Interview with Denis Gascon, Chairperson of the Canadian Competition Tribunal

Editor's Note: *The Honourable Denis Gascon was appointed Judge of the Federal Court of Canada on February 26, 2015. He was also appointed Chairperson of the Canadian Competition Tribunal on April 30, 2015. Prior to joining the Federal Court, he was a partner with Norton Rose Fulbright Canada in Montreal, where he headed the firm's Antitrust and Competition Team in Canada. Mr. Justice Gascon practiced competition law and international trade law at Ogilvy Renault (now Norton Rose Fulbright Canada) for 25 years.*

Mr. Justice Gascon received his Bachelor of Laws from the Université de Montréal in 1988. He also has a Bachelor of Science in economics as well as a Diplôme d'études approfondies (D.E.A.) in economics. He was interviewed for The Antitrust Source *on March 30, 2017, by Thomas Collin.*

THE ANTITRUST SOURCE: Justice Gascon, I'm looking forward to asking you some questions this morning about the Competition Tribunal, Canadian competition law, and also your individual experience.

Let's begin with the Tribunal itself. We don't have in the United States a specialized court to decide antitrust or competition cases. Can you give us an explanation as to how the Tribunal works, why it was set up, and the scope of its jurisdiction?

DENIS GASCON: First, let me thank you for conducting this interview and the ABA for organizing it. I am very pleased to be here this morning to talk about the Tribunal.

We have a bifurcated model in Canada, with the Commissioner of Competition and the Competition Bureau having an investigative function, and the Tribunal acting as the adjudicator in civil competition matters.

So, there are very distinct roles for the Commissioner, on one side, and for the Competition Tribunal, on the other. And we also have a bifurcated model in terms of our legislation in Canada, the *Competition Act*. We have civil provisions, and we have criminal provisions. The jurisdiction of the Tribunal is limited to the civil provisions. The criminal provisions are handled by the regular criminal courts.

Our jurisdiction at the Tribunal is therefore limited to the civil provisions of the *Competition Act*, and that means essentially mergers, abuse of dominance or monopolization, deceptive marketing practices, and a new provision we have had for some seven years now, civil collaborations between competitors.

The Tribunal was established 30 years ago, in 1986, when the *Competition Act* was revamped and Canada moved away from some criminal provisions and enacted a number of new provisions in the civil area. At the time, the government wanted to create a judicial body which had essentially two fundamental features: (1) a specialized expertise both from a legal standpoint and an economic standpoint; and (2) a more expedited process.

The civil provisions of the *Competition Act* involve conduct where the competitive effects are the major element. The idea was thus to create a body having specialized expertise and, given

that competition is intimately related to business activity, a body where the process will be faster than what you would expect to have in the regular civil courts.

So these were the two drivers behind the creation of the Tribunal—this specialized expertise, and the process. In terms of the expertise, that's why we have this special structure, whereby the Tribunal is composed of both judicial members, who are Federal Court judges like myself, and lay members, who typically will have a background in economics or business activity.

In terms of process, the Tribunal has developed a number of rules to make its proceedings more efficient and more expeditious, so that we can handle cases more rapidly than regular courts.

Another feature which I think is important to underline is the fact that the Tribunal is truly at arm's length from the Competition Bureau, just as a federal court would be. So we are independent and, at a conference like this [2017 Spring Meeting of the Section of Antitrust Law], I am always faced with this task of explaining the model that we have in Canada, where the independence of our adjudicating tribunal is a major distinction between Canada's enforcement model and the model of many other enforcement authorities around the globe. The Tribunal is an independent body deciding the cases, and this is a key feature of the model that we have developed in Canada.

[T]he two main provisions of the Competition Act over which the Tribunal has jurisdiction—mergers and abuse of dominance—cannot be the subject of a private right of action.

ANTITRUST SOURCE: Let me follow up on the independence of the Tribunal from the Commissioner. Are the cases that you hear exclusively cases involving the Commissioner and rulings by the Commissioner or does the Tribunal have additional jurisdiction?

DENIS GASCON: It is a good question. The Commissioner is the main party appearing before us, but, further to recent amendments to the *Competition Act*, Canada has started to develop some private rights of action.

So, for certain civil provisions of the Act, a private party can come and apply to the Tribunal, subject to obtaining leave from the Tribunal. Private actions before the Tribunal have been an incremental process, and they are still very limited. Incidentally, I don't think there is any jurisdiction in the world where private actions are as expanded as what you have in your country, but Canada is slightly different from other jurisdictions in that private actions have developed and grown over recent years. That said, private actions still remain a small portion of competition litigation in Canada.

Before the Tribunal, you can bring a private action for refusal to deal, for some restrictive trade practices like exclusive dealing, and now for price maintenance, which has been open to private actions recently. However, the two main provisions of the *Competition Act* over which the Tribunal has jurisdiction—mergers and abuse of dominance—cannot be the subject of a private right of action. There have been discussions about opening the abuse of dominance provision to private action, but that is a policy question that I cannot comment on.

So the Tribunal hears private actions, subject to leave being granted. So far, there have been about 30 cases before the Tribunal where a leave application has been filed, but only about a third of those have advanced beyond the leave stage.

It may be part of the Canadian approach or "culture," but, when the government created the opportunity for private actions, there was a concern that it would be opening a floodgate and that dozens and dozens of actions would be initiated without substantive basis. So this is why Canada subjected private actions to a leave process. We at the Tribunal will look at an application and determine, as a threshold matter, whether there is enough to go forward on the merits. And, as I indicated, so far only about a third of the private actions filed have gone beyond the leave stage.

The vast majority of cases brought before the Tribunal remain cases filed by the Commissioner.

ANTITRUST SOURCE: In a private action, does the Tribunal then function basically as the court of first instance, making fact findings and ruling on the disputed issues of fact and law?

DENIS GASCON: Yes. The Tribunal is like a court of first instance. It is like a trial court. We hear the factual evidence. We have not talked about the structure of the Tribunal yet, but typically cases on the merits are heard by a panel of at least three members, one of whom has to be a judicial member and one of whom has to be a lay member.

Normally, we have two judicial members and one lay member on a panel, and a panel is always presided over by a judicial member. The findings of facts are made by the whole panel. If there are purely legal issues, these are to be determined by the judicial members only. If you have purely factual issues, all three members will participate in the decision-making.

Our decisions are appealed directly to the Federal Court of Appeal, as are Federal Court decisions in Canada.

ANTITRUST SOURCE: How are the lay members appointed? Do the judicial members have some input on the selection of lay members for the Tribunal?

DENIS GASCON: The *Competition Tribunal Act* provides that the Tribunal can have up to six judicial members and up to eight lay members. As Chairperson, I make the decision as to who will be sitting on a given panel.

For judicial members, you have to take into account the fact that we are all Federal Court judges with our respective case load from the Federal Court. So in terms of availability, that is a factor in determining who will be able to sit on a panel. There may also be conflict issues, especially for someone like me who is coming from the competition bar. I have been on the Tribunal for two years now, and I have had some instances where I could not take a case because it was something I had worked on when the Commissioner was investigating it, and it has now come before the Tribunal.

The lay members are also subject to conflict of interest rules. Although we have a roster of eight, currently we have only three lay members because the term of a number of lay members expired at the end of 2016. We are in the process of filling those vacant positions, and appointments are expected to be made shortly by the government. In fact, the government will be announcing, I am told sometime in the coming week or so, its request for new applications for lay members.

The judicial members definitely are not involved in the process of selecting lay members. As Chairperson, however, I may be consulted, and I may also put forward names of individuals whom I think would be good candidates as lay members. At the end of the day, though, it is the government making the decision—more specifically, the Minister of Science, Innovation, and Economic Development.

Lay members are typically appointed for five years, and judicial members can be appointed for up to seven years. They are appointed through what we call the "Governor in Council" in Canada. In the very early days of the Tribunal, challenges were brought against the Tribunal on the ground that the lay members were not truly independent. The Federal Court of Appeal, however, held that they were independent because of provisions contained in the Competition Tribunal Act regarding their tenure and remuneration.

So, the selection of lay members is a process in which I may be indirectly involved because I am the Chairperson of the Tribunal, but, at the end of the day, it is a decision of the government.

ANTITRUST SOURCE: Let me ask about your responsibilities as a Federal Court judge. Does the Tribunal occupy all of your time as a federal judge and have all of your attention?

DENIS GASCON: If the case load was such that I would be required to work full time as the Chairperson and judicial member of the Tribunal, that would be the priority for me.

It is understood that the Federal Court would free as much of my time as needed to handle the work at the Tribunal. The reality is that the case load is not such that the Tribunal requires all of my time. Since I have been appointed, I would say that approximately 50 percent of my time is spent on Tribunal matters. The rest of my time is spent on regular Federal Court work, which I think is very similar to your federal court. We are basically the court controlling the activities of the federal government. The Federal Court deals with matters within the federal jurisdiction and controls the legality of the activities of the federal government. So anyone questioning the legality of an action taken by a Minister or an agency would bring the matter before our Federal Court, and that includes, for example, patent cases, trademark cases, immigration, national security—all of the activities in which the various agencies of the federal government are engaged. So I spend, I would say, half of my time as a Federal Court judge and the other half handling Competition Tribunal matters.

[The Tribunal has] the mandate to develop a more informal, more expeditious process to resolve competition matters.

ANTITRUST SOURCE: Let me ask you about the mediation directive issued last year by the Tribunal. In some of our federal courts of appeals in this country there are comparable mediation procedures. Would you describe how your procedure is intended to work and whether it has been extensively utilized?

DENIS GASCON: Yes. First of all, it is a very recent development. We issued our Practice Direction regarding Mediation in June of last year, so it is not even a year old.

So far, it has been a very successful process. I think it is useful to step back a moment and to see why we now have mediation as an option at the Tribunal. I think that you have to look at it from the Tribunal's perspective but also—and I believe this ties in with what you said about your own experience in the U.S.—from the perspective of the judicial regime in general.

As far as the Tribunal's perspective is concerned, we have, as I mentioned earlier, the mandate to develop a more informal, more expeditious process to resolve competition matters. So that concern has always been an element that drove the activities of the Tribunal. We noticed that the Tribunal may not have been utilized as much as people expected it would be when it was created. My predecessors thus looked at the idea of opening other doors through which matters could be brought up and resolved in the Tribunal. The normal litigation process is what we have in place, but we explored the possibility of creating other doors through which the Tribunal could help resolve matters under its jurisdiction. So we initiated discussions with that idea in mind through the Bench and Bar Liaison Committee that we have at the Tribunal. After discussing this with the Bar and with representatives of the Competition Bureau, mediation was identified as the low-hanging fruit, and this is what led to the Practice Direction on Mediation.

From a more general perspective, the other driving factor behind the mediation option is the need for better access to justice. Our Supreme Court has issued a very important decision in 2014

recognizing that access to justice is the main challenge that courts are facing today.[1] And when I say access to justice, I mean access in terms of cost of litigation and access in terms of timing and efficiency of litigation. In that decision, the Supreme Court called for a cultural shift in the approach to our adversarial system.

And the idea was that there needs to be other ways to resolve disputes, ways which are as effective and legitimate as the conventional trial court. If you look at the reforms made to the codes of civil procedure in place in various Canadian provinces, you will see more and more of a trend towards alternative dispute resolution models, including procedures for mediation.

So what we are doing at the Tribunal with mediation did not arrive by accident. It is really part of a more general trend in the whole judicial system.

It is in line with our mission at the Tribunal, and it is also in line with what we are seeing on a more global level in the judicial system in terms of access to justice.

The Practice Direction itself is three pages in length, and the principles are pretty general. First, mediation has to be by agreement. The Tribunal offers this option, but we are not imposing it on parties. The essence of mediation is that it is voluntary. What we have seen since the mediation option has been in place is that parties will plan to have a mediation session somewhere in their proposed schedule for a given application. The mediation may take place before or after discovery. That is not for us at the Tribunal to decide; it is up to the parties to determine when they want to have the mediation.

The parties also decide on the scope of the mediation, and it can be a mediation on the whole application or a mediation on a very specific aspect, such as product or geographic market definition. Even if it does not resolve the whole matter, the mediation can thus serve to narrow the issues.

It is also up to the parties to determine who they will use as a mediator. So far, the idea is that they will use one of the judicial members of the Tribunal because judicial members have some experience in the area. Typically, the parties know them, so they have confidence that the mediator can bring the dispute to a resolution. But, again, that is for the parties to choose. They can come to us and ask us to recommend an outside mediator, but that has not happened so far. Counsel in this area are experienced, and they know the qualifications of judicial members of the Tribunal.

If there is a resolution following the mediation session, the parties will confirm its terms in a consent agreement, which will then be registered with the Tribunal, as is done with any other consent agreement. So far, we have had two successful mediations, one in *Parkland*,[2] which was a merger case, and other one in *Moose Knuckles*,[3] which was a deceptive marketing practices case—two very different cases which were both mediated to a successful resolution. We are also scheduled to have a mediation in an abuse of dominance case later this year.

Mediation is thus a process that has taken on a life of its own, and, because of the early successes, parties now say, "Why not try to explore that?" So far, I think the parties are very pleased with the results, which has always been the goal.

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[1] Hryniak v. Mauldin, [2014] 1 SCR 87 (Can. Supreme Ct.).

[2] Comm'r of Competition v. Parkland., 2015 Comp. Trib. 3 (Can.), http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=377.

[3] Comm'r of Competition v. Moose Int'l Inc., 2016 Comp. Trib. 4 (Can.), http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=393.

In addition to mediation as a door allowing better access to justice, it may be worth considering other methods that may be able to provide for more expeditious resolution of matters before the Tribunal, especially in the merger area where timing is of the essence. These other options could involve either a summary trial or other forms of summary disposition, provided the procedure is agreeable to all parties. There are currently discussions with the Bar and the Commissioner on that front.

ANTITRUST SOURCE: If mediation doesn't result in an agreed resolution, when the case is heard on the merits, will the judicial members of the panel be different from the judicial member who presided at the mediation?

DENIS GASCON: This is a very good question and, in fact, unless the parties agree to the contrary, the mediator will never sit on the hearing on the merits. The parties could decide that they want to have that person on their panel, but the principle is that the mediator will not be hearing the case on the merits.

In fact, in the two cases that I mentioned, I was the case management judge, but I was not the mediator. I was continuing to manage the two cases, but the mediation was something totally different in which I was not involved. I did not even have access to the documents that were filed as part of the mediation. These are two separate processes, but, again, the parties may decide after an unsuccessful mediation to have the mediator sit on the merits panel.

ANTITRUST SOURCE: Understood. Let me shift gears here and ask you a few questions about the actual procedure in a case that you're considering. And specifically, let me ask you about expert witnesses. Are there situations in which the Tribunal will appoint its own expert? Sometimes in federal courts in this country that happens. The judge will select on his or her own initiative, with the consent of the parties, an independent expert to address some of the issues in the case. Is that something that you've considered or done, or how would you view that?

DENIS GASCON: We have two mechanisms whereby the Tribunal can use independent economic advisors. We have a more formal one and we have what I call an informal mechanism. The formal one is in our rules of procedure, which provide that the Tribunal can appoint an expert.

We would typically do that in consultation with the parties, but the independent expert would be advising on issues specified by the Tribunal. His or her report would be made available to the parties, and they would have an opportunity to comment on it and respond to it.

We also have an informal process whereby the Tribunal can appoint an economic advisor. Historically, we had a permanent economist on the staff of the Tribunal, but the position is no longer warranted given the Tribunal's intermittent workload. So there have been four or five cases in recent years where we have informally appointed such an economic advisor. We have done so to assist the Tribunal in the advisor's specific area of expertise. The practice we have developed is that, if the economic advisor writes a report, we will, for procedural fairness, make the report available to the parties and give them an opportunity to comment.

This subject leads me back to the qualifications of lay members on the Tribunal. The ideal lay member, for me as Chairperson, is a professor of economics, or someone having solid economic background. But you can also have someone with industry expertise or accounting expertise. In some cases where pure economic or econometric issues were central to the decision, there has been a need to go beyond the lay member sitting on the panel and to secure the needed economic expertise through an economic advisor.

The Tribunal has also been at the forefront of a number of initiatives in terms of handling expert evidence. An important trend that we see with respect to expert evidence is the idea that experts should be there to assist the Tribunal and not to plead the case of a party. This is a change that we are seeing not only at the Tribunal but in other judicial settings. The Tribunal has always thought that this is what the role of experts should be. They are not there to advocate the position of a party; they are there to assist the Tribunal. Under our rules at the Tribunal, we have what we call an acknowledgment of expert witness. An expert appearing before the Tribunal has to sign an acknowledgment indicating that he or she is acting impartially and that his or her first duty is to the Tribunal, not to the parties hiring them. Experts are indeed much more helpful to the Tribunal because of this requirement that they remain independent and impartial.

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Another procedure that we can resort to is to have panels of expert witnesses. This is sometimes referred to as hot-tubbing of experts. Having experts appearing together and asking questions to one another can assist in narrowing the issues much more quickly than you would be able to do through the typical adversary process, where the expert is defending or advocating the position of a party. Our rules therefore provide for witness panels, and we have considered the possibility of using these in some cases.

ANTITRUST SOURCE: I want to ask one other question about case management before turning to some of your recent rulings. In terms of case management, does the Tribunal impose on the parties time limits on how long a hearing is going to run or what each side can do in terms of presenting arguments and witnesses?

DENIS GASCON: Yes. In fact, the Tribunal is known as being pretty "hands-on" in terms of case management. As soon as the pleadings are in, we will call a case management conference to fix the timetable for the whole proceeding, so the process moves very rapidly. We try to complete a hearing on the merits and all discovery in less than a year, and we plan, at the very beginning of a matter, all the upcoming steps in the case, including interim motions, discovery, examination of witnesses, and other matters. So we have a good idea of the timetable very early, and we follow it closely.

We also have what I call hearing management processes, and the one that you are referring to is what we call that "chess clock" process. We ask counsel how much time they need for the oral hearing. Counsel will tell the Tribunal, for example, "We need two weeks or three weeks," but it is up to them to determine how much total time they need. Once they have determined the time needed for the hearing, we will determine the duration of the hearing and allocate time. Each side will have, for example, 30 hours. And having a "chess clock" process means that you start the hearing knowing that you have, let's say, 30 hours allotted to you, and you have to plan your case within that timeframe.

Whenever counsel for a party is on her or his feet, the time counts against that party unless they were responding to matters raised by the Tribunal. If you make a motion objecting to a testimony or to an exhibit and you win, the time is attributed to the other side. If you make a motion and you lose, the time is counted against you. Basically, at every break or at the end of each day, the parties know exactly how much time is left in the overall envelope that was determined at the beginning of the hearing. So in terms of how you plan and allocate the time, it is up to counsel to decide. You can decide to spend 90 percent of your time on direct examination and leave little time for cross-examination or little time for argument. But at the end of the day, you have to present your case within the time allotted to you.

This process forces counsel to think about narrowing the issues and focusing on what is really important to their case. Which witnesses should you be spending time on? Should you continue if cross-examination is leading nowhere? Maybe it is not wise to spend too much time on an objection with limited chances of success, because it is going to be counted against you. So the "chess clock" procedure is a mechanism by which we have been able to manage hearings at the Tribunal very effectively. Hearings move more rapidly because of it. The Federal Court is now looking at this as something they may want to implement in areas like intellectual property where you have complex cases, similar to competition cases. Initially, there was some concern that counsel would complain about procedural fairness or not being able to present their case, but, frankly, it never happened.

This "chess clock" procedure forces counsel to think about their strategy and, at the end of the day, I think this allows the Tribunal to have an efficient process, with the hearing focusing on what is truly at stake and what are the real issues that need to be determined.

[T]he "chess clock" procedure is a mechanism by which we have been able to manage hearings at the Tribunal very effectively.

ANTITRUST SOURCE: And what kind of expedited procedures are available in the case of a merger, if any?

DENIS GASCON: Apart from what I described so far, there is nothing different for a merger. We have an interim injunction process, but this does not address the merits of the underlying application. With respect to the merits of merger cases, the parties are mindful of the fact that it would help if there were some form of summary disposition process. That said, I should add that, even under the Tribunal's normal processes, rulings on the merits are made more quickly by the Tribunal than by the regular courts.

But if we could have a process that would allow merger challenges to be resolved more rapidly, that would certainly be beneficial. At this moment, however, there is no separate trial process for mergers.

ANTITRUST SOURCE: Let me ask you now about the actual rulings by the Tribunal and which ones you would view as particularly significant and why. Let's look at 2016, for example.

DENIS GASCON: Before the mediation in *Parkland*, there was an important interim injunction ruling that I issued. The Commissioner was seeking a preliminary injunction preventing the merger in certain geographic markets. This was an important ruling because it enabled the Tribunal to clarify the test be met on a request for a preliminary injunction.

The Commissioner was not seeking a freezing of the assets or a hold separate order for the entire transaction. He was arguing that there would be irreparable harm to competition in the relevant markets because of the delay between the application to the Tribunal and the hearing on the merits. The issue was whether the evidence of irreparable harm to competition was sufficient to meet the threshold of the preliminary injunction, and that issue had never been raised before at the Tribunal. So that was an important precedent, the *Parkland* case.

Another important recent case was the *Toronto Real Estate Board* (*TREB*)[4] decision on abuse of dominance. There, I have to be a bit prudent because the case is currently before the Federal Court of Appeal. In fact, we expect a decision in the first half of 2017.

[5] Comm'r of Competition v. Toronto Real Estate Bd., 2016 Comp. Trib. 7 and 2016 Comp. Trib. 8 (Remedy Order) (Can.).

It was an important case because not only did the Tribunal clarify the test on abuse of dominance but it also addressed to what extent, in an innovation case, qualitative evidence could be enough to meet the test of anticompetitive effects and substantial lessening of competition. The Tribunal concluded, based on the evidence as a whole, both quantitative and qualitative, that there was enough to meet the test, which is the balance of probability in civil cases.

In that case, there was not the same type of quantitative evidence that you often have in competition cases. We however concluded that the qualitative evidence on the non-price elements of competition, the effect of innovation on the range of services, and the impact on the quality of service was sufficient to establish anticompetitive effects resulting in a substantial lessening or prevention of competition. So, the case was important both in terms of abuse of dominance and the nature of evidence sufficient to establish anticompetitive effects.

Since I have been appointed at the Tribunal, I have been saying to counsel time and time again that facts are determinant. We are a trial court. At the end of the day, we apply the civil test of balance of probabilities based on the evidence before us. Even though it may not have been the perfect econometric model, the factual and qualitative evidence was found to be sufficient in *TREB*. The *TREB* case was an important decision on that front.

Another case was a challenge made by Kobo to a consent agreement in the e-books matter. You have also had decisions in the United States on e-books. In that case, the Commissioner concluded a consent agreement with some publishers, and it was then registered with the Tribunal. Once a consent agreement is registered, the Tribunal does not have jurisdiction to review unless a third party directly affected by it raises a challenge. And this is what happened in *Rakuten Kobo Inc. v. Commissioner*.[5] Kobo attacked the Commissioner's consent agreement with the publishers and that allowed the Tribunal to clarify on what grounds a third party could challenge a consent agreement. We also considered what facts need to be included in a consent agreement.

Based on our analysis, we determined that the consent agreement concluded with the publishers was not adequate. At the end of the day, the Commissioner agreed that, because of the test clarified by the Tribunal, the consent agreement with the publishers had to be rescinded. The Competition Bureau went back to the negotiating table and concluded new consent agreements that were registered early this year.

ANTITRUST SOURCE: Do you expect or anticipate that, given the ruling in the *Kobo* case, consent agreements negotiated prior to the ruling may become subject to challenge by third parties?

DENIS GASCON: That's an issue that we were wondering about, but that's not what we've seen. We will have an interest in how the Commissioner addresses future consent agreements. If you look at the new consent agreements that have been renegotiated in the e-books matter, and which are now again subject to another challenge by Kobo, it would appear that the Commissioner has taken into account the requirements that we've established for the consent agreements going forward.

ANTITRUST SOURCE: When the Federal Court of Appeal reviews fact finding by the Tribunal, what standard does it apply? Does it defer to the Tribunal's fact finding?

DENIS GASCON: It does, to some extent. The Federal Court of Appeal acknowledges the specific expertise of this Tribunal. Its judges acknowledge that they should be deferential to the findings

[5] Rakuten Kobo Inc. v. Comm'r of Competition, 2016 Comp. Trib. 11 (Can.).

of facts made by the Tribunal, but an appeal is still reviewed on the merits. The Court shows some deference to the expertise of the Tribunal. This doesn't mean that the Federal Court of Appeal will not intervene in a Tribunal decision—and it has in a number of cases when issues of law or of mixed facts and law were raised—but having specialized expertise in the Tribunal makes it appropriate for the Court to show deference to pure findings of fact. The *TREB* appeal will be an interesting decision from the Federal Court of Appeal because the Tribunal's decision was very facts-based.

ANTITRUST SOURCE: Let me move now to another area, Justice Gascon. Can you give us a little bit of insight into how your prior experience in the private bar either prepared you for serving on the Tribunal or has influenced how you hear cases as a justice?

DENIS GASCON: Well, it has certainly prepared me because, you see, I come with knowledge of the competition/antitrust area. I come also with the knowledge of most, if not all, of the actors in this area, whether it is the Commissioner, members of the Competition Bureau, or practitioners in the private bar. So I know them quite well. But at the same time, you also realize quickly that looking at things as a judge is quite different. There are things that you would not have noticed or thought about when you were acting as counsel.

Two things have mostly struck me since I have joined the bench. The first one is that, when you are sitting at the Tribunal or as a Federal Court judge, you realize that the cases that come before you are not the easy ones. What comes before the Tribunal are the difficult cases, the borderline cases, the cases that are not easy to decide.

And the second thing you realize is that, as a judge, you have more limited resources compared to what you had in private practice. You have this conjunction of difficult cases with much more limited resources to draw upon in deciding them. Competition is a very sophisticated and specialized area of the law. You have very sophisticated counsel and law firms with ample resources, and you, as a judge, have limited resources. This means that, as a judge, you rely heavily on counsel.

The good decisions are those in which the judge or the Tribunal can rely on good counsel. You want counsel to be there to help you do your work, and the best lawyers will be presenting the facts accurately and the legal arguments fairly. We know that they are going to be able to give us the material needed to render good decisions.

As a private practitioner, I did not have a complete understanding of that dimension of the work of a judge, especially in an area that is highly specialized like competition. So the role of counsel, and this is what I have been explaining to all stakeholders since I have been appointed, is very, very essential to the work that we do. Let me add this. The role of counsel is to persuade the court or the Tribunal of his or her position. What I have observed as a judge is that, in order to be persuaded by counsel, there are two skills that counsel must master.

The first one is the ability to instill trust. Counsel has to gain the trust of the Tribunal. And how do you do that? You do that by presenting the case fairly and understanding where your weaknesses are. Frankly, when you are the judge, you very quickly see the things that will work and the things that will not work from the evidence and the arguments. You need to be able to trust that counsel will be presenting the case fairly and will acknowledge where the case is strong and where it is not. That is part of persuading the judge.

The second skill to master is the ability for counsel to focus on the key elements of his or her case. What you realize as a judge is that counsel who are most likely to be successful are those

who are able to focus their argument on the key elements of their case. We still see a lot of the "kitchen-sink" approach, with counsel throwing everything at the judge and not focusing on what the strong points and important issues are. That does not really work. Instead, as counsel you have to be able to focus your efforts on the strong points in your case. The reality is that, even though cases before the Tribunal are difficult and complex, they will usually turn on a very limited number of issues. This is where, as counsel, you have to focus your efforts, knowing that the case will be won or lost on these issues.

From the bench, it looks very obvious, but not all counsel understand the need for this approach. Again, that is something that you very quickly realize sitting up there on the bench.

ANTITRUST SOURCE: As a presiding judge, do you sometimes tell counsel, "Don't spend time on that. I'm interested in this instead."

[E]ven though cases before the Tribunal are difficult and complex, they will usually turn on a very limited number of issues.

DENIS GASCON: Judges have different styles. I tend to be more interventionist and tell counsel, even from the start, when I think that the case will turn on issue X or Y. That said, I will never impose on counsel to change his or her strategy. That is their choice. But I will tell them, "I expect that you will address this point, this point, and this point," or "I am concerned about this evidence," or, "I don't understand this point." I will indicate to counsel where I have concerns, where I need clarifications or explanations and what issues I expect counsel to address.

This does not mean that counsel cannot discuss other points. If they go on with an argument which I think is not leading anywhere, I will tell them. I do that to be helpful and to indicate to counsel where they should be spending their time. I always do that politely and with respect. I have the greatest respect for counsel—especially knowing and coming from this area of the law. We are very privileged as Federal judges to have able counsel before us. These are highly qualified individuals, and whenever I make suggestions, it is always with respect for whatever argument counsel is advancing. But at the end of the day, I do not want to surprise counsel by deciding a point they did not have an opportunity to address because I failed to inform them that I thought that was where the case would or could be heading.

ANTITRUST SOURCE: Justice Gascon, let me turn away now from the Tribunal and ask you a little bit about your activities with international bar organizations and competition organizations. Can you tell us about that?

DENIS GASCON: Yes. I believed, when I was a practitioner, that the international dimension of this area of the law, the competition area, is very important. What we have seen and still see today, especially at the agency level, in terms of harmonization and collaboration at the international level, is a big success story.

And, since I have been appointed as a judge, I have been trying to see how, from an adjudicator's perspective, this international dimension can be developed and replicated, to make it as helpful to judges as it has been for agencies and for practitioners. Up to now, what has happened at the international level, whether it is at the ICN [International Competition Network] or at the OECD [Organization for Economic Co-operation and Development], is really more agency-focused. I think that there is a place for adjudicators like us at the Tribunal, and for competition judges in general. And in fact, I have been involved in two initiatives on that front.

Last October, the OECD asked me to attend a judges' workshop in Asia. The Korea Policy Center of the OECD organized the workshop. This was a training workshop for judges from seven

or eight countries in Asia on how to handle competition cases. This kind of exchanges and learning from the experience and practices of others is exactly what international bodies have done at the agency level. And I think there is room for similar exchanges for adjudicators. I am still at the stage where I am trying to assess what kind of opportunities there could be for adjudicators, especially at the OECD and at the ICN, because I think there is room for that.

As for the second initiative, I was recently at the OECD Competition Law Forum in Paris, which is held every year in early December. There also, I believe there is a role for judges to play and to contribute in a forum like this, but I was struck by the fact that there were very few judges participating in it at this stage. To me, it was as if the adjudicators were the elephant in the room. Everybody was talking about them, but they were not there! Everyone was asking, "How would a court react to this kind of enforcement action? How would courts react to these kinds of cases?" And I was saying to myself, "Well, maybe it would be helpful in this kind of forum to hear, as I do in other areas, from judges as to what works and what does not work before a court or an adjudicative body? What kind of evidence can convince a judge and what kind of evidence does not convince?"

I am trying to assess what kind of opportunities [for exchanges and learning] there could be for adjudicators, especially at the OECD and at the ICN . . .

So this is my involvement so far.

I need to add one caveat. We must always remain mindful of the fact that we, as judges and adjudicators, need to be independent and remain independent from the agencies. And this is where I am trying to find the right way in terms of involvement in the international activities. But, as a judge, you have to be careful about preserving that independence—especially in a model like the one we have in Canada or in your country, where you have the Federal Courts reviewing decisions of the Department of Justice. In this type of model, the independence of the judiciary from the agency is a key feature.

There are things that, in terms of training and experiences, judges can share that would be to the benefit of the judicial system in competition matters in general. At the same time, we have to remain mindful that we are independent from the Competition Bureau and the Commissioner, just as we are independent from the different parties appearing before us.

In the competition area, there are many other enforcement models that differ from ours. The "integrated" model is the most common in competition circles. So when you are talking about the Tribunal and its role in international circles, you have to keep this distinctiveness in mind.

ANTITRUST SOURCE: Thank you very much, Justice Gascon. Is there anything you want to add before we conclude?

DENIS GASCON: Nothing in particular. We could of course go on and on and talk about the Tribunal's experience for another hour, but I think we have covered a number of elements that illustrate the particular features of the Tribunal and of the judicial model that we have in Canada. As Chairperson of the Tribunal or as a Federal Court judge, I am always trying to find ways to improve our processes in order to make the Court or the Tribunal more accessible, while at the same time remaining extremely mindful of the procedural fairness that we, as the judicial members of the Tribunal, need to protect and make sure is respected. ●