Intelligence MEMOS

From: Steve Szentesi

To: The Hon. Navdeep Bains, Minister of Innovation, Science and Economic Development

CC: John Pecman, Commissioner of Competition

Date: March 28, 2017

Re: A Proposal to Amend the *Competition Act* Reference Section

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Despite being in force in one form or another for over a hundred years, Canadian competition law remains relatively underdeveloped compared to other major jurisdictions. A number of key sections have not been considered by the Competition Tribunal or the courts at all or only rarely. Amending the references provision of the *Competition Act* (section 124.2, which allows the Tribunal to issue decisions on points of law, among other things, without the need for a full hearing) would help solve this.

The *Act* provides a number of options to resolve contentious matters, but few avenues for guidance on standalone points of law.

Private parties can request written opinions from the Competition Bureau (section 124.1). However, opinions are discretionary. Also, given that since 2011 the Bureau has significantly circumscribed their scope – for example, to not provide any view on defenses or effects – they are of much less practical value than in the past.

Another section that provides some options is section 124.2 that was added to the *Act* in 2002.

However, the *Act* does not allow references brought by private parties alone, irrespective of proceedings initiated. This is an important gap.

The references provision initially promised an efficient route to guidance on points of competition law. For example, the Standing Committee on Industry noted in 2000 that it would "improve the dispute resolution system" and "allow early resolution of key issues". It also argued in 2002 to expand the section to allow private parties to bring references to resolve more cases "short of a full-blown hearing".

Over the past 15 years, the references provision has, unfortunately, proven to be of little assistance for guidance on the law or making the Tribunal process more expeditious. The reference provision has only been utilized twice – both by the Commissioner (in the *Burns Lake* and *Kobo* cases). That is because of the inability for private parties alone to obtain guidance on standalone legal points. This is despite, in my experience, many clients looking for an efficient means to obtain clarity on important and unsettled points of law before deciding whether to take more extensive steps.

Amending the *Act* to allow private parties alone to bring Tribunal references would have several obvious benefits, foremost adding clarity to the law and potentially forestalling expensive and unnecessary litigation. Reform would also allow the Tribunal to further fulfill a primary mandate – namely, the informal and expeditious determination of matters, which are expressly referred to in the *Act*.

Competition law enforcement has been shifting over the past several years from the Competition Bureau to private parties based, among other things, on budget cuts. Amending the *Act* to allow private parties to commence references would also allow private parties to resolve some matters efficiently short of full litigation.

If legislators deemed safeguards necessary to prevent frivolous or strategic litigation, these could easily be incorporated into an amendment including a leave requirement, which is already a required step for other private access.

It's time to expand the reference provision in the *Act*.

Steve Szentesi is a Canadian competition and advertising lawyer based in Toronto.