 2007, more than five years after Tribunal proceedings commenced.[28]

IV. Synopsis of the Tribunal's Process Issues

The Tribunal's record in adjudicating *Southam*, *Superior Propane*, *Canada Pipe*, and various other matters allows us to draw broader conclusions regarding process issues that have become evident over the past twenty-five years. Below, we discuss these various issues and explain how parties have responded by negotiating with the Commissioner in order to avoid Tribunal proceedings.

(a) Timeliness

The efficiency of the Tribunal has been impaired by the fact that, historically, its proceedings have been governed by many of the features characteristic of traditional civil litigation.[29] The highly adversarial proceedings are not conducive to the rapid resolution of disputes, especially in merger cases. Indeed, contested Tribunal proceedings between 1996 and 2007 lasted an average of 15 months.[30] In fully contested merger cases, the average duration from notice of application to the Tribunal's decision (including decisions on remedies) is almost 20 months.[31] Both of these figures exclude the time used by the Bureau to conduct an initial inquiry into the matter.

The Tribunal is not blind to the importance of timely deliberations and has itself issued a prescient warning on one occasion:

> The Tribunal can take notice of the fact that merger negotiations are by their nature frequently of a transitory nature requiring relatively quick decisions and action. If the Tribunal is to be relevant to the control of mergers, as Parliament obviously thought it should be, it must be prepared and able to act as quickly as possible in reaching a decision on the permissibility of any given merger. A prolongation of Tribunal proceedings, by the multiplication of witnesses and of cross-examination through the participation of interveners with such rights, can only serve to delay decision-making by the Tribunal and thus discourage resort to it.[32]

Arguably, however, the prolonged nature of Tribunal proceedings has indeed

acted as a significant deterrent to the use of the Tribunal. If the Tribunal is to play the meaningful role in competition matters that Parliament envisioned in 1986, the Tribunal must strike a more effective balance between due process and competing considerations related to expediency and timely decision-making.

(b) Expense of Litigating at the Tribunal

Tribunal proceedings are typically costly endeavours because of their long durations and due to the complexity of the subject matter. Private parties must carefully weigh the value of any negotiated solution against not only the value of the likely Tribunal outcome, but also the costs associated with achieving that litigated outcome. Given that decisions of the Tribunal are also frequently appealed, the costs associated with litigation are often sufficient to tip the scales in favour of a negotiated outcome.

Concerns with respect to costs are not the exclusive domain of private parties. The Bureau's budget limitations also have constrained the Commissioner's ability to pursue cases at the Tribunal.[33] One study conducted in 1999 concluded that the average cost incurred by the Bureau for contested proceedings at the Tribunal exceeded $1 million.[34] This figure would be substantially higher today due to inflation in the cost of providing legal services. Moreover, since the study was limited to a sample of refusal to deal and tied selling cases, it likely understated the costs for the Bureau in litigating more complex merger or abuse of dominance cases before the Tribunal.

Thus, while private parties may view a negotiated outcome more favourably in light of the financial burdens associated with pursuing a matter before the Tribunal, the Commissioner, for budgetary reasons, also may be predisposed to favour negotiated outcomes and the cost certainty which a negotiated solution entails.[35]

(c) Transparency of the Tribunal's Proceedings

For reputational or competitive reasons, parties that are alleged to have violated the *Competition Act* are typically not eager to submit to a transparent, public Tribunal proceeding. Mergers, being both time-sensitive and highly confidential, are particularly problematic in this respect. As one of the authors previously noted, "litigating a merger case is simply not the same as litigating past conduct."[36] Parties are reluctant to enter a forum where they will be forced to disclose business plans and other competitively sensitive information. The confidentiality that accompanies a negotiated outcome is yet another factor contributing to the relative appeal of negotiation versus public proceedings before the Tribunal.

(d) Lack of Precedent Increases Litigation Uncertainty

In the absence of a critical mass of case law, legal counsel are unable to assess the risks associated with challenging the Commissioner before the Tribunal with any reasonable degree of precision. Risk adverse clients are therefore more likely to accede to a negotiated solution even if they have a strong case and a reasonable likelihood of being vindicated at the Tribunal.[37]

The lack of Tribunal precedent is, of course, a reflection of the Tribunal's light workload. There is a feedback effect that compounds the problem in that the Tribunal's inactivity also creates the risk that the Tribunal may become overly engaged in a particular matter. As has been explained, "the Tribunal has not, since its inception in 1986, had enough of a caseload to fully occupy the time of its members; this may explain in part why Tribunal members tend to find particular cases exceptionally interesting and probe them more actively than, for instance, an over-worked trial judge."[38] Thus, the Tribunal's relative inactivity may serve to exacerbate issues related to the timeliness and expense of Tribunal proceedings, which in turn, creates a further disincentive to bring cases before the Tribunal.

(e) Lack of Finality of Tribunal Decisions

A great number of the Tribunal's decisions have been appealed to the Federal Court of Appeal. The high rate of appeal of Tribunal decisions discourages resort to the Tribunal by contributing to the length, cost and uncertainty of litigation.

Parties may be encouraged to appeal decisions of the Tribunal in light of the historic lack of deference exhibited by the Federal Court of Appeal when considering decisions of the Tribunal. The Federal Court of Appeal has adopted the "correctness" standard for questions of law under review in appeals of Tribunal decisions.[39] This non-deferential standard has provided the Federal Court of Appeal with significant leeway to overturn Tribunal decisions.[40]

The high rate of appeal and lack of finality of Tribunal decisions increases the risks associated with pursuing a litigated outcome and serves as a contributing factor to the Tribunal's historical inactivity.

V. The Issue of a Tribunal "Marginalized"?

For the reasons discussed above, parties, especially in merger cases, generally prefer to negotiate with the Commissioner rather than submit to a lengthy and comparatively uncertain Tribunal process. As a reflection of the unwillingness of parties to take disputes to the Tribunal, one study found that 99% of all mergers notified to the Bureau are resolved without the involvement of the Tribunal.[41]

Indeed, one can now conclude that the Tribunal has been used sparingly over the past quarter-century. The Tribunal has fully determined only five merger[42] and five abuse of dominance[43] cases in its twenty-five year history.

The unwillingness of parties to litigate at the Tribunal, along with the 2002 amendments curtailing the Tribunal's role in overseeing consent orders, have limited the Tribunal's role in adjudicating competition law matters. Conversely, the Commissioner's power has increased in relative terms as parties often perceive the Bureau as being the final arbiter of their case.

This shift in power and the Tribunal's relative inactivity over the past twenty-five years has not gone unnoticed. Commentators have remarked that "the Tribunal has become a minor institutional player in the competition policy process relative to the Bureau."[44] In a similar vein, others have argued that the Tribunal has evolved into a "bit player in competition matters in Canada"[45] and has become "dysfunctional" and "marginalized."[46]

Trebilcock and Iacobucci have argued that the Bureau has become a *de facto* integrated agency due to the substitution of the Bureau for the Tribunal over the past twenty-five years:

> [C]osts, delays, and uncertainty involved in Tribunal proceedings have induced firms and the Commissioner to substitute the locus of decision-making, even in difficult cases, away from the Tribunal and towards the Bureau where process values, such as transparency, accountability, and reasoned public decision-making, are much diminished. This substitution effect has turned the Bureau into a *de facto* integrated competition agency, performing investigative, enforcement, and adjudicative functions.[47]

While it is clear that, historically, the Tribunal has played a lesser role in the administration of the *Competition Act* than Parliament originally intended, there is now some reason for optimism that we are approaching a turning point in the Tribunal's history. The Tribunal received several high-profile applications in 2011 and its docket is now brimming with cases that have the potential to generate a meaningful renaissance of the Tribunal's jurisprudence. If the cases currently before the Tribunal do not settle, in addition to the Tribunal's recent decision in *CCS/Complete*,[48] important decisions can be expected in 2012/2013 in the realm of joint venture arrangements,[49] price maintenance,[50] and abuse of dominance.[51] These cases have the potential to deliver advances in the Tribunal's jurisprudence to a degree that would be largely unprecedented in the Tribunal's history.

Key to this development is the Commissioner's willingness to bring, in her

words, "responsible cases" in areas where it is "important to establish and clarify applicable ground rules."[52] The Commissioner has stated quite forcefully: "We will not be afraid to litigate ... win or lose, we advance the law, which is a particularly valuable outcome in areas that remain untested."[53]

The Commissioner's approach could go a long way towards revitalizing the Tribunal. Her decision, in particular, to challenge the $6.1 million merger between CCS Corporation and Complete Environment Inc. caught observers by surprise. As the first merger in six years challenged at the Tribunal, the case serves as a demonstration of the Commissioner's determination to contest potentially anti-competitive behaviour, regardless of the size of the parties or the scale of the transaction. The outcome of the Commissioner's challenges in other pending cases[54] will no doubt be watched with interest.

VI. Proposals for Reforming the Tribunal

Although the Commissioner's recent willingness to bring cases before the Tribunal is laudable, reform is needed to ensure that the Tribunal also becomes a more viable option for private litigants. Sustaining the Tribunal with a sufficient volume of cases over the long run will require more than an assertive Commissioner; rather, reforms must make the Tribunal more open and appealing to private parties.

Below we discuss several reform proposals designed to reassert the Tribunal in its role as final adjudicator of competition law disputes. While some observers believe that the role of the Tribunal should be amended in favour of a single, integrated agency,[55] we believe that there are strong justifications for preserving Canada's bifurcated model, provided that reforms can breath new life into the Tribunal and allow it to perform the oversight function that Parliament originally intended.

The institutional detachment between the Tribunal and the Bureau ought, in theory at least, to enhance credibility in the Act being objectively administered. As the Supreme Court recognized in *Hunter v. Southam*, the bifurcated model addresses concerns with respect to bias – or at least the appearance of bias – that arise where a single agency acts as investigator and adjudicator. Accountability would not be well served by having the Bureau serve as the judge, jury and executioner of competition law matters in Canada.

Under the current system, arguably in many cases, there is no objective check on the Commissioner. Since so few parties are willing to challenge the Commissioner before the Tribunal, parties usually either negotiate with the Bureau or cease the conduct or merger. As Houston and Pratt commented, "Businesses should not be in the position of having to either satisfy the Bureau or abandon

their business plans ... The Bureau as enforcer and the Tribunal as adjudicator is a good model, as long as the Tribunal actually has an adjudicative role."[56]

In addition, the paucity of Tribunal decisions means that parties and their counsel must turn to a wide array of interpretive bulletins, guidelines, backgrounders and speeches released by the Bureau in order seek guidance on the line between permissible and impermissible conduct and to shed light on the manner in which the law will be interpreted. Although these materials are highly useful to counsel, they are not substitutes for precedent and jurisprudence. Reliance on Bureau enforcement guidelines "runs the risk that such publications may be treated in a quasi-legislative and binding manner."[57] In the absence of Tribunal jurisprudence, arguably too much reliance is placed on the Bureau's non-binding interpretation of the law.

Thus, it may be beneficial to have the Tribunal provide objective oversight of the Bureau and for it to be given the opportunity to develop an increased body of competition law jurisprudence. With those aims in mind, below we discuss potential reforms designed to ensure that the Tribunal will serve a vital and integral function in adjudicating competition law disputes over the coming years:

- ***Amend the Rules to improve timeliness.*** The *Competition Tribunal Rules*[58] should promote efficient and expeditious proceedings at every opportunity. On May 14, 2008, the Rules were amended to introduce timing, case management, pre-hearing discovery, informal motion procedures, and other procedures designed to make Tribunal hearings more efficient. These reforms represent a significant improvement in streamlining and expediting the Tribunal process. Nonetheless, recent experience suggests that there is still room to improve upon the timeliness of Tribunal proceedings.[59]

  One possible solution that would encourage parties to litigate before the Tribunal would be to impose mandatory time limits on the Tribunal. Legislated time limits that have been proposed include a requirement for the Tribunal to deliver a decision no later than four[60] or six[61] months from the date on which the application was filed, including hearing time. While we are not suggesting that four or six months necessarily represents the correct length of time, a statutory time limit of some duration may be worth considering. While such a requirement would dramatically change current practices with respect to, for example, the treatment of interveners, examination for discovery and the filing of expert evidence, mandatory time limits would increase the attractiveness of the Tribunal as a forum, thereby allowing it to fulfill its intended purpose. Although legislated time limits might seem drastic, the proposal is not without precedent. Legislated time

limits are already imposed on the Canadian International Trade Tribunal in trade remedy cases and on the European Commission in cases involving merger review.

- ***Proposals to increase the finality of Tribunal decisions.*** The Tribunal would become a more attractive venue if there was a reasonable certainty that its decisions would impart a final and binding verdict on the parties. All else being equal, a party is more likely to accommodate the Commissioner in a negotiated outcome and, conversely, is less likely to challenge the Commissioner at the Tribunal, if there is a reasonable prospect that the Tribunal's decision will involve a lengthy and costly re-assessment at the Federal Court of Appeal.[62]

  Notwithstanding that the Tribunal is a specialized quasi-judicial body, the Federal Court of Appeal typically adopts a standard of review based on "correctness" when hearing appeals of Tribunal decisions. This non-deferential standard encourages parties to press their case at the Federal Court of Appeal. The authors propose two potential avenues for reducing the incidence of appeal of Tribunal decisions:

  i) ***Include a privative clause in the Competition Tribunal Act.*** Following the Supreme Court of Canada's decision in *Dunsmuir*,[63] administrative bodies such as the Tribunal are now afforded deference on questions of law where the administrative body has a high degree of specialized expertise, and where the question of law falls within the specialized body's area of expertise and is not a question of central importance to the legal system as a whole.[64] Although *Dunsmuir* may be sufficient to ensure that Tribunal decisions will be afforded greater deference in future appeals, the introduction of a privative clause would further increase the likelihood that the Federal Court of Appeal would adopt a reasonableness standard rather than a standard based on correctness on appeals from the Tribunal.[65] Appeals of Tribunal decisions would occur less frequently if the Federal Court of Appeal reviewed the Tribunal's decisions on a more deferential basis. In turn, this would render the Tribunal a more attractive forum in which parties could conclusively resolve their disputes; and

  ii) ***Ensure that Tribunal members are experts in the field.*** As Trebilcock and Iacobucci have observed, "[t]he prominent role played by the federal court trial division judges on the Tribunal ... has encouraged federal appellate judges to regard the Tribunal as little more than a regular court of first instance. The appellate judges feel relatively unconstrained (non-deferential) in overruling its decisions and substituting

their own (non-expert) judgments on the merits."[66] While the Supreme Court has determined that the Tribunal is an expert body on two occasions,[67] in *Superior Propane*,[68] Evans J.A of the Federal Court of Appeal examined the composition of the Tribunal and noted that the *Competition Tribunal Act* does not prescribe qualifications for lay members. Thus, to ensure that Tribunal decisions are reviewed on a more deferential basis, the Tribunal should be staffed with members with specialized expertise in economics. In that regard, the former chairperson of the Tribunal has recommended that the composition of the Tribunal be altered as new appointments are made so that its members would exclusively be comprised of economists and judges with commercial backgrounds.[69] Prescribing Tribunal member qualifications directly in the *Competition Tribunal Act* would also bring the Tribunal into line with the demonstrated intention of Parliament to create an expert body and could result in greater deference being afforded to Tribunal decisions.[70]

- ***Expanded reference powers.*** The Commissioner could make greater use of section 124.2 of the Act which allows her to bring discrete issues (such as questions of law) to the Tribunal. Moreover, legislative amendments could be considered to give greater scope to private parties to bring summary references before the Tribunal on discrete issues.[71] Discrete issues that might be suitable as Tribunal reference applications could include, for example, questions around market definition or the sufficiency of a particular merger remedy proposal.

- ***Tribunal oversight of SIR process.*** Parties that wish to contest either the scope of a supplementary information request ("SIR") or an assertion by the Bureau that the party's response to an SIR is incomplete must make use of an administrative appeal procedure that is internal to the Bureau. During the consultation process for the Bureau's draft Merger Review Process Guidelines, the American Bar Association recommended that the Bureau consider designating a third party, such as a retired Tribunal member, to rule on any appeals concerning the scope of SIRs.[72] Similarly, the Canadian Bar Association noted that in the absence of a mechanism for judicial review of SIRs, some type of oversight is necessary to ensure procedural fairness.[73] While procedural fairness would be enhanced by having a retired Tribunal member oversee the SIR process, consideration could also be given to whether the Tribunal could play a constructive role in resolving such disputes.

VII. Conclusion

Over the past twenty-five years, the Tribunal has been generally less active than some may have foreseen in the development of Canadian competition law due, in part, to statutory reforms and also because the Tribunal's process led parties to instead negotiate more certain and timely resolutions with the Commissioner. The Tribunal's relative inactivity has created an imbalance between the Commissioner and private parties insofar as the Commissioner has become the *de facto* final arbiter of competition law disputes in many cases. Correcting this imbalance through reforms intended to make the Tribunal a viable forum for litigating time-sensitive matters would ensure that "process fairness is maintained while the Commissioner's objectives in enforcing the competition law are fulfilled effectively and on an efficient and timely basis."[74]

A stronger Tribunal also will lead to the development of a greater body of case law interpreting the *Competition Act*. We believe that the Tribunal should have the opportunity going forward to develop an expanded jurisprudence as more cases are brought before it.

ENDNOTES

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[2] *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp.).

[3] House of Commons Debates, Official Report, 1st session, 33rd Parliament, Vol 8, at 11954-11955.

[4] Iacobucci & Trebilcock interviewed all former Commissioners of Competition, many of whom believe that the Tribunal, in its current form, is "unsalvageable." See: Edward Iacobucci and Michael Trebilcock, "Critical Reflections on the Institutional Design of Canadian Competition Policy," (2011) 24 Can Comp L Rev 43.

[5] RSC 1985, c 19.

[6] *An Act for the Prevention and Suppression of Combination formed in Restraint of Trade*, SC 52 Vic, c 41 (1889).

[7] In contrast, the United States established the Federal Trade Commission in 1914. See: Marc Winerman, "The Origins of the FTC: Concentration, Cooperation, Control and Competition," 71 Antitrust LJ 1 (2003).

[8] [1984] 2 SCR 145.

[9] *Hunter v. Southam*, *supra* note 8, at 164.

[10] Calvin S. Goldman & Navin Joneja, "The Institutional Design of Canadian Competition Law: The Evolving Role of the Commissioner," (2010) 41 Loy U Chi LJ at 537.

[11] RSC 1985, c C-34.

[12] *Supra* note 5.
[13] *Ibid.*, s. 9(2).
[14] *Canada (Director of Investigation and Research) v. Southam* (1992), 43 CPR (3d) 161 (main decision); and (1993), 47 CPR (3d) 240 (remedy decision).
[15] Susan M. Hutton & Karen Hogan, "Justice Must be Seen to be Done: Can the Transparency and Fairness of Competition Bureau Decision-Making Be Improved? Should We Introduce Statutory Time Limits on Tribunal Cases?," (Paper delivered at the CBA National Competition Law Conference at Gatineau, Quebec, October 12, 2007), at 8.
[16] See also: Calvin S. Goldman & John D. Bodrug, "The Hillsdown and Southam Decisions: The First Round of Contested Mergers Under the Competition Act," (1993) 38 McGill LJ 724 at 726: "[t]he extent of the entire litigation process in these first two contested cases, coupled with the length of the hearings themselves, raises significant questions about the willingness of parties to embark on contested proceedings in any situation where there is sensitivity to time or expense."
[17] *Dir. of Investigation & Research v. Palm Dairies Ltd.*, [1986] 12 CPR (3d) 540.
[18] *Ibid.* at 8 [emphasis in the original].
[19] Instead of pursuing formal consent orders, parties instead adopted a "fix-it first" approach or entered into undertakings with the Director. See: Calvin S. Goldman, "The Merger Resolution Process Under the Competition Act: A Critical Time in its Development," (1990) 22 Ottawa L Rev 1 at 20 where it was noted that the "consistent reaction of counsel" at the time "was one of considerable reluctance to embark upon consent order proceedings following the uncertainty that the *Palm Dairies* decision generated."
[20] *Canada (Director of Investigation & Research) v. Imperial Oil Ltd.*, [1990] 31 CPR (3d) 277.
[21] *Commissioner of Competition v. Ultramar Ltd.*, [2000] 6 CPR 50.
[22] *Ibid.* at 50.
[23] Note, however, that the Tribunal retains a role with respect to applications to rescind or vary consent agreements if the circumstances that led to the agreement changed.
[24] Commenting on the 2002 amendments, the Tribunal has held that, "[u]nder the current scheme, the Tribunal sees none of the evidence supporting the Commissioner's decision to deny a merger without a consent agreement and is not to engage even in the most cursory assessment of the proposed remedial measure. The Tribunal must register the consent agreement immediately, whereupon it 'has the same force and effect…as if it were an order of the Tribunal' even though it is not, strictly speaking, such an order." *RONA Inc. v. Commissioner of Competition*, 2005 Comp Trib 18 at 74.
[25] *Commissioner of Competition v. Superior Propane*, (2000), 7 CPR (4th) 385 (Comp Trib); first reviewed by the court at (2001), 199 DLR (4th) 130 (FCA); re-determined by the Tribunal at *Canada (Commissioner of Competition) v. Superior Propane* (2002), 18 CPR (4th) 417 (Comp Trib); and affirmed at (2003) 23. CPR (4th) 316 (FCA).
[26] Hutton & Hogan, *supra* note 15 at 8.
[27] *Canada (Commissioner of Competition) v. Canada Pipe Company Ltd.* (2005), 40 CPR (4th) 453 (Comp Trib); appealed at 2006 FCA 233.
[28] Competition Bureau, News Release, "Competition Bureau Reaches Agreement

with Canada Pipe Company Ltd.," December 20, 2007, online: Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02548.html>. Consent agreement registered as CT-2002-006.

[29] Trebilcock and Iacobucci have commented on the "judicialization" of the Tribunal's proceedings. Hutton and Hogan have criticized the Tribunal for adopting "many court-like practices," while Goldman and Bodrug have observed that the Tribunal's formalized procedures require parties to take "extensive and time-consuming litigious steps." See: Michael J. Trebilcock & Edward M. Iacobucci, "Designing Competition Law Institutions: Values, Structure, and Mandate," (2010), 41 Loy U Chi LJ at 463; Hutton & Hogan, *supra* note 15 at 6; and Goldman & Bodrug, *supra* note 16 at 751.

[30] Hutton & Hogan, *supra* note 15 at 6.

[31] Trebilcock & Iacobucci, *supra* note 29 at 463.

[32] *Director of Investigation and Research v. Air Canada* (1988), 23 CPR (3d) 160 at 174-75.

[33] Hutton & Hogan, *supra* note15 at 7.

[34] Richard M. Wise & Sheri-Anne Doyle, *Study of the Historical Cost of Proceedings before the Competition Tribunal* (March 26, 1999), at 19 [online: Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01313.html>].

[35] Note in this regard that the federal government's latest budget included cutbacks to the budget for the Competition Bureau. For more detail, see Stefano Berra, "Canada Sheds Regional Offices in Budget Cutbacks," *Global Competition Review*, 25 April 2012. Budget concerns are also not unique to the current era. In 1995, the Commissioner warned that, absent increased funding, "the Bureau's ability to continue to pursue all the cases that we believe are significant will be compromised." George N. Addy, "Address to the Third Annual Competition Law Conference," *Canadian Bar Association*, (29 September 1995).

[36] Goldman, *supra* note 19 at 11.

[37] Houston & Pratt note that, "Parties in potential cases before the Tribunal have been dissuaded from having their cases determined by the Tribunal, partly because the dearth of Tribunal jurisprudence increases the uncertainty of outcome and the attractiveness of a more certain, negotiated solution." Donald B. Houston & Jeanne L. Pratt, "The Marginalization of the Competition Tribunal," (Paper delivered at the CBA National Competition Law Conference at Gatineau, Quebec, November 2005) at 6.

[38] Goldman and Joneja, *supra* note 10 at 563. This may apply to lay members but likely not to judicial members of the Tribunal as the latter are sitting judges with busy schedules. Due to their pre-existing obligations on Federal Court matters, reports suggest that it is often difficult to assign Federal Court judges to Tribunal cases.

[39] See for example *Commissioner of Competition v. Superior Propane* (2001), 199 DLR (4th) 130 (FCA) at 59-92; *Canada (Commissioner of Competition) v. Canada Pipe Company Ltd.*, *supra* note 27 at 34; and *Canada (Director of Investigation and Research) v. Southam Inc.* (1995), 63 CPR (3d) 1 (FCA).

[40] The decisions in *Superior Propane* and *Canada Pipe*, in particular, have provided ammunition to legal commentators who claim that the Federal Court of Appeal has too readily second-guessed the Tribunal and has not been suitably deferential to the Tribunal's specialized expertise. See for example, Andrew Roman & Andrew Valentine, "Measuring Competition Relatively: The Federal Court's Decision in

Canada Pipe," (1 January 2007) 1 Antitrust Report 14 at 10-11 where the authors conclude that given the Tribunal's superior economic expertise, the Tribunal should have been permitted "wide latitude to use, or to refrain from using various alternative techniques of economic analysis which would aid it in making this complex business judgment."

[41] Michael J. Trebilcock & Edward M. Iacobucci, "Designing Competition Law Institutions," 25 *World Competition* 361 (2002) at p. 374.

[42] *Canada (Director of Investigation and Research) v. Hillsdown Holdings Ltd.* (1992), 41 CPR (3d) 289; *Canada (Director of Investigation and Research) v. Southam* (1992), 43 CPR (3d) 161; *Canada (Commissioner of Competition) v. Canadian Waste Holdings Inc.* (2001) 11 CPR (4d) 425; *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2002), 18 CPR (4th) 417; *Canada (Commissioner of Competition) v. CCS Corporation* (2012) CT-2011-002.

[43] *Canada (Director of Investigation and Research) v. NutraSweet*, (1990), 32 CPR (3d) 1; *Canada (Director of Investigation and Research)* v. *Laidlaw Waste Systems* (1992), 40 CPR (3d) 289; *Canada (Director of Investigation and Research)* v. *D & B Companies of Canada* (1995), 64 CPR (3d) 216; *Canada (Director of Investigation and Research)* v. *Tele-Direct* (1995), 64 CPR (3d) 216; *Canada (Commissioner of Competition) v. Canada Pipe,* [2005] CCTD No 3.

[44] A.N. Campbell, H.N. Janisch, & M.J. Trebilcock, "Rethinking the Role of the Competition Tribunal," (1997) 76 Can Bar Rev 297 at 299.

[45] Houston & Pratt, *supra* note 37 at 2.

[46] Trebilcock & Iacobucci, *supra* note 41 at 376.

[47] Trebilcock & Iacobucci, *supra* note 29 at 462.

[48] *Supra* note 42.

[49] *The Commissioner of Competition v. Air Canada, United Continental Holdings Inc. United Airlines Inc. and Continental Airlines Inc.*, CT-2011-004.

[50] *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated et al.*, CT-2010-010.

[51] *The Commissioner of Competition v. The Toronto Real Estate Board,* CT-2011-003.

[52] Remarks by Melanie L. Aitken, Commissioner of Competition to the Economic Club of Canada, Toronto, Ontario (4 May 2010), online: Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03246.html>.

[53] Remarks by Melanie L. Aitken, Commissioner of Competition to the 2010 Competition Law and Policy Conference, Cambridge, Ontario (3 February 2010), online: Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03205.html>.

[54] Pending cases include *Visa/Mastercard*, *Air Canada/United* and the *Toronto Real Estate Board.*

[55] Iacobucci & Trebilcock, *supra* note 4.

[56] Houston & Pratt, *supra* note 37 at 7.

[57] Goldman & Joneja, *supra* note 10 at 563. For an overview of the Competition Bureau's recent efforts in issuing new guidance materials, see: Remarks by Melanie L. Aitken, Keynote Speech at the Canadian Bar Association 2011 Fall Conference (6 October 2011), transcript available online: Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03424.html>.

[58] SOR/2008-141.
[59] Some delays may have been caused by the conflicting duties of the Tribunal's judges. Judges that are assigned a case at the Tribunal often have previously assigned Federal Court matters. According to Justice Sandra J. Simpson, there have been occasions when the Federal Court has refused to relieve judges and they have been forced to perform double duty at the Federal Court and the Tribunal. In order to avoid these types of bottlenecks, Justice Simpson recommends that the Chair of the Tribunal be given a veto so that judges can be pulled from Federal Court assignments for Tribunal work when necessary. See: Justice Sandra J. Simpson, "The Competition Tribunal 2003-2011 and Beyond," (2011), 24 Can Comp L Rev 50.
[60] Calvin S. Goldman, Q.C., Brian A. Facey & Mark Katz, "Mergers, the Information Economy and the New Millennium: A 'Modest Proposal' to Reform the Merger Review Process in Canada." (Paper delivered at the Canadian Bar Association, Competition Law Section, Annual Conference (21 September 2000)).
[61] Hutton & Hogan, *supra* note 15 at 22.
[62] We acknowledge that, to some degree, appeals of competition law matters are inevitable due to the high stakes of many cases. Furthermore, since the case law is so limited, cases that do proceed to litigation are often cases of first instance which may be ripe for appeal.
[63] *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190.
[64] William McNamara & Kevin Ackhurst, "Notes on Deference and the Competition Tribunal," Paper presented at the Canadian Bar Association Competition Law Spring Forum: Recent Developments In Civil Matters Under Canadian Competition Law (May 2009).
[65] The *Competition Tribunal Act* provides for a broad right of appeal of Tribunal decisions. Pursuant to s. 13(1), there is a right of appeal from any decision of the Tribunal "as if it were a judgment of the Federal Court." The only limitation on the scope of this right is for appeals of pure questions of fact which, pursuant to s. 13(2), require leave of the Federal Court of Appeal.
[66] Trebilcock & Iacobucci, *supra* note 29 at 462-463.
[67] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748 and *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 SCR 394.
[68] *Commissioner of Competition v. Superior Propane*, (2001), 199 DLR (4th) 130 (FCA) at 73.
[69] Justice Sandra J. Simpson, *supra* note 59 at 49.
[70] Currently, the *Competition Tribunal Act* merely prescribes at s. 3(3) that the Minister of Industry must receive recommendations regarding lay members from an advisory council comprised of members "knowledgeable in economics, industry, commerce or public affairs."
[71] See: Houston & Pratt, *supra* note 37 at p. 8. This proposed reform has also been endorsed by the former Chairperson of the Tribunal, Justice Sandra J. Simpson, *supra* note 59 at 49.
[72] Responses to the Consultation on the Draft Enforcement Guidelines on the Revised Merger Review Process, Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the Competition Bureau (Canada), (May 2009), online: Competition Bureau <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03106.html>.

[73] Letter from John D. Bodrug, on behalf of the National Competition Law Section of the Canadian Bar Association, to Ron Parker, Senior Assistant Deputy Minister, Industry Canada (February 3, 2009), online: Competition Bureau <www.cba.org/CBA/submissions/pdf/09-04-eng.pdf>.

[74] Goldman & Joneja, *supra* note 10 at 569.