Information Bulletin (Consultation Draft) on the Communication and Treatment of Information under the Competition Act

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 35,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Competition Law Section of the Canadian Bar Association.

Information Bulletin (Consultation Draft) on the Communication and Treatment of Information under the *Competition Act*

I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the CBA Section) is pleased to provide its comments on the draft *Information Bulletin on the Communication and Treatment of Information Under the Competition Act*[1]. The CBA Section supports the efforts of the Commissioner of Competition and the Competition Bureau to publish guidance on the application of provisions of the *Competition Act*. We appreciate and encourage the Bureau's practice of issuing information bulletins and interpretation guidelines, as it increases the transparency and predictability of the Bureau's interpretation and enforcement of the Act.

Given the commercially sensitive nature of the information obtained by the Bureau through its administration and enforcement of the Act, the Section strongly supports the Bureau's initiative to adopt adequate safeguards to protect against the improper disclosure of confidential information. Information provided to the Bureau routinely includes highly sensitive commercial details relating to all aspects of the operations of Canadian businesses, including strategic plans, operational information and indicators of the financial health of organizations. Information may be obtained by the Bureau through compulsory processes, such as search warrants or orders requiring the production of documents, or through voluntary production by complainants, potential witnesses or other individuals.

In the past, members of the Canadian business community have expressed concerns regarding the circumstances in which the Bureau will disclose confidential information to competitors, other Canadian enforcement agencies and private litigants. In addition, concerns have arisen over the prospect of confidential information being disclosed by the Bureau to international agencies or other third parties without any awareness on the part of the owner of such information. Adequate confidentiality protections are also essential to the Bureau's mandate to effectively administer and enforce the Act. Specifically, the disclosure of commercially

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[1] (August, 2005), online: Competition Bureau <http://www.competitionbureau.gc.ca/PDFs/2005-08-30bulletin_confidentiality_e.pdf>.

sensitive information to competitors may run counter to the Bureau's objective of preserving competitive markets in Canada. Further, ensuring that there are appropriate confidentiality protections is integral to the Bureau's ability to secure information on a voluntary basis.

There are also growing concerns among businesses in Canada and elsewhere regarding the scope of information-sharing activities among competition authorities. These concerns include whether information will be used for purposes other than that for which it was supplied, whether notice of disclosure will be received, and the types of confidentiality protections (if any) that will be required of the receiving jurisdiction. While the Section recognizes the Bureau's need to work closely with its foreign counterparts, it is important that the process followed by the Bureau in disclosing information to other competition authorities respects the privacy of the disclosing parties. The ongoing work of the Business and Industry Advisory Committee (BIAC) to the OECD regarding *Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations*[2] (the OECD Best Practices), and the recent report of the International Competition Network (ICN) on *Waivers of Confidentiality in Merger Investigations*[3] are indicative of the relative significance placed on this subject by various international organizations. Canadian commentators have also addressed the process of information sharing among competition authorities, for example in the 1996 *Report of the Consultative Panel on Amendments to the Competition Act*[4], and in submissions made in 2001 on the enactment of the mutual legal assistance provisions of the Act through Bill C-23[5]. These reports uniformly adopt the view that information sharing among competition authorities must be accompanied by measures to protect against unauthorized disclosure.

A number of comments set forward in the Bulletin were particularly welcome. For example, the CBA Section strongly endorses the clear statement that "the Bureau will not voluntarily provide information to persons contemplating or initiating a private action" (p. 16), as well as the Bureau's general observation that "[c]onfidentiality is fundamental to the Bureau's ability to administer and enforce the Act" (p. 4). As outlined in greater detail below, several important

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2 OECD Competition Committee, Document DAF/COMP(2005)25/REV1 (September 27, 2005).

3 Online: International Competition Network <http://www.internationalcompetitionnetwork.org/NPWaiversFinal.pdf>.

4 (March 6, 1996), online: Competition Bureau <http://www.competitionbureau.gc.ca/internet/index.cfm?itemid=1272&lg=e> [hereinafter *Report of the Consultative Panel*].

5 See, for example, the submission of the Canadian Bar Association: (March, 2002), online: Canadian Bar Association < http://www.cba.org/CBA/pdf/2002-03-12_comp.pdf>.

aspects of the Bulletin may benefit from further clarification or refinement to adequately address the concerns outlined above. All section references in this document correspond to the relevant section of the Bulletin. All page references correspond to the PDF version of the Bulletin. We also attach a copy of the Bulletin with suggested textual amendments that supplement these comments.

A. General Principles Governing Disclosure Should Be Clearly Articulated at the Outset of the Bulletin

Our most significant comment on the Bulletin relates to the discussion of the Bureau's ability to communicate confidential information ("Information") under the "Canadian law enforcement agency" and "administration or enforcement of the Act" exceptions to section 29 of the Act. The Bulletin does not appear to adopt a number of basic principles that should generally govern in all cases, and which were expressly referenced in the Bureau's May 1995 Information Bulletin entitled *Communication of Confidential Information Under the Competition Act*[6] (the "1995 Bulletin"). These principles (collectively referred to in this document as the General Principles) are as follows:

- *Principle of minimum disclosure* - The 1995 Bulletin explicitly stated that where Information provided to the Bureau is communicated by the Bureau to a Canadian law enforcement agency in relation to an investigation under the Act, the extent of such communication will be limited to the minimum amount of Information required in order to enable the Canadian law enforcement agency to provide the Bureau with the assistance sought[7]. The same clear principle should be included in section 4.1 of the Bulletin, which describes the communication of Information to Canadian law enforcement agencies, and in section 4.2.1, which addresses when Information is provided to a foreign authority to advance a specific investigation or inquiry under the Act.

- *Notice to the person who provided the Information* - Prior to Information being communicated by the Bureau to a Canadian law enforcement agency or foreign authority, the Bulletin should provide that the person who supplied the Information will be notified by the Bureau of its intention to communicate the Information, unless such notice would jeopardize an ongoing investigation or violate an international treaty obligation or court/tribunal order. Notice of an intent to communicate information is important, as the original Information provider may have concerns about disclosure, or the Bureau may not be aware of all implications that may flow from such disclosure. Reasonable notification will provide the person who supplied the Information to the Bureau with a sufficient opportunity to oppose such

6 (May, 1995), online: Competition Bureau <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1277&lg=e>.

7 *Ibid.*

communication or to discuss modifying the Information that is to be communicated. The absence of such a policy may undermine the Bureau's ability to obtain Information – particularly voluntarily supplied Information – in an era when many markets are international in scope and businesses are becoming increasingly concerned about the disclosure of their Information outside of Canada. In circumstances where prior notice is not appropriate, notice after the fact should be given to the original Information provider as promptly as possible.

- *Recipient of Information must have in place adequate safeguards* - The Bulletin sets out a number of examples of circumstances in which the Bureau may provide Information to Canadian law enforcement agencies or foreign authorities, whether on the Bureau's own initiative or at the request of a Canadian law enforcement agency or foreign authority. However, the Bulletin does not adequately describe the safeguards that the recipient must have in place before the Bureau will supply the Information. At a minimum, the Bulletin should provide that the Bureau will require the following basic assurances from the recipient prior to providing any Information:

    - An assurance that the Information provided will be used solely for the purpose for which it was communicated by the Bureau (in this regard, prior to providing any Information to a Canadian law enforcement agency or foreign authority, the Bureau should require the recipient to describe the purpose for which the Information is sought, and the Bureau should be required to satisfy itself that this purpose is reasonable and that the Information to be provided will aid in the achievement of this purpose);

    - An assurance that the recipient will protect, to the greatest extent possible, the confidentiality of the Information and any privilege that attaches to it, and will seek to invoke all available privileges and legal arguments to the fullest extent possible in order to oppose any requests for disclosure of the Information;

    - An assurance that, to the fullest extent possible, any disclosure of the Information in proceedings before a court, tribunal or other body will be held in an in camera hearing or session and will be subject to appropriate confidentiality orders;

    - An assurance that the recipient will: (i) promptly notify the Bureau if any unauthorized communication of the Information occurs so that the person whose Information has been improperly disclosed may seek the appropriate relief; and (ii) take all necessary steps to minimize any harm to the person that may result from the improper disclosure; and

    - An assurance that at the completion of the recipient's investigation and any related proceedings, the Information provided to it will be returned to the Bureau or destroyed.

The Bulletin notes on page 4 that in proceedings before the Competition Tribunal or courts, the Bureau is prepared to consider various protections to preserve the confidentiality of Information, such as sealing orders or in *camera* proceedings. For clarity, the Bulletin should note that while the Commissioner may consent to such protections, the Tribunal or court has the final authority to determine whether to grant a sealing order or to proceed in camera.

B. Section 3 – Applicable Legislation

- The Bulletin states that section 29 of the Act protects all Information provided to or obtained by the Bureau, as well as the identity of those persons who provided such Information. The Bulletin should also recognize that the Bureau will maintain confidentiality over the fact that Information has been provided to the Bureau in the first place.

- The Bulletin should clarify what is meant by the statement at page 6, that the Bureau may comment on an inquiry or examination to address "misinformation that may relate to public markets or the Bureau's enforcement practices". Specifically, the Bulletin should describe the particular circumstances in which the Bureau would disclose Information to address misinformation in public markets.

- The final paragraph in this section states that communication of Information obtained pursuant to techniques authorized by the Criminal Code may be subject to restrictions established pursuant to the Criminal Code. For greater certainty, this paragraph should state that Information obtained through such investigatory tools will remain subject to the protections found in section 29, in addition to any restrictions on disclosure or use of the Information established pursuant to the Criminal Code.

- In addition to the protections provided by section 29, the Bulletin should also recognize the confidentiality obligations found in section 10(3) of the Act. Specifically, section 10(3) requires that inquiries by the Bureau "shall be conducted in private", reflecting the principle that Information obtained by the Bureau through an inquiry, as well as the process and results of the inquiry, should generally not be subject to public disclosure and any such disclosure should be authorized under section 29.

C. Section 4.1 – To Canadian Law Enforcement Agencies

In the past, there has been some debate concerning whether particular agencies would fall within the scope of a "Canadian law enforcement agency" for the purpose of section 29; for example, whether this definition would include securities commissions and the Canada Revenue Agency. At page 7, the Bulletin applies a broad interpretation of "Canadian law enforcement agency" to include "all agencies or persons mandated to enforce laws in Canada" and uses the example of a "securities commission". There is some question as to whether "Canadian law enforcement agency" would encompass agencies that are not mandated to enforce federal laws (such as a provincial securities commission), or other agencies not exercising a traditional law enforcement function (such as the Canadian Revenue Agency). In light of the uncertainty around this issue, the Bulletin should clarify whether the Bureau

considers agencies, such as the Canada Revenue Agency, to fall within "Canadian law enforcement agency" for the purpose of section 29 of the Act.

D. Section 4.2 – For the Purposes of the Administration or Enforcement of the Act

1. General situations in which the Bureau may communicate Information for purposes of the administration or enforcement of the Act

As a general comment, the Bulletin adopts a very broad interpretation of when the Bureau may disclose Information as part of its "administration and enforcement" of the Act. For example, the Bulletin states at page 8 that the Bureau may disclose Information for the purpose of "eliciting additional information…from customers, suppliers or competitors, to determine whether the Bureau's assessment of a matter in question is accurate". Such broad exceptions nullify or significantly limit the protections provided by section 29. Disclosure under this exception should be limited to circumstances where customers, suppliers or competitors require Information to assist the Commissioner in the administration and enforcement of the Act. In addition, where disclosure is required, it should remain subject to the General Principles described in section (A) above (i.e. minimal disclosure, notice and safeguards).

Communication in the exercise of the Bureau's intervention rights (sections 125 and 126)

- The Bulletin suggests that the Bureau has a broad discretion to disclose Information in the exercise of its right to intervene before boards, commissions or other tribunals pursuant to sections 125 and 126 of the Act. At page 8, the Bulletin states that the Bureau may disclose Information protected by section 29 in the context of such interventions where it is satisfied with assurances it has received that the Information will remain confidential.

- The issue of whether the Bureau should be entitled to disclose Information in these circumstances was discussed in the 1996 *Report of the Consultative Panel* to the then Director of Investigation and Research considering certain amendments to the Act[8]. The consensus of the Panel was that the Bureau "should not be specifically authorized under the Act to communicate information obtained pursuant to the enforcement of the Act during interventions by the Director [now Commissioner] in proceedings under s. 125 or s. 126"[9]. However, the 1995 Bulletin indicated that "on rare occasions"[10], the Bureau may communicate Information protected by section 29 when intervening, "but only where the information cannot be obtained through the regulatory body's own process"[11].

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8 *Supra* note 4.

9 *Ibid*.

10 *Supra* note 6.

11 *Ibid*.

- At a minimum, the Bulletin should adopt the same protections found in the 1995 Bulletin against the disclosure of Information in interventions. Specifically, the Bureau should disclose Information protected by section 29 only in the context of an intervention pursuant to sections 125 and 126 where the regulatory body is unable to obtain the Information.

- Further, in applying for an order to compel the production of information or for a search warrant, the Commissioner must specify the purpose for which the information is required. Subsequent use of such information by the Commissioner for purposes not contemplated under the original application for the compulsory order – such as for use in an intervention by the Commissioner before a board or tribunal - should not be permitted, as such a purpose was not disclosed to or contemplated by the issuing court.

- Similarly, the use of Information for the purpose of an intervention under sections 125 and 126 may be outside of the scope of disclosure expected by parties who provide information voluntarily to the Bureau.

- The Bulletin also states on page 8 that the Bureau may disclose Information when making "informal representations to a regulator". The term "informal" implies that the Bureau will be engaged in casual conversations with a regulator during which Information will be disclosed. There is some question as to whether such "informal" representations are in furtherance of the Bureau's administration and enforcement of the Act. Further, there does not appear to be any assurance that Information informally disclosed to a regulator will be accompanied by adequate measures to protect confidentiality. The term "informal" should be removed from this sentence.

- The Bulletin should also state that the General Principles described in section (A) above (minimal disclosure, notice, safeguards) apply with equal force where the Bureau communicates Information in the exercise of its right of intervention before a regulatory body, parliamentary committee or other body. Except in extraordinary circumstances, the Bureau should notify the person who provided the Information, since the circumstances in which such notice would undermine the proceeding or jeopardize an investigation, international treaty obligation or court order in the context of an intervention pursuant to sections 125 and 126 would be extremely narrow, if any.

Communication to advance the Bureau's transparency mandate

- The Bulletin indicates that where disclosure of Information is made as part of the Bureau's transparency mandate, "[d]isclosure in these circumstances may include consultation with the affected parties and consideration of any submissions they may have on the issue"12 (italics added). Since disclosure in these circumstances can have a material impact on the legitimate interests of an affected party, such consultation should be mandatory. The Bureau should consult in all cases prior to making any such disclosure and should give the party whose Information is to be disclosed an opportunity to comment on both the timing and the substance of the Information that is to be disclosed. It is difficult to conceive of any circumstances in which the Bureau should be entitled to disclose Information for the purposes of its transparency mandate without giving reasonable notice to the person(s) who provided the Information.

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12 *Supra* note 1 at 9.

Indeed, the Bureau's general practice has been to engage in such consultations prior to disclosing Information as part of the Bureau's transparency mandate.

- The Bulletin should state that every effort will be made to minimize the disclosure of Information protected under section 29 in the advancement of the Bureau's transparency mandate. In this regard, the Section is not aware of any situation where the Bureau would be required to disclose Information as part of its transparency mandate. The Bureau's current practice in its Backgrounders, pleadings and other publicly available documents is to expurgate all confidential information prior to disclosure.

2. Section 4.2.1 – Providing Information to foreign authorities

General legal context needs to be explained

- The disclosure of Information to foreign authorities is an area of significant concern and complexity, yet the Bulletin does not provide a substantive discussion of this issue. Important issues, such as whether the Bureau is entitled to disclose information to foreign authorities, are not addressed in any significant detail. In general, the section regarding disclosure of Information to foreign authorities should be supplemented with further guidance regarding the circumstances in which the Bureau will disclose Information to foreign authorities and the confidentiality protections that will be implemented in respect of such disclosure.

- The Bulletin would be improved substantially if a statement explaining the legal context for protection and communication of Information was included at the outset of the section regarding communication with foreign authorities (Section 4). In particular, it should be clear from the outset that the Bulletin deals only with the Bureau's practice under section 29, and not to all forms of cross-border information sharing, such as cross-border evidence gathering in criminal cases, which is governed by the *Mutual Legal Assistance in Criminal Matters Act* (MLACMA)[13], and the various mutual legal assistance treaties (MLAT) that Canada has entered into with other jurisdictions.

- The Bulletin should state that where a formal cooperation agreement is in place, the protections in the agreement will apply in addition to section 29 of the Act.

- The Bulletin should state that where the parties have waived confidentiality, section 29 of the Act no longer applies to the extent of such waiver.

[13] R.S.C. 1985, c. 30 (4th Supp.). In addition to cross-border evidence gathering, the MLACMA also governs the service of documents, taking of evidence, and the transfer of incarcerated persons in custody for testimonial and other purposes.

Information already in the Bureau's possession

- Although the Bulletin does not deal with evidence-gathering under the MLACMA and MLAT agreements (as both the MLACMA and MLATs are administered by the Minister of Justice), it would be useful nonetheless if the Bulletin included a description of the Bureau's enforcement practice when Information requested under an MLAT agreement is already in the Bureau's possession. In particular, the Bureau should state that such Information is protected under section 29 of the Act.

General Principles (principle of minimum disclosure, notice, safeguards) apply

- The Bulletin should clearly state that the General Principles described in section (A) above apply when Information is provided to (or sought by) foreign authorities outside of the MLAT context.

- On the issue of safeguards, the Bulletin indicates that "[a]ny information communicated to a foreign authority under the provisions of a bilateral or multilateral cooperation instrument will be subject to the confidentiality safeguards contained in that instrument"[14]. The Bulletin further indicates that where no cooperation instrument exists, the Bureau will "consider the communication of information only after it is fully satisfied of the assurances provided by the foreign authority with respect to the confidentiality and use of the communicated information"[15]. However, the Bulletin is silent about the specific safeguards that the Bureau will require of the foreign authority before sharing the Information. Please refer to section (A) above for a list of the minimum safeguards that should be in place prior to any Information being provided by the Bureau to a foreign authority.

Section 4.2.1(b) – Disclosure On the Initiative of the Foreign Authority

- The Bulletin should be clearly consistent with international best practices including, in particular, the OECD Best Practices. Even in circumstances where the OECD Best Practices or other best practices would not be directly applicable, the Bulletin and Bureau should strive to adhere to their safeguards whenever possible. In particular, the Bulletin should expressly describe the standards that the Bureau will require foreign authorities to meet when requesting Information. At a minimum, the Bureau should require that foreign authorities must:

    - Explain to the Bureau in detail how the request for Information located in Canada concerns that authority's investigation of a violation of its competition laws.

    - Identify in detail its domestic (foreign) confidentiality laws and related practices so that the Bureau can assess that authority's ability to maintain the confidentiality of the exchanged Information.

    - Confirm that the exchanged Information will be used or disclosed solely in connection with the specific competition law matter specified in the request.

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14 *Supra* note 1 at 9.

15 *Ibid*.

- Confirm that it will to the fullest extent possible consistent with its laws: (i) maintain the confidentiality of the exchanged Information; and (ii) oppose the disclosure of Information to third parties for the use of such information in private civil litigation.

- Undertake to ensure that privilege against self-incrimination will be respected when using the exchanged Information in any criminal proceedings against individuals.

- Confirm that it will take all necessary measures to ensure that an unauthorized disclosure of exchanged Information does not occur.

- The Bulletin should describe (or provide examples of) the circumstances in which the Bureau would and might refuse to provide Information that is requested by a foreign authority (e.g., insufficient safeguards, poor track record in protecting Information, national security concerns, etc.)

- The Bulletin should include the following statement from the 1995 Bulletin:

> …the information communicated in response to a formal request is provided only for the specific use and purpose identified in the request by the foreign agency.[16]

The Bulletin should also address the measures that will be adopted to ensure that this is the case.

3. Section 4.2.2 – Disclosure From Foreign Authorities

- The Bulletin states that if the Bureau intends to use Information obtained from a foreign authority for a purpose other than the administration or enforcement of the Act, it will inform the foreign jurisdiction and determine that there is no objection. Information provided to the Bureau for the purpose of the administration and enforcement of the Act should not be used for other purposes absent consent from the foreign authority and the party that disclosed the Information to the foreign authority. The concern is that parties may have disclosed Information to foreign authorities on the basis that the Information will be used for competition enforcement or another limited purpose. As recognized by a joint BIAC / International Chamber of Commerce report entitled *Questions from Business Regarding the Protection of Confidential Information in the Context of international Antitrust Cooperation*[17], the use of Information for purposes other than for which it was disclosed is not appropriate:

> BIAC and the ICC would like to see an assurance from competition authorities that information will ***only*** be used for the purposes for which it was disclosed. Companies very often tailor presentation of information to suit the immediate purpose and this may not be suitable for any subsequent undisclosed

16 *Supra* note 6.

17 (October 23, 2000), online: ICC <http://iccwbo.org/home/statements_rules/statements/2000/biac_questions_from_business.asp>.

> proceedings. It is not appropriate for governments to use information provided to enhance international antitrust enforcement to further their other objectives or policies.[18] [emphasis added]

In any event, the Bulletin should specify the other purposes for which the Bureau might use Information obtained from a foreign authority.

E. Section 4.4 – Other Matters

1. Privileged Information

- The Bureau should articulate a policy with respect to privileged Information, in particular where: (i) Information that would be privileged in Canada is received from a jurisdiction that does not recognize such privilege; and (ii) Information that would benefit from public interest privilege is disclosed to a jurisdiction that does not recognize such privilege. For example, the Bulletin should deal with issues of how the Bureau will treat Information disclosed by a foreign authority that is not subject to solicitor-client privilege under the law of the foreign jurisdiction but would be subject to solicitor-client privilege in Canada.

2. The Bureau's Immunity Program

- The Bulletin should state that where Information is provided to the Bureau for the purpose of obtaining immunity in Canada, the Bureau will resist, to the fullest extent possible, the communication of that Information to a domestic or foreign agency or authority where doing so could result in harm to the interests of the person who provided the Bureau with the Information.

- The Bulletin currently reproduces a portion of the exceptions to its immunity applicant confidentiality policy that are detailed elsewhere in its recent *Immunity Program Responses to Frequently Asked Questions*[19]; however, the Bulletin fails to include the following statement from the same source: "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.[20]" Clearly, the requirement for a waiver to be obtained is crucial in this circumstance, and should be reflected as such in the Bulletin.

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18 *Ibid.*

19 (October 17, 2005), online: Competition Bureau <http://www.competitionbureau.gc.ca/PDFs/eng_faqs_oct17-05.pdf>.

20 *Ibid.*

3. Requests Under the Access to Information Act

- Since the Minister of Industry has the final say on whether a request under the *Access to Information Act* should be granted, the Bulletin should discuss the Minister's policy in this regard to the fullest extent possible.

4. Private Actions for Damages

- In the past, there has been some uncertainty regarding the Bureau's position on the issue of the disclosure of Information for the purposes of private actions brought pursuant to section 36 of the Act. Prior decisions in such cases fail to provide sufficient clarity regarding when the Bureau will oppose such a subpoena for the production of documents. In fact, in *Forest Protection Ltd. v. Bayer A.G. et al.*[21], the Bureau consented to the production of documents seized through search warrants executed as part of an inquiry into criminal conduct.

- The Section fully endorses the statements at pages 15 and 16 of the Bulletin that private litigants do not have a "general right of access to records in the Bureau's possession or control" and, as such, "the Bureau will not voluntarily provide information to persons contemplating or initiating a private action". The production of Information should occur only when the Bureau is compelled to produce the Information through a subpoena or order of a court having jurisdiction over the private action. In addition, the Bureau's stated commitment to apprise the original Information provider that a subpoena has been issued is appropriate and will ensure that this party has an opportunity to oppose the subpoena.

- The Bulletin states at page 16 that the "Bureau will generally oppose 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". This statement does not provide adequate guidance regarding the circumstances in which the Bureau will oppose a subpoena. Specifically, the Bulletin should provide a description of the circumstances in which the Bureau believes that it might advance the administration or enforcement of the Act to provide Information to a private litigant, and more broadly, the type of circumstances in which such subpoenas will be opposed. Such additional guidance will assist parties in evaluating the risk that Information provided to the Bureau will be disclosed in any subsequent private actions. In addition, further clarification will assist the parties to private actions in understanding when Information may be obtained from the Bureau.

- The Bulletin states "whether the Bureau will seek to invoke available privileges will be considered on a case-by-case basis". The Bulletin should provide that, in the context of disclosure sought by private litigants, the Bureau will invoke all applicable privileges in all circumstances.

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[21] [1996] 68 C.P.R. (3d) 59 (NBQB).

5. Other – Role of Waivers

- In some cases, the Bureau will request parties to waive confidentiality in order to permit sharing of Information with foreign authorities or domestic law enforcement agencies. In these circumstances, section 29 of the Act no longer applies to the extent that its protections are waived. The Bulletin does not describe the Bureau's policy respecting when it will request such waivers.

- Waivers of confidentiality provide a number of advantages for both the Bureau and private parties. Specifically, waivers of confidentiality may enable more complete communication between competition agencies, provide notice to the parties that may be affected by the disclosure and allow for greater flexibility regarding the scope and conditions associated with such disclosure. The Bureau often seeks such waivers in the context of a merger that is subject to review by more than one agency, as well as in other appropriate circumstances. In practice, parties are generally willing to grant such waivers so as to allow the Bureau to coordinate its review with other agencies.

- The benefits of waivers are well-recognized. For example, the ICN's *Recommended Practices for Merger Notification and Review*[22] provides that "competition agencies should encourage and facilitate the parties' cooperation in the merger coordination process," through, *inter alia*, the use of voluntary confidentiality waivers and the development of a basic waiver model that may be modified to suit specific needs.[23]

- The Section recognizes that in certain circumstances, it may not be appropriate to seek a waiver in respect of the disclosure of Information to a foreign authority. For example, in conducting an investigation into an international cartel, requesting a waiver would provide notice to the participants in the cartel that the Bureau is conducting an investigation, thereby providing the parties with an opportunity to destroy records or take steps that may otherwise jeopardize the inquiry. However, in many circumstances, the parties are aware of the inquiry, or notice to the parties will not jeopardize the Bureau's inquiry. In light of the benefits of waivers described above and the controversy regarding whether the Bureau is entitled to disclose information to foreign authorities, the Bureau should request waivers in all circumstances where notice to the parties would not jeopardize an investigation or inquiry, violate an international treaty obligation or court/tribunal order.

- In the merger context, unlike the example of the inquiry into a criminal matter discussed above, notice to the parties that Information will be disclosed to a foreign authority is not detrimental to the inquiry. As such, the Bulletin should be revised to state that where the Bureau wishes to disclose Information to a foreign competition agency in the context of a merger review, or in any other circumstance where notice will not impair an ongoing inquiry, the Bureau will request a waiver of confidentiality from the relevant parties.

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22 Online: International Competition Network <http://internationalcompetitionnetwork.org/mnprecpractices.pdf>.

23 *Ibid.* at 30.

The CBA Section appreciates the opportunity to comment on the Bulletin and continues to encourage the Bureau in its practice of issuing information bulletins and interpretation guidelines to increase the transparency and predictability of the Bureau's interpretation and enforcement of the Act. We would be pleased to meet with representatives of the Bureau to answer any questions or discuss the above comments.