Intelligence MEMOS

From: Julie Rosenthal and David Rosner

To: François-Philippe Champagne, Minister of Innovation, Science and Industry

Date: March 28, 2022

Re: **Four Reasons to Abolish the Competition Tribunal**

Competition law in Canada is underdeveloped.

This is particularly so for the law regarding "civilly reviewable conduct," including the abuse of dominance (section 79) and competitor collaborations (section 90.1) provisions in the *Competition Act*. A more developed law in these areas would facilitate enforcement and permit companies to better understand the rules of the game and compete effectively.

This underdevelopment stems from two restrictions in the Act. First, the Act gives the Commissioner of Competition near-exclusive power to commence legal proceedings regarding "civilly reviewable conduct." Second, the Act makes the Competition Tribunal the sole arbiter of these cases.

There are many arguments to remove the Bureau's exclusive power to bring these types of cases (see here and here, for example, in support of permitting private abuse of dominance claims.) Similarly, there are strong arguments to remove the Tribunal's exclusive jurisdiction to hear such cases.

Here are four:

1. Judicial Economy. It seems increasingly likely the Act will be amended in the near future to permit private claims for civilly reviewable conduct. In many instances, parties to such actions will wish to join common law claims to their competition law claims. However, the Tribunal does not (and cannot) have jurisdiction over such common law claims. Such cases should be resolved in a single forum, which can only be accomplished in the superior courts. Requiring the parties to pursue parallel litigation – before the Tribunal for competition claims and before superior courts for common law claims – would waste resources and risk inconsistent findings of fact. Complex disputes need efficient resolution, and provincial superior courts are the time-tested answer.
2. The Tribunal Structure Undermines Appeals and Development of the Law. Provincial superior courts hear cases with different facts and issue decisions that are often in tension with each other. Appellate courts assess and work to resolve those tensions, thereby developing the law. "Civilly reviewable conduct" does not benefit from this treatment. When Tribunal decisions are appealed, the Federal Court of Appeal reviews the decision but is rarely asked to reconcile different strands of case law, because all strands originate from a single source – the Tribunal. Moreover, because of the limited number of decisions from the Federal Court of Appeal and the subsequent lack of conflicting strands of case law, the Supreme Court of Canada almost never considers civilly reviewable conduct and therefore rarely – only one case since 2009 – participates in the development of this area of the law.
3. Too Few Voices. The Tribunal's exclusive jurisdiction over "civilly reviewable conduct" cases has resulted in two judges writing almost every significant decision in this area over the past 10 years. While Justices Paul Crampton and Denis Gascon are excellent jurists, no other area of law reserves its development to so few voices. Law is best developed when many different jurists (including people from equity-seeking groups and people who aren't former competition lawyers) contribute their viewpoints through the normal process of hearing disparate cases and subsequent appeals.
4. No Need for a Specialized Tribunal. The creation of the Tribunal in 1986 was motivated, in part, by a concern that superior courts couldn't adjudicate complex economic matters and by a desire to include business and economic experts in the adjudication of competition law matters (by appointing them to the Tribunal). In hindsight, it is apparent neither rationale is valid. Superior courts regularly and ably decide cases with complex economic evidence and billions of dollars at stake, including conspiracy claims. Moreover, since 1986, many foreign jurisdictions have created private rights of actions (including for abuse of dominance) that are successfully adjudicated in local courts (i.e., specialized tribunals have not proved necessary). Finally, over the past 10 years, the judicial members of the Tribunal have empaneled two judges at every Tribunal hearing (diminishing the role of the non-judicial members and undermining the rationale for the Tribunal's creation in the first place).

In short, the experience of the past 35 years has shown that granting exclusive jurisdiction over civilly reviewable conduct to the Competition Tribunal is neither necessary nor desirable. We believe that it would be preferable to grant concurrent original jurisdiction over civilly reviewable matters to provincial superior courts and to the Federal Court of Canada, following along the well-trodden path laid down in respect of other federally created claims, most notably under the *Patent Act*, the *Trademarks Act* and the *Copyright Act*.

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