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October 25, 2004

Ms. Suzanne Legault
Assistant Deputy Commissioner of Competition
Legislative Affairs Division
Competition Bureau
Place du Portage Phase 1
50 Victoria Street
Gatineau, Quebec K1A 0C9

Dear Ms. Legault:

Re: Proposed Amendments to the *Competition Tribunal Act*

Thank you for your letter of August 2004, seeking the views of the Canadian Bar Association National Competition Law Section (the CBA Section) on the recommendations of the House of Commons Standing Committee on Industry, Science & Technology (the Committee) for proposed amendments to the *Competition Tribunal Act*,[1] (the CTA) in particular sections 12 and 13.

We understand the Committee's recommendations to be as follows:

(i) Recommendation 10: Amend section 12 of the CTA to permit questions of law to be considered by all the members sitting in a proceeding; and

(ii) Recommendation 11: Amend section 13 of the CTA to require that an appeal from any order or decision of the Tribunal may only be brought with leave of the Federal Court of Appeal.

The views of the CBA Section are divided on the proposal to amend section 12 but unanimous on the proposal to amend section 13. We will summarize the comments of our members who oppose amendments to section 12 as well as those who support the amendments.

(i) Committee Proposal to Amend Section 12 of the CTA

(a) Comments by the CBA Section members who oppose the proposed amendment

The reservation about this proposal is the absence in the Committee's Report of a compelling rationale for the change, or any discussion of the mischief to which the amendment is directed. The only observation made by the Committee was that the current section 12, requiring questions

[1] R.S.C. 1985, c.19.

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of law to be determined only by the judicial members sitting in those proceedings, does not reflect current Tribunal practice. Not only do opponents of the proposed amendment question whether that would be an appropriate policy rationale for legislative change, they are not persuaded that the observation is correct.

To conclude that lay members currently decide questions of law before the Tribunal presupposes a particular definition of "questions of law".[2] Opponents of the proposed amendment are of the view that true questions of law are being decided by the judicial members alone and that the allocation of responsibility in section 12 of the CTA is being respected.

In determining the legal question of whether the Tribunal had jurisdiction to issue orders for contempt *ex facie*, the Supreme Court of Canada in *Chrysler Canada Ltd.* v. *Canada (Competition Tribunal)*,[3] pointed to the clear requirement in subsection 8(3) of the CTA for the judicial member's authorization before an order could issue justifying the Tribunal's competence to make the order. While the Court, somewhat confusingly, alluded to the Tribunal's expertise in such matters as counseling deference, the original Tribunal decision that it had jurisdiction had been made by a single judicial member, sitting alone.

Likewise, in the Federal Court of Appeal's decision in *Canada (Director of Investigation and Research)* v. *D&B Companies of Canada Ltd.*,[4] while the Court described the Tribunal as an adjudicator of fact and law, the essential question of the continued existence at law of a class of public interest privilege was decided by a judicial member, sitting alone. As in *Chrysler*, the Court noted the expertise of the Tribunal in deferring to the judicial member's decision. Nonetheless, there was no suggestion that lay members had participated in the decision under review.

While given recent Supreme Court of Canada decisions such as *R.* v. *Mattel*,[5] and the Federal Court of Appeal's decision in *Commissioner of Competition* v. *Superior Propane*,[6] it is difficult to clearly demarcate between questions of law and questions of mixed fact and law, opponents of the proposed amendment remain of the view that the public working of the Tribunal appears consistent with the division of responsibilities set out in the current section 12.

The CBA Section recognizes that the Competition Bureau has endorsed the proposed amendment "to ensure the full participation of all members of a panel in a hearing". CBA Section members support the full participation of lay members in matters engaging their collective expertise. However, opponents of the proposed amendment remain of the view that, in the case of pure questions of law, the judicial member is the one with the appropriate training and expertise to decide such questions, and the participation of lay members would not assist in the quality of the

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2 There is an ongoing legal debate about the proper identification of pure questions of law and, in particular, whether all other questions of law are properly characterized as "mixed" (and thereby already within the competence of all members of the Tribunal).

3 [1992] 2 S.C.R. 394.

4 [1994] F.C.J. No. 1643.

5 [2001] 2 S.C.R. 100.

6 [2001] F.C. 185.

decision-making.[7] Further, the opponents of the proposed amendment believe that, while there are other expert tribunals where lay members can make rulings on questions of law (such as the CRTC), the Competition Tribunal is unique in the requirement of a judicial member on each panel, and certain interlocutory questions have been expressly reserved for that member (see, for example, section 11 of the CTA). The concern of those who oppose the proposed amendment is that, should lay members participate in deciding pure questions of law, the credibility of the Tribunal risks being undermined. Moreover, the proposed amendment could lead to the absurd result of the lay members overruling the judicial member on a pure question of law, such as a jurisdictional question not engaging the Tribunal's expertise.

The final observation of the opponents of the proposed amendment to section 12 anticipates the CBA Section's unanimous response to the proposed denial of an absolute right of appeal on questions of law and mixed fact and law. While those who oppose amending section 12 are not persuaded that the amendment to include lay members in questions of law is justified, they do see some arguable benefits, such as the implicit endorsement of the value of the Tribunal's expertise. However, that perspective depends on there being an absolute right to appeal and, in particular, an unconditional right to appeal questions of pure law in which lay members participated. The current appellate approach to Competition Tribunal decisions, that questions of pure law will be reviewable on a correctness standard, seems inconsistent with a restricted right of appeal, particularly with respect to decisions in which lay members have participated.

(b) Comments by the CBA Section members who support the proposed amendment

Those CBA Section members who support the proposed amendment to section 12 observe that distinguishing between questions of law and other questions in many cases is difficult. In any event, many questions that courts have held are questions of law (for example, the meaning of section 96 of the *Competition Act*) would benefit from the expertise of the lay members. They also believe that section 12, properly applied, requires counsel in all cases before the Tribunal to make submissions to the judicial member at the outset as to which issues are questions of law, and the judicial member must then make that determination. An error by the judicial member on that determination would result in an inappropriately composed panel deciding the matter, which would be a ground for appeal. That this for the most part does not occur is implicit recognition of the impracticality of section 12. Supporters of the proposed amendment also observe that many tribunals composed of lay members commonly decide all questions including "pure" questions of law. With the proposed amendment, the Competition Tribunal would still retain the benefit of the judicial member's participation in determining pure questions of law.

While supporters of the proposed amendment appreciate that to date section 12 may not have raised serious problems, they believe that is because it has for the most part been ignored. However, their primary concern is its potential to deprive the public of the benefit of lay members' participation on questions of law within their expertise, add unnecessary complexity to Tribunal proceedings, and give rise to more appeals, particularly interlocutory appeals.

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[7] We note that the Committee speaks of all members "considering" questions of law, and the Bureau uses the term "participate". It is difficult to know whether the Committee and/or the Bureau contemplates something less than decision-making power. i.e., input only. In any event, we have approached the proposal as if it contemplates full participation by lay members, as in all other questions before the panel.

(ii) Committee Proposal to Amend Section 13 of the CTA

(a) Critique of Committee's Rationale

The rationale cited by the Committee for the proposed amendment to require leave to appeal all questions decided by the Competition Tribunal is threefold. First, the Committee argues that, because the judicial members of the Competition Tribunal are Federal Court Judges, they have "such a depth of legal knowledge and experience" that deference is merited, even on questions of law. Second, the Committee observes that lay members comment meaningfully on questions of law in Tribunal decisions. Third, the Committee argues that this amendment would promote the expeditious resolution of disputes.

On the Committee's first rationale, the CBA Section notes that, leaving aside the debate about what are true questions of law, the current law is that no deference is warranted on questions of law of general application. Indeed, the Federal Court of Appeal in *Superior Propane* pointed to the fact that, as a Federal Court Judge, the judicial member's expertise relative to that of the reviewing court did not counsel deference. Moreover, appeals from final decisions of trial judges in the courts do not require leave. Accordingly, the Committee's observation does not appear to be supported at law. As a basis for amending the CTA, it is not persuasive.

On the second ground, that, in practice, lay members contribute by "meaningful comment" on questions of law, we refer to the observations above of those who oppose amending section 12 to the effect that the Tribunal practice does not appear to reflect participation by lay members on “pure” questions of law.

On the third ground, that of expedition, the CBA Section agrees with the goal but cannot endorse the enormous price contemplated in the amendment. This proposed amendment would compromise parties' entitlement to appeal questions as of right, in circumstances where the interest at stake is significant, where no deference is apparently warranted on questions of law, and the overall scheme of the *Competition Act* and the CTA support the current legislative balance.

The CBA Section also questions whether adding a step to the appeal process (a leave application), will achieve expedition.

(b) Merits of the Proposed Amendment

In any event, the CBA Section is of the strong view that to pursue this proposal at this time is ill advised, for the following principal reasons.

- While the expeditious resolution of applications and interlocutory matters before the Competition Tribunal is a laudable goal, in our view the current proposal to dramatically restrict appeal rights, in a context where Parliament favoured comprehensive review as reflected in the existing section 13, signals a marked departure from the delicate balance struck in the original Act and CTA, requiring broad consultation and debate before even being considered.

- We remain concerned that, not only has no compelling case been made out to support such a material amendment, such a fundamental erosion of the parties' right of appeal cannot be justified, given the significance of the interest at stake and the potentially serious commercial and financial consequences of a Tribunal decision.

- Requiring leave in all cases will not necessarily expedite the appeal process. In cases in which leave is granted, it will lengthen the process.

- The proposal as currently framed is incomplete. For example, no test for leave has been articulated, in the absence of which it is not possible to provide a complete response.

In considering this proposal, some have recognized that there may be merit in exploring a leave requirement for the appeal of interlocutory decisions of the Tribunal. However, as that proposal has not been made, and particularly in the absence of any suggested leave test, any CBA Section comment in that regard would be premature.

Finally, we note that, should section 12 be amended as proposed, the CBA Section's particularly strong reservations with respect to amending section 13 of the CTA (as anticipated in our consideration of the amendment to section 12, above) would be engaged.

We hope that the foregoing is of assistance. Should you or any of your colleagues be interested in further comment or in discussing these issues further, we would be pleased to do so.

Yours very truly,

(*Original signed by Trevor M. Rajah on behalf of Donald Affleck*)

Donald Affleck, Q.C.
Chair, National Competition Law Section