CT-2025-004

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34;

AND IN THE MATTER OF an application by Alexander Martin for an order pursuant to section 103.1 of the *Act* granting leave to bring an application under sections 79(1) and 90.1(1) of the *Competition Act*.

B E T W E E N :

ALEXANDER MARTIN

Applicant

- and -

ALPHABET INC., GOOGLE LLC, GOOGLE CANADA CORPORATION, APPLE INC. and APPLE CANADA INC.

Respondents

WRITTEN REPRESENTATIONS OF THE COMMISSIONER OF COMPETITION
(Pursuant to subsection 103.1(6) of the *Competition Act*)

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1. The test for granting leave to private parties to apply to the Competition Tribunal ("**Tribunal**") to enforce certain civil provisions of the *Competition Act* ("**Act**") was recently expanded. Private parties may now be granted leave where the Tribunal is "satisfied that it is in the public interest to do so". The present application is the first opportunity for the Tribunal to interpret this new "public interest" basis for granting leave.

2. The Commissioner of Competition ("**Commissioner**") submits that in considering a leave application brought on the basis of the "public interest", the Tribunal should apply a modified version of the public interest standing test at common law. The Tribunal should weigh three factors, namely (i) whether the application raises a serious justiciable issue; (ii) whether the applicant has a genuine interest in the matter; and (iii) whether the proposed application is a reasonable and effective means of bringing the case to court. The Tribunal should weigh these factors in a flexible and generous manner that takes into account the underlying purposes of granting or limiting private access to the Tribunal as well as the underlying purposes of the Act.

3. The Commissioner makes these representations to assist the Tribunal in determining and applying the appropriate test. The Commissioner does so pursuant to subsection 103.1(6) of the Act, as a person served with the Applicant's application for leave. The Commissioner takes no position on the merits of this application for leave, and takes no position at this stage on the merits of the underlying issues raised.

II. THE PUBLIC INTEREST AND SUBSECTION 103.1(7)

A. History of Private Access to the Tribunal

4. The legislative history of private access to the Tribunal reflects an attempt to find the appropriate balance between granting and limiting private access. On the one hand, the purposes in providing for private access include complementing public enforcement of the Act, clarifying the law through the development of jurisprudence, and providing effective resolutions of competition law disputes. On the other hand, the purposes in limiting private access include avoiding frivolous, unmeritorious, or strategic litigation.

5. Private access to the specialized Tribunal has been contemplated since the conceptual beginnings of the modern Act. The 1969 *Interim Report on Competition Policy* of the Economic Council of Canada contemplated "two routes" to access a specialized tribunal, a first route for the public authority that would eventually become the Commissioner, and a second for "private parties deeming themselves to be affected" by a practice.[1] However, when the restrictive trade practices provisions were enacted in 1976, they did not include private access.

6. Private access was again raised in a 1995 discussion paper issued by the then-named Director of Investigation and Research. The paper contemplated private applications before the Tribunal "in respect of some civil reviewable matters".[2] The paper noted that private access could

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[1] Economic Council of Canada, *Interim Report on Competition Policy*, (Ottawa: The Queen's Printer, July 1969) at 121 ["**1969 Interim Report**"]; See also John S. Tyhurst, *Canadian Competition Law and Policy* (Toronto: Irwin Law, 2021), Book of Authorities, Tab 2 at 57-60 for a historical account of private access under the Act.

[2] Canada, Bureau of Competition Policy, *Discussion Paper Competition Act Amendments* (Ottawa: Industry Canada, June 1995), Book of Authorities, Tab 1 at 3 ["**1995 Discussion Paper**"].

"supplement" public enforcement and facilitate the pursuit of private remedies, but that a balance would need to be struck to safeguard against strategic litigation.[3] In the end, the panel that reviewed responses to the paper was divided over the question of private access, and recommended that the question be studied further.[4]

7. Further consultation was initiated in 2000 by a committee of the House of Commons. The committee's interim report again concluded that the Act was "under-enforced" and that competition would benefit from private cases. Again, there was a concern about strategic litigation.[5] The

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[3] 1995 Discussion Paper at 21 (**emphasis added**):

> Given the large volume of business activity that is subject to the Act, it is difficult for the Director to investigate and pursue all seemingly meritorious complaints that are brought forward. In determining resource allocation for investigations, greater emphasis is placed on cases that are perceived to have a greater economic impact. However, there are some matters that do not harm a broad class of consumers, but take the form of violations of contractual agreements between commercial interests. These types of violations of the Act may still be judged important by private parties.
>
> Amendments to the Act could allow parties aggrieved by alleged violations of the reviewable matters provisions to commence proceedings on their own initiative, seeking the remedial orders that are currently provided under the Act. As a result, the limited resources available to the Director to enforce the law with respect to reviewable matters would be supplemented, and jurisprudence would develop more quickly. However, in designing a process to allow private parties access to the Tribunal, **there is a need to strike a balance between facilitating the pursuit of private remedies and safeguarding against the use of litigation as an instrument of strategic behaviour, or as a means of pursuing objectives inconsistent with the promotion or maintenance of competition**. While this is an issue in respect of all of the reviewable matters provisions, it is a particular concern in respect of mergers.

[4] Canada, Consultative Panel on Amendments to the Competition Act, *Report of the Consultative Panel on Amendments to the Competition Act* (Ottawa: Industry Canada, 6 March 1996) at 31-34 ["**1996 Panel Report**"].

[5] House of Commons Standing Committee on Industry, *Interim Report on the Competition Act* (June 2000) (Chair: Susan Whelan) **["2000 Interim Report]**"; see Chapter 6: Private Rights of Action.

committee's final report also reflected the tension between providing effective redress for private litigants and discouraging strategic litigation.[6]

8. The provisions allowing for private access were first enacted in 2002. Initially, private access was available only in respect of refusal to deal (section 75 of the Act) and exclusive dealing, tied selling and market restriction (section 77).

9. In 2008, the Compete to Win panel examined, but ultimately recommended against, expanding private access to the abuse of dominance and merger provisions. The panel cited a concern that doing so "would serve to promote unmeritorious litigation between competitors" rather than enhancing competition in Canada.[7] Amendments to the Act in 2009 modestly expanded private access to include resale price maintenance (section 76 of the Act).

10. Recent amendments have attempted to ease the leave test while balancing the competing concerns with respect to allowing and limiting private access.

11. In 2022, a public consultation was launched by Innovation, Science and Economic Development Canada ("**ISED**") in respect of competition policy in Canada, including private access. ISED noted in its discussion paper that a "more robust framework for private enforcement" would "complement resource-constrained public enforcement by the Bureau, clarify aspects of the law through the development of jurisprudence, and

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[6] House of Commons Standing Committee on Industry, Science and Technology, *A Plan to Modernize Canada's Competition Regime* (April 2002) (Chair: Walt Lastewka) at 32-33. See also the discussion of damages at pages 48-50.

[7] Canada, Competition Policy Review Panel, Compete to Win: Final Report (Ottawa: Publishing and Depository Services, June 2008) at 59.

lead to quicker case resolutions." It also noted that any changes would be designed to "avoid unmeritorious or strategic litigation".[8]

12. ISED's summary of the submissions it received included the observation that no private case had been successfully litigated at the Tribunal. This was noted to be in part because of the absence of strong financial incentives, and also because of a leave threshold that was perceived as "particularly rigid". Businesses would have to be injured to such a degree that they may no longer be in a position to undertake a case. And other parties, such as affected consumers or public interest groups, were excluded entirely. ISED observed that stakeholders sought a "less strict leave threshold" which would "enable new and larger classes of applicant". At the same time, ISED also noted concerns from other stakeholders about the possibility of "unmeritorious, frivolous, and strategic litigation".[9]

13. Private access was expanded to include abuse of dominance (section 79 of the Act) via Bill C-19 in 2022.[10] It was further expanded as of June 2025 to include deceptive marketing practices (section 74.1) and anti-competitive agreements (section 90.1) via Bill C-59 in 2024.[11]

14. The new leave test which applies to this application was introduced in the first reading of Bill C-59. The leave test was not subsequently altered during the legislative process, so there is little indication in the history of

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[8] Innovation, Science and Economic Development Canada, The Future of Competition Policy in Canada (November 2022) at 53.
Innovation, Science and Economic Development Canada, *Future of Canada's Competition Policy Consultation – What We Heard Report* (Ottawa: ISED, 20 September 2023) **["2023 ISED Report"]**. See the heading "Private Enforcement".

[10] *Budget Implementation Act, 2022, No. 1*, SC 2022, c 10 (assented to 23 June 2022) **["Bill C-19"]**.

[11] *Fall Economic Statement Implementation Act, 2023*, SC 2024, c 15 (assented to 20 June 2024) ("**Bill C-59**").

Parliament's intent behind the new leave test.[12] As such, the ISED consultation which drove Bill C-59's amendments to the Act is the best indication that the intent behind the amendments was to enact a "less strict leave threshold" that would broaden the pool of potential applicants.

B. The "Public Interest" Leave Test

15. Until the 2024 amendments to the Act, access to the Tribunal by private parties under subsection 103.1(7) was limited to applicants that the Tribunal had reason to believe were directly and substantially affected in their business by a practice referred to in one of the relevant sections of the Act. Prior to being amended, subsection 103.1(7) read as follows:[13]

Granting leave	**Octroi de la demande**
103.1 (7) The Tribunal may grant leave to make an application under section 75, 77 or 79 if it has reason to believe that the applicant is directly and substantially affected in the applicant's business by any practice referred to in one of those sections that could be subject to an order under that section.	**103.1 (7)** Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75, 77 ou 79 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

[12] At the Senate Committee stage, one government official identified the leave test as a "safeguard" against strategic behaviour that would prevent companies from bringing "gotcha" lawsuits against defendants who had not had time to adjust to the amendments (specifically, the deceptive marketing provisions against unsubstantiated environmental claims): Senate, Standing Senate Committee on National Finance, *Evidence*, 44-1, No 111 (11 June 2024) at 111:10-11 (Martin Simard).

[13] *Competition Act*, RSC 1985, c C-34, s 103.1(7) (as it appeared prior to 20 June 2025).

16. As discussed above, Bill C-59 amended subsection 103.1(7) to broaden private access to the Tribunal.[14] These amendments came into force on June 20, 2025. The amended subsection 103.1(7) now in force reads as follows (emphasis added):[15]

Granting leave — sections 75, 77, 79 or 90.1	**Octroi de la demande : articles 75, 77, 79 ou 90.1**
103.1 (7) The Tribunal may grant leave to make an application under section 75, 77, 79 or 90.1 if it has reason to believe that the applicant is directly and substantially affected in **the whole or part of** the applicant's business by any **conduct** referred to in one of those sections that could be subject to an order under that section **or if it is satisfied that it is in the public interest to do so.**	**103.1 (7)** Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75, 77, 79 ou 90.1 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans **tout ou partie de** son entreprise en raison de l'existence de l'un ou l'autre des **comportements** qui pourraient faire l'objet d'une ordonnance en vertu de l'un de ces articles **ou s'il est convaincu que cela servirait l'intérêt public.**

17. These amendments expanded the leave test in two important ways. First, the amendments relaxed the requirements for applicants who are "directly and substantially affected", who now need only show there is reason to believe they are so affected in "the whole or part" of their business.

18. Second, the amendments created a second branch for leave to be granted, the one at issue in this application. Now, the Tribunal may also grant leave if it is "satisfied it is in the public interest to do so". Under this "public interest" branch, leave may be granted regardless of whether an applicant is "directly and substantially affected" in any business.

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[14] *Fall Economic Statement Implementation Act, 2023*, SC 2024, c 15, s 254(4).
[15] *Competition Act*, RSC 1985, c C-34, s 103.1(7), as amended by SC 2024, c 15 ["**Act**"].

19. While not directly at issue in the present application, a "public interest" branch was also added for leave applications under subsection 103.1(6.1) of the Act, which deals with applications under the deceptive marketing provisions of the Act.[16]

20. However, the Act does not define "public interest" under either provision nor enumerate any factors to be considered by the Tribunal in its determination.

C. Public Interest Standing at Common Law

21. The common law test for public interest standing provides an appropriate starting point for interpreting "public interest" as used in section 103.1 of the Act.

22. The public interest branch of subsection 103.1(7) stands in contrast to the alternative requirement that an applicant be directly and substantially affected in the whole or part of the applicant's business. This implies the public interest branch was intended to allow for claims by applicants who are not directly and substantially affected.

23. This distinction is closely analogous to the law of standing, which permits a party to bring an action on the basis that either the party is directly involved in the matter, or if they can establish the case is of public

[16] Act, s 103.1(6.1), which governs application for leave to bring an application under section 74.1 of the Act.

interest.[17] Central to the law of standing is a balance between "ensuring access to the courts and preserving judicial resources."[18]

24. In deciding whether to exercise their discretion to grant public interest standing, the courts consider three factors:

    a. whether the case raises a serious justiciable issue;

    b. whether the applicant has a real stake or genuine interest in the issues; and

    c. whether the proposed claim is a reasonable and effective means to bring the case to court.[19]

25. These factors are to be applied in a "flexible and generous manner" that takes into account the underlying purposes of public interest standing that justify limiting or granting standing. In the common law context, the purposes that justify limiting standing include:

    a. efficiently allocating scarce judicial resources and screening out "busybody" litigants;

    b. ensuring that the courts have the benefit of contending points of view of those most directly affected by the issues; and

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[17] For the evolution of public interest standing, see, for example, §59:5. Discretionary public interest standing in Peter W. Hogg & Wade Wright, *Constitutional Law of Canada,* 5th ed (1 July 2025), online: (WL Can) Thomson Reuters Canada, Book of Authorities, Tab 3.
[18] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 23 ("***Downtown Eastside***").
[19] *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 at para 28 ["***Council of Canadians with Disabilities***"].

c. ensuring the court play their proper role within our democratic system of government.

26. The purposes that justify granting public interest standing include:

a. giving effect to the principle of legality; and

b. ensuring access to the courts, or more broadly, access to justice.[20]

D. Public Interest in the Competition Law Context

27. While the traditional purposes underlying public interest standing remain relevant, the Tribunal should also apply the factors from the public interest standing test in a manner that is adapted to the competition law context.

28. In the competition law context, the Tribunal should consider the purposes of providing for and limiting private access to the Tribunal. As set out above, the purposes of limiting private access include avoiding frivolous, unmeritorious or strategic litigation. On the other hand, the purposes of providing for private access to the Tribunal include complementing public enforcement of the Act, clarifying the law through the development of jurisprudence, and providing effective resolutions of competition law disputes.

29. In assessing the three factors, the Tribunal should also have regard to the purposes of the Act, given that the public interest branch for leave under subsection 103.1(7) of the Act is a statutory test. This is consistent with the approach courts have previously taken, in which they have interpreted

[20] *Council of Canadians with Disabilities* at paras 29-30; *Downtown Eastside* at para 20.

the term “public interest” in the context of the statute in which the term appears, including the statute’s legislative history, its legislative and social context, and its purpose.[21]

30. The primary purpose of the Act is to "maintain and encourage competition in Canada".[22] The primary purpose is followed by four objectives, which are: (i) to promote the efficiency and adaptability of the Canadian economy; (ii) to expand opportunity for Canadian participation in world markets, while recognizing the role of foreign competition in Canada; (iii) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and (iv) to provide consumers with competitive prices and product choices.

31. In addition to the objectives listed in the Act, the case law has identified two additional objectives of the Act: (i) deterrence of anti-competitive

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[21] See for example: *R v Zundel* (1992), [1992] 2 SCR 731, 95 DLR (4th) 202 per Cory and Iacobucci JJ. (dissenting) (Gonthier J. concurring), at 805-806("The term [public interest] does not and cannot have a uniform meaning in each statute. It must be interpreted in light of the legislative history of the particular provision in which it appears and the legislative and social context in which it is used."); *Lindsay v Manitoba (Motor Transport Board)* (1989), 1989 CanLII 179 (MB CA), 62 DLR (4th) 615 at para 36 (“The meaning of those words, neither precise nor unambiguous in themselves, must be construed in the context of the statute in which they are found”); *Rankin, Re* (2013), 2013 ONSC 112 (Div Ct) at para 25 (“The "public interest" is not defined in the [Securities] Act, but the Commission is guided in its determination of the public interest by the purposes of the Act, set out in s. 1.1 [of that Act]”).

[22] Section 1.1 of the Act; see also *Tervita Corp. v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 199 (the primary purpose of the Act is to maintain and encourage competition in Canada); *General Motors of Canada Ltd v City National Leasing*, 1989 CanLII 133 (SCC), [1989] 1 SCR 641 at page 676 (the purpose of the Act is to eliminate activities that reduce competition in the market-place); *R v Wholesale Travel Group Inc*, 1991 CanLII 39 (SCC), [1991] 3 SCR 154 at p 257 (per Iacobucci J: the overall objective of the Act is to promote vigorous and fair competition throughout Canada).

behaviour; and (ii) compensation for the victims of such behaviour.[23] These objectives are also relevant in assessing the factors in the public interest standing test.

E. A Modified Public Interest Standing Test

32. The public interest standing jurisprudence was developed in the context of the courts' increasing role in public law and requires some modification for the competition law context. In this section, each of the three factors are described as they may apply under subsection 103.1(7) of the Act.

a. Serious Justiciable Issue

33. The first factor considers whether the case raises a serious justiciable issue.

i. Seriousness

34. At common law, an issue is "serious" when it is "far from frivolous". This is assessed in a preliminary manner. Once it becomes clear that the leave application reveals at least one serious issue, it is generally "unnecessary

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[23] *Pioneer Corp v Godfrey*, 2019 SCC 42 at para 65 ("This Court has also recognized two other objectives of the Competition Act of particular relevance here, being deterrence of anti-competitive behaviour, and compensation for the victims of such behaviour"), citing a trilogy of 2013 SCC cases: *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59 at para 111 ("acceptance of the passing-on defence would adversely affect the Competition Act's objectives of deterrence and compensation. It might enable wrongdoers to keep ill-gotten gains…"); *Sun-Rype Products Ltd. v Archer Daniels Midland Co.*, 2013 SCC 58 at paras 24-27 ("…deterrence objective of the Canadian competition laws…"); and *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 at paras 46-49 ("…deterrence objectives of Canadian competition laws…"). See also *Shah v LG Chem Ltd*, 2018 ONCA 819 at para 37, citing the same trilogy, which in turn was cited in *Commissioner of Competition v Cineplex* 2024 Comp Trib 5 at para 226.

to minutely examine every pleaded claim" to assess whether to grant leave.[24]

35. In weighing this factor, the Tribunal should consider the objective of avoiding unmeritorious or frivolous claims. Allowing leave when an application raises one or more issues that are "far from frivolous" responds to this objective. In assessing whether a public interest applicant has met their evidentiary burden, the Tribunal should account for (i) the preliminary nature of a leave application; and (ii) the ability of a public interest applicant to obtain evidence prior to commencing a proceeding. The evidence required of a leave applicant under section 103.1 of the Act should not be overly onerous in light of these overlapping considerations.

36. The Supreme Court of Canada has recognized that an applicant should not be required to produce trial evidence at a preliminary stage.[25] There is a fairness concern in that a respondent would obtain evidence prior to discovery.

37. But in the competition law context, it also raises two practical concerns as well:

    a. First, a public interest applicant under section 103.1 of the Act is differently situated from applicants who are directly and substantially affected by the impugned conduct; and even more so from the Commissioner, who is responsible for the administration and enforcement of the Act.[26]

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[24] *Council of Canadians with Disabilities* at para 49; *Downtown Eastside* at para 42.
[25] *Council of Canadians with Disabilities* at para 72.
[26] Act, s 7(1)(a).

A public interest applicant will ultimately face the same evidentiary requirements at trial as any other party in establishing the elements of the impugned conduct. However, at the leave stage, a public interest applicant who is not a participant in the relevant market is unlikely to have access to evidence from market participants (especially competitively sensitive information) without having had the benefit of discovery or subpoenas. A public interest applicant, for example, will not have had the same information gathering powers as the Commissioner, including orders under section 11 of the Act.[27]

b. Second, applications under section 75, 77, 79 or 90.1 of the Act generally require extensive volumes of evidence. In light of the foregoing, it would be overly burdensome and impractical for a public interest applicant to be required to marshal such evidence at a preliminary stage, before even knowing whether leave would be granted.

38. As a result of these two concerns, it would not be appropriate to import into the "public interest" test the requirement from the previous case law under the "directly and substantially affected" branch that an applicant bring evidence of all of the elements of the relevant practice.[28]

39. Consistent with the public interest standing jurisprudence, the Tribunal should not examine the merits of the case at the leave stage. Although the Respondents have been granted leave to introduce certain evidence on this leave application, it is not the Tribunal's task to weigh competing evidence on each element of the reviewable conduct at issue. At the leave

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[27] Act, s 11.
[28] *Symbol Technologies Canada ULC v Barcode Systems Inc*, 2004 FCA 339 at paras 18-19.

stage, in light of the two concerns above, an applicant should not be required to establish a *bona fide* belief or a *prima facie* case. Instead, the Tribunal should determine whether the claim is far from frivolous.

40. As was stated by the Supreme Court in *Downtown Eastside*,

> Where there are aspects of the claim that clearly raise serious justiciable issues, it is better for the purposes of the standing analysis not to get into a detailed screening of the merits of discrete and particular aspects of the claim. They can be assessed using other appropriate procedural vehicles.[29]

41. Distinguishing the previous case law under the "directly and substantially affected" branch is supported both by the text of subsection 103.1(7) and in practice.

42. The requirement for an applicant under that branch to lead evidence of the requisite elements flows from the phrase "could be subject to an order" in subsection 103.1(7). This phrase is entirely absent from the "public interest" branch. Also absent under the public interest branch is the reference to the Tribunal having "reason to believe". Reason to believe has been interpreted to mean reasonable grounds to believe and led to the Tribunal previously requiring "credible, cogent and objective evidence" of the substantive elements of the reviewable conduct.[30] Instead, here, the Tribunal must be "satisfied" that it is in the public interest to grant leave.

43. Arising from the concerns outlined above, it is also unrealistic in practice to require an applicant to lead evidence of all of the elements of the relevant practice. Similarly described above, an applicant who is not

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[29] *Downtown Eastside* at para 56.
[30] *JAMP Pharma Corporation v Janssen Inc*, 2024 Comp Trib 8 at paras 15-16.

directly affected may not at the leave stage have had an opportunity to gather "sufficient, credible, cogent evidence of each of the elements of the alleged reviewable practice".[31]

ii. Justiciability

44. The justiciability requirement relates to the types of issues raised. An issue is "justiciable" when it is one that is appropriate for courts to decide.[32]

45. Since the Tribunal derives its jurisdiction from the *Competition Tribunal Act*, it should also consider whether the proposed application falls under its jurisdiction. The Tribunal is empowered to "hear and dispose of" applications under the Act.[33] Applications that seek relief other than that available under the Act to private access applicants should be denied leave.

b. Real Stake or Genuine Interest

46. The common law public interest standing test evolved to allow plaintiffs to bring cases where they were not directly affected. In that context, the courts have required that the plaintiff have a "real stake or a genuine interest" in the issue raised. This is assessed with a view to "conserving scarce judicial resources and the need to screen out the mere busybody."[34]

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[31] *JAMP Pharma Corporation v Janssen Inc*, 2024 Comp Trib 8 at para 19.
[32] *Council of Canadians with Disabilities* at para 50; *Downtown Eastside* at para 40.
[33] *Competition Tribunal Act*, s 8.
[34] *Council of Canadians with Disabilities* at para 51.

47. In the context of the "public interest" branch of subsection 103.1(7) of the Act, an applicant should not be required to demonstrate a "close nexus" between the practice and the impact on the applicant's business,[35] or that the applicant's business is affected.[36] Part of the purpose of easing the leave test was, as noted above, to enable "new and larger classes of applicant". It would not be appropriate to require that the applicant be either "directly" or "substantially" affected by the conduct at issue, nor indeed that the applicant even operate a business.

48. Instead, consistent with the common law jurisprudence on public interest standing, the Tribunal should at the leave stage require that the applicant demonstrate a "genuine interest" in the issues, but not more. Where the applicant is directly affected, this ought in most cases be a sufficient "real stake or genuine interest" in the matter. In other cases, the Tribunal may refer to other factors such as the applicant's reputation and the applicant's continuing interest in and link to the claim.[37]

49. Additionally, there should not be a requirement that an applicant under subsection 103.1(7) demonstrate that they are a suitable representative of other persons alleged to have been affected by the conduct at issue. The Supreme Court has stated in the public interest standing context that such standing "has never depended on whether the plaintiff represents the interests of all, or even a majority of, directly affected individuals."[38] Without anything in subsection 103.1(7) to suggest otherwise, the same

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[35] *Audatex Canada ULC v CarProof Corporation*, 2015 CACT 28 ["**Audatex**"]
[36] *Audatex* at para 54; *CarGurus, Inc v Trader Corporation*, 2016 CACT 15 at para 65 (appeal dismissed 2017 FCA 181); *Sears Canada Inc v Parfums Christian Dior Canada Inc and Parfums Givenchy Canada Ltd*, 2007 CACT 6 at para 21 ("a substantial effect on a business is measured in the context of the entire business").
[37] *Council of Canadians with Disabilities* at para 51.
[38] *Council of Canadians with Disabilities* at para 90.

is apposite here. The relevance of the remedy sought to the public interest test is discussed further in Part III below.

c. Reasonable and Effective Means

50. The Tribunal should take a purposive approach to considering whether a proposed application by a public interest applicant is a reasonable and effective means of bringing the matter to judicial determination.

51. The existing jurisprudence on this factor must be distinguished to an extent on the basis that they largely addressed constitutional claims. A significant concern in those cases was whether the proposed claims would be presented in a sufficiently concrete and well-developed factual setting.[39] This is less significant in the context of section 103.1 of the Act, where an application will necessarily involve specific conduct of a person.

52. Despite the foregoing, there are several considerations identified in the existing case law that are applicable in the competition context:

    a. *The applicant's capacity to bring the claim forward*:[40] the Tribunal may consider whether an applicant would be able to adequately prosecute the case – including whether the applicant is expected to produce sufficient evidence at trial. This could involve an assessment of an applicant's resources, expertise, and opportunities to obtain evidence from directly affected persons. For example, in cases where the applicant is an organization, organizations which are composed of or work directly with persons who are directly affected by a matter are likely able to produce evidence from such persons;

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[39] *Council of Canadians with Disabilities* at para 60.
[40] *Council of Canadians with Disabilities* at para 55.

b. *Whether the case is of public interest*: public interest cases will "transcend the interests of those most directly affected".[41] The Act seeks to "encourage and maintain competition", not to protect individual competitors;

c. *Whether there are alternative means*:[42] the Tribunal should consider whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources. For example, where there are parallel proceedings in respect of the same conduct, it would be open to the Tribunal to consider whether the parallel proceedings may resolve the issues in a more effective and reasonable manner;

d. *The potential impact of the proceedings on others*:[43] the Tribunal should consider whether the failure of an application by a public interest applicant prejudices subsequent challenges by either the Commissioner or parties that are directly and substantially affected by the impugned conduct.

53. This list is not exhaustive, and the Tribunal must exercise its discretion in light of all of the circumstances.[44]

III. THE PUBLIC INTEREST AND REMEDIES

54. Along with the public interest branch of the leave test, Bill C-59 also introduced a new monetary remedy available only to private applicants. If

[41] *Council of Canadians with Disabilities* at para 55.
[42] *Council of Canadians with Disabilities* at para 55.
[43] *Council of Canadians with Disabilities* at para 55.
[44] *Downtown Eastside* at para 52.

the Tribunal makes an order under Part VIII on a private application, it may order a respondent,

> to pay an amount, not exceeding the value of the benefit derived from the conduct that is the subject of the order, to be distributed among the applicant and any other person affected by the conduct, in any manner that the Tribunal considers appropriate.[45]

55. This amendment should not be interpreted as requiring a private applicant seeking this new remedy to act as a representative of "any other person affected by the conduct".

56. The discussions and parliamentary debates that led to this new remedy suggest that Parliament's intent was to create greater incentive for private parties to bring applications before the Competition Tribunal.

57. Leading up to Bill C-59, ISED's paper on The Future of Competition Policy in Canada noted that "Absent the possibility of damages, however, a strong incentive for private cases does not appear to be present."[46] In its subsequent consultation paper, ISED observed that "To date, no successful private case has been litigated at the Tribunal, and many stakeholders pointed to the absence of strong financial incentives as one of the reasons why they so rarely occur". It went on to state the following:

> Many submissions therefore recommended allowing the Tribunal to award damages alongside remedial orders, or else opening up civil conduct to lawsuits for damage recovery through s. 36 (or a similar provision), or some combination of both."[47]

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[45] Act, ss 75(1.2), 76(11.1), 77(3.1), 79(4.1) & 90.1(10.1).
[46] Innovation, Science and Economic Development Canada, *The Future of Competition Policy in Canada* (Ottawa: ISED, 17 November 2022) at 53.
[47] 2023 ISED Report under the heading "Private Enforcement".

58. Consistent with these comments, government members speaking on Bill C-59 stated that the government was "broadening the reach of the law by enabling more private parties to bring cases before the Competition Tribunal and to receive payment if they are successful."[48]

59. A private applicant should not be treated akin to a representative plaintiff in a class proceeding. There is no indication in either the legislative history or the Act that this new remedy was intended to transform a private applicant seeking leave under section 103.1 into a representative of persons affected by the conduct at issue. Further, requiring a private applicant to fulfill the role of a class representative before they are able to access the new pecuniary remedy would diminish the incentive to bring a private application that Parliament sought to introduce.

60. Nevertheless, the remedies sought by a private applicant may be relevant to the Tribunal's consideration of the public interest factors discussed above. For example, the Tribunal may consider the impact of a public interest application seeking the new remedy on other persons affected by the conduct. Such an application, whether successful or not, may affect the ability of other affected persons to seek compensation through other proceedings. The Tribunal could also consider the impact of the proposed application on related class proceedings.

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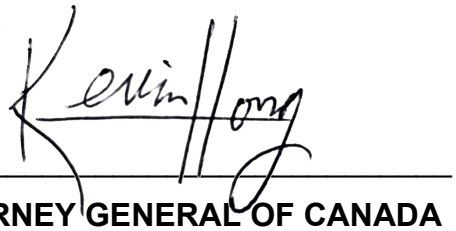
[48] "Bill C-59, An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023", 2nd reading, *House of Commons Debates*, 44-1, No 271 (30 January 2024) at 1625 (Francesco Sorbara); "Bill C-59, An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023", 2nd reading, *House of Commons Debates*, 44-1, No 272 (31 January 2024) at 1825 (Lena Metlege Diab).

IV. CONCLUSION

61. In considering a leave application brought on the basis of the "public interest", the Tribunal should weigh (i) whether the application raises a serious justiciable issue (that is, one that is far from frivolous); (ii) whether the applicant has a genuine interest in the matter (which interest need not be direct or substantial); and (iii) whether the proposed application is a reasonable and effective means of bringing the case to court.

62. In addition to the traditional purposes of public interest standing, the Tribunal should weigh these factors in light of the underlying purposes of granting private access (including complementing public enforcement of the Act, clarifying the law through the development of jurisprudence, and providing effective resolutions of competition law disputes), the underlying purposes of limiting private access (including avoiding frivolous, unmeritorious or strategic litigation) and in light of the purposes of the Act as a whole.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of August 2025.



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V. LIST OF AUTHORITIES

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3. *Fall Economic Statement Implementation Act, 2023*, SC 2024, c 15, s 254(4).

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C. Parliamentary Materials

22. "Bill C-59, An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023 and certain provisions of the budget tabled in Parliament on March 28, 2023", 2nd reading, *House of Commons Debates*, 44-1, No 271 (30 January 2024).

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