



THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

The Voice of
the Legal Profession

La voix de la
profession juridique

June 9, 2004

Ms. Sheridan Scott
Commissioner of Competition
Competition Bureau
50 Victoria Street
Gatineau QC K1A 0C9

Dear Ms. Scott:

Subject: Information Bulletin on Private Access to Competition Tribunal

The National Competition Law Section of the Canadian Bar Association is pleased to provide its comments on the Competition Bureau's *Information Bulletin on Private Access to the Competition Tribunal*, released on September 18, 2003. The Section commends the Bureau on taking the initiative to clarify the Commissioner's role in private applications to the Tribunal. We are pleased to offer the following comments and suggestions for your consideration.

1. Private access is not limited to private disputes

The Bulletin states that private access is designed to deal with "private disputes". In fact, to prove a case under section 75 or 77 of the *Competition Act*, a private applicant is required to show an effect on competition, i.e., that it is not just a "private dispute". It would be preferable, in our view, to say that the Bureau is less likely to intervene in a case that it views to be essentially a "private dispute".

2. Commissioner's certification

Section 103.1(3) does not deal with a situation where an applicant for leave has previously complained to the Bureau and the Bureau has either not commenced an inquiry or has discontinued an inquiry because it found the complaint to be without merit. Section 103.1(11) precludes the Tribunal from drawing an inference from the Bureau's decision not to take action, but does not preclude the Tribunal from considering, or the Bureau from providing, information the Bureau received in relation to the complaint. In such cases, the Bureau may well have information which would assist the Tribunal. It would be helpful for the Bulletin to clarify the Bureau's approach in these situations.

3. Bureau's role on applications for leave

The Bulletin states that the Commissioner will generally not make written representations at this stage, but may do so "...if, in exceptional circumstances, it is believed that the Commissioner's representations

500 - 865 Carling, Ottawa, ONTARIO Canada K1S 5S8

Tel/Tél. : (613) 237-2925 Toll free/Sans frais : 1-800-267-8860 Fax/Télécop. : (613) 237-0185

Home Page/Page d'accueil : www.cba.org E-Mail/Courriel : info@cba.org

can have a significant impact on the Tribunal's decision to grant leave...". We do not think this should be the criterion applied by the Commissioner. In cases before the Tribunal, the Commissioner's representations will usually have a "significant impact". For that reason, the Commissioner's general reluctance to make written representations at this stage is well founded.

The circumstances in which it could be appropriate for the Commissioner to make written representations on a leave application would include:

- (a) Where the Commissioner has relevant factual information which has not been provided to the Tribunal by the applicant (e.g., in cases where the applicant has made a previous complaint to the Commissioner based on different or inconsistent allegations - see #2 above); or
- (b) Where the Commissioner is of the view because of the importance of a case beyond the immediate parties, or because of its jurisprudential value, leave should be granted.

4. Intervention criteria

We believe the Bulletin sets too high a threshold for intervention by the Commissioner. The Bulletin states, "the Commissioner will only become involved in private actions before the Tribunal in exceptional circumstances where the issues have a significant impact on consumers, on the business community and on the Canadian economy". It would be preferable to state that the Commissioner may intervene where any of those circumstances are present. In our view, the Bulletin should also state that the Commissioner will consider intervening in cases which are likely to have jurisprudential value. One of the anticipated benefits of private litigation is the jurisprudence it will generate. It is important that the Commissioner be a participant in cases that are likely to be of precedential value.

5. When will the Commissioner commence an application?

Pursuant to section 103.1(10), the Commissioner can commence an application in respect of the same subject matter, even if the Tribunal has granted leave to a private party, as long as it is before the private party applies to the Tribunal under sections 75 or 77. It would be helpful for the Bulletin to answer the following questions: If the Commissioner makes such an application, is it the Commissioner's view that the private party is then precluded from proceeding with its application pursuant to leave granted by the Tribunal? In what circumstances would the Commissioner commence an application rather than intervening pursuant to section 103.2?

6. Intervention by the Commissioner in consent agreements

Section 106.1 provides for consent agreements between private parties in cases where leave has been granted under section 103.1. Section 106.1(6) allows the Commissioner to apply to the Tribunal to vary or rescind such an agreement if the Tribunal finds that the agreement "has or is likely to have anti-competitive effects". It would be helpful for the Bulletin to set out the criteria the Bureau will use to assess whether a consent agreement under section 106.1 is likely to have "anti-competitive effects".

Representatives of the Section would be pleased to meet with you or members of your staff to discuss this further. We hope the comments and suggestions are of assistance.

Yours truly,

(Original signed by Trevor Rajah for Susan S. Boughs)

Susan S. Boughs
Chair, National Competition Law Section