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Competition Tribunal denies leave in first decision under new public-interest test for private applicants

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Key Takeaways

- Recent amendments opened new enforcement pathways for private applicants, allowing them to seek remedial orders for anti-competitive behaviour.
- The Tribunal adopted a test that for leave that focused on three core questions, derived from long-standing Canadian jurisprudence on public-interest standing.
- Despite denying leave, the Tribunal clarified the test for future private enforcement cases, indicating a more predictable path for applicants.

On January 13, 2026, the Competition Tribunal (the Tribunal) released its decision on the public-interest leave application in the proposed private enforcement action against Apple and Google in *Martin v. Alphabet Inc., Google LLC, Google Canada Corporation, Apple Inc., and Apple Canada Inc.*[1] The Tribunal's decision marks a crucial moment for private competition law enforcement in Canada, as it is the first case to interpret and apply the recently expanded leave test for private applicants seeking remedial orders — including monetary compensation — for claims of abuse of dominance and anti-competitive agreements under the *Competition Act* (the Act).

While the Tribunal ultimately declined to grant leave, the Tribunal provided a clear roadmap for how the new "public interest" leave test will be applied in future private enforcement applications. In *Martin,* the Tribunal adopted a balanced approach to the leave test that was modelled on the Supreme Court of Canada test in the constitutional and public law context while accounting for the role and statutory framework governing private enforcement under the Act. In adopting this test and in its ultimate result, the Tribunal underscored its important screening role in reviewing applications for private enforcement and reinforced that applicants will have to meet a real evidentiary burden in future cases to demonstrate a substantial and genuine competition law dispute.

Recent amendments: a new 'public interest' pathway to strengthen private enforcement

As we have outlined in separate Osler Updates, as part of a series of generational amendments to modernize Canada's competition law between 2022 and 2024, Parliament

overhauled section 103.1 of the Act to expand private enforcement of the Act.[2] Private applicants — "any person", including businesses, consumers and public interest groups — can now apply to bring cases under key civil provisions of the Act such as abuse of dominance (section 79) and anti-competitive agreements (section 90.1) that were previously only available to the Commissioner of Competition (the Commissioner). In addition, if successful on the merits, they can generally seek monetary compensation. Prior to these amendments, private applicants could only seek leave under a narrow range of civil provisions (which did not include sections 79 or 90.1) where a stricter leave test was met, and monetary compensation was not available.

To proceed with their claim under these civil provisions, private applicants must first obtain "leave" from the Tribunal. Section 103.1 now offers two distinct routes to leave. The traditional "affected business test" branch, which was liberalized through the recent amendments, asks whether there is reason to believe the applicant's business is directly and substantially affected in whole or in part by the alleged conduct. The new "public interest test" branch, which was introduced in the amendments and came into force in June 2024, allows the Tribunal to grant leave where the Tribunal is satisfied that "it is in the public interest to do so."[3] These are separate gateways with different standards, reflecting Parliament's intent to open the door to genuine public-interest cases even where the applicant is not a directly affected business.

As the Tribunal recognized in *Martin*, these amendments were an attempt by Parliament to encourage and financially incentivize private enforcement of the Act to complement the Commissioner's public enforcement work.[4] In practical terms, these amendments materially expanded private access to Tribunal proceedings and the availability of monetary compensation payable to private applicants.

The Tribunal's interpretation of the public-interest leave test

In *Martin*, the applicant, an individual, invoked the public-interest test to pursue remedies under the abuse of dominance and anti-competitive agreement provisions of the Act against Google and Apple, based in part on parallel proceedings in the United States. After extensive submissions by the parties as well as the Commissioner, the Tribunal concluded that the public-interest test should be interpreted using the common law test for public standing as modified for the specific context and purposes of the Act.[5]

In the context of constitutional and public law cases, the Supreme Court of Canada has established a three-factor test for public-interest standing.[6] Under that framework, the Court may exercise its discretion to grant public-interest standing having regard to whether (i) the case raises a serious justiciable issue; (ii) the party bringing the action has a genuine interest in the matter; and (iii) the proposed suit is a reasonable and effective means of bringing the case to court.

Recognizing the many distinctions between constitutional matters and competition law matters, the Tribunal held that these three factors must be modified in determining whether to grant leave to private applicants for reviewable trade practices of the Act.[7] After noting its scarce resources and its important role in screening out unmeritorious and strategic claims under the Act, the Tribunal adopted a test that was focused on three core questions, weighed cumulatively:

1. Is the proposed application a *substantial and genuine competition law dispute* that warrants resolution by the Tribunal under the provision for which leave is requested?

2. Does the applicant have a *genuine interest* in the proposed application?
3. Is the proposed proceeding a *reasonable and effective*means to determine the competition issues raised?

In addressing the first question, the Tribunal will assess whether the proposed proceeding is a *substantial* competition law dispute, based on the facts provided in support of the proposed application (i.e., the affidavit(s) filed by the applicant), but importantly will not weigh competing evidence. In assessing whether there is a *genuine* competition law dispute, the Tribunal will determine whether the essential character of the proposed proceeding is relevant and directed towards addressing competition in a market through the enforcement of a reviewable trade practices provision, as opposed to a commercial quarrel between competitors.

In addressing the second question, the Tribunal imported the traditional "genuine interest" concept, which includes evidence on matters such as "the applicant's 'real stake in the proposed proceeding, 'engagement' with the issues, reputation, and 'real and continuing interest' in the matter at issue."[8]

In addressing the third question, the Tribunal indicated that while many of the considerations applicable in public and constitutional law public-interest standing apply to the competition law context, there were three material differences that should be incorporated into the analysis:[9]

1. consideration of whether the application presents a concrete and well-developed factual setting may be more important in a competition context such that the Tribunal may consider whether the applicant's evidence shows a realistic or tangible prospect of obtaining the necessary additional evidence for a hearing on the merits of the proposed application
2. consideration of the fact that the Tribunal is the only forum that has a statutory mandate to hear applications under Part VIII of the Act, which may be relevant when considering whether the applicant has the opportunity to pursue the lawsuit elsewhere
3. consideration of the statutory framework, since the Act prohibits the Tribunal from drawing any inference from the fact that the Commissioner has or has not taken any action on the matter raised

The applicant's claims: Google's abuse of dominance and anticompetitive agreement with Apple

Martin's application targeted Google's distribution strategy for its general search engine service, centering on Google's arrangements to position its search engine as the default option across a wide range of consumer products. In particular, the application focused on Google's longstanding revenue-sharing agreement with Apple (the ISA) whereby Google's search engine was installed as the default search service on billions of Apple devices worldwide in exchange for substantial payments intended to disincentivize Apple from developing a competing search product.

Martin alleged that Google held a dominant position in the general search engine market in Canada, and that its arrangements with actual or potential competitors like Apple amounted to a practice of anticompetitive acts or anticompetitive conduct designed to maintain Google's dominance.[10] Martin also alleged that the ISA between Google and Apple (as well as other similar arrangements with other parties) violated the Act because a significant purpose of the ISA was to prevent or lessen competition for general search engines globally (including

in Canada) and to entrench Google's offering.[11] On these bases, Martin sought prohibition orders and monetary orders from the Tribunal.

Evidence filed by the applicant

The Tribunal first determined whether it should consider the documentary evidence filed by the applicant, noting that many documents attached to the affidavit were from the United States District Court for the District of Columbia proceeding between the United States of America *et al.* and Google (U.S. proceedings).

The Tribunal noted that it was permissible for a leave application to rely on documents from sources such as publicly accessible court files, and that they may be considered with the rest of the evidence filed for leave at the first step of the public-interest test.[12] However, The Tribunal identified several major deficiencies with the applicant's affidavit, including that it had no substantive content of its own and that many of the attached documents did not constitute evidence of facts (i.e., they were pleadings, arguments or opinions).[13] In considering the impact of a foreign judicial decision, he emphasized that, as a matter of law, a previous judicial decision may be admissible in a leave application, contingent on the purpose for which it is submitted and the intended application of its findings and conclusions.[14] For example, the Tribunal found the following:

1. In light of the statutory obligation to file an affidavit detailing the facts supporting the proposed application, factual findings made in a prior decision cannot serve as a complete workaround or proxy for admissible evidence of facts.[15]
2. When determining whether to grant leave, the Tribunal will not make findings of fact relating to the merits of the proposed application; the decision is solely about whether to grant leave to make an application.[16]
3. Using court decisions for facts to support a proposed application may introduce issues and arguments that are incompatible with a summary application for leave.[17]

Applying these factors, the Tribunal only considered a limited set of extricated facts from the U.S. proceedings.

Application of the test

Step 1: Substantial and genuine competition law dispute: favours leave, but 'not strongly'

The Tribunal found that while the proposed application did raise genuine competition law issues, there were many deficiencies in the applicant's materials. Most importantly, the Tribunal observed that the applicant's materials were notably sparse on the nexus to Canada. The notice and submissions emphasized U.S. arrangements (including with U.S. carriers) but offered limited Canada-specific allegations or effects. The Tribunal viewed this as a gap that the applicant tried to fill mostly by asserting that the ISA between Google and Apple applied similarly in Canada. The Tribunal acknowledged that cross-border conduct can be cognizable (e.g., section 90.1 has no territorial limit) but emphasized that the applicant still needed to ground Canada-specific effects with evidence at leave.[18]

Step 2: Genuine interest: not established

The applicant, an independent video game developer, used Google's general search engine

for various business-related and personal matters. However, the Tribunal found that there was no meaningful evidence of prior engagement with the competition or technology issues raised in the proposed application, such as the applicant's interest in the efficiency of the general search engine market in Canada.[19] Furthermore, the applicant's submissions did not provide substantiation of claims to represent a broader cohort of affected e-commerce actors who rely on general search engines.[20] This weighed against granting leave.

Notably, the Tribunal did not accept the respondents' suggestion that the applicant was pursuing private business interests such that it would be more appropriate to seek leave under the affected-business test branch; rather, it observed that the applicant sensibly proceeded under the public-interest test branch.[21]

Step 3: Reasonable and effective means: not established

The applicant identified no fact witnesses, retained no experts and provided no concrete litigation plan or explanation of how a proper evidentiary record would be developed for a proposed application on the merits, beyond a general intent to obtain discovery from respondents. The Tribunal emphasized that, even at the leave stage, a public-interest applicant should demonstrate a realistic or tangible prospect of adducing necessary evidence (e.g., identifying a list of potential witnesses or experts and the plan to develop their factual bases). The applicant's failure to do so indicated that the applicant did not have the capacity to bring the application and that the issues in the proposed application would not be presented in a sufficiently concrete and well-developed factual setting.

Takeaways

There are several key takeaways for organizations and businesses that are either seeking to bring or are required to defend future applications for leave before the Tribunal under the public-interest test for reviewable trade practices:

- **The Tribunal has adopted a balanced test for leave**. The Tribunal adopted a balanced test that is more strict than standing in a constitutional case and that is focused on whether the applicants have adduced evidence of a substantial and genuine competition law dispute that merits private enforcement.
- **The Tribunal has reinforced its important screening role**. The Tribunal underscored its scarce resources and noted that it will play an important screening role in reviewing and excluding unmeritorious and opportunistic claims in future cases.
- **The Tribunal will hold applicants to their minimal evidentiary burden**. The Tribunal clarified that while the leave phase does not demand a fully developed evidentiary record, applicants must still provide some substantive and persuasive evidence, or at least identify the realistic means by which they intend to adduce such evidence. The Tribunal's ultimate ruling was grounded in the finding that the applicant had failed to meet that evidentiary burden. The Tribunal was rigorous in scrutinizing the evidence on the record and noted several times the deficiencies in the applicant's evidence.
- **The Tribunal will scrutinize evidence and findings from foreign proceedings.** The Tribunal found that the applicant was limited in its ability to rely on foreign court decisions and filings that were based on different evidentiary records and different laws, but noted that the Tribunal may consider extricable findings from foreign proceedings in appropriate

cases.

While the Tribunal denied leave in this particular case, it clarified the applicable test for leave, highlighting that the threshold "should not be difficult to meet" if sufficient evidence is adduced for each of the three questions. Future applicants now have a more predictable path for pursuing applications and developing their evidence. The Tribunal's decision may now actually invite future applications from more sophisticated and diligent applicants who were wary of the cloud of uncertainty that previously hovered over the leave test.

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[1] *Martin v. Alphabet Inc., Google LLC, Google Canada Corporation, Apple Inc., and Apple Canada Inc.*, 2026 Comp Trib 3.

[2] For more information regarding the series of recent amendments to the Act between 2022 and 2024 which substantially overhauled, *inter alia,* the Act's private enforcement regime, please refer to our prior Osler Update titled "The dramatic expansion of private enforcement of Canada's competition laws" (28 June 2024).

[3] Act at section 103.1(7).

[4] See, e.g., *Martin* at paras 69–72 and 99–100.

[5] *Martin* at para. 77.

[6] *British Columbia (Attorney General) v. Council of Canadians with Disabilities,* 2022 SCC 27, [2022] 1 SCR 794; *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* 2012 SCC 45.

[7] In *Martin* at para. 111, the Tribunal noted that in granting leave to commence a proceeding under the Act, the Tribunal is informed by factors that are specific to and focus on the statutory context in which leave may be granted, including: "the scarcity of Tribunal resources and a need to screen out unmeritorious, vexatious or strategic claims; the need to provide enhanced access to the Tribunal by those who may be affected by anti-competitive behaviour; that the proceeding concerns a competition problem suitable for determination by the Tribunal under the statutory provision(s) for which leave is requested; that the Tribunal will have the benefit of contending points of view on the competition questions presented by the proceeding; and that the proposed Tribunal proceeding is a reasonable and effective means to apply the statutory provision(s) to the conduct of the proposed respondents."

[8] *Martin* at para. 135, citing *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27, [2022] 1 SCR 794, and *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524.

[9] These considerations include: the applicant's capacity to bring the application, whether the case is of public interest, whether there are alternative means to resolve the issues, and the potential impact of the proceedings on others.

[10] See, e.g., *Martin* at paras. 12–18. For more information regarding recent amendments to the Act's abuse of dominance provisions, refer to our Osler Update titled "Leading firms and oligopolies: beware" (28 June 2024).

[11] See, e.g., *Martin* at paras. 19–22. For more information regarding recent amendments to

the Act's anticompetitive agreements provisions, refer to our Osler Update titled "Commercial agreements: a new legal framework" (28 June 2024).

[12] *Martin* at para. 174.

[13] *Martin* at paras. 176, 181, 183.

[14] *Martin* at para. 192.

[15] *Martin* at para. 193.

[16] *Martin* at para. 194.

[17] *Martin* at para. 195.

[18] *Martin* at para. 206.

[19] *Martin* at para. 225.

[20] *Martin* at para. 226.

[21] *Martin* at para. 229.