INSTITUTIONAL DESIGN AND THE ADMINISTRATION OF CANADIAN COMPETITION LAW: MODERNIZING THE COMPETITION TRIBUNAL

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With the federal government's consultation process to modernize Canadian competition law well underway, the time has come to revisit the structure and function of the Competition Tribunal. In recent years, the Competition Tribunal has faced criticism for lengthy decision-making timelines and an overly formal approach to resolving disputes. This paper examines certain other Canadian tribunals and foreign competition tribunals to gain insight into how other specialized decision-making bodies have been designed in order to fulfill their unique mandates. We then explore calls for reforming the Competition Tribunal championed by professors and practitioners alike before concluding with a list of four priorities to consider for Competition Tribunal reform. In accepting these four proposals, the federal government could ensure that the Competition Tribunal provides Canadians with increased access to justice through the efficient and effective resolution of disputes under the Competition Act.

Le processus de consultation du gouvernement fédéral visant à moderniser le droit de la concurrence au Canada va bon train, et le moment est venu de revoir la structure et le fonctionnement du Tribunal de la concurrence. Ces dernières années, le Tribunal a été la cible de critiques pour ses interminables délais décisionnels et son processus de résolution des litiges jugé trop peu flexible. Les auteurs de cet article jettent un regard sur d'autres tribunaux du droit de la concurrence, au Canada et à l'étranger, pour voir comment les autres instances décisionnelles spécialisées ont été structurées en vue de remplir leur mandat particulier. Vient ensuite un examen des appels à la réforme du Tribunal de la concurrence, mise de l'avant par professeurs, professeures, praticiens et praticiennes et praticiens. Ils concluent cet article par une liste des quatre priorités qui devraient présider à cette réforme. En acceptant ces quatre propositions, Ottawa pourra garantir que le Tribunal assure à la population canadienne un accès amélioré à la justice grâce à un processus efficace de résolution des litiges sous le régime de la Loi sur la concurrence.

Introduction

In February 2022, the Minister of Innovation, Science and Industry announced his intention to undertake a review of the *Competition Act*, beginning with immediate, targeted improvements and followed by further consultations to consider broader changes. The Government of

Canada completed the first stage of targeted amendments in June 2022, and in November 2022 it launched a Consultation on the Future of Competition Policy in Canada (the "**Consultation**").[2] The first stage of the Consultation was completed on March 31, 2023, and the Government is now considering a broad range of proposals for reform, including with respect to the function and role of the Competition Tribunal (the "**Tribunal**"). This process creates an important opportunity to revisit the institutional design of Canadian competition law enforcement agencies, and to ensure that the Tribunal is well-equipped to facilitate access to justice for Canadians.

This paper begins by describing the current structure and certain aspects of the Tribunal's procedure—which has not been significantly altered since the 2002 amendments to the *Competition Act* and *Competition Tribunal Act*.[3] After examining how certain other specialized administrative decision-makers in Canada and around the world are designed to carry out their mandates, we evaluate the merits of various calls for reforming the Tribunal. We conclude that by imposing time limits, altering the composition of members, expanding private access and reworking certain procedural rules, the Tribunal can more effectively and efficiently fulfill its mandate. To ensure that Canadian individuals and businesses are ensured access to justice in competition law matters, the Government of Canada should in particular emphasize reforms tailored to ensure the timeliness of all decisions made by the Tribunal.

Part I: How the Competition Tribunal Currently Works

A) Overview of Canadian Competition Law and the Competition Tribunal's Role

Competition law in Canada is regulated at the federal level by the *Competition Act*, which separates anti-competitive conduct into two types: (i) that which attracts criminal sanctions; and (ii) that which is not illegal, but which is reviewable by the Tribunal and can be subject to civil sanctions in certain circumstances.[4] Matters reviewable by the Tribunal are found at Parts VII.1 and VIII of the *Competition Act* and include certain deceptive marketing practices, restrictive trade practices (*i.e.*, refusals to supply, resale price maintenance, abuse of dominance, exclusive dealing, etc.), certain competitor collaborations and mergers.[5]

The civilly reviewable sections of the *Competition Act* are enforced by three entities: (i) the Competition Bureau (the "**Bureau**") headed by the Commissioner of Competition (the "**Commissioner**"); (ii) the Tribunal; and (iii) the courts. There are three potential stages in the Bureau's

enforcement process: (i) a preliminary examination; (ii) a formal inquiry; and (iii) an application to the Tribunal. At any time during a formal inquiry, the Commissioner may conclude that there are grounds for an order under the *Competition Act* and if such a conclusion is reached, and the parties are unable to negotiate a settlement, the Commissioner will make an application to the Tribunal to litigate the issue. Currently, there are no time limits imposed on the Bureau's investigations, nor on the overall length of Tribunal proceedings.

The Tribunal was established in 1986 by the *Competition Tribunal Act*.[6] The Tribunal has the powers, rights and privileges of a superior court of record. In particular, it has the authority to:

- hear and determine applications relating to the reviewable matters provisions of the *Competition Act* and any related matters;[7]
- hear and determine references of any question of law, mixed law and fact, jurisdiction, practice or procedure in respect of the reviewable matters provisions of the *Competition Act*;
- hear and determine contempt proceedings for breach of a Tribunal order;
- vary or rescind a Tribunal order on request from the Commissioner or a person against whom the order was made;
- grant leave to private parties who wish to bring an application before the Tribunal for remedies in respect of conduct falling under Sections 75 (refusal to supply), 76 (resale price maintenance), 77 (exclusive dealing/tied selling/market restriction) and 79 (abuse of dominance);
- grant leave to intervene to any person affected by a matter before the Tribunal and determine the extent to which the intervener will participate; and
- award costs, including costs against the Commissioner.

Private parties are also able to seek leave from the Tribunal to bring an application for remedies in respect of civilly reviewable conduct falling under Sections 75 (refusal to deal), 76 (price maintenance), 77 (exclusive dealing/tied selling/market restriction) and—since June 2022—78–79 (abuse of dominance) of the *Competition Act*. If granted leave, the private party may negotiate a settlement agreement and have it registered as a consent agreement with the Tribunal that is enforced as if it were an order

of the Tribunal or seek any of the remedies available to the Commissioner under the sections listed above (including the imposition of an administrative monetary penalty, *i.e.*, a fine).

To obtain leave to bring a matter before the Tribunal, private parties must make an application within one year after the practice or conduct that is the subject of the application has ceased. The Tribunal may only grant leave if it has reason to believe that: (i) the applicant's business has been substantially and directly affected (in the case of Sections 75, 77 and 79) or directly affected (in the case of Section 76) by the conduct complained of; and (ii) that the conduct in question could be subject to an order under one of Sections 75, 76, 77 or 79.[8] On an application for leave, the applicant needs to provide "sufficient credible evidence" of what is alleged so that the Tribunal has a "*bona fide* belief" that both required elements for leave are satisfied. In other words, the applicant must establish that their business was directly and substantially affected by the conduct of the respondent and must give evidence that the respondent's practice met all statutory elements of the reviewable practice with respect to which they are seeking leave to apply.[9] If leave to bring a matter before the Tribunal is granted, the notice of application is deemed to be filed as of the date the leave was granted and the respondent must respond within 45 days. The case then proceeds in accordance with the *Competition Tribunal Rules* for contested proceedings.[10] If granted leave, the private party may seek an order prohibiting the anti-competitive conduct at issue and/or ask the Tribunal to issue an administrative monetary penalty (*i.e.*, a fine) against the party engaged in the conduct.[11] Unlike the Commissioner, a private party may not obtain a prescriptive order forcing the respondents to do specific things to restore competition. Private parties cannot recover damages for losses stemming from anti-competitive conduct.[12]

Private applications to the Tribunal are infrequent. In the more than 20 years since private access to the Tribunal has been available in Canada there have only been 28 applications for leave to bring an application under Sections 75, 76 or 77 of the *Competition Act* (and none under Section 79 (abuse of dominance), which has been permitted at the time of writing for one year).[13] Only eight of the 28 applications for leave were granted by the Tribunal and the applications on their merits all either settled before reaching a hearing or were dismissed.[14] Possible reasons for the limited number of private actions in competition cases include private parties facing challenges obtaining leave as well as a lack of incentives due to the fact that they cannot recover damages at the Tribunal for any losses suffered as a result of the practices in question (unless they are alleging a respondent is in breach

of a pre-existing Tribunal order, which breach is a criminal violation and is therefore compensable in damages under section 36 of the *Competition Act*).

The courts are also involved in the enforcement of the civilly reviewable sections of the *Competition Act*—the superior courts of the provinces and the Federal Court share jurisdiction with the Tribunal to adjudicate matters relating to reviewable deceptive marketing practices under the *Competition Act*. In addition, the Federal Court of Appeal (the "**FCA**") hears and determines appeals from decisions of the Tribunal as if they were judgements of the Federal Court.[15]

B) The Composition of the Tribunal

The Tribunal is a specialized adjudicative body intended to combine economic, business and legal expertise for the determination of civil proceedings pursuant to the *Competition Act*. The expertise of the Tribunal was intended to flow from its composition—the Tribunal is made up of no more than six judicial members from the Federal Court and no more than eight lay members appointed by the Governor in Council (both on the recommendation of the Minister of Justice).[16]

Applications before the Tribunal (for matters other than civilly reviewable deceptive marketing cases) are heard by a panel of three to five members, among which there must be at least one judicial member and at least one lay member. Motions and references may be heard by one judicial member.[17] Only judicial members may determine questions of law, while questions of fact or mixed fact and law are to be decided by all members of the panel. The Tribunal also has the power to appoint one or more independent experts to inquire into and report on any question of fact or opinion relevant to an issue in a proceeding.[18]

The Tribunal deals with interlocutory or interim matters and also decides cases on their merits in accordance with the civil standard of proof (*i.e.*, on a balance of probabilities). Decisions of the Tribunal may be appealed to the FCA (as of right from all decisions, whether final, interim or interlocutory as if they were decisions of the Federal Court, however pure questions of fact require leave).[19]

C) Expediency of Litigation at the Tribunal

In contrast with some other administrative tribunals in Canada and elsewhere, there are no overall time limits on proceedings or decisions at the

Tribunal. The *Competition Tribunal Act* requires that proceedings before the Tribunal be "dealt with as informally and expeditiously as the circumstances and considerations of fairness permit".[20] However, in practice, the Tribunal functions like a superior court—it has all the same powers as a superior court with respect to the "attendance, swearing and examination of witnesses, the production and inspection of documents [and] the enforcement of its orders" and has a comprehensive set of procedural rules (the *Competition Tribunal Rules*) which are similar to rules of court, including documentary discovery and examinations for discovery as of right.[21] These formalized procedures result in proceedings at the Tribunal being plagued by similar access to justice issues as the courts.

For example, in *Canada (Commissioner of Competition) v Vancouver Airport Authority*, over two years passed from the date the notice of application was filed at the Tribunal (*i.e.*, the case was commenced) to the first date of the hearing.[22] Similarly, in *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited* ("Parrish & Heimbecker"), over 12 months passed from the date the notice of application was filed at the Tribunal to the first date of the hearing.[23] There is also no limit on how long the Tribunal can take to make its decision and provide reasons, which can be another cause for lengthy delays. For example, again in *Parrish & Heimbecker,* the Tribunal's decision was not released to the parties until nearly 21 months after the end of the hearings and the reasons were not released to the public until two weeks later.[24] The Tribunal is capable of making faster decisions, as it demonstrated in *Rogers-Shaw*, which decision was released just over two weeks after the end of the hearing.[25]

The procedure for matters brought before the Tribunal is set out in the *Practice Direction Regarding Timelines and Scheduling for Proceedings Before the Tribunal* ("**Normal Proceedings PD**").[26] Under the Normal Proceedings PD, the Tribunal considers a period of 10 to 16 months between the filing of the notice of application and the commencement of the hearing on the merits to be reasonable. This timeline is not fixed and "may be varied and extended depending on the particular context, urgency or circumstances of each case".[27] The Tribunal's own scheduling requirements can also lead to an extension of the timeline.[28] When a case proceeds under the Normal Proceedings PD, the Tribunal takes an active role in case management and will schedule a case management conference after the pleadings stage has ended (*i.e.*, after: (1) the notice of application has been served by the applicant; (2) the response has been served by the respondent; and (3) the applicant has served a reply or the 14 day period for serving a reply has expired)—already some nine weeks into the process.[29] This case management conference will

set timelines for pre-hearing procedures and establish a schedule for the hearing (*i.e.*, when it will be held and its length).[30] The Normal Proceedings PD does not institute a timeline for the issuance of decisions by the Tribunal.

In January 2019, the Tribunal issued an additional practice direction to introduce an expedited process for parties to consider adopting depending on the specific circumstances of their particular matter (the *Practice Direction Regarding An Expedited Proceeding Process Before The Tribunal* ("**Expedited Proceedings PD**")).[31] The Expedited Proceedings PD states that a period of five to six months between the filing of a notice of application and the commencement of the hearing on the merits is a reasonable timeline. Where all parties consent, the Tribunal is likely to adopt the expedited process for a case.[32] The Tribunal may also adopt the expedited process even if only one of the parties requests it, where the requesting party satisfies the Tribunal that the expedited process is reasonable and advisable in light of the circumstances of the matter and considerations of fairness.[33]

The Expedited Proceedings PD notes that case management will be further emphasized under the expedited process. Whenever an application proceeds under the expedited process, the Tribunal will convene an opening case management conference within 14 days after the close of the pleadings to finalize the draft scheduling and confidentiality orders. Discovery plans should also be exchanged between parties within seven days after the close of pleadings and should be aimed towards reducing the number of potential disputes with respect to documentary disclosure and examinations for discovery. The Tribunal will also use the opening case management conference to "actively identify certain issues or sub-issues that, if adjudicated and/or otherwise resolved early on, would lead to a more efficient and effective proceeding." Under the Expedited Proceedings PD, the parties are expected to "reasonably cooperate and agree on expediting discovery and pre-hearing steps, as well as the hearing itself, including with respect to documentary discovery, examinations for discovery, and the presentation of evidence in a manner that could streamline the hearing."[34] The Expedited Proceedings PD also lays out a process for dealing with intervenor applications on an expedited basis. Significantly, the Expedited Proceedings PD states that, although the Tribunal is not legally bound by this timeline, the Tribunal will aim to issue its decision within one month after oral argument.

To date, there has not been a proceeding brought entirely under the Expedited Proceedings PD. Most recently, the contested merger case *Rogers-Shaw* was partially brought under the expedited process.[35] In another

contested merger case, *Parrish & Heimbecker*, the Commissioner made a request to adopt an expedited process without the consent of the respondents. The request was denied by the Tribunal because of the respondent's objection that it would result in procedural fairness issues.[36]

Part II: How do Other Administrative Tribunals Compare?

Before exploring proposals to modernize the Tribunal, it is important first to consider how other Canadian administrative tribunals are designed to carry out their respective mandates. In this section, we examine several specialized decision-making bodies in Canada to assess the following design features: (i) composition of the tribunal; (ii) private rights of access; (iii) time limits; and (iv) rules of procedure.

A) Canadian International Trade Tribunal

The Canadian International Trade Tribunal ("**CITT**") is a quasi-judicial body that conducts trade remedy inquiries, federal government procurement inquiries, and customs duties and excise tax appeals for Canadian and international businesses.[37]

The CITT consists of up to seven permanent members, including a Chairperson and Vice-chairperson, appointed by the Governor in Council (*i.e.*, the federal cabinet).[38] In addition, the Governor in Council may, when "the workload of the Tribunal so requires," appoint up to five temporary members.[39] While permanent members may serve as permanent members for no more than ten years, there is no such term restriction for temporary members.[40] Subject to certain legislative provisions and regulations, three members of the CITT may generally constitute quorum, and there is no minimum number of permanent members required to meet quorum.[41] Members of the CITT are not judges; instead, members have a variety of academic and professional backgrounds, and there are no requirements for qualifications of members prescribed in the legislation or by regulation. The Chairperson of the CITT may assign panels of one or three members of the Tribunal to hear cases.[42]

Canadian and international businesses may bring a variety of cases before the CITT that relate to Canada's international trade obligations. In particular, the CITT conducts inquiries into complaints from private parties involving alleged injuries from dumping and countervailable subsidies, sudden surges of imports and procurement by the federal government alleged to be in breach of Canada's trade agreements.[43] Private parties may also pursue appeals at the CITT, including appeals from decisions of the Canada Border

Services Agency ("**CBSA**") rendered pursuant to the *Customs Act* or the *Special Import Measures Act* ("SIMA"), as well as decisions of the Minister of National Revenue rendered pursuant to the *Excise Tax Act*.[44] Beyond these private rights of access, the CITT may also advise the Government on economic, trade and tariff issues.[45]

The CITT is subject to strict time limits at various stages of the proceedings within its mandate. For instance, with respect to procurement inquiries (involving complaints by suppliers alleging that the federal government has breached its obligations under certain trade agreements), the CITT has five days from the filing of a complaint to decide whether to conduct an inquiry.[46] If the complaint is not accepted for inquiry, the complainant is notified of that decision and reasons are provided, usually, within 15 days.[47] If an inquiry is commenced, the CITT typically has 90 days from the filing of the complaint to complete its inquiry and issue its findings and recommendations to the interested parties.[48] There are two exceptions to the 90 day rule: (i) where the CITT has granted a request for an expedited inquiry ("express option"), it must provide its decision within 45 days after granting this request; and (ii) even where the CITT has granted an extension of time, it must issue its decision within 135 days after the filing of the complaint.[49]

Similar timelines also apply for anti-dumping and countervailable subsidy injury inquiries under the *SIMA*, which proceed in two phases: (i) the preliminary injury inquiry phase; and, if necessary, (ii) the final injury inquiry phase.[50] The first phase begins when the CBSA initiates its investigation into the presence or absence of dumping and/or countervailable subsidies; the CITT then issues a notice of commencement of a preliminary injury inquiry. The CITT then has 60 days to receive submissions and decide whether the record discloses "a reasonable indication of injury or retardation or threat of injury" flowing from the alleged conduct.[51] After making its preliminary finding, the CITT has 15 days to issue its reasons for the decision (*i.e.,* 75 days from the commencement of the first phase). If the CITT makes an affirmative preliminary finding of a "reasonable indication" of injury, retardation or threat of injury on day 60, the CBSA has 30 days to render its preliminary determination of the quantity of dumping and/or subsidizing (*i.e.*, 90 days from the commencement of the first phase).[52] This deadline may be extended to a maximum of 135 days from the commencement of the first phase in complex matters.[53]

The second phase of a CITT injury inquiry begins when a notice of commencement of inquiry is issued the day following the CBSA's affirmative preliminary determination. In the second phase, if the CBSA makes a

non-negligible preliminary determination of dumping and/or subsidizing of imports (after the CITT's positive preliminary injury finding in the first phase), the CITT has 120 days to make a final decision as to whether the alleged dumping and/or subsidizing of imports has caused or is likely to cause injury or retardation under *SIMA*.[54] It has a further 15 days to issue its reasons for the decision (*i.e.*, 135 days from the commencement of the second phase).[55]

From start to finish, therefore, CITT procurement, dumping, and countervailing duty cases (looking at preliminary and final injury inquiries as separate proceedings) can all take a maximum of 135 days from the filing of a complaint to the issuance of reasons.[56]

The CITT's statutory mandate—like that of the Tribunal—states that hearings "shall be conducted as informally and expeditiously as the circumstances and considerations of fairness permit".[57] To fulfill this mandate, like the *Competition Tribunal Rules*, the *CITT Rules* allow presiding members to "dispense with, vary or supplement" any procedural rules if it is fair and equitable to do so, or to provide for a more expeditious or informal process.[58] While the CITT, like the Tribunal, has all of the powers, rights and privileges of a superior court of record, the rules and procedures are less formal in nature - with the result, we would argue, that access to justice at the CITT is improved.[59] In support of this position, in the same period of time that the Tribunal has heard 28 cases brought by private litigants (*i.e.*, 20 years), the CITT has heard over 3,300 cases on strictly enforced timelines.[60] With that said, while the speed with which the CITT proceeds through its caseload is commendable, policymakers should exercise caution when prioritizing the timely resolution of disputes through overly strict statutory timelines. The CITT has faced some criticism for its use of strict timelines and its impact on participatory rights in proceedings.[61] The exploration of economic causality by the CITT is also, of necessity in light of the timelines, somewhat more rudimentary than similar inquiries by the Tribunal.

Typically, the CITT decides procurement inquiries on the basis of written submissions.[62] However, the CITT may schedule a public hearing if the information in submissions is insufficient or disputed and the matter cannot be resolved on the basis of the written record alone.[63] More formal procedures may be employed at the discretion of the presiding members.[64] For anti-dumping inquiries under the *SIMA*, it is not the CITT's practice to have an oral hearing during the preliminary injury inquiry phase, but oral hearings are routinely held during the final injury inquiry phase.[65] Here as well, however, formal rules of evidence are not typically enforced, motions

are rare, and discoveries are extremely limited, being limited to one set of requests for information that are vetted by the CITT as to whether they deem the information necessary.[66] All evidence in chief is in written form, and parties are typically provided with hours, not days, within which to conduct cross-examinations of panels of witnesses. Despite the enormous time pressures, it would appear to the authors that the CITT metes out somewhat rough, but ultimately fair and expeditious, justice in the matters before it.

In conclusion, the track record of the CITT demonstrates that deciding complex economic matters involving private litigants with speed and efficiency is an attainable aspiration. The CITT seems to have struck a reasonable balance between expediting cases and ensuring procedural fairness, which has enabled it to successfully fulfill its mandate. Admittedly, in injury and procurement cases the CITT is dealing with backward looking matters most of the time (apart from "threat" cases). This may make those matters more easily amenable of proof than the necessarily forward looking test of a "likely substantial lessening or prevention of competition" that must in most cases be applied by the Tribunal. It could therefore be the case that 135 days (approximately 4.5 months) is not appropriate for Tribunal hearings in most cases. Nonetheless the CITT experience does beg the question as to why it should take the Tribunal more than a year to hear and decide most cases under the *Competition Act*.

B) Trademarks Opposition Board

The Trademarks Opposition Board ("**TMOB**") is a quasi-judicial body that facilitates hearings on certain issues under the *Trademarks Act*, namely trademark opposition proceedings and Section 45 trademark expungement proceedings.[67]

The TMOB consists of a chairperson, members, hearing officers, a manager and clerks.[68] There is no legislatively prescribed minimum or maximum number of positions. Currently there are 18 active members, 1 chairperson and 3 hearing officers at the TMOB.[69] Members of the TMOB are not judges; instead, members are employees of the Treasury Board of Canada, staffed in accordance with Treasury Board Guidelines subject to the approval of the Registrar of Trademarks.[70] While formal legal training is not required, increasing numbers of members of the TMOB hold law degrees and are members of a provincial law society.[71] When sitting to hear a matter, the TMOB is comprised of one hearing officer.

A private party can bring either of the two types of proceedings before the TMOB. According to the *Trademarks Act*, "any person" can file a statement of opposition and "any person who pays the prescribed fee" can file a request to issue a section 45 expungement proceeding notice.[72]

The TMOB is not subject to any time limits. The Canadian Intellectual Property Office has stated that Section 45 and opposition proceedings before the TMOB can take as long as two to four years (or even longer).[73]

The TMOB's powers are restricted to those delegated by the Registrar of Trademarks under the *Trademarks Act*.[74] There is no express statutory wording in the *Trademarks Act* establishing the TMOB, however its adjudicative functions are set out in the relevant sections for each type of proceeding.[75] While the *Federal Courts Rules* guide proceedings at the TMOB, the TMOB is not strictly bound by them, which allows it, in theory, to operate as intended—flexibly and capable of running expeditious proceedings.[76] Evidence at the TMOB is filed in the form of affidavits or statutory declarations, which can be subject to cross-examination.[77] Arguments are made in the form of written representations; however, an oral hearing can be requested by either party.[78] The TMOB has the authority to issue interlocutory rulings and final decisions in all proceedings before it, but it cannot grant injunctions, issue a stay of proceedings or award damages or costs.[79] The TMOB has issued procedural guidance for each type of proceeding over which it presides.[80]

While the TMOB stands as an example for the sufficiency of one administrative decision-maker presiding over certain commercial issues, it also serves as a warning for the types of significant delays that occur in the absence of statutory time limits. Without any meaningful timelines in place, TMOB proceedings have been known to linger on for four years or more to reach a resolution.[81] The commercial uncertainty borne out of such significant delays is an outcome that should be vigorously avoided. Furthermore, without any judicial members, the TMOB may also suffer from a lack of expertise in applying often complex legal principles to the issues brought forth. This lack of legal expertise may in turn be a significant contributor to the long delays.

C) Canada Energy Regulator

The Canada Energy Regulator ("**CER**") reviews and assesses proposed federally-regulated pipelines, power lines and offshore renewable energy projects for potential impacts to people, property and the environment.[82] The CER was previously called the National Energy Board until August 28,

2019.[83] Regulations made under the *National Energy Board Act* (repealed) remain in force under the *Canadian Energy Regulator Act*.[84] The CER Commission (the "**Commission**") is the quasi-judicial, independent decision-making body housed within the CER. It is a court of record and holds all of the powers, rights and privileges vested in a superior court for matters falling within its statutory jurisdiction.[85]

The Commission consists of up to seven full-time commissioners and may also include an unspecified number of part-time commissioners.[86] At least one of the full-time commissioners must be an Indigenous person.[87] Additionally, one of the full-time commissioners must be designated as the Lead Commissioner, which involves being responsible for the Commission's affairs and apportioning the Commission's work amongst its membership.[88] Commissioners may "hold office during good behaviour" for a term of six years and may be reappointed for one or more terms of up to six years each.[89] However, a commissioner can only serve ten years in total.[90] Subject to certain legislative provisions, three commissioners constitutes a quorum of the Commission.[91] Commissioners must be Canadian citizens or permanent residents; members of the CER's Board of Directors are not eligible to be commissioners.[92] Commissioners are not judges; instead, they have a variety of academic and professional backgrounds, often with experience in the energy sector but drawing as well on experience with administrative tribunals and Indigenous relations.

Companies proposing to build pipelines, power lines or offshore renewable energy projects under federal jurisdiction must file a project notification with the CER, identifying members of the public and Indigenous peoples who may be potentially affected.[93] The CER staff then engages the identified members of the public and Indigenous peoples in a consultation, with the assistance of "process advisors" who assist various stakeholders wishing to participate in the application process.[94] The company then files a project application and, again, must notify all potentially affected persons and communities, within 30 days of which any concerned member of the public or Indigenous peoples can file a formal statement of concern.[95] Anyone can then participate in a hearing before the Commission as a commentor or intervenor.[96] Intervenors are entitled to present evidence and ask questions of other parties, while commenters are only entitled to make written submissions.[97] Process advisors are assigned to each hearing and are available to support members of the public, including Indigenous peoples who want to participate.[98]

The Lead Commissioner must prescribe time limits not exceeding the statutory time limits for certain types of applications and has the authority to take "any measure that he or she considers appropriate" to ensure those timelines are met.[99] For example, the Lead Commissioner may increase or decrease the number of commissioners dealing with an application to expedite the process.[100] This power includes the ability to designate a sole commissioner to deal with the application.[101]

For pipeline applications under section 183 of the *Canadian Energy Regulator Act,* the Lead Commissioner must set a time limit for the Commission to deliver its report to the Minister of Natural Resources not exceeding 450 days from the date that the application is deemed complete.[102] Generally, the Commission releases its recommendations, report or decision within 12 weeks after the hearing has concluded.[103] Within 90 days of receiving the Commission's report, the Governor in Council must make the final decision to approve or deny the application.[104]

Other types of applications under the *Canadian Energy Regulator Act* are subject to shorter statutory timelines. For example, the Commission has six months from the date of the application for an import or export license to release its decision (and to issue the license, if applicable).[105] The process for applications for exemption orders for pipelines and for the issuance of a certificate for a federally regulated power line also have prescribed time limits. [106] The final decision for these applications must be issued within 300 days.[107]

On January 9, 2020, the Lead Commissioner issued a letter outlining the time limits for processing applications under sections 183 (pipeline applications), 214 (exemption orders for pipelines) and 262 (certificates for federally regulated power lines) of the *Canadian Energy Regulator Act*.[108] For sections 183 and 262, the Lead Commissioner did not designate shorter time limits that the statute requires.[109] However, for section 214, issues are divided into categories of complexity, each with their own time limit: 130 days for "minor" complexity issues, 210 days for "moderate" complexity issues and 300 days for "major" complexity issues.[110] In addition to the time limits set out in the legislation, the CER has established non-binding service standards for applications, participant funding, land matters complaints and audits. [111]

While the Commission has all of the powers, rights and privileges of a superior court of record, the rules and procedure appear to be somewhat less judicial in nature to improve access to the Commission.[112] Much of this

is due to the fact that the CER is specifically crafted to facilitate a broad public consultation on large-scale energy infrastructure projects. For instance, during public hearings, process advisors employed by the CER may attend to help participants understand how they can effectively participate in the proceedings before the Commission.[113] The Commission also has the power to create its own rules respecting its procedure, and the *Canadian Energy Regulator Act* states that proceedings and applications before the Commission "must be dealt with as expeditiously as the circumstances and procedural fairness and natural justice permit."[114] While these provisions allow for flexibility, the proceedings still resemble a court-like process, and there are significant volumes of filings that project proponents must make in accordance with the CER's Filing Manuals.[115]

Furthermore, the Commission is also empowered to act on its own initiative to conduct inquiries, hear and determine any matter under the *Canadian Energy Regulator Act*.[116] The Commission has jurisdiction to hold a public hearing, however the "process chosen by the CER for a hearing will be adapted based on the project being assessed and those participating".[117] For example, when the Commission issues its "hearing order" at the beginning of the hearing process, it sets out a procedural framework for the hearing with tailored deadlines and timing information.[118] Given the CER's mandate to engage many stakeholders in the decision-making process, it is commendable that the Commission is proving to be quite capable of issuing decisions on reasonably strict timelines. While competition law matters before the Tribunal do not require the same type of consultative engagement with the public at-large, the Commission's ability to adapt its procedures and provide resources to make hearings more accessible to private participants could still be of value when discussing reforms aimed at increasing access to justice at the Tribunal.

D) Trends in Canadian Administrative Tribunals

The composition of the above-noted Canadian tribunals differs rather substantially from the Competition Tribunal in its present form. No sitting judges are part of any of the CITT, TMOB or the Commission. Like the Tribunal, they hear at times complex economic evidence, and make decisions which can have significant commercial implications. Unlike under the *Competition Act*, however, there is no implication of wrongdoing attached to proceedings at these tribunals: either duties will be imposed, or they won't; a trademark will be registered, or it won't; or a pipeline will be built, or it won't. While in theory, civil matters before the Tribunal similarly are matters of dispassionate economic review, some civil cases recently have

opened the door for findings of harm related to civil *Competition Act* "violations", and the Act itself calls for higher penalties (administrative monetary penalties) for repeat "offenders".[119] Perhaps because of this aura of impropriety, as will be discussed in Part III of this paper, it is common practice in other countries for competition law matters to be heard at first instance by judges, regardless of the institutional design within which they are heard.

Expansive private rights of access are commonplace in Canadian tribunals. This flows from the principle that these tribunals are established to provide private parties with efficient and effective resolutions to specific types of issues within their specialized jurisdiction. The legislative schemes empowering the above-noted Canadian tribunals do not have "gatekeepers" for many of the matters falling within their scope. We welcome recent amendments to the *Competition Act* that have now also made private access to the Tribunal possible for a broader range of actions, namely actions under the abuse of dominance provisions; however, in each of the above tribunals studied, there are incentives for the private party that is bringing the case to do so (*e.g.*, a company may be compensated for injuries resulting from dumping goods in Canada, or is able to block the registration of a proposed trademark that is likely to cause confusion with their own brand, or requires the Commission's approval in order to build an energy project).[120] Without the availability of loss-related damages for private litigants in competition law matters, there is little incentive for affected Canadians to bring an expensive case forward to the Tribunal.

The above survey of Canadian tribunals also reveals an interesting trend in establishing time limits for certain, but not all, contexts. In commercial matters involving highly time-sensitive disputes before the CITT or the Commission, strict timelines are imposed on the decision-maker. In contrast, where no such time constraint exists for the TMOB, there are extensive delays for having a matter heard (in some cases exceeding four years), creating significant commercial uncertainty for businesses with respect to the status of their intellectual property rights.[121]

With respect to the rules of procedure in Canadian administrative tribunals, the pattern is clear: to ensure a more expeditious and cost-effective resolution, flexibility is preferable to a rigid application of the rules. Each of the administrative decision-makers described above retains a broad discretion to adapt their process to the circumstances of the case at-bar.

Part III: How do International Competition Tribunals Compare to their Canadian Counterpart?

In addition to surveying the Canadian landscape of administrative tribunals generally, it is also helpful to consider international tribunals specialized in handling competition law matters. Below, we examine two prominent international tribunals to assess the following design features: (i) composition of the tribunal; (ii) private rights of access; (iii) time limits; and (iv) rules of procedure.

A) The United Kingdom Perspective: The Competition Appeal Tribunal

In the United Kingdom, the Competition Appeal Tribunal ("**CAT**") hears a wide range of matters affecting competition. The CAT derives its jurisdiction from Section 12 and Schedule 2 of the *Enterprise Act* and hears matters brought forward under a wide range of economic-focused legislation, including, *inter alia,* the *Competition Act 1988* (United Kingdom), the *Enterprise Act* and the *Consumer Rights Act*.[122]

The CAT is comprised of the president, a panel of "chairmen" (in Canadian parlance, a "chairman" refers to a judicial member of the CAT) and a panel of ordinary members. The President and chairmen roles are judicial appointments, requiring them to be legally qualified and possess appropriate experience and knowledge of competition law or another relevant field.[123] Ordinary members of the CAT are similar to the Tribunal's lay members: they are appointed for time-limited terms as non-judicial members and must have appropriate experience and expertise relating to the subject matter of the CAT.[124] As with the Tribunal, a sitting panel of the CAT is typically composed of three members. The hearing is chaired by either the president or a chair, and the other two members are selected from amongst the chairmen or the ordinary members.[125] There are, however, specific instances outlined in the *Competition Appeals Tribunal Rules* ("CAT Rules") where the President or a chair, sitting alone, may exercise the CAT's powers.[126]

The CAT provides a private right of access for a wide range of matters within its jurisdiction, including actions for damages and injunctive relief under the *Competition Act 1998,* appeals of decisions made under the *Competition Act 1998* by the Competition and Markets Authority and other sector-specific regulators, and appeals under the *Subsidy Control Act 2022* of decisions made by public authorities to issue subsidies.[127] The CAT may

also hear collective claims and applications for approval of collective settlements under the *Competition Act 1998.*[128]

While there are several strict time limits regarding *commencing* proceedings before the CAT, the CAT itself is generally not subject to time limits for competition litigation cases.[129] However, some claims may be subject to the "fast-track procedure" ("**FTP**") defined in Rule 58 of the *CAT Rules*. While the FTP is particularly common in claims for damages under Section 47A of the *Competition Act 1998,* the CAT has the authority to subject any matter to the FTP "on its own initiative or on the application of a party".[130] The intended purpose of the FTP is to allow "less complex claims" to be decided on an expedited basis with "limited risk as to costs".[131] To achieve this end, the substantive hearing of a matter under the FTP is to occur "as soon as practicable and in any event within six months" of the order subjecting the matter to the FTP.[132] There is no explicit time limit on when the CAT must issue its decision or reasons under the FTP or otherwise.

The *CAT Rules* are to be interpreted with regard to a list of governing principles that promote time and cost efficiency. Specifically, Rule 4(5) outlines the concept of "active case management", which the CAT is to employ in all matters to "ensure that the case proceeds in the quickest and most efficient manner possible".[133] While the CAT has the authority to engage in traditional, formal procedures (*e.g.*, oral cross-examination of witnesses), it retains a broad discretion to tailor its process to the specific circumstances of each case.[134]

B) The Australian Perspective: The Australian Competition Tribunal

Competition law matters are heard in Australia by the Australian Competition Tribunal ("**ACT**"). The ACT is an independent statutory tribunal whose primary role is to review decisions of the Australian Competition and Consumer Commission ("**ACCC**"). A review by the ACT is a re-hearing or a re-consideration of a matter initially decided by the ACCC. The ACT may perform all the functions and exercise all the powers of the original decision-maker for the purposes of review. It can affirm, set aside or vary the original decision.

The ACT is composed of one president, a number of deputy presidents and other members as appointed by the Governor-General of Australia.[135] A president or deputy president must be a judge of the Federal Court of Australia.[136] Other members of the ACT must have "knowledge of, or experience in, industry, commerce, economics, law or public administration."[137]

For the purpose of hearing and determining matters, the ACT is constituted by a presidential member (either the president or a deputy president) and two non-presidential members.[138] All members of the ACT are appointed for a period not exceeding seven years.[139]

The ACT has jurisdiction to undertake reviews of the following determinations made by the ACCC: (i) granting or refusing authorization for company mergers and acquisitions; (ii) granting or revoking authorizations permitting conduct and arrangements that would otherwise be prohibited under the *Competition and Consumer Act, 2010* because of their anti-competitive effect; and (iii) revoking notices for exclusive dealing conduct that would or may otherwise be prohibited under the *Competition and Consumer Act, 2010*. These reviews may be initiated by private parties.

The ACT is not bound by any statutory deadlines when rendering decisions regarding reviews of conduct authorization applications.[140] The ACT is, however, subject to timelines in the context of reviewing merger authorization applications. Applications for reviewing domestic merger authorizations must be decided within 90 days from the date of filing the application.[141] This time limit may be extended in two ways: (i) if the ACT allows new information or evidence, the time limit is 120 days; and (ii) if the ACT determines that the matter is complex or otherwise cannot be dealt with appropriately within the initial period, the time limit is up to 180 days (*i.e.*, 6 months).[142] Importantly, if the ACT does not make its decision within the timeframe, the application—which is by definition an appeal from a matter already decided by the ACCC—is taken to be refused.[143]

The procedure to be used before the ACT is within the discretion of the tribunal itself.[144] Proceedings are to be conducted with "as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the [ACT] permit".[145] If the ACT finds that more formal procedures are appropriate in certain circumstances, however, the *Competition and Consumer Act, 2010* empowers it with a wide range of court-like powers of inquiry. These include summoning individuals to appear before the ACT, compelling the production of specific documents, and requiring the oral hearing of witness evidence.[146]

Part IV: Proposals for Changes to Canada's Competition Tribunal

Proposal 1: Impose Time Limits on Tribunal Proceedings and Deliberations

Currently, there are no time limits imposed on any stage of the Tribunal's process. In some cases where the Tribunal and the parties are highly motivated, for example the *Rogers-Shaw* merger case, proceedings at the Tribunal can proceed quite expeditiously.[147] In *Rogers-Shaw*, the notice of application was filed on May 9, 2022. Just under six months passed from the filing of the notice of application to the first date of the hearing on November 7, 2022. The hearing ran for 34 days, ending on December 14, 2022, and the decision with reasons was released only 18 days later on January 1, 2023. In *Rogers-Shaw*, accordingly, less than eight months passed from the date the notice of application was filed to the date the case was decided. The process in *Rogers-Shaw* was expedient and, in our view, commendable.

However, the speed in the *Rogers-Shaw* case is not the norm at the Tribunal—in some cases the process has been so lengthy that one is reminded of the maxim: "Justice delayed is justice denied". For example, in *Parrish & Heimbecker* the notice of application was filed on December 19, 2019 and the first date of hearing was held over a year after later, on January 6, 2021.[148] The hearing lasted 24 days and then over 21 months passed between the last date of the hearing and the issuance of the decision with reasons on October 31, 2022.[149]

Of course, the merger had already closed in the *Parrish & Heimbecker* case, whereas financing for a $26 billion merger was hanging in the balance for the *Rogers-Shaw* transaction.[150] The motivation of the parties, and the Commissioner, can therefore be assumed to differ in terms of the degree to which they demand speedy resolution. The issues, however, are no more or less complex simply because a transaction has closed or, in the case of abuse of dominance cases, the behaviour is ongoing. If the Tribunal can proceed expeditiously when the parties are anxious for it to do so, and when much public attention is focused on the Tribunal, why should it not proceed, as it is instructed by the *Competition Tribunal Act* "as expeditiously as the circumstances and considerations of fairness permit" in all cases?[151]

The expediency and motivation that propelled the *Rogers-Shaw* should in our view be applied to all cases at the Tribunal. The fact that the *Rogers-Shaw* case was brought partially under the Expedited Proceedings PD could be a contributing factor to the expediency of its resolution. With this in

mind, we believe that modifying the Tribunal's rules of procedure to codify the Expedited Proceedings PD as the default would be in the interest of access to justice. There should be a presumption that all proceedings are to proceed under the Expedited Proceedings PD unless there are compelling reasons not to—and to require full disclosure of the Commissioner's file at the outset, thus obviating the need for the respondents to painfully extract disclosure or seek to examine members of the Bureau.[152]

In addition, the length of time that passed between the last date of the hearing and the release of the decision in the *Parrish & Heimbecker* case should not be precedent-setting. To avoid this, we, along with others, propose imposing a statutory deadline (to be found in the *Competition Tribunal Act*) of six months from the end of a hearing to the release of a decision with reasons to the public which can be extended only upon consent of the parties.[153] This deadline would be consistent with the general unwritten practice of the Federal Court. In some cases, the Tribunal has released decisions with reasons to the public in less than six months from the end of the hearing.[154] However, in many other cases, decisions with reasons have been released to the public much later than six months after the end of the hearing.[155] Implementing a statutory deadline for the issuance of a decision and reasons would provide the parties with certainty and would ensure the Tribunal is operating efficiently on a consistent basis.

Proposal 2: Alter the Composition of the Tribunal

Modifying the structure of the Tribunal could also increase its efficacy while maintaining its expertise. Former chairperson of the Tribunal, Justice Sandra J. Simpson, has previously called for altering the composition of the Tribunal so that it is composed solely of economists and judges with commercial backgrounds. Justice Simpson also suggests establishing priority of assignments between the Federal Court and the Tribunal by amending the *Competition Tribunal Act* and, if necessary, the *Federal Courts Act* so that when the Chair of the Tribunal deems it necessary, Tribunal work takes priority over Federal Court assignments.[156] Competition lawyers, Calvin S. Goldman, K.C. and Charles Layton agree with Justice Simpson's recommendations and further suggest prescribing Tribunal member qualifications directly in the *Competition Act* to bring the Tribunal more in line with the vision of a specialized court that Parliament had intended when it created the Tribunal.[157]

Standing in some contrast with Justice Simpson and Goldman and Layton, leading Canadian competition law academic, Michael J. Trebilcock, has

claimed that the time-consuming court-like process at the Tribunal developed over time as a result of the over-involvement of the judicial members of the Tribunal. Trebilcock and his co-authors claim that lay members should have an increased role at the Tribunal and propose two changes to that effect: (i) the judicial members' monopoly over questions of law should be eliminated (*i.e.*, lay members should be able to decide questions of law); and (ii) every three-member panel should include two lay members and every five-member panel should have three or four lay-members since it is the lay members who are expected to bring economic and business expertise to the Tribunal.[158]

Another possible change would be to eliminate the lay members altogether. The appointment process currently in place for lay people[159] means that they may not have the economic and competition law expertise originally envisaged, and the fact that the positions are part-time can prevent those most qualified from taking the position. Having lay people involved can also further complicate the scheduling of Tribunal matters, as contested cases arise infrequently and hearings need to be scheduled in a way that permits the lay members to take leave of their "day jobs". So long as the judicial members of the Tribunal continue to have access to their own expert economists pursuant to Rule 80 of the *Competition Tribunal Rules*, the loss of lay members ought not to diminish the expertise of the Tribunal. While other Canadian tribunals have been designed to be presided over by lay members alone, Parliament made a clear decision to include judicial members on the Tribunal. Such judicial members of necessity build up considerable expertise over time as they are the ones tasked with hearing *Competition Act* cases. Indeed, several recent appointees to the Federal Court already had significant competition law expertise.[160] The matters heard by the Tribunal often involve complex questions of law, which lay members are not, and we argue should not be, involved in deciding.[161] Questions of this nature are appropriately left in the hands of judicial members alone, and insofar as non-legal expertise would be useful to the Tribunal members to assist in deliberating over questions of fact or mixed fact and law, the judicial members could and should exercise their power to retain experts *ad hoc.* This power to retain "consultants" is also held, and used, by the ACT in Australia.[162] The Tribunal also presently holds this discretionary power, and in the absence of lay members, would be able to retain experts whose subject-matter expertise most closely aligns with the issues at-bar.[163] Moreover, consideration could be given to the permanent retention of expert Tribunal staff, to advise the judicial members, much as the CITT staff who prepare reports which are tabled to the parties in injury cases before the CITT.

If the Tribunal's composition is modified by eliminating lay members, we do not believe this would reduce the Tribunal's specialized expertise because the Tribunal's judicial members themselves have significant expertise. Moreover, the Tribunal has two mechanisms by which it can make use of independent experts, including economic experts, if necessary in particular cases.[164] First, as mentioned above pursuant to Rule 80 of the *Competition Tribunal Rules*, the Tribunal has access to external independent experts.[165] Rule 80 authorizes the Tribunal to appoint one or more independent experts to inquire into and report on any question of fact or opinion relevant to an issue in a proceeding.[166] The parties may jointly recommend an expert to the Tribunal.[167] Where an expert report is produced, the report shall be made part of the case record and a copy is served on every party and intervenor.[168] However, "tribunal-appointed experts need not submit a report but can be retained merely to assist the Tribunal in understanding the evidence, most notably economic evidence, proffered to the Tribunal."[169] If an expert report is filed, parties are permitted to file a written response to the expert's report and to examine the expert.[170] The Tribunal may also order the expert to make a further or supplementary report.[171] Second, there is an informal process whereby the Tribunal can appoint an economic advisor.[172] The Tribunal has developed the practice whereby if the economic advisor writes a report the Tribunal will make the report available to the parties and provide them with an opportunity to comment in the interests of procedural fairness.[173]

By eliminating lay members altogether, we see a benefit not only in ensuring that expert assistance is tailored to the case at hand, but also in streamlining Tribunal proceedings, as ad hoc experts can usually be retained on fairly short notice. Another change that would also help to streamline Tribunal proceedings would be to require that all matters be heard by only one judicial member of the Tribunal (as in all other courts of first instance), which would also facilitate timely Tribunal review. Currently, motions and references at the Tribunal may be heard by one judicial member whereas applications must be heard by "at least one" judicial member.[174] There has been at least one instance, *Rogers-Shaw*, where only one judicial member was on the panel hearing the application.[175] However, this is rare. We propose requiring that all matters be heard by one judicial member to aid efficiency—assisted by experts as that judicial member deems useful. The judges of the Federal Court are used to conducting hearings and issuing decisions alone and those with competition expertise can do so in all but the most complex of cases. Appropriately assisted by experts, experienced judges on the Federal Court could more expeditiously deal with matters

such as private applications, and all but the most complex behavioural and merger cases.

Furthermore, on March 2, 2023, a pilot project was launched which created a specialized Intellectual Property and Competition Chambers in the Federal Court to ensure that intellectual property and competition law cases are assigned to judges who have expertise in those areas.[176] Assigning intellectual property and competition law cases to judges who have expertise in those areas has been informally done for several years at the Federal Court; this pilot project formalizes that procedure. In assigning cases, the sub-specialties (*e.g.,* copyright, trademarks, patents and competition) are also considered. While this pilot project is running, we also recommend that judicial members of the Tribunal be selected only from the Intellectual Property and Competition Chambers. As a result of this, only those judges with expertise in competition law would be members of the Tribunal and thereby have the necessary expertise to hear most matters at the Tribunal as a "panel" of one.

Proposal 3: Expand Private Access at the Tribunal

While recent amendments to the *Competition Act* increased the scope of matters in respect of which private parties may seek leave to bring applications to the Tribunal (adding abuse of dominance claims),[177] many commentators recommend expanding private access even further. As mentioned above in Part I of this paper, private applications to the Tribunal are infrequent, in our view partly because potential applicants must overcome a substantial burden to obtain leave to bring an application and partly because, if they are successful, they cannot recover damages at the Tribunal for any losses suffered as a result of anti-competitive acts. As a preface to the discussion below, we echo the caution of others that expanding private rights of action should *not* be used as an excuse to reduce funding to the Bureau—private rights of action should be an additional tool for deterrence and enforcement alongside public enforcement.[178]

The most obvious way to expand private access to the Tribunal is to allow private access for all civilly reviewable matters covered by the *Competition Act*.[179]Another way to incentivize private access at the Tribunal is to allow the Tribunal to award damages for losses suffered as a result of anti-competitive conduct in private action proceedings.[180] Allowing for the possibility of damages at the Tribunal may incentivize private parties to bring actions to the Tribunal and aid in the enforcement and development of Canadian competition law.

Another consideration that should be looked at to increase private access is amending the leave requirement private parties currently face in order to bring a case to the Tribunal. The leave requirement may be unduly high.[181] One recommendation is to lower the test for standing which currently requires that the applicant's business be "directly and substantially affected".[182] A possible alternative would be to require that the applicant's business be "directly and materially" affected.[183] This new standard would still ensure the applicant has a meaningful interest and connection to a case. Some commentators caution against expanding private access at the Tribunal for fear of frivolous litigation being brought. However, even if the standing requirement is lowered applicants still need to satisfy the Tribunal, through evidence, that all statutory elements of the alleged anti-competitive conduct have been met. Therefore, frivolous litigation would continue to not be granted leave were a lower standing requirement to be introduced.

One might even consider eliminating the need for private applicants to obtain leave prior to bringing an application. Frivolous cases could be effectively weeded out by summary motions to dismiss, and cost awards against the applicants. One must question whether the extra costs to applicants imposed by a second rather fulsome hearing on the merits of the case, is really necessary.

Proposal 4: Amend the Tribunal's Rules of Procedure

There has been criticism that the Tribunal has become overly judicialized and the rules of procedure should be simplified to strike a better balance between due process and expediency and timely decision-making.[184] Michael J. Trebilcock and his co-authors have previously called for: (i) eliminating documentary discovery and examinations for discovery at the Tribunal; (ii) prohibiting cross-examination of witnesses by opposing counsel and instead confining questioning of witnesses to members of the Tribunal; (iii) questioning expert witnesses for opposing parties on common issues together; and (iv) the Tribunal to take a more active role in case management by defining and narrowing issues in dispute.[185] Competition practitioners have echoed this call for the Tribunal to take a more active role in case management by imposing substantial limitations on the scope of discovery, limiting the availability of pre-hearing motions and the number of witnesses (both lay and expert) that the parties will be able to call, and to define the issues to be litigated.[186]

We also recommend allowing private parties to state a case to the Tribunal for settlement of a discrete legal or factual dispute with the Commissioner,

during the course of a Bureau inquiry. Section 124.2 of the *Competition Act* currently permits the Commissioner to state a case of his own volition (without consent from the parties who are the object of the inquiry), but private litigants or those whose actions are the subject of an inquiry need the Commissioner's consent to refer a matter to the Tribunal. Given the Commissioner's status as an interested party in any ensuing litigation, it seems odd to appoint the Commissioner as the gatekeeper to justice. Giving private parties the same ability to state a question to the Tribunal could contribute to faster inquiries by the Commissioner, as well as potentially contribute to the settlement of more cases, as questions the parties may have regarding the law could be resolved at an earlier stage in a dispute. Allowing private parties to state questions to the Tribunal would also result in more decisions being made on discrete points of the law, thereby clarifying competition law generally.

Conclusion

The Canadian competition law landscape appears primed for its most significant amendments since the 2009. While substantive changes to the *Competition Act* itself have understandably drawn much of the attention during the ongoing public consultation, the potential impact of modernizing the Tribunal should not be overlooked. Joining the calls of others, we strongly encourage the Government to consider the ways in which the Tribunal can adapt to better provide access to justice for Canadians. As described in the foregoing section, our recommendations revolve around four key changes. First, stricter time limits on the release of Tribunal decisions (with reasons) should be codified to increase commercial certainty and to provide parties with a more timely and cost-effective resolution. The goal of more efficient decision-making is also supported by our second recommendation: altering the composition of the Tribunal by eliminating lay members and creating more scenarios where one member may preside alone. Given the Tribunal's existing ability to appoint its own experts, alongside the specialized knowledge already possessed by appointed judicial members, we believe that the Tribunal can retain its subject-matter expertise while more efficiently advancing matters by removing lay members altogether. Third, expanding private access to the Tribunal and allowing the Tribunal to award damages would help fulfil the goals of competition law while further developing jurisprudence. Lastly, the Government should attempt to reverse the trend towards overly judicializing the Tribunal by simplifying the default rules of procedure and more actively engaging in case management. Sharing the Minister's aspiration for a "more efficient and responsive" approach to administering the *Competition Act,* we hope

to see these four changes reflected in the much-anticipated amendments on the horizon.[187]

ENDNOTES

[1] Laura Rowe and Tessa Martel are associates at Stikeman Elliott LLP and Zach Rudge is at the time of writing a student-at-law. The views expressed in this paper are those of the authors alone and do not necessarily represent those of Stikeman Elliott LLP or its clients.

[2] Innovation, Science and Economic Development Canada, "The Future of Competition Policy in Canada" (22 Nov 2022), online (pdf): <https://ised-isde.canada.ca/site/strategic-policysector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf> [Consultation Paper].

[3] In 2002, the Government of Canada passed *An Act to amend the Competition Act and the Competition Tribunal Act*, SC 2002, c 16, bringing significant changes to the administration of Canadian competition law. Significantly, the 2002 amendments marked the beginning of private access to the Competition Tribunal, allowing private litigants to seek leave to bring applications in respect of some types of civilly reviewable conduct (*e.g.*, refusal to deal, exclusive dealing, tied selling and market restriction under sections 75 and 77 of the *Competition Act*). Additionally, the 2002 amendments also included changes to expedite proceedings before the Tribunal, notably by largely removing the Tribunal's role in substantively reviewing consent agreements made between the Commissioner and private parties (agreements now are merely registered with the Tribunal and—provided their terms could have been the terms of an order of the Tribunal—have the force of a Tribunal order).

[4] *Competition Act*, RSC 1985, c C-34.

[5] For clarity, certain "hard core" cartel offences are criminal, as are willfully deceptive marketing practices. The Tribunal hears only civil cases and cannot impose criminal penalties.

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

[7] Related matters include allegations of abuse of process (*Canada (Director of Investigation & Research) v Canadian Pacific Ltd*, [1997] CCTD No 7, 1997 CarswellNat 3105 at paras 10-11).

[8] *Competition Act*, *supra* note 4, ss 103.1(7)-103.1(7.1); *National Capital News Canada v Milliken*, 2022 Comp Trib 41 at para 8.

[9] Paul Erik Veel, "Private Party Access to the Competition Tribunal: A Critical Evaluation of the Section 103.1 Experiment" (2009) 18:1 Dal J Leg Stud 1 at 11 [Veel].

[10] *Competition Tribunal Rules*, SOR/2008-141, rr 38 and 124(1).

[11] Kyle Taylor, "Competition Litigation Comparative Guide—Canada" (17 January 2023), online: Mondaq <https://www.mondaq.com/canada/antitrustcompetition-law/1272322/competition-litigation-comparative-guide>.

[12] Veel, *supra* note 9 at 14-15.

[13] Competition Tribunal, "Advanced Search", online: <https://decisions.ct-tc.

gc.ca/ct-tc/en/d/s/index.do?cont=&ref=&d1=&d2=&p=&l=6919&l=6921&col=207&tf1=&tf2=&tf3=&or=> [Competition Tribunal Case Search].

[14] Nikiforos Iatrou, *Litigating Competition Law in Canada* (Toronto: LexisNexis Canada, 2018) at Chapter 7G [*Litigating Competition Law*].

[15] *Competition Tribunal Act, supra* note 6, s 13.

[16] *Ibid*, s 3(2). Subsections 3(3) and 3(4) of the *Competition Tribunal Act* provide for the possibility of Governor in Council forming an advisory committee with whom the Minister must consult before making their recommendations on the appointment of lay people. The advisory panel is to be composed of not more than ten members who are knowledgeable in economics, industry, commerce or public affairs and may include individuals chosen from business communities, the legal community, consumer groups and labour. No advisory panel has ever been appointed.

[17] *Ibid,* s 3(2).

[18] *Competition Tribunal Rules*, *supra* note 10, r 80(1).

[19] *Competition Tribunal Act*, *supra* note 6, s 13.

[20] *Ibid*, s 9(2).

[21] *Ibid*, s 8(2); *Competition Tribunal Rules*, *supra* note 10, rr 60-64.

[22] Competition Tribunal, "Case Details: Vancouver Airport Authority - CT-2016-015", online: <https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/462498/index.do>.

[23] Competition Tribunal, "Case Details: Parrish & Heimbecker, Limited - CT-2019-005", online: <https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/462487/index.do> [*P&H* Docket].

[24] *Ibid;* the decision was released to the parties on October 31, 2022 and the reasons were release publicly on November 17, 2022, 635 and 652 days, respectively, after the close of hearings on February 4, 2021.

[25] Competition Tribunal, "Case Details: Rogers-Shaw - CT-2022-002", online: <https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/520930/index.do> [*Rogers-Shaw* Docket].

[26] See Competition Tribunal, "Timelines and Scheduling for Proceedings Before the Tribunal" (January 2019), online: <https://www.ct-tc.gc.ca/en/procedure/practice/timelines-scheduling.html>.

[27] *Ibid.*

[28] *Ibid.*

[29] *Ibid.*

[30] *Ibid.*

[31] Competition Tribunal, "Expedited Proceeding Process before the Tribunal" (January 2019), online: <https://www.ct-tc.gc.ca/en/procedure/practice/expedited-proceeding.html>.

[32] *Ibid.*

[33] *Ibid.*

[34] *Ibid.*

[35] In the Scheduling Order dated June 17, 2022 (*Canada (Commissioner of Competition) v Rogers Communications Inc. and Shaw Communications Inc.*, 2022 Comp Trib 06), the Tribunal notes in paragraph 2 that the scheduling

order was made "having regard to certain, but not all, aspects of the Tribunal's *Practice Direction Regarding An Expedited Proceeding Process Before The Tribunal* (January 2019) that have been considered by the Parties and the Tribunal in preparing the schedule in this Order".

[36] *Canada (Commissioner of Competition) v Parrish & Heimbecker, Limited*, 2020 Comp Trib 1 at para 10 [*Parrish & Heimbecker*].

[37] Canadian International Trade Tribunal, "About the Tribunal", online: <www.citt-tcce.gc.ca/en/about-tribunal>.

[38] *Canadian International Trade Tribunal Act*, RSC 1985, c 47 (4th Supp.), s 3(1) [*CITTA*].

[39] *Ibid,* s 3(5).

[40] *Ibid,* ss 3(5) and 3(6).

[41] *Ibid,* s 13.

[42] *Ibid;* see also Canadian International Trade Tribunal, "Chapter 2—Mandate, Organization and Activities)", online: <www.citt-tcce.gc.ca/en/publications/chapter-2-mandate-organization-and-activities>.

[43] Canadian International Trade Tribunal, "What we do (and don't do)", online: <www.citt-tcce.gc.ca/en/about-tribunal/what-we-do-and-don-t-do>.

[44] *Ibid.*

[45] *Ibid.*

[46] *Canadian International Trade Tribunal Procurement Inquiry Regulations,* Can Reg 93/602, s 7(1) [*CITT Procurement Inquiry Regulations*].

[47] Canadian International Trade Tribunal, "Procurement Inquiries Guide", online: <www.citt-tcce.gc.ca/en/procurement-inquiries/procurement-inquiries-guide> [*Procurement Inquiries Guide*].

[48] *CITT Procurement Inquiry Regulations, supra* note 46, s 12(a).

[49] *Ibid*, ss 12(b)-(c).

[50] Canadian International Trade Tribunal, *Preliminary and Final Injury Inquiry Guidelines,* online: <www.citt-tcce.gc.ca/en/anti-dumping-injury-inquiries/preliminary-and-final-injury-inquiry-guidelines> [*Injury Inquiry Guidelines*].

[51] *Ibid.*

[52] *Special Import Measures Act*, RSC 1985, c S-15, s 38(1) [*SIMA*].

[53] *Ibid,* s 39(1).

[54] *Ibid;* this deadline is statutorily mandated (see *SIMA*, supra note 52, s 43(1)).

[55] *Ibid.*

[56] *Procurement Inquiries Guide,* supra note 47; Canadian International Trade Tribunal, "Anti-dumping and countervailing injury inquiries guide", online: <https://www.citt-tcce.gc.ca/en/anti-dumping-injury-inquiries/anti-dumping-and-countervailing-injury-inquiries-guide>.

[57] *CITTA, supra* note 38, s 35.

[58] *Canadian International Trade Tribunal Rules,* Can Reg 91/499, s 6.

[59] *CITTA, supra* note 38, s 17(2); see also Canadian International Trade Tribunal, "Management of cases before the Tribunal", online: <www.citt-tcce.gc.ca/en/practices-and-procedures/management-cases-tribunal>.

[60] Competition Tribunal Case Search, *supra* note 13; Canadian International

Trade Tribunal, "Advanced Search", online: < https://decisions.citt-tcce.gc.ca/citt-tcce/en/d/s/index.do?cont=&ref=&d1=2002-06-21&d2=&or=>.

[61] For example, some trade law practitioners have argued that strict time limits have impacted the efficacy of witness examinations before the CITT, since "an evasive witness can use up the time potentially leaving many questions unexplored" (See, e.g., Dan Ciuriak, "Trade Defence Practice in Canada" (2012) Ciuriak Consulting Working Paper, online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2086602>).

[62] *Procurement Inquiries Guide*, *supra* note 47.

[63] *Ibid.*

[64] *Ibid.*

[65] *Injury Inquiry Guidelines*, *supra* note 50.

[66] *Ibid.*

[67] In Canadian trademarks law, an opposition is a proceeding where a party (the opponent) raises an objection to the registration of an applied-for trademark in Canada. If the opponent is successful, the Registrar of Trademarks is prevented from issuing a registration for the applied-for mark. Section 45 proceedings differ in that they are brought against marks that have already been successfully registered in Canada, but the mark's owner is unable to show use of the mark during the three-year period prior to the date of the Section 45 notice. Section 45 proceedings allow a party to request that a registered mark be removed from the Register of Trademarks for such non-use. The removal of registered trademarks from the Register through this process is known as "expungement" of the mark.

[68] Canadian Intellectual Property Office, "Trademarks Opposition Board" (3 March 2023), online: <ised-isde.canada.ca/site/canadian-intellectual-property-office/en/trademarks/trademarks-opposition-board>.

[69] Canadian Intellectual Property Office, "Trademarks Opposition Board—List of Employees" (2 February 2023), online: <ised-isde.canada.ca/site/canadian-intellectual-property-office/en/trademarks/trademarks-opposition-board/trademarks-opposition-board-list-employees>.

[70] Bayo Odutola & Karen Hansen, "Appointment of Members of the Opposition Board" in *Odutola on Canadian Trademark Practice, Release No. 2* (Thomson Reuters, March 2023) at §17:19.

[71] Bayo Odutola & Karen Hansen, "Duties of Opposition Board Members and Hearing Officers" in *Odutola on Canadian Trademark Practice, Release No. 2* (Thomson Reuters, March 2023) at §17:21.

[72] *Trademarks Act*, RSC 1985, c T-13, ss 38(1), 11.13(1) and 45(1). A Section 45 notice is issued by the Registrar of Trademarks upon the filing of a written request by any person, and requires the mark's registered owner to file evidence showing that the mark has been used in Canada at any time during the three-year period preceding the date of the Section 45 notice.

[73] Canadian Intellectual Property Office, "FAQ on Opposition Proceedings—The Opponent" (29 October 2021), online: <ised-isde.canada.ca/site/canadian-intellectual-property-office/en/trademarks/trademarks-opposition-board/

opposition-proceedings/faq-opposition-proceedings-opponent> [Opposition Proceeding FAQ]; Canadian Intellectual Property Office, "FAQ on Section 45 Proceedings—The Requesting Party" (15 September 2021), online: <ised-isde.canada.ca/site/canadian-intellectual-property-office/en/trademarks/trademarks-opposition-board/section-45-proceedings/faq-section-45-proceedings-requesting-party> [Section 45 Proceeding FAQ].

[74] *Trademarks Act*, *supra* note 72, s 63(3).

[75] *Trademarks Act*, *supra* note 72, ss 11, 38 and 45; *Trademarks Regulations*, SOR/2018-227, s. 42-58, 67-74 and 78-93.

[76] *Tension 10 Inc v Tension Clothing Inc*, 2004 CarswellNat 5775 [TMOB] at para 10.

[77] Canadian Intellectual Property Office, "Practice in Trademark Opposition Proceedings" (28 June 2021), online: <https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/trademarks/trademarks-opposition-board/practice-trademark-opposition-proceedings#Section11>.

[78] *Ibid.*

[79] Odutola & Hansen, *supra* note 71 at §17:20 and §17:21.

[80] Canadian Intellectual Property Office, "Trademarks Opposition Board Practice Notices" (21 January 2022), online: <https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/trademarks/trademarks-opposition-board/trademarks-opposition-board-practice-notices>.

[81] Opposition Proceeding FAQ, *supra* note 73; Section 45 Proceeding FAQ, *supra* note 73.

[82] Canada Energy Regulator, "Applications and Hearings" (22 June 2021), online: <www.cer-rec.gc.ca/en/applications-hearings/>.

[83] Canada Energy Regulator, "Frequently Asked Questions—Regulations" (12 October 2022), online: <www.cer-rec.gc.ca/en/about/acts-regulations/frequently-asked-questions-regulations.html#s10>.

[84] *Ibid.*

[85] *Canada Energy Regulator Act*, SC 2019, c 28, s 31 [*CERA*].

[86] *Ibid,* s 26(1).

[87] *Ibid*, s 26(2).

[88] *Ibid,* ss 37-38.

[89] *Ibid*, s 28(1) and (2).

[90] *Ibid.*

[91] *Ibid*, s 27.

[92] *Ibid,* s 28(4) and (5).

[93] Canada Energy Regulator, "Hearing Process" (28 June 2022), online: <www.cer-rec.gc.ca/en/applications-hearings/participate-hearing/hearing-process/index.html> [*CER Hearing Process*].

[94] *Ibid.*

[95] *Ibid.*

[96] *Ibid.*

[97] *Ibid.*

[98] Canada Energy Regulator, "Process Advisor Support" (18 January 2022),

online: <https://www.cer-rec.gc.ca/en/applications-hearings/participate-hearing/hearing-process/process-advisor-support-hearing-participants.html>.

[99] *CERA, supra* note 85, ss 183, 214, 262 and 42(1); Canada Energy Regulator, "CER Time Limits and Service Standards" (12 December 2022), online: <www.cer-rec.gc.ca/en/about/who-we-are-what-we-do/cer-time-limits-and-service-standards.html> [*CER Time Limits*].

[100] *CERA, supra* note 85, s 42(1)(c).

[101] *Ibid,* s 42(2).

[102] *Ibid,* s 183(4).

[103] *CER Hearing Process, supra* note 93.

[104] *Ibid.*

[105] *CER Time Limits*, supra note 99.

[106] *CERA, supra* note 85, s 214.

[107] *Ibid,* ss 214 and 262.

[108] *CER Time Limits*, supra note 99.

[109] *Ibid.*

[110] *Ibid.*

[111] *Ibid.*

[112] *CERA*, *supra* note 85, s 31(2); *National Energy Board Rules of Practice and Procedure*, 1995, SOR/95-208.

[113] Canada Energy Regulator, "Hearing Room" (5 August 2022), online: < https://www.cer-rec.gc.ca/en/applications-hearings/participate-hearing/hearing-process/hearing-room.html> [CER Hearing Room].

[114] *CERA*, *supra* note 85, ss 35 and 31(3).

[115] CER Hearing Room, *supra* note 113; Canada Energy Regulator, "Filing Manual" (25 May 2022), online: < https://www.cer-rec.gc.ca/en/applications-hearings/submit-applications-documents/filing-manuals/filing-manual/>.

[116] *CERA*, *supra* note 85, s 33.

[117] *CER Hearing Process*, *supra* note 93.

[118] *Ibid.*

[119] See, e.g., *Royal J&M Distributing Inc v Kimpex Inc*, 2021 ONSC 3777, and *Dow Chemical Canada ULC v Nova Chemical Corporation*, 2020 ABCA 320; see also James Musgrove & Janine MacNeil, "Blurred Lines: How *Dow Chemical* and *Royal J&M* May Confuse Remedies Under the *Competition Act*" (2022) 35:1 Can Competition L Rev 46; e.g., *Competition Act, supra* note 4, s 79(3.2)(e).

[120] *Competition Act, supra* note 4.

[121] Opposition Proceeding FAQ, *supra* note 73; Section 45 Proceeding FAQ, *supra* note 73.

[122] *Enterprise Act 2002* (UK), c 40*; Competition Act 1998* (UK), c 41; *Consumer Rights Act 2015* (UK), c 15.

[123] Competition Appeal Tribunal, "Guide to Proceedings" (2015), online (pdf): <www.catribunal.org.uk/sites/cat/files/2017-12/guide_to_proceedings_2015.pdf>, ss 1.7-1.8 [*CAT Proceedings Guide*].

[124] *Ibid,* s 1.9.

[125] *Ibid,* s 1.11.
[126] *Ibid,* s 1.12; *The Competition Appeal Tribunal Rules 2015,* SI 2015 No 1648 [*CAT Rules*].
[127] Competition Appeal Tribunal, "About the Tribunal", online: <www.catribunal.org.uk/about>.
[128] *Ibid.*
[129] See, e.g., *CAT Proceedings Guide, supra* note 123, ss 4.5-4.14.
[130] *CAT Rules*, *supra* note 126, r 58(1); Note, however, that although the CAT can assign any matter to the FTP, in practice this is typically only done where one or more parties brings an application.
[131] *CAT Proceedings Guide, supra* note 123, s 5.139.
[132] *CAT Rules*, *supra* note 126, r 58(2)(a).
[133] *Ibid,* rr 4(4) and 4(5); See also *CAT Proceedings Guide, supra* note 123, ss 2.2-3.5.
[134] *CAT Rules, supra* note 126, r 4.
[135] *Competition and Consumer Act 2010* (Austl) (Cth), ss 30(2)-30(3) [*CCA*].
[136] *Ibid*, s 31(1).
[137] *Ibid*, s 31(2).
[138] *Ibid*, s 37.
[139] *Ibid*, s 32.
[140] Australian Competition & Consumer Commission, *Guidelines for Authorisation of Conduct (non-merger),* December 2022, online: <https://www.accc.gov.au/system/files/Authorisation%20of%20Conduct%20%28non-merger%29%20guidelines%20-%20December%202022_0.pdf> at para 12.19.
[141] *CCA,* supra note 135, s 102(1AC).
[142] *Ibid*, s 102(1AD).
[143] *Ibid*, s 102(1AB).
[144] *Ibid*, s 103(1)(a).
[145] *Ibid.*
[146] *Ibid,* s 105(2); *Competition and Consumer Regulations 2010* (Austl), SR 1974 No. 170, ss 25, 28M(3).
[147] See, e.g., *Rogers-Shaw* Docket, *supra* note 25.
[148] *P&H* Docket, *supra* note 23.
[149] *Ibid.*
[150] The Canadian Press, "Rogers takeover of Shaw finalized, deal now official" (3 April 2023), online: CBC News <https://www.cbc.ca/news/business/rogers-shaw-merger-official-1.6799566>.
[151] *Competition Tribunal Act, supra* note 6, s 9(2).
[152] We understand that full disclosure of the case file is mandatory for the European Commission. Given the presumption that the Commissioner acts in the public interest, full disclosure is warranted in light of his quasi-prosecutorial role.
[153] See, e.g., Susan M Hutton & Karen Hogan, "Justice Must Be Seen To Be Done: A Look at Canada's Competition Bureau Procedures" (2008) 23:1 Can Competition Rec 116 at 128; Calvin S Goldman, KC & Charles Layton, "Trials and Tribulations: A Quarter-Century of the Competition Tribunal" (2012)

25:2 Can Competition L Rev 522 at 531-532 [Goldman & Layton]; A Neil Campbell, Hudson N Janisch & Michael J Trebilcock, "Rethinking the Role of the Competition Tribunal" (1997) 76:3&4 Can Bar Rev 297 at 307 [Trebilcock et al.].

[154] For example, in *Commissioner of Competition v Rogers Communications Inc and Shaw Communications Inc* (CT-2022-002), a decision with reasons was released to the public 18 days after the end of the hearing and in *Commissioner of Competition v CCS Corporation* (CT-2011-002), a decision with reasons was released to the public roughly 5 months after the end of the hearing.

[155] For example, in *Commissioner of Competition v Secure Energy Services Inc. and Tervita Corporation* (CT-2021-002), it has been almost 12 months since the end of the hearing and no decision has been released and in *Commissioner of Competition v Parrish & Heimbecker, Limited* (CT-2019-005), it took 21 months from the end of the hearing for a decision to be released.

[156] Justice Sandra J Simpson, "The Competition Tribunal 2003-2011 and Beyond" (2011) 24:1 Can Competition L Rev 49 at 49-50.

[157] Goldman & Layton, *supra* note 153 at 532-533.

[158] Trebilcock et al., *supra* note 153 at 305-306.

[159] Pursuant to section 3(2)(b) of the *Competition Tribunal Act*, lay members are appointed to the Tribunal by the Governor in Council on the recommendation of the Minister of Innovation, Science and Economic Development. Given that the optional advisory panel was never used, this process provides no independent oversight over the lay members' appointed, giving rise to the possibility that their appointment may be influenced by partisan considerations of the Government of the day.

[160] Justice Denis Gascon, who is a current judicial member and former chairperson of the Tribunal, practiced competition law for 25 years prior to his appointment to the Federal Court in 2015. Two more recent appointments, Justice Nicholas McHaffie in 2019 and Justice Andrew Little in 2020, also have expertise with competition law. Justice Little is the current chairperson of the Tribunal.

[161] *Competition Tribunal Act, supra* note 6, s 12(1)(a).

[162] *CCA*, *supra* note 135, s 43B.

[163] *Competition Tribunal Rules, supra* note 10, r 80(1).

[164] The Antitrust Source, "Interview with Denis Gascon, Chairperson of the Canadian Competition Tribunal" (June 2017), online (pdf): <www.ct-tc.gc.ca/en/tribunal/documents/jun17_gascon_intrvwC.pdf> [*Gascon Interview*].

[165] *Competition Tribunal Rules*, supra note 10, r 80.

[166] *Ibid*, r 80(1).

[167] *Ibid*, r 80(4).

[168] *Ibid*, r 80(5) and (6).

[169] *Litigating Competition Law, supra* note 14 at §8.48.

[170] *Competition Tribunal Rules, supra* note 10, r 80(7). The power given to parties in Rule 80 of the *Competition Tribunal Rules* is much broader than Rule 52 of the *Federal Courts Rules*. There, parties are not permitted to file a written response or examine the expert.

[171] *Competition Tribunal Rules*, *supra* note 10, r 80(8).

[172] *Gascon Interview*, *supra* note 164.
[173] *Competition Tribunal Rules*, *supra* note 10, r 80.
[174] *Competition Tribunal Act, supra* note 6, s 3(2).
[175] For example, in *Rogers-Shaw* the panel was composed of one judicial member (Chief Justice P. Crampton) and two lay members.
[176] Federal Court of Canada, "Notice to the Parties and the Profession—Pilot Project: Chambers of the Court" (2 March 2023), online (pdf): <https://www.fct-cf.gc.ca/Content/assets/pdf/base/2023-03-02-Notice-Specialized-Chambers.pdf>.
[177] Prior to the June amendments, private parties could bring an action to the Tribunal under Sections 75 (refusal to deal), 76 (price maintenance) and 77 (exclusive dealing, tied selling, and market restriction). Following the amendments, private parties can bring an action to the Tribunal under Sections 78 and 79, the abuse of dominance provisions of the *Act*.
[178] Vasiliki Bednar, "Senator Wetston Response re: Examining the Canadian Competition Act in the Digital Era Consultation Paper (15 Dec 2021) at 12, online (pdf): *Senator Colin Deacon* <https://colindeacon.ca/media/50728/bednar.pdf>.
[179] *Ibid*.
[180] John Pecman, "Toughening Canada's Competitiveness" (Nov 2022) at 13, online (pdf): *Canadian Chamber Future of Business Centre* <https://chamber.ca/wp-content/uploads/2022/11/Toughening-Canadas-Competitiveness-EN.pdf>.
[181] Competition Bureau Canada, "Examining the Canadian *Competition Act* in the Digital Era" (8 Feb 2022) at 8.7, online: <https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era> [Bureau Submission].
[182] Veel, *supra* note 9 at 21.
[183] *Ibid* at 22; See also Kent Roach and Michael J Trebilcock, "Private Enforcement of Competition Laws" (1996) 34:1 Osgoode Hall LJ 461 at 502.
[184] Goldman & Layton, *supra* note 153 at 527.
[185] Trebilcock et al., *supra* note 153 at 307-308; Michael Trebilcock & Francesco Ducci, "The Evolution of Canadian Competition Policy: A Retrospective" (2018) 60:2 Can Bus LJ 171 at 198.
[186] Calvin S Goldman, KC, 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 Fall Conference, September 2000) at 10.
[187] Consultation Paper, *supra* note 2 at 55.