

**Submission on**

**Draft Model Treaty regarding  
Mutual Legal Assistance  
in Non-criminal Matters**

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**NATIONAL COMPETITION LAW SECTION  
CANADIAN BAR ASSOCIATION**



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## **PREFACE**

The Canadian Bar Association is a national association representing over 36,000 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 of the Canadian Bar Association, 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 by the Executive Officers as a public statement by the National Competition Law Section of the Canadian Bar Association.



# **Submission on Draft Model Treaty regarding Mutual Legal Assistance in Non-criminal Matters**

## **I. INTRODUCTION**

The National Competition Law Section of the Canadian Bar Association (the Section) welcomes this opportunity to comment on the Draft Model Treaty on Mutual Legal Assistance in Non-criminal Matters (the Model Treaty). The Commissioner of Competition distributed the Model Treaty to the House of Commons Standing Committee on Industry, Science and Technology on October 4, 2001. The Model Treaty reflects the main elements of Bill C-23, *Competition Act Amendments*, regarding mutual legal assistance in civil competition matters.

The Model Treaty contains a number of important provisions which should be incorporated into Bill C-23. These are listed in Appendix A. Suggested amendments to Bill C-23 to reflect our comments on the Model Treaty are set out in Appendix B. The Model Treaty should closely reflect the language of Bill C-23.

## **I. SUMMARY**

Our principal comments on the Model Treaty can be summarized as follows:

- ! Any competition law assistance treaty with a foreign state should govern all exchanges of information, including information already in the possession of the Commissioner;
- ! Article II.C should be deleted. It is not appropriate for Canadian authorities to use their power to compel production of evidence to assist in a foreign investigation or proceeding regarding conduct that is permitted in Canada;

- ! Before evidence is sent to a foreign state, the Competition Bureau should provide adequate notice to the person from whom evidence was obtained and any other person with an interest in the evidence. The Bureau should grant these persons the opportunity to show why the evidence should not be sent abroad. The notice should indicate the place and date of the hearing and should inform the recipient of the opportunity to inspect and copy the evidence that the Bureau proposes to send;
- ! The reasons for denying assistance, which are listed in Article IV, should be broadened. The Minister should be allowed to refuse a request in whole or in part if it would place an unreasonable burden on the Bureau's resources or on persons from whom evidence is to be obtained. The reasonableness of the cost should be considered in light of factors such as those listed below;
- ! A person whose testimony is taken should have the right to counsel, including the right of counsel to raise objections, conduct cross-examination and obtain a transcript of the proceeding. This is particularly important if the investigation concerns conduct which may be the subject of a criminal proceeding in the foreign state;
- ! Article X should clearly indicate that the requesting party must pay all costs (including those reasonably incurred by persons who have provided evidence), other than those payable by the party from which the information is requested. The quantum of costs should be at the discretion of the judge hearing the request to have evidence sent abroad.
- ! The description of Canada's confidentiality laws and procedures will necessarily be complex. The Section requests an opportunity to comment on any such description before Canada enters into an agreement based on the Model Treaty.

## **I. Terms of the Model Treaty**

The Model Treaty is a form of agreement between the Government of Canada and a foreign state. On receipt of a request for assistance from one state party (the "requesting party"), the treaty requires the other party (the "requested party") to assist in gathering



evidence of conduct addressed in the requesting party's competition law. Such assistance is subject to the terms of the agreement and may include obtaining evidence pursuant to:

- ! an order to produce documentary evidence;
- ! an order for the examination of a witness;
- ! a search and seizure order;
- ! an order for a video link; or
- ! an order to lend exhibits admitted into evidence in a court or other judicial body.

A request for assistance must be in writing and directed to the central authority of the requested party (in Canada, the Minister of Justice or a person designated by the Minister of Justice). The request must include

- ! a description of the conduct under investigation;
- ! the purpose for which the evidence is sought;
- ! its relevance to the investigation;
- ! a description of the evidence sought;
- ! a description of any procedural or evidentiary requirements that should be observed;
- ! the desired time period for execution of the request; and
- ! other information to facilitate review or execution of the request.

Annex A of the agreement is to include a description of the confidentiality laws and procedures of each party.<sup>1</sup> Each request for assistance must also be accompanied by written assurances from the central authority that there have been no significant modifications to these laws and procedures.

The requested party may deny assistance for four reasons:

- ! the request is not in accordance with the agreement;
- ! execution of the request would exceed reasonably available resources;

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<sup>1</sup> There is no such description in the Model Treaty.

- ! execution of the request would not be authorized by law; or
- ! execution of the request would be contrary to the public interest of the requested party.

A person whose testimony is to be taken is permitted to have counsel present during the testimony.

The Model Treaty would require each party to maintain the confidentiality of any request and of any information communicated by the other party, to the fullest extent possible under that party's laws. Each party would be required to oppose any application by a third party for disclosure of such confidential information. By entering into the agreement, each party confirms that the confidentiality of evidence obtained under the agreement is ensured by its laws and procedures. Any unauthorized or illegal disclosure or use is to be reported to the other party immediately. All evidence is to be returned or destroyed at the conclusion of the investigation or proceeding which is the subject of the request.

The requesting party may use evidence obtained under the agreement only in the investigation or proceeding specified in the request and for the purpose stated in the request. The requested party may attach other terms or conditions to the use of the evidence.

The requested party pays all costs of executing a request, except:

- ! fees of expert witnesses;
- ! costs of translation, interpretation and transcription; and
- ! allowances and expenses for the requesting party's officials to execute the request.

A party may terminate the agreement immediately by written notice when there is unauthorized or illegal disclosure or use of confidential evidence. In addition, either party

may terminate the agreement upon expiry of a prescribed notice period. The provisions regarding confidentiality and return of evidence survive termination.

## **I. Comments on Model Treaty**

### **A. Object and Scope of Assistance**

Article II.C of the Model Treaty provides that “assistance may be provided whether or not the conduct underlying a request could constitute a contravention of the competition law of the requested party”. However, proposed section 30.01(a) of Bill C-23 provides that before Canada enters into a mutual assistance agreement, the Minister of Justice must be satisfied that the competition laws of the foreign state are “substantially similar” to the relevant provisions of the *Competition Act*. If the conduct is prohibited abroad but permissible in Canada, the foreign laws cannot be “substantially similar”. Formal powers to compel the production of evidence in Canada should not be used to assist in a foreign investigation or proceeding regarding conduct that is entirely permissible under Canada’s competition laws. Accordingly, Article II.C should be deleted.

Where there is a mutual legal assistance agreement between Canada and a foreign state, Article II.D of the Model Treaty provides that the parties may continue to provide such assistance under other agreements, treaties or arrangements. This is inappropriate. The purpose of the Model Treaty is to establish a procedure for obtaining information in a foreign state which is relevant to a civil competition law investigation or proceeding. All such information provided to a foreign state, whether obtained in response to a request for assistance or already in the possession of the Bureau, should be subject to the same procedures and procedural safeguards. There is no reason to have more than one agreement governing the exchange of such information. While the Model Treaty should not prevent the provision of assistance pursuant to a mutual assistance treaty in respect of *criminal* matters, Article II.D is overbroad.

For the same reason, Article II.B should be expanded to provide for the sharing of information already in the possession of the Commissioner. If a mutual legal assistance treaty is in place, the Commissioner should not be exchanging information with a foreign state pursuant to informal agreements with other competition authorities, with no legislative underpinning, or under *ad hoc* waivers, which can be granted when private actors need the goodwill of competition authorities and are in an awkward negotiating position. These vehicles may not contain the same procedural safeguards as the treaty. In our view, the treaty should govern all confidential information provided to a foreign state, whether in the Bureau's possession or obtained by the Bureau at the request of the foreign state.

Article II.F indicates that a mutual assistance agreement does allow a private person to obtain evidence or impede the execution of a request. We are concerned that Article II.F may be inconsistent with Bill C-23. Bill C-23 would allow persons from whom evidence was obtained and persons with an interest in the evidence an opportunity to make representations before any evidence is sent to a foreign state. In some cases, a judge could refuse to authorize the execution of the request based on these representations. Further, Article II.F would have to be amended to accord with any changes to Bill C-23 that may provide for notice.<sup>2</sup>

## A. Loan Orders

Paragraph III.B.5 of the Model Treaty refers to an order for the loan of “evidence which was admitted into evidence in a court or judicial body of the requested party”. This goes beyond what is contemplated by proposed section 30.19 of Bill C-23. Paragraph II.B and paragraph III.B.5 should be amended to clarify that a loan order would be restricted to “an exhibit that was admitted into evidence in a proceeding in respect of an offence in a court or in a proceeding before the Competition Tribunal”.

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See XXX, below.

We assume that the term “judicial body” is intended to refer to the Competition Tribunal in Canada (and its equivalent in the foreign state). This term should be defined.

## **A. Limitations on Assistance**

Article IV of the Model Treaty defines the circumstances in which a requested party can deny assistance in whole or in part. One of these circumstances is that the execution of a request would exceed the requested party’s reasonably available resources. It is difficult to imagine a situation in which the execution of a request would exceed Canada’s resources. However, a request might place an unreasonable burden on the Competition Bureau’s resources. Complying with a request can also place a tremendous burden on the persons from whom evidence is to be obtained — some of whom may not be alleged parties to the conduct being investigated. Indeed, the conduct might not even constitute an offence or reviewable conduct under Canadian competition law. In our view, the circumstances under which assistance may be limited or denied should be broadened to account for the cost burden of responding to a request.

Assistance can also be limited where the execution of a request would be “contrary to the public interest of the requested party”. The Model Treaty does not provide any guidance on the factors to be considered in the public interest test. The decision to accept or refuse a request for assistance should be based on a consideration of several factors, including the following:

- ! the cost (in money, time and other resources) to Canadian individuals and businesses of complying with the request;
- ! the seriousness of the allegation ;
- ! whether the Canadian individuals and businesses are alleged to have participated in the reviewable conduct;

- ! whether, on an examination of the information accompanying the request, the Minister of Justice has reasonable grounds to believe that persons have engaged in reviewable conduct;
- ! the extent to which the foreign state has complied with previous requests for assistance made by Canada, if any;
- ! any credible information tending to suggest the foreign state has failed to comply with the limitations on use or the confidentiality provisions of the agreement in respect of a previous request for assistance; and
- ! any credible information tending to suggest that information provided to the foreign state would likely be used to the detriment of the public interest or the legitimate commercial interests of Canadian persons.

Some countries have large state trading enterprises or may employ their competition laws with different goals than Canada does. In determining whether compliance with a request for assistance is in the public interest, the Minister of Justice should know the actual or expected costs of the investigation, the competitively sensitive nature of the information requested and the potential for misuse of such information.

Bill C-23 would require that any person giving evidence or who has an interest in any record produced be given an opportunity to make submissions before information is provided to a foreign state. However, at that stage of the process, government authorities and private individuals and businesses would already have spent resources to comply with the request. To the extent possible, the Minister should provide affected persons an opportunity to be heard on the public-interest issue before significant compliance costs are incurred.

## **A. Execution of Requests**

In executing a request, Article V.F of the Model Treaty indicates that the requested party, to the extent permitted by its laws and “other important interests”, shall facilitate the participation of officials of the requesting party. The Bureau should clarify whether these “other important interests” are meant to refer to something other than the public interest.

Article V.G of the Model Treaty indicates that a person whose testimony is taken would be permitted to have counsel present during the testimony. This right to have counsel “present” is too limited. A person who is compelled to testify should be entitled to full “representation” by counsel – including the right to object to improper questions, to conduct a cross-examination or re-examination and to obtain a transcript of the examination.

## **A. Confidentiality**

The Section’s prime concern is maintaining the confidentiality of evidence obtained pursuant to Bill C-23. We are encouraged by the provisions in the Model Treaty regarding confidentiality (Article VI), automatic termination for breach of confidentiality (Article XI.C) and survival of the confidentiality and return-of-information provisions after the termination of an agreement (Article XI.D). A violation of the obligation to report misuse of or unauthorized disclosure of information (Article VI.B) should also be grounds for immediate termination.

The Section is also concerned that persons from whom evidence has been obtained or persons having an interest in such evidence be provided an opportunity to make representations before such evidence is provided to a foreign state. This is a principle that is inadequately addressed in Bill C-23. It is impossible for such persons to make adequate representations unless they are provided adequate and timely notice of: (1) the time and place of the hearing; and (2) the nature of the documents and other evidence proposed to be sent to the foreign state.

Prior to the hearing, the person from whom evidence has been obtained should have an opportunity to inspect and make copies of all records seized and all transcripts of oral evidence. That person should also be provided a copy of the request for assistance and supporting documentation, in order to make representations about the context of the investigation, inaccuracies in the documents supporting the request, and possible biases or ulterior motives of the requesting party or the complainants in the underlying investigation. Such basic rights should be included in Bill C-23.

A more difficult question is how to ensure other persons with an interest in the evidence have an opportunity to make representations at the hearing. It is undesirable to rely on the person from whom evidence is obtained to notify other interested persons, as that person will likely have other pressing concerns. It is also undesirable for the Commissioner or the Minister of Justice to send notices unilaterally, as the person from whom evidence is obtained may, with valid reasons, not want others to learn of the ongoing investigation. We suggest that proposed sections 30.08(1) and 30.13(2) of Bill C-23 be amended to empower the judge hearing a request to require that notice of the hearing be given to persons who may have an interest in such evidence.

### **A. Return of Evidence**

At the conclusion of the investigation or proceeding which is the subject of the request, Article IX of the Model Treaty requires the requesting party to return all original evidence obtained and either return or (with the approval of the requested party) destroy all copies of such evidence. The Model Treaty should clarify whether a requesting party is permitted to retain evidence until the conclusion of any proceeding which might result from an investigation.

### **A. Costs**



Article X of the Model Treaty provides that the requested party shall pay “all costs of executing a request” except for certain excluded costs. The Model Treaty should require the requesting party to pay the excluded costs.

In addition, it is not clear whether “all costs” includes costs incurred by private parties in complying with a request or with a court order made pursuant to a request. These costs may be substantial and may apply to persons who are not the subject of the proceedings. The judge determining whether evidence should be sent to a foreign state should also be empowered to make an order regarding costs incurred by persons who have provided evidence.

## **A. Description of Confidentiality Laws and Procedures**

The Model Treaty indicates that the confidentiality laws and procedures of Canada and the foreign state will be described in an annex. The description of Canada’s confidentiality laws and procedures will necessarily be complex. They include:

- ! the confidentiality provisions of proposed section 30.29 of Bill C-23;
- ! the *Access to Information Act*;
- ! various legal privileges (including public interest, solicitor-client, litigation and common interest privilege);
- ! policies (such as the Commissioner of Competition’s May 1995 Statement on the Communication of Confidential Information); and
- ! formal or informal agreements or arrangements.

The Section requests an opportunity to comment on any such description before Canada enters into an agreement based on the Model Treaty.

The annex would also arguably have to address Department of Justice and Bureau rules and procedures to ensure the preservation of confidentiality. These include employee screening methods, contractual provisions, firewalls, conflict screens, measures to restrict

access to physical premises and electronic records. The publication of these matters could jeopardize the efficacy of such arrangements.

## **I. CONCLUSION**

The Section appreciates the opportunity to provide its input on the Model Treaty, which is an important ancillary document to Bill C-23. Should the need arise, we would gladly provide further assistance.

## Appendix A - Significant Provisions of Model Treaty not reflected in Bill C-23

Article	Description	Proposed Section of the <i>Competition Act</i>
II.C	“Assistance may be provided whether or not the conduct underlying a request could constitute a contravention of the competition law of the requested Party.”	Inconsistent with s. 30.01(a).
II.D	“Nothing in this Agreement shall prevent the provision of assistance pursuant to other agreements, treaties or arrangements between the Parties.”	Inconsistent with the intent of Bill C-23 (to create a complete code).
II.G	“Nothing in this Agreement compels a person to provide any evidence in violation of any legally applicable right or privilege.”	Should be included in s. 30.01(c).
III.B, C, D	List of things to be included in a request for assistance	Should be included in s. 30.01.
IV.	Grounds and procedure for denying assistance	Should be included in s. 30.01(c)(i).

V.B	Without limitation, the terms and conditions of complying with a request may relate to (1) the manner or timing of the execution of the request, or (2) the use or disclosure of any evidence provided.	Should be included in s. 30.01(d)(iii).
V.G	“The central authority shall, to the extent permitted by the laws of the requested party, permit a person whose testimony is to be taken...to have counsel present during the testimony.”	Should be included in s. 30.11(11).
VI.D	Requesting party must give 10 days’ notice of disclosure of evidence in an action or proceeding brought by the requesting party.	Should be included in s. 30.01(d).
VII.A	“Evidence obtained pursuant to this Agreement may be used by a requesting Party to administer or enforce its competition law only (1) in the investigation or proceeding specified in the request in question and (2) for the purpose stated in the request.”	Should be incorporated in s. 30.01(d)(ii).
VIII	Changes in applicable law	Should be included in s. 30.01(d).
X	Costs	Should be included in s. 30.01(d).

XI	Termination and survival provisions	Should be included in s. 30.01(e).
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## Appendix B - Proposed Amendments to Bill C-23, Section 3

<i>Competition Act</i>	Comment
30.01	Include list of things to be included in a request for assistance (Model Treaty, Article III.B, C, D).
30.01(c)	Protect persons from being compelled to provide any evidence in violation of any legally applicable right or privilege. Allocate all costs of executing a request as between the parties to the agreement, including the reasonable costs incurred by persons compelled to give or produce evidence.
30.01(c)(i)	Include grounds and procedure for denying assistance (Model Treaty Article IV; see comments under “Limitations on Assistance”, above).
30.01(d)	The requesting party must give 10 days’ notice of disclosure of evidence in an action or proceeding brought by the requesting party, that the Parties shall provide to each other prompt written notice of actions within their jurisdictions having the effect of modifying their competition law or their confidentiality laws or procedures.
30.01(d)(ii)	Evidence obtained pursuant to this agreement may be used by a requesting party to administer or enforce its competition law only (1) in the investigation or proceeding specified in the request in question and (2) for the purpose stated in the request.
30.01(d)(iii)	Without limitation, the terms and conditions of complying with a request may relate to (1) the manner or timing of the execution of the request, or (2) the use or disclosure of any evidence provided.

30.01(e)	<p>An agreement must include provisions for immediate termination, on notice, upon the unauthorized or illegal disclosure or use of confidential evidence, or the failure to report such unauthorized or illegal disclosure or use.</p> <p>An agreement must provide that the provisions governing confidentiality, authorized use, and return of information survive the termination of the agreement.</p>
30.06(4)	<p>The search warrant must state that every person from whom a record or thing is seized may inspect and make copies of the records or things sought to be sent abroad prior to the hearing.</p>
30.08	<p>Prior to making an order in respect of the records or things seized, the judge may order that a person who, in the opinion of the judge, has an interest in a record or thing seized, be given notice of the hearing and an opportunity to inspect and copy any records or things specified in the order.</p>
30.11(5)	<p>An order made under subsection (1) shall provide that a person named in the order be entitled to be represented by counsel throughout the examination referred to in subsection (2).</p>
30.11(11)	<p>An order made under subsection (1) must state that a person named in the order, and any person who claims an interest in any record or thing provided pursuant to the order, <u>may inspect and make copies of any records or things provided and transcripts of all evidence taken pursuant to the order, and</u> may make representations referred to in subsection 30.13(2) before any order is made under subsection 30.13(1).</p>

30.13	Prior to making an order under subsection (1), the judge may order that a person who, in the opinion of the judge, has an interest in a record or thing seized, be given notice of the hearing and an opportunity to inspect and copy any records or things specified in the order.
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