

CANADIAN COMPETITION RECORD

CANADIAN COMPETITION LAW AND POLICY DEVELOPMENTS

CANADA'S 2007 AMENDMENTS TO ITS IMMUNITY POLICY – A BRIEF REVIEW

By: Peter Glossop
Osler Hoskin & Harcourt LLP

Canada has had a formal immunity policy for competition law offences since September 2000 (the “2000 Policy”). Under the policy, the Attorney General (now Director of Public Prosecutions or “DPP”) would grant immunity from prosecution to the first person to confess to activity which could contravene the criminal provisions of the *Competition Act*. In return, the applicant was required to provide evidence and assistance to enable the government to investigate and prosecute the offence.¹

Like immunity programs in other jurisdictions, Canada's program has been quite successful in providing an incentive to confess to potential violations (predominantly cartels, which thrive on secrecy and stability). By September 2006, the Bureau had received close to 50 first-in immunity applications on a broad spectrum of products.²

However, the process itself, by its very nature, is not transparent. The 2000 Policy document was very brief. There have been no contested cases which could provide judicial guidance. Since cases which begin as immunity applications typically result in pleas of guilty by other participants in the offence, there is little on the public record which enables observers to understand how the case was handled procedurally.

In the course of administering the policy, the Bureau and practitioners identified certain deficiencies.

Because cartels often operate internationally, immunity cases can involve numerous jurisdictions. It became apparent there were areas where Canadian practice might be harmonized with the principal jurisdictions which have an immunity program. The Bureau released a consultation paper in February 2006 seeking comments on these issues.³ As a result of this process, the Bureau released the following documents in October 2007:⁴

- a revised “Information Bulletin: Immunity Program under the *Competition Act*” (the “2007 Policy”)
- a Policy Backgrounder “Adjustments to the Immunity Program and the Bureau's Response to Consultation Submissions” (the “Adjustments Document”)
- revised “Immunity Program Responses to Frequently Asked Questions” (the “2007 FAQs”)

Subsequently, the Bureau also released templates for a corporate immunity agreement and an individual immunity agreement.

Although only one of the three October 2007 documents is actually styled as the “immunity program”, it is absolutely necessary to understand both the Adjustments Document and the 2007 FAQs in order to appreciate the full extent of the revised program.

Overall, the October 2007 documents are commendable. The Bureau not only consulted broadly, but also seriously took the consultations into account, and

CANADIAN COMPETITION RECORD

in some cases changed the prior policy as a result. The Adjustments Document in particular is quite remarkable in its open and honest assessment of reasons for changing the 2000 Policy. On balance, many of the troubling issues which had arisen in practice under the 2000 Policy have been addressed. The overall effect of the changes is to encourage immunity applicants to come forward and to broaden the potential universe of successful applicants.

The 2007 Policy and the accompanying documentation could be assessed against any number of different frameworks. The framework I will adopt here describes the major changes in the 2007 Policy in the context of four basic questions facing an immunity applicant:

- is the applicant eligible for immunity?
- if the applicant is not eligible for immunity, is lenient treatment available?
- is there a risk of other or additional penalties in some situations?
- what is the process involved in obtaining and managing a grant of immunity?

Eligibility for Immunity

Instigator vs Coercer

The 2000 Policy stated that the applicant could not have been the instigator or the leader of the illegal activity. The 2007 Policy now states that the applicant must not have coerced others to be a party to the illegal activity. This is a tougher standard. In the Adjustments Document, the Bureau noted that all stakeholders that addressed the issue considered the coercion test to be more appropriate. In accepting this suggestion, the Bureau said that as a general rule, it prefers a more inclusive program making it more

likely applicants will come forward. In its view, the coercion test “provides a clearer standard and increased predictability for potential immunity applicants”.⁵ The Bureau noted that it was difficult to determine in what circumstances the instigator test could apply because leadership might shift over time. Essentially, an instigator should not be denied the benefit of being able to apply for immunity.

Sole Beneficiary vs Single Firm

The former policy disentitled the sole beneficiary of the activity in Canada from applying for immunity. The Bureau states that it has “narrowed” this criterion, so that if an applicant is the only party involved in the potential offence, e.g. price maintenance or misleading advertising, it is ineligible for immunity. However, the Bureau indicates that directors, officers and employees (“DOEs”) of an entity which may have committed such an offence may be eligible for individual immunity. Again, the Adjustments Document points out that there is a public interest benefit in uncovering a situation where there may have been only one beneficiary to the conduct in Canada,⁶ and where other single firm conduct such as price maintenance might otherwise go unreported if no one is entitled to apply for immunity.

Disclosure of Offences

Under the prior policy, it was unclear whether an applicant was required to disclose any and all criminal offences that it may have committed in order to obtain immunity under the *Competition Act*. In practice, the Bureau did not require such general disclosure. The 2007 Policy and 2007 FAQs make it clear that applicants must “disclose all competition offences under the Act of which they are aware and that relate to any product”⁷ The 2007 FAQs also point out that applicants “will be expected to exercise reasonable due diligence in determining whether they have been

CANADIAN COMPETITION RECORD

involved in other criminal competition offences”.⁸ Strictly speaking, matters which are reviewable as civil practices under the Act apparently need not be disclosed.⁹ Similarly, violations of provincial consumer protection laws and foreign competition laws apparently need not be disclosed. Although the disclosure for immunity purposes can be limited to criminal provisions of the Act, the FAQs point out “witnesses will be asked about any criminal activity, under any legislation, that can reasonably be expected to impact their credibility as a witness”.¹⁰

Termination of Conduct

Both the former and revised policies require that the applicant have terminated its participation in the illegal activity. The 2007 FAQs helpfully point out, however, that termination in itself may tip off other participants that the applicant has approached the Bureau (thus potentially compromising the Bureau’s investigation of an ongoing criminal offence). Similarly, securing co-operation of DOEs may also alert other participants. The Bureau simply states that applicants should raise this concern with the Bureau.¹¹

Directors, Officers and Employees

The 2007 Policy more clearly articulates the Bureau’s approach to treating current DOEs differently from former DOEs. Normally, current DOEs who co-operate with a corporation’s immunity application effectively may take the benefit of the corporate grant of immunity. Any DOEs who do not co-operate, or who may have impeded the investigation by way of obstruction or perjury, can be “carved out” of an immunity agreement. The 2007 Policy provides a high degree of comfort to current DOEs that so long as they co-operate, they will not be carved out. However, former DOEs do not enjoy the same degree of comfort.¹² Although the Bureau sought input on this issue in its consultations, and most stakeholders indicated that former DOEs

should be eligible for corporate immunity, the Bureau decided that it will continue with a case by case approach to former DOEs. The Bureau attributes this to “many unknown factors, including involvement of such individuals in the same or other cartels while with another business organization”¹³ There is definitely potential for a conflict of this type, where a former DOE is currently employed with a competitor which has not received immunity. As well, it is generally the case that a corporation does not have the same type of leverage over former DOEs as it does with current DOEs to secure their co-operation in the investigation.

Lenient Treatment

Formal Leniency Program

The Adjustments Document proposes the creation of a formal leniency program.¹⁴ This is an overdue and eagerly anticipated development. Currently, there are no formal and transparent guidelines which enable a party which does not qualify for immunity to understand the potential entitlement to, and benefits of, lenient treatment. Although persons that either fail to be the first to disclose an offence, or that fail to meet the Bureau’s criteria for immunity will likely be found guilty, they may qualify for a reduced fine or prison time. The problem at the moment is that the scope of lenient treatment is difficult to predict. In addition, a formal leniency program will encourage parties to come forward and co-operate whereas they may now be reticent to do so. This will enable the Bureau to obtain evidence more quickly.¹⁵

However, the task of developing a formal leniency program is not as simple as devising a grid setting out percentage fine reductions depending on whether the applicant is second-in, third-in and so on. The facts could involve, for example:

- a two-party conspiracy

CANADIAN COMPETITION RECORD

- the second-in applicant providing more valuable information than the first-in
- various delays in the subsequent applicants approaching the Bureau
- the significance of the roles of the various applicants
- an “immunity plus” situation.¹⁶

It will be interesting to see how the formal leniency program deals with these and other situations.

Pro-Active Immunity

In its consultations, the Bureau sought comments on the concept of “pro-active immunity”. The Bureau defines this as targeting potential immunity applicants outside of the normal course of enforcement and investigation activities. The Bureau states that it does not engage in pro-active immunity “in effect to select an optimal candidate”.¹⁷ Instead, experience indicates that the process indeed is driven by the first-in principle. The Adjustments Document notes that the Bureau “does, however, inform actual and potential targets, at appropriate junctures in the course of an investigation, about the Program. The Bureau does not otherwise actively solicit preferred potential immunity applicants”.¹⁸ In the context of an investigation in which there has not yet been an immunity applicant, the Bureau may be anxious to solidify its analysis with the assistance of an applicant. Experience suggests that the Bureau may encourage applicants to come forward for this purpose.

Risk of Additional Penalties

“Penalty Plus”

“Penalty Plus” is an element of the United States immunity program in which an applicant’s failure to disclose all antitrust offences will subject the applicant

to harsher penalties for the undisclosed offences on which it is subsequently charged. However, the failure to disclose the other conduct will not necessarily result in a loss of immunity.

The Bureau sought comments on whether it should adopt a similar approach in Canada. The Bureau announced that it does not plan to do so, and will continue to apply its current policy, under which the Bureau will recommend the revocation of an applicant’s immunity if there has been intentional non-disclosure, and will recommend as well increased penalties in respect of non-disclosed offences.¹⁹ In principle, the Bureau’s approach is at least as severe as that in the U.S., since the applicant is subjected to the risk of revocation in addition to harsher penalties for the non-disclosed offences.

Revocation

The former policy did not provide stakeholders with any guidance on the Bureau’s approach to revocation of immunity. The Adjustments Document notes that the government has never withdrawn corporate immunity (at least prior to the 2007 Policy) and “has withdrawn individual immunity only twice and following repeated and unsuccessful attempts by the Bureau to gain the co-operation owed under the Program by the parties”.²⁰

The revised policy states that the approach on breach of immunity will be governed by the Federal Prosecution Service Deskbook.²¹ Although the Adjustments Document notes that “revocation should be limited to situations where an applicant deliberately and clearly fails to co-operate or gives false information in an intentional and serious manner”,²² it is not completely clear that the Bureau’s policy on this matter will be construed this narrowly. The 2007 Policy itself states that “the DPP may revoke a party’s immunity, and take appropriate action against the party, if that party fails to comply with any of the terms and conditions under

CANADIAN COMPETITION RECORD

its immunity agreement”²³ (emphasis added). Given the rare instances of revocation to date, it is hoped that the type of criteria articulated in the Adjustments Document will govern the assessment of whether revocation is warranted.

The revised policy permits an immunity applicant which is potentially in default of its obligations to remedy the problem. The 2007 Policy provides that the DPP will provide 14 days’ written notice before revoking an immunity agreement. The Adjustments Document notes also any revocation will only affect the parties that do not co-operate or otherwise fail to comply with the requirements of the program, so that if a corporation’s immunity is revoked, its co-operating employees will remain covered.²⁴

Restitution

The 2000 Policy required an immunity applicant to provide restitution as a condition of immunity. In practice, this requirement was not insisted upon. The 2007 Policy removes this requirement. The Adjustments Document states that “civil actions are the best means for victims of anti-competitive activity to seek recourse for damage caused to them by such activity”.²⁵

The Immunity Process

Applying for Immunity

The revised policy restates and confirms much of the existing practice of the immunity application process. This practice evolved over the years since the 2000 Policy was announced, but it was not always transparent to those who had not been actual participants in the process.

The revised policy confirms that the initial contact by the immunity applicant with the Bureau consists of a request for a “marker” to signify that the applicant is

first in line. The applicant then must provide the Bureau with evidence, known as a “proffer”. The applicant may submit the proffer orally. The 2007 FAQs usefully set out a detailed list of the type of information that should be provided at the proffer stage.

In the Adjustments Document, the Bureau makes it clear that “the only documents that need be produced to the Bureau are existing documents that provide evidence of the offence in question; the Bureau will not, in the normal course of any investigation, require any documents to be created by an applicant”²⁶ The reason for this is that “written proffers may increase an applicant’s litigation exposure and thereby act as a disincentive to participation in the Program”²⁷ The paperless process evolved as a result of civil claimants in the United States who sought access to, and in some cases obtained the written proffers that had been submitted by applicants. The formal recognition and continuation of the paperless process is welcomed.

Under the prior policy, applicants were required to complete their proffer within 30 days after obtaining a marker. This period of time was widely criticized by practitioners as inadequate. Unfortunately, this requirement has been continued in the 2007 FAQs. The Bureau does acknowledge that a delay may be warranted in complex cases involving multiple jurisdictions, and difficult information gathering situations (mere commitments to other jurisdictions are insufficient reasons for delay).²⁸

The 2007 FAQs also address the troubling issue of whether and to what extent the applicant must show that cartel conduct has “unduly” lessened competition: “applicants are required to address the issue but are not required to demonstrate decisively to the Bureau that an undue lessening of competition has occurred”.²⁹ Experience suggests that the “unduly issue” can become a major focus of a particular case.

CANADIAN COMPETITION RECORD

The applicant simply may not have the information available to address the problem, and yet the Bureau must assess the issue in order to determine whether an offence has been committed. The Bureau may have to resort to other investigative techniques to address the information gap.

Confidentiality

Under the prior policy, an applicant's identity and the information that it provided was expected to be kept confidential under section 29 of the Act. The precise circumstances in which confidentiality might not be accorded to an applicant in an immunity application were not clearly defined. The revised policy makes it clear the Bureau will not share information provided by an applicant with other competition authorities without an express waiver. The revised policy sets out six particular exceptions to the general rule on confidentiality.³⁰

In the past, there had been some confusion over whether disclosure by a party which may have been mandated by securities laws was appropriate; the exception which now provides for disclosure as required by law should cover off this question. In the spirit of full co-operation, it would be beneficial for both the immunity applicant and the Bureau to indicate to each other in advance to the maximum extent possible consistent with respective legal obligations, whether and to what extent they intend to disclose information concerning the immunity application. For example, if an applicant intends to issue a press release concerning a grant of immunity, this should be carefully co-ordinated with the Bureau so as not to potentially disrupt the ongoing investigation. Similarly, if the Bureau intends to obtain and execute search and seizure orders based on information from an immunity applicant, that development should at least be communicated to the applicant's counsel on a confidential basis.

Grant of Immunity

The former policy contemplated the issuance of (1) a marker, (2) a provisional guarantee of immunity ("PGI"), and then (3) a final guarantee of immunity. The revised policy eliminates the PGI and instead contemplates a marker and single "final" agreement.³¹ This change is consistent with practice; the Attorney General did not issue a final guarantee of immunity after having issued a PGI. The Adjustments Document explains that the new approach will reduce uncertainty for an immunity applicant, and allow for greater convergence of the immunity process between Canada and other jurisdictions.³² A single immunity grant is consistent with the outcome of the consultation process.

Although the process has been streamlined, in that one step has been eliminated, the revised policy does not mean that applicants will obtain immunity sooner than before. The 2007 Policy does not provide applicants with any notion of the length of time that may be required in order for the DPP to issue a grant of immunity. Applications for immunity may take a considerable period of time to be resolved.

Form of Immunity Agreement

The Bureau has published proposed templates which set out the terms and conditions of an immunity agreement between a corporation and the DPP, and an individual and the DPP.³³

Under the prior policy, the starting point was often the sample forms contained in the Federal Prosecution Service Deskbook. However certain aspects of the forms typically were negotiated by applicant's counsel to enhance protection of the applicant and to clarify the arrangement for both sides. In part, this was necessary because the prior policy was not as clear as the revised policy regarding several issues such as the

CANADIAN COMPETITION RECORD

scope of confidentiality. It remains to be seen whether the new templates will be flexibly implemented or whether they are intended to be rigidly adhered to. While many of the provisions in the templates are not controversial, and reflect the content of the revised policy, there may well be a need for negotiation of certain provisions in a particular case. Surprisingly, the definition of “anti-competitive conduct” in the templates contemplates that the applicant admits to having committed the offence in question. This is surely going too far, in that it is a matter for the DPP to determine rather than the applicant to presume. Indeed, as discussed above, an applicant may not have the knowledge to definitively assert that particular conduct unduly lessened competition and thereby violated the provisions of the Act.

Conclusion

Overall, the 2007 Policy is a welcome and meaningful advance over the 2000 Policy. The 2007 Policy is more inclusive and clearer. The addition of a formal leniency program should further enhance the appeal of the revised policy.

Notes

¹ Competition Bureau, Information Bulletin: Immunity Program under the *Competition Act*, 2000, and “Responses to Frequently Asked Questions” first published in 2003 and expanded in 2005. Available online at www.competitionbureau.gc.ca. The 2000 Policy is described in *Leniency Regimes – Jurisdictional Comparisons* (2nd ed., eds K. Arquit, J. Buchart, O. Antoine), Canada Chapter by P. Glossop and G. Reynolds.

² Denyse MacKenzie, “The Bureau’s Immunity Program – Fine Tuning or Overhaul” Canadian Bar Association Competition Law Section Annual Conference, September 28-29, 2006.

³ Competition Bureau Immunity Program Review – Consultation Paper, available at www.competitionbureau.gc.ca

⁴ Available online at www.competitionbureau.gc.ca

⁵ Adjustments Document, section 2.

⁶ *Ibid.* For example, in a worldwide market division cartel, the participants may have allocated Canada to one firm.

⁷ 2007 FAQs, para. 37.

⁸ *Ibid.*

⁹ As a matter of co-operation and credibility, it might be advisable to disclose such conduct to the Bureau in any event if it bears some relationship to the offence in question.

¹⁰ 2007 FAQs, para. 37.

¹¹ *Ibid.* paras. 33 and 34.

¹² 2007 Policy, para. 20.

¹³ Adjustments Document, section 7.

¹⁴ *Ibid.* section 11.

¹⁵ *Ibid.*

¹⁶ Under “Immunity Plus”, the DPP may grant immunity for Product 2 to an applicant which is not first-in on Product 1, if the applicant is the first to disclose evidence of an offence on Product 2. The applicant will have to plead guilty to the offence on Product 1 but will obtain a reduction in the recommended sentence. See 2007 FAQs, para. 38.

¹⁷ Adjustments Document, section 9.

¹⁸ *Ibid.*

¹⁹ *Ibid.* section 5.

²⁰ *Ibid.* section 6.

²¹ 2007 Policy, para. 27.

²² Adjustments Document, section 6.

²³ 2007 Policy, para. 27.

²⁴ Adjustments Document, section 6.

²⁵ *Ibid.* section 4.

²⁶ *Ibid.* section 8.

²⁷ *Ibid.*

²⁸ 2007 FAQs, para. 18.

²⁹ *Ibid.* para. 20.

³⁰ 2007 Policy, para. 31.

³¹ *Ibid.* Part E.

³² Adjustments Document, section 1.

³³ Available online at www.competitionbureau.gc.ca

COMPETITION BUREAU AND THE CANADIAN BAR ASSOCIATION SECTION OF COMPETITION LAW ADOPT COLLABORATION PROTOCOLS

By: Melanie L. Aitken, Competition Bureau*
Barry Zalmanowitz, Q.C., Fraser Milner
Casgrain LLP*

In an October 11, 2007 press release¹ the Competition Bureau announced that it and the Canadian Bar Association’s National Competition Law Section (the “Section”) had endorsed a protocol to promote more effective communication in the advancement

CANADIAN COMPETITION RECORD

of competition policy and practices. In the press release, the Commissioner of Competition, Sheridan Scott, said, "A better understanding of each other's perspectives will allow us to advance our shared interest in the sound development of competition policy and practice. Indeed, we have already pursued initiatives to our joint advantage."

The protocol for collaboration is set out in the "Final Report of the Task Force on Collaboration Between the Competition Bureau and the Canadian Bar Association's National Competition Law Section, July 13, 2007"²

It might seem surprising that an understanding between the Section and the Competition Bureau to improve their working relationship would be the subject of a task force report and that the adoption of such a report would justify a press release by the Commissioner. In fact, the impact that improved collaboration may have on the development of competition policy and enforcement practices could be very significant. While still early days, both the Section and the Bureau are encouraged, in light of the optimism with which members of both the private bar and the Bureau have embraced the initiative, and the several substantive interactions that have taken place under the auspices of this new framework and understanding. This article explores the background to the work culminating in the Task Force's Report, and elaborates on its potential significance.

Background

The Section was created in 1991 and, from its inception, had a good working relationship with the Bureau. Indeed, two former Bureau heads, Lawson Hunter and Cal Goldman, were Section chairs in the early years, and the Commissioner of Competition has held the title of Honorary Section Chair. The Section's Fall Conference is the largest meeting of Canadian

competition lawyers, economists, and representatives of the Competition Bureau. The Commissioner and Bureau representatives have always played a key role in organizing and speaking at the conference and meet regularly with the Section Executive. Most recently, the Bureau has been a supporter of the Section's efforts to establish an additional mid-year gathering of the leading participants in the practice area; this event has already become a fixture in the Canadian antitrust calendar.

By the fall of 2006 it had become apparent to the Bureau and the Section Executive that what may have been a more productive relationship in the past had deteriorated. This was particularly evident when contrasted to the relationship between the enforcement agencies and the American Bar Association Section of Antitrust Law ("ABA Section"), which has developed, over time and with considerable dedication from the ABA Section and the Agencies, into an enormously productive vehicle for regular exchange on a wide range of practice and policy issues.

Inspired by what was observed south of the border, the Bureau researched and prepared a proposal to take to the CBA Executive. To the Section's credit, they immediately committed to join the Bureau in striking a Joint Task Force on Collaboration to explore more fully the prospects for a brighter future in relations between the two constituencies.

Work of the Task Force

In early 2007, a Task Force consisting of senior Section and Bureau representatives, with the assistance of Don Klawiter, past chair of the ABA Section, met and constructively analyzed the problem over a number of months. As a group, the Task Force frankly acknowledged certain hurdles that would have to be overcome, and recognized certain limitations, some of which are exacerbated by differences between the

CANADIAN COMPETITION RECORD

organizations of the respective U.S. and Canadian antitrust communities. While identifying risks, such as potential criticism of a too-close collaboration between a government enforcement agency and an organization that represents an independent legal profession, it was felt that these considerations were manageable, posing more of a communication and education challenge than anything more daunting. On balance, the Task Force unanimously concluded that taking modest steps to usher in a new era in Section/Bureau relations, to move away from what had become a somewhat negative and unproductive environment, held enormous promise for the Canadian antitrust community in the development of sound, principled policy and practices.

To that end, the Task Force recommended certain protocols to facilitate a frank exchange of views on topics not then subject to enforcement or investigation; in other words, an open dialogue on pure principle and policy development. For example, it was proposed that comments and debate occurring in Bureau/Section task forces or working groups (as opposed to exchanges in public forums) be “not for attribution”. Further, where confidentiality is requested in such settings it would be honoured and individuals on both sides would strive to offer their informed opinions on relevant matters without engaging in partisan advocacy for a particular position, and without fear of being quoted (or misquoted) outside.

In sum, the Task Force concluded that greater and more effective collaboration was both desirable and achievable. In addition to such general guiding principles as those noted above, the Task Force recommended a number of specific mechanisms, including:

1. Bureau members to participate in the formal governance structure of the CBA as Committee Chairs or Vice-Chairs;
2. The Section or the Bureau could establish joint task forces to address certain general policy and practice issues deserving of joint attention, input and consultation;
3. For more modest undertakings, the Commissioner could establish *ad hoc* working groups or convene informal meetings to draw upon the knowledge and expertise of Section members, providing a broader set of perspectives to the Commissioner in her policy development role; the Task Force proposed several initial topics for discussion; and
4. There would be regular meetings between key Bureau Committees and the Section, to share information with the bar (and to receive input, as appropriate), about priority policy developments and issues under study, as well as to enhance the Section’s access to the work of international antitrust policy organizations such as the OECD, and the ICN in particular.

Implementation of the Task Force Report

Since the announcement, several recommendations of the Task Force Report have been implemented. Bureau members serve as Vice-Chairs on many Section committees; this is a model, borrowed from the ABA Section, that marks a major departure from past practice, and one that the Bureau recognizes as a meaningful first step holding the promise over time of a move away from the polarization of recent years. Further, joint task forces have been struck and informal consultations convened on, among other topics, the following:

- Issues in Hostile Mergers
- Interpretation Guidelines on Merger Notification Issues

CANADIAN COMPETITION RECORD

- The Bureau's draft Compliance Bulletin
- Section member participation in Bureau training and education
- Several small group sessions to discuss particular challenges, including a summer 2007 meeting to discuss particular challenges associated with production orders
- A joint meeting of the Bureau's Enforcement Policy Committee and Section representatives was held in November 2007, which resulted in several initiatives, including the opportunity to comment on a bulletin that is in progress addressing sections 15 and 16 of the Act which deal with search warrants and searching data in computer systems.

The Promise of Collaboration

As noted above, there are risks associated with greater collaboration. The Bureau must always question whether on a particular issue it is appropriate to communicate freely with persons outside of the Bureau. In turn, the Section must be vigilant to ensure that a close relationship does not inhibit independent criticism or at least be seen by members of the public as doing so.

However, both the Section and the Bureau are sensitive to these concerns, and are persuaded that enhanced collaboration, particularly through mechanisms allowing for a more continuous and open dialogue, will ultimately result in the development and application of more effective competition law and policy for Canada.

The particular reality of competition law and policy in Canada is that relatively few cases are brought before the courts or the Competition Tribunal, and Bureau

policies, guidelines and bulletins play an important role in shaping Canadian competition policy and have a significant impact on the Canadian economy and yet are not often tested. The regular and more constructive interface recommended by the Task Force may allow the Section and the Bureau to engage in earlier consultations on emerging policy issues or ones ripe for re-examination, rather than having the initial exchange of views take place in formal position papers, or in actual cases, at which stage views can have become entrenched.

Further, while more economic study and ex post examination exercises are being undertaken by the Bureau and academics, it is important that the Bureau has access to the frank views of knowledgeable outsiders and continues to engage in a process of examining its policies and processes to ensure that enforcement efforts are appropriate and effective. Bureau enforcement practices and policy guidelines must promote the important economic objectives of Canadian competition policy, be clear, and respond to developments in antitrust economics and changes in the Canadian economy. The Bureau and the Section share a belief in the importance of competition policy, and recognize the value of competition as a key component in sound economic policy. Collaboration serves the public interest in promoting those goals and, as such, will benefit Canadians.

It is still expected that the Bureau will engage in broad public consultations when it comes to issuing major policy documents and that informal collaboration will not displace public consultation. However, where broad public consultation is not warranted, both the Bureau and the public at large will benefit from the knowledge and the experience of Section members on an informal basis. The Section also will benefit from the experience and knowledge of Bureau representatives on its committees and task forces, particularly where

CANADIAN COMPETITION RECORD

the Section is involved in submissions on legislative reform to parliamentary committees or government agencies other than the Bureau.

Conclusion

While the implementation of the recommendations of the Task Force is in its early stages there is reason to be optimistic. Both the Section and the Bureau will monitor its implementation to make sure that the objectives are pursued and the risks are managed.

Notes

* Melanie L. Aitken, Senior Deputy Commissioner of Competition, Mergers, Competition Bureau, Gatineau, Quebec and Barry Zalmanowitz, Q.C., Fraser Milner Casgrain LLP, Edmonton, Alberta and Chair, Canadian Bar Association National Competition Law Section.

¹ <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02491e.html>

² http://www.cba.org/CBA/sections_Competition/main/Submissions.aspx

CANADIAN COMPETITION RECORD

INFORMATION NOTICES AND NEWS RELEASES ISSUED BY THE COMPETITION BUREAU DURING THE PERIOD JUNE 1, 2007 TO FEBRUARY 29, 2008

The following Information Notices and News Releases are available on the Bureau's website at <http://www.competitionbureau.gc.ca/internet/index.cfm>

June 5, 2007

INFORMATION: Commissioner of Competition Appoints Special Economic Advisor

June 11, 2007

NEWS RELEASE: Quebec Telemarketers Charged for Operating Business-to-Business Directory Scam

June 12, 2007

NEWS RELEASE: Montreal-based Scam Allegedly Bilks Organizations of \$10-Million

July 5, 2007

NEWS RELEASE: Competition Bureau Completes Measures to Increase Competition in Grain Handling Industry

July 6, 2007

INFORMATION: Competition Tribunal to Hear Case in Halifax

July 19, 2007

NEWS RELEASE: Du Pont Performance Elastomers Fined \$4 Million for its Role in an International Price Fixing Agreement

July 24, 2007

NEWS RELEASE: Competition Bureau Will Not Contest Abitibi-Consolidated Inc. and Bowater Incorporated Merger

July 31, 2007

NEWS RELEASE: Competition Bureau Reaches Further Agreements with Six Cigarette Companies to Stop Using "Light" and "Mild" on Cigarette Packages

August 1, 2007

NEWS RELEASE: UV Protective Clothing: Educate Yourself Before Buying

August 1, 2007

NEWS RELEASE: Guidance on the Labelling of Textiles for Businesses

August 9, 2007

INFORMATION: Independent Report on Dynamic Efficiencies in Mergers Published

August 14, 2007

NEWS RELEASE: Canadian-Australian Agencies Strengthen Cooperation

CANADIAN COMPETITION RECORD

August 20, 2007

NEWS RELEASE: Reinforcing International Cooperation to Combat Cartels

August 20, 2007

NEWS RELEASE: Toner and Ink-Jet Telemarketing Operation Fined Over \$800,000

September 5, 2007

NEWS RELEASE: Competition Bureau Investigation Results in Jail Sentence for Deceptive Telemarketer

September 19, 2007

NEWS RELEASE: Japanese Company Pleads Guilty to Price Fixing

September 21, 2007

NEWS RELEASE: Competition Bureau Clears Teachers-BCE Transaction

September 21, 2007

NEWS RELEASE: Competition Bureau Wins Award

September 28, 2007

INFORMATION: Who Can You Trust Online? Competition Bureau Collaborates on International Internet Sweep

October 2, 2007

NEWS RELEASE: Competition Bureau and Toronto Strategic Partnership Move Quickly to Shut Down Bogus Directories Scam

October 4, 2007

INFORMATION: Competition Bureau Publishes Post-Merger Review Study

October 9, 2007

INFORMATION: Competition Bureau Seeks Comments on Predatory Pricing Enforcement Guidelines

October 10, 2007

INFORMATION: Competition Bureau Publishes Bulletin on Immunity

October 10, 2007

INFORMATION: Competition Bureau Publishes Revised Bulletin on Confidentiality

October 11, 2007

INFORMATION: Competition Bureau Announces Collaboration Accord with Canadian Bar Association

October 15, 2007

NEWS RELEASE: Competition Bureau Welcomes Greater Competition in Dental Hygiene Services

CANADIAN COMPETITION RECORD

October 29, 2007

NEWS RELEASE: Canadians Could be Paying Less for Generic Drugs, Competition Bureau Study Finds

October 30, 2007

NEWS RELEASE: Bayer Group Fined \$3.645 Million for its Role in Three International Cartels

November 9, 2007

INFORMATION: Competition Bureau Wins Award

November 9, 2007

NEWS RELEASE: SEC Carbon Pleads Guilty to Conspiracy

November 16, 2007

NEWS RELEASE: Lululemon VitaSea Clothing

November 16, 2007

NEWS RELEASE: Competition Bureau Clears Schering-Plough's Acquisition of Organon BioSciences

November 27, 2007

NEWS RELEASE: Premier Fitness Undisclosed Fees Investigation Successfully Concluded

November 28, 2007

NEWS RELEASE: Competition Bureau Applauds Nova Scotia Move to Permit Greater Competition in Dental Hygiene

December 6, 2007

NEWS RELEASE: Competition Bureau Calling on Prepaid Phone Card Providers to Disclose More Information

December 11, 2007

NEWS RELEASE: Consumers and Economy Would Benefit from Reduction in Regulation in Professions, a Competition Bureau Study Finds

December 14, 2007

NEWS RELEASE: Competition Bureau Resolves Concerns in Paint Merger

December 20, 2007

NEWS RELEASE: Competition Bureau Reaches Agreement with Canada Pipe Company Ltd.

January 15, 2008

INFORMATION: Cross-Border Enforcement Action Helping Businesses and Consumers

February 11, 2008

NEWS RELEASE: Competition Bureau Wins Court Order Against Chimney Products Company

CANADIAN COMPETITION RECORD

February 19, 2008

NEWS RELEASE: Competition Bureau Clears Thomson Acquisition of Reuters

February 21, 2008

NEWS RELEASE: Competition Bureau and Toronto Strategic Partnership Investigation Leads to Arrests in Secret Shopper Scam
