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The Next New Thing: Mediation in Canadian Competition Tribunal Disputes

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Mediation has come to the Canadian Competition Tribunal. In two recent merger cases, the Commissioner and respondents agreed to mediate their contested dispute. In one case, (*Parkland/Pioneer*) mediation resulted in a settlement (then incorporated in a Consent Agreement filed with the Tribunal); in the second case (*Staples/Office Depot*), although mediation was scheduled, the merger was abandoned before the mediation took place.

The Competition Tribunal is a specialized court established in 1986 (when Canada's modern *Competition Act* was introduced) composed of Federal Court judges and lay members. The Tribunal has jurisdiction over the non-criminal reviewable trade practices provisions of the *Act* (e.g., mergers, abuse of dominance and non-criminal misleading advertising). In June, the Tribunal issued a Practice Direction governing the mediation of Tribunal disputes. The Practice Direction gives parties the option of mediating any Tribunal dispute before a judicial member of the Tribunal and sets out the procedure governing any such mediation.

The availability of mediation in Tribunal matters is inarguably a positive development. Tribunal matters are typically complex, lengthy and costly, but most ultimately are resolved without a full Tribunal hearing. As such, any process that will facilitate resolution (and, potentially, resolutions that the parties find more acceptable) should be welcomed. Although available for all matters, mediation is likely to have the largest impact in complex merger cases. The merger provisions are far and away the most utilized of the reviewable trade practice provisions under the *Act*, but contested merger applications before the Tribunal are comparatively rare. Corporate mergers are necessarily time sensitive and a fully contested Tribunal application typically takes more than a year to complete (which still does not account for the possibility of appeals). Many merger cases are resolved on consent without a formal Tribunal application (indeed, since the merger provisions came into force in 1986 there have been less than 10 fully contested cases that have gone before the Tribunal). Where a pre-application resolution is not reached, however, merging parties may abandon a transaction in the face of a protracted application-- the possibility of a mediated resolution could, in some circumstances, facilitate a resolution and allow a transaction that might not otherwise go forward, to proceed.

There are, however, potential concerns with the mediation model that the Tribunal has advanced. The two recent merger cases which involved mediation had some common features. In both cases, the parties had selected a judicial member of the Tribunal as mediator and in both cases the mediation step was included in the publicly disclosed case management schedule. The Practice Direction expressly contemplates both of these features: the designation of a judicial member of the Tribunal as mediator and the inclusion of the mediation step in the case timetable. While the Practice Direction does not state that these are mandatory requirements of Tribunal mediations, it would be preferable if the practice direction made the opposite clear, namely that parties are free to use any mediator they choose and are permitted to conduct the mediation entirely outside of the Tribunal process (in other words the fact of mediation need not appear in the case timetable, and indeed, the Tribunal need not even be aware that that the parties are pursuing a mediated resolution).

There is nothing wrong with the manner in which mediation was dealt with in the matters to date. If parties wish to use a judicial member of the Tribunal as their mediator and build the mediation step into the case timetable, they should be free to do so; but these should not be mandatory requirements (again, it is not obvious that these are requirements, it is just not

clear they are not). Depending on the case, parties may prefer not to use a judicial member of the Tribunal as their mediator and may in fact prefer that the Tribunal not be aware of the fact that they are mediating at all. While the Practice Direction makes clear that the parties may not be required to use a Tribunal member as mediator, the stipulation that the, "Tribunal will propose an alternate judicial member or other member of the Federal Court to conduct the mediation", at least leaves some ambiguity whether it is open to the parties to submit their dispute to any mediator they choose; it would be helpful if this point was clarified.

The need for greater flexibility in the selection and use of mediation processes may not be as clear in the merger context, where there is generally no allegation of "wrongdoing", as such. In conduct, cases, however, such as abuse of dominance (which, it is clear, can also be the subject of mediation) a party's stated position may be that it has done nothing wrong and it may not wish the trier of fact to be aware that it is contemplating a mediated resolution (just as the Commissioner may not wish to signal to the Tribunal its willingness to resolve the matter on consent). Contested proceedings before the Competition Tribunal are litigation matters and are governed by many of the same strategic considerations that apply to commercial litigation generally; there is no requirement in commercial litigation that parties disclose to the trier fact that they are pursuing settlement and parties will often prefer that the fact of such efforts remain confidential. Given that the goal of mediation is to foster the efficient and cost-effective resolution of disputes, barriers to the adoption by the parties of mediation processes should be eliminated to the extent reasonable.

The introduction of mediation as a means of resolving contested Tribunal proceedings is a welcome and positive development that should save resources on all sides and promote potentially better outcomes for matters in dispute before the Tribunal. The Tribunal's Practice Direction, however, should be amended to make clear that parties are free to select their own mediators (and not only judicial members of the Tribunal or Federal Court) and are free to conduct mediations outside of the Tribunal's formal process and without the need to disclose the fact of mediation to the Tribunal.