September 27, 2002

Jim Varro
Policy and Legal Affairs Department
Law Society of Upper Canada
Osgoode Hall
130 Queen Street West
Toronto, ON M5H 2N6

Dear Mr. Varro,

Re: Proposed Rule on Lawyers' Duties with respect to Property Relevant to a Crime or Offence

I write on behalf of the National Competition Law Section of the Canadian Bar Association (the CBA Section) to comment on the rule of professional conduct and commentary proposed by the Law Society of Upper Canada's Special Committee on Lawyers' Duties with Respect to Property Relevant to a Crime or Offence in its Report to Convocation dated March 21, 2002.

We understand that the Proposed Rule is being developed in response to events which took place in connection with Kenneth Murray=s representation of Paul Bernardo. According to the Committee's Report, on the instructions of his client, Mr. Murray took possession of videotapes that were relevant to crimes of which his client was accused and did not disclose the existence of those videotapes for approximately 17 months. During this time, a police investigation was ongoing. Crown counsel agreed to seek a reduced sentence for Karla Homolka in return for Ms. Homolka's guilty plea and her co-operation in respect of the prosecution of Mr. Bernardo. Crown counsel have indicated that, had they been aware of the existence of the videotapes and their contents at the time, they would not have reached the agreement they did with Ms. Homolka as it would not have been in the interests of justice.

The CBA Section supports the Law Society's efforts to formulate a rule which clearly sets out defence counsels' obligations with respect to property relevant to a criminal investigation. However, given the unusual circumstances of the Murray case, we question whether hard and fast rules ought to apply to a myriad of unforeseen situations less dramatic and less striking. Given the context in which the Proposed Rule has been developed, we would have thought it would be limited to *Criminal Code* offences. In any event, we believe that such a rule should not apply to offences under the *Competition Act* (the *Act*). For an offence under the *Act*, it is often difficult to determine whether a particular document is "relevant to a crime or offence". Further, lawyers may adjust their policies and behaviour to avoid the impact of the Proposed Rule, substantially affecting

the practice of law without assisting law enforcement agencies to obtain evidence in criminal proceedings. We suspect that the problem goes beyond the competition law field and that practitioners in other areas of the law that include criminal prohibitions might have similar concerns.

1. Description of the *Competition Act*

The *Competition Act* (the *Act*) is a law of general application that establishes basic principles for the conduct of business in Canada. The purpose of the *Act*, as set out in section 1.1, is to maintain and encourage competition in Canada in order to: promote the efficiency and adaptability of the Canadian economy; expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada; ensure that small and medium-sized businesses have an equitable opportunity to participate in the Canadian economy; and provide consumers with competitive prices and product choices.

Part VIII of the *Act* identifies a number of matters reviewable by the Competition Tribunal (the Tribunal), including mergers, abuse of dominant position, refusal to deal, tied selling, delivered pricing and specialization agreements. The Tribunal may issue orders to remedy the effects of conduct referred to in Part VIII, but cannot fine or imprison.

Part VII.1 of the *Act* sets out a number of deceptive marketing practices reviewable by the Tribunal or the courts, including misleading advertising, promotional contests and representations as to tests and testimonials. The Tribunal or the courts may issue remedial orders "with a view to promoting conduct ... that is in conformity with the purposes of Part [VII.1] and not with a view to punishment". In addition, administrative monetary penalties can be ordered paid but these are limited in amount. No imprisonment can be imposed.

Part VI of the *Act* prohibits offences that can be prosecuted in the criminal courts such as bid-rigging, price maintenance, telemarketing and conspiracy to lessen competition unduly.

The Tribunal is a specialized body established under the *Competition Tribunal Act*. It is composed of judges from the Federal Court of Canada and lay persons appointed by the Governor in Council on the recommendation of the Minister of Industry.

In the case of *General Motors of Canada Limited* v. *City of National Leasing*, [1989] 1 S.C.R. 641, the Supreme Court of Canada unanimously found the *Combines Investigation Act* to be a "valid federal enactment in accordance with Parliament's power over trade and commerce affecting the entire nation". In the course of delivering judgment for the Court, Chief Justice Dickson (as he then was) wrote at p. 676:

> From this overview of the *Competition Act* I have no difficulty in concluding that the *Act* as a whole embodies a complex scheme of economic regulation. The purpose of the *Act* is to eliminate activities that reduce competition in the market-place.

In the subsequent decision of *R.* v. *Nova Scotia Pharmaceutical Society et al*, [1992] 2 S.C.R. 606, which involved a *Charter* challenge to the competition legislation, Gonthier J. delivered the judgment on behalf of a unanimous seven-member Court. At pp. 648-9, he cited the above quote from Dickson C.J. in the *General Motors* case and then stated:

> The *Act* can thus be seen as a central and established feature of Canadian economic policy.

Gonthier J. went on to find that the legislation did not infringe the *Charter*.

Therefore, the *Competition Act*, even its so-called criminal provisions, constitutes economic regulation, as opposed to true criminal law.

2. The Proposed Rule should not apply to *Competition Act* offences

For several reasons, it is often unclear whether a particular type of conduct covered by the *Act* constitutes a "crime or offence". The *Act* provides that certain types of conduct may give rise to either a criminal prosecution or a civil review by the Competition Tribunal. Frequently, counsel will not know in advance whether federal authorities will pursue the criminal or civil process.

A good example is misleading advertising. Where a person has made a materially false or misleading representation to the public to promote the supply or use of a product, the Commissioner of Competition may apply to the Competition Tribunal for an administrative remedy. On the other hand, if the misleading representation was made knowingly or recklessly, the person may be subject to criminal prosecution.

In addition, a good deal of judgment goes into assessing whether certain activity constitutes a "crime" under the *Act*. For instance, in determining whether a representation is false or misleading, the general impression conveyed by the representation as well as its literal meaning must be assessed. "General impression" is evaluated on the objective standard of a reasonable person and reasonable people may disagree about whether a particular representation meets the standard. Similarly, there is no bright-line test for determining whether a representation is false or misleading in a "material" respect.

For other offences under the *Act*, whether an offence has been committed depends in part on an examination of market conditions. For example, an agreement among competitors to lessen competition in the supply of a product is only an offence if the lessening of

competition is "undue". Courts have held that this determination requires an assessment of whether the alleged conspirators have market power. To assess market power, it is necessary to define the product and geographic dimensions of the "relevant market" and assess a variety of factors such as market share, barriers to entry and the nature and extent of change and innovation in the market.

If the Commissioner of Competition determines that enforcement action is warranted, a decision to recommend that the Attorney General proceed by way of a criminal prosecution (rather than to seek an administrative penalty or to proceed by way of alternative case resolution) will depend on a number of factors, such as the quality of evidence as to the accused's state of mind, the seriousness of the alleged offence and the existence of any mitigating factors.

In summary, particular conduct may constitute an offence under the *Act*, be the basis of a prohibition order or administrative penalty, or be perfectly lawful, depending on the surrounding circumstances B including the purpose of the conduct and the prevailing market conditions. In many cases, the Competition Bureau may defer a decision on whether a criminal offence has been committed until months after commencing its investigation. Given this, it is unreasonable to expect counsel to be able to assess whether a document is relevant to a crime or offence immediately upon taking possession of the document (which may be before an investigation has even been initiated).

3. In the alternative, an occurrence should not be considered an offence for the purpose of the Proposed Rule unless the lawyer is aware that an investigation is ongoing or a charge is pending

Our position is that the Proposed Rule should not extend to the *Act*. If, however, the Law Society decides to apply the Proposed Rule to offences under the *Act*, it should only apply where the lawyer in question knows that an investigation is ongoing or a charge is pending. Otherwise, the lawyer would be required to make an independent assessment of whether the client had committed an offence - in other words, to judge the guilt or innocence of a client. This is obviously inconsistent with the proper role of counsel in our adversarial system.

Even if the Proposed Rule is confined to cases where the lawyer is aware of an ongoing investigation or pending charge, this is still not a wholly satisfactory solution. In some cases, the *Act* requires that the Commissioner commence an inquiry even where there is no reason to believe an offence has been committed. If the Commissioner receives a complaint from six residents of Canada who believe that an offence under the *Act* has been committed, an inquiry must be commenced whether or not there is any merit to the complaint. In such circumstances, the mere initiation of an inquiry should not lead to the presumption that a "crime or offence" has occurred. We suggest that any lawyer ought to be able to obtain an exemption from the rule on a confidential application to the Law Society setting out the circumstances making a disclosure unwarranted.

4. Lawyers can already be required to produce evidence of *Competition Act* offences in their possession

The *Act* already provides a mechanism for mandatory disclosure of information, so there is no need for the Proposed Rule to apply to offences under the *Act*. Section 11 of the *Act* permits the Commissioner to obtain an order requiring a person to produce a record that is relevant to an inquiry. This production is to be made within a time and at a place specified in the order. Unless there is a constitutional basis for non-compliance, no person is excused from complying with such an order solely on the ground that the record may tend to incriminate the person or subject the person to any proceeding or penalty.

Section 11 has been used to require a person to produce classes of documents in the person**'s** possession or control. Although it may be an arguable point, we believe the Competition Bureau would take the view that documents belonging to a client in the possession of the client's lawyer would still be in the control of the client - and therefore subject to production in response to a section 11 order. As it is already impermissible for a lawyer to counsel or participate in any alteration, concealment, loss or destruction of a document that responds to a court order, the Proposed Rule is superfluous in such circumstances.

5. Lawyers will modify their policies and behaviour in response to the Proposed Rule

The Proposed Rule would require lawyers to turn over documents that would alert law enforcement agencies to the existence of a crime or offence. In our view, this would provide an incentive for lawyers to avoid taking and keeping possession of documents and for clients to conceal documents from their lawyers. Lawyers may seek to avoid taking possession of documents within the meaning of the Proposed Rule by reviewing them, for example, at their clients' premises under their clients' supervision. If this strategy is unsuccessful to avoid the application of the Proposed Rule, lawyers will be obliged to warn their clients that they may be required to turn over any documents reviewed to law enforcement authorities.

All of this will impede lawyers from providing proper and informed advice to their clients. This is obviously inconsistent with the proper role of counsel in our legal system and is a result that should be avoided. Further, the Proposed Rule may have the unwanted effect of continuing illegal activity. Where the managers of a business discover evidence of activity that could be illegal, they could be driven to conceal relevant documents rather than seeking advice from their lawyers on whether the activity can lawfully be continued. In such circumstances, the Proposed Rule would not result in additional evidence being made available to law enforcement authorities.

On behalf of the CBA Section, I thank you for this opportunity to comment on the Proposed Rule. This letter has been reviewed by the CBA's National Legislation and Law Reform Committee and approved by its National Executive Officers as a public statement by the CBA Section. If you have any questions or if we can be of further assistance, please contact us.

Yours truly,

"original signed per Gaylene Schellenberg"

Bruce M. Graham, Chair
National Competition Law Section