THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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Via email: kristen.pinhey@canada.ca

Ms. Kristen Pinhey
A/Senior Advisor
Competition Bureau
50 Victoria Street
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Dear Ms. Pinhey:

Re: Draft Bulletin Regarding Information Requests from Private Parties in Proceedings for Recovery of Loss or Damages

The National Competition Law Section of the Canadian Bar Association (CBA Section) welcomes the opportunity to comment on the *Draft Bulletin Regarding Information Requests from Private Parties in Proceedings for Recovery of Loss or Damages* (the Bulletin) issued for consultation by the Competition Bureau (the Bureau) on March 8, 2017.

The CBA Section strongly supports the Bureau's continuing efforts to clarify its enforcement and confidentiality policies through enforcement guidelines, information bulletins, position statements and other guidance. The CBA Section commends the Bureau for engaging in a meaningful process of public consultation prior to issuing a final bulletin on this topic, particularly given the increasing frequency of these types of information requests and the evolving case law in this area.

General Support for the Bureau's Position and Commitment to Protecting Confidentiality

The CBA Section supports the Bureau's endorsement in the Bulletin of the importance of confidentiality in conducting civil and criminal investigations. Protecting confidential information that has been produced by cooperating/responding parties during an investigation is a critical component in the Bureau's ability to effectively enforce the *Competition Act* (Act). As explained in the Bulletin, "[t]he Bureau's ability to provide … an assurance of confidentiality under the Act makes [private parties] more willing to cooperate with the Bureau", and thereby advances the Bureau's ability "to effectively fulfil its mandate."

The public policy rationale for this protection is embodied in section 29 of the Act, and has been expressed by the Bureau in previous policy statements and bulletins. Given increasing demands for production in the context of civil actions and a number of recent judicial decisions on this topic, the CBA Section believes that it is both timely and appropriate for the Bureau to set out its position in a dedicated bulletin that addresses requests in the context of private actions under Section 36 of the Act.

The CBA Section acknowledges the Bureau's commitment to protecting confidentiality as a matter of public policy and practical concerns about the resource and financial costs of responding to information requests. Requests of this nature can and have resulted in costly litigation that may unnecessarily divert resources from the Bureau's primary public interest mandate.

The CBA Section offers specific comments consistent with the commitment to confidentiality and objectives of the Bulletin. . In particular parts of the Bulletin may be interpreted as accepting propositions of law that have not been judicially determined or that are in litigation. With revisions, the CBA Section believes that the objectives of the Bulletin can be further advanced.

The Interplay between Section 36 and Section 29

The proposed introduction states that section 36 is an "additional and important enforcement mechanism" of the Act. In addition, Part V of the Bulletin may be read to suggest that a proceeding under section 36 is a proceeding for the purposes of the "administration or enforcement of the Act", and is an exception to the confidential protection afforded by section 29 of the Act.

The CBA Section believes that it is unnecessary and premature for the Bureau to take a firm position on the specific interplay of sections 29 and 36 in the Bulletin. There is a diversity of views on this issue, and the CBA Section believes that future litigants should have a fair opportunity to assert that section 29 continues to apply to the materials produced to the Bureau in the context of a section 36 proceeding.

Section 36 is a statutory mechanism of limited scope that permits private parties to recover damages actually sustained as a result of conduct that contravenes Part IV of the Act or the failure to comply with an order of the Competition Tribunal. It is found in Part IV of the Act, entitled "Special Remedies". It is not found in Part II of the Act relating to "Administration", nor is it found in Parts VI to VII.1 of the Act that set out particular offences and reviewable practices. In this regard, it is important to contrast section 36, which is simply a right to seek private damages in certain limited circumstances, with the private rights of action afforded under sections 75, 76 and 77 of the Act, which permit private parties (with leave) to initiate proceedings under the reviewable provisions of the Act.

In brief, there are good arguments that Parliament never intended a proceeding under section 36 for a private "remedy" of damages to fall within the exception under section 29. The Bureau's reference to section 36 as an "enforcement mechanism" could have significant implications, since a party that produced information to the Bureau with an expectation of protection under section 29 may be at risk of losing that protection. The Bureau does note in footnote 18 of the Bulletin that there have been two reported judicial decisions on the interplay of sections 29 and 36. However, it is not clear that either decision stands for the general proposition that a private action under section 36 is a proceeding for "the purposes of the administration or enforcement of [the] Act" and thereby exempted from the protection afforded by section 29 by operation of statute.

Overly-Broad Position Regarding Public Interest Privilege

The draft Bulletin also includes a lengthy discussion on public interest privilege as a class-based privilege, both generally and in the context of requests by private parties for confidential information. The CBA Section offers two comments on this section of the Bulletin.

First, the Bureau should acknowledge, by way of footnote or otherwise, that there are differing views on the existence of a class-based privilege, particularly in light of the evolution of the law of privilege and disclosure in Canada in regulatory proceedings. As the Bureau is aware, there was a recent challenge to the Bureau's invocation of public interest privilege on a class-basis in an enforcement proceeding before the Tribunal (see *Commissioner of Competition v*. V.A.A., 2017 Comp. Trib. 6). While the Tribunal upheld the Bureau's assertion of public interest privilege in that

particular case, the Tribunal's decision may be subject to appeal. Moreover, in other cases, litigants have previously raised concerns before the Courts and the Tribunal (with mixed results) with respect to the applicability of this privilege. While the Bureau is certainly entitled to its views, it should express them in a manner that acknowledges the existence of current (and historical) litigated proceedings.

Second, the CBA Section believes that any statements in the Bulletin regarding public interest privilege should be limited to requests for information by private parties in the context of proceedings initiated under section 36. For example, in Part V of the Bulletin, the Bureau states that "there is no distinction in principle in the application of public interest privilege between an enforcement proceeding under the Act and a private action under section 36 of the Act." In the CBA Section's view, there may be significant differences regarding the Bureau's ability to claim public interest privilege in the context of a Bureau enforcement proceeding versus private damages cases. Moreover, the CBA Section does not believe that it is necessary to address this broad issue of principle in this Bulletin, given that the Bulletin's limited purpose is to address the Bureau's position on confidentiality in the context of private proceedings initiated under section 36. The Bureau should indicate that these views reflect its interpretation (that is, if it is the Bureau's position that there is no distinction in principle).

In civil litigation, adverse parties must disclose all relevant information as a matter of practice. In the criminal context, the Crown is required to disclose all potentially relevant information to the accused. In the context of an enforcement proceeding, the responding party is directly adverse to the Bureau and therefore has a direct interest in obtaining access to all relevant information in the Bureau's possession. However, when enforcement proceedings are brought by the Bureau, claims of public interest privilege are an exception to the standard disclosure obligations that can materially disadvantage a party to those proceedings. Accordingly, the use of broad public interest privilege claims is less appropriate.

By contrast, requests by private parties for confidential information in the Bureau's possession to further private damages cases are effectively requests for production from non-parties. As a general rule, in civil proceedings, requests for production from non-parties will only be granted with leave of the court and in special circumstances. The assertion of a broad public interest privilege is arguably more appropriate in this context given that (i) the Bureau is not a party to the damages proceedings and (ii) the parties to those proceedings will have full discovery rights as against one another.

Since the purpose of the Bulletin is to address the Bureau's position on confidentiality in the context of private actions under section 36 of the Act, the CBA Section suggests no firm position be advanced on the issue of public interest privilege in enforcement proceedings.

Similar Policy Concerns May Be Engaged in Connection with Other Civil Proceedings

The Bulletin is limited to requests for information by litigants involved in proceedings under section 36 of the Act. As a matter of civil practice, , many private plaintiffs assert claims in tort and restitution, as well as under the Civil Code of Quebec, that are premised on contraventions of the Act. In some cases, private plaintiffs rely exclusively on these non-statutory remedies, particularly in light of the special limitation period in section 36 of the Act and other limits associated with the section. There are open questions of law relating to this practice that are still being argued before the courts. The CBA Section believes that the Bureau's policy statement on confidentiality should expressly extend to such claims as well.

In brief, the CBA Section believes that the same policy interests and practical concerns relating to confidentiality are engaged whether a request for information arises under a private action under section 36, a private action in tort or restitution or under the *Civil Code* of Quebec.

Similar Policy Concerns May be Engaged in respect of Information in the Hands of Private Litigants

As drafted, the Bulletin is limited to requests for confidential information that are "in the Bureau's possession or control". The Bulletin does not address requests for the same confidential information that was assembled and produced for the purposes of co-operating with the Bureau that may be in the possession of private litigants. For example, if a cooperating party voluntarily assembles and produces confidential and sensitive information to the Bureau in the context of a criminal investigation, the party may retain an identical copy in its own files. In the Bulletin, the Bureau has underscored the strong policy interest in preserving the confidentiality of that information, particularly to protect the integrity of its investigations. The Bureau has further noted that the disclosure of such information may "potentially interfere with [an] ongoing examination, inquiry or enforcement proceeding". Those same policy concerns, however, could be undermined if a private plaintiff in a proceeding under section 36 seeks to compel from the co-operating party their identical compilation of those documents.

The CBA Section recommends that the Bureau expressly acknowledge that, where appropriate, the Bureau reserves the right to intervene in civil proceedings to protect the confidentiality of similar or identical information that is in the possession or control of the cooperating party.

The Bureau has previously intervened in foreign civil proceedings to enforce that interest (see, e.g., *In re: Vitamins Antitrust Litigation*, 2002 U.S. Dist. LEXIS 25815). More recently, the Bureau intervened in ongoing class proceedings in the United States to support the assertion of confidentiality and privilege in respect of documents that were held by the immunity and leniency applicant. (see Declaration of John Pecman dated October 24, 2008 filed in *In re: Chocolate Confectionary Antitrust Litigation* (MDL Docket No. 1935).Consistent with these interventions and underlying policy goals, the CBA Section believes that the Bureau should confirm that it will intervene in private litigation in Canada in appropriate circumstances.

The Importance of Confidentiality to the Immunity and Leniency Programs

In the Bulletin, the Bureau makes a passing reference to the importance of confidentiality to the Immunity and Leniency Programs. In particular, in Part IV, the Bulletin notes that "immunity and leniency applicants" are reluctant to cooperate with the Bureau for fear of reprisal, and that the Bureau's ability to conduct an investigation would be "seriously compromised" in the absence of an assurance of "confidentiality".

The CBA Section believes that the Bulletin would be strengthened by a stronger statement of the importance of confidentiality to the essential functioning of these programs. The Immunity and Leniency Programs contain express confidentiality provisions, including protection of the identity of an immunity and leniency applicant. The CBA Section believes that the Bulletin should specifically refer to these requirements, given:

- the nature of the admissions that are expected from cooperating parties to participate in such programs;
- the requirements of the proffer process before an immunity agreement is signed;
- the significant potential exposures associated with admissions of criminal conduct; and,
- the additional stakes associated with confidentiality in the context of international cartel cases that require significant coordination across jurisdictions.,

The Existence of Potential Privileges that May Be Asserted by Cooperating Parties

The Bureau acknowledges that cooperating parties may have a strong interest in the confidentiality of information that is voluntarily produced to the Bureau as part of a civil or criminal investigation. A cooperating party, however, may also have a claim of legal privilege in respect of any compilation of information that is voluntarily produced to the Bureau. For example, a cooperating party may have a

claim of settlement privilege in respect of communications and information produced to the Bureau for the purpose of resolving an anticipated or actual enforcement proceeding. The CBA Section believes that the Bulletin should address the process for asserting such claims. While the Bureau has confirmed (in Part II of the Bulletin) that it will seek a protective order if it is unsuccessful in opposing a subpoena from a private plaintiff, the Bureau has not addressed whether it will support a process for assessing or determining a cooperating party's claims of privilege prior to production.

Previously, the Bureau has supported a cooperating party's claims of settlement privilege in respect of documents voluntarily produced to the Bureau (see again, the Declaration of John Pecman dated October 24, 2008 filed in *In re: Chocolate Confectionary Antitrust Litigation* (MDL Docket No. 1935). While the CBA Section understands that the Bureau may not take a position in respect of such claims in a particular case, we believe that the Bureau should support a fair and reasonable opportunity for a cooperating party to advance such claims. As such, the CBA Section recommends that the Bureau indicate it would seek a protective order and support a process to adjudicate any claims of privilege by the cooperating party over information that is in the possession or control of the Bureau prior to any actual production.

The National Scope of the Bureau's Policy on Confidentiality

The Bulletin appears to suggest the Bureau's overall position would not vary, regardless of the jurisdiction where a proceeding was commenced or the jurisdiction where the request for information was made. As the Bureau is aware, a private action under section 36 may be brought in any "court of competent jurisdiction" in Canada, including in any superior court of a province as well as the Federal Court. However, footnote 5 of the Bulletin states that courts in "various jurisdictions" have ordered disclosure of information in the possession or control of the Bureau, referencing two cases from Quebec involving disclosure under the Quebec Code of Civil Procedure. In the same footnote, the Bureau suggests that these courts reached "different conclusions" based on the "specific facts before them".

The CBA Section believes that it would be a welcome clarification to the Bulletin to note expressly that the Bureau's position on confidentiality is intended to apply on a national basis, regardless of where the proceeding under section 36 was commenced. The CBA Section is concerned that some may read footnote 5 as suggesting that the Bureau's position is subject to modification depending on the jurisdiction in which the request for information arises. While courts in different jurisdictions may reach different conclusions based on the specific facts and procedural laws before them, the Bureau's policy interests and concerns about expense and cost apply with equal force, regardless of the particular jurisdiction where the information request arises. The CBA Section believes that this concern can be addressed by adding a single sentence in Part I of the Bulletin that confirms the Bureau's position applies to any proceeding under section 36 of the Act, regardless of where the proceeding has been brought or where the request for information has been made.

In summary, the CBA Section welcomes the Bureau's clarification of its policy and supports the Bureau's position that it will not voluntarily provide information to parties in connection with potential or ongoing damages claims. Subject to the points discussed above, the CBA Section believes that the Bulletin clearly sets out legal, policy and practical grounds for the Bureau's position on this important policy issue.

Yours truly,

(original letter signed by Marc-André O'Rourke for Rod Frank)

Rod Frank
Chair, National Competition Law Section