August 16, 1999

Ms. Andrea Rosen
Competition Bureau
Place du Portage I
50 Victoria Street
Hull, Québec
K1A 0C9

Dear Ms. Rosen:

Re: Consultation on Draft Information Bulletin - Cooperating Parties Program

The National Competition Law Section of the Canadian Bar Association (the Section) welcomes the opportunity to provide comments on the draft Information Bulletin "Cooperating Parties Program Under the *Competition Act*" (the Bulletin) released by the Competition Bureau on May 7, 1999. The Bulletin sets out the Bureau's policy and approach concerning the Commissioner's recommendation of immunity.

The Section recognizes the complexity of issues surrounding the recommendation of immunity for corporations and individuals. It supports the Bureau's efforts to pursue transparency and predictability in enforcing the *Competition Act* by articulating its policy and approach in this area. We trust that the following comments will be of assistance in the development of the final version. For ease of reference, we have included the wording of the relevant provision under some of the headings.

Paragraph 1.2 - Criminal Provisions of the *Act*

> 1.2 The *Competition Act* is comprised of criminal provisions which prohibit certain anti-competitive business activities such as conspiracies to fix prices and allocated markets…

It would be more accurate to state that section 45 prohibits agreements to prevent or lessen competition unduly. These agreements may take the form of, or have as their outcome, price fixing or market allocation. However, the *Act* does not make specific reference to these impugned activities.

Paragraphs 4.1.1 to 4.1.10 - Factors and Conditions

These paragraphs set out various factors to be assessed by the Commissioner in exercising the discretionary power to recommend immunity, favourable treatment or prosecution.

It would be helpful if the Bulletin indicated which, if any, factors and conditions are of greater importance than others. Further, the Bulletin should state whether these factors (and their corresponding importance) are the same or similar to those used by the Attorney General in exercising discretion to grant immunity.

The Bulletin should also identify whether there are further considerations beyond those noted in paragraph 4.1.

There is a significant overlap between the first three factors. We would suggest that "full and frank disclosure" (para. 4.1.1) implies that the party must be "credible" (para. 4.1.3). In turn, "credible" disclosure is by its nature "reliable" or something which can be corroborated (para. 4.1.2). We would therefore suggest that these factors be amalgamated.

Paragraph 4.1.3 - Previous offences

> 4.1.3 Further, the party providing information must remain credible throughout the investigation and any ensuing legal proceeding. Thus, the party should be prepared, at the outset, to reveal any and all offences in which it may have been involved. The investigation should not bring to light any offences other than those disclosed by the party.

Individuals and corporations have a legitimate interest in not being required to incriminate themselves. This interest must be taken into account in assessing the extent to which a person should be required to disclose previous offences. We would suggest that an appropriate balance between the interests of the Bureau and those of a party is struck by requiring that party to disclose offences related to the matter being investigated. An offence unrelated to the matter being investigated by the Bureau should not have an impact on whether immunity is granted in another specific fact situation. Should other offences be uncovered during the course of the Bureau's investigation, the party would run the risk of being prosecuted for those offences. Thus, the requirement should be that the party requesting immunity should disclose all offences in the matter under consideration.

Paragraph 4.1.4 - Full Cooperation

> 4.1.4 The party must cooperate fully and at its own expense, with the Bureau's investigation and any ensuing prosecution or other legal proceedings. Companies must promote the continuing cooperation of its officers and employees for the duration of the investigation and any ensuing legal proceedings.

The Section is unclear as to what "other legal proceedings" means. Does it include civil proceedings under section 36? This would appear to expand the scope of cooperation expected from the person seeking immunity. In our view, "other legal proceedings" should be clarified to apply only to criminal proceedings which flow from the subject matter of the investigation. To that end, "other legal proceedings" should be replaced by "ensuing and related criminal proceedings". This would be consistent with the intention of the paragraph, as demonstrated by the language used in the second sentence of paragraph 4.1.4.

Paragraph 4.1.5 - Immediate Termination of Illegal Activity

> 4.1.5 The party must confirm that it has terminated (or is prepared to terminate) the illegal activity in question and reported it to the Bureau as soon as it was discovered…

Often companies and individuals will conduct an internal investigation to determine whether an offence has taken place. The time taken to perform an investigation should not be considered as a failure to comply with or departure from paragraph 4.1.5. Moreover, cessation of the activity under scrutiny should not be considered as an admission against interest in the event immunity is not granted.

Paragraph 4.1.7 - Presence of Compliance Program

> 4.1.7… If, however, the program was ignored by management, its existence will be an aggravating factor in the decision process.

Sometimes businesses will institute a compliance program but will not have the resources or the knowledge base to either carry it out or to make it effective. These circumstances would arguably fall within the scope of the phrase "ignored by management". The Section believes that it is not appropriate to treat unintentional failures to implement compliance programs in the same fashion as instances of flagrant disregard. Otherwise, the Bureau would be providing a disincentive for a corporate party to institute a compliance program. If the failure to implement a compliance program is flagrant, then it should be an aggravating factor. If the failure is unintentional, it should be a neutral factor. The phrase "ignored by management" should therefore be changed to "flagrantly disregarded by management".

Furthermore, this paragraph should state that it refers only to corporate parties.

Paragraphs 6.0 to 6.3 - Impact of Immunity on Directors, Officers and Employees

These paragraphs deal with availability of immunity for individuals irrespective of whether or not a corporation is eligible.

The Section supports these provisions and, in particular, welcomes the recognition that immunity may be available to officers, directors and employees even if a company does not qualify for full or partial immunity. These provisions will encourage companies and individuals to come forward and to speed up the process of investigation and prosecution.

Paragraph 7.2 - Protection Against the Use of Information

> The ground rules for proffers ... are usually agreed upon in advance between counsel for the party and Bureau counsel.

In view of the "without prejudice" nature of immunity discussions, the Bulletin should state outright that any information voluntarily provided to the Bureau is covered by the "without prejudice" privilege and therefore cannot be disclosed without the other party's consent, should immunity ultimately not be granted.

Paragraphs 9.0 and 9.1 - Confidentiality

These paragraphs limit the use of confidential information submitted under the Cooperating Parties Program. Given the potential use of confidential information for other proceedings under the *Competition Act*, private actions under this Act, and criminal or civil proceedings under other legislation, the Bulletin should provide a more detailed discussion of the issues.

In view of the Attorney General's disclosure obligation pursuant to *Stinchcombe* and other cases, claims of privilege in the criminal process are very restricted. Therefore, these paragraphs may mislead some readers into believing that protection of their confidential information is stronger than it really is. As disclosed information is intended to be used in criminal proceedings, it is doubtful that any claim of privilege would be successful. Accordingly, these paragraphs should be amended to reflect the limitations on the Commissioner's ability to protect information. In particular the Section would welcome comments from the Commissioner as to the potential use of information obtained during "without prejudice" discussions in the event that immunity is not granted.

The Bureau should expand the discussion in paragraph 9.1 of how public-interest privilege applies after the Bureau has completed its investigation and the Attorney General has completed any prosecutions. In particular, the Bureau must state its policy on disclosure to plaintiffs in a section 36 action of potentially privileged information obtained during an investigation. Furthermore, paragraph 9.1 gives the impression that the Commissioner would oppose all applications for disclosure of confidential information in a section 36 action. This is inconsistent with the Bureau's policy statement entitled "Communication of Confidential Information under the *Competition Act*", released on May 1, 1995. Under the heading "Private Actions", the Bureau states at page 4:

> Private parties wishing to claim damages and pecuniary compensation may initiate a private action pursuant to section 36 of the *Act*. No general right of access to records in the Director's possession is provided in the *Act*. To preserve the independence necessary to carry out his mandate effectively and to protect the integrity of the investigative process under the *Act*, the Director would not voluntarily provide information to persons contemplating or initiating a private action. The Director believes that the civil discovery process and subpoena mechanisms available to any private litigant following the filing of a motion before the courts are appropriate mechanisms to gain access to records, including those in the Director's possession.
>
> The Director would oppose compliance with subpoenas for production of documents while an investigation is ongoing if compliance would have a potential to impede his investigation or otherwise undermine his ability to enforce the *Act*. Should the Director's opposition be unsuccessful, protective orders would be sought. Should a subpoena be served upon the Director after the investigation has been completed, it may be complied with once the action has been initiated and the information provider has been apprised of the request. Whether the Director would seek to invoke available privileges would be considered on a case-by-case basis.

This indicates that once an investigation is completed, the Bureau will not always invoke available privileges if served with a subpoena. Paragraph 9.1 should deal with this inconsistency by stating that it overrides the May 1, 1995 policy.

Conclusion

The Section welcomes the opportunity to comment on the draft Bulletin and looks forward to discussing these matters with you at your convenience. Should you have any questions, please do not hesitate to contact the undersigned.

Yours truly,

Jo'Anne Strekaf
Chair, National Competition Law Section