THE CANADIAN CHAMBER OF COMMERCE
LA CHAMBRE DE COMMERCE DU CANADA

Submission to the Competition Bureau

Re: Information Bulletin on the Communication and Treatment of Information under the Competition Act

December 2, 2005

The Voice of Canadian Business ™
Le porte-parole des entreprises canadiennes MD

SUBMISSION CONCERNING THE DRAFT INFORMATION BULLETIN ON THE COMMUNICATION AND TREATMENT OF INFORMATION UNDER THE COMPETITION ACT

I. INTRODUCTION

The Canadian Chamber of Commerce (the "Canadian Chamber") welcomes the opportunity to provide comments on the draft *Information Bulletin on the Communication and Treatment of Information under the Competition Act* (the "Draft Bulletin"). The Canadian Chamber is Canada's largest and most representative business association, with membership in excess of 170,000 businesses, represented through a network of hundreds of chambers of commerce across the country. The Canadian Chamber appreciates the initiative shown by the Commissioner of Competition and the Competition Bureau (collectively, the "Bureau") in soliciting public comment on legislative and enforcement issues concerning the *Competition Act* (the "Act") and believes the process to be of great benefit to its members, who are important stakeholders.

II. GENERAL COMMENTS

The Canadian Chamber believes that parties consulting the Draft Bulletin for guidance should receive clear assurance from the Bureau that the protection of confidential information is the *rule*, with communication of such information the *exception,* as clearly stated in the May 1995 *Information Bulletin on the Communication of Confidential Information under the Competition Act* (the "1995 Bulletin").[1] The Canadian Chamber further believes that such a statement ought to be prominently included in Section 2.

The importance of the Draft Bulletin communicating, as its principal message, that confidential information provided voluntarily will be held in the strictest of confidence, subject only to a limited range of statutory exceptions, cannot be overemphasized. The Bureau has many times acknowledged that the life-blood of its work is provided through its having access to confidential information which is voluntarily supplied to it and that, without such information, it would be in serious difficulty in carrying out its statutory mandate. Any suggestion that such information (much of which, in the case of information supplied to the Bureau, is highly competitively sensitive) could fall into the wrong hands or be used for purposes other than those for which it was provided could lead private parties to decline to provide such information voluntarily. In light of this, it is surprising that in the Draft Bulletin the emphasis appears to be largely placed on the circumstances when the Bureau can or may disclose such information to third parties (including for other purposes than that for which it was provided), rather than providing a much more positive assurance that such information will ordinarily be fully protected

[1] The 1995 Bulletin stated that the Bureau's policy was "one of minimizing the extent to which confidential information is communicated. Although the Director may be legally empowered to communicate information in a specific instance, he does not necessarily do so. Communication of confidential information is *not* the rule; it is the exception".

from such disclosure, except as otherwise specifically provided by express exceptions contained in the legislation.

As a general observation, the application of the exceptions contained in section 29 of the Act should be carefully circumscribed. Parliament's intent was <u>not</u> to provide the Bureau with unlimited discretion to interpret the "Canadian law enforcement agency" and "administration or enforcement" exceptions. This is indicated by the deliberate and specific references to "this Act" made throughout the section, which make clear that the exceptions are not open-ended. The Canadian Chamber, therefore, urges that the Bureau be cautious in its interpretation of the scope of the exceptions.

III. SPECIFIC COMMENTS

(a) Section 3 – Applicable Legislation

Though the Draft Bulletin suggests that section 29 is the "key" provision protecting information, there are, in fact, *two* sources in the Act for the obligation of non-disclosure – section 29 *and* subsection 10(3). The latter provision states that all inquiries under section 10 are to be conducted in private. The protection provided by subsection 10(3) arguably captures information provided to the Bureau either voluntarily or through the operation of the evidence gathering powers contained in the Act. In addition, the grant of privacy in that provision is unqualified. Though the Draft Bulletin makes reference to the provision in a footnote, the protection granted by subsection 10(3) (and its relationship to section 29) should be recognized by the Bureau in a more substantive manner.

The Draft Bulletin states that the Bureau may "comment on an inquiry or examination if it has become public through another source or to comment on *misinformation that may relate to public markets or the Bureau's enforcement policies*" (emphasis added). There is little question that law enforcement decisions often have an impact on an affected firm or firm's share price.[2] Timely disclosure of the progress of an inquiry, whether in the merger context or otherwise, may well avoid actual or perceived unfairness in market activity, provided such disclosure complies with the requirements of sections 10 and 29. Correcting "misinformation" relating to public markets, however, is a separate and unrelated concern, and is arguably inconsistent with the requirement that the exception to the general policy of non-disclosure be made for the purposes of the Act and not for other types of legislation, such as securities laws. The Canadian Chamber suggests that this reference ought to be deleted.

(b) Section 4 – Policy and Practice

(i) To Canadian Law Enforcement Agencies

Section 29 permits the Bureau to communicate information otherwise subject to confidentiality to a "Canadian law enforcement agency". The Draft Bulletin broadly states that the term "Canadian law enforcement agency" includes all agencies or persons

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[2] See e.g. W.F. Grimes, "Transparency in Federal Antitrust Enforcement" (2003) 51 Buffalo L.R. 937.

"mandated to enforce laws in Canada." The Act, of course, does not define the term "Canadian law enforcement agency". Nonetheless, it cannot be the case that *any* agency or person with a mandate "to enforce laws in Canada" could reasonably qualify for an exception to the general obligation of non-disclosure. The Draft Bulletin implicitly suggests, for example, that an employment standards officer conducting an investigation under provincial employment standards legislation could request and receive information from the Bureau which would otherwise be subject to section 29.

The literal scope of the exception for permitted disclosures to Canadian law enforcement agencies is unfortunately open-ended and would, at least technically, permit the disclosure by the Bureau of confidential information which is voluntarily provided to it for one purpose (e.g., in connection with its review of a pending merger) to a wholly unconnected third-party law enforcement agency for a completely unrelated purpose in circumstances where no useful purpose would be served in terms of the administration or enforcement of the Act. However, section 29 does not, in terms, compel the disclosure of confidential information in those circumstances and it is submitted that the Bureau may, for all the good policy reasons which support the protection of such information, and should exercise its discretion to decline to effect the disclosure of such information in those circumstances. Were the Bureau to include in its revised Bulletin a positive statement to such effect, we believe that this would provide to parties considering whether to cooperate with the Bureau, in furnishing confidential information to it, a much-desired level of comfort that their confidential information will be appropriately protected.

Another, possibly more practical way to deal with this issue, might be to add a degree of asymmetry to the possible flow of information between agencies. The Bureau could, for example, take the position that it is entitled to receive information from any "Canadian law enforcement agency" (subject to other issues such as the possible application of the *Charter of Rights and Freedoms* (the "Charter") and the corresponding agency's ability to provide such information) as the term is interpreted in the Draft Bulletin, but that it would only disclose information in its possession to a narrower range of agencies (e.g. the RCMP, provincial police forces, the Canada Revenue Agency and provincial securities commissions). It is not necessarily in the Bureau's interest to act as a repository of information accessible to other law enforcement agencies for reasons unrelated to the purposes of the Act.

In considering the potential application of this exception, it is noteworthy that the 1995 Bulletin made clear that the Bureau maintained an "arm's length" relationship with Canadian law enforcement agencies, with communication "primarily restricted to the redirecting of complaints when they fall within other agencies' jurisdictions", though such communication could involve communication with Canadian law enforcement agencies for the express purpose of assisting such agencies in carrying out their duties. The Draft Bulletin, on the other hand, does *not* contain similar language. A statement expressing the Bureau's views on the nature of its relationship with other Canadian law enforcement agencies would be of considerable guidance to stakeholders in the Draft Bulletin.

The Draft Bulletin states that the Bureau will communicate information to Canadian law enforcement agencies in four situations:

- When information received by the Bureau falls within another agency's mandate and where such information "reveals a potential violation of a statute enforced by that agency";
- When the communication of information will enable another agency to assist the Bureau;
- When the Bureau undertakes coordinated enforcement actions with other agencies to advance a particular matter and/or for the purpose of sharing intelligence; or
- When a Canadian law enforcement agency has expressly requested the information for the purpose of carrying out its duties.

The ability of the Bureau to communicate information in the above-noted situations is subject to two significant limitations which do not appear to have been contemplated in the Draft Bulletin. First, and in certain contexts (in particular, matters which may be criminal in nature), communication of information from the Bureau to another Canadian law enforcement agency (or vice versa) may raise issues under the Charter, and in particular, the right to be secure against an unreasonable search and seizure as contained in section 8 thereof. It cannot be assumed that the Bureau or any other Canadian law enforcement agency can rely on the exception in section 29 to, for example, circumvent the requirement for a search warrant. Second, it is unclear how assisting a Canadian law enforcement agency to enforce legislation relevant to that agency is consistent with the overall purpose of section 29, which is arguably to promote the enforcement and administration of the Act (though the "Canadian law enforcement agency" exception, unlike the "administration or enforcement" exception, is not expressly limited to the Act). However, as mentioned above, there is nothing in section 29 that compels the Bureau to make a disclosure in such circumstances. The adoption by the Bureau of a policy position confirming that it will only effect such a disclosure in circumstances where its doing so would be in support of the purposes of the enforcement or administration of the Act would serve to provide a much-desired assurance concerning the protection of the integrity and confidentiality of information voluntarily provided to the Bureau by private parties.

(ii) For the Purposes of the Administration or Enforcement of the Act

1. <u>Representations to Regulatory Bodies or Commissions/Parliamentary Committees</u>

The Draft Bulletin states that information subject to section 29 may be disclosed for the purposes of making representations before regulatory boards or commissions pursuant to sections 125 and 126 of the Act, or before parliamentary committees.

It is to be hoped that the disclosure of confidential information in such circumstances would only be made in exceptional circumstances, as it is difficult to imagine how such

disclosure might be required in the context of representations before commissions, let alone parliamentary committees.

The Draft Bulletin is silent on when such disclosure would be required. It is noteworthy that in the 1995 Bulletin, the Bureau took the position that communication of information protected under section 29 could occur on "rare occasions" in the event of an intervention pursuant to sections 125 or 126. At that time, the Bureau also stated that such communication would occur only when relevant to the intervention, and only where the information could not be obtained through the regulatory body's own process. Though the Draft Bulletin does state that confidential information will only be communicated where the Bureau is satisfied that the regulatory body in question will keep the information confidential, it does not contain any additional assurances.

The Canadian Chamber submits that at a minimum, language similar to that used in the 1995 Bulletin be included in the Draft Bulletin. Such language should outline the precise situations where disclosure would be made to a regulatory board or commission pursuant to sections 125 or 126 – ideally where the regulatory board or commission could not otherwise obtain it.

The Canadian Chamber is of the view that the Bureau is not entitled to disclose information otherwise subject to protection under section 29 to parliamentary committees without the consent of the relevant parties under any circumstances. This language, accordingly, should be deleted. In the Canadian Chamber's view, the disclosure of confidential information to a parliamentary committee is neither authorized by any exception contained in section 29 or by any other specific provision of the Act, including, in particular, either sections 124 or 125.

2. Transparency

The Canadian Chamber endorses the Bureau's commitment to transparency and agrees that stakeholders benefit from knowing the results of the Bureau's examinations and inquiries. Notwithstanding this, the Canadian Chamber also believes that maintaining confidentiality as required under section 10 and/or section 29 is an equally important (though competing) commitment.

At a minimum, any disclosure of information subject to section 29 for the purpose of advancing the Bureau's transparency mandate, whether through the release of technical backgrounders, press releases, or otherwise, should be made pursuant to meaningful and timely consultation with the affected parties (as opposed to the present language of the Draft Bulletin, which makes such consultation optional). In particular, the affected party or parties should be given an opportunity to consider the form, content, and timing of such disclosure well in advance of the actual disclosure in a manner that affords sufficient opportunity to address any concerns that may be raised.

(iii) To Foreign Authorities

Perhaps the most significant enforcement development since the issuance of the 1995 Bulletin has been the increased focus on the part of the Bureau and its foreign counterparts upon investigating and prosecuting international cartels. The Bureau's efforts in this area rely upon co-operation with other competition agencies around the world.

One issue raised by increased inter-agency co-operation is the extent to which the Bureau can share information with its counterparts in other jurisdictions. The Bureau can resort to competition law co-operation agreements, such as those entered into with the U.S. and European Union, Mutual Legal Assistance Agreements and, in some cases, MLATs[3]. In addition, Part III of the Act provides a regime for the collection and exchange of information between member states that have entered into a treaty or agreement pursuant to that Part. The Draft Bulletin should clarify that the positions taken therein are limited to section 29 and do not extend to other forms of information sharing that may be facilitated by these arrangements.

The Draft Bulletin states that in the absence of co-operation instruments, the Bureau will consider the communication of information to a foreign authority only after it is satisfied "of the assurances provided by the foreign authority" with respect to confidentiality and the use of the information. Disclosure to foreign authorities may occur in one of two contexts:

(i) when the Bureau believes such disclosure may assist in advancing a specific examination or inquiry under the Act, in which case such communication will only occur if compatible with Canadian law and the Bureau's obligations under other instruments or arrangements;

(ii) when the Bureau receives a request from a foreign authority for information, in which case communication may occur if the communication is compatible with Canadian law and the Bureau's obligations.

No mention is made of any notice being provided to interested parties in the event a decision is made by the Bureau to communicate information to a foreign authority in either of these contexts.

It is difficult to suggest rules of universal application that should be applied in the event of a disclosure to a foreign authority. The degree of concern that interested parties may have with disclosure will obviously vary depending on the nature of the matter. Parties to a multi-jurisdictional transaction may be willing to have the Bureau communicate information to other competition authorities to facilitate the merger review process. On the other hand, parties to cartel investigations, and in particular those considering

[3] See e.g. *Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters*, Can. T.S. 1990/19.

applications for immunity, might not be as sanguine if they have reason to believe that the communication might increase exposure in other jurisdictions. These issues are the subject of active discussion in numerous national and international fora, and we do not propose to revisit that discussion here.

The Canadian Chamber is struck by the discrepancy in the level of protection which is to be accorded to confidential information where it is to be exchanged with foreign authorities under the provisions of a treaty agreement entered into with a foreign authority under the provisions of Part III of the Act and what is contemplated in the Draft Bulletin. In particular, we would note the provisions in that regard of sections 30.01, 30.13 (2), 30.14, 30.16 (4), 30.29 and 30.291. It is not clear why, when these sorts of minimum standards of protection have been mandated by Parliament to operate in situations where formal treaty arrangements are put in place, any lower standards should be applicable in regard to information exchanges that take place outside the scope of such treaty arrangements.

The Canadian Chamber submits, however, that as a minimum, the Bureau provide prior notice to affected parties of a proposed disclosure. Safeguards should also be provided to ensure that, as a minimum, the Bureau receive confirmation that the foreign jurisdiction will, to the fullest extent possible consistent with its laws, maintain the confidentiality of the information in the request. Finally, any communication should be limited to the minimum extent possible.

(iv) Other Matters

1. The Bureau's Immunity Program

The Draft Bulletin should reflect the content of the most recent version of the Bureau's Immunity FAQ (the "FAQ").[4] The FAQ cites the exceptions noted in the Draft Bulletin, but notes that they are currently the subject of review. In addition, the FAQ states that the Bureau will not share the identity of an immunity applicant, or the information provided, with other enforcement agencies or a foreign agency unless the immunity applicant provides a waiver giving the Bureau permission to do so. The FAQ also notes that where a company has not applied for or does not qualify for immunity, the Bureau will not agree to conditions in plea agreements that limit disclosure to a foreign competition agency. These points should also be incorporated or, at the very least, referred to, in the Draft Bulletin.

2. Private Actions for Damages

The question of access to the Bureau's file in the context of private actions for damages pursuant to section 36 of the Act has been sporadically considered by Canadian courts

[4] Competition Bureau, "Immunity Program – Responses to Frequently Asked Questions" (October 2005).

with differing results.[5] The Canadian Chamber, therefore, endorses the position taken in the Draft Bulletin with respect to subpoenas for production of documents if compliance with them would potentially impede an examination or inquiry or otherwise undermine the administration or enforcement of the Act.

The Draft Bulletin does state, however, that the Bureau may choose to comply with a subpoena served upon it after the completion of any examination or inquiry and decide whether or not it will invoke available privileges. The basis for this position is unclear. Information in the Bureau's possession which is subject to section 29 does not lose its confidential nature merely because of the status of an examination or inquiry. Parties may be reluctant to provide confidential information if there is a possibility that it may be disclosed to a third party after the conclusion of an examination or inquiry. As a result, the Draft Bulletin should clearly state that the Bureau will assert all applicable forms of privilege to oppose subpoenas for production, regardless of the status of the examination or inquiry.

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[5] See e.g. D. Houston, S. Bhattacharjee et al., "Private Remedies for Anticompetitive Conduct" (Toronto: Canadian Bar Association, 1998). See also *Forest Protection Ltd.* v. *Bayer AG* (1996), 68 C.P.R (3d) 59 and *British Columbia Children's Hospital et al.* v. *Air Products Canada Ltd*. et al., [1997] B.C.J. No. 494.