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# PRIVATE PARTY ACCESS TO THE COMPETITION TRIBUNAL: A CRITICAL EVALUATION OF THE SECTION 103.1 EXPERIEMENT

PAUL ERIK VEEL<sup>†</sup>

*The author examines private access to the Competition Tribunal under section 103.1 of the Competition Act. After considering the proceedings of private parties that have taken place before the Tribunal, he analyzes the requirements that must be met in order to have access and the remedies available. Assessing these from a policy perspective, the author suggests two revisions to the Competition Act: lowering the standing requirement for individuals from having their businesses be “directly and substantially” affected to merely having their businesses be “directly and materially” affected, and expanding section 103.1 to include the possibility of bringing applications for reviewable practices falling under section 79.*

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## INTRODUCTION

In contrast with the experience of many other jurisdictions, including the United States,<sup>1</sup> the enforcement of competition laws in Canada has historically been undertaken by governmental bodies. Prior to 1976, individuals in Canada had no standing before courts to enforce competition laws or to seek damages for breaches of competition laws. Legislative amendments introduced in 1976—and continued in section 36 of the current *Competition Act*—provided individuals with the right to sue for damages for losses caused by certain types of anti-competitive conduct, the most important of these being conspiracies.<sup>2</sup> Section 36 has seen significant use, especially since the introduction of class action legislation, and class actions dealing with anti-competitive conspiracies are now increasingly being litigated in Canadian courts.<sup>3</sup> However, the enforcement of many important provisions of the *Competition Act*, including the provisions outlined in Part VII prohibiting restrictive trade practices, remained exclusively in the hands of Competition Bureau.

Following a flurry of debate over allowing private enforcement,<sup>4</sup> this situation changed in 2002 with the passage of amendments to the *Competition Act*, which gave private parties the ability to access the Competition Tribunal to challenge certain restrictive trade practices

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1 B.A. Facey & D.H. Assaf, *Competition and Antitrust Law: Canada and the United States*, 3<sup>rd</sup> ed. (Markham, Ont.: LexisNexis Canada Inc., 2006) at 489-90 [Facey & Assaf].

2 *Competition Act*, R.S.C., 1985, c. C-34, s. 36 [*Competition Act*]. Legislative amendments in 1976 provided individuals with the right under what is now section 36 of the *Competition Act* to recover damages for losses suffered in certain cases, but private actions under this section were limited by both a) the limitations on the type of offences for which parties could recover damages and b) the inability of parties to seek injunctive relief to prevent the wrong from occurring. See; also Michael Trebilcock, Ralph Winter, Paul Collins & Edward Iacobucci, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2003) at 765-75 [Trebilcock *et al.*].

3 The legal and policy considerations relating to competition class actions in Canada have been explored elsewhere at length. See, e.g., Vol. 3, No. 1, of The Canadian Class Action Review, which was devoted exclusively to issues surrounding competition class actions.

4 See, *inter alia*, N. Finkelstein & J. Quinn, “Reevaluating the Role of Private Enforcement and Private Party Access to the Competition Tribunal” (Paper presented at the University of Toronto Faculty of Law, 8 December 1995) [unpublished]; Trebilcock & Roach, *infra* note 7; Roach & Trebilcock Article, *infra* note 60; Rowley & Campbell, *infra* note 8.

in limited circumstances.<sup>5</sup> While these changes represented in some ways a substantial break with the traditional model of competition law enforcement in Canada, little academic attention has been paid to them since their introduction.<sup>6</sup> This article will seek to fill this gap by discussing two interrelated issues which have remained largely unaddressed. First, this article will provide a comprehensive overview of the legal framework for private party access. Second, this article will critically assess that legal framework by exploring *why* private party access is permitted under the *Competition Act* and whether the current framework optimally furthers the policy objectives of allowing private party access.

It is important to note that this article does not purport to provide a comprehensive theoretical analysis of the private enforcement of competition laws; nor does it attempt to provide an international comparative study of the framework governing private enforcement of competition laws; nor does it analyze in detail the substantive provisions in the *Competition Act* that are now enforceable by private litigants. While these are worthwhile research programs, these issues have already been examined elsewhere.<sup>7</sup> This paper will not avoid these topics entirely, but it will only engage with them to the extent necessary to effectively analyze the current provisions. Instead, this paper focuses directly on the Canadian provisions governing private access in order to highlight the current state of the law and assess whether the law actually furthers the policy goals of the *Competition Act*.

This paper will proceed as follows: Part I provides a brief overview of the private proceedings which have taken place before the Tribunal; Part II

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5 *An Act to Amend the Competition Act*, S.C. 2002, c. 16.

6 A cursory overview of the provision and some of the cases is available in John Callaghan, Ian MacDonald & Blair McKechnie, "What about the flood of litigation?," online: (2005) Gowlings Lafleur Henderson LLP <<http://www.gowlings.com/resources/PDFs/What%20about%20the%20flood%20of%20litigation.pdf>>.

7 See Kent Roach & Michael Trebilcock, "Private Party Access to the Competition Tribunal" (Hull, Que.: 7 May 1996) [Trebilcock & Roach]; R. Jack Roberts, "International Comparative Analysis of Private Rights of Access (A Study Commissioned by Industry Canada; Competition Bureau)," online: (1999) <<http://strategis.ic.gc.ca/SSI/ct/roberts-e.pdf>>; see also Trebilcock *et al.*, *supra* note 2 at Chapters 6, 7, 8 and 12.

examines the law of private party access to the Competition Tribunal, both outlining the thresholds that parties must meet in order to obtain access and examining the remedies available to parties; Part III proceeds to assess whether the current legal framework of private party access is effective from a policy standpoint, and it argues that certain changes to the *Competition Act* would better serve the underlying policy goals of private party access; and Part IV serves as a brief conclusion.

## I. A BRIEF OVERVIEW OF PRIVATE PROCEEDINGS BEFORE THE COMPETITION TRIBUNAL

Prior to the amendments which enabled private parties to access the Tribunal, some commentators argued that allowing private access would have disastrous consequences. Rowley and Campbell predicted, *inter alia*, that procedural safeguards would not prevent the flood of unmeritorious litigation and that the high costs relating to private actions would have an overall negative effect on the Canadian economy.<sup>8</sup> Six years after the introduction of private party access, one can conclude that their predictions were incorrect. Between the coming into force of these provisions in 2002 and December 2008, the Tribunal has considered nineteen applications for leave to make an application under sections 75 or 77.<sup>9</sup> Of these nineteen applications, thirteen were dismissed and six were allowed. Of the six which were allowed, only one application has ultimately been adjudicated on its merits, where it failed, and a full hearing on one other is currently pending. Of the four which were allowed but never heard on their merits, settlements were achieved between the parties in two of

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8 J. William Rowley & Neil Campbell, "Private Litigation Over Reviewable Practices: A Cost-Benefit Analysis" in *Should Reviewable Practices be Turned into Competition Torts?* (A Report prepared for the Competition Policy Group, October 2001) 21 at 117-166 [Rowley & Campbell].

9 Another application was filed in 2007 by London Drugs, but it was withdrawn before the Tribunal considered it; see Competition Tribunal, online: (2007) <[http://www.ct-tc.gc.ca/CMFiles/CT-2007-002\\_0029\\_53PVI-582007-1463.pdf](http://www.ct-tc.gc.ca/CMFiles/CT-2007-002_0029_53PVI-582007-1463.pdf)>.

the cases, one application was withdrawn, and in one leave was rescinded under section 106.<sup>10</sup>

These figures, if taken alone, suggest mixed results from the Canadian experiment with private access. The anticipated flood of frivolous claims has not materialized, and with the possible exception of the two cases in which settlements were reached, private applications have not generally been successful, with the majority (68%) failing at the initial stage of seeking leave to bring an application.<sup>11</sup> This lack of success by private applicants at the initial stage could indicate either that the claims were genuinely unmeritorious or that the rules governing private access prevented genuinely meritorious claims from being heard. The following sections address precisely this question by outlining and critically assessing the law of private access.

## II. THE LAW OF PRIVATE ACCESS TO THE COMPETITION TRIBUNAL

This Part explores the statutory provisions and case law surrounding private access to the Competition Tribunal. It begins with an extended examination of the conditions which an applicant must satisfy in order to be granted leave. It then briefly examines the remedies available to applicants.

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<sup>10</sup> *Competition Act*, *supra* note 2, s. 106.

<sup>11</sup> Of course, there may be other measures of success than simply success by private applicants at the Tribunal. The increased possibility of a company being subject to an application under section 103(1) may have resulted in increased deterrence of reviewable practices which thus could not be the subject of any application, though this obviously cannot be properly assessed.

## A. OBTAINING LEAVE TO MAKE AN APPLICATION

The starting point of an analysis of private access is its governing provisions. The foundational provision governing access to the Competition Tribunal is section 103.1(1), which, at the time of writing states:

- (1) Any person may apply to the Tribunal for leave to make an application under section 75 or 77. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under section 75 or 77.<sup>12</sup>

There are three important aspects of this provision. First, there is no automatic right of access to the Tribunal; rather, a person must apply for leave. The conditions for obtaining leave are discussed in greater detail immediately below. Second, under the language of section 103.1 as it has stood from its introduction in 2002, an application can only be made under section 75 (refusal to deal) or 77 (exclusive dealing, tied selling, and market restriction), though amendments to the *Competition Act* included in Bill C-10 at the time of writing would allow applications to be made under an amended section 76 (price maintenance).<sup>13</sup> Third, the application is undertaken primarily on the basis of affidavit evidence. The application is to be judged summarily, primarily on the basis of affidavit evidence from both parties and without an oral hearing.<sup>14</sup>

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12 *Competition Act*, *supra* note 2, s. 103.1(1). Bill C-10, the 2009 budget implementation bill, substantially amends the *Competition Act*. For the purposes of this paper, the most important modification is the amendment of section 103.1 of the Act to include an amended section 76 along with sections 75 and 77 as the provisions under which a person may seek leave to make an application. The amended section 76 introduces price maintenance as a reviewable practice. This change, coupled with the repeal of section 61 of the *Competition Act*, converts price maintenance from a criminal offence to a civil reviewable practice. Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, 2<sup>nd</sup> Sess., 40<sup>th</sup> Parl., 2009 [Bill C-10].

13 Bill C-10, *ibid.*

14 *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, 2004 FCA 339, [2004] F.C.J. No. 1657 at para. 24 [*Barcode (FCA)*]. Section 103.1(6) permits the party served by an application to respond to the application with written representations. The applicant may also be allowed to file a reply to the respondent's response. See *Nadeau Poultry Farm Limited v. Groupe Westco Inc. et al.*, 2008 Comp. Trib. 6.

Various subsections govern the requirements for obtaining leave. Section 103.1(4) prohibits the Tribunal from considering an application for leave where the matter with respect to which leave is sought is the subject of an inquiry by the Commissioner, was the subject of an inquiry by the Commissioner which was discontinued because of a settlement, or has already been brought before the Tribunal by the Commissioner.<sup>15</sup> Section 103.1(8) specifies that leave cannot be obtained where the matter which is the subject of the application ceased more than one year prior.<sup>16</sup>

Beyond the above requirements, the general provision governing the granting of leave is section 103.1(7), which states:

The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.<sup>17</sup>

In the subsequent jurisprudence, the Tribunal has parsed this provision into two distinct elements: "(1) the applicant is directly and substantially affected in the applicant's business by any practice referred to in section 75

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15 *Competition Act*, *supra* note 2, s. 103.1(3), (4). In order to enable the Tribunal to more easily decide this question, section 103.1(3) requires the Commissioner to certify within 48 hours of receiving a copy of the application for leave whether or not the matter which forms the subject of the application fits either of these conditions. *Ibid.* at s. 103.1(3).

16 *Ibid.*, s. 103.1(8).

17 *Ibid.*, s. 103.1(7). Under Bill C-10, the standard that would be applicable for granting leave for applications under section 76 of the *Competition Act* is not the standard outlined in section 103.1(7). Rather, Bill C-10 introduces a new section, section 103.1(7.1), which creates a modified standard which is solely applicable to granting leave for applications under section 76. This provision reads as follows: "The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section." Bill C-10, *supra* note 12, s. 431(4). While similar in many ways to the standard in the current section 103.1(7), the standard in the proposed section 103.1(7.1) differs in two respects. First, it removes any reference to an applicant's business, thereby broadening the class of persons who can bring applications. Second, it only requires that an individual be "directly affected" rather than "directly and substantially affected," as is the requirement in section 103.1(7).



or 77 of the Act; and (2) the alleged practice could be subject to an order under that section”.<sup>18</sup> The following sections thus first examine the content of these two requirements, before moving on to the required standard of proof.

### **1. “Directly and substantially affected” – The Standing Requirement**

The first of the two requirements which the applicant must fulfill is to demonstrate that “the applicant is directly and substantially affected in the applicant’s business by any practice referred to in section 75 or 77 of the Act.”<sup>19</sup> This requirement has been exceptionally important in applications under section 103.1. Indeed, in the vast majority of decisions where leave was refused, the reason for refusal was that the applicant did not demonstrate that his business was “directly and substantially affected.” It is also important to note that this requirement is effectively a test for standing. In order to be able to bring an application, an individual’s business must be directly and substantially affected by the impugned conduct; this implies that neither unaffected businesses nor consumers have standing to bring an application under section 103.1(7).<sup>20</sup> Indeed, this interpretation of the purpose of this provision has been confirmed by the Federal Court of Appeal.<sup>21</sup>

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18 *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41, at para. 8. [*National Capital News*].

19 *Ibid.*

20 The rigidity of this requirement is demonstrated by the Competition Tribunal’s decision in *Canadian Standard Travel Agency Registry v. International Air Transport Association*, 2008 Comp. Trib. 14, in which it held that a trade association representing a large number of allegedly affected businesses did not have standing to bring an application, as the applicant itself was not affected. From a comparative perspective, the class of parties who can obtain standing in Canada under section 103 of the *Competition Act* is significantly more limited than the class of litigants in the United States that have antitrust standing under American antitrust statutes. For useful discussions of some of the contours of antitrust standing in the United States, see *Associated General Contractors of California, Inc. v. California State Council of Carpenters et al.*, 459 U.S. 519 (1983); *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302 (4th Cir. 2007).

21 *Barcode (FCA)*, *supra* note 14 at para. 22.

In terms of the substance of what this provision requires, there has thus far not been any judicial consideration of the requirement that the business be “directly” affected. While the Tribunal has not yet had any reason to address this directness requirement, this language likely has the effect of denying standing to a downstream business whose business suffered from the anti-competitive practices taken against an upstream supplier. Thus, if a retailer’s business is negatively impacted by a producer’s decision to refuse to deal with a wholesaler who had been supplying that retailer, the directness requirement likely limits standing to the directly affected wholesaler rather than the indirectly affected retailer.<sup>22</sup>

In contrast to the lack of judicial interpretation of the directness requirement, the question of when a business has been “substantially affected” has been explored at length by the Competition Tribunal. The threshold for what has been considered “substantial” by the Tribunal has been quite high. Noting the similarity in wording between section 75(1)(a) and section 103.1(7), the Tribunal has effectively taken “substantial” to mean the same thing in the context of section 103.1(7) as it does in section 75(1)(a).<sup>23</sup> Under section 75(1)(a), “substantially affected” has been interpreted to require an examination of whether the business as a whole has been substantially affected rather than simply examining whether a particular product or product line of that business has been affected,<sup>24</sup> and this interpretation has been adopted into the meaning of substantial in section 103.1(7). Thus, in *Broadview Pharmacy v. Wyeth Canada Inc.*, the Tribunal did not find a direct and substantial effect because the product which was the subject of the application only constituted 5% of the applicant’s sales of pharmaceuticals.<sup>25</sup> Similarly, in *Construx Engineering Corporation v. General Motors of Canada*, evidence that a line of vehicles which was the subject of an alleged refusal to deal constituted 67% of the applicant’s sales of new motor vehicles was not considered to be sufficient

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22 This limitation is thus likely analogous to the limitation on recovery by indirect purchasers in American conspiracy class actions. For the classic case on this point, see *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

23 *Competition Act*, *supra* note 2, ss. 75, 103.1.

24 *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1989), 1989 Carswell Nat 720, 27 C.P.R. (3d) 1, [1989] C.C.T.D. No.49, at 29-31.

25 2004 Comp. Trib. 22. [*Broadview*].

evidence of a company's business being substantially affected, since there was no indication what percentage of the company's total sales this represented.<sup>26</sup> Even more striking in this regard is the Tribunal's decision in *Sears Canada Inc. v. Parfums Christian Dior Canada Inc. and Parfums Givenchy Canada Ltd*, where a loss of \$16 million was not considered a substantial impact to Sears because "it [was] insignificant in the context of Sears' \$6 billion business overall".<sup>27</sup>

By contrast, cases where the Tribunal has found evidence of a substantial impact have been those where the business of the applicant has been virtually ruined by the impugned conduct. In *B-Filer Inc. v. The Bank of Nova Scotia*, the Tribunal found that the loss of 50% of the applicant's revenue constituted a substantial impact.<sup>28</sup> In *Robinson Motorcycle Limited. v. Fred Deeley Imports Ltd.*, an applicant's business was substantially affected because it relied exclusively on the products which the respondent refused to supply.<sup>29</sup> In *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, the alleged refusal to deal forced the company into receivership and caused it to lay off half of its workforce.<sup>30</sup> Thus, although there are not enough cases to make a definitive statement, it seems that the threshold of what constitutes a substantial impact is a high one.

## **2. "That could be the subject of an order" – Establishing the Elements of the Practice**

The second requirement for being granted leave to make an application is that "the alleged practice could be subject to an order under that section." The initial interpretation of this section was muddled. In the first application under section 103.1, the applicant sought an order to compel the Speaker of Parliament to give him access to the parliamentary press gallery, alleging that the Speaker's failure to do so constituted

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26 2005 Comp. Trib. 21 [*Construx*].

27 2007 Comp. Trib. 6, at para. 33 [*Sears*].

28 2005 Comp. Trib. 38 [*B-Filer (2005)*].

29 2005 Comp. Trib. 52, at para. 8 [*Robinson*].

30 2004 Comp. Trib. 1, para. 16-17 [*Barcode (CT)*].

a refusal to deal. The Tribunal disposed of this matter by concluding that parliamentary privilege gave the Speaker of the House the right to refuse access to Parliament to individuals and that the Tribunal had no jurisdiction to consider this privilege; the Tribunal did not discuss what, if anything, an applicant was required to demonstrate under this part of the provision.<sup>31</sup> In *Barcode (CT)*, the second application to the Tribunal under section 103.1, the Tribunal removed this evidentiary burden altogether. The Tribunal ruled that in order to be granted leave to make an application to the Tribunal, applicants only had to demonstrate that their business was directly and substantially affected; in this case, the applicant did not have to provide any evidence of all of the statutory elements of the impugned practice.<sup>32</sup>

On appeal to the Federal Court of Appeal, the Competition Tribunal's conclusion on this point was reversed. The Court of Appeal concluded that in an application for leave, "there must be some evidence by the applicant and some consideration by the Tribunal" of all elements of the reviewable practice which is the subject of the application for leave.<sup>33</sup> This has remained the appropriate standard which has been applied by the Tribunal since *Barcode (FCA)*.

To summarize, the current interpretation of section 103.1(7) requires that in order to be granted leave to make an application, applicants must adduce evidence of two things. First, they must establish that their business was directly and substantially affected by the conduct of the respondent. Second, applicants must give some evidence that the respondent's practice met all the statutory elements of reviewable practice with respect to which they are seeking leave.

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31 *National Capital News*, *supra* note 18.

32 *Barcode (CT)*, *supra* note 30 at para. 8.

33 *Barcode (FCA)*, *supra* note 14.

### 3. “Reason to believe” – The Evidentiary Threshold

Having examined the elements which an applicant must demonstrate in an application for leave, it is also necessary to consider the question of the extent to which parties must demonstrate those elements.<sup>34</sup> Section 103.1(7) does not require that a claim be established on the balance of probabilities, but rather specifies that the Tribunal must have “reason to believe” that the elements could be made out.<sup>35</sup> The exact content of this standard has fluctuated somewhat. The initial test employed by the Tribunal in *National Capital News* was that the application would have to be “supported by sufficient credible evidence to give rise to a *bona fide* belief” that the elements of section 103.1(7) could be made out.<sup>36</sup> In *Barcode (CT)*, the Tribunal held that this standard amounted to “less than a balance of probabilities” but more than a “mere possibility”.<sup>37</sup> Some decisions have been decided simply on whether the Tribunal “could conclude” that the elements were made out,<sup>38</sup> a standard which necessarily seems to conflict with the fact that a mere possibility is not sufficient. Thankfully, most of the case law has applied the initial test formulated in *National Capital News*.

While the test to be employed has been fairly constant throughout the case law, the application of that test in determining what constitutes “sufficient evidence” has varied. In some cases, a relatively low requirement has been implemented, with the Tribunal accepting affidavit evidence and limited financial statements as sufficient credible evidence that the applicant’s business would be directly and substantially harmed.<sup>39</sup> By contrast, where

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34 Obviously, the burden of proof must be lower than a balance of probabilities, since such a high standard would negate many of the benefits of an initial application stage. Moreover, it would be unreasonable to require a demonstration of the elements on an overly onerous standard simply on the presentation of affidavit evidence.

35 *Competition Act*, *supra* note 2, s. 103.1(7).

36 *National Capital News*, *supra* note 18 at para. 14; approved of by the Federal Court of Appeal in *Barcode*, see *Barcode (FCA)*, *supra* note 14 at para. 19; applied in *B-Filer (2005)*, *supra* note 28 at para. 52.

37 *Barcode (CT)*, *supra* note 30 at paras. 12-13.

38 *Robinson*, *supra* note 29; *Quinlan’s of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 15 [*Quinlan*].

39 *Allan Morgan and Sons Ltd. v. La-2-Boy Canada Ltd.*, 2004 Comp. Trib. 4 [*Allan Morgan*]. Note, however, that precise data is not required for every element. In *Barcode*, the

no financial statements were given, the Tribunal has refused leave, stating that it would not rely on mere speculation;<sup>40</sup> similarly, where financial information was provided in an affidavit but the basis or manner of calculation of that information has not been provided, leave has been refused.<sup>41</sup> While these decisions seem reasonable, the more difficult ones to understand are those where some financial evidence has been adduced in support of the applicant's contention, but the Tribunal has rejected the evidence as being insufficient, as occurred in *Construx*.<sup>42</sup> These cases provide only minimal indication in terms of what the courts will accept as sufficient evidence, and the practical meaning of the test in *National Capital News* is somewhat ambiguous. All that can be said is that while the courts will certainly require some concrete evidence in support of the application, the amount of evidence which is required to constitute "sufficient credible evidence" is unclear.

One final evidentiary point which is worth noting is the impact of section 103.1(11). This section specifies that "in considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it".<sup>43</sup> While this provision has not been judicially considered, its inclusion in the statute is nonetheless important. If the Tribunal were allowed to draw inferences from the fact that the Competition Commissioner had not taken action, a significant additional hurdle would be placed in front of any potential applicants. Especially insofar as one of the policy aims of section 103.1 is to allow private parties to bring valid claims when the Bureau is for some reason unwilling or unable to do so—an idea which is discussed further below—the absence of an explicit provision such as section 103.1(11) might have the effect of completely

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Federal Court of Appeal inferred that there could be a substantial lessening of competition based on certain facts of the case rather than being provided any evidence directly thereof. See *Barcode (FCA)*, *supra* note 14.

40 *Paradise Pharmacy Inc. and Rymal Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc.*, 2004 Comp. Trib. 21, at para. 23 [*Paradise*]. See also *Annable v. Capital Sports and Entertainment Inc.* 2008 Comp. Trib. 5 [*Annable*].

41 *Sono Pro Inc. v. Sonotechnique P.J.L. Inc.*, 2007 Comp. Trib. 18.

42 *Construx*, *supra* note 26.

43 *Competition Act*, *supra* note 2, s. 103.1(11).

undercutting the policy aims of section 103.1(1).

## B. REMEDIES

The remedy available to parties who successfully bring an application under sections 75 or 77 is injunctive relief that prohibits the impugned practice.<sup>44</sup> In addition to final injunctive relief, interlocutory relief is also available.<sup>45</sup> Section 104(1) authorizes the Tribunal to grant interlocutory relief “having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.”<sup>46</sup> The Tribunal has indicated that the governing test for interlocutory relief under section 104(1) is that found in *RJR-MacDonald Inc. v. Canada (Attorney General)*.<sup>47</sup> Under this test, the applicant must establish:

- 1) that there is a serious issue to be tried;<sup>48</sup>
- 2) that not granting relief will cause irreparable harm to the applicant; and,
- 3) that the balance of convenience favours the grant of the injunction.<sup>49</sup>

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44 *Ibid.*, ss. 75, 77.

45 Interim relief orders may be available even before leave to bring an application has been granted. See *Canadian Standard Travel Agency Registry v. International Air Transport Association*, 2008 Comp. Trib. 12.

46 *Competition Act*, *supra* note 2, s. 104.

47 [1994] 1 S.C.R. 311 [*RJR-MacDonald*]; see *B-Filer Inc. v. The Bank of Nova Scotia*, 2005 Comp. Trib. 52 [*B-Filer (Interim Relief Order)*]; and *Quinlan’s of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28 [*Quinlan (Interim Relief Order)*].

48 Interestingly, in *Quinlan (Interim Relief Order)*, *ibid.*, the Tribunal rejected the suggestion that because the injunction sought was a mandatory interlocutory injunction, the standard should be the higher “strong prima facie case” standard. This is in tension with other mandatory interlocutory injunction cases which have employed a higher standard, though not necessarily the “strong prima facie case” standard. For example, see *Dempster v. Mutual Life of Canada*, [2000] I.L.R. I-3748, [1999] O.J. No. 3595 and the cases discussed therein; see also *Parker v. Canadian Tire Corp.*, [1998] O.J. No. 1720.

49 *RJR-MacDonald*, *supra* note 47.

Although there have been few decisions which have considered interlocutory relief under section 104(1), the few decided cases thus far suggest that such injunctions will often be readily obtainable. The first factor above will most likely be met if the applicant obtains leave under section 103.1(7). With respect to the second requirement, the Tribunal in *Quinlan (Interim Relief Order)* held that there was no duty on the part of the applicant to mitigate by making alternative business arrangements and that the loss of sales and goodwill could constitute irreparable harm.<sup>50</sup> Finally, the Tribunal suggested that in a section 75 case, if the products are in ample supply—evidence of which is itself a requirement for obtaining leave—then the balance of convenience will favour the granting of an injunction.<sup>51</sup> Thus, this suggests that interlocutory relief will often be easily available once the applicant has been granted leave.

In contrast to the United States, a successful applicant cannot recover any damages. Section 103.1 has no provision for the awarding of damages; nor do sections 75 or 77. Moreover, section 77(3.1) explicitly states that there may be no award of damages under section 77 to an individual bringing an application under section 103.1.<sup>52</sup> While it is surprising that no analogous provision was inserted into section 75, this does not suggest that damages would be available under section 75 in an application under section 103.1, since injunctive relief is the only remedy contemplated in section 75.

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50 *Quinlan (Interim Relief Order)*, *supra* note 47. Interestingly, in *B-Filer (Interim Relief Order)*, where interlocutory relief was refused, one of the reasons that no irreparable harm was found by the court was that B-Filer had made alternative business arrangements; see *B-Filer (Interim Relief Order)*, *supra* note 47. Thus, it seems that there is no duty to mitigate, but if the party does mitigate, it will be denied interlocutory relief. This could potentially create a perverse incentive against mitigation.

51 *Quinlan (Interim Relief Order)*, *Ibid.*

52 *Competition Act*, *supra* note 2 at s. 77.



### III. THE POLICY AIMS OF PRIVATE ACCESS TO THE COMPETITION TRIBUNAL

Having outlined the law on private access as it currently stands, this section considers whether the law advances the policy aims of the *Competition Act*. To this end, this Part first considers what the policy goals are of allowing private party access to the Tribunal. It is important to clearly define these policy goals prior to evaluating the effectiveness or appropriateness of these particular provisions, because it is the realization of the underlying purposes which is the standard by which the current provisions must be measured. This Part then examines to what extent these goals are adequately reflected in the current legal framework by critically examining a) the criteria for being granted leave to bring an application, b) the remedies available to private litigants, and c) the substantive scope of private party access.

In order to elucidate the rationale underlying private party access, it is first necessary to remember the oft-stated maxim that the purpose of competition law is to protect competition, not competitors. Indeed, from an economic perspective, the harm of anti-competitive conduct is not that it harms competitors. Rather, the harm of anti-competitive conduct is the dead-weight social loss that occurs when markets are not operating efficiently.<sup>53</sup> Though for broader reasons rather than the more narrow welfare justifications provided by economic theory, the purpose of the *Competition Act* likewise seems to be the protection of competition. The purpose clause in section 1.1 begins by stating that “the purpose of the Act is to maintain and encourage competition in Canada,” and it then proceeds to list a number of reasons why competition is protected.<sup>54</sup> While there are a number of goals fostered through the protection of competition—and there have been significant debates over how to balance those often-

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53 Trebilcock *et al.*, *supra* note 2 at 40. For an economic analysis of the harms of monopolistic situations, see Chapter 1 of Jean Tirole, *The Theory of Industrial Organization* (MIT Press, 1988).

54 *Competition Act*, *supra* note 2, s. 1.

competing goals<sup>55</sup>—the overarching objective is to protect competition itself rather than competitors.<sup>56</sup> This is further confirmed by the fact that the majority of the most important substantive provisions of the *Competition Act* only proscribe conduct which harms competitors when that conduct also has an anti-competitive effect, and not when it simply has a harmful effect on a competitor.<sup>57</sup>

This conception of the purpose of competition law has particularly important implications for the private enforcement of competition law. As Rothstein JA wrote in *Barcode (FCA)* with respect to private party access:

the purpose of the *Competition Act* is to maintain and encourage competition in Canada. It is not to provide a statutory cause of action for the resolution of a dispute between a supplier and a customer that has no bearing on the maintenance or encouragement of competition.<sup>58</sup>

Thus, private party access is not justified on the basis that it can be used by parties to rectify private wrongs, but on the basis that it is instrumentally effective insofar as it serves the socially desirable end of promoting competition.<sup>59</sup>

The theoretical strengths and weaknesses of permitting private enforcement of law in favour of public ends are well-examined by

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55 For the debate over how these goals are balanced, see *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2000 Comp. Trib. 15, 7 C.P.R. (4th) 385 at para. 404-413; *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, 199 D.L.R. (4th) 130, 269 N.R. 109, [2001] 3 F.C. 185, 2001 CarswellNat 2092, 3 F.C. 185, 11 C.P.R. (4th) 289.

56 For an introductory discussion relating to the historical debate over the purpose of competition law in Canada, see James Musgrove, "Introduction and Overview: The Purpose of Canadian Competition Law" in James Musgrove, ed., *Fundamentals of Canadian Competition Law* (Toronto: Thomson Carswell, 2007) 1.

57 See, *inter alia*, *Competition Act*, *supra* note 2, ss. 45, 75, 77, 79, 92.

58 *Barcode (FCA)*, *supra* note 14 at para. 23.

59 Indeed, Tribunal decisions support this justification. In the cost order resulting from the litigation in *Robinson v. Deeley* cost order, para.31, the Tribunal wrote that "[p]rivate Competition Act litigation is an important enforcement procedure of the Act." See *Robinson Motorcycle Limited v. Fred Deeley Imports Ltd.*, 2005 Comp. Trib. 40.

Trebilcock and Roach and bear reviewing here. On the one hand, there are significant benefits which can flow from allowing private parties to enforce public laws: private enforcement can supplement public enforcement with additional resources, which is particularly important if the public enforcer has limited resources; private enforcers may be in a better position to detect breaches of the law; and private enforcement is an efficient means of holding public enforcers accountable for their decisions not to take action.<sup>60</sup> These considerations certainly apply in the competition context, as the Bureau is resource-constrained and the cost of litigating complex competition cases can be high.<sup>61</sup> Private party access to the Tribunal can thus play an important role in relieving the Competition Bureau of some of its responsibilities, rectifying any perceived under-enforcement, and ensuring effective competition. However, as Trebilcock and Roach note, there are also harms which can result from private enforcement of the law: private enforcement can result in over-deterrence; private enforcers can engage in strategic enforcement or bring frivolous claims;<sup>62</sup> and private enforcement can undermine a coherent plan of public enforcement.<sup>63</sup> Put broadly, this implies that while private enforcers may play a useful role in achieving a public end, because their incentives structure differs from that of a public enforcer, allowing private enforcement of the law may also result in certain societal harms. This suggests that private enforcement should be allowed, but the rules which govern that private enforcement should be structured in such a way as to attempt to bring private incentives

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60 Kent Roach & Michael Trebilcock, "Private Enforcement of Competition Laws" (1996) 34 Osgoode Hall L.J. 461 [Roach & Trebilcock Article] at 488; see also the "Interim Report on the *Competition Act*" (Report of the Standing Committee on Industry, June 2000) at Chapter Six, online: (2000) <<http://cmte.parl.gc.ca/Content/HOC/committee/362/indu/reports/rp1031742/indu01/13-ch6-e.html>>.

61 "Study of the Historical Cost of Proceedings Before the Competition Tribunal", Report Prepared for the Competition Bureau, online: (1999) <<http://strategis.ic.gc.ca/pics/ct/wiserep-e.pdf>> [Cost Study].

62 Indeed, the potential for frivolous litigation is quite substantial. One study reported that between 1992 and 2000, only 1% of reviewable complaints were found by the Bureau to be meritorious of action on their part, suggesting that there may be a large pool of unsatisfied complainants. See Rowley & Campbell, *supra* note 8 at 56.

63 Roach & Trebilcock Article, *supra* note 60 at 488-89; this final concern is less of an issue in Canadian competition law since the Commissioner has a right under section 103.2 to intervene in a private application.

in line with public aims, i.e., encouraging parties to bring meritorious litigation and dissuading parties from bringing frivolous or strategic litigation.

It is important to note that this conception of private party access is one in which private party access is instrumentally effective as a mechanism for fostering competition. Contrary to what Trebilcock and Roach suggest,<sup>64</sup> allowing this type of private party access to the Tribunal should not be—and has not been, as evidenced by Rothstein JA's comment cited above—justified on grounds of corrective justice. Corrective justice would require the vindication of an applicant's rights where they have been infringed or violated.<sup>65</sup> However, as noted above, the general conception of competition law is that it protects competition rather than competitors; a corrective-justice framework of private access would necessarily imply that a primary goal is protecting competitors. Moreover, it seems difficult to argue that any type of private right belonging to competitors is explicitly protected by competition law. This is because the *Competition Act* only prohibits actions when they have an anti-competitive effect and not simply when a business is harmed. For example, a refusal to deal which ruins a business only runs afoul of section 75 if it has an “adverse effect” on competition.<sup>66</sup> However, whether there has been an adverse effect on competition or not, the business itself has been affected in the exact same manner by the refusal to deal. If corrective justice was a legitimate rationale, the law would protect the business whether or not the practice caused an adverse effect on competition, while the law in fact only prohibits the practice if it results in reduced competition. Thus, although certain types of private actions not considered here, such as those permitting recovery by consumers under section 36, might be justified in part by theories of corrective justice, it is important to bear in mind that the private party access to the Tribunal considered by this article is justified by the social benefit such access brings in terms of protecting competition. With this

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64 Roach & Trebilcock Article, *Ibid.* at 488.

65 For a general overview of corrective justice, see E.J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995).

66 *Competition Act*, *supra* note 2, s. 75.

in mind, the following sections examine the extent to which the current framework of private party access appropriately structures the incentives of private parties to bring them in line with the public goal of fostering competition.

### **A. OBTAINING LEAVE TO MAKE AN APPLICATION**

As discussed above, section 103.1(7) requires an applicant seeking leave to establish 1) that his business is directly and substantially affected by the practice, and 2) that the alleged practice could be subject to an order under sections 75 or 77. While much of the current mechanism for bringing an application is appropriate from a policy standpoint, the policy considerations discussed above would justify a different standard for the first requirement, i.e., the standing test.

Both a) the requirement to seek leave to make an application, and b) the requirement to give some evidence in support of each statutory element of a reviewable practice are reasonable from a policy standpoint. There are a number of reasons for this. First, an initial application stage provides an opportunity for frivolous or vexatious claims to be dismissed without exposing the respondent to long and costly litigation.<sup>67</sup> Second, it provides an opportunity for novel legal claims to be tested at lower cost to the applicants, thereby actually increasing the possibility of a genuinely meritorious, though novel, claim being brought. Third, by providing a low-cost forum for the adjudication of novel claims, the jurisprudence on the legal meaning of certain statutory provisions can be expanded relatively easily. Indeed, the applications brought under section 103.1 have provided at least some additional definition to certain provisions.<sup>68</sup> This clarity is

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<sup>67</sup> This goal has been successfully accomplished by the current provisions. While the merits of many of the cases are debatable, at the very least it seems clear that the applicant in *National Capital News* would have failed in an application under section 75. See *National Capital News*, *supra* note 18. A seemingly frivolous claim was also dismissed in *Annable*, *supra* note 40

<sup>68</sup> At the very least, the applications under section 103.1(1) have helped define some of the outer contours of the requirements of section 75. Perhaps the best example of this is that

especially important in Canadian competition law, where few cases have been litigated and the contours of many statutory provisions are unclear.

By contrast, the current test for standing—which requires that the applicant’s business be directly and substantially affected—is overly onerous. On the one hand, it does make sense to have some type of standing requirement. It is desirable that the applicant actually has some genuine interest in the outcome of the application in order to ensure that the applicant has an incentive to properly litigate what could be, if the application for leave is allowed, a long and costly process. On the other hand, there should not be an overly arduous threshold for standing which arbitrarily bars genuinely interested applicants who have a sufficient incentive to properly litigate a claim.<sup>69</sup>

The particularly problematic aspect of this requirement from a policy perspective is the notion that what is “substantial” is to be assessed in the context of the entire business. There are two problems with this. First, as noted above, in terms of the rationale for having a standing requirement in order simply to give standing to applicants who will take proper steps to effectively litigate the application, there seems to be no justification for denying standing to applicants whose companies have only had one product line of their business impacted; this is particularly the case if the degree to which the firm has been affected is still relatively substantial in absolute terms, even if it is not substantial in proportion to the total size of the business.

Second, and more importantly, it should be remembered that the purpose of competition law is to protect competition rather than competitors. From the perspective of protecting competition, the assessment for impact should be with respect to the product in question rather than the firm. To give a concrete example, whether Givenchy refuses to supply its perfumes

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the meaning of “substantially affected” in section 75(1)(a) has been given some additional precision by certain decisions, e.g., *Broadview*, *supra* note 25; *Paradise*, *supra* note 40.

<sup>69</sup> Perhaps the most obvious example of this is in *Sears*, *supra* note 27. Given that they stood to lose about \$16 million, it seems surprising to suggest that they did not have a sufficient interest to bring an application.

to Sears or to a small retailer which exclusively sells Givenchy perfume, the anti-competitive effect is equivalent, as the competition in the sale of Givenchy's perfume has been reduced.<sup>70</sup> If the purpose of competition law is to protect competition rather than competitors, then it seems arbitrary that the small retailer should be given standing but Sears should not.<sup>71</sup> The focus should be on the anti-competitive effects on the particular product market rather than on the producer or retailer of that product.

Given the policy considerations listed above, it seems that a better requirement for standing would be a provision that requires that the business be "directly and materially" affected rather than "directly and substantially" affected.<sup>72</sup> The former term would still ensure that the applicant has a sufficient interest to effectively litigate the action, but it

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70 While a discussion of the anti-competitive effects of vertical restraints are outside the scope of this paper, for an overview of the economics of vertical restraints, see Doris Hildebrand, *Economic Analyses of Vertical Agreements – A Self-Assessment* (The Hague: Kluwer Law International, 2005) at 11-23 [Hildebrand].

71 On a related point, this also suggests that the tribunal looking to section 75(1)(a) in order to inform the meaning of "substantial" in section 103.1(7) may have been somewhat misguided. In the context of section 75(1)(a), the requirement of the business being "substantially affected" was a substantive statutory element of the reviewable practice, since, as Trebilcock *et al.* write, the history of this provision was that it was, atypically in the *Competition Act*, one that was—but no longer following the introduction of section 75(1)(e) in 2002—concerned with the protection of downstream businesses rather than protecting competition per se. See Trebilcock *et al.*, *supra* note 2 at 420-21. By contrast, "substantially affected" in section 103.1(7) is not a substantive element of the reviewable practice but rather a provision which limits standing. Thus, the purpose of the term is different in the two sections, and the Tribunal should have considered this when interpreting "substantially affected" in the statutory context of section 103.1(7).

72 This point may appear somewhat academic, since applicants under section 75 would still have to establish that they were substantially affected under the second element of the section 103.1(7) test. However, an overly onerous standing requirement should not restrict the availability of standing to bring a section 77 application. Moreover, the second argument above also speaks to a modification of the meaning of "substantial" in section 75(1)(a), so there may be reasons to change the wording in both sections. Note also that "materially" is the term favoured by Roach and Trebilcock, though they too would not have included the directness requirement. See Roach & Trebilcock Article, *supra* note 60. By contrast, the standing requirement which would be introduced by Bill C-10 for private applications challenging price maintenance is, as noted above in footnote , that a person be "directly affected." The absence of the requirement that the person be "substantially" affected suggests an even lower threshold for standing than the "directly and materially" standard suggested here.



would not preclude a large firm from bringing an application merely because the effect on its business was relatively small. While this might seem to expand the number of successful applications—especially given the number of applicants that failed to clear the hurdle of being substantially affected—it should be remembered that applicants would still have to establish the elements of underlying reviewable practice including some type of harm to competition.<sup>73</sup> Many of the frivolous applicants which were dismissed by the Tribunal for want of a substantial effect on the applicant's business would still likely be dismissed for lack of an adverse effect on competition. The only difference is that meritorious applicants that could show an adverse effect on competition would not be prevented from accessing the Tribunal merely because their businesses were not completely annihilated.

## B. REMEDIES

As examined above, while the current statutory framework allows parties to seek both interlocutory and permanent injunctive relief, it does not allow parties to recover damages. This section will consider whether there are policy arguments for allowing private parties to recover damages, as some have argued.<sup>74</sup> It will conclude that although there may be some benefits in terms of deterrence from allowing parties to recover damages, there are stronger arguments to limit parties' available remedies to injunctive relief.

There are two potential ways in which allowing successful applicants to recover damages could structure private incentives in line with the socially desirable outcome. First, the potential for recovery of damages gives the aggrieved applicant a greater incentive to bring an application before the Tribunal. Second, the prospect of having to pay damages deters a potential offender from engaging in the anti-competitive conduct in the first place.<sup>75</sup>

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<sup>73</sup> *Competition Act*, *supra* note 2, s. 103.1.

<sup>74</sup> For example, see Trebilcock *et al.*, *supra* note 2 at 82-89, 91.

<sup>75</sup> Both these points are noted in a 2002 House of Commons Committee report on



Although both of these arguments seem plausible, they are much weaker upon closer inspection.

With respect to the first mechanism, it should first be noted that it is not immediately clear that an award of damages is actually necessary in order to provide parties with a sufficient incentive to bring applications. Between the introduction of section 103.1 in 2002 and December 2008, 17 applications were brought by private parties under section 103.1 alleging reviewable practices under section 75. By contrast, since the introduction of the *Competition Act* in 1986, only five applications have been brought by the Bureau to the Tribunal under section 75. There has thus been a significant increase in the number of applications. Second, while the availability of damages awards might increase the number of meritorious applications, it might also increase the incidence of those that are frivolous or merely strategic. Furthermore, the potential for large damage awards might deter sufficiently risk-averse corporations from defending frivolous claims and instead compel them to settle. This could put excessive power in the hands of unscrupulous applicants. Third, even if in some cases the unavailability of damages provided no incentive for a party to bring an application under section 103.1, they could still either make a complaint to the Bureau about the practice in question or apply to the Commissioner to begin an inquiry under section 9.<sup>76</sup> The fact that private parties do not necessarily have sufficient incentives to challenge every reviewable practice does not mean that the private party mechanism is ineffective. Rather, it merely highlights the fact that the Bureau and the existence of a private right of access are not alternatives, but are instead complementary, with the Bureau having a role in bringing certain applications which private parties do not have sufficient incentives to bring.

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competition law, which argued in favour of the availability of damages for successful private litigants. Standing Committee on Industry, Science and Technology, “A Plan to Modernize Canada’s Competition Regime” (April 2002) at 46-48 [Committee Report]. For theory and evidence on the deterrent effect of damages for violation of antitrust laws, see Michael Block, Frederick Nold & Joseph Gregory Sidak, “The Deterrent Effect of Antitrust Enforcement” (1981) 89 J. Pol.’l Econ □□’y. □ 429.

<sup>76</sup> *Competition Act*, *supra* note 2, s. 9. For a discussion of some of the Commissioner’s duties under section 9, see *Charette v. Canada (Commissioner of Competition)*, 2003 FCA 426, 2003] F.C.J. No. 1697.

With respect to the second mechanism discussed above, although awarding damages to successful applicants would likely deter corporations from undertaking reviewable practices, there are two additional considerations which speak against permitting damage awards. First, there is always the possibility of over-deterrence. From a practical standpoint, it is exceptionally difficult to set awards in such a way as to provide the optimal level of deterrence.<sup>77</sup> Moreover, the reviewable practices which can form the basis of an application under section 103.1 can in many circumstances have benign or pro-competitive effects. The possibility of high damage awards might thus deter corporations from engaging in such conduct even when it is not anti-competitive.<sup>78</sup> Second, the possibility of significant cost awards being granted to successful parties may already provide sufficient deterrence against the most egregious practices. In *B-Filer Inc. et al. v. The Bank of Nova Scotia*, the only application under section 103.1 which was litigated to conclusion, the Tribunal awarded costs to the respondent of almost \$900,000.<sup>79</sup> Because of the complexity of competition litigation, the potential for large cost awards being made against the losing party is high. Thus, at least some measure of anti-competitive conduct may already be deterred without the need for significant damage awards.

These observations provide preliminary support for the conclusion that damages should not be available to successful litigants in private actions under section 103.1. However, this paper should not be taken to endorse the proposition that damages should not be awarded. The desirability of damage awards is, using the framework developed above, a question of striking the optimal balance between the benefit of deterring anti-competitive conduct and the harm of frivolous or strategic litigation. While the discussion above suggests that, at the moment, the appropriate balance is already being achieved without the availability of damage awards, a comprehensive assessment of this issue requires significant empirical

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<sup>77</sup> For a discussion of various theories of optimal deterrence and the difficulties in assessing that optimal level, see William Breit & Kenneth G. Elzinga, "Private Antitrust Enforcement: The New Learning" (1985) 28 J.L. & Econ. 405 at 407-413.

<sup>78</sup> For a discussion of some of the benign or even efficiency-enhancing effects of reviewable practices, see Hildebrand, *supra* note 70 at 16-18; see also Trebilcock *et al.*, *supra* note 2 at 424, 468-73.

<sup>79</sup> *B-Filer Inc. et al. v. The Bank of Nova Scotia*, 2007 Comp. Trib. 29.

work that is beyond the scope of this paper. It is sufficient for the moment to remark that damage awards should not be made available without the existence of evidence which contradicts the observations and arguments developed above, and any move to introduce damage awards should thus be based on a demonstrable rather than a hypothesized need to deter anti-competitive conduct.

As a final point on this issue, in accordance with the framework developed above, this paper now notes one argument that should *not* be taken to support the availability of damages for successful litigants. In addition to the instrumental deterrence-based rationales examined above, some have argued in favour of the availability of damages in such actions on somewhat correctivist grounds, suggesting that parties have a right to be compensated for harms suffered as a result of another's anti-competitive conduct.<sup>80</sup> However, for the reasons examined above, this justification has and ought to have limited application in the context of section 103.1, as the purpose of this provision and the *Competition Act* generally relates to the protection of competitive markets as an objective in and of itself, rather than the protection or provision of any non-instrumental right to individual competitors. Thus, any justification for awarding damages in actions under section 103.1 should be based on instrumental considerations rather than on the notion that competitors possess any inherent right not to be harmed by anti-competitive conduct that section 103.1 allows them to vindicate.

### C. THE SUBSTANTIVE SCOPE OF PRIVATE ACCESS

The final issue which this paper addresses is whether it is appropriate to expand the scope of private access to the Tribunal to allow private parties to bring applications under sections other than sections 75 or 77, or, if Bill

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80 For example, in "A Plan to Modernize Canada's Competition Regime," the Standing Committee on Industry, Science and Technology noted that "[t]he right to sue for damages is a fundamental right accorded to plaintiffs in civil proceedings throughout the world. It is an injustice that applicants in Tribunal proceedings should be denied the same fundamental right as any other litigant to claim restitution for the losses they have sustained as a result of another person's anticompetitive conduct." Committee Report, *supra* note 75 at 47.

C-10 becomes law, under an amended section 76. In questioning what applications private parties should be permitted to bring, the fundamental policy issue remains the same as above; the potential for more effective enforcement of competition laws must be balanced against the potential harm of strategic or frivolous litigation. Based on these considerations, this paper argues that there is a strong case for allowing private parties to bring applications under section 79.<sup>81</sup>

Section 79, which prohibits abuse of a party's dominant position in the market, is a broad provision which can capture a wide cross-section of anti-competitive acts.<sup>82</sup> Section 79(1) states that:

(1) Where, on application by the Commissioner, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.<sup>83</sup>

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81 This proposal is by no means unprecedented. A 2002 House of Commons committee report recommended expanding the private right of access to include actions under section 79 of the *Competition Act*. Committee Report, *supra* note 75 at 50. In its response to this proposal, the government indicated that it preferred to wait until the effect of private party access under section 75 and section 77 could be assessed before making a decision as to whether to expand it to section 79. See 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*” (October 2002) at 9.

82 For an overview of the law relating to abuse of dominance, see Trebilcock *et al.*, *supra* note 2 at Chapter 8.

83 *Competition Act*, *supra* note 2, s. 79.

The breadth of this provision stems from the scope of the term “anti-competitive act,” which is defined in section 78(1) by reference to a non-exhaustive list of eleven examples of anti-competitive acts, and which was held in *Canada (Director of Investigation and Research) v. Nutrasweet Co.* to include any acts with an anti-competitive purpose.<sup>84</sup>

It seems likely that private applications under section 79 would provide more effective enforcement of the *Competition Act*. As with all reviewable practices, the private applicants may have better information about the impugned practice than would the Bureau, as well as a greater incentive to bring the application. Given the breadth of section 79, the fact that only nine applications have been brought under its aegis by the Bureau since 1986 suggests that the Bureau may be overly conservative in enforcing the provision.<sup>85</sup> Indeed, the high success rate of the Bureau in section 79 applications suggests that they will only bring an application under section 79 if they are very likely to be successful.<sup>86</sup> This suggests that there may be a role for private parties to play in enforcing the provision in borderline cases. Moreover, if private applicants were to appropriate some of the Bureau’s role in enforcing section 79, this would provide the Bureau with more resources to devote to effectively enforcing those areas of competition law where private enforcement would be especially problematic, such as in the merger review process. Finally, given the breadth of the statutory provision and the scant judicial consideration it has received, there may be significant benefits from increased litigation which can adequately define the contours of these provisions.

By contrast, there are not significant concerns over the potential for a flood of strategic or frivolous litigation if private applications can be brought

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84 *Ibid.*, s. 78; *Canada (Director of Investigation and Research) v. Nutrasweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib) [*Nutrasweet*].

85 Mark Katz, “Abuse of Dominance” in James Musgrove, ed., *Fundamentals of Canadian Competition Law* (Toronto: Thomson Carswell, 2007) 147 at 149.

86 The high cost of abuse of dominance applications may explain the limited number of applications brought by the Bureau. One study estimated the costs to the Bureau of investigating and prosecuting *NutraSweet* at \$1,449,195 and *Tele-Direct* at \$2,726,888; see Cost Study, *supra* note 61 at 19. *Nutrasweet*, *supra* note 84; *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.).

under section 79. There are two reasons for this. First, the statutory terms of section 79 provide an internal check on the number of potentially meritorious suits which the Tribunal could allow. Section 79(1)(a) limits the provision to situations where “one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business.” The Tribunal has stated that there will not be a *prima facie* finding of dominance if the respondent’s market share is lower than 50%.<sup>87</sup> This means that the class of businesses to which section 79 could potentially apply is much smaller than that to which sections 75 or 77 could apply. Moreover, the Federal Court of Appeal recently held that section 79(1)(b) requires some aspect of an anti-competitive intent, though subjective intent need not be demonstrated.<sup>88</sup> Furthermore, the court held that “proof of a valid business justification for the conduct in question can overcome the deemed intention arising from the actual or foreseeable effects of the conduct, by showing that such anti-competitive effects are not in fact the overriding purpose of the conduct in question”.<sup>89</sup> This can provide respondents with a strong defence to an action under section 79. Finally, unlike section 75(1)(e) which only requires an “adverse effect on competition”, section 79(1)(c) requires the prevention or substantial lessening of the competition.<sup>90</sup> Thus, this overview of the statutory requirements of section 79(1) suggests that the difficulties in establishing that a violation of section 79 occurred may significantly dissuade private litigants from bringing unmeritorious claims.

Second, the incentive to bring frivolous litigation is further dampened by the high costs that losing applicants may have to bear. This effect may be especially pronounced in abuse of dominance cases, where the factual and legal issues can be more complex and the costs of litigating even higher than in other types of competition actions.<sup>91</sup> Thus, the difficulties

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87 *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.*, [1992] C.C.T.D. No. 1, 40 C.P.R. (3d) 289, at para. 68.

88 *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, 49 C.P.R. (4th) 241, 268 D.L.R. (4th) 193, 350 N.R. 291, [2007] 2 F.C.R. 3.

89 *Ibid.*, at para. 73.

90 *Competition Act*, *supra* note 2, ss. 75, 79.

91 See Cost Study, *supra* note 61 at 19.

in establishing an offence, combined with the possibility of a high adverse cost order, will likely provide a deterrent to the bringing of frivolous or strategic actions under section 79.

## IV. CONCLUSION

This paper has explored and critically assessed the current framework of private access to the Competition Tribunal. First, it has provided a systematic overview of some of the provisions governing private party access to the Tribunal. This discussion suggests that while the case law on private party access is slowly starting to flesh out the content of section 103.1, there remain some ambiguities, particularly with respect to what constitutes “sufficient credible evidence” to justify granting leave. Applicants should have an understanding of exactly what is required of them at the initial stage of seeking leave, and clarity from the Tribunal on this point would be a welcome development.

Second, this paper has evaluated these provisions from a policy perspective in order to determine whether the current regime is an optimal one in furthering the goals and purposes of competition law in Canada. This was based on a consideration of the degree to which the current framework of private party access appropriately structures the incentives of private parties to align them with the public goal of fostering competition by providing incentives to bring meritorious litigation while still deterring frivolous or strategic litigation. Based on this analysis, two modest revisions to the *Competition Act* were proposed: lowering the standing requirement for individuals from having their businesses be “directly and substantially” affected to merely having their businesses be “directly and materially” affected; and expanding section 103.1 to include the possibility of bringing applications for reviewable practices falling under section 79.

While there are legitimate concerns that the expansion of a private right of access to the Tribunal could result in an explosion of costly competition litigation, the above analysis suggests that these concerns are limited with respect to the changes proposed. While both the lowering of the standing requirement and the expansion of private access to section 79 would increase the amount of litigation, frivolous and strategic litigation would still be a) dismissed at the Tribunal stage, thereby minimizing social costs, and b) deterred by the power of the Tribunal to award costs to the successful party. Thus, the proposed revisions represent incremental changes which would not open the floodgates to unmeritorious litigation, but which would rationalize the structure of private party access to align it with the underlying policies of permitting that access.