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Court File No. CT-2024-006

OTTAWA, ONT.

#45

COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an application by JAMP Pharma Corporation for an order pursuant to section 103.1 granting leave to make an application under section 79 of the *Competition Act*;

BETWEEN:

JAMP PHARMA CORPORATION

Applicant

– and –

JANSSEN INC.

Respondent

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

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I. OVERVIEW

1. JAMP Pharma Corporation's ("**JAMP**") application for leave to apply to the Tribunal under the abuse of dominance provisions of the *Competition Act* (the "**Act**") raises important issues of competition policy and access to justice.

2. To support the adoption of biosimilar drugs, biosimilar drug companies access the same physicians, hospitals, health care professionals, patients and public and private insurers as originator biologic companies. Conduct by an originator biologic drug manufacturer that discourages, impedes, or delays entry of biosimilars, thus excluding competitors, can raise serious issues under section 79 of the Act. Allowing the potential entrant to challenge such conduct before the Competition Tribunal (the “**Tribunal**”) can be an efficient way in appropriate cases to resolve a dispute, facilitate competition and reduce prices for consumers.
3. The Commissioner of Competition (the “**Commissioner**”) is a person served with JAMP’s application for leave pursuant to subsection 103.1(2) of the Act and makes these representations pursuant to subsection 103.1(6).
4. The Commissioner takes no position on the merits of JAMP’s application for leave, and at this stage takes no position on its underlying section 79 claim. The Commissioner’s position is that the test for leave in an abuse of dominance case under the existing subsection 103.1(7) should not be set so high as to bar the adjudication of potentially meritorious claims.
5. The Commissioner submits that in assessing, under subsection 103.1(7), whether Janssen’s conduct “could” be the subject of an order pursuant to section 79, the Tribunal should apply a liberal interpretation that is informed by those recent amendments to the private access and abuse of dominance provisions of the Act that are already in force.
6. The Commissioner also brings to the attention of the Tribunal two public statements on issues related to JAMP’s application that were recently issued by the Competition Bureau (“**Bureau**”). These are identified and summarized below.

II. SUBSECTION 103.1(7) OF THE ACT

A. Legislative Requirements

7. To obtain leave under subsection 103.1(7) of the Act, the applicant must establish reason to believe that: i) the applicant is “directly and substantially affected in the applicant’s business” by a practice; and ii) the alleged practice is referred to in section 75, 77 or 79 and could be subject to an order under one of those sections.

<p>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.</p>	<p>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.</p>
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8. Amendments to subsection 103.1(7) of the Act will come into force on June 20, 2025. The amended subsection 103.1(7) will instead require that an applicant establish reason to believe that i) the applicant is “directly and substantially affected in the **whole or part of the applicant’s business**” by a practice; and ii) the alleged practice is referred to in section 75, 77, 79 or 90.1 and could be subject to an order under one of those sections, **or that it is in the public interest to grant leave.**

<p>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</p>	<p>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</p>
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subject to an order under that section or if it is satisfied that it is in the public interest to do so.	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.
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9. As noted below, other amendments to the private access and abuse of dominance provisions are already in force and should inform the Tribunal's assessment.

B. Benefits of Private Access

10. Private access to the Tribunal complements public enforcement of the Act by the Commissioner. It increases the deterrent effect of the Act by allowing individuals and businesses to take action themselves, if they choose to do so. This may lead to quicker resolution of disputes. Private cases may also clarify the law by contributing additional jurisprudence, giving the Bureau, the business community, and the public a clearer understanding of how the law applies.¹
11. The requirement to obtain leave allows the Tribunal to exercise a gatekeeper function to ensure that its resources are used effectively and to minimize the burden on respondents and the Tribunal from frivolous or vexatious claims. However, an interpretation of the existing subsection 103.1(7) that could serve to bar meritorious claims reduces the benefits of private access.

C. Interpretation of “Substantially Affected in the Applicant’s Business” under current subsection 103.1(7)

12. Once it comes into force, the amended subsection 103.1(7) will broaden the test for leave for private applicants. But in the meantime, the

¹ See e.g. Competition Bureau, *Amending the Competition Act : a discussion paper on meeting the challenges of the global economy* (Ottawa: Government of Canada, April 2000) at 5.

Commissioner submits that the Tribunal should avoid a threshold under the current test that bars meritorious claims.

13. To that end, the current requirement that an applicant demonstrate “reason to believe that the applicant is directly and substantially affected in the applicant’s business” should be interpreted liberally.
14. This case presents the opportunity for the Tribunal to interpret this requirement for the first time in an abuse of dominance case. The Tribunal has never decided an application for leave under subsection 103.1(7) of the Act to make an application under section 79.
15. Although the phrase “substantially affected in his business” is also used in paragraph 75(1)(a) of the Act, its interpretation need not be the same. The two provisions are of different natures: subsection 103.1(7) is a provision that limits standing, while paragraph 75(1)(a) is a substantive element of a reviewable practice. The purpose of the phrase is different in the two sections, and the Tribunal should account for this in its interpretation.² In any case, there may be good reason to interpret the threshold for leave differently in respect of section 79, for which “substantially affected” is not an element of the reviewable conduct.
16. Restricting leave to applicants who can demonstrate substantial effects on their entire businesses would bar potentially meritorious claims.
17. An overly restrictive interpretation of subsection 103.1(7) will have a detrimental impact on both the public and private interests at play under the private access regime. Specific instances of anti-competitive conduct can affect a particular applicant’s business, but may also have larger consequences for the Canadian economy. This broader impact may be of particular significance in cases of abuse of dominance. Litigation

² Paul Erik Veel, “[Private Party Access to the Competition Tribunal: A Critical Evaluation of the Section 103.1 Experiment](#)” (2009) 18:1 Dalhousie JLS at footnote 71.

between private parties can thus also be seen as a part of the overall system to promote competition in Canada.

D. Conduct that “could” be subject to an Order pursuant to section 79

18. The Commissioner submits that in assessing, under subsection 103.1(7), whether Janssen’s conduct “could” be the subject of an order pursuant to section 79, the Tribunal should apply a liberal interpretation that is consistent with the purpose and intent of the recent amendments to the abuse of dominance and private access provisions which are already in force.
19. The 2022³ and 2023⁴ amendments to the Act made significant changes to the abuse of dominance regime:
 - a. section 103.1 was amended to provide for private access in abuse cases with leave of the Tribunal;
 - b. section 78 was amended to expand the definition of an “anti-competitive act,” and to add to the non-exhaustive list of acts which could constitute anti-competitive acts; and
 - c. section 79 was amended to enable the Tribunal to make a prohibition order where the respondent is shown to have engaged in a practice of anti-competitive acts or to have engaged in conduct that results in a likely substantial lessening or prevention of competition.
20. These changes facilitate the ability of an applicant to obtain a prohibition order in an abuse case.

³ Bill C-19, *An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures*, 1st Sess, 44th Parl, 2022 (assented to 23 June 2022) [*Bill C-19*].

⁴ Bill C-56, *An Act to amend the Excise Tax Act and the Competition Act*, 1st Sess, 44th Parl, 2023 (assented to 15 December 2023) [*Bill C-56*].

21. In the Senate debates over Bill C-19, one senator described the purpose of these changes (and others) as follows:

“...As for businesses, they benefit from free and fair competition that allows innovation and drive to flourish. Bill C-19 fosters such an environment by improving access to justice for businesses through the Competition Tribunal for abuse of dominance cases and by expanding the bureau’s powers and the scope of activities subject to review through additional proportionate penalties.

In general, the government’s proposed amendments will enhance the Competition Bureau’s investigative powers, criminalize wage fixing and related agreements, increase maximum fines and administrative monetary penalties, clarify that incomplete price disclosure is a false or misleading representation, **expand the definition of business practices that may constitute abuse of dominance**, allow private access to the Competition Tribunal to remedy an abuse of dominance, and improve the effectiveness of merger notification requirements and other provisions”.⁵

[emphasis added]

22. These provisions have not yet been the subject of any Tribunal jurisprudence. The Commissioner submits that in determining whether leave should be granted, the Tribunal should apply a liberal interpretation of these provisions that is informed by the intent and purpose of these recent amendments.

E. Prior Bureau Investigations

23. For context, the Bureau brings to the attention of the Tribunal its recent public statements about two related investigations concerning

⁵ [“Bill C-19, An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures”](#), 2nd reading, Debates of the Senate, 44-1, Vol 153, No 53 (14 June 2022) at 1643 (Hon Lucie Moncion).

competition between originator biologic and biosimilar pharmaceutical companies.

a. 2019 Inquiry into Janssen's Conduct regarding Remicade (active ingredient "infliximab")

24. In 2019,⁶ the Bureau inquired into whether the alleged conduct of the Respondent, Janssen Inc ("**Janssen**"), was likely to substantially prevent or lessen competition in a market contrary to the abuse of dominance provisions of the Act.
25. The Bureau's analysis considered whether Janssen engaged in anti-competitive conduct that shielded its originator biologic drug, Remicade (active ingredient "infliximab") from competition with biosimilar drug products in Canada like Inflectra and Renflexis.⁷
26. The Bureau concluded that Janssen had engaged in, and continued to engage in conduct that could raise concerns under the Act. However, the Bureau discontinued the inquiry because of insufficient evidence of a substantial lessening or prevention of competition.⁸

b. Investigation into Relabelled Biologic Drugs

27. In 2022,⁹ the Bureau completed a preliminary investigation into the potential anti-competitive harm from relabelled biologic drugs that are identical to the originator biologic drugs but marketed under a secondary brand name.

⁶ Competition Bureau Canada, Position Statement, "[Inquiry into alleged anti-competitive conduct by Janssen](#)" (20 February 2019).

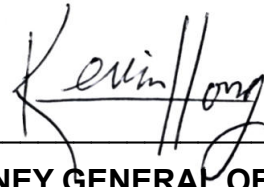
⁷ *Ibid.*

⁸ *Ibid.*

⁹ Competition Bureau Canada, Position Statement, "[Completion of Preliminary Investigation into Relabelled Biologic drugs](#)" (27 June 2022).

28. The Bureau closed its investigation because the drugs in question had not been marketed in Canada. However, the Bureau concluded that relabelled biologic drugs could harm competition by making it less likely that patients will switch away from an originator biologic drug to biosimilars, reducing incentives for pharmaceutical companies to develop and market biosimilars.¹⁰

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of
September, 2024 at Toronto, Ontario.**



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¹⁰ *Ibid.*

ANNEX A – LIST OF AUTHORITIES

Legislation

1. Bill C-19, *An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures*, 1st Sess, 44th Parl, 2022 (assented to 23 June 2022) online: https://www.parl.ca/Content/Bills/441/Government/C-19/C-19_4/C-19_4.PDF.
2. Bill C-56, *An Act to amend the Excise Tax Act and the Competition Act*, 1st Sess, 44th Parl, 2023 (assented to 15 December 2023) online: https://www.parl.ca/Content/Bills/441/Government/C-56/C-56_4/C-56_4.PDF.

Parliamentary Material

3. “Bill C-19, An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures”, 2nd reading, *Debates of the Senate*, 44-1, Vol 153, No 53 (14 June 2022) online: https://sencanada.ca/content/sen/chamber/441/debates/pdf/053db_2022-06-14-e.pdf.

Publications

1. Competition Bureau Canada, *Amending the Competition Act : a discussion paper on meeting the challenges of the global economy* (Ottawa: Competition Bureau Canada, April 2000) online: https://publications.gc.ca/collections/collection_2023/isde-ised/lu54-111-2000-eng.pdf.
2. Competition Bureau Canada, Position Statement, “Inquiry into alleged anti-competitive conduct by Janssen” (20 February 2019) online: <https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/position-statements/inquiry-alleged-anti-competitive-conduct-janssen>.
3. Competition Bureau Canada, Position Statement, “Completion of Preliminary Investigation into Relabelled Biologic drugs” (27 June 2022) online: <https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/position-statements/completion-preliminary-investigation-relabelled-biologic-drugs>.
4. Paul Erik Veel, “Private Party Access to the Competition Tribunal: A Critical Evaluation of the Section 103.1 Experiment” (2009) 18:1 Dalhousie JLS online: <https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1266&context=djls>.

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