Intelligence MEMOS

From: Tim Brennan

To: Competition Policy Watchers

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Re: **Private Action in Competition Law: Cautionary Notes from South of the Border**

In its extensive response last month to a Senate invitation to comment on potential changes to the competition law framework in Canada, the Competition Bureau called for expanding private access to the Competition Tribunal regarding abuse of dominance and competitor collaborations.

It argued that private cases can clarify the scope and meaning of the *Competition Act* by expanding case law. It also suggests that private parties have information on harms from abuse and collaborations and thus could act more readily than the Bureau if they had access to the Tribunal. Finally, the Bureau says its resource constraints prevent it from attacking all meritorious cases, and that private parties could fill the gap.

These arguments have some merit. At the same time, however, there are lessons to be drawn from the US experience with private-party interventions that flow from a couple of significant differences between US and Canadian competition law. But awareness of potential pitfalls could help make private access more beneficial to the Canadian public.

Differences between common law litigation and competition law bring out the underlying cause for concern.

In contract, tort or property cases, the plaintiff typically bears the harm from a breach, accident, or nuisance, the defendant reaps the benefits, and the court decides which has the stronger claim.

In competition law, consumers bear the harms of anticompetitive actions, but perhaps outside class actions, they rarely if ever are the plaintiffs. It all too frequently will be an injured competitor, whose interests in profits may well be the opposite of the consumers that benefits from lower prices and higher quality.

This explains the long-standing emphasis on "protecting competition, not competitors." It also explains the importance of public enforcement; it, not private plaintiffs, serves as the voice of otherwise unrepresented consumers.

Two features together in US antitrust law suggest the potential significance of this concern. First, antitrust law in the US is very much like common law.

In contrast to Canada's *Competition Act*, the substance of US antitrust statutes can be written on a Post-It note: prohibiting unreasonable restraints of trade, monopolization, or mergers that may substantially lessen competition or tend to create a monopoly.

The practical and operational meaning of all of these phrases – price fixing, predatory pricing, exclusive dealing, market definition – are defined by case law.

A common law approach to competition law is not necessarily a bad thing. The problem in the US results from distorting incentives created by damage awards in antitrust cases.

A successful US antitrust plaintiff can get triple the damages. Multiplying damage awards makes sense in theory when only a fraction of violations are detected. However, plaintiffs only get "single" damages for breaches of contract and other business torts.

The difference creates an enormous financial incentive to bring a contract breach or tort case as a private antitrust case. Since the substantive content of US antitrust law is set in the courts, the distortions created by this incentive have led to disputes between wholesalers and retailers and entrants and incumbents that have little if anything to do with consumer harm.

Canada has an enormous advantage in this regard – a *Competition Act* that provides more specificity regarding what actions are anticompetitive. However, the Bureau expresses concern that monetary damages may be need to be increased substantially to better deter anticompetitive abuses and collaborations.

If the evidence bears out the need for greater deterrence, two changes may help make private actions beneficial. Most important would be to instruct adjudicators to base damages on harms to consumers, not to competitors (and, by the way, not based on the size of the defendant, which is irrelevant to consumer harm.)

The second change to consider would be to grant access to otherwise disinterested parties to sue for those damages and to prevent competitors and intermediaries from using competition law to insulate themselves from competition.

Tim Brennan is professor emeritus of public policy at the University of Maryland, Baltimore County. He held the T.D. MacDonald Chair in Industrial Economics at the Competition Bureau in 2006, and since then he has been a member of the C. D. Howe Institute's Competition Policy Council.

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