



INTER-AMERICAN DEVELOPMENT BANK



**LATIN AMERICAN COMPETITION FORUM  
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**-- Session III: The Role of Economic Analysis in Judicial Decisions --**

**Note by Canada**

The Competition Bureau Canada (the “Bureau”) is pleased to provide the following discussion material on “The Role of Economic Analysis in Judicial Decisions”.

**1) What is the role of the courts in your country, i. e. do the courts make enforcement decisions on cases brought by the competition agency, or do they only review the legitimacy of administrative decisions taken by the competition agency?**

1. The Bureau is an independent law enforcement agency headed by the Commissioner of Competition (the “Commissioner”). The Bureau is responsible for the administration and enforcement of the *Competition Act*, *Consumer Packaging and Labelling Act* (non-food products), *Textile Labelling Act* and the *Precious Metals Marking Act*. The *Competition Act* (the “Act”) contains a number of criminal offences, such as conspiracies to lessen competition unduly or bid-rigging, that are subject to prosecution before criminal courts. The Act also includes civil reviewable matters, such as mergers or abuse of dominance, that are reviewed by the Competition Tribunal (the “Tribunal”).

2. The Tribunal is a quasi-judicial body that acts as the first-instance decision-maker for civil reviewable matters. There are up to six judicial members, who are sitting judges of the Federal Court with other judicial duties, and up to eight non-judicial members. In the past, certain of the non-judicial members have been economists.

3. For reviewable matters, the Commissioner may seek a remedy by application to the Tribunal. To secure a remedy in a contested proceeding, the Commissioner is required to discharge the burden of establishing each of the elements of the reviewable matter on the balance of probabilities. Appeals of Tribunal decisions are made to the Federal Court of Appeal, with further appeal available with leave to the

Supreme Court of Canada. Appeals to the Federal Court of Appeal are restricted to questions of law, while questions of fact can be appealed only with leave.

4. For criminal matters, the Commissioner refers matters for possible prosecution to the Director of Public Prosecutions who may prosecute the case on behalf of the Crown before the criminal courts. In criminal proceedings, the Crown must establish each of the elements of the offence beyond a reasonable doubt. Appeals are available to the provincial courts of appeal or possibly the Federal Court of Appeal, and, with leave, the Supreme Court of Canada.

5. Contested civil or criminal matters under the Act are often significant and complex proceedings with full rights of hearing, including the introduction of evidence, examination and cross-examination of witnesses, as well as written and oral arguments.

## **2) Is your judicial system inquisitorial or adversarial?**

6. Canadian competition laws are enforced through an adversarial system.

## **3) Are your courts able to build economic arguments independently from the submissions made by the parties – e.g. by using court-appointed consultants? If so, how do the courts define the mandate of such consultants?**

7. In cases involving significant and complex economic evidence, a court-appointed expert may be appropriate to assist the Tribunal or court in reviewing and evaluating such evidence. In general, given the procedural and due process concerns that may arise, the Bureau would not recommend that a court-appointed expert be entitled to “supplement” the evidence of the parties.

8. The process for appointing such an expert should be impartial and transparent. Parties should be allowed to provide comments on the appropriateness of any proposed court-appointed expert. In addition, any report prepared by the court-appointed expert should be disclosed to the parties and the parties should have an opportunity to rebut the report and/or cross-examine the court-appointed expert. Moreover, it should be clear that the responsibility of deciding factual matters is that of the Tribunal or judge, not the appointed expert.

9. The new Tribunal rules permit the Tribunal to appoint an expert. Such experts are subject to examination by the parties and may also be questioned by the Tribunal.

## **4) What are your actual experiences as a competition authority with presenting complex economic theories or sophisticated economic evidence to courts? Which techniques proved most effective: use of external economic consultants or internal staff? Written or oral pleadings?**

10. With the exception of certain matters, such as misleading advertising or deceptive telemarketing, economic evidence plays a central role in both criminal and civil proceedings under the Act. For example, in contested merger proceedings, the Commissioner and respondents submit substantial economic evidence on a number of issues, including market definition, unilateral and coordinated effects, barriers to entry and efficiencies. Similarly, in abuse of dominance cases, the parties submit economic evidence regarding various issues, such as the definition of the relevant market, whether the allegedly dominant firm has market power, the alleged anti-competitive acts and whether the impugned conduct substantially lessens competition. In certain contested proceedings before the Tribunal, the Commissioner has utilized econometric models and statistical evidence, including regression analyses.

11. Economic evidence has also been a significant component of the evidence in numerous criminal proceedings. For example, to secure a conviction in respect of a cartel arrangement (other than bid-rigging cartels), the Crown must prove beyond a reasonable doubt that the agreement is likely to prevent or lessen competition unduly in a relevant market. As such, in contested cartel proceedings, the court considers economic evidence regarding the appropriate definition of the relevant market; whether the colluding firms are likely to or collectively have market power; and the competitive impact of the impugned agreement.<sup>1</sup>

12. The experience regarding the presentation of economic evidence varies between individual proceedings. In some cases, courts or the Tribunal found that the economic evidence submitted by the Commissioner or Crown was persuasive. In other cases, the court or Tribunal refused to accept the economic evidence submitted by the Commissioner or the Crown on the basis that such evidence was not supported by the facts, the expert was not credible, the proposed economic theory was not valid, or for other reasons. For example, in a criminal cartel proceeding, the Court assigned little or no weight to the economic and industry evidence presented by an expert called by the Crown regarding the relevant product market.<sup>2</sup> In the Court's view, the expert lacked objectivity and his evidence was not detailed, was theoretical and failed to take into account the practical realities of the market. Courts and the Tribunal have also accepted some aspects of the economic evidence submitted by the Commissioner or Crown, while rejecting other aspects of this evidence. As an example, in a recent abuse of dominance case, the Tribunal agreed with the results of price correlations and other evidence of the Commissioner's expert regarding the issues of the appropriate definition of the relevant markets and whether the respondent was dominant in those markets.<sup>3</sup> However, the Tribunal did not accept the evidence of the Commissioner's expert regarding the anti-competitive effects of the alleged anti-competitive conduct.

13. Given this varied experience, it is difficult to make general statements regarding the presentation of complex economic evidence in Canada. In respect of reviewable matters, the Tribunal has considered various forms of complex economic evidence and economic theories in determining contested proceedings. In respect of criminal proceedings, experience with the presentation of economic evidence in contested proceedings has been somewhat limited in recent years. As with other forms of complex evidence, the experience in criminal proceedings suggests that complex economic evidence is unlikely to be accepted unless it is presented in a manner that is credible, simple and well supported by the underlying factual evidence.

14. In contested proceedings, complex economic evidence is generally presented through one or more expert witnesses by oral testimony at the hearing, often with a written report or affidavit outlining the assumptions, findings and conclusions of the expert witness.

15. In terms of effective techniques for the presentation of complex economic evidence, it is critical that the evidence be presented in a manner that is credible, simple and well supported by the facts before the court or Tribunal. In addition to these general comments, we have outlined below a few specific issues relating to techniques that have been effective in the past and techniques that may be applied in the future.

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1 See for example, *R. v. Clarke Transport Canada Inc. et al.*, 64 C.P.R. (3d), 1995.

2 *Clarke Transport Canada Inc.*, 1995.

3 *Commissioner of Competition v. Canada Pipe Company Ltd./Tuyauteries Canada Ltée.*, Competition Tribunal, 2005.

## Availability of Expert Reports

16. The new Tribunal rules now allow members of the Tribunal to read the reports of expert economists when they are filed, that is ten days prior to the commencement of the hearing, unless a party objects.<sup>4</sup>

17. Having the economic expert reports available to the Tribunal members prior to the commencement of a hearing is seen as critical. This is particularly the case since economic expert oral evidence does not normally take place until after fact witnesses have been heard. Economic theory, however, typically forms the foundation of competition cases. Without an economic theory of the case to which the facts can be related, there is a risk that the relevance of certain facts may be lost or misunderstood. The Bureau anticipates that having access to the expert reports in advance of the hearing will assist Tribunal members in fully understanding the economic evidence of the parties.

## Economic Expert Reports

18. The typical job of an economic expert report is to develop a coherent and appropriate economic theory that applies to the facts of a case. It must also be made understandable to the trier of fact. To this end, how much economic theory is explained versus how much is assumed, including what vocabulary is used, should be adjusted as appropriate depending on the experience of the judge or Tribunal members. It might be appropriate to limit use of economic jargon or other technical expressions, or to explain such terms.

19. As the testimony of an expert economist is largely based upon factual assumptions that are established through other witnesses or documentary evidence, to the extent possible, expert reports should identify the specific sources of any evidence they relied on.

20. Certain types of evidence tends to be better established through particular avenues, and other types of evidence may not be relevant to the competition issue at hand. Consequently, it may fall to the expert to not only explain what evidence is critical to his or her analysis, but also to explain why other evidence is not and should not be a consideration. For example, when trying to establish customers' willingness to switch among products, customer fact witnesses testifying to their own willingness to switch may be of limited value. This is because it cannot be known whether a testifying customer is a marginal or infra-marginal buyer.<sup>5</sup> Also, evidence that is compelling in its own way but is not pertinent to the competition issue at hand can, at times, be submitted. For example, the effect of divestitures on shareholder value is typically not a consideration in competition cases.

## Econometric Evidence

21. The Bureau has had some success in the use of econometric evidence, such as merger simulations, in reviewable matters. For example, in one case, the Tribunal characterized econometric evidence regarding the own-price and cross-price elasticities of demand in order to estimate the impact of the merger on product prices as "highly relevant" to the central issue of whether a merger is likely to result

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4 Objections are typically made on the grounds of the admissibility of the expert evidence. The case law principles on opinion evidence provide that expert evidence should only be admitted where it is (1) relevant, (2) necessary to assist the trier of fact, (3) is not excluded by an exclusionary rule, and (4) the expert is properly qualified.

5 In the face of a particular price increase, infra-marginal consumers are those consumers who will continue to buy the product and marginal consumers are those who will not. Customer switching as a mechanism by which price increases are thwarted typically depends on the sufficiency of switching by marginal customers.

in a substantial lessening of competition.<sup>6</sup> The Tribunal found that econometric evidence was more persuasive where it could be reinforced through multiple simulations, each yielding a consistent result.

### **Exchange of Reports**

22. In the case involving econometric evidence, the Tribunal applied a useful process for the exchange of expert reports in advance of the hearing. The experts for the respective parties exchanged reports, and were then entitled to submit a rebuttal report that addressed any comments made by an expert for the adverse party. As a result of this process, the experts were able to attempt to address any deficiencies in their evidence in advance of the hearing. For example, the Commissioner's expert recalculated the estimated price impacts in light of certain criticisms made by the respondent's expert, and was able to demonstrate that even if the respondent's assumptions were applied, the price increases were still likely to occur.

### **Oral Testimony**

23. The Crown and Commissioner also submit economic evidence through the oral testimony of expert witnesses. The examination-in-chief of such witnesses provides a valuable opportunity for the judge or Tribunal members to ask questions or otherwise attempt to clarify aspects of their evidence which remain unclear. The new Tribunal rules limit the examination-in-chief of expert witnesses. An expert will continue to be examined-in-chief, but only for the purpose of summarizing or highlighting the evidence contained in his or her report. Since the new rules also make economic expert reports available to Tribunal members prior to the commencement of a hearing, it is hoped that the combination of these two changes will allow for more effective examination-in chief, and will place Tribunal members in a better position to ask relevant questions.

24. Visual aids, such as black boards, overheads and projected pages from the expert report, are allowed as part of examination, and are felt to have been beneficial.

25. Fact witnesses are typically heard first, followed by expert testimony, with economic expert testimony typically occurring last. This is because the testimony of an expert economist is largely based upon factual assumptions that are established through other witnesses or documentary evidence. The disadvantage of this approach is that the relevance of certain facts may be unappreciated or misunderstood absent a theory of the case to which they can be linked. This risk is reduced by having economic expert reports available prior to the commencement of the hearing. Oral economic expert evidence at the commencement of a hearing is a further option. This evidence would differ from that which occurs at the end of the process in that its focus would be theory of the case, or the types of theories that are generally applicable in regard to certain conduct, absent any facts. This expert could also indicate the type of facts that would be relevant to determining when an anti-competitive theory is applicable. As a practical matter, there may be further benefit in dividing these two testimonies between two experts. Such a division would help assure that the first testimony, which largely amounts to an explanation of the underlying economics, is independent and impartial.

26. Having two testifying economic experts would have to be justified in Canada given the Tribunal's commitment to streamlining the hearing process, but it may also help narrow and better define issues. Such matter could be discussed as part of case management.

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6 *Canada (Director of Investigation and Research) v. Superior Propane*, Competition Tribunal, 2000.

## **Economists as Adjudicators**

27. As noted above, Tribunal membership is open to non-judicial members, including economists. Having an economist, particularly one with specialization in microeconomics, as a member of the Tribunal is seen as beneficial.

### **5) In your country, are the issues different when a case is brought before an appellate judge (higher court) as opposed to a judge who is responsible for making factual findings (lower court)?**

28. In terms of the presentation of evidence, it is highly unusual for an appellate court to permit a party to introduce additional evidence at the appellate stage. As such, the evidence reviewed during the appeal is the evidence submitted into the record at the initial hearing. In fact, the appellate court will generally rely upon the factual findings made by the lower court or Tribunal. Typically, the arguments made at the appellate level are confined to questions of law or questions of mixed fact and law. That said, the comments above, such as the need for simplicity and well-supported economic theories, are equally applicable to appeal proceedings. This is particularly the case because questions of law in Canada, as these matters extend beyond the particulars of any one case, can entail such questions as the correct approach to defining markets or the meaning of anti-competitive acts.<sup>7</sup>

### **6) Should economic experts be sitting in higher / lower courts with the judges dealing with antitrust cases?**

29. See answer to question 5.

### **7) Is it practical to have specialised courts reviewing antitrust cases which can build up the necessary economic experience to deal with this area of law?**

30. Given the limited number of contested antitrust proceedings occurring in Canada, the Bureau believes that it is beneficial to have the Tribunal, a specialised quasi-judicial body, decide all abuse of dominance and merger review cases. This allows for the acquisition and development of relevant economic knowledge and experience by judicial and non-judicial members of the Tribunal. Bringing these matters to regular courts of law would not allow for such specialization of the decision makers.

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<sup>7</sup> See for example, *Commissioner of Competition v. Canada Pipe Ltd./Tuyauteries Canada Ltée.*, Federal Court of Appeal, 2006.