



Competition Bureau
Canada

Bureau de la concurrence
Canada

Information Bulletin on Private Access to the Competition Tribunal

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I. Introduction

In an effort to foster compliance and ensure greater transparency, fairness and predictability, the Competition Bureau (the “Bureau”) publishes Enforcement Guidelines dealing with specific sections of the *Competition Act* (the “Act”), and Bulletins which explain the Bureau’s approach on issues arising with enforcement. This Information Bulletin¹ (the “Bulletin”) outlines and clarifies the Bureau’s role in a private access matter and under which circumstances the Bureau would intervene in private access proceedings before the Competition Tribunal.

In June 2002, Bill C-23 (S.C. 2002, c.16) came into force, amending the Act. Within the Amendments are provisions allowing private parties to apply directly to the Competition Tribunal (the “Tribunal”) if they are directly and substantially affected by the conduct of another party.

Private access to the Tribunal is only available for conduct reviewable under sections 75 (refusal to deal) and 77 (exclusive dealing, tied selling and market restriction) of the Act. The private access provisions were added to the Act to complement the Bureau’s public enforcement and increase the deterrent effect of the Act. Private litigation before the Tribunal will also yield valuable jurisprudence which will assist the Bureau in its enforcement and application of the Act and will better delineate the bounds of legitimate behaviour to the business community.

II. Commissioner’s statutory obligations and rights

While the private access provisions were enacted to provide private parties with direct access to the Tribunal, the Commissioner of Competition (the “Commissioner”) is called upon on three distinct occasions.

a) Application for Leave

When a private party applies for leave to bring a matter to the Tribunal, the Commissioner must be notified and shall certify to the Tribunal whether or not the matter for which leave is sought is currently under inquiry by the Commissioner. The Commissioner shall also certify whether or not the matter for which leave is sought was the subject of an inquiry that was discontinued

¹This Bulletin is not intended to restate the law or to be a binding statement of how the Commissioner's discretion will be exercised in a particular situation. Therefore, this bulletin should not substitute for the advice of counsel. Enforcement decisions of the Commissioner, and the ultimate resolution of any particular matter, are based on the specific circumstances at hand.

pursuant to a settlement.

b) Written Representations

Once the Tribunal receives the Commissioner's certification and has decided that it can hear the application, it shall decide whether or not it will grant leave to the private applicant to file an application. Before such a decision is made, parties to the application for leave and the Commissioner may make written representations to the Tribunal on the application for leave. The Commissioner will generally not make written representations at this stage, unless in exceptional circumstances, such as:

- when the Commissioner believes a particular case has importance beyond the immediate parties, or;
- when the case could result in valuable jurisprudence.

The decision whether or not to make written submissions at the 'application for leave' stage will always be done on a case by case basis.

c) Interventions

If leave is granted and an application is filed with the Tribunal, pursuant to the private access provisions, the Commissioner may intervene in the proceedings. The Commissioner can intervene at any stage of the proceedings.

The Commissioner can also intervene in a private proceeding if a consent agreement is reached between the private parties. The private access provisions allow that, on application by the Commissioner, the Tribunal may vary or rescind a registered consent agreement if it finds that the agreement has or is likely to have anti-competitive effects.

III. Intervention Criteria

When deciding whether or not to intervene in a matter, the Commissioner will take into consideration a variety of factors. However, the overriding factors are whether there are significant competition issues raised and whether it is in the public interest for the Commissioner to intervene. The Commissioner will only intervene in exceptional circumstances, such as:

- when the impact on competition has importance beyond the immediate parties and affects a wider geographical area, or;
- when the issues could have a significant impact on consumers, on the business community or on the Canadian economy, or;

- when the case could result in the development of a new economic theory or in valuable jurisprudence.

The Commissioner may also decide to intervene in a private proceeding if a consent agreement is reached between the private parties which the Commissioner believes has or is likely to have anti-competitive effects. The Commissioner may seek to have the Tribunal vary or rescind such an agreement. As an example of the foregoing, consider a situation where two private parties who are engaged in a section 75 or 77 dispute before the Tribunal reach a consent agreement and file it with the Tribunal for registration under section 106.1(6). The terms of the hypothetical agreement favours the entry or expansion of one of the private parties while raising barriers to entry or restricts access for other potential competitors in the relevant market. In such an instance, the Commissioner may believe that the agreement has or is likely to have anti-competitive effects, and choose to apply to the Tribunal to have it varied or rescinded.

The decision whether or not to intervene will always be done on a case by case basis.

IV. Application by the Commissioner

There may be some circumstances when the Bureau would choose to file its own application as opposed to intervening in an existing process. An example of such a circumstance is a situation where the Commissioner believes that there are significant competition issues that would be better dealt with under section 79 of the Act, which prohibits abuse of a dominant market position. This is not an option that would be available to private Applicants, as section 103.1 makes private access available only on matters brought pursuant to section 75 (Refusal to Deal) and section 77 (Exclusive Dealing, Tied Selling and Market Restriction).

For example, consider the case of a private party seeking a remedy against only one firm when the Commissioner believes that an Order addressing two or more parties that are jointly dominant would be more appropriate. An application filed under section 79 may better lead to a remedy that is more preferred under the circumstances.

V. Additional Information

For further information on the Bureau's approach to enforcement issues under the Act or for general information, please call the Bureau's Information Centre at (819) 997-4282, toll-free at 1-800-348-5358, or visit the Bureau's Web site at www.cb-bc.gc.ca.

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