May 24, 2001

Monique Seguin
Registrar
Competition Tribunal
Royal Bank Centre
90 Sparks Street, Suite 600
Ottawa ON K1P 5B4

Dear Ms. Seguin,

**Re: Proposed Amendments to Competition Tribunal Rules
Submission of National Competition Law Section of the Canadian Bar Association**

The National Competition Law Section of the Canadian Bar Association (the Section) welcomes the opportunity to comment on proposed amendments to the *Competition Tribunal Rules*, which were published in Part I of the *Canada Gazette* March 17, 2001.

While the Section generally supports the goal of streamlining the Competition Tribunal (the Tribunal) process for reviewable practices other than mergers, it questions whether the proposed amendments will achieve this goal. It also questions whether the amendments achieve the goal of preserving fairness in the process.

In particular, the Section has serious concerns about the following issues:

- documentary discovery and continuous disclosure;
- the reading into evidence of information given in a section 11 examination;
- the requirement for expert evidence to be given in panels; and
- the proposed timelines for service of disclosure statements.

Document Discovery and Continuous Disclosure

Document Discovery

The proposed amendments would eliminate document discovery in all non-merger applications, unless a party applied for and obtained an order from the Tribunal to the contrary (proposed section 13.1). Instead, the parties would be required to prepare a "Disclosure Statement" summarizing the

documentary and *viva voce* evidence upon which each intended to rely (proposed sections 4.1 and 5.1). The goal of this amendment is to streamline Tribunal applications by reducing expenses and delay. This may be laudable. However, the proposed amendment arguably violates a respondent's right to procedural fairness and its ability to make full answer and defence.

Tribunal proceedings are *quasi*-judicial and Tribunal orders often have very serious effects on a respondent's business, particularly in abuse of dominance cases. The Tribunal has the power to impose severe restraints on a respondent or to require it to divest assets or shares. There is no basis to distinguish between discovery rights in merger cases and non-merger cases, especially as similar types of remedial orders are available to the Tribunal in either case. Limiting or abolishing a respondent's right of discovery could violate its right to procedural fairness, especially given the serious consequences that a Tribunal order can carry.

The proposed amendments limit the extent of the duty of disclosure of the Commissioner of Competition (the Commissioner). In the Disclosure Statement, the Commissioner is only required to list those documents on which he or she *intends to rely* (proposed section 5.1(2)(a)). This is clearly insufficient. In the course of its investigation, the Competition Bureau (the Bureau) may come across numerous documents from the respondent's competitors, customers, or suppliers that could support the respondent's case. However, under the proposed amendments, if the Commissioner decides not to rely on these documents, the respondent may not even learn of their existence, much less obtain copies of them.

For example, consider a proceeding under either section 77 or 79 concerning exclusivity or loyalty discounts of a supplier. In such proceedings, it is relevant to examine whether the respondent supplier's customers considered purchasing from other sources and the reasons why they chose to buy only from the respondent. In presenting its case, the Bureau would probably focus on customers who are complaining about the practice. However, the Tribunal should be entitled to hear evidence from customers who may prefer to deal with one supplier for reasons that have nothing to do with alleged anti-competitive behaviour. The respondent's own information and documents would not contain this information and would therefore be insufficient to respond properly and fully to the allegations. Absent document discovery against the Commissioner, the respondent would not be able to obtain such evidence, unless the respondent sought and the Tribunal permitted document discovery against third parties. This would likely lead to a longer process than currently exists, including applications for additional discovery (and possibly appeals).

Further, the Commissioner's public interest role is to promote efficiency and competition in the Canadian economy, not to win every case it brings before the Tribunal. If the Commissioner is aware of evidence that tends to suggest that the Tribunal should not be making an order, it is in the public interest (not only in the interest of the respondents) that such evidence be disclosed.

The Commissioner should be required to disclose all relevant documents. Disclosure should also extend to allowing a respondent to inspect and copy all such documents.

Continuous Disclosure

The proposed amendments provide a limited duty of continuous disclosure which applies only to new information concerning the issues raised in a Disclosure Statement. Proposed sections 4.1(3) and 5.1(3) state that where new information relevant to the issues raised in a Disclosure Statement arises during the proceedings, a party must amend its Disclosure Statement to reflect this new information.

By focusing on the contents of the Disclosure Statement, these proposed provisions suffer from the same flaws noted above. If the new information relates to an issue on which the Commissioner is not relying, then that information does not have to be disclosed. Yet this new information should be disclosed because it may well support an argument which the respondent wishes to make.

We suggest that the obligation of continuous disclosure should focus on the issues raised in the pleadings. Where new information arises which is relevant to the issues as set out the pleadings, that information should be disclosed.

The elimination of documentary discovery and the limited duty to provide continuous disclosure raise serious concerns about the rights of a respondent. They also may result in the Tribunal making important rulings without having all of the relevant evidence. It is essential to both the respondent's rights and the public interest that the Tribunal have access to all of the relevant evidence before it makes a decision.

Reading In Section 11 Examinations as Evidence

If the respondent chooses not to call its own officer as a witness, then proposed section 22.1 would allow the Commissioner to read into evidence the transcript of a section 11 examination. This is an attempt to shorten the length of non-merger hearings before the Tribunal.

The Section has three concerns about this proposal. First, a section 11 examination of a respondent's officer is not like a discovery and does not offer the respondent the protections that are available in a discovery. For example, a section 11 examination is conducted pursuant to an investigation, so there are no issues defined by the pleadings. Consequently, the Commissioner has very wide scope to ask questions of a respondent (to which no objection can be taken). Moreover, the case law has established that counsel for the respondent does not have the right to request a transcript of the examination from the Commissioner (See *Re CP Containers (Bermuda) Ltd. and Cast Group Ltd.* (1995), 64 C.P.R. (3d) 384). If a section 11 examination is to be treated as a discovery of the respondent, then the respondent should have the same protections that it would have in a discovery.

Second, reading in section 11 examinations at Tribunal hearings blurs the distinction between the investigative and prosecutorial functions of the Commissioner. The courts have upheld the constitutionality of these compelled examinations because they are conducted pursuant to the Commissioner's investigative responsibilities (see *Re CP Containers*, *supra*, at 394). Currently, therefore, the Commissioner has a high degree of latitude in conducting these examinations.

However, if examinations of a respondent's officers are to be used against the respondent in a Tribunal hearing, this removes a rationale for broad section 11 powers. We suspect that judges would scrutinize section 11 orders more closely and place more significant limitations on them if the evidence taken could be used against a respondent. If this proposal is adopted, respondents should be provided greater procedural rights and fairness under the section 11 process.

Third, the proposal would require that the respondent undertake to call the officer as a witness to avoid having the section 11 examination entered as evidence. 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. Moreover, counsel would be forced to conduct a direct examination of a witness he or she did not even want to call, while the Commissioner would have the opportunity to cross-examine that witness. If there is evidence that the Commissioner wishes to adduce, then the Commissioner should adduce that evidence and the respondent should be entitled to test that evidence through cross-examination.

The effect of this requirement is to limit the respondent's ability to test evidence through cross-examination. Again, this is procedurally unfair and jeopardizes the respondent's right to make full answer and defence. This has special significance in cases involving multiple respondents where decisions made by one respondent may have an impact on the rights of co-respondents. For instance, if one respondent agrees not to call 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. The problem is exacerbated by the fact that the co-respondent may not have been present at the section 11 examination in question.

This proposed amendment is substantive, not procedural, in nature. The Section believes that such a fundamental change is more appropriately made through amendment to the *Competition Act* than amendment to the Rules. This would require a more open and full public debate on the proposal. If the Rules are to be amended, the Section recommends that this proposal be redrafted so that the section 11 examination can be read into evidence only with the respondent's consent.

Expert Evidence

Proposed sections 48.1 and 48.2 provide that the testimony of experts would be given in panels. The experts would explain their views, rebut the views of opposing experts and be permitted to ask questions of opposing experts. In theory, this would save time by creating a focused discussion of the expert testimony.

The Section has serious reservations about the efficacy of these proposed rules. First, they would likely lengthen, rather than reduce, the time taken to deal with expert testimony at a Tribunal hearing. Under the proposed process, each expert would give his or her views, comment on the views of opposing experts, ask questions of opposing experts and make concluding statements. After that, the Tribunal would be permitted to ask questions. The parties would then conduct examination-in-chief, cross-examination and potential re-examination. It is difficult to see how this intricate process would decrease the length of Tribunal proceedings.

Second, the Section believes that these rules will probably not lead to a focused discussion of the expert evidence, but rather do the opposite. Allowing experts to cross-examine each other in a panel is likely to leave everyone else present (including the Tribunal members) attempting to understand the experts' highly-specialized debate.

Third, the new rules would turn experts into advocates. Their task would not just be to present their own opinion evidence, but also to cross-examine other experts on their opinions. We do not agree that this is likely to increase the frankness of experts. If anything, it is likely to do the opposite. The Tribunal should have access to objective and impartial economic analysis before rendering its decision. Turning experts into advocates will not achieve this goal.

Moreover, it is difficult to see what can be gained by having an expert question an opposing expert instead of allowing the usual examination by counsel or the Tribunal (at least one member of which is usually an economist).

We understand that Australia uses a similar process for experts and that this has been used as a justification for these proposed rules. However, we also understand that the Australian Tribunal plays a different role than its Canadian counterpart. Therefore, transplanting these Australian methods into the Canadian system may be ill-advised.

Timelines for Service of Disclosure Statements

The Section believes that the Disclosure Statement is a worthy amendment, particularly insofar as it will provide respondents with a clear idea of the Commissioner's case well in advance of the hearing.

However, we have serious concerns about the timelines set out for the production of the Disclosure Statement.

By the time the Commissioner files the notice of application, the Bureau will have been investigating a matter for some time and the Commissioner will have developed the theory of the case. We would expect that the Commissioner could serve the Disclosure Statement within 14 days of filing the application, if not before. We do recognize further evidence often emerges during the pre-hearing discovery process and that the Commissioner's theories may be refined. The proposed amendments contemplate this by allowing for amendments to the Disclosure Statement. However, we do not believe the Commissioner should be permitted to amend the Disclosure Statement right up until the eve of the hearing, as this would defeat the purpose of having a Disclosure Statement. There should be a deadline for amendment which is a reasonable period of time in advance of the hearing.

The timeline for filing the respondent's Disclosure Statement is unfair and potentially prejudicial. Proposed section 5.1 would give a respondent a maximum of 59 days to file its Disclosure Statement after the Disclosure Statement of the Commissioner has been filed. This is too early in the process to expect a respondent to be able to disclose the list of documents on which the respondent intends to rely, the will-say statements of non-expert witnesses, and a concise statement of the economic theory in support of the respondent's case.

In many cases, the Bureau will not have clearly articulated its allegations and theory of the case until the notice of application or the proposed Disclosure Statement is filed. Indeed, respondents in some cases have expressed concern that the Bureau has changed its theory later than that – even during the hearing. Subject to the respondent obtaining an extension for filing its Disclosure Statement, one or more amendments to the respondent's Disclosure Statement can be expected in most cases.

A more practical method of setting deadlines for Disclosure Statements would be to work back from the hearing date, much like the provisions of the Ontario *Rules of Civil Procedure* that deal with filing the reports of expert witnesses. For example, the Commissioner might be required to file the Disclosure Statement no later than 60 days before the hearing date, while the respondent would file its Disclosure Statement no later than 30 days before the hearing date.

Setting deadlines in this manner for the Disclosure Statement would reduce the need for amendments, although we suggest that parties should always be able to apply to the Tribunal to amend their Disclosure Statement. In order for Disclosure Statements to serve their intended purpose, parties should be required to keep their positions consistent with their Disclosure Statements, subject to convincing the Tribunal that an amendment is warranted.

This discussion should be read in conjunction with our other comments (e.g. regarding discovery of documents). It presumes that the Disclosure Statement would no longer be the respondent's only way of obtaining document discovery from the Commissioner.

Conclusion

We thank you for the opportunity to provide our comments concerning these proposed Rules. If you have any questions or comments, you may contact us directly or through Richard Ellis at the CBA National Office.

Yours truly,

Stanley Wong
Chair, National Competition
Law Section