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The Competition Tribunal's First Word on the New "Public Interest" Leave Test

In *Martin v Alphabet Inc*, the Competition Tribunal issued its first decision interpreting the new "public interest" branch of the leave test under subsection 103.1(7) of the *Competition Act*. The case arose from a proposed private application alleging abuse of dominance and an anti-competitive agreement relating to Google's default search arrangements with Apple.

While the Tribunal ultimately dismissed the leave application, the decision is significant for what it says about the scope, purpose, and limits of public-interest access to the Tribunal under the recent amendments to the Act. The decision also provides some welcome clarity to potential applicants on the test to be met to obtain leave at the Tribunal.

The Recent Amendments to the *Competition Act*

Parliament has amended the *Competition Act* in stages between 2022 and 2024, significantly expanding both private access to the Competition Tribunal and the remedies available in reviewable-conduct cases. Three sets of changes impacted the legal landscape of the Tribunal's decision.

First, Parliament expanded private rights of access to new reviewable conduct. Parliament amended section 103.1 to allow private applicants to seek leave to bring applications under section 79 (abuse of dominance), a remedy that had historically been reserved to the Commissioner. Subsequently, Parliament further amended section 103.1 to permit leave applications in respect of section 90.1 (anti-competitive agreements).

Second, Parliament introduced the possibility of monetary remedies under subsections 79(4.1) and 90.1(10.1), but only where the Tribunal has first made a substantive remedial order under those sections.

Third, and most importantly for this case, in its most recent amendment, Parliament amended subsection 103.1(7) to create two alternative bases for granting leave:

1. where the applicant is "directly and substantially affected" in its business; or
2. where the Tribunal is "satisfied that it is in the public interest"

to grant leave.

This case represents the first time the Tribunal was required to interpret and apply the newly amended subsection 103.1(7).

Factual Background

The applicant sought leave to bring an application under sections 79 and 90.1 against Google and Apple. At a high level, the proposed case alleged that:

- Google controls over 90% of the general search engine market in Canada.
- Google maintains that dominance through exclusionary revenue-sharing agreements that secure default search placement on browsers, devices, and operating systems.
- A central agreement – the Information Services Agreement (ISA) between Google and Apple – makes Google the default search engine on Apple devices in exchange for multi-billion-dollar annual payments.
- These arrangements allegedly foreclose rival search engines, deter entry and innovation, and disincentivize Apple from developing its own general search product.

The applicant did not claim to be directly and substantially affected in his own business. Instead, he sought leave exclusively under the new "public interest" branch of subsection 103.1(7).

Interpreting the "Public Interest" Requirement

This application required the Tribunal to decide, for the first time, what it means to be "satisfied that it is in the public interest" to grant leave under subsection 103.1(7).

The applicant argued for a low threshold, grounded in the Supreme Court's public-interest standing jurisprudence, under which leave should be granted where the case raises a serious issue and merits exploration through discovery. By contrast, the respondents argued for a much more stringent screening role, warning against "fishing expeditions," strategic litigation, and the effective circumvention of the "affected business" test.

The Tribunal ultimately held that the proper framework for the public-interest leave test is the three-part public interest standing test developed by the Supreme Court, adapted to the competition law context:

> "The language, context and purposes of subsection 103.1(7) lead to the conclusion that the Public Interest Test for leave should use the three steps in the common

> law test for public interest standing … after adapting those steps for the specific context and purposes of the *Competition Act*."

Those three steps are:

1. Whether the proposed application constitutes a substantial and genuine competition law dispute that warrants resolution by the Tribunal under the provision(s) for which leave is requested;
2. Whether the applicant has a genuine interest in the matter; and
3. Whether the proposed proceeding is a reasonable and effective means of bringing the issue before the Tribunal.

The Tribunal provided helpful guidance to litigants on the analysis to be undertaken under each step of this three-part analysis.

Part (1) of the test was reformulated by the Tribunal from the usual test for public interest standing to better suit its applicability in the competition law context. At Part (1), the Tribunal will consider whether there is a **substantial** and **genuine** competition law dispute that warrants a Tribunal proceeding:

- A "substantial competition law dispute" will be determined based on an analysis of the factual basis provided in support of the proposed application. The Tribunal indicated that it would take a "practical and flexible approach" in their assessment of this part of the test, drawing on their expertise to determine whether the proposed application raises "worthwhile substantive issues to be tried between the parties in light of the overall requirements of the provision(s) for which leave is requested". The Tribunal was clear, however, that they will not engage in a weighing of evidence at this stage, and will not grant leave if there is no realistic chance of success in the application.
- A "genuine competition law dispute" will be one where the essential character is relevant and is directed towards addressing competition in a market rather than a "commercial quarrel between competitors". The Tribunal will consider the alleged conduct, as well as the remedies to be requested by the applicant when making this determination.

The Tribunal held that Part (2) of the test holds the same meaning as the public interest standing test outlined by the Supreme Court. To satisfy the test, the Tribunal held that it "will expect 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.”

Under Part (3) of the test, the Tribunal considers whether the application is a reasonable and effective means of bringing the case to Court. At this stage, the Tribunal indicated that it will consider a number of factors, including the applicant’s ability to bring forward a claim, whether the claim is in the public interest, and whether there are alternative means of the claim being heard.

While acknowledging the preliminary nature of leave proceedings, the Tribunal emphasized that the public-interest pathway is not an invitation to speculative litigation untethered from evidence. The Tribunal stressed that it must still be satisfied on the record before it that the proposed application is capable of advancing the purposes of the *Competition Act*.

Application to the Facts

Applying this framework, the Tribunal concluded that the applicant had not met the public-interest test. While the issues raised were serious and widely debated in other jurisdictions, the evidentiary record did not satisfy the Tribunal that granting leave would be a reasonable and effective way to advance the public interest under the Competition Act. The Tribunal held that the applicant’s evidence on the leave application does not adequately support his genuine interest in the proposed proceeding. The application was therefore dismissed.

Implications

This decision is an important first signal of how the Tribunal intends to police the boundaries of public-interest access under the amended *Competition Act*. Several implications stand out:

- Public-interest standing is available, but not automatic. Applicants must still engage meaningfully with the elements of the substantive provisions of the Act at issue.
- The applicant’s interest in the issues in the proceeding will be important.
- The Tribunal remains a gatekeeper. The decision confirms that concerns about strategic or under-developed litigation remain central, even in the era of expanded private enforcement.
- Evidence matters early. While the burden is not equivalent to proving a prima facie case, applicants should expect to adduce credible, structured evidence addressing market definition, conduct, and competitive effects.

This will not be the last word. As more applicants test the public-interest pathway, particularly public-interest organizations rather than individual litigants, the contours of the test will continue to develop.

For now, *Martin v Alphabet Inc* establishes that the "public interest" branch of subsection 103.1(7) meaningfully expands access to the Tribunal, but does so within a disciplined, purposive framework grounded in both competition law and public law standing principles.