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**REFORM OF THE TRIBUNAL'S PROCEDURE:
IMPLICATIONS FOR DUE PROCESS**

by

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REFORM OF THE TRIBUNAL PROCESS¹

INTRODUCTION

Sweeping amendments to the *Competition Act*² (the "Act"), the *Competition Tribunal Act*³ (the "Tribunal Act") and the *Competition Tribunal Rules*⁴ (the "Rules") may significantly affect the way reviewable matters are investigated and decided. The changes, many of which were introduced by Bill C-23, *An Act to Amend the Competition Act and the Competition Tribunal Act*,⁵ give the Competition Tribunal (the "Tribunal") a number of new powers, including the power to issue interim orders, make summary dispositions, hear and decide references and award costs. The amendments to the Rules, which include rules restricting discovery, relating to expert testimony and allowing the Commissioner to read section 11 transcripts into evidence, are intended to make the Tribunal a more flexible and efficient forum for adjudication. In particular, the new Tribunal procedure is intended to reduce the time before and during hearings and to reduce the costs associated with lengthy and complex litigation.⁶

In addition to the changes described above, the Tribunal has also recently issued Practice Directions intended to clarify and supplement the Rules and to provide detailed procedural instructions until formal amendments to the Rules are finalized.⁷ The Practice

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² R.S.C. 1985, c. C-34.

³ R.S.C. 1985, c. 19.

⁴ *Competition Tribunal Rules*, SOR/94-290. Amendments to the Rules relating to reviewable matters other than mergers came into force upon their publication in the *Canada Gazette*, Part II, on February 13, 2002. The Rules and the recent amendments (SOR/2002-62) are available on the Competition Tribunal's website at <http://www.ct-tc.gc.ca/english/legislation.html>. Section 16 of the Tribunal Act provides that the Tribunal may, with the approval of the Governor in Council, make general rules for regulating its practice and procedure.

⁵ S.C. 2002, c. 16. Bill C-23, which came into force on June 21, 2002, is available on the Competition Bureau's website at: <http://strategis.ic.gc.ca/SSG/ct02392e.html>. All but one of the amendments contained in Bill C-23 came into force on this date. Section 124.1, which allows the Commissioner to issue binding advisory opinions, was not yet in force at the time of writing.

⁶ SOR/2002-62 (Regulatory Impact Analysis Statement).

⁷ The Practice Directions were issued by the Tribunal on August 8, 2002, and are available on the Tribunal's website at: <http://www.ct-tc.gc.ca/English/legislation.html>.

Directions are meant to be read in conjunction with the existing Rules, and will be followed by the Tribunal until further Practice Directions are issued or the Rules are amended.

This paper discusses the impact of the new amendments on the way reviewable matters are litigated, including how evidence is obtained and produced, how cases are heard and disposed of and the types of remedies that may be imposed by the Tribunal. In addition, a number of issues and uncertainties relating to the new Tribunal process are highlighted. Future developments, including recommendations by a Parliamentary Standing Committee for further amendments, as well as the Commissioner's recent application in *Canada Pipe*, are also discussed.

PART I. INTERIM ORDERS

The Bureau's enforcement of reviewable matters has been significantly enhanced by the Commissioner's new power under section 103.3 of the Act to make *ex parte* applications to the Tribunal for temporary interim orders to prevent the continuation of certain reviewable practices, such as refusal to deal, exclusive dealing, tied selling and abuse of dominant position, while an inquiry is being conducted.

(a) Test to Issue Interim Order

The Tribunal may issue an interim order where the Commissioner has certified that an inquiry is being made under section 10(1)(b) of the Act and (1) injury to competition that cannot adequately be remedied by the Tribunal is likely to occur, (2) a person is likely to be eliminated as a competitor or (3) a person is likely to suffer significant loss of market share, revenue or other harm that cannot be adequately remedied by the Tribunal.⁸ Section 23(1) of the Practice Directions sets out what must be filed by the Commissioner on an application for an interim order.

Interim orders are initially in effect for ten days,⁹ subject to the Commissioner's right to apply for up to two extensions of 35 days each.¹⁰ The Tribunal may also order that the

⁸ Section 103.3(2).

⁹ Section 103.3(4).

effective period of the interim order be extended on application by the Commissioner if the Tribunal is satisfied that information requested by the Commissioner for the purpose of the inquiry has not been provided by the person to whom the order applies or, if already provided, that the Commissioner requires more time to review that information.¹¹ In that case, the Tribunal could extend the order for such period as it considers necessary to give the Commissioner a reasonable opportunity to receive and review the information.¹²

(b) Vary or Rescind Interim Order

Interim orders may be varied or set aside upon application by the person against whom an interim order is made within the initial ten-day period.¹³ The Tribunal must confirm the interim order where there is (or will be) (1) injury to competition that cannot be adequately remedied by the Tribunal, (2) a person is likely to be eliminated as a competitor or (3) a person is likely to suffer significant loss of market share, revenue or other harm that cannot be adequately remedied by the Tribunal.¹⁴ Where none of these situations exist (or is likely to exist), the Tribunal must set aside the interim order.¹⁵

(c) Effect of Interim Order

Perhaps the most significant aspect of the Tribunal's new power to issue interim orders for reviewable matters is that the Commissioner is not required to establish that there has been a substantial lessening of competition. The Commissioner is only required to show that an inquiry is being made under section 10(1)(b) of the Act and that there is potential injury to a competitor. This appears to be a significantly lower threshold than required to obtain a final order for some reviewable matters, such as abuse of dominance, where a substantial lessening of

¹⁰ Section 103.3(5).

¹¹ Section 103.3(5.3).

¹² Section 103.3(5.4).

¹³ Section 103.3(7). Section 24.1(1) of the Practice Directions sets out what must be filed on an application to vary or set aside an interim order.

¹⁴ Section 103.3(7)(a).

¹⁵ Section 103.3(7)(b).

competition must be shown. Prior to the amendments, some argued that in order to obtain an interim order to prevent the continuation of conduct at a preliminary stage of an inquiry, the Commissioner should be required to show that reasonable grounds exist for the Tribunal to make an order.¹⁶ The low threshold required for the Commissioner to obtain an interim order (*i.e.*, injury to a competitor *not* competition generally) is arguably also a departure from the well established principle that the purpose of competition law is to protect competition not competitors:

"Moreover, the Tribunal is entitled under the proposed amendment to issue an interim order where 'a person is likely to be eliminated as a competitor', even when there is no evidence of harm to competition in the market. The purpose of the *Act* is to protect competition, not competitors. An interim order should not be issued to prevent harm to a competitor unless the harm at issue would satisfy the statutory effects test of substantial harm to competition in a relevant market".¹⁷

It remains to be seen to what extent the Commissioner will rely on interim orders. It would seem that this new power would be an attractive option given that such an order could be obtained prior to a hearing (*i.e.*, while an investigation is being conducted) and without the requirement to show a substantial lessening of competition. An interim order could prove very costly for an entity that may be required to alter its distribution and pricing practices before an investigation has been concluded, albeit ostensibly on a temporary basis.

¹⁶ See for example G. Addy, *Statement on Amendments to the Competition Act and Related Statutes (Bill C-23)*, Submission to the House of Commons Standing Committee on Industry, Science & Technology at 10-11.

¹⁷ G. Addy, *Statement on Amendments to the Competition Act and Related Statutes (Bill C-23)*, Submission to the House of Commons Standing Committee on Industry, Science & Technology at 11. See also *A Plan to Modernize Canada's Competition Regime: Report of the Standing Committee on Industry, Science and Technology* (Walt Lastewka, M.P., Chair – April 2002), where the Standing Committee observes in Chapter 3 that "the legal test for the granting of the order is quite low – the Commissioner is not required to show that competition will be irretrievably harmed, but merely that a person is likely to be eliminated as a competitor, or that a person is likely to suffer a significant loss of market share, revenue or other irretrievable harm. The Committee believes that granting any manner of relief – interim or final – merely on the grounds that a competitor is losing revenue (something which happens all the time, and which is not, in itself, evidence of any anticompetitive activity) represents a serious departure from the well-established and important principle that competition law aims at protecting competition, not competitors".

PART II. NEW DISCOVERY RULES

Recent amendments to the Rules are intended to streamline the Tribunal process with respect to reviewable matters under the Act.¹⁸ As a result of these amendments, the old discovery process in all non-merger applications has been replaced with a mandatory disclosure process. In addition, a party's ability to conduct an oral examination of the Commissioner has been further restricted to cases where the Tribunal determines it to be "warranted in the circumstances".

(a) Disclosure Statements

Prior to the adoption of the new Rules, the rules applicable to non-merger applications required the Commissioner to provide an "affidavit of documents" to parties against whom orders were sought which, among other things, listed all documents that were in the Commissioner's possession, power or control that were "relevant to any matter in issue". The old discovery process has been replaced with a mandatory disclosure process in which parties are required to deliver disclosure statements containing a list of the records on which they intend to rely (as opposed to all "relevant documents"), the will-say statements of non-expert witnesses and a concise statement of the economic theory in support of their case.¹⁹ The Commissioner must serve his disclosure statement on each person against whom an order is sought within 14 days after the notice of application is filed. Respondents must serve their disclosure statements within 14 days after the service of the response.²⁰

(b) Right of Discovery

The amendments to the Rules have substantially truncated the Commissioner's documentary production obligations in respect of non-merger cases. Whereas the old Rules required the Commissioner to deliver an affidavit of documents describing all of the non-

¹⁸ The amendments to the Rules relating to discovery apply to contested reviewable practices other than mergers.

¹⁹ Rules 4.1(2) and 5.1(2).

²⁰ The contents of the Commissioner's and the respondent's disclosure statements are set out in Rules 4.1 and 5.1.

privileged documents in his possession, power or control that were "relevant to any matter in issue", the new Rules applicable to proceedings of this nature only require the Commissioner to produce "a list of the records on which the Commissioner intends to rely".²¹

With respect to oral discovery, the new Rules have also narrowed the circumstances in which oral examinations for discovery of the Commissioner's representative will be permitted. Whereas paragraph 21(2)(d) of the Rules used to provide that the Tribunal could consider the "desirability of examination for discovery of particular persons or documents", the new paragraph 21(2)(d.1) limits oral examinations for discovery to cases where they are "warranted by the circumstances". It remains to be seen how the Tribunal will interpret this new test (which appears to be narrower than the old test) in deciding whether to grant oral discovery or when parties will be able to establish that oral discovery is "warranted by the circumstances".

In addition to the above restrictions on documentary and oral discovery, the new Rules also provide that unless the Tribunal orders otherwise, the parties are only required to identify their non-expert witnesses by name and address two days before a particular witness is called to testify.²² As a result, in the absence of a Tribunal order precluding him from doing so, the Commissioner is now entitled to refuse to disclose to a respondent the names and addresses of virtually all of his non-expert witnesses until after the contested hearing has commenced. The practical effect of this is that respondents will be precluded from speaking with or interviewing any of the Commissioner's non-expert witnesses until they are called to testify at the hearing and set foot in the witness box.

Recently, Sears Canada brought a motion before the Tribunal seeking, among other things, an extension of time to serve its disclosure statement, oral discovery of the Commissioner, oral discovery of certain third parties and all non-expert witnesses who were to testify in the case and "meaningful written summaries of all relevant information gathered in the

²¹ Rule 4.1(2)(a).

²² Rules 4.2 and 5.2.

context of the Commissioner's inquiry".²³ The motion was brought in relation to the Commissioner's July 22, 2002 application to the Tribunal alleging that Sears had engaged in deceptive marketing practices constituting reviewable conduct under subsection 74.01(3) of the Act. Among the grounds argued by Sears in its motion was that full discovery would "afford the parties full entitlement to procedural natural justice and fairness, through adequate notice, sufficient opportunity to present all relevant evidence and arguments and adequate preparation time".²⁴ Sears also argued that the new truncated discovery provisions in the Rules create an un-level playing field given the Commissioner's ability to achieve what amounts to full discovery by seeking and obtaining compulsory orders for document production, written responses to questions and/or oral examination under section 11 of the Act. In an order issued without reasons, the Tribunal held that it was not "persuaded the grounds exist which would justify departure" from Sears' obligation to serve its disclosure statement, and that the Tribunal would deal with the "balance of the matters raised" by Sears' Notice of Motion at the pre-hearing conference.²⁵

In his Memorandum of Argument in response to Sears' motion for full discovery,²⁶ the Commissioner argued generally that "Sears has not established that discovery is warranted by the circumstances" and that "natural justice and procedural fairness do not require that Sears be provided with discovery".²⁷ The Commissioner argued that procedural fairness and natural justice only require the Commissioner to disclose the case Sears has to meet, and that this had been satisfied by the Commissioner by disclosure of the documents he intends to rely on. In addition, the Commissioner argued that full discovery (i.e., all information available to the

²³ Notice of Motion (Respondent), *Commissioner v. Sears Canada Inc.*, File No. CT -2002/004 (September 18, 2002).

²⁴ Sears' Notice of Motion is available on the Tribunal's website at <http://www.ct-tc.gc.ca/english/casetype.html>.

²⁵ *Commissioner of Competition v. Sears Canada Inc.*, 2002 Comp. Trib. 40, File No. CT -2002/004 (October 23, 2002).

²⁶ The Commissioner's Memorandum of Argument, filed on December 11, 2002, is available on the Tribunal's website at <http://www.ct-tc.gc.ca/English/casetype.html>.

²⁷ Memorandum of Argument, p. 2.

Commissioner) is not available in administrative proceedings which do not warrant the level of disclosure that would be available in criminal proceedings.

With respect to Sears' argument that the Commissioner has substituted its compulsory powers under section 11 of the Act for discovery, the Commissioner stated that "even before the introduction of the [new discovery rules], the Commissioner routinely made use of those powers in virtually every case that has come before the Tribunal", while conceding that "it is widely anticipated that with the introduction of the [new discovery rules], the Commissioner will make even greater use of s. 11 of the Act".²⁸ Moreover, the Commissioner stated in his response that the new discovery regime balances "the right of the party to 'know the case against it' with the need to consider and dispose of commercial matters in a timely and expeditious manner so as to allow the economic consequences of conduct to be corrected, if appropriate, and markets to operate".²⁹

On February 5, 2003, the Tribunal issued an order and reasons dismissing Sears' motion subject to a right to reapply at a later date for full discovery in connection with one particular issue raised in the pleadings for which the Commissioner had failed to provide a disclosure statement and in respect of which it was ordered to do so by the Tribunal.³⁰ In its reasons, the Tribunal identified a number of deficiencies in Sears' motion, including the failure to lead affidavit evidence addressing the specific information or documents said to be necessary for the defence of the application, Sears' inability to obtain such information without discovery, any actual unfairness if Sears had to proceed to hearing without specific evidence and the delay and expense that would flow from granting the requested discovery.³¹ In the Tribunal's opinion,

²⁸ Memorandum of Argument, p. 4.

²⁹ Memorandum of Argument, p. 5.

³⁰ *Commissioner of Competition v. Sears Canada Inc.*, 2003 Comp. Trib. 2, File No. CT-2002/004 (February 5, 2003). The Commissioner had not served a disclosure statement on Sears revealing the case that Sears had to meet regarding Sears' argument in the main proceedings that subsection 74.01(3) of the Act was constitutionally invalid because it infringes the rights of Sears to freedom of expression under subsection 2(b) of the Charter.

³¹ Reasons and Order at para. 19.

these were all relevant considerations for assessing whether discovery is warranted by the circumstances.

The Tribunal also addressed and dismissed Sears' arguments that discovery was warranted due to the Commissioner's ability to rely on his compulsory powers under section 11 of the Act. The Tribunal remarked that those powers "are procedures which may commonly be employed by the Commissioner in the conduct of an inquiry under the Act" and that "[h]ere where there is no attack on the sufficiency of the disclosure statement, something more than recourse to those tools must [...] be established in order to constitute circumstances which warrant discovery".³²

Finally, in dismissing Sears' motion, the Tribunal noted that intervening events had resulted in at least partial satisfaction of certain requests made by Sears in its motion. First, the Tribunal observed that the Commissioner and Sears had come to an agreement during argument of the motion whereby the Commissioner would provide will-say statements to Sears in respect of affidavits sworn by certain other industry participants. Second, the Tribunal noted that the Commissioner agreed to deliver to Sears copies of documents obtained from industry participants pursuant to section 11 (upon which he intended to rely) once the terms of a confidentiality order are settled.

(c) Procedural Fairness Issues

The new discovery process raises a number of procedural fairness issues, including a respondent's ability to make full answer and defence and to cross-examine witnesses. For example, a respondent's ability to make full answer and defence may be severely circumscribed by the new rules which only require the Commissioner to produce documents he intends to rely on, as opposed to all relevant documents. Thus, for example, if the Commissioner has in his possession documents that are harmful to his case, the new Rules do not require him to disclose them to the respondent.

³² Reasons and Order at para. 20.

The ability to make full answer and defence is further impeded by the Commissioner's increased use of section 11 orders to gather evidence. While section 12(4) of the Act gives a respondent the right to attend section 11 examinations, the Commissioner is not required to give respondents notice of such examinations. As a result, respondents are often not aware that the Commissioner is conducting section 11 examinations and, as a result, are deprived of the opportunity to cross-examine witnesses. A respondent's ability to know the case to meet is in many cases further limited by the fact that the Bureau routinely obtains sealing orders over section 11 orders, as well as its increased reliance on claims of public interest privilege.

The changes to the Rules relating to discovery are also likely to encourage further use of section 11 orders.³³ Because a respondent is only required to produce documents on which it intends to rely in the proceeding, the Commissioner has even more incentive to issue production orders under section 11 to obtain all of a respondent's relevant documents, especially those that may not support the respondent's case. In addition, the Commissioner is likely to use section 11 oral examinations under oath, prior to an application, in place of the oral discovery of the respondent which previously took place after the Commissioner filed his notice of application.

In addition, as the commencement of proceedings does not prevent the Bureau from continuing its investigation, and in light of the reduced discovery under the new rules, the Commissioner may use section 11 orders on an on-going basis throughout proceedings. This process, in which the Commissioner may employ section 11 orders both prior to and following an application to the Tribunal, further tips the scale in favour of the Commissioner, and raises serious issues of fundamental justice and procedural fairness relating to the respondent's right to meet the case.

PART III. PRELIMINARY DISPOSITION OF CASES

³³ Section 11 of the Act provides for three different types of obligations which may be imposed by court order: (1) document production, (2) written responses to questions and (3) oral examination under oath. While complying with section 11 orders has often proven very costly and disruptive for affected parties because of the typical breadth of these orders, the Commissioner need only satisfy a judge that an inquiry is underway and that the target of the order is "likely to have information that is relevant to the inquiry". This test does not require that the firm targeted by the order be the actual subject of the Bureau's investigation or that the Bureau demonstrate to the court the basis for commencing its inquiry.

The recent amendments to the Act and the Tribunal Act have introduced several new ways in which reviewable matters may be decided without proceeding to a full Tribunal hearing. The Tribunal now has the power to make summary dispositions and hear and decide references. New rules also provide that parties may enter into consent agreements in reviewable matters without Tribunal approval which, upon registration, have the force of a Tribunal order.

(a) Summary Disposition

The Tribunal now has the power, on a motion by a party to an application made under Part VII.1 (deceptive marketing practices) or Part VIII (reviewable matters) of the Act, to hear and determine the application in a summary way.³⁴ Summary dispositions are to be decided by a judicial member of the Tribunal,³⁵ in accordance with "any rules on summary dispositions".³⁶ On a motion for summary disposition, the Tribunal may dismiss the application in whole or part if there is "no genuine basis" for it or allow the application in whole or in part if satisfied that there is "no genuine basis" for the response to it.³⁷ The recently issued Practice Directions set out what must be filed on a motion for summary disposition.³⁸

While the Tribunal's new power to make summary dispositions will allow cases to be resolved without the need for a full hearing, a key issue will be how the Tribunal will interpret the test "no genuine basis" in granting or denying motions.³⁹ The most obvious "rules on summary dispositions" that may provide assistance in interpreting this test are the *Federal*

³⁴ Tribunal Act, section 9(4).

³⁵ Tribunal Act, section 9(5). Tribunal panels are composed of judicial and lay members.

³⁶ Tribunal Act, section 9(4).

³⁷ Tribunal Act, section 9(5).

³⁸ Practice Directions, sections 46.1 and 46.2.

³⁹ *See for example*, Canadian Bar Association (Competition Law Section), "Submissions on Bill C-23: *Competition Act* Amendments" (October 2001) at 28, where the CBA states that "[t]he key questions will be the Tribunal's construction of the words 'no genuine basis' and its willingness to make decisions without hearing evidence".

*Court Rules, 1998*⁴⁰ (the "Federal Rules"), which provide that a court may grant summary judgment where there is "no genuine issue" for trial.⁴¹

The Tribunal's power to make summary dispositions means that, in theory, a more efficient process is possible, as well as fewer cases going to the Tribunal for a full hearing. It remains to be seen, however, how willing the Tribunal will be to summarily decide cases without hearing evidence.

(b) References

The Act has also been amended to allow the Tribunal to hear and decide references.⁴² The Commissioner and a person who is the subject of an inquiry under section 10 of the Act may refer a question of law, mixed law and fact, jurisdiction, practice or procedure in respect of a matter under Part VII.1 (deceptive marketing practices) or Part VIII (reviewable matters) of the Act to the Tribunal for determination.⁴³ The new reference provision, however, requires the Commissioner's consent.⁴⁴ The Commissioner may also unilaterally refer a question of law, jurisdiction, practice or procedure relating to Parts VII.1 to IX of the Act to the Tribunal.⁴⁵ The Commissioner's ability to unilaterally refer questions to the Tribunal, however, does not include the right to refer questions relating to a particular case (i.e., questions of "mixed law and fact"). The Tribunal must decide questions referred to it "informally and

⁴⁰ SOR/98-106.

⁴¹ Federal Rule 216. In order to show that there is no genuine issue for trial, the moving party must show that the case is so doubtful that it deserves no further consideration. *See Granville Shipping Co. v. Pegasus Lines Ltd. S.A.*, [1996] 2 F.C. 853 (T.D.).

⁴² It has been noted that the Tribunal's new reference power merely formalizes its former informal practice in some cases. *See for example*, Hon. W.P. McKeown, Q.C., "New Practices and Procedures at the Competition Tribunal", Annual Conference, Canadian Bar Association – Competition Law Section (Ottawa, October 34, 2002) at 6, who describes the "quasi-reference" process in the *Air Canada* case where the Tribunal was requested by the parties to hear and determine certain issues first, before proceeding with the balance of the application.

⁴³ Section 124.2(1).

⁴⁴ Section 124.2(1) of the Act provides that the Commissioner and a person who is the subject of an inquiry under section 10 may "by agreement" refer a question of law, mixed law and fact, jurisdiction, practice or procedure to the Tribunal for determination.

⁴⁵ Section 124.2(2).

expeditiously".⁴⁶ The Practice Directions set out what must be filed on a reference made to the Tribunal, and also provide that the Tribunal may appoint an *amicus curiae* when the Commissioner unilaterally brings a reference under section 124.2(2).⁴⁷

Though the reference provisions were introduced to allow parties to have a specific aspect of their dispute resolved without the need for a full hearing, and are part of amendments intended to streamline the Tribunal process,⁴⁸ they may be of limited use to respondents given the fact that the Commissioner's consent is required to bring a reference before the Tribunal. The Canadian Bar Association ("CBA") has noted that the necessity for private parties to obtain the Commissioner's consent to use the new reference procedure may severely limit its use:

"the Commissioner should not have the ability to unilaterally block the disposition of an issue that is based on a question of law, jurisdiction, practice or procedure. Parties subject to a section 10 inquiry should have the right to bring a reference to the Tribunal on the limited bases that are currently proposed to be granted to the Commissioner".⁴⁹

The lack of fairness in allowing only the Commissioner to unilaterally bring references before the Tribunal was widely noted prior to the passage of Bill C-23.⁵⁰

⁴⁶ Section 124.2(4) of the Act requires the Tribunal to "decide the questions referred to it informally and expeditiously, in accordance with any rules on references made under section 16 of the *Competition Tribunal Act*."

⁴⁷ Practice Directions, sections 98 and 99.

⁴⁸ See P-L Hebert (Senior Competition Law Officer), "Strengthening a Pillar of Canadian Competition Law: Enforcing and Amending the Abuse of Dominance Provisions of the *Competition Act*", prepared for the INSIGHT CONFERENCE, "International Dimensions of Competition Laws" (March 22, 2002).

⁴⁹ Canadian Bar Association (Competition Law Section), "Submissions on Bill C-23: *Competition Act* Amendments" (October 2001) at 26.

⁵⁰ See for example, G. Addy, *Statement on Amendments to the Competition Act and Related Statutes (Bill C-23)*, Submission to the House of Commons Standing Committee on Industry, Science & Technology at 1.

(c) Consent Agreements

In addition to the Tribunal's new powers to make summary dispositions and hear references, the new rules relating to consent agreements may further affect the way reviewable matters are decided.

(i) Parties

Following the passage of Bill C-23, sections 105 and 106 of the Act (dealing with consent orders and the rescission and variation of consent orders) have been replaced. Under the new rules, the Commissioner and the person who is the subject of an application made by the Commissioner may now enter into a consent agreement based on terms that could be the subject of a Tribunal order.⁵¹ Upon registration of the consent agreement with the Tribunal the proceedings, if any, are terminated and the agreement has the force and effect of a Tribunal order.⁵² The fact that a consent agreement has the force of a Tribunal order once registered is significant, as a breach of Tribunal orders can result in civil liability in damages.⁵³ Unlike under the old rules, consent agreements no longer need to be approved by the Tribunal.⁵⁴ Under the new system, a consent agreement will effectively become an order of the Tribunal without any oversight or involvement by the Tribunal until and unless the parties make an application to rescind or vary the agreement.

⁵¹ Sections 105(1) and (2).

⁵² Section 105(4). Section 77.1 of the Practice Directions sets out the process for the filing of a consent agreement.

⁵³ Section 36(1) of the Act provides that "any person who has suffered loss or damage as a result of ... the failure of any person to comply with an order of the Tribunal or another court under the Act, may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of the proceedings under this section".

⁵⁴ Under the old section 105, consent orders were required to be approved by the Tribunal, whose mandate was to ensure that the proposed order would be reasonably expected to meet the objectives of the Act, including a consideration of the appropriateness of the measures to combat the alleged substantial lessening of competition, their enforceability and the efforts made to meet the legitimate concerns of producers and consumers in the relevant market. See *Canada (Director of Investigation & Research) v. Asea Brown Boveri Inc.* (1989), 27 C.P.R. (3d) 65 (Comp. Trib.).

There is also a parallel set of rules dealing with consent agreements in the context of private access (*i.e.*, consent agreements between private parties for refusal to deal, exclusive dealing, tied selling and market restriction).⁵⁵

It remains to be seen how removing the requirement for Tribunal approval of consent agreements will affect the rights of parties in reviewable matters, and whether the new rules will encourage settlement and the timely disposition of reviewable practices cases.

(ii) Rescission and Variation

There are also new rules relating to the rescission or variation of consent agreements. The Commissioner or the person who consented to the agreement may apply to the Tribunal to rescind or vary a consent agreement.⁵⁶

In addition, anyone "directly affected" by the consent agreement (*i.e.*, non-parties) may also apply to the Tribunal, within 60 days after the registration of the agreement, to have one or more of its terms rescinded or varied.⁵⁷ The rule giving third parties the right to apply to rescind or vary a consent agreement is new (formerly only the Commissioner or a person against whom an order had been made could apply to vary or rescind a consent order). The test, however, for third parties to challenge a consent agreement appears to be quite narrow: the Tribunal may grant the application if it finds that "the terms could not be the subject of an order of the Tribunal".⁵⁸ While it is unclear how the Tribunal will interpret this new standard, or how readily the Tribunal will vary agreements based on applications made by non-parties, the new

⁵⁵ Section 106.1(1).

⁵⁶ Section 106(1). The Tribunal may rescind or vary a consent agreement if it finds that (1) the circumstances for making the agreement have changed and, in the circumstances that exist at the time the application to rescind or vary is made, the agreement would not have been made or would have been ineffective in achieving its intended purpose (s. 106(1)(a)) or (2) the Commissioner and the person who consented to the agreement consent to an alternative agreement (s. 106(1)(b)).

⁵⁷ Section 106(2).

⁵⁸ Section 106(2).

regime does give non-parties (including competitors of parties to the agreement) some latitude to challenge such agreements.⁵⁹

There are, however, several weaknesses in this new process. First, a third party's right to seek rescission or variation can only be based on the Tribunal's lack of jurisdiction to make such an order, not that the remedy is excessive or that an alternative may be more pro-competitive. Second, it is unclear how a third party can determine how the consent agreement has been filed. While section 106.1(3) of the Act requires that consent agreements in private access cases must be published "without delay" in the *Canada Gazette*, there is no corresponding rule for Commissioner-negotiated consent agreements. Third, allowing third parties to challenge consent agreements introduces uncertainty for respondents, who have no assurance that such agreements are final until 60 days have elapsed (the period third parties have to challenge consent agreements).

PART IV. NEW PROCESS AT TRIBUNAL HEARINGS

(a) Costs

In addition to the Tribunal's new powers to make summary dispositions and hear references, the Tribunal now has the power to award costs in reviewable matters on a final or interim basis in accordance with the provisions governing costs in the Federal Rules.⁶⁰ The Tribunal may decide who must pay and who is to receive costs⁶¹ and may award costs against the Crown.⁶²

⁵⁹ For a detailed discussion of the scope and impact of the new consent order process, including who may be considered to be "directly affected by a consent agreement" and how the Tribunal may interpret the test for non-parties to challenge consent agreements ("the terms could not be the subject of an order of the Tribunal"), see J. Bodrug & C. Margison, "The Consent Order Process: Post-*Ultramar* and Looking Ahead" (2002) Spring/Summer Canadian Competition Record 59.

⁶⁰ Section 8.1(1) of the Tribunal Act provides that the Tribunal may award costs of proceedings before it in respect of reviewable matters under Parts VII.1 and VIII of the Act on a final or interim basis, in accordance with the provisions governing costs in the Federal Rules.

⁶¹ Section 8.1(2) of the Tribunal Act provides that the Tribunal may direct by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

⁶² Tribunal Act, section 8.1(3).

It has been suggested that under these new rules, costs could be awarded against any participant to a proceeding (including the Commissioner) where the proceedings are frivolous or vexatious or where any step is taken to hinder or delay the progress of the proceeding.⁶³ The CBA has commented that the Tribunal could also award costs against the Commissioner where an unnecessarily large number of anti-competitive acts have been alleged (in abuse of dominance cases), there have been unnecessary delaying tactics or where a party has been put through a large unnecessary expense:

"Historically, Tribunal proceedings have been lengthy and expensive to all parties, but particularly to respondents. ... In applications brought under the abuse of dominance provisions, a significant contributing factor has been the large number of anti-competitive acts which have been alleged. In *Tele-Direct*, for example, 19 anti-competitive practices were alleged but only parts of two became the subject of an order. The Tribunal should have the power to consider an award of costs in circumstances such as this. ... Cost awards could be used to punish unnecessary delaying tactics. They could also be used to compensate a party who has been put to large, unnecessary expense through no fault of its own."⁶⁴

It will remain to be seen whether the new rules giving the Tribunal the power to award costs will protect against frivolous or strategic litigation or unnecessary delays, prevent the Bureau from bringing applications for reviewable matters that are without merit or will in any way limit the Bureau's increasing use of its formal powers of investigation (including section 11 orders).

⁶³ See Canadian Bar Association (Competition Law Section), "Submissions on Bill C-23: *Competition Act* Amendments" (October 2001) at 26. See also J. Bodrug & C. Margison, "The Canadian Merger Review Process: Issues and Proposed Amendments", 2002 Competition Law Invitational Forum (May 9, 2002).

⁶⁴ Canadian Bar Association (Competition Law Section), "Submissions on Bill C-23: *Competition Act* Amendments" (October 2001) at 27.

(b) Expert Evidence

The recent amendments will also affect the way in which experts testify at Tribunal proceedings. The Tribunal may now require expert witnesses to testify as a panel.⁶⁵ Expert witnesses may give their views, comment on the views of other experts, pose questions to the other experts and make concluding statements.⁶⁶ In addition, the Tribunal may pose questions to the panel within their area of expertise and counsel may cross-examine and re-examine expert witnesses following their testimony.⁶⁷

The new rules relating to expert testimony raise important issues relating to the role of experts at hearings, as well as how the new rules will work in practice. In theory, expert testimony at Tribunal hearings could become a focussed discussion. However, the CBA has noted that this new process may actually lengthen, rather than reduce, the time taken to deal with expert testimony and could potentially lead to highly-specialized debates on issues, instead of focused discussions.⁶⁸ The CBA has also questioned the role of experts in the hearing process, noting that the new rules would mean that experts would become advocates (*i.e.*, experts would present their own opinion evidence and cross-examine other experts on their opinions).

(c) Reading-in Section 11 Transcripts

As a result of the recent amendments to the Rules, the Commissioner may, with leave or authorization of the Tribunal, now read into evidence the transcripts of oral examinations obtained from "officers" of respondents during section 11 examinations, where such officers do not testify as witnesses at the hearing.⁶⁹

⁶⁵ Rule 48.1. The Regulatory Impact Analysis Statement accompanying the amendments to the Rules states, with respect to the new procedure for expert testimony, that "this new process has been already used in other jurisdictions, most particularly in Australia, and has proven to be very useful and expeditious".

⁶⁶ Rule 48.2(2).

⁶⁷ Rules 48.2(1) and (3).

⁶⁸ Canadian Bar Association (Competition Law Section), "Re: Proposed Amendments to Competition Tribunal Rules" (May 24, 2001) at 5.

⁶⁹ Rule 22.1 provides that the "Commissioner may by motion request authorization from the Tribunal to read into evidence information obtained pursuant to paragraph 11(1)(a) of the Act from an officer of the person filing the response, unless the person undertakes to call the officer as a witness". Section 11 of the Act

The Bureau's use of section 11 orders in lieu of voluntary information requests has provoked considerable discussion in the Canadian competition law community, given that compliance with these orders is very costly and disruptive to respondents. In response to stakeholder concern, the Bureau has felt compelled to formally explain its increased use of formal investigative powers under the Act.⁷⁰ Bureau representatives have stated that they will continue to use section 11 orders in light of the recent amendments to the Rules.

Moreover, the recent amendments to the Rules are likely to encourage the further use of section 11 orders for two reasons. First, because the Rules only oblige a respondent to produce the documents upon which it intends to rely in the proceeding, the Commissioner has even more incentive to issue production orders under section 11 to obtain all of a respondent's relevant documents, especially those that may not support the respondent's case. Second, the Commissioner is also likely to conduct section 11 oral examinations under oath, prior to an application, in place of the oral discovery of the respondent which previously took place after the application had been commenced. This will impose a heavier burden on the target of an investigation at an earlier stage of the process, possibly even before the target has had an opportunity to address the Commissioner's concerns by modifying its conduct or through another form of negotiated resolution.

(i) Procedure for Reading-in

The new Rules do not provide any mechanism relating to the procedure for reading-in section 11 transcripts (e.g., whether an entire transcript or only excerpts are to be read-in) or indicate whether there are other ways to prevent the transcript from being read-in, other than by calling the officer as a witness. In addition, the Rules do not provide any guidance

provides for three types of orders: (1) an order directing a person to attend and be examined by the Commissioner or his representative under oath (commonly referred to as an 'examination'), (2) an order to produce records within a time and at a place specified ('production') and (3) an order to make and deliver to the Commissioner within a time specified a written return under oath showing in detail such information as is required by the order (commonly referred to as an 'information return').

⁷⁰ See for example, P. Humber (Senior Competition Law Officer), "The Use of Section 11 Orders Under the *Competition Act*", Annual Conference, Canadian Bar Association - Competition Law Section (September 20-21, 2001).

as to what criteria the Tribunal is to consider in granting or denying the Commissioner's request to read-in the transcript.

With respect to the procedure for reading-in section 11 transcripts, several cases decided before the enactment of Bill C-23 that deal with the admission of section 11 transcripts may be relevant. For example, in *Canada (Director of Investigation and Research) v. Washington*,⁷¹ the Director proposed that any party at the hearing have the option of tendering evidence-in-chief by way of affidavit or sworn statement or, in the case of the Director, by submitting excerpts from section 11 examinations. In responding to strenuous objections made by the respondents, the Tribunal noted that oral evidence is the norm, but held that evidence could be admitted in this manner on a limited basis provided the parties agree and any affidavits or statements on which the Director intended to adduce were provided to the respondents before the hearing. The Tribunal held that if the respondents objected based on credibility issues, or that the Tribunal should have the opportunity to compare the views of the witnesses, then the evidence should be presented orally.

The Federal Rules governing the reading-in of affidavits and examinations for discovery are also likely to be relevant in interpreting the scope and application of the new rule for reading-in section 11 transcripts.⁷²

(ii) Preventing Reading-in

On the face of the new rule, the only way a respondent may prevent the Commissioner from reading section 11 transcripts into evidence is by calling the officer as a

⁷¹ 71 C.P.R. (3d) 1 (Comp. Trib.). See also *Canada (Director of Investigation and Research) v. Canadian Pacific Ltd.* (1997), 78 C.P.R. (3d) 411 (Comp. Trib.), where the respondents sought production of section 11 transcripts; *Canada (Director of Investigation and Research) v. Superior Propane Inc.* (1988), 85 C.P.R. (3d) 192 (Comp. Trib.), where the Director applied for an interim order to introduce excerpts of a section 11 examination; and *Canada (Director of Investigation and Research) v. Canadian Pacific Ltd.* (1997), 74 C.P.R. (3d) 55 (Comp. Trib.), where the respondents alleged, among other things, that the Director abused his compulsory powers under section 11 of the Act by using them as a substitute for the Tribunal's discovery process.

⁷² Rule 72(1) provides that where procedure is not set out in the Tribunal Rules, the Federal Rules are to be followed (commonly referred to as the "gap" rule). Federal Rules 285 and 288 govern the reading into evidence of affidavits and examinations for discovery.

witness.⁷³ However, cases decided under the Federal Rules dealing with the reading-in of affidavits and examinations for discovery may assist respondents in making arguments that the admission of section 11 transcripts in lieu of *viva voce* evidence should be granted only in exceptional cases.⁷⁴ It remains to be seen whether other types of objections, based on procedural fairness or other grounds (discussed below), are possible.

(iii) Procedural and Constitutional Issues

The new discovery process and, in particular, the possibility that the Bureau may use section 11 orders in lieu of discovery, raises a number of potential procedural fairness and constitutional issues including:

- A respondent may be prevented from making full answer and defence as a result of the new limitations on discovery (oral discovery is only possible in limited circumstances and the Commissioner is only required to disclose the documents on which he intends to rely), the fact that the Commissioner is only required to identify non-expert witnesses two days before they testify, the Commissioner's increased use of public interest privilege and the new rule for reading-in section 11 transcripts (which does not appear to prevent the Commissioner from selectively reading-in portions of a transcript).
- There is arguably no corresponding limitation on the Commissioner's right of discovery. This is because while the Commissioner is ostensibly subject to the same discovery rules as the respondent, the Commissioner retains an unfettered right to use section 11 Orders to compel the disclosure of documents, as well as an unbridled right to conduct oral examinations of the respondent's representatives pursuant to section 11.

⁷³ The CBA has commented that "the proposal [to permit reading section 11 transcripts into evidence] would require that the respondent undertake to call the officer as a witness to avoid having the section 11 examination entered as evidence". The CBA has also observed that "because a respondent's counsel might not wish to call the officer as a witness, the proposed amendment would seriously impair counsel's ability to conduct the case as he or she thinks best". See Canadian Bar Association (Competition Law Section), "Re: Proposed Amendments to Competition Tribunal Rules" (May 24, 2001).

⁷⁴ See for example, *Nfld. Processing Ltd. v. "South Anglia" (The)* (1995), 96 F.T.R. (T.D.), where the Federal Court held that the use of examinations for discovery as a substitute for *viva voce* evidence is exceptional (as a general principle, a party must prove its case by oral evidence), and should be permitted only where a party persuades the court that, on balance of probabilities, the witness is absolutely unavailable and that all reasonable steps to arrange the witness' attendance at trial have been taken.

- The reduced disclosure under the new Rules is amplified by the fact that parties are not entitled as of right to a transcript of section 11 examinations,⁷⁵ as well as the fact that parties who have an interest in the matters being inquired into, but who are not being examined, may be excluded from section 11 examinations.⁷⁶
- The new rule allowing the Commissioner to read-in section 11 transcripts may also mean that respondents will be deprived of the opportunity to cross-examine witnesses. For example, in cases involving multiple respondents, if one respondent agrees not to call its officer as a witness and the Commissioner reads-in portions of a section 11 transcript, a co-respondent will be deprived of the right to cross-examine that witness.⁷⁷ This problem may be exacerbated by the fact that the co-respondent may not have been present at the section 11 examination in question.
- Additional procedural fairness arguments may be possible based on the absence of any notice requirement for section 11 examinations. While section 12(4) of the Act provides that the person whose conduct is being inquired into (and their counsel) are entitled to attend a section 11 examination, there is no statutory requirement to provide the respondent with notice of such hearings.
- Objections based on constitutional grounds may also be possible. For example, the CBA has commented that "reading in section 11 examinations at Tribunal hearings blurs the distinction between the investigative and prosecutorial functions of the Commissioner" and that courts have upheld the constitutionality of compelled section 11 examinations because they are conducted "pursuant to the Commissioner's investigative responsibilities".⁷⁸

⁷⁵ *See Re CP Containers (Bermuda) Ltd. and Cast Group Ltd.* (1995), 64 C.P.R. (3d) 384.

⁷⁶ Section 12(4) of the Act gives the presiding officer of a section 11 examination the power to exclude the person whose conduct is being inquired into from the proceedings in certain cases.

⁷⁷ *See* Canadian Bar Association, National Competition Law Section, "Re: Proposed Amendments to Competition Tribunal Rules" (May 24, 2001) at 4.

⁷⁸ Canadian Bar Association, National Competition Law Section, "Re: Proposed Amendments to Competition Tribunal Rules" (May 24, 2001) at 3-4. The CBA further states that judges would likely "scrutinize section 11 orders more closely and place more significant limitations on them if the evidence taken could be used against a respondent".

- In the recent *Air Canada* decision,⁷⁹ the Quebec Court of Appeal declared section 104.1 of the Act, which deals with interim orders in the airline context, to be inoperative under section 2(e) of the Canadian Bill of Rights because the section allowed the Commissioner to make interim orders without giving respondents a fair hearing (the right to be heard and notice) in accordance with the principles of fundamental justice. The Court also held that the overlap between investigative and adjudicative functions in making such orders meant that respondents were denied the right to an impartial tribunal. In addition, the Court held that in the circumstances, a high level of natural justice was required.⁸⁰ This case may be of assistance in defining or challenging the new Tribunal procedures under the new Rules.
- Previous constitutional challenges to section 11 orders have failed, in part, based on the fact that section 11 orders were formerly part of the investigation process not the adjudicative process (i.e., the same safeguards were not afforded to the respondent because rights were not being finally decided).⁸¹ It is unclear whether this analysis will change now that evidence gathered in an investigation may now be directly introduced during the hearing by reading-in section 11 transcripts.

⁷⁹ *Air Canada c. La Procureure Generale du Canada*, [2003] J.Q. No. 21 (QL) (January 16, 2003).

⁸⁰ The Court held at paragraph 81 of the decision that "the nature of the Commissioner's order, the procedural steps that lead to it, the applicable substantive rules, the rights affected, the legitimate expectations of the person affected and the potential duration of the order, favour a substantial normative content for defining the rules of natural justice applicable in this case". (emphasis added)

⁸¹ Several cases have considered the constitutionality of admitting evidence gathered under compulsory process in an investigation at a hearing. In *Thomson Newspapers Ltd. v. Director of Investigation & Research*, (1990), 67 D.L.R. (4th) 161 (S.C.C.), the Supreme Court of Canada held that the power under section 17 of the *Combines Investigation Act* to compel a person to give oral testimony violated section 7 of the *Charter*. However, La Forest J. held that the power to compel testimony was not, by itself, contrary to the principles of fundamental justice. One factor the court considered in coming to this conclusion was that section 17 inquiries were "inquisitorial rather than adversarial in nature" and no final determination as to criminal liability is reached. In *North American Van Lines Canada Ltd. v. Canada (Director of Investigation and Research)* (1997), 78 C.P.R. (3d) 221 (F.C.T.D.), it was held that section 11 oral examinations were investigative and not adversarial, and did not involve the determination of any substantive rights.

PART V. FUTURE DEVELOPMENTS

In addition to the changes to Tribunal process discussed above, further changes to the procedure for hearing and deciding reviewable matters at the Tribunal (including mergers) are being contemplated. Some of these future developments are discussed below.

(a) Tribunal-Bar Liaison Committee

At the time of writing, the Tribunal-Bar Liaison Committee (the "Liaison Committee") was in the process of preparing a discussion paper to explore the possibility of amending the rules relating to mergers.⁸² The Liaison Committee was responsible for the recent changes to the Rules resulting in reduced discovery, new rules relating to expert testimony and the new rule allowing the Commissioner to read-in section 11 transcripts at hearings. Contemplated future amendments include electronic filing and hearing, limiting the number of witnesses to be called at the hearing and the introduction of time limits for the issuance of reasons and orders by the Tribunal.

(b) Standing Committee Report

On April 23, 2002, the House of Commons Standing Committee on Industry, Science and Technology (the "Committee") tabled its final report on the future of Canada's competition law. The report, entitled *A Plan to Modernize Canada's Competition Regime*⁸³ (the "Committee Report"), is the culmination of consultations with competition law experts, Bureau officials and members of the Tribunal regarding the continuing effectiveness and economic validity of competition law in Canada. The Committee Report includes a number of recommendations that, if implemented by the Government, would affect Tribunal process including:

⁸² The Liaison Committee was established by the Tribunal in 1997, and is comprised of Tribunal members, members of the Competition Law Section of the Canadian Bar Association and General Counsel from the Department of Justice's Competition and Consumer Law Section. The Liaison Committee's mandate is to review Tribunal procedures and determine how they might be refined and improved.

⁸³ *A Plan to Modernize Canada's Competition Regime: Report of the Standing Committee on Industry, Science and Technology* (Walt Lastewka, M.P., Chair – April 2002), available online at: <http://www.parl.gc.ca/InfoComDoc/37/1/INST/Studies/Reports/indurp06-e.htm>.

- The Tribunal (in consultation with the Liaison Committee) should continue its on-going review of procedures with the aim of creating an adjudicative system that will ensure "just results" in an expeditious and timely manner (to reduce parties' costs and the time required to conclude contested cases, while ensuring that due consideration is given to principles of procedural fairness and the appearance of justice).
- The Tribunal should be given the power to impose administrative fines in its discretion against firms identified as being in breach of certain civil review sections of the Act (sections 75, 76, 77, 79 and 81). In the Committee's view, fines in the discretion of the Tribunal would complement the Tribunal's newly enacted power to issue interim orders.⁸⁴
- To amend the Act and the Tribunal Act to extend private access to abuse of dominance, and to permit the Tribunal to award damages in private action proceedings.⁸⁵ Currently, only the Commissioner may bring abuse of dominance applications before the Tribunal. Private parties may only sue for damages in respect of abuse of dominance if they have suffered losses resulting from the breach of a remedial order issued by the Tribunal.⁸⁶
- To amend section 124.2 of the Act to permit a party to a contested proceeding under Part VII.1 or VIII to refer a question of law, jurisdiction, practice or procedure to the Tribunal in relation to the application or interpretation of Part VII.1 or VIII. This recommendation is intended to level the playing field to allow private parties to unilaterally bring references to the Tribunal (currently only the Commissioner has this power).⁸⁷

⁸⁴ The Committee states that there was considerable support among witnesses for giving the Tribunal the authority to levy administrative monetary fines as a further deterrent to egregious anticompetitive conduct.

⁸⁵ "Private access" refers to the right of private parties to bring proceedings before the Tribunal. Currently, only the Commissioner may initiate proceedings before the Tribunal for abuse of dominance. Recent amendments to the Act as a result of Bill C-23, however, now allow private access for some reviewable matters (refusal to deal, exclusive dealing, tied selling and market restriction).

⁸⁶ The authority for a private party to sue for damages under the Act is found in section 36 of the Act, which provides that "[a]ny person who has suffered loss or damage as a result of ... the failure of any person to comply with an order of the Tribunal or another court under this Act, may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section".

⁸⁷ The Committee states that there is no compelling policy justification for only allowing the Commissioner to unilaterally bring references before the Tribunal.

- The Tribunal should develop and articulate a policy to allocate costs in a fair and equitable manner (having regard to the resources available to the parties). The Committee also recommends that such a policy consider the merits of exempting small businesses from liability for costs in Tribunal proceedings.
- To amend the Tribunal Act to permit questions of law to be considered by all Tribunal members (*i.e.*, judicial and lay members).
- To amend the Tribunal Act to require that appeals from Tribunal decisions may only be brought with leave of the Federal Court of Appeal. This recommendation is intended to give more deference to the Tribunal (currently, there is an automatic right of appeal from Tribunal decisions except on a question of fact alone, in which case leave is required).

(c) Government Response to Standing Committee Report

In late 2002, the Government issued its response to the Committee Report.⁸⁸ With respect to the Committee's recommendation to allow the Tribunal to impose administrative monetary penalties for certain reviewable matters, the Government states that it agrees in principle with this recommendation, that monetary penalties will help deter anti-competitive behaviour and encourage compliance with the Act, and undertakes to consult with stakeholders and address this issue in a discussion paper outlining the next round of amendments. At the time of writing, the Government's discussion paper had not yet been released.

With respect to extending the right of private access to abuse of dominance, the Government states that a review of the current private access amendments will occur two years after they come into force and that it will be in a better position at that time to assess whether private access should be extended to abuse of dominance. The Government also notes that, in the context of private access generally, that some stakeholders have expressed considerable concern about the potential for strategic litigation.

⁸⁸ *Government Response to the Report of the House of Commons Standing Committee on Industry, Science and Technology "A Plan to Modernize Canada's Competition Regime"*. The Government's response, which was issued on October 1, 2002, is available on Industry Canada's website at [http://www.ic.gc.ca/cmb/welcomeic.nsf/ICPages/Special Reports](http://www.ic.gc.ca/cmb/welcomeic.nsf/ICPages/Special%20Reports).

With respect to damage awards in private action proceedings, the Government states that it will revisit the issue of damages after it has gained some experience with administrative monetary penalties.

As to whether any party should be permitted to unilaterally bring references before the Tribunal, the Government states that the current rule (in which only the Commissioner can unilaterally bring references) reflects the Commissioner's position as a public policy official, and that the Commissioner cannot bring a reference that relates to a specific case (*i.e.*, a reference on a question of mixed law and fact). The Government does state, however, that it will "consider implementing measures to ensure that all sides of an issue are properly argued before the Tribunal" in reference proceedings.

With respect to whether the Tribunal should develop a policy for allocating costs in a fair and equitable manner, the Government's position is that the Federal Rules should continue to apply equally to all parties involved, and that the Committee's recommendation in this regard would "undermine one of the safeguards recently put into place" against strategic litigation (*i.e.*, the risk of cost awards encourages litigants to act in good faith and to only contest matters that genuinely need to be contested).

The Government states that it endorses the Committee's recommendation to allow all Tribunal members (judicial and lay members) to consider questions of law, and will seek to amend the Tribunal Act to ensure the full participation of all members of a Tribunal panel in a hearing.

Finally, on the issue of whether the Tribunal Act should be amended to require that any appeal from a Tribunal decision (on facts *or* law) may only be brought with leave of the Federal Court, the Government only states that it recognizes that the Tribunal has specialized expertise on competition matters and that it will consult with stakeholders (including the Liaison Committee) on this issue.

(d) Canada Pipe

On October 31, 2002, the Commissioner commenced an Application before the Tribunal alleging that certain practices of Canada Pipe violated sections 77 and 79 of the

Competition Act. On November 14, 2002, the Commissioner delivered a Disclosure Statement pursuant to section 4.1 of the Rules. The Disclosure Statement delivered by the Commissioner included only five "Will-Say" statements even though the Commissioner had indicated that he intended to call 42 non-expert witnesses to testify at the hearing of the matter. Those witness statements did not identify the names or addresses of any of the Commissioner's non-expert witnesses, and they did not specify, even in a general way, what the evidence of any particular non-expert witness would be. Rather, they purported to describe what certain categories of witnesses expected to be called by the Commissioner were anticipated to say when called to testify.

The Disclosure Statement delivered by the Commissioner also included a lengthy list of documents that the Commissioner intended to rely upon during the hearing. The Commissioner's list was divided into two parts: (a) the first part contained a list of 526 documents that the Commissioner obtained from Canada Pipe which the Commissioner intended to rely upon and which he was prepared to disclose to Canada Pipe; and (b) the second part contained a list of 92 documents or categories of documents (with no indication of the number of documents in each category) which the Commissioner indicated he intended to rely upon. The Commissioner refused to disclose any of these documents to Canada Pipe on the basis of a blanket claim of "public interest privilege". The second category of documents listed in the Commissioner's Disclosure Statement appeared to include many documents either written by Canada Pipe or sent to Canada Pipe by third parties which the Commissioner likely obtained pursuant to the section 11 Order obtained against 19 third parties in the matter.

In response to the Application and the Disclosure Statement filed by the Commissioner, Canada Pipe brought a motion before the Tribunal seeking an Order to have many of the new Rules (in particular, ss. 4.1, 4.2, 5(2), 5.1, 5.2, 13.1, 21(2)(d.1) and 22.1) declared invalid and inoperative on the ground that they violate Canada Pipe's right to a fair hearing protected by section 2 of the *Canadian Bill of Rights*. In the alternative, Canada Pipe has asked for an Order construing and applying ss. 4.1 and 4.2 of the Rules so as to:

- (i) require the Commissioner to produce to Canada Pipe all relevant documents in his possession, including all documents listed in his Disclosure Statement in respect of which the Commissioner had asserted

claims of "public interest privilege" and all documents in his possession which undermine or were detrimental to the various positions the Commissioner had taken in the Application; and

- (ii) require the Commissioner to deliver immediately to Canada Pipe detailed and separate witness statements of all of his non-expert witnesses, on a witness-by-witness basis, which, among other things, identify each witness by name and address and set out a concise but accurate summary of the evidence of each individual witness.

In its motion materials, Canada Pipe asserted that its right and ability to defend itself on a fair and informed basis had been seriously compromised and prejudiced by the Commissioner's conduct, as well as by recent changes to the *Rules* governing the conduct of contested non-merger applications before the Tribunal. In particular, Canada Pipe asserted that these changes to the Rules have circumscribed Canada Pipe's rights to obtain disclosure of relevant documents in the Commissioner's possession, as well as its right to conduct an oral examination of a representative of the Commissioner. Canada Pipe asserted that the effect of these changes, together with the Commissioner's continued right to obtain further evidence through section 11 Orders issued under the *Competition Act* and his assertion of "public interest privilege" over documentation and information the Commissioner had already indicated he intended to rely upon, violated Canada Pipe's rights to a fair hearing as guaranteed by section 2 of the *Canadian Bill of Rights* and was a violation of the principles of natural justice and procedural fairness. Canada Pipe's motion is scheduled to be heard the week of April 28, 2003. The outcome of this motion will likely have consequences on Tribunal process and give meaning to some of the new rules and procedures discussed above.

PART VI. CONCLUSION

Many of the recent amendments, including the Tribunal's new powers to hear and decide references, make summary dispositions and award costs, were intended to streamline the Tribunal process and make proceedings more efficient. According to the Tribunal, the recent changes "will help to build a more efficient, innovative and competitive marketplace in the

changing global economy and increase the Tribunal's powers and simplify procedures".⁸⁹ Others have argued that the amendments "will be of great assistance in narrowing the issues, which will in turn have the effect of limiting the length of hearings".⁹⁰

The recent changes to the way reviewable matters are decided mean that the Tribunal now has the power to dispose of cases that are without merit (under its summary disposition power), decide issues of fact and law at an early stage in proceedings (under its new power to hear references) and to award costs in certain cases (including costs against the Commissioner). These increased powers may affect the way that the Commissioner brings applications and investigates reviewable matters.

It remains to be seen, however, whether the Tribunal hearing process will in practice be shortened or made more efficient. The recent amendments to the Act, the Tribunal Act and the Rules have left many wondering how the new rules will operate in reality, and have already been challenged on procedural fairness and other grounds in the *Sears* and *Canada Pipe* cases.

About the only conclusion that is possible to make with any certainty is that the amendment process is not finished, as further changes to the way reviewable matters are investigated and decided have been proposed by the Standing Committee and are the subject of on-going review by the Liaison Committee.

⁸⁹ Competition Tribunal, *A Report on Plans and Priorities: 2002-2003 Estimates* (February 4, 2002) at 7.

⁹⁰ Hon. W.P. McKeown, Q.C., "New Practices and Procedures at the Competition Tribunal", Annual Conference, Canadian Bar Association – Competition Law Section (Ottawa, October 3-4, 2002) at 6.